European Federation for Investment Law and Arbitration

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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# ENSURING EQUITABLE ACCESS TO ALL STAKEHOLDERS: CRITICAL SUGGESTIONS FOR THE MIC

The European Federation for Investment Law and Arbitration (EFILA) has been established in Brussels to promote the knowledge of all aspects of EU and international investment law, including arbitration, at the European level. EFILA endeavours to facilitate a meaningful exchange of views on relevant and timely issues vital to the development of the European internal market, in order to contribute to a more favourable investment climate in Europe and beyond.

Since EFILA was established in June 2014, it has developed into a highly regarded think-tank that is specifically focusing on the EU's investment law and arbitration policy.

EFILA is unique in that it brings together arbitration practitioners, academics and policy makers, which have extensive first-hand experience and deep understanding of the relevant investment law and arbitration issues.

* The opinions expressed in this paper are those of EFILA and no other organization, institution, or law firm. The main contributors of this paper have been: Gloria Alvarez, Saadia Bhatty, Nikos Lavranos, Alexander Leventhal, Tetyana Makukha.
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## EXECUTIVE SUMMARY

1. The European Federation for Investment Law and Arbitration (EFILA) believes that no discussion about the reform of the investor-State dispute settlement (ISDS) system should occur without taking stock of the interests of all stakeholders. This is particularly true for the proposal for a Multilateral Investment Court (MIC), which is currently being discussed and negotiated in UNCITRAL Working Group III. Without the active participation of all stakeholders (i.e. all potential users of the MIC) – including investors and their legal counsel – any ISDS system will lack legitimacy.

2. With this in mind, EFILA submits the following, non-exhaustive suggestions for ISDS reform and, in particular, for the MIC proposal:

3. The Appointment & Selection of MIC Judges: Central to the ISDS system's ability to effectively resolve disputes between investors and States is the confidence of all stakeholders in their decision-makers. For this reason, EFILA believes that investors should continue to have a direct and indirect say in the choice of their decision-makers. The MIC should:

   A. Let a college of representatives chosen by the investors, as users of the system, participate in choosing candidates for the MIC;

   B. Give all stakeholders a right to strike out a given number of judges assigned to their panel; and

   C. Allow all stakeholders to retain the right to challenge MIC judges on the basis of clearly defined standards before an independent body.

4. Consistency of MIC Decisions: EFILA agrees that consistency in legal decisions is an important element of any well-functioning dispute resolution system. Consistency, however, must be objective. It cannot be used as a means to "correct" awards that arrive at unwelcome results. Any responses to consistency must respect the rule of law and the equality of the parties.

Accordingly, any final design of the MIC should:

A. Not allow joint binding interpretations with potentially retroactive effect;

B. Avoid unnecessarily reducing the material scope of the standards of investment and investor protection; and

C. Limit exclusions of certain types of investors, investments and sectors to only to the extent objectively and reasonably necessary.

5. Access To Justice For SMEs: Small and medium sized enterprises (SMEs) are an integral part of the global economy. Any proposed reform of the ISDS system cannot disregard SMEs or discourage them from making full use of the ISDS system. The MIC, therefore, must include structural and systemic solutions that effectively ensure access to the system for SMEs. These include:

A. Adopting cost-efficient rules that promote access to justice by SMEs;

B. Establishing a process that informs and educates SMEs about the ISDS system and helps them to assess their claims; and

C. Creating a financial support system for accessibility to the ISDS system for SMEs.

6. Enforcement of MIC Decisions: The application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) to MIC decisions (even if just on an interim basis) raises serious potential obstacles to the enforceability of those decisions. Further thought should be given to ensuring that MIC decisions will be enforceable.

7. These suggestions, EFILA believes, will encourage confidence from all stakeholders in the MIC system and thus make the MIC a fair dispute settlement system for all users.

## INTRODUCTION

8. EFILA submits this paper pursuant to the decision of UNCITRAL Working Group III at its last session in New York in April 2019.[1] This paper seeks to contribute to the discussion under the aegis of the Working Group to address concerns related to the existing ISDS system. In particular, it addresses one proposal that is being discussed and negotiated: the establishment of the MIC. According to proponents of the MIC, this proposal would address the following concerns about the current ISDS system:

   A. Decision-Makers: The MIC's proponents believe that a system of full-time adjudicators will be better able to ensure independence and impartiality by moving away from appointment by disputing parties.[2]

   B. Consistency: The MIC, according to its proponents, would ensure predictability and consistency through a permanent standing body and an appellate system.[3]

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1 See Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019) A/CN.9/970, para. 83 (step 1), https://undocs.org/en/A/CN.9/970 accessed on 8 July 2019.

2 Submission of the European Union and its Member States to UNCITRAL Working Group III dated 18 January 2019, pp. 10-11.

3 Submission of the European Union and its Member States to UNCITRAL Working Group III dated 18 January 2019, pp. 9-10.

C. Costs: A standing mechanism would lead to a reduction of the costs of the disputes, any administrative costs and other costs of the decision-makers, which would be borne by States.[4]

D. Enforcement: The MIC's proponents have suggested that the treaty instrument that would create a standing adjudicatory body would also put in place an enforcement mechanism, but, until then, MIC decisions could be subject to enforcement under the New York Convention.[5]

9. EFILA strongly believes that Working Group III should ensure that all possible solutions capable of addressing concerns with the current ISDS system are fully and fairly explored with an open, unbiased mind. In the past, EFILA has questioned whether the creation of a MIC would actually resolve perceived problems and shortcomings of the system.[6] While many details of the MIC remain unspecified, EFILA wonders whether the current MIC proposal sufficiently addresses the concerns of all stakeholders.

10. ISDS derives its legitimacy not only from the States that provide substantive protections and effective and independent recourse for the violation of those protections, but also from private enterprise that relies on States' commitments and obligations in those treaties when investing in a host State. Investment treaties are generally signed to promote and protect investments. They do so by eliminating the risk that investors may otherwise perceive from State actions that could constitute investment treaty violations. The dispute resolution process is a central pillar of this system as it allows an investor to enforce the rights that are provided under the treaties. If investors do not have faith in the dispute resolution process, or do not have

4 Submission of the European Union and its Member States to UNCITRAL Working Group III dated 18 January 2019, pp. 11-12.

5 Submission of the European Union and its Member States to UNCITRAL Working Group III dated 18 January 2019, p. 7.

6 Submission of the European Federation for Investment Law and Arbitration (EFILA) to the Public Consultation Organized by the European Commission on a Multilateral Reform of Investment Dispute Resolution dated 15 March 2017.

access to it, they may refrain from making investments, which will be to the detriment of the host State's economy.

11. Against this backdrop, EFILA provides the following non-exhaustive suggestions on: (**I**.) the selection of MIC judges, (**II**.) the MIC's role in ensuring the consistency of ISDS decisions, (**III**.) allowing access to the MIC to small and medium-size enterprises (SMEs), and (**IV**.) the MIC enforcement regime.

## I. THE APPOINTMENT & SELECTION OF MIC JUDGES – ALLOWING ALL STAKEHOLDERS TO PARTICIPATE

12. The MIC – like other permanent international adjudicatory bodies – should allow all stakeholders – including private parties – to participate in the selection of decision-makers.

13. With one exception (which will be addressed below), all permanent, non-criminal[7] international adjudicatory bodies have been formed to hear intra-State disputes and allow stakeholders to directly choose judges[8] or participate in the selection process.[9]

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[7] While some international criminal courts allow the prosecution of private individuals, but do not allow those individuals to select judges, the example of such courts is a different one. They result from a transfer of a State's criminal law powers to an international court rather than a State's acceptance of an international court's jurisdiction.

[8] See e.g. ITLOS Statute, available at https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf, accessed on 8 July 2019, Art. 4(1) ("*Each State Party may nominate not more than two persons having the qualifications prescribed in article 2 of this Annex. The members of the Tribunal shall be elected from the list of persons thus nominated*."); Protocol on the African Court, available at http://hrlibrary.umn.edu/instree/protocol-africancourt.pdf, accessed on 8 July 2019, Art. 12(1) ("*States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State.*").

[9] See e.g. ICJ Statute, available at https://www.icj-cij.org/en/statute, accessed on 8 July 2019, Art. 4(1) ("*The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions*."); ECHR Rules of Court, available at https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf, accessed on 8 July 2019, Art. 22 ("*The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a*

This reality finds its origin in the adjudicatory bodies set up to resolve intra-State disputes prior to the formation of any permanent body: arbitration. States were able to choose some of their decision-makers or agree on the process for their selection.[10] This was done to ensure that stakeholders would have faith in the legitimacy of the dispute resolution process.

14. The MIC would be exceptional amongst permanent international adjudicatory bodies because each dispute would include both States as well as individuals and legal entities. Although other such bodies, like the European Court of Human Rights (ECHR), investor-State dispute resolution is the result of a *quid pro quo* between investor and State, not a means to ensure compliance with treaty standards..

15. As noted above, ISDS derives its legitimacy not only from the States that offer substantive protections, and recourse for the violation of those protections, but also from private enterprise that relies on the State's obligations in those treaties. Moreover, UNCITRAL Working Group III recognized that party appointment is referred to as a fundamental right of parties in arbitration, and one of the main reasons they agree to settle their disputes in arbitration.[11] Thus, UNCITRAL Working Group III must address the risk that private parties will not see the MIC as a viable forum for enforcing the treaty protections granted to them by States.

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*majority of votes cast from a list of three candidates nominated by the High Contracting Party*."); Agreement establishing the WTO, available at https://www.wto.org/english/docs_e/legal_e/04-wto.pdf, accessed on 8 July 2019, Annex 2, Art. 8(6) ("*The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons*.").

[10] For example, in the *Alabama Claims* between the United States and Great Britain, each side was able to choose one arbitrator, with the King of Italy, the President of the Swiss Confederation, and the Emperor of Brazil all naming co-arbitrators. See Treaty of Washington dated 8 May 1871, available at https://archive.org/details/cihm_27720/page/n15, accessed on 8 July 2019.

[11] Draft report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session, 6 November 2018, paragraph 101, available at https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf, accessed on 8 July 2019.

16. The Iran-US Claims Tribunal (IUSCT) is a permanent adjudicatory body that allows private parties to bring legal suits against certain States (the US and Iran), but does not give them a say in the choice of their adjudicators. However, this body represents a different paradigm with objectives that are different from those of investment treaty adjudicators. The IUSCT was formed to resolve an existing, intra-State dispute: the crisis between the United States and Iran arising out of the November 1979 hostage crisis at the U.S. Embassy in Tehran.[12] It was not formed with any long-term goals, much less any objective to promote and protect investment. On the contrary, it was formed to resolve claims of compensation for investments that were destroyed in the course of that crisis.

17. Thus, the IUSCT does not serve as an appropriate blueprint or example for the debate on the envisaged MIC.

18. Instead, Working Group III Member States should (**a.**) ensure that all stakeholders have an effective role in selecting MIC judges – both at the first instance and the appellate level – and (**b.**) allow them to retain a right in defined cases to strike out or challenge judges.

### a. Participation In The Selection Process

19. At the institutional level, allowing all stakeholders to participate in the selection process for MIC judges is important to maintaining the faith of all stakeholders in the dispute resolution process. The MIC proposal would create a two-tiered standing

[12] See Algiers Accords dated 19 January 1981, Declaration of the Government of the Democratic and Popular Republic of Algeria, available at http://www.parstimes.com/history/algiers_accords.pdf, accessed on 8 July 2019 ("*The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran, has consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran*.")

mechanism comprised of full-time decision-makers appointed for a non-renewable term by Contracting States.[13] Judges would be held to standards of independence and impartiality.[14] However, even if MIC judges are individually impartial and independent from the parties to the dispute, concerns about *institutional* independence may affect investors' views of the legitimacy of the MIC dispute resolution process.

20. The current MIC proposal remarkably contains no detailed description of the selection process. Using rather broad language it provides that the States are expected to appoint objective adjudicators and "*inspiration can be drawn, inter alia, from recently created international or regional courts which have screening mechanisms*".[15] Thus, investors have no role in the appointment mechanism.

21. On the one hand, the States would be the actors instituting the dispute resolution body and having principal control over the selection of its members; on the other, they would be respondents, and thus interested in the outcome of disputes.[16] If only States will choose the MIC judges, other stakeholders may feel that MIC judges are not entirely free of the risk of undue influence of, or interference from, the States that directly or indirectly select those judges.

22. While the MIC has been proposed to address concerns regarding a perceived lack of independence and impartiality of adjudicators in the current ISDS system, the MIC as currently proposed will not alleviate such concerns. The experience of other permanent adjudicatory bodies shows that where States are allowed to choose adjudicators *directly*, this may politicize the adjudicatory process, leading to a

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13 Submission of the European Union and its Member States to UNCITRAL Working Group III dated 18 January 2019, pp. 4-6.

14 Submission of the European Union and its Member States to UNCITRAL Working Group III dated 18 January 2019, pp. 4-6.

15 Submission of the European Union and its Member States to UNCITRAL Working Group III dated 18 January 2019, paras 22-23.

16 Gabrielle Kaufmann-Kohler and Michele Potestà, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, CIDS Supplemental Report, 15 November 2017, para. 82.

perceived lack of legitimacy, or to the paralysis of the entire system – as recent examples from the International Court of Justice (ICJ)[17] and the World Trade Organization (WTO) Appellate Body[18] have shown.[19]

23. According to the model adopted in recent European Union (EU) agreements,[20] the selection of the MIC adjudicators would potentially be done by a body comprised of government officials from the contracting parties. Such a selection process raises questions regarding impartiality, but also as regards transparency. There are no provisions requiring that the decision-making meetings of such a body be held in public or through a consultative process. [21]

24. Further, it is not clear what number of judges would sit on the MIC, whether that number would reflect the number of contracting States and, thus, whether all the potential contracting States would be equally represented. Although some international courts and tribunals, including the ICJ and the ITLOS, maintain fewer judges than contracting States, the question arises as to whether such "selective

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17 For example, the attempted re-appointment of Sir Christopher Greenwood to the ICJ led to a political standoff in the UN General Assembly that only ended when the United Kingdom withdrew his candidacy. "International Court of Justice: UK abandons bid for seat on UN bench", BBC News, available at https://www.bbc.com/news/uk-42061028; accessed on 8 July 2019.

18 Recently, the WTO Appellate Body has been paralyzed by the United States' exercise of its veto on appointment of Appellate Body judges. "U.S. blocks WTO judge reappointment as dispute settlement crisis looms", Reuters, https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC19O

19 Similar concerns have been raised about the European Court of Human Rights. See E. Voeten, "The Impartiality of International Judges: Evidence from the European Court of Human Rights", American Political Science Review, Vol. 102, No. 4, November 2008.

20 For example, the CETA between Canada and the European Union, EU-Vietnam Investment Protection Agreement.

21 Stephan Wilske, Raeesa Rawal, Geetanjali Sharm, The Emperor's New Clothes: Should India Marvel At The EU's New Proposed Investment Court System?, Indian Journal Of Arbitration Law, Volume 6, Issue 2, p. 89.

representation" is suitable for the MIC and whether it will not result in bias and lack of diversity as allegedly perceived in the current ISDS system.[22]

25. For this reason, EFILA proposes that all stakeholders be permitted to participate *indirectly* in the selection of MIC judges. This could be done through an appointment committee whose members are appointed in equal measure by States and private stakeholders (through an existing organisation such as the International Chamber of Commerce, the International Bar Association, or EFILA). To address concerns about the qualifications of these judges, an independent body, such as the Secretary General of the Permanent Court of Arbitration or the Secretary-General of ICSID, could confirm that nominees comply with relevant qualifications.

### b. A Clearly Defined And Independent Mechanism For Dismissal

26. At the level of individual judges, EFILA considers it important that all stakeholders be allowed to exercise clearly defined rights to strike out MIC judges before an independent dismissal body.

27. First, EFILA proposes that all disputing parties be allowed to strike one or more MIC judges assigned to the panel to hear their dispute. Such a dismissal system exists on the French *Cour d'Assises* where a defendant may request, without any need for justification, the dismissal of any jurors,[23] and in U.S. civil and criminal litigation, where parties may exercise similar *voir dire* rights.[24] Granting disputing parties a right to

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22 While the safeguards for judicial independence in existing international courts provide helpful guidance, they may not be entirely applicable and adequate to investor-State dispute resolution due to its asymmetric nature and participation of private stakeholders. See Gabrielle Kaufmann-Kohler and Michele Potestà, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, CIDS Supplemental Report, 15 November 2017, para. 107.

23 See French Code of Criminal Procedure, available at https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071154&dateTexte=, accessed on 8 July 2019, Art. 297, et seq..

24 See Federal Rules of Civil Procedure, available at https://www.uscourts.gov/sites/default/files/Rules%20of%20Civil%20Procedure., accessed on 8 July 2019, Rule 47.

strike out MIC judges on their panel will increase the perception of legitimacy amongst all stakeholders – including States. A right to choose one's decision-maker is a critical element in a party's perception of the legitimacy of the decision that is rendered. Moreover, such a right would allow a party to dismiss a judge that it sees as biased on any number of grounds that would otherwise not give rise to a formal challenge – ties with one of the disputing parties, the judge's previous decisions or other issues (i.e., issue conflicts), etc.

28. Second, the MIC must have clearly defined standards for dismissal that address the importance of each party's perception of independence and impartiality. Standards of independence and impartiality in existing permanent, adjudicatory bodies tend to be poorly defined.[25] Likewise, in many permanent adjudicatory bodies, a presumption exists that adjudicators are independent or impartial unless something close to *actual* bias is shown.[26] This approach to independence and impartiality, however, may not satisfy stakeholders' concerns in the process. Therefore, clearly defined standards that address *perceived* bias – such as the IBA Guidelines on Conflicts of Interest in International Arbitration – must be elaborated for the MIC and included in the final design of the MIC.

29. Third, EFILA proposes that an independent body should hear and decide challenges or requests for dismissal. One of the concerns before some bodies in the existing ISDS system – namely ICSID – has been that sitting arbitrators decide on the challenge to a

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25 See ICJ Statute, Art. 2 ("*The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law*.").

26 See, for example, 28 U.S.C. § 144, available at https://www.law.cornell.edu/uscode/text/28/144, accessed on 8 July 2019 ("*Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding*." (emphasis added)).

co-arbitrator.[27] There may be a further perception of illegitimacy where a body that is not fully independent may make decisions on challenges. A commission on conflicts of interest – which would be neutral and independent of States and investors – could be formed to decide challenges to sitting MIC judges. Such a body could assuage concerns that all stakeholders may have in the independence and impartiality of decision-makers.

## II. CONSISTENCY – PROTECTING THE RIGHTS OF ALL STAKEHOLDERS

30. The MIC's proponents have suggested that a permanent adjudicatory body, with a standing appeal mechanism, will promote consistency in ISDS decisions, a concern which UNCITRAL Working Group III is currently addressing. A permanent, dual-tiered adjudicatory body, it is suggested, will provide "consistent" answers on issues that arise frequently in ISDS. However, in order to ensure that true consistency is served, EFILA believes that UNCITRAL Working Group III should (**a**.) clarify what "consistency" means in a world of diverse investment agreements and (**b**.) define what tools already exist to address States' consistency concerns.

### a. Consistency In A World Of Diverse Investment Agreements

31. The current debate about "consistency" is grounded in two misguided assumptions.

32. First, it ignores that "inconsistency" may only exist where the same provisions of the same treaty are applied differently. The system in which ISDS operates is unique in the world of international adjudicatory bodies. On the one hand, bodies like the ECHR exist to interpret a single treaty instrument. On the other hand, the ICJ retains jurisdiction under an array of treaties with different subject matters, making it less likely that the Court will be called upon to revisit the very same factual or legal

[27] While the decision on an arbitrator's challenge must be decided by the co-arbitrators by virtue of Article 58 of the ICSID Convention, recent proposals to amend the ICSID Arbitration Rules have facilitated co-arbitrators' ability to defer such a decision to another body in response to such criticisms. See Proposals for the Amendment of the ICSID Rules Working Paper No. 2, March 2019, available at https://icsid.worldbank.org/en/Documents/Vol_1.pdf, accessed on 8 July 2019, p. 144 et seq.

circumstances with as much frequency as in the ISDS system. ISDS decisions, therefore, will necessarily be "inconsistent" amongst each other because they apply to different treaty instruments, albeit with similar provisions and protections. Different outcomes may be justified on similar provisions. For example, investment tribunals have distinguished the prospective or retrospective effect of denial of benefits provisions in investment treaties on the basis of the language of those treaties and their object and purpose.[28]

33. "Inconsistency", however, is generally referenced where the same or similar treaty provisions are applied or interpreted differently across treaties. An award may be considered "incorrect" (and thus inconsistent with a "correct" view of a treaty standard) (i) because the tribunal arrived at an incorrect result (for example, by appreciating the facts incorrectly) (a subjective approach) or (ii) because the arbitral tribunal did not apply or interpret the applicable law in the generally accepted way and/or drew inappropriate or nonsensical conclusions (an objective approach).

34. However, the application and interpretation of the law is by its very nature a subjective exercise in which a party's view will be formed by its own interpretation of the law (which may not be the right one) and the interests it seeks to advance. Decision-makers may hail from different legal, social and cultural backgrounds, which necessarily influence their understanding and application of the law. They may also harbor different perceptions of what interests should be advanced – those of the host State, all contracting States to the treaty, or the promotion and protection of investments and their investors.

35. Second, the current debate uses "inconsistency" and "incorrectness" interchangeably and thereby gives undue credence to the subjective concerns of some, but not all, stakeholders.

36. The same considerations apply to the question of what "inconsistent" ISDS awards are. Does "inconsistency" refer to other awards which were based on similar or

[28] See *Ulysseas, Inc. v. Ecuador*, UNCITRAL, Interim Award, 28 September 2010, para. 173; *Stati v. Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013, para. 745.

identical factual and legal points? Or does "inconsistency" refer to a more abstract level of inconsistency with other relevant international and/or domestic rules of the host State – and potentially home State as well?

37. In this context, the Academic Forum paper notes: "*Consistency and correctness are distinct concepts: inconsistent ISDS decisions can be correct, and consistent ISDS decisions can be incorrect*."[29] However, in the debate that has centered around "consistency", the term appears to be used interchangeably with "incorrectness".

38. There is great risk in this. States – which, unless otherwise provided, relinquish any right to alter a treaty once rendered – may seek to label "unwelcome" ISDS awards as "incorrect" and/or "inconsistent". All States enter into investment treaties believing that the treaty will protect its investors and/or will promote investment. No State enters a treaty believing that it will provide future liability for that State.

39. And yet, are States' concerns justified? Amongst the 942 known ISDS cases, a majority were rendered in favour of States.[30] "Incorrectness", therefore, may be nothing more than a tool by States to dismiss the legitimacy of an otherwise sound award. States may label an unwelcome ISDS award as "incorrect" and/or "inconsistent" by referring to other awards that arrive at a different conclusion on the basis of seemingly similar circumstances. In this process of "labelling", the fact- and case-specific differences are often ignored or papered over and dismissed as irrelevant. Interested parties, which have not participated in the ISDS process – such as media and NGOs – may fail to understand the complexities of ISDS cases. To respond to the criticisms of these interested parties, a losing party may (unfairly) apply the label of "inconsistency".

40. States – as the masters of their own standing offers to arbitrate – hold the existence of ISDS in their hands. While an investor may only accept (or not) a standing offer to

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29 Academic Forum on ISDS, Working Group Four, Incorrectness of ISDS Decision, available at https://www.cids.ch/images/Documents/Academic-Forum/4_Incorrectness_of_ISDS_Decisions_-_WG4.pdf accessed 8 July 2019.

30 UNCTAD Issue Note, May 2019, Fact Sheet on Investor–State Dispute Settlement Cases in 2018, https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf, accessed on 8 July 2019.

arbitrate, a State may alter the substantive and procedural rules in the treaty or terminate the treaty altogether.

41. This power, however, must be exercised with great caution. Any exercise must respect the equality of arms and the effective access to independent and impartial courts and tribunals. In other words, the standards to "correct", "incorrect" and/or "inconsistent" ISDS awards can only be acceptable if the essential rule of law principles are respected.

**b. Reasonable Approaches To Inconsistency**

42. "Inconsistency" in the ISDS system can really only be said to exist where there are opposing interpretations of provisions of the same treaty. The MIC will no doubt assist in ensuring such interpretations are consistent by referring interpretations of the same provisions to the same ultimate decision-maker.

43. However, while States still retain other tools at their discretion to "correct" unwelcome outcomes of ISDS awards, they should only make sparing use of such tools and only in a manner that respects commonly accepted rule of law principles.

44. In this context, certain basic rule of law and equality of arms principles should always be respected – otherwise the envisaged MIC will not gain the respect and authority from the users, which in the end would make the MIC pointless.

i. <u>No joint binding interpretations with potentially retroactive effect</u>

45. The adoption of joint binding interpretations remains a powerful tool for States to react to unwelcome awards by ensuring that similar cases will not be decided in the same way in the future. In this way, States may limit the ability of arbitral tribunals to decide cases in a dynamic, independent and impartial way. In other words, States can directly shape the case law of the MIC, which naturally will be in their favour and to the disadvantage of investors/claimants.

46. Such a tool for States has existed in in the North American Free Trade Agreement (NAFTA) since 1994, although a joint interpretation was only adopted once in 2001 and the exact effect of this interpretation has been unclear and disputed.[31]

47. In the the Comprehensive Economic and Trade Agreement (CETA), the contracting States tried to avoid such ambiguity by adding a sentence stating that the contracting States can specify the date of entry into force of the joint binding interpretation. This implies *that a date in the past could be given, granting the interpretation retroactive effect.* Obviously, this raises serious rule of law concerns since a respondent – being one of the CETA contracting States – could change the rules of the game during the game in its favour. Fortunately, in Opinion 1/17 regarding the CETA dispute resolution system, the Court of Justice of the EU (CJEU) made clear that the EU and its Member States cannot adopt joint binding decisions with retroactive effect.[32]

48. As the CJEU rightly found, retroactive joint interpretations raise serious concerns regarding the independence of tribunals and the equality of arms. A joint interpretation, therefore, must be given concrete and delimited effect that does not breach the basic concerns for the rule of law.

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[31] NAFTA Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, July 31, 2001, http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp, accessed on 8 July 2019; see for a critical analysis: Charles H. II Brower, Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105, 46 Va. J. Int'l L. 347, 364 (2006) available at: https://digitalcommons.wayne.edu/lawfrp/301, accessed on 8 July 2019.

[32] CJEU, Opinion 1/17 CETA ICS (Full Court) 30 April 2019, paras. 235 et seq., http://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4976548, accessed on 8 July 2019. See for an analysis: G. Croisant, Opinion 1/17 – The CJEU Confirms that CETA's Investment Court System is Compatible with EU Law, Kluwer Arbitration blog, 30 April 2019, http://arbitrationblog.kluwerarbitration.com/2019/04/30/opinion-117-the-cjeu-confirms-that-cetas-investment-court-system-is-compatible-with-eu-law/, accessed on 8 July 2019; N. Lavranos, Court of Justice of the EU approves CETA investment court system, June 14, 2019, Practical Arbitration blog, http://arbitrationblog.practicallaw.com/court-of-justice-of-the-eu-approves-ceta-investment-court-system/, accessed on 8 July 2019.

ii. Avoid unnecessarily reducing the standards of protection

49. In addition to the modification of procedural and institutional aspects of the ISDS system as discussed above, States have also begun to change the standards of protection by limiting their wording and scope, thereby reducing the level of protection. A telling example of this is the new closed list of fair and equitable treatment (FET) breaches, which has been introduced in CETA and other new EU free trade agreements (FTAs).[33]

50. According to this closed list of FET breaches, only measures that fall within that list can be considered breaches of the FET standard. In other words, everything that falls outside cannot be considered a breach of the FET standard. The wording of this list makes clear that only the most deplorable measures may be considered FET breaches, which allows States to engage in conduct that would otherwise result in breaches of the FET standard and thus the payment of compensation.

51. In addition to the limitation of the FET standard, States have also modified the other core protection standards, by limiting or completely eliminating the most-favoured

[33] See Art. 8.10 CETA:

Treatment of investors and of covered investments

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 6.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:

(a) denial of justice in criminal, civil or administrative proceedings;

(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;

(c) manifest arbitrariness;

(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

(e) abusive treatment of investors, such as coercion, duress and harassment; or

(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

nation (MFN) and national treatment (NT) standards in treaties as well as the umbrella clause.

52. All of these are tools to "correct" "incorrect" ISDS decisions preventively by excluding investors/claimants from bringing them in the first place. This, however, could lead to the demise of the ISDS system if all stakeholders do not have full faith in the system.

iii. Limit exclusions certain types of investors, investments and sectors to only those where necessary

53. Finally, States have also been limiting the scope of the investment treaties by excluding certain types of investors, investments and sectors.

54. For example, CETA (and all other EU FTAs) explicitly exclude mailbox companies from the definition of "investor".[34] This trend has now also been followed by the Netherlands in its recently published new model BIT text.[35]

55. In addition, States increasingly exclude certain types of investments such as subsidies or certain sectors such as tobacco (as in the case of Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)) and public debts from the scope of ISDS claims.[36] However, the reduction of the level of protection should be

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34 In CETA the definition of enterprise with regard to the investment protection chapter reads as follows:
For the purposes of this definition, an enterprise of a Party is:
(a) an enterprise that is constituted or organized under the laws of that Party and has substantial business activities in the territory of that Party;

35 The new Dutch Model BIT text 2018 contains the following definition of investor:
(b) "investor" means with regard to either Contracting Party:
[…]
(ii) any legal person constituted under the law of that Contracting Party and having substantial business activities in the territory of that Contracting Party; or
Available at: https://www.rijksoverheid.nl/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investeringsakkoorden, accessed on 8 July 2019.

36 See for example, Article 29.5: Tobacco Control Measures in CTPP:
A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration

compensated by imposing obligations on States to improve their domestic legal, judicial and administrative system.

56. The new Dutch model BIT text indeed addresses this point by imposing an explicit obligation on the contracting States to guarantee the rule of law.[37] The next step would be to make that a right that is enforceable by investors.

57. In short, States must limit exclusions of certain types of investors and investments to only those based on justifiable reasons. An overly expansive exclusion may limit the force of any investment protections.

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under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.

https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/29.-Exceptions-and-General-Provisions.pdf, accessed on 8 July 2019.

[37] The new Dutch Model BIT text 2018 contains the following provision:

Article 5 Rule of law

1. The Contracting Parties shall guarantee the principles of good administrative behavior, such as consistency, impartiality, independence, openness and transparency, in all issues that relate to the scope and aim of this Agreement.

2. Each Contracting Party shall ensure that investors have access to effective mechanisms of dispute resolution and enforcement, such as judicial, quasi-judicial or administrative tribunals or procedures for the purpose of prompt review, which mechanisms should be fair, impartial, independent, transparent and based on the rule of law.

3. As part of their duty to protect against business-related human rights abuse, the Contracting Parties must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. These mechanisms should be fair, impartial, independent, transparent and based on the rule of law.

## III. ACCESS TO JUSTICE FOR SMALL AND MEDIUM-SIZED ENTERPRISES

58. SMEs are vital for the international economy. In the EU, for example, it has been recorded that SMEs can have an annual turnover of EUR 50 million.[38] While it is true that SMEs are involved in international economic relations, their involvement is on a lower scale than investors with significant financial resources. Nonetheless, it has been recognised that SMEs are the backbone of the European economy and play an important role in exporting revenues, creating new jobs and fostering innovation. Globally, the World Bank has reported that formal SMEs contribute to 60% of employment and 40% of GDP in emerging economies.[39] International statistics have also highlighted that the most pervasive constraint on the success of SME's is access to capital and funding; it has been estimated that approximately 70% of SMEs (including micro enterprises) lack access to credit.[40]

59. SMEs have specific strengths and weaknesses that may require special policy and legal responses in various sectors. International investment law is no exception.[41] For example, in foreign direct investment projects, SMEs usually have weaker bargaining power and an inferior position when negotiating with host State authorities, including the settlement of disputes.[42] In this respect, one of the concerns shared by the members of UNCITRAL Working Group III is that the financial burdens of investment treaty proceedings may limit the access of SMEs to adjudication mechanisms or deter

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38 Eurostat, Small and Medium-sized Enterprises, accessed on 21 May 2019, available at https://ec.europa.eu/eurostat/web/structural-business-statistics/structural-business-statistics/sme OECD, Policy Brief, Small and Medium-sized Enterprises: Local Strength, Global Reach, available at http://www.oecd.org/cfe/leed/1918307.pdf, accessed on 22 May 2019.

39 World Bank, Small and Medium Enterprises (SMES) Finance, available at https://www.worldbank.org/en/topic/smefinance, accessed on 22 May 2019.

40 World Bank, Small and Medium Enterprises (SMES) Finance, available at https://www.worldbank.org/en/topic/smefinance, accessed on 22 May 2019.

41 OECD, Policy Brief, Small and Medium-sized Enterprises: Local Strength, Global Reach, available at http://www.oecd.org/cfe/leed/1918307.pdf, accessed on 22 May 2019.

42 Joachim Karl, *The Treatment of Small and Medium-Sized Enterprises in International Investment Law* (Oxford University Press 2017).

their use.[43] These burdens can effectively deprive SMEs of substantive investment protections provided to them under investment treaties.

60. It has been shown that the cost of ISDS has risen to a level that could be perceived as a barrier of access to certain investors with limited financial resources.[44]

61. ISDS reform solutions, either structural (investment court and appeal mechanism) or systemic (step-by-step improvements to ISDS), and international policy-making can play an important role in creating greater access to justice rights for SMEs. The MIC should create procedural rights that remove financial obstacles that SMEs might face.[45] Hence, UNCITRAL Working Group III should seek to harness economic development in a way that protects vulnerable investors with limited access to financial support. This will contribute to the development of a mature, rules-based system that promotes economic growth and access to justice for limited resource investors (UN Sustainable Development Goal 16).[46] This can be done with respect to both structural solutions within the MIC negotiation process and systemic improvements to the ISDS system.

62. In its current form, the MIC proposal does not address the promotion of the use of the ISDS system by all stakeholders.

63. This, however, is an important aspect of the proper functioning of the ISDS system. In Opinion 1/17, the CJEU noted that the non-binding language of CETA's commitments on financial accessibility for SMEs might limit access to CETA to those who have

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43 UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session (Vienna, 29 October – 2 November), Possible reform of investor-State dispute settlement (ISDS) – cost and duration, https://undocs.org/en/A/CN.9/WG.III/WP.153, accessed on 23 May 2019. See also Scott Miller and Gregory N. Hicks, Investor-State Dispute Settlement: A Reality Check, A Report of the Centre for Strategic & International Studies (Rowan & Littlefield 2015).

44 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017), available at https://undocs.org/en/A/CN.9/WG.III/WP.153, accessed on 22 May 2019, 3.

45 Karl (n 5).

46 Sustainable Development Goals, Goal 16, available https://sustainabledevelopment.un.org/sdg16, accessed on 24 May 2019.

significant financial resources.[47] There are a number of solutions that could improve SMEs' access to the protections in international investment treaties: for example, adopting CETA's supplemental rules aimed at reducing the financial burden on natural persons and small and medium-sized enterprises[48] or by implementing systemic or structural changes in accordance with UNCITRAL Working Group III.

64. The MIC should establish cost-efficient rules that promote access to justice by SMEs. Notably, it should:

A. Integrate procedural rules on expedited procedures and/or simplified procedures for small claims.[49] Experienced arbitration institutions such as the ICC and SCC already facilitate access of SMEs with expedited arbitration rules, in particular when there are straightforward issues and/or factual issues in dispute. [50] Cost-efficient procedural rules can also provide procedural rules

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47 Opinion of the Court 1/17 (Full Court), 19 April 2019, ECLI:EU:C:2019:341, 213. Article 8.39 of CETA States as follows: "*The CETA Joint Committee shall consider supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium-sized enterprises. Such supplemental rules may, in particular, take into account the financial resources of such claimants and the amount of compensation sought*." European Commission, SMEs and CETA, available at http://ec.europa.eu/trade/policy/in-focus/ceta/smes-and-ceta/, accessed on 22 May 2019.

48 Opinion of the Court 1/17, para 215.

49 UNCITRAL Working Group III, Possible reform of investor-State dispute settlement (ISDS) – cost and duration, https://undocs.org/en/A/CN.9/WG.III/WP.153

See also Austrian Federal Ministry of Finance, Unit III/3, December 2018, available at https://icsid.worldbank.org/en/amendments/Documents/Rules%20Amendment-Austria%20Comments.pdf, accessed on 22 May 2019. See also ICSID Secretariat, Proposals for Amendments of the ICSID Rules, Chapter XII- Expedited Arbitration, Working Paper # 2, Volume 1, March 2019, accessed on 24 May 2019, available at https://icsid.worldbank.org/en/Documents/Vol_1.pdf.

50 Arbitration Institute of the Stockholm Chamber of Commerce, Expedited Arbitration, available at https://sccinstitute.com/dispute-resolution/expedited-arbitration/, accessed on 24 May 2019 and International Chamber of Commerce, Expedited Procedure Provisions, available at https://iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions/, accessed on 24 Mary 2019. See also ICSID Secretariat, Proposals for Amendments of the ICSID Rules,

that mandate submission of only electronic documents and give the tribunal discretion to limit the number and length of submissions.

B. Allow joinder of two or more proceedings that concern the same measures, but are based on different instruments of consent, reducing time and costs.[51]

C. Create a set of criteria that allow mandatory consolidation when the applicant is an SME. While CETA does not automatically facilitate consolidation requests on behalf of SMEs, the closest approach to this proposal is Article 19(7) of the new Dutch Model BIT, according to which the: "…*Tribunal shall in principle accept such request for consolidation, especially where the claimants are small and medium sized enterprises*…"

D. Implement the benefits of cost budgeting and cost management in arbitration rules for lower-value SME claims. In order to avoid unnecessary expenditure, EFILA proposes putting a ceiling on arbitrator's fees and legal representation costs for SMEs. While arbitration institutions are currently taking the lead in introducing cost rules, this UNCITRAL Working Group III could benefit from institutional initiatives. The relevant principle should be that capping any type of expenses in the arbitration process should be done with the authorization

Chapter XII- Expediated Arbitration, Working Paper # 2, Volume 1, March 2019, accessed on 24 May 2019, available at https://icsid.worldbank.org/en/Documents/Vol_1.pdf.

51 Bernhard von Pezold and others v Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award (July 28, 2015), para 118. For example the Article 19(7) of the Netherlands Model BIT: " *If two or more claims have been submitted separately to arbitration under this Article and the claims have a question of law or fact in common and arise out of the same events or circumstances, either party to the dispute may seek a consolidation order at either Tribunal. After giving all disputing parties the opportunity to be heard, the Tribunal shall in principle accept such request for consolidation, especially where the claimants are small and medium sized enterprises"*. See also ICSID Secretariat, Proposals for Amendment of the ICSID Rules-Working Paper, Volume 3, available at https://icsid.worldbank.org/en/Documents/Amendments_Vol_3_Schedule%207.pdf, accessed on 24 May 2019, 836.

of the disputing parties.[52] For example, the CEPANI Arbitration Rules recommend to the parties to agree on the upper limit for the reimbursement of these costs. [53]

65. A number of systemic solutions may ensure the participation of all stakeholders.

66. The MIC should establish a process that would inform and educate SMEs about the ISDS system and help them assess their claims:

A. Provide support and training to SMEs on alternative methods for dispute resolution, including mediation and negotiation, as cost-efficient and preventive tools to resolve matters in relation to investor-State regulatory changes.[54]

B. Create enquiry points to resolve information requests in relation to early-case assessment on the cost-benefit analysis for SMEs considering commencing a dispute.[55]

67. The MIC should also establish a financial support system for accessibility:

A. Create joint committees between contracting parties to assess requests on SME's financial accessibility, including legal-aid.[56]

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52 ICC Dispute Resolution Bulletin 2015, Commission Report: Decision on Costs in International Arbitration, Appendix B: Summary of National Reports, 55 Issue 2.

53 CEPANI Arbitration Rules, Schedule II: Parties' Costs, available at https://www.arbitrationbelgium.com/Arbitration%20Rules/rules_en.pdf, accessed on 12 June 2019.

54 UNCITRAL Working Group III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017), A/CN.9/930/Rev, available at https://undocs.org/en/A/CN.9/930/Rev.1, accessed on 24 May 2019.

55 Alexander Gebert, *Legal Protection for Small and Medium-Sized Enterprises through Investor-State Dispute Settlement: Status Quo, Impediments, and Potential Solutions* (Oxford University Press 2017). The Energy Charter Treaty already provides for enquiry points as part of promoting of transparency in the public sector and cut down the costs for investors in Gloria M. Alvarez, Article 20: Transparency, Commentary on the Energy Charter Treaty, Rafael Leal-Arcas (ed.) (Elgar 2018).

56 Recommendation 003/2018 of 26 September 2018 of the CETA Joint Committee on Small and Medium-sized Enterprises (SMEs) http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157417.pdf, accessed on 22 May 2019.

B. Establish SME-specific financial rules to reduce burden on legal representation and costs of the proceedings. [57]

C. Put in place third-party funding rules that could be used by SMEs while ensuring a balanced investor-State relationship, and support due process, full disclosure, independence, and impartiality of arbitrators.[58]

## IV. ENFORCEMENT

68. According to the MIC proposal, enforcement of MIC decisions will be subject to Article V of the New York Convention until a special instrument on the enforcement of MIC decisions is in place.

69. The New York Convention, however, does not automatically transform decisions from every international adjudicatory institution into enforceable awards.[59] For the Convention to apply, the decision issued by the MIC must first constitute an "*arbitral award*" within the meaning of Article I of the New York Convention.

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[57] See Article 22(3) of the Netherlands Model Investment Agreement, Article 20(3) available at https://www.tweedekamer.nl/kamerstukken/detail?id=2018D51015&did=2018D51015, accessed on 24 May 2019. ("*The Tribunal shall order that reasonable costs incurred by the successful disputing party shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such allocation is unreasonable in the circumstances of the case. Such a determination may take into account whether the successful disputing party has acted improperly, for example by raising manifestly frivolous objections or improperly invoking preliminary objections, and whether the unsuccessful disputing party is a small or medium sized enterprise. If only some parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims"*).

[58] While UNCITRAL Working Group III has acknowledged that third-party funding could be a useful tool to ensure access to justice for SMEs in UNCITRAL, Note by the Secretariat, Possible reform of investor-State dispute settlement (ISDS), Third-party funding, available at https://undocs.org/en/A/CN.9/WG.III/WP.157, accessed on 8 July 2019.

[59] Alvaro Galindo, David L. Attanasio, et al., 'Chapter 27: The New York Convention's Concept of Arbitration and the Enforcement of Multilateral Investment Court Decisions', 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; Kluwer Law International 2019).

70. There is no consensus on the definition of an "arbitral award" within the meaning of the New York Convention – neither the New York Convention nor the UNCITRAL Model Law contain such legal definition. However, it is generally accepted that, to constitute an award, the decision should be (i) a foreign, non-domestic or a-national award[60]; which is (ii) legally binding and final; and (iii) rendered by an *arbitral body*[61]; following a (iv) voluntary submission of the parties.[62]

71. It is unclear to what extent a MIC decision would meet that definition. In particular, with respect to the final and binding character of the decision[63]; the requirement that

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60 Article I (1) of the NYC requires awards to be rendered in the territory of another State, meaning non-domestic awards: "1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." This provision implies that an arbitral award is foreign as long as it has not been rendered in the territory of the state of enforcement. By comparison, Iran-US Claims Tribunal awards were enforceable as anational awards under the NYC and thus considered as non-domestic. *See United States, U.S. Court of Appeals, Ninth Circuit / Ministry of Defense of the Islamic Republic of Iran v. Gould Inc., Gould Marketing, Inc., Hoffman Export Corporation, and Gould International, Inc*. 23 October 1989 / 88-5879 / 88-5881.

61 Richard Happ, Sebastien Wuschka, 'From the Jay Treaty Commissions Towards a Multilateral Investment Court: Addressing the Enforcement Dilemma", Indian Journal of Arbitration Law, (Indian Journal of Arbitration Law; Centre for Advanced Research and Training in Arbitration Law, National Law University, Jodhpur 2017, Volume VI Issue 1) pp. 113-132, at p. 125.

62 Article I(2) of the NYC makes a distinction between arbitration and compulsory court jurisdiction: "2. The 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." Some authors suggest that as long as the investor can choose between international arbitration and national court, the voluntary nature of the submission is verified, as it is the case under the ICSID Convention. *See* Kaufmann-Kohler and Potestà (2016), *op. cit*. p. 36. Providing in the MIC Statute a choice of forum to the investor is likely to be considered by national courts as fulfilling the voluntary submission criteria. See Alvaro Galindo, David L. Attanasio, et al., *op. cit.* pp. 463-464.

63 The current state of negotiations reveals that the MIC Statute would fulfil the requirement of a third, neutral party issuing a final decision; *see* Marc Bungenberg, August Reinisch, *op. cit.* p. 156.

the decision be rendered by a non-State decision maker[64], and perhaps most importantly, the requirement that the decision be rendered by "arbitrators" or an "arbitral body". The selection of judges by contracting States alone would distinguish the MIC from traditional forms of arbitration[65], and raises questions as to whether a system that ignores one of the perceived foundations of arbitration – party autonomy in the appointment of arbitrators[66] – could be considered an arbitral body. The appointment regime of MIC arbitrators may therefore raise due process concerns, especially in jurisdictions, such as France, where the *Cour de Cassation* has found that inequality between the parties in the process of appointing an arbitrator is a violation of public policy.[67] In this context, a party may resist the enforcement of a MIC decision on the grounds of Article V (1)(d) of the New York Convention, i.e., "[…] *the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where arbitration took place*".

64 Similarly to the Iran-US claims tribunal, the MIC possesses attributes of both a public and a private entity. For instance, the adjudicators are permanently appointed which corroborates the public body theory, but on the other hand, the MIC is not linked to a national legal system. The Iran-US Claim tribunal's nature as a State or private institution has not been addressed during enforcement procedures under the New York Convention; *see* Marc Bungenberg, August Reinisch, *op. cit*. pp. 157-158.

65 See Alvaro Galindo, David L. Attanasio, et al. *op. cit*. pp. 463-464. It is however similar to the regime governing appointment of arbitrators of the Iran-US Claims Tribunal. See Kaufmann-Kohler and Potestà (2016) *op. cit* p.37.

66 Gary B. Born , International Commercial Arbitration (Second Edition), 2nd edition, p. 1638. It has been suggested that its elimination would constitute an "assault on the very institution of international arbitration"; see Charles N. Brower, Michael Pulos & Charles B. Rosenberg, *So Is There Anything Really Wrong with International Arbitration As We Know It?,* in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, 3,p. 8.

67 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*").

72. Secondly, and in accordance with Article I, para 2 of the New York Convention, only awards "*made by arbitrators appointed for each case* [and] *those made by* ***permanent arbitral bodies*** *to which the parties have submitted*" are enforceable under the New York Convention.[68]

73. It is unclear what is understood by "*permanent arbitral bodies*" within the New York Convention, and whether the MIC composed of arbitrators appointed by States only, would constitute a "*permanent arbitral body*" for the purposes of enforcement under the New York Convention.

74. Interestingly, the IUSCT – which, similar to the projected MIC, provided that arbitrators be appointed by the States only (and not by the investor) – was recognized as a "*permanent arbitral body*" under Article I(2) of the Convention[69] by the US Federal Court of Appeals for the Ninth Circuit in *Iran v. Gould*.[70]

75. However, it is important to note that the *Gould*[71] decision did not consider whether the IUSCT's appointment provision affected its status as a permanent arbitral body[72]. The issue therefore remains to be seen with respect to the MIC.

76. Finally, 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 considered itself a seat) would retain jurisdiction to set aside the award on a number of grounds. This 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 – to MIC decisions due to disagreements on questions of jurisdiction.[73]

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68 Kaufmann-Kohler and Potestà (2016),*op. cit* p. 54.

69 *Ibid.*

70 *Iran v Gould*, *op. cit.*

71 *Iran v Gould*, *op. cit.*

72 Alvaro Galindo, David L. Attanasio, et al *op. cit*. p. 463.

73 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*, CA Paris, 7 February 2017.

## V. CONCLUSION

77. EFILA believes that the proposals contained in this position paper address many concerns regarding the current ISDS system and proposed reforms, while ensuring equitable access to all stakeholders.

78. EFILA reaffirms that the success of any proposed reform of the ISDS system depends on the faith that all users have in that system's ability to provide fair resolution to a pending dispute.

79. Due concern must be had for an investor's ability to select its decision-maker, a State's ability to affect the rules of procedure in an equitable manner, access to the system for SMEs and others who seek to pursue smaller claims, and the enforceability of MIC decisions.

80. 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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