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Comparative Report of the IILCC Study Group on ISDS Reform on the

Creation and Implementation of a Multilateral Investment Court

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IILCC Comparative Report on the Creation and Implementation of a Multilateral Investment Court

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Introduction

The purpose of this Report is to provide an overview on essential questions related to the creation and implementation of a permanent body for the settlement of international investment disputes, often referred to as Multilateral Investment Court. To this end, the Report summarizes and compares two comprehensive academic studies published by leading experts in the field of international investment law and international dispute settlement.

In 2016, *Gabrielle Kaufmann-Kohler* and *Michele Potestà* from the University of Geneva published an analysis on whether the Mauritius Convention can serve as a model for further reforms of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism.[1] In 2017, the study was complemented by a research paper on the *Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards*.[2] Taken together, both publications provide a comprehensive roadmap with suggestions for creating a permanent body, which the authors refer to as International Tribunal for Investments (ITI).

In 2018, *Marc Bungenberg* from Saarland University and *August Reinisch* from the University of Vienna published a study entitled *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court – Options Regarding the Institutionalization of Investor-State Dispute Settlement.* [3] In detail the authors set out the main features of a permanent body for the settlement of investment disputes to which they refer to as Multilateral Investment Court (MIC).

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[1] Gabrielle Kaufmann-Kohler and Michele Potestà, *Can the Mauritius Convention serve as a model for the reform of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap*, CIDS 2016, available at https://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf (Kaufmann-Kohler/Potestà 2016). All online references contained in this Report have been accessed on 16 January 2020.

[2] Gabrielle Kaufmann-Kohler and Michele Potestà, CIDS Supplemental Report on the Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, CIDS 2017, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_supplemental_report.pdf (Kaufmann-Kohler/Potestà 2017).

[3] Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court – Options Regarding the Institutionalization of Investor-State Dispute Settlement*, Springer 2018 and 2019, available at https://www.springer.com/gp/book/9783662597316 (Bungenberg/Reinisch). In the following, references will made to the 2019 edition.

The idea of establishing a permanent body for the settlement of international investment disputes is not new but has recently gained significant dynamic due to the ongoing debate on the legitimacy of the current arbitral system of investor-state dispute settlement (ISDS). In response to these developments, the international community of States chose the UNCITRAL Working Group III as a multilateral forum to discuss a potential reform of ISDS. In the course of this process, ideas developed by policy makers, academics, legal practitioners and representatives of civil society across the globe could lead to a fundamental transformation of the legal framework governing international investment protection.

It should be noted that the reform options suggested by *Kaufmann-Kohler/Potestà* and *Bungenberg/Reinisch* are two examples of a rich and growing scholarship dedicated to the ISDS reform process.[4] The ongoing discussions at UNCITRAL are for example closely followed by the Academic Forum on ISDS, an international network of academics active in the field.[5] In 2019, members of the Forum published a series of concept papers dedicated to different aspects of reform options.[6] Even though reference is additionally made to individual Academic Forum concept papers, the present Report is not meant to give an exhaustive summary of the ongoing academic discussion.

Instead, by comparing the studies conducted by *Kaufmann-Kohler/Potestà* and *Bungenberg/Reinisch,* the Report provides an overview of the most important aspects related to the creation of a permanent mechanism for the settlement of investment disputes. The scope of the Report is limited to the presentation and comparison and

[4] The UNCITRAL website provides a selection of publications on the ISDS reform, available at https://uncitral.un.org/en/library/online_resources/investor-state_dispute.

[5] Academic Forum on ISDS, administered by PluriCourts. Further information on the Forum is available at https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/.

[6] See especially Chiara Giorgetti and Mohamed Abdel Wahab, A Code of Conduct for Arbitrators and Judges, Academic Forum on ISDS Concept Paper 2019/8, 14 October 2019 (Giorgetti/Abdel Wahab, AF 2019/8); Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St. John, Selection and Appointment in International Adjudication: Insights from Political Science, Academic Forum on ISDS Concept Paper 2019/10, 17 September 2019 (Larsson et al., AF 2019/10); Andrea Bjorklund, Marc Bungenberg, Manjiao Chi, and Catharine Titi, Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform, Academic Forum on ISDS Concept Paper 2019/11, 24 September 2019 (Bjorklund et al., AF 2019/11); Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti, The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement, Academic Forum on ISDS Concept Paper 2019/12, 13 October 2019 (Langford/Behn/Malaguti, AF 2019/12); Karl P. Sauvant, An Advisory Centre on International Investment Law: Key Features, Academic Forum on ISDS Concept Paper 2019/14, 10 September 2019 (Sauvant, AF 2019/14).
All concept papers of the Academic Forum on ISDS are available at https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/.

does not intent to evaluate the suggestions contained in both studies. In addition to summarizing the studies, the added value of the present Report consists in setting out the differences of the two approaches and thereby shedding light on critical points of discussion worthy to explore in the future. It is against this background that the authors of this Report aim to constructively contribute to the ongoing reform debate.

The Report is structured in five sections, each covering a topic related to the creation of a permanent body for the settlement of investment disputes. At the outset, the institutional structure of a future MIC or ITI is discussed (I.). The question of whether and how to integrate an appeal mechanism is of particular importance and therefore addressed in a separate section (II.). Given that the acceptance of any future dispute settlement mechanism will largely depend on the actual and perceived legitimacy of decision makers, both studies elaborate on the status of the adjudicators in great detail (III.). The section is divided in two parts, dedicated to the selection and appointment of adjudicators (A.) and the terms of their appointment (B.). In addition, the question of how to implement a permanent body for the settlement of investment disputes into the current legal framework is addressed (IV.). The final section is dedicated to the issue of international recognition and enforcement of decisions (V.).

Within each section, the analysis and evaluation conducted in both studies is presented separately before summarizing the respective commonalities and differences and setting out further points of discussion.

Executive Summary

I. Institutional Structure of the Permanent Body

The institutional structure constitutes the foundation of any reformed and more permanent ISDS mechanism and will decisively determine the acceptance of the system by governments, investors and civil society. The approaches proposed by *Bungenberg/Reinisch* and *Kaufmann-Kohler/Potestà* both aim to increase the legitimacy of ISDS through a greater degree of coherence and transparency. Even though some overlaps can be identified in specific issues, the two perspectives and methodical approaches differ to a great extent.

Bungenberg/Reinisch aim for a holistic and coherent reform of the existing investment arbitration system by introducing a permanent court. They refer to the permanent body as Multilateral Investment Court (MIC). The authors provide a comprehensive institutional structure for a permanent international organisation on the basis of a treaty, with its own organs and with a separate legal identity.

Kaufmann-Kohler/Potestà refer to the permanent body as International Tribunal of Investments (ITI) and do not suggest a definitive institutional structure but rather introduce two possible options for a more permanent investment dispute settlement system. Establishing a roster of previously elected individuals from which both disputing parties can appoint adjudicators would be an option. Alternatively, the creation of a permanent standing body of adjudicators is suggested. The authors show advantages and drawbacks and illustrate the consequences of choosing each option without clearly recommending one or the other.

II. Appeal Mechanism

Both studies emphasise that contradicting decisions under the current system undermine the legitimacy of investment arbitration and foster legal uncertainty. Against this background the authors concur that the implementation of an appeal mechanism would promote consistency and that such a mechanism could consist of either a two-tiered court with first and second instance, a standalone uniform appeal or annulment

stage for *ad hoc* tribunals or an autonomous body for preliminary rulings and en-banc decisions.

Bungenberg/Reinisch favour a two-tiered MIC with a first instance and an appellate body. The appellate body would have the competence to confirm, amend or annul judgments of the first instance. It should, however, not have the power to refer cases back to the first instance in order to avoid delays. *Kaufmann-Kohler/Potestà* raise doubts whether a two-tiered system is necessary considering that the efficiency of ISDS could be adversely affected. Alternatively, the authors consider a preliminary ruling procedure to be less burdensome to implement.

Hence, points of discussion *inter alia* focus on whether the scope of review should be designed to entail annulment or appeal or something different and whether grounds of appeal/annulment should be modelled after the ICSID Convention. Of central relevance remains the question whether and to which extent the creation of an appeal or annulment mechanism would affect the efficiency of the dispute settlement process.

III. Status of Adjudicators

A. Selection and Appointment Process

In the context of selecting and appointing adjudicators to a permanent body, both approaches take into consideration the need to balance competence, diversity, representativeness, impartiality and the interests of the parties.

Both studies favour a process at the national level of every participating Member State which is based on self-nomination, coupled with an independent screening body tasked with reviewing the individuals' qualifications. The authors concur in ascribing great importance to the need for the process to ensure diversity. The question of the adjudicators' background beyond regional representation is more heavily emphasised by *Kaufmann-Kohler/Potestà*, especially with regards to professional background and gender.

In further discussion, participating Member States will need to decide whether cases of potential judicial bias should be adjudicated by the permanent body itself or by a different institution.

B. Terms of Appointment and Code of Conduct

Both models prefer full-time adjudicators to ensure effective case management, high quality awards, compact procedures and a high degree of independence and impartiality. Parallel engagements should be minimized and excluded in case they negatively impact availability and impartiality. Based on the experience drawn from existing rules, a written, binding and enforceable code of conduct should be developed.

The two proposals disagree on whether it would be advisable to involve nationals of a concerned State as adjudicators. *Bungenberg/Reinisch* would like to admit nationals of the disputing parties in case of mutual agreement, whereas *Kaufmann-Kohler/Potestà* would like to exclude nationals of the parties to the dispute.

IV. Implementation of the MIC or ITI

The core issues with respect to the implementation of a permanent body into the current system of ISDS concern its jurisdiction and the relationship to existing and future investment treaties. With regards to jurisdiction, *Kaufmann-Kohler/Potestà* propose that jurisdictional requirements should be exclusively governed by the investment treaty under which a dispute arises. In contrast, *Bungenberg*/*Reinisch* suggest that the treaty leading to the creation of the permanent body should stipulate its own additional jurisdictional minimum requirements in order to avoid universal jurisdiction of the MIC.

With respect to existing IIAs, both studies suggest that the MIC Treaty (*Bungenberg*/*Reinisch*) or the Opt-In Convention (*Kaufmann-Kohler*/*Potestà*) contains a standing dispute settlement offer by the MIC or ITI, however to a slightly differing extent. Regarding future IIAs, *Kaufmann-Kohler*/*Potestà* suggest that ISDS clauses could directly refer to the ITI Statute and in absence of further specifications, the ITI would become an additional means of dispute resolution. *Bungenberg*/*Reinisch* suggest that the MIC Statute should ensure that the MIC will become the exclusive dispute settlement mechanism in all future IIAs. Overall, both proposals seek to

implement a permanent body without the necessity to amend existing IIAs. The approach of *Kaufmann-Kohler*/*Potestà* to implementation may be characterized as causing slightly less interference with the network of existing IIAs and leading to a rather gradual transition from the existing to a new dispute resolution framework.

V. Recognition and Enforcement of Decisions

Both studies agree to a large extent on the main points related to the recognition and enforcement of MIC/ITI decisions and emphasize that effectiveness of a reformed ISDS regime is crucial. Hence, in addition to enforcement in Member States, recognition in States which are not party to the treaty creating the permanent body should be made possible.

Both proposals suggest that the treaty creating the permanent body should contain a system of enforcement, preferably similar to the ICSID enforcement system. In view of the particularities of the ICSID mechanism both studies consider enforcement of MIC/ITI decisions under the ICSID Convention to be impossible.

In contrast, enforcement pursuant to the New York Convention is considered possible. However, the authors stress that the final decision whether the ITI/MIC will be considered as permanent arbitral body within the meaning of the New York Convention will made by the competent national courts in which recognition and enforcement is sought.

Comparative Report

I. Institutional Structure of the MIC or ITI

Both proposals elaborate an institutional structure for a permanent body for the settlement of investment disputes. The spectrum of possible options ranges from independent and permanent models as a new form of ISDS to rather cosmetic changes within the existing system.

As will be seen, the two approaches differ greatly in this respect. *Bungenberg/Reinisch*, on the one hand, take up the reform ideas of the EU for the introduction of an investment court system and offer a detailed design of a permanent dispute settlement mechanism. The model by *Kaufmann-Kohler/Potestà*, on the other hand, is characterized by general considerations regarding the requirements and consequences of a transformation from an *ad hoc* dispute settlement system to a more permanent institution.

A. Model by Bungenberg/Reinisch

As the title of *Bungenberg/Reinisch*'s study – *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court – Options Regarding the Institutionalization of Investor-State Dispute Settlement* – already suggests, the authors concentrate on the 'institutionalization' of ISDS. They present two possible options for a 'permanent, pre-appointed judiciary according to rule of law standards'.[7] The first option consists in creating a two-tier Multilateral Investment Court (MIC) comprising a first instance tribunal and an appeal mechanism as the preferred solution to solve the legitimacy crisis of international investment law.[8] The MIC would replace the current *ad hoc* arbitration practice and thereby comprehensively reform the existing ISDS system.

[7] Bungenberg/Reinisch, para. 39.
[8] *Ibid.*, Chapter 4-8.

As an alternative to the MIC, the establishment of a Multilateral Investment Appeals Mechanism (MIAM) is suggested. Such a mechanism would be added to a first phase of *ad hoc* arbitration subject to e.g. ICSID, UNCITRAL or SCC rules.[9]

According to the authors, both models of a permanent dispute resolution mechanism would be able to offer streamlined procedures by the means of an efficient organisation and address fundamental concerns raised towards ISDS in the past, such as the lack of legitimacy, control, consistency and transparency, as well as the suspected lack of neutrality and independence of the arbitrators.[10] However, adding to a first phase of *ad hoc* arbitration, the MIAM would not represent a holistic and comprehensive reform and therefore would not, compared to the MIC, be equally suited to counter the far-reaching criticism.[11] In addition, the interaction of the first-level *ad hoc* arbitration and the MIAM could create new problems e.g. with regard to the enforceability of arbitral awards.[12]

In any event, *Bungenberg/Reinisch* favour an independent international organisation on the basis of a treaty, however, they make clear that this solution would require a minimum of approximately 40 members to ensure savings on payments made to the judges.[13] Further, the statute for the establishment of the MIC (or the MIAM) should only enter into force once it has a certain number of ratifications.[14] It should allow the accession of all States, independent customs unions or Regional Economic Organisations (REIOs) as well as dependent territories (such as Hong Kong or Macau) and should set out the organisational requirements, whereas more detailed questions such as the procedural rules could also be specified in secondary law.[15]

The organisational structure of the MIC would include a Plenary Body (1), a Secretariat (2), an Advisory Centre (3) and the Judges (4). A standalone MIAM would be structured in a similar way, however, it would be smaller in size with just one (appeal) instance

[9] *Ibid.,* Chapter 9.
[10] *Ibid.,* paras. 50 ff.
[11] *Ibid.,* paras. 64 ff.
[12] *Ibid.,* paras. 67, 642-650. For greater detail see *infra*, section V.
[13] *Ibid.,* paras. 9 f., 546.
[14] *Ibid*. For greater detail see *infra*, section IV.A.
[15] *Ibid.,* paras. 12, 74, 76. For greater detail see *infra*, section IV.A.

and no Advisory Centre.[16] In general, the proposal shares great similarities with the organisational structure of the WTO.[17]

1. Plenary Body

The Plenary Body would act as the central organ of the MIC/MIAM and would be responsible for all central decisions regarding the organization and functioning of the institution.[18] It would be composed of representatives of all Members (including independent administrative entities and international organisations) that - periodically or *ad hoc* - come together for plenary or extraordinary sessions.[19] The Plenary Body could deal with all issues that fall within its mandate. Therefore, it could also manage the dispute resolution as a whole by e.g. appointing judges and assigning cases.[20] In addition, the Plenary Body could have legislative power to an extent provided for in the MIC/MIAM Statute. *Bungenberg/Reinisch* consider the Plenary Body as the 'political organ of the MIC' (or MIAM), through which the Members may pass secondary rules like e.g. a code of conduct, procedural provisions or interpretative statements.[21] The authors propose that decisions should be taken by a qualified majority in most of the cases and should be published online.[22] To exercise its mandate, the Plenary Body would be competent to form internal subdivisions that constitute committees dealing with specific tasks such as the evaluation of candidate judges.[23]

2. Secretariat

The Secretariat would focus on the administrative tasks of the MIC/MIAM, i.e. administration of pending cases, translation and proofreading of decisions, monitoring of technical devices, supervision of the enforcement process or legal research for judges.[24] With regard to any form of legal work, however, *Bungenberg/Reinisch* emphasise that by no means should the Secretariat draft decisions for the judges or

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[16] *Ibid.,* paras. 609 ff., 636 ff., 651 ff.
[17] The WTO organisation chart is accessible at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm .
[18] Bungenberg/Reinisch, paras. 13, 80.
[19] *Ibid.,* paras. 81, 83.
[20] *Ibid.,* para. 80.
[21] *Ibid.,* paras. 80, 82, 106.
[22] *Ibid.,* paras. 113 ff.
[23] *Ibid.,* para. 82. See also *infra*, section III.A.1.
[24] *Ibid.,* paras. 178 f.

get involved with the disputing parties.[25] The Secretariat should be staffed according to the specific tasks of the MIC/MIAM, have its own budget, staff rules and should be run by a Director General that is responsible for all important decisions.[26] The Secretariat could be divided into different departments.[27]

3. Advisory Centre

The Advisory Centre, unlike the Secretariat, would directly get involved with the parties by providing (legal) support, training and further education for developing countries as well as Small and Medium Enterprises (SMEs).[28] According to *Bungenberg/Reinisch*, the Advisory Centre could serve as an effective means to reduce legal defence costs that currently represent a heavy burden especially for developing countries.[29] With regard to legal support for respondents, issues of bias and confidentiality would need to be prevented by strictly separating the Advisory Centre from the Secretariat.[30] The Centre could be financed through the MIC's budget and by donations of MIC Members.[31] The authors propose further to affiliate the Advisory Centre with UNCTAD to profit from its expertise in the area of investment protection.[32]

As for the MIAM, *Bungenberg/Reinisch* support the establishment of an Advisory Centre only to a limited extent because the relevant case preparation would already have been done during the first-instance of *ad hoc* arbitration and the representatives of the parties would - in most cases - stay the same for the appellate procedure.[33]

Alternatively, the concept paper by *Karl P. Sauvant* proposes the creation of an Advisory Centre on International Investment Law (ACIIL) in the form of an independent intergovernmental organisation, with its membership being open to all countries.[34] The beneficiaries would be developing countries and economies in transition that are

[25] *Ibid.,* para.179.
[26] *Ibid.,* paras. 181 ff. Compared to the MIC, the size of a Secretariat supporting the MIAM would be smaller. See *ibid.,* para. 614.
[27] *Ibid.,* para. 184.
[28] *Ibid.,* paras. 188 ff.
[29] *Ibid.,* paras. 59, 189.
[30] *Ibid.,* para. 190.
[31] *Ibid.,* para. 192.
[32] *Ibid.*
[33] *Ibid.,* para. 615.
[34] Sauvant, AF 2019/14, p. 5. The ACIIL could consist of a General Assembly, an Executive Director, qualified in-house lawyers as well as dedicated staff (p.10).

members of the ACIIL, whereas SMEs are not mentioned.[35] Adding to the already existing support services, the ACIIL would focus on assisting under-resourced governments in obtaining adequate legal defence in international investment disputes.[36] This would also include the promotion of settlements or risk assessments. The financing of the ACIIL could be ensured by a combination of different sources, such as a substantial trust fund, fees, donations or payments made by countries that have a particular interest in a functioning international investment regime and that are in a position to provide financial assistance.[37]

4. Judges

The judges of the MIC would be appointed as full-time judges and would be organised in chambers. The separate appellate body would consist of a different set of judges that do not serve in the first instance.[38] In general, judges at the MIC should be selected subject to high standards and the election process should balance the interests of the parties involved.[39] One of the judges would act as President and at least one as Vice President of the Court.[40] The President and Vice President of the MIC would represent the court externally.[41] In addition, *Bungenberg/Reinisch* suggest that the MIC President should chair all plenary sessions, assign judges as well as the individual cases to the chambers and supervise the administration.[42] The assignment of the cases to the chambers would be subject to objective criteria, except when there is a need to prevent a chamber from being overburdened.[43]

The first instance of the MIC would include chambers consisting of three, five or seven members, one of which serving as the presiding judge.[44] The presiding judge could be selected either by the other members of the chamber or by the President.[45] In general,

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[35] *Ibid.*
[36] *Ibid.*, p. 9 f.
[37] *Ibid.*, p. 10.
[38] Bungenberg/Reinisch, paras. 119 ff., 166 ff., 176. See in more detail *infra*, II.A. and III.A.1.
[39] *Ibid.*, para. 119. See *infra*, section III.A.1.
[40] *Ibid.*, paras. 15, 163 ff.
[41] *Ibid.*, paras. 15, 164.
[42] *Ibid.*, para. 164.
[43] *Ibid.,* para. 169 f.
[44] *Ibid.,* paras. 166 ff.; but see Bjorklund et al., AF 2019/11, p. 20 with a suggestion of 15 judges in the first instance and 9 judges in the second instance.
[45] *Ibid.,* para. 168.

the assignment of the judges to the chambers should follow the diversity of the MIC and aim for gender balance.[46] To counter allegations of 'pro-State' or 'investor-friendly' decisions, *Bungenberg/Reinisch* propose to allow the investor as well as the respondent State to select additional *ad hoc* judges.[47] At the same time, they consider a single judge procedure for smaller cases or for cases involving developing countries as not suitable for the MIC.[48]

In important proceedings that could create a precedent as well as upon request of a party or a chamber, the plenary or a grand chamber could decide on a specific case.[49] According to *Bungenberg/Reinisch* the grand chamber should consist of the President and a number of Vice Presidents that would ideally serve as presiding judges at the same time.[50] Both authors expect this dual function to lead to 'a certain continuity in the jurisprudence of the court'.[51]

The judges of the MIAM would be appointed in a similar way.[52] A total of nine judges for the MIAM is suggested.[53] Such a number would allow the formation of chambers, including plenary decisions in exceptional cases.[54]

B. Model by Kaufmann-Kohler/Potestà

While *Kaufmann-Kohler/Potestà* do recognise that an institutional structure comprising a Secretariat for case management is needed,[55] they focus on a reform of the existing investment dispute settlement system.[56] They suggest the creation of an 'International Tribunal for Investments' (ITI) with a permanent institutional structure. Since the implementation of the ITI entails creating entirely new institutions, the authors

[46] *Ibid.,* para. 167.
[47] *Ibid.,* para. 174. On the advantages and drawbacks of *ad hoc* judges see Bjorklund et al., AF 2019/11, p. 20: while States would feel represented by at least one of their nationals, larger panels would be needed to avoid concerns that the State representative would influence the result.
[48] *Ibid.,* para. 175. See also Langford/Behn/Malaguti, AF 2019/12, p.12 for a discussion on a mandatory threshold rule for the use of a sole arbitrator or a three-member tribunal.
[49] *Ibid.,* para. 172.
[50] *Ibid.*, paras. 165, 172.
[51] *Ibid.*, para. 165.
[52] *Ibid.,* paras. 612 f.
[53] *Ibid.*, para. 613.
[54] *Ibid.,* paras. 613, 636 f.
[55] Kaufmann-Kohler/Potestà 2016, para. 176.
[56] Kaufmann-Kohler/Potestà 2017, paras. 6-19.

recommend that the ITI Statute be conceived as a treaty rather than as 'soft law'[57]. States' consent to arbitration would, however, only be given by signing a separate Opt-In Convention or through a dispute resolution clause in future investment agreements.[58] This reform entails a transformation from an *ad hoc* approach to a more permanent institution and will, most notably, induce a power shift. While currently both disputing parties have almost complete control over the composition of the tribunal, this competence is transferred to the States as contracting parties to an ITI Statute. Hence, States will be able to exercise a considerable amount of control in selecting the ITI adjudicators before an investment dispute arises.[59]

1. Roster Model or Permanent Model

The authors present and evaluate two possible approaches: a semi-permanent roster model and a permanent body.[60] In the former version both disputing parties select 'their' adjudicator(s) from a roster of previously elected members, while in the latter model a permanent standing body of adjudicators has already been elected before the proceedings are initiated.[61] It is noted that both dispute settlement mechanisms generate binding decisions and are based on the parties' voluntary participation. Like under the current system, investors would be able to bring claims before the ITI by accepting the State's standing offer to dispute settlement.[62]

The authors argue that investors would most likely prefer the roster model since they would retain some control in the selection of adjudicators.[63] Moreover, the roster model would entail a less radical change to the current system.[64] However, this system would not abolish the criticised appointment of adjudicators by disputing parties.[65] Finally, it

[57] According to Kaufmann-Kohler/Potestà, 'soft law' designates, for example, instruments drafted by the UNCITRAL Working Group II which is then adopted by the Commission an 'endorsed' by the UN General Assembly. As an example, the authors cite the UNCITRAL rules, see Kaufmann-Kohler/Potestà 2016, para. 176.
[58] See *infra*, section IV.B.
[59] Kaufmann-Kohler/Potestà 2017, paras. 14-16.
[60] For an overview see Kaufmann-Kohler/Potestà 2016, paras. 168-175.
[61] *Ibid.*, para. 168. If States opted for a roster model, several subsequent issues arise, including whether the appointment is left to the parties or to a newly formed institution, how the selection takes places and whether the roster serve as mere guidance or be mandatory. On these questions see Langford/Behn/Malaguti, AF 2019/12, p. 8-12.
[62] *Ibid.*, paras. 86-88.
[63] *Ibid.*, para. 170.
[64] *Ibid.*, para. 175.
[65] *Ibid.*, para. 173.

could favour adjudicator bias and lead to a polarization among the ITI members as either 'pro-investor' or 'pro-State'.[66]

2. Consequences for Subsequent Questions

Kaufmann-Kohler/Potestà show that choosing either one of the two models considerably affects the characteristics of the ITI. Most notably, if States wanted the ITI to qualify as arbitration as opposed to an international court, the authors recommend employing the roster model.[67] Above all, this model would ensure that the dispute settlement mechanism is independent of a State judiciary[68] while enabling the parties to participate in the selection of ITI members.[69]

a) Number of ITI Members

It is argued that the appropriate number of ITI members depends on the model. Either each State nominates one ITI member (so-called full representation) or the States choose a system of selective representation, i.e. with less adjudicators than contracting parties.[70] The authors consider selective representation to be the less expensive and more practical approach for a permanent body, taking especially into consideration that the number of State parties may grow.[71]

Conversely, full representation would be more suitable for the roster model.[72] Since it is supposed to give disputing parties a choice, the roster would have to contain more members than the fully permanent system.[73] If the ITI included an appeal mechanism,[74] it would also be possible to implement a 'blended' system of full representation at first instance and selective representation at second instance.[75] If necessary, the number of ITI members can also be revised.[76]

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[66] *Ibid.*
[67] *Ibid.*, para. 98. This is determinative of other important features, such as recognition and enforcement of decisions (see *infra*, section V.).
[68] *Ibid.*, paras. 89-90.
[69] *Ibid.*, paras. 91-98.
[70] *Ibid.*, para. 21.
[71] *Ibid.*, paras. 21, 24.
[72] *Ibid.*
[73] *Ibid.*
[74] See *infra*, section II.B.
[75] Kaufmann-Kohler/Potestà 2016, para. 25.
[76] *Ibid.*, paras. 26-27.

For both options the authors regard a number of five members per chamber as ideal,[77] but promote the possibility for chambers to refer cases to a grand chamber or a full tribunal.[78] The full tribunal would be competent to hear cases concerning issues of systemic relevance, such as new legal questions or the intention to depart from an established line of cases.[79]

In order to avoid politicisation, the process of electing ITI members must be transparent and verifiable by the States.[80] In addition, investors could be given the opportunity to participate in ITI member appointment.[81] States should also discuss the term of office and the possibility of re-election: a shorter term combined with a possible re-election could increase performance but might also come at the expense of independence considering an (actual or perceived) pressure to be re-elected.[82]

b) Case Assignment Method

Finally, the case assignment method also varies with the different models.[83] With regard to the permanent mechanism the authors suggest that cases be assigned randomly and/or impersonally, e.g. through an algorithm, by a computer programme or by lot.[84] However, this method must provide for some corrective mechanisms to ensure fair work distribution, language requirements, and nationality restrictions.[85]

In any event, States should ensure that chambers reflect geographical diversity beyond nationality.[86] Regarding the procedure of appointment (e.g. timing, possible need for confirmation, and appointment of a chair) the authors suggest consulting the UNCITRAL and ICSID Rules.[87]

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[77] *Ibid*., para.175. See *supra*, n. 44 for alternative propositions by Bjorklund et al., AF 2019/11, p. 20.
[78] Kaufmann-Kohler/Potestà 2017, paras. 203-204.
[79] *Ibid.*, para. 203.
[80] Kaufmann-Kohler/Potestà 2016, para. 167; see also *infra*, section III.A.2.
[81] *Ibid.*, para. 168; see also *infra*, section III.A.2.
[82] *Ibid.*, para. 170; see also Larsson et al., AF 2019/10, p. 20-22 concurring with *Kaufmann-Kohler/Potestà* in that re-election may impact accountability and independence but also refer to judges' valuable expertise and the development of a coherent case law. See for a summary of the key trade-offs in the context of appointment: Langford/Behn/Malaguti, AF 2019/12, p. 37-38.
[83] Kaufmann-Kohler/Potestà 2017, paras.176-198.
[84] *Ibid.*, paras. 194-195.
[85] *Ibid.*, paras. 196-198.
[86] *Ibid.*, paras. 205-206.
[87] *Ibid.*, para. 178.

C. Comparison and Points of Discussion

Although *Bungenberg/Reinisch* and *Kaufmann-Kohler/Potestà* both deal with the prospective institutional structure of a reformed ISDS mechanism, their perspectives and methodical approaches differ to a great extent.

Bungenberg/Reinisch aim for a holistic and coherent reform of the existing investment arbitration system. From their perspective, the current system needs to be replaced by a permanent body capable of addressing the various concerns raised. In this regard, the authors provide a comprehensive institutional structure for a permanent international organisation on the basis of a treaty, with its own organs and with a separate legal identity. Against this background, the MIC and the MIAM represent two different reform models of varying scope.

In contrast, *Kaufmann-Kohler/Potestà* rather than a definitive institutional structure introduce two possible options for a more permanent investment dispute settlement system. They show advantages and drawbacks and illustrate the consequences of choosing each option without clearly recommending one or another.

Both approaches try to increase the legitimacy of investment arbitration through a greater degree of coherence and transparency. Against this background, both solutions aim to introduce a more permanent institutional structure.[88] Some concrete overlaps can be identified with regard to the role of the decision-makers and the assignment of cases.

Increasing the legitimacy of ISDS certainly requires taking into account a multitude of different aspects. But the establishment of an institutional structure will lay the foundation of any reformed and more permanent ISDS mechanism and thereby decisively determine to which to which extent the home and host States‘ concerns, such as lack of control of the system, can be redressed. In this sense, questions of institutional structure are decisive and closely linked to the degree of political control

[88] Langford/Behn/Malaguti, AF 2019/12 emphasize that a permanent system would decrease the duration of proceedings, for example when it comes to the replacement or the challenge of an arbitrator, whereas a roster is not likely to have any influence on these factors (p. 21.). On the other hand, it is argued that a permanent system would not necessarily reduce costs for the parties as the duration of the proceedings might increase if the new system is overburdened (p. 19).

over ISDS. Hence, choices in this area are crucial to the system's acceptance by governments, investors and civil society.

II. Appeal Mechanism

The debate about the legitimacy of ISDS is partly rooted in inconsistent arbitral decision-making which has created legal uncertainty for States and investors alike. Within the current system of *ad hoc* arbitration, every tribunal is established to settle one specific dispute without being bound by any previous case law or precedent. Even though tribunals tend to contribute to the development of the law by constructively building on each other's decisions, inconsistencies are almost impossible to exclude. Hence, the discussions on ISDS reform have emphasized that a multilateral appeal mechanism would be an important step in creating consistent case law and legal certainty for States and investors. Against this background, the authors of both studies have addressed possible options for the establishment of an appeal mechanism in ISDS.

The model suggested by *Bungenberg/Reinisch* envisions either a two-tiered MIC or a 'Multilateral Investment Appeals Mechanism' (MIAM) as a free-standing second instance in all *ad hoc* arbitration proceedings. Hereby, the authors make a comparatively clear design suggestion for an effective control mechanism in ISDS. The model by *Kaufmann-Kohler/Potestà* considers a two-tiered system with an appellate body or a built-in appeal as well but is generally more reluctant towards a control mechanism that would hinder the swiftness of arbitration in comparison to multi-tiered court proceedings too much. Therefore, the authors also explore alternatives to a built-in appeal which could be less burdensome for ISDS users.

A. Model by Bungenberg/Reinisch

1. In Regard to MIC

The model by *Bungenberg/Reinisch* favours a two-tiered MIC,[89] similar to the WTO Dispute Settlement Mechanism with a first instance and an appellate body.[90] The

[89] See *supra*, section I.A.
[90] Bungenberg/Reinisch, para. 176.

appellate body would be a separate organ of the MIC and its judges would not serve in the first instance.[91] The drafters leave open whether intervening third parties, such as the European Commission or NGO's, may be given the right to appeal, but feel that they should at least be granted the right to make a statement.[92] The time period for lodging appeals should be limited to a period of 30 to 90 days.[93] The appellate body should have the competence to confirm, amend or annul judgments of the first instance. It should, however, not have the power to refer cases back to the first instance in order to avoid delays to proceedings.[94] Thus, the principles of investigation, celerity, oral hearing and transparency are also ought to apply in the appellate stage and facts and evidence already submitted in the first instance should be taken into account.[95] The competence of the appellate body should include the grounds for annulment listed in Article 52 of the ICSID Convention as well as the substantial scrutiny of the award regarding errors in the application or interpretation of the applicable law and manifest errors of fact.[96]

At the appellate stage, it should be possible to have a decision by chambers or by the plenary of judges in cases of exceptional importance. In such exceptional cases, the panel of judges may refer the issue to a grand chamber or a plenary of all judges if one of the parties requests so for important reasons, such as divergences in the decisions.[97] The authors advocate against a system of binding precedent at the appellate stage. According to them, the principles of predictability and legal certainty only demand a *de facto* precedent in regard to the interpretation of the agreement on which a specific decision has been taken.[98] A general system of *stare decisis*, however, is not required if the chambers of the MIC are permanently staffed. If necessary, chambers should be obligated to consult a grand chamber or the plenary of judges in cases of fundamental disagreement between all judges of the second instance.[99] In

[91] *Ibid.*
[92] *Ibid.,* para. 345.
[93] *Ibid.,* para. 347.
[94] *Ibid.,* para. 350.
[95] *Ibid.,* para. 352.
[96] *Ibid.,* paras. 356-358.
[97] *Ibid.*, para. 360.
[98] *Ibid.,* para. 362.
[99] *Ibid.,* para. 362.

the authors' view, this is sufficient to guarantee consistency while maintaining the necessary flexibility in the process of decision making.

2. In Regard to MIAM

As an alternative to a two-tiered MIC, *Bungenberg/Reinisch* suggest the establishment of a MIAM which would serve as second instance in all *ad hoc* arbitration proceedings.[100] The appellate body should consist of appointed judges in order to achieve more consistency in the decision-making practice.[101] The competence of the appellate body should be the same as in the MIC model, i.e. scrutinizing the awards for errors in the application or interpretation of the applicable law and manifest errors of fact and the grounds for annulment laid out in Article 52 of the ICSID Convention.[102] Additionally, also plenary decisions should be possible in order to prevent substantive differences in divergent decisions of different chambers.[103] Consistency in the arbitral practice should not be reached through binding precedent but by further definition and formation of investment law principles by the MIAM, therefore leading to a system of *de facto* precedent.[104] The authors generally acknowledge the option of a preliminary ruling procedure but do not further comment on it.[105]

B. Model by Kaufmann-Kohler/Potestà

The model by *Kaufmann-Kohler/Potestà* is rather sceptical towards any kind of control mechanism in international investment law, but the authors find it nevertheless advisable to put at least some kind of control mechanism of ITI awards in place.[106] Hereby, *inter alia* a two-tiered system with a built-in annulment or appeal body or a self-contained multilateral appellate body for all investment disputes is suggested. Alternatively, the authors consider a preliminary ruling procedure and an en-banc determination and consulting procedure as options to reach the aims of correctness

[100] Pointing out that if a MIAM was established, its members would presumably be subject to the same requirements as the MIC judges, taking into consideration both personal and professional standards: Bjorklund et al., AF 2019/11, p. 21.
[101] *Ibid.,* para. 607.
[102] *Ibid.,* para. 633.
[103] *Ibid.,* para. 636.
[104] *Ibid.,* para. 640.
[105] *Ibid.,* para. 255.
[106] Kaufmann-Kohler/Potestà 2016, para. 105.

and consistency. In the eyes of the authors, the main choice regarding the structure of an ITI control system lies between the annulment or appeal control mechanism.[107] Accordingly, it needs to be decided whether the second instance should have the competence to amend the decision of the first instance or whether the competence should be limited to annulment.

In case of a mere annulment instance, the grounds for annulment should cover lack of jurisdiction, irregular constitution of the tribunal and lack of impartiality and independence of its members, and breach of due process, perhaps complemented by the grounds for challenge in Article 34 of the UNCITRAL Model Law.[108]

In case of an appeal instance, the grounds for appeal should cover 'autonomous' formulations without attempting to combine new grounds with the grounds set out in Article 52 of the ICSID Convention. It is suggested that formulations limiting the appeal to 'clear', 'serious' or 'manifest' errors of law or assessment of the facts would aid to define the balance of power between the first instance and the appellate body.[109] The scope of review should extend to issues of law and fact. The question of whether the appellate body should review these issues *de novo* or whether it should accord some degree of deference to the findings of the first instance adjudicator is left open.[110]

Kaufmann-Kohler/Potestà reject the idea of introducing a system of *stare decisis* and binding precedent in ISDS. However, they are convinced that appeal decisions would be regarded as 'authoritative' beyond the scope of the dispute at hand and therefore leading to a system of *de facto* precedent.[111]

In general, the authors raise doubts whether a two-tiered system is necessary: It would, on the one hand, guarantee consistency of decisions. On the other hand, the efficiency of ISDS could be adversely affected.[112] Therefore, they suggest a preliminary ruling procedure and a plenary (en-banc) determination and consulting as an alternative to a built-in appeal. The envisioned procedures could be combined with an annulment

[107] *Ibid*., para. 107.
[108] *Ibid*., paras. 111, 112.
[109] *Ibid.,* para. 118.
[110] *Ibid.,* para. 118.
[111] *Ibid.,* paras. 188, 189.
[112] *Ibid.,* paras. 122-123.

procedure restricted to serious procedural violations, excess of jurisdiction and issues of impartiality of the tribunal. Taken together, both types of procedures could serve as alternative to an appeal mechanism.[113]

The preliminary ruling procedure could be modelled after the one used within the European Union, which allows a court to refer a question of law to the CJEU for final determination before rendering a decision.[114] Such a procedure would allow for a decentralised dispute resolution while ensuring a uniform interpretation of the body of investment law.[115] The right to request a preliminary ruling should be limited to situations where there is a serious concern for the investment treaty system as a whole, a new legal question never addressed before, contradicting interpretations in the case-law of ITI divisions or the intention to depart from an established line of cases.[116]

As another alternative to an appeal system, the authors also consider the option of an en-banc determination and consulting. Similar to the preliminary ruling procedure, a question of law could be referred to a plenary tribunal for final determination when the resolution of an issue might result in inconsistent decisions or awards by other tribunals.[117] According to the authors, these alternative mechanisms would be much less burdensome to implement and sustain than an appeal and can reasonably be expected to ensure the emergence of coherent jurisprudence and foster judicial continuity within the dispute settlement body.[118]

C. Comparison and Points of Discussion

The models of *Bungenberg/Reinisch* and *Kaufmann-Kohler/Potestà* share the view that some kind of control mechanism in international investment dispute settlement is advisable.[119] However, as members of the Academic Forum point out, the simple existence of an appellate body could considerably lengthen the duration of the

[113] *Ibid.*, para. 125.
[114] Article 267 of the Treaty on the Functioning of the European Union (TFEU).
[115] Kaufmann-Kohler/Potestà 2016, para. 129.
[116] *Ibid.,* para. 130.
[117] *Ibid.,* paras. 132-136.
[118] *Ibid.,* para. 137.
[119] As an additional option, Langford/Behn/Malaguti, AF 2019/12 suggest a standing tribunal with no appellate mechanism (p. 13-14).

proceedings.[120] While *Bungenberg/Reinisch* develop a concrete design for such a mechanism, drawing inspiration from the Investment Court System of recent EU FTAs (such as the CETA and the EU-Vietnam FTA) and from the WTO Dispute Settlement Mechanism, *Kaufmann-Kohler/Potestà* focus on the exploration of different options and evaluate how useful the different control mechanisms are in regard to consistency while being less burdensome on the ISDS practice in its current form. Thereby, the drafters either envision a self-contained two-tiered dispute settlement system or a separate body of appeal for all investment arbitration awards.

Alternatively, appellate adjudicators could be appointed to a specific case.[121] For this purpose, the appointment of the adjudicators could be based on the consent of the parties, with an administering institution serving as a back-up in case agreement cannot be reached within specific time limits. A second option would allow parties to pick appellate adjudicators on the basis of the institution's recommendation, with the institution making the appointment if no agreement is reached.[122] Thirdly, the institution could appoint appellate adjudicators without the parties' involvement, as is the case with the WTO appellate body or the ICSID annulment procedure.[123]

Instead of binding precedent, a system of *de facto* precedent is considered to be more suitable. Consistency of decisions should be guaranteed by *ex ante* procedures such as the preliminary ruling reference to the appellate body or a plenary decision. The en-banc decision by *Kaufmann-Kohler/Potestà* mirrors the concept of the plenary decision by *Bungenberg/Reinisch* in that regard. However, the model of *Bungenberg/Reinisch* suggests the plenary decision to be a mere supplementary measure for ensuring consistency between the different chambers of the appellate body and does not implement the option of a preliminary ruling,[124] whereas the model of *Kaufmann-Kohler/Potestà* deems the en-banc decision or the preliminary ruling to be an alternative to a separate appellate body.[125] Also, *Kaufmann-Kohler/Potestà* point

[120] *Ibid.*, p. 21. The wider the appellate body's scope of review, the longer the proceedings will be. On the other hand, the authors consider that no time would be lost if an annulment tribunal comparable to the ICSID system was established.
[121] See Bjorklund et al., AF 2019/11, p. 21.
[122] *Ibid.*
[123] *Ibid.*
[124] Bungenberg/Reinisch, para. 255 acknowledges the option of a preliminary ruling procedure without further comment.
[125] Kaufmann-Kohler/Potestà 2017, paras. 125-137, 207-210.

out the possibility that the second instance's competence might be limited to mere annulment, which corresponds to considerably less scrutiny than a full appeal. Accordingly, the model of *Kaufmann-Kohler/Potestà* rejects the imitation of the grounds in Article 52 of the ICSID Convention for an annulment or appeal procedure in order to avoid any comparison, whereas the model of *Bungenberg/Reinisch* builds on the ICSID Convention.

In the discussions about creating legal certainty through increased consistency in decision-making, at least three questions need to be addressed. The first question relates to whether and to which extent a multilateral review process would weaken the finality of arbitral awards. If such a process is considered necessary or useful, different options such as appeal, annulment or preliminary ruling are at disposal. Once the type of review process is clarified, the scope and standard of review have to be considered. Finally, it needs to be decided whether such a multilateral review process should be implemented as a built-in or standalone mechanism. It seems clear that the answers to all these questions should reflect a sound compromise between consistency and correctness of decisions on the one hand and efficiency and flexibility of the proceedings on the other.

Regarding qualifications of appellate adjudicators, members of the Academic Forum suggest bolstering the proposed appellate body's authority by demanding 'extraordinary' qualifications from its members. They could be selected either by maintaining a common list of candidates for both instances or by requiring a permanent appellate body composed of a fixed number of members.[126]

III. Status of Adjudicators

Whether MIC or ITI, any permanent body competent for the settlement of investment disputes will need to establish a procedure to nominate (i.e. propose or formally enter as a candidate to serve in the court), select (i.e. choose from the pool of eligible candidates), and, appoint individuals to its roster of adjudicators (A). In addition, it is critical for the legitimacy of any decision-making body to define what the exact terms

[126] Bjorklund et al., AF 2019/11, p. 19.

of appointment are and under which code of conduct the adjudicators render their decisions (B).

A. Selection and Appointment Process

The models provided by both studies reflect the need to define principles governing the selection and subsequent appointment of candidates. These principles must ensure that a balance between competence, diversity, representativeness, impartiality and the interests of the different parties is ultimately achieved.

1. Model by Bungenberg/Reinisch

The model favoured by *Bungenberg/Reinisch* addresses essential questions pertaining to the procedure a candidate must complete before joining the roster of judges. In particular, they articulate general principles and give indications on the relationship between the selection at the national and international level. They also emphasize the advantage of independently screening the candidates' qualifications and address the need for their diversity and impartiality.

In view of the nomination procedure's importance for the independence and acceptance of an MIC, *Bungenberg/Reinisch* discuss two procedural models of nomination.[127] The first alternative would see Member States nominate a larger pool of candidates, from which an international committee or body would ultimately be able to select.[128] The second option would consist in the Plenary Body confirming government-chosen candidates without the option of choosing from a larger pool. Even though both procedures are considered to be inherently political,[129] a larger pool is preferred to the confirmation of government-chosen candidates, which is criticized as the less transparent procedure.[130] The qualification requirements should be as for a high or the highest national judges.[131] Alternatively, individuals of recognised competence, as for example academics, should be admissible.

[127] Bungenberg/Reinisch, para. 87.
[128] *Ibid.,* para. 88.
[129] *Ibid.*
[130] *Ibid.,* para. 89.
[131] Noting that all elements of selection and appointment to a standing court and a standing appellate system should ideally be contained in the respective statute: Bjorklund et al., AF 2019/11, p. 18.

a) Selection on National Level

Concerning the selection procedure on the national level, the authors use the ECtHR preselection – which must be democratic, transparent and non-discriminatory – as an example of how the Plenary Body could adopt guidelines on the selection of nominees on a national level. They suggest that States may advertise vacant posts to encourage candidates to apply through a national preselection process before receiving their State's nomination as a candidate.[132] An alternative would lie in an open and direct application of candidates to the organisation establishing the MIC. Such a process would likely be favoured by investors given that it limits the influence of States on the nomination process and thereby might reduce its politicisation. However, the authors bring into consideration that a direct application process might be less acceptable for States and lead to administrative problems due to a high number of candidates.[133]

b) Screening

Bungenberg/Reinisch propose a screening committee similar to the ones existing within the CJEU and ECtHR to vet the qualifications of the candidates, including expertise and general suitability – independence, integrity and neutrality – prior to the election by the Plenary Body.[134] A screening process would contribute to transparency and objectivity and lead Member States to set high standards in their internal nomination procedure.[135]

c) Diversity and Competence

In terms of diversity, the authors argue in favour of a representation of the various legal systems, regions and genders. In particular, they draw on the example of the WTO Appellate Body, where no two members might hail from one Member State.[136] Referring to ITLOS, the authors discuss a possible role for regional groupings of states in the selection of a common candidate and of possible rotation schemes within the

[132] Bungenberg/Reinisch, para. 90.
[133] *Ibid.,* paras. 91-92.
[134] *Ibid.,* para. 94. Emphasizing that arbitrators' expertise and experience should, in addition to international law, also include commercial law: Langford/Behn/Malaguti, AF 2019/12, p. 27.
[135] Bungenberg/Reinisch, para. 95; see also Bjorklund et al., AF 2019/11, p. 19.
[136] *Ibid.,* para. 96; see also Bjorklund et al., AF 2019/11, p. 18.

group.[137] The alternative – an absence of such regional groups – would mean a freer choice, but coupled with the possibility that stronger States would ultimately prevail.[138]

d) Independence and Impartiality

Bungenberg/Reinisch address the issue of bias by suggesting that the second instance of the proposed MIC should have jurisdiction to rule on challenges brought against first instance judges. In addition, the plenary of the second instance should decide on biases of judges of the second instance. Alternatively, a third instance such as the ICJ could decide on the bias of the second instance.[139]

2. Model by Kaufmann-Kohler/Potestà

Concerning the procedure for the selection and appointment of candidates, the model favoured by *Kaufmann-Kohler/Potestà* makes many similar points. Comparable emphasis is placed on the importance of national procedures and the independence of qualification screening. *Kaufmann-Kohler/Potestà* also make a detailed analysis of the impact and importance of diversity, both in substance as with regards to the selection procedure.

The authors emphasize that with a switch from *ad hoc* to permanent institutions, it becomes even more important that the procedure of choosing candidates process guarantees judicial independence to ward of the risk of a politicisation of appointments, which may, in turn, undermine independence, credibility and legitimacy.[140] Therefore, the selection process would need to fulfil three criteria: First, it should be multi-layered, with a number of procedural phases constraining the potentially wide discretion of States.[141] Second, it needs to be open, taking into consideration views from multiple stakeholders, not only States.[142] And third, the procedure must be transparent, by subjecting the procedure to public scrutiny.[143]

[137] Bungenberg/Reinisch, para. 97.
[138] *Ibid.,* paras. 100-101.
[139] *Ibid.,* para. 159.
[140] Kaufmann-Kohler/Potestà 2017, paras. 107-108.
[141] *Ibid.,* para. 112.
[142] *Ibid.,* para. 113.
[143] *Ibid.,* para. 115.

a) Selection on National Level

It is stressed that if States wish for a 'candidature' phase – which is not included in all selection procedures for international courts and tribunals – they will have to consider who nominates, whether the nomination phase must provide for a mandatory consultation phase and whether the nomination is subject to some form of screening by an external supranational body.[144] With regards to the right to nominate, they outline three options.[145] In the first option, each Member State puts forward one or more nominees, akin to the procedure at ITLOS, CJEU, ECtHR, African Court on Human and Peoples' Rights, and Arab Investment Court.[146] The second option would see the nomination in the hand of a separate entity in a way similar to the situation with PCA national groups at the ICJ.[147] The third option, preferred by the authors, would be individual self-nomination, with a parallel drawn to the Caribbean Court of Justice and the former EU Civil Service Tribunal.[148]

The authors argue in favour of a 'consultation' phase. They envisage such a phase either as a preliminary sub-phase within nomination at the national level or – supra-nationally, with the body entrusted with the election/appointment having to incorporate the outcome of the process in the decision – at the appointment phase.[149] The advantage of such a consultation mechanism would be to take into account the asymmetry of ISDS.[150] Accordingly, NGOs, other arbitral institutions, and associations of international law professionals would gain the opportunity to participate to ensure representation and expertise.[151]

The authors point out that whether a selective or full representation model is followed, the ITI electors are likely to be representatives of State parties – be it governments or a supra-national parliamentary body, as with the ECtHR.[152] Therefore, political

[144] *Ibid.,* para. 119.
[145] *Ibid.,* para. 120.
[146] *Ibid.,* para. 121. Larsson et al., AF 2019/10 contains an analysis of 24 international courts with regard to full and selective representation, including potential effects on independence (p. 6-11).
[147] Kaufmann-Kohler/Potestà 2017, 122.
[148] *Ibid.,* paras. 124-125. On this model see also Larsson et al., AF 2019/10, p. 13-14.
[149] Kaufmann-Kohler/Potestà 2017, 126.
[150] *Ibid.,* para. 133.
[151] *Ibid.,* para. 134.
[152] *Ibid.,* para. 157.

considerations are likely to be unavoidable.[153] In the authors' view, the presence of multiple procedural checks and balances and a final 'political' determination would increase the likelihood of the most qualified candidates being elected.[154]

b) Screening

Kaufmann-Kohler/Potestà see a screening procedure as an advantage as well.[155] They argue that with regards to the composition of a possible ITI Advisory Screening Panel charged with assessing candidates' eligibility, similar questions as those concerning the selection of adjudicators meant to be screened arise, and point to the CJEU's appointment of former judges of the Court on the advisory panel as an example.[156] Furthermore, they express preference for the screening procedure as a mandatory step in the nomination procedure.[157] They recommend that the criteria for evaluation should be contained in the constitutive instrument and cover the fulfilment of the eligibility criteria, which they deem more precise than 'suitability'.[158] The authors raise the question of whether the screening committee's findings should be binding and stress that at the least, it should be final and removed from challenges by candidates.[159] In terms of transparency, *Kaufmann-Kohler/Potestà* view a possibility to diversify confidentiality levels of the screening procedure depending on the recipients.[160] They conclude that such an Advisory Screening Panel would be likely to improve the chances of choosing qualified and independent ITI members. Different confidentiality levels might also temper the politicization and avoid unsuitable candidates being put forward in the first place. In the end, *Kaufmann-Kohler/Potestà* issue the following recommendations for a screening mechanism in order to reflect their concerns: First, states as constituting parties draw up the applicable criteria for office. Second, the panel's role should be limited to applying pre-determined criteria and weeding out unfit candidates. And third, with the benefit of the panel's advice, the ultimate responsibility for the appointment of ITI members, including the determination

[153] *Ibid.,* para. 160.
[154] *Ibid.,* para. 160.
[155] *Ibid.,* para. 135.
[156] *Ibid.,* para. 137; Article 255 TFEU.
[157] *Ibid.,* para. 144.
[158] *Ibid.,* paras. 145-146.
[159] *Ibid.,* paras. 149, 152.
[160] *Ibid.,* para. 154.

of the ITI's composition to reflect the diversity requirements, should lie with the electors.[161]

c) Diversity and Competence

Since the shift to a permanent system would imply a more structured appointment process, diversity would no longer depend on goodwill and self-regulation of the actors in the arbitral process.[162] The authors argue that the system should consider geographical diversity *lato sensu*, ensuring that representativeness extends to related elements such as ethnicity, legal systems, culture, religion, tradition, level of development[163] and include a negative nationality requirement in order not to have more than one judge per State.[164] In terms of gender diversity, the authors point out possibilities at different phase of the selection process: guidance could be provided to States at the nomination phase – with unisex lists being acceptable only in exceptional circumstances[165] – and during the election phase.[166] In order to ensure age diversity, an age limitation is given as a possibility. The inclusion of 'invisible minorities' such as sexual minorities or people with disabilities is seen as a more complex challenge by the authors.[167]

Furthermore, *Kaufmann-Kohler/Potestà* draw a line from the emphasis on diversity to the issue of professional competence of the adjudicators and emphasize what they describe as 'background' diversity. By this, the authors express their criticism of the 'rigid dual judge-scholar track' and plead for the inclusion of lawyers, officials, and representatives of international organisations active in international dispute settlement. They argue that professional experience and expertise should be decisive[168] and recommend screening for competence in the ITI's subject matter - international law, investment law, and international dispute settlement. To the authors, it is important that

[161] *Ibid.,* para. 155.
[162] *Ibid.,* para. 52.
[163] *Ibid.,* para. 54.
[164] *Ibid.,* para. 57.
[165] *Ibid.,* para. 64.
[166] *Ibid.,* para. 66.
[167] *Ibid.,* para. 53.
[168] *Ibid.,* para. 35.

competence rather than specific prior professional activity is taken into consideration.[169]

d) Independence and Impartiality

Kaufmann-Kohler/Potestà point out the necessity for both structural and individual independence and impartiality:[170] Structural independence aims at protecting the adjudicatory body from external interferences, threats, or pressure from States, international organisations, and non-State actors such as businesses or NGOs.[171] The authors draw on the example of the ECtHR for means to safeguard it: A selection method geared towards competence rather than political or other considerations, security of tenure, a limitation of terms of office, financial security, adequate resources, rules on incompatibilities, privileges and immunities, and case assignment rules.[172] Concerning individual independence and impartiality, they speak out in favour of 'justifiable doubt' as an appropriate benchmark for an ITI member not adjudicating a specific dispute and point out that the transition from an *ad hoc* to a permanent system will change the categories of circumstances giving rise to independence issues.[173] In particular, they argue that circumstances to be addressed should include repeated appointments[174] and issue conflicts, such as prior or current service as counsel or expert, prior decisions on the same or a similar legal issue by the judge, or scholarly writings that could cast doubt on the neutrality of the judge.[175] *Kaufmann-Kohler/Potestà* plead in favour of balancing these impartiality-related concerns with the requirements of the selection procedure regarding competence.[176] Hence, ITI members should not be recused because of special knowledge that qualifies them as

[169] *Ibid.,* para. 39.
[170] *Ibid.,* para. 71. In addition, Larsson et al., AF 2019/10 focuses on managerial and interpretative autonomy. While the former concerns the question whether the court can administer its own operations, e.g. select its staff, the latter asks whether it can render judgments without concern about the States' reactions (p. 26, 28-30).
[171] Kaufmann-Kohler/Potestà 2017, para. 82.
[172] *Ibid.,* paras. 84-92.
[173] *Ibid.,* paras. 94-95.
[174] *Ibid.,* para. 96.
[175] *Ibid.,* para. 98. For a detailed analysis of issue conflicts see also Giorgetti/Abdel Wahab, AF 2019/8, paras. 23-25.
[176] Members of the Academic Forum point out that institutionalisation improves independence of the adjudicators from the disputing parties. However, the more independent decision makers are, the less accountable they will be and vice versa. See Langford/Behn/Malaguti, AF 2019/12, p. 33.

potential members in the first place.[177] Furthermore, the authors point to the issue of 'traditional categories of alleged conflicts' such as acting as a judge in his or her own cause, financial or personal interest, prior involvement in the dispute, business dealings with a party, personal or family relationship, and proven prior bias.[178]

In the end, the authors see the right to request disqualifications as the main bulwark to safeguard individual independence and impartiality. However, States would need to agree on who should decide such questions – the ITI, either in plenary composition or as a special chamber, or an external authority (such as the PCA Secretary General, ICSID, or the ICJ)?[179]

Overall, the authors consider switching from an *ad hoc* to a permanent system in ISDS will increase political accountability of adjudicators. Accountability is seen as the necessary counterpart of judicial independence, limiting the risk of abuses of power and thereby respond to the critics of the current dispute resolution mechanism.[180]

3. Comparison and Points of Discussion

The models of selection and appointment of decision-makers advocated by *Bungenberg/Reinisch* and *Kaufmann-Kohler/Potestà* essentially overlap yet differ in details and depth. Both models emphasise the need for the constitutive treaty establishing the MIC or ITI to lay the procedural foundations for a selection and nomination of the most suited candidates. It is agreed that the procedure must balance qualification, representativeness, and the inevitability of political considerations in order to provide the electing body with the best possible pool of suitable individuals. Both studies ultimately speak out in favour of an open self-nomination process at the national level.[181] Both concur that an independent screening body tasked with reviewing the individuals' qualifications would be an important factor in ensuring that professional qualifications counterbalance political considerations. The question of the adjudicators' background beyond regional representation is more heavily emphasised

[177] Kaufmann-Kohler/Potestà 2017, para. 102. On the necessity of disclosure obligations, see Giorgetti/Abdel Wahab, AF 2019/8, para. 26.
[178] Kaufmann-Kohler/Potestà 2017, para. 103.
[179] *Ibid.,* para. 104.
[180] *Ibid.,* para. 105.
[181] A separate question concerns voting rules. For an overview of different majority requirements see Larsson et al., AF 2019/10, p. 12.

by *Kaufmann-Kohler/Potestà*, especially with regards to professional background and gender.[182]

Finally, both *Bungenberg/Reinisch* and *Kaufmann-Kohler/Potestà* make it clear that States will have to decide whether cases concerning bias would be adjudicated by the MIC/ITI itself or by a different institution, such as the ICJ or the PCA.

B. Terms of Appointment and Code of Conduct

Once suitable candidates have been selected and appointed as adjudicators to the permanent body, the rules according to which they exercise their mandate become highly relevant. In that regard, the model suggested by *Bungenberg/Reinisch* sets the spotlight on concrete terms of appointment, especially incompatibility rules, while the model by *Kaufmann-Kohler/Potestà* focusses on ensuring impartiality and independence during the appointment process by setting structural guarantees.

1. Model by Bungenberg/Reinisch

Full time judges would most effectively prevent the so-called 'double hatting'.[183] They would also ensure an effective case management and a high degree of independence and quality in the work done by the MIC, which would contribute to a higher caseload and would exclude any incentives for prolonging the settlement of a case. In the beginning, a system of part-time judges, who would receive a stand-by fee plus a fee for the actual work, would probably be less expensive.[184]

In a non-permanent system availability could, for example, be ensured by an obligation to reside at the seat of the court. Consequently, also stand-by fees would have to be paid by the Member States of the MIC. The concrete amounts proposed as monthly stand-by fees per judge are 2000 € for the first instance and 7000 € for the appellate

[182] Similarly, members of the Academic Forum have focused on quotas or aspirational targets for gender and geographic representation, see Larsson et al., AF 2019/10, p. 16-18; Langford/Behn/Malaguti, AF 2019/12, p. 37. However, it has also been pointed out that the use of a roster system in combination with party appointment would not ensure the constitution of a diverse tribunal, Langford/Behn/Malaguti, AF 2019/12, p. 32.

[183] 'Double-hatting' refers to dispute resolution professionals accepting appointments as arbitrator and counsel on a regular basis. This practice is controversial since it is often associated with conflicts of interests. A detailed analysis of double-hatting is conducted by Giorgetti/Abdel Wahab, AF 2019/8, paras. 18-22.

[184] Bungenberg/Reinisch, paras. 120 ff.

body.[185] To which extent parallel engagements are permissible would depend on the classification as part- or full-time judge. In the former case, parallel engagements are obviously necessary but should also be subject to approval and include temporal obligations to ensure availability. In the latter case, parallel engagements should be minimized but permissible if the judicial activity is not affected. Independence must be guaranteed by excluding engagements as government representatives except where they are not obliged to follow instructions (for example as an academic or judge).[186]

In addition, the proposal stresses the necessity of written rules of conduct, guaranteeing the highest ethical and moral standards to prove the integrity of the judges. The most important rules should be part of the MIC Statute, further rules might be set as secondary law by the Plenary Body, consisting of representatives of the Member States. The development of concrete rules could draw inspiration from existent codes of conduct such as the Bangalore Principles of Judicial Conduct or the IBA Guidelines on Conflicts of Interest in International Arbitration. Breaches of the code of conduct should be penalised.[187] Comments on political issues should be forbidden and after the work as a judge at the MIC there should be a two year 'cooling-off' period before new engagements as counsel in ISDS proceedings may be accepted.[188] An oath of office should be taken and immunity for the work as a judge at the MIC should be granted.[189]

2. Model by Kaufmann-Kohler/Potestà

Independence should be guaranteed in a structural and individual sense. The former includes especially the protection against direct or indirect influence on the adjudicatory function, which is even more relevant in a permanent body.[190] States as respondents might be especially tempted to control the selection and appointment

[185] *Ibid.,* para. 146.
[186] *Ibid.,* paras. 130 ff.
[187] *Ibid.,* paras. 142, 161 ff.
[188] *Ibid.,* paras. 132, 141.
[189] *Ibid.,* paras. 149 f.
[190] Kaufmann-Kohler/Potestà 2017, paras. 71 f., 82 ff.

process in a dangerous way, considering the asymmetric settlement mechanism in investment disputes.[191]

Individual independence includes most importantly the non-existence of personal relationship with a disputing party.[192] In a permanent body, adjudicators are less exposed to individual conflict of interests,[193] especially since the issue of repeated appointments does not arise.[194]

The admissibility of parallel engagements largely depends on the decision on full- or part-time judges. Every other activity that could negatively impact the judicial activity should be forbidden. Precise guidelines should be drawn up. Security of tenure rules should ensure impartiality against the appointing entities, especially limiting the reasons to be removed from office.[195] Adequate financial resources for the MIC judges and for the Body as a whole should be provided.[196]

Case assignment rules should generally be defined in a general manner, not allowing the parties to influence the outcome of a case by choosing an adjudicator.[197] Nevertheless, the general possibility to challenge an adjudicator known in international law shall apply.

In order to prevent 'judicial nationalism' *Kaufmann-Kohler/Potestà* would like to impose nationality restrictions ensuring that adjudicators are not deciding on disputes in which their home country is involved. They express the fear that in such a case the adjudicators could be tempted to support the claim of their home State, which would leave all deciding power to the third (presiding) adjudicator.[198]

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[191] *Ibid.,* para. 79. Langford/Behn/Malaguti, AF 2019/12 recommend less party control over appointment which would enhance the independence and impartiality of adjudicators (p. 37).
[192] Kaufmann-Kohler/Potestà 2017, paras. 73 f., 94 ff. The proposal especially refers to the aforementioned IBA guidelines for examples of questionable individual independence.
[193] *Ibid.,* para. 78.
[194] *Ibid.,* para. 96.
[195] *Ibid*, para. 86. For more details on the removal of judges see Larsson et al., AF 2019/10, p. 25.
[196] *Ibid.,* paras. 88-89.
[197] *Ibid.,* paras. 92 ff.
[198] Kaufmann-Kohler/Potestà 2016, paras. 171 ff.

Following some newer IIAs, States should consider developing a code of conduct for the adjudicators.[199] To guarantee for structural independence of adjudicators, immunity should be granted.[200] However, it is also stated that accountability is a necessary counterpoint to judicial independence in order to maintain legitimacy and prevent abuse of judicial power.[201] The introduction of a permanent and transparent appointment method together with the possibility to disqualify adjudicators lacking independence and impartiality would likely improve the accountability of the system.[202]

3. Comparison and Points of Discussion

The comparison between the two proposals shows, that both agree on the importance of a system which ensures independence and impartiality. Accordingly, the developed systems are very similar. For example, both agree that a written code of conduct is needed - with some differences such as nationality restrictions to prevent adjudicators deciding disputes in which their home country is involved.[203] Members of the Academic point to the possibility of adopting different models, consisting either in adopting a general Code which is binding for adjudicators, the disputing parties and their counsels or specific codes for each group of actors involved in the proceedings.[204] The Code of Conduct could reflect the procedure, comprising rules for the pre-appointment phase and provisions applicable during the actual dispute settlement.[205]

Most of the other points discussed by *Bungenberg/Reinisch* and *Kaufmann-Kohler/Potestà* do not exclude each other but simply set the spotlight on different concerns. *Kaufmann-Kohler/Potestà* focus more on structural guarantees to ensure independence and impartiality, while the rules proposed by *Bungenberg/Reinisch*

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[199] Kaufmann-Kohler/Potestà 2017, para. 94 with reference to CETA, Art. 8.30 together with Annex 29-B; EU Vietnam FTA, Art. 14 together with Chapter 13, Annex II.
[200] *Ibid.,* para. 91.
[201] *Ibid.,* para. 105. Langford/Behn/Malaguti, AF 2019/12 suggest that independence and accountability of adjudicators are not necessarily diametrical and some reform options allow for the attainment of both interests to at least some degree. If States can directly influence the roster of adjudicators it may adversely affect the adjudicators' independence. As compensation, States should have less power to interfere with post-decision interpretations (p. 34).
[202] *Ibid.,* para. 105.
[203] For an illustrative overview of existing Codes of Conduct, their far-reaching similarities and minor differences see Giorgetti/Abdel Wahab, AF 2019/8. The authors point out that especially rules about independence and impartiality, diligence, integrity, and competence can be found in all of the most important Codes of Conduct (p. 8, Table I).
[204] *Ibid.,* paras. 30-33.
[205] *Ibid.,* paras. 28-29.

include more details about specific rules of ethics and conduct. Together they do provide a very comprehensive analysis on measures to be taken as far as questions of independence and impartiality are concerned.[206]

The Member States of the MIC or ITI would need to discuss and decide several aspects which relate to how and under which circumstances the adjudicators should exercise their mandate. First, they would have to decide whether they want to appoint full- or part-time adjudicators. As discussed above, several further questions depend on this question.

Second, the two proposals disagree on whether it would be advisable to involve nationals of a concerned State as adjudicators. *Bungenberg/Reinisch* would like to admit nationals of the parties to the dispute only in case of mutual agreement,[207] whereas *Kaufmann-Kohler/Potestà* would like to exclude nationals of the parties to the dispute. On the one hand, the involvement of judges holding the nationality of a disputing party would simplify and improve the knowledge about the national law. On the other hand, it might call into question the adjudicator's impartiality.[208] Finally, both proposals remain very general about the concrete rules concerning the code of conduct. Thus, further discussion and analysis will be needed in the future.

IV. Implementation of the MIC or ITI

Another important aspect concerns the proposals with respect to the implementation of a permanent body into the current system of ISDS. The core issues in this context concern the jurisdiction of the MIC or ITI and the relationship of the MIC or ITI to existing and future investment treaties.

A. Model by Bungenberg/Reinisch

Bungenberg/Reinisch propose to implement the MIC by creating an independent international organization by means of an international treaty (MIC Treaty).[209] The MIC Treaty should contain both the substantive rules establishing the MIC as well as the

[206] See also *supra*, section III.A.
[207] Bungenberg/Reinisch, para. 173.
[208] Kaufmann-Kohler/Potestà 2016, paras 171 ff.
[209] Bungenberg/Reinisch, para. 546. See in detail *supra*, at I.A.

mechanism to extend those rules to existing IIAs. Substantive investment protection standards would remain in IIAs and not be governed by the MIC Treaty.[210] To avoid that the MIC constitutes just another dispute resolution mechanism of a few States alongside already existing mechanisms, the authors propose that the MIC Treaty only enters into force after ratification by a minimum of 40 members.[211]

1. Jurisdiction of the MIC

It is suggested that the jurisdiction of the MIC should be determined within the MIC Treaty.[212] In order to avoid universal jurisdiction of the MIC, certain minimum requirements (in particular the categorization as an investment and nationality requirements) should be stipulated by the MIC Treaty in addition to the requirements laid down in the IIA under which a dispute arises.[213]

2. Relationship of the MIC Treaty with IIAs

Bungenberg/Reinisch suggest determining in the MIC Treaty that all future IIAs of MIC Member States should foresee the exclusive possibility of dispute resolution by the MIC.[214] Additionally, all MIC Member States should promote MIC membership in their international treaty negotiations by way of a memorandum of understanding. With regards to existing IIAs, five different constellations can be envisaged.

a) Both Host and Home State are Parties to the MIC Treaty

If in an investment arbitration under an existing IIA both the host State and the investor's home State are parties to the MIC, their existing treaty relationship is consensually amended by the MIC Treaty.[215] Therefore, in this constellation the MIC becomes an exclusive or additional dispute settlement forum under the respective IIA.[216]

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[210] *Ibid.,* para. 568.
[211] *Ibid.,* paras. 564 f.
[212] *Ibid.,* paras. 195 ff.
[213] *Ibid.*, paras. 197 ff.
[214] *Ibid.,* para. 569.
[215] *Ibid.,* paras. 247 ff.
[216] *Ibid.,* paras. 580 f.

In case all members to the existing IIA become members to the MIC, *Bungenberg/Reinisch* suggest that the MIC Treaty should be considered as the new exclusive dispute resolution mechanism.[217] It would be desirable to design the jurisdiction of the MIC as comprehensively as possible. However, they note that the MIC Treaty could as well foresee that each individual member decides on its own whether to accept the MIC as exclusive or additional dispute resolution mechanism for its IIAs.[218]

The authors also discuss the issue of whether sunset clauses used in existing IIAs can rule out the possibility to add the MIC as the exclusive dispute settlement option.[219] They find that sunset clauses do not present any obstacle, as they are limited by their wording, classification and purpose and usually do not refer to the consensual modification of the treaty.

For legal certainty, States acceding the MIC Treaty should provide the Secretariat of the MIC with a list of every existing IIA that shall be covered by the jurisdiction of the MIC.[220]

b) Only the Host State is Party to the MIC Treaty

In this constellation the issue arises whether an investor can resort to the MIC in addition to the dispute resolution mechanisms available under the existing IIA in reliance on a unilateral offer made by the host State through the MIC Treaty (Unilateral Offer Mechanism). *Bungenberg/Reinisch* note that this possibility could decrease the incentive for States to join the MIC Treaty.[221] Many States nonetheless could consider it to be positive that the MIC's jurisdiction can be established even if the investor's home State is not party to the MIC.[222] If so, the Unilateral Offer Mechanism could be drafted into the MIC Treaty.[223] The authors furthermore suggest making the Unilateral

[217] *Ibid.,* para. 579.
[218] *Ibid.,* para. 578.
[219] *Ibid.,* para. 582.
[220] *Ibid.,* para. 584.
[221] *Ibid.,* para. 202.
[222] *Ibid.,* para. 204.
[223] *Ibid.,* paras. 585, 201 ff.

Offer Mechanism subject to reservations to be specified by the parties to the MIC Treaty.[224]

c) Only the Home State is Party to the MIC Treaty

In this constellation the issue arises whether an investor can resort to the MIC in reliance on an *ad hoc* consent given by the host State. *Bungenberg/Reinisch* suggest that the possibility of an *ad hoc* consent should be rejected.[225] It would take away any incentive to join the MIC Treaty if States could decide on a case-by-case basis if they wish to fall under the jurisdiction of the MIC.

d) Neither Home nor Host State are Party to the MIC Treaty

In this constellation as well, the issue arises whether an investor can resort to the MIC on the basis of an *ad hoc* agreement. The authors suggest that this is to be rejected in principle.[226]

e) Application of the MIC over MFN Clauses?

In order to avoid legal uncertainty, the authors suggest stipulating in the MIC Treaty that the establishment of MIC jurisdiction over most favoured nation (MFN) clauses is precluded.[227]

B. Model by Kaufmann-Kohler/Potestà

Kaufmann-Kohler/Potestà propose to implement the ITI in two steps.[228] First, an instrument determining the substantive features of the ITI is to be adopted (ITI Statute). Subsequently, a second instrument is to be adopted which extends the ITI Statute to existing IIAs (Opt-In Convention).

While the Opt-In Convention should be a treaty, the ITI Statute may also be adopted in form of 'soft law' like the UNCITRAL Rules (Soft Law Approach).[229] If one follows

[224] *Ibid.,* para. 202.
[225] *Ibid.,* paras. 206, 586.
[226] *Ibid.,* paras. 206, 587.
[227] *Ibid.,* para. 583.
[228] Kaufmann-Kohler/Potestà 2016, para. 75.
[229] *Ibid.,* para. 76.

this approach, the Opt-In Convention would refer to the ITI Statute and could also include it as an annex. In this case the ITI Statute would assume treaty status, too. However, the ITI Statute could also be adopted in form of a treaty (Treaty Law Approach).[230] Although the Soft Law Approach may in practice be easier to pursue, considering that the ITI Statute entails the creation of a new institution with its own institutional structure, the authors consider the Treaty Law Approach to be more appropriate.[231]

Whether the Soft or the Treaty Law Approach is chosen regarding the MIC Statute, the Opt-In Convention serves as a flexible instrument for States to express their consent to submit disputes arising under their existing IIAs to the ITI.[232] Hence, the substantive investment protection standards will continue to be governed by IIAs.[233] To increase the chances of a successful implementation of the ITI, the Opt-In Convention is designed to start as a plurilateral initiative with the possibility for States to join whenever they consider it appropriate.[234]

1. Jurisdiction of the ITI

Because the ITI would either replace or complement investor-State arbitration under existing IIAs, the authors suggest that the jurisdiction of the ITI over disputes under an IIA is defined by the respective IIA exclusively. Accordingly, neither the ITI Statute nor the Opt-In Convention could modify the IIA in this regard.[235] The idea is that the ITI impacts IIAs as little as possible in order to increase the chances of a successful multilateral implementation.

[230] *Ibid.,* para. 77.
[231] *Ibid.,* para. 78.
[232] *Ibid.,* paras. 212 ff.
[233] *Ibid.,* para. 214.
[234] *Ibid.,* para. 74.
[235] *Ibid.,* paras. 178–179.

2. Relationship of the Opt-In Convention with IIAs

Kaufmann-Kohler/Potestà suggest that States may refer to the ITI Statute in their future IIAs, if they wish to extend the ITI to a newly concluded treaty.[236] The Opt-In Convention could clarify that it does not preclude States from doing so.[237]

With regards to existing IIAs, the authors discuss whether the Opt-In Convention is to be considered as a successive treaty relating to the same subject matter or as an amendment of existing treaties.[238] They suggest that the relationship between the Opt-In Convention and existing IIAs is to be viewed as one of a successive treaty relating to the same subject matter.[239] Hence, the customary international law rule codified in Art. 30 VCLT would apply. In the absence of specific provisions this would mean that in cases where all parties to an IIA are also parties to the Opt-In Convention, the IIA would apply to the extent its provisions are compatible with the Opt-In Convention. Accordingly, if a State is party to an IIA but not to the Opt-In Convention, the IIA would continue to apply with its original dispute resolution mechanism vis-à-vis the non-party.

As the Opt-In Convention is supposed to regulate its relationship with existing IIAs, they furthermore suggest to include a compatibility clause.[240] The provision should in broad terms provide that the ITI is deemed to be included in the dispute resolution provisions in existing IIAs concluded by State parties to the Opt-In Convention, according to the modalities of the Opt-In Convention.[241] As existing IIAs could contain compatibility clauses themselves, it would be necessary to address the relationship with those clauses, as well.[242] In application of those principles, five constellations are to be distinguished.

[236] *Ibid.,* para. 215.
[237] *Ibid.,* para. 216.
[238] *Ibid.,* paras. 225–234.
[239] *Ibid.,* para. 227.
[240] *Ibid.,* para. 232.
[241] *Ibid.,* para. 234.
[242] *Ibid.,* para. 235.

a) Both Host and Home State are Parties to the Opt-In Convention

In this scenario the Opt-In Convention would modify the existing IIA between the two States with the result that the investor may resort to the ITI.[243]

On the one hand, States should be allowed to flexibly tailor their level of involvement in the ITI in this situation. On the other hand, it should be prevented that the entire content of the Opt-In Convention is carved out. Therefore, *Kaufmann-Kohler/Potestà* suggest that the Opt-In Convention provides for an exhaustive list of reservations and declarations.[244] By means of a reservation, the exclusion of specific IIAs could be considered in this scenario.[245]

With regards to declarations, the authors propose to introduce a system which allows States to choose whether the ITI constitutes the exclusive dispute resolution mechanism or an alternative to investor-State arbitration under its existing IIAs.[246] In case a State fails to make such a declaration, the Opt-In Convention should provide a default rule. This default rule could be that in the absence of a declaration the ITI applies as an additional means of dispute resolution. If the declarations of all State parties to an IIA match, the ITI applies to that IIA as the matching declarations provide. In case that declarations do not match, there should be another default rule in the Opt-In Convention which could be that the ITI constitutes an additional forum under the IIA. This system impacts existing IIAs as little as possible and therefore increases the chances of a successful implementation of the ITI.[247]

Sunset clauses in existing IIAs should be of little concern, as they usually cover the issue of unilateral termination or denunciation of the treaty. However, some clauses may also apply to mutually agreed modifications or amendments of the treaty and may provide for transitional agreements.[248] For legal certainty, it is suggested that all affected existing IIAs are being listed.[249]

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[243] *Ibid.,* para. 247.
[244] *Ibid.,* paras. 259 f.
[245] *Ibid.,* para. 261.
[246] *Ibid.,* paras. 262–264.
[247] *Ibid.,* para. 264, bullet point No. 4.
[248] *Ibid.,* para. 236.
[249] *Ibid.,* paras. 271 f.

b) Only the Host State is Party to the Opt-In Convention

In this constellation *Kaufmann-Kohler/Potestà* propose to draft a Unilateral Offer Mechanism into the Opt-In Convention in order to allow investors to resort to the ITI as an additional option for dispute settlement.[250] At the same time, the authors propose to consider the possibility of excluding the Unilateral Offer Mechanism by means of a reservation.[251]

c) Only the Home State is Party to the Opt-In Convention

If the host State consented to the application of the MIC on an *ad hoc* basis, there would be no bar to the application of the ITI.[252] In case that States wish to promote the use of the ITI in this situation, the Opt-In Convention could provide that disputing parties can agree on ITI jurisdiction at any time.[253]

d) Neither Home nor Host State are Party to the Opt-In Convention

If the host State consented to the application of the ITI on an *ad hoc* basis, the situation would be similar to the situation of a Unilateral Offer Mechanism.[254]

e) Application of the ITI over MFN Clauses?

The authors discuss whether the possibility to resort to the ITI by invocation of MFN clauses can be barred in the Opt-In Convention (MFN Bar).[255] One could take the position that this is not possible: An MFN Bar in the Opt-In Convention can affect the scope of the MFN in the underlying IIA only in relation between the parties to the Opt-In Convention *inter se*, i.e. a third party cannot be prevented by the Opt-In Convention from invoking MFN clauses. However, the authors argue that one could also take the opposite position: An MFN Bar in the Opt-In Convention expresses that the scope of the Opt-In Convention – as it extends the ITI to the existing IIA containing

[250] *Ibid.,* paras. 249 ff.
[251] *Ibid.,* para. 260.
[252] *Ibid.,* para. 256.
[253] *Ibid.,* para. 258.
[254] *Ibid.,* paras. 257 f.
[255] *Ibid.,* paras. 266 ff.

the MFN clause – does not cover this situation, i.e. that it "'does not wish to be applied' in this circumstance".[256]

C. Comparison and Points of Discussion

To sum up, *Kaufmann-Kohler*/*Potestà* propose to implement the ITI in two steps. The first step would be to implement the ITI Statute which governs the institutional design of the tribunal. Subsequently, the second step would require implementing the Opt-In Convention by which State parties to existing IIAs could express their consent to submit disputes under their existing IIAs to the ITI. In order to impact IIAs as little as possible, the jurisdiction of the ITI would be governed exclusively by the IIA under which a dispute arises. With respect to future IIAs, States could directly refer to the ITI Statute as an option of dispute settlement. If States want to include the ITI as an option of dispute settlement in existing IIAs, they could accede to the Opt-In Convention. In such cases States could formulate reservations excluding specific IIAs or excluding the Unilateral Offer Mechanism and declare whether resorting to the ITI under existing IIAs would constitute an additional or the exclusive dispute settlement mechanism.

In contrast, *Bungenberg*/*Reinisch* propose to implement the MIC by adopting the MIC Treaty, a treaty which governs both the institutional design of the MIC and its extension to the network of existing IIAs. In order to prevent the mere addition of a new dispute settlement institution, it is proposed that the MIC Treaty only enters into force after a minimum of 40 ratifications. In order to avoid universal jurisdiction of the MIC, the MIC Treaty should stipulate jurisdictional minimum requirements in addition to those laid down in the IIA under which a dispute arises. With respect to future IIAs, it should be determined in the MIC Statute that all future IIAs of Member States to the MIC Treaty should foresee the exclusive possibility of dispute resolution by the MIC. Furthermore, by way of a memorandum of understanding MIC Member States should endeavour to promote MIC membership. With respect to existing IIAs, the MIC Treaty – like the Opt-In Convention – would oblige States to offer dispute resolution by the MIC. It is suggested that an opt-in into the MIC Treaty automatically leads to an opt-out from the dispute resolution mechanisms of existing IIAs, i.e. when all State

[256] *Ibid*., para. 270.

parties to an IIA accede the MIC Treaty, the MIC replaces the dispute resolution mechanism under that IIA, whereas it is added as an additional dispute resolution mechanism, if not all State parties to an IIA accede the MIC Treaty.

Both proposals seek to implement a permanent body without the necessity to amend existing IIAs. In comparison, the approach of *Kaufmann-Kohler*/*Potestà* to implementation may be characterized as causing slightly less interference with the network of existing IIAs and lead to a rather gradual transition from the existing to a new dispute resolution framework.

V. Recognition and Enforcement of Decisions

The recognition and enforcement of a decision of a permanent body for the settlement of investment disputes is a crucial task in order to assure the effectiveness of the system. The qualification of such a decision as an arbitral award, i.e. as opposed to the qualification as court decision, may allow the decision to benefit from the enhanced system of recognition and enforcement of international arbitral awards. If the MIC or ITI did not possess its own mechanism of enforcement, the ICSID Convention and the New York Convention would remain the prevailing methods in investment arbitration to enforce an award.

Generally, recognition and enforcement of a decision are guaranteed by the courts of the State in whose territory the enforcement is sought. The competent court can autonomously decide whether it considers that a decision falls in the scope of an international convention assuring the recognition and enforcement of arbitral awards. Therefore, national law may significantly impact the enforcement of a decision. Both studies give a general overview over the enforcement of decisions without addressing detailed questions of national jurisprudence.

A. Model by Bungenberg/Reinisch

1. MIC Inherent System of Enforcement

Bungenberg/Reinisch consider it useful if the MIC would be equipped with its own enforcement mechanism.[257] The authors stress that it is of particular importance to

[257] Bungenberg/Reinisch, paras. 483, 536-540.

have a system that allows the enforcement by and in a State not party to the dispute. A system similar to the self-contained ICSID mechanism would be desirable because of its effectiveness. In addition, they suggest the implementation of a fund, similar to the organisation of the Iran-United States Claims Tribunal (IUSCT), which could be used to directly pay compensations up to a certain amount. Such an enforcement system would only be binding for Member States of the MIC.

2. Enforcement under the ICSID Convention

The authors do not consider it possible to qualify MIC decisions as ICSID awards in order to obtain the facilitated enforcement procedures of the ICSID Convention.[258] Attention is drawn to the fact that the ICSID Convention provides a very specific method to resolve disputes between investors and States, including e.g. special procedures, special methods to constitute the panel of arbitrators. The structure of the MIC as outlined above would not represent the same characteristics, so that MIC decisions could not be considered as ICSID awards. In consequence, MIC decisions could not benefit from the ICSID system of recognition and enforcement.[259]

The authors find it nevertheless conceivable to consider the MIC Treaty as an inter-se modification of the ICSID Convention pursuant to Article 41 VCLT.[260] Such a modification would be admissible. First, because the rights and obligations of the other members of the ICSID Convention would not be impaired by the MIC Treaty. Second, because this approach seems to be compatible with the intention and purpose of the ICSID Convention.

However, an inter-se modification, i.e. the qualification of an MIC decision as an ICSID award, would only be binding on the States that are members of the MIC. The crucial question of enforcement in third States would therefore not be answered.

[258] *Ibid.,* paras. 495-499.
[259] *Ibid.,* para. 496.
[260] *Ibid.,* paras. 497-499.

3. Enforcement under the NYC

In order to be enforceable under the auspices of the NYC, a MIC decision would have to fall within the scope of application of the NYC pursuant to its first article.[261]

In order to enforce a MIC decision under the NYC, MIC proceedings would have to be based on a voluntary submission by the parties and the MIC would need to be considered a permanent arbitral body.[262] First, a voluntary submission could be questioned if the underlying MIC Treaty would provide for the MIC as compulsory mechanism for investor-State dispute resolution. Most national courts consider though that an investor's individual voluntary submission can be replaced by the consent of the investor's home State. Alternatively, the filing of the claim could also be considered the voluntary submission. Court decisions adopting this reasoning were rendered with regard to the IUSCT. Second, the authors consider a qualification of the MIC as permanent arbitral body to be uncomplicated because e.g. the IUSCT or the ICC have been accepted as permanent arbitral body within the meaning of the NYC. The authors, however, deem it problematic if MIC judges would be exclusively appointed by States and not by investors as well. It is however concluded that enough private elements could be introduced into the system in order for the MIC to be considered a non-State dispute resolution mechanism.

In addition, MIC decisions, presupposed they would have final and binding character, could be considered as foreign or non-domestic awards and therefore fall within the scope of the NYC. [263] Decisions of the MIC could be considered foreign insofar as they would not be rendered in the State in which enforcement is sought. With respect to enforcement in the State where the proceedings take place the same would apply if

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[261] Art. 1 NYC: *(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. (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.*

[262] Bungenberg/Reinisch, paras. 503-509, 512-515, 516-520, 528-529.

[263] *Ibid.,* paras. 521-526.

national law was not applied since this kind of delocalised decisions have frequently been subsumed as arbitral award under the NYC by national courts.[264]

It is furthermore noteworthy that many States limit the application of the NYC to 'commercial matters'.[265] Jurisprudential practice, however, includes investment disputes into the scope of commercial matters.

B. Model by Kaufmann-Kohler/Potestà

1. ITI Inherent System of Enforcement

Kaufmann-Kohler/Potestà suggest the implementation of an ITI specific enforcement mechanism.[266] Even if this system should preferably be similar to the ICSID enforcement mechanism, a mere reference or incorporation of the ICSID rules would not be advisable due to the particularities of the ICSID dispute resolution system. A particular enforcement mechanism that belongs to the ITI would, however, only be mandatory for Member States of the ITI.

2. Enforcement under the ICSID Convention

Taking into account the particularities of ICSID arbitration *Kaufmann-Kohler/Potestà* doubt that ITI decisions could be considered as ICSID awards because the ITI structure and proceedings differ greatly from the ICSID system.[267]

However, if ITI decisions were expressly qualified as ICSID awards by ITI Member States, this agreement could be considered as inter-se modification of the ICSID Convention pursuant to Article 41 VCLT.[268] Even if one were to accept the admissibility of such an inter-se modification,[269] this modification of the ICSID Convention would only bind ITI Member States. Such an inter-se modification would therefore not ensure an enforcement in third States.

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[264] *Ibid.,* para. 524.
[265] *Ibid.,* paras. 530-533.
[266] Kaufmann-Kohler/Potestà 2016, para. 140.
[267] *Ibid.,* para. 141.
[268] *Ibid.,* para. 141.
[269] See *supra*, section IV.B.2.

3. Enforcement under the NYC

Kaufmann-Kohler/Potestà also assess whether ITI decisions would fall within the scope of the NYC in order to benefit from its global enforcement system.

In order to determine whether the ITI could be qualified as a permanent arbitral body within the meaning of Art. I (2) NYC, the authors point to the *travaux préparatoires* and determine the preservation of the voluntary jurisdiction of the tribunal as the decisive element of a permanent arbitral body.[270] The authors assess the choice of the arbitrators by the parties as less significant. As several national courts accepted the IUSCT as a permanent arbitral body, they consider it likely that the courts would also accept the ITI as a permanent arbitral body. In addition, the authors suggest UNCITRAL to make a 'recommendation' with regard to the interpretation of an ITI as a permanent arbitral body. Further, as consent in arbitration without privity is commonly accepted as a consensual written arbitration agreement in the sense of Art. II (1) NYC, the authors consider these requirements to be fulfilled. They recommend nevertheless to add an express stipulation to the ITI Statute that such an agreement should fall within the scope of the NYC.

Depending on the finally adapted structure of the ITI, decisions could be either foreign awards that have been rendered under the *lex arbitri* of another State than the State of enforcement, or non-domestic awards if the proceedings would be delocalized.[271] Both kinds of awards have commonly been characterized as awards within the meaning of the NYC by national courts. The authors therefore consider it likely that this jurisprudence will sustain and would also apply to a potential ITI and its decisions.

Kaufmann-Kohler/Potestà finally examine if a built-in appeal procedure would constitute an obstacle to enforcement under the NYC.[272] National laws generally accept two-tiered arbitration proceedings as arbitral proceedings. The application of the NYC is nevertheless restricted to final and binding arbitral awards. As long as an appeal were pending or possible under the ITI Statute, a decision would not fulfil this requirement. Accordingly, enforcement proceedings under the NYC would only be

[270] Kaufmann-Kohler/Potestà 2016, paras. 147-155, 158-160.
[271] *Ibid.,* paras. 100-104.
[272] *Ibid.,* paras. 161-164.

possible if the time limit of appeal is elapsed or if the decision was rendered by the Appellate Body.

C. Comparison and Points of Discussion

The overview indicates that the respective authors agree on the main points and that differences remain only with regard to questions of detail.

It is agreed that an MIC or ITI should be established with an inherent mechanism of enforcement and recognition of decisions. The functionality and efficiency of such a mechanism can be questioned though because only Member States of the new institution would be bound by the constitutive treaty. It is also agreed that enforcement under the ICSID Convention, i.e. the assessment of a MIC or ITI decision as an ICSID award, is likely to be rejected. The ICSID Convention envisages a very particular ISDS system. The concepts of an MIC or ITI as described above do not represent the same characteristics. Hence, it is concluded that decisions of such bodies will most likely not be treated as ICSID awards.

Enforcement in third States would, however, be conceivable under the NYC. The authors consider it likely that an MIC or ITI decision would fulfil the requirements of an arbitral award in the sense of the NYC and could thus be enforced in all Member States of the NYC. Attention is drawn to the fact that the final decision on these questions will be taken by the competent national courts at the place where enforcement is sought.

Whereas the final assessment under NYC will in the end depend on the national court in front of which the enforcement of the award is sought, an MIC or ITI inherent system could present an alternative that is less dependent on national courts and national law. The authors submit ideas as to how such an enforcement system could be structured and organised. The details however, e.g. the proposition of *Bungenberg/Reinisch* to implement a fund similar to the one within the framework of the IUSCT, rest to discuss.

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Glossary – Abbreviations, Terms and Definitions

CETA	Comprehensive Economic and Trade Agreement, signed on 30 October 2016 by the EU, the EU Member States and Canada
CJEU	Court of Justice of the European Union
ECtHR	European Court of Human Rights
IBA	International Bar Association
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also known as the Washington Convention, adopted on 18 March 1965 and entered into force on 14 October 1966.
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
ITI	International Tribunal for Investments
ITLOS	International Tribunal for the Law of the Sea
IUSCT	Iran-United States Claims Tribunal
MIAM	Multilateral Investment Appeal Mechanism
NGO	Non-Governmental Organization
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, adopted on 10 June 1958 and entered into force on 7 June 1959.
PCA	Permanent Court of Arbitration
VCLT	United Nations Convention on the Law of Treaties, also known as the Vienna Convention, adopted on 23 May 1969 and entered into force on 27 January 1980.
WTO	World Trade Organization

About the IILCC Study Group on ISDS Reform

The *IILCC Study Group on ISDS Reform* is a collaboration of young researchers associated to the IILCC doctoral network.[273] The aim of the group is to constructively contribute to the ongoing discussions on a reform of Investor-State Dispute Settlement. In achieving this goal, the Study Group is actively supported by Jun.-Prof. Dr. Julian Scheu from the International Investment Law Centre Cologne (IILCC). Members of the Study Group are (in alphabetic order):

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[273] The *IILCC Doctoral Network on International Investment Law* is forum dedicated to the exchange of ideas and experiences between doctoral candidates in the field of international economic law and international dispute resolution with a particular focus on the law of international investment protection. Further information is available at http://www.iilcc.uni-koeln.de/17492.html?&L=1