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Enforcement of ISDS Decisions by Permanent Adjudicatory Bodies

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Abstract

During the discussions on reform to investor-State dispute settlement, the delegates at the United Nations Commission on International Trade Law (UNCITRAL) Working Group III have entertained the question of enforcement as a crucial element for the implementation of systematic reforms of Investor-State dispute settlement, i.e. the establishment of a standing multilateral investment court (MIC) or a stand-alone multilateral investment appeals mechanism (MIAM). In this context, Contracting Parties could consider the utilization of existing enforcement mechanisms for arbitral awards namely the ICSID Convention or the New York Convention. Yet, uncertainties remain whether the domestic courts of enforcement will accept to apply those conventions to decisions of an MIC or MIAM. It thus appears that the most preferable solution is to create an inherent enforcement regime tailored to the design and functioning of any new standing mechanism for the settlement of investment disputes.

Keywords

UNCITRAL Working Group III – Investor-State dispute settlement (ISDS) – ISDS Reform – Enforcement – ICSID Convention – New York Convention – Multilateral Investment Court – Multilateral Investment Appeals Mechanism

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Enforcement of ISDS Decisions by Permanent Adjudicatory Bodies[1]

Andrés E. Alvarado-Garzón[*] and Carla Müller[**]

A. Introduction

An enforcement mechanism guarantees the effectiveness of any dispute settlement mechanism as it provides the winning party with a tool to force the compliance of the decision rendered at its favour. In the current system of investor-State dispute settlement (ISDS) two conventions become relevant for enforcement: the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention),[2] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[3]

Given the facilitated enforcement mechanism provided for in both conventions as well as their broad reach,[4] ISDS is considered to enjoy a robust and successful enforcement mechanism, by which a winning party may seek assets of the losing party in a multitude of jurisdictions including States where neither party to the dispute is based. Undisputedly, in any dispute settlement mechanism, the losing party has the obligation to comply with the decision rendered against it. Should this not occur, the winning party should be provided with a tool to force compliance through an enforcement mechanism, which guarantees the effectiveness of the respective dispute settlement mechanism.

Understandably, the enforcement of decisions has not gone unnoticed in the discussions on ISDS reform at the United Nations Commission on International Trade Law (UNCITRAL). Particularly, the UNCITRAL Working Group III has entertained the question of enforcement as a crucial element for the implementation of systematic reforms of ISDS,[5] i.e. the establishment of a standing multilateral investment court (MIC) or a stand-alone multilateral investment appeals mechanism (MIAM)[6] for the settlement of investment disputes (conjunctively referred to as Permanent Adjudicatory Bodies).

Against this backdrop, this working paper seeks to shed some light on the possible avenues for enforcement of decisions rendered by a Permanent Adjudicatory Body, which would ensure the

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1 This paper draws upon the authors' considerations made in the section on "Dispute Prevention and Alternative Dispute Resolution" in a previous contribution by the *EI-IILCC Study Group on ISDS Reform* in ZEuS 2022/1, pp. 32-38.

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2 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention).

3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention).

4 Whilst the ICSID Convention comprises 165 member States, the New York Convention has reached 172 member States till date.

5 UNCITRAL WG III, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eight session (28 January 2020), A/CN.9/1004/Add.1, available at: https://undocs.org/en/A/CN.9/1004/Add.1 (1/2/2022), paras. 62 ff.

6 Ibid., para. 25.

effectiveness of such new mechanism for the settlement of investment disputes. The first section lays out the reform options discussed by the Working Group III which are relevant for further discussion on enforcement (A.). The second section assesses the feasibility for a Permanent Adjudicatory Body to rely on the existing mechanisms for enforcement of investment arbitral awards (B.). The third section explores the adoption of new instruments for the enforcement of decisions of a Pemanent Adjudicatory Body (C.). The last section presents some conclusions and balances the alternatives for the enforcement of decisions in a new permanent system of ISDS.

B. Reform Options Relevant to Enforcement: Permanent Adjudicatory Bodies

The Working Group III contemplates, as part of the variety of reform options,[7] the possibility to establish a stand-alone MIAM and/or a two-tiered MIC.[8] As these two reform options entail a structural modification of the existing system of investment arbitration, the Working Group III has entertained the question of enforcement as a crucial element for the implementation of the mentioned two reform options.[9] Nevertheless, as a preliminary clarification, the MIAM and MIC can be distinguished from each other.

An MIC, on the one hand, seeks an overhaul of the existing model of investment arbitration by centralising dispute settlement at a permanent body, which is designed in a court-like fashion.[10] This permanent body would operate, in principle, as a two-instance mechanism, with permanent judges appointed by the MIC Contracting States. At the centre of the idea of pursuing an MIC stands the European Union (EU).[11] An MIAM, on the other hand, seeks to preserve investment arbitration but adding an appeal as an extra layer. Unlike the MIC, an MIAM could be devised not only within a multilateral instrument but also on a bilateral and *ad hoc* basis limited to a specific treaty.[12]

Certainly, the idea of restructuring ISDS is controversial and has generated mixed reactions. Some States oppose to the Permanent Adjudicatory Bodies for ISDS as an alternative to investment arbitration,[13] whereas some others support the creation of either the MIC or the MIAM.[14] Yet, this

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7 See for instance, a multilateral advisory centre; arbitrators' code of conduct; dispute prevention through mediation; exhaustion of local remedies, UNCITRAL, 'Possible Reform of investor-State dispute settlement (ISDS): Note by the Secretariat', A/CN.9/WG.III/WP.166, 30 July 2019.

8 UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Resumed Thirty-Eight Session', A/CN.9/1004, 23 October 2019, para. 25.

9 UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Resumed Thirty-Eight Session', A/CN.9/1004/Add.1, 28 January 2020, paras. 62ff.

10 See on this: *Kaufmann-Kohler/Potestà*, pp. 33 ff; *Bungenberg/Reinisch*, pp. 29 ff.

11 UNCITRAL Working Group III, 'Possible reform of investor-State dispute Settlement: Submission from the European Union and its Member States', A/CN.9/WG.III/WP.159/Add.1, 24 January 2019.

12 UNCITRAL Working Group III, 'Possible reform of investor-State dispute Settlement (ISDS): Appellate mechanism and enforcement issues', A/CN.9/WGIII/WP.202, 12 November 2020, para. 3

13 UNCITRAL WG III, Submission from the Government of Bahrain (29 August 2019), A/CN.9/WG.III/WP.180, available at: https://uncitral.un.org/sites/uncitral.un.org/files/wp_180_bcdr_clean.pdf (1/2/2022), paras. 26 ff.; UNCITRAL WG III, Submission from the Government of the Russian Federation (31 December 2019), A/CN.9/WG.III/WP.188, available at: https://undocs.org/en/A/CN.9/WG.III/WP.188, paras. 15–17.

14 See for instance, UNCITRAL WG III, , Submission from the European Union and its Member States (24 January 2019), A/CN.9/WG.III/WP.159/Add.1, available at: https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1 (1/2/2022); UNCITRAL WG III, Submission from the Government of China (19 July 2019) A/CN.9/WG.III/WP.177, available at: https://undocs.org/en/A/CN.9/WG.III/WP.177 (1/2/2022); UNCITRAL WG III, Submission from the

paper does not discuss the feasibility or desirability of such Permanent Adjudicatory Bodies for ISDS, but rather focuses on how their decisions could eventually be enforced.

C. Reliance on Existing Mechanisms for the Enforcement of Arbitral Awards

The existing instruments for the enforcement of arbitral awards used in investment arbitration enjoy widespread recognition. As such, one may consider utilising such instruments to enforce decisions of a newly established Permanent Adjudicatory Body for ISDS. Accordingly, it is pertinent to analyse whether a newly established Permanent Adjudicatory Body could benefit from the enforcement mechanism established by the ICSID Convention (I.) and the New York Convention (II.).

I. ICSID Convention

It is important to differentiate enforcement within States that are members to the ICSID Convention and to the new MIC/MIAM (Contracting Parties), from enforcement in States that are members to the ICSID Convention but *not* members to the MIC/MIAM (Third Parties). These two categories pose different enforcement obstacles and are thus analysed separately.

1. Contracting Parties to an MIC or MIAM

Under this option, Contracting Parties to an MIC or an MIAM would seek that the ICSID Convention serves as the enforcement mechanism for the decisions of the respective Permanent Adjudicatory Body. A decision rendered by an MIC/MIAM must be deemed an "award rendered pursuant to [the] Convention"[15] to benefit from the enforcement mechanism under the ICSID Convention. However, the ICSID Convention contemplates the settlement of investment disputes through the traditional system of investment arbitration and excludes the possibility of appeals. As such, the utilisation of the ICSID Convention for the enforcement of decisions of an MIC or MIAM would require the modification of the ICSID Convention.

The ICSID Convention foresees a procedure for the treaty's amendment. Article 66(1) ICSID Convention establishes a two-step process: first at least two-thirds of the Administrative Council must decide to circulate the proposal for amendment; second, *all* ICSID members must ratify, accept, or approve it, for an amendment to enter into force. Thus, considering the number of ICSID members, the modification of the treaty seems extremely unlikely.

One may consider an *inter se* modification of the ICSID Convention between the Contracting Parties to the newly created Permanent Adjudicatory Body as per Article 41 of the Vienna Convention on the Law of Treaties (VCLT). Article 41 VCLT allows *inter se* modifications which are not prohibited by the relevant treaty, as long as they do not affect other parties nor do they relate to a provision, whose derogation would be incompatible with the object and purpose of the treaty. It thus seems theoretically feasible that Contracting Parties to a permanent adjudicatory body may avail themselves of the ICSID Convention insofar as the enforcement is sought within their territories.

However, it is controversial whether extending the enforcement mechanism under the ICSID Convention to decisions of Permanent Adjudicatory Bodies would be compatible with the object and purpose of the Convention, particularly by including an appeal option which is expressly

Government of Morocco (11 February 2020), A/CN.9/WG.III/WP.195, available at: https://undocs.org/en/A/CN.9/WG.III/WP.195 (1/2/2022).

15 Art. 54(1) ICSID Convention.

prohibited under Article 53 ICSID Convention or by reformulating the arbitral process.[16] These uncertainties could be avoided by way of a tailor-made inherent enforcement mechanism[17] (see below C.).

2. Third Parties

Even if the Contracting Parties to the Permanent Adjudicatory Body undertake an *inter se* modification of the ICSID Convention, given the principle that a "treaty does not create either obligations or rights for a third State without its consent" or *res inter alios acta*,[18] Third Parties would not be bound by it. The question here is whether those Third Parties, who are indeed members to the ICSID Convention, could enforce decisions of an MIC/MIAM under the ICSID Convention.

A decision rendered by an MIC must be deemed an "award rendered pursuant to [the] Convention"[19] to benefit from the enforcement mechanism under the ICSID Convention. In this context, there are two features of the MIC that may hinder such characterisation: first, the selection of the adjudicators and second, the possibility of appeals.

In principle, the selection of adjudicators at the MIC departs from the traditional model of party-appointed arbitrators in investment arbitration as only Contracting Parties and not the claimant investor would influence such selection. One may argue that such change would alter the role of the ICSID Secretary General in the constitution of tribunals.[20] Hence, ICSID Contracting States that are not members to the MIC may question whether decisions rendered by such Permanent Adjudicatory Body adheres to the ICSID Convention to which they have agreed.[21]

Yet, the right to appoint an arbitrator and the role of the ICSID Secretary General in the composition of the tribunal are in essence a default procedure.[22] Pursuant to Article 37(2)(a) of the ICSID Convention, "the Tribunal shall consist of a sole arbitrator, or any uneven number of arbitrators appointed as the parties shall agree". As such, a different method of selection of adjudicators at the MIC could be considered to supersede the default procedure under the ICSID Convention. Thus, one may argue that party-appointment is not a crucial feature of the ICSID process and would not constitute an impediment for the enforcement of MIC decisions through the ICSID Convention.

With respect to the possibility of appeals, an MIC with a built-in appellate mechanism might be incompatible with the ICSID Convention, particularly Article 53 thereof which limits the remedies available against arbitral awards, appeals not being one of them. Consequently, it is conceivable that Third Parties would not consider that an MIC decision falls within the scope of the ICSID Convention thereby refusing to enforce that decision as per Article 54 thereof.

16 *Schreuer/Malintoppi/Reinisch/Sinclair*, Art. 53, mn. 29; *Triantafilou*, in: Fouret/Gerbay/Alvarez (eds.), Art. 53, mn. 4.1305; *Reinisch*, JIEL 2016/19, p. 779; *Calamita*, ICSID Rev., 2017/32, p. 614; *Happ/Wuschka*, Indian JAL, 2017/VI, p. 130.

17 UNCITRAL WG III, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eight session (28 January 2020), A/CN.9/1004/Add.1, para. 64.

18 Art. 34 VCLT.

19 Art. 54(1) ICSID Convention.

20 *Bernardini*, ICSID Rev., 2017/32, pp. 47-48; *Calamita*, ICSID Rev., 2017/32, p. 614.

21 *Potestà*, in: Klausegger and others (eds.), p. 169.

22 *Reinisch*, JIEL 2016/19, p. 777.

Like MIC decisions, a decision rendered by an MIAM must be deemed an "award rendered pursuant to [the] Convention"[23] to benefit from the enforcement mechanism under the ICSID Convention. Similarly, the major hurdle is posed by Article 53 ICSID Convention, which prohibits any review on the merits of the award as in the case of an appeal. However, the specific design of the MIAM could permit enforcement through the ICSID Convention in very specific circumstances.

In the context of the MIAM, the first instance decision would be rendered in accordance with the traditional model of investment arbitration as a result of either ICSID or non-ICSID arbitration proceedings. An MIAM would arguably operate for awards rendered in both ICSID and non-ICSID arbitrations indistinctively. Consequently, decisions of an MIAM, whereby the first instance award was rendered in a non-ICSID arbitration, might not benefit from the enforcement mechanism under the ICSID Convention as not even the first instance proceedings fall within the application of the Convention.

Conversely, in case of decisions of an MIAM, whereby the first instance award was rendered in a ICSID arbitration, the situation may be different. As suggested by the ICSID Secretariat in 2004 when discussing the possibility of an Appeals Facility,[24] the MIAM Contracting Parties may devise the decision of first instance as "provisional" and only the last decision of the MIAM would be considered an "award".[25] Alternatively, the appeal decision would remand the case to the first instance, the latter endorsing the decision as an "award".[26] This "award" could then arguably be enforced through the ICSID Convention in Third Parties, but it most certainly would be equally subject to other remedies within the Convention such as annulment.

Given that this may very well render proceedings more costly and lengthy, States will have to consider carefully if this is a desirable outcome.

II. New York Convention

Alternatively, the New York Convention may serve as basis for the enforcement of decisions from a Permanent Adjudicatory Body.[27] The New York Convention offers the advantage to be the most widely spread international instrument aimed at the enforcement of international arbitral awards. Currently, 172 States acceded to the New York Convention. Any of those member States that is not concurrently a Contracting Party of the Permanent Adjudicatory Body would probably turn to the New York Convention to enforce a decision from the Permanent Adjudicatory Body. In a nutshell, the New York Convention's advantage is its high effectiveness as it allows only restricted grounds of refusal of enforcement and provides for a prohibition of a *révision au fond*.

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23 Art. 54(1) ICSID Convention.

24 ICSID Secretariat, Discussion Paper, Possible Improvements of the Framework for ICSID Arbitration, (22 October 2004) paras. 20–23 and Annex: Possible Features of an ICSID Appeals Facility https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf#search=Possible%20Improvements (24/02/2023).

25 *Van den Berg*, ICSID Rev., 2019/34, p. 177.

26 *Van den Berg*, ICSID Rev., 2019/34, p. 177.

27 UNCITRAL WG III, Appellate mechanism and enforcement issues, Note by the Secretariat (12 November 2020), A/CN.9/WGIII/WP.202, available at: https://undocs.org/en/A/CN.9/WG.III/WP.202 (1/2/2022), paras. 41–44.

Article I of the New York Convention sets out the Convention's scope of application and reads as follows:

> *(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.'*

As such, decisions of a Permanent Adjudicatory Body would be enforceable under the New York Convention if they qualify as "arbitral awards". Whilst there is no generally accepted definition of the term "arbitral award", there are certain criteria which have been considered by scholars and domestic courts to determine whether a decision is indeed an arbitral award in the sense of the New York Convention. For instance, it is considered that an arbitral award must be rendered by arbitrators or a permanent arbitral body, resolve a dispute or part of the dispute in a final manner, and be binding upon the disputing parties.[28] Some authors also posit that a decision only constitutes an arbitral award if the parties voluntarily submitted to the tribunal and they participated in the selection of the arbitrators.[29] Naturally, the denomination of the decision does not affect its qualification as arbitral award as the nature and content prevail over the label given by arbitrators.[30]

Certainly, some elements to characterise a decision as an "arbitral award" are less controversial than others. For instance, decisions rendered by an MIC/MIAM would be designed to settle an investment dispute in a final manner and to be binding upon the disputing parties. Similarly, the denomination of such decision would not create major problems for enforcement. Accordingly, this working paper focuses on the controversial criteria that might pose challenges to the enforcement of decisions rendered by a Permanent Adjudicatory Body under the New York Convention namely the characterisation of the MIC/MIAM as "permanent arbitral bodies" (1.), the appointment of adjudicators by the disputing parties (2.), and the voluntary submission of the dispute (3.). Additionally, some further considerations on the New York Convention's application to decisions of a Permanent Adjudicatory Body are briefly touched upon (4.).

1. Permanent Arbitral Body

Pursuant to Article I(2) of the New York Convention not only arbitral tribunals in the traditional meaning are able to hand down awards in the sense of the New York Convention but a permanent arbitral body may do so as well. Taking into account that the MIC/MIAM would be designed as a standing mechanism, it would be far-fetched to consider it an "arbitral tribunal". The crux of the matter is thus whether the MIC/MIAM could be considered as a "permanent arbitral body" in the sense of the New York Convention.

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28 UNCITRAL Secretariat, Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 2016, Art. I, mn. 21.

29 *Happ/Wuschka*, Indian JAL, 2017/VI, p. 125. Similarly, *Potestà*, in: Klausegger and others (eds.), p. 162.

30 For instance: Court of Appeal of Paris (France), Braspetro Oil Services Company - Brasoil v. The Management and Implementation Authority of the Great Man-Made River Project, Judgment (01.07.1999); Supreme Court of Justice (Colombia), Merck & Co. Inc., Merck Frosst Canada Inc., Frosst Laboratories Inc. v. Tecnoquimicas S.A., Judgment (26.01.1999); Court of Appeals of the Seventh Circuit (US), Publicis Communication v. Publicis S.A., True North Communications Inc., 206 F.3d 725, Judgment (14.03.2000); Federal Court of Justice [BGH] (Germany), III ZB 35/06, Judgment (18.01.2007).

Originally, the inclusion of "permanent arbitral bodies" was prompted by the delegates of the former Soviet Union and Czechoslovakia[31] but its relevance remained limited for several years. The paramount example of a permanent body whose decisions have been enforced through the New York Convention is the Iran-US Claims Tribunal (IUSCT).[32] While it appears that the majority of domestic courts have not found many qualms with enforcing IUSCT decisions under the New York Convention,[33] there are some voices of dissent. For instance, the UK High Court of Justice found that the New York Convention was not applicable to IUSCT decisions as these lacked an agreement between the disputing parties to submit to arbitration.[34] Similarly, some authors doubt that the New York Convention has been properly used for enforcing decisions of the IUSCT.[35]

In the context of the enforcement of MIC/MIAM decisions, it has been discussed whether an anaology from the IUSCT to the MIC/MIAM is possible.[36]

The idea of such an analogy stems from the common features that the IUSCT and a Permanent Arbitral Body would share insofar as they would both be standing adjudication organs having jurisdiction for claims from individuals against another State. Additionally, the claimants in front of the IUSCT did not participate in the appointment of the adjudicators as it would also be the case for the MIC/MIAM. Nevertheless, there are significant differences between the IUSCT and the MIC/MIAM. For instance, the IUSCT has been created in an extraordinary situation. The conflict between the Iranian State and the United States in 1979/1980 and the taking of hostages in the US Embassy required urgent negotiations to resolve the conflict. The negotiations of the Algiers Accords were especially impacted by the need to ensure the release of the hostages. Such a solution of an international crisis by establishing a dispute resolution institution differs however greatly from the current discussion on ISDS reform.[37] Whereas the IUSCT was placed in a political and diplomatic crisis and was aimed at a restricted number of disputes, i.e. the disputes between Iranian or American Citizens and the other State which stem from a predetermined period, the MIC/MIAM would dispose of a more permanent and general mandate.

In this vein, some authors have voiced their concerns and criticise that the New York Convention should not be applied for the enforcement of decisions rendered by the MIC/MIAM.[38]

But – as with any enforcement proceedings – the final decision lies in the hands of the domestic courts interpreting the New York Convention and the instruments setting out the Permanent

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31 UNCITRAL Secretariat, Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 2016, Art. I, mn. 66.

32 *Ehle*, in: Wolff (ed.), Art. I(2), mn. 88; *Bungenberg/Reinisch,* pp. 169.

33 The landmark cases in this regards are: US District Court (Central District of California), *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc. and others*, Decision (14.01.1988); US Court of Appeals (9th Circ.), *Gould Inc., Gould Marketing v. Hoffman Export Corporation, Gould International, Inc. v. Ministry of Defense of the Islamic Republic of Iran*, 887 F.2d 1357, Decision (23.10.1989).

34 UK High Court of Justice, Queen's Bench Division (Commercial Court), *Mark Dallal v. Bank Mellat*, Judgment (26.07.1985).

35 *Galindo/Attanasio/Duran*, in: Fach Gomez/Lopez (eds.), pp. 459 ff.

36 See for this idea *Bungenberg/Reinisch*, pp. 166, 169; see also *Kaufmann-Kohler/Potestà,* pp. 56-57.

37 See on this *Brower/Ahmad*, Fordham ILJ, p. 806, who refer to the Alabama Arbitration as a further example of an international tribunal established to resolve an international crisis. The authors consider that such institutions, which are established to resolve a pending international conflict, are an unfit example for an ISDS institution which is supposed to cover normal investor-State disputes.

38 *Bernardini*, ICSID Rev., 2017/32, pp. 48-50; *Happ/Wuschka*, Indian JAL, 2017/VI, pp. 124-129; *Galindo/Attanasio/Duran*, in: Fach Gomez/Lopez (eds.), pp. 459 ff.

Adjudicatory Bodies. For this, the jurisprudence on the enforcement of IUSCT decisions can be considered an indication as to how decisions from a Permanent Adjudicatory Body would be assessed.

Additionally, one could consider *Kaufmann-Kohler/Potestà*'s suggestion that UNCITRAL issues a recommendation to interpret the Permanent Adjudicatory Body as a permanent arbitral body under the New York Convention.[39] Such a recommendation does not bind domestic courts in any way but may prompt them to follow this assessment when deciding on the enforcement of a decision from the Permanent Adjudicatory Body under the aegis of the New York Convention.

2. Appointment of Adjudicators

The appointment of adjudicators has a dominant impact on the qualification of any adjudicatory body to be of arbitral nature.[40] Considering the consensual nature of arbitration, it appears problematic if only States have the power to appoint adjudicators.[41] Whilst it is theoretically thinkable to let investors or organisations of representation of their interest participate in some capacity in the appointment of adjudicators, such a participation would lead to further complications. Arguably, this puts the Permanent Adjudicatory Body closer to the States than to the investors. As arbitral bodies are characterized as a dispute resolution mechanism through private adjudicators, this potential proximity of the Permanent Adjudicatory Body to the States may compromise its qualification as arbitral body. At the same time, some scholars question the tenability of party-appointed arbitrators within the system of international arbitration.[42] Nevertheless, as the New York Convention's significance lies in the possibility to allow enforcement in Third Parties, there is still a risk that State courts will consider the lack of equal participation in appointing the adjudicators to be a public policy violation and to refuse enforcement on this ground.[43]

Granting the power of appointment exclusively to the Contracting Parties is however prone to complicate the acceptance of the new system by the investors. Investors may be concerned as to the political considerations underlying the shift from party-appointed arbitrators to a selection exclusively by one of the parties to the dispute.[44]

In practice, the selection of adjudicators exclusively by States is the common approach for international courts, e.g. the Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECtHR), in contrast to arbitral tribunals. Thus, one may question whether the selection of adjudicators by States at an MIC/MIAM would fit the characterisation of arbitral body under the New York Convention.

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39 *Kaufmann-Kohler/Potestà,* pp. 56-57; UNCITRAL WG III, Appellate mechanism and enforcement issues, Note by the Secretariat (12 November 2020), A/CN.9/WGIII/WP.202, available at: https://undocs.org/en/A/CN.9/WG.III/WP.202 (1/2/2022), para. 43; *Potestà*, in: Klausegger and others (eds.), pp. 174-174. See for the recommendations UNCITRAL issued regarding Art. II (2) and Art. VII (1) of the NYC the UNCITRAL 'Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session (19 June – 7 July 2006), A/61/17, available at: https://unctad.org/system/files/official-document/a61d17_en.pdf; pp. 61-62

40 *Bungenberg/Reinisch,* p. 166; but see *Kaufmann-Kohler/Potestà,* pp. 54-56 who do not accord the same importance to the appointment of arbitrators.

41 Bungenberg/Reinisch, p. 166.

42 *Potestà*, in: Klausegger and others (eds.), pp. 164-169.

43 See on this thought also *Alvarez and others*, pp. 5-6.

44 *Alvarez and others*, p. 6; *Brower/Ahmad*, Fordham ILJ, p. 809.

Kaufmann-Kohler/Potestà argue that the appointment of adjudicators is of lesser importance for the qualification of a body as of arbitral nature and refer to the Court of Arbitration for Sport (CAS) as an example.[45] The athletes who have to submit to the mandatory jurisdiction of the CAS in order to exercise their sport cannot participate in the appointment of the arbitrators of the CAS. Rather – according to Article 11 of the Arbitration Rules for the Olympic Games of the Court of Arbitration for Sport – the arbitrators are appointed by the President of the ad hoc Division from a preselected list.[46]

Nevertheless, scholars such as *Brower/Ahmad* oppose to this comparison since the CAS represents a regulatory and disciplinary body for a specific group of professionals similar to e.g. bar associations for lawyers or doctors. The professionals generally do not appoint the members of these bodies with regard to their own dispute.[47]

If one follows the characterization of the CAS by *Brower/Ahmad*, the analogy does not seem fitting for the case of an MIC/MIAM. This is because a Permanent Adjudicatory Body would represent a particular form of ISDS but would not be a regulatory and disciplinary board, at least and especially not for investors but, if any, for the Contracting Parties.

3. Voluntary Submission of a Dispute to the Permanent Adjudicatory Body

A further element conveying an arbitral award is the requirement that the dispute in question was voluntarily submitted to the arbitral body by the disputing parties. Referring to the New York Convention's *travaux préparatoires* this criterion is often considered as the most significant element in order to qualify an adjudicatory body as an arbitral tribunal within the meaning of the New York Convention.[48] Accordingly, a submission to an MIC or MIAM would need to be voluntary (instead of compulsory) for the resulting decisions to be enforceable under the New York Convention.

However, there are different approaches to consider the submission of a dispute to the Permanent Adjudicatory Body as voluntary. First, referring to domestic court decisions in the context of the enforcement of IUSCT decisions, *Bungenberg/Reinisch* argue that those courts allowed the investor's home State to replace the investor's individual voluntary submission with its own consent.[49] Second, in arbitration without privity constellations, the submission of the dispute to the tribunal is considered to be voluntary since the investor accepts the State's offer to settle the dispute in front of an international arbitral tribunal.[50] Finally, one could also argue that the submission of the dispute to the MIC/MICAM is voluntary if the investor voluntarily chooses the MIC/MIAM over the domestic courts of the host State when filing the dispute at the MIC/MIAM.

4. Further Reflections on the New York Convention

The requirements of a permanent arbitral body and of a voluntary submission of the dispute as described above are likely the crucial factors to determine the applicability of the New York Convention. There are however further reflections that may come up when analysing the

45 *Kaufmann-Kohler/Potestà,* p. 40; see on this with more scepticism *Brower/Ahmad*, Fordham ILJ, p. 806-807.

46 See on the CAS *Brower/Ahmad*, Fordham ILJ, p. 806-807.

47 *Brower/Ahmad*, Fordham ILJ, p. 807.

48 *Bungenberg/Reinisch,* pp. 162-164; *Kaufmann-Kohler/Potestà,* p. 55-56; *Potestà*, in: Klausegger and others (eds.), pp. 172-173; *Reinisch*, JIEL 2016/19, pp. 767-768. See with further reflections on this topic *Brower/Ahmad*, Fordham ILJ, p. 807 and *Happ/Wuschka*, Indian JAL, 2017/VI, pp. 128-129.

49 Bungenberg/Reinisch, pp. 163-164.

50 *Kaufmann-Kohler/Potestà,* p. 36; *Potestà*, in: Klausegger and others (eds.), p. 163.

enforcement of decisions of a Permanent Adjudicatory Body under the New York Convention. Those issues will probably however remain side stages and will not pose any insurmountable obstacle. In this sense, a decision from a Permanent Adjudicatory Body is e.g. likely to be accepted as enforceable under the New York Convention irrespective of its qualification as foreign, non-domestic or a-national.[51] In the same vein, a reservation by States on the applicability of the New York Convention only to commercial matters is generally understood to include investment disputes and would therefore also not hinder the enforcement of decisions from the Permanent Adjudicatory Body.[52] Finally, as with regard to the ICSID Convention, concerns are raised whether the implementation of an appellate mechanism hinders an enforcement under the New York Convention. There is however no general incompatibility of an appeal mechanism with the New York Convention as long as the decision to be enforced is already binding, neither according to the original negotiations of the New York Convention nor in current national law and jurisprudential practice.[53]

Finally, it has to be kept in mind that whilst an enforcement of MIC/MIAM decisions under the New York Convention seems possible, it is still the domestic courts of enforcement who have the last say.[54] Accordingly, the Contracting Parties to the Permanent Adjudicatory Body may consider to exclude the grounds of refusal of enforcement provided in the New York Convention for decisions of the respective Permanent Adjudicatory Body in order to ensure greater effectiveness of enforcement. Yet, this would be binding only for Contracting States but not for Third Parties. Nevertheless, such an exclusion could prevent Contracting States from invoking the excluded grounds of refusal even where enforcement is sought in a Third Party's territory.

Be that as it may, if the State court of enforcement sees too many issues regarding the enforcement, it might rely on *ordre public* considerations and refuse the enforcement. This will more likely come up in Third Parties but could theoretically also worry Contracting Parties' courts.

D. Adoption of New Instruments for Enforcement

In lieu of relying on existing enforcement mechanisms, the Contracting States can establish an enforcement system dedicated particularly to the decisions of the Permanent Adjudicatory Body. This approach would avoid the intricacies and risks of a treaty modification or a mere treaty

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51 *Bungenberg/Reinisch,* p. 166-168; *Kaufmann-Kohler/Potestà,* pp. 57-58; *Potestà*, in: Klausegger and others (eds.), pp. 174-175; *Van den Berg*, ICSID Rev., 2019/34, pp. 180-181. See also *Schreuer/Malintoppi/Reinisch/Sinclair*, Art. 54, mn. 20 with further references.

52 *Bungenberg/Reinisch,* pp. 169-171; *Kröll*, in: Bungenberg and others (eds.), paras. 21-23; *Reinisch*, in: Yannaca-Smalls and others (eds.), pp. 674; *Van den Berg*, ICSID Rev., 2019/34, p. 183.

53 UNCITRAL WG III, Appellate mechanism and enforcement issues, Note by the Secretariat (12 November 2020), A/CN.9/WGIII/WP.202, available at: https://undocs.org/en/A/CN.9/WG.III/WP.202 (1/2/2022), para. 42 with further references; see also the comments from the European Union and its Member States on this in UNCITRAL WG III, Annotated comments from the European Union and its Member States to the UNCITRAL Secretariat (19 October 2020), A/CN.9/WG.III/WP., available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/eu_and_ms_comments_appeal_and_enforcement.pdf, comment no. 23; see also in general the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (United Nations 2017), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016_guide_on_the_convention.pdf, pp. 13-14; *Kaufmann-Kohler/Potestà,* pp. 59-60; *Potestà*, in: Klausegger and others (eds.), pp. 177-178.

54 See on the role of domestic courts and the risks related thereto *Bungenberg/Holzer*, in Ünüvar/Lam/Dothan (eds.) pp. 80-81.

reference. It must be nevertheless noted that such an inherent enforcement system would not bind Third Parties unless they voluntarily adhere to it.

I. Statute or Treaty Setting Out the MIC or MIAM: Only Contracting Parties

Contracting Parties may opt for designing their *sui generis* enforcement mechanism within the Statute setting out the Permanent Adjudicatory Body.[55] The reform discussions at Working Group III have not yet extensively touched upon the issue of enforcement of MIC/MIAM decisions. However, early submissions signal a tendency in favour of an inherent enforcement regime.[56] They would not have to start from scratch but can model their enforcement regime after the existing mechanisms. Such an inherent enforcement mechanism provides the advantage that the Contracting Parties may design the regime as extensive as they deem reasonable and desirable. This means that if the Contracting Parties wish to design the enforcement regime as effective as possible, they will likely model it after the ICSID Convention,[57] thereby excluding the application of grounds for the refusal of recognition and enforcement.[58]

It should be noted though, that the greatest flaw of an inherent enforcement system lies in its limited extent.[59] In contrast to the ICSID Convention and the New York Convention, the Permanent Adjudicatory Body will start with a lesser number of member States. However, the effectiveness of any international enforcement instrument relies on the amount of member States. Hence – in order to ensure the most effective enforcement – the Contracting Parties should include as many States as possible into the Permanent Adjudicatory Body.[60]

Further, any enforcement of decisions of the Permanent Adjudicatory Body could be complemented by a fund, as suggested by *Bungenberg/Reinisch*.[61] The idea behind such a fund is to assure the effective satisfaction of claimants. This means that a successful claimant could obtain compensation from the fund and its claim would then be assigned to the Permanent Adjudicatory Body. The fund's financing would be dependent on the Contracting Parties' financial contributions. Various options to determine which State should deposit which amount are conceivable.[62] One could consider to have all Contracting Parties pay the same sum. Alternatively, one could link the amount to each State's economic development. Finally, one could refer to the State's share in investment flow or consider the investment flow in relation with the number of successful cases

55 *Bungenberg/Reinisch,* pp. 155-156, 171-172; *Kaufmann-Kohler/Potestà,* pp. 52-53; *Potestà*, in: Klausegger and others (eds.), pp. 168-169.

56 See e.g. UNCITRAL WG III, Annotated comments from the European Union and its Member States to the UNCITRAL Secretariat (19 October 2020), A/CN.9/WG.III/WP., available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/eu_and_ms_comments_appeal_and_enforcement.pdf, comment no. 18.

57 See on this: *Bungenberg/Reinisch,* p. 171; *Bungenberg/Holzer*, in Ünüvar/Lam/Dothan (eds.) p. 86.

58 On a proposal of how such obligation on enforcement may look, see Art. 56 of the draft statute in *Bungenberg/Reinisch*, Draft Statute of the Multilateral Investment Court.

59 *Bungenberg/Reinisch*, p. 171; *Bungenberg/Holzer*, in Ünüvar/Lam/Dothan (eds.) pp. 86-87; *Kaufmann-Kohler/Potestà*, p. 53.

60 *Bungenberg/Holzer*, in Ünüvar/Lam/Dothan (eds.) p. 87; *Van den Berg*, ICSID Rev., 2019/34, p. 176.

61 See for this paragraph the analysis of *Bungenberg/Reinisch,* pp. 171-172. See also *Bungenberg/Holzer*, in Ünüvar/Lam/Dothan (eds.) pp. 97-108. A similar fund has been established within the framework of the IUSCT under the auspices of the Algiers Accords, see Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration, 1981), paras. 6 and 7, available at: https://iusct.com/wp-content/uploads/2021/02/1-General-Declaration_.pdf.

62 See for these ideas the analysis of *Bungenberg/Reinisch,* p. 172.

brought against the State. The latter option is however most likely to discourage (third) States from adhering to the Permanent Adjudicatory Body and the fund.

Additionally, measures should be envisaged to preserve the fund against a rapid depletion and to reserve it for those cases where its stepping in is necessary.[63] This could either be realized by limiting the fund to small and medium enterprise (SME) claimants. Alternatively or additionally, the Contracting Parties could set a maximum threshold of compensation up to which the fund steps in. There could also be a requirement for claimants to substantiate reasons why they cannot seek enforcement directly from the respondent State or the urgency to receive immediate payment from the fund.

For the sake of clarity: such a fund can be established irrespective of the question whether the Contracting Parties choose to rely on one of the already existing mechanisms or to establish an inherent enforcement regime.

II. Treaty or Additional Protocols: For Third Parties

Contracting Parties to a Permanent Adjudicatory Body may as well consider the enforcement of decisions in Third Parties via a new treaty or additional protocols to an existing instrument, i.e. most likely the New York Convention. The advantage of this option lies in the possibility to tailor the new treaty or protocol in accordance with the unique design of the MIC or the MIAM.[64] Accordingly, a new treaty or additional protocol for the enforcement of decisions rendered by a Permanent Adjudicatory Body would be open for accession to all States irrespective of their membership to the MIC/MIAM.

A new treaty could foresee a similar provision as Article V of the New York Convention to bestow certain powers of control on the enforcing courts. This might be decisive for Third Parties deciding to join the new treaty. For instance, under Article V of the New York Convention the ground of public policy to refuse enforcement of arbitral awards has been considered as a 'safety-valve' to prevent irreconcilable intrusions into the enforcing State's legal system.[65] As such, a similar worded provision might alleviate concerns of Third States about enforcing decisions of a Permanent Adjudicatory Body to which they are not members.

The only difference between a new treaty and a protocol to the New York Convention is that in the latter option, only a provision extending the applicability of the New York Convention would be needed, avoiding the negotiation of an entire treaty from scratch.[66] However, a new treaty or such protocol would in any case require the ratification by the respective Third Parties.

E. Conclusions

The issue at stake is the following: if one cannot enforce a decision effectively, such decision is not worth a lot. Therefore, the question how to enforce decisions from a Permanent Adjudicatory Body is crucial. Should the Contracting Parties opt to avail themselves of the existing enforcement mechanisms for arbitral awards, they may rely on the ICSID Convention or the New York Convention. Yet, uncertainties remain whether the domestic courts of enforcement will accept to apply the ICSID Convention and the New York Convention to decisions of a Permanent

63 Bungenberg/Reinisch, p. 172.

64 *Bungenberg/Holzer*, in Ünüvar/Lam/Dothan (eds.) p. 87.

65 *Wolff*, in: Wolff (ed.), Art. V(2)(a), mn. 490.

66 *Bungenberg/Holzer*, in Ünüvar/Lam/Dothan (eds.) p. 94.

Adjudicatory Body. Against this backdrop and taking into account the above considerations, the most preferable solution is to create an inherent enforcement regime. Such an enforcement mechanism offers the advantage that the Contracting Parties can establish it with the exact characteristics they deem necessary and reasonable. The disadvantage such an inherent system entails is however, that it cannot bind Third States. Yet, in order for the Permanent Adjudicatory Body to be as successful as possible, the Contracting Parties will in any event need to persuade Third Parties to adhere to it or to at least cooperate at the enforcement stage.

Bibliography

ALVAREZ, GLORIA/BHATTY, SAADIA/LAVRANOS, NIKOS/LEVENTHAL, ALEXANDER, *Ensuring the Effective Recognition and Enforcement of MIC Decisions – Submission by the European Federation for Investment Law and Arbitration (EFILA) to the UNCITRAL Working Group No. III on ISDS Reforms*, Brussels, 2020, available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/efila_submission_to_uncitral_wg_iii.pdf> [last accessed 26/04/2023].

BERNARDINI, PIERO, *Reforming Investor-State Dispute Settlement: The Need to Balance both Parties' Interests*, ICSID Review, 2017, 32(1), pp. 38–57.

BROWER, CHARLES N./AHMAD, JAWAD, *From the Two-Headed Nightingale to the Fifteen-headed Hydra: The Many Follies of the Proposed International Investment Court*, Fordham International Law Journal, 2018, 41(4), pp. 791–820.

BUNGENBERG, MARC/REINISCH, AUGUST, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement*, 2nd edition, Berlin, 2020.

BUNGENBERG, MARC/REINISCH, AUGUST, *Draft Statute of the Multilateral Investment Court*, Berlin, 2021.

BUNGENBERG, MARC/HOLZER, ANNA, *Potential Enforcement Mechanisms for Awards of a Multilateral Investment Court*, in: Ünüvar, Güneş/Lam, Joanna/Dothan, Shai (eds.), Permanent Investment Courts: The European Experiment, Berlin, 2020, pp. 75–118.

CALAMITA, JANSEN, *The Challenge of Establishing a Multilateral Investment Tribunal at ICSID*, ICSID Review, 2017, 32(3), pp. 611–624.

EHLE, BERND, *Article I(2)*, in: Wolff, Reinmar (ed.), New York Convention on the Recognition and Enforcment of Foreign Arbitral Awards of 10 June 1958: Article-by-Article Commentary, 2nd edition, Munich, 2019.

GALINDO, ALVARO/ATTANASIO, DAVID L/DURAN, ANA MARIA, *The New York Convention's Concept of Arbitration and the Enforcement of Multilateral Investment Courts Decisions*, in: Fach Gomez, Katia/Lopez-Rodriguez, Ana M (eds.), 60 Years of the New York Convention: Key Issues and Future Challenges, The Netherlands, 2019, pp. 459–472.

HAPP, RICHARD/WUSCHKA, SEBASTIAN, *From the Jay Treaty Commissions Towards a Multilateral Investment Court: Addressing the Enforcement Dilemma*, Indian Journal of Arbitration Law, 2017, VI(1), pp. 113–132.

KAUFMANN-KOHLER, GABRIELLE/POTESTÀ, MICHELE, *Can the Mauritius Convention serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?*, 2016 available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf> [last accessed 26/04/2023].

KRÖLL, STEFAN, *Enforcement of Awards*, in: Bungenberg, Marc and others (eds.), Baden-Baden, 2015, pp. 1482–1504.

POTESTÀ, MICHELE, *Investment Arbitration, Challenges and Prospects for the Establishment of a Multilateral Investment Court: Quo Vadis Enforcement?*, in: Klausegger, Christian and others (eds.), Austrian Yearbook on International Arbitration, 2018, pp. 157–178.

REINISCH, AUGUST, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, Journal of International Economic Law, 2016, 19(4), pp. 761–786.

REINISCH, AUGUST, *Enforcement of Investmet Awards*, in: Yannaca-Small and others (eds.), Arbitration under international investment agreements, 2nd edition, Oxforxd, 2018, pp. 671–697.

SCHREUER, CHRISTOPH H/MALINTOPPI, LORETTA/REINISCH, AUGUST/SINCLAIR, ANTHONY, *The ICSID Convention: A Commentary*, 2nd edition, Cambridge 2009.

TRIANTAFILOU, EPAMINONTAS E, *Article 53*, in: Fouret, Julien/Gerbay, Rémy/Alvarez, Gloria M (eds.), The ICSID Convention, Regulations and Rules: A Practical Commentary, Cheltenham, 2019, mn. 4.1291–4.1334.

VAN DEN BERG, ALBERT JAN, *Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions*, ICSID Review, 2019, 34(1), pp. 156–189.

WOLFF, REINMAR, *Article V(2)(a)*, in: Wolff, Reinmar (ed.), New York Convention on the Recognition and Enforcment of Foreign Arbitral Awards of 10 June 1958: Article-by-Article Commentary, 2nd edition, Munich, 2019, mn. 480–586.