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Strengthening the Rule of Law in Investor-State-Dispute-Settlement through a Multilateral Investment Court

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1 Introduction

At the heart of today's international investment law are several bilateral or multilateral investment treaties (BITs). Most BITs today contain dispute settlement provisions for disputes related to the BIT.[1] These are designed in such a way that they give investors from one contracting state (home state) the opportunity to take action in arbitration against the other contracting state in which the investment is to be made (host state) if the investor feels that its substantive rights under the BIT have been violated by the host state. In investor-state dispute settlement (ISDS), as is traditional in arbitration,[2] one arbitrator is selected by each party, which then select the chairperson arbitrator. Moreover, ISDS generally does not provide for substantive review of arbitral awards, but only for annulment in the event of serious procedural irregularities. Among other things, these characteristics of ISDS lead to criticism regarding the rule of law of these procedures.[3] One forum in which possible reform approaches for ISDS are discussed is UNCITRAL's working group III. One of these possible reform options, which is still being discussed in detail in Working Group III today, is the creation of a permanent, institutionalised multilateral investment court (MIC).

This paper aims to evaluate the reform option of the MIC as it is currently discussed from a rule of law perspective. The rule of law has been used before in academic work as an analytical tool for existing courts and legal systems.[4] The challenge of this work will be that it will evaluate a court that does not yet exist. A court that does not yet exist does not produce data that would be accessible to empirical research. This challenge can be addressed by describing the current status of the reform proposals of UNCITRAL's Working Group III and then analysing them. The work will thus make use of a doctrinal legal research methodology based on a rule of law perspective. This will strengthen the argumentative discourse in the current reform discussion.

In the first chapter (2.1), an analytical methodology is developed that is tailored to evaluate the MIC before it emerges from a rule of law perspective. The basic idea of this methodology will also be transferable to other international courts. In the second chapter of the paper (2.2), I will take a closer look at the current discussion on the reform of ISDS by UNCITRAL's Working Group III, and how exactly the MIC will be designed according to these proposals. Before concluding (3), in part three (2.3) I will apply my working method to the currently discussed design of the MIC to answer the research question of this paper: How can the MIC strengthen the rule of law in ISDS to the greatest extent possible?

[1] Pohl, et. al., "Dispute Settlement Provisions", 3.

[2] Chase, "ISDS and the rule of law", 226.

[3] Garzón, "Blueprints for a New Route", 485.

[4] Albers, "How to measure the rule of law", 3-11.

2 Main part

2.1 The Rule of law as an analytic tool

In this first part of the paper, I define the rule of law and describe its core elements (2.1.1) to develop a suitable working method for this paper later on (2.1.2).

2.1.1 Definition

First, the most important rule of law elements for this work are described below. This serves the understanding for the rest of the work and is essential to derive a working method later on. How the rule of law can be instrumentalised for measurement depends essentially on the underlying definition of rule of law.[5]

The rule of law is a broad concept whose meaning is not universally uniform.[6] There are an endless number of definitions of the rule of law and numerous elements that are assigned to it in various contexts.[7] Some of these elements are more controversial than others. This is not surprising, since most states have their definition of what the rule of law means and what is mandatory for it.[8] However, it is not useful for this work to use one of these national definitions, even if it may be the only correct one for a specific state. Rather, as a multilateral organisation, the MIC should conform to an international definition of the rule of law. But even this international version of the rule of law did not develop in a vacuum[9] but rather represents the intersection of the elements used in the national definitions. There is now at least a slight consensus among scholars and the international community as to which core elements correspond to an international minimum standard of rule of law.[10]

For this work, however, the number of possible definitions and associated elements can also be limited from the outset. Most concepts of the rule of law contain both formal and substantive aspects.[11] Some concepts focus either more on formal[12] or more on substantive[13] aspects. Sometimes there is even a division into three categories: substantive, formal and procedural.[14] In my opinion, a sharp distinction between formal and procedural elements is often difficult to make

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[5] Beqiraj, Moxham, "Reconciling the Theory and the Practice of the Rule of Law", 5 f.

[6] Ibid., 2.

[7] McCorquodale, "Defining the International Rule of Law: Defying Gravity?", 279.

[8] Venice Commission, "Report on the the Rule of Law", paras. 4-16 describes the differences between the terms Rechtsstaat, Etat du droit and rule of law.

[9] Arajärvi, "Core Requirements of the International Rule of Law", 176.

[10] Arajärvi, "Core Requirements of the International Rule of Law", 178; Pech, Grogan, "Unity and Diversity in National Understandings of the Rule of Law in the EU", 31 ff.; Pech, Grogan, " Meaning and Scope of the EU Rule of Law", 38 ff.; Beqiraj, Moxham, "Reconciling the Theory and the Practice of the Rule of Law", 2; Venice Commission, "Report on the the Rule of Law", para. 35.

[11] Pech, Grogan, "Unity and Diversity in National Understandings of the Rule of Law in the EU", 8 f.; Rijpkema, "The Rule of Law beyond thick and thin", 794.

[12] Craig, "Formal and Substantive Conceptions of the Rule of Law", 468 - 477.

[13] Ibid., 477 - 484.

[14] McCorquodale, "Defining the International Rule of Law: Defying Gravity?", 281.

due to the strong interconnectedness of the two, which is why the procedural elements are understood as a subcategory of the formal aspects in this paper.[15]

The formal or procedural concepts are roughly speaking about the enactment, but in particular also about the procedural application of the law, but they do not evaluate the actual content of the law.[16] This means that formal requirements are placed on the laws, such as accessibility, predictability, publicity and generality.[17] Procedurally, they require that dispute resolution mechanisms be led by independent and impartial judges who apply the law predictably and equally.[18]

Substantive concepts, on the other hand, focus more on the content of the laws applied.[19] They demand that laws be just in their content and take human rights into account.[20] By their nature, these substantive elements, especially in international law, are much more politicised and dependent on the values of society than formal or procedural elements.[21] This makes the possible substantive elements of an international rule of law and their potential scope a highly contentious issue.[22]

This paper aims to evaluate procedural design options for the MIC with the help of rule of law considerations. The substantive law that the MIC will have to apply later (in particular the substantive provisions in BITs) is not the focus of this work and will not be dealt with in detail. Potential elements of the rule of law that only relate to substantive law are therefore of no use for this work and will be left out.

2.1.1.1 Legal certainty

Legal certainty is one of the most undisputed elements of a formal concept of the rule of law.[23] This element is not only included in recognised international definitions of the rule of law within Europe but is also anchored globally within the UN definition[24] of the rule of law.[25] Although legal certainty itself is well recognised as an element of the rule of law, the concept of legal certainty itself is not so easy to define, as it also has several interlinked elements.[26]

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[15] Wohlwend, *The International Rule of Law*, 28 f.; goes in the same direction, identifying procedural aspects as part of formal elements.

[16] Craig, "Formal and Substantive Conceptions of the Rule of Law", 467.

[17] McCorquodale, "Defining the International Rule of Law: Defying Gravity?", 281.

[18] McCorquodale, "Defining the International Rule of Law: Defying Gravity?", 282.

[19] Beqiraj, Moxham, "Reconciling the Theory and the Practice of the Rule of Law", 2.

[20] McCorquodale, "Defining the International Rule of Law: Defying Gravity?", 282.

[21] Wohlwend, *The International Rule of Law*, 26.

[22] Ibid.

[23] Arajärvi, "Core Requirements of the International Rule of Law", 186; who identified at least 117 States recognise predictability or certainty as an element of rule of law.

[24] United Nations, "What is the Rule of Law".

[25] Beqiraj, Moxham, "Reconciling the Theory and the Practice of the Rule of Law", 2-4.

[26] Arajärvi, "Core Requirements of the International Rule of Law", 185.

Firstly, legal certainty requires that the legal texts themselves are formulated in a clear and accessible manner.[27] This element of legal certainty thus refers to how the substantive law applied by courts and authorities is formulated. As mentioned at the beginning, the substantive law will not play a role in this paper, so I will not go into this element in detail.
Since legal certainty aims to ensure that the legal consequences remain predictable or foreseeable, [28] it places requirements not only on substantive law but also on procedural law. Inextricably linked to predictability is consistency.[29] Inconsistent administrative or executive decisions are not conducive to predictability and thus legal certainty, but at least they can usually be reviewed by the courts and thus a certain degree of coherence can be restored. Much more damaging to legal certainty and far more relevant to this work are inconsistent and incoherent court decisions. On the first level, legal certainty, therefore, requires that a norm is given the same meaning in all cases, even if it is applied by different courts.[30] Only if special circumstances of the individual case make the application of this standard meaning of the norm appear inequitable, the courts should be allowed to deviate from it in their clearly defined scope of the decision.[31] What is even more important for consistency than the uniform interpretation of individual norms is that court decisions do not directly contradict each other.[32] Two different configurations are conceivable in which two or more rulings contradict each other and thus contradict legal certainty. On the one hand, that different judgements are made in several identical cases. But what is even more interesting in the context of the subject of this paper is that two contradictory judgments are issued in a single case. But more on that later.

2.1.1.2 Non-arbitrariness

Another element of the rule of law is non-arbitrariness.[33] In essence, this is a prohibition directed at all holders of sovereign power and prohibits arbitrary decisions from being made within a granted margin of discretion.[34] It is therefore forbidden that decisions are made in an unreasonable, irrational, or repressive manner.[35] This is also where the link between legal certainty and non-arbitrariness can be seen. The clearer and more precise a law granting discretionary powers des them, the easier it becomes for the practitioner to prevent arbitrariness.[36]

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[27] Venice Commission, "Report on the the Rule of Law", para. 44.

[28] Ibid., 46.

[29] Arajärvi, "Core Requirements of the International Rule of Law", 185.

[30] Ibid., 188.

[31] Arajärvi, "Core Requirements of the International Rule of Law", 188; Venice Commission, "Report on the the Rule of Law", para. 49.

[32] Venice Commission, "Report on the the Rule of Law", para. 50.

[33] Arajärvi, "Core Requirements of the International Rule of Law", 185; McCorquodale, "Defining the International Rule of Law: Defying Gravity?", 288; Venice Commission, "Report on the the Rule of Law", para. 52.

[34] Venice Commission, "Report on the the Rule of Law", para. 52.

[35] Ibid.

[36] Venice Commission, "Report on the the Rule of Law", para. 45.

In international law inscribe particular, any exercise of power requires a sufficiently legitimate basis to be considered non-arbitrary.[37] Persons exercising discretion in international law are therefore obliged to take into account only those factors arising from relevant international law in their decision-making.[38] The deeper reason behind these requirements stems from the principle of sovereign equality.[39] No state or its nationals should have the values of another state unilaterally imposed on them through the exercise of international power that has no basis in internationally agreed law. Decisions should not be politicised but should be made solely based on international norms agreed upon by consensus between the states involved.[40] This aspect leads me directly to the next, strongly related element of the rule of law.

2.1.1.3 Independence and impartiality

The next element associated with the rule of law is that dispute resolution processes are held before independent and impartial courts.[41] An element that is often mentioned in this context is also the accessibility to these impartial and independent courts.[42] However, some definitions also see accessibility as a separate element of the rule of law.[43] Both of these elements, while desirable for a dispute settlement mechanism, are not necessarily linked or even dependent on each other. For this reason, a separate section will also be devoted to accessibility in this work - especially for the benefit of clarity and comprehensibility. Independence and impartiality of a dispute resolution mechanism, on the other hand, are so closely linked that it only makes sense to describe these two characteristics together.

The independence of judges requires that the decision-making process takes place without external influence, i.e. judges should not be able to be pressured by anyone to decide a certain way.[44] Such influence could come from superior judges or, in particular, from the executive in the form of a superior ministry or the government. This danger also exists in international courts. Here, the influence on a judge could, for example, come from the government of his or her home state, especially if the home state itself is a party to the legal dispute on which the judge has to decide.

At this point, the smooth transition to the aspect of impartiality also becomes clear. Impartiality means that the judge is not biased in his decision-making.[45] The lack of independence of a judge is thus one of the possible reasons why he or she cannot make his or her decisions without

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[37] Arajärvi, "Core Requirements of the International Rule of Law", 185.

[38] Ibid., 184.

[39] Ibid., 183.

[40] Ibid., 184.

[41] McCorquodale, "Defining the International Rule of Law: Defying Gravity?", 282.

[42] Venice Commission, "Report on the the Rule of Law", para. 53 ff.

[43] McCorquodale, "Defining the International Rule of Law: Defying Gravity?", 281.

[44] Venice Commission, "Report on the the Rule of Law", para. 55.

[45] Ibid.

impartiality. However, other reasons than lack of independence for lack of impartiality are also conceivable. A judge could assume, even without external pressure and influence, that the winning party to the dispute could return the favour to him afterwards, which would make the judge arguably biased, but still independent.

2.1.1.4 Accessibility

The next element of the international rule of law that I would like to talk about is the accessibility of the courts or, more generally, access to justice.[46] First of all, this element requires that it is possible for individuals who feel that their rights have been violated to be heard by a court.[47] Various barriers can make it difficult for individuals to access the courts. Some of these barriers are purely factual, while others have their origins in the design of procedural and judicial laws. One of these factual obstacles can be the sheer financial cost of litigation.[48] This is not just about court fees themselves, but also the cost of appropriate legal advice and representation in court. In particular, legal aid for those who need it can mitigate this problem.[49]

Another aspect that plays a role in the accessibility of courts is the capacity of courts. There must be enough courts and judges in a court to be able to deal with the volume of litigation in a reasonable time. In turn, the individual disputes themselves must be heard and decided in a reasonable time.[50]

A further obstacle to the accessibility of justice can arise from the fact that laws restrict whether and which exercises of state power can be subject to judicial review at all. The basic prerequisite of the rule of law is therefore that state acts can be reviewed in principle.[51] Reviewable acts are in particular executive administrative acts, but also legislative acts (e.g. laws and ordinances) or judicial acts (e.g. judgements of other courts).[52] However, it must also be borne in mind that, for the sake of a functioning judicial system, not every state action can be reviewed by every person under all circumstances. Certain admissibility requirements for a lawsuit are essential to keep a judicial system from becoming overburdened. In particular, the review of sovereign acts of national states by international courts is often made conditional on the prior review of that national act by national courts. Such restrictions serve not only to protect the international court from overburdening but also to preserve the sovereignty of the nation-state. Whether and to what extent such restrictions on the accessibility of international courts are compatible with the rule of law will be examined in more detail later.

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[46] McCorquodale, "Defining the International Rule of Law: Defying Gravity?", 296; Venice Commission, "Report on the the Rule of Law", para. 53 f.; Wohlwend, *The International Rule of Law*, 49.

[47] Venice Commission, "Report on the the Rule of Law", para. 53.

[48] Ibid., 56; Wohlwend, *The International Rule of Law*, 49.

[49] Venice Commission, "Report on the the Rule of Law", para. 56.

[50] Ibid.

[51] Wohlwend, *The International Rule of Law*, 47.

[52] Ibid., 48.

2.1.2 Analysing through a rule of law perspective

In the following, it will be shown how the quality of a court can be determined practically based on the rule of law. As mentioned in the introduction, this approach is not a novelty in academia. Some researchers and organizations have already addressed the question of how to make the rule of law usable to evaluate and improve courts. However, this research focuses on existing courts.[53] Some of these analytical methods are therefore based on data produced by the courts or judicial systems in the course of their work. For example, the SDG indicators refer to the proportion of the population that has used a dispute resolution mechanism in the last two years (16.3.3), or the proportion of prisoners still waiting in prison without being sentenced (16.3.2).[54] Such empirical methods of analysis cannot be applied to a court that has not yet been established, because such a court does not yet produce empirically evaluable data. All these methods are not intended to play a role in this work.

However, there are other methods of analysis that are not based on the outcome of the work of the courts but look directly at the normative properties and formal organisation of courts to conclude the state of their rule of law. So, these methods are not so much concerned with whether this analysed normative design leads to a strengthening of the rule of law in practice.[55] For example, the Rule of Law Checklist is based on whether national constitutions formally safeguard certain features of the courts that have a positive impact on the rule of law.[56] Since the discussion on the reform option of the MIC has already progressed to such an extent that even draft provisions have been prepared, such doctrinal legal research methods are in principle also suitable for analysing the current status of the MIC reform proposals. However, since the Rule of Law Checklist refers mainly to national constitutions,[57] its method of analysis cannot be easily applied to reform proposals for the creation of an international court.

So, first of all, adaptations are necessary to the Rule of Law Checklist to make it usable as the basis for the analysing methodology of this paper. That is why it was so important to define the rule of law at the beginning. Only through the content of the individual aspects of the rule of law can the meaning behind the indicators of the Checklist be derived. Based on the meaning underlying an indicator, it can then be adapted so that it makes the same sense in the context of an international court as it does in the context of a national constitution. For some indicators,

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[53] Beqiraj, Moxham, "Reconciling the Theory and the Practice of the Rule of Law", 4 ff.

[54] IAEG-SDGs, "Global indicator framework for the SDGs and targets of the 2030 Agenda for Sustainable Development", 19.

[55] Venice Commission, "Rule of Law Checklist", para. 25; speaks mainly of rule of law safeguards and only complementary of practice indicators.

[56] Venice Commission, "Rule of Law Checklist", para. 24; Engler, et. al., "Democracy Barometer", 16 would be another example of this working method. But because of Barometers broader application to "democracy as a whole", the Rule of Law Checklist is better specialised in the context of this work.

[57] Venice Commission, "Rule of Law Checklist", para. 24.

however, it will also turn out that they do not make sense in the context of an international court and are therefore omitted from the evaluation in the context of this work.

2.1.2.1 Rule of Law Checklist

Before the Rule of Law Checklist is used to create the appropriate working method for this paper, it should be explained why exactly the Rule of Law Checklist is such a good basis for this. The Rule of Law Checklist was drafted by the Council of Europe's Venice commission. The Rule of Law Checklist uses as its definition of the rule of law the definition contained in the "Report on the Rule of Law"[58], also prepared by the Venice Commission.[59] As can be seen in chapter 2.1.1, this definition of the Venice Commission has also had a decisive influence on the rule of law definition on which this paper is based. Therefore, the checklist is well suited to base the analysis methodology of this paper on it. Another feature that makes the checklist attractive to adapt into a suitable working method for this work is the fact that it can be applied by a wide range of actors who wish to assess the rule of law. In addition to parliaments, international organisations and non-governmental organisations (NGOs), it is also aimed at civil society.[60]

But the main argument in favour of the checklist is, as already mentioned, its working method. The working method of the checklist is primarily based on the evaluation of rule of law legal safeguards.[61] This means that the main function of the checklist is to analyse what level of rule of law is granted by laws and constitutions. This is achieved by examining the laws currently in force to see if they meet the legal parameters set by the rule of law checklist.[62]

In principle, this working method can also be applied to draft provisions discussed by Working Group III regarding the MIC reform option. However, two fundamental differences need to be considered to make the Checklist applicable to an international court such as the MIC: On the one hand, the Checklist refers to entire legal systems and not only to individual courts; on the other hand, its scope of application is national laws and constitutions and not international law. However, as the Venice Commission is also convinced that a high level of rule of law requires not only the safeguarding of the rule of law but also its practice and implementation, the checklist also contains complementary parameters for the assessment of rule of law practice and implementation.[63] Since it is not possible to make any statements about the practice and

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[58] Venice Commission, "Report on the the Rule of Law", para. 41 ff.

[59] Beqiraj, Moxham, "Reconciling the Theory and the Practice of the Rule of Law", 8; Venice Commission, "Rule of Law Checklist" paras. 14-21; The definition of the "Report on the Rule of Law" is, in turn, based on that of Bingham, *The Rule of Law*, 8; Venice Commission, "Report on the the Rule of Law", para. 36.

[60] Beqiraj, Moxham, "Reconciling the Theory and the Practice of the Rule of Law", 9; Venice Commission, "Rule of Law Checklist", para. 27.

[61] Venice Commission, "Rule of Law Checklist", para. 25.

[62] Ibid., 26.

[63] Beqiraj, Moxham, "Reconciling the Theory and the Practice of the Rule of Law", 8; Venice Commission, "Rule of Law Checklist", para. 25.

implementation of the rule of law in the MIC's work before its potential emergence, these indicators are left aside. Based on these considerations, I will now adapt the checklist into a suitable method of analysis.

2.1.2.2 Adaptation to a working method

Within the checklist, Chapter E. "Access to Justice" and its sub-chapters are the most appropriate starting point in the context of this work, as the indicators contained therein refer to characteristics of the judiciary rather than the executive from the outset.[64] The third sub-chapter, however, relates to constitutional justice (e.g., the constitutional reviewability of laws) and therefore does not play a role in the context of the MIC.

2.1.2.2.1 Independence of the judiciary

The first interesting indicator is the "independence of the judiciary".[65] Judiciary in the context of the MIC would refer to the part of the MIC that performs judicial functions, notably not the MIC Secretariat or a Member State body. In total, fourteen questions are assigned to this indicator, some of which can be directly transferred to the MIC (e.g., how long the term of office of judges is, if they can be reappointed and under what circumstances and by whom they can be dismissed). The purpose behind these questions is to ensure the independence of judges from the body that would be responsible for dismissals or reappointments.[66] In a nation-state context, executive bodies come into consideration here.[67] In the context of the MIC, it would be the governments of the individual member states of the MIC or a body composed of representatives of the member states.

When the questions speak of a constitution and ordinary law (e.g. Question 1), the statute establishing the MIC comes closest to a constitution in the context of the MIC. Ordinary law would accordingly be the rest of the law about the MIC.[68]

The transfer of a judge to another court (question vii) is irrelevant to the MIC. However, one could consider whether the transfer of a judge inside of the MIC to another chamber or the assignment from the first instance to the appeal mechanism, by their design, could constitute a disguised sanction and thus influence the independence.

The question relating to a judicial council (question ix) is not easily transferred from a national context to that of the MIC. In the context of the MIC reform, the Selection Panel is the closest equivalent in terms of selection and appointment.[69] Regarding the external representation of

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[64] Venice Commission, "Rule of Law Checklist", paras. 74-107.

[65] Ibid., 74 ff.

[66] Ibid., 76, 77.

[67] Ibid., 74.

[68] WG III, "Standing multilateral mechanism: Selection and appointment", para. 6 describes the potential regulatory framework.

[69] In view of the tasks described in Venice Commission, "Rule of Law Checklist", paras. 81,82.

interests and internal organisation, the Presidium of the Tribunal is the closest equivalent. The questions regarding the prosecution cannot be transferred to the MIC.
The question of whether the MIC is perceived as independent (question xii) cannot yet be answered, as the MIC does not yet exist. The most that can be said is whether the current design of the MIC is conducive to it being perceived as independent.

2.1.2.2.2 Independence of individual Judges

The last indicator referred to the external independence of the entire judicial branch of the MIC. This indicator focuses on the independence of the individual judges of the MIC itself.[70]
Of the four questions assigned to this indicator, the first and the last can be easily transferred to the MIC (examination of judgements outside the appeal mechanism and allocation of cases). About question 2, it should be noted that a right to a predetermined judge could not arise from a constitution, but from the statute of the MIC or the rules of procedure, if applicable. Question 3 can be adapted in the context of the MIC so that its jurisdiction should be clearly delimited, in particular about arbitral tribunals and other international courts.

2.1.2.2.3 Impartialityparciality of the judiciary

The indicator of the impartiality of the judiciary contains only two questions, the first of which relates to public perception of independence and the second (subdivided into three individual questions) to corruption. The indicator of the impartiality of the judiciary contains only two questions, the first of which relates to public perception of impartiality and the second (subdivided into three individual questions) to corruption as a cause of impartiality. The first question can again only be adapted to focus on whether the current safeguards are conducive to the public perception of impartiality, as the MIC does not yet exist. The second question makes much more sense in the context of the MIC if it is adapted to focus not on corruption as a cause of impartiality, but on so-called "double hatting" as a cause of impartiality.[71]

2.1.2.2.4 Access to courts

The Access to Court's indicator contains six questions, the last five of which can be readily applied to the context of the MIC (legal aid; formal and financial requirements; measures to make it accessible in practice; public information).[72] The first question concerning the locus standi must be adapted in the context of this work because the MIC is not supposed to be responsible for every violation of rights and in this respect is not comparable with the requirements that are placed on an entire national judicial system. From the point of view of the rule of law, the MIC should only have jurisdiction that is large enough to ensure that there are no

[70] Venice Commission, "Rule of Law Checklist", paras. 86-88.

[71] Working Group III, "Report of thirty-sixth session", paras. 70, 72; identifies in particular double-hatting as a cause for the lack of impartiality in ISDS or the appearance thereof.

[72] Venice Commission, "Rule of Law Checklist", paras. 99-103.

gaps in legal protection. The second question about the right to defend makes sense in a national context, where the defendants are often natural persons in need of such protection. In an ISDS context, however, the defendants are usually nation-states that have access to effective legal assistance even without an explicit right to it.

2.1.2.2.5 Other aspects

This indicator contains new questions that are intended to make statements about the existence of a fair trial.[73] Most of the questions can also be asked directly in the context of the MIC (e.g., equality of arms, undue length of proceedings, timely access to court documents; right to be heard; properly and promptly delivered court notifications).

In my opinion, the question of well-reasoned judgements plays a prominent role in the context of the rule of law definition of this work. Only in the case of well-reasoned judgements can it be understood which considerations played a role in reaching the judgement. That no irrational or unreasonable considerations played a role, but only the applicable international law. Or to put it more simply: It can be understood that the judgement was not made arbitrarily.

The question of the existence of an appeal mechanism also plays a prominent role in the context of this work. If there is a possibility of appeal, it is less likely in the first place that arbitrary sentences will be handed down, and if they are, they can be set aside. Furthermore, an appeal mechanism can contribute to legal certainty in the sense of this work by eliminating contradictory judgements and conflicting interpretations of legal terms, thereby ensuring coherence.

2.1.2.2.6 Effectiveness of judicial decisions

This indicator[74] raises the interesting question of the enforceability of MIC decisions. This question has of course also arisen in the reform discussion by Working Group III[75], but the topic is, on the one hand, not directly related to the formal and procedural design of the MIC itself, and on the other hand, it is too extensive to explain in detail here.

2.2 The ISDS reform discussed by UNCITRAL's Working Group III

Here in the third chapter of the thesis, I will objectively describe the discussion of ISDS reform in UNCITRAL's Working Group III. The approach will be chronological and focus on the most recent status, as this will serve as the basis for the evaluation in chapter 2.3.

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[73] Ibid., 105, 106.

[74] Ibid., 107.

[75] e.g., UNCITRAL Secretariat, "Appellate and multilateral court mechanisms", para. 57; proposes the creation of a new enforcement regime for the MIC, but additionally wants to rely on Article 1(2) of the New York Convention.

2.2.1 Course of the discussion so far

Discussion of ISDS reform in UNCITRAL's Working Group III began in July 2017.[76] The mandate for the work of Working Group III is divided into three successive stages: identify and consider concerns regarding ISDS; consider whether reform was desirable; and if the Working Group were to conclude that reform was desirable, develop any relevant solutions.[77] In April 2019, the thirty-seventh session decided that solutions should be developed, which is the start of the work in the third stage.[78] The actual discussion of reform options, which will be the subject of this paper, thus only began in this third stage. Nevertheless, I would also like to briefly describe how the work of Working Group III proceeded in the first and second stages, to clarify the background of the reform efforts.

2.2.1.1 Stage 1 and 2: identify ISDS concerns and consideration if reform is desirable

The work in phase one began in session thirty-four[79] based on a document from the UNCITRAL Secretariat[80] summarising concerns about the current ISDS system. The concerns identified in this document were broadly divided into three groups: Consideration of the arbitral outcomes, Consideration of the arbitrators/decision-makers and the Perceptions of States, investors and the public.[81] Discussion of these concerns continued in session thirty-five.[82]

In the thirty-sixth session, the working group then addressed the question of whether and which of the problems identified made reform desirable. In other words, the Working Group moved on to phase two of its mandate. There it was decided that reforms should be worked out at least[83] regarding ten identified concerns.[84] These ten identified concerns were also divided into three categories, which are very similar to the original categories in the Secretariat document just mentioned. Namely „Concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals", "Concerns pertaining to arbitrators and decision makers" and "Concerns pertaining to cost and duration of ISDS cases".

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[76] Bungenberg, Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, para. 1.

[77] General Assembly, "Report of the United Nations Commission on International Trade Law Fiftieth session", para. 264.

[78] Bungenberg, Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, para. 1.

[79] WG III, "Report of thirty-fourth session", paras. 19-88.

[80] UNCITRAL Secretariat, "Possible reform of investor-State dispute settlement".

[81] Ibid., paras. 20-47.

[82] WG III, "Report of thirty-fifth session", paras. 20-97.

[83] The Working Group did not rule out the possibility that new concerns might be discovered in the later course of its work; WG III, "Report of thirty-sixth session", para. 17.

[84] WG III, "Report of thirty-sixth session", paras. 40, 53, 63, 83, 90, 98, 108, 123, 127, 133.

Given the topic of this paper, it should be noted that the European Union and its Member States in their submission to establish a MIC assume that only the reform option of the MIC is capable of addressing all identified concerns without requiring additional reform options.[85]

2.2.1.2 Stage 3: development of solutions

Since the work in this phase is still ongoing, we will first describe what has been discussed so far. Then the current state of the discussion will be discussed in detail. Due to the topic of this paper, I will only discuss those reform options that directly aim at, or are at least linked to, the establishment of a MIC.

2.2.1.2.1 Appellate and multilateral court mechanisms

Potentially inseparable from the reform option of the MIC is the reform option of the appellate body. Therefore, it is indispensable for the evaluation of the MIC to explain exactly whether and how it is potentially related to the appellate mechanism.

Two types of appellate mechanism reform options are discussed: A model appellate mechanism and a permanent appellate mechanism.

A model appeal mechanism would be about standardising the functioning of the appeal mechanism and then making it available for use. The use of the model mechanism could be agreed upon in an investment treaty by the treaty parties, ad hoc by the parties to the dispute, or designed so that institutions (such as ICSID) dealing with ISDS cases can make use of it.[86] This reform option would have no points of contact with the MIC.

The second variant proposed by several members of Working Group III envisages the permanent establishment of a multilateral appellate body.[87]

For this variant, however, there are again two design alternatives: either the establishment of a stand-alone appeal mechanism that complements the current ISDS regime or an appeal mechanism as a second tier within a multilateral investment court.[88]

What is interesting here is that while a stand-alone appeal mechanism is discussed, a stand-alone MIC, which contains only a first instance, is not discussed. Whenever the MIC is discussed, it is designed as a first instance with an (at least external) appeal mechanism.[89]

But even if the appeal mechanism were to be integrated into the MIC as a second level, it would be conceivable that it would not only be responsible for appeals against decisions of the first instance of the MIC but also decisions of arbitral tribunals.[90]

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[85] EU and its Member States, "Possible reform of investor-State dispute settlement (ISDS)", para. 57.

[86] UNCITRAL Secretariat, "Appellate and multilateral court mechanisms", para. 40.

[87] Ibid., para. 45.

[88] Ibid., 46, 47.

[89] Ibid., 39-54.

[90] Ibid., 48.

Here, Working Group III follows its usual working method, which consists of discussing and elaborating several possible reform options in parallel and only later deciding which reform should be implemented in the end.[91] It is therefore not yet clear whether and how the appellate body will interact with the MIC. Since recent working documents of Working Group III also assume a MIC with an integrated appeal level[92], I will also base this paper on this assumption.

2.2.1.2.2 Selection and appointment of ISDS tribunal members

For discussion at the fortieth session of Working Group III in February 2021, the Secretariat published a working paper in November 2020 on the selection and appointment of ISDS tribunal members.[93] This paper contained, besides general qualifications and other requirements,[94] an extra chapter[95] dealing with the selection and appointment of judges in a standing mechanism. The Working Group discussed this working paper with the result that the Secretariat should prepare a detailed draft for the selection and appointment of judges of a permanent mechanism, based on the outcome of the discussion.[96] This draft[97] was published by the Secretariat on 8 December 2021 and discussed by Working Group III at its forty-second[98] and forty-third[99] sessions. I will describe the content of this draft and the corresponding discussions in detail in the next chapter and then use it as the basis for my rule of law evaluation.

2.2.1.2.3 Code of Conduct

The next reform option closely related to the MIC is the Code of Conduct (CoC). Since the early stages of its conception in session thirty-seven and session thirty-eight, it has been clear that the CoC should apply not only to arbitrators but also to judges of a permanent body potentially created by the reform.[100]

A first draft of the CoC was prepared for session 40, but not discussed there. Instead, a slightly revised draft was discussed in sessions forty-one and forty-two. In session forty-one, during the discussion of Article 1 of the Code, it became clear that it would later be necessary to create two codes: one for arbitrators and one for judges of a permanent body.[101] Despite this consideration, the Secretariat should only prepare a single, revised draft CoC for the Forty-Third Session, based on the suggestions for improvement that emerged from the discussion. I will explain

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[91] WGIII, "Report of resumed thirty-eight session", para. 15.

[92] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", para. 8.

[93] UNCTIRAL Secretariat, "Selection and appointment of ISDS tribunal members".

[94] Ibid., 6-16.

[95] Ibid., 41-72.

[96] WG III, "Report of fortieth session", para. 55, 56.

[97] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment".

[98] WG III, "Report of forty-second session", paras. 15-78.

[99] WG III, "Report of forty-third session", paras. 13-41.

[100] WG III, "Report of thirty-seventh session", para. 84; WG III, "Report of thirty-eight session", para. 55.

[101] Working Group III, "Report of forty-first session", para. 27.

the content of this latest draft and its discussion in session forty-three in the next chapter and then use it as the basis for the evaluation in chapter three (2.3).

2.2.2 Current state of the discussion

Now I will reflect on the current state of the discussion. The current state of the discussion is that which emerged at the forty-third session of Working Group III in Vienna from 5 September to 16 September 2022. My considerations include documents published as of 17.10.2022, i.e. in particular the report of Working Group III on the forty-third session[102] and the initial draft Commentary to the CoC[103]. First, it should be noted that even up to this point, several reform options are being discussed simultaneously.[104] Nonetheless, it is still not certain what exactly the outcome of Working Group III's work will be. Meanwhile, it seems rather clear that the members of Working Group III have different ideas about what is a desirable outcome for the Working Group's work.[105] Despite this still high degree of uncertainty, it is already possible to make a statement about the direction of the reform and where there is agreement. At the same time, it is also possible to identify where there is disagreement. It is precisely these points with controversial design options where an evaluation through the rule of law perspective will offer scientific added value. Due to the objective of this paper, I will focus again on the reform option that directly aims at the creation of a MIC. I will also discuss the reform options that potentially interact with the MIC, depending on their exact subsequent design.

2.2.2.1 Standing multilateral mechanism

The current discussion regarding the MIC in both the forty-second session[106] and forty-third session[107] of Working Group III revolved around the "Selection and appointment of ISDS tribunal members and related matters"[108].

The idea behind this discussion is that the members of a standing multilateral mechanism should no longer be determined by the parties to the dispute, as is currently the case in ISDS arbitration. Rather, as in the case of other international courts, they should be appointed by the states in their capacity as treaty parties.[109]

To this end, eleven draft provisions were already prepared in December 2021 to be discussed by Working Group III.[110] Draft provisions one to seven were discussed by Working Group III

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[102] WG III, "Report of forty-third session".

[103] ICSID Secretariat, UNCITRAL Secretariat, "Commentary to the Code of Conduct".

[104] Roberts, St John, "What to Expect When You're Expecting".

[105] Ibid.

[106] WG III, "Report of forty-second session", paras. 15-78.

[107] WG III, "Report of forty-third session", paras. 13-41.

[108] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment".

[109] Ibid., 5.

[110] Ibid., 8-65.

in its forty-second session.[111] It concluded that the Secretariat should revise these provisions and that the remaining provisions should be considered at a subsequent session.[112] In its forty-third session, Working Group III discussed draft provisions eight to eleven.[113] Here it again concluded that provisions eight to eleven should also be revised by the Secretariat.[114] No revised version of provisions one to 11 has been published by the Secretariat at this time. The subject of the evaluation in chapter 2.3 of the work will therefore be draft provisions one to eleven, considering the discussion in sessions forty-two and forty-three of Working Group III. For this reason, I would like to begin by explaining what exactly the content of draft provisions one to eleven is and how the discussion about them proceeded in detail.

2.2.2.1.1 Provision 1

Draft provision 1 deals with the "establishment of the tribunal".[115] Together with provisions 2 and 3, it forms the first section of the draft provisions, which deals with the basic framework conditions.[116] This provision aims at establishing the multilateral investment tribunal and at the same time stipulates that it has a first instance and an appellate instance. In addition, the abbreviation "the Tribunal" is introduced. At its forty-second session, Working Group III had already found several things to criticise about the provision. First of all, the standing character of the Tribunal should be more strongly emphasised in the wording.[117] In addition, the provision should provide more details on the establishment (seat, financing, interaction with ISDS) of the Tribunal.[118]

2.2.2.1.2 Provision 2

Provision 2 deals with the jurisdiction of the Tribunal. Two wording alternatives are proposed for paragraph 1 of provision 2.[119] The main difference between the two alternatives is that under the first, the Tribunal's jurisdiction would be made dependent on the concept of "investment" under the Tribunal's statute. The second alternative avoids the use of the term "investment", which in turn prevents a double check in the sense that there is an "investment" both in the sense of the Tribunal's statute and in the sense of the applicable investment treaty.[120] Furthermore,

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[111] WG III, "Report of forty-second session", paras. 15-77.

[112] Ibid., 78.

[113] WG III, "Report forty-third session", paras. 13-40.

[114] Ibid., 41.

[115] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", para. 8.

[116] Ibid., 7.

[117] WG III, "Report of forty-second session", para. 20.

[118] Ibid., 19.

[119] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", para. 10.

[120] Ibid.,, 11.

the first alternative contains an addition in brackets that would limit jurisdiction to disputes arising under an international investment treaty.[121]

Both alternatives have in common that the jurisdiction of the tribunal results from the parties' consent to submit a dispute to the tribunal. The term "parties" in this context may refer either to the parties to the dispute or the state parties to an investment treaty.[122] Accordingly, in neither of the two alternatives would the jurisdiction of the tribunal result solely from the fact that a certain state is a party to the statute establishing the tribunal, but would always require a separate consent, which could, for example, result from the provisions of an investment treaty.[123]

Paragraph 2 of provision 2 is a deeming provision which states that the consensus in an international investment treaty to submit disputes to a tribunal shall mean the Multilateral Investment Tribunal.[124]

The Working Group III has expressed various opinions on the two alternatives of paragraph 1 of provision 2 as well as on paragraph 2 of provision 2.[125] About the two options for paragraph 1 of provision 2, the second wording option was predominantly preferred as it avoids the double test requirement.[126] About the first alternative, it was nevertheless argued that the term "investment" could be retained if it was made clear that it should always mean the same as in the underlying investment instrument, to prevent double testing.[127] Furthermore, the text in brackets was opposed as it limits jurisdiction too much by only including disputes arising from investment treaties and not from other investment instruments and contracts or national laws.[128]

However, criticism was also voiced regarding the second alternative, although it prevents the double test of the term "investment" from the outset. The second alternative could lead to the court's jurisdiction becoming too broad and extending to disputes that have nothing to do with investment law, which could result in disputes ending up in several bodies. Therefore, the provision should refer to either "international investments" or "investment disputes". It was argued that the term "disputes" is sufficient because it gives states the necessary flexibility to reach a consensus on jurisdiction and the underlying investment instrument limits the scope of the jurisdiction from the outset.[129]

Similar to the criticism of the text in brackets from alternative 1 for paragraph 1, it was expressed in paragraph 2 that the restriction to investment treaties is too narrow, as this does not include other investment instruments. In addition, it should be emphasised more clearly that

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[121] Ibid.

[122] Ibid., 13.

[123] Ibid., 12.

[124] Ibid., 14.

[125] WG III, "Report of forty-second session", para. 21.

[126] Ibid., 22 and 23.

[127] Ibid., 22.

[128] Ibid.

[129] Ibid., 23.

this is only a deeming provision, which does not automatically establish the jurisdiction of the tribunal, even under the circumstances mentioned there.[130]
A fundamental consideration expressed about the scope of the Tribunal's jurisdiction is that the determination must take into account the resources available to the Tribunal to prevent over-burdening.[131] Another fundamental consideration was to allow states to submit existing treaties to the jurisdiction of the Tribunal and to specify these treaties precisely.[132] In addition, provision 2 should provide that the consensus on jurisdiction must be in writing.[133]

2.2.2.1.3 Provision 3

Draft Provision 3 deals with the administrative structure of the Tribunal and in this context stipulates that there shall be a committee of the parties and the President and the Vice-President of the Tribunal shall be directly elected by the Tribunal. The Committee of the Parties consists of one representative of each treaty party to the Statute and is responsible for determining the procedural rules of the various bodies of the Tribunal, the first instance, the appellate level and the selection panel. Furthermore, the committee lays down the financial rules for all operations financed from the Tribunal's budget. However, rules regarding routine functioning are to be set by the Tribunal for itself. [134]
The main criticism voiced in the forty-second session about provision 3 was that it should be more clearly defined and weighed up on which procedural rules should be established by the committee and which by the Tribunal.[135] About the president of the tribunal, it was discussed whether there should be one for the entire tribunal or one each for the first instance and the appellate level. In addition, for diversity and representation of member states, it was proposed to have several vice presidents.[136]

2.2.2.1.4 Provision 4

Draft provision 4 together with draft provision 5 form the second section "Selective representation and tribunal members".[137] Provision 4 deals with the members of the Tribunal. Paragraph 1 is intended to regulate the number of tribunal members, whether they work full or part-time, what nationality they should have and what professional and personal competencies are expected of them. All these elements are not yet specified in the draft, but possible alternative

[130] Ibid., 26.
[131] Ibid., 24.
[132] Ibid., 25.
[133] Ibid.
[134] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", para. 15.
[135] WG III, "Report of forty-second session", paras. 29 and 32.
[136] Ibid., 34.
[137] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", paras. 18-28.

regulations are mentioned especially about nationality.[138] The number of judges is also only a variable so far, but it is not intended to achieve full representation of the member states in the judiciary. Or in other words, one judge for each member state. Rather, only selective representation is envisaged, and how this is to be achieved follows from draft provision 8.[139]
Paragraph 2 provides that the number of members of the Tribunal may be adjusted by the Committee by a two-thirds majority decision, depending on the workload and the number of Member States. Paragraph 3 clarifies that there shall not be two tribunal members of the same nationality and how to deal with tribunal members who have more than one nationality.[140]
There was little consensus in the discussion of Draft provision 4. There were differing opinions as to whether the exact number of tribunal members should be determined at this stage. In this context, a transitional provision was proposed that would keep the number of members flexible according to the workload and the member states.[141]
There seemed to be a consensus that full-time judges are by and large preferable to part-time judges to ensure independence and impartiality.[142]
About the qualifications of the judges, it was submitted that the requirements should be formulated more broadly, in particular in order not to draw the circle of possible candidates too narrowly.[143] About the need for diversity, it was expressed that there is a need to specify more precisely which types of diversity are meant, for example geographical, gender, development status and legal systems.[144]
The biggest point of contention in paragraph 1 was probably whether nationality should play a role in the composition of the tribunal or whether only the other qualifications should matter.[145]
This discussion continued about paragraph 3, which would not play a role if nationality did not matter anyway. It was also discussed in this context whether nationals of a non-member state should be considered as candidates and that tribunal members should not take on cases of the state in which they are nationals or in which nationals of that state are involved.[146]
In paragraph 2, it was expressed that other reasons than only the workload and the number of member states for a change in the number of members of the Tribunal might have to be considered.[147] The requirement of a two-thirds majority was supported.[148]

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[138] Ibid., 19.
[139] Ibid., 18.
[140] Ibid., 19.
[141] WG III, "Report of forty-second session", para. 36.
[142] Ibid., 38.
[143] Ibid., 40-43.
[144] Ibid., 45.
[145] Ibid., 46.
[146] Ibid., 37, 50.
[147] Ibid., 48.
[148] Ibid., 49.

2.2.2.1.5 Provision 5

Draft provision 5 deals with ad hoc Tribunal members. It provides that in certain categories of cases an ad hoc tribunal member may be appointed by the parties.[149] During the discussion in session forty-two, it was first noted that the question of the appointment of ad hoc tribunal members was strictly separate from the question of the formation of chambers for specific cases.[150] There was no agreement on whether it was desirable to be able to temporarily appoint external ad hoc tribunal members.[151] Critics pointed out that this is one of the biggest criticisms of the current ISDS system.[152] It is also unclear what procedural rules and qualifications would and could apply to ad hoc members, especially given the limitation on multiple roles from the draft CoC (see chapter 2.2.2.2).[153] If anything, it should be made clearer that both parties to the dispute, i.e. states and investors, must be able to make an appointment to ensure equality.[154] Supporters argued that this was necessary for party autonomy and could generate potential candidates for membership in the tribunal.[155]

2.2.2.1.6 Provision 6

Draft provisions 6 to 8 form the section "Nomination, selection and appointment of candidates". This section describes how the selection and appointment process should be structured to "contribute to the quality and fairness of the justice rendered as well as to the appearance thereof, and that they guarantee transparency, openness, neutrality, accountability and reflect high ethical standards, while also ensuring appropriate diversity"[156]. To meet this requirement and not be influenced by political considerations, a multi-layered and transparent process was devised that is open to stakeholders.[157]

Draft provision 6 describes the first step of this process, the "Nomination of candidates". The draft proposes two options for nomination. Option 1 is the nomination of one or two candidates by a State Party. Option 2 is self-nomination by the candidates.[158] It should be noted that these options are not mutually exclusive and the list of nominees may be composed of candidates who have either nominated themselves or been nominated by States.[159] To ensure that option 1

[149] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", para. 25.
[150] WG III, "Report of forty-second session", para. 52.
[151] Ibid., 54.
[152] Ibid., 55.
[153] Ibid., para. 57.
[154] Ibid., 56.
[155] Ibid., 58.
[156] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", para. 29.
[157] Ibid., 30.
[158] Ibid., 33.
[159] Ibid., 39.

is also as open and transparent as possible and that stakeholders are involved, paragraph 2 requires states to consult with stakeholders during their domestic nomination process.[160]
Although doubts were initially expressed as to whether a "formal nomination phase" was necessary, it was decided that the revised version of provision 6 should contain a combination of option 1 and option 2.[161]
About option 1, there was a discussion on how many candidates can be nominated by a state, whether the candidates should represent different genders, and whether the candidates must necessarily be nationals of the nominating state. In this context, it was noted that the possibility of a co-nomination and thus the nomination of a national of another state should be possible.[162]
In addition, about paragraph 2 of option 1, it was discussed whether states should be encouraged rather than obliged to follow the process described and whether representatives of investor interests should be more involved. [163]
About option 2, it was recognised that while it promotes openness, transparency, independence and diversity, it significantly complicates the implementation of the nomination phase due to the potential number of nominations.[164]

2.2.2.1.7 Provision 7

Draft provision 7 is about the "Selection Panel". The Panel's role is to inform the Committee which of the candidates nominated to the Tribunal under draft provision 6 meet the requirements for appointment. In addition to the function of the panel, Provision 6 regulates how the panel is to be composed, what requirements are to be met by the panel members and how the panel is to work. The members of the panel should be determined by the committee and, similar to the tribunal members, should be as diverse and representative as possible.[165]
In the discussion on draft provision 7, it was first acknowledged that an independent Selection Panel is likely to promote inclusiveness and representativeness of Tribunal members.[166]
Doubts were expressed as to whether the Selection Panel would be truly independent if appointed directly by the Committee or whether it would then be too prone to politicisation.[167]
Thus, the question arose as to how it could be ensured that it also represented the interests of non-state stakeholders.[168] In this context, it was discussed whether a better result could not be

[160] Ibid., 37.
[161] WG III, "Report of forty-second session", paras. 62, 70.
[162] Ibid., 65, 66.
[163] Ibid., 64, 67.
[164] Ibid., 68, 69.
[165] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", para. 40.
[166] WG III, "Report of forty-second session", paras. 71, 72.
[167] Ibid., 73.
[168] Ibid., 77.

achieved even more easily by assigning a registrar or a similar administrative body with the verification.[169]

About the possible Selection Panel itself, it was discussed how large it should be in order not to be too cost-intensive but still offer sufficient diversity and representativeness. To save costs, it was suggested that the Selection Panel should not be a permanent body but an ad hoc one.[170] Regarding the tasks, it was noted that the Selection Panel should be able to launch a call for more applications and nominations.[171]

2.2.2.1.8 Provision 8

Draft provision 8 refers to the appointment of candidates. The Panel will allocate eligible candidates to specific Regional Groups (Asia, Africa, Latin America and the Caribbean, Western Europe and others, and Eastern Europe) and submit the resulting list to the Committee. Whether the assignment to the regional groups is based on the nationality of the candidate or the nominating member state has not yet been determined. The panel will also make a recommendation as to which of the candidates are suitable for the appellate level based on whether they have "extensive adjudicatory experience".[172] In this context, however, it is still unclear whether the appointment level candidates are appointed in the same process, or whether two independent nomination and appointment processes run side by side, or whether the tribunal members determine among themselves after appointment who will serve in which level.[173]

The committee then elects an as-yet undetermined number of candidates, of which each regional group must make up an as-yet-undetermined proportion. It is also not yet clear whether the member states of the committee will only be allowed to vote on candidates of the regional group to which they belong.[174]

In the discussion on draft provision 8 in session forty-three, it was first noted that the allocation of candidates to regional groups should be based on nationality. This would be particularly stringent if Member States were allowed to nominate foreign nationals and co-nominations.[175] For candidates with more than one nationality, the predominant one should be decisive and states should also be able to vote for those candidates who are not assigned to the same regional group as the voting state to ensure more diversity and flexibility.[176]

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[169] Ibid., 74.

[170] Ibid., 74, 76.

[171] Ibid., 75.

[172] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", para. 44.

[173] Ibid., 47.

[174] Ibid., 44.

[175] WG III, "Report of forty-third session", para. 15.

[176] Ibid., 17, 19.

Because it has not yet been decided which states will become parties to the Tribunal Statute, it was considered premature to define the exact regional groups.[177] In this context, it was also noted that it would be desirable to be able to flexibly adapt the total number and the exact distribution key of candidates to the individual regional groups to the composition of the member states at a later stage.[178]

About the appointment level, it was noted that the qualification "extensive adjudicatory experience" was too narrow and that other qualifications could also justify suitability for the appellate level.[179] On the fundamental question of whether and to what extent the appointment procedure for the appellate level should be the same as for the other Tribunal members, it was decided that it was too early to clarify this matter, in particular, because the structure of the Tribunal and whether the appellate level should be an integral part of it had not yet been determined.[180]

2.2.2.1.9 Provision 9

Draft provision 9 deals with the duration of the term of office of the individual tribunal members if the term is renewable and under which conditions early dismissal is possible. Regarding the term of office, a staggering is foreseen so that not all tribunal members are replaced at once. Dismissal should be possible in case of misconduct or inability to perform the office and should be done internally by the tribunal itself and not the Committee.[181]

In the discussion of the provision, long terms of office without the possibility of re-election were advocated. The absence of the possibility of re-election is intended to ensure the independence and impartiality of Tribunal members. The long terms of office are intended to strengthen the coherence of jurisprudence and collegiality.[182]

However, there were also advocates of short terms of office with the possibility of re-election. Shorter terms of office could ensure a greater degree of diversity and thus representation. A possible shortage of suitable candidates and the loss of valuable experience could be curbed by the possibility of re-election.[183]

There was consensus on staggered tenure lengths in favour of continuity.[184] However, there was again disagreement about whether and to what extent all this should also apply to members of

[177] Ibid., 16.

[178] Ibid., 20.

[179] Ibid., 18.

[180] Ibid., 21.

[181] UNCITRAL Secretariats, "Standing multilateral mechanism: Selection and appointment", para. 50.

[182] WG III, "Report of forty-third session", para. 24.

[183] Ibid., 25.

[184] Ibid., 26.

the appeal level, as it has not yet been decided whether the appeal level should be part of the tribunal.[185]

Regarding early dismissal, serious or repeated violations of the CoC (see chapter 2.2.2.2) were recognised as a sufficient condition. However, it would have to be specified more precisely who applies for the exclusion, who decides on it and how this decision can be challenged if necessary.[186]

2.2.2.1.10 Provision 10

Draft provision 10 "Conditions of services" explains that Tribunal members are bound by the CoC and that they receive an annual salary.[187] As the CoC is an integral part of the Tribunal's design as it stands, a separate chapter (2.2.2.2) is devoted to it in this paper. In the discussion of draft provision 10, it was suggested that sanctions should also be considered against former Tribunal members who have violated the CoC.[188]

2.2.2.1.11 Provision 11

Draft provision 11 regulates the assignment of cases to the individual judges or chambers of the Tribunal and the assignment of judges to the respective chambers. The draft offers several different options and alternatives for the distribution method in paragraph 1.[189]

Option 1 leaves it to the President, either alone or with the assistance of the Tribunal members, to allocate the judges to the chambers and to assign the cases to the chambers. The distribution shall be based either on the procedural rules adopted by the Committee only (alternative 1) or on the procedural rules adopted by the Committee and the criteria set out in Provision 11 paragraph 1 (alternative 2).[190]

Option 2 for paragraph 1 provides for the cases to be distributed randomly among the chambers. The assignment of judges to chambers and the potential redistribution of cases by the President shall be governed by the procedural rules adopted by the Committee.[191] Paragraph 2 provides that tribunal members shall not decide on cases where they either have the nationality of the state party to the dispute or they have the same nationality as the investor party.[192]

During the discussion in session forty-three, there was consensus that the case assignment process should "(i) ensure neutrality, impartiality and independence as well as the diversity of the

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[185] Ibid., 27.

[186] Ibid., 29, 30.

[187] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", para. 57.

[188] WG III, "Report of forty-third session", para. 32.

[189] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", para. 61.

[190] Ibid., 62.

[191] Ibid., 63.

[192] Ibid., 61.

members assigned to a case; (ii) be flexible to adjust to the circumstances of the case; and (iii) be transparent".[193]

To achieve this goal, it was decided regarding paragraph 1 and its options and variants that an allocation method should be developed that contains and combines all the advantages of the options and variants. For example, the cases could be distributed randomly, and the President could redistribute only under clearly defined and publicly available criteria.[194]

Regarding the formation and composition of chambers, it was decided that the chambers would be pre-determined and then composed of members on an ad hoc basis. This ad hoc composition procedure would need to be developed in more detail.[195]

Regarding paragraph 2, there was no consensus on whether the nationality of a tribunal member should be relevant to the non-assignment of a case.[196]

2.2.2.2 Code of Conduct

As already explained (2.2.1.2.3), the CoC has already undergone a complete reading, discussion and corresponding revision. Because of this advanced stage of development, the latest version of the CoC provides a solid basis for the evaluation in chapter 2.3.

The latest version of the CoC does not change the fact that it is intended to apply not only to arbitrators but also to the judges of a standing multilateral body who are relevant in the context of this paper.[197] In the discussion, the idea from the forty-first session was taken up again that in future there will no longer be one CoC that intends to apply to both arbitrators and judges, but two separate codes, one for arbitrators and one for judges.[198] Since this development of two Code texts is not to be completed until the next session at the beginning of 2023,[199] this paper will refer to the current draft CoC[200] that applies to arbitrators and judges. In addition, the discussion of the Code from session forty-three[201] and the draft commentary on the Code[202], which was open for comments until 14 October 2022, will be considered. Now the relevant Articles will be described.

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[193] WG III, "Report of forty-third session", para. 34.

[194] Ibid., 36.

[195] Ibid., 38.

[196] Ibid., 37.

[197] UNCITRAL Secretariat, ICSID Secretariat, "Possible reform of ISDS Draft Code of Conduct", para. 7.

[198] WG III, "Report of forty-third session", para. 204.

[199] Ibid.

[200] UNCITRAL Secretariat, ICSID Secretariat, "Possible reform of ISDS Draft Code of Conduct".

[201] WG III, "Report of forty-third session", paras. 201-279.

[202] ICSID Secretariat, UNCITRAL Secretariat, "Commentary to the Code of Conduct".

2.2.2.2.1 Article 3

Article 3 requires Adjudicators to be independent and impartial, whereby Adjudicators under Article 1 (d) include, in addition to Arbitrators, judges on a standing mechanism as defined in Article 1 (c). Paragraph 1 imposes this obligation on Adjudicators. Paragraph 2 contains in six subparagraphs ((a) to (f)) a non-exhaustive[203] list of circumstances in which the obligation in paragraph 1 is breached. Amendments to these subparagraphs were discussed in session forty-three and some were adopted. In addition, the Draft Commentary to the Code explains in more detail when each circumstance is deemed to exist.

One of the most notable changes was the agreement to use the word "a" instead of "any significant" to make it clear in subparagraph (d) that any intention to benefit is problematic, no matter to what extent.[204]

Regarding subparagraph (c), it was noted that in addition to a past or present relationship, a prospective relationship may also be considered to influence judges.[205]

The Commentary contains an important explanation of the appearance of a lack of independence and impartiality from subparagraph (f). Namely, the existence of this appearance must be determined objectively, based on indications discernible to third parties.[206] Since the creation of this appearance is therefore not determined subjectively from the judge's point of view, the judge must proactively prevent the creation of the appearance.[207]

2.2.2.2.2 Article 4

Article 4 regulates "Limit on multiple roles", i.e. a circumstance often referred to in legal literature as "double hatting". Paragraphs 1 and 2 of Article 4 shall apply exclusively to arbitrators, and paragraphs 3 to 6 shall apply exclusively to judges.

According to paragraph 3, judges shall not exercise any political or administrative function. Only administrative functions at the standing multilateral mechanism itself, for example as president, shall be exempted from this.[208] In addition, judges shall be prohibited from engaging in any other professional activity that makes it impossible for him or them to fulfil the obligations of independence and impartiality under Article 3 of the Code or to fulfil the requirements of a full-time judge. In particular, he shall not participate in any other IID proceeding as an expert witness or legal representative.

Paragraph 4 ensures that the requirements of paragraph 3 are complied with by requiring judges to report to the standing multilateral mechanism (or its president) before engaging in any other function or occupation. The standing multilateral mechanism shall then decide whether the

[203] WG III, "Report of forty-third session", para. 227.

[204] Ibid., 231.

[205] Ibid., 230.

[206] ICSID Secretariat, UNCITRAL Secretariat, "Commentary to the Code of Conduct", para. 30.

[207] Ibid., 29.

[208] Ibid., 44.

reported activity is prohibited under paragraph 3 or whether it may be carried out. If such a function or activity has already been performed without being reported, it must be reported immediately.[209] Interesting about paragraph 4 is the possibility that the standing multilateral mechanism could authorise a judge to work in particular as an arbitrator in another IID case, as long as this work complies with the requirements of paragraph 3, as paragraph 3 explicitly only prohibits work as a legal representative or expert witness in other IID cases.[210]

Paragraphs 5 and 6 regulate the possible functions that a former judge may assume in IID proceedings before the standing multilateral mechanism in the period after the end of the term of office.[211] Neither of these provisions limits activity in IID proceedings that are not conducted by the standing multilateral mechanism.[212]

Paragraph 5 is a far-reaching prohibition that prohibits indefinitely any involvement of a former judge in IID proceedings before the standing multilateral mechanism that was pending before the end of the judge's term.[213]

The prohibition in paragraph 6 is limited in time to three years after the end of the judge's term of office and refers only to the activity as a legal representative in IID proceedings that became pending after the end of the term of office.[214]

During session forty-three, only the first two paragraphs of Article 4 were discussed.[215] However, since their scope is limited to arbitrators, I will not go into the discussion here.

2.3 Analysing the reform through the rule of law perspective

Now I will use the indicators adapted for the purpose of this paper (2.1.3) to evaluate the MIC, in the shape of the reform discussion just described (2.3), through a rule of law perspective.

2.3.1 Independence of the judiciary

Now all relevant questions related to this indicator[216], adapted to the context of the MIC, are discussed.

[209] Ibid., 47.

[210] Ibid.

[211] Ibid., 48.

[212] Ibid., 51.

[213] Ibid., 49.

[214] Ibid., 50.

[215] WG III, "Report of forty-third session", paras. 232-246.

[216] For the original questions see Venice Commission, "Rule of Law Checklist", para. 74.

2.3.1.1 Question 1

Question 1 addresses, in the context of the MIC, whether the basic principles of judicial independence are laid down in the statute of the MIC or supplementary law. At the moment, it is still unclear where exactly the draft provision will be found in the framework of the MIC.[217]
Those basic provisions directly affecting the independence of judges (e.g. draft provisions 4, 8 and 9)[218] should be included as far as practicable in the statute of the MIC to make them more difficult to amend. The legislative power of the Commission (draft Provision 3 (a) 3) should only refer to procedural questions of detail and should not be able to change the general scope of independence granted to the MIC judiciary in the Statute.

2.3.1.2 Question 2

Question 2 relates to the tenure of judges, grounds for dismissal and procedures for challenging dismissal. In the context of the MIC, the question of reappointment is also relevant in this context.[219]
From a p independence perspective, a lifetime appointment would be best, as it would ensure independence from the body responsible for reappointments or renewals. Nevertheless, Draft Provision 9 (a) 1 provides for a limited term of office. It should be noted that, particularly in the context of an international court, there are also important reasons why a lifetime appointment is not appropriate, despite the promotion of judicial independence. An important aspect of an international court is the diversity of the judiciary to ensure adequate representation of the member states.[220] Since no full representation (i.e., one judge per member state) but selective representation is envisaged for the MIC,[221] the term of office of the judges must be limited to allow sufficient rotation in the judiciary and thus representation within a reasonable p. This line of thought can also be applied to states that could potentially become new member states of the MIC, as these would potentially be deterred from joining the MIC by lifetime appointments, as they would not get a chance at representation in the foreseeable future.[222]
Now that it has been clarified why a lifetime appointment is hardly a viable method, the question arises of reappointment or re-election in the case of term limits. The possibility of re-election creates a potential dependence of judges on the body responsible for re-election. In the context of the MIC, this body would be the committee, or even the home state, which must make a reappointment. Since the committee is made up of member states and these are

[217] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", para. 6.

[218] In this section of the paper, draft provisions are always used to refer to those from WG III, "Standing multilateral mechanism: Selection and appointment".

[219] As identified in Venice Commission, "Rule of Law Checklist", para. 76.

[220] WG III, "Report of forty-third session", para. 25.

[221] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", para. 18.

[222] Bungenberg, Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, para. 157.

potentially involved in proceedings, it is obvious that judges may be concerned about deciding against state interests in view offered the re-election.[223] Proponents of the possibility of re-election argue that the exclusion of re-election could potentially create a shortage of suitable candidates and result in the loss of valuable expertise.[224] In my opinion, the disadvantages of the possibility of re-election outweigh the advantages. Because the use of experience can also be ensured by relatively long terms of office. In addition, long terms of office also offer the advantage of promoting consistency of decisions and collegiality.[225] Therefore, Working Group III should decide to remove the bracketed text providing for re-election from draft provision 9 (a) 1.

The possibility of early dismissal offers the same concerns about the independence of judges as the possibility of re-election, namely that it creates a dependency on the body that makes the decision. Unlike re-election, however, it is not an option to completely remove the possibility of dismissal, as it is always possible for judges to be guilty of such serious misconduct that they must be dismissed. Here, therefore, a high degree of independence can only be ensured by ensuring that the grounds and procedure for dismissal are clearly defined by law and that the grounds are limited to serious misconduct. There should also be a possibility to challenge the dismissal decision. Draft provision 9(b)1 allows dismissal for breaches of the CoC (by reference to draft provision 10) or in the event of the judge's inability to perform his or her duties. The decision on dismissal is to be made by the MIC judges (whether unanimously or by a two-thirds majority has not yet been determined). It is already conducive to independence here that the dismissal decision is made internally by the judiciary and thus independence cannot be influenced by a decision of the Committee.[226] However, concerns were also expressed in the discussion, as the other judges of the MIC might be hesitant to dismiss their colleagues.[227] To avoid this problem and still ensure independence from the member states in the Committee, another international court (e.g. the ICJ) could be entrusted with the decision.[228]

Moreover, the proposals from the discussion of Working Group III are promising.[229] The reasons for dismissal should be specified in more detail, in particular, how serious a breach of the CoC must be and whether there should be a quantitative threshold. To promote strong independence, only the most serious or repeated violations should count as grounds. It is also important to establish who has the procedural right to initiate dismissal proceedings. The only

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[223] Ibid., 156; Howse, "Designing a Multilateral Investment Court", 226.

[224] WG III, "Report of forty-third session", para. 25.

[225] Ibid., 24; Bungenberg, Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, para. 156.

[226] Bungenberg, Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, para. 162.

[227] WG III, "Report of forty-third session", para. 30.

[228] Bungenberg, Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, para. 162.

[229] WG III, "Report of forty-third session", para. 30.

questionable aspect of the discussion is that it is still unclear whether the dismissal decision should be reviewable. The possibility of having the dismissal decision reviewed by an independent body or even a third court should be provided for.[230] The costs of such a procedure could be high, but so could the return on the independence of the judiciary.

2.3.1.3 Questions 3 to 5

Questions 3 to 5 deal with disciplinary measures against judges and who is responsible for imposing them. Here, the same concerns arise regarding independence as in the case of dismissal decisions, since pressure can be exerted on judges by the competent body through unlawful sanctions. At the moment, there are no disciplinary measures in the draft provisions themselves. Draft provision 10(1) only requires MIC judges to comply with the CoC, but does not provide for sanctions for breach of this obligation (apart from the dismissal just discussed in Draft provision 9(b)). The draft CoC itself does not contain any sanctions either,[231] but only a reference in Article 11(3) to the "applicable rules or treaties" regarding possible sanctions and remedies. In the discussion of draft provision 10, it was recognised that a possibility should be provided to sanction former MIC judges.[232] This makes sense insofar as former judges are not eligible for dismissal under draft provision 9(b) as a sanction.

In the discussion on Article 11 of the CoC, it was not yet clear whether and which disciplinary measures (e.g. reduction of remuneration) would be considered by which bodies and how they could be enforced.[233]

If Working Group III decides to introduce disciplinary measures for misconduct that is not serious enough to justify dismissal during the reform discussion, the procedure, the requirements, and the responsible body should be explicitly regulated. The same applies to the sanctions that are being discussed against former judges.

2.3.1.4 Question 6

Question 6 refers to whether the appointment and promotion of judges are based on relevant criteria such as ability, integrity, and experience, and whether these are explicitly normed. The purpose of this question is to ensure that the decision to appoint or promote is not politically or personally motivated and thus cannot create dependency.[234]

Draft provision 4(1) contains the criteria for MIC judges. These are incorporated into the selection process via draft provision 6 and thereby into the appointment process via draft provisions

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[230] Bungenberg, Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, para. 162.

[231] ICSID Secretariat, UNCITRAL Secretariat, "Commentary to the Code of Conduct", para. 110.

[232] WG III, "Report of forty-third session", para. 32.

[233] WG III, "Report of forty-third session", paras 120-126; UNCITRAL Secretariat, "Means of implementation and enforcement", paras. 29-36.

[234] Venice Commission, "Rule of Law Checklist", para. 79.

7(f) and 8. Even after the discussion of Draft Provision 4(1), the basic criteria retained were skills, experience, and moral integrity. Only the exact scope of these criteria needs to be clarified.[235] In addition, Article 4(1) of the draft calls for diversity and the discussion[236] also called for this criterion to be made more precise. This criterion does not create the risk of decisions being made based on political or personal considerations. Rather, the opposite is true, as the criterion of diversity potentially forces the appointing body to choose candidates who do not suit it politically or personally. In addition, diversity in terms of legal systems, level of development and gender increase the acceptance of the MIC.[237] That is why the criterion of diversity is desirable[238] rather than questionable.

However, there was disagreement in the discussion about the question, which was also left open by Draft provision 4(1), whether the nationality of a judge should be a decisive criterion.[239] The criterion of nationality was argued that it was a decisive factor in determining the independence of a judge from a particular state.[240] However, this argument makes little sense in the context of the selection and appointment of judges. A nationality-based dependency in the selection process could only be completely ruled out if only judges who are nationals of non-MIC states are eligible. Where nationality should play a role, however, is in the assignment of cases to specific judges. Here, care should be taken to ensure that no judge decides on cases in which the state in which he or she is a national is involved. However, this issue is more about impartiality than about the independence of judges (and is currently addressed in Draft Provision 11(2)). Therefore, the criterion of nationality should not play a role in the selection and appointment of judges (i.e. the formulation option " elected regardless of their nationality " should be chosen), but only whether the candidate is independent and fulfils the professional and personal requirements.[241] However, the nationality of the candidates will of course play a role indirectly through the criterion of diversity (e.g. in the case of regional diversity and diversity by stage of development).

The initial question requires clear criteria not only for the appointment process but also for promotion. However, it is not yet clear whether there is a promotion within the framework of the MIC or whether all judges (first instance and appellate mechanism) are elected according

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[235] WG III, "Report of forty-second session", paras. 40-44.

[236] Ibid., 45.

[237] Bungenberg, Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, para. 96.

[238] Diversity supportive, but without further justification Howse, "Designing a Multilateral Investment Court", 224.

[239] WG III, "Report of forty-second session", para. 46.

[240] Ibid.

[241] Also arguing against the criterion of nationality: Bungenberg, Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, para. 129.

to the same criteria in the same process.[242] If there is the possibility of promotion, the considerations just made should of course also apply here, to prevent politically or personally motivated decisions that compromise independence.

2.3.1.5 Questions 7

Question 7 cannot be directly applied to the MIC, as it concerns the transfer to another court. The possible "promotion" to the appellate body or transfer to another chamber could have the same effect as a transfer to another court, depending on the specific circumstances. Especially if it creates the need for the judge to change his or her place of residence. There is therefore the possibility that this decision will exert external pressure on the judiciary. These decisions (similar to decisions on dismissal or potential disciplinary measures) should therefore be subject to clear conditions and be taken by a body where there is no risk of dependence (i.e. in particular not by the committee).

2.3.1.6 Questions 8 and 9

The question of whether there is a judicial council and whether judges can complain there about violations of independence cannot be easily transferred to the MIC at present. Currently, there is no judicial council as such. However, the Presidium in the form of the President and Vice Presidents[243] could perform this and other functions (e.g., representing the interests of the judiciary before the Committee) and thus strengthen the independence of the MIC judges.

2.3.1.7 Question 12

Since the MIC does not yet exist and therefore it is not yet possible to assess whether it would be perceived as independent, the only question that can be discussed in this context is whether there are enough regulations to promote the perception of the MIC as an independent. First of all, of course, all the factors discussed so far, such as the selection and appointment criteria and the clear regulation of certain decisions that could influence judges (dismissal, disciplinary action, transfer, promotion) contribute to the perception of the judiciary of the MIC as an independent.

In addition, Article 3 of the CoC (which explicitly applies to MIC judges via Draft provision 10(1)) serves to promote the perception of judges as an independent. Article 3(1) requires judges to be independent and Article 3(2) does not exhaustively list examples of what conduct judges are prohibited from engaging in. As mentioned above (2.2.2.2.1), it also prohibits judges from engaging in any conduct that objectively gives the appearance of a lack of independence, regardless of whether such conduct creates dependence.

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[242] More on that UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", para. 47; WG III, "Report of forty-third session", para. 21.

[243] More about the option to have multiple vice presidents WG III, "Report of forty-second session", para. 33.

At first glance, such a broad prohibition of conduct that suggests a lack of independence naturally looks as if it would be conducive to the independence of judges. However, as mentioned above (2.3.1.2), the dismissal of judges under Draft provision 9(b)1 (and perhaps other disciplinary measures as the reform progresses) can be based on a violation of the CoC. There, it was already emphasised that it is essential to formulate the conditions for dismissal as precisely as possible to prevent judges from being made dependent on the competent body with the threat of an unjustified dismissal decision. Therefore, while a broad prohibition such as Article 3(2) (in particular paragraph (f)) pursues a legitimate aim by reducing the appearance of a lack of independence, it also promotes the risk of actual independence through the legal uncertainty it fosters about the dismissal decision.
A balance should be struck between the advantages of a broadly formulated prohibition and precisely formulated conditions. Therefore, it can only be reiterated that the quality and/or quantity of violations of the CoC that justifies dismissal must be more clearly defined.[244]

2.3.1.8 Questions 10 and 14

These questions aim to ensure that the judiciary as a whole is financially independent through a guaranteed budget, but also that each judge is financially independent through appropriate remuneration. The salary of the judges is currently regulated in Draft Provision 10(2) and is to be determined by the Committee. This is unobjectionable if it is ensured that the salary cannot be reduced to such an extent that the Committee can exert pressure on the judges. In the discussion of Draft provision 10, it was noted that the salary of judges should be based on that of judges in other international courts, which indicates that the compensation will be appropriate.[245] However, the remuneration should also depend on the financing structure of the MIC,[246] which is directly linked to the rest of the initial question.
The MIC's original proposal envisages the levying of user fees on disputing parties as a funding option in addition to traditional funding via the member states (weighted according to the level of development).[247] In the discussion on the financing of the MIC, this basic idea was clarified in such a way that the expenses of the MIC could be categorised and financed differently. The funding required for the general operation of the MIC could be borne by the member states, whereas the costs based on the administration of ISDS cases would be borne by the parties to the dispute.[248] With this combination, the financial independence of the MIC would be guaranteed, at least in principle, by the share that the member states pay anyway. In the - still pending - concrete formulation of the funding system,[249] it should be ensured that the independence of

[244] WG III, "Report of forty-third session", para. 29.
[245] Ibid., 33.
[246] Ibid.
[247] UNCITRAL Secretariat, "Appellate and multilateral court mechanisms", para. 58.
[248] WG III, "Report of resumed thirty-eight session", para. 84.
[249] Ibid., 94.

the judiciary cannot be influenced by external pressure in the form of funding cuts. In this context, the weighting of the Member States' funding shares was discussed again, and concerns were raised about these being based on the level of development. If not all states contribute equally to the funding, there is a risk that the states that provide a large share of the funding will exert more influence on the MIC and that the MIC will become dependent on these states.[250] If the MIC's independence is the only concern, a hybrid funding model in which the share of member states is funded equally would be best, so that the MIC is not particularly dependent on either an external source or individual states. However, funding plays a role not only in the independence of the MIC, but also in its accessibility, so there is potentially a trade-off to be made[251].

2.3.2 Independence of Individual judges

Now the questions linked to the indicator "Independence of individual judges"[252] are answered and adapted to the context of the MIC.

2.3.2.1 Question 1

Question 1 is intended to ensure that judgments are only reviewable under clear conditions by the designated appeal mechanism (i.e., not by the court president, fellow judges, or even executive bodies).

In the ISDS context, there are some ways in which external bodies can review arbitral awards. These include setting aside by a national court at the seat of the arbitration under national arbitration law, annulment under Article 52(1) of the ICSID Convention and refusal of recognition and enforcement under Article 5 of the New York Convention.[253] However, this work focuses on the procedural design of the MIC and not on the enforcement of its judgments. Therefore, it should only be noted here that the narrow requirements (e.g. serious procedural errors) for the above-mentioned remedies[254] are likely to be included in the broader requirements for an appeal to the Appellate Mechanism of the MIC (which could also be based on errors in the application of substantive law). Thus, there is no need for the additional possibility of annulment against appeal decisions of the MIC, which would create a three-instance procedure.[255] Preventing the decision of external courts on the one hand strengthens the independence of judges. On the other hand, the appeal decision could directly promote coherence and thus legal certainty in ISDS.

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[250] Ibid., 86.

[251] See chapter 2.3.4.

[252] Venice Commission, "Rule of Law Checklist", para. 86.

[253] Garzón, "Blueprints for a New Route", footnote 102.

[254] Ibid., p. 490.

[255] UNCITRAL Secretariat, "Appellate and multilateral court mechanisms", para. 49.

2.3.2.2 Questions 2 and 4

Question 2 ensures that a judge is pre-determined for a particular dispute. Question 4 ensures that the case allocation is done according to objective and transparent criteria and that the reallocation is done only if the judge or the parties consider it well-founded.

The draft provisions already recognised that the right to a predetermined judge is necessary to prevent a case from being assigned to a particular judge for political reasons, thereby compromising independence.[256]

As already explained,[257] Draft Provision 11(1) contains the method of distribution of cases to judges and the criteria for reallocation. However, after discussing the provision, a new hybrid distribution method is to be devised. It is to be welcomed that the distribution of cases will initially be random and can only be corrected by the President under clearly defined objective criteria. This method does not regularly require a decision (which could be politicised) on the allocation, as would be the case if the president of the court were to take over the allocation from the outset. It would be welcome if strict criteria, such as that the judges or the parties consider it justified, were attached to the reallocation of cases in the Revised Version of Draft Provision 11(1).

2.3.2.3 Question 3

The third question is to ensure that the competent court is identified and that there are rules to resolve conflicts of jurisdiction. This is the only way to ensure that judges are not deprived of cases that were supposed to be decided by them.

The jurisdiction of the MIC is currently regulated in Draft Provision 2. In the discussion on Draft Provision 2[258], it has already emerged that it is currently still too imprecisely formulated to clearly define the jurisdiction of the MIC and to distinguish it from other courts.

The possibility of the term "investment" leading to a double test, resulting in legal uncertainty in the jurisdiction of the MIC, should be avoided at all costs, which is why option 2 for paragraph 1 is to be preferred. Regarding option 2, however, the risk was rightly identified that the jurisdiction of the MIC could become too broad and commercial, or trade disputes could be covered. In the worst-case scenario, these disputes would end up before multiple judicial bodies. This problem should not be solved by an indirect reference to the term "investment" like option 1.[259] As it would create the same issues as identified regarding option 1. In addition, Working Group III should not rely on the fact that jurisdiction will later be quasi-automatically

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[256] UNCITRAL Secretariat, "Standing multilateral mechanism: Selection and appointment", para. 59.

[257] See chapter 2.2.2.1.11

[258] See chapter 2.2.2.1.2.

[259] WG III, "Report of forty-second session", para. 23 suggests „option 2 should refer to “international investment”, or “investment” disputes".

limited by the underlying investment instrument, [260] but should itselfure provide as precise provisions as possible.

One way to limit the jurisdiction of the MIC and still not give up the flexibility that the establishment of jurisdiction by party agreement brings would be to set substantive requirements for the agreement of jurisdiction in the statute of the MIC. In addition to the formal requirement that the agreement must be in writing, [261] it should be provided that the MIC can only be given exclusive jurisdiction over disputes in which it is to have jurisdiction.

2.3.3 Impartiality of the judiciary

Both questions assigned to this indicator refer to the lack of impartiality and the perception thereof, and whether legal countermeasures are in place. Instead of corruption, the lack of independence, or at least the appearance thereof, in the context of ISDS arises mainly from double-hatting[262]. Double hatting refers to "the practice of individuals switching roles as arbitrator, counsel and expert in different ISDS proceedings".[263] This practice is even more worrying in cases where one person performs different roles (in particular arbitrator and counsel) in different ISDS proceedings at the same time.[264]

The extent to which double hatting is practised in the current ISDS system can be empirically traced and reveals an intertwined web of dependencies in which it is almost impossible not to doubt the impartiality of the arbitrators.[265] Although there are also weak arguments for double hatting (lack of qualified and experienced persons), the better arguments (perception of ISDS as illegitimate) speak for a ban.[266]

The creation of a permanent court with permanent judges who are not constantly reappointed helps in itself to curb double-hatting.[267] The work of judges full-time and the formal prohibition of double hatting for MIC judges during their term of office would make double hatting virtually impossible in the context of the MIC. Furthermore, to promote the appearance of impartiality, judges should be also prohibited from certain professional activities for a certain per after their term of office (the so-called cooling-off period).

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[260] Ibid.

[261] Ibid., 25.

[262] See chapter 2.1.2.2.3.

[263] WG III, "Report of thirty-sixth session", paras. 70.

[264] Langford, et. al., "Ethics and Empirics of Double Hatting", 6 ff.; For a list of concerns associated with double-hatting, see ICSID, "BACKGROUND PAPERS DOUBLE-HATTING", para. 3; For further constellations of concern, see ICSID Secretariat, UNCITRAL Secretariat, "Commentary to the Code of Conduct", para. 27.

[265] Langford, et. al., "Ethics and Empirics of Double Hatting", 3 ff.; Langford, et. al., "Revolving Door in International Investment Arbitration", 324 ff.; ICSID, "BACKGROUND PAPERS DOUBLE-HATTING", paras. 4-12.

[266] Langford, et. al., "Ethics and Empirics of Double Hatting", 9 f.

[267] EU and its Member States, "Possible reform of investor-State dispute settlement (ISDS)", paras. 47, 48.

In this context, it is striking that the currently discussed design of the MIC provides for the possibility to appoint ad hoc tribunal members in the MIC (Draft Provision 5). This would largely undermine the impartiality inherent in a permanent court with permanent judges.[268] In favour of the appointment of ad hoc arbitrators, it was argued that this is the only way to preserve party autonomy and thus ensure the legitimacy of the MIC.[269] This argument is not very convincing, because the legitimacy of the MIC is already established by the fact that the disputing parties already participate at least indirectly (investors through stakeholders) in the appointment of the permanent judges of the MIC. Allowing each party to the dispute to influence the composition of the bench through ad hoc members is not necessary to promote legitimacy. It is also argued that ad hoc members are needed to provide special expertise that the permanent MIC judges lack.[270] This argument is also unconvincing, as the selection of MIC judges requires a high level of expertise. If necessary, chambers could be formed for specific areas of expertise, to which the relevant cases would be assigned to ensure the necessary expertise. The appointment of ad hoc members should therefore not be possible in the final MIC, or it should at least be ensured that double hatting is effectively prohibited[271] for them.

Such a prohibition of double hatting is already found for permanent judges of the MIC in Articles 4(3) to (6) and Article 3 of the Draft CoC. It is noticeable that it is not completely excluded that judges of the MIC participate in external ISDS proceedings. According to Article 4(4), judges may participate in ISDS proceedings as arbitrators if the MIC decides that this activity is unobjectionable regarding the duty of impartiality (and independence) under Article 3.[272] It should be noted that the activity as arbitrator is comparable to that of a MIC judge since here the interests of a party to the dispute are not represented (as is the case with a legal counsel). At most, it is questionable that the MIC judge as an arbitrator would be directly remunerated by the parties to the dispute, thus creating a certain de facto financial dependence on the parties to the dispute. However, the justified expectation of being remunerated for the work as the arbitrator does not represent such a financial interest that would give rise to fears that this could influence the work as MIC judge.[273] Therefore, there are almost no concerns about the parallel activity as an arbitrator regarding impartiality, especially because in cases where there are reasonable doubts, the MIC can prohibit the activity via Article 4(4). It is much more the case that the parallel activity as arbitrator promotes the rule of law in ISDS. MIC judges acting in separate ISDS cases reduce the likelihood of inconsistent rulings (and awards) through the unity of personnel and thus promote the coherence of ISDS jurisprudence.

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[268] WG III, "Report of forty-second session", para. 55.

[269] Ibid., 58.

[270] Ibid.

[271] Ibid., 57 considers whether and how the double hatting prohibition could apply to ad hoc members.

[272] ICSID Secretariat, UNCITRAL Secretariat, "Commentary to the Code of Conduct", paras. 46, 47.

[273] Ibid.,

The absolute obligation to disclose all secondary activities for MIC judges via Article 4(3) is also conducive to the perception of impartiality. This ensures that the judge concerned does not decide for himself which activity could be problematic, but the judiciary of the MIC. It is to be welcomed that Articles 4(5) and (6) promote the perception of impartiality through a cooling-off period.[274] Regarding paragraph 6, a longer cooling-off period would of course be even more beneficial. However, conflicting interests must also be considered when determining the duration. As time passes, concerns about the impartiality of a former judge diminish and interest in using that person's experience and skills increases.

2.3.4 Access to courts

Answering most of the questions associated with this indicator[275] would require an evaluation of the Advisory Centre. Indeed, its role is to promote the accessibility of the MIC (and ISDS as a whole) by publishing information, providing advice, and actively assisting with defence and litigation.[276] However, the Advisory Centre is no longer discussed as part of the MIC, but as an external independent body, [277]and thus will not be discussed further in this paper.

In the context of the MIC itself, question 4 on formal requirements, time limits, and reasonable court fees is interesting. Apart from the comments on the jurisdiction,[278] it is not yet possible to make any statements on formal access requirements. The development of the MIC is also not yet advanced enough for time limits.

However, the question of court fees is closely linked to the financing of the MIC[279] and is therefore already being discussed. Firstly, pure funding by member states is probably no longer seen as an option, but only the hybrid funding model,[280] which implies that there will be court fees to some extent. A concern about this hybrid funding model regarding court fees is that the financial burden on states would be very high, as they would be funding the MIC on the one hand as a member state and on the other hand as a party to the dispute.[281] Particularly in the case of the least developed states, the funding already provided as a member state should be deductible when assessing the court fees as a party to the dispute. Such or similar calculation formulas that take this double burden into account should be developed during the reform.[282]

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[274] Which is not to be taken for granted, considering the discussion about a cooling-off period for arbitrators WG III, "Report of forty-third session", paras. 233-236.

[275] Venice Commission, "Rule of Law Checklist", para. 99.

[276] UNCITRAL Secretariat, "Possible reform of ISDS Advisory Centre", paras. 7-24.

[277] WG III, "Report of forty-second session", para. 30.

[278] See chapter 2.3.2.3.

[279] See chapter 2.3.1.8.

[280] WG III, "Report of resumed thirty-eight session", para. 84.

[281] Ibid., 91.

[282] Ibid.

2.3.5 Other aspects

Most of the questions in this indicator[283] will not be answered until the committee establishes the rules of procedure for the Tribunal under Draft Provision 3(a)(3). Question 8 asks about the existence of an appeal process and this important question can already be answered. Since its first draft, the MIC itself has never been envisaged as a court against whose decisions there is no appeal process.[284] The only question still open at present is whether the Appellate Mechanism is an independent institution or the second tier within the MIC.[285] However, this question does not need to be discussed in the context of this paper. If it is ensured that the appellate mechanism (no matter how it is designed) offers an appeal procedure for all decisions of the first instance of the MIC, it will enrich the promotion of the rule of law by the MIC itself. To promote the rule of law throughout ISDS as a whole, it would be desirable for the appellate mechanism to have jurisdiction over as many decisions (arbitral awards, MIC first instance decisions, national investment law judgments) as possible.[286]

Through the currently discussed "Multilateral Instrument on ISDS Reform", it would be possible to oblige every state that wants to become a member of the MIC to also become a member of the appellate mechanism, without obliging every member of the appellate mechanism to become a member of the MIC.[287] In this way, the appellate mechanism could, on the one hand, promote the rule of law throughout ISDS by ensuring consistency of judgments. On the other hand, it would ensure the rule of law advantages of an appeal mechanism to all states that want to have access to the permanent judges of the MIC already in the first instance.

3 Conclusion

In this paper, a method of analysis has been presented that is suitable for analysing the MIC from a rule of law perspective before it even emerges. The further the development of the MIC reform option progresses, the more precisely this method of analysis can be applied. Therefore, it will continue to be a useful tool for all those participating in the reform discussion in the future.

After applying this working method to the reform proposals, the research question about how the MIC can strengthen the rule of law in ISDS can be answered. The reform option of the MIC has at least the potential to promote formal and procedural elements of the rule of law in ISDS. Especially from the perspective of independent and impartial judges, the MIC promises potentially great advantages over the current ISDS system. However, all the achievements that the MIC can deliver for the rule of law in ISDS are currently only "potential". It is in the hands of

[283] Venice Commission, "Rule of Law Checklist", para. 105.

[284] EU and its Member States, "Possible reform of investor-State dispute settlement (ISDS)", para. 14.

[285] WG III, "Report of forty-third session", para. 21.

[286] As suggested in UNCITRAL Secretariat, "Appellate and multilateral court mechanisms", para. 48.

[287] UNCITRAL Secretariat, "Multilateral instrument on ISDS reform" (2022), paras. 7-13.

Working Group III to extract the full potential from the MIC reform option for ISDS. On the one hand, it should reconsider some regulations that could limit the potential of the MIC, especially the appointment of ad hoc tribunal members via Draft Provision 5.
On the other hand, the regulations that already seem promising should be deepened, clarified, and expanded. Draft provisions 6 through 8 provide a promising starting point for a selection and appointment process of permanent judges. It takes into account both investor and state interests, sets clear objective criteria to push back politicised decisions and promotes representation through diversity.
Articles 3 and 4 of the CoC which promote impartiality by limiting double-hatting and other secondary activities. In this context, the new Draft CoC specifically for judges[288] will hopefully take further steps in the right direction very shortly.

[288] WG III, "Report of forty-third session", para. 279.

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