Chapter 9
Standalone Appeal Mechanism: "Multilateral Investment Appeals Mechanism" (MIAM)

A purely multilateral Appellate Body was recently proposed as an alternative to the two-tiered court model—a MIAM.[1] In this variant, the first phase of *ad hoc* arbitration as practiced so far, be it an ICSID, UNCITRAL or SCC procedure, should be retained.[2] Nevertheless, a uniform multilateral judicial Appellate Body or quasi-judicial Appellate Body should be added. However, in contrast to the proposals, in particular those made in the context of ICSID in 2004 and 2005 as well as approaches in other recent US IIAs, this should be characterised by tighter organisational structures and a panel of judges appointed for a longer period of time. This is to achieve more consistency in decision-making practice. **607**

This variant of the structure of a multilateral appeal mechanism is very much oriented at the WTO Dispute Settlement Model.[3] In addition to creating a rule based regime,[4] one of the main innovations of the reform of the dispute settlement system with the establishment of the WTO was an institutional enlargement with the addition of a permanent Appellate Body. The purpose of creating the Appellate Body was in particular to ensure consistency and stability of decision-making by seven permanent members of the Appellate Body. **608**

[1] A similar appellate body has been discussed *inter alia* in European Commission (2017), p. 28; UNCITRAL (2018), para. 42. A discussion on appeals proposals is also seen in Bottini (2015), pp. 455 et seqq.

[2] A similar recommendation has been made in UNCITRAL (2018), para. 42.

[3] A discussion on use of a model similar to the WTO Appellate Body can also be seen in McRae (2010), pp. 382 et seqq.; Lee (2015), pp. 480 et seqq.

[4] Cf. among others Cass (2001), p. 50.

M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, European Yearbook of International Economic Law, https://doi.org/10.1007/978-3-662-59732-3_9

9.1 Organisational Structure of the MIAM

609 The Members of the MIAM should be the same as those of the MIC (see paras. 77 et seq.).

610 Like the MIC, a permanent appellate mechanism should be established with a Plenary Body, Judges and a Secretariat.

611 The Plenary Body (see paras. 80 et seqq.) should represent the members of a MIAM. Its main task would be the election of judges and the adoption of procedural rules as secondary law.

612 For the judges of an Appellate Mechanism, there should be no other requirements in terms of qualification than those which have been already set out for the two-tiered solution (see paras. 124 seqq.). The same applies to the independence of the judges and the ethical standards to be observed (see paras. 130 et seqq.). They should be permanently available, which means that they are comparable to judges of other international courts and can only engage in secondary employment that over time does not prevent them from exercising their judicial activity and that does not jeopardise their independence.[5]

613 The judge's election/appointment by the Plenary Body should also be the main factor for the future acceptance of this mechanism.[6] The considerations applicable for the selection of judges for the MIC could also be applicable here (see paras. 84 seqq.). The judges should reflect the traditions of the various legal systems. Therefore, a sufficiently large number of judges should be appointed. Since up to nine appeals judges are already designated for the EU's bilateral agreements, a total of nine judges should be considered for the MIAM, while the composition could be geared towards that of the ICJ.[7]

614 An Appellate Mechanism should also be supported by a Secretariat. However, the Secretariat should be configured in a manner that it is correspondingly smaller (see paras. 177 et seqq.).

615 The establishment of an International Investment Law Advisory Centre only for the appeals instance, is only recommended to a limited extent. This is because the main work related to the case has already been done during the *ad hoc* arbitration. Furthermore, representatives for the parties who have familiarised themselves with

[5]The need for permanent employment and availability of adjudicators has also been recommended in European Union (2019), para. 16; European Commission (2017), p. 42. The members of the Appeals Tribunal in the EU-Vietnam IPA (Art. 3.39(13)) (draft for signature), EU-Singapore IPA (Art. 3.10(10)) (draft for signature) and EU-Mexico Global Agreement (Art. 12(11)) (draft for signature) as on February, 2019, are also required to be available at all times and are paid a monthly retainer fee for the purpose.

[6]A discussion on the procedure for election of judges based on the proposal and agreement of the contracting parties is seen in European Union (2019), para. 22. On the other hand European Commission (2017), pp. 46 et seq. prescribed appointment of judges through an independent body.

[7]The European Union also prescribes geographical and gender diversity in the standing mechanism for dispute settlement, European Union (2019), para. 21. Diversity in the MIC has also been considered as an essential part for impartiality in a future MIC by Gomez (2018).

the case and acted on behalf of the parties, should in most cases, for substantive, and financial reasons, also be entrusted with representing their client in the appellate instance.

9.2 General Procedure of the MIAM

The appeals procedure against investor-state arbitration decisions should begin with the filing of the appeal against the arbitral decision by one or both of the parties of the first-instance arbitration. **616**

An appeal through the MIAM should temporarily suspend the validity of the arbitral award or the first instance decision of an investment court system (e.g. CETA or EU-Vietnam IPA).[8] At the same time, it should also eliminate the possibility of an appeal against the arbitral decision before national courts, for example in the process of recognition and enforcement.[9] An arbitral tribunal under the ICSID Convention would have to decline jurisdiction in case there is a consensual amendment of the IIA excluding ICSID arbitration. **617**

However, proceedings under other arbitration rules would still be possible and desirable. Of course, such decisions would continue to be enforceable in third countries that are members of the New York Convention but not of the MIAM. Nonetheless, it could be problematic that first-instance arbitral awards could continue to be enforced in non-MIAM Member States. They can, thus, undermine the appeal possibilities of a respondent MIAM state in the MIAM. This could be ruled out in cases where the home state of the investor as well as the respondent are members of the MIAM. The MIAM Statute could stipulate that enforcement of an arbitral award under the New York Convention in third countries would only be possible after the appeal period has expired. It would thereby lead to an amendment of the IIA underlying the dispute. Amendment of the IIA between two MIAM Members by the MIAM Statute as a subsequent treaty between the two states, could require first-instance tribunals to state in their arbitral awards that they are provisional and not enforceable under the New York Convention (see Article V para. 1 lit. e NYC). The awards would become final only after (a) the expiration of the Appeal Deadline under the MIAM or (b) an arbitral tribunal after a final decision taking into account MIAM's legal interpretation, declares it to be a final and enforceable decision within the meaning of New York Convention.[10] However, it **618**

[8]The CETA (art. 8.28(9)), EU-Vietnam IPA (Art. 3.54(1)) (draft for signature), EU-Singapore IPA (Art. 3.19(1)) (draft for signature) and EU-Mexico Global Agreement (Art. 29(8)) (draft for signature) as on February, 2019, provide for a provisional award which becomes final after a definite time period (90 days) if it is not appealed in the Appeals Tribunal.

[9]Kaufmann-Kohler and Potestà (2016), pp. 71 et seq.

[10]A clear statement that an award of the investment tribunal will not become enforceable until the appeals procedure is completed is seen in the CETA (Art. 8.28(9)(c)), EU-Singapore IPA (Art. 3.22

cannot be ruled out that non-member state countries will consider the arbitral award as final and allow it to be enforced.

619 In order for the suspensory effect to occur during the enforcement process, the IIAs serving as the basis of arbitration would have to be supplemented accordingly; and this could also be provided for in the MIAM Statute (see para. 247). Security may also be sought from the claimant.[11] The right of intervention of third parties must be clarified (see para. 346).[12] Non-involved third parties could have the option to comment or submit their opinion, in line with the general principles of transparency (see paras. 326 et seqq.). However, since third party opinions are likely to lead to delays, caution should be exercised here, especially in cases where such a possibility as mentioned above was not provided for. Given that in principle there should be awareness about ongoing arbitration proceedings, short time limits could be stipulated in case (there is possibility to submit a comment or opinion), as well as limitations on the scope of this possibility.

620 Any jurisdiction of the MIAM in an arbitration which has already been initiated at the time of its establishment should be possible only by consensus of the claimant investor and the respondent (then MIAM Member).

621 MIAM appeals procedures do not seem possible in the case of ICSID proceedings. They are in contradiction to Articles 53 and 54 ICSID Convention.[13] An amendment to the ICSID Convention through the MIAM Statute should be rejected, as the inclusion of an appeal body in ICSID proceedings would contradict the aim and purpose of the ICSID Convention, i.e. to bring about immediate enforcement without further review of the content of the judgment.[14] The MIAM Statute could therefore at most provide that ICSID arbitration proceedings in actions against a MIAM Member by claimants from other MIAM Member States would no longer be possible.

622 Appeals against decisions in arbitration proceedings under other arbitration rules except the ICSID Convention should only be possible within a short time limit. If no legal appeal is filed within this period, the judgment will become final. Here, a 1-month appeal period could be set, with the option of an additional 1-month

(1)) (draft for signature) and EU-Mexico Global Agreement (Art. 31(1)) (draft for signature) as on February, 2019.

[11] Article 29 para. 4 section 3 Investment Chapter TTIP draft: "A disputing party lodging an appeal shall provide security for the costs of appeal and for the amount provided for in the provisional award." Similar provisions are seen in Art. 3.19(5) EU-Singapore IPA (draft for signature), Art. 3.54(6) EU-Vietnam IPA (draft for signature) and Art. 30(4) EU-Mexico Global Agreement (draft for signature) as on February, 2019.

[12] Third party submissions have been permitted under the provisions of the treaty under Art. 3.19 (6) EU-Singapore IPA (draft for signature), Art. 3.54(7) EU-Vietnam IPA (draft for signature) and Art. 30(5) EU-Mexico Global Agreement (draft for signature) as on February, 2019.

[13] Similar views have been expressed by Tams (2006), p. 12; Schreuer (2018), p. 156.

[14] According to this Calamita (2017), pp. 585 et seqq.

deadline for the declaration of grounds of appeal.[15] To prevent abuse, a Court (misuse)[16] fee could be considered for abusing the possibility of appeal (see para. 306). However, in case of abuse, the necessary expenses incurred by the opposing side for the purpose of legal defense should be reimbursed.

The grounds of appeal should indicate the scope of the appeals as well as the appellant's allegations of infringement and the grounds on which the appellant bases its view. **623**

The MIAM should decide by judgment. **624**

The MIAM should be able to confirm, modify or reverse the decisions of the initial main proceedings.[17] It is questionable whether the Appellate Body could also be given the opportunity to remand cases back to the tribunal for the purpose of modifying the decision[18] with the obligation to reassess the case taking into account the legal interpretation of the MIAM.[19] However, as already stated (see para. 351), the introduction of a possibility to remand back a case is to be viewed critically, particularly because the overall duration of the proceedings would be extended. Additionally, where required, an arbitral tribunal outside the new multilateral appeals body would be required to make a (second) decision "taking into account the MIAM legal opinion". **625**

However, a remanding of cases could also have advantages. A decision made by an arbitral tribunal which when reconsidering the case, has possibly taken the legal interpretation of the MIAM into account, would then be available. An execution of such a decision under the New York Convention could be possible. However there would be no possibility for enforcement under the ICSID Convention in this scenario (see paras. 496 et seqq.). **626**

The MIAM should be given extensive investigative powers to enable full autonomous decision-making as an authority empowered with jurisdiction for establishment of facts. This is even more necessary if no power to remand the case is provided to the MIAM. **627**

The appeal proceedings should be divided into a written and an oral procedure. Facts and evidence already submitted in the earlier initial arbitral proceedings **628**

[15]Similar as well in WTO-DSU, cf. Working procedures for appellate review, Rule 20. A 90 day period for appeal has been prescribed under the CETA, EU-Singapore IPA (draft for signature), EU-Vietnam IPA (draft for signature) and EU-Mexico Global Agreement (draft for signature) as on February, 2019.

[16]Foreseen like this in Article 32 BVerfGG (Act on the Federal Constitutional Court); if the there mentioned misuse fee amounting up to €202,600 is enough, must be left open.

[17]Article 8.28 para. 2 CETA: "The Appellate Tribunal may uphold, modify or reverse a Tribunal's award based on: [...]". Similar provisions are seen in Art. 3.19(3) EU-Singapore IPA (draft for signature), Art. 3.54(3) EU-Vietnam IPA (draft for signature) and Art. 30(2) EU-Mexico Global Agreement (draft for signature) as on February, 2019.

[18]Compare Article 8.28 para. 7 lit. b) and para. 9 lit. c) sublit. iii) CETA.

[19]An explicit possibility for referral back to the initial tribunal for re-consideration based on the Appeals Tribunal's decision is seen in Art. 3.55(4) EU-Vietnam IPA (draft for signature), Art. 3.19 (3) EU-Singapore IPA (draft for signature) as on February, 2019.

should, in principle, be taken into account. It is up for discussion whether statements and evidence that were not introduced in the initial arbitration proceedings could be introduced now. From the point of view of process efficiency, this would not be preferable.

629 There should be the opportunity to withdraw the appeal at any time. However, a decision on costs should also be possible at the request of the appellant. The withdrawal of the appeal should result in the discontinuation of the suspensive effect of the appeal and, at the same time, the loss of the right to a new appeal.

9.3 Specific Issues

9.3.1 Duration of Proceedings

630 The WTO Dispute Settlement Procedure provides for a maximum of 60 days for an appeal proceeding but in no case should it take longer than 90 days.[20] The duration for a MIAM appeals procedure duration should also be kept short as it is staffed with full-time judges.[21] In any case, the principle of accelerated proceedings should apply. In individual cases, however, the respective chamber should be free to extend the duration of the appeals procedure for important reasons.

631 Should it come to repetitive procedural extensions due to an overburdening of the appeal mechanism, this would be an indication for the Plenary Body to increase the number of judges of the MIAM.

9.3.2 Scope of Examination and Investigative Jurisdiction

632 In the WTO Dispute Settlement Procedure, the jurisdiction of the Appellate Body is limited to the legal issues dealt with in the panel report and the corresponding interpretation of the law by the Panel.[22] The appeal procedure primarily serves the

[20] Article 17 para. 5 DSU: "As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days."

[21] An 180 day time period for completion of appeals proceedings is seen in in Art. 3.19 (4) EU-Singapore IPA (draft for signature), Art. 3.54(5) EU-Vietnam IPA (draft for signature) and Art. 30(3) EU-Mexico Global Agreement (draft for signature) as on February, 2019.

[22] Article 17 para. 6 DSU: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."

objective of legal control. The ICSID Secretariat proposals of 2004 stated that there should be a possibility to appeal against decisions based on the reasons given in Article 52 ICSID Convention as well as for a "clear error of law" or "serious error of fact".[23] In addition to the reasons set out in Article 52 of the ICSID Convention,[24] an appeal "due to errors in the application or interpretation of the applicable law, due to manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law" is provided for in CETA.[25] In WTO Law, very serious errors can lead to the annulment of a panel report.[26] Here it is criticised that two different concepts—annulment and appeal—would be mixed together.[27] However, it is not clear why an appeal panel should not be allowed to deal with both these concepts.

633 The applicable law in MIAM appeals also includes procedural law, which means that there should be a possibility for review of compliance with the procedural principles by the arbitral tribunal in the first instance proceedings. The question of whether fact-finding was properly carried out in the first instance should also be considered as a question of law, namely whether an "objective appreciation of the facts" has been carried out.[28] Additionally, a review of whether there were "serious errors of fact" should be specifically made.

634 In principle, it should be clarified whether a reference to Article 52 ICSID Convention should be made—and if so, whether the interpretation of this provision by ICSID arbitral tribunals should be given greater consideration. Alternatively, it must be clarified whether the reasons of annulment listed in Article 52 ICSID Convention and not included in the MIAM Statute should be included (see paras. 557 et seqq.). The jurisdiction of the MIAM should in principle be limited to arbitral decisions. It must be clarified whether the MIAM should also be given jurisdiction to annul the arbitral decision. In situations of bias of individual arbitrators in the initial arbitral proceedings, a distinction should be made between requests for suspension in an ongoing procedure and subsequent annulment (see para. 347).

635 As stated, the determination of the applicable substantive law can either be at the level of the Rules of Procedure of a Dispute Settlement Body or may be governed by

[23] ICSID Secretariat (2004), Annex, p. 4.

[24] Article 52 para. 1 ICSID Convention: "Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."

[25] Article 8.28 para. 2 CETA: "The Appellate Tribunal may uphold, modify or reverse a Tribunal's award based on: (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds set out in Article 52(1)(a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b)."

[26] Ohlhoff (2003), C.I.2., para. 106.

[27] EFILA (2016), pp. 29 et seq.; American Bar Association Section on International Law (2016), p. 78.

[28] According to Ohlhoff (2003), C.I.2., para. 106.

the applicable bilateral and multilateral investment protection treaties. In this respect, the applicable law in the case of the MIAM should primarily be determined by the law already applied by the arbitral tribunal. However, it should also be possible to assess, within the scope of MIAM's jurisdiction of review, whether the Arbitral Tribunal has applied the "right" substantive law in a justifiable manner.

9.3.3 Chamber and Plenary Decisions

636 The MIAM should be able to form chambers. Only "for good reason" should one of the disputing parties be able to request a plenary decision. Plenary decisions are of significant importance and prevent substantive differences in divergent decisions of different chambers.

637 The ICSID proposal provided for an appeal panel of 15 judges of different nationalities.[29] The WTO Appellate Body, however, has only seven members who decide in each case in chambers of three judges.[30] This relatively small number of appellate body members appears to have had no negative impact on the acceptance of the WTO DSU system so far. Based on this, it was also determined in CETA that decisions will be made in the Appellate Body in divisions of three.[31] In certain situations, chambers of 5, 7 or 9 judges could be formed. In case of the EU-Vietnam IPA, the EU-Singapore IPA and the EU-Mexico Global Agreement, the number of members of the appellate tribunal has been fixed at 6 with the possibility for formation of divisions consisting of 3 members.[32] If chambers are introduced, an obligation requiring exchange of views between all judges of the MIAM could be stipulated, as is the case with the WTO Appellate Body.[33]

[29]ICSID Secretariat (2004), Annex, p. 3: "Such a set of ICSID Appeals Facility Rules could provide for the establishment of an Appeals Panel composed of 15 persons elected by the Administrative Council of ICSID on the nomination of the Secretary-General of the Centre. The terms of the Panel members would be staggered. Eight of the first 15 would serve for three years; all others would be elected for six year terms. Each member would be from a different country. They would all have to be persons of recognized authority, with demonstrated expertise in law, international investment and investment treaties."

[30]Article 17 para. 1 sentence 3 DSU: "It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation."

[31]Article 8.28 para. 5 CETA: "The division of the Appellate Tribunal constituted to hear the appeal shall consist of three randomly appointed Members of the Appellate Tribunal."

[32]See, Art. 3.10 EU-Singapore IPA (draft for signature), Art. 3.39 EU-Vietnam IPA (draft for signature) and Art. 12 EU-Mexico Global Agreement (draft for signature) as on February, 2019.

[33]Working procedures for appellate review, Rule 4.3: "In accordance with the objectives set out in paragraph 1, the division responsible for deciding each appeal shall exchange views with the other Members before the division finalizes the appellate report for circulation to the WTO Members. [. . .]." In this sense, Alvarado Garzón (2019), p. 491.

9.3.4 Decision on the Bias of Arbitrators in the Initial Arbitral Proceedings and MIAM

The judges of the MIAM could be given the power to decide on the bias of arbitrators in the initial arbitral proceedings. The content of the IIAs and the arbitration rules underlying the first instance proceedings could be modified by the MIAM Statute if the home state of the claimant investor and the respondent state are both MIAM Members. If only the respondent state is a member, this jurisdiction will not be applicable (for the *inter se* amendment of multilateral treaties, see para. 498). **638**

The potential bias of judges of the MIAM should be decided by a third party, such as the ICJ.[34] Alternatively, test for bias could be delegated to another MIAM chamber or to the MIAM judge's plenary.[35] For the latter option, it is an additional advantage that a solution is found "within the system", but at the same time, this could also lead to lower objectivity in the decisions. **639**

9.3.5 Precedence Created by Second-Instance Judgments?

In principle, a precedent of MIAM judgments should only be accepted with regard to the interpretation of specific provisions of the agreement on which a specific decision was taken. In addition, such a binding effect could probably only be accepted for the MIAM, but not for future arbitration based on IIAs. However, it could be assumed that a MIAM can definitely contribute more to the formation of principles in investment protection law and, to that extent, to greater consistency in this area of law.[36] **640**

[34]Cf. as well American Bar Association Section on International Law (2016), Executive Summary & Conclusions and Recommendations, p. 14. Cf. Article 8.30 para. 2 CETA: "If a disputing party considers that a Member of the Tribunal has a conflict of interest, it shall send to the President of the International Court of Justice a notice of challenge to the appointment. The notice of challenge shall be sent within 15 days of the date on which the composition of the division of the Tribunal has been communicated to the disputing party, or within 15 days of the date on which the relevant facts came to its knowledge, if they could not have reasonably been known at the time of composition of the division. The notice of challenge shall state the grounds for the challenge."

[35]The EU-Singapore IPA (Art. 3.11) (draft for signature), EU-Vietnam IPA (Art. 3.40) (draft for signature) and EU-Mexico Global Agreement (Art. 13) (draft for signature) as on February, 2019 provide that challenges based on conflict of interest against a Member of a Tribunal or Appeal Tribunal will be heard by the President of the Tribunal or Appeal tribunal respectively. Challenges against the President of each tribunal is heard by the President of the other tribunal (Tribunal and Appeal Tribunal).

[36]See in this respect as well Kaufmann-Kohler and Potestà (2016), p. 69; Sauvant (2016), p. 29; Howard (2017), pp. 47 et seq.; UNCITRAL (2018), paras. 36 et seqq.; Li (2018), p. 948.

9.4 Decisions Rendered by the MIAM

641 Judgments of MIAM should have no direct effect on national law. As a rule, international courts and arbitral tribunals merely have an obligation to eliminate any identified international law infringements of national legal acts. This can also be mitigated by a mere obligation to indemnify, as is generally the case in investment protection law. In addition, the power to determine the existence of (unlawful) indirect expropriation and to determine the due amount of compensation should be stated in the individual investment protection agreements.

9.5 Enforcement of MIAM Decisions

642 The possibility for enforcement of decisions of a standalone appellate authority instead of an MIC would be difficult to estimate because it depends on the configuration of this appellate authority.

643 Judgments of the MIAM, in line with the criteria already set out for the MIC will not, be considered to be enforceable under the ICSID Convention. Enforcement of decisions under the ICSID Convention will continue to be subject to the above-mentioned obstacles: the ICSID Convention does not provide for an appeal and the decision of such an authority cannot in any case constitute an ICSID arbitration award. A modification of this provision between two states would be conceivable (see para. 498).

644 Whether an option for enforcement under the New York Convention is available is subject to great legal uncertainty and depends on the perspective of the specific national court.[37] If it concerns an appeal against arbitral awards rendered by ordinary arbitral tribunals, the condition of a voluntary submission of the parties could be fulfilled as the jurisdiction of the tribunals deciding in the first instance would be based on an established basis.

645 It is questionable whether, if the MIAM modifies or confirms the first-instance award, is it still an arbitral award that is enforceable under the New York Convention (see paras. 500 et seqq.). The conditions for the election of judges should certainly be also crucial for the qualification of an arbitral award in the sense of the New York Convention or as a judgment of an international court. If this is done by a plenary body and if the judges are full-time judges, it seems difficult for the decision to qualify as an enforceable award under the New York Convention (see paras. 516 et seqq.).[38]

646 However, the situation may be different if the case would be remanded to the original arbitral tribunal for a "reassessment taking into account the legal interpretation of MIAM", after being decided by the mechanism. In this case, it could be an

[37]For further discussion on status of appellate awards see, Potesta (2018), pp. 176 et seqq.

[38]Regarding this problem, see Kaufmann-Kohler and Potestà (2016), p. 70.

arbitral award within the meaning of the New York Convention, since ultimately in this situation an arbitral tribunal will make the final decision in every case.

A mere multilateral appeal would not pose any particular challenges to the finality and binding nature of decisions. Enforcement of an award under the New York Convention would only be possible if the decision is final, after the Appellate Body has finally ruled or when the time limit for appealing the first-instance award has expired. **647**

If a defeated MIAM Member appeals an arbitral award rendered under the ICSID Convention or the New York Convention, this may result in a decision which would no longer be enforceable under the ICSID Convention or the New York Convention and therefore fall outside the scope of application of those enforcement instruments, even if the appeal procedure is successful. Considering this situation an effective enforcement system should also be created in the MIAM Statute, so that a MIAM Member could not ultimately defend enforcement by a mere appeal to an arbitral award in the sense of the ICSID Convention or the New York Convention. The establishment of a stand-alone system comparable to the ICSID Convention or the New York Convention would therefore make sense for the MIAM due to the uncertainties mentioned. For this, however, a new convention for the recognition and enforcement of decisions of the MIAM would have to be developed. The ratification of such a separate recognition and enforcement convention by non-MIAM Member States would, however, be unlikely. Hence, an enforcement system under the MIAM Statute should be considered, but only the parties to this agreement would be bound. **648**

The enforcement fund appears to be a good way to offset this disadvantage. As an alternative, securities should be provided before an appeal, equal to the amount of the sum awarded in the arbitral award, plus legal costs.[39] **649**

The enforcement fund proposed above in the sense of a "security account" for the settlement of claims for damages arising from MIC decisions must therefore also be examined for the MIAM (see para. 539). **650**

9.6 Possibilities for Setting Up a MIAM

9.6.1 Establishment as an Independent International Organisation

An acceptance of MIAM decisions as arbitral awards within the meaning of the New York Convention seems quite questionable, as already discussed for the MIC alternative. As with the MIC, specific requirements should be laid down for the **651**

[39]The EU-Vietnam IPA (Art. 3.54(6)) (draft for signature) states that the Appellate Tribunal may determine the amount of security required to be posted based on the circumstances of the case.

appointment of judges and to support the proceedings before a MIAM, a Secretariat should be established.

652 The best option for an effective MIAM would be to establish it as an independent multilateral court of appeal in the sense of an independent international organisation. As an international organisation, a MIAM would enjoy legal personality under international and national law.[40] The MIAM Statute as a treaty should provide for both its own procedural law and its own enforcement provisions. The establishment of an international organisation would ensure the essential requirements for the functioning of an independent tribunal, such as functional immunity for judges, financially equal treatment of the state parties, the conclusion of a seat and immunity agreement and the like (see para. 547).

653 A connection to existing institutions is not desirable. Changes to the ICSID Convention to include this system in the ICSID framework would require unanimity, therefore such an option seems unrealistic,[41] especially as states that explicitly oppose the MIAM system are unlikely to agree to an amendment of the ICSID Convention.[42] Integration into the WTO system also appears to be unrealistic at the present time (see paras. 558 et seqq.).

654 However, an agreement between the MIAM and ICSID or the PCA or other arbitration institutions regarding support in terms of logistics and personnel could be envisaged. For example, a separate Secretariat of the MIAM could be dispensed with and the MIAM Secretariat tasks could be dealt with externally.[43] Hearing facilities and Secretariat support from existing institutions, such as the ITLOS, could be used.

655 Additionally, the project of judicial multilateralisation of an investment dispute settlement system with the support of OECD, UNCITRAL and UNCTAD should be promoted (see para. 563).[44]

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[40] Cf. Article 18 sentence 1 ICSID Convention; Article VIII:1 WTO Agreement, Article 47 TEU, Article 4 Rome Statute.

[41] Article 66 para. 1 ICSID Convention: "If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment."

[42] American Bar Association Section on International Law (2016), p. 120.

[43] For example, the Secretariat of the ICSID has been designated as the Secretariat for the Investment Tribunal and the Appeal Tribunal under Art. 3.09(16) and 3.10(14) EU-Singapore IPA (draft for signature), Art. 3.38(18) and 3.39(18) EU-Vietnam IPA (draft for signature) and Art. 11(17) and Art. 12(15) EU-Mexico Global Agreement (draft for signature) as on February, 2019.

[44] American Bar Association Section on International Law (2016), pp. 120 et seq.

9.6.2 Necessity of a Minimum Number of Members

A multilateral court of appeal should be open to accession by other states and REIOs. The MIAM Statute should only come into effect after a certain number of ratifications, for reasons of composition of the panel and greater acceptance of MIAM judgments. Such a step will also create guidance for subsequent arbitration practice, cost distribution etc. **656**

A MIAM makes sense for the EU even with only a minimum number of states. The new generation of agreements, such as the CETA and the EU-Vietnam IPA already contain an investment Court system which would then be replaced by the MIAM. **657**

From an EU perspective, all new agreements could provide MIAM jurisdiction. If the MIC system cannot be realised, it would need to be discussed whether the MIAM should still be set up. In their negotiations and renegotiations of trade, general economic, investment protection and association agreements, the EU and its Member States should ask the other parties to actively participate in the establishment of a MIAM. The EU and its Member States should seek the membership of the third states in a MIAM. **658**

9.6.3 Establishment of MIAM Jurisdiction

9.6.3.1 Establishment of MIAM Jurisdiction by Explicit Amendment of Existing Treaties and Through IIAs Concluded in the Future

The foregoing considerations are based on the premise that existing EU member state IIAs remain largely in force, which means that these existing IIAs will be modernised and Member State agreements will gradually be replaced by EU agreements. It is therefore necessary to show how this particular substantive network can be linked to a purely multilateral appeal system at the dispute settlement level. The immediate use of the existing IIA network has the advantage that the negotiating parties and the parties to the agreements of the EU and its Member States can be invited to join the MIAM through negotiations. **659**

An establishment of MIAM jurisdiction should be made by expressly declaring its jurisdiction in new agreements of the EU with other states that want to promote this new system. For this purpose, the MIAM Statute should stipulate that in future, all newly concluded agreements of the MIAM Members will provide for the possibility of appeal against the initial arbitral tribunal decisions at the MIAM. MIAM Members will endeavour in their treaty negotiations to promote the extension of the MIAM Member circle (in the sense of a declaration of intent). **660**

In that regard, it should be explicitly stated in agreements to be concluded by the EU that, after the establishment of a MIAM, that it alone will have jurisdiction over appeals against arbitral decisions and first-instance decisions of the ICS and that it, **661**

consequently, constitutes the ICS Court of Appeal.[45] Provisions should be made for the second instance of the ICS established in the bilateral EU Agreements to give up their respective jurisdiction and to transfer jurisdiction to a MIAM as soon as it is established and operational. Corresponding transitional rules are not provided for in either CETA or in the EU-Vietnam IPA—so far—but they should be included. The MIAM Statute would also be able to act as an amendment treaty to the EU agreements with non-member states regarding the transfer of jurisdiction of the second instance of the bilateral ICS in the agreements involving the EU to the MIAM, if the respective parties to the agreements with the EU also become MIAM Members. The required detailed changes of the existing bilateral treaties could be set out in protocols and declarations to the MIAM Statute.

662 Additionally, it should be stipulated in the EU agreements that the parties to the agreement will actively participate in and join the establishment of a MIAM. Further, the new EU free trade and/or investment protection agreements that will be negotiated in the future with third countries should also stipulate that both parties to the agreement will actively participate in the promotion of a multilateral investment protection system ("snowball system").

663 Existing EU agreements will be reformed, renegotiated etc. It should be specified that in the future, the EU will also include the MIAM in all reform negotiations of existing treaties. For investment disputes, the EU shall take into account the membership of its partners in the MIAM. For example, the agreements with Mexico and South Korea could be complemented by investment protection chapters,[46] which also provide for a jurisdiction of the MIAM for legal remedies in investment protection matters.

664 In the long term, EU Member States could also use their bargaining power to reform old agreements with their respective parties to the agreement, encourage them to become members of MIAM, introduce legal remedies in the field of investment law, and also to work in agreements with other states to establish MIAM's jurisdiction ("snowball system").

665 The modified Member State IIAs could in turn include a clause stating that MIAM, after its establishment, has the jurisdiction to decide on legal disputes in investments on the basis of Member States IIAs.

666 Part of the Member States' IIAs could therefore, in the long term, after amendment, establish a jurisdiction of the MIAM Appellate Body.[47]

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[45] A possibility for appeal of Investor State Dispute Settlement Awards has been foreseen *inter alia* in Art. 29, India-Belarus BIT, 2018; Art. 28(10), USA-Uruguay BIT, 2005; Art. 28(10), USA-Rwanda BIT, 2008; Annex 8-E, Chapter 8, Canada-Republic of Korea FTA, 2014.

[46] See European Commission (2015), pp. 35 and 37. The pending negotiations with Mexico and the already available investment protection chapter do nevertheless not include indications how the dispute settlement mechanism should be designed.

[47] List of the bilateral investment agreements referred to in Article 4 para. 1 of Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third

9.6.3.2 MIAM Statute as an Opt-in Convention to Amend Existing IIAs

667 The MIAM Statute could also be designed as an opt-in convention. With each accession of the parties to an IIA, MIAM would complement other dispute resolution mechanisms established in the respective IIA. This applies in all cases where both/all parties to the disputed IIA are also members of the MIAM. The MIAM could have jurisdiction if, in the context of legal proceedings against the EU or its Member States (assuming that the EU and its Member States are parties to the MIAM), the third country where the complaining investor comes from (and the investor refers to IIAs of its home country with the EU or its Member State(s)) is also a party to the MIAM. In this case, a consensual treaty amendment (a bilateral treaty through a multilateral treaty) can be assumed.[48]

668 The existing IIAs between MIAM Members, then would not have to be explicitly amended or renegotiated. Consequently, MIAM's jurisdiction could be based on an opt-in convention comparable to the Mauritius Convention[49]—insofar as the MIAM Statute is concerned—and the MIAM Statute obliges states to additionally offer an opportunity to appeal by MIAM. The MIAM Statute and accession to it would then give MIAM jurisdiction to appeal against decisions of arbitral tribunals or the first instance of an ICS.

669 Comparable to the Mauritius Convention, it should be foreseen that the establishment of MIAM jurisdiction via MFN clauses is excluded.[50] In addition, those who accede to the MIAM should submit lists to the MIAM Secretariat, which should state all their respective agreements which establish MIAM jurisdiction. These lists should also be published.

670 The new opt-in convention could establish the jurisdiction of MIAM, as the Mauritius Convention does,[51] for example if only the EU and its Member States as respondents are party to MIAM but not the state of origin of the claimant, a "unilateral offer of application"[52] could be made by the member states through an

countries, OJ C 149 of 27.4.2016, p. 1 according to which the United Kingdom currently has concluded 94 bilateral investment agreements.

[48]Cf. Article 39 VCLT: "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."

[49]United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency), has been concluded on 10.12.2014 and entered into force on 18.10.2017.

[50]Article 2 para. 5 Mauritius Convention: "The Parties to this Convention agree that a claimant may not invoke a most favoured nation provision to seek to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention."

[51]Cf. Article 2 para. 2 Mauritius Convention: "Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), and the claimant agrees to the application of the UNCITRAL Rules on Transparency."

[52]So Kaufmann-Kohler and Potestà (2016), p. 86.

opt-in convention which could be accepted by the respondent. This alternative would, however, unlike a unilateral establishment of jurisdiction within a two-tiered solution, raise considerable additional problems. Therefore, it would have to be stated exactly as to at what time the jurisdiction of the MIAM should be constituted by acceptance of the unilateral offer, that is, for example, whether by filling a claim against a MIAM Member (which also provides a "unilateral offer") the full acceptance of the jurisdiction of MIAM by the claimant and the respondent would take place at the same time. In this context, in the interest of legal certainty for both the investor and the respondent, it would need to be clarified as soon as possible to whether the MIAM should be competent in such a case.

671 In principle, the *ad hoc* inclusion of an appeal and thus the establishment of jurisdiction in the case of non-membership of the respondent should be rejected. In particular, there would be no incentive to join MIAM if *ad hoc* decisions were taken on whether or not to recognise jurisdiction in appeal proceedings.

672 The MIAM Statute could also apply to multilateral treaties such as the ECT and be agreed upon as a future Appellate Body in the field of investment protection. However, this would require either an explicit amendment of the ECT in accordance with Article 42 ECT with three quarters of the parties to the agreement, but the amendment would only apply to the parties that approved it. Alternatively, an *inter se* modification of the ECT by individual parties in accordance with Article 41 VCLT could again be an option. In any event, in the case of non-ICSID proceedings, MIAM jurisdiction may be assumed if both the respondent and the home state of the complaining investor are members of MIAM (within the meaning of Article 41 para. 1 lit. (b) VCLT). According to Article 16 ECT no deterioration of the legal positions of investors may occur through subsequent treaty modifications.[53] However, the introduction of an additional appeal may hardly be considered as deterioration, if otherwise substantive protective positions as well as the fundamental ISDS possibility remained untouched. In addition, ICSID procedures based on the ECT would still be possible with the corresponding direct ICSID enforcement mechanism. A problem with investment protection proceedings in the area of the ECT would be that the first-instance arbitral decisions would continue to be enforceable in third countries.

673 In doing so, the MIAM Statute should specify that there is a particular jurisdiction:

[53] Article 16 ECT: "Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty, (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favorable to the Investor or Investment."

a) if, in the future, which means after the MIAM Statute enters into force and on accession thereto, an IIA is concluded between MIAM States and an investment arbitration is carried out on the basis of this IIA;
b) if an IIA has in the past been concluded between two MIAM Member States and a consensual establishment of jurisdiction for that existing agreement has been given by the MIAM Statute (a list of these agreements should be sent to the MIAM Secretariat for reasons of legal certainty; lists do not have to be exhaustive) and an investment arbitration is carried out on the basis of this IIA; and
c) where applicable, if an IIA has been designated in the list by a MIAM Member State (unilateral establishment of jurisdiction for already existing treaties), which then presents the problem, at which time the jurisdiction of MIAM must be accepted by the investor and on the basis of this IIA investment arbitration is carried out.

9.7 Transitional Provisions and System Conformity of a MIAM

674 The MIAM Statute should be seen as an amendment to existing agreements such as the EU-Vietnam IPA and CETA (see paras. 247 et seqq.), since this is a later multilateral agreement amending the bilateral agreements among certain parties to the respective agreement (see in that regard, Article 30 para. 3 and Article 41 VCLT). However, future EU agreements should state that the respective bilateral dispute settlement mechanism should be modified and amended by the jurisdiction of the MIAM for appeal when the MIAM Statute enters into force and the respective party has joined the MIAM together with the EU. At the same time, transitional provisions should be included in the agreements of the EU under negotiation, in the event that MIAM commences to operate in the future. In that regard, provision may be made for dispute settlement procedures already pending in the respective ICS system to be terminated by the respective bilateral dispute settlement system in the respective instance, but an appeal can only be lodged before the MIAM.

675 In addition, transitional provisions should be made for judges of the second instance of an ICS already appointed under bilateral agreements, provided that this second instance is to be replaced by the MIAM; for example, the CETA ICS judicial remuneration system adopted by the Joint CETA Committee[54] may already indicate that once the MIAM enters into force, it will no longer be allowed to appeal to the relevant CETA ICS and therefore for the CETA judges concerned, no further retainer fee will be paid from a certain date on.

676 When new members join the MIAM Statute, the financing quotes must be adjusted accordingly. Representation in plenary should immediately be possible.

[54]Cf. Article 8.27 para. 12 CETA: "In order to ensure their availability, the Members of the Tribunal shall be paid a monthly retainer fee to be determined by the CETA Joint Committee."

Since MIAM accession will not involve market access obligations as in WTO Law, but only the recognition of MIAM as a court of appeal for clearly regulated types of disputes, a MIAM accession should be a matter of unproblematic bargaining.

677 MIAM could also provide in its Statute for jurisdiction to be extended to investment disputes based on investor-state contracts. The freedom of contract when concluding an investor-state contract includes the freedom of selection of dispute settlement options.

9.8 Working and Procedural Language of the MIAM

678 For cost reasons, provisions on the working and procedural languages of the MIAM must be regulated. As with the MIC, there are good reasons for using English as a working language (see para. 602).

9.9 Costs of the New System

679 The rules on financing the expected permanent costs of the MIAM, i.e. the staff of the Secretariat, the judges, as well as the necessary infrastructure in the form of facilities, equipment etc., will have to be drafted. From an economic point of view, MIAM makes sense only with a critical mass of Member States sharing the costs of such a permanent Appellate mechanism. For example, it would certainly reduce the cost of having a large number of judges in EU bilateral investment tribunals, if the second instance of the respective investment court system could be closed and the MIAM takes over their task.[55] At a manageable cost, MIAM offers a way to compensate for the currently discussed deficiencies within the existing ISDS system, but also as stated in the context of CETA ICS, to ensure greater acceptance in international investment protection procedures.

680 The MIAM, like other international organisations, should be financed primarily by members' contributions, i.e. by the parties to the agreement. Expenditure would determine the necessary amount, which should be collected proportionally from the members. Similar to the WTO,[56] the quota of MIAM Members could be calculated by the proportion of foreign direct investment in relation to the share of total investment of all MIAM Members.

681 With regard to the question of whether court fees should be established, reference may be made to the comments on the MIC (see paras. 306 et seqq.).

[55]Hodgson (2014), p. 3 assumes cost amounting to US$373,200 per procedure and party.

[56]Cf. https://www.wto.org/english/thewto_e/secre_e/contrib_e.htm.

9.10 Overview of Necessary Agreements Etc.

The following agreements and secondary legislation, among others, appear necessary for the establishment of a MIAM: **682**

- Statute of a Multilateral Investment Appellate Mechanism including a code of conduct for the judges (MIAM Statute);
- Immunity agreements between the Member States of the MIAM (Agreement on the Privileges and Immunities of the MIAM);
- Seat agreement between the MIAM (with its own legal personality) and the host state
- Procedural rules of the MIAM;
- Guidelines for the essential content of an application;
- Guidelines for the conduct of oral proceedings;
- Guidelines on court costs (if applicable);
- Guidance on security;
- Retirement provisions for the MIAM staff.

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