

# Contents

|          |  |           |
|----------|--|-----------|
| <b>1</b> | <b>Executive Summary</b> . . . . .   | <b>1</b>  |
| 1.1      | Preliminary Considerations Regarding the Establishment of the MIC/MIAM . . . . .           | 3         |
| 1.2      | Organisational Structure . . . . .   | 4         |
| 1.3      | Procedure of the MIC . . . . .   | 5         |
| 1.4      | Applicable Law of the MIC . . . . .  | 6         |
| 1.5      | Legal Remedies and Enforcement of MIC Decisions . . . . .                                  | 6         |
| 1.6      | Establishment of a Standalone Multilateral Investment Appellate Mechanism (MIAM) . . . . . | 7         |
|          | References . . . . .   | 7         |
| <b>2</b> | <b>Introduction</b> . . . . .  | <b>9</b>  |
|          | References . . . . .   | 13        |
| <b>3</b> | <b>Targets for the Reorganisation of the Investment Protection Regime</b> . . . . .        | <b>17</b> |
| 3.1      | Positive Effects of a New Approach . . . . .   | 17        |
| 3.1.1    | Consistency of Decisions . . . . .   | 18        |
| 3.1.2    | Greater Legitimacy . . . . .   | 19        |
| 3.1.3    | Independence and Neutrality of Judges . . . . .  | 19        |
| 3.1.4    | Lack of a Control Mechanism . . . . .  | 20        |
| 3.1.5    | Cost Efficiency . . . . .  | 20        |
| 3.1.6    | Access for SMEs . . . . .  | 21        |
| 3.1.7    | Transparency . . . . .   | 22        |
| 3.1.8    | Time Efficiency . . . . .  | 22        |
| 3.2      | Advantages of the Two-Tiered MIC Option . . . . .  | 23        |
|          | References . . . . .   | 24        |
| <b>4</b> | <b>Design and Implementation of a Two-Tiered MIC</b> . . . . .                             | <b>29</b> |
| 4.1      | Institutional and Procedural Design . . . . .  | 31        |
| 4.1.1    | Members of an MIC . . . . .  | 31        |
| 4.1.2    | Plenary Body . . . . .   | 32        |

|          |   |    |
|----------|---|----|
| 4.1.2.1  | Appointment of Judges Through the Plenary Body . . . . .                                      | 33 |
| 4.1.2.2  | Adoption of Specific Secondary Rules . . . . .  | 41 |
| 4.1.2.3  | Requirement of Majority for Decision Making . . .   | 42 |
| 4.1.2.4  | Transparency in Proceedings of the Plenary Body . . . . .                                     | 43 |
| 4.1.2.5  | Seat of the Plenary Body and Frequency of Meetings . . . . .                                  | 43 |
| 4.1.3    | Judges at the MIC . . . . .   | 44 |
| 4.1.3.1  | Full- or Part-Time Judges . . . . .   | 44 |
| 4.1.3.2  | Qualification . . . . .   | 45 |
| 4.1.3.3  | Independence . . . . .  | 47 |
| 4.1.3.4  | Ethics . . . . .  | 47 |
| 4.1.3.5  | Availability . . . . .  | 51 |
| 4.1.3.6  | Remuneration . . . . .  | 51 |
| 4.1.3.7  | Oath of Office . . . . .  | 52 |
| 4.1.3.8  | Immunity . . . . .  | 53 |
| 4.1.3.9  | Parallel Engagements . . . . .  | 53 |
| 4.1.3.10 | Appointment/Election by the Parties to the Agreement . . . . .                                | 54 |
| 4.1.3.11 | Duration of Appointment and Rotating Reappointment . . . . .                                  | 55 |
| 4.1.3.12 | Decisions on Instances of Bias by Judges . . . .  | 56 |
| 4.1.3.13 | Termination of the Appointment . . . . .  | 57 |
| 4.1.3.14 | Removal from Office . . . . .   | 57 |
| 4.1.4    | President of the Court and Vice President of the Court . . .                                  | 58 |
| 4.1.5    | Plenary Decisions, Chambers and Single Judges . . . . .                                       | 58 |
| 4.1.6    | Appellate Mechanism . . . . .   | 61 |
| 4.1.7    | Secretariat . . . . .   | 61 |
| 4.1.8    | Advisory Centre . . . . .   | 63 |
| 4.2      | The Complaints Procedure Before the MIC . . . . .   | 64 |
| 4.2.1    | Jurisdiction of the MIC . . . . .   | 64 |
| 4.2.1.1  | Membership of the Respondent State and of the Home State of the Investor in the MIC . . . . . | 64 |
| 4.2.1.2  | (Written) Consent to the Jurisdiction of the MIC . . . . .                                    | 66 |
| 4.2.1.3  | Jurisdiction <i>Ratione Personae</i> . . . . .  | 68 |
| 4.2.1.4  | Jurisdiction <i>Ratione Materiae</i> . . . . .  | 69 |
| 4.2.1.5  | Jurisdiction <i>Ratione Temporis</i> . . . . .  | 70 |
| 4.2.1.6  | Avoidance of Abuse of Process and Negative Admissibility Requirements . . . . .               | 70 |
| 4.2.2    | Relationship of the MIC to Other Courts and Arbitral Tribunals . . . . .                      | 75 |
| 4.2.3    | The Relationship with Domestic Courts . . . . .   | 77 |

|          |  |            |
|----------|--|------------|
| 4.2.4    | The Relationship with Inter-State (Arbitration) Dispute Settlement . . . . .                             | 78         |
| 4.2.5    | General Procedure Before the MIC . . . . .   | 79         |
| 4.2.5.1  | Compulsory Consultations? . . . . .  | 80         |
| 4.2.5.2  | First Instance Procedure . . . . .   | 82         |
| 4.2.5.3  | Second Instance Procedure/Appeal . . . . .   | 102        |
| 4.2.6    | Consolidation of Pending Procedures at the MIC . . . . .   | 110        |
|          | References . . . . .   | 110        |
| <b>5</b> | <b>Applicable Law . . . . .</b>  | <b>117</b> |
| 5.1      | Applicable Substantive Law . . . . .   | 119        |
| 5.1.1    | EU Law as Applicable Substantive Law? . . . . .  | 121        |
| 5.1.2    | Uniform Interpretation of Standards of Protection . . . . .  | 123        |
| 5.1.2.1  | Permanency of the Treaty Interpreters<br>at the MIC . . . . .  | 124        |
| 5.1.2.2  | Harmonising Interpretation Mandate . . . . .   | 126        |
| 5.1.3    | Ensuring a Neutral and Objective Interpretation<br>of Standards of Protection . . . . .                  | 127        |
| 5.1.3.1  | Clarification and Limitation of Investment<br>Protection Standards in Investment<br>Agreements . . . . . | 127        |
| 5.1.3.2  | Limiting the Mandate for Interpretation . . . . .  | 130        |
| 5.1.3.3  | Authentic Interpretation by the Parties . . . . .  | 131        |
| 5.1.3.4  | Composition of the MIC: Impartial<br>and Independent Judges . . . . .                                    | 132        |
| 5.2      | Applicable Procedural Law and Procedural Principles . . . . .  | 134        |
| 5.2.1    | Transparency . . . . .   | 136        |
| 5.2.2    | Efficiency . . . . .   | 139        |
| 5.2.3    | Practice of Judicial Investigation and Limitation<br>of the Subject Matter of the Dispute . . . . .      | 142        |
|          | References . . . . .   | 144        |
| <b>6</b> | <b>The Pronouncement of Decisions and Its Consequences . . . . .</b>                                     | <b>149</b> |
| 6.1      | Legal Effects of Decisions of International Dispute Settlement<br>Bodies . . . . .                       | 149        |
| 6.2      | Effects of Decisions of Investment Arbitral Tribunals . . . . .  | 151        |
|          | References . . . . .   | 154        |
| <b>7</b> | <b>Recognition and Enforcement of Decisions . . . . .</b>  | <b>155</b> |
| 7.1      | Decisions of the MIC as Arbitral Awards Within the Meaning<br>of the ICSID Convention . . . . .          | 159        |
| 7.2      | Decisions of the MIC as Arbitral Awards Within the Meaning<br>of the New York Convention . . . . .       | 161        |
| 7.2.1    | Voluntary Submission by the Parties . . . . .  | 162        |
| 7.2.2    | Final and Binding Dispute Resolution . . . . .   | 164        |

|          |   |            |
|----------|---|------------|
| 7.2.3    | Non-State Decision-Makers . . . . .   | 165        |
| 7.2.4    | Arbitrator Selection by the Parties . . . . .   | 166        |
| 7.2.5    | Foreign, Non-Domestic and Anational Awards . . . . .  | 166        |
| 7.2.6    | Litigation Between Natural or Legal Persons . . . . .   | 168        |
| 7.2.7    | MIC as a “Permanent Arbitral Body” Under Article I<br>Para. 2 NYC . . . . .   | 169        |
| 7.2.8    | Reservation on “Commercial Matters” Under Article I<br>Para. 3 NYC . . . . .  | 169        |
| 7.3      | Recognition and Enforcement of Decisions of the MIC . . . . .   | 171        |
|          | References . . . . .  | 172        |
| <b>8</b> | <b>Possibilities for the Establishment of an MIC and a Possible<br/>Connection to Existing Institutions and System Conformity . . . . .</b> | <b>175</b> |
| 8.1      | Practical Implementation of the Establishment of an MIC . . . . .   | 175        |
| 8.2      | Structuring the MIC as an International Organisation . . . . .  | 177        |
| 8.3      | Connection to Existing Institutions . . . . .   | 179        |
| 8.4      | Entry into Force of the MIC Statute Only with a Minimum<br>Number of Members . . . . .  | 182        |
| 8.5      | Establishment of MIC Jurisdiction by Explicit Modification<br>of Existing and Future IIAs . . . . .   | 183        |
| 8.5.1    | Conclusion of New IIAs and FTAs with Investment<br>Chapters . . . . .   | 184        |
| 8.5.2    | Renegotiation and Reform of Existing EU Economic<br>Agreements . . . . .  | 185        |
| 8.5.3    | Inclusion of “IIA Networks” of the Member States<br>in the Establishment of MIC Jurisdiction . . . . .                                      | 185        |
| 8.6      | The MIC Statute as Opt-In Convention for the Modification<br>of Existing IIAs . . . . .   | 186        |
| 8.6.1    | The Standard Case: Consensus on the Establishment<br>of MIC Jurisdiction . . . . .  | 187        |
| 8.6.2    | Exceptional Cases: Jurisdiction of the MIC Even if the<br>Home State of the Investor Is Not an MIC Member? . . . .                          | 189        |
| 8.6.3    | Jurisdiction of the MIC in Case of Multilateral IIAs . . . . .  | 190        |
| 8.6.4    | Summary of the Establishment of MIC Jurisdiction . . . . .  | 190        |
| 8.7      | Transitional Provisions and System Conformity of the MIC . . . .  | 191        |
| 8.8      | Working Language and Language of Proceedings at the MIC . . .   | 192        |
| 8.9      | Cost Distribution in the New System . . . . .   | 193        |
| 8.10     | Overview of the Necessary Agreements and Secondary<br>Instruments . . . . .   | 194        |
|          | References . . . . .  | 195        |
| <b>9</b> | <b>Standalone Appeal Mechanism: “Multilateral Investment Appeals<br/>Mechanism” (MIAM) . . . . .</b>  | <b>197</b> |
| 9.1      | Organisational Structure of the MIAM . . . . .  | 198        |
| 9.2      | General Procedure of the MIAM . . . . .   | 199        |

- 9.3 Specific Issues . . . . . 202
  - 9.3.1 Duration of Proceedings . . . . . 202
  - 9.3.2 Scope of Examination and Investigative Jurisdiction . . . . . 202
  - 9.3.3 Chamber and Plenary Decisions . . . . . 204
  - 9.3.4 Decision on the Bias of Arbitrators in the Initial Arbitral Proceedings and MIAM . . . . . 205
  - 9.3.5 Precedence Created by Second-Instance Judgments? . . . . . 205
- 9.4 Decisions Rendered by the MIAM . . . . . 206
- 9.5 Enforcement of MIAM Decisions . . . . . 206
- 9.6 Possibilities for Setting Up a MIAM . . . . . 207
  - 9.6.1 Establishment as an Independent International Organisation . . . . . 207
  - 9.6.2 Necessity of a Minimum Number of Members . . . . . 209
  - 9.6.3 Establishment of MIAM Jurisdiction . . . . . 209
    - 9.6.3.1 Establishment of MIAM Jurisdiction by Explicit Amendment of Existing Treaties and Through IIAs Concluded in the Future . . . . . 209
    - 9.6.3.2 MIAM Statute as an Opt-in Convention to Amend Existing IIAs . . . . . 211
- 9.7 Transitional Provisions and System Conformity of a MIAM . . . . . 213
- 9.8 Working and Procedural Language of the MIAM . . . . . 214
- 9.9 Costs of the New System . . . . . 214
- 9.10 Overview of Necessary Agreements Etc. . . . . 215
- References . . . . . 215
- Index (refers to page numbers) . . . . . 217**