Chapter 7
Recognition and Enforcement of Decisions

A key issue for any dispute resolution mechanism is the question of effectiveness of decisions. This is ensured by the fact that these are not only final and binding (see paras. 469 et seqq.), but also legally enforceable if necessary. **479**

The distinction between recognition and enforcement of decisions has little practical relevance,[1] especially because due to international enforcement mechanisms such as the ICSID Convention[2] or the New York Convention,[3] no separate recognition procedure (in the sense of a double *exequatur*) is required for enforcement. **480**

This enforceability could theoretically be ensured by international institutions (for example, measures of the UN Security Council for enforcing judgments of the ICJ),[4] but is usually guaranteed through the support of state courts. **481**

The prevailing model in investment arbitration is the recognition and enforcement of awards through state courts in third countries according to the provisions of the ICSID Convention or the New York Convention. Both conventions state that arbitral awards are final and binding on the specific parties to the dispute and that they can be recognised and enforced also in other states which are a party to the treaty, but were not involved in the investment dispute. **482**

In practice, it often occurs that losing state parties do not comply with their obligations resulting from awards; in such cases, the prevailing party often has the only a chance to successfully enforce the award if the assets of the losing party are **483**

[1] Toope (1990), pp. 102 et seq.; however, an important distinction is, that a decision, indeed, can be accepted as *res judicata*, but, at the same time can be unenforceable e.g. due to state sovereignty.

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18.3.1965, 575 UNTS 159; 4 ILM 532 (1965).

[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, 330 UNTS 38; 7 ILM 1046 (1968).

[4] Article 94 para. 2 UN Charter provides powers for the UN Security Council to enforce ICJ decisions.

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_7

located in a third state and can be accessed there via an enforcement procedure. Therefore, it would be useful for the MIC to have its own procedure permitting enforcement in third countries as well as in other MIC states at least. In addition, it must be examined whether the MIC can be designed in such a way that its decisions are considered as arbitral awards within the meaning of the ICSID Convention or the New York Convention. This would have the advantage that MIC decisions would be directly enforceable in the already numerous state parties to the two conventions and no separate or new enforcement mechanism would have to be created.

484 ICSID awards enjoy a particularly high level of enforceability. According to the ICSID Convention, ICSID awards have to be recognised as binding and their monetary content (namely compensation and damages) has to be enforced in a manner equivalent to a last-instance decision of its own state courts by all (currently 163[5]) parties to the ICSID Convention.[6] This means that a review as to whether the content of the specific ICSID award is in accordance with the *ordre public* or similar concepts has to be omitted. The only permissible restriction of enforceability is the law of state immunity in enforcement proceedings.[7]

485 In contrast, non-ICSID awards are governed by the provisions of the New York Convention (when enforcing it in one of the current 160[8] parties to the Convention). Non-ICSID awards include arbitral awards under the ICSID Additional Facility Rules,[9] via the UNCITRAL Rules, according to the Rules of the ICC,[10] the SCC[11] or the LCIA.[12]

486 Although investment arbitration awards are sometimes assumed to be "anational" or "internationalised" awards which have not been necessarily made in the territory of a party to the treaty, as non-domestic arbitral awards they are—according to

[5] As of 2.8.2019.

[6] Article 54 ICSID Convention: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. [. . .]."

[7] Article 55 ICSID Convention: "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

[8] As of 2.8.2019.

[9] Schreuer et al. (2009), pp. 1120 et seq.; see also Article 3 Additional Facility Rules: "Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein."

[10] ICC Rules of Arbitration 2012, www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Mediation/Rules/2012-Arbitration-Rules-and-2014-Mediation-Rules-ENGLISH-version/.

[11] Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 2010, www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf.

[12] LCIA, Arbitration Rules 1998, 37 ILM 669 (1998), www.lcia-arbitration.com; LCIA, Arbitration Rules 2014 www.lcia.org/dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

predominant opinion—[13] at least subject to the New York Convention (see paras. 526 et seqq.).[14]

Meanwhile, it is also largely agreed that investment arbitral awards, despite their special character (which often includes a review of sovereign state activities), have to be considered as "commercial" disputes for those states who have declared a corresponding reservation (see paras. 530 et seqq.)[15] to the New York Convention.[16] In particular, some investment protection agreements explicitly state this interpretation.[17] **487**

Furthermore, investment arbitration based on treaties, according to which there is no written *ex ante* arbitration agreement between the parties to the dispute, but rather arbitration based on a claim according to the provisions of the investment protection treaty,[18] is in practice not an obstacle to the requirement of a written agreement under the New York Convention.[19,20] **488**

[13] Article I para. 1 NYC: "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

[14] See Delaume (1993), pp. 48 et seq.; Delaume (1995), p. 170; Choi (1995–1996), pp. 190 et seq.

[15] Article I para. 3 NYC.

[16] See *United Mexican States v. Metalclad*, Canada, Supreme Court of British Columbia, 2.5.2001, [2001] BCSC 664, 5 ICSID Reports 236; *United Mexican States v. Feldman Karpa*, Canada, Ontario Court of Appeal, 11.1.2005, 9 ICSID Reports 508, 516, para. 41; *Czech Republic v. CME Czech Republic BV*, Sweden, Svea Court of Appeal, 15.5.2003, 9 ICSID Reports 439, 493.

[17] E.g. Article 1136 para. 7 NAFTA: "A claim that is submitted to arbitration shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the Inter-American Convention." Article 26 para. 5 lit. b) ECT: "Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of that Convention."

[18] Cf. Paulsson (1995), p. 232.

[19] Article II para. 1 NYC: "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

[20] See *Republic of Ecuador v. Occidental Exploration and Production Company*, England, Court of Appeal, 9.9.2005, [2005] EWCA 1116, 12 ICSID Reports 129. Cf. Article 26 para. 5 lit. a) ECT: "The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for: [. . .] (ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 [hereinafter referred to as the New York Convention]." Cf. also Article 25 para. 2 lit. b) US Model BIT 2004; Article 28 para. 2 lit. b) Canadian Model BIT 2004.

489 Similarly like the ICSID Convention, the New York Convention obliges all parties to the agreement to recognise and enforce arbitral awards.[21] Enforcement may be rejected by the restrictions of sovereign immunity. In addition, Article V NYC states more far-reaching exceptions, according to which a conflict with the *ordre public*, the invalidity of the arbitration agreement (for instance due to legal incapacity of the parties or another lack of will), a violation of the right to be heard, lack of jurisdiction of the tribunal, a flawed constitution of the arbitral tribunal or a lack of binding legal force and/or the annulment of the arbitral award according to the *lex arbitri* or the law of the state of residence can lead to the refusal of enforcement.[22]

490 Although enforcement under the ICSID Convention has the advantage that the awards do not have to withstand a review by the executing State, the New York Convention is considered as an effective and established enforcement mechanism as well.

491 A substantive revision of the award is only permitted to a very limited extent in both conventions and the successful claimant only has to have the award being declared enforceable in the state of enforcement. Another advantage of the conventions is that there is already plenty of court practice. The respective enforcement courts could thus be guided by their experience and parties could to a certain extent rely on past cases.

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[21] Article III NYC: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

[22] Article V NYC: "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

Accordingly, qualifying decisions of the MIC as arbitral awards within the meaning of the ICSID Convention or the New York Convention would be useful in terms of effective enforceability. That could have prompted the EU Commission to describe the decisions of the permanent investment courts in CETA, the EU-Vietnam IPA and the TTIP draft as arbitral awards within the meaning of the ICSID Convention. 492

In the following paragraphs, it will therefore be examined to what extent the decisions of a permanent MIC can be qualified as arbitral awards in the sense of the ICSID Convention or the New York Convention. 493

However, it has to be pointed out at the outset, that in both the enforcement regime of the ICSID Convention as well as the New York Convention, the national courts having jurisdiction over enforcement are responsible for the interpretation and application of the conventions. Most of the terms of the conventions are defined by national law. Hence, there is no consistent interpretation and enforcement practice worldwide. The national conflict-of-law rules and the *lex arbitri* may also have an impact on the outcome of the application of the convention through the national courts. For this reason, the following statements always have to be understood with the proviso that an attempted enforcement of an MIC decision could be very different, depending on the state in which it is handed down. 494

7.1 Decisions of the MIC as Arbitral Awards Within the Meaning of the ICSID Convention

The provisions of the ICSID Convention outlined above clearly refer to "arbitral awards under this Convention",[23] i.e. in order to benefit from the particularly effective enforcement regime of the ICSID Convention, it has to be an ICSID arbitral award. 495

It seems impossible that decisions of a permanent MIC could be considered as ICSID arbitral awards. The ICSID Convention provides a specific method for constituting the panels, certain rules of procedure, the exclusion of legal remedies such as appeals and similarly only very limited review mechanisms in the form of annulment procedures and interpretation and revision of arbitral awards.[24] The approaches discussed above of designing an MIC and its decisions contradict all these conditions, which have to be fulfilled to qualify a decision as an ICSID award. 496

However, it would be conceivable to consider the decisions of the MIC as an ICSID award after *inter se* modification of the ICSID Convention, thus as a modification only between those involved and not between all parties to the 497

[23] Article 54 ICSID Convention: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. [...]."

[24] Reinisch (2016), pp. 765 et seq.

agreement. According to the principles codified in the VCLT, an *inter se* modification of a multilateral treaty between various states which agree to do so, requires that the other parties to the agreement are impaired neither in their rights nor in their obligations and that the modification is not incompatible with the object and purpose of the treaty as a whole.[25]

498 Regarding the ICSID Convention, a modification would probably not affect the rights and obligations of other ICSID States, such that the assessment of the permissibility of the modification depends on what the exact object and purpose of the ICSID Convention is. If the object and purpose of the ICSID Convention is to provide a dispute settlement mechanism between investors and states, which can be inferred from Article 1 para. 2 ICSID Convention and not the specific form of dispute resolution in force, a modification for MIC decisions is likely to be allowed.[26] However, this is not undisputed[27]; but even if an *inter se* modification of the ICSID Convention would be considered admissible, the resulting decisions could not be qualified as ICSID awards, rather at best as arbitral awards for the modifying parties; only they would be obliged to enforce it.

499 Therefore, it would be better to consider a general revision of the ICSID Convention in order to achieve a far-reaching enforceability of MIC decisions as ICSID arbitral awards. The ICSID Convention requires the consent of all parties for a revision of the Convention. For practical reasons, this consensus is very difficult to achieve.[28] Hence, it makes sense to examine the alternative of whether decisions of an MIC can be considered as arbitral awards within the meaning of the New York Convention and thus are subject to its recognition and enforcement regime.

[25]Cf. Article 41 VCLT.

[26]A modification of the ICSID Convention between states consenting hereto, requires that the remaining Member States neither are affected in their rights nor in their obligations, and that the modification is not contradictory with the object and the purpose of the treaty as a whole (as stated in Article 41 VCLT and, even though not undisputed, provided in customary law). Since a modification most probably would not affect the rights and obligations of other ICSID Member States, the admissibility of the modification depends on the object and purpose of the ICSID Convention. If the object and purpose of the ICSID Convention would be a dispute settlement mechanism between investors and states, in reference to Article 1 para. 2 ICSID Convention, and the concrete design of this dispute settlement would not belong to the object and purpose, a modification for MIC decisions would presumably be admissible. For a closer analysis of this topic, see Reinisch (2016), p. 761.

[27]Calamita (2017).

[28]Schreuer et al. (2009), p. 1265.

7.2 Decisions of the MIC as Arbitral Awards Within the Meaning of the New York Convention

The decisions of the MIC would have to be arbitral awards under Article I NYC[29] in order to fall within the material scope of application of the New York Convention.[30] There is no single definition of the term "arbitral award". Neither the New York Convention, nor the UNCITRAL Model Law[31] contain a legal definition. The characterisation of a decision as an arbitral award thus falls within the competence of the courts having jurisdiction over enforcement or the respective national legal systems.[32] **500**

However, some similarities can be inferred from literature and court decisions on the definition of arbitral awards. In any case, the principle of "substance over form" prevails: the mere designation of a decision as such does not automatically make it an arbitral award.[33] **501**

The four constituent elements of an arbitral award are: (1) a voluntary submission of the parties (2) to a legally binding final dispute settlement (3) by a non-state decision-maker (4) which is constituted by arbitrators selected by the parties. The importance of this last element is considered diversely.[34] As the question whether a **502**

[29]Article I NYC: "(1) This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. (2) The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted."

[30]See on the contrary Petrochilos (2004), p. 378, para. 8.100, who considers that the classification of a decision as arbitral award by a legal order is no *ratione materiae* requirement for the applicability of the NYC; he disagrees expressly with Sanders by arguing that the NYC uses the term "awards" in a "rudimentary legal manner": "to refer to what is commonly known as 'award' and 'arbitration' [...] it uses autonomous terms, without reference to any law, to refer to the intrinsic characteristics of as type of proceedings." According to Petrochilos, the NYC should clarify explicitly, that "awards" are defined pursuant to a certain legal order like in other provisions of the NYC (e.g. Art. V NYC).

[31]Article 31 UNCITRAL Model Law regulates only "form and content of award". Herefrom it can be concluded that the awards are made by "arbitrators" of an "arbitral tribunal".

[32]Ehle (2012), pp. 32–34, concluding that from national laws and decisions no uniform or only predominant practice can be derived about whether the *lex fori*, the *lex arbitri*, a combination of both or an autonomous interpretation of the NYC is decisive for the characterisation of awards. Bermann (2014), pp. 13 et seq., concludes from a comparative law perspective that a considerable number of legal orders do not state a significant definition of awards, neither by law, nor by case law; in and about the same number of legal orders have a very broad definition of awards and a smaller group requires the finality and the legally binding effect of the decision for the definition of awards by copying Art. 31 UNCITRAL Model Law. Born (2014), pp. 246 et seqq.

[33]Ehle (2012), p. 35.

[34]Kaufmann-Kohler and Potestà (2016), para. 86; see Born (2014), p. 240, remarking on the prerequisites of "due process"; Ehle (2012), pp. 34–36, identifying two characteristics of all awards:

decision is an arbitral award under the New York Convention ultimately remains within the competence of the respective national courts having jurisdiction over enforcement, the possible enforceability of an MIC decision can only be tentatively assessed here.

7.2.1 Voluntary Submission by the Parties

503 Article I para. 2 NYC states that decisions which are enforceable under the New York Convention include those "to which the parties have submitted". This voluntary submission is considered to be a significant difference between arbitration and compulsory court jurisdiction.[35]

504 Party autonomy in arbitration proceedings, which manifests itself in a voluntary declaration of submission, proves to be a particularly important element of an arbitral award. Whether it is sufficient for such a declaration of submission that the parties fall within the scope of application of an international investment agreement, which compulsorily provides an arbitral tribunal for the purposes of dispute settlement, is controversial. An MIC would constitute such a compulsory dispute resolution system; investors, who fall within the scope of application of the respective agreement which provides for the dispute settlement jurisdiction of the MIC, could file claims against states only under the MIC system, without the individual investors having ever agreed to the MIC's authority.[36] Whether an MIC decision derives from

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they are made by a tribunal and are final and legally binding. This opinion focuses on the definition of the term "arbitral tribunal", which corresponds to the above mentioned "awards": "a private panel of one or more arbitrators appointed to resolve a dispute by way of arbitration instead of state court proceedings, deriving its authority and jurisdiction from an agreement between the parties." Ehle considers the compliance with principles of fair trial as a characteristic of arbitral tribunals. Additionally, the attribute, that tribunals are *ad hoc* institutions is repeatedly mentioned. However, in the context of the enforcement of MIC decisions through the New York Convention this characteristic does not have to be addressed, since Article I para. 2 NYC explicitly declares awards of permanent arbitral institutions as enforceable.

[35]See e.g. *Altain Khuder LLC v. IMC Mining Inc*, Victoria State Court, 2011, para. 295: "unlike court proceedings, arbitration proceedings are consensual"; Born (2014), pp. 249–251.

[36]A similar constellation is explicitly provided in Article 26 para. 5 ECT. This provision states that the consent of all parties to the ECT regarding the submission to arbitral tribunals is to be considered compliant with the ICSID Convention and New York Convention enforcement requirements. Article 26 para. 5 ECT: "(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for: (i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules; (ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and (iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules. (b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York

the voluntary submission of the parties would thus be one of the key points for the issue of enforceability under the New York Convention.

505 It is indisputable that the conclusion of an IIA which includes a general, compulsory dispute settlement system fulfils the requirement of voluntary submission in regard to the state party.[37] If an investor would like to file a claim against the state on the basis of an IIA and not under national law, the investor submits itself to one of the proposed dispute resolution mechanisms by bringing the dispute to arbitration. If this dispute settlement mechanism is the ICSID Convention, the resulting award can, according to prevailing opinion, also be enforced through the New York Convention and not just through the ICSID Convention.[38]

506 However, it is considered controversial in the context of the IUSCT whether an investor voluntarily submits itself as soon as it assigns the case to an arbitration tribunal and thus whether the submission element of an arbitration award according to the New York Convention is fulfilled. Since US or Iranian investors in investment disputes against Iran or the US may bring a case only before the IUSCT and not before domestic courts of the two states respectively, both literature[39] and courts[40] have considered that the lack of alternative dispute resolution options could undermine the voluntary nature of the submission.

507 However, in the few cases in which the New York Convention was used for the enforcement of awards of the IUSCT and the characterisation of the decision as an arbitral award was discussed,[41] the courts in general came to the conclusion that the submission of individual investors can be replaced through the consent of the

Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention." See also *Republic of Ecuador v. Occidental Exploration and Production Company*, England, Court of Appeal, 9.9.2005, [2005] EWCA 1116, 12 ICSID Reports 129; cf. also Article 25 para. 2 lit. b) US Model BIT 2004; Article 28 para. 2 lit. b) Canadian Model BIT 2004; Article 1136 para. 6 NAFTA.

[37] Paulsson (1995), p. 233; van Harten and Loughlin (2006), pp. 128 et seq.

[38] Van den Berg (1981), p. 99; Cane (2004), pp. 444 et seq.; Schreuer et al. (2009), p. 1119; Tawil (2009), p. 335, fn. 42; Lew et al. (2003), p. 801; Verhoosel (2009), pp. 310 et seq.

[39] Ehle (2012), pp. 54 et seq. takes the view that IUSCT cannot make awards in the sense of the New York Convention, since the Algiers Accords was made admissible based on public international law treaties and not based on private law declarations; hence, the element of voluntary submission, according to Ehle, is missing. Ehle concludes that arbitral tribunals established by law can never make arbitral awards in the sense of the NYC, based partly on the text of the convention, partly on the *travaux préparatoires*. Kaufmann-Kohler and Potestà (2016), pp. 38 et seq., identify this point as the main problem of possible enforceability of arbitral awards of a permanent international arbitral tribunal under the NYC.

[40] See *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc. et al.*, US Court of Appeals for the Ninth Circuit, Nos. 88-5879 and 88-5881, 1989, France No. 33; *Abrahim Rahman Golshani v. The Government of the Islamic Republic of Iran*, Bureau for International Legal Services, Cour d'Appel (Court of Appeal), 28.6.2001.

[41] In other cases, the characterisation of IUSCT decisions as awards in the sense of the New York Convention was not mentioned.

respective government to settle disputes through the IUSCT[42] or that bringing the case before the IUSCT by the investor is a voluntary submission.[43]

508 One opinion in the literature suggests that the voluntary nature of submission should be sufficient for enforcement under the New York Convention as long as investors still have the choice between settling disputes through an international arbitral tribunal or national courts.[44] This opinion can be justified by the fact that the submission of investors under ICSID proceedings is considered to be sufficiently voluntary for the characterisation as an arbitral award under the New York Convention.

509 Therefore, it would be more likely that national courts consider the element of voluntary submission to be fulfilled if the MIC should leave domestic jurisdiction accessible to investors.

7.2.2 Final and Binding Dispute Resolution

510 The fact that an arbitral award under the New York Convention must result in a final and binding resolution of the dispute does not present any problems in the case of MIC decisions.[45] Arbitration is a genuine alternative to national jurisdiction. In arbitration, the parties expect a binding decision by a third, neutral party in a court-like procedure.[46] In contrast to this are, for example, mediation procedures or simple arbitration reports, which do not lead to arbitral awards and therefore would not be enforceable under the New York Convention.

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[42]In *Ministry of Defense of the Islamic Republic of Iran v. Gould*, the court held that the President can replace a voluntary submission for arbitral awards under the New York Convention (according to Article I para. 2 as permanent arbitral award) with an Executive Order submitting US citizens to the jurisdiction of the IUSCT. Alternatively, the circumstance, that *Gould* had brought the case before the IUSCT voluntarily, would constitute a ratification of the submission by the President. In the cases, *Iran Aircraft Industries v. AVCO* and *Flatow v. Iran*, the courts had decided correspondingly. In France, the court had equally decided in *Golshani v. Iran*, that *Golshani* could not argue, that no declaration of submission existed, since he had voluntarily brought the case before the IUSCT.

[43]In 1985, the English High Court had made an *obiter dictum* in *Dallal v. Bank Mellat*, that the NYC would not be applicable for the enforcement of the IUSCT in England. The High Court had not held the decision as an award under the NYC, since according to the *lex arbitri* (according to the High Court Dutch law), an award would require a declaration of submission in writing and signed by both parties. However, the High Court in *Dallal* had solely to decide on the admissibility of the IUSCT and not on the question whether the NYC would be applicable to IUSCT decisions. The High Court had decided that *Dallal* had submitted himself voluntarily to the IUSCT by bringing the case before the tribunal and, therefore, at least had established the jurisdiction of the tribunal. In any case, according to the High Court, the prerequisites of a voluntary submission were fulfilled.

[44]Kaufmann-Kohler and Potestà (2016), para. 88.

[45]Ehle (2012), p. 37, para. 32.

[46]Ehle (2012), p. 37.

In any case, an MIC, which should undoubtedly have court-like features, would fulfil the requirement that a third, neutral party renders a final resolution of a given dispute in a court-like procedure. **511**

7.2.3 Non-State Decision-Makers

Both national court decisions and prevailing opinion in the literature agree that an essential characteristic of arbitral tribunals is their private, non-governmental nature, which distinguishes them from courts or governmental institutions.[47] **512**

This raises the question of whether the MIC should be considered as a public or private entity. Some authors draw parallels to the ICJ and ECtHR to show that while a permanent investment tribunal would not be an institution of state justice, it would certainly not be a "private" entity.[48] Others refer to the IUSCT as an institution *sui generis*.[49] **513**

A solution would be to give the MIC sufficient "private" elements to classify it as an arbitral tribunal under the New York Convention. For example, a permanent judiciary might conflict with the characterisation as a private entity. However, a list of specific candidates used in the election procedure of the judicial bench could solve this problem.[50] Here, this element of arbitration overlaps with the fourth element—the arbitrators selected by the parties—which will be discussed below (see paras. 517 et seqq.). **514**

The MIC is not likely to be a less private entity than the IUSCT, whose nature as a state or private institution has not been addressed during enforcement procedures under the New York Convention.[51] In states which enforce decisions of the IUSCT as arbitral awards according to the New York Convention, this element should therefore not be a problem. In general, this third element cannot be evaluated independently, but rather can only be clarified from the overlap and elaboration of the other elements. **515**

[47] Born (2014), pp. 255–258 accepts the difference between arbitration and choice of jurisdiction clauses in court proceedings: in the case of arbitral proceedings, a dispute is transferred to another, non-state level and will not be decided by state officials, whereas, in the case of choice of jurisdiction clauses, only a specific national court was chosen by the parties. Additionally, in the case of choice of jurisdiction clauses, the parties do not choose the individuals who take the decision, but the judges out of an existing judiciary, that are chosen by the court, independent from the parties' wishes.

[48] Kaufmann-Kohler and Potestà (2016), pp. 36 et seq.

[49] Toope (1990), p. 284.

[50] Kaufmann-Kohler and Potestà (2016), pp. 36 et seq.

[51] Neither *Ministry of Defense of the Islamic Republic of Iran v. Gould*, *Flatow v. Iran* nor *Dallal v. Bank Mellat* discuss this aspect.

7.2.4 Arbitrator Selection by the Parties

516 The last element of arbitral awards is not consistently given the same degree of attention within the literature.[52]

517 If the MIC were to be permanently established and regulated by the member states only and if these states elected the judges exclusively, while investors had no impact on that process, one could doubt the private nature of such an institution. This is also a significant difference to ICSID procedures, whose decision-makers are at least private: both parties to the dispute, the respondent state and the investor, have the same influence on the constitution of the arbitrator's bench.

518 Again, an examination of the IUSCT can be useful here. Iran, the US and the state-appointed arbitrators each select one third of the nine arbitrators.[53] Consequently, only the states, but not the investors, have an influence on the decision-makers in the IUSCT. In the rulings on the enforcement of IUSCT awards through the New York Convention, this arrangement of the arbitrator's bench was not problematic.[54]

519 It is also frequently argued that a modern definition of arbitration does not require the arbitrators being elected by the parties, since the focus would lie on the voluntary submission of the parties, as has already been confirmed by some arbitral tribunals.[55]

520 One possibility of making the MIC more tribunal-like would be to use *ad hoc* judges appointed by the investors in each case in addition to the permanent judges appointed by the states (see para. 174). This arrangement would create space for party autonomy and might bring the character of the MIC closer to that of arbitral tribunals.

7.2.5 Foreign, Non-Domestic and Anational Awards

521 The definition of another element of Article I para. 1 NYC is relevant to the question of whether decisions by the MIC would be enforceable under the New York Convention: only awards "rendered in the territory of another State" ("foreign") and those "not considered as domestic" ("non-domestic") fall within the scope of application of the New York Convention.

522 Foreign arbitral awards follow the principle of territoriality: an arbitral award is foreign, as long as it has not been rendered in the territory of the state of enforcement; if the state of enforcement has not declared the reservation of reciprocity in accordance with Article I para. 3 NYC, the New York Convention is applicable universally,

[52]Ehle (2012), for example, does not mention this element at all; however, Kaufmann-Kohler and Potestà (2016), p. 37, discuss the choice of arbitrators by the parties as a controversial potential feature of arbitral awards.

[53]Brower and Brueschke (1998), p. 10.

[54]Neither *Ministry of Defense of the Islamic Republic of Iran v. Gould*, *Flatow v. Iran* nor *Dallal v. Bank Mellat* discuss this aspect.

[55]Kaufmann-Kohler and Potestà (2016), see the sources in para. 96.

irrespective of the state of origin of the arbitral award or of the parties.[56] According to the prevailing view, an arbitral award is "made" in the state of the seat of the tribunal.[57]

Thus, the question arises as to whether a decision by the MIC would be foreign in the case where the host state of the MIC is not the state of enforcement at the same time. In the context of the principle of territoriality, which only deals with the statutory geographical position of the tribunal,[58] such an interpretation may well be conceivable.[59] **523**

Arbitral awards are non-domestic if they were rendered according to the principle of territoriality in the state of enforcement, but national law was not applied. However, the definition of that term, which falls in the competence of the national courts, does not seem to be of much importance for the enforcement of MIC decisions in light of the existing jurisprudence—relevant cases that may be non-domestic are usually referred to as "anational" or "delocalised". The examination of jurisprudence and literature reveals that the question of whether or not the decision was rendered under domestic or foreign law would not be problematic for the enforcement of MIC decisions, but rather whether the decision was based on any national law and whether basing the decision on national law would be necessary.[60] **524**

Some authors,[61] and judges especially in France[62] and the US,[63] claim that IUSCT-awards are enforceable as anational awards under the New York **525**

[56]Ehle (2012), pp. 56 and 59. Petrochilos (2004), p. 352, para. 8.35 concludes that it is both sufficient and necessary, if the award was made in another state than the enforcement forum, for applying the NYC.

[57]Ehle (2012), p. 57, para. 99.

[58]Ehle (2012), p. 56, para. 95. Ehle (2012), p. 60, considers an absolute geographical interpretation as inappropriate, since the focus should be on the word "made"—an award would not be made where it is signed, but at the legal formal seat of the tribunal.

[59]Additionally, Petrochilos (2004), p. 357 concludes that it is sufficient and necessary, if an arbitral award was made in another state than the enforcement forum, for applying the NYC.

[60]Kaufmann-Kohler and Potestà (2016), p. 57 define anational/delocalized awards as "awards not made under domestic law" and point out how much attention the possible enforcement of such awards under the NYC has gained recently.

[61]According to Ehle (2012), pp. 60 et seq., the majority opinion favours the idea that arbitration should or must be established, especially by the agreed seat-state and/or the *lex arbitri*. Ehle argues this with the following reasoning: a subsumption is neither under the term foreign, nor under the term non-domestic possible; a historical interpretation of anational awards under the NYC is also not possible, since a national awards were not a topic discussed within the NYC negotiations. Petrochilos (2004), p. 371 instead concludes that there is no proof that the NYC could not be applied to awards, which have been rendered under merely international law. Toope (1990), pp. 127–129 does as well conclude that a-national awards do exist and can be enforced under the NYC. The UNCITRAL Guide on the NYC, para. 63, however, assumes that the text of Article 1 para. 1 NYC permits the enforcement of a national awards, so that the domestic or a national nature of the awards would be without effect on the applicability of the NYC.

[62]Cour de Cassation, Les Cahiers de l'Arbitrage 2007, 44 = 25(4) ASA Bull. 829 (2007) = XXXII Y.B. Com. Arb. 299 (2007).

[63]See *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc. et al.*, Court of Appeals for the Ninth Circuit, 23.10.1989, 887 F.2d 1357, the court denied that there was a condition under the NYC, that the award had to be rendered under domestic law. The reasons for refusal of an enforcement were stated explicitly in the NYC. None of these reasons required the award to be rendered under domestic law (1364–5).

Convention.[64] In any event, as discussed above, ICSID awards (as a sort of a national arbitration awards) may be enforced through the New York Convention.[65] Within the literature, it is therefore argued that there is no reason why the arbitral awards of an international arbitral tribunal should not be enforceable under the New York Convention.[66]

526 Another way of reading the New York Convention would be that the grounds for refusal of enforcement are listed in one article only: Article V NYC. It explicitly states according to which legal system the individual exclusion criteria should be assessed. Article V NYC furthermore recognises the distinction between the law "of the country in which, or under the law of which [the arbitration award was rendered]",[67] which could be taken as an indication that an arbitral award does not necessarily have to be made under the law of a particular country. With that argument, the US court in the *Gould* case came to the conclusion that the New York Convention *ratione materiae* is also applicable to anational arbitration awards, since in Art. V NYC, and also in Article I NYC, it does not presuppose a national nature of the arbitration award.

7.2.6 Litigation Between Natural or Legal Persons

527 There is consensus (also confirmed by the *travaux preparatoires* and court decisions) that the term "legal person" in Article I para. 1 NYC also includes legal persons of public law, for example states and international organisations.[68] The interpretation of this term should therefore not be a problem in the context of the enforcement of MIC decisions.[69]

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[64]Cases regarding the enforcement of awards *SEEE v. Yugoslavia* (26.10.1973, Hoge Raad) and *SEEE v. Yugoslavia* (13.11.1984, Cour d'appel de Rouen); *Götaverken v. France*, *LIAMCO* and *Gould* are commonly been referred to as proofs of judicial practice regarding the enforcement possibility of anational awards under the NYC.

[65]Schreuer et al. (2009), pp. 1122 et seq. explain that an enforcement of ICSID awards under the NYC will probably not come up in the future, but such a case would need to be handled in a manner similar to the enforcement of ICSID additional facility awards. Additional facility awards should be enforced under the NYC, since a majority of legal scholars and some court decisions assumed as well that "international, a-national and denationalized awards" fall within the scope of the NYC. Kaufmann-Kohler and Potestà (2016), p. 58 therefore saw in their legal opinion no reason why an award of another international arbitral tribunal should not be enforced under the NYC.

[66]Kaufmann-Kohler and Potestà (2016), p. 58.

[67]Article V para. 1 lit. e) NYC: "of the country in which, or under the law of which".

[68]Ehle (2012), p. 69.

[69]According to the *travaux préparatoires,* the majority of states did not want to implement such rules into the NYC, since they considered it redundant. The Union of Soviet Socialist Republics (USSR) and Czechoslovakia, who wanted to make the awards rendered by their arbitral institutions enforceable under the NYC, were finally able to gain acceptance for their proposal. It can be extracted from the *travaux* that the supreme topic of negotiations regarding Article I para. 2 was the

7.2.7 MIC as a "Permanent Arbitral Body" Under Article I Para. 2 NYC

Article I para. 2 NYC explicitly states that "not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted" are enforceable under the New York Convention. **528**

Arbitral institutions such as the ICC,[70] the Arbitration Institute of the Finnish Central Chamber of Commerce[71] and the Singapore International Arbitration Centre (SIAC),[72] have already been subsumed under Article I para. 2 NYC as permanent arbitral bodies.[73] In the *Gould* case the IUSCT was regarded as a permanent arbitration tribunal under Article I para. 2 NYC. In any event, Article I para. 2 NYC makes it clear that the permanent existence of the MIC does not pose a problem for the enforceability of a decision according to the New York Convention. **529**

7.2.8 Reservation on "Commercial Matters" Under Article I Para. 3 NYC

Under Article I para 3, the New York Convention explicitly provides two reservations that states may declare.[74] Many Member States have declared, by accession to the New York Convention, through a reservation under Article I para. 3 NYC, that they only enforce arbitral awards arising out of disputes over commercial matters **530**

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voluntary submission to these permanent arbitral bodies. The majority of the states were of the opinion that awards from permanent arbitral tribunals would also fall into the scope of Article I para. 1 NYC, as long their jurisdiction was not compulsory. The free choice of arbitrators was e.g. not discussed in the negotiations. A German court followed this strong focus on voluntary submission and denied the enforcement of a Polish tribunal's decision under the NYC, since the jurisdiction of the tribunal was compulsory. Kammergericht Berlin (Court of Appeal), decision of 7.3.1995—14 U 2979/93; see as well BGH (Federal Supreme Court), decision of 20.1.1994—III ZR 143/92, BGHZ 125, 7.

[70] *FG Hemisphere Associates LLC v. Democratic Republic of Congo*, Supreme Court of New South Wales, 1.11.2010.

[71] Brandenburgisches Oberlandesgericht (Higher Regional Court of Brandenburg), decision rendered on 13.6.2002—8 Sch 02/01.

[72] *Transpac Capital Pte Ltd v. Buntoro*, Supreme Court of New South Wales, 7.7.2008, [2008] NSWSC 671.

[73] *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc. et al.*, Court of Appeals for the Ninth Circuit, 23.10.1989, 887 F.2d 1357.

[74] Article I para 3 NYC: "When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

under the New York Convention.[75] For this reason, it is equally relevant to the practical enforceability of MIC decisions under the New York Convention to identify which cases are considered to concern "commercial matters". *In concreto,* the question arises as to whether "commercial matters" can be construed as including investment disputes between states and investors or only matters of international commercial law between private individuals.

531 According to Article I para. 3 NYC, the definition of "commercial matters" depends on the national law of the reserving state. Thus, until now, reservations on commercial matters have been interpreted widely by national courts; legal disputes between states and investors under an investment agreement have been subject to the same criteria for the classification as commercial matters as those between private individuals.[76] For example, the US has declared a reservation for commercial matters.[77] However, in cases concerning the enforcement of decisions by the IUSCT under the New York Convention in the US, this reservation has not been addressed. Therefore, it can be assumed that investment disputes between states and investors are also covered by the term "commercial matters".[78]

532 In any event, Canadian courts have acknowledged NAFTA investment awards under Chapter 11 NAFTA as awards concerning "commercial matters" as defined by the UNCITRAL Model Law.[79] Furthermore, the Swedish Svea Court of Appeal has

[75]In 2012, out of the 147 state parties of the NYC, 46 had applied reservations for commercial matters.

[76]According to Ehle (2012), pp. 81 et seq. the interpretation of "commercial matters" has not so far created problems in practice, since the states interpret the term widely. Also, he concludes that courts have a tendency to interpret "commercial matters" as broadly as envisaged in the UNCITRAL Model Law (footnote 2 of the UNCITRAL Model Law defines "commercial" as "[. . .] Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road."); Born (2014), pp. 302 et seq., defines "commercial matters" as "relationship involving an economic exchange where one (or both) parties contemplate realizing a profit or other benefit." This definition would also be consistent with the tenor of national court decisions regarding the NYC.

[77]See U.S. Federal Arbitration Act (FAA) 9 U.S.C. § 201; according to § 202 the NYC applies "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."

[78]However, Born (2014), pp. 300 et seq. shows that in the context of state immunity, space for different interpretation is given. In cases of public law, such as trusts law, concession and other contracts which are based on national sovereignty, doubts concerning the interpretation of the term "commercial matters" seem to be significant. According to Born, the parties of concession contracts, however, intend arbitration clauses in a way that they constitute commercial matters in the sense of the NYC, since effective enforcement would be one of the fundamental goals of international arbitration treaties.

[79]*United Mexican States v. Metalclad*, Canada, Supreme Court of British Columbia, 2.5.2001, [2001] BCSC 664, 5 ICSID Reports 236; *United Mexican States v. Feldman Karpa*, Canada, Ontario Court of Appeal, 11.1.2005, 9 ICSID Reports 508, 516, para. 41.

recognised the award in the case *CME v. Czech Republic*[80] as "international commercial arbitration".[81]

A possible reservation on commercial matters would therefore presumably not **533**
per se preclude enforcement of an MIC decision under the New York Convention.

7.3 Recognition and Enforcement of Decisions of the MIC

It follows from the preceding analysis that the enforcement of MIC decisions in third **534**
countries would not be possible through the ICSID Convention since its decisions do not constitute ICSID arbitration awards, due to the fact that the MIC and its procedures are designed in a manner differing from the ICSID Convention.

An enforcement according to the New York Convention would be legally **535**
conceivable; nevertheless, successful enforcement depends on the perspective of the specific national court having jurisdiction over enforcement. This can lead to divergent results, depending on the legal system. The main difficulties in recognition and enforcement of MIC decisions as arbitral awards could be the issue of "voluntary submission" to the MIC by both parties and the controversial enforceability of "anational decisions".

Due to the legal uncertainty as to whether MIC decisions can be qualified as **536**
arbitral awards—whether according to the ICSID Convention or under the New York Convention—the best solution seems to be the imposition of an obligation to enforce within the MIC Statute, analogous to the provisions of the ICSID Convention. For the moment, this would mean that only the parties to the agreement would be bound by the MIC Statute. However, later on, with a wider acceptance of the MIC, this solution should be legally unequivocal.

Besides, a fund system could be set up in addition to an autonomous enforcement **537**
mechanism provided for in the MIC Statute. The IUSCT followed an interesting approach to ensure the enforcement of decisions of this tribunal. After the conclusion of the Algiers-Agreement, US$1 billion of Iranian assets in US bank accounts at the time of the hostage crisis after the storming of the US Embassy in Tehran in 1979 was paid into a "security account" as a fund for the satisfaction of US claims resulting from IUSCT decisions.[82] In addition, Iran has been obliged to make additional payments to this account, so that the account balance never falls below US$500 million. Iran itself has had no access to this security account and therefore had to go through regular enforcement channels; however, Iran has so rarely been awarded damages that the bias of the IUSCT enforcement mechanism can be

[80] *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, Partial Award, 13.9.2001, 9 ICSID Reports 121.

[81] *Czech Republic v. CME Czech Republic BV*, Sweden, Svea Court of Appeal, 15.5.2003, 9 ICSID Reports 439, 493.

[82] See Brower and Brueschke (1998), p. 8.

neglected.[83] Nevertheless, this enforcement mechanism has proven to be very efficient, which also explains the rarity of execution attempts under the New York Convention.[84] Certainly, it would not be easy to set up a comparable instrument for the MIC. Nevertheless, it would be worth considering the extent to which it would be possible to set up a fund for the settlement of claims for compensation arising from MIC decisions.

538 In this respect, one way of ensuring the prompt and effective enforcement of MIC judgments would be that the MIC members make a deposit into a fund. It should be determined whether the amount of the payment should be based on the member's economic situation or whether all members should make equal payments. One argument against the latter alternative is that countries with higher economic output may benefit more from an MIC, since in absolute terms higher investments are likely to be made by investors in these countries. However, it cannot be assumed that the volume of foreign investments is directly proportional to the number of investment cases. Moreover, since the possible amount of damages for an MIC decision is not based on the economic strength of the respective state, economic performance as a basis for the financing of the fund does not seem to be an appropriate criterion.

539 The compensation of damages up to a certain maximum amount could immediately be paid from this fund to the winning investor. In that regard, a cap on the payout sum could be stipulated. In any case, the fund volume should never fall below a certain minimum sum; with 40 or more members, a sum in the single-digit millions of each member should be sufficient to keep the fund operational. At least, such a fund system could be used by SMEs as a special system of enforcement, so that their claims can be satisfied as soon as possible. The claim from the MIC judgment against the MIC member would then be transferred to the MIC itself.

540 Enforcement in the MIC system and the fund system should not be mutually exclusive. However, it could be considered that recourse to the fund system would only be possible if other forms of enforcement prove to be difficult.

References

Bermann GA (2014) Recognition and enforcement of foreign arbitral awards: the application of the New York Convention by National Courts. Springer, Heidelberg

Born G (2014) International commercial arbitration. Wolters Kluwer, Alphen aan den Rijn

Brower CN, Brueschke JD (1998) The Iran-United States claims tribunal. Martinus Nijhoff, Leiden

Calamita NJ (2017) The (In)compatibility of appellate mechanisms with existing instruments of the investment treaty regime. J World Invest Trade 18:585–627

Cane G (2004) The enforcement of ICSID awards: revolutionary or ineffective? Am Rev Int Arbitr 15:439–465

Choi S (1995–1996) Judicial enforcement of arbitration awards under the ICSID and New York Conventions. N Y Univ J Int Law Polit 28:175

[83] Toope (1990), p. 280.

[84] Toope (1990), p. 281: "the practical importance of the Account cannot be overstated."

Delaume GR (1993) Enforcement of state contract awards: jurisdictional pitfalls and remedies. ICSID Rev Foreign Invest Law J 8:29–52
Delaume GR (1995) Reflections on the effectiveness of international arbitral awards. J Int Arbitr 12:5–19
Ehle B (2012) Article I (scope of application). In: Wolff R (ed) New York Convention. Convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958. Commentary. Verlag C.H. Beck, Hart, Nomos, Oxford, Baden-Baden
Kaufmann-Kohler G, Potestà M (2016) Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? – Analysis and roadmap
Lew JDM, Mistelis LA, Kröll SM (2003) Comparative international commercial arbitration. Kluwer Law International, Alphen aan den Rijn
Paulsson J (1995) Arbitration without privity. ICSID Rev Foreign Invest Law J 10:232–257
Petrochilos G (2004) Procedural law in international arbitration. Oxford University Press, Oxford
Reinisch A (2016) Will the EU's proposal concerning an investment court system for CETA and TTIP lead to enforceable awards? – The limits of modifying the ICSID Convention and the nature of investment arbitration. J Int Econ Law 19:761–786
Schreuer CH, Malintoppi L, Reinisch A, Sinclair A (2009) The ICSID Convention. A commentary, 2nd edn. Cambridge University Press, Cambridge
Tawil GS (2009) Binding force and enforcement of ICSID awards: untying articles 53 and 54 of the ICSID Convention. In: van den Berg AJ (ed) 50 Years of the New York Convention. Kluwer Law International, Alphen aan den Rijn, p 327
Toope SJ (1990) Mixed international arbitration. Cambridge University Press, Cambridge
Van den Berg AJ (1981) The NY arbitration convention of 1958: towards uniform judicial interpretation. Springer, Heidelberg
Van Harten G, Loughlin M (2006) Investment treaty arbitration as a species of global administrative law. Eur J Int Law 17:121–150
Verhoosel G (2009) Annulment and enforcement review of treaty awards: to ICSID or not to ICSID? In: van den Berg AJ (ed) 50 Years of the New York Convention. Kluwer Law International, Alphen aan den Rijn, p 310