Diversity and the Principle of Independence and Impartiality in the Future Multilateral Investment Court (MIC)

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Abstract: This article starts from the assumption that the future Multilateral Investment Court (MIC) will be shaped by a new and different type of international investment adjudicator (IIA), and it focuses on the diversity issues that will need to be addressed during the court's creation. In this article, diversity is understood in a broad sense that includes questions related to IIA gender, race, geographical origins and legal background. The article argues that diversity may in fact evolve into one of the MIC's key collective composition rules. It also sets out some of the grounds in favour of diversity in the MIC, and considers the specific ways in which diversity may permeate the constituent process for the MIC roster and its *modus operandi*. A further common thread is provided by the links between diversity and the principle of independence and impartiality, which will be a crucial MIC duty.

Keywords: Diversity, Gender, Independence, Impartiality, International Judge, International Court, European Union, Multilateral Investment Court.

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1. Introduction

Party-appointed arbitrators have always been a cornerstone of the classic investor-state dispute settlement (ISDS) system. Their incisive elimination by the European Union (EU) in texts such as the EU-Vietnam FTA, TTIP, and the 2016 CETA represents a genuine shake-up, the effects of which are yet to be felt. The appearance of new committee-appointed figures in the form of "members of the tribunal", or "judges" in some of these documents has generated a lively debate between defenders of the classic system and others who applaud this radical change.

In recent years the EU has also promoted the setting up of a multilateral investment court (MIC), (both in some of the texts referred to here and also in parallel) in which party-appointed arbitrators would be replaced by "tenured, highly qualified judges, obliged to adhere to the strictest ethical standards".[1] In connection with this, the European Commission has recently released a Recommendation which, if adopted by the Council, would enable the EU to take part in negotiations for a convention establishing a MIC.[2] UNCITRAL is also expected to give some consideration to implementing a new international investment adjudicator (IIA) profile, and in July 2017 entrusted its Working Group III with a broad mandate to work on a possible reform of ISDS[3].

[1] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608.
[2] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1505306108510&uri=COM:2017:493:FIN.
[3] http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl250.html. The latest document drafted at the time of writing states that: "*If it wishes to consider to pursue reforms to the ISDS regime, the Working Group may wish to examine, among other questions: (…) Whether reforms to address specific issues (for instance (..) party-appointment and consequential issue relating to arbitrators' independence and impartiality) might sufficiently meet those policy objectives (…). Possible adjustments to the existing ISDS regime may include: Alternative methods for appointing arbitrators (see document A/CN.9/917, paras. 26 and 27), such as streamlining the appointment process and designing a system with a pool of members that would form a new adjudicative body. The Working Group may wish to note that a*

Taking as a starting point the assumption that any future MIC will be shaped by a different type of IIA, it seems necessary to study these somewhat mysterious IIA figures in more depth.[4] This article therefore focuses on one very specific issue[5]: the diversity considerations to be worked on from the perspective of implementing these international initiatives. Understood in a broad sense that includes gender issues as well as aspects related to race, geography and legal background,[6] diversity is a particularly relevant topic. It connects with key considerations such as the MIC independence and impartiality[7] as well as with the goals of transparency, effectiveness, credibility and legitimacy that seek to hold sway in the international investment system.

The close connection between diversity and independence in the context of a future MIC was recently raised by the Belgian government in a request for a European

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forthcoming supplemental report by CIDS will address the matter of appointment of decision-makers (arbitrators/adjudicators) (see also document A/CN.9/917, paras. 33-39)", Possible reform of investor-State dispute settlement (ISDS). Note by the Secretariat, 18 September 2017, A/CN.9/WG.III/WP.142, https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/067/48/PDF/V1706748.pdf?OpenElement.

[4] The latest EU documents pay surprisingly little attention to the figure of the MIC judges. In addition, the brief allusions in the TTIP context are neither especially precise nor enlightening: "*the judges would have very high technical and legal qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body*". Reading Guide to the Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP). http://trade.ec.europa.eu/doclib/press/index.cfm?id=1365. The reflection made public in the context of CETA, where it is pointed out that increasing MIC membership would require designing a review clause capable of facing these challenges (e.g. in terms of geographical representativeness of adjudicators) is more precise. Discussion paper. Establishment of a multilateral investment dispute settlement system Expert meeting 13 and 14 December 2016, Geneva, http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf. See also infra Section 4.

[5] Other issues connected with this topic, such as the analysis of statistics showing that women and minorities are clearly underrepresented in the professional context of international arbitration, as well as a good number of implemented or proposed measures aiming at remedying this situation, have already been addressed in the article: Katia Fach Gómez, "Diversidad y género en el arbitraje internacional: entre los hechos y los anhelos", en K. Fach Gómez (ed.), *La política de la Unión Europea en materia de derecho de las inversiones internacionales/EU Policy on International Investment Law* (2017), 279.

[6] The notion of diversity can encompass a broad range of elements, among which the following stand out: gender; race and ethnicity; culture; geographical issues; age (generational diversity); religious and political beliefs; sexual orientation; socioeconomic status, and functional diversity – a term coined to replace the notion of disability. A broad concept of diversity would also encompass what can be referred to as diversity of experience, which covers factors such as global mindset and cultural fluency: Vivian Hunt, Denis Layton, and S. Prince, *Diversity Matters* (2015), 1. http://www.diversitas.co.nz/Portals/25/Docs/Diversity%20Matters.pdf. Reflecting on the notion of diversity, Ingrid A. Müller, "Diversity and Lack Thereof Among International Arbitrators-Between Discrimination, Political Correctness and Representativeness", *Transnational Dispute Management, Special Issue on Dealing with Diversity in International Arbitration* (2015) 1.

[7] For the sake of brevity, the term "independence" is used throughout this article when referring to the complex notion of "the principle of independence and impartiality".

Court of Justice opinion on whether the investment court system (ICS) established in CETA is compatible with EU law. More specifically, an opinion is pending on whether appointing CETA members to the tribunal and the appeals body is consistent with the right to an independent and impartial judiciary.[8]

2. Diversity and the Multilateral Investment Court

With the MIC's creation now likely to take place in the near future, it is worth reflecting on the basis for justifying the inclusion of diversity criteria in this court. It may also be useful to undertake a brief comparative review to determine whether the diversity-related decisions taken when shaping other international tribunals may be relevant to the configuration of the MIC.

2.1. Some Grounds for Favouring Diversity in the MIC

The first issue that inevitably arises when the topic of diversity in the MIC is addressed concerns the need for and benefits of including groups categorized as "underrepresented" in the new court. A thorough analysis of the issues presented in this section would merit a genuinely interdisciplinary study focusing entirely on these issues; even so, a few brief comments on three possible, but not exclusive, justifications for diversity in the MIC may nevertheless be useful.

[8] Note that the comparative parameter in this issue comes from the judicial context (*"the right to an independent and impartial judiciary*"). This connects with a relevant characteristic of the MIC proposal supported by the EU: it is openly promoted as a public justice system, which is honoured to resemble national judicial systems at various points. That is why not only international courts but also national legal systems are useful references in the context of this article. See for example, Council of Europe. "Plan of Action on Strengthening Judicial Independence and Impartiality", CM(2016)36 final, https://rm.coe.int/1680700285.

Very simply, the "difference theory", argues that minorities provide a unique contribution to adjudicatory activity because of their different values and world view.[9] The fact that their participation may lead to different outcomes from those produced by a more homogeneous panel must therefore not be valued negatively.[10]

Another current of thought rules out this argument, either because it is empirically questionable or because it is considered insufficient in itself and therefore needs to be reinforced by others. The "legitimacy theory" holds that if an adjudicatory body is to have public trust, it has to implement a diversity policy.[11] It is now generally agreed that investment awards - and therefore the awards to be made by a MIC - produce effects on the daily lives of ordinary people, which is why adjudicatory mechanisms need the approval of an increasingly sophisticated and globally connected society.[12] In this context, notions such as the public perception of fairness and the sense of impartiality play a highly relevant role.

A third current takes a step forward and highlights the rule of law. Diversity in adjudicatory courts is a logical and necessary sign of democratic representation.[13] A democratic society requires courts to be representative institutions, and all the more so

[9] Tracy Robinson, "Why Diversity Matters", in CEJIL, *The Selection Process of the Inter-American Commission and Court on Human Rights: Reflections on necessary reforms*, 2014, https://cejil.org/en/position-paper-no-10-selection-process-inter-american-commission-and-court-human-rights-reflections; Gus Van Harten, "The (lack of) women arbitrators in investment treaty arbitration", *FDI Perspectives* (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2005336.

[10] From this perspective, the price to pay for non-biased and fairer outcomes might be a lower degree of predictability.

[11] Focusing on gender issues in the judicial context, Kate Malleson, "Justifying Gender Equality on the Bench: Why Difference Won't Do", *Feminist Legal Studies* (2003), 1.

[12] Interesting in this regard is the extensive list of key stakeholder categories that the EU Consultation Strategy has identified. http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_154997.pdf.

[13] "Having professional dispute resolvers and professionals of both genders (and of racial, ethnic and class diversity as well) is essential for the democratic representation of the parties in disputes". Carrie Menkel-Meadow, "Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers", *Dispute Resolution Magazine,* Spring (2012), 5, 8. Reflecting on the European context, Armin von Bogdandy and Christoph Krenn, "On the Democratic Legitimacy of Europe's Judges. A Principled and Comparative Reconstruction of the Selection Procedures" in Michal Bobek (ed.), *Selecting Europe's Judges,* 2015, 162.

if they are international courts. *Sensu contrario*, a homogeneous court is not sustainable from the rule of law perspective[14].

2.2. Diversity in other International Courts

A brief review of hard and soft law in the field of international courts and tribunals shows that diversity has not yet acquired the status of a general and substantial requirement in the supranational judicial context. The texts consulted for this article devote much of their attention to outlining the judges' individual qualifications, and when dealing with collective requirements[15] such as diversity, generally limit themselves to including specific references that fail to cover all the main subtypes of diversity.

There are, nevertheless, notable exceptions and initiatives: the 2004 Burgh House Principles on the Independence of the International Judiciary states that, "procedures for nomination, election and appointment should consider *fair representation of different geographic regions and the principal legal systems, as appropriate, as well as female and male judges*"[16], while the 2011 Resolution of the Institute of International Law includes the phrase, "States shall ensure an *adequate geographical representation* within international courts and tribunals (…) the relevant

[14] In the words of Jean-Marc Sauvé, President of the panel set up by Article 255: *"[The Article 255 Committee] thus making its contribution (to a work that far exceeds it): the strengthening of the rule of law and justice in Europe"*. (Author's translation). Intervention de Jean-Marc Sauvé, vice-président du Conseil d'Etat de France, Président du comité prévu par l'article 255 du Traité sur le fonctionnement de l'Union européenne, devant la Commission des affaires juridiques du Parlement européen, Bruxelles, (2013), http://www.conseil-etat.fr/content/download/3457/10399/version/1/file/2013-05-30_audition-au-parlement-europeen.pdf.

[15] Also called "collective composition rules" (in contrast to "individual selection criteria"). Ruth Mackenzie, Cesare P. R. Romano, Yuval Shany and Phillippe Sands, *Manual on International Courts and Tribunals* (2010).

[16] ILA Study Group on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals. 2.2: "*While procedures for nomination, election and appointment should consider fair representation of different geographic regions and the principal legal systems, as appropriate, as well as female and male judges, appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges",* http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf.

procedures [of selection of candidates] shall be such as to ensure the selection of candidates (…) *without any discrimination, in particular on grounds of sex, origin or beliefs*".[17]

The most complete positive text on diversity in international courts is probably Article 36.8 a) of the 1998 Rome Statute of the International Criminal Court (ICC): "The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: *the representation of the principal legal systems of the world; equitable geographical representation; and a fair representation of female and male judges*.[18] It is also worth mentioning the gender practice developed by the European Court of Human Rights (ECHR) regarding its judges, which will be addressed later,[19] and also the classic reference in Article 9 of the Statute of the 1946 International Court of Justice: "The electors [States] shall bear in mind (…) that in the body as a whole *the representation of the mains forms of civilization and of the principal legal systems of the world should be assured".*[20] This approach has been reproduced in a regional context in texts such as Article 14.2 of the 2004 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights: "The Assembly shall ensure that in the Court as a whole there is *representation of the main regions of Africa and of their principal legal traditions*".[21]

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[17] Resolution of the Institute of International Law. The Position of the International Judge: "*States shall ensure an adequate geographical representation within international courts and tribunals (...) Procedures of selection of candidates both at the national and international levels should support the above-mentioned principles and should, as necessary, be improved to that end (...) In any case, the relevant procedures shall be such as to ensure the selection of candidates having the required moral character, competence and experience, without any discrimination, in particular on grounds of sex, origin or beliefs*". http://www.idi-iil.org/app/uploads/2017/06/2011_rhodes_06_en.pdf.

[18] http://legal.un.org/icc/statute/99_corr/cstatute.htm.

[19] *See infra* section 4.3.

[20] http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf. An almost identical text appears in Article 2.2 of the Statute of the International Tribunal for the Law of the Sea. https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf.

[21] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights. This sentence is complemented by the following: "*In the election of*

Texts such as these will undoubtedly be relevant when shaping the MIC's diversity policy towards its IIAs. However, as many issues are left hanging in the air, the following sections of this article reflect on whether the MIC should take a step forward in terms of diversity and, if so, what the most controversial issues to face would be. The common thread running through these sections is the connection between diversity and independence, as statements made in the past seems just as valid today, if not more so: "*It is questionable whether a racially and ethnically homogenous court can ever be fully independent. In order to be wholly independent, the court must represent the diversity of its peoples*".[22]

3. Independence and Impartiality in the Multilateral Investment Court

The independence of the MIC is a key issue and raises a number of fundamental questions from the outset. How should the notion of independence be defined in the context of the MIC? Is it the individual independence of each court member or the sum of them all? Or does a contemporary notion of independence cover something else, a sort of MIC "collective independence"? Should the MIC fulfil a collective duty of independence?

Although this is a very complex issue whose detailed analysis is outside the scope of this article, a brief mention of some contextualizing ideas regarding IIA independence is necessary. Multiple provisions in the investment arbitration framework assert the need for arbitrators to be independent. For example, Article 14 of the 1965 ICSID Convention states that: "Persons designated to serve on the Panels (…) may be relied upon to exercise independent judgment", and –only- the Spanish version of this

the judges, the Assembly shall ensure that there is adequate gender representation". http://www.achpr.org/instruments/court-establishment/#12.

[22] Referring to the ECJ and focusing on the race and ethnic issue: Iyiola Solanke, "Diversity and Independence in the European Court of Justice", 15 *Columbia Journal of European Law* (2009), 89, 93.

provision requires from the arbitrators to "inspire full confidence in their impartiality of judgment"[23]. Recent EU-negotiated texts also underline the existence of a duty of independence and impartiality on the part of the adjudicators, which is referred to in the new codes of conduct drawn up for them.

In practice, attempting to pin down these concepts nevertheless creates controversy. It is difficult to find detailed clarifications of these notions, and even when efforts are made to specify them, as in ICSID cases, the different stakeholders do not always entirely agree on their precise definitions.[24]

The increasing accountability imposed on investment arbitrators will undoubtedly result in the independence of future MIC members becoming a crucial issue which merits much discussion among academics.

Along with this notion of individual independence, both general and legal dictionaries point out that the term "independence" is also applicable to collective bodies.[25] In the context of supranational courts, international organizations such as UNCITRAL[26] and the Institute of International Law[27] and also legal scholars[28] have

[23]The Spanish version proclaims: "*Las personas designadas para figurar en las listas deberán (...) inspirar plena confianza en su imparcialidad de juicio*". Convention on the Settlement of Investment Disputes between States and National of other States. http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partA-preamble.htm.

[24] ICSID cases state that: "*The concepts of independence and impartiality are often seen as distinct, although the borderline between the two concepts is not easy to find*" (National Grid PLC vs. The Republic of Argentina, paragraph 76). "*Independence is characterized by the absence of external control, in particular of relations between the arbitrator and a party which may influence the arbitrator´s decision. Impartiality, on the other hand, means the absence of bias or predisposition towards one party and requires that the arbitrator hears the party without any favour and bases his or her decision only on factors related to the merits of the case" (Saint-Gobain vs. The* Bolivarian Republic of Venezuela, Decision on Claimant´s Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal, paragraph 56). "*Thus is it possible in certain situations for a judge or arbitrator to be independent of the parties but not impartial. Independence and impartiality are states of mind"*. (Suez v. The Argentine Republic, May 12, 2008, paragraphs 29 and 30)

[25] The first meaning of independence in the Cambridge dictionary indicates that independence is "freedom from being governed or ruled by another country", as well as the Black Law´s dictionary states that: "Political independence is the attribute of a nation or state which is entirely autonomous, and not subject to the government, control, or dictation of any exterior power."

[26] United Nations, Commentary of the Bangalore Principles of Judicial Conduct, 2007, 38 https://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf.

[27] Article 5: *"The independence of courts and tribunals depends not only on the procedures of selection of judges and their status, but also on the way in which the court or tribunal is organized and operates*".

referred to the notion of institutional independence. It has been defined as the judicial institution's degree of autonomy vis-à-vis external authorities such as other branches of a national government.[29] In order to test this institutional independence, elements such as the court financing system (financial independence) and the form of internal organization, i.e., internal regulations, presidency, secretariat (functional independence) have usually been taken into account.

The notion of non-individual independence of the judiciary is not new. As early as 1959 the International Commission of Jurists pointed out that: "it is important to have regard to the independence not only of the judge but *also of the Judiciary as an institution; the latter may provide traditions and a sense of corporate responsibility which are a stronger guarantee of independence than the private conscience of the individual judge*".[30]

The present article raises the question of whether there is a kind of "collective independence" in the ISDS context.[31] This perhaps not entirely orthodox term has been consciously chosen to delineate it from the notion of institutional independence. The notion of collective independence suggested here does not focus on autonomy and satisfactory self-management. Collective independence rather refers to a series of checks and balances to be established within the judicial collegium, and leads to the

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This provision refers to a registry (information systems) and its budget and its staff management (internal administration). Resolution of the Institute of International Law, The Position of the International Judge 2011, http://www.idi-iil.org/app/uploads/2017/06/2011_rhodes_06_en.pdf.

[28] Maira Eudes, "La légitimité du juge de la Cour Européenne des droits de l´homme. Observations sur la représentativité et l'indépendance du juge de Strasbourg", 13 *Revue québécoise de droit international* (2000), 131, 151-158.

[29] It must be borne in mind that these reflections have sometimes focused on the judiciary at national level. For instance, Council of Europe. Plan of Action on Strengthening Judicial Independence and Impartiality, CM(2016)36 final, https://rm.coe.int/1680700285.

[30] Focusing on national judiciary branches, International Commission of Jurists, The Rule of Law in a Free Society (1959), 279. http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf.

[31] Following the definitions handled in the context of the ICSID case law, it might be more appropriate to call it "collective impartiality".

study of the actions and effects generated by such checks and balances –or the lack of them-.

If we accept the hypothesis that an international court as a whole has its own particular needs in the independence context, it is worth bringing it up in the context of a future MIC. This court, which would be the essential institution in the global international investment field, may strengthen its collective independence by resorting to various mechanisms. As detailed in the following section, defining and agreeing *ex ante* on such mechanisms would provide crucial support for the establishment and consolidation of an independent MIC. The article puts forward a case for including diversity rules in the future MIC as a strategy to foster, among others, collective independence.

4. Diversity and Independence in the Multilateral Investment Court: context, ways of incorporating diversity, and pending issues

Having outlined the possible foundations for diversity in the MIC and a court duty regarding independence, a series of interconnected questions arises over the collective facets of independence and diversity. Would the existence of diversity in the MIC affect the court's independence? That is, would incorporating diversity rules increase the MIC's real and/or perceived independence and attack systemic bias[32]? Are diversity rules therefore a de-biasing criterion in international courts such as the MIC? The answer to these questions requires a brief examination of the ideas that follow.

4.1 Diversity in Context

[32] S. Brekoulakis, "Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making", 4 *Journal of International Dispute Settlement (*2013), 553.

Times have clearly changed, and there seems to be no turning back. States initially viewed the appointing of international judges as a sovereign prerogative;[33] this not only granted politics and diplomacy a very prominent role,[34] but also prioritised non-merit factors such as friendship, political connections and political ideology among prospective judges. The current system still places great weight on criteria such as nationality -and in some cases, regional quotas, and so has obviously not dispensed entirely with *jeux de pouvoir*. However, a tendency towards a more detailed positivising of the requirements for individual judges has recently emerged. The rules setting out the qualifications for becoming an international judge generally either require candidates to hold the necessary qualifications for appointment to the highest judicial office or to be jurists of recognized competence, as well as having specialized legal skills and language expertise, among others, a development that has magnified the importance of meritocracy.

Most interested parties have praised this implementing of meritocratic parameters in principle as a step in the right direction,[35] but it has also generated some complaints. It could perhaps be argued that merit-based criteria are not truly universal,[36]

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[33] Lord Mance, "The Composition of the European Court of Justice, Talk given to the United Kingdom Association for European Law, 19th October 2011", https://www.supremecourt.uk/docs/speech_111019.pdf; Szurek Sandra, "La composition des jurisdictions internationales permanentes: de nouvelles exigences de qualité et de représentativité", 56 *Annuaire français de droit international* (2010), 41, 43.

[34] Highly illustrative here is Philippe Sands' enjoyable account in "Choosing Our International Judges, Past and Present", in V. Gowlland-Debbas, M. Kohen and L. Boisson de Chazournes (eds.), *International Law and the Quest for its Implementation. Le droit international et la quête de sa mise en oeuvre. Liber Amicorum* (2010), 446.

[35] Sauve's speeches in relation to the Article 255 panel are very emphatic and support: "*A system of appointment which ceases to rest exclusively on the sovereign prerogative of States and which is based on a new method of evaluation and selection of candidates more open, objective, impartial and based on merit*" (author's translation). Intervention de Jean-Marc Sauvé, vice-président du Conseil d'Etat de France, Président du comité prévu par l'article 255 du Traité sur le fonctionnement de l'Union européenne, devant la Commission des affaires juridiques du Parlement européen, Bruxelles, (2013), http://www.conseil-etat.fr/content/download/3457/10399/version/1/file/2013-05-30_audition-au-parlement-europeen.pdf.

[36] In this sense: "*the fact that there are such divergent views about the relative merits of different judicial backgrounds and characteristics suggests that it is not always easy to predict, on the basis of prior experience, who will prove to be an excellent judge once on the bench" "merit is a slippery and open-ended concept and there is room for reasonable people to reach different conclusions on what it means*

or, on the other hand, that a monopolistic defence of this type of criteria threatens representativeness[37] – as also occurs in highly politicized processes. In other words, an international tribunal composed of judges who meet all the individual eligibility criteria might still be collectively perceived as a biased when taken as a group.

In this context, the notion of diversity appears to be a suitable solution. An empirical study has argued that the fact that "judges are from different countries and the bias of one judge can be mitigated by other judges" is one of the reasons why international courts appear to enjoy a greater degree of independence than national courts.[38] Academics have also suggested that judges with homogeneous profiles tend to share the same attitudes,[39] which would logically seem to reduce the court's independence.

Faced with the reality that diversity criteria are currently on the increase in international courts, questions arise about who is ultimately promoting it. On the one hand, if civil society is currently considered a kind of "active consumer" of international awards, especially when decisions concern public issues, promoting diversity may be a consequence of the fact that global society no longer tolerates international courts composed of male legal elites from the West. On the other hand, if states are deemed to have taken on the role of de-biasing agents in this international context, promoting

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and how it should be evidenced". Ruth Mackenzie, Kate Malleson, Penny Martin and Philippe Sands, *Selecting International Judges: Principle, Process, and Politics* (2010), 177 and 179.

[37] Representativeness as a relevant factor is analysed by Sally J. Kenney, "Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice", 10 *Feminist Legal Studies* (2002), 257, 270.

[38] Kanstantsin Dzehtsiarou and Donal K Coffey, "Legitimacy and Independence of International Tribunals: An Analysis of the European Court of Human Rights", 37 *Hastings International &Comparative Law Review* (2014), 271, 281-282.

[39] In this sense: "*Baroness Hale, Deputy President of the United Kingdom Supreme Court, has observed that most top English judges are white, male, attended the same elite universities, and specialized in commercial law. Apart from the lack of expertise in public law issues that abound in investment arbitration, these judges, of whatever court, most likely have the same ideological predispositions."* M. Sornarajah, "An International Investment Court: panacea or purgatory?", 180 *Columbia FDI Perspectives, Perspectives on topical foreign direct investment issues* (2016), http://ccsi.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf.

diversity may be the logical outcome of their desire to reproduce in the international arena a guiding principle that has already been incorporated into their national legal and judicial contexts. Irrespective of the nature of the trigger factor, the reality is that the court's representativeness, and by the same token, diversity, is a not inconsiderable element of contemporary debate. To provide a very recent example from the investment arbitration field, the fact that that the latest nominations list drawn up by the ICSID Arbitration Council Chairman is both equal in terms of gender and diverse in terms of race, geographical representation, and the presence of different legal systems is certainly neither coincidence nor the result of improvisation.[40]

It therefore seems that a future international court such as the MIC will lack the support it needs from both states and societies if it does not meet two essential requirements: individual meritocracy and collective representativeness, with the latter redressing any imbalances created by the former. The implication is that although the states may –supposedly- retain formal competence in the crucial process of appointing MIC judges,[41] in fact they will have to take into account many other collective concerns apart from classical sovereign interest.

For all these reasons, it seems clear that the MIC cannot afford to take a step backwards in terms of diversity when such efforts are already being implemented in other international legal contexts. It is therefore necessary to reflect on the most appropriate way to inject diversity into this new court.

4.2 Anchoring Diversity in the Multilateral Investment Court

The EU texts referred to above give few details as to how future IIAs will be selected and appointed, except for the fact that treaty parties assume competence in this

[40] https://icsid.worldbank.org/en/Pages/icsiddocs/Panels-of-Arbitrators-and-Conciliators.aspx
[41] This is not the case in the CCJ. *See infra* Section 4.3.

matter via joint committee.[42] This was stipulated by the TTIP drafters, for instance, in the sense that the judges would be appointed by the EU and the US governments[43]. The fact that no detailed official information as to the creation of the judges' roster was initially offered in the context of the MIC generated criticism among various stakeholders[44] and created a halo of suspicion with regard to a MIC that could be biased in favour of defendant states.[45] The issue of diversity was not addressed in the initial documents concerning the prospective creation of a MIC.

In 2016 the EU published the "Questionnaire on options for a multilateral reform of investment dispute resolution," as part of a wider consultation strategy.[46] One section was devoted to the "design, composition and features" of the MIC, but only a

[42] Regarding the composition of this kind of committee, see for instance article 26.1 of CETA: "*The Parties hereby establish the CETA Joint Committee comprising representatives of the European Union and Representatives of Canada. The CETA Joint-Committee shall be co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees"*.

[43] For instance, referring to TTIP: *"on the investment tribunal, the 15 judges would be appointed jointly by the EU and the US governments".* Reading Guide to the Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP). http://trade.ec.europa.eu/doclib/press/index.cfm?id=1365.

[44] M. Sornarajah, "An International Investment Court: panacea or purgatory?", 180 *Columbia FDI Perspectives, Perspectives on topical foreign direct investment issues* (2016), http://ccsi.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf; Investment Treaty Working Group of the International Arbitration Committee, American Bar Association Section on International Law, Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal, October 14, 2016, 27-29, http://apps.americanbar.org/dch/thedl.cfm?filename=/IC730000/newsletterpubs/DiscussionPaper101416.pdf.

[45] Investment Treaty Working Group of the International Arbitration Committee, American Bar Association Section on International Law, Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal, October 14, 2016, 23-25, http://apps.americanbar.org/dch/thedl.cfm?filename=/IC730000/newsletterpubs/DiscussionPaper101416.pdf.

[46] Questionnaire on options for a multilateral reform of investment dispute resolution, http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233.

single question (No. 48) referred generically to adjudicator selection, and no concerns regarding diversity were raised.[47]

The fact that the EU has thus far kept a low profile with regard to both the nomination and selection of MIC judges and diversity issues should not lead to the resigned assumption that these matters will be decided in the old-fashioned opaque way; on the contrary, the creation of the MIC needs to be a stepping stone towards diversity.

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[47] *Questions 46 to 55 focus on the "Design, composition and features of a single Multilateral Investment Court or a Multilateral Appeal Tribunal". Their text reads as follows: "Common to the proposal for a single Multilateral Investment Court and for a Multilateral Appeal Tribunal are questions on overall design and size. It would for instance be necessary to provide for mechanisms allowing the body established to adjust to a growing membership. 46. Do you consider that it is important to ensure that each country party to the agreement establishing the single Multilateral Investment Court or Multilateral Appeal Tribunal should have the possibility to appoint one or more adjudicators? 47. Do you consider it important that the number of adjudicators should be tailored to the likely number of cases and not linked to the number of countries signatory to the agreement? 48. Do you have any further comments on the manner in which adjudicators should be selected? 49. Also common to both proposals whether to establish a single Multilateral Investment Court or a Multilateral Appeal Tribunal, are considerations on the qualifications required to be a permanent adjudicator. In the EU's Investment Court System (ICS), there are a number of criteria that adjudicators must meet for being eligible, including being qualified to hold judicial office in their country or being recognised jurists, as required by the International Court of Justice (ICJ) or the European Court of Human Rights (ECHR). Under the ICS, judges must also have expertise in public international law and previous experience in international investment law. It is assumed that adjudicators would be able to call on experts for technical or scientific information. Do you consider that these qualifications would also be appropriate for a permanent multilateral mechanism, whether a single Multilateral Investment Court or a Multilateral Appeal Tribunal? 50. Do you have any further comments on the qualifications of adjudicators under such a mechanism? 51. An important consideration would be the remuneration and conditions of employment of these adjudicators. Judges in the International Court of Justice (ICJ), the World Trade Organisation (WTO) Appellate Body or the Court of Justice of the EU (CJEU) receive a regular monthly salary which is not linked to their workload. Do you consider that adjudicators in a single Multilateral Investment Court or a Multilateral Appeal Tribunal should be remunerated in a similar manner? 52. Under the EU's ICS set out in EU level agreements, tribunal members must adhere to high standards of ethical conduct. In particular, they cannot act as counsel in investment disputes (so-called "double hatting"). This is also a safeguard ensuring their impartiality. The legal text in EU agreements establishing the ICS foresees the possibility that tribunal members become full-time and hence would, in principle, not be allowed to have external activities. Do you agree that adjudicators in a single Multilateral Investment Court or in a Multilateral Appeal Tribunal should be full-time with no external activities? 53. In most international and domestic courts, including under the EU's ICS, disputes are allocated on a random basis to divisions of adjudicators to ensure impartiality and independence. Do you agree that a similar approach should be followed for the distribution of cases in a potential multilateral investment mechanism, whether a single Multilateral Investment Court or in a Multilateral Appeal Tribunal? 54. Another important consideration relates to the financing of a single Multilateral Investment Court or a Multilateral Appeal Tribunal, including salaries for adjudicators, staff and related administration expenses. For instance, under the EU's ICS, the Parties to the Agreement (i.e. the EU and the other country signing the trade and investment agreement) share the fixed operational costs of the ICS. A repartition key, for instance based on the level of economic development, is often used to determine the contribution of states that are members of international organisations. In your view, would it be appropriate to employ a repartition key to determine the share of the contracting Parties in the operational costs? 55. In your view, should it also be considered that some of the operational costs could be funded in part by user fees (i.e. by investors and/or states)?".*

The most desirable approach would entail serious debate about diversity during the shaping of the rules governing the MIC, using the standards reached in other international judicial contexts as a starting point from which to take a determined step forward. The revolution that those promoting the MIC wish to achieve through the creating of this global court must also be reflected in the way the diversity issue, and through it, the independence question, are addressed.

Having outlined the development and current status quo of other international tribunals (ICC, ICJ, ECHR, ECJ, CCJ, etc.) in terms of diversity, a number of key ideas now need to be highlighted. There is a growing tendency to include pro-diversity parameters in the collective composition rules of international tribunals,[48] and their incorporation reflects the consensus among the community of states and their civil societies regarding the importance of diversity in this international judicial context. International approval of the diversity factor has also been echoed at other stages of the selection process. Through a top-down approach, good practices with reference to diversity in international courts are prevailing during the early phases of nominating and selecting international judges. There are, for instance, judges´ nomination committees at national level that have to comply with specific diversity parameters, either with regard to the composition of the committee itself[49] or regarding to prior consultation mechanisms.[50] Multiple supranational committees, both advisory and with decision-making powers, also have to comply with diversity rules (e.g., fair representation of

[48] *See supra* Section 2.2.

[49] In the context of the ECHR, point IV states: "*The body responsible for recommending candidates should be of balanced composition. Its members should collectively have sufficient technical knowledge and command respect and confidence. They should come from a variety of backgrounds, be of similar professional standing and be free from undue influence, although they may seek relevant information from outside sources."* Guidelines of the Committee of Ministers on the selection [at national level] of candidates for the post of judge at the, 28-29 march 2012, CM(2012)40 final,https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cb1ac.

[50] In the ICJ sphere, Article 6 of the ICJ Statute only contains a recommendation: *"Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law*".

both genders, presence of the main legal systems, equitable geographical representation, different professional backgrounds of the members or the members´ electors, etc.)[51].

[51] The terms of reference for the establishment of an Advisory Committee on nominations for judges of the International Criminal Court state, regarding its composition: "*The Committee should be composed of nine members, nationals of States Parties, designated by the Assembly of States Parties by consensus on recommendation made by the Bureau of the Assembly also made by consensus, reflecting the principal legal systems of the world and an equitable geographical representation, as well as a fair representation of both genders, based on the number of States Parties to the Rome Statute.*" https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.5-ENG.pdf and https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-36-ENG.pdf; the Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for the Election as Judge to the European Court of Human Rights, indicated regarding its composition: "*The Panel shall be composed of seven members, chosen from among members of the highest national courts, former judges of international courts, including the European Court of Human Rights and other lawyers of recognised competence, who shall serve in their personal capacity. The composition of the Panel shall be geographically and gender balanced"*. http://www.justice.gov.ge/Multimedia%2FFiles%2F2017%2FRes_2010_26_eng.pdf. The Article V of the Agreement establishing the Caribbean Court of Justice (CCJ) indicates in a regional context that *"the Regional Judicial and Legal Services Commission* [in charge of appointing the Judges of the Court, other than the President] *shall consist of the following persons: (a) the President who shall be the Chairman of the Commission; (b) two persons nominated jointly by the Organisation of the Commonwealth Caribbean Bar Association (OCCBA) and the Organisation of Eastern Caribbean States (OECS) Bar Association; (c) one chairman of the Judicial Services Commission of a Contracting Party selected in rotation in the English alphabetical order for a period of three years; (d) the Chairman of a Public Service Commission of a Contracting Party selected in rotation in the reverse English alphabetical order for a period of three years; (e) two persons from civil society nominated jointly by the Secretary-General of the Community and the Director General of the OECS for a period of three years following consultations with regional non-governmental organisations; (f) two distinguished jurists nominated jointly by the Dean of the Faculty of Law of the University of the West Indies, the Deans of the Faculties of Law of any of the Contracting Parties and the Chairman of the Council of Legal Education; and (g) two persons nominated jointly by the Bar or Law Associations of the Contracting Parties",* http://www.sice.oas.org/Trade/CCME/agreement_CCJ.pdf. In the sports context, referring to diversity in the electors' professional backgrounds, the Statutes of the Bodies Working for the Settlement of Sport-Related Disputes states that: "*the International Council of Arbitration for Sport (ICAS)* [in charge of appointing the arbitrators who constitute the list of CAS arbitrators and the mediators who constitute the list of CAS mediators] *is composed of twenty members, experienced jurists appointed in the following manner: a. four members are appointed by the International Sports Federations, viz. three by the Association of Summer Olympic Ifs and one by the Association of Winter Olympic Ifs, chosen from within our outside their membership; b. four members are appointed by the Association of the National Olympic Committees, chosen from within or outside its membership; c. four members are appointed by the International Olympic Committee, chosen from within or outside its membership; d. four members are appointed by the twelve members of the ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes; e. four members are appointed by the sixteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS*", http://www.tas-cas.org/fileadmin/user_upload/Code20201320corrections20finales20_en_.pdf-. With less emphasis on diversity, Article 255 of the Treaty on the Functioning of the European Union declares that: **"***A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254. The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice." http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.*

The gradual consolidation of diversity as a balancing criterion in the process of structuring international courts is taking place in a more general context of change. Some national initiatives or isolated changes that were initially considered incidental have turned out to be inspiring indicators during the phases of nominating and selecting international judges.[52] In this sense, transparency and pluralist participation are two of the transversal driving forces behind many of the new initiatives that are being implemented, which may include advertising, calls for information, model CVs, consultations, interviews, and screening of candidates.[53] As touched on in Section 3, these might be the kind of new mechanisms that constitute crucial support for the establishment and consolidation of the MIC.

In short, diversity must be one of the backbone elements of the entire nomination and selection process of IIAs in the MIC. While the whole IIA nomination process has to be transparent and needs public involvement if the MIC wishes to be "accountable, transparent and subject to democratic principles",[54] diversity should also be one of the new court's collective composition rules. Reinforcing the presence of diversity along these two axes also correlates with the principle of independence and impartiality. In words of Remiro Brotóns – referring to the International Court of Justice: *"if independence, professional competence and moral integrity are necessary attributes of a court worthy of such a name and of its members, it is essential to*

[52] For example, changes have been proposed in the Latin American context that reflect the indicated trends, such as the creation of a committee of independent experts within the OAS for the election of the commissioners of the inter-American Commission of Human Rights. This committee would consist of two members of national supreme courts, three former Commissioners and two representatives of civil society. Laurence Burgorgue-Larsen, "Des idéaux à la réalité. Réflexions compares sur les processus de selection et de nomination des membres des Cours européenne et interaméricaine des droits de l'homme", 6 *La Revue des droits de l'homme* (2014), 1.

[53] Elaborating on these "contemporary concerns", Ruth Mackenzie, Kate Malleson, Penny Martin and Philippe Sands, *Selecting International Judges: Principle, Process, and Politics,* (2010), 137.

[54] Cecilia Malmström, "Proposing an Investment Court system", 16 September 2015, https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en.

promote these values in the Court by encouraging nomination and selection inspired by the principles of transparency, merit, as well as diversity and representation"[55].

4.3. Proposals for the Multilateral Investment Court and Their Impact on the Court´s Independence and Diversity

This section briefly presents various additional elements for a future debate on diversity and independence in the MIC. Individual attention will be paid to the following three questions: the setting of a specific mechanism to nominate and select the IIAs, the possible use of quotas within the MIC, and other relevant factors in the MIC's configuration. An analysis of these issues leads to the belief that the enhancement of diversity in the nomination and selection process of the MIC may bring about a decoupling of political pressures that in turn lead to greater independence in the court.

a) IIA Nomination and Selection

As pointed out in previous sections, highly different mechanisms are used to nominate and select international judges. Briefly, states have gradually accepted the fact that it is necessary to share the stage to a greater or lesser extent with other stakeholders in this complex procedure. An innovative initiative was recently implemented in the framework of the Caribbean Court of Justice (CCJ) in which control of the nomination and selection process was removed from states and given to a non-state commission. Despite this, it is impossible to ignore the fact that the states are still the heavyweights in this sphere.

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[55] (Author's translation) Antonio Remiro Brotóns, "Nomination et Élection des Juges à la Cour Internationale de Justice", in D. Alland, V. Chetail, O. de Frouville, J. E. Jorge E. Viñuales (eds.), *Unité et diversité du droit international/Unity and Diversity of International Law, Essays in Honour of Professor Pierre-Marie Dupuy* (2014) 639, 658.

A crucial issue where the MIC is concerned is determining how much power to grant to non-governmental stakeholders during the phases of IIA nomination and selection. The reflections provided by academic opinion on this question mostly contain references to advisory committees, which still leaves states considerable leeway. Various options have been proposed: creating an independent body made up of the presidents of various international courts – ICJ, ECHR, IACHR, US-Iran Claims Tribunal - which would assess the competence of prospective IIAs,[56] or constituting a committee made up of international legal associations, such as the International and the American Bar Associations and the International Council for Commercial Arbitration, which would have a right to veto candidates.[57] A further suggestion involves setting up consultations with business organizations[58] to eliminate the risk of pro-state bias within the MIC. Nevertheless, it remains unclear whether this kind of proposal reflects a real preference for merely advisory participation, or if it is rather a sign of the inertia of the system that still prevails today.

There are nonetheless some recent references to setting up a decision-making commission with power of appointment in the MIC context. A discussion paper drafted in the context of the CETA negotiations expressly pointed out the possibility that IIAs "would not be directly appointed by the Parties, but by an independent body deciding on

[56] Investment Treaty Working Group of the International Arbitration Committee, American Bar Association Section on International Law, Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal, October 14, 2016, 27, http://apps.americanbar.org/dch/thedl.cfm?filename=/IC730000/newsletterpubs/DiscussionPaper101416.pdf.

[57] Investment Treaty Working Group of the International Arbitration Committee, American Bar Association Section on International Law, Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal, October 14, 2016, 27, http://apps.americanbar.org/dch/thedl.cfm?filename=/IC730000/newsletterpubs/DiscussionPaper101416.pdf.

[58] Gabrielle Kaufmann-Kohler and Michele Potestà, "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?", 61, http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf.

criteria other than their origin".[59] Apart from this, academic opinion has pointed out that judges should not be selected by MIC contracting parties but by a multilateral committee representing the interests of the entire international community, as is the case with the UN General Assembly and the Security Council where the ICJ is concerned.[60]

It is reasonable to perceive a direct relationship between the degree of independence with respect to political and financial powers, for example, achieved during the IIA nomination and selection process, and the degree of independence of a MIC constituted through this process. As addressed in Section 3, introducing the diversity factor throughout the whole nomination and selection process would also have a positive effect on the independence of the process itself, which would result in a boost to the MIC's independence.

To this end, it would seem positive for future MIC IIAs to be appointed by a non-political body similar to that already implemented in the CCJ. It should be noted, however, that current general feeling about this type of innovation is characterized by caution. While the independence benefits that granting decision-making powers to an apolitical commission would entail are not questioned, it is also argued that many favourable circumstances would have to converge in the international context for this to come about. [61] While this is undoubtedly true, it also needs to be borne in mind that the

[59] Establishment of a multilateral investment dispute settlement system Expert meeting 13 and 14 December 2016, Geneva, 5, http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf.

[60] Stephan Schill, "Das TTIP-Gericht: Keimzelle oder Stolperstein für echte Multilateralisierung des internationalen Investitionsrecths", 2015, http://verfassungsblog.de/das-ttip-gericht-keimzelle-oder-stolperstein-fuer-echte-multilateralisierung-des-internationalen-investitionsrechts/. The latter's practice regarding the of judge selection shows, however, that a depoliticized procedure has not been achieved so far in the ICC context, and it therefore might raise questions about similar solutions in the MIC.

[61] This is the right time, because "*it is generally much easier to introduce forward-looking and more radical provisions at the point when a court is created than to institute such changes in established courts"*. Ruth Mackenzie, Kate Malleson, Penny Martin and Philippe Sands, *Selecting International Judges: Principle, Process, and Politics*, (2010), 151-2, 172.

MIC initiative offers stakeholders a highly motivating blank slate on which multilevel negotiations may generate novel outcomes.

b) Diversity Quotas

The possibility that diversity quotas will be imposed on the IIA roster is a burning issue in considerations about the composition of the MIC. In principle, the idea of debating the quota issue need not be a cause for alarm, since this is not the first time that this thorny issue has been raised in the international court sphere. The following three cases, which focus respectively on geographical groups, qualifications and gender, are useful examples of the existence of quotas in the international tribunal context.

b.1) Aiming for a fair representation of all geographical areas, Article 3.2 of the International Tribunal for the Law of the Sea (ITLOS) Statute states that: "There shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations". This provision was further developed in 2009, by an arrangement of the States Parties proclaiming that: "From the next election, the Tribunal shall have the following composition: (a) Five members of the Tribunal shall be from the Group of African States; (b) Five members of the Tribunal shall be from the Group of Asian States; (c) Three members of the Tribunal shall be from the Group of Eastern European States; (d) Four members of the Tribunal shall be from the Group of Latin American and Caribbean States; (e) Three members of the Tribunal shall be from the Group of Western European and other States; (f) The remaining one member of the Tribunal shall be elected from among the Group of African States, the Group of Asian States and the Group of Western European and other States".[62]

[62] Arrangement for the allocation of seats on the International Tribunal for the Law of the Sea and the Commission on the Limits of the Continental Shelf, Nineteenth Meeting of States Parties on 22-26 June 2009 (Document SPLOS/201), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/386/72/PDF/N0938672.pdf?OpenElement.

b.2) Referring to the judges' qualifications, Article 36. 5 of the Rome Statute of the International Criminal Court stipulates that: "For the purposes of the election, there shall be two lists of candidates: List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i) [criminal law and procedure's profile]; and List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii) [international law's profile]. (…) At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists." [63]

b.3) Dealing with gender in the 1990s,[64] the Parliamentary Assembly of the European Court of Human Rights (ECHR) imposed requirements regarding the issue on its member states. The initial stipulation that national candidate lists should reflect "the presence of candidates of both sexes"[65] has been polished[66] over time, not without some

[63] This provision ends as follows: Article 36. 3. B. "*Every candidate for election to the Court shall: (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court".* https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf. A provision with the same objective was included in the 2001 Agreement establishing the Caribbean Court of Justice. Article IV: "The Judges of the Court shall be the President and not more than nine other Judges of whom at least three shall possess expertise in international law including international trade law".
http://www.caribbeancourtofjustice.org/wp-content/uploads/2011/09/ccj_agreement.pdf.

[64] An indirect reference to gender quotas can be found in the Stockholm Chamber of Commerce policy on Appointment of Arbitrators, amended by the SCC board on 8 September 2017: "*the SCC seeks to foster diversity in all appointments. This includes but is not limited to acting in the spirit of its commitment as a signatory to the Equal Representation in Arbitration Pledge*". This document also refers to tribunal balance in the following way: "*In all of its appointments, the SCC seeks to balance expertise, legal qualifications, seniority, language and other relevant circumstances, taking into account all members of the Arbitral Tribunal".*

[65] Order 558 (1999): "*The Assembly, referring to its Recommendation 1429 (1999) on the procedure for the nomination of candidates to the European Court of Human Rights at national level, instructs the Sub-Committee on the Election of Judges of its Committee on Legal Affairs and Human Rights, to make sure that in future elections to the Court member states apply the criteria which it has drawn up for the establishment of lists of candidates, and in particular the presence of candidates of both sexes*". http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=16744.

[66] There are less strict gender requirements with regard to ad hoc ECHR judges (the list submitted by the contracting party *"shall include both sexes"*- Rule 29 of the Rules of Court). Marie-Louise Bemelmans-Videc (rapporteur), Juges ad hoc à la Cour européenne des droits de l'homme: un aperçu. Doc. 12827, 23

tension[67], in the latest resolution, which walks an extremely fine line in order to establish a not entirely mandatory[68] gender quota: *"The lists of candidates should, as a general rule, include at least one candidate of each sex, unless the candidates belong to the under-represented gender in the Court (less than 40% of the judges) or where exceptional circumstances lead to derogation from this rule* ".[69]

It is therefore clear that the group of states involved have agreed to establish diversity quotas in international tribunals in some contexts and for specific issues. This may be a good starting point for discussing the merits of also incorporating diversity quotas in the MIC context.[70] From the perspective of independence and, as previously noted, quotas are an antidote to homogeneity. In that sense, quotas may be an instrument to combat –implicit or explicit- bias within the MIC.

There is no doubt that stakeholders' perspectives regarding quotas in the MIC will be highly varied: quotas can be viewed as a legitimate, non-waivable claim, a

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janvier 2012. https://www.coe.int/t/dgi/brighton-conference/documents/pace_documents/AP_DOC_12827_FR.pdf.

[67] Detailing the tensions that the "diversity requirement" (l'exigence de mixité sexuelle) has generated in the European Court of Human Rights, see Jean-François Flauss, "Les élections de juges à la Cour Européenne des Droits de L´Homme (2005-2008)", 75 *Revue trimestrielle* des *droits* de l'*homme* (2008), 713; Norbert Paul Engel, "More Transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights", 32 *Human Rights Law Journal* (2012) 448.

[68] Also known as "soft quota", Bilyana Petkova, "Spillovers in Selecting Europe's Judges. Will the Criterion of Gender Equality Make it to Luxembourg?" in Michal Bobek (ed.), *Selecting Europe's Judges,* 2015, 233.

[69] (Author's translation) This text in the 2012 Lignes directrices du Comité des Ministres concernant la sélection [au niveau national] des candidats pour le poste de juge à la Cour européenne des droits de l'homme summarizes a more detailed version in Resolution 1627 (2008) "Candidates for the European Court of Human Rights", amending Resolution 1366 (2004), as modified by Resolution 1426 (2005): "*The Assembly decides not to consider (national) lists of candidates where (…) the list does not include at least one candidate of each sex, except when the candidates belong to the sex which is under-represented in the Court, that is the sex to which under 40% of the total number of judges belong. The Assembly decides to consider single-sex lists of candidates of the sex that is over-represented in the Court in exceptional circumstances where a Contracting Party has taken all the necessary and appropriate steps to ensure that the list contains a candidate of the under-represented sex, but has not been able to find a candidate of that sex who satisfies the requirements of Article 21 § 1 of the European Convention on Human Rights* (*…)"* .http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17670&lang=en.

[70] This possibility had already been raised in the past in the context of gender initiatives: *"If the roster itself did not achieve this end [gender representation], then states could move to mandatory representation of particular groups on the roster*". Gus Van Harten, "The (lack of) women arbitrators in investment treaty arbitration", *FDI Perspectives* (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2005336.

necessary evil, or a burden that could even be harmful to minorities themselves. To go into a little more detail, a supportive approach to imposing quotas on the MIC would be the following: in democratic societies, where the principle of equal opportunities operates - at least formally - the goal of social promotion has unquestionably not been achieved in many contexts. Thus, diversity remains a desideratum in many political bodies and business management boards, despite the efforts of supranational institutions such as the EU,[71] and this situation has led to arguments in favour of quotas in some of these scenarios. Since the ISDS diversity deficit would also be the direct forerunner of a MIC that aspires to adjudicate at global level, it does not seem illogical to impose quotas on the latter. However, this may be rejected on the basis that quotas represent an attack on the quality of IIAs. While merit-based selection fosters a top-of-the-class approach, diversity quotas encourage a system aimed at equality and inclusion. This perspective views meritocracy and representativeness as two aims that are difficult to reconcile. [72]

c) Further Issues

[71] The EU has also been a precursor of innovative diversity and gender policies in various areas and has been dictating Directives and Regulations on gender equality for several decades (several precepts of the Treaty on the Functioning of the European Union itself refer to equality between men and women). In the Directives and Regulations framework, see, for example, Directive 2002/73 / EC, Directive 76/207 / EEC, Directive 2000/78 / EC, Directive 2004/113 / EC, Directive 2006/54 / EC, Regulation 1922/2006, etc. Other texts such as the Proposal for a Directive of the Parliament and the Council aimed to improve the gender balance between the non-executive directors of listed companies and those establishing related measures (http://eur-lex.europa.eu/ legal-content / ES / TXT /? uri = CELEX% 3A52012PC0614), have generating intense social debate and promoting new initiatives at national level. Furthermore, the EU is still very involved in developing of the gender equality policy through the ambitious Strategic Engagement for Gender Equality 2016-2019 - one of its transversal axes being the promotion of equality between men and women in the of decision-making context (http://ec.europa.eu/anti-trafficking/eu-policy/strategic-engagement-gender-equality-2016-2019, 2017 Report on equality, between women and men in the EU, http: //ec.europa.eu/newsroom/document.cfm?doc_id=43416).

[72] Some alternatives to quota setting have been proposed, such as extending commission prerogatives, to include carrying out checks –and in some cases, decide- whether prospective IIAs also match the MIC's collective composition rules. In the EU context, it has been suggested that: "*the panel provided for under Article 255 TFEU should be able to determine whether the candidate not only possesses the legal qualification to perform the role, but also if he or she would fit the Court needs in term of diversity*." Camilla Cordelli, "Judicial Appointments to the Court of Justice of the European Union", 54 *Acta Juridica Hungarica* 24, 38.

A very brief reference will be made to various additional aspects that are both related to the configuration of the MIC and connected with its independence and diversity. An issue that may prove somewhat controversial concerns the optimal number of IIAs that would make up each court division. The classic number in the investment arbitration context is three,[73] but arguments have been put forward in support of an increase. Likewise, the optimal number of eligible adjudicators is a controversial issue.[74] On a separate issue, various voices from academia have pointed out that short term appointments not only reduce the judges' productivity, but may also negatively affect their independence.[75] Longer-term non-renewable appointments are therefore preferable in the MIC framework,[76] since this would reduce the risk of conflict of interests, among other things.[77] Moreover, the possible introduction of an age limit for IIAs in the MIC has also been suggested, as this would enhance diversity in terms of age and experience.[78]

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[73] Gabrielle Kaufmann-Kohler, "Remarks" in American Society of International Law, *Proceedings of the 110th Annual Meeting,* 2016, 146.

[74] In CETA, the Tribunal is composed by 15 members of the Tribunal, and the TTIP´s proposal the Appeal Tribunal is composed by 6 members. Scholars have been pointed out that such meager numbers can affect the court´s diversity and experience. Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators. Current Case Law, Alternative Approaches, and Improvement Suggestions* (2017), 219.

[75] Angela Huyue Zhang, "The faceless court", 38 *University of Pennsylvania Journal of International Law* 2016, 71; Aida Torres Pérez, "Can Judicial Selection Secure Judicial Independence? Constraining State Governments in Selecting International Judges", in Michal Bobek (ed.), *Selecting Europe's Judges,* 2015, 199.

[76] 2016 CETA states that "*Members of the Tribunal appointed pursuant to this Section shall be appointed for a five-year term, renewable once*". TTIP indicates that: "*the judges appointed pursuant this section shall be appointed for a six-year term, renewable once*", and the EU-Vietnam FTA affirms that: "*the Members of the Tribunal appointed pursuant to this Section shall be appointed for a four-year term, renewable once*".

[77] Investment Treaty Working Group of the International Arbitration Committee, American Bar Association Section on International Law, Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal, October 14, 2016, 27, http://apps.americanbar.org/dch/thedl.cfm?filename=/IC730000/newsletterpubs/DiscussionPaper101416.pdf.

[78] European Federation for Investment Law and Arbitration, *Task Force Paper regarding the proposed International Court System*, 17, http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf.

5. Conclusion

The *modus operandi* for nominating and selecting judges making up supra-national tribunals is evolving. Political interests no longer have a monopoly on the process, and a series of transversal principles such as transparency, participation and diversity are breathing new life into the way these courts are constituted.

This article has outlined some grounds for justifying diversity in the future MIC, explored the possible role to be assigned to diversity in a successful MIC, and examined a series of decisions on diversity that would need to be adopted in the MIC context. The connections between diversity and the principle of independence and impartiality have also been addressed throughout.

The article puts forward a case for adopting an exemplary stance on diversity in the process of creating a MIC. If supranational powers such as the EU are willing to undermine many foundations of the current international investment arbitration system, they must also take a step forward in terms of diversity.