Chapter 5
Applicable Law

One of the central concerns in establishing an MIC is the creation of institutional framework conditions for the avoidance of contradictory decisions and the development of a uniform decision-making process in the settlement of investment disputes. 366

This concern is understandable given the previous and at times remarkably divergent interpretations of similar, if not identical investment protection standards. One must, however, also acknowledge that in the current decentralised system of investment arbitration, a high degree of convergence in the interpretation of investment protection standards has generally been achieved. 367

Nevertheless, the sometimes fundamental differences in interpretation show that there is a need for harmonisation, for instance with regard to the scope of the term 'investment' under Article 25 ICSID Convention,[1] the applicability of Most-Favored-Nation (MFN) clauses to jurisdictional and procedural matters[2] as well as the "importation" of protection standards,[3] the scope of so-called umbrella 368

[1]See Manciaux (2008), p. 443; Schreuer et al. (2009), p. 128 et seq.; Reinisch (2010), p. 749; Dupont (2011), p. 245; Dolzer and Schreuer (2012), p. 44 et seq.

[2]Gaillard (2005), Douglas (2011), p. 97; Maupin (2011), p. 157; Paparinskis (2011), pp. 14–58; Schill (2011), p. 353.

[3]So far, arbitral awards generally accept, that MFN clauses can help to "import" more preferable protection standards of other agreements. Cf. e.g. *Berschader v. Russian Federation*, SCC Case No. 080/2004, Award, 21.4.2006, para. 179: "[. . .] it is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties [. . .]." See Dolzer and Schreuer (2012), p. 211: "The weight of authority clearly supports the view that an MFN rule grants a claimant the right to benefit from substantive guarantees contained in third treaties." CETA and other EU agreements exclude the application of MFN clauses on procedural aspects and to substantial protection provisions of other agreements. Cf. Art. 8.7 para. 4 CETA: "For greater certainty, the "treatment" referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute

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clauses,[4] the scope of obligations of Fair and Equitable Treatment (FET),[5] the conditions for the application of a state of emergency[6] etc.

369 In the context of the divergent interpretations of comparable investment protection standards, criticism expressed regarding an allegedly too investor-friendly interpretation of investment protection standards by investment tribunals must be considered.[7] This would follow, inter alia, from an emphasis on a teleological interpretation based on the object and purpose of an investment treaty, which in IIAs are very often explicitly the increase of foreign direct investment and the creation of an investor-friendly climate.[8] Indeed, in light of the rather low success

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"treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations."

[4]See Alexandrov (2004), p. 555; Schreuer (2004), p. 231; Sinclair (2004), p. 411; Wälde (2005), p. 183.

[5]Cf. Kläger (2011), Yannaca-Small (2008), p. 112; Jacob and Schill (2015), p. 700; Tudor (2008).

[6]See Burke-White and von Staden (2007), p. 307; Reinisch (2007), p. 191; Schill (2007), p. 265; Waibel (2007) p. 637; Bjorklund (2008), p. 495; Alvarez and Khamsi (2009), p. 379; Binder (2009), p. 608; Bjorklund (2009), p. 479.

[7]Weeramantry (2012), p. 191; Dolzer and Schreuer (2012), p. 30; Yen (2014), p. 91 et seq.: "Interpreting general and vague treaty terms that can convey various meanings, tribunals have sought guidance in the treaty title and preamble. On that basis, they have found the prominent purpose of protecting and promoting investments to justify their pro-investment interpretations. [. . .] A more serious problem arises where reliance on this means of interpretation is accompanied with a disregard of other means under international rules on treaty interpretation." See also the critique of NGOs: Eberhardt and Olivet (2012), p. 16: "This report argues that the alleged fairness and independence of investment arbitration is an illusion. The law and the consequential disputes are largely shaped by law firms, arbitrators [. . .]. This industry is also responsible for growing its own business with pro-investor interpretations of the treaties." Cf. also Open Letter from Lawyers to the Negotiators of the Trans-Pacific Partnership urging the Rejection of Investor-State Dispute Settlement, 8.5.2012, https://tpplegal.wordpress.com/open-letter/: "Simultaneously, the substantive rights granted by FTA investment chapters and BITs have also expanded significantly and awards issued by international arbitrators against states have often incorporated overly expansive interpretations of the new language in investment treaties. Some of these interpretations have prioritized the protection of the property and economic interests of transnational corporations over the right of states to regulate and the sovereign right of nations to govern their own affairs."

[8]Cf. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29.1.2004, para. 116: "The object and purpose of the BIT supports an effective interpretation of Article X(2).The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12.10.2005, para. 52: "The object and purpose rule also supports such an interpretation. While it is not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors, here such an interpretation is justified. Considering, as pointed out above, that any other interpretation would deprive Art. II(2)(c) of practical content, reference has necessarily to be made to the principle of effectiveness, also applied by other Tribunals in interpreting BIT provisions (see *SGS v. Philippines*, para. 116 and *Salini v. Jordan*, para. 95)."

rates of investor claims, a generally too investor-friendly interpretation does not seem discernible.

Although both problems can be addressed at the level of the applicable substantive law and through institutional and procedural arrangements, a conceptual distinction has to be made between the uniformity of interpretation and the likelihood of too state-friendly or too investor-friendly interpretations of investment protection standards. **370**

These problems could be tackled, at least to a certain extent, by increasing the degree of precision and by clarifying the scope of investment protection. **371**

However, the competence transferred by the Lisbon Treaty to the EU to conclude IIAs regarding foreign direct investment has created a new and more fundamental problem for the applicable substantive law. It follows from the established case law of the CJEU, which emphasises its interpretative monopoly over EU Law, that the EU's participation in international dispute settlement systems is compatible with this interpretative monopoly only insofar as the ultimate jurisdiction on matters of validity and interpretation of EU Law is reserved for the CJEU. In the CETA-Opinion 1/17, the CJEU has held that tribunals outside the EU judicial system cannot have the power to interpret or apply provisions of the EU law other than those of the international agreements or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.[9] Therefore EU agreements cannot confer on the envisaged tribunals any power to interpret or aply EU law other than the power to interpret or apply the provisions of that agreement having regard to the rules and principles of international law applicable between the parties and that these tribunals may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.[10] **372**

Therefore, from an EU legal perspective, the interpretation and application of EU Law as the substantive applicable law in investment disputes by an MIC will cause problems, if the conditions set up by the CJEU are not taken into consideration. This "EU internal" problem, which is not directly related to the other discussed issues with regard to the establishment of an MIC, should therefore be considered initially. **373**

5.1 Applicable Substantive Law

In the field of investment law, there are two models for the determination of the applicable substantive law: it can be determined by the rules of procedure of a dispute settlement body or it can be contained in the applicable bilateral or multilateral IIAs. In addition, it is possible that both regulatory regimes contain provisions on the applicable substantive law. **374**

[9]CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 118.

[10]CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 119.

375 For example, the ICSID Convention provides that in light of the principle of party autonomy, the parties to the dispute basically have the right to choose the applicable substantive law. Otherwise, i.e. in the absence of a choice of law, the domestic law of the host state and public international law shall apply.[11]

376 In the case of investment contracts between investors and states, the choice of law is contained in a contractual clause. In the case of treaty-based investment dispute settlement, which is much more common in practice, the choice of law is agreed by the state parties to the treaties. Individual investors accept this "offer" of a choice of law in the same manner as they accept the offer to arbitrate, namely by bringing a request for arbitration.[12]

377 The "cumulative" application of the domestic law of the host state and of public international law provided for in Art. 42 ICSID Convention has caused conceptual problems. The original practice was based on a "complementary and corrective function" of public international law, according to which the domestic law had to be applied primarily; public international law was used only to fill gaps and correct results incompatible with international law.[13] However, it is nowadays accepted that both legal systems play an equal role,[14] the latter especially with regard to customary rules on state responsibility, particularly regarding issues of attribution and the circumstances precluding wrongfulness, the protection against denial of justice, expropriation etc.[15]

378 Most bilateral and multilateral IIAs also contain a definition of the applicable substantive law. As a rule, the substantive investment protection standards of the respective IIAs should in many cases be applied in conjunction with general international law. Furthermore, there are a number of treaties which in addition to public international law also provide for the application of the domestic law of the

[11] Article 42 ICSID Convention: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

[12] Schreuer et al. (2009), Art. 42, para. 23.

[13] Cf. *Amco v. Indonesia*, Resubmitted Case: Award, 5.6.1990, para. 20, 1 ICSID Reports 580: "This Tribunal notes that Article 42(1) refers to the application of host-state law and international law. If there are no relevant host-state laws on a particular matter, a search must be made for the relevant international laws. And, where there are applicable host-state laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as "only" "supplemental and corrective" seems a distinction without a difference." Dolzer and Schreuer (2012), p. 292.

[14] *Wena Hotels v. Egypt*, Decision on Annulment, 5.2.2002, 6 ICSID Reports 129, para. 40: "What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42 (1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit." Gaillard and Banifatemi (2003), p. 377.

[15] Dolzer and Schreuer (2012), p. 288.

host state and specific investment contracts between investors and states.[16] Conversely, some IIAs limit the applicable law to the respective substantive investment protection treaty standards.[17]

From the EU's perspective, a treaty provision in an MIC Statute or in the respective IIAs concluded by the EU which stipulates that the domestic law of the host state shall be the applicable law would mean that EU Law would have to be interpreted and applied by an MIC. **379**

While from a public international law perspective this would seem unproblematic and might even have the advantage that an MIC could take EU Law directly into account, from an EU legal perspective and especially in light of the CJEU's jurisprudence on safeguarding its interpretative monopoly, problems could arise with regard to the conformity of such a choice of law with EU Law. **380**

5.1.1 EU Law as Applicable Substantive Law?

Within the EU, the question arises as to whether the application and interpretation of EU Law by an MIC could jeopardise the ultimate jurisdiction of the CJEU over the interpretation of EU Law. **381**

In principle, the CJEU does not regard the establishment of international courts on the basis of international treaties as incompatible with the EU Treaties.[18] Rather, it has repeatedly held that binding international dispute settlement provisions are compatible with EU Law in so far as they concern the application and interpretation of treaties concluded by the Union.[19] It has also considered international dispute settlement systems as permissible under EU Law, provided that they do not affect the competences of the Union and its institutions or the autonomy of the EU legal order.[20] **382**

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[16]Cf. Article 10 para. 7 Argentina-Netherlands BIT: "The arbitration tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable."

[17]Cf. Article 26 para. 6 ECT: "A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law." Article 1130 North American Free Trade Agreement (NAFTA) Governing Law: "A Tribunal established under this Subchapter shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

[18]See CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 105 with further references.

[19]ECJ, Opinion 1/91, *EEA I*, ECLI:EU:C:1991:490, para. 40: "An international agreement providing for such a system of courts is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions."

[20]CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 105 et seqq.

383 It follows that such courts are in conformity with EU Law, provided that they confine themselves to the interpretation and application of the international agreements in question and do not extend to the interpretation and application of EU Law, which would have been the case with the draft for a "European and Community Patents Court" which the CJEU has found to be incompatible with the EU Treaties.[21]

384 After the CJEU Opinion 1/17[22] it now seems to having been clarified that also an MIC should be compatible until EU law provided for that the conditions set up by the CJEU in this Opinion 1/17 are fully taken into account when creating a statute for an MIC, especially in regard to the applicable law[23]

385 Several investment tribunals have held that the interpretation of EU Law as applicable law in investment disputes is unproblematic and considered it compatible with the EU legal order in light of the *acte claire* doctrine.[24] Arbitral decisions concerning the ECT also did not find the overlap of interpretations to constitute a curtailment of the CJEU's exclusive jurisdiction, since assessments of measures based on EU Law would never deal with the validity of European Law, a question reserved for the competent EU institutions.[25]

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[21]ECJ, Opinion 1/09, *European Patents Court*, ECLI:EU:C:2011:123, para. 78: "By contrast, the international court envisaged in this draft agreement is to be called upon to interpret and apply not only the provisions of that agreement but also the future regulation on the Community patent and other instruments of European Union law, in particular regulations and directives in conjunction with which that regulation would, when necessary, have to be read, namely provisions relating to other bodies of rules on intellectual property, and rules of the FEU Treaty concerning the internal market and competition law. Likewise, the PC may be called upon to determine a dispute pending before it in the light of the fundamental rights and general principles of European Union law, or even to examine the validity of an act of the European Union." Cf. further para. 89: "Consequently, the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law."

[22]CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341.

[23]CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 130 et seqq.

[24]*Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic [I]*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26.10.2010, para. 282 et seq.: "The argument that the ECJ has an "interpretative monopoly" and that the Tribunal therefore cannot consider and apply EU law, is incorrect. The ECJ has no such monopoly. Courts and arbitration tribunals throughout the EU interpret and apply EU law daily. What the ECJ has is a monopoly on the final and authoritative interpretation of EU law: but that is quite different. Moreover, even final courts are not obliged to refer questions of the interpretation of EU law to the ECJ in all cases. The acte clair doctrine is well-established in EU law."

[25]Cf. *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30.11.2012, para. 4.197 et seq.: "The Tribunal recognises the special status of EU law operating as a body of supranational law within the EU. It also recognises

Because of still existing uncertainty, it is understandable that the negotiators of European investment treaties and chapters in comprehensive free trade agreements are very cautious with regard to the application of EU Law. For example, Article 8.31 para. 2 CETA provides that an investment tribunal does not have jurisdiction to determine the legality of a measure under domestic (including EU) law. Domestic law may only be relevant as a question of fact and interpretations of domestic law by investment tribunals have no binding effect on state courts and institutions of the contracting party.[26] **386**

Accordingly, it seems appropriate to also include a provision on the applicable substantive law in an MIC Statute, which essentially limits the standards of protection to those of the applicable treaties. Such a provision could also stipulate whether and, if yes, under which circumstances an MIC can exercise jurisdiction over breaches of investor-state contracts (see para. 214 et seq.). **387**

5.1.2 Uniform Interpretation of Standards of Protection

It is evident that a uniform interpretation of investment protection standards can best be achieved on the basis of uniform treaty texts. Therefore, the optimal condition for a homogeneous interpretation would be the existence of a single multilateral investment treaty. However, it is also clear from today's perspective and after the experience with the failure of a multilateral investment agreement in the 1990s that a multilateral investment treaty is currently politically impossible.[27] Rather, the application of the existing and future IIAs needs to be considered. According to estimates by the United Nations Conference on Trade and Development (UNCTAD), there is a **388**

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the roles undertaken by the ECJ as the arbiter and gate-keeper of EU law comprising, in the words of ECJ Opinion 1/09, "the fundamental elements of the legal order and judicial system of the EU" (paragraph 54). However, these important features do not arise in the present case. [. . .] Although the Tribunal is required in this arbitration to interpret the European Commission's Final Decision of 4 June 2008, and in that sense, to apply EU law to the Parties' dispute, the Tribunal is not required to adjudicate here upon the validity of that decision [. . .]. That adjudication remains a decision for the EU courts alone [. . .]."

[26] Article 8.31 para. 2 CETA: "The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party." On this point CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 131 et seqq.

[27] Zuleta (2015), p. 405; Dolzer and Schreuer (2012), p. 10 et seq.; Salacuse (2013), p. 354.

considerable legal body of approximately 3000 bilateral and multilateral treaties (especially IIAs and trade agreements with investment chapters).[28]

389 Although these treaties contain to a large extent similar provisions on substantive standards of protection,[29] those provisions are often formulated in a significantly more detailed manner in the more recent agreements compared to those in the first generations of IIAs.[30] In this context, we are faced with rather standardised provisions on compensation for direct and indirect expropriations, FET, full protection and security and non-discrimination in the "older" treaties from the 1960s to 1990s and subsequently with a series of agreements that do not always consistently regulate the various standards of protection in much greater detail.

390 This results in treaty-based limitations on a possible uniform interpretation of investment protection standards. As far as the wording of applicable substantive standards of protection clearly diverge, these textual differences must be taken into account in accordance with the generally accepted principles of treaty interpretation codified in the VCLT.[31]

391 Nevertheless, as evidenced by previous practice of investment arbitration, individual arbitral tribunals are able and willing to interpret and harmonise divergent provisions (see para. 394).

392 In addition, there are also procedural steps that contribute to a harmonious interpretation and which could be incorporated in an MIC Statute. This would primarily include the permanence of treaty interpreters (as opposed to *ad-hoc* arbitrators) inherent in a permanent court as well as an explicit, harmonious interpretation mandate.

5.1.2.1 Permanency of the Treaty Interpreters at the MIC

393 As the various interpretations of investment protection standards referred to above are not only owed to the fact of 'objectively' diverse treaty wording, but can sometimes also be attributed to the different treaty interpreters. A 'standardisation' among the treaty interpreters would be another important step towards the desired result.[32]

394 Already in the previous practice of investment arbitration, similar rudimentary steps were made; for example, by the formal consolidation of individual

[28] 2353 BITs in force and 313 agreements in force with investment provisions. Division on Investment and Enterprise, https://investmentpolicy.unctad.org/international-investment-agreements.

[29] They are often based on comparable national standard investment protection contracts, that, in turn, are based on OECD standards. Cf. Vandevelde (2010), p. 57; Brown (2015), p. 182; De Brabandere (2014), p. 25.

[30] Brown (2015), p. 183.

[31] Vienna Convention on the Law of Treaties of 23.5.1969, 1155 UNTS 331.

[32] Marceddu (2016), p. 44.

proceedings[33] or by the appointment of the same arbitrators in different but related proceedings[34] in order to avoid divergences in interpretation as much as possible.

In fact, the repeated reappointment of certain arbitrators in different arbitration proceedings resulted in a certain permanence of adjudicators, which may have contributed to a more uniform interpretation of treaty provisions.[35] 176 out of the total of 361 existing arbitrator posts in proceedings between 1972 and 2006 were occupied by the same 43 arbitrators.[36] This trend has intensified in recent years and led to the development of shared legal views, which has resulted in an increased consistency of decisions.[37] **395**

This standardising function can undoubtedly be strengthened by the establishment of an MIC, which would establish a single institution to decide on the interpretation and application of treaty standards instead of different *ad hoc* arbitral tribunals.[38] **396**

[33]Cf. examples from the past "*de facto* consolidation": Kurtz (2014), pp. 257, 271; Kaufmann-Kohler et al. (2006), p. 74.

[34]Cf. e.g. the composition of the tribunals in *Sempra* and *CMS* (*CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12.5.2005): Francisco Orrego Vicuna has served as President and Marc Lalonde as member of both tribunals. In general, the decisions are identical, the tribunal in *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28.9.2007, para. 346 finds that: "While two arbitrators sitting in the present case were also members of the tribunal in the CMS case the matter has been examined anew." Cf. additionally more critical Burke-White (2010), p. 425 et seq.; Dugan et al. (2008), p. 89 et seq.

[35]Commission (2007), p. 136: "The question as to whether or not ad hoc tribunals with ever-changing members can truly create precedent, and a distinct jurisprudence, is not a new one. As to investment treaty decisions and awards emanating from ICSID tribunals, however, the tribunal members are no longer ever-changing. Put simply, their backgrounds, qualifications, experiences in international law and their regular interactions, both professionally and otherwise, have contributed to the development of an esprit de corps amongst ICSID and other investment treaty arbitrators." Cf. regarding the previous common practice of numerous reappointments of certain arbitrators Shihata and Parra (1999), p. 311.

[36]Commission (2007), p. 141; Fontoura Costa (2011), p. 11: "For instance, group of only 12 arbitrators (4.4%) of the ICSID population accounts for about a quarter of nominations [. . .] the 12 people (first quartile) who account for over a quarter of the ICSID nominations are present in 60% of the tribunals, i.e. in 158 out of 263 tribunals. In other words, the group of more frequent arbitrators spreads their influence not only on a quarter of tribunals, but well over half of them."

[37]Commission (2007), p. 141.

[38]Cf. the statements on the influence of the presence of permanent judges (as opposed to *ad-hoc*) on harmonised decisions on the occasion of the establishment of the Statute of the Permanent Court of International Justice (PCIJ), the predecessor of the International Court of Justice. Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, Annex No. 1, 695 (1920): "In the Court of Arbitration, there is no permanent tie between the sitting judges, and consequently, no esprit de corps nor progressive continuity in jurisprudence; on the other hand, the Court of International Justice, being composed of judges, permanently associated with each other in the same work, and, except in rare cases, retaining their seats from one case to another, can develop a continuous tradition, and assure the harmonious and logical development of International Law."

397 It can be expected that the interpretation of identical or similar investment protection standards by the same group or a small group of persons who decide in a similar composition will lead to a greater degree of consistency and coherence, as should be the case with the proposed MIC.

5.1.2.2 Harmonising Interpretation Mandate

398 A further possibility to achieve a higher degree of uniformity in the interpretation of identical or similar investment protection standards would be to emphasize the need for the most uniform possible interpretation of the applicable provisions by the MIC.

399 Other dispute settlement systems also feature comparable "interpretation mandates" for treaty users and treaty interpreters. For example, the WTO DSU stipulates that the WTO Dispute Settlement System is primarily intended to serve legal certainty and predictability, and explicitly states that it should be oriented towards the international customary principles of interpretation of international treaties and must abstain from "legislative" interpretation.[39] The background of the latter skepticism towards overly activist interpretations by WTO Panels and the Appellate Body has been a concern that Member States may have had in the often far-reaching interpretative practice of GATT Panels.[40] However, it seems essential that the WTO Dispute Settlement System comprises a provision which contains a precise interpretative directive.[41]

400 Similarly, it seems practical not only to instruct the MIC to observe international customary principles of interpretation of international treaties, but also the most harmonising possible interpretation of investment protection standards which are not formulated in a completely identical manner. Such an interpretative mandate could, for example, be achieved by an emphasis on the systematic interpretation already mentioned in the VCLT and also known in investment arbitration practice in accordance with Article 31 para. 3 lit. c VCLT.[42] Alternatively, one could also

[39] Article 3.2 DSU: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

[40] Jackson (1998), p. 342.

[41] Van Damme (2010), p. 606 et seq.

[42] Article 31 VCLT: "(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. [. . .] (3) There shall be taken into account, together with the context (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties." *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15.4.2009, para. 78: "It is evident to the Tribunal that the same holds true in

choose a wording according to which the interpretation of the applicable investment standards by the MIC would be oriented towards the principles of consistency and coherence.

5.1.3 Ensuring a Neutral and Objective Interpretation of Standards of Protection

A separate problem of interpretation is the question as to how to prevent investment treaty standards agreed upon by the parties from being interpreted as too investor- or too state-friendly. The previous debate above was about the concern of a too investor-friendly interpretation of the standards of protection contained in IIAs and other treaties by investment arbitral tribunals which has given rise to various considerations for a "change of course". **401**

The proposals ranged from specifying and limiting investment standards to establishing corrective measures by the parties to the treaties e.g. authentic treaty interpretations or even proposals to establish an MIC to eliminate the influence of arbitrators appointed by the investors. **402**

Similar to the issue of uniformity, in the interpretation of investment standards, this is also a question of interpretation, but at the same time involves weighing conflicting interests in interpretation.[43] Therefore, it appears particularly necessary to consider the integrity of the interpretation and decision-making process by an MIC. **403**

5.1.3.1 Clarification and Limitation of Investment Protection Standards in Investment Agreements

An unproblematic response to an interpretation practice of arbitral tribunals which is perceived to be too investor-friendly would be the correction and revision of investment protection standards in the applicable agreements. In fact, not only the **404**

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international investment law and that the ICSID Convention's jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles."; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8.11.2010, para. 233: "The Tribunal will apply the provisions of the UABIT and interpret the UABIT in a manner consistent with customary international law." See for the systemic interpretation also Hofmann and Tams (2011), p. 53; McLachlan (2005), p. 279.

[43] *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27.4.2006, para. 70: "This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow." Weeramantry (2012), p. 193.

CETA and TTIP texts but also a number of other recent investment agreements have clearly included provisions aimed at restricting investor rights.[44]

405 This can be well illustrated by the provisions on indirect expropriation. Whereas in the original "first generation" IIAs, direct and indirect expropriations were generally treated as equal and therefore in principle triggered an obligation to provide compensation,[45] in the practice of investment tribunals[46] and at the same time in the practice of treaty drafting, it has become accepted that non-discriminatory state measures adopted for a public purpose, e.g. health or environmental protection or for general public safety, cannot in principle be considered as measures tantamount to expropriation.[47]

406 Comparable textual limitations[48] of investor rights can also be found in other standards of protection. For example, the CETA text provides for a far-reaching curtailment of the standard of FET by defining only extreme violations of the elements of FET identified in previous practice of investment tribunals as CETA violations.[49] Similarly, the CETA text adopts the standards of full protection and

[44]See on this also CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 155 et seqq.

[45]Dolzer and Schreuer (2012), p. 101 et seq.; Vandevelde (2010), p. 285 et seq.: "Like the [first] German BITs, the Abs-Shawcross Convention also explicitly recognized the distinction between a direct and an indirect expropriation. [. . .] The concept of an indirect expropriation in these early instruments quickly gained recognition in general BIT practice." See e.g. Article 7 Switzerland-Guinea BIT 1962: "Falls eine Vertragspartei Vermögenswerte, Rechte oder Interessen von Staatsangehörigen [. . .] enteignet oder verstaatlicht oder gegen diese Staatsangehörigen, Stiftungen, Vereinigungen oder Gesellschaften irgendeine andere Massnahme der direkten oder indirekten Besitzentziehung ergreift." Article 3 Netherlands-Tunisia BIT 1965: "Where one Party expropriates or nationalizes property, rights or interests [. . .] or takes any measure which results directly or indirectly in the dispossession of such nationals or corporations [. . .]." Similarly also Article 3 BLEU (Belgium-Luxembourg Economic Union)-Tunisia BIT 1964.

[46]Cf. *Methanex v. USA*, UNCITRAL (NAFTA), Final Award, 3.8.2005, Part IV, D., para. 7: "[. . .] as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, 17.3.2006, para. 262: "[. . .] the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States" forms part of customary international law today."

[47]See e.g. Annex B(4) 2012 US Model BIT; Annex B.13(1) 2004 Canada Model FIPA; Annex 8-A (3) CETA: "For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations."

[48]See on this also CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 156 et seqq.

[49]See e.g. Article 8.10 para. 2 CETA: "A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process,

security by being expressly restricted to protection against physical threats by third parties.[50]

As the wording of a provision is the starting point of treaty interpretation[51] under the VCLT rules,[52] such prospective limitation of investors' rights seems to be the safest and least problematic way of preventing individual standards from being interpreted in a too investor-friendly manner at the expense of host states. At most, however, an excessive limitation[53] could result in investors finding the protection granted inadequate and they may therefore possibly turn to alternative methods of dispute settlement.[54] This could range from a reactivation of diplomatic protection (which could be accompanied by a politicisation of the disputes),[55] the increased conclusion of investment contracts between investors and states including their own separate arbitration clauses, to the strategic planning of investments via states that have a higher level of protection due to existing IIAs. **407**

Such a redirecting effect would certainly be counterproductive with regard to the objective of uniform and consistent interpretation of investment protection standards. However, insofar as the respective agreements find a balance between the **408**

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including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article."

[50]See e.g. Article 8.10 para. 5 CETA: "For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments."

[51]Cf. the comments of the ILC to Article 31 VCLT, in ILC, Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, 1966, vol. II, p. 220: "The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intentions of the parties." See also *Methanex v. USA*, UNCITRAL (NAFTA), Final Award, 3.8.2005, Part II, B, para. 22: "[. . .] the approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties." *Wintershall v. Argentina*, ICSID Case No. ARB/04/14, Award, 8.12.2008, para. 78: "The carefully-worded formulation in Article 31 is based on the view that the text must be presumed to be the authentic expression of the intention of the parties. The starting point of all treaty-interpretation is the elucidation of the meaning of the text, not an independent investigation into the intention of the parties from other sources (such as by reference to the travaux preparatoires, or any predilections based on presumed intention."

[52]Article 31 para. 1 VCLT: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[53]Newcombe (2013), p. 23; Alvarez (2011), p. 235; Tan and Bouchenaki (2015), p. 253 et seq.; Levesque and Newcombe (2013), p. 40.

[54]Ryan (2008), p. 761: "That means that all participants will be required to adjust their expectations if the system is to flourish. The United States is attempting to more clearly define the scope of protections accorded to investors through changes to its Model BIT. In doing so, it has arguably narrowed the scope of protections available to investors. Investors, in turn, may be required to adjust their expectations in such a way that will allow them to operate in the changing legal environment."

[55]Schreuer (2015), p. 881 et seq.

legitimate interests of host states and investors, a clarification of the standards of protection not only seems to be unproblematic, but even practical in order to provide the treaty interpreter, i.e. a future MIC, with a more detailed decision-making basis.

5.1.3.2 Limiting the Mandate for Interpretation

409 It should also be considered whether the MIC should be instructed with specific interpretative maxims. For example, it would be conceivable to clarify in the respective text of the treaty, in the preamble or in the annexes, that the investment protection standards are to be interpreted neutrally and objectively, or that specific interpretative variants could be agreed as binding. The more recent practice of interpreting the scope of the standard of FET and full protection and security or clarification of what should not be regarded as indirect expropriation provides useful examples (see para. 406). Since they are already provided for in the applicable treaties, investors cannot claim being confronted with an unexpected interpretation.

410 As an alternative to incorporating them in the applicable IIAs, one could consider whether comparable interpretation directives could be included in an instrument that governs the functioning of an MIC.

411 In this case, it may be necessary to differentiate whether a particular interpretation is within the scope of what the original text envisages or goes beyond it. This will be the case if, for example, the clarification of the individual elements of the FET standard contained in CETA is based on established principles of the previous interpretation by investment tribunals[56]; however, with regard to the subsidiary protection of legitimate expectations[57] and the total lack of any stability and predictability, this may be considered questionable.[58]

412 More problematic than the clarification of the content of the investment protection standards in the applicable IIAs or the establishment of certain interpretation maxims therein (or in a general instrument for the functioning of the MIC) are two additional methods of interpretation in the context of correcting an investor-friendly ruling:

[56]Cf. Article 8.10 para. 2 CETA: "A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article."

[57]Cf. Article 8.10 para. 4 CETA: "When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."

[58]Cf. Kriebaum (2014), p. 482.

so-called authentic interpretation by the parties to the agreement and the appointment of state-friendly judges as treaty-interpreters.

5.1.3.3 Authentic Interpretation by the Parties

A number of IIAs already provide that the Contracting Parties should be able to interpret individual treaty provisions as binding, in addition to the dispute settlement institution designated for "routine" interpretation and application of such treaties.[59] In other words, the MIC (superseding the previous arbitral tribunals) and the parties to the IIA would in principle be entitled to interpret an IIA. The MIC Statute could therefore clarify (within the provision on the applicable law) that the MIC must take into account interpretative statements of the parties to the applicable IIA. However, the Plenary Body of the MIC cannot be given jurisdiction for the interpretation of bilateral IIAs, at best it could have jurisdiction for interpreting the MIC Statute. **413**

As the rare invocation of such interpretative competence has shown, it is especially used as a corrective measure against overly investment-friendly interpretations by arbitral tribunals. A clear example is provided by the interpretation of FET by the North American Free Trade Agreement (NAFTA) Free Trade Commission, which stated that the FET standard provided for in Chapter 11 (the investment chapter of the NAFTA) does not go beyond the minimum standard of treatment under customary international law.[60] **414**

To the extent that such interpretations are within the scope of the respective investment protection standard and do not go beyond that,[61] i.e. modify the treaty, **415**

[59]Cf. Article 30 para. 3 US Model BIT 2012: "A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision." Article 31 US Model BIT 2012: "Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I, II, or III, the tribunal shall, on request of the respondent, request the interpretation of the Parties on the issue. [. . .] 2. A joint decision issued under paragraph 1 by the Parties, each acting through its representative designated for purposes of this Article, shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that joint decision. If the Parties fail to issue such a decision within 90 days, the tribunal shall decide the issue." Article 1131 para. 2 NAFTA: "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

[60]NAFTA Free Trade Commission Clarifications Related to NAFTA Chapter 11, Decisions of 31.7.2001, www.worldtradelaw.net/nafta/chap11interp.pdf: "B.1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."

[61]Cf. *Pope & Talbot Inc. v. Canada*, Award in Respect of Damages, 31.5.2002, para. 47: "[w]ere the tribunal required to make a determination whether the commission's action is an interpretation or an amendment, it would choose the latter."

and to the extent that it is prospectively applicable, such "authentic" interpretations by the contracting parties appear to be a legitimate instrument to help them assert their will.[62]

416 However, it seems problematic to provide the contracting state parties with such extensive interpretative competence that they could help their legal position to a breakthrough in ongoing proceedings.[63] This would not only be contrary to the principle that no one may be a judge in his own case (*in causa sua nemo iudex sit*), but also contrary to fundamental rule of law requirements for a fair trial.[64] It would therefore be particularly important to note that any "authentic" interpretation by the parties to the agreement, even if made in response to an interpretation by the MIC or another dispute settlement body, must not have an effect on any pending proceedings.[65]

5.1.3.4 Composition of the MIC: Impartial and Independent Judges

417 Another means of ensuring neutral and independent interpretations of the investment protection standards appears to be already implicitly included in the plans to establish an MIC. The appointment of judges to an MIC is intended to prevent arbitrators who are too investor-friendly from interpreting the standards of protection in favour of the investors, not only in individual cases, but on a permanent basis.

418 In traditional arbitration, the influence of party-appointed arbitrators is counterbalanced by the presiding third arbitrator.[66] In addition, rules governing the independence and impartiality of persons appointed as arbitrators should prevent an

[62]Roberts (2010), pp. 179–225; Ewing-Chow and Losari (2015), p. 103; Dolzer and Schreuer (2012), p. 33.

[63]Kaufmann-Kohler (2011), pp. 181–183.

[64]*Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8.2.2005, para. 149; Ishikawa (2015), p. 141; UNCTAD (2011), p. 4.

[65]See in this regard CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 237. A potential risk of breaching certain procedural minimum guarantees in the sense of *due process* could be avoided, if there would be a mechanism of consultations in advance to a procedure. One possibility would be the establishment of a state-to-state mechanism of consultations that would enable an interpretative dialogue between the arise of a dispute and the beginning of the dispute settlement procedure. Cf. Ishikawa (2015), p. 145.

[66]Carbonneau (2003), p. 1211: "The tradition in prior practice had been to require only that the presiding arbitrator (the "neutral" arbitrator) be fully impartial. There was an expectation that party-designated arbitrators would be sympathetic to the position of the appointing party and would favor that position in the deliberations."; Franck (2009), p. 443 et seq.: "All arbitrators are generally required to be impartial and to contribute to the adjudicatory outcome. Nevertheless, the presiding arbitrator performs a different role than the party-appointed arbitrator and his or her appointment is a matter of vital importance. The presiding arbitrator can "influence the style of an international arbitration" and make critical procedural decisions. Some suggest that presiding arbitrators resolve disputes between party-appointed arbitrators and, in some cases, become the ultimate decision makers." Böckstiegel (2003), p. 371.

undue influence of investors or states on the tribunal.[67] As explained above (see para. 133 et seq.), this should be regulated primarily by a corresponding Code of Conduct of an MIC, with the option of incorporating the already very nuanced and widely used IBA Guidelines on Conflicts of Interest in International Arbitration.[68]

419 If the judicial decision-makers are appointed solely by one or more state parties, this could not only call the arbitral nature of this form of dispute settlement (see para. 518) into question, but also raise doubts about the independence and impartiality of the judges appointed exclusively by the potential respondent states. Indeed, this could be rebutted by the fact that states not only protect their own interests as potential respondent host states against foreign investors, but at the same time protect the interests of their investors abroad. Thus, they have an interest in a balanced appointment of the members of the MIC. However, even these considerations cannot change the fact that the selection of the MIC Members would lie exclusively in the hands of the state parties.[69]

420 Therefore, it would be important to minimise other factors beyond the appointment to the judicial office which could affect the impartiality of the individual decision-makers as far as possible (for details on the impartiality and independence of the judges, see para. 130 et seq.).

421 As stated above, terms of office should be as long as possible and either no or only a one-time re-election should be envisaged (see para. 155 et seq.). The exclusion or restriction of re-election is often considered as the main instrument to prevent a potential dependency of judicial decision-makers on the electing states. In addition, the exclusion of persons who could have a close relationship to potential parties to the dispute should also be considered. In specific terms, this could not only mean excluding government officials and party representatives of investors, as stated in CETA,[70] but also persons who have held certain political or administrative offices in states' or EU institutions in the past.

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[67]Cf. Article 6(7) UNCITRAL Arbitration Rules 2010: "independent and impartial arbitrator"; Article 14 para. 1 ICSID Convention: "Persons [. . .] of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment." Article 18 para. 1 SCC Arbitration Rules 2017: "Every arbitrator must be impartial and independent. [. . .]." Article 10.1 London Court of International Arbitration (LCIA) Arbitration Rules 2014: "The LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: [. . .] (iii) circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence." Article 10 para. 1 Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules 2017: "Any arbitrator appointed in an arbitration under these Rules, whether or not nominated by the Parties, shall be and remain at all times independent and impartial. [. . .]." Poudret and Besson (2007), p. 346 et seq.; Lawson (2005), p. 22; Dimitropoulos (2016), p. 415 (proposed standards for the investment arbitration).

[68]IBA Guidelines on Conflicts of Interest in International Arbitration, Resolution of the International Bar Association Council of 23.10.2014. Wuschka (2016), p. 165.

[69]Sandrock (2015), p. 627.

[70]Article 8.30 para. 1 CETA: "The Members of the Tribunal shall be independent. They shall not be affiliated with any government. They shall not take instructions from any organisation, or

5.2 Applicable Procedural Law and Procedural Principles

422 The current decentralised system of investment dispute settlement by *ad hoc* arbitral tribunals based on IIAs generally provides for various alternatives. Thus, it is usually at the investors' discretion whether to initiate proceedings under the rules of the ICSID Convention, the ICSID Additional Facility Arbitration Rules, the UNCITRAL Arbitration Rules (possibly administered by the PCA), or under the arbitration rules of various institutions (such as International Chamber of Commerce (ICC), SCC, London Court of International Arbitration (LCIA) etc.).

423 These arbitration rules mostly do not differ significantly with regard to the core aspects of the proceeding. However, it should be noted that only the ICSID Arbitration Rules and the ICSID Additional Facility Arbitration Rules apply specifically to investment arbitration proceedings, while the other arbitration rules—except for the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration[71]—are also used in commercial arbitration.

424 Since in all these procedural rules the actual proceeding is regulated very rudimentarily and informally, only small differences arise. The core of all these arbitration rules is party autonomy and respect for the mutual right to be heard.[72]

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government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article 8.44.2. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement." This so called "German professors-clause" shall clarify that university professors, in countries where the universities are state-financed, are not excluded. See on this also CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 240.

[71]UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, in force since 1.4.2014.

[72]Article 17 para. 1 UNCITRAL Arbitration Rules: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute." Article 22 ICC Arbitration Rules 2017: "(2) In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties. [. . .] (4) In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case." The right to be heard before the court is also reflected in the following articles of the ICSID Arbitration Rules 2006: Schreuer et al. (2009), p. 987: "The principle that both sides must be heard on all issues affecting their legal 305 position is one of the most basic concepts of fairness in adversarial proceedings. [. . .] It is reflected throughout the ICSID Arbitration Rules (see esp. Rules 20, 21, 27, 31, 32, 37, 39, 40, 41, 42, 44, 49, 50, 54, 55)."; Petrochilos (2004), p. 254: "By ineluctable inference from the reference in Article 52 of the ICSID Convention to 'fundamental' procedural rules, an ICSID tribunal must respect the minimum standards of due process, namely the equality of the parties and the right to be heard." Cf. Blackaby et al. (2009), para. 6.11 et seq.; Wälde (2011).

425 Therefore, in practice, the choice between the various arbitration rules is primarily based on the different enforcement mechanisms between the ICSID arbitral awards that provide for a separate enforcement mechanism under the ICSID Convention and arbitral awards under other procedural rules, which are generally governed by the New York Convention (see para. 483). In addition, the special rules on jurisdiction of the ICSID Convention[73] and its annulment system[74] also influence the choice of procedure.[75] Investors who have doubts as to whether their investments comply with the so-called *Salini* criteria of "investment" developed in ICSID arbitration practice or the nationality criteria set out in Article 25 ICSID Convention, or investors wishing to avoid the potential procedural delay caused by the possibility of annulment under the ICSID Convention may therefore rather opt for UNICTRAL rules based arbitration or other non-ICSID arbitration proceedings.

426 The fundamental question is primarily whether the current system of adopting existing rules of procedure should be maintained or whether separate rules of procedure should be provided for. The MIC Rules of Procedure could already be directly integrated into the MIC Statute or adopted by the Plenary Body as secondary rules specifying the MIC Statute (see para. 107).

427 This fundamental question depends on several factors: enforceability of awards, special procedural requirements such as transparency, efficiency (in particular cost efficiency but also reduction of the length of proceedings etc.), avoidance of abusive procedures etc.

428 The realisation of these objectives should partly be achieved by adopting existing rules of procedure and partly by creating own rules of procedure.

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[73] Article 25 ICSID Convention: "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally. (2) "National of another Contracting State" means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

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

[75] Dolzer and Schreuer (2012), p. 241.

429 As will be explained in more detail below (see para. 484 et seq.), ICSID arbitral awards are subject to a particularly efficient enforcement mechanism according to which all (currently 163)[76] parties to the ICSID Convention have in principle the duty to enforce the awards as if it were a final judgment of their own national court, whereby only the principles of state immunity in enforcement proceedings may constitute an admissible objection. Similarly efficient is the enforcement of arbitral awards governed by the New York Convention in all its (currently 160)[77] members. However, there are additional grounds for non-recognition or non-enforcement of awards under the New York Convention. A precondition for the applicability of the enforcement mechanisms of increased effectiveness under the two named conventions is that the resulting decisions can be regarded as ICSID arbitral awards or as arbitral awards within the meaning of the New York Convention (see para. 480).

430 Whether decisions of the MIC can be regarded as ICSID arbitral awards or as arbitral awards within the meaning of the New York Convention is not only fundamentally problematic, but it also depends on the extent to which they are based on a procedure consistent with the ICSID Rules of Procedure or rules of procedure that satisfy the requirements of the New York Convention (see para. 480).

431 A series of measures/rules aimed at more efficient procedures which ultimately move away from the principle of party autonomy prevailing in arbitration towards a stronger concentration of the judicial process could run counter to this objective. Nevertheless, these should be discussed in detail in the context of a comprehensive reform of investment dispute settlement as is planned within the MIC.

5.2.1 Transparency

432 Principles of transparency have recently been the subject of various discussions and reform plans within arbitration. Under the aspect of transparency, the issues of publication of documents, the participation of third parties interested in the proceedings as well as public access to hearings are generally included. Transparency is seen as an expression of fundamental rule of law requirements. In order to ensure the simple application of the UNCITRAL Transparency Rules without having to renegotiate all existing investment agreements, the UN General Assembly adopted the Mauritius Convention[78] at the end of 2014.

[76] As of 01.08.2019.

[77] As of 01.08.2019.

[78] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, A/RES/69/116 of 10.12.2014.

Transparency is dealt with differently in the various investment dispute settlement mechanisms: on the one hand, there are divergences regarding the definition of a general obligation, either of confidentiality or transparency.[79] On the other hand, there are differences in the implementation of presumed transparency.[80] **433**

Using the transparency obligations enshrined in the 2013 UNCITRAL Rules on Transparency[81] as a potential standard for an MIC is largely undisputed. As a result of many years of negotiation, they constitute a stable set of rules and cater to the specific needs of proceedings between states and investors as a tailored set of rules which can significantly promote transparency in investment arbitration.[82] **434**

In the context of the MIC, it would therefore make sense to incorporate the UNCITRAL Rules on Transparency into the constituent instrument following the example of CETA.[83] Above all, this would avoid the problem of application that **435**

[79]Cf. Article 28 para. 3 Norway Model BIT 2007, Draft version 191207: "All awards and substantive decisions of the Tribunal shall be made publicly available."

[80]Cf. the opportunity not to publish decisions under ICSID and the Secretariat's obligation to publish excerpts of the legal reasoning of the tribunal: Article 48 para. 5 ICSID Convention: "The Centre shall not publish the award without the consent of the parties" and Article 48 para. 4 ICSID Arbitration Rules: "The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal" or the rules on transparency in Article 29 para. 1 US Model BIT 2012 concerning the publication of process documents: "the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28 (2) [Non-Disputing Party submissions] and (3) [Amicus Submissions] and Article 33 [Consolidation]; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal", as well as Article 29 para. 2 concerning the publicity of hearings: "The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure." Ortino (2013), p. 121.

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

[82]Loken (2013), pp. 1302–1303; Alvarado Garzón (2019), p. 491.

[83]Article 8.36 CETA: "(1) The UNCITRAL Transparency Rules, as modified by this Chapter, shall apply in connection with proceedings under this Section. (2) The request for consultations, the notice requesting a determination of the respondent, the notice of determination of the respondent, the agreement to mediate, the notice of intent to challenge a Member of the Tribunal, the decision on challenge to a Member of the Tribunal and the request for consolidation shall be included in the list of documents to be made available to the public under Article 3(1) of the UNCITRAL Transparency Rules. (3) Exhibits shall be included in the list of documents to be made available to the public under Article 3(2) of the UNCITRAL Transparency Rules. (4) Notwithstanding Article 2 of the UNCITRAL Transparency Rules, prior to the constitution of the Tribunal, Canada or the European Union as the case may be shall make publicly available in a timely manner relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository. (5) Hearings shall be open to the public. The Tribunal shall determine, in consultation with the disputing parties, the

arose with regard to IIAs concluded before 1 April 2014 in relation to the UNCITRAL Rules. This issue had to be solved by a special multilateral instrument (Mauritius Convention).[84]

436 Specifically, it has to be noted that the debate in the area of a transparent investment dispute settlement system focuses on the following issues: access to information concerning the initiation of proceedings, public access to hearings, the possibility for third parties to participate in proceedings as well as the publication of procedural documents, in particular of the final award.[85]

437 As already stated above, the statement of claim should be published on the MIC website after the submission of a claim. The UNCITRAL Transparency Rules also provide that all documents related to the dispute must be published. The entire award and all relevant procedural documents such as the parties' written pleadings, records of hearings and decisions would have to be published according to the Mauritius Convention (Article 3).

438 Under the aspect of transparency the participation of "interested third parties" has often been discussed in the past.[86] The guarantee of procedural participation rights of interested parties also serves as "minority protection" in a broader sense; in any case, those affected by a decision should also have a right to participate in the proceedings leading to the decision in question. For example, according to the CETA guidelines, *amicus curiae* briefs should generally be allowed. Pursuant to the UNCITRAL Transparency Rules, the arbitral tribunal has the discretion to allow *amicus curiae* briefs (Article 4). The participation of third parties has now also been comprehensively regulated in the various transparency chapters.[87]

439 Pursuant to the UNCITRAL Transparency Rules, oral hearings should also in principle be public, unless that proves to be logistically impossible (Article 6).

440 In particular, transparency through the publication of documents and the conduct of oral hearings open to the public should in principle be under the caveat that business and trade secrets are treated in a confidential manner and that no respondent should have to disclose information concerning its confidential interests (Article 7). It should also be ensured that the "integrity" of the procedure is not impaired by transparency, for example by impeding the taking of evidence, intimidating witnesses, party representatives or arbitrators.

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appropriate logistical arrangements to facilitate public access to such hearings. If the Tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection. (6) Nothing in this Chapter requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should apply those laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information."

[84]Ortino (2013), p. 126.

[85]Dolzer and Schreuer (2012), p. 286.

[86]Cf. e.g. Böckstiegel et al. (2005), Brekoulakis (2010) and Ruthemeyer (2014).

[87]Cf. e.g. Article 4 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

5.2.2 *Efficiency*

At present, arbitration proceedings last on an average for 3 years and 8 months.[88] For the effectiveness and acceptance of the new system, limitations should be provided for the duration of the proceedings. Thus, in addition to being susceptible to soaring costs, the existing system is often criticised for the excessive duration of the proceedings.[89] A shortening of the length of the proceedings would automatically lead to a reduction of the total costs.[90] **441**

In traditional arbitration, it is partly up to the arbitral tribunals to ensure the efficient conduct of the proceedings; however, the concrete procedural organisation remains mostly at the disposition of the parties. The time-efficient and cost-effective completion of a procedure can thus be rendered more difficult by the obligation of the tribunal to decide on all submissions of the parties as explicitly laid down in the respective dispute settlement instruments.[91] **442**

In practice, it is above all the right to be heard that usually causes the arbitral tribunal to admit submissions by the parties,[92] even if they have a delaying effect on the proceedings, since otherwise they are subject to the risk of annulment.[93] **443**

Here, a stronger conduct of proceedings by the MIC could provide a meaningful remedy. Where appropriate, it should be noted that in terms of cost and time efficiency, procedural decrees taken by the MIC are not, as a rule, to be considered as limitations on the due process of law. **444**

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[88] European Federation for Investment Law and Arbitration (2014), p. 8; Hodgson (2014).

[89] Schill (2015), p. 3.

[90] Schill (2015), p. 9.

[91] Cf. Article 48 para. 3 ICSID Convention: "The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based." Article 46 ICSID Convention: "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

[92] Article 17 UNCITRAL Arbitration Rules: "The Arbitral Tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

[93] According to the grounds of rescission of Article 52 ICSID Convention, that is at most Article 52 para. 1 lit. d) ICSID Convention: "serious departure from a fundamental rule of procedure", the right to be heard before the court can be asserted. Cf. *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on the Application for Annulment, 3.7.2013, para. 36: "[. . .] the Parties agree on the substance of the principe du contradictoire and on the fact that it is a rule of procedure that ensures equality of the parties in an adversarial proceeding. The Committee further notes that this principle is closely related to the right to be heard. This right of parties to present their case has been recognized as part of that "set of minimal standards" considered fundamental for a fair hearing. The Committee thus concludes that the principe du contradictoire is a fundamental rule of procedure." But an award that does not deal with the pleadings can also be contested under Article 52 para. 1 lit. b) ICSID Convention. See Schreuer et al. (2009), p. 816 et seq.: "An award that is not comprehensive and exhaustive of the parties' questions amounts to an excess of powers just like a decision on questions that have not been submitted to the tribunal."

445 It therefore seems advisable to set time frames for the length of proceedings for the MIC using the example of the reformed WTO DSU or regional instruments such as Association of South-East Asian Nations (ASEAN)[94] or NAFTA.[95] By virtue of complying with the deadlines set by the WTO DSU, the issue of longstanding disputes under the old GATT System has been resolved and it has helped the system to be transformed into an efficient dispute settlement mechanism.[96]

446 For the entire procedure of the first instance, from the lodging of the statement of claim to the decision, a maximum duration could be set from which it should be possible to deviate only after a special statement of reasons by the chamber. The investment dispute settlement mechanism in CETA and in the EU-Vietnam IPA provides for a maximum duration of proceedings based on the WTO DSU, which has so far not been found in investment arbitration. The first instance should last a maximum of 18 months, the second instance a further 6 months (see also para. 354 et seqq.).

447 Despite the generally accepted positive effects of fixed deadlines[97] and defined subject matters of the disputes on procedural and cost efficiency, there was also some doubt in the context of the WTO Dispute Settlement System. In particular, it was criticised that such arrangements may have a cost-saving effect in the short term, but could have the opposite effect in the longer term,[98] since the probability of several "procedural stages" could increase.[99]

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[94] 60 days of mediation and consultation before the proceeding, 45 days for the establishment of the panel, decision (report) within 60–70 days. See ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

[95] Article 1904 para. 14 NAFTA: "Chapter 19-decisions have to be made within 315 days"; see also Rule 2 NAFTA Art. 1904 Panel Rules: "These rules are intended to give effect to the provisions of Chapter Nineteen of the Agreement with respect to panel reviews conducted pursuant to Article 1904 of the Agreement and are designed to result in decisions of panels within 315 days after the commencement of the panel review. The purpose of these rules is to secure the just, speedy and inexpensive review of final determinations in accordance with the objectives and provisions of Article 1904."

[96] Butler (2015), p. 356.

[97] Sevilla (1998).

[98] Moonhawk (2008), pp. 657–686: "For example, stricter time limits can increase time pressure on bureaucracies. The possibility – in fact high likelihood – for review by the Appellate Body on issues of law further increases and countries' need for deeper expertise in the WTO law increases."

[99] Busch and Reinhardt (2003), p. 467 et seq.: "To that end, we note that the legal reforms of the DSU may actually raise the transaction costs inherent in settling disputes by affording opportunities for longer delays, increasing incentives for foot-dragging in litigation, and motivating defendants to delay concessions. Granted, each separate stage of the process now operates according to a tighter timeline, but this fact is overwhelmed by the new possibility, indeed, the inevitability of successive rounds of litigation in the same dispute, [. . .] Further, the added stages of litigation, tight enforcement of terms of reference, the legal disincentives for disclosure, and the rules on standing, all serve to put the onus on disputants and third parties to legally mobilize as soon as possible in order to avoid losses on technicalities (i.e., having the panel or AB deem a certain argument outside its terms of reference) later on."

As a result, the MIC should in future be granted discretion to set the temporal dimension of specific cases based on their complexity. It should therefore be possible to extend the stipulated time frames in particularly complex cases or indeed if the establishment of the facts raises specific challenges. **448**

For the MIC, it should be noted that already in the first instance, the judges should in principle be full-time judges, unlike, for example, under the CETA mechanism or the WTO DSU (which is known to appoint *ad hoc* arbitrators). Therefore, a shorter maximum length of proceedings could be envisaged, which could only be extended based on a statement of reasons, for instance due to the particular complexity of the facts. In the case of full-time judges, a maximum length of proceedings of generally 6 months/180 days for the first instance is generally accepted, which could be extended if, for example, comprehensive and lengthy fact finding is required or if there are particular difficulties in the legal assessment or calculation of damages and expert opinions have to be obtained. The procedural role of the MIC with full-time judges, unlike the *ad hoc* arbitrators of WTO Panels, could prevent the parties from lengthening proceedings and causing additional costs. **449**

In conjunction with the introduction of requirements for the length of proceedings, the principle of celerity should apply. Hence, in all its work, the chamber should be careful not to unreasonably impair the conduct of the proceeding. In that regard, the chamber could be provided with means to expedite the implementation of the procedure, such as having the ability to deny submissions for the admission of evidence after a certain point in time, only providing for oral hearings or enforcing strict duties for pleadings. At the same time, however, it must be borne in mind that a balance should be struck between the interests of complete and comprehensive establishment of the facts on the one hand and the interest of least possible impairment to a potentially accelerated conduct of the proceedings on the other hand. **450**

From the moment a chamber gives reasons for an extension of the length of the proceedings, this chamber should not be assigned new disputes until the decision has been handed down. If all chambers are busy and an extension of the length of the proceedings is requested on a regular basis, the President of the Court should propose to the Plenary Body for the number of MIC judges to be increased (see para. 86). **451**

5.2.3 *Practice of Judicial Investigation and Limitation of the Subject Matter of the Dispute*

452 In German public law,[100] European law[101] and public international law[102] proceedings, the application of the practice of judicial investigation is widely accepted.[103] There are no reasons why this should be deviated from in the case of the MIC, where basically the behaviour of public authorities is examined for compatibility with subjective legal positions. The MIC should therefore be allowed to establish the facts of the dispute *ex officio*.

453 This means that, the court would not be bound by the submissions and motions by the parties to take evidence.[104] At the same time, however, it could be set forth that a substantive examination can only be carried out to the extent that a reference to the claimant's arguments is clear. Furthermore, it should be considered whether a determination/limitation of the subject matter of the dispute—as is the case in the WTO DSU[105] or also in the ICC Arbitration[106]—should take place, inter alia, by

[100] Cf. in Germany e.g. Article 86 VwGO (Code of Administrative Court Procedure); Article 26 BVerfGG (Act on the Federal Constitutional Court).

[101] Article 24 Protocol No. 3 CJEU Statue: "The Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal. The Court may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings."

[102] E.g. Articles 49–51 ICJ Statute.

[103] Schill (2016), p. 118.

[104] Under German law, the principle of investigation applies in all proceedings whose subject touches particularly public interests.

[105] Article 7 DSU: "1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel: "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." 2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute. 3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB."

[106] Article 23 ICC Arbitration Rules: "As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars: (a) the names in full, description, address and other contact details of each of the parties and of any person(s) representing a party in the arbitration; (b) the addresses to which notifications and communications arising in the course of the arbitration may be made; (c) a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims; (d) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined; (e) the names in full, address and other contact details of each of the arbitrators;

establishing Terms of Reference. This could lead to a focus of the proceeding on the actual points of contention. CETA has similar aims as it states that the claimant may not present any measure in its claim that was not already presented in the request for consultations.[107]

454 The chamber should clarify the facts of the dispute to the extent that it deems necessary for its decision. The principle of *ex officio* investigation or the principle of judicial investigation is thus in proportion to the principle of party disposition on the part of the applicants. Nevertheless, within the context of the scope of examination, it should only be examined whether the claimant's interests were damaged, i.e. whether the rights of the claimant originating in the particular IIA were violated. Therefore, such violations of an MIC Member that do not affect the applicant's own standards of protection should not be dealt with by the MIC.

455 Contrary to the principle of legal representation and the principle of production of evidence in civil procedural law, the chamber would itself under the principle of judicial investigation determine the manner and extent of the investigations. Insofar as the chamber sees further need for investigation, it should, in principle, exhaust all reasonably available and legally admissible possibilities for clarifying the relevant facts. In many cases, however, a chamber will only be able to confine itself to the points raised by the claimant as well as to other manifest and serious infringements. Further elaboration of the formalities regarding the taking of evidence should be provided for in the procedural rules of the MIC, for example, that the court can examine, take oath and, in the case of non-appearance, impose a fine on witnesses and experts, or that the MIC in this respect also has a right to information towards its members.[108]

456 The obligation of the parties to advance the procedure should in principle interact with the obligation of the chamber to find out the relevant facts *ex officio*. If a party to the proceedings fails to perform his obligation to ensure smooth conduct, the MIC chamber would consider it to the detriment of the non-compliant party. The duty to investigate the matter and to establish the facts should rather only come into play in case that the arguments of the parties (or the other facts), if considered reasonably, provide a sufficient reason to do so. From the interaction between the principle of judicial investigation and the principle of efficiency and the principle of celerity, it

(f) the place of the arbitration; and (g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as amiable compositeur or to decide ex aequo et bono."

[107] Article 8.22 para. 1 lit. e) CETA.

[108] For legally relevant facts that can be proven, the plaintiff must designate the available evidence. Concerning the fact-finding, the participants of the dispute have to be obliged to co-operation. The participants must point out and clarify circumstances that lie in their sphere. This obligation to co-operation serves the fact-finding. Therefore, in the case, that facts could be clarified by one participant especially in his own favour, the chamber must not investigate all conceivable courses of events. The plaintiff has to designate all legally relevant and provable facts as available evidences.

follows that the procedure should be terminated if the claimant fails to perform its obligations in a sufficiently swift manner.[109]

457 Without receiving a detailed statement of fact, the chamber should not be obliged to investigate on its own. Conversely, it follows from this "interaction doctrine" that, in case that the statement of facts by the parties or other facts give the supervisory bodies sufficient grounds for examination, they should be obliged to conduct further *ex officio* investigation and judicial review. The burden of proof for the legal facts should be borne by the one who asserts a right.

458 In the procedure before the MIC, the principle of free evaluation of evidence should apply, which results as a consequence of the principle of judicial investigation. The chamber should be bound to the rules of legal logic as well as to principles derived from recognised empirical principles and methods of interpretation in assessing the facts. In its assessment, the chamber can include in addition to the results following the taking of evidence the statement of facts by the parties, the knowledge of the administration, and as a whole, the overall impression of all circumstances etc.

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[109] Article 8.35 CETA: "If, following the submission of a claim under this Section, the investor fails to take any steps in the proceeding during 180 consecutive days or such period as the disputing parties may agree, the investor is deemed to have withdrawn its claim and to have discontinued the proceeding. The Tribunal shall, at the request of the respondent, and after notice to the disputing parties, in an order take note of the discontinuance. After the order has been rendered the authority of the Tribunal shall lapse."

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