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Investment Court System Under EU Trade and Investment Agreements: Addressing Criticisms of ISDS and Creating New Challenges

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The Investment Court System ('ICS') included in the European Union ('EU')'s recent investment and trade agreements provides for the creation of a permanent first instance tribunal ('First Instance Tribunal') and an appellate tribunal ('Appeal Tribunal') drawn from a pre-selected roster of tribunal members. The ICS imposes mandatory transparency of proceedings, as well as a strict code of conduct applicable to all tribunal members. The ICS is expected to address several long-standing criticisms levied against investor-State dispute settlement ('ISDS'). At the same time, the ICS raises new challenges that must be resolved for its effective operation. These must be addressed first and foremost by the EU and those pioneering trading partners who have so far committed to the ICS; only once resolved will the ICS gain traction with ISDS stakeholders.

keywords: EU Investment Court System, CETA, EU–Singapore Investment Protection Agreement, EU–Vietnam Investment Protection Agreement, EU–Mexico Global Agreement, enforcement of ICS awards, ICSID Convention, New York Convention, ISDS.

1 Introduction

The Investment Court System (ICS) was first proposed by the European Commission ('Commission') in November 2015 during the negotiations between the EU and the United States for the Transatlantic Trade and Investment Partnership ('TTIP').[1] Although the TTIP negotiations ended without an agreement, the EU has adopted the ICS model of dispute resolution in the four subsequent EU trade and investment agreements that have since been concluded (together, the 'EU Agreements'): (1) EU–Canada Comprehensive Economic and Trade Agreement ('CETA'); (2) EU–Singapore Investment Protection Agreement ('IPA'); (3) EU–Vietnam IPA; and (4) revised EU–Mexico Global Agreement ('GA').[2]

The EU's long-term objective is to fully replace all existing investor-State dispute settlement (ISDS) provisions in both intra-EU and EU-external trade and investment agreements with the ICS, for the stated purpose of achieving 'a modern, efficient, transparent and impartial system for international investment dispute resolution'.[3]

For intra-EU investor-State disputes, the demise of the ISDS regime within the EU legal order crystallized in March 2018 when the Court of Justice of the EU ('CJEU') rendered its decision in *Achmea*, holding that investor-State arbitration clauses in intra-EU Bilateral Investment Treaties ('BITs') are incompatible with EU law.[4] Further to the CJEU decision in *Achmea*, EU Member States[5] signed an agreement for the termination of all intra-EU BITs[6] in May 2020,[7] which entered into force on 29 August 2020.

The ICS represents a significant departure from the long-standing ISDS model of party-appointed arbitrators, and is expected to address a number criticisms of ISDS which have together resulted in a deepening crisis of legitimacy. These include the (real or perceived) lack of:

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1 European Commission, Press release, EU finalizes proposal for investment protection and Court System for TTIP (12 Nov. 2015).

2 The signing date of the EU Agreements are as follows: (i) CETA (30 Oct. 2016); (ii) EU – Singapore IPA (19 Oct. 2018); EU – Vietnam IPA (30 June 2019); (iv) EU – Mexico GA (negotiation concluded on 28 Apr. 2020, to be signed after finalizing the agreement and translating it to all EU languages).

3 European Commission, *supra* note 1. *See also* European Commission, *A New EU Trade Agreement with Japan* 6 (July 2018). The old ISDS is not acceptable to the EU. 'For the EU, ISDS is dead'.

4 *Slovak Republic v. Achmea B.V.* (Case C-284/16), Judgment of the Court (Grand Chamber) of 6 Mar. 2018.

5 Signatories are: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain. On the other hand, Austria, Finland, Ireland, Sweden (and the United Kingdom) did not sign the agreement.

6 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (OJ L 169, 29 May 2020, at 1–41).

7 European Commission, EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties (5 May 2020).

(1) consistency of arbitral awards; (2) independence and impartiality of arbitrators; (3) ethical code for arbitrators; (4) and transparency.

At the same time, the ICS raises new challenges that must be resolved for its effective operation, namely: (1) the applicability of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') to ICS proceedings (or lack thereof); (2) enforcement uncertainty under the ICSID Convention and/or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'); and (3) a potential for increases in the cost and/or duration of proceedings arising out of the appeal mechanism. Stakeholders have also raised concerns around the calibre and practical experience of potential arbitrators willing to be appointed to the ICS.

This paper examines the ICS under the EU Agreements. In particular: section 2 sets out an operative summary of the ICS dispute settlement procedure under the EU Agreements; section 3 analyses how the ICS may address criticisms of ISDS; and, lastly, section 4 discusses new challenges posed by the ICS that must be addressed.

2 ICS DISPUTE SETTLEMENT PROCEDURES

Pursuant to the EU Agreements, claims brought by investors against a host State will generally proceed in four stages: **(1) consultations; (2) determination by the First Instance Tribunal; (3) determination of an appeal by the Appeal Tribunal; (4) and enforcement of any final award.**[8] These four steps are very similar to the World Trade Organization ('WTO') dispute settlement procedures, which also consist of consultations, a panel stage, an appeal stage and enforcement.

2.1 *Consultations*

Consultations are a mandatory pre-condition under the EU Agreements.

Proceedings are initiated by an investor (claimant) by submitting a request for consultations to the respondent (host State) ('Request'), having regard to the applicable limitation period in the governing agreement.[9] The Request must stipulate inter alia: (1) the provisions of the agreement that are alleged to have been breached; (2) the legal and factual basis for the claim; and (3) the relief sought.[10] Under the CETA and the EU–Mexico GA, the Request must also contain (4) evidence establishing that the investor is an investor of the other contracting party and that it owns or controls the investment[11] and must be articulated with (5) '*sufficient specificity to allow the respondent to effectively engage in consultations and to prepare its defence*'.[12]

Consultations must take place within nienty days from the date of submission of the Request under the CETA, EU–Vietnam IPA, and the EU–Mexico GA.[13] The EU–Singapore IPA does not prescribe a time period for the commencement of consultations.

If the investor fails to submit a claim to the First Instance Tribunal within eigtheen months of submitting the Request, it will be deemed to have withdrawn from the consultations.[14] The CETA, EU–Mexico GA and EU–Vietnam IPA go one step further specifying that, in these circumstances, the claimant's notice requesting a determination of the respondent, if applicable, will also be deemed withdrawn.[15] Any such withdrawal will have the effect of precluding any future claim with respect to the same measures.[16]

It remains to be seen whether mandatory consultations will achieve the desired results in practice. Consultation and negotiation provisions contained in traditional ISDS provisions have more often than not been side-lined, with parties simply paying lip service to the prescribed 'cooling-off' period that typically follows service of a notice of dispute (without recourse to consultations), before proceeding directly to arbitration. In contrast, under the WTO dispute settlement mechanism, which similarly provide for mandatory

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[8] By way of illustrative example, Figure I sets out the prescribed stages of investor-State dispute settlement under the CETA.

[9] The Request must be submitted within the applicable time period: (i) three years (CETA, EU – Vietnam IPA, EU – Mexico GA) or thirty months (EU – Singapore IPA) from the occurrence of the alleged breach; (ii) if the domestic remedies were sought, two years (CETA, EU – Vietnam IPA, EU – Mexico GA) or one year (EU – Singapore IPA) after ceasing to pursue the claim before domestic court; and (iii) in any event, ten years (CETA, EU – Singapore IPA, EU – Mexico GA) or seven years (EU – Vietnam IPA) after the investor acquired knowledge of the breach.

[10] CETA. Art. 8.19.4, EU – Singapore IPA, Art. 3.3.2, EU – Vietnam IPA, Art. 3.30.1, EU – Mexico GA, Art. 3.4.

[11] CETA. Art. 8.19.4, EU – Mexico GA, Art. 3.1.

[12] CETA. Art. 8.19.5, EU – Mexico GA, Art. 3.5.

[13] CETA. Art. 8.19.1, EU – Vietnam IPA, Art. 3.30.4, EU – Mexico GA, Art. 3.1.

[14] CETA. Art. 8.19.8, EU – Singapore IPA, Art. 3.3.4, EU – Vietnam IPA, Art. 3.30.5, EU – Mexico GA, Art. 3.9. The EU – Vietnam IPA does not include such a limitation.

[15] CETA. Art. 8.19.8, EU – Mexico GA, Art. 3.9. When a notice of intent has been sent to the EU, the EU must make a determination of the respondent and, after having made such a determination, it must inform the claimant within 60 days of the receipt of the notice of intent as to whether the EU or a Member State of the EU will be the respondent.

[16] CETA. Art. 8.19.8, EU – Vietnam IPA, Art. 3.30.5, EU – Mexico GA, Art. 3.9. In contrast, the EU – Singapore IPA does not include such a limitation.

consultations, 40% of the disputes initiated were resolved between 1995 and 2018.[17]

2.2 *First Instance Tribunal*

If a dispute has not been resolved through consultations, an investor may then proceed to arbitration, subject to the satisfaction of certain requirements. Notably, these requirements include: (1) the withdrawal from any existing proceedings before courts or tribunals under domestic and international law with respect to the same measures; and (2) a waiver of the right to initiate any future claim or proceeding with respect to the same measure. These requirements serve to address a common problem in ISDS where tribunals are faced with ongoing parallel domestic or commercial proceedings, giving rise to a risk of double recovery.[18] [19]

Once the investor has submitted a claim to the First Instance Tribunal, the respondent State must formalize its consent to the First Instance Tribunal's determination of the claim.[20] (This is a mere formality, since the EU Agreements include a standing offer of consent.) The respondent State may only refuse to give its consent in narrowly defined circumstances in reliance on the denial of benefits provision available under the CETA and the EU–Mexico GA.[21]

Within ninety days of the submission of a claim, the president of the First Instance Tribunal (who must be a national of a third country)[22] must constitute the First Instance Tribunal by appointing one national of each State contracting party (these are drawn from the pre-selected roster of tribunal members on a rotating basis).[23]

The ICS also provides for early strike-out measures whereby the respondent State can submit: (1) an objection that a claim is manifestly without legal merit[24] (this must be submitted within thirty days after the constitution of the First Instance Tribunal, and in any event before its first session); or (2) an objection that a claim is unfounded as a matter of law[25] (this must be submitted prior to submission of the respondent State's counter-memorial).[26] Objections will be determined by way of a provisional award rendered by the First Instance Tribunal.[27]

The First Instance Tribunal must issue its **final award** within a specified time period from the date of the claim: twenty-four months (CETA); eighteen months (EU–Singapore IPA, EU–Vietnam IPA); and thirty months (EU–Mexico GA).[28] The award will become final if it is not appealed within ninety days of issuance.[29]

The First Instance Tribunal's remedies are confined to either (1) monetary damages and any applicable interest; or (2) restitution of the property.[30] Monetary damages are limited to the actual loss suffered by the investors to avoid exponential increases in damages.[31] Restitution may entail not only physical restitution, but also monetary damages equivalent to the fair market value of the property immediately prior to the expropriation or the date on which the impending expropriation became known (whichever is earliest), thus precluding the increasingly common date of award valuations seen in ISDS. The First Instance Tribunal may not award punitive (also known as moral) damages, which are prima facie available under public international law.[32] Such limitations on the First Instance Tribunal's power to award damages is an apparent nod to a growing strain of criticism of ISDS which

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[17] Successful resolution of disputes via consultations may have been attributed to the fact that WTO disputes are resolved by way of State-to-State dispute settlement. *See* WTO, Dispute settlement activity – some figures, https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm. (accessed 12 Mar. 2021)

[18] As another requirement, the investor must wait at least 180 days from the submission of the request for consultations ***and***: (i) if applicable, at least ninety days from the submission of the notice requesting a determination of the respondent (CETA, EU – Mexico GA); or (ii) ninety days from the submission of the notice of intent (EU – Singapore IPA, EU – Vietnam IPA). *See* CETA, Art. 8.22.1(b), EU – Singapore IPA, Art. 3.7.1(b), EU – Vietnam IPA, Art. 3.35.1(b), EU – Mexico GA, Art. 6.1(b).

[19] CETA, Art. 8.22.1(b), EU – Singapore IPA, Art. 3.7.1(b), EU – Vietnam IPA, Art. 3.35.1(b), EU – Mexico GA, Art. 6.1(b).

[20] CETA, Art. 8.25, EU – Singapore IPA, Arts 3.6.1 and 3.6.2, EU – Vietnam IPA, Art. 3.36.1, EU – Mexico GA, Art. 6.1(b).

[21] CETA. Art. 8.16 and EU – Mexico GA, Art. 20. Under the CETA and the EU – Meixco GA, a State can deny benefits of an investment chapter to third country-controlled or -owned enterprises that comply with the definition of investor, only if the country of origin of the investor controlling the enterprise is subject to measures in the framework of security policy that would be otherwise circumvented if the benefit of the investment chapter is granted. For instance, this could include embargo measures, individual sanctions freezing assets, or other actions taken to combat terrorism in the United Nations framework treaty. The EU – Singapore IPA and the EU – Vietnam IPA do not provide the denial of the benefit provision.

[22] CETA. Art. 8.27.6, EU – Singapore IPA, Art. 3.9.7, EU – Vietnam IPA, Art. 3.38.6, EU – Mexico GA, Art. 11.6. The disputing parties could agree that a case be heard by a sole Member of the Tribunal to be appointed at random from the third country nationals.

[23] CETA. Art. 8.27.7, EU – Singapore IPA, Art. 3.9.8, EU – Vietnam IPA, Art. 3.38.7, EU – Mexico GA, Art. 11.8.

[24] CETA. Art. 8.32.1, EU – Singapore IPA, Art. 3.14.1, EU – Vietnam IPA, Art. 3.44.1, EU – Mexico GA, Art. 17.1.

[25] CETA. Art. 8.33.1, EU – Singapore IPA, Art. 3.15.1, EU – Vietnam IPA, Art. 3.45.1, EU – Mexico GA, Art. 18.1.

[26] CETA. Art. 8.33.2, EU – Singapore IPA, Art. 3.15.2, EU – Vietnam IPA, Art. 3.45.2, EU – Mexico GA, Art. 18.2.

[27] CETA. Art. 8.32.5, EU – Singapore IPA, Art. 3.14.3, EU – Vietnam IPA, Art. 3.44.3, EU – Mexico GA, Art. 17.5.

[28] CETA. Art. 8.39.7, EU – Singapore IPA, Art. 3.18.4, EU – Vietnam IPA, Art. 3.53.6, EU – Mexico GA, Art. 29.7.

[29] CETA. Art. 8.28.9(c)(iii), EU – Singapore IPA, Art. 3.18.4, EU – Vietnam IPA, Art. 3.55.1, EU – Mexico GA, Art. 29.8.

[30] CETA. Art. 8.39.1, EU – Singapore IPA, Art. 3.18.1, EU – Vietnam IPA, Art. 3.53.1, EU – Mexico GA, Art. 29.1.

[31] CETA. Art. 8.39.3, EU – Singapore IPA, Art. 3.18.2, EU – Vietnam IPA, Art. 3.53.2, EU – Mexico GA, Art. 29.4.

[32] CETA. Art. 8.39.4, EU – Singapore IPA, Art. 3.18.2, EU – Vietnam IPA, Art. 3.53.3, EU – Mexico GA, Art. 29.4.

condemns the high sums awarded by tribunals under the prevailing full reparation standard for compensation.

2.3 *Appeal Tribunal*

An award by the First Instance Tribunal may be appealed to the Appeal Tribunal within ninety days.[33] The appellant must provide security, including for the costs of the appeal, as well as a reasonable amount to be determined by the Appeal Tribunal having regard to the circumstances of the case.

The grounds of appeal include: (1) errors in the interpretation or application of the applicable law; (2) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; and (3) the grounds for annulment under Article 52 of the ICSID Convention, in so far as they are not covered by subparagraphs (a) and (b).[34] It follows that, contrary to the ICSID annulment function (an 'exceptional recourse to safeguard against the violation of fundamental legal principles relating to the process')[35] **the Appeal Tribunal under the EU Agreements has a broad and far-reaching power to intervene on issues of the merits (e.g., errors of law and fact), in addition to procedural issues.** Based on these grounds, the Appeal Tribunal may uphold, modify or reverse an award in whole or part.[36] The Appeal Tribunal may alternatively submit the claim back to the First Instance Tribunal for reconsideration.[37]

The Appeal Tribunal must issue its decision within 180 days from the date of notification of the appeal.[38] If the appeal is dismissed, the First Instance Tribunal's award will become final.[39] Alternatively, the award, as modified or reversed by the Appeal Tribunal, becomes final.[40] In the event that the claim has been remitted, the First Instance Tribunal must, after hearing the disputing parties if appropriate, revise its award to reflect the findings and conclusions of the Appeal Tribunal which are binding on it. The First Instance Tribunal must seek to issue its revised award within ninety days of receiving the decision of the Appeal Tribunal.[41]

2.4 *Enforcement*

The EU Agreements provide that awards are binding as between the disputing parties in respect of the claim.[42] Just as under the ICSID Convention,[43] signatories to the EU Agreements must recognize any final award as binding and enforce any pecuniary obligation within its territory as if it were a final judgment of a domestic court.[44]

The enforcement provisions in the EU Agreements refer to both the New York Convention and the ICSID Convention. The EU Agreements state that final awards are deemed to be arbitral awards in relation to claims arising out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention.[45] The most notable aspect of the enforcement provisions in the EU Agreements is their attempt to make an *inter se* modification to the ICSID Convention by providing that final awards must qualify as an award under section 6 of the ICSID Convention.[46] The question of enforceability is further discussed in section 4.2 below.

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[33] CETA. Art. 8.28.9(a), EU – Singapore IPA, Art. 3.19.1, EU – Vietnam IPA, Art. 3.54.1, EU – Mexico GA, Art. 30.1.

[34] Article 52.1 of the ICSID Convention provides: 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.

[35] ICSID, Post-Award Remedies.

[36] CETA. Art. 8.27.7, EU – Singapore IPA, Arts 3.19.2 and 3.19.3, EU – Vietnam IPA, Arts 3.54.2 and 3.54.3, EU – Mexico GA, Art. 30.2.

[37] This feature of the ICS appeal mechanism is strikingly similar to the Court of Justice of the EU's review of the judgment of the General Court. The CJEU remands cases to the General Court for re-examination.

[38] CETA Joint Committee Decision, Art. 3.5, EU – Singapore IPA, Art. 3.19.4, EU – Vietnam IPA, Art. 3.54.5, EU – Mexico GA, Art. 30.4. If the Appeal Tribunal considers that it cannot issue its decision within 180 days, it must inform the disputing parties in writing of the reasons for the delay, together with an estimate of the period for its decision. In no circumstances, can the appeal proceedings exceed 270 days.

[39] CETA Joint Committee Decision, Art. 3.4, EU – Singapore IPA, Art. 3.19.2, EU – Vietnam IPA, Art. 3.55.2, EU – Mexico GA, Art. 30.2. For CETA, in Oct. 2019, the Commission presented to the Council four procedural proposals, including rules setting out the functioning of the ICS Appeal Tribunal and a code of conduct for the ICS judges. In Jan. 2021, the EU and Canada adopted four decisions on these procedural issues. *See* European Commission, The EU and Canada adopt rules putting in place the CETA investment court, 29 Jan. 2021.

[40] CETA. Art. 8.28.9(d), EU – Singapore IPA, Art. 3.19.3, EU – Vietnam IPA, Art. 3.55.3, EU – Mexico GA, Art. 30.2.

[41] CETA Joint Committee Decision, Art. 3.3, EU – Singapore IPA, Art. 3.19.3, EU – Vietnam IPA, Art. 3.55.4.

[42] CETA. Art. 8.41.1, EU – Singapore IPA, Art. 3.22.1, EU – Vietnam IPA, Art. 3.57.1, EU – Mexico GA, Art. 31.1.

[43] Article 54 of the ICSID Convention provides: Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent State.

[44] CETA. Art. 8.41.2, EU – Singapore IPA, Art. 3.22.2, EU – Vietnam IPA, Art. 3.57.2, EU – Mexico GA, Art. 31.2.

[45] CETA. Art. 8.41.5, EU – Singapore IPA, Art. 3.22.5, EU – Vietnam IPA, Art. 3.57.7, EU – Mexico GA, Art. 31.5.

[46] CETA. Art. 8.41.6, EU – Singapore IPA, Art. 3.22.6, EU – Vietnam IPA, Art. 3.57.8, EU – Mexico GA, Art. 31.6.

Figure 1

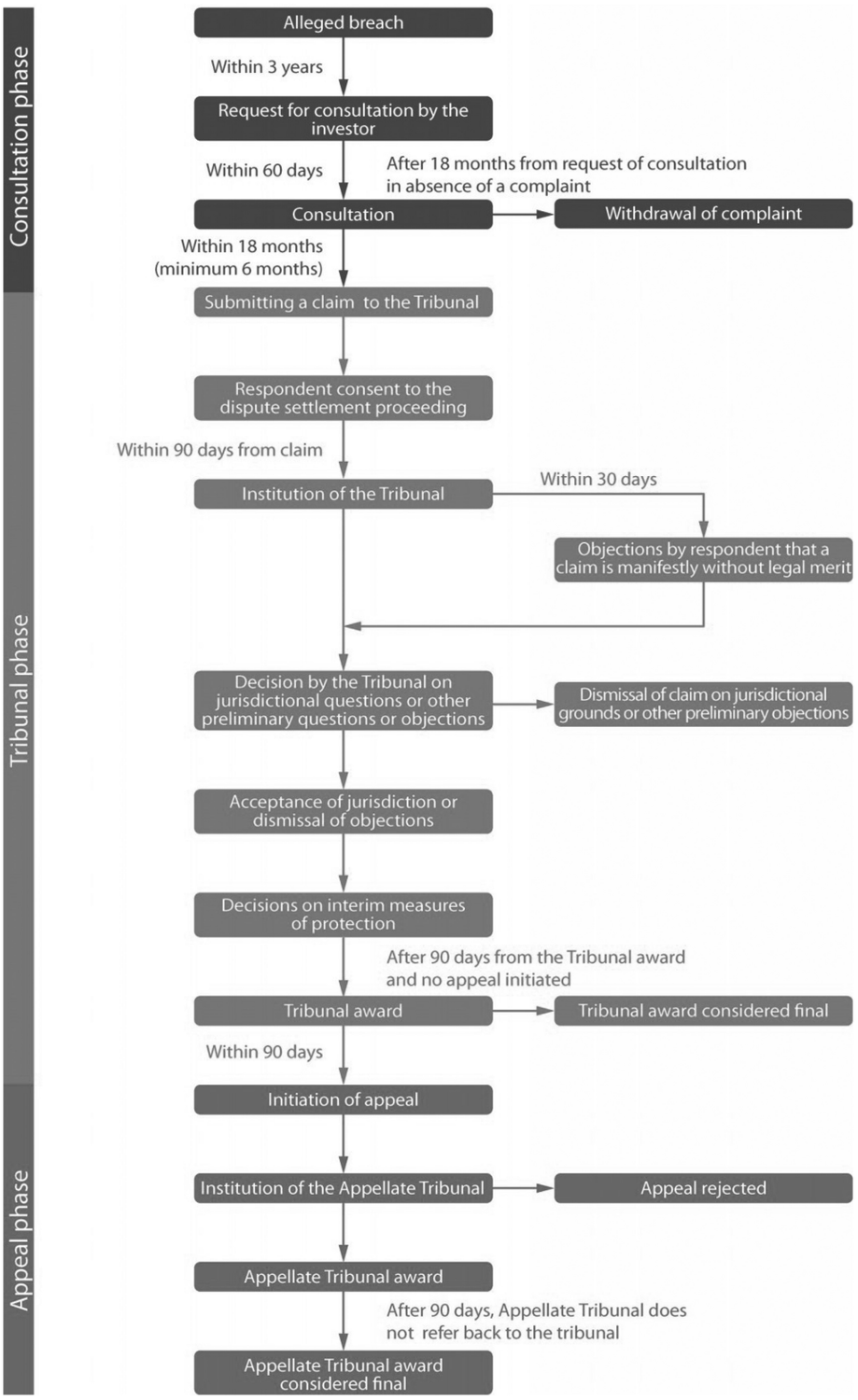

Figure I: Procedures of the investor-State dispute settlement under the CETA
Source: European Parliamentary Research Service

3 Addressing criticisms of ISDS

The ICS is expected to address a number of criticisms against ISDS, in particular: (1) the consistency and predictability of tribunal decisions; (2) a (real or perceived) lack independence and impartiality of members of the tribunal; and (3) a lack of transparency in proceedings.

3.1 *Consistency and Predictability of ICS Tribunal Decisions*

First, the establishment of a standing Appeal Tribunal under the ICS (similar to the WTO Appellate Body) should promote consistency and increase predictability of ICS tribunal decisions under the EU Agreements. One of the main criticisms against ISDS has been that tribunals may deliver divergent interpretations of the same substantive protections. The ICS attempts to address this issue by creating a two-tier system. With the introduction of the appeal mechanism, the ICS is intended to create a body of binding precedents leading to greater consistency in the interpretation of substantive protections under the EU Agreements.

However, increased consistency of ICS tribunal decisions fostered by the two-tier ICS will be limited to disputes arising under the EU Agreements.[47] In the absence of a single multilateral investment treaty and a permanent Multilateral Investment Court ('MIC'),[48] there are practical limits to the ability of the ICS to promote greater consistency of arbitral awards under the investment law regime.[49] This means that the ICS *is unlikely to* have any immediate effect on the consistency of investment arbitration awards globally. As long as traditional ISDS continues to be the dominant forum for the determination of investment disputes (as is widely expected to be the case for some time), the ICS' reach will remain limited.[50]

3.2 *Independence and Impartiality of Members of the ICS Tribunal*

The inclusion of strongly-worded ethics provisions and code of conduct ('ICS Code of Conduct') for the members of any First Instance and Appeal Tribunals ('Members') is expected to ensure independence and impartiality of the Members. Critics of ISDS often point to (a real or perceived) lack of the impartiality and/or independence of arbitrators (by virtue of their being party-appointed). In contrast, under the ICS, First Instance Tribunal Members are appointed by the contracting States for a fixed term. The EU Agreements further set out detailed rules concerning disclosure obligations, independence and impartiality, confidentiality, and obligations of former Members.

In terms of **disclosure obligations**,[51] prior to appointment, a candidate must disclose to the parties any past or present interest, relationship or matter that is likely to affect his or her independence or impartiality, or that might reasonably create an appearance of impropriety or bias. To this end, a candidate must make all reasonable efforts to become aware of any such interests, relationships and matters.[52] A Member must communicate matters concerning actual or potential violations of the code of conduct to the disputing parties.

A lack of clarity around disclosure obligations in ISDS, and related concerns around inadequate disclosure have long been a source of discount. The ramifications were most keenly highlighted in the 2020 ICSID annulment decision in *Eiser v. Spain.* In that case, Eiser's appointed arbitrator's failure to disclose a pre-existing (and ongoing) relationship with Eiser's appointed quantum experts was held to constitute an annullable error.[53] The ICS intends to head-off such issues through the introduction of binding and pervasive disclosure obligations for tribunal members.

With respect to **independence and impartiality**,[54] Members must avoid direct and indirect conflicts of interest and observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. Members must not allow financial, business, professional, family or social relationships or responsibilities to influence their conduct or judgment. Further, Members must avoid entering into any relationship or acquiring any financial interest that is likely to affect their impartiality or that might reasonably create an appearance of impropriety or bias.

Notes

47 Piero Bernardini, *The European Union's Investment Court System – A Critical Analysis,* in 35(4) ASA Bull. 824 (Matthias Scherer ed., 2017).

48 The EU and its Member States support the establishment of a MIC, composed of a first instance and an appellate tribunal staffed by full-time adjudicators to deal with all ISDS disputes, replacing the current party-appointed tribunal system.

49 Possible reform of investor-State dispute settlement (ISDS): comments by the Kingdom of Bahrain to UNCITRAL Working Group III (31 July 2019), para. 49.

50 The EU and other countries are discussing the establishment of the MIC and the reform of ISDS at UNCITRAL. *See* UNCITRAL Working Group III, https://uncitral.un.org/en/working_groups/3/investor-state. (accessed 12 Mar. 2021)

51 CETA Joint Committee Decision, Art. 3.1, EU – Singapore IPA, Annex 7, paras 3–5, EU – Vietnam IPA, Annex 4, paras 3–5, EU – Mexico GA, Art. 3.5 and Annex I, Art. 3.

52 CETA Joint Committee Decision, Art. 3.1, EU – Singapore IPA, Annex 7, para. 3, EU – Vietnam IPA, Annex 4, para. 3, EU – Mexico GA, Art. 3.

53 On 11 June 2020, an ICSID ad hoc committee granted Spain's application to annul the award in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* in its entirety because it found that Eiser's party-appointed arbitrator's failure to disclose connections with Eiser's damages expert in the underlying arbitration resulted in an improper constitution of the tribunal and a serious departure from a fundamental rule of procedure.

54 CETA Joint Committee Decision, Art. 4, EU – Singapore IPA, Annex 7, paras 10–14, EU – Vietnam IPA, Annex 4, paras 10–14, EU – Mexico GA, Art. 2 and Annex I, Art. 2.

One of the main criticisms of ISDS concerns arbitrator independence and impartiality. This is also reflected in the growing number of challenges to arbitrators. For example, between 1982 and 2001, there was only one challenge to an arbitrator under the ICSID Convention, whereas from 2011 to date there have been over eighty challenges.

Criticism of ISDS in this regard has crystallized around 'double-hatting', the practice of arbitrators simultaneously acting as counsel or expert in ISDS proceedings, which is prohibited under the ICS. The nature of the issue(s) which arise from multiple roles are said to include (1) possible issue conflicts (for example, for arbitrators who are also instructed as counsel in disputes with overlapping issues; and for experts who have previously expressed a view on a certain point, which a tribunal they are subsequently appointed to is tasked with considering); (2) lack of impartiality; and (3) lack of independence (the latter two potentially arising out of system of reciprocity and 'clubbyness').

Whilst an outright prohibition against 'double-hatting' may serve to address these criticisms, stakeholders on the other side of the spectrum have noted the possible adverse effects on diversity of the arbitrator pool and encouraging new talent. Stakeholders have further expressed concerns that prior experience as counsel results in better arbitrators and better decisions. A total prohibition on multiple roles may have the negative effect of disqualifying people with significant practical experience that they can bring to bear when adjudicating a dispute, and thereby limit party choice.

There remains a further possibility that Members will not be allowed to sit as arbitrator in other ISDS cases if a committee established under the EU Agreements decides to permanently transform the retainer fee, the daily fee and the other fees and expenses into a regular salary. This would serve to further limit the pool of Members, creating (justifiable) concerns around their experience and suitability.[55]

Concerning **confidentiality**,[56] Members and former Members must not at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding, except for the purposes of that proceeding, and must not, in particular, disclose or use any such information to a personal advantage or an advantage for others or to affect the interest of others. Moreover, Members and former Members must not disclose any details of their deliberations, or any Member's view at any time.

Former Members must also avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decisions or awards of the tribunal or the Appeal Tribunal.[57] Members must undertake that for a period of three years after the end of their term, they must not represent any one of the disputing parties in an investment dispute.[58]

In many ways, the ICS Code of Conduct reflects the various options proposed in the ICSID United Nations Commission on International Trade Law ('UNCITRAL') Draft Code of Conduct for Adjudicators ('Draft Code'), the result of the ongoing efforts of UNCITRAL Working Group III to reform ISDS. The advantage of the ICS Code of Conduct is the ease with which it can be mandatorily imposed through the EU Agreements and the nascent ICS. By contrast, there have been a number of different options for enforcement outlined in the commentary to the Draft Code. However, these will depend on how the Draft Code is implemented. Proposals in this regard include its express incorporation into new treaties and by incorporation by convention into existing treaties. Alternatively, it could be implemented by way of incorporation into procedural rules or through a multilateral instrument.

In any event, enforcement of the Draft Code remains a long way off. The first challenge to finalizing the Draft Code concerns when Working Group III will be able to reconvene to resume discussions in light of the Coronavirus disease 2019 (COVID-19) pandemic. In addition, and owing to the inclusive nature of the negotiations, the public and all 193 United Nations Member States have been invited to submit their comments on the Draft Code. The policy of Working Group III is to resolve any substantive issues by consensus. This means that all of the different viewpoints will need to be considered and discussions will continue until a mutually acceptable draft is agreed. A further challenge is that the Draft Code is not a standalone project, but rather it is being discussed in the context of multiple proposed reforms to the broader ISDS framework.

3.3 *Transparency in ICS Proceedings*

Confidentiality is a key feature of the ISDS model and party consent is required for the publication of materials from the proceedings including pleadings, procedural decisions and awards. Hearings are typically conducted *in camera* and it is not uncommon for the outcome of the arbitration to remain confidential. (This is true both under the ICSID Convention and Rules and for ad hoc arbitrations administered on a case-by-case basis.) Many

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[55] In addition to limiting the pool of Members, the fact that States would be responsible for payment of the Members' retainer fees may give rise to a concern that Members are economically dependent on the States, which could prevent them from being perceived as independent and impartial. Further, since judicial terms of the Members are renewable, some States may be tempted to oppose the re-appointment of the Members who are perceived to have acted against the States' interests. This may lead the perception that the ICS is biased in favour of the respondent State, tilting the balance against investors.

[56] CETA Joint Committee Decision, Art. 6, EU – Singapore IPA, Annex 7, paras 10–14, EU – Vietnam IPA, Annex 4, paras 10–14, EU – Mexico GA, Art. 2 and and Annex I, Art. 6.

[57] CETA Joint Committee Decision, Art. 5, EU – Singapore IPA, Annex 7, paras 15–18, EU – Vietnam IPA, Annex 4, para. 15, EU – Mexico GA, Art. 5 and Annex I, Art. 5.

[58] The EU – Vietnam IPA does *not* require this obligation on former Members.

critics of ISDS point to the lack of transparency of proceedings as promulgating a lack of accountability and public scrutiny. Indeed, during the North American Free Trade Agreement ('NAFTA') re-negotiations in 2018, commentators across the political spectrum spoke scathingly of 'obscure tribunals', a 'secret trade court', and 'justice behind closed doors'.

The ICS aims to combat such criticisms head-on. The EU Agreements introduce mandatory transparency by incorporating the United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration[59] ('UNCITRAL Transparency Rules') (CETA, EU–Vietnam IPA)[60] or including detailed transparency rules similar to the UNCITRAL Transparency Rules (EU–Singapore IPA, EU–Mexico GA).[61]

Pursuant to these rules, substantive materials including the Request, any written submissions and, most importantly, awards rendered by the First Instance Tribunal and/or Appeal Tribunal will be published. (The rules include a limited exemption for confidential information and business secrets.) Most notably, hearings will be open to the public and transcripts also made publicly available. This will allow the public to be promptly informed of disputes and interested third parties to contribute to the proceedings,[62] while subjecting decisions to full public scrutiny.

4 New challenges for the successful implementation of ICS

At the same time, the ICS raises new challenges for the conduct of investor-State arbitrations under the EU Agreements. These include: (1) the applicability of the ICSID Convention to ICS proceedings; (2) uncertainty regarding enforcement of ICS awards; and (3) a potential increase in the duration and cost of proceedings due to the appeal mechanism.

4.1 *Applicability of the ICSID Convention to ICS Proceedings*

A majority of investor-State arbitrations take the form of institutional arbitrations (as opposed to ad hoc arbitrations), which are administered by an arbitral institution and are conducted in accordance with that institution's arbitral rules. ICSID remains the dominant and most popular choice of institution for the conduct of investor-State arbitrations.[63] In apparent recognition of this, the EU Agreements provide that claimant investors can submit their claims under the ICSID Convention or ICSID Additional Facility Rules,[64] providing a legal basis for reliance on the ICSID Rules as the governing procedural rules in ICS proceedings.

Whilst the ICSID Convention will be applicable to disputes where an EU Member State, except Poland, is the respondent,[65] the application of the ICSID Convention to ICS proceedings **when the respondent is the EU** raises a number of questions. (Notably, the Commission's intention appears to be to serve as the respondent instead of individual EU Member States.[66])

Article 25 of the ICSID Convention provides that the Centre's jurisdiction will be limited to disputes between a contracting State and a national of another contracting State. Further, Article 67 of the ICSID Convention restricts ICSID membership to State members of the World Bank or, at a minimum, parties to the Statute of the International Court of Justice.[67] In contrast to the EU Member States, the EU is not a contracting party to the ICSID Convention and the EU does not qualify as either a State member of the World Bank or a party to the Statute of the International Court of Justice.[68]

It follows that an amendment to the ICSID Convention is required in order for the EU to qualify for membership.[69] However, any amendment of the ICSID Convention requires unanimous approval of *all* signatories.[70] Thus, whilst legally possible, any such amendment raises significant practical difficulties.

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[59] The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

[60] Article 8.36, EU – Vietnam IPA, Art. 3.46.

[61] EU – Singapore IPA, Art. 3.16 and Annex 8, EU – Mexico GA, Art. 19.

[62] Interested natural or legal persons of the signatories to the EU Agreements may submit amicus curiae briefs to the tribunal in accordance with certain rules.

[63] ICSID has concluded over 440 arbitrations and has over 250 cases pending.

[64] CETA. Art. 8.23.2, EU – Singapore IPA, Art. 3.6.1, EU – Vietnam IPA, Art. 3.33.2, EU – Mexico GA, Art. 7.2.

[65] This is because all the EU Member States, except for Poland, are contracting parties to the ICSID Convention. *See also* Database of ICSID Member States.

[66] *Ibid.,* at 3. *See also* Arts 8–9 of Regulation (EU) No. 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-State dispute settlement tribunals established by international agreements to which the European Union is party (OJ L 257, 28 Aug. 2014, at 121–134).

[67] Article 67 of the ICSID Convention provides: This Convention shall be open for signature on behalf of States members of the [World] Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice […].

[68] In theory, the EU could pursue becoming a member of the World Bank or a party to the Statute of the International Court of Justice. However, it will have its own challenges and take some time, if pursued.

[69] August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19(4) J. Int'l Econ. L. 769 (2016).

[70] ICSID Convention, Art. 66.

In the alternative, the EU and its trading partners under the EU Agreements could enter into an *inter se* amendment to modify the terms of the ICSID Convention among themselves under Article 41(1)(b) of the Vienna Convention to allow the EU to join the ICSID Convention.[71] Through an *inter se* amendment of the ICSID Convention, these parties (and only these parties) could acknowledge the EU as a contracting party to the ICSID Convention. Thus, in this way, it may be possible to confirm the EU's status as an ICSID Convention party for the purpose of ICS proceedings between the EU and its partners under the EU Agreements.[72] Whilst in theory possible, the ability of such an amendment to satisfy the requirements for an *inter se* amendment under Article 41(1)(b) of the Vienna Convention,[73] and withstand a potential challenge by another ICSID contracting party, remain uncertain.

In any event, certain key features of the ICSID Convention and Rules, including the annulment procedure, will not be applicable to ICS proceedings, since the EU Agreements, as *lex specialis*, prevail over the ICSID Convention as *lex generalis.*[74]

4.2 *Enforcement of ICS Tribunal Decisions Under the ICSID Convention and New York Convention*

The key challenge that the ICS faces is a perceived enforcement risk arising out of legal uncertainty regarding the enforcement of ICS awards. This issue will arise when assets capable of enforcement are located in third countries which are not contracting States to the ICS. The ease of enforcement of awards in these circumstances will be critical for the overall attractiveness and effectiveness of this new system.

In the present ISDS regime, the ICSID Convention and the New York Convention provide an effective legal framework for the enforcement of investor-State arbitral awards. These treaties provide effective mechanisms for enforcing arbitral awards in different jurisdictions.

The enforcement provisions under the EU Agreements refer to both the ICSID Convention[75] and the New York Convention.[76] However, a series of questions arise as to whether ICS awards will meet the requirements under the ICSID Convention and/or the New York Convention.

4.2.1 *Enforcement Under the ICSID Convention*

Most scholars and practitioners agree that **there is no mechanism for enforcement of ICS awards under the ICSID Convention.**[77] Article 54(1) of the ICSID Convention provides that each contracting State must recognize *an award rendered pursuant to this Convention* as binding and enforce the pecuniary obligations imposed by that award within its territories. For enforcement under the ICSID Convention, the award must have resulted from arbitration proceedings conducted in accordance with the ICSID Convention and ICSID Rules. The two-tier structure and appeal mechanism under the ICS are clearly not compatible with Article 53(1) of the ICSID Convention, which expressly forbids any appeal.[78]

To address this inconsistency, parties to the EU Agreements could similarly seek to amend the ICSID Convention (either in its entirety or by way of a limited *inter se* amendment)[79] to permit an appeal mechanism for claims brought pursuant to the EU Agreements.[80]

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[71] Reinisch, *supra* n. 69, at 769.

[72] This appears to be not possible for the ICS proceedings under the EU – Vietnam IPA. While Canada, Singapore and Mexico are parties to the ICSID Convention, Vietnam is not a party to the ICSID Convention as of Feb. 2021.

[73] Article 41(1)(b) of the Vienna Convention requires (1) that the *inter se* 'modification in question is not prohibited' by the subject treaty; (2) that it does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; ***and*** (3) that it is not incompatible with the effective execution of its object and purpose as a whole.

[74] Freya Baetens, *The EU's Proposed Investment Court System (ICS): Addressing Criticisms of Investor-State Arbitration While Raising New Challenges,* 43(4) Legal Issues Econ. Integration 4 (2016).

[75] CETA. Art. 8.41.6, EU – Singapore IPA, Art. 3.22.6, EU – Vietnam IPA, Art. 3.57.8, EU – Mexico GA, Art. 31.6. The EU Agreements provide in general that a final award […] shall qualify as an award under s. 6 of Ch. IV of the ICSID Convention.

[76] CETA. Art. 8.41.5, EU – Singapore IPA, Art. 3.22.5, EU – Vietnam IPA, Art. 3.57.7, EU – Mexico GA, Art. 31.5. The EU Agreements provide in general that for the purposes of Art. I of the New York Convention, final awards […] are arbitral awards relating to claims that are considered to arise out of a commercial relationship or transaction.

[77] Anastasia Medvedskaya, *Enforcement Mechanism Under the TTIP Investment Court System, an Appropriate Tool for Enforcing Awards in Third States?,* 35 Spain Arb. Rev. (Revista del Club Español del Arbitraje) 84 (2019).

[78] Article 53(1) of the ICSID Convention provides: The award shall be binding on the parties and **shall not be subject to any appeal** or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

[79] Based on the EU Agreements, which provide for an appeal mechanism under the ICS, it could be argued that the EU and its trading partners have already made an *inter se* modification to the ICSID Convention, namely the EU and Canada, Singapore, Vietnam and Mexico, respectively. Even if we view the EU Agreements as an *inter se* modification to the ICSID Convention (e.g., EU-Canada, EU-Singapore, EU-Vietnam, EU-Mexico), it is an **open question** whether we could view this *inter se* modification as the modification between each party to the EU Agreements (i.e., Mexico-Canada, Canada-Singapore, Singapore-Vietnam, Vietnam-Mexico). In practice, this could be an issue if, e.g., a Canadian judge is called upon to enforce an ICS award against Mexican assets in Canada. Since Canada and Mexico did not directly conclude an investment treaty that introduces the ICS, one could argue that there is no *inter se* modification to the ICSID Convention. This would mean that the Canadian judge could refuse the enforcement of ICS award against Mexican assets in Canada. On the other hand, it could be argued that there is an (implicit) *inter se* modification to the ICSID Convention between each party to the EU Agreements as they all introduced the ICS via the EU Agreements. This would mean that the (hypothetical) Canadian judge could enforce an ICS award against Mexican assets in Canada.

[80] N. Jansen Calamita, *The (in)compatibility of Appellate Mechanisms with Existing Instruments of the Investment Regime*, 18(4) J. World Inv. & Trade 610 (2017).

Both types of amendment face the same practical difficulties described above in relation to the EU's membership of the ICSID Convention, as explained in section 4.1. Moreover, certain commentators note that an *inter se* amendment of the ICSID Convention allowing for an appeal mechanism is precluded on the basis that any such amendment fails to meet the first requirement under Article 41(1)(b) of the Vienna Convention that the *inter se* modification in question is not prohibited by the subject treaty. Article 53(1) of the ICSID Convention explicitly provides that an ICSID Convention award '*shall not be subject to any appeal or to any other remedy except those provided for in this Convention*'.[81]

4.2.2 *Enforcement Under the New York Convention*

Although the possibility to enforce the ICS awards pursuant to the ICSID Convention remains doubtful, scholars and practitioners *generally* agree that it will be possible to enforce ICS awards under the New York Convention.

The New York Convention applies to the enforcement and recognition of any foreign 'arbitral award'[82] *with the proviso that* individual States may reserve the right to apply the New York Convention to arbitral awards in 'commercial' disputes only.[83] Prima facie, both of these requirements are satisfied.

First, the New York Convention does not prescribe any strict definition of 'arbitral award', instead granting interpretative discretion to the country in which enforcement is sought.[84] Article I(2) of the New York Convention defines the term 'arbitral awards' to 'include not only awards made by arbitrators appointed for each case but also those made by *permanent arbitral bodies* to which the parties have submitted'. Such permanent arbitral bodies may include tribunals where all of the members are appointed by the State parties[85] like the Members of the ICS First Instance and the Appeal Tribunals. This is consistent with the approach adopted towards awards rendered by the Iran–United States Claims Tribunal,[86] (a tribunal constituted entirely by State-appointed judges) and awards rendered by the Courts of Arbitration of the Chambers of Commerce in Comecon States during the Soviet period[87] (where arbitrators were chosen from a list made by the State-controlled Chambers). In both cases, awards have been recognized as 'arbitral awards' under the New York Convention and were successfully enforced.[88]

Secondly, ICS awards may be treated as 'commercial' for the purpose of the New York Convention, in the event that States have made a reservation to this effect. This issue has already arisen under the current investor-State arbitration regime, and domestic courts have consistently affirmed that an investment treaty arbitration qualifies as 'commercial' for the purposes of the New York Convention.[89] As a further reassurance, the EU Agreements explicitly state that final awards are deemed to be arbitral awards in relation to claims arising out of a *commercial* relationship or transaction for the purposes of Article 1 of the New York Convention.[90]

Notwithstanding the above, some commentators warn that the enforcement of ICS awards under the New York Convention could still depend on how national courts treat the issue of the prospective waiver of Article V(1) grounds of review,[91] since non-parties to the EU Agreements cannot be bound with respect to their obligations under the New York Convention (or the application of their national law).[92]

The authors are not convinced by this. The ICS does not give rise to serious cause for concern as regards the procedural deficiencies addressed under Article V(1) the New York Convention. Rather, the ICS provides enhanced procedural protections to disputing parties,

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[81] *Ibid.*, at 610.

[82] Article I(2) of the New York Convention provides: The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

[83] Article I(3) of the New York Convention provides: Any State may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as *commercial* under the national law of the State making such declaration.

[84] Medvedskaya, *supra* n. 77, at 84.

[85] Calamita, *supra* n. 80, at 620–621.

[86] *Ministry of Defense of Islamic Republic of Iran v. Gould, Inc.*, 887 F2d 1357 (9th Cir 1989), *cert. denied*, 110 S Ct 1319 (1990).

[87] *See* A. J. Van den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* 378–379 (Kluwer International 1981).

[88] Calamita, *supra* n. 80, at 620–621.

[89] *See Republic of Argentina v. BG Group PLC*, 764 F Supp2d 21 (DDC 2011), reversed by 665 F3d 1363 (DC Cir 2012), reversed by 134 S Ct 1198, 1204 (2014). *See also United Mexican States v. Metalclad Corp.*, 2001 BCSC 664 (British Columbia Sup Ct 2001), para. 44.

[90] CETA. Art. 8.41.5, EU – Singapore IPA, Art. 3.22.5, EU – Vietnam IPA, Art. 3.57.7, EU – Mexico GA, Art. 31.5.

[91] Article V(1) of the New York Convention provides that a national court is entitled to refuse recognition and enforcement of a foreign arbitral award in the event that the party against whom the award is invoked furnishes proof of a *procedural deficiency* going to the fairness of the arbitral proceedings. Article V(1) grounds of review are as follows: (i) a party to the arbitration agreement was under some incapacity; (ii) the arbitration agreement was invalid; (iii) the procedure before the arbitral tribunal was affected by procedural unfairness; (iv) the award deals with issues falling outside the scope of the submission to arbitration; (v) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, absent such an agreement, the law of the arbitral seat; (vi) the award has not yet become binding on the parties; and (vii) the award has been set aside in the country where it was made.

[92] Calamita, *supra* n. 80, at 622.

inter alia by imposing stricter ethical rules on Members and greater transparency (as explained above in Sections 3.2 and 3.3). Accordingly, ICS awards are highly likely to be enforceable in third countries under the New York Convention.

4.3 *Increase in the Duration and Cost of Proceedings Due to the Appeal Mechanism*

The ICS' appeal mechanism has drawn criticism for its potential to prolong the length and increase the cost of proceedings.[93] In particular, broader, merits-based grounds for appeal under the EU Agreements are expected to significantly increase the number of appeals. This could result in proceedings spanning two to three years from the date of submission to the date of a final award.[94] Further delays and additional costs will arise, if the Appeal Tribunal elects to remand the claim back to the First Instance Tribunal.[95]

It is important to note that this is by no means unique to the ICS. Parties are increasingly utilizing the ICSID annulment function as a de facto appeal mechanism shoehorning merits based appeals into the limited procedural grounds for annulment. Thus, ICSID proceedings (extended by annulment proceedings) may last in excess of four years, although it should be noted that this is principally a result of lengthy time periods (one to two years) for rendering an award.

To avoid the unnecessary prolongation of proceedings under the ICS, the EU Agreements stipulate that appeal proceedings are not to exceed 180 days, unless the Appeal Tribunal informs the disputing parties of the reasons for the delay.[96] In any case, the appeal proceedings cannot exceed 270 days.

However, it remains to be seen whether these time limits will be strictly observed. Indeed, WTO practice shows that whilst the WTO Appellate Body initially met similarly prescribed deadlines for its appellate review,[97] it has increasingly published its reports late, purportedly due to the complex legal and factual issues which have arisen in disputes since 2011. This has given rise to a number of complaints from WTO Members, including the United States,[98] but, so far, there have been no attempts to address this issue.

ICS appeal proceedings could similarly fail to observe the procedural deadlines set out in the EU Agreements. In the event of such an emerging practice, parties to the EU Agreements will need to stipulate additional measures to guarantee the prompt resolution of investor-State disputes, as envisaged in the EU Agreements.

5 Conclusions

As soon as the EU Agreements enter into force (which may take a few years),[99] the ICS will become operative. Upon submission of a claim, disputes before the First Instance Tribunal and Appeal Tribunal will proceed pursuant to the procedural rules set forth in the EU Agreements. These will be supplemented by working procedures to be drawn up by the First Instance Tribunal and the Appeal Tribunal in subsequent procedural orders.[100]

Notwithstanding the imperfect regime for investment disputes offered by ISDS, scepticism of the ICS is anticipated to remain high for some time. It will be critical for the EU and its trading partners, who are parties to the EU Agreements (e.g., Canada, Singapore, Vietnam and Mexico), to satisfactorily resolve new challenges arising under the ICS – in particular, pertaining to the applicability of the ICSID Convention to ICS proceedings and enforcement risk. Of equal importance, the ICS must show that it is able to effectively tackle the criticisms raised of ISDS and serve as an independent, impartial and reliable mechanism for the resolution of investor-State

Notes

[93] Charris Benedetti, *The Proposed Investment Court System: Does It Really Solve the Problems?*, in *State Law Magazine*, 83–115 (Universidad Externado de Colombia. No. 42, Jan.-Apr. 2019). *See also* Submission by the Corporate Counsel International Arbitration Group (CCIAG) to UNCITRAL Working Group III (18 Dec. 2018), para. 52.

[94] For instance, under the CETA, the Tribunal has to issue its provisional award within eighteen months of the submission of the claim, or adopt a decision specifying the reasons for the delay. Either disputing party may appeal a provisional award within ninety days of its issuance. The appeal proceedings are not to exceed 180 days, unless the Appeal Tribunal informs the disputing parties of the reasons for the delay. In no case should the proceedings exceed 270 days. On the other hand, ICSID proceedings (extended by annulment proceedings) may last in excess of four years, although it should be noted that this is principally a result of lengthy time periods (one to two years) for rendering an award.

[95] For example, under the CETA, if the Appeal Tribunal modifies or reverses the original decision, the case is remanded to the Tribunal, which must seek to issue its revised award within ninety days of receiving the report of the Appeal Tribunal.

[96] CETA Joint Committee Decision, Art. 3.5, EU – Singapore IPA, Art. 3.19.4, EU – Vietnam IPA, Art. 3.54.5, EU – Mexico GA, Art. 30.3.

[97] Article 17.5 of the Dispute Settlement Understanding ('DSU') provides that the WTO appeal proceedings are not to exceed sixty days from the date a disputing party notifies its decision to appeal to the date the Appellate Body circulates its report and that in any case, the proceedings cannot exceed ninety days.

[98] United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* 4–5 (Feb. 2020).

[99] The EU Agreements are 'mixed agreements' which require the ratification by both the European Parliament and national/regional parliaments of EU Member States.

[100] CETA, Art. 8.27.10 and CETA Joint Committee Decision, Art. 2.8, EU – Singapore IPA, Arts 3.9.10 and 3.10.9, EU – Vietnam IPA, Arts 3.38.10 and 3.39.10, EU – Mexico GA, Arts 11.10 and 12.10.

disputes. In many ways the ICS' success is dependent upon its growth. The EU must convince more trading partners to adopt the new regime before many of its intended benefits will be seen. The extent to which it can do so depends on its ability to satisfactorily resolve these issues.

Subject to this, and looking towards the long-term, the EU Agreements' inclusion of a commitment to the pursuit and establishment of a multilateral investment tribunal[101] could potentially serve as a small step towards the creation of a standing Multilateral Investment Court, and its associated benefits for ISDS

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[101] Article 8.29, EU – Singapore IPA, Art. 3.12, EU – Vietnam IPA, Art. 3.41, EU – Mexico GA, Art. 13.14.