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International Investment Court System: The Future of Investment Dispute Settlement?

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Abstract

The paper is concerned with examining the texts of the Investment Protection Agreements concluded by the European Union, for the purpose of addressing some of the issues created by the shortcomings of the texts. Focus is given to the provisions related to the Investment Court System established under the respective agreements. The relevant provisions are subject to analysis and conclusions are drawn in an effort to address the issues that arisen. Taken into consideration are works of various other scholars who contributed to the topic.

Keywords

European Union; International Investment Arbitration; International Investment Court; Investment Protection Agreement; CETA; EU-Singapore Investment Protection Agreement; EU-Vietnam Investment Protection Agreement; Multilateral Investment Court; New York Convention.

1 Introduction

With the conclusion of a number of new-generation Investment Protection Agreements ("IPAs") by the EU in recent years and new treaties being in the process of negotiation[1], it is of the utmost importance to examine the newly established Investor-state dispute settlement ("ISDS") mechanism provided for in these IPAs. In the present, it is widely spread that the EU's new-generation IPAs renounce the well-established mechanism of settling investment disputes in arbitration. It comes as the EU's reaction

1 EU reached an agreement in principle with Mexico in April 2018. The text of the agreement is now in process of legal revision.

to long-standing criticisms of the ISDS. Instead, the EU's IPAs aim to submit the disputes to an investment Tribunal with a guaranteed appeal mechanism and its own procedural alterations. So far, the ratification process is still ongoing for all the EU's IPAs, which results in being impossible to examine the impacts and operation of the investment Tribunals established under these agreements. Moreover, despite the provisional application of Comprehensive Economic and Trade Agreement ("CETA"), the relevant provisions of chapter 8 (Investment) do not fall under the provisional application.[2] Subject to examination, therefore, remains only the published texts of the IPAs taken together with statements and declarations by the respective parties to these agreements. However, this does not prevent from addressing some of the issues that arise after only reading through the respective provisions concerning the resolution of investment disputes.

This paper will not focus on the reasons for replacing the common arbitration proceedings, as this topic was already addressed by various scholars in the past.[3] Rather, this paper will pursue to examine the nature of the Investment Court System ("ICS") and strive to shed light on its procedural divergencies (as regards arbitration). Taken into consideration will be all the CETA, the EU-Singapore IPA, and the EU-Vietnam IPA. Although it was also taken into account, the EU-Mexico IPA won't be explicitly mentioned in this paper because it being still in the process of legal revision and therefore subject to potential modifications in the future. Nevertheless, the author points out that all the provisions examined below are either identical or extremely similar to those provided for in the (draft

2 See Notice concerning the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part. *EUR-Lex* [online]. 16. 9. 2017 [cit. 6. 5. 2021]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=urisrv:OJ.L_.2017.238.01.0009.01.ENG

3 See MARCEDDU, M. L. Implementing Transparency and Public Participation in FTA Negotiations: Are the Times a-Changin'? *Journal of International Economic Law*. 2018, no. 21, p. 693; see also BROWN, C. M. Chapter 13: The EU's Approach to Multilateral Reform of Investment Dispute Settlement. In: STANIČ, A. and C. BALTAG (eds.). *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court*. Alphen aan den Rijn: Wolters Kluwer, 2020, p. 219; GICQUELLO M. The Reform of Investor-State Dispute Settlement: Bringing the Findings of Social Psychology into the Debate. *Journal of International Dispute Settlement*, 2019, no. 10, p. 562.

of the) EU-Mexico IPA.[4] As a result of leaving out the EU-Mexico IPA, this paper endeavours to draw parallels between the remaining IPAs.

2 Investment Court System

As was already mentioned, some of the most distinctive aspects of the EU's IPAs are the provisions related to dispute settlement. The agreements renounce *ad hoc* arbitration as a form of settling disputes and replace it with its own mechanism of a two-instanced court-like tribunal. The Tribunal established by each agreement is called up to adjudicate investment disputes under each agreement respectively. In this regard, the EU makes clear its intent to create a Multilateral Investment Court ("MIC") that, once established, shall assume all the agenda from the Tribunals created by the respective agreements. CETA, the EU-Singapore IPA, and the EU-Vietnam IPA all contain articles dedicated to pursuing the creation of a MIC in the international community.[5] However, until a MIC is established, the Tribunals are the bodies to adjudicate all disputes related to investments made under the IPAs.

2.1 Organisation Issues

The investment courts created by each agreement are to be *permanent*[6] bodies consisting of a Tribunal (of First Instance[7]) and an Appeal Tribunal. Both tiers are to have a certain number of *members* to whom will be distributed the cases. The Tribunal under CETA shall have 15[8] members, whilst under the EU-Vietnam IPA the number is lowered to 9[9] members and under the EU-Singapore IPA it further decreases to 6[10] members. The term is set to be 5 years long in the case

4 Draft EU-Mexico agreement, Section on Resolution of Investment Disputes. *European Commission* [online]. [cit. 7. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156814.pdf

5 Art. 8.29 CETA; Art. 15 EU–Vietnam FTA; See CETA: EU and Canada agree a new approach on investment in trade agreement. *European Union* [online]. 29. 2. 2016 [cit. 6. 5. 2021]. Available at: http://europa.eu/rapid/press-release_IP-16-399_en.htm

6 See para. 1.6 below.

7 EU-Singapore IPA refers to the first instance body as a Tribunal of First Instance, whereas the other agreements use the term Tribunal.

8 Art. 8.27 para. 2 CETA.

9 Art. 3.38 para. 2 EU-Vietnam IPA.

10 Art. 3.9 para. 2 EU-Singapore IPA.

of CETA[11], 4 years under the EU-Vietnam IPA[12], and 8 years in the case of EU-Singapore IPA.[13] The agreements with Canada and Vietnam add that the term is renewable once, however, in relation to Singapore it is stated that a member's term may be renewed by decision of the Committee upon expiry.[14] In this case there is no indication about limited renewability.

2.2 Appointment

The Committee[15] is to be holding a key position in the process of appointing the members to the Tribunal. Upon the entry into force of the agreements, the respective Committee shall appoint the members of the Tribunal, out of whom 1/3 will be nationals of a member state of the EU, 1/3 will be nationals of either Canada, Vietnam, or Singapore respectively, and 1/3 shall be nationals of third countries. Upon the appointment of its members, the Tribunal will be able to hear individual cases. Each individual case will be heard by a division of three members of the Tribunal, of whom one shall be a national of EU member state, one a national of the other Party, and one a national of a third country, who will also be the chair of the division.[16]

The process of appointing the members of the Tribunals brings an issue regarding the party's autonomy. The principal advantage of (current) investor-state arbitration over state-to-state arbitration or diplomatic protection consists of the capability of the Investor party to a dispute to be in full control over its case. Some examples may be the option to initiate the proceedings, the option to select the procedural rules, and most importantly the capability to appoint the arbitrators. Naturally, there are certain limits in a form of the state's (pre-)given consent to arbitration. Nevertheless, the key feature of the established ISDS mechanism is the appointment of adjudicators by the parties to the dispute. This crucial trait and standing characteristic of investment arbitration is completely abandoned in the ICS.

11 Art. 8.27 para. 5 CETA.
12 Art. 3.38 para. 5 EU-Vietnam IPA.
13 Art. 3.9 para. 5 EU-Singapore IPA.
14 Ibid.
15 Each agreement provides that an organization body (Committee) which will consist of representatives both from the EU and the particular state shall be created. See Art. 26.1 CETA, Art. 4.1 EU-Vietnam IPA, Art. 4.1 EU-Singapore IPA.
16 Art. 8.27 para. 6 CETA, Art. 3.38 para. 6 EU-Vietnam IPA, Art. 3.9 para. 7 EU-Singapore IPA.

In replacement, the ICS provides for a system that strongly resembles a national law procedure of naming judges to courts. In the EU's IPAs the parties to a dispute are in no control over the selection of adjudicators who will hear their case. Instead, this authority is handed over to the respective Committees. This way the states retain control over the composition of the Tribunal to some minor extent, however, any additional control over the composition of individual divisions is excluded. Instead, the selection of members of the Tribunal who will be hearing a particular case will be determined on a rotation basis.[17]

The lack of party autonomy in selecting the adjudicators gives the impression of the true nature of the ICS. As it abandons the standing arbitration characteristic the ICS appears to carry more judicial aspects which may cause issues in relation to enforcement of its decisions.

Also, as was already stressed out hereinbefore, the adjudicators are consistently referred to as "members of the tribunal". This makes clear the intention of the drafters to neither use the term judges nor arbitrators. Although merely symbolic, this modification is likely an attempt to address some legitimate concerns expressed by the public in the past.[18]

2.3 Permanency

It is not quite certain as to whether the Tribunals will be in fact permanent bodies or merely conceptual structures.[19]

It is clear that the term "permanent" has to be interpreted in accordance with the remaining provisions regarding the Tribunals. Developing on this idea,

17 Art. 8.27 para. 7 CETA, Art. 3.38 para. 7 EU-Vietnam IPA, Art. 3.9 para. 8 EU-Singapore IPA.

18 SARDINHA, E. The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement. *ICSID Review*, 2017, Vol. 32, no. 3, p. 633; see also SARDINHA, E. The Impetus for the Creation of an Appellate Mechanism. *ICSID Review*, 2017, Vol. 32, no. 3, p. 503.

19 The opinions of scholars have differed in the past. *Sardinha* writes about a permanent structure, however, mentions the missing term "permanent" in the CETA Art. 8.28 para. 1, see SARDINHA, E. The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement. *ICSID Review*, 2017, Vol. 32, no. 3, p. 633; *Thanvi* on the other hand clearly states that the Tribunals won't be permanent structures, but rather two-tier systems, see THANVI, A. The Investment Court System under the EU-Canada Comprehensive Economic and Trade Agreement: Proposal and Some Unaddressed Issues. *Indian Journal of Arbitration Law*, 2019, Vol. 8, no. 2, p. 100.

permanency seems to be the only feasible manner to accomplish the creation of a roster of members of the Tribunal as mentioned above. If it was not permanent, the pool of adjudicators appointed by the Committees would not be able to operate properly. The IPAs provide that in order to ensure their availability, members of the Tribunal shall be paid a monthly retainer fee.[20] Taking these provisions into consideration, a conclusion can be drawn that the relation between members of the Tribunal and the Tribunal itself is of permanent nature. Following this conclusion, it is necessary to point out that permanency is another aspect of a judicial organ rather than an arbitration body. Arbitration is defined by its *ad hoc* and temporary nature. Although there are arbitration centres that are permanent (e.g., ICSID, LCIA, SCC)[21] and have rosters of arbitrators, all of these are in fact permanent organs (with designated seats and administrative organisation). In contrast, the Tribunals created by the EU's IPAs shall utilize the ICSID Secretariat, which shall provide them with appropriate support, as Secretariat to the Tribunals.[22] Moreover, there is no indication about the possible seat of the Tribunals.

Interestingly, it has to be pointed out that the specific term "permanent" is not included in CETA's investment chapter and is only marginally mentioned in the EU-Singapore and EU-Vietnam IPAs.[23] Consequently, there cannot be found any clear indication about the permanent nature of CETA's Tribunal in the wording of the agreement itself. However, this seems to be at odds with the proclamations made by the EU in the past relating to CETA.[24] Also, as the Investment Court established under CETA is aimed

20 Art. 8.27 para. 12 CETA, Art. 3.38 para. 14 EU-Vietnam IPA, Art. 3.9 para. 12 EU-Singapore IPA.

21 The International Centre for Settlement of Investment Disputes; The London Court of International Arbitration; The Arbitration Institute of the Stockholm Chamber of Commerce.

22 Art. 8.27 para. 16 CETA, Art. 3.38 para. 18 EU-Vietnam IPA, Art. 3.9 para. 16 EU-Singapore IPA.

23 EU-Singapore and EU-Vietnam IPAs include the term "permanent" only in relation to the Appeal Tribunal, see Art. 3.10 para. 1 EU-Singapore IPA, Art. 3.39 para. 1 EU-Vietnam IPA.

24 Investment provisions in the EU-Canada free trade agreement (CETA). *European Commission* [online]. [cit. 7. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf; Similarly, the EU-Singapore IPA mentions permanency regarding only the Appeal Tribunal, but presents the entire Tribunal as a permanent body, see European Union – Singapore Trade and Investment Agreements. *European Commission* [online]. [cit. 7. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157684.pdf

to be a small-scale variant of the MIC (which is intended to be a permanent body), it would seem only natural for the court to be of permanent character as well. Moreover, in the event of interpretation issues (which are clearly present), the permanent nature of the ICS would be most probably found according to Art. 31 of the VCLT[25], as the purpose of the ICS to be a new standing mechanism of dispute settlement is made obvious.

3 Ethics

Another notable aspect of the EU's IPAs is the inclusion of provisions related to ethics and code of conduct for the members of the Tribunal and Appeal Tribunal.[26] While EU-Vietnam and EU-Singapore IPAs also include the code of conduct for the members of the Tribunal and the Appeal Tribunal in the form of annexes, CETA adopted the code of conduct only very recently[27] through the Committee on services and investment pursuant to CETA Art. 8.44 para. 2.

Should a particular member of the Tribunal not meet the mentioned ethical standards, the articles on ethics also carry provisions related to the removal of a Member of the Tribunal either from a particular division or from the Tribunal or Appeal Tribunal in general. These procedures may serve as another example of a departure from the currents ISDS and the established procedures regarding challenges and disqualification of arbitrators. Whereas under the ICSID provisions, the decision on a challenge of an arbitrator is taken out by the other members of the tribunal, the CETA provides for a decision on a challenge to be taken out by the President of the ICJ[28], and the EU-Singapore and EU-Vietnam agreements entrust the decision to the President of the Tribunal of the Appeal Tribunal respectively.[29]

25 Vienna Convention on the Law of Treaties 1969.

26 CETA Art. 8.30 para. 1 mentions that only *"members of the Tribunal shall be independent"*, but there is no indication that members of the Appellate Tribunal should not be bound by this provision as well. See SARDINHA, E. The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement. *ICSID Review*, 2017, Vol. 32, no. 3, p. 647.

27 See Decision of the Committee on Services and Investment of 29 January 2021, No 001/2021 (Code of conduct for the members of the Tribunal, Members of Appellate Tribunal and mediators). *European Commission* [online]. [cit. 7. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159403.pdf

28 Art. 8.30 para. 2–3 CETA.

29 Art. 3.40 para. 2–3 EU-Vietnam IPA, Art. 3.11 para. 2–3 EU-Singapore IPA.

The agreements also prevent members of the Tribunals from serving as counsel, party-appointed expert, or witness in any other pending or new investment dispute, either under these or any other international agreements. The prohibition does not include acting as an arbitrator in other such proceedings, provided that the affected member of the Tribunal remains available and able to perform his/her duties under the EU's IPAs.[30]

Interestingly, according to the code of conduct created by the CETA Committee, the members of the Tribunal (of first instance) are guided to "take appropriate account" of other dispute settlement activities under CETA and in particular of awards (decisions) rendered by the Appeal Tribunal.[31] Whilst similar provision would not seem odd if incorporated into the provisions related to the constitution of the Tribunal itself, its placement in the code of conduct might implicate the "moral" obligation imposed on the members of the Tribunal to follow the rulings of the Appeal Tribunal. This issue might be addressed in the future given the connection between the obligations provided for in the code of conduct and the possibility of removal from the Tribunal should the member demonstrate behaviour that is inconsistent with his/her obligations under the code of conduct.

Naturally, a conclusion can be drawn that the rules of conduct and the requirements set on the members of the Tribunal override the provisions established in, e.g., the ICSID Convention. In other words, the procedural rules selected by the investor party to the dispute will apply with the exception of (*lex specialis*) rules provided for in the particular EU's IPA.

4 Procedural Distinctions

As expected, all the EU's IPAs offer to the investor the option to select the procedural rules for the resolution of the dispute. The contracting parties' consent has been given for the application of (a) the ICSID Convention and Rules of Procedure for Arbitration, (b) the ICSID Additional Facility

30 Art. 8.27 para. 11 CETA, Art. 3.38 para. 13 EU-Vietnam IPA, Art. 3.9 para. 11 EU-Singapore IPA.

31 Art. 4 para. 10 Decision of the Committee on Services and Investment of 29 January 2021, No 001/2021 (Code of conduct for the members of the Tribunal, Members of Appellate Tribunal and mediators). *European Commission* [online]. [cit. 7. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159403.pdf

Rules, (c) the UNCITRAL Arbitration Rules, or (d) any other rules that the disputing parties may agree to.[32] It needs to be pointed out, that the ICSID Convention does not allow for the accession of international organizations to the Convention, and thus the investor pursuing his claim against the EU might be limited as to the choice of the procedural rules. The EU-Singapore IPA mentions this issue in a footnote added to the ICSID Additional Facility Rules, which shall apply instead (should the investor wish to).

Each agreement has its own manner of expressing the consent of the respondent to ICS. However, all of the IPAs provide that the respondent's consent together with the investor's submission of a claim under the respective IPA's investment provisions (claimant's consent) shall satisfy the requirements of Art. 25 of the ICSID Convention, ICSID Additional Facility Rules for written consent and Art. II of the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") for an agreement in writing.

Notwithstanding the applicable procedural rules, the UNCITRAL Transparency rules (as modified by the agreements) shall apply to the proceedings under CETA and the EU-Vietnam IPA.[33] Consequently, the discretion to make the relevant documentation public is taken away from the parties to the dispute, who are now obliged to merely accept this reality. Not only is certain documentation made public, but also the hearing shall be open to public access. However, should the proceedings be concerned with protected or confidential information, appropriate redacting measures are to be taken before making the documentation publicly available.

The Tribunal may also accept written or oral submissions from the non-disputing party to the agreement regarding the interpretation of the respective treaty.[34] The exception is the EU-Vietnam IPA which

32 Art. 8.23 para. 2 CETA, Art. 3.33 para. 2 EU-Vietnam IPA, Art. 3.6 para. 1 EU-Singapore IPA.

33 Art. 8.36 para. 1 CETA, Art. 3.46 para. 1 EU-Vietnam IPA; EU-Singapore IPA Art. 3.16 refers to Annex 8 which mentions a list of documents to be made available to the public and also obliges the Tribunal to conduct the hearings open to public.

34 Art. 8.38 para. 2 CETA, Art. 3.17 para. 1 EU-Singapore IPA.

grants the non-disputing party merely the right to make oral representations relating to the interpretation of the IPA.[35]

4.1 Appeal

The pronounced aspect of the ICS is the possibility to appeal against awards rendered by the Tribunal (of First Instance).[36] However, it has to be pointed out that the possibility to revise an award is not an entirely new concept. For instance, the ICSID Convention provides for revision under its Art. 51, although on a much narrower scale in comparison with the EU's IPAs. The ICS on the other hand provides the Appeal Tribunal with the option to uphold, modify or reverse the award.[37] The grounds for appeal are also quite broad, especially in comparison with the limited grounds for revision and annulment under the ICSID Convention.[38] The grounds for appeal in the ICS are (a) error in application or interpretation of the applicable law, (b) manifest error in the appreciation of the facts, and (c) the grounds set in Art. 52 of the ICSID Convention (Annulment).

As the IPAs stipulate, only an award may be subject to appeal. In this regard, *Sardinha* points out that under the ICISD Convention rules, the Tribunal renders also procedural decisions[39] (e.g., decision on jurisdiction[40]). She follows with a question whether such decisions shall be subjects to appeal.[41] The author of this paper would answer in the negative. According to Art. 41 of the ICSID Convention, the objection regarding jurisdiction, if dealt with in the form of a separate decision, constitutes merely a preliminary question. Therefore, although being subject to a separate decision, it makes part of the (final) award rendered by the tribunal. Consequently, decisions

35 Art. 3.51 para. 2 EU-Vietnam IPA.

36 See SARDINHA, E. The Impetus for the Creation of an Appellate Mechanism. *ICSID Review*, 2017, Vol. 32, no. 3, p. 503.

37 Art. 8.28 para. 2 CETA, Art. 3.54 para. 3 EU-Vietnam IPA, Art. 3.19 para. 3 EU-Singapore IPA.

38 See Art. 51 and 52 ICSID Convention.

39 SARDINHA, E. The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement. *ICSID Review*, 2017, Vol. 32, no. 3, p. 642.

40 See Award-ICSID Convention. *ICSID* [online]. [cit. 8. 5. 2021]. Available at: https://icsid.worldbank.org/services/arbitration/convention/process/award

41 SARDINHA, E. The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement. *ICSID Review*, 2017, Vol. 32, no. 3, p. 642.

on jurisdiction rendered under the ICSID procedural rules shall be subject to appeal, however only through an appeal to the (final) award.

Another interesting issue arises from the option of the Appeal Tribunal to refer the matter back to the Tribunal (of First Instance) for adjustments.[42] In that case, the Tribunal (of First Instance) shall be bound by the findings and conclusions of the Appeal Tribunal. Accordingly, with the provided findings and conclusions, the Tribunal (of First Instance) will render (another/a new) award. However, whether such an adjusted award shall also be subject to appeal is unclear.

5 Enforcement of the Tribunal's Decisions

Having hereinbefore mentioned the judicial aspect of the ICS, it raises the expected question of whether the decisions of the Tribunal and the Appeal Tribunal will be enforceable under the NYC.

Right before attempting to provide an answer to this question, one other characteristic of the ICS demands mentioning. The decisions rendered by the Tribunals are referred to as (final) awards.[43] This implicates further ambiguity of the ICS. On one hand, the system is permanent in nature (although with issues addressed hereinbefore) and deprives the investor party to the dispute of its discretion regarding the selection of adjudicators [judicial characteristics]. On the other hand, it maintains the option of selecting the procedural rules and calls its decisions awards (and not judgments) [arbitral characteristics]. Taking all of these aspects into consideration, the true nature of the ICS is hybrid.[44]

42 Art. 3 para. 3 Decision of the CETA Joint Committee of 29 January 2021, No 001/2021 (setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal). *European Commission* [online]. [cit. 8. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159401.pdf; Art. 3.54 para. 4 EU-Vietnam IPA. In the case of the EU-Singapore IPA, it is stipulated that the referral to the Tribunal is not optional but rather mandatory, see Art. 3.19 para. 3 EU-Singapore.

43 Art. 8.39 CETA, Art. 3.55 EU-Vietnam IPA, Art. 3.18 EU-Singapore IPA.

44 See THANVI, A. The Investment Court System under the EU-Canada Comprehensive Economic and Trade Agreement: Proposal and Some Unaddressed Issues. *Indian Journal of Arbitration Law*, 2019, Vol. 8, no. 2, p. 100; see also GAFFNEY, J. and S. NAPPERT. Investor-state disputes under new generation EU free trade and investment protection agreements. *Thomson Reuters Pracitical Law* [online]. 2020 [cit. 8. 5. 2021]. Available at: https://ca.practicallaw.thomsonreuters.com/w-025-6387?transitionType=Default&contextData=(sc.Default)

Having come to the conclusion about the hybrid nature of the ICS, the question regarding the enforceability of its awards is ever more important to address. For the NYC to be applicable, it is required that the award is either (a) made in the territory of a State other than the State where the recognition and enforcement of such award are sought[45] or to (b) awards not considered as domestic in the State where recognition and enforcement is sought.[46] The NYC applies to awards rendered in any state, whether or not a contracting state to the NYC.[47] The conditions for applying the NYC do not exclude one another, but rather complement each other. As was already mentioned, there is no indication of the location of the possible seat of the Tribunals. However even if the award was rendered in the territory of the state of enforcement, the award should still be considered as non-domestic in this state. This is because the awards rendered by the ICS might be considered "international awards" (or also "a-national") because they are not governed by any national law and therefore complying with the non-domestic criterium.[48]

Moreover, NYC Art. I para. 2 explains that the term "arbitral awards" shall include awards made by permanent arbitral bodies to which the parties have submitted. Permanency shall after all not be the issue when it comes to enforcement under the NYC. However, having mentioned the judicial aspects of the ICS, there might appear voices arguing against the ICS qualifying as an arbitral body.[49]

Also, the NYC offers to its signatories the option to declare that they will apply the Convention only to differences arising out of legal relationships, which are considered as commercial under the national law of the respective States

45 Art. 1 para. 1 NYC.

46 Ibid.

47 EHLE B. Commentary on Article I. In: WOLFF, R. (ed.). *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary*. Munich: Beck / Oxford: Hart Publishing/Baden-Baden: Nomos, 2012, pp. 26 and 56.

48 See New York Convention Guide, Art. I(C)(b). *United Nations UNCITRAL* [online]. [cit 8. 5. 2021]. Available at: https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=617&opac_view=-1

49 Notwithstanding the potential debate, the author of this paper is of the opinion that the ICS shall after all qualify as an arbitral body, given its similarities with the Iran-US Claims Tribunal, which had been found complying with the concept of arbitral body stipulated in the NYC; further see Judgment of the US Court of Appeals, Ninth Circuit of 23 October 1989, Case No. 88-5879, 88-5881.

making such declaration. To address this potential issue with enforcement of the Tribunals' awards, all of the EU's IPAs carry a provision indicating, that for the purposes of the NYC, the awards issued by the Tribunals are deemed to relate to claims arising out of a commercial relationship or transaction.[50]

Ultimately, the NYC requires an agreement in writing under which the parties submit their dispute to arbitration.[51] Yet again, the EU's IPAs do address this issue and provide that the consent given by the parties to the respective agreements taken together with the submission of a claim to the Tribunals shall satisfy the requirements of the NYC for an agreement in writing.[52]

In conclusion, although not being crystal clear, it appears that the Tribunals' awards shall be enforceable under the NYC.

6 Conclusion

In the effort made to address the issues created by the shortcomings of the legal texts, it became apparent that the respective IPAs are very much alike. The reason can be most likely explained by the negotiating position of the EU in the international community and its strong determination to reform the established ISDS system. Given these factors, the contracting partners to the IPAs had probably a limited space for demanding desired alterations to the concept proposed by the EU. Moreover, the similarities between the IPAs are desirable also for the purpose of creating the MIC. Merging of identical Tribunals may come with the benefit of not having to interfere with potential ongoing proceedings, although the administrative load probably would still be enormous.

It has been found that the nature of the ICS holds significant judicial characteristics, mainly the reduction of party autonomy. Also, the intention to make the proceedings accessible to the public should not be overlooked. Despite these modifications, its creator still wished for the ICS to comply

50 Art. 8.41 para. 5 CETA, Art. 3.57 para. 7 EU-Vietnam IPA, Art. 3.22 para. 5 EU-Singapore IPA.

51 Art. 2 para. 1 NYC.

52 Art. 8.25 para. 2 letter b) CETA, Art. 3.36 para. 4 letter b) EU-Vietnam IPA, Art. 3.6 para. 2 letter b) EU-Singapore IPA.

with the definitions of arbitral bodies. The result can't be anything else but a hybrid system.

Whether this system shall find its use or not will be clear only once it begins operating. However, given the number of resources that the EU and its contracting counterparts have spent on the creating of the ICS, one would find it difficult to imagine them abandoning the system despite it resulting unsatisfactory.

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