THE INVESTMENT COURT SYSTEM UNDER THE EU-CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT: PROPOSAL AND SOME UNADDRESSED ISSUES

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Abstract

Investor-State dispute settlement ["***ISDS***"] *has been the preferred mechanism for resolution of disputes between foreign investors and States over the last few decades. However, despite the preference, the system has come under severe criticism in the recent past. Among numerous suggestions that have been floated to address the shortcomings of the system, a multilateral investment court proposed by the European Union* ["***EU***"] *and its Member States holds potential to bring about a paradigm shift in the way disputes are settled between foreign investors and sovereign States. The EU has, in fact, already incorporated provisions for such a court in some of its recent trade and investment treaties. For instance, the EU-Canada Comprehensive Economic and Trade Agreement proposes setting up an investment court system* ["***ICS***"] *and submitting their investment disputes to such a court. At the outset, this paper attempts to assess the model proposed by the treaty parties to this agreement by analysing the structure proposed for the court, its composition, the law applicable to proceedings before it and the nature of the decisions rendered by such an investment court. It then goes on to analyse the reasons for which the validity of the proposed court was challenged before the Court of Justice for the European Union* ["***CJEU***"] *and the reasoning provided by it to uphold validity of the proposed ICS. In the third part, the author has identified issues that have, thus far, been left unaddressed by the CJEU and which may cause hinderance in smooth functioning of the proposed model of investor-State dispute resolution. The author concludes that the proposed court system is merely a modified version of the prevalent ad-hoc arbitration with no real promise to be the panacea to the current ills of the system. The proposed court may lend legitimacy to the dispute-resolution process by giving sovereigns the authority to appoint judges but there is nothing to ensure that it would address the other issues faced by ISDS today, including quality and consistency of decisions rendered.*

I. Introduction

> "*Every teenager learns the hard lesson that with freedom comes responsibility. ISDS, as dispute resolution systems go, is in its teenage years, and as teenagers do it unnerves many who find its immaturity exacerbating at times.*"[1]

The EU, for one, seems to have had enough with the unfettered freedom enjoyed by the traditional mechanism of ISDS. To address the shortcomings of the prevailing system, the EU has been promoting the idea of a permanent multilateral court that would examine all investment

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1 Sophie Nappert, EFILA Inaugral Lecture: Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism 15 (Nov. 26, 2015).

disputes. However, it seems that the practicalities of global diplomacy may not permit a sudden overhaul of the existing system.[2] The EU has thus adopted the policy of introducing a proto-version of the multilateral court in its investment agreements with its trading partners.

The EU's Comprehensive Economic and Trade Agreement ["**CETA**"] with Canada is one such agreement that envisages the new model of ISDS. It proposes a so-called two-tiered "Investment Court System" which purports to address the shortcomings of traditional ISDS such as concerns regarding legitimacy and lack of consistency in ruling.[3] While there are many sceptics globally with whom the idea of an investment court isn't agreeable, legitimate concerns and opposition have been raised against the ICS proposed under the CETA within Europe as well. The Kingdom of Belgium, in fact, sought an opinion from the CJEU on the validity of the CETA, and compatibility of the proposed ICS with the autonomy of the EU law. On April 30, 2019, the CJEU gave its final binding opinion, which held the ICS proposed under the CETA to be compatible with EU law.[4]

This paper, in the first part, examines the essential features of the proposed ICS under the CETA. In **Part II**, it addresses the opinions delivered by both, the Advocate General and the CJEU. The author studies the reasons provided in both, the opinions in favour of upholding the validity of the CETA and in favour of holding the ICS to be compatible with the EU law. In **Part III**, the author argues that even though the concept has been given a green light by the highest court in Europe, certain other concerns persist. *First*, it isn't entirely clear from the text of the CETA if the proposed ICS is indeed a court or just a modified version of traditional investor-State arbitration. *Second*, presuming it to be a court, can the opinion issued by such a "court" be enforced under the extant legal regime? *Third*, if the ultimate goal is to have a single multilateral court, how would the many proliferated courts under individual treaties reach the point of culmination? In this part, the author also argues that for the EU to be able to achieve its goal of a multilateral court, it will have to be party to every treaty itself. The author concludes by arguing that whatever the structure and function of the multilateral court may be in the future, the ICS proposed under the CETA is essentially only a modified version of traditional investor-State arbitration. In fact, for it to deliver its mandate of effective dispute resolution, it cannot be a court under the extant international legal regime.

II. The Investment Court System Under The CETA

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2 The discussions pertaining to the investor-State dispute settlement (ISDS) reforms are in progress. In the next meeting of the State representatives, the option of having a two-tier system which has an independent permanent/semi-permanent multilateral court is going to be considered. For the developments in this regard, *see Working Group III: Investor-State Dispute Settlement Reform*, UNITED NATIONS COMM'N ON INT'L TRADE L. (UNCITRAL) (Apr. 9, 2020), *available at* https://uncitral.un.org/en/working_groups/3/investor-state.

3 *See* Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States pmbl., art. 6(g), Jan.14, 2017, 2017 O.J. (L 11) 3, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ:L:2017:011:FULL&uri=uriserv:OJ.L_.2017.011.01.0003.01.ENG [*hereinafter* "CETA Joint Interpretative Instrument"].

4 Opinion 1/17 of the Full Court of Justice of European Union on Comprehensive Economic and Trade Agreement (Apr. 30, 2019), *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4976548 [*hereinafter* "Opinion 1/17"].

The CETA was negotiated for eight years and finalised in 2014, but it underwent legal revision, which was completed in 2016.[5] This so-called "legal scrub"[6] of the CETA led to two noteworthy changes to the original text of its investment chapter. One of these revisions was the replacement of the proposed dispute resolution mechanism i.e., traditional investor-State arbitration with a two-tier tribunal, complete with appellate mechanism.[7] Another provision that underwent change was 'Applicable law and Interpretation'.[8]

However, the CETA was not the first European trade agreement to provide for an ICS. The development of a new dispute resolution mechanism in the CETA was an effect of a development in the EU-USA trade negotiations for the Transatlantic Trade and Investment Partnership ["**TTIP**"]. After public consultation, the European Parliament had asked that a new system of dispute settlement be defined with appointed judges.[9]

The EU has been pushing for reforming the dispute resolution mechanism to make good the shortfalls of the traditional investor-State dispute resolution, and has been working towards setting up a Multilateral Investment Court ["**MIC**"].[10] In 2018, the European Council issued the directives for undertaking negotiations to establish a MIC.[11] The tribunal proposed under the CETA is a step towards the ultimate goal of establishing a MIC.[12] In fact, the joint statement released by the EU Commissioner for Trade and Minister of International Trade for Canada, unequivocally stated that the modifications in the agreement reflect the desire of both parties to reform the "*investment protection and dispute resolution provisions and to continue working together…to pursue the establishment of a multilateral investment tribunal.*"[13] Nevertheless, it is unclear how this transition from tribunals under different Free-Trade Agreements[14] signed by the EU to a single MIC, will be effected.[15]

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5 *See* Comprehensive Economic and Trade Agreement, Can.-EU, Jan. 14, 2017, 2017 O. J. (L11) 23 [*hereinafter* "CETA"].

6 The term was used by the European Commission in its press release announcing the re-negotiated provisions of the CETA. *See CETA: EU and Canada agree on new approach to investment in trade agreement*, EUR. COMM'N (Feb. 29, 2016), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468.

7 *Id.*

8 *Id.*; *see also* Jarrod Hepburn, *CETA's New Domestic Law Clause,* EJIL: TALK! (Mar. 17, 2016), *available at* https://www.ejiltalk.org/cetas-new-domestic-law-clause/.

9 LAURA PUCCIO & RODERLCK HARTE, EUR. PARL. RESEARCH SERV., FROM ARBITRATION TO INVESTMENT COURT SYSTEM: EVOLUTION OF CETA RULES (2018).

10 *The Multilateral Investment Court Project*, EUR. COMM'N (Dec. 21, 2016), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608.

11 Council Directive 12981/17 of Mar. 20, 2018, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, *available at* http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf; *see also* Cecilia Malmstrom, European Commissioner for Trade, A Multilateral Investment Court: a contribution to the conversation about reform of investment dispute settlement (Nov. 22, 2018), *available at* http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157512.pdf.

12 CETA, *supra* note 5, art 8.29 provides that the parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes.

13 PUCCIO & HARTE, s*upra* note 9; *see* CETA, *supra* note 5.

14 A dispute resolution mechanism similar to the one proposed under CETA has been incorporated in the Investment Protection Agreement, EU-Viet., June 30, 2019 [*hereinafter* "EU-VIPA"]; EU-VIPA, ch. 3(4), contemplates establishment of an 'Investment Tribunal System'; art. 3.38 establishes a tribunal to adjudicate disputes between investor of one party on one hand and the other state party on the other; art. 3.39 provides a permanent appellate tribunal to hear appeals from the tribunal of first instance. Moreover, much like the CETA, EU-VIPA also expressly registers the parties' intention to enter into negotiations for international agreement to establish a multilateral

A. Structure

What the CETA provides for is not a permanent standing structure but a two-tier system with the International Centre for Settlement of Investment Disputes ["**ICSID**"] as its Secretariat to provide it with the appropriate support.[16] It provides for a tribunal of first instance, which may decide disputes under any of the rules provided under Article 8.23(2). These rules include the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"] and Rules of Procedure for Arbitration Proceedings, and the ICSID Additional Facility Rules if the conditions for proceeding pursuant to ICSID Convention and Rules do not apply;[17] the United Nations Commission on International Trade Law ["**UNCITRAL**"] Arbitration Rules or any other rules that the parties may agree to. The Tribunal is also permitted to draw up its own procedure.[18]

CETA creates an Appellate Tribunal to review the awards rendered[19] by the tribunal of first instance. The Appellate Tribunal has been granted the jurisdiction to uphold, modify or reverse a tribunal's award[20] not only on the basis of grounds for annulment as set out in Article 52 of the ICSID Convention,[21] but also on additional grounds. The first of these additional grounds is error in the application or interpretation of applicable law,[22] and second, manifest error in appreciation of facts including appreciation of domestic law.[23] Details regarding the Appellate Tribunal's functioning are to be determined by the CETA Joint Committee.[24] The CETA provides that the award made by the Appellate Tribunal shall be final and enforceable,[25] and its

investment tribunal; Investment Protection Agreement, EU-Sing., Oct. 15, 2018 [*hereinafter* "EU-SIPA"] similarly provides for establishment of investment court system with a tribunal of first instance and an appellate tribunal to adjudicate upon disputes between investors and State(s) party to the EU-SIPA, under art. 3.9 and 3.10; Likewise, the new deal on trade agreement reached between EU and Mexico, tentatively called the EU-Mexico Agreement, agreed in principle, aims to establish a "standing international investment court system composed of a Tribunal of First Instance and an Appeal Tribunal." *See New EU-Mexico Agreement, The Agreement in Principle*, EUR. COMM'N (Apr. 23, 2018), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833.

15 Celine Levesque, *The European Union Commission Proposal for the Creation of an "Investment Court System": The Q and A that the Commission Won't be Issuing*, KLUWER ARB. BLOG (Apr. 6, 2016), *available at* http://arbitrationblog.kluwerarbitration.com/2016/04/06/the-european-union-commission-proposal-for-the-creation-of-an-investment-court-system-the-q-and-a-that-the-commission-wont-be-issuing/.

16 CETA, *supra* note 5, art. 8.27.16.

17 *See* CETA, *supra* note 5, art. 8.23.4. The article clarifies that for a claim to be submitted under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, Oct. 14, 1966, 575 U.N.T.S. 159 [*hereinafter* "ICSID Convention"] and ICSID Rules of Procedure for Arbitration Proceedings, Apr. 2006 [*hereinafter* "ICSID Arbitration Rules"], conditions laid down in art. 25(1) of the ICSID Convention must be satisfied.

18 CETA, *supra* note 5, art. 8.27.10.

19 *Id.* art. 8.28.1.

20 *Id.* art. 8.28.2.

21 *Id.* art. 8.28.2 (c).

22 *Id.* art. 8.28.2 (a).

23 *Id.* art. 8.28.2 (b).

24 *Id.* art. 8.28.7.

25 *Id.* art. 8.28.9(d); A final award issued pursuant to Section F is an arbitral award that is deemed to relate to claims arising out of commercial relationship of transaction for the purpose of art. I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21.3. U.S.T. 2517 [*hereinafter* "New York Convention"]; and if a claim has been submitted pursuant to art. 8.23.2(a) i.e., under the ICSID Convention and Arbitration Rules, then the final award issued under this section shall qualify as an award under § 6 of the ICSID Convention.

execution shall be governed by the laws concerning execution of judgments or awards in force where the execution is sought.[26]

B. Composition of the Tribunal

This Tribunal shall be composed of fifteen members[27] such that five members[28] are from EU Member States, five are from Canada, and the remaining five are from a third country.[29] The members of the tribunal are to be appointed by the CETA Joint Committee[30] for a term of five years, renewable once.[31] The proposed court shall hear disputes in a division consisting of three members or one. Where the bench comprises of three members, it will be composed of one member of the EU, one of Canada, and be presided by a member of third nationality.[32]

While the CETA stipulates that an arbitral tribunal constituted to sit in appeal shall hear the matter in divisions of three,[33] it has left it to the Joint Committee to work out the details of the composition of the Appellate Tribunal.[34]

C. Applicable Law

One provision of the CETA, which has singularly brought maximum spotlight on the Agreement, is the provision regarding applicable law. Article 8.31 of the CETA provides that the tribunal shall apply the Agreement in accordance with the Vienna Convention on the Law of Treaties and other rules of international law applicable between the Parties.[35] Importantly, to address the issue of conflicting and inconsistent interpretation, it provides that in case of a conflict with regards to matters of interpretation of the provisions of the treaty, the Committee

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26 CETA, *supra* note 5, art. 8.41.4.

27 The Investment Court System proposed under CETA differs from similar tribunals proposed under the EU-VIPA and the EU-SIPA in terms of composition of the tribunal. While a tribunal under EU-VIPA will consist of nine members (EU-VIPA, *supra* note 14, art. 3.38.2), a tribunal under the EU-SIPA will consist of six members, subject to Joint Committee's decision of increasing or decreasing the membership (EU-SIPA, *supra* note 14, art. 3.9).

28 CETA, *supra* note 5, 59 n.9 states that each country could actually propose to appoint five members from any nationality. In such a case the member so appointed to the tribunal shall be considered a national of the party that proposed his or her appointment for the purpose of this article.

29 *Id.* art. 8.72.2.

30 *Id.* art. 26.1 established the CETA Joint Committee, akin to the Free Trade Commission under art. 2001 of the NAFTA. However, unlike the Free Trade Commission, the CETA Joint Committee is not mandated to be comprised only of cabinet level representatives of the parties. The CETA provides that the Joint Committee shall be co-chaired by the Minister for International Trade of Canada and Member of the European Commission responsible for Trade, of their respective designees. *Prima facie* it appears to be a more powerful body than the NAFTA Free Trade Commission, with greater responsibilities to address; *see* North Atlantic Free Trade Agreement art. 2001, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993) [*hereinafter* "NAFTA"]. A similar provision also exists in the Free Trade Agreement between Canada and the State of the European Free Trade Association. art. 26 of the Free-Trade Agreement provides for a Joint Committee that has functions similar to the CETA Joint Committee; s*ee* Free Trade Agreement, Can.-Ice.-Liech.-Nor.-Switz, Jan. 26, 2008, *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/european-association-europeenne/fta-ale/index.aspx?lang=eng/. These Commissions have in the past generally proven beneficial in increasing predictability and thus promoting rule of law; *see also* Gabrielle Kauffman-Kohler, *Interpretative Powers of the Free Trade Commission and the Rule of Law*, *in* FIFTEEN YEARS OF NAFTA CHAPTER 11 ARBITRATION (Emmanuel Gaillard & Frederic Bachand, eds., 2011).

31 CETA, *supra* note 5, art. 8.27.5.

32 *Id.* art. 8.27.6.

33 *Id.* art. 8.28.5.

34 *Id.* art. 8.28.3 and art.8.28.7(f).

35 *Id.* art. 8.31.1.

on Services and Investment[36] may recommend that the CETA Joint Committee adopt an interpretation, which will be binding upon the Tribunal.[37]

Notably, the Tribunal shall have no authority to interpret the domestic law of the parties, and will have to treat it as a matter of fact.[38] In case the Tribunal interprets a provision of a domestic law of any of the disputing Parties, such an interpretation will not be binding on the courts or authorities of that Party.[39]

D. Procedure for Submission of Claim and Initiation of Adjudication

Under Article 8.23.1, a dispute may be submitted by an investor of a party to the CETA on its own behalf, or on behalf of a locally established enterprise which it owns or directly controls. When submitting a claim, the investor may propose that a sole member of the Tribunal hear the matter.[40] The disputing parties may also mutually agree for the matter to be heard by a sole member of a third country chosen randomly; however, such a request must be made before the Tribunal is constituted by the President of the Tribunal.[41] The President shall appoint the members of the Tribunal, who shall then compose the division of the Tribunal hearing the case within 90 days of receiving the claim.[42] Such a division shall be composed on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all members of the Tribunal to serve.[43]

In case the members of the Tribunal have not yet been appointed and 90 days of submission of the claim elapse, the Secretary-General of ICSID shall appoint a division of three members of the Tribunal at the request of either of the parties, unless the parties agree for the case to be heard by a sole arbitrator.[44] These appointments shall be made by random selection from the existing nominations, and the Secretary-General shall not appoint a member of the EU or Canada as Chair of the Tribunal.[45]

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36 *Id.* art. 8.44 established the Committee on Services and Investment which may "on agreement of the Parties, and after completion of their respective internal requirements and procedures: (a) recommend to the CETA Joint Committee the adoption of interpretations of this Agreement pursuant to art. 8.31.3; (b) adopt and amend rules supplementing the applicable dispute settlement rules, and amend the applicable rules on transparency. These rules and amendments are binding on a Tribunal established under this Section; (c) adopt rules for mediation for use by disputing parties as referred to in art. 8.20; (d) recommend to the CETA Joint Committee the adoption of any further elements of the fair and equitable treatment obligation pursuant to Article 8.10.4; and (e) make recommendations to the CETA Joint Committee on the functioning of the Appellate Tribunal pursuant to art. 8.28.8."

37 *Id.* art. 8.31.3.

38 *Id.* art. 8.31.2.

39 *Id.*

40 *Id.* art. 8.23.5.

41 *Id.* art. 8.27.9.

42 *Id.* art. 8.27.7.

43 *Id.*

44 *Id.* art. 8.27.17.

45 *Id.*

E. Nature of Proceedings and Decision Rendered

The CETA allows the claimant to submit a claim under four possible sets of rules, i.e., the ICSID Convention and Rules of Procedure for Arbitration, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other rules that the disputing parties may agree to.[46]

Under both the ICSID Convention[47] and Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"],[48] for arbitration to commence, a primary requirement is written consent of the parties to arbitrate. The CETA fulfils that requirement by expressly recording the respondent State's consent to dispute resolution by the Tribunal and further clarifies that this consent shall satisfy the requirement of a written consent under Article 25 of the ICSID Convention, Chapter II of the ICSID Additional Facility Rules and Article II of the New York Convention.[49]

A claim may be brought before the Tribunal under Section F of CETA and other international agreements. However, should there be a potential overlap of compensation or a significant impact on the other international claim due to the decision of the Tribunal, then the CETA Tribunal shall either stay the proceedings or ensure that the other proceedings are taken into account when rendering the award.[50] In case of two claims with a common question of fact or law, the parties may seek consolidation of proceedings.[51] Moreover, a modified version of the UNCITRAL Transparency Rules apply to the proceedings, which entails making all list of documents public, as well as a public hearing.[52] The Tribunal may, after consultation with the disputing parties, even invite non-disputing parties to make oral or written submissions on interpretation of the Agreement.[53]

It is important to note that the CETA refers to the decision rendered by the Tribunal not as a decision, opinion or judgment, but as an "award".[54] Moreover, Article 8.41 discusses ways of "enforcement of award" and unequivocally proclaims that a final award issued by the Tribunal is the "arbitral award that is deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of Article I of the New York Convention[55]."[56] If the claim was

46 *Id.* art. 8.32.3.

47 *See* ICSID Convention, *supra* note 17, art. 25(1), "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

48 New York Convention, *supra* note 25, art. II, "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

49 CETA, *supra* note 5, art. 8.25.

50 *Id.* art. 8.24.

51 *Id.* art. 8.43.

52 *Id.* art. 8.36.

53 *Id.* art. 8.38.2.

54 *Id.* art. 8.39.

55 New York Convention, *supra* note 25, art. I allows the ratifying party to declare at the time of signing, ratifying or acceding to the Convention 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.

56 CETA, *supra* note 5, art. 8.41.5.

submitted for adjudication pursuant to the ICSID Convention, then according to the CETA, the "award" rendered by the Tribunal shall qualify as an award under Section 6 of the ICSID Convention.[57]

III. Challenge to the Validity of The ICS under CETA

A. EU's scepticism of CETA Belgian Compromise to Seek Opinion

While the EU's united voice gives it the bargaining power needed to push for its goal of reforming the ISDS at the international fora, the idea has faced much criticism within Europe. The European Association of Judges[58] has opposed the idea of the ICS on the ground of its possible incompatibility with the EU law. After the text of the CETA was finalized in 2014, it came under criticism from different quarters, with even some of EU's Member States joining the ranks of the critics. Notably, the text of CETA's investment chapter triggered a vivid debate in Germany,[59] where the opposition to CETA's investment chapter came from political parties, labour unions as well as non-governmental organizations.[60] A suit was filed before the Federal Constitution Court of Germany by complainants seeking a temporary injunction on provisional application of CETA.[61] It also requested the court to disallow the German member from approving the CETA during the EU Council vote.[62] It has also been suggested that the signing of the CETA was deferred in 2014, *inter alia*, because of opposition from Germany's Federal Minister for Economic Affairs and Energy.[63]

The Parliament of Wallonia in Brussels had been an early critic of the CETA.[64] On April 25, 2016, the Parliament of Wallonia passing a resolution listing its key problems with the CETA, and asking the federal Government of Belgium to seek an opinion under Article 218 of the

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57 *Id.* art. 8.41.6.

58 The European Association of Judges (EAJ) is one of the four regional groups comprising the International Association of Judges. It comprises judges from 44 countries. The Statement made by the EAJ was in the context of the court proposed under the Transatlantic Trade and Investment Partnership (TTIP). However, the similarity between the proposed Investment Court System (ICS) under the TTIP and the two-tier tribunals proposed under the CETA, make this statement relevant here. It is worth noting that the Statement concluded, "The European Union and its member states have a well-functioning judicial system which is capable of protecting the rights of an investor in all areas of law. It should be central to an international treaty on trade and investment, to apply this system to investors as the central body to safeguards its rights. Systems outside this judicial system, either on a basis of arbitration or as a new established International Investment Court System do have to prove that arbitrator or judges in these systems are selected, organized, remunerated and have a term of office which guaranties their personal independence and the independence of the system according to European and international standards. The EAJ is not satisfied that the proposed ICS do meet with this criteria (sic.)". *See* European Association of Judges, Regional Group of the International Association of Judges, Statement from the European Association of Judges on the Proposal from the European Commission on a New Investment Court System (Nov. 9, 2015), *available at* https://www.iaj-uim.org/iuw/wp-content/uploads/2015/11/EAJ-report-TIPP-Court-october.pdf.

59 Stephan W. Schill, *The German Debate on International Investment Law,* 16(1) J. WORLD INV. & TRADE (2015).

60 *Id.*

61 Susanna Villani, *Considerations on the Judgment of BVerfG on the Conclusion of CETA*, 17(1) EUR. TAX STUD. 235 (2017).

62 Jelena Baulmer, *Only a Brief Pause for Breath: The Judgment of German Federal Constitution Court on CETA*, INV. TREATY NEWS (Dec. 12, 2016), *available at* https://www.iisd.org/itn/2016/12/12/only-a-brief-pause-for-breath-the-judgment-of-the-german-federal-constitutional-court-on-ceta-jelena-baumler-baeumler/.

63 Stephan Schill, *A Question of Democracy: The German Debate on International Investment Law*, KLUWER ARB. BLOG (Mar. 2, 2015), *available at* http://arbitrationblog.kluwerarbitration.com/2015/03/02/the-german-debate-on-investor-state-dispute-settlement/.

64 Laurens Ankersmit, *Investment Court System in CETA to be Judged by the ECJ*, EUR. L. BLOG (Oct. 31, 2016), *available at* https://europeanlawblog.eu/2016/10/31/investment-court-system-in-ceta-to-be-judged-by-the-ecj.

Treaty on the Functioning of the European Union[65] ["**TFEU**"] on the issue of compatibility of the ICS with the EU Law.

Pursuant to the resolution, the Kingdom of Belgium submitted the following question for the Opinion of the Court:

> "*Is Chapter Eight ("Investments") Section F ("Resolution of investment disputes between investors and state") of the Comprehensive Economic and Trade Agreement between Canada, on one part, and the European Union, of the other part, signed in Brussels on 30 October 2016, compatible with the Treaties, including with fundamental rights?*"[66]

The Advocate General ["**AG**"] Yves Bot gave his Opinion[67] in the matter on January 29, 2019,[68] and the CJEU echoed his Opinion that Section F of Chapter 8 of the CETA is compatible with the EU law,[69] when it issued its binding Opinion on April 30, 2019.

The scope of the Opinion sought was very broad and so, for the purpose of this paper, the focus will only be on one of the issues addressed in the Opinion, i.e., compatibility of the CETA with the exclusive jurisdiction of the Court over definitive interpretation of EU law.

B. Reasons given by the Advocate General for Upholding Validity of the ICS vis-à-vis EU Law

The AG started by clarifying that preservation of the autonomy of the EU legal order is not synonymous with autarchy.[70] In accordance with the provisions of the TFEU,[71] the CETA will be integrated into the EU legal order and be a part of it in the same way as other sources[72] of EU legislation. The Opinion explains that "*in order for the constitutional autonomy of the EU legal order to be respected, it is essential that the international agreements concluded between the EU and third States do not*

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65 Treaties or of any rule of law relating to their application, or misuse of powers (Consolidated Version of the Treaty on the Functioning of the European Union, arts. 263(2),(4), Oct. 26, 2012, 2012 O.J. (C 236) [*hereinafter* "TFEU"]) provide the procedure to be followed when an agreement is to be negotiated and signed between the Union and third countries or international organisations. art. 218(11) provides, "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."

66 Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Opinion 1/17), Oct. 30, 2017 O.J. (C 369).

67 TFEU art. 19 provides that the Court of Justice shall be comprised of judges from each Member State and shall be assisted by Advocates-General; TFEU art. 252 provides that there will be eight Advocate-Generals to assist the Court of Justice and it shall be duty of the Advocate-General, acting with complete impartiality and independence, to make, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement; *See also* NOREEN BURROWS & ROSA GREAVES, THE ADVOCATE GENERAL AND EC LAW (2007).

68 Opinion of Advocate General Bot delivered on Jan. 29, 2019 in Opinion 1/17, ECLI:EU:C:2019:72, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=210244&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10811785.

69 Opinion 1/17, *supra* note 4.

70 *Id.* ¶ 59.

71 TFEU art. 216(2): "1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. 2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

72 Opinion 1/17, *supra* note 4, ¶ 60.

undermine the delicate balance struck between 'the international derivation and the specificity of the EU law"'.[73] However, the AG failed to explain what constitutes this delicate balance that needs to be maintained.

The AG opined that preservation of the EU legal order's autonomy requires that the essential character of the powers of the EU and its institutions remains unaltered; and that the procedure for resolving disputes will not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law.[74] Moreover, the AG held that by establishing a dispute settlement mechanism such as the one under the CETA, the EU intends to satisfy the demand for neutrality and speciality in resolution of disputes between investors and States.[75]

The AG distinguished the present case from that of *Slowakische Republik* v. *Achmea BV*[76] ["**Achmea**"] where the CJEU had held the arbitral tribunal to be incompatible with the EU law.[77] This distinction is based primarily on the basis of the text of the treaty forming the tribunal involved in the two cases.[78] The AG clarified that under the Netherlands-Slovak Bilateral Investment Treaty ["**BIT**"], the applicable law clause was such that it gave the arbitral tribunal the jurisdiction to interpret and apply the EU law. On the other hand, the CETA clearly states that the applicable law is the Agreement as interpreted in accordance with international law.[79] Moreover, domestic law of each party, *of which EU law forms part* (emphasis added), in the case of Member States, can be taken into account by the Tribunal only as a matter of fact,[80] thus differentiating the applicable law clause under the CETA from the one in the Netherlands-Slovak BIT, which allowed the tribunal to interpret the domestic law of the parties to the BIT. To find further support for the Tribunal proposed under the CETA, the AG in fact relies on a part of the CJEU's dicta in *Achmea*, that an "*international agreement providing for the establishment of a court responsible for interpretation of its provisions… is not in principle incompatible with EU Law.*"[81]

To emphasise the protection of the autonomy of the CJEU in terms of interpretation of EU law, the AG argued that the CETA contains sufficient guarantees to safeguard the role of the CJEU

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73 *Id.* ¶ 64.

74 *Id.* ¶ 67.

75 *Id.* ¶ 88.

76 Case C-284/16, Slowakische Republik v. Achmea BV, 2018 E.C.R. 158 [*hereinafter* "Achmea"].

77 *See generally* Guillaume Croisant, *CJEU Opinion 1/17 – AG Bot Concludes that CETA's Investment Court System is Compatible with EU Law*, KLUWER ARB. BLOG (Jan. 29, 2019), *available at* http://arbitrationblog.kluwerarbitration.com/2019/01/29/cjeu-opinion-117-ag-bot-concludes-that-cetas-investment-court-system-is-compatible-with-eu-law/.

78 Opinion 1/17, *supra* note 4, ¶ 106-113.

79 *Id.* ¶ 110; CETA, *supra* note 5, art. 8.31.1.

80 Opinion 1/17, *supra* note 4, ¶ 11.

81 *Id.* ¶ 111. *See also* Achmea, 2018 E.C.R. 158, ¶ 57 where the court relied on Opinion 1/91 of the Court of the European Union delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area (Dec. 14, 1991), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61991CV0001, Opinion 1/09 of the Full Court of the European Union on Agreement creating a unified patent litigation system (Mar. 8, 2011), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI:EU:C:2011:123 and Opinion 2/13 of the Full Court of the European Union on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Dec. 18, 2014), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2014:2454.

as the ultimate interpreter of EU law.[82] The AG opined that the jurisdiction of the CETA tribunal is very narrowly circumscribed by Article 8.18.5, which provides that the Tribunal shall not decide claims that fall outside of the scope of the provision.[83] He thus clarified that the Tribunal under the CETA does not adversely affect the system since it is not intended to review the legality of acts of the EU.[84] The AG further explained how the CETA Tribunal does not have jurisdiction to annul a measure which it deems to be contrary to Chapter 8 of the CETA, and can only award monetary damages, or with the agreement of the parties, restitution of property.[85]

However, Article 8.31.2 provides, *"…any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party*." This provision presumes that there are bound to be circumstances when the Tribunal may find itself in a position wherein it has to interpret provisions of EU law out of necessity. The AG opined that this can happen only when there is no guidance in that regard within EU law, and if such an interpretation is in fact made, it will not be binding upon the authorities or courts of the EU.[86] Moreover, if an interpretation of EU law by the CETA Tribunal appears to be incorrect, the CJEU may, "*without triggering a breach of European Union of its international obligations, dismiss such an interpretation and adopt the interpretation which appears to it to be the most appropriate*."[87] Concerns raised about the Appellate Tribunal's authority to interpret the EU law have also been dismissed by the AG.[88]

To clarify the position of the Tribunal proposed under the CETA, the AG explained that this Tribunal will have no jurisdiction to rule on disputes internal to the EU, i.e., those involving direct application of EU law.[89]

Pertinently, the AG explained that the mechanism established under the CETA could be classified as "*quasi-judicial*", which retains certain imprints of arbitration.[90] The purpose of this mechanism is to guarantee neutrality and autonomy of resolution, as against the judicial systems of the parties.[91] Prejudices of individual States may, nevertheless, crop up at the time of enforcement of awards, based on the choice of arbitration rules made by the disputing parties.[92] Particularly, such a situation may surface in case of conflict with the public policy of the State in which enforcement of that award is sought.[93] However, as the AG has observed, the domestic courts have a limited role in this paradigm[94] and that the review in the event of conflict with public policy would not affect the autonomy of EU law.[95]

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82 Opinion 1/17, *supra* note 4, ¶ 116.
83 *Id.* ¶ 120.
84 *Id.* ¶ 124.
85 *Id.* ¶ 125.
86 *Id.* ¶ 139.
87 *Id.* ¶ 143.
88 *Id.* ¶ 181.
89 *Id.* ¶ 160.
90 *Id.* ¶ 165.
91 *Id.* ¶ 179.
92 *Id.* ¶ 181.
93 *Id.*
94 *Id.* ¶ 79.
95 *Id.*

C. Reasons given by the CJEU for Upholding the Validity of ICS vis-à-vis EU Law

The CJEU concurred with the AG in its Opinion, although with less detailed reasoning, and pronounced that the ISDS mechanism envisaged under the CETA is compatible with the EU legal order. At the outset, relying on its decision in the case concerning accession of the EU to the European Convention on Human Rights,[96] the CJEU reiterated the EU's capacity to conclude international agreements, from which the power to submit to the decision of a court created by such agreements necessarily follows.[97] The court held that the tribunal created under the CETA is such a court. However, for it to be compatible with EU law, it ought to be ensured that such an adjudicatory mechanism has no adverse effect on autonomy of the EU legal order.[98]

The CJEU acknowledged that the Tribunal established by the CETA is outside the judicial system of either of the parties, i.e., it stands outside the judicial system of Canada, EU or any of the Member States.[99] However, this does not *ipso facto* adversely affect the autonomy of the EU legal order.[100] Furthermore, the CJEU noted that for the autonomy of the EU legal order to be protected, *first*, the CETA cannot confer on the Tribunal any power to interpret or apply EU law other than the power to interpret and apply the provisions of CETA having regard to the rules and principles of international law applicable between the parties. *Second*, the CETA cannot structure the powers of the Tribunal in such a way that it may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework. In other words, since these tribunals stand outside the EU judicial system, they cannot have the power to interpret or apply EU law other than the provisions of the CETA, or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.[101]

The CJEU then went on to examine the jurisdiction of the tribunal under CETA, and observed that Section F of CETA ought to be distinguished from the draft agreement on creation of a unified patent litigation system,[102] which was previously declared to be incompatible with EU law.[103] While the applicable law in the unified patent litigation system included directly applicable community law, CETA limits the jurisdiction of the proposed Tribunal to the text of the Agreement.[104] It also distinguished the CETA Tribunal from the Tribunal under consideration in *Achmea*. The CJEU was of the view that, unlike a CETA Tribunal, the underlying investment

96 Opinion 2/13 of the Full Court on the Compatibility of Draft Agreement on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms with TEU and TFEU, ¶ 182, ECLI:EU:C:2014:2454 (Dec. 18, 2014), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CV0002.

97 Opinion 1/17, *supra* note 4, ¶ 106.

98 *Id.* ¶ 108 and 112

99 *Id.* ¶ 114.

100 *Id.* ¶ 115.

101 *Id.* ¶ 118.

102 *Id.* ¶ 123.

103 Opinion 1/09 of the Court of Justice for the European Union on the Compatibility of the Draft Agreement for Creation of a Unified Patent Litigation System with the Treaties (Mar. 8, 2011), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CV0001&from=EN.

104 *Id.* ¶ 123-124.

agreement in *Achmea* "*established a tribunal that would be called upon to give rulings on disputes that might concern the interpretation or application of EU law*."[105]

It was also observed that if and when the CETA Tribunal is called upon to examine the compliance of a measure of the host State or by the EU, with the CETA, the Tribunal will have to undertake an examination of the effect of that measure.[106] However, the CJEU was of the opinion that though such an examination may indeed require that the domestic law of the respondent party be taken into account, it consists taking domestic law into account as a matter of fact,[107] and therefore, cannot be classified as equivalent to interpretation of domestic law by the CETA tribunal.

Clarifying the position of the Appellate Tribunal, the CJEU clarified that the CETA Appellate Tribunal will also not be called upon to interpret or apply the rules of EU law other than provisions of the CETA.[108] It acknowledged Article 8.28.2(b) of the CETA which states that the Appellate Tribunal may identify manifest errors in the appreciation of facts, including appreciation of relevant domestic law. However, the Appellate Tribunal has jurisdiction only to uphold, modify or reverse the Tribunal's award and as the applicable law is only the CETA and the principles of international law, it is clear that parties do not intend to confer the jurisdiction to interpret EU law upon the Appellate Tribunal.[109]

The CJEU also addressed the concern of some of the governments that in the course of examination of relevant facts, the Tribunal may be faced with a situation wherein a measure was adopted by the members pursuant to an EU legislation in public interest, but was challenged by an investor.[110] It was argued that in such a situation, the Tribunal might give a ruling on secondary EU law,[111] which would be a definitive decision and would adversely affect the exclusive jurisdiction of the Court over the definitive interpretation of EU law.[112] The CJEU, relying on Article 8.9.2, held that the discretionary powers of the CETA Tribunal and Appellate Tribunal do not extend to permitting them to call into question the level of protection of public interest determined by the Union.[113]

Thus, the CJEU concluded that Section F of Chapter Eight of the CETA does not adversely affect the autonomy of the EU.

IV. Issues Left Unanswered by the AG and the CJEU

Everything that one sees is a perspective, and everything that one reads is an opinion. Neither a perspective nor an opinion is the absolute truth, but they are all complete unto themselves.

105 *Id.* ¶ 126.
106 *Id.* ¶ 131.
107 *Id.*
108 *Id.* ¶ 133.
109 *Id.*
110 *Id.* ¶ 138.
111 Under EU law, the treaties establishing the EU such as TEU or TFEU are considered as primary law whereas legal instruments based on the treaties such as regulations, directives, decisions etc. are considered as secondary law. *See Sources of European Union Law*, EUR-LEX (Dec. 13, 2017) *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14534.
112 *Id.* ¶ 138.
113 *Id.* ¶ 138, 154, 155 and 156

Nevertheless, their incompleteness gives space to reasonable minds to reasonably agree or disagree with them. The CJEU's opinion on the Tribunal proposed under CETA is no different. According to the author, while the opinion of the CJEU has established the validity of the CETA tribunal vis-à-vis EU law, some concerns have been left unaddressed.

A. Does the CETA propose a new model for a court or an improved form of arbitration?

In his Opinion, the AG emphatically attempted to differentiate the proposed Tribunal under the CETA from an investment arbitral tribunal, but conceded that this new proposed system retains certain imprints of the rules applicable to investment arbitration.[114]

The model of the ICS proposed under the CETA is prima facie ambiguous in that it aims to establish a permanent court replacing the ad hoc arbitration mechanism currently prevalent, but has features that are integral to traditional investor-State arbitration. For instance, the CETA provides for court-like features such as the creation of a list[115] of "*members*" of the Tribunal who will be retained with a fixed fee.[116] On the other hand, the claimant has a choice in the rules of procedure that it wishes to submit the claim under. More importantly, the options for available rules are established arbitration rules, and the decision rendered by the Tribunal is not called a judgment or an opinion, but rather a "*final award*" which is enforceable under the ICSID Convention and the New York Convention.[117] Moreover, as mentioned earlier, there is no permanent structure to house this proposed ICS; instead, the ICSID will be used as a secretariat and costs will be borne by the parties to the dispute.

Although there is no standard definition of investment-arbitration, but based on practice, certain essential features have been identified which may be helpful in assessing the true nature of the ICS proposed under the CETA: (i) it is a dispute settlement mechanism; (ii) it is based on the parties' voluntary submission; (iii) it is a private mechanism; (iv) the outcome is binding on the parties; and (v) the parties must play an active role in the selection of the arbitrators.[118]

The ICS proposed under the CETA is in fact a dispute resolution mechanism, and submission to it will be voluntary.[119] However, it cannot be categorised as a private mechanism such as an arbitral tribunal devised by private parties to settle their discords, which neither forms a part of the State's judicial apparatus nor a governmental decision maker.[120] Moreover, not all the disputing parties will play an active role in the selection of the arbitrators. That said, there exist dispute-resolution models wherein the adjudicators are pre-appointed without any input from the disputing parties and yet these have proved to be successful fora for arbitration. In terms of investor-State arbitration specifically, the Iran-US Claims Tribunal is a standing example of such

114 Opinion 1/17, *supra* note 4, ¶ 165.
115 CETA, *supra* note 5, art. 8.27.
116 CETA, *supra* note 5, art. 8.27.12.
117 CETA, *supra* note 5, arts. 8.39 and 8.41.
118 Gabrielle Kaufmann-Kohler & Michele Potesta, *Can the Mauritius Convention serve as a model for the Reform of Investor-State Arbitration in Connection with the Introduction of Permanent Investment Tribunal or an Appeal Mechanism* 35 (Geneva Ctr. for Int'l Disp. Settlement 2016).
119 CETA, *supra* note 5, arts. 8.22, 8.25.
120 Gabrielle Kaufmann-Kohler & Michele Potesta*, supra* note 118.

a mechanism, which has been called the most significant arbitral body in history.[121] The Tribunal was created by an international treaty,[122] and has jurisdiction over disputes between investors and States.[123] Further, the members are appointed by the States party to the treaty,[124] and its rules of procedure are based on the UNCITRAL Rules with some modifications.[125] However, its constitutive documents refer to the mode of dispute settlement as arbitration.[126]

There also exists another model of dispute resolution, namely the International Court of Justice ["**ICJ**"] Chambers, formed under Article 26 and 29 of the Statute of the ICJ.[127] The parties that bring disputes to the ICJ are allowed to choose the panel which shall hear their case from the existing members of the Court, and they can also choose ad hoc members, although the disputing parties' ability to choose ad hoc members is limited.[128] It has been argued that the parties have the ability to determine the rules applicable to the dispute while submitting the dispute to the ICJ.[129] When presenting a dispute before the Chambers, the ICJ Rules allow the parties to modify the Rules of the Court, thus giving the disputing parties the ability to choose the rules of procedure applicable to the dispute.[130] Thus, in a way, the ICJ possesses more characteristics of traditional arbitration than the Iran-US Claims Tribunal.[131]

In light of this comparison between two similar but distinct models, it can be safely concluded that the proposed ICS is closer in its nature to the Iran-US Claims Tribunal, which is essentially arbitration. One may, however, argue that arbitration does not provide for any appeals mechanism, whereas the ICS has a distinct Appellate Tribunal. This may be countered by the

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121 David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84(1) AM. J. INT'L L. 104 (1990).

122 Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) (Jan. 19, 1981), *available at* http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf.

123 *Id.* art. I.

124 *Id.* arts. II, III.

125 *Id.* art. III(2).

126 *Id.* art. I; *See also* TFEU, *supra* note 65, ¶ 133, at 38.

127 Statute of the International Court of Justice, art. 26, Apr. 18, 1946, 33 U.N.T.S. 993 [*hereinafter* "ICJ Statute"] ("1. The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications. 2. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties. 3. Cases shall be heard and determined by the chambers provided for in this article if the parties so request."); *see* ICJ Statute, art. 29 ("With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit.").

128 *Id.* art. 31.

129 John C. Guilds, *If it Quacks Like a Duck: Comparing the ICJ Chambers to International Arbitration for Mechanism of Enforcement*, 16(1) MD. J. INT'L L. & TRADE 43-82 (1992) (The author has argued that art. 38(1)(a) of the Statute of the ICJallows the parties to determine the applicable law to be used to settle their dispute. To substantiate his argument, he cites the example of the ELSI case where the Chamber strictly applied the facts of the dispute solely to the rules recognized by the government of Italy and United States, which were the disputing parties); *see also* David D. Caron, *supra* note 121.

130 Rules of the International Court of Justice, 2007 I.C.J. Acts & Docs. 91, art. 101 ("The parties to a case may jointly propose particular modifications or additions to the rules contained in the present Part (with the exception of Articles 93 to 97 inclusive), which may be applied by the Court or a Chamber if the Court or the Chamber considers them appropriate in the circumstances of the case.").

131 CETA, *supra* note 5, arts. 8.39 and 8.41.

fact that even the ICSID provides for post-award mechanisms[132] to address the concerns of the disputing parties regarding the arbitral award; and though arguably the Appellate Tribunal under the CETA may have wider jurisdiction than the annulment committee under the ICSID Convention,[133] yet, it too, does not have any power to authoritatively create or settle law.

Thus, the proposed Investment 'Court' System may have been inspired by the need of the European Commission to create a "*court*" to address the demands of the critics.[134] However, it is at most a hybrid mechanism, and at least, a modified version of traditional investor-State arbitration with modified treaty provisions.

B. Will the Awards Rendered by the ICS be Enforceable?

As discussed earlier, the CETA specifically provides for enforcement[135] of the "*final award*" issued by the Tribunal and aims to address possible hindrances that the award may face during the enforcement process, under the New York Convention as well as the ICSID Convention.

i. Enforcement under the New York Convention

The New York Convention provides for enforcement of arbitral awards made in the territory of a State other than the State where the enforcement is sought.[136] Further, it requires an agreement[137] in writing for the purpose of recognition and enforcement of the award. The New York Convention also gives the party acceding to it the right to reserve the application of the Convention to commercial relations under the national laws of that State.[138]

The CETA has attempted to make the award enforceable under the New York Convention by laying down that the final award issued pursuant to the terms of the CETA will be deemed to be an arbitral award related to claims arising out of commercial relationship or transaction, for the purpose of Article I of the New York Convention.[139]

The New York Convention covers within its ambit either awards rendered in the territory of another State or awards that are considered non-domestic within the territory where their enforcement is sought. The question that then arises is whether a decision by the ICS would be foreign in case the host State is not the State of enforcement.[140] Citing examples of successful enforcement of awards rendered by the Iran-US Claims Tribunal under the New York Convention, Bungenberg and Reinisch argue that there seems to be no reason for non-

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132 *See* ICSID Arbitration Rules, *supra* note 17, ch. VII.

133 The ICSID annulment committee has on occasion acted beyond its mandate by annulling awards on grounds of manifest error of law or failure of the tribunal to exercise jurisdictions. *See* Lise Johnson, *Annulment of ICSID Awards: Recent Developments*, INT'L INST. SUSTAINABLE DEV. (2010), *available at* https://www.iisd.org/pdf/2011/dci_2010_annulment_icsid_awards.pdf; *See also* ANTONIO PARRA, THE HISTORY OF ICSID (2d ed. 2012).

134 August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Award? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19(4) J. INTL ECO. L. 761 – 86 (2016).

135 CETA, *supra* note 5, art. 8.41.

136 New York Convention, *supra* note 25, art. I(1).

137 *Id.* art. I(2).

138 *Id.* art. I(3).

139 CETA, *supra* note 5, art. 8.41.5

140 Marc Bungenberg & August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to Multilateral Investment Court, in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW (2018).

enforcement of an award rendered by an international arbitral tribunal.[141] Moreover, they argue that the New York Convention explicitly provides for enforcement of an award rendered by a "*permanent arbitral body to which the parties have submitted*."[142] The Iran-US Claims Tribunal has already been subsumed as a permanent arbitral body,[143] and thus there appears no reason why the proposed investment court cannot be so subsumed within the scheme of the New York Convention.

One provision which raises some concern is that the execution of the award shall be governed by the laws concerning the execution of the award or judgment in force where the execution is sought.[144] Article V(2) of the New York Convention provides that recognition and enforcement of an award can be denied on the ground that the award is contrary to the public policy of the country where its enforcement is sought.[145] The public policy of every country, as well as its definition, varies in every jurisdiction. Moreover, the Joint Instrument for Interpretation of CETA, *inter alia*, provides that both parties have the right to regulate in public interest and that the EU, its Member States and Canada will therefore continue to have the ability to achieve the legitimate public policy objectives that their democratic institutions set, such as public health, social services, public education, safety, environment, public morals, privacy and data protection and the promotion and protection of cultural diversity.[146] Therefore, given the decentralized nature of interpretation and application of the New York Convention, there can be no certainty of consistent enforcement of the awards rendered by the ICS.[147]

ii. Enforcement Under the ICSID Convention

Enforcement under the ICSID Convention has an advantage over the New York Convention in the sense that the award would not stand the scrutiny of national courts on any ground. However, for a decision to be enforceable under the ICSID Convention, it has to be an award.[148] As in the case of enforcement under the New York Convention, the CETA jumps this hurdle by presuming that if a decision has been rendered pursuant to submission of claim under the ICSID Convention and Rules of Arbitration Procedure, such a "*final award*" shall qualify as an 'award' under Article 6 of the ICSID Convention.[149]

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141 *Id.* at 156–158.

142 New York Convention, *supra* note 25, art. I(2) 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"; *See also* Marc Bungenberg & August Reinisch, *supra* note 140, at 153, ¶ 500.

143 *See*, *e.g.*, in the case of Ministry of Defense of the Islamic Republic of Iran v. Gould Inc., 969 F. 2d. 764 (9th Cir. 1992) (U.S.) the court first found that the award was subject to the New York Convention, as the requirements of the Federal Arbitration Act had been fulfilled (namely, that (i) the award arose out of a legal relationship which was (ii) commercial in nature and (iii) was not entirely domestic in scope). The court held that the award also satisfied the requirements of Article 1 of the New York Convention and was "made in the territory of another Contracting State" by a "permanent arbitral body". The Court also explained that the Claims Settlement Declaration, which established the Iran-United States Claims Tribunal as a mechanism for binding third-party arbitration, satisfied "the agreement in writing" standard under the New York Convention.

144 CETA, *supra* note 5, art. 8.41.4.

145 New York Convention, *supra* note 25, art. V(2).

146 *See* CETA, *supra* note 5.

147 N Jansen Calamita, *The (In)Compatibility of Appellate Mechanisms within the Existing Instruments of Investment Treaty Regime*, 18 J. WORLD INV. & TRADE 585 (2017).

148 ICSID Convention, *supra* note 17, art. 54.

149 CETA, *supra* note 5, art. 8.41.6.

The ICSID Convention establishes a particular self-contained model of investor-State arbitration. The CETA also establishes a unique model, which is quite different from the ICSID model. It provides for the possibility of application of ICSID Rules. As Calamita has argued,[150] it is important to note that while the ICSID Convention provides specific rules to establish a tribunal, the CETA replaces these rules entirely. Further, under the ICSID, review of an award is conducted by ad hoc annulment committees,[151] whereas the CETA provides for its own Appellate Tribunal. There is, therefore, doubt as to whether the award thus rendered by the ICS is even an award under the ICSID Convention.[152] Nevertheless, supporters of the new model have argued that these adaptations within the CETA may be treated as *inter-se* modifications to the ICSID Convention as applied to the EU, its Member States, and their trading partner under the CETA – in this case, Canada. Supporters have argued that such modification will not affect the enjoyment of the rights or obligations of other parties to the Convention or be incompatible with the object or purpose of the ICSID Convention as a whole.[153]

C. Multilateralising the Investment Court[154]

The CETA has now passed the first hurdle of scepticism against it inside the EU. However, the challenges of multilateralising[155] the ICS persist.

Measures for reforming ISDS are under consideration at UNCITRAL Working Group III, and the EU has repeatedly proposed the idea of a Multilateral Investment Court ["**MIC**"] during its proceedings.[156] So far, it has found some support,[157] although the support is not sufficient for the

150 New York Convention, *supra* note 25, art. V(2).

151 ICSID Convention, *supra* note 25, art. 52(3).

152 John C. Guilds*, supra* note 129.

153 August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Award? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19(4) J. INT'L ECON. L. 761, 775 (2016); Gabrielle Kaufmann-Kohler & Michele Potesta*, supra* note 118.

154 C. Titi, *The European Union's Proposal for International Investment Court: Significance, Innovations and Challenges Ahead*, 14(1) TRANSNAT'L DISP. MGMT. 27 (2017) (The author explains, "The perspective of a multilateral court implies that not all countries can have appointed Judges and Members of the Appeal Tribunal. For this reason, it has been suggested that Judges should be appointed not by the treaty parties – this could work only bilaterally – but by a multilateral body that is deemed to represent the interests of the international community, such as in the example of the International Court of Justice's (ICJ) election of judges.").

155 Richard Baldwin, *Multilateralizing 21st Century Regionalism*, ORG. ECON. CO-OPERATION AND DEV. 31 (2014) ("Multilateralizing" refers to the phenomenon of making the ICS a, regional and globally, conducive and acceptable system. The phenomenon, in this context, focuses on accepting higher standards of transparency); *See generally* Iza Lejárraga, *Multilateralising Regionalism: Strengthening Transparency Disciplines in Trade* (Org. Econ. Co-operation and Dev. Trade Pol'y Paper No. 152 2013).

156 *Submission of the European Union and its Member States to UNCITRAL Working Group III on Establishing a Standing Mechanism for the Settlement of International Investment Disputes* (Jan. 18, 2019), *available at* http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf; *Submission of the European Union and its Member States to UNCITRAL Working Group III on Possible Work Plan for Working Group III* (Jan. 18, 2019), *available at* http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157632.pdf.

157 UNCITRAL Secretariat, Submission from the Gov't of Morocco at the Third Working Group of UNCITRAL (Investor-State Dispute Settlement Reform) in its Thirty-Seventh Session, ¶¶ 8–9, U.N. Doc. A/CN.9/WG.III/WP.161 (Mar. 4, 2019) (Morocco has recently prepared a new model BIT which provides for submission of disputes to a "multilateral investment tribunal"); UNCITRAL Secretariat, Submission from the Gov't of Colombia at the Third Working Group of UNCITRAL (Investor-State Dispute Settlement Reform) in its Thirty-Eighth Session, ¶ 6, U.N. Doc. A/CN.9/WG.III/WP.173 (June 14, 2019); *See also* UNCITRAL Secretariat, Submission from the European Union and its Member States at the Third Working Group of UNCITRAL (Investor-State Dispute Settlement Reform) in its Thirty-Seventh Session, U.N. Doc. A/CN.9/WG.III/WP.159/Add.1 (Jan. 24, 2019).

MIC to be the only idea on the table. Nevertheless, it is necessary to note that the EU may, in fact be able to achieve its goal through its new agreements with the rest of the world. The CETA, as well as all the recent similar trade agreements entered into by the EU or purported to be entered into by the EU, carry a provision obliging the parties to the agreement to promote and persuade its trading partners for the development of an MIC.[158] Hence, even States that may not wish to be part of a multilateral court, if party to one of the Free Trade Agreements with the EU, may be required to promote the MIC as part of their treaty obligations.

The EU is an important trading partner in the global economy and thus, it could be challenging for individual nations to resist its diplomatic might. Nevertheless, even though Canada, Singapore, Vietnam and Mexico have already signed investment agreements with the EU that include a bilateral ICS, a number of the EU's major trading partners, including the USA and Japan, have expressed little support for the creation of an MIC.[159] For now, it remains to be seen if this dual diplomacy of the EU will prevail or fail.

D. Exclusiveness of Mixed Agreements

Members of the EU are some of the oldest players in the field of international investment agreements. Germany was, in fact, the first ever country to enter into a bilateral agreement with Pakistan in 1959.[160] However, since the Lisbon Reform,[161] foreign direct investment falls within the common commercial policy of the EU and has, accordingly, become a part of the 'exclusive competence' of the EU.[162] In other words, Member States have lost their competence to negotiate extra-EU bilateral investment agreements.

To harmonise the extant BITs that Member States may have with third States, the EU adopted Regulation 1219/2012.[163] This regulation provides that a BIT entered into between a Member State and a third country may enter into force, or continue to enter into force, until a BIT is entered into between the said third country and the EU.[164] Further, to amend an existing BIT, or to enter into a new BIT with a third State, Member States require authorization from the EU, which shall be granted subject to certain conditions.[165] The new competence of the EU does not,

158 CETA, *supra* note 5, art. 8.29; EU-VIPA, *supra* note 14, art. 3.41.

159 *Legislative Train Schedule, Multilateral Investment Court*, EUR. PARL. (May 20, 2019), *available at*, https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-multilateral-investment-court-(mic).

160 Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24(3) INT'L LAWYER 655 (1990).

161 The Treaty of Lisbon signed in 2009, reformed how EU institutions operate and decisions are taken. It also reformed EU's internal and external policies. This development is often colloquially referred to as the Lisbon Reform. *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

162 TFEU arts. 3(1)(e), 206, 207.

163 Regulation (EU) No. 1219/2012, of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries 2012 O.J. (L 351).

164 *Id.* art. 3.

165 *Id.* art. 9(1) ("The Commission shall authorise the Member States to open formal negotiations with a third country to amend or conclude a bilateral investment agreement unless it concludes that the opening of such negotiations would: (a)be in conflict with Union law other than the incompatibilities arising from the allocation of competences between the Union and its Member States; …").

therefore, seem to legally require the Member States to automatically terminate the extra-EU BITs that they may be party to.[166]

Moreover, it is settled law that international agreements concluded by the EU, pursuant to the provisions of the treaties, constitute acts of the institution of the EU.[167] As such, these agreements are not only integral to the EU legal order,[168] but also prevail over the provisions of secondary EU legislation.[169]

Notably, however, the competence bestowed upon the Commission under the conferral system, is only to the extent of negotiating and concluding agreements vis-à-vis foreign direct investment. Neither the treaties nor the regulations adopted thereafter say anything about the dispute resolution mechanism that Member States may adopt in its dealings with a third State. This was confirmed by the CJEU in its landmark Opinion 2/15, wherein the court was asked to opine if the EU has the requisite competence to sign and conclude the Free Trade Agreement with Singapore alone.[170] The court concluded that while the Free Trade Agreement *per se* fell under the exclusive competence of the EU, certain chapters of it, including the chapter on investor-State dispute resolution, were exceptions and fell within the shared competence of the EU and the Member States.[171]

In Opinion 2/15,[172] the CJEU held that the EU needed Member States to individually ratify the part of the agreement concerning the dispute resolution mechanism.[173] Subsequently, the CJEU, in its judgment in *Achmea*, went on to hold that in the field of international relations, the EU's capacity to conclude international agreements necessarily entails the power to submit to the decision of a court which is created or designated by such agreements.[174] The Advocate General, in his opinion on the legality of the CETA, reiterated the CJEU's observation regarding the EU's capacity to submit itself to an international court. The AG, as well as the CJEU, distinguished the ICS proposed under the CETA from the Tribunal under consideration in *Achmea*. Specifically, the AG explained that the two differed on two separate counts *viz.,* the parties to the agreement constituting the tribunal, and the law applicable to the tribunal.[175] The underlying fear for this was the possible threat to the autonomy of EU law, and its preservation as a uniform and consistent legal order.

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166 Wenhua Shan & Sheng Zhang, *The Treaty of Lisbon: Half Way towards Common Investment Policy*, 21(4) EUR. J. INT'L L. 1049 (2010).

167 Case C-266/16, Western Sahara Campaign UK, The Queen v. Commissioners of Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs, 2018 E.C.R. 118, ¶ 45.

168 *Id.* ¶ 46; *see* Case 181-73, R. & V. Haegeman v. Belgian State, 1974 E.C.R. 00449; Case C-224/16; Aebtri v. Nachalnik na Mitnitsa Burgas, 2017 E.C.R. 880.

169 Opinion 1/17, *supra* note z4, ¶ 120.

170 Opinion 2/15 of the Full Court of Justice of European Union on the draft EU-Singapore Trade Agreement (May 16, 2017), *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3014 [*hereinafter* "Opinion 2/15"].

171 *Id.* at ¶ 305.

172 This was the opinion delivered by the Full Court on whether the European Union had the competence to sign and conclude alone the Free Trade Agreement with Singapore.

173 Opinion 2/15, *supra* note 170, ¶ 292.

174 Achmea, 2018 E.C.R. 158, ¶ 57 (Relying on Opinion 1/91, Opinion 1/09 and Opinion 2/13).

175 Opinion 1/17, *supra* note 4, ¶ 110.

Moreover, while the CETA denies direct application of domestic law in the ICS or direct application of the CETA in domestic courts, nothing in the Agreement affects the authority of the domestic courts within the territory of Member States. There are studies suggesting that prior to the commencement of international arbitration, foreign investors in domestic courts overwhelmingly rely on domestic law and not on international investment law.[176]

From these facts, one is forced to conclude that while Member States still have the competence to enter into BITs, and even though they share competence for agreeing on a dispute resolution mechanism, Member States cannot agree to a dispute resolution mechanism similar to the one under the CETA without prior approval of the Union. This severely restricts a Member State's ability to freely enter into agreements with third countries. Not only do the Members not have the requisite authority to take a dispute out of their territory, a decision to do so may be averse to the autonomy of EU law as EU law now forms part of the Member States' domestic law.[177]

The varied nature of investment agreements may have helped the EU towards its goal of a common commercial policy, but it has definitely cast a cloud on the sovereign authority of Member States and would require serious reconsideration about the very nature of EU law.

V. Conclusion

Investor-State arbitration is a very young mechanism of dispute resolution that has experienced dizzying growth, almost making it seem as though ready to implode. Change and innovation are much needed for the system to survive and keep growing. Those making suggestions for changes propose both incremental and systemic changes. The EU finds itself in the latter category, with its proposal of an MIC. The idea of such a court as a panacea to all the ills that mar traditional investor-State arbitration is appealing.

However, as the proposed ICS in the CETA stands, it is reasonable to argue that it is necessarily a modified, or even improvised, version of traditional investor-State arbitration. Appointment of judges by the States that are party to the CETA may lend a certain amount of legitimacy to the dispute resolution process. However, it cannot necessarily ensure better or even consistent decisions. Moreover, as the international law regime stands, for its decisions to be enforceable, they cannot be orders of a "*court*", but need to be awards delivered by a tribunal.

The EU may hereon choose to either develop the ICS as a legal system for dispute resolution or develop it as an ad-hoc mechanism with more evolved rules to appease those that critique the prevalent practice of the investor-State dispute system. The factor that will be most determinative of this development going forward, would be the readiness of the nations of the world to let go of the freedom that traditional ISDS provides and embrace the jurisdiction of yet another court.

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176 Szilárd Gáspár-Szilágyi, *AG Bot in Opinion 1/17. The autonomy of the EU legal order v. the reasons why the CETA ICS might be needed*, EUR. L. BLOG (Feb. 6, 2019), *available at* https://europeanlawblog.eu/2019/02/06/ag-bot-in-opinion-1-17-the-autonomy-of-the-eu-legal-order-v-the-reasons-why-the-ceta-ics-might-be-needed/.

177 There is no official statement from the EU on this issue nor any argument from any of the institution of the EU. Nevertheless, the AG opines in Opinion 1/17 at ¶ 110 that EU law forms part of the domestic law of Member States. It is necessary to note here that to supplement his observation, the AG cites ¶ 4 of the judgment in Achmea, which interestingly is nothing but a mere reproduction of art. 8 of the erstwhile Agreement on encouragement and reciprocal protection of investments, Neth.–Slovk., Apr. 29, 1991.