Journal of International Economic Law, 2016, 19, 761–786
doi: 10.1093/jiel/jgw072
Advance Access Publication Date: 19 December 2016
Article

OXFORD

Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration

August Reinisch*

ABSTRACT

Both the November 2015 EU Commission proposal for Investment Protection and Resolution of Investment Disputes in the EU-US Transatlantic Trade and Investment Partnership (TTIP) as well as the revised February 2016 version of the Canada-EU Comprehensive Economic and Trade Agreement (CETA) contain an investment court system (ICS) which is a two-tier mechanism for investor-State dispute settlement (ISDS), combining elements of traditional investor-State arbitration (ISA) with judicial features. The resulting hybrid form of dispute settlement should be regarded as a permissible *inter se* modification of the ICSID Convention. Nevertheless, this will not ensure that the non-modifying ICSID Contracting Parties have to recognize and enforce ICS awards as ICSID awards pursuant to the specific rules of the ICSID Convention. Rather, they should be regarded as enforceable awards under the New York Convention. This latter result will ensure that the outcome of ICS dispute settlement will be enforceable not only in the respective Contracting Parties of TTIP and CETA, but also in other States parties to the New York Convention.

I. INTRODUCTION

The European Union (EU) has recently included elements of an investment court system (ICS) in three enlarged free trade agreements (FTAs). Both the text of the EU–Vietnam FTA of January 2016[1] and the (non-binding) Commission proposal for Investment Protection and Resolution of Investment Disputes in the EU–US Transatlantic Trade and Investment Partnership (TTIP)[2] contain a two-tier

* Professor, International and European Law, University of Vienna. E-mail: august.reinisch@univie.ac.at. He is grateful for valuable comments on an earlier draft by Ursula Kriebaum, Joost Pauwelyn, and Stephan Wittich.

1 EU–Vietnam Free Trade Agreement: Agreed text as of January 2016, published on 1 February 2016, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437; http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf.

2 EU's proposal for Investment Protection and Resolution of Investment Disputes of 12 November 2015 (TTIP), available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (visited 30 September 2016).

mechanism for investor–state dispute settlement (ISDS), combining elements of traditional investor–state arbitration (ISA) with judicial features. Also the revised February 2016 version of the Canada–EU Comprehensive Economic and Trade Agreement (CETA)[3] contains features of an investment court-like dispute settlement institution.

These proposed changes raise the general question whether such ISDS can still be regarded as ISA or has already migrated into the field of judicial dispute settlement, with the practically highly important effect that its outcomes may have to be considered judgments and not arbitral awards. They also raise the more specific question whether ISDS provided for under these agreements can be viewed as arbitration under the ICSID Convention.[4] If that were not the case, it would seem necessary to inquire whether the proposed changes to ICSID arbitration can be made by either amending the Convention or whether they can be regarded as permissible modifications between some ICSID Contracting States. The latter issue specifically raises the question what effect that would have on the other ICSID Contracting Parties. These questions will be addressed in detail after first outlining the planned ICS.

II. AN OUTLINE OF THE ENVISAGED ICS

While the initial 2011 negotiation mandate from the EU's Council of Trade Ministers to the Commission concerning CETA and other FTAs called for traditional ISA,[5] the increased public criticism,[6] or what some have called 'backlash' against investment arbitration,[7] fuelled considerations to create a permanent court instead of *ad hoc* arbitration.[8]

3 The revised text of the CETA has been made public on 29 February 2016, available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf (visited 30 September 2016).

4 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, signed on 18 March 1965, entered into force 14 October 1966, 575 UNTS 160.

5 See, e.g. the leaked Council Negotiating Directives (Canada, India, and Singapore), 12 September 2011; available at http://www.bilaterals.org/spip.php?article20272&lang=en (visited 30 September 2016), ('Enforcement: the agreement shall aim to provide for an effective investor-to-state-dispute settlement mechanism. State-to-state dispute settlement will be included, but will not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanism. It should provide for investors a wide range of arbitration fora as currently available under the Member States' bilateral investment agreements (BIT's).').

6 See, e.g. G. van Harten, *Investment Treaty Arbitration and Public Law* (Oxford, OUP 2007); St. Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?', 24(5) Journal of International Arbitration 469 (2007); N. Hachez and J. Wouters, 'International Investment Dispute Settlement in the 21st Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?', Leuven Centre for Global Governance Studies Working Paper No. 81, available at http://ssrn.com/abstract=2009327 and http://dx.doi.org/10.2139/ssrn.2009327; M. Kumm, 'An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege', 4(3) ESIL Reflections (2015); see also the European 'Stop TTIP' initative, available at https://stop-ttip.org/; see for US opposition: Open letter by the Alliance for Justice, March 2015, to Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, Minority Leader Pelosi, and Ambassador Froman, at 1, available at http://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf (visited 30 September 2016).

7 M. Waibel et al. (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Alphen aan den Rijn, Kluwer Law International 2010).

8 See the overview by A. Reinisch, The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court, In: Centre for International Governance Innovation (CIGI), Investor-State Arbitration Series, Paper No. 2 – March 2016, available at https://www.cigionline.org/publications/european-union-and-investor-state-dispute-settlement-investor-state-arbitration-permane.

In the first half of 2015, the idea of an investment court gained political momentum and was seen by many as a possibility to remedy the perceived shortcomings of ISA.

First, the Socialists and Democrats in the EU Parliament, led by their German branch,[9] proposed the establishment of a permanent investment court instead of traditional *ad hoc* arbitral tribunals.[10] Then the European Parliament adopted a resolution calling for the establishment of a permanent ICS with an appellate structure.[11]

The mid-September 2015 Commission draft text of the TTIP investment chapter can be regarded as an implementation of these ideas by proposing an 'Investment Court System'.[12] It was further elaborated on in the November 2015 Commission proposal for Investment Protection and Resolution of Investment Disputes in TTIP.[13] An ICS was also included in the February 2016 CETA text agreed with Canada,[14] and in the January 2016 agreement with Vietnam.[15]

The ICS introduces a two-tier system for ISDS,[16] which is composed of the 'Tribunal' as tribunal of first instance[17] and the 'Appellate Tribunal'[18] or 'Appeal

9 See M. Krajewski, 'Modell-Investitionsschutzvertrag mit Investor-Staat-Schiedsverfahren für Industriestaaten unter Berücksichtigung der USA, Projekt Nr. 83/15 des Bundesministeriums für Wirtschaft und Energie', available at http://ttip2016.eu/files/content/docs/Full%20documents/150430%20Gabriel%20Krajewski%20ISDS%20model%20agreement.pdf.

10 Group of the Progressive Alliance of Socialists and Democrats (S&D), Position Paper on investor–state dispute settlement mechanisms in ongoing trade negotiations, 4 March 2015, available at http://www.socialistsanddemocrats.eu/sites/default/files/position_paper_investor_state_dispute_settlement_ISDS_en_150304_3.pdf.

11 European Parliament, Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the TTIP, available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0252&format=XML&language=EN. (demanding a 'new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives').

12 Commission draft text TTIP – investment, 16 September 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

13 See EU's proposal, above n 2, available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.

14 See revised text of CETA, above n 3.

15 See EU–Vietnam FTA Investment Chapter, above n 1.

16 See on the proposal in general, K. Ameli *et al.* (2016), 'Task Force Paper regarding the proposed International Court System (ICS)', EFILA, Draft, 2 January 2016, available at http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf; F. Baetens 'The EU's Proposed Investment Court System (ICS): Addressing Criticisms of Investor-State Arbitration While Raising New Challenges', in *Legal Issues of Economic Integration* (forthcoming); R. Howse, 'Courting the Critics of Investor-State Dispute Settlement: the EU proposal for a Judicial System for Investment Disputes', available at https://cdn-media.web-view.net/i/fjj3t288ah/Courting_the_Criticsdraft1.pdf; St. Schacherer, 'TPP, CETA and TTIP Between Innovation and Consolidation - Resolving Investor-State Disputes under Mega-regionals', 7(3) Journal of International Dispute Settlement 628 (2016); C. Titi, 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead', Working Paper, Revised version of 9 April 2016, available at http://ssrn.com/abstract=2711943; G. van Harten, 'Key Flaws in the European Commission's Proposals for Foreign Investor Protection in TTIP', Osgoode Legal Studies Research Paper No. 16/2016 , available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692122.

17 Article 8.27 revised text of CETA, above n 3.

18 Ibid, Article 8.28.

Tribunal'.[19] Members of these tribunals are selected in a manner markedly different from that applying in traditional ISA and clearly intended to minimize investor influence.

For instance, Article 8.27(2) CETA stipulates that the 15 Members of the Tribunal shall be appointed by the bilateral high-level CETA Joint Committee[20] for a renewable five-year term. In order to provide for equal participation, five of the Members of the Tribunal shall be nationals of a Member State of the EU, five shall be nationals of Canada, and the other five shall be third-country nationals. Qualifications for appointment resemble those of other international courts and tribunals by requiring specific knowledge in the field. In particular, Article 8.27(4) CETA warrants that the Members of the Tribunal shall possess 'qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence' and they shall have demonstrated expertise in the field. Similar provisions are contained in the EU–Vietnam FTA and are suggested for TTIP.[21]

Individual cases shall be adjudicated by 'divisions' of three Members of the Tribunal with third-country nationals presiding over such tribunals.[22] While this arrangement is to some extent similar to traditional ISA, a truly novel feature lies in the case-allocation mechanism similar to that found in some domestic judicial systems: the three Members of the Tribunal are to be appointed by the President of the Tribunal on a yet-to-be specified 'random and unpredictable' rotation system.[23] This is clearly contrary to the traditional ISA approach where the disputing parties are free to select 'their' arbitrators,[24] partly subject to the condition that they should not be nationals of disputing parties.[25]

The ICS proposals also incorporate the 2013 Rules on Transparency in Treaty-based ISA of the United Nations Commission on International Trade Law (UNCITRAL).[26] Under these Rules, the repository promptly makes 'available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made' upon commencement of the arbitration proceedings.[27] A broad range of documents relating to the case

19 Article 10, section 3, EU's proposal, above n 2.

20 According to Article 26.1 revised text of CETA, above n 3, the CETA Joint Committee shall be composed of 'representatives of the European Union and representatives of Canada' and 'co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees'.

21 Article 12(4), section 3, EU–Vietnam FTA Investment Chapter, above n 1; Article 9(4), section 3, EU's proposal, , above n 2.

22 See Article 8.27(6) revised text of CETA, above n 3.

23 Ibid, Article 8.27(7).

24 See, e.g. Article 9 UNCITRAL Arbitration Rules, as revised in 2013, available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf.

25 See, e.g. Articles 38, 39 ICSID Convention, above n 4; but see below text at n 112 as to the *ius dispositivum* character of this provision.

26 UNCITRAL, Rules on Transparency in Treaty-based Investor–State Arbitration (2013), available at: http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf; Article 18, section 3, EU's proposal, above n 2; Article 8.36 revised text of CETA, above n 3; Article 20, section 3, EU–Vietnam FTA Investment Chapter, above n 1.

27 Ibid, Article 2 UNCITRAL Transparency Rules

should be published, including the statement of claim and defence, any written submission and the award.[28]

The ICS proposals also provide for third-party and *amicus curiae* participation. This permits, for instance, a non-disputing Party to the treaty (i.e. usually the home state of the investor) to participate[29] and also 'any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party'.[30] Further, Tribunals may allow NGOs to submit *amicus curiae* briefs.[31]

Awards rendered by the Tribunal (of first instance) can be appealed to the 'Appellate/Appeal Tribunal' within 90 days of their issuance.[32] The proposed appeal system enlarges the annulment grounds of the ICSID Convention[33] with the power to review errors of law and manifest errors in the appreciation of facts.[34] Based on these grounds, the Appellate/Appeal Tribunal may uphold, modify, or reverse the Tribunal's award.

If the Appellate/Appeal Tribunal rejects the appeal, the Tribunal award becomes final.[35] If the appeal is upheld, the Appeal Tribunal can wholly or partially modify or reverse the legal findings and conclusions in the original award.[36] However, the Appeal/Appellate Tribunal does not itself render a modified final award. Rather, the first instance Tribunal subsequently has to issue a revised award within 90 days of receiving the report of the Appeal Tribunal.[37]

III. THE ICS AS A FORM OF ARBITRATION

The three enlarged FTAs: TTIP, CETA, and the EU–Vietnam FTA containing an ICS, appear to be intentionally ambiguous as to the nature of the envisaged ISDS. This may have been inspired by the need of the Commission to create a 'court' as demanded by CETA/TTIP critics[38] and to ensure that the institution can still be viewed a 'tribunal' for purposes of enforcement of the ultimate 'award'.[39] At the

28 Ibid, Article 3(1).

29 Article 22, section 3, EU's proposal, above n 2; Article 8.38 revised text of CETA, above n 3; Article 25, section 3, EU–Vietnam FTA Investment Chapter, above n 1.

30 Article 23(1), section 3, EU's proposal, ibid.

31 Ibid, Article 23(5), section 3.

32 See Article 8.28(9)(a) revised text of CETA, above n 3; Article 29(1), section 3, EU's proposal, ibid; Article 28(1), section 3, EU–Vietnam FTA Investment Chapter, above n 1.

33 See Article 52(1) ICSID Convention, above n 4.

34 Article 8.28(2) revised text of CETA, above n 3; Article 29(1), section 3, EU's proposal, above n 2; Article 28(1), section 3, EU–Vietnam FTA Investment Chapter, above n 1.

35 Article 29(2), section 3, EU's proposal, ibid; Article 8.28(9)(c)(ii) revised text of CETA, ibid; Article 29(2), section 3, EU–Vietnam FTA Investment Chapter, ibid.

36 Article 29(2), section 3, EU's proposal, ibid; Article 8.28(2) revised text of CETA, ibid; Article 28(3), section 3, EU–Vietnam FTA Investment Chapter, ibid.

37 Article 28(7), section 3, EU's proposal, ibid; Article 29(4), section 3, EU–Vietnam FTA Investment Chapter, ibid; Article 8.28(7)(b) revised text of CETA, ibid.

38 European Commission, *Commission Staff Working Document, Report, Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP),* Brussels, 13 January 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf; St. Schill, 'Editorial: The German Debate on International Investment Law', 16 The Journal of World Investment & Trade 1 (2015); I. Venzke, 'Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication', 17 The Journal of World Investment & Trade 374 (2016).

39 See below text at n 143.

same time, the ambiguous denomination of an investment 'court' system is likely to create opposition from negotiating partners like USA, which have traditionally opposed any permanent international dispute settlement institutions.[40]

The crucial legal issue is whether a third-party dispute settlement institution with permanent 'tribunal members' is more a court or can still qualify as an arbitral tribunal. Usually, the distinctive element is exactly the permanency and the method of appointment: Judges are appointed for a certain period of time and for an undefined number of disputes, whereas arbitrators are appointed by the disputing parties for a specific dispute.[41] Further, the lack of an appeals possibility and greater party autonomy in shaping the procedure are considered to be hallmarks of arbitration vis-à-vis adjudication through courts.[42] Sometimes, additionally the 'compulsory' jurisdiction of courts is contrasted with the 'voluntary' acceptance of arbitration,[43] though the ICJ with its requirement of a separate acceptance of the Court's jurisdiction[44] demonstrates quite ably that this distinction is probably more valid in domestic legal systems.[45]

40 See also St. Schill, 'The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law', 20(9) ASIL Insights (2016), available at https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping ('The Commission's Proposal provides an important impetus towards constitutional reform of international investment law. Still, the Proposal may face opposition across the Atlantic, as the U.S. is usually hesitant to create international courts. Instead of a court, the U.S.-led Trans-Pacific Partnership (TPP), which was concluded in October 2015 after long negotiations, contains a public law reformed version of investor-state arbitration that stresses the right to regulate, transparency of proceedings, third-party participation, and tighter control of arbitrators.').

41 See J.G. Merrills, *International Dispute Settlement,* 4th ed. (Cambridge, CUP 2005) 91; W. Park, 'Arbitrator Integrity', in M. Waibel et al. (eds.), *The Backlash Against Investment Arbitration* (Alphen aan den Rijn, Kluwer Law International 2010) 189, at 192; S. Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making', 4(3) Journal of International Dispute Settlement 553 (2013), at 573–79. See also St. Wittich, 'Party Autonomy and the Judicial Function of the International Court of Justice' (Habilitationsschrift, Vienna, 2014).

42 See St. Wittich, 'The Limits of Party Autonomy in Investment Arbitration', in C. Knahr et al. (eds), *Investment and Commercial Arbitration – Similarities and Divergences* (Utrecht: Eleven Publishing, 2010) 47, at 52.

43 See the distinctive features identified by the Advisory Committee of Jurists during the negotiations of the Statute of the Permanent Court of International Justice, the ICJ's predecessor: 'the nomination of the arbitrators by the parties concerned, the selection by these parties of the principles on which the tribunal should base its findings, and finally its character of voluntary jurisdiction'. Advisory Committee of Jurists, *Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice* 113 (1920); cited by S. Nappert, 'Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism', *EFILA Inaugural Lecture,* Brussels, 26 November 2015, 10, available at http://efila.org/wp-content/uploads/2015/11/Annual_lecture_Sophie_Nappert_full_text.pdf.

44 See Article 36 Statute of the International Court of Justice.

45 See, in general, on the qualification of the ICJ, S. Forlati, *The International Court of Justice. An Arbitral Tribunal or a Judicial Body*? (Cham, Heidelberg, New York, Dordrecht, London, Springer 2014).

However, there are also hybrid forms, the arbitral character of which has been largely accepted although the individual members of such institutions may have not been appointed on an *ad hoc* basis and by the specific parties to the dispute.

The most prominent example is the Iran–US Claims Tribunal with judges appointed by two states to decide an undetermined number of disputes also between nationals of one state and the other state.[46] But, in the past, also numerous so-called mixed claims commissions have been set up by states to adjudicate a number of similar cases stemming from claims by nationals of one state against the other state.[47]

In this regard it is also important to note that the New York Convention[48] does not appear to restrict its notion of arbitration to *ad hoc* arbitration, but acknowledges that permanent arbitration bodies can also render enforceable arbitral awards. Article I(2) expressly provides that '[t]he 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. [. . .].'[49] While the New York Convention does not define the notion of 'permanent arbitral bodies', there is judicial practice that an institution like the Iran–US Claims Tribunal can be qualified as such a body.[50] The *travaux préparatoires* of the Convention indicate that even a permanent dispute settlement institution can be regarded as arbitration and that what was crucial was the '*voluntary* nature of arbitration, based on "will" or "agreement" of the parties, as opposed to any type of adjudication based on "compulsory", or "mandatory" jurisdiction, imposed on the parties "regardless of their will".'[51]

Thus, even where the parties may not be able to appoint 'their' arbitrators, they must still be able to freely consent to such dispute settlement. Otherwise, it would lose its character as arbitration. This is the case for the proposed ICS, since investors

46 Established by the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the USA and the Government of the Islamic Republic of Iran of 19 January 1981 ('Algiers Declaration' or 'Algiers Accord'), 1 Iran–US CTR 9; see also D.D. Caron, 'The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution', 84 American Journal of International Law 104 (1990); Ch. N. Brower and J.D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Nijhoff 1998).

47 St. Toope, *Mixed International Arbitration* (1990), see Chapter V – Remedies Available to Mixed International Arbitral Tribunals, 159–96.

48 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed on 10 June 1958, entered into force 7 June 1959, 330 UNTS 38.

49 Article I(2) New York Convention, ibid.

50 See, e.g. *Gould Inc., Gould Marketing v Hoffman Export Corporation, Gould International, Inc. v Ministry of Defense of the Islamic Republic of Iran*, U.S. Court of Appeals (9th Cir.), 23 October 1989, 887 F.2d 1357, 1362, noting that '[t]he Convention defines "arbitral awards" to include those "made by permanent arbitral bodies". Article I(2).'

51 G. Kaufmann-Kohler and M. Potestà, 'Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? – Analysis and roadmap' (2016), para 152 (footnotes omitted, emphasis in original); also available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

would be regarded as freely accepting the Contracting Parties' offer of consent contained in the agreements.[52]

On this basis, it seems justified to conclude that even a semi-permanent dispute settlement institution with panel members that have been appointed by states and not by the parties to a specific dispute can qualify as arbitration.[53]

Nevertheless, the suggestion that UNCITRAL should issue a 'recommendation'[54] clarifying that ICS 'falls within the ambit of the NYC, as a 'permanent arbitral body' under Article I(2)',[55] seems prudent in order to avoid subsequent problems before domestic courts.

IV. THE ICS AS ICSID ARBITRATION

That ICS under TTIP, CETA, and the EU–Vietnam FTA should be regarded as allowing ISA under the ICSID Convention seems to have been the intention of the treaty drafters who expressly provided for arbitration under the ICSID Convention as one of the possibilities for investors.[56] However, it is obvious that the specific ICS features deviate in many respects crucially from the arbitration provided for under the ICSID Convention. To what extent ICSID Contracting States may adapt the Convention, so as to allow them to regard the ICS as a modified version of ICSID arbitration among themselves, will be explored subsequently.[57]

The idea that the ICS envisaged by the EU should be regarded as providing access to ICSID arbitration also raises an important additional *ratione personae* issue, stemming from the fact that the EU is not a Contracting Party to the ICSID Convention.

52 See on the consensual nature of investment arbitration without privity below at n 150.

53 Recently, the German Association of Judges and State Prosecutors stated—though without providing much reasoning—that the ICS is not an international court, but a permanent arbitration tribunal. See Deutscher Richterbund, Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP, 2016, available at www.drb.de/fileadmin/docs/Stellungnahmen/2016/DRB_160201_Stn_Nr_04_Europaeisches_Investitionsgericht.pdf. But see Nappert, above n 43, at 12 who is of the view that '[t]he proposed appeal mechanism is not consonant with arbitration as contemplated by the [New York Convention], and Article 30 [of the TTIP draft providing for the enforcement of "awards"] cannot unilaterally change that fact.'

54 See, e.g. UNCITRAL (2006), 'Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958', Official Records of the General Assembly, 66th Session, Supplement No. 17, Annex II, UN Doc. A/61/17, 61ff.

55 Kaufmann-Kohler and Potestà, above n 51, para 155.

56 See Article 6(2)(a), section 3, EU's proposal, above n 2 ('A claim may be submitted to the Tribunal under one of the following sets of rules on dispute settlement: (a) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID); . . .'); Article 8.23(2)(a)(b) revised text of CETA, above n 3; Article 7(2)(a)(b), section 3, EU–Vietnam FTA Investment Chapter, above n 1; see also Article 7(2)(a), section 3, EU's proposal, ibid ('The consent under paragraph 1 and the submission of a claim under this Section shall be deemed to satisfy the requirements of: Article 25 of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the disputing parties; . . . .'); Article 8.25(2)(a) revised text of CETA, ibid; Article 10(4)(a), section 3, EU–Vietnam FTA Investment Chapter, ibid.

57 See below text starting at n 76.

As far as cases against EU Member States are concerned, the ICS does not seem to pose this problem (at least for those that are members of the ICSID Convention),[58] but as far as cases brought against the EU are concerned, it is clear that ICSID tribunals would lack jurisdiction over cases brought against an entity that is not a Party to the ICSID Convention as required by Article 25 ICSID Convention.[59] It is thus no wonder that the Commission announced already a while ago that 'it will explore with interested parties the possibility that the European Union seek to accede to the ICSID Convention'.[60]

However, for the EU to become a Contracting Party to the ICSID Convention a revision of the Convention would be necessary since Article 67 restricts membership to states (and even more particularly to member States of the World Bank or at least parties to the ICJ Statute).[61] The most straightforward avenue to enable the EU becoming an ICSID Contracting Party would entail the cumbersome treaty amendment procedure under Articles 65 and 66, basically requiring unanimous approval of all existing ICSID Contracting Parties. Such an amendment was discussed in 2004 when the adoption of an appellate review system for ICSID arbitration was debated.[62] It is generally acknowledged that an amendment, though legally possible, would be practically almost impossible to achieve.[63]

One could also consider whether an *inter se* modification of the Convention pursuant to Article 41 of the 1969 Vienna Convention on the Law of Treaties (VCLT)[64] were possible in order to allow the EU to join the ICSID Convention. But this would face obstacles of the type subsequently discussed, in particular: would it be 'incompatible with the effective execution of the object and purpose' of the ICSID Convention which arguably is to contribute to the settlement of investment disputes between 'States and Nationals of Other States'?[65] However, such a modification would still not confer Contracting Party status on the EU vis-à-vis non-modifying ICSID parties.[66]

58 Except for Poland, all EU Member States are also Contracting Parties of the ICSID Convention as of mid-2016. See https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx?ViewMembership=All.

59 Article 25 ICSID Convention, above n 4 ('(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. . . . .').

60 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions 'Towards a Comprehensive European International Investment Policy', COM (2010) 343 final, 10.

61 Article 67 ICSID Convention, above n 4 ('This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.').

62 See ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration' Discussion Paper, 22 October 2004, available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf.

63 See Ch. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention. A Commentary*, 2nd ed. (Cambridge, Cambridge University Press, 2009) 1265.

64 VCLT, 1155 UNTS 331.

65 See below text at n 76ff.

66 See below text at n 127ff.

One should mention, though, that in other fields of international economic law, including fields encompassing dispute settlement rules, there are precedents of a more informal assumption of treaty obligations by the EU. In the framework of the GATT, also non-EEC Members in the 1960s/70s gradually recognized that the Communities had assumed the external trade powers of their Member States and had thus also *de facto* become parties of the GATT itself, permitting them to defend cases brought against them.[67] One should remember, however, that the ECJ's blessing to this form of functional treaty succession of the Communities to their Member States' international treaty obligations was based on the uncontroversial assumption that the Communities had fully taken over their Members' external trade powers.[68] In the field of the Lisbon Treaty[69]-enlarged Common Commercial Policy (CCP), though, while it is clear that the EU has assumed powers concerning foreign direct investment pursuant to the Treaty on the Functioning of the European Union (TFEU),[70] it is much more questionable whether this also comprises portfolio investment and all aspects of what is usually regulated in an investment protection treaty.[71] The currently pending advisory opinion proceedings[72] concerning the EU–Singapore FTA[73] will tell whether the Court sides with the Commission's expansive

67 See Joined Cases 21-24/72 *International Fruit Company* [1972] ECR 1219; P. Eeckhout, *External Relations of the European Union* (Oxford, Oxford University Press, 2004) 11; J. Bourgeois, 'The European Court of Justice and the WTO: Problems and Challenges', in J. Weiler (ed.), *The EU, WTO and NAFTA: Towards a Common Law of International Trade?* (Oxford, Oxford University Press 2000) 71; J. Mortensen, 'The World Trade Organization and the European Union', in K.E. Jorgensen (ed.), *The European Union and International Organizations* (London, Routledge 2009) 80, at 83–86.

68 Case C-366/10 *Air Transport Association of America (ATAA) v Secretary of State for Energy and Climate Change*, ECLI:EU:C:2011:864, para 63, regarding the International Civil Aviation Convention.

69 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed on 13 December 2007, Official Journal (OJ) C 306/01 of 17 December 2007.

70 See Article 207(1) Consolidated version of The Treaty on the Functioning of the European Union, OJ C 115/47 of 9 May 2008 ('The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.').

71 See on this question, C. Tietje, 'Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon' 83 Beiträge zum transnationalen Wirtschaftsrecht 16 (2009); A. Reinisch, 'The Division of Powers between the EU and its Member States "after Lisbon"', in M. Bungenberg, J. Griebel and S. Hindelang (eds), *Internationaler Investitionsschutz und Europarecht* (Baden-Baden - Nomos, Wien - facultas.wuv, Zürich - Dike, 2010) 99; J.A. Bischoff, 'Just a Little Bit of "Mixity"? The EU's Role in the Field of International Investment Protection Law' (2011) 48 Common Market Law Review 1527; M. Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon', in C. Hermann and J.P. Terhechte (eds), European Yearbook of International Economic Law (2010) 123–51; A. Dimopoulos, *EU Foreign Investment Law* (Oxford, Oxford University Press, 2011); M. Bungenberg, J. Griebel and S. Hindelang (eds), *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (Heidelberg, Springer 2011); R.V. Puig, 'The Scope of the New Exclusive Competence of the European Union with Regard to "Foreign Direct Investment"' 40(2) Legal Issues of Economic Integration 133 (2013).

72 Opinion 2/15, Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU, OJ [2015] C 332/45.

73 EU–Singapore FTA, authentic text of May 2015, published on 29 June 2015, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=961.

view of the investment power inherent in the enlarged CCP[74] or whether it rather adopts a more narrow reading of such powers.[75]

A. The possibility of an *inter se* modification of the ICSID convention

Rules on *inter se* modifications of treaties are contained in the 1969 VCLT.[76] Its Article 41 expressly envisages such modifications under certain circumstances. The VCLT rules are applicable to treaties entering into force after 1980, the VCLT's entry into force.[77] Since the ICSID Convention entered into force in 1966, the VCLT rules are not applicable to it. However, as far as they can be considered customary international law they can and have in fact been applied to the ICSID Convention. This is particularly evident in the case of the VCLT rules on treaty interpretation.[78] But also in regard to treaty

74 See, e.g. European Commission, Communication, Towards a comprehensive European international investment policy, COM (2010) 343 final, Brussels, 7 July 2010, 8 ('. . . [T]he articulation of investment policy should be consistent with the Treaty's Chapter on capital and payments (Articles 63-66 TFEU) . . . . That chapter does not expressly provide for the possibility to conclude international agreements on investment, including portfolio investment. However, to the extent that international agreements on investment affect the scope of the common rules set by the Treaty's Chapter on capitals and payments, the exclusive Union competence to conclude agreements in this area would be implied . . . .). F. Hoffmeister and G. Ünüvar, 'From BITS and Pieces towards European Investment Agreements', in M. Bungenberg, A. Reinisch and Ch. Tietje (eds), *EU and Investment Agreements. Open Questions and Remaining Challenges* (Baden-Baden - Oxford, Nomos – Hart Publishing, 2013) 57–86.

In early summer 2016, the EU Commission proposed that the CETA should be signed by the Council alone on the basis that the Union had comprehensive powers to conclude the agreement. After protests by many Member States, the Commission changed course and suggested a Proposal for a COUNCIL DECISION on the signing on behalf of the EU of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the EU and its Member States, of the other part, COM (2016) 444 final, published on 5 July 2016, 4, available at http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-444-EN-F1-1.PDF ('CETA has identical objectives and essentially the same contents as the Free Trade Agreement with Singapore (EUSFTA). Therefore, the Union's competence is the same in both cases. In view of the doubts raised with regard to the extent and the nature of the Union's competence to conclude EUSFTA, in July 2015 the Commission requested from the Court of Justice an opinion under Article 218(11) TFEU (case A – 2/15). In case A -2/15 the Commission has expressed the view that the Union has exclusive competence to conclude EUSFTA alone and, in the alternative, that it has at least shared competence in those areas where the Union's competence is not exclusive. Many Member States, however, have expressed a different opinion. In view of this, and in order not to delay the signature of the Agreement, the Commission has decided to propose the signature of the Agreement as a mixed agreement.').

75 See, e.g. German Federal Constitutional Court, 2 BvE 2/08, 30 June 2009 ('Lisbon Treaty judgment'), para 379 ('The extension of the common commercial policy to "foreign direct investment" (Article 207.1 TFEU) confers exclusive competence on the European Union also in this area. Much, however, argues in favour of assuming that the term "foreign direct investment" only encompasses investment which serves to obtain a controlling interest in an enterprise . . . . The consequence of this would be that exclusive competence only exists for investment of this type whereas investment protection agreements that go beyond this would have to be concluded as mixed agreements.'), available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

76 VCLT, above n 64.

77 Ibid, Article 4.

78 See, e.g. *Mondev Int'l Ltd v USA*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para 43 ('. . . the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties, which for this purpose can be taken to reflect the position under customary international law.'); *Phoenix Action Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para 75 ('It is not disputed that the interpretation of the ICSID Convention and of the BIT is governed by

denunciation and other matters, ICSID and other investment tribunals have largely relied on the provisions codified in the VCLT as reflecting customary international law.

Whether technical rules like Article 41 VCLT can be considered customary international law may be difficult to determine. Nevertheless, it appears generally acceptable to rely on them when assessing treaty law issues. While questioning whether Article 41 codified already existing custom at the time of the VCLT's drafting, most commentators agree that the principles contained in Article 41 now reflect customary law.[79]

Article 41 VCLT, entitled 'Agreements to modify multilateral treaties between certain of the parties only' provides as follows:

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
   a. the possibility of such a modification is provided for by the treaty; or
   b. the modification in question is not prohibited by the treaty and:
      i. does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
      ii. does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.[80]

The ICSID Convention is silent on the matter of *inter se* modifications between ICSID Contracting Parties—a question that has to be distinguished from the conceptually different, though partly similar, question whether the parties to a dispute may modify some of the procedural rules under the ICSID Convention and its Arbitration Rules.[81] Therefore, the criteria of Article 41(1)(b) VCLT have to be fulfilled.[82] Since the ICSID Convention does not address *inter se* modifications at all, it

international law, including the customary principles of interpretation embodied in the Vienna Convention on the Law of Treaties and the general principles of international law.'); *Enron Creditors Recovery Corp, Ponderosa Assets, L.P. v Argentina*, ICSID Case No. ARB/01/3, Decision on Annulment, 30 July 2010, para 114 ('. . . the terms of the BIT and the ICSID Convention, which fall to be interpreted in accordance with customary international law rules of treaty interpretation as codified in the 1969 Vienna Convention on the Law of Treaties.').

79 K. Odendahl, Article 41, in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A Commentary* (Heidelberg, Springer 2012) 723; J. Pauwelyn, *Conflicts of Norm in Public International Law* (2003) 305; See also A. Rigaux and D. Simon, Article 41, in O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of Treaties. A Commentary* (Oxford, Oxford University Press 2011) 994; Wittich, above n 41, 135.

80 Article 41 VCLT, above n 64.

81 Articles 36 to 47 ICSID Convention, above n 4, often expressly state that a certain procedure has to be followed 'except as the parties otherwise agree'. See in detail, Wittich, above n 42, 47; A. Boralessa, 'The Limits of Party Autonomy in ICSID Arbitration', 15 American Review of International Arbitration 253 (2004).

82 However, one should note that, for instance, in the WTO system various derogation, amendment and waiver provisions have been viewed by the Appellate Body as *leges speciales* excluding reliance on Article 41 VCLT. See, e.g. *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, 20 July 2015, para 5.112 ('Nevertheless, we note that the WTO agreements contain specific provisions

also does not prohibit them.[83] Thus, their permissibility must be assessed on the basis of the two conditions contained in Article 41(1)(b)(i) and (ii) VCLT. This crucial issue will have to be scrutinized in regard to each modification of the ICSID Convention stemming from the ICS proposals. Before looking at these individual aspects, it is necessary to understand more precisely what the two conditions of Article 41(1)(b)(i) and (ii) VCLT require.

1. Whether a modification affects the enjoyment of the rights of other parties or the performance of their obligations—Article 41(1)(b)(i) VCLT

The ILC Commentary on this provision specifically states that 'affecting' is meant to negatively affect, by stating that the first condition for an *inter se* modification, that 'the modification must not affect the enjoyment of the rights or the performance of the obligations of the other parties' means that 'it must not prejudice their rights or add to their burdens'.[84] Beyond that, however, no specific illustrations are given. According to Rigaux and Simon, this condition relates to 'the principle of the relative effect of treaties: the *inter se* are agreements *res inter alios acta* for the parties of the original multilateral treaty who are not parties to the modifying treaty'.[85] Odendahl suggests that in order to assess whether a modification meets the two conditions set out in Article 41(1)(b) VCLT, 'it might be helpful to rely on the distinction between treaties imposing obligations of a reciprocal, an interdependent or an integral nature'.[86] She thus suggests that 'modifications of reciprocal treaties (like the 1961 Vienna Convention on Diplomatic Relations or the 1994 WTO Agreement) often comply with the conditions set out in para 1 lit b'.[87] The mostly 'bilateral' or 'reciprocal' character of the rights and obligations of the Vienna Convention on Diplomatic Relations (VCDR)[88] is indeed largely accepted and would thus militate in favour of the parties' freedom to modify the VCDR provision as they wish. But this is less obvious with the obligations under WTO Agreements, even the basic trade obligations to reduce tariffs under so-called bindings pursuant to the GATT.[89] While the fixing of tariffs for specific goods clearly implies 'bilateral' or 'reciprocal' obligations between members of the multilateral WTO agreements,[90] the MFN obligation of Article I GATT leads to a multilateralization of the fixing of tariffs. Thus, if some WTO Members would want to eliminate such tariffs entirely among themselves (as in a typical FTA or customs union), this might lead to a redirection of trade flows

addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention, such as Article 41.').

83 See Odendahl, above n 79, 724.

84 International Law Commission, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission 1966,* vol. II (ILC Commentary, 1966), 220, at 235.

85 A. Rigaux and D. Simon, above n 79, 1002.

86 Odendahl, above n 79, 725.

87 Ibid.

88 Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, entered into force on 24 April 1964, 500 UNTS 95.

89 General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994).

90 On the nature of WTO obligations in general, see J. Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?', 14 European Journal of International Law 907 (2003).

and thus prejudice the rights of other WTO Members. It seems that such a consideration may have inspired the GATT drafters to include substantive conditions for the formation of regional economic integration agreements which can be regarded as *inter se* modifications of the GATT.[91]

At the same time, while it is true that 'modifications of interdependent treaties (like disarmament treaties) and of integral treaties (like human rights conventions) most likely affect the rights and obligations of other states Parties'[92] under Article 41(1)(b)(i) VCLT, this may not always be the case. For instance, if a multilateral treaty provided for environmental protection standards protecting the global commons, such as protecting against air or maritime pollution, *inter se* modifications of some parties of such a treaty, permitting less effective standards, may be viewed as negatively affecting other treaty parties. On the other hand, stricter environmental standards may not negatively affect them and thus be permissible *inter se* modifications.

In the present context, an *inter se* modification of the rules of the ICSID Convention with a view to modifying the types of dispute settlement institutions deciding cases, the applicable law and the methods of and grounds for review of their 'awards' for a certain group of ICSID Contracting Parties and their nationals does not seem to affect 'the enjoyment of the rights or the performance of the obligations of the other parties'.[93]

By the envisaged ICS, some ICSID parties would grant special dispute settlement rights to investors that are similar but different from those under the ICSID Convention, but this does not curtail the right of the nationals of third ICSID states (non-modifying parties) to use the existing ICSID system also against modifying ICSID parties. Since the envisaged ICS would only apply between Contracting Parties (the EU and its Member States, on the one hand, and the USA, Canada, and Vietnam, on the other), a limitation that could be qualified as 'affecting the enjoyment of the other parties of their rights' is hard to envisage. It may not be fully excluded, however, that there are financial consequences also for non-modifying parties resulting from the use of the ICSID Secretariat and the like which have not been fully addressed in the current rules on ICS.[94]

91 Of course, Article XXIV GATT should be viewed as a specific authorization of an *inter se* agreement in the sense of Article 41(1)(a) VCLT, above note 64. In the view of the Appellate Body, though, Article XXIV GATT has been recently qualified as *lex specialis* excluding reliance on Article 41 VCLT. See *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, 20 July 2015, para 5.112 ('Nevertheless, we note that the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention, such as Article 41. This is particularly true in the case of FTAs considering that Article XXIV of the GATT 1994 specifically permits departures from certain WTO rules in FTAs. However, Article XXIV conditions such departures on the fulfilment of the rule that the level of duties and other regulations of commerce, applicable in each of the FTA members to the trade of non-FTA members, shall not be higher or more restrictive than those applicable prior to the formation of the FTA.')

92 Odendahl, above n 79, 725.

93 See below text at note 104.

94 For instance, Article 8.27(16) revised text of CETA, above n 3, provides that the 'ICSID Secretariat shall act as Secretariat for the Tribunal and provide it with appropriate support'. There is no provision in the current version which provides for reimbursement of ICSID's fees for such services. Ibid, merely provides that the fees for the Tribunal members 'shall be paid equally by both Parties into an account managed by

2. Whether modifications are incompatible with the effective execution of the object and purpose of the treaty as a whole—Article 41(1)(b)(ii) VCLT

The second and most important condition for the permissibility of an *inter se* modification, that it must not 'relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole',[95] is also difficult to ascertain in practice. The 1966 ILC Commentary on this provision merely provides one example, stating that 'an inter se agreement modifying substantive provisions of a disarmament or neutralization treaty would be incompatible with its object and purpose and not permissible under the present article'.[96] This example seems to be premised on the idea that it is the object and purpose of a disarmament or neutralization treaty to reduce certain arms or to keep certain states out of military alliances so that any change in such obligations between some parties would be immediately against the object and purpose of the treaty as a whole. Other commentators have pointed out that also human rights, environmental protection, or treaties providing for nuclear weapons free zones, all of which require a uniform application by all parties—as opposed to a bilateral structure—could serve as examples of treaties where an *inter se* agreement would be contrary to object and purpose of the original treaties.[97] However, one may have doubts whether an *inter se* modification of an environmental treaty which provides for higher standards should be regarded as contrary to its object and purpose.[98] The same is true for modifications of human rights treaties aimed at raising the protection standard of the original treaty, as exemplified by a number of additional protocols to the European Convention of Human Rights (ECHR),[99] which provide for a higher level of human rights protection than the original Convention and which have entered into force only as between those ECHR Contracting Parties that have also ratified these additional protocols.[100] However, one may also consider that they do not actually modify the original Convention obligations but are merely additional to them.

Finally, it must be kept in mind that Article 41(1)(b)(ii) VCLT refers to the object and purpose of a treaty 'as a whole' which implies that modifications relating to 'single and less important aspects of the object and purpose of the treaty are to be considered as permissible'.[101]

For present purposes, it is thus necessary to identify what could be regarded as the 'object and purpose' of the ICSID Convention. Article 1(2) ICSID Convention explicitly states that it is the purpose of the ICSID[102] 'to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals

the ICSID Secretariat'. It is to be expected though that, ultimately, ICSID fees in connection with services for the Tribunals and Appeal/Appellate Tribunals will have to be covered either by the parties to the dispute or the Contracting Parties of CETA, TTIP, and other modifying agreements and not by all ICSID members at large.

95 Article 41 (1)(b)(ii) VCLT, above n 64.

96 ILC Commentary 1966, above n 84, 235.

97 A. Rigaux and D. Simon, above n 79, 1004.

98 K. Odendahl, above n 79, 725.

99 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, ETS No. 5, Rome 4 November 1950, entry into force 3 September 1953.

100 E.g. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Strasbourg, 16 September 1963, ETS No. 46.

101 Odendahl, above n 79, 725.

102 Established by Article 1(1) ICSID Convention, above n 4.

of other Contracting States in accordance with the provisions of this Convention'.[103] This provision very clearly envisages ISDS as the main object and purpose of the Convention. This finding is particularly supported by the preambular paragraphs 4 and 5 to the Convention, '[a]ttaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;' and '[d]esiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;' as well as by the title of the Convention itself which speaks of the 'Settlement of Investment Disputes.'

The fact that Article 1(2) ICSID Convention speaks of dispute settlement 'in accordance with the provisions of this Convention' should not be regarded as limiting the object and purpose of the Convention to ISDS in the form of conciliation and arbitration as exactly provided for in the ICSID Convention. Such a reading would, in fact, make any inquiry into the compatibility of modifications of the Convention superfluous. If only ISDS 'in accordance with the provisions of this Convention' were to serve its object and purpose, then any modification would be impermissible. Rather, the language 'in accordance with the provisions of this Convention' should be regarded as referring to the way how the ICSID Convention intends to serve its object and purpose of providing ISDS to its Contracting Parties and their nationals. This still requires an inquiry with regard to each envisaged modification whether it can be regarded as compatible 'with the effective execution of the object and purpose of the treaty as a whole'.

B. Representative modifications of the ICSID Convention by ICS

1. Tribunal composition

As outlined above, the composition of ICS Tribunals as well as of the Appeal/Appellate Tribunals differ markedly from the way ICSID tribunals are set up. While the ICSID Convention gives the parties to a specific dispute the right to choose 'their' arbitrators,[104] the ICS envisages a roster of pre-appointed Tribunal Members from which the President of the Tribunal will appoint Members to hear individual cases on a rotation and random and unpredictable basis.[105] Furthermore, the concept of ICS deviates from the idea of the ICSID Convention to have primarily third-state nationals to decide cases.[106] Instead, ICS Tribunals and Appeal Tribunals will always consist of a Member who will have the nationality of a Member State of the EU and one, having the nationality of its treaty partner.

103 Ibid, Article 1(2) ICSID Convention.

104 Ibid, Article 37(2)(b) ICSID Convention ('Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.').

105 Article 8.27(7) revised text of CETA, above n 3; Article 9(7), section 3, EU's proposal, above n 2; Article 12(7), section 3, EU–Vietnam FTA Investment Chapter, above n 1.

106 See Article 39 ICSID Convention, above note 4 ('The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.').

There is a debate whether these modifications are wise from a policy perspective. It has been argued that they may lead to 'politicization' through the participation of national 'judges' in the adjudication of disputes.[107] Moreover, concern has been voiced that the entire new ICS will entail a pro-state bias as a result of appointments through Contracting States only and of particular incompatibility provisions in favour of States[108] in spite of general impartiality rules.[109] However, the issue here is more narrowly to assess whether such changes would be incompatible 'with the effective execution of the object and purpose of [the ICSID Convention rules] as a whole.'

Theoretically, the parties' right to choose their arbitrators pursuant to Article 37(2) ICSID Convention could be seen as a crucial requirement derogation from which is contrary to 'the effective execution of the object and purpose of the treaty as a whole'.

However, it appears questionable whether the parties' right to nominate their arbitrators is indeed such a central feature of ICSID arbitration. In order to ensure access to ISA, the Convention provides for a default appointment procedure,[110] demonstrating that effective dispute settlement prevails over the right of parties to nominate. Further, as already discussed, it appears that other forms of tribunal appointments can be still qualified as arbitration.[111] Since in the case at hand, the Contracting Parties to the investment agreements containing ICS (TTIP, CETA, EU–Vietnam FTA) agree on the arbitrators/judges, it would appear that the resulting modifications could still be considered arbitration that is not incompatible 'with the effective execution of the object and purpose of [the ICSID Convention rules] as a whole'.

The proposed nationality rules appear even less problematic. While in practice most ICSID tribunals consist of arbitrators having neither the nationality of the host state nor of the investor's home state, the ICSID Convention itself is not particularly strict about these rules. Article 39 makes clear that the preference for third-party nationals to ICSID tribunals is *ius dispositivum* by providing that the parties may agree to appoint their own nationals as Tribunal Members.[112]

107 See E. Zuleta, The Challenges of Creating a Standing International Investment Court, in J.E. Kalicki and A. Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System* (Leiden - Boston, Brill Nijhoff 2015) 403, at 409ff.

108 See e.g. Article 11(1), fn. 6, section 3, EU's proposal, above n 2 ('For greater certainty, this does not imply that persons who are government officials or receive an income from the government, but who are otherwise independent of the government, are ineligible.'); Article 8.30(1), fn. 10 revised text of CETA, above n 3; Article 14(1), fn. 27, section 3, EU–Vietnam FTA Investment Chapter, above n 1.

109 Article 11(1), section 3, EU's proposal, ibid; Article 8.30(1) revised text of CETA, ibid; Article 14(1), section 3, EU–Vietnam FTA Investment Chapter, ibid ('[Judges] shall not be affiliated with any government. They shall not take instructions from any government or organisation with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. In so doing they shall comply with Annex II (Code of Conduct). In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law.').

110 Article 38 ICSID Convention, above n 4 ('If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. . . .').

111 See above text at n 41.

112 See above text at n 106.

2. Applicable law

Pursuant to Article 42(1) ICSID Convention, ICSID tribunals 'shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'.[113]

Under the suggested ICS, the Tribunals and Appeal/Appellate Tribunals are supposed to regard only the substantive provisions of the investment chapters as applicable law.[114] The Tribunals are specifically enjoined to determine the legality of measures under the domestic laws of disputing parties. They may only consider the domestic law of a disputing party as a matter of fact and shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that party.[115]

The exclusion of domestic law as applicable law is apparently inspired by CJEU jurisprudence which seems to consider any interpretation (often necessary in the course of an application) of EU law by any other tribunal than itself to be incompatible with EU law.[116]

This clearly differs from the standard situation under ICSID where domestic law usually plays an important part. However, the exclusion seems still in line with the Convention since it can be viewed as a choice of law of the Parties in the IIA. In a number of other IIAs, like NAFTA[117] or the Energy Charter Treaty,[118] parties have similarly chosen to make only the treaty itself applicable law, not domestic law and that is regarded an exercise of the choice provided for in Article 42 ICSID Convention.[119]

113 Article 42(1) ICSID Convention, above n 4.

114 See e.g. Article 8.31(1) revised text of CETA, above n 3 ('When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the *Vienna Convention on the Law of Treaties*, and other rules and principles of international law applicable between the Parties.'); Article 13(2), section 3, EU's proposal, above n 2; Article 16(2), section 3, EU–Vietnam FTA Investment Chapter, above n 1.

115 Article 8.31(2) revised text of CETA, ibid ('The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.'); Article 13(3)(4), section 3, EU's proposal, ibid; Article 16(2), section 3, EU–Vietnam FTA Investment Chapter, ibid.

116 ECJ, Opinion 1/91, *European Economic Area I*, [1991] ECR, I-6079; ECJ, Opinion 1/92, *European Economic Area II*, [1992] ECR, I-2815; CJEU, Opinion 2/13, *European Convention on Human Rights*, Opinion pursuant to Article 218(11) TFEU, 18 December 2014 [nyr].

117 Article 1131(1) North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (NAFTA), December 17, 1992, 32 ILM 289 (1993) ('A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.').

118 Article 26(6) Energy Charter Treaty, 17 December 1994, entered into force 16 April 1998, 2080 UNTS 95 ('A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Agreement and applicable rules and principles of international law.'").

119 Schreuer, above n 63, 576ff.

3. Appeal mechanism

In order to 'compensate' for the exclusion of any residual control of the arbitral process and its outcome by domestic courts common under other forms of arbitration, the ICSID Convention provides for a special annulment procedure, according to which special *ad hoc* panels may annul ICSID awards for a limited set of reasons. Such annulment procedures exclude recourse to any other mechanisms challenging an ICSID award.[120]

One of the most important features of the proposed ICS in all three FTAs currently under discussion is the establishment of an appellate mechanism.[121]

The envisaged appeal mechanism of the ICS contained in the three new EU investment chapters clearly broadens the existing control mechanism in the form of annulment in the ICSID Convention. It permits the appellate tribunals to revise 'provisional awards' of the Tribunals (of first instance), not only on grounds pertinent for an annulment, but also for errors in law and, to a more limited extent, the assessment of facts.[122]

The replacement of annulment by an appeal mechanism is clearly not in line with the ICSID Convention and would thus constitute a modification. The crucial question, however, is whether it would be a permissible *inter se* modification under the criteria of Article 41 VCLT, whether this modification 'is incompatible with the effective execution of the object and purpose' of the ICSID Convention as a whole.[123]

Such an incompatibility could be perceived if one regarded the limited annulment grounds as central to the ICSID Convention's concept of effective and time-efficient arbitration.[124] However, one may doubt whether the specific limited review mechanism under the ICSID annulment procedure is crucial to the effective execution of the ICSID Convention's 'object and purpose'.

The Convention's purpose is the settlement of investment disputes through arbitration or conciliation. Whether a control mechanism is fashioned in the form of full appeal or limited annulment does not appear to be crucial to the 'the effective

120 Article 53(1) ICSID Convention, above n 4 ('The award . . . shall not be subject to any appeal or to any other remedy except those provided for in this Convention.').

121 See above text at n 17ff.

122 Article 29(1), section 3, EU's proposal, above n 2 ('. . . (a) that the Tribunal has erred in the interpretation or application of the applicable law; (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or, (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).'); Article 8.28(2) revised text of CETA, above n 3; Article 28(1), section 3, EU–Vietnam FTA Investment Chapter, above n 1.

123 The question was left open by in Schreuer, above n 63, 1105 ('An agreement on an *inter se* modification of the Convention between certain of its parties to allow for an appeals mechanism also would not be without difficulties. . . . .').

124 See Wittich, above n 42, 47, at 60, who argues that '[a]nother limitation upon procedural party autonomy inherent in the arbitral function is contained in article 53(1) of the Washington Convention which provides in strict terms that an award made pursuant to the Convention shall be binding on the parties and not subject to any appeal or to any other remedy except those stated in the Convention.' He thus concludes that 'the parties cannot validly agree that the award is non-binding or may be appealed or otherwise remedied by means or remedies outside the Convention'. While Article 53(1) ICSID Convention clearly restricts the party autonomy of the parties to the disputes (investors and host states), the questions remains whether this limitation also prevents the Contracting Parties of the ICSID Convention to provide otherwise.

execution of the object and purpose of the treaty as a whole'. Broader grounds for the revision of awards may lead to a prolongation of proceedings, but entail other benefits, such as a more coherent interpretation and application of the underlying investment rules. It is hard to say that it would impede the execution of the ICSID Convention as such. Also the fact that the appeal grounds include all the annulment reasons under the ICSID Convention militates in favour of the view that the envisaged modification would be permissible.

Furthermore, the fact that the establishment of an appeals mechanism was already ventured by ICSID itself a few years ago[125] militates in favour of the argument that such a system is not squarely contrary to the concept of ICSID ISDS.[126]

4. Interim conclusion on the permissibility of the proposed ICS as modification of the ICSID Convention

On the basis of the above considerations, it seems that a modification of the ICSID Convention required in order to achieve the establishment of an ICS as envisaged in the three current EU proposals would not be precluded by the rules of the VCLT on *inter se* modifications of treaties.

5. The effect of the proposed modifications on third parties

One of the crucial advantages of ICSID arbitration lies in the peculiar enforcement system envisaged by the ICSID Convention. Article 53 ICSID Convention provides for the binding force of awards and requires that the parties 'shall abide by and comply with the terms of the award'.[127] Its prohibition of having resort to 'any appeal or to any other remedy except those provided for in this Convention'[128] has been interpreted as providing for an exclusive nature of the ICSID enforcement rules with the consequence that the grounds for non-recognition and non-enforcement under the New York Convention cannot be raised before national courts where the enforcement of ICSID awards is sought.[129]

Furthermore, Article 54(1) ICSID Convention provides that not only the State Party to an ICSID arbitration, but '[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. . . ..'[130] The only practical obstacles to such enforcement measures are state immunity from execution rules as provided for in Article 55 of the

125 ICSID Secretariat Discussion Paper, above n 62.

126 While not analyzing the compatibility under the Article 41 VCLT requirements in detail, the ICSID Secretariat clearly envisaged the possibility of an *inter se* agreement. ICSID Secretariat Discussion Paper, ibid, Annex, para 2.

127 Article 53(1) ICSID Convention, above note 4 ('The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.').

128 Ibid.

129 *MINE v Guinea*, Decision on Annulment, 22 December 1989, 4 ICSID Reports 79, 84, para 4.02 ('It appears from these provisions that the Convention excludes any attack on the award in national courts.').

130 Article 54(1) ICSID Convention, above n 4.

Convention.[131] Apart from that the Convention provides for what is sometimes referred to as an almost self-contained regime of enforcement obligations, eliminating any *ordre public* or similar residual control possibilities by national courts.[132]

The EU negotiators have devoted considerable attention to the question of the finality and enforceability of ICS awards. The draft texts provide, *inter alia*, that final awards cannot be subject to further 'appeal, review, set aside, annulment or any other remedy'.[133] They further follow the enforcement provisions of the ICSID Convention by stating that '[e]ach Party shall recognize an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party',[134] while '[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force where such execution is sought.'[135]

It is clear, though, that these TTIP, CETA, and EU–Vietnam FTA provisions—as much as they are inspired by the wording of the ICSID Convention[136]—pertain to the parties of the respective EU agreements and cannot as such obligate third parties.

Whether a permissible *inter se* modification of the ICSID Convention achieved by those agreements would be sufficient for this purpose is highly questionable.

For this matter, it is crucial to determine whether the outcome of any ISDS envisaged under modified rules of the ICSID Convention can still be regarded as an ICSID award under Articles 53 and 54 of the Convention. One may be tempted to think so, on the basis of the assumption that if there is a valid modification of the Convention, then the modified awards should be treated as ICSID awards.

However, Article 41 VCLT provides for *inter se* modifications with the consequence that treaty parties that have not modified the ICSID Convention remain only bound by the original Convention and do not need to accept any changes. This *inter se* effect of treaty modification under Article 41 VCLT is confirmed not only by the title of that provision ('*Agreements to modify multilateral treaties between certain of the parties only*'), but also by the ILC Commentary which explicitly states that '[t]his article . . . deals not with 'amendment' of a treaty but with an 'inter se agreement' for its

131 Article 55 ICSID Convention, ibid ('Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.').

132 J.-Ch. Honlet, B. Legum and A. Crevon, 'ICSID Annulment', in M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch (eds.), *International Investment Law. A Handbook* (München - C.H. Beck, Oxford - Hart Publishing, Baden-Baden - Nomos, 2015), 1431, at 1432; see also ICSID, *Background Paper on Annulment for the Administrative Council of ICSID*, 10 August 2012, 7 ('One of the unique features of the ICSID system is its autonomous nature. ICSID arbitration is known as self-contained, or de-localized, arbitration because local courts in any particular State have no role in the ICSID proceeding.').

133 Article 30(1), section 3, EU's proposal, above n 2; Article 8.28(9)(b) revised text of CETA, above n 3; Article 31(1), section 3, EU–Vietnam FTA Investment Chapter, above n 1.

134 Article 30(2), section 3, EU's proposal, above n 2 ('Each Party shall recognize an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.'); Article 31(2), section 3, EU–Vietnam FTA Investment Chapter, ibid; Article 8.28(9)(d), Article 8.41 revised text of CETA, ibid.

135 Article 30(3), section 3, EU's proposal, ibid; Articles 8.28(9)(d) and 8.41(4) revised text of CETA, ibid; Article 31(5), section 3, EU–Vietnam FTA Investment Chapter, ibid.

136 See above text at n 127ff.

'modification'; that is, with an agreement entered into by some only of the parties to a multilateral treaty and intended to modify it between themselves alone.'[137]

Therefore, any modification of the ICSID Convention by the proposed ICS system which could be considered compatible with the object and purpose of the Convention would lead to a modification of ISDS and the notion of 'awards' as between the modifying parties. Therefore, third states, parties to the ICSID Convention, which do not participate in the *inter se* agreement would not be affected by such modification with the consequence that they would not be under an obligation to enforce the ensuing (modified) awards under the ICSID Convention rules. This clearly follows from the concept of an *inter se* modification which for the other parties is *res inter alios acta*.[138]

In order to lead to an enforcement obligation in third states, the EU and its partners would have to conclude specific recognition and enforcement agreements with them.[139]

Alternatively, an amendment of the ICSID Convention might turn awards of ICS tribunals into genuine ICSID awards entailing the full thrust of the Convention's enforcement provisions.[140]

V. ICS AWARDS AS ENFORCEABLE NON-ICSID AWARDS

The above considerations have demonstrated that the planned ICS, although conceived of as a hybrid form of ISA with a number of features closely resembling those found in the ICSID Convention, contains significant modifications of the Convention. They have also shown that these modifications would not be impermissible under general treaty law. Thus, the EU and its negotiating partners would be allowed to go ahead with its plans to modify the ICSID Convention as among themselves.

As also shown above,[141] however, such an *inter se* modification of the ICSID Convention would not affect other ICSID Contracting States with the particular disadvantage that the outcome of ICS proceedings would not have to be enforced by them as ICSID awards.

It thus appears crucial to assess whether such awards can be regarded as arbitral awards susceptible of recognition and enforcement under the New York Convention.[142]

A. ICS awards as 'arbitral awards' under the New York Convention

The New York Convention provides for the recognition and enforcement of foreign arbitral awards, which it defines as 'arbitral awards made in the territory of a State

137 ILC Commentary 1966, above n 84, 235 (emphasis in original).

138 It should also be noted that Article 54(1) ICSID Convention, above n 4, specifically requires Contracting States to 'recognize an award rendered pursuant to this Convention'. An award rendered by an ICS tribunal would not be one rendered pursuant to the original Convention. Thus, the obligation under Article 54(1) ICSID Convention would not affect non-modifying parties.

139 See F. Baetens, 'The EU's Proposed Investment Court System (ICS): Addressing Criticisms of Investor-State Arbitration While Raising New Challenges', in *Legal Issues of Economic Integration* (forthcoming).

140 See above text at n 61ff.

141 See above text at n 127ff.

142 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed on 10 June 1958, entered into force 7 June 1959, 330 UNTS 38.

other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal'.[143]

While the ICS proposals do not indicate any specific seat of the envisaged permanent investment Tribunal and Appeal/Appellate Tribunal, they also do not indicate that they should be considered anational or delocalized tribunals. Thus, any difficulties that may arise for the awards of such tribunals should be avoided.[144] One should also mention that, unlike with ICSID, there is no requirement to be a 'member' of UNCITRAL in order to have UNCITRAL Arbitration Rules apply to dispute settlement.[145] Thus, arbitration proceedings both against EU Member States and against the EU may be conducted according to UNCITRAL Rules.

However, the more crucial issue will be whether national courts in New York Convention Contracting States, where recognition and enforcement may be sought in the future, will consider ICS awards as awards made by an arbitral body. The whole purpose of the New York Convention is the enforcement of arbitral awards as opposed to foreign judicial decisions.

As discussed above,[146] it appears that the proper view should be that ICS remains predominantly a form of arbitration and that in spite of its name and some judicial features ICS tribunals will render arbitral awards. Nevertheless, one should not underestimate the possibility that some national court in one of the New York Convention States may come to a different conclusion which would render the Convention inapplicable and thus endanger the enforcement of ICS 'outcomes'.

B. The existence of an arbitration agreement in writing under the New York Convention

Article II(1) of the New York Convention requires 'an agreement in writing' for purposes of recognition and enforcement under the Convention.[147]

Where a permanent tribunal is created through an international agreement entered into by states such privity between the disputing parties is regularly missing. In regard to the Iran–US Claims Tribunal some national courts initially had problems of enforcing that tribunal's awards because of the lack of 'an agreement in writing' directly between the disputing parties, but seem to have eventually accepted that

143 Article I(1) New York Convention, above n 142. Additionally, it provides that '[i]t shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.'

144 See Th. Rensmann, 'Anational Arbitral Awards: Legal Phenomenon or Academic Phantom', 15(2) Journal of International Arbitration 38 (1998), at 54ff.

145 Therefore, the fear of the European Parliament that the EU 'cannot use' the UNCITRAL arbitration rules since the EU 'as such' was not a member of '[this] organization' was misguided. See Resolution of 6 April 2011 on the future European international investment policy, RP DOC. 2010/2203 (INI), para 33. See also M. Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems', 15 The Journal of World Investment and Trade 551 (2014), at 560.

146 See above text at n 41ff.

147 Article II(1) New York Convention, above n 142 ('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.').

the Algiers Accord[148] 'constitute[d] a written agreement between the nations on their own behalf and on behalf of their nationals'.[149]

Similarly, investment treaty arbitration is not based on direct contractual relations between investors and host states, but rather on dispute settlement provisions contained in BITs or other international investment agreements between sovereign states. In investment arbitration jurisprudence it has become generally accepted that an agreement to arbitrate may be completed by an investor's acceptance of a host state's standing offer contained in an IIA, often through the initiation of arbitral proceedings. This has been referred to as 'arbitration without privity'.[150] That treaty clauses offering arbitration constitute 'agreements in writing' for purposes of the New York Convention has been generally accepted by national courts.[151] In addition, some investment treaties expressly clarify that this is exactly how consent based on treaty clauses should be interpreted.[152]

Similarly, the ICS provisions in CETA, TTIP, and the EU–Vietnam FTA clarify that the offer of consent by a Contracting Party together with its acceptance by an investor through the submission of a claim constitute an 'agreement in writing' for purposes of the New York Convention.[153] Given previous jurisprudence on the matter it would seem unlikely that national courts would not accept this.

C. The existence of a commercial dispute under the New York Convention

As is well known, the New York Convention permits Contracting Parties to make a reservation to the effect that they 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'.[154]

Since investment arbitration often concerns sovereign legislative and/or regulatory activities concern has been voiced whether such disputes can be qualified as

148 See above n 46.

149 *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc. and others*, US District Court (Central District of California), Decision of 14 January 1988, published in Albert J. van den Berg (ed.), *Yearbook Commercial Arbitration*, vol. XIV (1989), 763, at 765. See also *Dallal v Bank Mellat* [1986] 1 QB 441.

150 J. Paulsson, 'Arbitration Without Privity', 10 ICSID Review 232 (1995).

151 See, e.g. *Republic of Ecuador v Occidental Exploration and Production Company*, England, Court of Appeal, 9 September 2005 [2005] EWCA 1116, 12 ICSID Reports 129, at 145, para 32, in which an English court concluded that the BIT Article providing for mixed arbitration must have been 'intended to give rise to a real consensual agreement to arbitrate, even though by a route prescribed in the Treaty'.

152 See, e.g. Article 26(5)(a) Energy Charter Treaty, opened for signature 17 December 1994, entered into force 16 April 1998, 2080 UNTS 95 ('The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for: . . . (ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 [hereinafter referred to as the New York Convention].') See also Article 25(2)(b) US Model BIT 2004 and Article 28(2)(b) Canadian Model BIT 2004.

153 See Article 7(2)(b), section 3, EU's proposal, above n 2 ('The consent under paragraph 1 and the submission of a claim under this Section shall be deemed to satisfy the requirements of: . . . Article II of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards for an "agreement in writing".'); Article 8.25(2)(b) Revised text of CETA, above n 3; Article 10(4)(b), section 3, EU–Vietnam FTA Investment Chapter, above n 1.

154 Article I(3) New York Convention, above n 142.

'commercial disputes' in the sense of the New York Convention. Thus, a number of investment treaties expressly qualify claims that may be brought on the basis of their provisions as 'commercial' in nature.[155] Also the 1985 UNCITRAL Model Law on International Commercial Arbitration[156] contains a broad definition of the notion 'commercial arbitration' which expressly includes a reference to 'investment'.[157]

Also jurisprudence of domestic courts called upon to enforce investment awards suggests that a reservation limiting the application of the New York Convention to 'commercial' disputes should not impede the actual enforcement of investment awards.[158]

VI. CONCLUSION

The proposed ICS raises a number of complex legal issues. While clearly intended to provide a more permanent investor–state dispute settlement forum, replacing the vilified ISA, the 'awards' of the resulting hybrid between a court and an arbitral tribunal risk not being recognized as arbitral awards. As this contribution has shown, however, there are compelling arguments to regard the envisaged modifications as compatible with the ICSID Convention. This would imply that, from a treaty law perspective, the envisaged ICS could be regarded as permissible *inter se* modification of the ICSID Convention pursuant to Article 41 VCLT.

Still, even though the treaty negotiators have carefully attempted to make the resulting ICS awards appear like ICSID awards, it would not ensure that the other ICSID Contracting Parties had to recognize them as ICSID awards enforceable under the specific rules of the ICSID Convention. Permissible *inter se* agreements under general treaty law remain *inter se* agreements, i.e. agreements modifications binding the modifying partners only.

155 See, e.g. Article 1136(7) NAFTA, above n 117 ('A claim that is submitted to arbitration shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the Inter-American Convention.'); Article 26(5)(b) Energy Charter Treaty, above n 152 ('Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.').

156 1985 UNCITRAL Model Law on International Commercial Arbitration, adopted by UNCITRAL on 21 June 1985, and amended by UNCITRAL on 7 July 2006, UN Docs. A/40/17, Annex I and A/61/17, Annex I; available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

157 Article I(1) UNCITRAL Model Law provides that it 'applies to international commercial * * arbitration.' The double asterisk is explained as follows: 'The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.'

158 See, e.g. *United Mexican States v Metalclad*, Canada, Supreme Court of British Columbia, 2 May 2001 [2001] BCSC 664, 5 ICSID Reports 236, 247, para 44; *United Mexican States v Feldman Karpa*, Canada, Ontario Court of Appeal, 11 January 2005, 9 ICSID Reports 508, 516, para 41; *Czech Republic v CME Czech Republic BV*, Sweden, Svea Court of Appeal, 15 May 2003, 9 ICSID Reports 439, 493.

This means that for enforcement purposes it will be crucial that the outcome of ICS proceedings can be qualified as awards under the New York Convention. As a result, one's trust must lie in national courts; that they recognize them as enforceable awards under the New York Convention—which seems plausible though not inescapable. While this risk certainly exists, it seems to this author that the better arguments militate in favour of regarding ICS as a form of arbitration and the outcome of ICS dispute settlement as constituting enforceable awards.