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Beyond the Pledge: The Imperfect Legal Framework for Enforcing Awards of the CETA Investment Court against the European Union

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Leo Butz*

The Comprehensive Economic and Trade Agreement between Canada, the European Union (EU), and its Member States (CETA) envisages a novel Investment Court System to resolve legal disputes between foreign investors and their host states. The CETA investment court aims to respond to the criticism levelled against investment arbitration which has given rise to a serious legitimacy crisis of the current international regime for investment dispute resolution. Even though the EU is intended to play a key role in the dispute resolution proceedings, CETA does not contain a robust legal framework for enforcing awards of the CETA investment court against the EU. This article explores various sources of legal uncertainty that cast doubt on the enforceability of CETA investment awards against the EU and thereby strain the reciprocity of CETA's investment chapter. First, it examines whether awards of the CETA investment can be enforced under the existing international legal framework for the enforcement of arbitral awards, namely the Convention of the International Centre for Settlement of Investment Disputes (ICSID) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Second, it draws out how the Court of Justice of the European Union (CJEU) could interfere with the enforcement of investment awards against the EU before EU domestic courts. The article concludes by outlining several propositions to enhance the legal framework for enforcing awards of the CETA investment court against the EU.

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L'accord économique et commercial global conclu entre le Canada, d'une part, et l'Union européenne (UE) et ses États membres, d'autre part (AECG) prévoit la mise en place d'un nouveau système de tribunaux d'investissement pour résoudre les différends juridiques entre les investisseurs étrangers et leurs États hôtes. Le tribunal d'investissement de l'AECG a pour objectif de répondre aux critiques formulées à l'encontre de l'arbitrage d'investissements, des critiques qui ont donné lieu à une grave crise de légitimité au sein du régime international actuel de règlement des différends en matière d'investissement. Même si l'UE est censée jouer un rôle clé dans les procédures de règlement des différends, l'AECG ne contient pas de cadre juridique rigoureux permettant d'appliquer les décisions du tribunal d'investissement de l'AECG contre l'UE. Cet article étudie diverses sources d'incertitude juridique qui mettent en doute l'applicabilité des sentences d'investissement de l'AECG à l'encontre de l'UE et qui compromettent ainsi la réciprocité du volet sur les investissements de l'AECG. Premièrement, cette étude examine si les sentences de l'AECG peuvent être exécutées en vertu du cadre juridique international existant pour le respect des sentences arbitrales, notamment la Convention du Centre international pour le règlement des différends relatifs aux investissements (CIRDI) et la Convention de New York sur l'arbitrage. Deuxièmement, l'article décrit comment la Cour de justice de l'Union européenne (CJUE) pourrait intervenir dans l'exécution des sentences d'investissement contre l'UE auprès des tribunaux nationaux de l'UE. Finalement, l'article conclut en présentant plusieurs propositions visant à améliorer le cadre juridique pour la mise en œuvre des sentences du tribunal d'investissement de l'AECG contre l'UE.

1. Introduction

The European Union (EU) and its Member States are striving to revamp the international investment dispute resolution regime. In their view, the long-lasting legitimacy crisis of investment arbitration[1] as the dominant mechanism for Investor-State Dispute Settlement (ISDS) will only be defused by establishing a permanent international investment court.[2] As a first step toward the proposed Multilateral Investment Court (MIC),[3] the EU and Canada agreed in the Comprehensive Economic and Trade Agreement (CETA), signed in 2016, to substitute investment arbitration with a novel Investment Court System (ICS).[4] The ICS will be composed of a standing first instance tribunal and an appellate body, both staffed with full-time judges who adjudicate on claims filed by foreign investors against their host states on grounds of alleged breaches of CETA's investment protection standards.[5] Canadian investors in Europe will need to direct their claims against either the EU itself or one of its Member States, depending on the legal responsibility for the disputed treatment.[6]

The adoption of the ICS and the EU's advance into the realm of ISDS mark the advent of a paradigm shift in international investment dispute resolution. Until now, disputes between foreign investors and their host states have usually been settled in front of arbitral tribunals that are constituted for each case and not linked to any form of centralized international legal authority.

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1 See Susan D Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73:4 Fordham L Rev 1521; Won L Kidane, *The Culture of International Arbitration* (New York: Oxford University Press, 2017) at 135–40; Andrea K Bjorklund, "The Legitimacy of the ICSID" in Nienke Grossmann et al, eds, *Legitimacy and International Courts* (Cambridge: Cambridge University Press, 2018) 234 at 242–53 [Bjorklund, "The Legitimacy of ICSID"]; Anil Y Vastardis, "Investment Treaty Arbitration: A justice bubble for the privileged" in Thomas Schultz & Federico Ortino, eds, *The Oxford Handbook of International Arbitration* (Oxford: Oxford University Press, 2020) 617 at 629–40.

2 See European Union, *Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States*, UNCITRAL WG III, 37th sess, UN Doc A/CN.9/WG.III/WP.159/Add.1 (2019) [*Submission from the EU and its Member States*]. The idea of establishing a permanent multilateral investment tribunal is not new, see Maria Fanou, "The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future" (2020) 22 Cambridge YB Eur Leg Stud 106 at 116–18.

3 See EC, *Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes*, [2018] 12981/17 ADD 1; Marc Bungenberg & August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement*, 2nd ed (Berlin: Springer, 2020).

4 *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*, 30 October 2016, ch 8, s F (on 21 September 2017, the agreement entered provisionally into force, except for the investment chapter) [*CETA*].

5 See *ibid*, arts 8.27–8.28.

6 See *ibid*, art 8.21.

This dispute resolution mechanism, however, has given rise to many concerns on the part of states and civil society, which have been collected and systematized by the United Nations Commission on International Trade Law (UNCITRAL) Working Group III as a basis for its deliberations on possible reforms of ISDS.[7] The permanent judicial architecture of the ICS manifestly departs from the idea of assigning investment dispute resolution to temporary arbitral tribunals. Yet, the ICS retains several key elements of investment arbitration. In particular, investors submit their claims to the CETA investment court under the rules of the International Centre for Settlement of Investment Disputes (ICSID) or the UNCITRAL arbitration rules.[8] Accordingly, the investment court does not decide on the claim of an investor by issuing a judgment but renders a final award on monetary compensation.[9] The ICS hence forms a hybrid dispute resolution mechanism that connects a two-tier judicial architecture with the procedural framework of investment arbitration.

In CETA's investment chapter, Canada, the EU, and its Member States have pledged to recognize and comply with final awards that will be rendered against them by the investment court.[10] That said, it can never be ruled out that one of the parties to the agreement will someday violate this pledge by declining to pay an award issued by the investment court in favor of a foreign investor. As state practice demonstrates, the refusal to honor an investment award is an infrequent but still regular occurrence in the realm of international investment dispute resolution.[11] This holds particularly true for large-scale awards that vastly exceed the total value of the foreign investment in the debtor state.[12] In the event that a state refuses to comply with an award, its creditor must first locate seizable assets of the recalcitrant state, then find a domestic court that has jurisdiction over those assets, and eventually enforce the award in front of that court.[13] Canadian and European investors hence require effective legal means for enforcing awards rendered by the CETA investment court. However, the legal framework for

7 See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session* UNCITRAL WG III, 51st sess, UN Doc A/CN.9/930 (2017).

8 See *CETA*, *supra* note 4, art 8.23(2).

9 See *ibid*, art 8.39.

10 See *ibid*, art 8.41(2).

11 See Andrea K Bjorklund, "Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes" (2010) 21 Am Rev Intl Arb 211 at 213; Alan S Alexandroff & Ian A Laird, "Compliance and Enforcement" in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 1171 at 1177–85.

12 See Jacob A Kuipers, "Too Big to Nail: How Investor-State Arbitration Lacks an Appropriate Execution Mechanism for the Largest Awards" (2016) 39:2 Boston College Intl & Comp L Rev 417 at 420–22.

13 See generally Andrea K Bjorklund, "State Immunity and Enforcement of Arbitral Awards" in Christina Binder et al, eds, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009) 302.

enforcing awards of the investment court against the EU is strained by legal uncertainty. This uncertainty derives from the ICS' hybrid design on the one hand and from the EU's participation in the dispute resolution proceedings on the other.

Legal uncertainty as to the enforcement of CETA investment awards against the EU is a serious problem. It may frustrate the efforts of Canadian investors to enforce an award against the EU in front of a domestic court and thereby undermines the reciprocity of CETA's investment protection standards. Moreover, recent clashes of arbitral awards obtained by investors with the EU legal order stoked fears that EU law could be a stumbling block for the enforcement of investment awards in Europe.[14] In the long-running *Micula* saga,[15] for instance, the European Commission directed Romania not to pay an investment award on the ground that the payment would amount to illegal state aid under EU law.[16] Against that background, Canadian investors have reason to worry about the enforceability of investment awards rendered by the CETA investment court against the EU. As a consequence, they might shy away from substantial investments in Europe. Such a reaction would thwart CETA's goal to stimulate mutually beneficial business activity between Canada and the EU.[17] To prevent this scenario from coming true, Canadian investors need clarity about their legal recourse against the EU if the latter refuses to comply with an award rendered by the CETA investment court.

This article aims to shed light on both the international and European legal frameworks for enforcing awards of the CETA investment court against the EU. Clarity over the means of legal redress against the EU is important for the business interests of Canadian investors and the reciprocity of CETA's investment chapter. Furthermore, the analysis of the enforcement framework under CETA provides valuable lessons for the debate on multilateral reform of the ISDS regime. This is because the EU views the ICS as a stepping stone for the transition to the Multilateral Investment Court as a permanent international investment dispute resolution mechanism.[18]

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14 See generally George A Berman, "European Union Law and International Arbitration at a Crossroads" (2019) 42:3 Fordham Intl LJ 967 at 976–79.

15 *European Food SA and Others v European Commission*, T-624/15, T-694/15 and T-704/15, [2019] ECLI:EU:T:2019:423 [*Micula*]. This judgment of the General Court, annulling the Commission's state aid decision, is currently appealed by the Commission before the Court of Justice. In February 2020, the UK Supreme Court lifted a stay of enforcement of the award in the UK, see *Micula and others (Respondents/Cross-Appellants) v Romania (Appellant/Cross-Respondent)*, [2020] UKSC 5.

16 See *Micula*, *ibid* at paras 1–56. The CETA investment chapter introduces specific regulations on the permissibility of subsidies and thereby explicitly carves out the scenario in *Micula*, see *CETA*, *supra* note 4, art 8.9(3), (4).

17 See *CETA*, *supra* note 4, Preamble para 8.

18 See Kyle Dylan Dickson-Smith, "Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model" (2016) 17:5 J World Invt & Trade 773 at 807–09; but see Stephan W Schill, "Authority, Legitimacy, and Fragmentation in the (Envisaged) Dispute

With that in mind, the EU insisted on including the ICS, albeit with slight modifications, in its investment protection agreements with Singapore, Vietnam, and Mexico and additionally convinced these states to espouse its efforts for setting up a MIC on the international scene.[19] The legal and institutional design of the proposed MIC is largely based on the ICS.[20] Thus, the legal framework for enforcing awards of the CETA investment court can serve as a blueprint for the enforcement of decisions by a future MIC.

Section 2 of this article describes the legal regime for investment dispute resolution under CETA. It shows that the EU is intended to play a key role in the dispute resolution process by acting as a respondent in the vast majority of investment disputes. The article's main part examines the legal uncertainties which jeopardize the enforcement of awards rendered by the CETA investment court. In this context, I argue that the EU's predominant position in the dispute resolution proceedings is not complemented by a robust legal framework for enforcing investment awards against the EU. Specifically, two strands of problems cast doubt on the enforceability of CETA investment awards. While the former stems from the linkage of the CETA investment court with the enforcement regime under international investment law, the latter emerges from the specifics of the EU legal order. Following this distinction, section 3 analyzes the legal interplay of the CETA investment court with the two paramount international legal instruments for enforcing investment awards, namely the ICSID Convention[21] and the New York Convention.[22] Section 4 then lays out the relationship of the CETA investment court with EU law and sets out how the Court of Justice of the European Union (CJEU) could interfere with the enforcement of awards against the EU. In section 5, the article concludes by outlining several propositions to enhance the legal framework for enforcing awards of the CETA investment court against the EU.

Settlement Disciplines in Mega-Regionals" in Stefan Griller, Walter Obwexer & Erich Vranes, eds, *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford: Oxford University Press, 2017) 111.

19 See *CETA*, *supra* note 4, art 8.28; *Investment Protection Agreement*, European Union and Singapore, 18 April 2018 at ch 3 s A, art 3.12, online: *Eur-Lex* <eur-lex.europa.eu/resource.html?uri=cellar:55d54e18-42e0-11e8-b5fe-01aa75ed71a1.0002.02/DOC_2&format=PDF#page=29>; *Investment Protection Agreement*, European Union and Viet Nam, October 17, 2018 at ch 3, s B.4, art 3.41, online (pdf): *European Commission* <trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157394.pdf>; *Modernisation of the Trade part of the EU-Mexico Global Agreement Without Prejudice*, European Union and Mexico, 21 April 2018 at s X, art 14, online (pdf): *European Commission* <trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156814.pdf>.

20 See *Submission from the EU and its Member States*, *supra* note 2.

21 *Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) [*ICSID Convention*].

22 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) [*New York Convention*].

2. Investment Dispute Resolution under CETA

The ICS is the EU's policy response to the backlash against investment arbitration and the ongoing legitimacy crisis of ISDS.[23] CETA and its investment chapter are considered a "gold standard" by the EU for modern comprehensive free trade agreements.[24] In 2015, during the negotiations between the EU and the United States (US) over the Transatlantic Trade and Investment Partnership (TTIP), the idea of assigning investment dispute resolution to a permanent two-tier court system surfaced for the first time.[25] Back then, the EU saw itself confronted with broad public and political opposition against both TTIP and CETA. In particular, the parties' choice for investment arbitration as a mechanism for resolving investment disputes sparked controversy.[26] As a response, the EU proposed to replace investment arbitration with the ICS. By establishing a permanent court, the EU hoped it could reduce the resistance against the envisaged trade and investment agreements.[27] This hope was only partially fulfilled: the negotiations over CETA were successfully concluded and the agreement has been provisionally applied since 2017, but the agreement's final ratification continues to face legal and political hurdles in several EU Member States.[28] Most recently, the parliament of Cyprus rejected the agreement in an initial vote on its ratification.[29]

This section introduces the legal regime for investment dispute resolution under CETA by looking at two of its cornerstones: subsection 2.1 outlines the main institutional features of the ICS against the background of the prevalent concerns about investment arbitration. Subsection 2.2 explains the legal mechanism under which the EU assumes the role of a respondent for claims of Canadian investors against their treatment in Europe.

2.1 Institutional Features of the Investment Court System

23 See generally Hannes Lenk, *The EU Investment Court System: A Viable Reform Initiative?* (Göteborg: University of Göteborg, 2019).

24 Joint statement, "Canada-EU Comprehensive Economic and Trade Agreement (CETA)" (29 February 2016), online (pdf): *European Commission* <trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154330.pdf>.

25 See Dickson-Smith, *supra* note 18 at 777–78.

26 See generally David A Gantz, "The CETA Ratification Saga: The Demise of ISDS in EU Trade Agreements?" (2017) 49 Loy U Chicago LJ 361 at 374–78.

27 See *ibid* at 368.

28 See e.g. David Kleiman & Gesa Kübek, "The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15" (2018) 45:1 LIEI 13 at 29–36. Thus far, CETA has been ratified by Canada as well as 15 of the 27 EU Member States. The negotiations over TTIP were terminated by the previous US administration.

29 See Barbara Moens, Giorgio Leali & Eleanor Mears, "Halloumi cheese puts EU's Canada trade deal to the test", *Politico Europe* (4 August 2020), online: *Politico* <www.politico.eu/article/halloumi-cheese-puts-eu-trade-policy-to-the-test/>.

The ICS envisages a two-tier judicial architecture consisting of a first instance investment tribunal and an appellate body.[30] The investment tribunal will have fifteen permanent members who are appointed by the CETA Joint Committee for a five-year term which is renewable once.[31] Among these adjudicators shall be five EU nationals, five nationals of Canada, and five nationals of third countries.[32] To become a member of the investment tribunal, candidates shall have demonstrated expertise in public international law as well as preferably in international investment law and investment dispute resolution.[33] Cases shall be heard by the tribunal in a division of three, consisting of a national of each the EU, Canada, and a third country with the latter chairing the division.[34] The investment tribunal's president is to be drawn by lot from among the members who are third-country nationals[35] and shall appoint the divisions hearing the cases brought by investors on a rotation basis while ensuring that the composition of the divisions is both random and unpredictable.[36]

The ICS' judicial structure aims to respond to several points of criticism that are regularly levelled against investment arbitration.[37] A permanent roster of adjudicators and the assignment of cases to randomly assembled divisions are intended to dispel widespread concerns about the independence and impartiality of investment arbitrators. These concerns derive from the nomination mechanism in temporary tribunals, according to which two of the three arbitrators of a tribunal are appointed by the disputing parties.[38] Critics argue that this mechanism links arbitrators to the vested interests of the appointing parties.[39] By assigning investment cases to a random division of preselected adjudicators, the ICS aims to prevent any potential link between the decision-makers and the parties' interests. Furthermore, investment arbitrators occasionally play multiple roles in different arbitral proceedings, for instance by acting as counsel in another case. This practice, called "doublehatting," may result in an overlap of contrasting responsibilities on the part of arbitrators and hence raises additional concerns about their

30 See *CETA*, *supra* note 4, arts 8.27–8.28.
31 See *ibid*, art 8.27(2), (5).
32 See *ibid*, art 8.27(2).
33 See *ibid*, art 8.27(4).
34 See *ibid*, art 8.27(6).
35 See *ibid*, art 8.27(8).
36 See *ibid*, art 8.27(7).
37 See André von Walter & Maria Luisa Andrisani, "Resolution of Investment Disputes" in Makane Moïse Mbengue & Stefanie Schacherer, eds, *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)*, vol 15 (Cham: Springer, 2019) 185 at 185–206.
38 See *ICSID Convention*, *supra* note 21, art 37(2); see generally Jan Paulsson, "Appointment of Arbitrators" in Thomas Schultz & Federico Ortino, eds, *The Oxford Handbook of International Arbitration* (Oxford: Oxford University Press, 2020) 103.
39 See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session*, UNCITRAL WG III, 51st sess, UN Doc A/CN.9/935 (2018) [*WG III Report on thirty-fifth session*] at para 54.

independence and impartiality.[40] To tackle this issue, CETA imposes strict ethics rules on the members of the investment court and the appellate tribunal which, in the event of a direct or indirect conflict of interest, prohibit a member of the ICS from participating in the consideration of a dispute.[41] Those rules are supplemented by a specific code of conduct for the ICS' adjudicators.[42]

In addition to the concerns about the impartiality and independence of arbitrators, the current investment arbitration regime is strained by a lack of consistency in the decisions of arbitral tribunals.[43] Arbitral decisions can be considered inconsistent when individual tribunals interpret identical investment treaty standards or the same rule of customary international law differently and thereby render decisions that are incompatible with each other. In the absence of any reasonable ground for differentiation, this inconsistency becomes a concern.[44] Closely related but materially distinct from this issue is the alleged lack of correctness of various decisions rendered by investment tribunals.[45] In arbitral decision-making, correctness can be defined as the "correct identification and precise application of applicable law."[46] The legal remedies under the current framework for both inconsistent and incorrect decisions are limited. If the dispute is arbitrated under the rules of the ICSID Convention, the parties are entitled to seek annulment of the award on certain grounds before an ICSID *ad hoc* committee.[47] If the ICSID Convention does not govern the arbitration proceedings, the award can only be challenged in front of a domestic court, either by a vacatur application at the seat of arbitration[48] or by blocking the recognition and enforcement of the award at the place where enforcement is sought.[49]

The introduction of a permanent appellate tribunal under CETA is intended to ensure the consistency and correctness of decisions rendered by the investment court. In the debate on possible reforms of ISDS, the added value of an appeal mechanism entitled to review investment awards has been

40 See Chiara Giorgetti et al, "Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options" (2020) 21:2/3 J World Invt & Trade 441 at 443.

41 *CETA*, *supra* note 4, arts 8.30, 8.28(4).

42 See *ibid*, art 8.44(2); *Decision 001/2021 of the Committee on Services and Investment of 29 January 2021 adopting a code of conduct for Members of the Tribunal, Members of the Appellate Tribunal and mediators*, European Union and Canada, 29 January 2021, online (pdf): *European Commission* <trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159403.pdf>.

43 See generally Julian Arato, Chester Brown & Federico Ortino, "Parsing and Managing Inconsistency in Investor-State Dispute Settlement" (2020) 21:2/3 J World Invt & Trade 336 at 337–39.

44 See *WG III Report on thirty-fifth session*, *supra* note 39 at para 21.

45 See generally Anna De Luca et al, "Responding to Incorrect Decision-Making in Investor-State Dispute Settlement: Policy Options" (2020) 21:2/3 J World Invt & Trade 374 at 375–80.

46 *Ibid* at 378.

47 *ICSID Convention*, *supra* note 21, art 52.

48 See Franck, *supra* note 1 at 1551–54.

49 *New York Convention*, *supra* note 22, art V.

discussed for quite some time.[50] A role model for the ICS appeal mechanism is often seen in the appellate body of the World Trade Organization (WTO).[51] Yet in 2004, the proposed inclusion of an appeals facility in the ICSID regime[52] did not find sufficient support among the contracting parties. The opposition to an appeal mechanism at that time might be explained by reasonable doubts as to whether a multilateral appeal mechanism would be able to increase the consistency of decisions by investment tribunals. These doubts stem from the fact that the decisions of arbitral tribunals are based on individually negotiated investment agreements.[53] Nonetheless, the EU firmly believes that a multilateral appellate body would ensure both a consistent and correct international investment law jurisprudence.[54] The CETA appellate tribunal is the designated precursor of such a multilateral appellate body. The appellate tribunal can review awards rendered by the CETA investment court on grounds of "errors in the application or interpretation of applicable law" as well as on grounds of "manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law."[55] To the extent that they are not already encompassed by the aforementioned grounds,[56] the appellate tribunal can also review awards on the legal grounds for annulling an award prescribed by the ICSID Convention.[57] As is the case with the first instance investment court, the CETA appellate tribunal shall hear cases in divisions of three randomly appointed members.[58] In January 2021, the CETA Joint Committee agreed that the appellate tribunal will have six members out of which two shall be selected from nominations proposed by Canada, two from nominations put forward by the EU, and two from nominations by either of the parties who must not be nationals of Canada or any EU Member State.[59]

In view of its institutional features, the ICS resembles more an international

50 See e.g. Karl P Sauvant, ed, *Appeals Mechanism in International Investment Disputes* (Oxford: Oxford University Press, 2008).

51 See e.g. Dickson-Smith, *supra* note 18 at 799–802, Hannes Lenk, "The EU Investment Court System and Its Resemblance to the WTO Appellate Body" in Szilárd Gáspár-Szilágyi, Daniel Behn & Malcom Langford, eds, *Adjudicating Trade and Investment Disputes* (Cambridge: Cambridge University Press, 2020) 62 at 65.

52 See ICSID Secretariat, "Possible Improvements of the Framework for ICSID Arbitration" (2004) Discussion Paper, online (pdf): *ICSID Secretariat* <icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> [ICSID Secretariat 2004].

53 See Barton Legum, "Options to Establish an Appellate Mechanism for Investment Disputes" in Karl P Sauvant, ed, *Appeals Mechanism in International Investment Disputes* (Oxford: Oxford University Press, 2008) 231 at 235.

54 See *Submission from the EU and its Member States*, *supra* note 2 at paras 43–45.

55 *CETA*, *supra* note 4, art 8.28(2).

56 See *ibid*, art 8.28(3).

57 *ICSID Convention*, *supra* note 21, art 52.

58 See *CETA*, *supra* note 4, art 8.28(5).

59 See *Decision 001/2021 of the CETA Joint Committee setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal*, European Union and Canada, 29 January 2021, art 2, online (pdf): *European Commission* <trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159401.pdf>.

court than an arbitration tribunal. Yet, awards of the CETA investment court are rendered pursuant to the ICSID and UNCITRAL arbitration rules.[60] The investment court therefore operates under the procedural framework of investment arbitration. This hybrid form of investment dispute resolution has been described as "judicialization of ISDS."[61]

2.2 The EU as a Respondent to Claims by Canadian Investors

In 2009, by virtue of the Treaty of Lisbon, the EU gained competence over foreign direct investment.[62] Since then, the European Commission has negotiated and concluded several ambitious investment agreements while simultaneously pushing for multilateral reforms of ISDS on the global stage.[63] The EU's competence for ISDS, however, is only shared with its Member States. Hence international agreements that include provisions on ISDS are "mixed agreements" which require the approval and ratification by each of the 27 EU Member States.[64]

With regard to the dispute resolution process, the shared competence for ISDS implies that both the EU and its Member States are entitled to serve as a respondent to claims lodged by foreign investors. A legal framework to determine whether the EU or one of its Member States shall respond to a claim brought under an investment agreement, to which the EU is a party, is prescribed by the EU regulation on financial responsibility in ISDS.[65] As a general rule, this regulation seeks to align the respondent status in international investment disputes with the financial responsibility for paying the award under EU law. Financial responsibility, in turn, is allocated to the entity which afforded the treatment found to be in breach of an international investment agreement.[66] Accordingly, the Union shall act as a respondent when a foreign investor seeks redress against a treatment that is afforded by institutions, bodies, offices, or agencies of the EU.[67] When a dispute concerns

60 See *CETA*, *supra* note 4, art 8.23(2).

61 See e.g. Angelos Dimopoulos, "EU Investment Agreements: A New Model for the Future" in Julien Chaisse, Leïla Choukroune & Sufian Jusoh, eds, *Handbook of International Investment Law and Policy* (Singapore: Springer, 2020) 1 at 18–20.

62 See EC, *Consolidated Version of the Treaty on the Functioning of the European Union*, [2012] OJ, C 326/47, arts 3(1)(e), 207(1) [*TFEU*].

63 See generally Jan Asmus Bischoff, "Initial Hiccups or More? Efforts of the EU to Find Its Future Role in International Investment Law" in Jean E Kalicki & Anna Joubin-Bret, eds, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Leiden/Boston: Brill Nijhoff, 2015) 531.

64 See *Opinion 2/15 of the Court (Full Court)*, C-2/15, [2017] ECLI:EU:C:2017:376 at para 293.

65 See EC, *Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party*, [2014] OJ, L 257/121 (according to the regulation, the European Commission and the Member States are obliged to pay final awards to claimants, see art 18).

66 See *ibid*, art 7.

67 See *ibid*, art 4.

a treatment that is fully or partially afforded by an EU Member State, the respective Member State shall act as a respondent.[68] To that allocation of the respondent status under EU law, there are two important exceptions. First, the Union may unilaterally decide to assume the role of the respondent when it would bear part of the financial responsibility, when the dispute also concerns treatment afforded by EU bodies or when similar treatment is challenged in a related claim against the Union in the WTO.[69] Second, the Member State whose treatment is being challenged by a foreign investor may decline to act as a respondent and thereby pass on this role to the EU.[70] In light of this internal scheme, it can be expected that the EU, as represented by the European Commission, will act as a respondent in the majority of investment disputes. This is because the EU has far-reaching options to assume the status as respondent unilaterally while the Member States probably will not insist on exercising that laborious role and thus pass it on to the Union.

However, an EU regulation cannot impose a legally binding determination of the respondent on Canadian investors or the CETA investment court. On the contrary, the legal responsibility of the EU and its Member States vis-à-vis foreign investors under an investment agreement is exclusively a subject matter of international law. For the EU and its Member States, that is a latent problem. As Philipp Stegmann has pointed out, the traditional rules of international responsibility are ill-suited to capturing the peculiar form of supranational cooperation within the EU.[71] Precisely for that reason, the CETA and other EU investment agreements contain a specific procedural mechanism that allows the EU and its Member States to internalize the question of international responsibility.[72] If Canadian investors plan to submit a claim to the CETA investment court, they are obliged to notify the EU beforehand and request a determination of the appropriate respondent.[73] In their notification, investors must indicate the measure in respect of which they want to file their claim.[74] Afterward, the EU is required to determine the respondent and inform the investor about its decision within 50 days of the request.[75] In the event that the EU fails to inform the investor within that period, CETA determines the appropriate respondent by default: if the dispute exclusively concerns a measure by a Member State, the Member State shall be the respondent; if the dispute additionally concerns EU

68 See *ibid*, art 5.
69 See *ibid*, art 9(1)(a), (2), (3).
70 See *ibid*, arts 9(1)(b), 6, 8.
71 See Philipp Theodor Stegmann, *Responsibility of the EU and the Member States under EU International Investment Protection Agreements* (Cham: Springer, 2019) at 79–137.
72 See *ibid* at 139–40.
73 See *CETA*, *supra* note 4, art 8.21(1).
74 See *ibid*, art 8.21(2).
75 See *ibid*, art 8.21(3).

measures, the EU shall be the respondent.[76] Under these rules, the EU is even more likely to assume the role as a respondent than under its own internal scheme. In the case of both a determination of the respondent by the EU and a determination by default, the outcome is binding on the CETA investment court and not contestable by the EU or one of its Member States.[77]

The procedural mechanism outlined above is tailor-made for the peculiar structure of the EU. It allows the EU to decide on the appropriate respondent based on its internal legal scheme, which is prescribed by the EU regulation on financial responsibility in ISDS. In doing so, the CETA's provisions align the responsibility for the treatment of Canadian investors pursuant to international law with the responsibility for that treatment under EU law. This procedural mechanism, with roots in the Rhine Conventions between the EU, Switzerland, and the EU Member States bordering the Rhine river, has been accurately termed by Luca Pantaleo as an "internalization model."[78] The unilateral determination of the respondent by the EU is intended to avoid the daunting task of attributing international responsibility for breaches of investment protection agreements to such a complex supranational entity as the EU.[79] The internalization model might not rule out all possible conflicts in the interrelation between EU law and investment agreements such as CETA.[80] Yet, it carves out the necessary leeway for the EU and its Member States to participate in international dispute settlement without overthrowing their internal division of competences. This is because the internalization model essentially transfers the EU's international allocation of responsibility to the level of international investment law. Consequently, the EU's predominant status as a respondent under EU law will also prevail under CETA. In other words, Canadian investors who challenge their treatment in Europe before the CETA investment court will regularly face the European Commission. This outcome of the internalization model underscores the crucial importance of a solid legal framework for enforcing awards of the CETA investment court against the EU.

3. The Interplay between Awards of the CETA Investment Court and the International Enforcement Framework

Since the EU put forward its proposal for the ICS, legal scholarship has mainly focused on the compatibility of the ICS with the requirements of EU law[81]

76 See *ibid*, art 8.21(4).
77 See *ibid*, arts 8.21(6), (7).
78 Luca Pantaleo, *The Participation of the EU in International Dispute Settlement* (The Hague: Asser Press, 2019) at 36–38, 99–139.
79 See *ibid* at 157.
80 See Stegmann, *supra* note 71 at 332–33.
81 See e.g. Szilárd Gáspár-Szilágyi, "A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union" (2016) 17:5 J World Invt & Trade 701; Stefan Mayr, "CETA, TTIP, TiSA, and Their Relationship with EU Law" in Stefan Griller, Walter Ob-

or evaluated the institutional novelties of the ICS in light of the dominant concerns about investment arbitration.[82] Only a few commentators have pointed out that investors could run into problems when they try to enforce an award rendered by the CETA investment court against the EU in front of a domestic court.[83]

CETA envisages that awards rendered by the investment court can be enforced under the established framework for the enforcement of arbitral awards. More specifically, the investment chapter[84] links awards rendered by the CETA investment court to the ICSID Convention[85] and the New York Convention.[86] These two conventions have been signed by more than 150 states and safeguard the recognition and enforcement of (investment) awards before domestic courts.[87] The application of the ICSID Convention, however, presupposes that the respondent is a contracting party to the convention. With respect to the EU, this is not the case. Because the ICSID Convention restricts accession to specific states,[88] the EU is currently not even eligible to join the convention. Therefore, it seems doubtful whether awards of the CETA investment court could be enforced against the EU under the ICSID Convention. In a similar vein, it can be questioned as to whether awards rendered by the CETA investment court are enforceable under the New York Convention. This is because the New York Convention applies exclusively to awards made by either a temporary or a permanent arbitral body.[89] In light

wexer & Erich Vranes, eds, *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford: Oxford University Press, 2017) 246.

82 See e.g. Dickson-Smith, *supra* note 18; Gus Van Harten, "The European Union's Emerging Approach to ISDS: A Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA" (2016) 1:1 U of Bologna L Rev 138; Freya Baetens, "The European Union's Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges" (2016) 43:4 LIEI 367; Elsa Sardinha, "Towards a New Horizon in Investor-State Dispute Settlement? Reflections on the Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA)" (2016) 54 Can YB Intl L 311; Luca Pantaleo, "Investment Disputes under CETA: From Gold Standards to Best Practices?" (2017) 28:2 Eur Bus L Rev 163; Joanna Lam & Güneş Ünüvar, "Transparency and Participatory Aspects of Investor-State Dispute Settlement in the EU 'New Wave' Trade Agreements" (2019) 32:4 Leiden J Intl L 781.

83 See e.g. Baetens, *supra* note 82 at 381–82; Pantaleo, *supra* note 82 at 182–83; Richard Happ & Sebastian Wuschka, "From the Jay Treaty Commissions Towards a Multilateral Investment Court: Addressing the Enforcement Dilemma" (2017) 6:1 Indian J Arb L 113 at 122; Nikos Lavranos, "The ICS and MIC Projects: A Critical Review of the Issues of Arbitrator Selection, Control Mechanisms, and Recognition and Enforcement" in Julien Chaisse, Leïla Choukroune & Sufian Jusoh, eds, *Handbook of International Investment Law and Policy* (Singapore: Springer, 2020) 1 at 15–17; Zareen Qayyum, "The Enforceability of Proposed Reforms to Investor-State Dispute Settlement" (2020) 35:1/2 ICSID Rev 253.

84 See *CETA*, *supra* note 4, art 8.41(5), (6).

85 See *ICSID Convention*, *supra* note 21.

86 See *New York Convention*, *supra* note 22.

87 See generally Susan Choi, "Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions" (1995) 28:1/2 NYUJ Intl L & Pol 175.

88 See *ICSID Convention*, *supra* note 21, art 67.

89 See *New York Convention*, *supra* note 22, art I(2).

of the ICS' judicial architecture, domestic courts, before which enforcement is sought, could refuse to qualify the CETA investment court as a permanent arbitral body.

As Elsa Sardinha notes, CETA "simultaneously continues, yet radically modifies and supplements, long-established arbitral rules with regard to the enforcement and recognition of awards."[90] Against that backdrop, the seamless integration of the CETA investment court into the international legal framework seems far from certain. In fact, the interplay of the CETA investment court with the ICSID and the New York Conventions gives rise to legal uncertainty. Building upon the emerging discussion in investment law literature, this section ascertains the enforceability of awards rendered by the CETA investment court against the EU under both the ICSID Convention and the New York Convention. Subsection 3.1 shows that the enforcement of awards rendered by the CETA investment court against the EU as ICSID awards is legally possible but considerably limited in scope. Subsection 3.2 argues that domestic courts before which enforcement is sought should recognize awards of the CETA investment court as arbitral awards under the New York Convention.

3.1 Relationship between CETA and the ICSID Convention

An arm of the World Bank, ICSID provides the most important institutional venue for the legal settlement of investment disputes to date. One of the vital strengths of the ICSID system is the ICSID Convention's self-contained enforcement regime for awards rendered pursuant to the ICSID arbitration rules. Each contracting state to the convention is legally obliged to recognize an ICSID award as binding and enforce the award's pecuniary obligations within its territories as if it were a final judgment of a court in that state.[91] That said, the ICSID Convention explicitly declares that the contracting states have not waived their sovereign immunity with respect to execution.[92] As per the prevailing restrictive approach to state immunity, state assets are generally immune to enforcement unless they can be deemed merely commercial, which also applies to assets of the EU.[93] Consequently, foreign investors who want to enforce an award against a recalcitrant debtor first need to locate suitable commercial assets of their host state and then seek

90 Elsa Sardinha, "The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement" (2017) 32:3 ICSID Rev 625 at 627.

91 See *ICSID Convention*, *supra* note 21, art 54(1).

92 See *ibid*, art 55. The terms 'execution' and 'enforcement' used in the ICSID Convention are identical in meaning, see Bjorklund, *supra* note 13 at 306.

93 See Bjorklund, *supra* note 13 at 303; Andrea K. Bjorklund, "Enforcement" in Thomas Schultz & Federico Ortino, eds, *The Oxford Handbook of International Arbitration* (Oxford: Oxford University Press, 2020) 186 at 211–14. See also *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004, art 19(c) (not yet in force).

enforcement of their award before a responsible domestic court.[94] The enforcement procedure is governed by the domestic law at the seat of the enforcing court.[95]

If investors submit a claim to the investment court pursuant to the ICSID Convention and its arbitration rules, CETA stipulates that awards rendered by the investment court shall qualify as awards under chapter IV of the ICSID Convention.[96] Yet for awards rendered against the EU, this provision seems to amount to mere fiction. That is because the ICSID Convention only applies to investment disputes between a contracting state and a national of another contracting state.[97] Thus, in order to rely on ICSID's enforcement regime, both the home state and the host state of the claimant must be contracting parties to the ICSID Convention. In contrast to the vast majority of its Member States,[98] the EU itself is not a contracting party to the ICSID Convention. Moreover, under the convention's current wording, the EU is not even eligible to join. The ICSID Convention allows membership only to states which are members of the World Bank or which are parties to the statute of the International Court of Justice.[99] Neither of those prerequisites is fulfilled by the EU. Any amendment to the ICSID Convention requires the ratification of all 155 contracting states.[100] Therefore, opening the ICSID Convention for supranational actors like the EU is immensely cumbersome. Are Canadian investors hence precluded from filing a claim against the EU under the ICSID Convention? This would gravely undermine the reciprocity of CETA's investment dispute resolution regime.

Sardinha has offered two possible explanations for linking CETA awards to the ICSID Convention: either Canada and the EU Member States were anticipating a future amendment of the ICSID Convention that would allow the EU to become a contracting party or they sought to modify the ICSID Convention among themselves in order to permit the enforcement of awards rendered by the CETA investment court as ICSID awards.[101] As of the time of writing, an amendment to the ICSID Convention seems

94 For the role of national courts in the arbitral process see generally Mees Brenninkmeijer & Fabien Gélinas, "Execution Immunities and the Effect of the Arbitration Agreement" (2020) 37:5 J Intl Arb 549 at 564–65.

95 See *ICSID Convention*, *supra* note 21, art 54(3), see also *CETA*, *supra* note 4, art 8.41(4). The enforcement of arbitral awards before domestic courts is an important interface between the arbitral legal order and national legal orders, see Emmanuel Gaillard, "The Arbitral Legal Order: Evolution and recognition" in Thomas Schultz & Federico Ortino, eds, *The Oxford Handbook of International Arbitration* (Oxford: Oxford University Press, 2020) 554.

96 See *CETA*, *supra* note 4, art 8.41(6).

97 See *ICSID Convention*, *supra* note 21, art 25(1).

98 See ICSID, "Member States", online: *ICSID* <icsid.worldbank.org/en/Pages/about/Member-States.aspx>. Among the EU Member States, only Poland is not a contracting state to the ICSID Convention.

99 See *ICSID Convention*, *supra* note 21, art 67.

100 See *ibid*, art 66.

101 Sardinha, *supra* note 90 at 661.

virtually impossible. The current political climate on the world stage makes meaningful multilateralism extremely difficult and has even triggered a trend of de-multilateralization,[102] or at least polarization. It may be precisely for that reason that ICSID in 2018 launched a project for amending its rules and regulations.[103] The ICSID secretariat's final reform proposal intends to allow Regional Economic Integration Organizations (REIO) such as the EU to become a party to fact-finding and mediation proceedings under the auspices of ICSID as well as to participate in disputes under the ICSID additional facility rules.[104] However, the additional facility rules do not include a self-contained enforcement regime as encompassed by the ICSID Convention.[105] Therefore, the current ICSID reform project has no implications for the enforcement of investment awards against the EU. Thus, the only way to make sense of CETA's reference to the ICSID Convention is that Canada and the EU Member States aim to establish an *inter-se* modification of the convention which allows for the enforcement of awards rendered by the investment court as ICSID awards.

In a pioneering article, August Reinisch has explored the prospects of an *inter-se* modification of the ICSID Convention among Canada and those EU Member States that are contracting states to the ICSID Convention.[106] Reinisch accurately points out that an *inter-se* modification of the convention among contracting states ought to be conceptually distinguished from the modification of the ICSID Convention's procedural rules by the parties to a single dispute.[107] As a general rule, *inter-se* modifications of existing international treaties must comply with the criteria set out in the Vienna Convention on the Law of Treaties (VCLT).[108] It must be noted that, from a formal treaty law perspective, the rules of the VCLT cannot be applied to the ICSID Convention. This is because the latter entered into force 24 years before and the VCLT does not exert any retroactive effect.[109] Yet, it is safe to say that the provisions of the VCLT on the interpretation of international treaties reflect international customary law.[110] Therefore, they

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102 See Anne van Aaken & Johann Justus Vasel, "Demultilateralisation: A cognitive psychological perspective" (2019) 25 Eur LJ 487 at 489.

103 See ICSID, "Proposals for Amendment of the ICSID Rules" (2020) ICSID Working Paper #4 Volume 1, online (pdf): *ICSID* <icsid.worldbank.org/en/Documents/WP_4_Vol_1_En.pdf>.

104 See *ibid* at ss V, IX, X.

105 The provisions of the ICSID Convention are explicitly not applicable to proceedings under the additional facility rules, see ICSID, "ICSID Additional Facility Rules" (2006), arts 2, 3, online (pdf): *ICSID* <icsid.worldbank.org/sites/default/files/AFR_2006%20English-final.pdf>.

106 See August Reinisch, "Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration" (2016) 19:4 J Intl Econ L 761.

107 See *ibid* at 772.

108 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [*VCLT*].

109 See *ibid*, art 4.

110 See Reinisch, *supra* note 106 at 771–72.

provide a suitable yardstick for ascertaining the permissibility of an *inter-se* modification of the ICSID Convention among Canada and the EU Member States. According to Article 41 VCLT, two or more parties to a multilateral treaty can modify the treaty between themselves if either the treaty provides for such a modification, or the modification is not prohibited by the treaty.[111] In the case of the latter, the modification additionally must have neither an adverse effect on other parties to the treaty nor relate to a subject matter that is incompatible with the effective execution of the object and purpose of that treaty.[112] The ICSID Convention neither explicitly allows nor prohibits *inter-se* modifications. Consequently, the permissibility of its modification among the parties to CETA depends on whether the intended changes adversely affect the rights of other contracting states and are compatible with the ICSID Convention's object and purpose.

To adjust the ICSID arbitration regime to the characteristics of the investment dispute resolution regime under CETA, the ICSID Convention requires several modifications. Besides treating the EU as a party to the convention, the required modifications primarily relate to the institutional novelties of the ICS compared with traditional ICSID arbitration, namely the permanent roster of adjudicators, the random assignment of cases and the built-in appellate tribunal with its expanded grounds for legal review. These institutional features of the CETA investment court must be accommodated under the ICSID Convention. However, the ICSID Convention's dispute resolution regime represents the archetype of investment arbitration. Therefore, accommodating the ICS under the ICSID Convention would mean a significant modification of the convention's dispute resolution regime. Yet this modification would not curtail the rights of any other, non-modifying, parties to the ICSID Convention. As Reinisch correctly notes, other contracting states which do not participate in the *inter-se* modification can still rely on the traditional arbitration regime provided by the ICSID Convention, also in disputes against modifying parties.[113] Thus, an adverse effect on their right to use the ICSID arbitration regime is not discernable.

Up until this point, the permissibility of an *inter-se* modification of the ICSID Convention among Canada and the EU Member States to allow for the enforcement of awards rendered by the CETA investment court against the EU is fairly uncontroversial. Considerably more contentious is the compatibility of the ICS and its novel institutional features with the object and purpose of the ICSID Convention. In particular, legal scholars are divided as to whether establishing a permanent appellate mechanism under the auspices of the ICSID Convention is compatible with the effective execution of the convention's object and purpose and thereby forms a

111 See *VCLT*, *supra* note 108, art 41.
112 See *ibid*, art 41.
113 See Reinisch, *supra* note 106 at 774.

legitimate subject matter of an *inter-se* modification. This is because an appellate mechanism, vested with expansive grounds for legal review, may undermine the strict enforcement regime stipulated by Article 53(1) of the ICSID Convention, according to which an ICSID award shall not be subject to any appeal or any other remedy except those included in the convention.[114] With respect to its object and purpose, Reinisch argues that the ICSID Convention serves to settle investment disputes by means of arbitration or conciliation.[115] According to him, it is not relevant for achieving that purpose whether the dispute settlement process includes merely a limited annulment procedure[116] or a fully-fledged appellate stage as envisaged by CETA.[117]

By contrast, Jansen Calamita claims that appellate mechanisms are generally incompatible with the ICSID Convention and hence form a prohibited subject matter of an *inter-se* modification.[118] In reaching this conclusion, he relies on a distinctly narrow reading of the ICSID Convention.[119] Even though one might initially be inclined to concede that Article 53(1) of the ICSID Convention does indeed oppose any type of appellate review for ICSID awards, Calamita's position is hard to maintain for at least two different reasons. First, the ICSID Convention does not in fact contain any ground for assuming that a modification of Article 53(1) among certain contracting parties is incompatible with the convention.[120] Second, the author's interpretation fails to take into account the provision's *telos*. The explicit restriction of legal remedies is intended to insulate the enforcement procedure against repeated challenges of the award in front of domestic courts. However, by subjecting CETA investment court awards to an additional appellate review, Canada and the EU do not attempt to obstruct the enforcement procedure. Instead, they deliberately add another layer to the dispute resolution process in order to improve the consistency and correctness of the investment court's jurisprudence.

While Reinisch argues from a teleological standpoint, Calamita stresses the ICSID Convention's language. Considering the VCLT's criteria on the effective execution of the object and purpose of the ICSID Convention, there is a clear superiority of the former line of argument. The ICSID Convention, in essence, aims to provide a robust and effective legal regime for the resolution of investment disputes which the contracting states can offer to their national investors abroad. Whether the ICSID Convention can effectively execute this

114 See *ICSID Convention*, *supra* note 21, art 53(1).
115 See Reinisch, *supra* note 106 at 779.
116 See *ICSID Convention*, *supra* note 21, art 52.
117 See Reinisch, *supra* note 106 at 779–80.
118 See N Jansen Calamita, "The (In)Compatibility of Appellate Mechanism with Existing Instruments of the Investment Treaty Regime" (2017) 18:4 J World Invt & Trade 585 at 604–05, 612.
119 See *ibid* at 605.
120 See *ICSID Convention*, *supra* note 21, art 53(1). See also Albert Jan van den Berg, "Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions" (2019) 34:1 ICSID Rev 156 at 170.

purpose does not merely depend on the velocity and efficiency of the legal proceedings but also on the sociological legitimacy of the dispute resolution regime. This notion of legitimacy depicts states' perceptions of the exercise of international legal authority by dispute settlement bodies.[121] As Andrea Bjorklund has pointed out, states and scholars have raised many types of legitimacy critiques concerning investment arbitration in general and the ICSID regime in particular;[122] a large portion of those critiques is based on the inconsistency and unpredictability of arbitral decision-making.[123] This is because the concerns regarding the consistency and correctness of decisions taken by investment arbitration tribunals, which have been outlined above,[124] undermine the credibility of the dispute resolution process before these tribunals and diminish the acceptance of its outcomes. One might even say that the alleged inconsistency of arbitral decisions along with the concerns about the independence and impartiality of arbitrators challenges the idea that those tribunals restore justice in the relationship between investors and their host states. The widespread concerns about the consistency and correctness of arbitral decision-making hence strain the legitimacy of the ICSID dispute resolution regime. This lack of legitimacy does not overshadow the ICSID Convention's purpose to provide a robust and effective investment dispute resolution regime but rather hampers its execution. Accommodating a permanent appellate tribunal under the ICSID Convention as envisaged by CETA would make a significant contribution to a more consistent investment law jurisprudence, at least within the ambit of the agreement. It would showcase both the flexibility and the adaptability of the ICSID Convention and thereby eventually reinforce the legitimacy of its dispute resolution regime. Consequently, the CETA appellate tribunal is compatible with the object and purpose of the ICSID Convention.[125]

Furthermore, none of the other modifications of the ICSID Convention, which are required to enforce CETA awards against the EU under the ICSID regime, can be deemed incompatible with the Convention's object and purpose. Neither the permanent roster of adjudicators and their random assignment to cases nor CETA's applicable law provisions[126] are irreconcilable with the ICSID Convention's rules for investment dispute resolution.[127] With respect to these rules, the provisions in CETA are simply *leges speciales*. This applies as well to the treatment of the EU as a contracting party. Arguably, expanding the spectrum of possible respondents to claims by Canadian

121 See Bjorklund, *supra* note 1 at 236.
122 See *ibid* at 242–53.
123 See *ibid* at 245–46.
124 See 2.1., *above*.
125 In 2004, ICSID itself considered establishing an appeals facility by means of an *inter-se* modification, see ICSID Secretariat 2004, *supra* note 52, annex at para 2.
126 See *CETA*, *supra* note 4, art 8.31.
127 See Reinisch, *supra* note 106 at 776–78.

investors lodged under the ICSID Convention[128] does not interfere with the ICSID Convention's aim to provide a robust and effective legal regime for investment dispute resolution. On the contrary, the expansion of the pool of possible respondents might be even conducive to that aim. Finally, it cannot be asserted that the EU's treatment as a contracting party is prohibited because it imposes obligations on a third party, considering that it is the EU itself that strives for the status as a respondent in CETA investment disputes.[129] As a result, the *inter-se* modification of the ICSID Convention among Canada and the EU Member States allowing the enforcement of awards rendered by the CETA investment court against the EU under the ICSID regime is permissible.

Yet what is legally permissible is not necessarily practical. The *inter-se* modification of the ICSID Convention among the parties of CETA has an important constraint: the very nature of such a modification restricts the legal effect to the modifying parties. Consequently, awards rendered by the CETA investment court against the EU could be enforced as ICSID awards exclusively within the territories of Canada and the EU Member States which are modifying parties to the ICSID Convention.[130] In other words, EU assets that are located outside of those territories remain untouched from the ICSID Convention's enforcement regime. Thus, when acting multilaterally seems too cumbersome, an *inter-se* modification might be a convenient way to harness an existing multilateral legal framework, but its impact remains inherently limited in scope.

3.2 Enforcement of Investment Court Awards under the New York Convention

Seizable assets of the EU and its Member States, such as property or bank accounts, may be located across the globe. Hence, from the perspective of Canadian investors, awards rendered by the CETA investment court must be enforceable in countries that are not participating in the *inter-se* modification of the ICSID Convention. To provide an efficacious legal instrument for seizing EU assets in third countries, awards of the CETA investment court need to qualify as arbitral awards pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[131] As is the case with the ICSID Convention, the New York Convention establishes an international legal regime for enforcing arbitral awards against their debtors without including a waiver of sovereign immunity with respect to

128 Arguably, treating the EU as a contracting party to ICSID would have the additional effect that Polish investors, as EU nationals, could bring a claim against Canada under the ICSID rules.

129 See 2.2., *above*.

130 As long as the inter-se modification would not encompass treating also Poland as a contracting party, awards rendered against the EU could not be enforced as ICSID awards in Poland.

131 See *New York Convention*, *supra* note 22.

execution.[132] Residual enforcement of ICSID awards under the New York Convention is generally possible.[133]

CETA declares that awards of the investment court are "deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of [...] the New York Convention."[134] This prescription, however, is not binding on domestic courts in third countries. On the contrary, domestic courts must themselves examine whether awards rendered by the CETA investment court can be enforced under the New York Convention. The New York Convention applies to arbitral awards made in the territory of a state other than the one in which the enforcement is sought.[135] Additionally, it applies to awards that are not considered domestic awards in the state where enforcement is sought.[136] Whether an award is considered domestic or not is determined by the law of the state in which enforcement is sought.[137] Awards that are not made under domestic law, often termed a-national awards, are nowadays generally considered to be enforceable under the New York Convention.[138] Yet, domestic courts at the seat of the CETA investment court might qualify an award by the investment court as a domestic award. If this were the case, CETA awards could not be enforced under the New York Convention at the seat of the investment court. Against this background, it seems advisable to establish the CETA investment court either in Canada or in an EU Member State which is a party to the ICSID Convention. Thereby, awards of the CETA investment court could be enforced at the investment court's seat under the ICSID Convention.

Moreover, the New York Convention applies only to awards that arise out of a dispute between physical or legal persons.[139] As states and the EU are legal persons,[140] this criterion does not pose any obstacle to the enforcement of awards rendered by the CETA investment court. By contrast,

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132 See Jieying Ding, "Enforcement in International Investment and Trade Law: History, Assessment, and Proposed Solutions" (2016) 47:3 Geo J Intl L 1137 at 1145–47. Brenninkmeijer & Gélinas, *supra* note 94 at 577–88 argue for interpreting the states' consent to arbitration as an implied waiver of immunity from execution.

133 See van den Berg, *supra* note 120 at 181–82.

134 *CETA*, *supra* note 4, art 8.41(5). States can restrict the application of the New York Convention to disputes arising from legal relationships which are considered as commercial under domestic law, see *New York Convention*, *supra* note 22, art I(3).

135 See *New York Convention*, *supra* note 22, art I(1).

136 See *ibid*.

137 See Hans Bagner, "Article 1" in Herbert Gronke et al, eds, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Alphen aan den Rijn: Kluwer Law International, 2010) 19 at 24.

138 See Gabrielle Kaufmann-Kohler & Michele 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), online (pdf): *CIDS* <www.cids.ch/images/Documents/CIDS_First_Report_ISDS_2015.pdf> at paras 156–57.

139 See *New York Convention*, *supra* note 22, art I(1).

140 See Bagner, *supra* note 137 at 26; for the EU see *TFEU*, *supra* note 62, art 47 which states that the Union shall have legal personality.

it is considerably more difficult to assess whether awards of the investment court qualify as "arbitral awards." This is because the judicial architecture of the ICS manifestly deviates from the traditional idea of arbitration.[141] Hence, domestic courts in third countries may regard awards of the CETA investment court not as *arbitral* awards pursuant to the New York Convention. However, the convention prescribes that the term 'arbitral awards' shall include not only awards rendered by arbitrators appointed for each case but also awards rendered by permanent arbitral bodies to which the parties have submitted.[142] Canada and the EU have expressly consented to the settlement of disputes by the CETA investment court.[143] Thus, it is pivotal whether the investment court is captured by the New York Convention's notion of a permanent arbitral body. For clarifying the status of the CETA investment court as such a permanent arbitral body, a recommended interpretation to that effect by UNCITRAL would certainly be the most effective instrument.[144] Recommended interpretations of this kind have been already issued in the past.[145] Even though such recommendations are not legally binding for domestic courts, they can provide an important orientation to courts deciding whether to enforce an award under the New York Convention.

In any event, national courts must carry out their own assessment as to whether the CETA investment court can be regarded as a permanent arbitral tribunal. Historically, permanent arbitral bodies formed a special feature of the Union of Soviet Socialist Republics (USSR).[146] In recent times, the notion of permanent arbitral bodies gained importance in connection with the Iran-US Claims Tribunal. This peculiar dispute settlement body was established in 1981, following the Iranian revolution, to resolve claims by US and Iranian nationals against the other state as well as claims between the two state parties.[147] In terms of its purpose and structure, the Iran-US Claims Tribunal builds upon the tradition of mixed claims commissions. These commissions are instituted after the events giving rise to legal claims among the parties that have already occurred and consist of nationals of both disputing states.[148] Against the background of a broad scholarly discussion about its "nature,"[149] US courts have recognized the Iran-US Claims

141 See 2.1., *above*.
142 See *New York Convention*, *supra* note 22, art I(2).
143 See *CETA*, *supra* note 4, art 8.25.
144 See Kaufmann-Kohler & Potestà, *supra* note 138 at para 155.
145 See *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, done in New York, 10 June 1958*, UNCITRAL GAOR, 61st Sess, Supplement No 17, Annex II, UN Doc A/61/17 (2006).
146 See Bagner, *supra* note 137 at 21.
147 See *ibid* at 30.
148 See Andrea K Bjorklund, "Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims" (2005) 45:4 Va J Intl L 809 at 827.
149 See David D Caron, "The Nature of the Iran-United States Claims Tribunal and the Evolving

Tribunal as a permanent arbitral body within the meaning of the New York Convention.[150] Accordingly, the tribunal has been heralded as the "most significant arbitral body in history."[151] Many commentators have compared the CETA investment court with the Iran-US Claim Tribunal and argued on this ground for recognizing the CETA investment court as a permanent arbitral body under the New York Convention.[152]

However, due to its retrospective angle, the Iran-US Claim Tribunal cannot be equated with the CETA investment court. The tribunal's jurisdiction only covers claims that were outstanding on the date of the agreement which established the tribunal.[153] By contrast, the CETA investment court is instituted to hear every potential future claim that arises from a breach of the investment chapter.[154] Thus, analogous to the offer to arbitrate in a bilateral investment treaty (BIT),[155] the investment dispute resolution regime under CETA is characterized by a prospective trajectory. In this respect, the ICS is not at all different from conventional investment arbitration. This fundamental difference in perspective renders the popular comparison of the CETA investment court with the Iran-US Claims Tribunal ill-conceived.

The lack of comparability between the CETA investment court and the Iran-US Claims Tribunal does not prevent the CETA investment court from falling under the New York Convention's notion of a permanent arbitral body. Aside from the Iran-US Claims Tribunal, several permanent arbitral institutions have been qualified by domestic courts as permanent arbitral bodies pursuant to the New York Convention, for instance, the International Court of Arbitration and the Singapore International Arbitral Centre.[156] The common feature of those institutions is their unequivocal commitment to the realm of arbitration. As the analysis of its institutional features has shown,[157] the CETA investment court, by comparison, is wavering between a permanent arbitral tribunal and an international court.

Despite many inter-sections, arbitration is traditionally contrasted with the domain of adjudication.[158] While the former is a mode of private

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Structure of International Dispute Resolution" (1990) 84:1 AJIL 104.

150 See Bagner, *supra* note 137 at 30–31.

151 *Ibid.*

152 See Pantaleo, *supra* note 82 at 183; Reinisch, *supra* note 106 at 783–84; Calamita, *supra* note 118 at 620–21.

153 See *Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria* in the *Algiers Accords*, 19 January 1981, 20 ILM 223, art 2.

154 See *CETA*, *supra* note 4, art 8.18.

155 See Bjorklund, *supra* note 148 at 830.

156 See UN, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 2016 ed (New York: UN, 1958) at para 68.

157 See 2.1., *above*.

158 See Ralf Michaels, "International Arbitration as Private and Public Good" in Thomas Schultz & Federico Ortino, eds, *The Oxford Handbook of International Arbitration* (Oxford: Oxford University Press, 2020) 398 at 398–401.

dispute resolution, the latter is administered by the state and hence belongs to the public sphere.[159] With regard to investor-state arbitration, the categorization along that dichotomy is more complex.[160] Considering the hybrid legal structure of the CETA investment court, it is even more intricate to differentiate between private arbitration on the one hand and public adjudication on the other. Nonetheless, it can be argued that the CETA investment court forms part of the realm of arbitration. This is because the investment court is a neutral dispute resolution forum created by equal partners for certain types of disputes in accordance with their individual preferences. Put differently, the court is a customized dispute resolution mechanism that primarily serves the interests of its parties. Thus, notwithstanding its name, the CETA investment court is considerably more similar to an arbitral tribunal than to a public court.

The CETA investment court should be viewed as a private dispute resolution mechanism. Rather than striving for the consistent development of international investment law, the court is responsible for upholding justice between the parties to CETA.[161] If it fails to deliver on that promise, the parties have the chance to intervene in the court's performance by adopting binding notes of interpretation in the CETA Joint Committee.[162] An intervention of this kind would be unthinkable in the sphere of litigation. Despite its judicial features, the CETA investment court hence belongs to the realm of arbitration. Therefore, domestic courts should recognize awards of the CETA investment court as arbitral awards rendered by a permanent arbitral body pursuant to the New York Convention.

4. Possible Interferences by the Court of Justice of the EU in the Enforcement of CETA Investment Awards

In the context of the EU's aspirations to participate in international dispute settlement, the CJEU has often been accused of being a "jealous court."[163] This characterization derives from the CJEU's repeated opposition against international agreements that sought to subject the EU and its legal system to the jurisdiction of international courts and dispute settlement bodies.[164] In this respect, the CJEU regularly complained that the envisaged

159 See *ibid*.

160 See *ibid*. See also José E Alvarez, "Is Investor-State Arbitration 'Public'?" (2016) 7:3 J Intl Dispute Settlement 534.

161 See Andrea K Bjorklund & Jonathan Brosseau, "L'accord commercial entre le Canada et l'Union européenne prévoit-il une résolution des différends par arbitrage ou règlement judiciaire?" (2018) 31:1 RQDI 1.

162 See *CETA*, *supra* note 4, art 8.31(3).

163 See e.g. Paul Gragl, "The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR" in Wolfgang Benedek et al, eds, *European Yearbook on Human Rights* (Vienna: Neuer Wissenschaftlicher Verlag, 2015) 27; Steffen Hindelang, "Repellent Forces: The CJEU and Investor-State Dispute Settlement" (2015) 53:1 Archiv des Völkerrechts 68.

164 See *Opinion 1/09 of the Court*, C-1/09, [2011] ECR I-01137 ECLI:EU:C:2011:123; *Opinion 2/13*

dispute resolution mechanisms were not designed in a way that allows them to take sufficient account of the autonomy of the EU legal order. The autonomy principle vests the CJEU with an unassailable monopoly over the interpretation of EU law. Yet with respect to the CETA investment court, the CJEU found in April 2019 that the ICS complies with the requirements of EU law.[165] This opinion departs, to some extent, from the CJEU's previous case law and has been harshly criticized by many scholars.[166] The CJEU's deferential ruling on the CETA investment court is indeed hardly convincing and entails important caveats. These caveats could give rise to a judicial conflict of the CETA investment court with the CJEU at the stage of enforcement.

This section explores EU law as the second source of uncertainty straining the legal framework for enforcing awards of the CETA investment court against the EU. Specifically, it examines whether the CJEU could interfere with the enforcement of an award rendered by the CETA investment court against the EU. Subsection 4.1 looks at the CJEU's opinion on the ICS and draws out the Court's safeguards for preserving the autonomy of the EU legal order, including their caveats. Subsection 4.2 demonstrates how the requirements of EU law can prompt an additional layer of proceedings that would ultimately stall the enforcement of a CETA award against the EU.

4.1 Safeguards for the Autonomy of the EU Legal Order

Recently, considerable tension has built up between the EU legal order and international investment arbitration.[167] In 2018 the CJEU ruled in the *Achmea* case that investor-state arbitration under a bilateral investment treaty between two EU Member States exerts an adverse effect on the

of the Court, C-2/13, [2014] ECLI:EU:C:2014:2454.

165 See *Opinion 1/17 of the Court*, C-1/17, [2019] ECLI:EU:C:2019:341 [*Opinion 1/17*]. The CJEU can issue an opinion as to whether an international agreement is compatible with the European Treaties. If the Court denies the compatibility, the envisaged agreement may not enter into force unless it is amended or the Treaties are revised, see *TFEU*, *supra* note 62, art 218(11).

166 See e.g. Francisco de Abreu Duarte, "'But the Last Word Is Ours': The Monopoly of Jurisdiction of the Court of Justice of the European Union in Light of the Investment Court System" (2019) 30:4 Eur J Intl L 1187 at 1209–19; Simas Grigonis, "Investment Court System of CETA: Adverse Effects on the Autonomy of EU Law and Possible Solutions" (2019) 5:2 Intl Comparative Jurisprudence 127 at 129–34; Steffen Hindelang, "The Price for a Seat at the ISDS Reform Table: CJEU's clearance of the EU's investment protection policy in Opinion 1/17 and its impact on the EU constitutional order" in Andrea Biondi & Giorgia Sangiuolo, eds, *Judicial Protection and EU Free Trade Agreements* (Edward Elgar Publishing, forthcoming); Giulia C Leonelli, "CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test" (2020) 47:1 LIEI 43; Leszek Bozek & Grzegorz Żmij, "On the CETA's compatibility with European Union law in light of Opinion No 1/17 of the Court of Justice of 30 April 2019" (2020) 6 Zeitschrift für Europarecht Int Privatrecht und Rechtsvergleichung 248.

167 See generally Luke Tattersall, "Challenges to International Investment Law Within the European Union" in Bungenberg et al, eds, *European Yearbook of International Economic Law 2019* (Cham: Springer, 2020) 315.

autonomy of the EU legal order and is thus incompatible with EU law.[168] The court's main argument in this ruling was that because of the wording of the BIT's applicable law clause, an investment tribunal established pursuant to that treaty may be called on to interpret EU law even though is it located outside of the EU's judicial system and therefore not entitled to refer a question on the interpretation of EU law to the CJEU.[169] Following the judgment, 23 of the 27 EU Member States recently signed an agreement to terminate their intra-EU BITs.[170]

As per the CJEU's case law, the EU legal order emerging from the European treaties gives rise to an independent legal system that is autonomous from both domestic and international law.[171] In its opinion on the CETA investment court, the CJEU developed a twofold approach to the autonomy principle. At the outset, the Court reaffirmed its jurisprudence according to which international agreements that establish an international dispute settlement body with binding jurisdiction over the EU are permitted by EU law as long as that they do not affect the autonomy of the EU legal order.[172] Then, the CJEU set forth two distinct safeguards which must be complied with to preserve the autonomy of the EU legal order. First, the ICS must not possess the competence to interpret any other provisions of EU law than those of CETA.[173] In this regard, it should be noted that the CJEU considers international agreements entered into by the EU as an integral part of EU law.[174] Second, the jurisprudence of the ICS must not prevent EU institutions from operating in accordance with their constitutional framework pursuant to EU law.[175]

The CJEU opined that the ICS, as envisaged under CETA, is in line with those requirements.[176] The clause on the applicable law in investment disputes under CETA merely allows the investment court to consider the domestic law of a party, including EU law, "as a matter of fact."[177] Additionally, the applicable law clause obliges the investment court to follow the prevailing interpretation of domestic law by the national courts of the respective party and stipulates that the consideration of domestic law by the

168 *Slowakische Republik v Achmea BV*, C-284/16, [2018] ECLI:EU:C:2018:158 [*Achmea*].
169 See *ibid* at paras 40–49.
170 See *Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union*, 29 May 2020, online: *European Commission* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A0529(01)&from=EN.>
171 See *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, C-26/62, [1963] ECLI:EU:C:1963:1 ECR I-2 at I-12; *Opinion 1/17*, *supra* note 165 at para 109.
172 See *Opinion 1/17*, *supra* note 165 at paras 106–07.
173 See *ibid* at paras 118–19.
174 See *ibid* at para 117.
175 See *ibid*.
176 See *ibid* at paras 120–61.
177 *CETA*, *supra* note 4, art 8.31(2).

investment court has no binding effect on national courts and authorities.[178] Hence, the CETA investment court can apply EU law only "as a matter of fact," is required to follow the interpretation of EU law by the CJEU, and cannot itself render any binding interpretations of EU law.[179] This setting of the investment court's relationship with EU law persuaded the CJEU. Accordingly, the CJEU found that the investment court's interpretative power would be indeed confined to the provisions of CETA.[180] Similarly, the CJEU held that the investment court would not be entitled to "call into question the level of protection of public interest determined by the Union following a democratic process."[181] If the ICS could issue awards finding that the level of protection of public interest established by a measure of EU law is in breach of the investment protection standards under CETA, the EU would be forced to downscale its level of protection of public interest.[182] In turn, the CETA investment court would curtail the EU's power to legislate in accordance with its own constitutional and democratic framework and eventually impinge on the EU's autonomy.[183] The CJEU, however, infers from the right to regulate which has been enshrined in CETA[184] that the investment court has no jurisdiction to declare the level of protection of public interest under EU law as incompatible with CETA's investment protection standards.[185] Consequently, the CJEU concluded that the ICS does not infringe on the autonomy of the EU legal order.[186]

Irrespective of the opinion's positive outcome, the CETA investment court did not receive a *carte blanche* from the CJEU. On the contrary, the CJEU's opinion contains two important caveats. First, the CJEU based its ruling on the assumption that the consideration of EU law "as a matter of fact" cannot lead to any mismatches between its own interpretation of EU law and the jurisprudence of the investment court.[187] Yet, it seems not at all clear what the consideration of law "as a matter of fact" is supposed to mean in practice. Some commentators tend to describe this clause as having more political than legal significance.[188] Others emphasize that it restricts the consideration of EU law by the CETA investment court to

178 See *ibid*.
179 *Opinion 1/17*, *supra* note 165 at paras 130–33.
180 See *ibid* at para 122.
181 *Ibid* at para 156.
182 See *ibid* at para 149.
183 See *ibid* at paras 150–51.
184 See *CETA*, *supra* note 4, art 28.3(2).
185 See *Opinion 1/17*, *supra* note 165 at paras 152–53.
186 See *ibid* at para 161.
187 See *ibid* at paras 130–36.
188 See Jarrod Hepburn, "CETA's New Domestic Law Clause" (17 March 2016), online (blog): *EJIL:Talk! Blog of the European Journal of International Law* <www.ejiltalk.org/cetas-new-domestic-law-clause/>; Dafina Atanosova, "Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?" (2019) 10:3 J Intl Dispute Settlement 396 at 416.

a mere 'examination' as opposed to its interpretation.[189] But does not any consideration of law necessarily entail some form of interpretation, at least implicitly? In order to avoid judicial conflicts with the CJEU, it will be crucial that the CETA investment court adheres to the interpretation of EU law by the CJEU. But what if the investment court bases an award on an erroneous understanding of the CJEU's case law? What if there is not yet an established interpretation of a provision of EU law that is factually relevant for the investment court's decision? Within the EU's judicial system, the preliminary ruling procedure provides a legal remedy for those situations.[190] Under that procedure, national courts of the EU Member States that must decide in a case involving a question of EU law are entitled to suspend the domestic proceedings and refer the question to the CJEU. Yet, as set out above, the CETA investment court is located outside of the EU's judicial system and hence not entitled to make use of the preliminary ruling procedure.[191] The CJEU found in its opinion that the investment court's lack of entitlement to request a preliminary ruling would be consistent since the interpretative power of the investment court is confined to the provisions of CETA. This reasoning appears to be not only formalistic[192] but also somewhat circular.

Second, the CJEU's position that the CETA investment court is not entitled to call into question the level of protection of public interest established by EU law[193] is hard to maintain. The right to regulate, on which the CJEU has grounded this position, forms a substantive response by Canada and the EU to the legitimacy crisis of ISDS.[194] Yet, that right does not come without limitations: CETA prescribes that, with respect to the investment chapter's sections B (establishment of investments) and C (non-discriminatory treatment), nothing shall prevent the parties from adopting or enforcing measures that are necessary to protect public interests such as public security or public health.[195] This clause applies "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services."[196] Consequently, EU measures that protect public interests must be necessary and applied in a non-discriminatory manner. These material limitations of the right to regulate impose meaningful constraints on the EU's power to regulate in accordance with CETA's investment protection

189 See Fanou, *supra* note 2 at 123–24.
190 See *TFEU*, *supra* note 62, art 267.
191 See *Opinion 1/17*, *supra* note 165 at para 134.
192 See Leonelli, *supra* note 166 at 47–52.
193 See *Opinion 1/17*, *supra* note 165 at paras 152–53.
194 See generally Catharine Titi, "The Right to Regulate" in Makane Moïse Mbengue & Stefanie Schacherer, eds, *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)*, vol 15 (Cham: Springer, 2019) 159 at 159.
195 See *CETA*, *supra* note 4, art 28.3(2).
196 *Ibid*.

standards. Canadian investors could argue, for instance, that a measure adopted by the EU is not necessary or discriminatory and the CETA investment court would need to investigate those claims.[197] Furthermore, the general exception clause outlined above does not apply to section D of CETA's investment chapter which stipulates the core rules on investment protection. In respect of this section, Canada and the EU merely reaffirm their mutual right to regulate and set out interpretative guidelines for the investment court.[198] Arguably, the protection of public interest under those declaratory provisions is significantly weaker than under the general exception clause. Against that background, the CJEU's position that the CETA investment court could not call into question the level of protection of public interest as established by EU law seems, at best, optimistic.

4.2 Judicial Challenges at the Stage of Enforcement

The caveats in the CJEU's opinion bear the potential to trigger a judicial conflict at the stage of enforcement. Domestic courts before which enforcement is sought can be encouraged to challenge the compatibility of an award rendered by the CETA investment court with EU law by seeking a preliminary ruling of the CJEU on the relevant interpretation of EU law.[199] References by domestic courts to the CJEU present a particular risk for awards rendered pursuant to the ICSID Convention. This is because those awards must be treated by the contracting parties as a final judgment of a court in that state.[200] However, the Treaty on the Functioning of the European Union (TFEU) requires EU domestic courts whose decisions cannot be challenged by a judicial remedy under national law to bring matters of EU law that are relevant for its final decision before the CJEU.[201] Thus, an EU domestic court that faces a question of EU law related to the enforcement of an ICSID award is obliged by EU law to halt the enforcement proceedings and request a preliminary ruling of the CJEU.

An additional layer of legal proceedings for the enforcement of awards against the EU (or one of its Member States) runs contrary to CETA's regime for investment dispute resolution. The agreement envisages a two-tier investment dispute resolution procedure in which the appellate tribunal is the only instance of legal review. If an award has passed that stage, it ought not to be subject to any additional scrutiny before the CJEU. As Steffen Hindelang correctly notes, this would result in a residual control of the CETA

197 See also Leonelli, *supra* note 166 at 54–56.
198 See *CETA*, *supra* note 4, art 8.9(1), (2).
199 In enforcement proceedings under the New York Convention, the debtor of an award could argue that the award of the investment court impinges on EU public policy, see Fanou, *supra* note 2 at 128; *New York Convention*, *supra* note 22, art V(2)(b).
200 See *ICSID Convention*, *supra* note 21, art 54(1).
201 See *TFEU*, *supra* note 62, art 267.

investment court by the CJEU.[202] Angelos Dimopoulos goes even further and reads the CJEU's opinion as a warning to the CETA investment court that if it ignores the requirements of EU law, its awards will be annulled by the CJEU which would thereby assume a "hegemonic role."[203] This setting casts a shadow of uncertainty over the enforceability of CETA investment awards against the EU and thereby poses a serious threat to the reciprocity of CETA's investment chapter.

A judicial challenge of awards rendered by the CETA investment court before the CJEU can arise not only from the caveats in the CJEU's opinion on the ICS. The TFEU's protocol on the privileges and immunities of the EU declares that the "property and assets of the Union shall not be the subject of any administrative or legal measure of constraint without the authorization of the Court of Justice."[204] The relationship between this precept of EU law and the framework for enforcing awards of the CETA investment court is a veritable legal conundrum. As it seems, the CJEU must sign off on any enforcement procedure within the EU.[205] Accordingly, EU domestic courts would be required to obtain prior approval of the CJEU before they can enforce an award of the CETA investment court against EU assets. This would strain the reciprocity of CETA's investment chapter even further.

Essentially, there are two options to cope with that conundrum. First, the EU Member States could amend the provision in the TFEU's protocol to allow EU domestic courts to enforce awards against EU assets without prior approval of the CJEU. Second, one could read the provision in the protocol as establishing an exclusive jurisdiction of the CJEU over assets of the EU located in the territory of the EU Member States. As per this reading, the CJEU would be the only responsible court in the EU to enforce awards against EU assets. Creditors of an award of the CETA investment court would thus need to seek enforcement directly in front of the CJEU. This raises the question of whether the ICSID and the New York Conventions could apply in enforcement proceedings before the CJEU. Even though the EU is not a contracting party to either of those conventions, their application in enforcement proceedings before the CJEU is indeed conceivable. As this article has shown,[206] by means of an *inter-se* modification of the ICSID Convention, Canada, and the EU Member States can treat the EU as a contracting party to the ICSID Convention within the ambit of CETA. Arguably, this modification would automatically render the ICSID Convention applicable in enforcement proceedings against the EU before

202 See Hindelang, *supra* note 166; see also Gesa Kübek, "Autonomy and International Investment Agreements after *Opinion 1/17*" (2020) 4:1 Europe & World: A L Rev 1 at 11–12 who compares this situation with the *Solange* rulings of the German Federal Constitutional Court.

203 Dimopoulos, *supra* note 61 at 9.

204 *TFEU*, *supra* note 62, Protocol (no. 7) on the Privileges and Immunities of the European Union, art 1.

205 See Bjorklund, *supra* note 93 at 214.

206 See 3.1., *above*.

the CJEU. Likewise, Canada and the EU Member States could modify the New York Convention to allow for the treatment of the EU as a contracting party and thereby render it applicable in enforcement proceedings before the CJEU.[207] Thus, enforcing CETA investment awards against the EU before the CJEU under the ICSID and New York Conventions does not appear to be beyond the realm of imagination.

5. Conclusion

The EU's pledge to comply with awards rendered by the CETA investment court is worth only as much as it can be enforced. As the examination of the legal framework for enforcing awards against the EU has shown, three sets of problems crop up if Canadian investors attempt to enforce an award against the EU. First, enforcing a CETA award against the EU under the ICSID regime requires an *inter-se* modification of the ICSID Convention among Canada and the EU Member States that are contracting parties to the convention. Second, to enforce awards of the investment court under the New York Convention, domestic courts must qualify the awards rendered by the CETA investment court as *arbitral* awards. Third, EU domestic courts might stall the enforcement of CETA awards by requesting a preliminary ruling of the CJEU on the compatibility of the award with EU law. These problems expose serious gaps in the enforcement framework which undermine the reciprocity of CETA's investment chapter to the detriment of Canadian investors. Consequently, the legal framework for enforcing awards of the CETA investment court against the EU suffers from imperfection.

The gaps in the legal framework for enforcing investment awards against the EU can be explained by the fact that the EU is slowly but steadily advancing into a field of international law that has been hitherto dominated by states. Accordingly, the international legal framework for enforcing (investment) awards is predominantly geared toward states and not tailored to the EU as a unique supranational actor on the global scene. It is precisely for this reason that the EU strives to revamp international investment dispute resolution not only in bilateral investment agreements but also at the multilateral level. Yet, a future MIC that is modelled after the ICS would face the same problems as the CETA investment court related to the interplay of awards with the ICSID and New York Conventions[208] and possible interferences by the CJEU at the stage of enforcement. Thus far, the EU has not proposed any solution to those problems. When it comes to a MIC, it seems indeed advisable to seek a multilateral agreement on

207 Same as the ICSID Convention, the New York Convention restricts membership to states, see *New York Convention*, *supra* note 22, arts VIII(1), IX(1).

208 See Kaufmann-Kohler & Potestà, *supra* note 138 at paras 138–44; UNCITRAL Secretariat, *Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues*, UNCITRALWG III, 40th sess, UN Doc A/CN.9/WG.III/WP.202 (2020).

enforcement.[209] For the CETA investment court, by contrast, this is not a viable path. Negotiating an enforcement instrument exclusively for the ICS under CETA is disproportionately cumbersome and, considering the agreement's references to the ICSID and New York Conventions, not in line with the intention of the contracting parties.

To ensure the enforcement of CETA investment awards against the EU, the current legal framework should be clarified and complemented. First, Canada and the EU Member States should officially proclaim an *inter-se* modification of the ICSID Convention to allow for the enforcement of CETA investment awards under the ICSID regime. This can and should be done by notifying the other contracting parties to the ICSID Convention on the adopted modifications, as prescribed by the VCLT.[210] Second, the parties need to clarify that final awards of the investment court are deemed to be awards rendered by a permanent arbitral tribunal within the meaning of the New York Convention, either by a joint declaration of the parties to CETA or, in the best case, by a note on the recommended interpretation of the New York Convention issued by UNCITRAL. Third and last, Canada should urge the EU and its Member States to ensure that the enforcement of CETA awards in the EU will not be stalled by requests for a preliminary ruling to the CJEU. To that end, it seems worthwhile exploring whether the jurisdiction over EU assets located in the territory of the EU Member States could be exclusively conferred to the CJEU. This would be an important step toward restoring the reciprocity of CETA's investment dispute resolution regime.

209 See e.g. Lavranos, *supra* note 83 at 17; Qayyum, *supra* note 83 at 272–78.
210 See *VCLT*, *supra* note 108, art 41(2).