



# International Investment Arbitration in the European Union<sup>1</sup>

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**Abstract.** The author analyses the regulation of institutional arbitration under investor–state dispute settlement mechanisms, with an emphasis on such arrangements to which the European Union is a party. The functioning of the EU’s Investment Court System is presented in detail as a major reform to the status quo, along with some questions raised when qualifying this system as a means of arbitration, especially for the purposes of recognition and enforcement of decisions rendered, both in jurisdictions party to the Comprehensive Economic and Trade Agreement between Canada and the European Union and third countries. The latter problem is identified as a significant aspect of international investment arbitration.

**Keywords:** arbitration, European Union, investor–state dispute settlement, CETA, ICSID

## 1. Introduction

Several experts have expressed their criticisms of investment protection arbitration in the previous years. Critics of the current system of dispute resolution method (Investor–State Dispute Settlement, abbreviated as ISDS) between a foreign investor and the host state generally complain that the case-law is unpredictable and inconsistent, the procedure is indistinct, and the substantive review of arbitration awards is not possible. The way arbitrators are nominated by the parties has also been criticized, given that it can negatively affect the impartiality of arbitrators, which may have serious consequences in resolving investment disputes affecting the public interest. Nevertheless, there is

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no doubt that arbitration has numerous advantages over state-/court-administered litigation proceedings, which essentially mean the widespread recognition and enforceability of arbitration awards in almost every country in the world. This is basically made possible by two international conventions, the ICSID Convention<sup>2</sup> and the New York Convention.<sup>3</sup> Although the ISDS system has many advantages, the European Union (EU) has set itself the goal of setting up an investment dispute settlement court.

As a first step, the establishment of a bilateral Investment Court System (ICS) is being planned, which would be institutionalized in trade and investment agreements concluded with third countries (e.g. in a Comprehensive Economic and Trade Agreement between Canada on the one side and the European Union and its Member States on the other; hereinafter referred to as: CETA). However, due to its 'bilateral' nature, the ICS is not able to remedy all criticisms of investment arbitration; therefore, as a second step, the Union is working to establish a Multilateral Investment Court (MIC).<sup>4</sup> It should be noted that the EU intends to lay the current system of investment arbitration on completely new foundations, while it seeks to make the existing system of rules on the mutual recognition and enforcement of judgments applicable to ICS rulings. The questions may arise: will this new investment court system be able to solve the problems; will it be able to act as an effective dispute settlement mechanism? Will the Conventions actually be applicable to subsequent ICS judgments, or in which other direction would the recognition and enforcement of new court decisions in third states develop?

To answer these questions, it is necessary to briefly examine the current system of ISDS. In addition, it is important to know the main features of the proposed EU investment court system, including any of the concerns and criticisms that may arise. The rules of procedure for arbitration tribunals in investment protection disputes are also worth reviewing, in particular the rules on the recognition and enforcement of their decisions. The study intends to follow these outlined directions.

2 *Convention on the Settlement of Investment Disputes between Natural and Legal Persons of States and Other States, adopted on 18 March 1965.* <https://treaties.un.org/doc/Publication/UNTS/Volume%20575/v575.pdf> (accessed on: 25.04.2020).

3 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York on 10 June 1958.* [https://treaties.un.org/doc/Treaties/1959/06/19590607%2009-35%20PM/Ch\\_XXII\\_01p.pdf](https://treaties.un.org/doc/Treaties/1959/06/19590607%2009-35%20PM/Ch_XXII_01p.pdf) (accessed on: 25.04.2020).

4 *Council Decision Authorizing the Opening of Negotiations for a Convention on the Establishment of a Multilateral Court for the Settlement of Investment Disputes, Brussels, 13 September 2017.* <https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX%3A52017PC0493> (accessed on: 23.04.2020).

## 2. The Current System of ISDS

### 2.1. International Investment Agreements

After the Second World War, in addition to international trade, foreign investment<sup>5</sup> played a key role in shaping the global economy. The liberal market economies emerging around the world and the technical breakthroughs that took place at the time further increased the flow of foreign direct investment. There have been several challenges to the operation of foreign investment – for example: the pursuit of maximizing advantages and minimizing disadvantages, expropriation trends, the treatment of foreign investors, and individual state investment support policies. In view of all this, the implementation of the protection of foreign investments within national borders required international regulation.<sup>6</sup>

International legal protection for foreign investors is primarily provided by international investment agreements (IIAs). There are currently more than 3,000 bilateral investment treaties (BITs)<sup>7</sup> in force worldwide, and a number of chapters in trade agreements contain substantive rules on investment and arbitration, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID, also referred to as the Washington Convention), the Energy Charter Treaty (ECT), the North American Free Trade Agreement (NAFTA), etc.

Although there are several differences between international investment agreements, whether we look at the number of parties or the obligations involved, they still have common features. They offer investors various international legal solutions that reduce business risks arising from the unknown legal environment of the foreign state, including standard ‘clauses’ that set out, inter alia, the treatment of foreign investments, compensation for expropriation, and investor and state dispute resolution rules (e.g. non-expropriation principles, non-discrimination principles, right to adequate treatment, etc.).<sup>8</sup> In addition, they include investor–state dispute settlement rules (ISDS), thus allowing a foreign investor to bring proceedings before an institutional arbitral tribunal against the host state if it has violated any of its obligations under an international investment protection agreement concluded between the investor’s home state and the host state.

5 The general characteristics of the investment are described in *Salini Costruttori S.p.A. v Morocco*, ICSID Case No ARB/00/4. <https://www.italaw.com/cases/958> (accessed on: 20.04.2020). According to these, an investment is to be considered as falling within the scope of Article 25(1) of the ICSID Convention if it means a contribution of the investor, it includes a certain duration of performance and a participation in the risks of the transaction; also, it shall constitute a contribution to the economic development of the host state of the investment.

6 Dimopoulos 2011. 11.

7 Conventions currently in force are available at: *International Investment Agreements Navigator*. <http://investmentpolicyhub.unctad.org/IIA> (accessed on: 30.05.2020).

8 Dolzer–Schreuer 2009. 220–221.

## 2.2. Dispute Settlement Methods

As one of the options, ICSID dispute resolution shall be mentioned. The rules of this procedure are framed by the ICSID Convention itself, which is the only legal source for the procedure. It is a self-regulating autonomous system, which is independent of any national legal implications. This regulation seeks to provide certain benefits to both parties. On the one hand, the investor does not have to fear that its home state may not support its activities for diplomatic or other reasons and thus be unable to assert its claim. Claims are enforced internationally, objectively, and free of political considerations. On the other hand, the host state (the place of investment) is assured that the home country of the investor will not attempt to assert claims at the interstate level.<sup>9</sup> The rules of procedure provide for independence and neutrality as well as flexibility and relatively low costs, just as arbitration in general. It is important to emphasize that the enforcement of an arbitration award made by ICSID is also ensured by the ICSID Convention itself, and it is possible to review and – in some exceptional cases – annul the award before the institution's own forum.<sup>10</sup> Since its establishment, the vast majority of investment disputes have taken place before this forum.<sup>11</sup>

The other option is to use the procedure of other international investment arbitral tribunals, the enforceability of which is based on the New York Convention, as in the case of commercial arbitral tribunals. The procedure is based on a regulation developed jointly by the parties (e.g. a BIT), which is based on the national law of the place of the procedure. Consequently, the legal basis for decisions varies from case to case. However, when interpreting similarly worded provisions in conventions, courts generally take into account the decisions of cases that have already been closed, and, if they wish to deviate from a previously established practice, the deviation is justified in the reasoning.<sup>12</sup>

In summary, although the two dispute settlement methods have the same purpose, there is a great contrast between them. If we systematize further differences, we can observe even more specific differences, including in the examination of the jurisdiction and procedure of the arbitral tribunal and the annulment of the arbitral award. As far as ICSID is concerned, a dispute directly arising from the investment is required to establish jurisdiction; the dispute must meet three conditions in order for proceedings to be instituted in that forum: the consent of the parties, the status of the parties, and the nature of the dispute

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9 A common feature of all investment dispute resolution forums is that the investor and the country where the investment is located reach an agreement directly outside the judicial system of the state where the investment is made as well as the fact that the investor does not require the support of his home state in bringing his claims to the appropriate forum.

10 Schreuer 2009. 398.

11 Dimopoulos 2011. 14.

12 Katona 2014. 3.

shall be in accordance with the rules of the ICSID Convention.<sup>13</sup> Both the host state and the investor or the national of the investor must be a party to the ICSID Convention. For the other modes, it is sufficient if the disputed issue relates to an investment. It can be seen that in the latter case the jurisdiction is wider than in the case of ICSID disputes. A dispute is of a legal nature if its subject concerns a right, a legal obligation, or the breach of such an obligation, and it is not merely a dispute of interest. The biggest difference between the procedures is that the ICSID arbitration procedure has no legally defined place, only geographically, so other legal instruments than the ICSID Convention have no legally binding effect. Another major difference is that the ICSID Convention also authorizes arbitrators to take interim measures (unless the parties have ruled out the possibility thereof). Arbitration courts do not generally have such jurisdiction, but in many cases they allow the parties to apply to national courts for defence. (This type of rule can also be observed in ICC, UNCITRAL, and other arbitration regulations.) In this respect, parties to proceedings before a non-ICSID forum may in some cases be able to defend themselves more quickly as the ICSID will have to wait for the arbitrators to be selected and set up.<sup>14</sup>

### 3. Reform Efforts – The European Union’s Investment Court System

In this section, I briefly present the legal background to foreign investments, which establishes the competence of the European Union, and the main features of the judicial system for investment disputes that is proposed to be established.

Article 3(1) of the Treaty on the Functioning of the European Union (TFEU) lists the areas of exclusive EU competences. Paragraph (e) of this article sets out the common commercial policy, the precise scope and concept of which are set out in Article 207 of the TFEU.<sup>15</sup> Accordingly, following the Lisbon Treaty,<sup>16</sup> foreign direct investments, including the negotiation and conclusion of international agreements on foreign direct investment, became an exclusive EU competence, as confirmed by the Court of Justice of the European Union in its Opinion No 2/15 on the Free Trade Agreement between the European Union and the Republic of Singapore.<sup>17</sup>

It is important to note that there is no uniform definition for the concept of foreign direct investment (FDI). According to the settled case-law of the Court of Justice of

<sup>13</sup> ICSID Convention, Article 25(1).

<sup>14</sup> Hajdú 2015. 17.

<sup>15</sup> Király 2010. 265–271.

<sup>16</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community. *Official Journal of the European Union* C 306 of 17 December 2007.

<sup>17</sup> *Opinion 2/15 of the Court of 16 May 2017 (EU:C:2017:376)*. [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CV0002\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CV0002(01)). (accessed on: 30.05.2020).

the European Union, ‘direct investment consists in investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity’. In addition to acquisitions, real estate investments and loan transactions are also included. However, the purchase (acquisition) of company shares for financial investment purposes without the intention to influence the management and control of the undertaking (so-called ‘portfolio’ investment) does not fall into this category.<sup>18</sup>

The Court also emphasized in Opinion 2/15 that the competence to regulate investor–state dispute settlements is shared between the Union and the Member States, given that not only the Union but also individual Member States may act as parties in the proceedings. Consequently, the binding effect of investor–state dispute settlement provisions in Union trade and investment agreements shall be recognized by each and every Member State.<sup>19</sup>

Under the mandate provided by the Lisbon Treaty, the European Commission presented a proposal in May 2015 for the first time, to establish a two-stage investment court with the United States during the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) and with Canada during the negotiations of the Comprehensive Economic and Trade Agreement (CETA).<sup>20</sup> Although the fate of TTIP is now quite uncertain as the European Commission declared the partnership guidelines ‘obsolete and no longer relevant’ in April 2019,<sup>21</sup> the CETA negotiations were more successful: the EU and Canada signed CETA on 30 October 2016, and, following the adoption of the necessary implementing rules, the agreement entered into force provisionally on 21 September 2017.<sup>22</sup> It shall be noted, however, that with respect to the findings of the Opinion 2/15 of the CJEU, the full implementation of CETA is conditional on the ratification of the dispute settlement mechanism provided in the agreement by all EU Member States, in accordance with the respective constitutional requirements. As soon as the full implementation of CETA happens, the investment protection arbitration contained in the bilateral trade and investment protection agreements previously concluded by and between the EU Member States and Canada shall be replaced by the ICS institutionalized in CETA.<sup>23</sup>

18 Ibid. Paragraphs 227–228.

19 Sardinha 2017. 627.

20 Happ–Wuschka 2017. 113–114.

21 *European Commission*, 6052/19. <https://www.consilium.europa.eu/media/39180/st06052-en19.pdf> (accessed on: 20.05.2020).

22 *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*. Accessed at: <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2016017> (accessed on: 20.05.2020).

23 *EU–Canada Trade Agreement Enters into Force*. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_3121](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3121) (accessed on: 20.05.2020).

Given that the two-stage judicial reform of investment protection governed by CETA also serves as a model for future trade and investment agreements to be concluded by the EU,<sup>24</sup> the rest of this study presents the key characteristics of the ICS that are relevant to the recognition and enforcement of its decisions, based on CETA provisions.

CETA's new dispute settlement regulation system, in response to the criticisms on investment protection arbitration, mixes the elements of traditional arbitration with elements of pre-trial proceedings.<sup>25</sup> On the one hand, CETA does not define a specific set of procedures that would take into account the specifics of the legal dispute, but it provides the possibility to apply the rules of procedure normally taken into account in investment arbitration (e.g. ICSID Convention and ICSID Arbitration Rules, UNCITRAL Arbitration Rules).<sup>26</sup> Besides this, in accordance with the widely accepted practice of investment arbitration, also known as 'arbitration without privity', CETA expressly provides that the consent of the respondent or the approval by the plaintiff for the submission of the claim to the Tribunal shall satisfy the requirements of Article II of the New York Convention for an agreement in writing.<sup>27</sup> Furthermore, to make arbitration more transparent, as CETA orders the application of the Transparency Rules in Treaty-Based Investor-State Arbitration<sup>28</sup> that was adopted within the framework of UNCITRAL, it also refers to the provisions of the New York Convention and the ICSID Convention to foster the recognition and enforcement of the Tribunal's judgments in third countries.<sup>29</sup>

At the same time, the ICS, which is institutionalized by CETA, shows a resemblance to permanent judicial bodies. For example, 15 members of the Tribunal are appointed by the CETA Joint Committee, composed of representatives of the European Union and Canada, for a five-year, renewable term, who discuss cases in a randomly appointed three-member panel.<sup>30</sup> Conclusively, contrary to arbitration, the new dispute settlement mechanism to be set up by the EU does not provide any control for the disputing parties to choose the judges to deal with the case. Another important difference compared to arbitration is the two-tier nature of the procedure (Investment Tribunal and Appeal Tribunal), the broad provision of the right to appeal to eliminate possible errors in first instance judgments and thus develop a predictable and consistent case-law in the field of investment law.<sup>31</sup> Accordingly, not only can the judgment be set aside on the ground of a

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24 See, for example, the EU–Vietnam Free Trade Agreement or the EU Singapore Investment Protection Agreement.

25 Potestà 2018. 161–162.

26 CETA, Article 8.23(2).

27 CETA, Article 8.25(2)(b).

28 CETA, Article 8.36.

29 CETA, Article 8.41(3)–(6).

30 CETA 8.27(2)–(6), Horváthy 2020.

31 Bernardini 2017. 38.

breach of procedural law during the appeal proceedings, but a substantive review of the judgment may also be requested from the Appeals Tribunal.<sup>32</sup>

In addition to the above, the transparency of the procedure is intended to be increased. As a consequence, the procedure is based on the principle of full disclosure, defining the range of documents to be disclosed. The participation of advocacy or other civil organizations is also facilitated as *amicus curiae* interveners in the proceedings. The reform would also be a step forward in terms of ethical rules as the convention contains detailed rules on ethics and conflict of interests. One of its biggest innovations is ‘stability’ stemming from permanence, coherent jurisprudence, as it is not based on an *ad hoc* judicial forum. However, critics say the use of a two-tier system will undoubtedly prolong and make dispute resolution more costly, thus leaving dispute resolution unavailable to investors with less capital.<sup>33</sup> Furthermore, the parties’ right of appeal is likely to be adversely affected by effective and prompt decisions.<sup>34</sup>

In coherence with the longer-term objectives of the European Union, CETA also envisages the establishment of a multilateral investment justice tribunal and appellate mechanism in the future, which would replace the bilateral dispute settlement mechanism included in EU bilateral trade and investment agreements.<sup>35</sup>

#### 4. Application and Enforcement of ICS Judgments under the ICSID Convention

Despite the criticism levelled against it, arbitration under the ICSID Convention is considered the most popular one among the currently available investment protection dispute settlement mechanisms. According to statistics, nearly 60 percent of known arbitration proceedings have been initiated before ICSID.<sup>36</sup> The popularity of arbitration under the ICSID Convention can be explained, among other things, by its enforcement mechanism. The ICSID Convention establishes an autonomous system by regulating in detail the entire arbitration procedure, which includes the regulation of the remedies available against the arbitral award, and the issues related to the recognition and the enforcement of the award. Therefore, it is completely separated from the laws in force in the Contracting States and from other international treaties.<sup>37</sup> Thus, an ICSID arbitration award can only be the

32 CETA, Article 8.28(2).

33 Katona–Kende 2016. 7–8.

34 Charris-Benedetti 2019. 83–115.

35 CETA, Article 8.29; Horváthy 2016.

36 *World Investment Report 2019 – Special Economic Zones*. [https://unctad.org/en/PublicationsLibrary/wir2019\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf) (accessed on: 20.04.2020).

37 Musa–Polasek 2015. 13.



subject of an appeal under the ICSID Convention.<sup>38</sup> In addition, the Convention expressly obliges all contracting states to recognize the awards rendered pursuant to the Convention and to enforce the pecuniary obligations included in it in case of non-performance, just as if the arbitral award had been ordered by the final judgment of the court of the contracting state.<sup>39</sup> Consequently, the possibility to review the arbitral award in enforcement proceedings is not provided to the courts of the contracting states, not even based on purely formal grounds, so that, for example (contrary to the provisions of the New York Convention), recognition and enforcement of the award cannot be refused based on public policy reasons or citing lack of arbitration.<sup>40</sup>

Although arbitration awards rendered under the ICSID Convention are extremely easy to enforce in the territory of the Contracting States, and therefore it would significantly increase the effectiveness of the ICS if its awards were enforceable in third countries under the provisions of the ICSID Convention, it is the unanimous opinion of the scholars on this point that decisions taken in the context of the institutional reform implemented by the European Union cannot be considered as arbitration awards under the ICSID Convention.<sup>41</sup> The reason for this is that the new judicial system differs from the basic principles of arbitration that are considered to be traditional and that are at the same time laid down in the ICSID Convention to such an extent that it, at best, can be considered as an agreement between the Contracting States to the ICSID Convention.

Both features of the newly developed court system, that is, the broad opportunities to review the ICS decisions as well as the regulations on the establishment on the Permanent Tribunal and on the selection of members of the tripartite panel are significantly different from the investment arbitration procedure stipulated in the ICSID Convention. Although the literature is not uniform on the question of whether Article 41 of the Vienna Convention on the Law of Treaties,<sup>42</sup> which codifies the rules of customary international law, allows contracting parties to amend the provisions of the ICSID Convention and, accordingly, whether it is possible for the states that introduce ICS to enforce ICS judgments under the regulations of the ICSID,<sup>43</sup> there is no doubt that under the ICSID Convention third states are not obliged to recognize and enforce ICS judgments.

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38 ICSID Convention, Article 53(1).

39 Ibid.

40 Szabados 2017. 37.

41 Potestà 2018. 169. Kaufmann-Kohler–Potestà 2016. 82–85.

42 *Vienna Convention on the Law of Treaties*, May 23, 1969. [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (accessed on: 20.04.2020).

43 At the same time, according to the literature, the states that have set up the ICS model shall not amend the basic provisions of the ICSID Convention among themselves. See: Calamita 2017. 604–613.

In the light of the above, it is an essential question whether the New York Convention on the Facilitation of the Recognition and Enforcement of Arbitral Awards is applicable, and, if so, under what conditions it is possible to enforce ICS judgments in third states. If the answer to the first question is negative, the enforcement of judgments will be governed by the domestic state law of the place of enforcement, which in most cases contains provisions that are less favourable than what is laid down in the New York Convention. Consequently, if the provisions of the New York Convention shall not apply to judgments given under the new dispute settlement mechanism to be set up by the EU, it could also have adverse consequences for the future of this reform.

## 5. Application and Enforcement of ICS Judgments under the New York Convention

The New York Convention, adopted in 1958, was not designed specifically to facilitate the recognition and enforcement of investment protection arbitration awards. However, practice has clearly demonstrated its applicability in this area as well.<sup>44</sup> Thus, if ICS judgments meet the requirements prescribed in the New York Convention for arbitration awards, the recognition and enforcement of those judgments may also be ensured under its provisions in third states.

The New York Convention does not define the concepts of arbitration, arbitral tribunal, or arbitral award. However, Article I (2) of the Convention provides some guidance in this regard, stating that '[t]he term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted'. Although the New York Convention does not define the concept of permanent arbitral tribunals, it can be concluded from the *travaux préparatoires* that the authors of the Convention considered the most important distinguishing feature of arbitration from other means of dispute settlement to be that the parties to the dispute voluntarily give their consent to this alternative form of legal dispute resolution and thus derogate from the state court proceedings. In essence, any permanent body whose procedural power is not based on a binding statutory legal provision but on the private autonomous will of the parties is a body within the concept of Article I(2) of the New York Convention. By contrast, the authors of the Convention did not attach any particular importance to the manner how the arbitrators are appointed, wherefore an award rendered by a body that was not set up by the parties can also be considered as an arbitral award.<sup>45</sup>

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44 Barbosa 2009.

45 Káposznyák 2018. 559.

While the provision of a broad right of appeal is incompatible with the institution of the annulment of the award provided in Article 52 of the ICSID Convention, the New York Convention, taking into consideration the possibility of two-stage arbitration proceedings, expressly provides the recognition and enforcement of an arbitral award if it has not yet become mandatory (final) to the parties,<sup>46</sup> i.e. if the deadline to file an appeal has not yet expired.<sup>47</sup> Thus, the two-step procedure of the ICS model is also not contrary to the spirit of the New York Convention. Overall, the enforcement mechanism of the New York Convention is flexible enough to ensure the recognition and enforcement of judgments of the newly established ICS in third states. It is very important, however, that ultimately the courts of the Contracting States are those that will rule regarding the compatibility of ICS judgments with the concept of an arbitration award under the New York Convention, and, therefore, the courts will provide the exact answer to the question of the applicability of the Convention to national law.

## 6. Concluding Remarks

The European Union launched a system-wide, comprehensive reform process in the field of ISDS a few years ago, which has raised several issues. One of the most important of these is the issue of recognition and enforcement of the awards in third countries made by the newly established EU investment arbitration system. Although the EU intends to lay down the current system of investment arbitration on completely new foundations, at the same time it strives to create a more favourable set of rules for the recognition and enforcement of judgments applicable to ICS rulings.<sup>48</sup> Thus, a judgment rendered under CETA under ICS should be considered an enforceable arbitral award under the New York Convention or the ICSID Convention, depending on what arbitration rules (e.g. ICSID Arbitration Rules, UNCITRAL Arbitration Rules) have been applied during the proceedings. However, the position of the literature can be considered uniform on the issue that explicit provisions of CETA concerning the applicability of the two international conventions have no legal effect in third states under the principle of *res inter alios acta* of international law, wherefore the conventions constitute an international legal obligation only for the contracting states to recognize and enforce ICS judgments. Thus, when enforcing ICS judgments in third states, the favourable enforcement rules contained in the Conventions can only be applied if the ICS judgments actually meet the requirements for an arbitration award.

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46 New York Convention, Article V, paragraph (1).

47 Potestà 2018. 177–178.

48 Titi 2017. 122; Potestà 2018. 169.

Regarding the implementation of the European Union reforms, other issues may arise. For example, on 6 September 2017, the Kingdom of Belgium submitted a request for an opinion to the Court of Justice of the European Union under Article 218(11) of the TFEU regarding the compatibility of the Treaties of the European Union with the new investment protection dispute settlement mechanism contained in CETA.<sup>49</sup> On 30 April 2019, the Court ruled that:

Section F of Chapter Eight, of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, that concerns the establishment of a mechanism for the resolution of investment disputes between investors and States, is compatible with the Treaty on European Union, the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union.<sup>50</sup>

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50 Opinion 1/17: Opinion of the Court (Full Court) of 30 April 2019 – Kingdom of Belgium (Opinion pursuant to Article 218(11) TFEU. *Official Journal of the European Union* C 220, 1 July 2019. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AC%3A2019%3A220%3ATOC> (accessed on: 20.04.2020).

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