CML 3385: International Trade and Investment Practicum

Whether Multilateral Investment Court Awards Could Be Enforced Using the ICSID Convention, the New York Convention and/or an Alternative Method

Beneficiary:
Susanna Kam
Trade Law Bureau
Global Affairs Canada

Submitted by:
Grace Tran
Claudia Lach
Joshua Toews

Submitted to:
Professor J. Anthony VanDuzer

Submitted:
April 30, 2019

University of Ottawa, Faculty of Law
Fauteux Hall, 57 Louis Pasteur St, Ottawa, Ontario, K1N 6N5, Canada

TradeLab

International rules on cross-border trade and investment are increasingly complex. There is the WTO, World Bank and UNCTAD, but also hundreds of bilateral investment treaties (BITs) and free trade arrangements ranging from GSP, EU EPAs and COMESA to ASEAN, CAFTA and TPP. Each has its own negotiation, implementation and dispute settlement system. Everyone is affected but few have the time and resources to fully engage. TradeLab aims to empower countries and smaller stakeholders to reap the full development benefits of global trade and investment rules. Through pro bono legal clinics and practica, TradeLab connects students and experienced legal professionals to public officials especially in developing countries, small and medium-sized enterprises and civil society to build lasting legal capacity. Through 'learning by doing' we want to train and promote the next generation of trade and investment lawyers. By providing information and support on negotiations, compliance and litigation, we strive to make WTO, preferential trade and bilateral investment treaties work for everyone.

More at: https://www.tradelab.org

What are Legal Practica

Legal practica are composed of small groups of highly qualified and carefully selected students. Faculty and other professionals with longstanding experience in the field act as Academic Supervisors and Mentors for the Practica and closely supervise the work. Practica are win-win for all involved: beneficiaries get expert work done for free and build capacity; students learn by doing, obtain academic credits and expand their network; faculty and expert mentors share their knowledge on cutting-edge issues and are able to attract or hire top students with proven skills.

Practicum projects are selected on the basis of need, available resources and practical relevance. Two to four students are assigned to each project. Students are teamed up with expert mentors from law firms or other organizations and carefully prepped and supervised by Academic Supervisors and Teaching Assistants. Students benefit from skills and expert sessions, do detailed legal research and work on several drafts shared with supervisors, mentors and the beneficiary for comments and feedback. The Practicum culminates in a polished legal memorandum, brief, draft law or treaty text or other output tailored to the project's needs. Practica deliver in three to four months. Work and output can be public or fully confidential, for example, when preparing legislative or treaty proposals or briefs in actual disputes.

University of Ottawa, Faculty of Law, Ottawa

As a global and national leader in a variety of fields, Common Law offers specializations in Dispute Resolution, Environmental Law, International Trade, Business and Human Rights Law, Social Justice and Technology Law, Public Law and Aboriginal Law. The Centre for Law, Technology and Society has helped to solidify the law school's position as the leading Law and Technology Faculty in the country. uOttawa also provides one of the richest sets of course offerings in the world in International Law. We are also home to the internationally renowned Human Rights Research and Education Centre. Furthermore, we are the national leader in Environmental Law and home to the IUCN Academy of Environmental Law.

More at: http://commonlaw.uottawa.ca/en /

TABLE OF CONTENTS

1 ISSUES STATEMENT AND BRIEF ANSWERS

1. Would a multilateral investment court's (MIC) awards be enforceable using the *International Centre for the Settlement of Investment Disputes (ICSID) Convention*?

   Brief Answer: No, under the current *ICSID Convention* MIC awards would not be enforceable. However, MIC awards could be enforceable if the *ICSID Convention* were modified.

   a. Could a MIC convention modify *inter se* the *ICSID Convention* to render MIC awards enforceable as ICSID awards between the modifying parties?

      Brief Answer: Yes, a MIC convention could modify *inter se* the *ICSID Convention* and render MIC awards enforceable as ICSID awards between the modifying parties. However, the EU would not be able to modify the *ICSID Convention inter se* because it is not an *ICSID Convention* party.

   b. Will the *Comprehensive Economic and Trade Agreement* (*CETA*) create such an *inter se* modification between Canada and the European Union (EU)?

      Brief Answer: No, *CETA* would not create an *inter se* modification between Canada and the EU. However, it would create an *inter se* modification between Canada and EU Member States through *CETA* Article 8.41(6).

   c. What is the effect of *CETA* deeming its awards valid under the *ICSID Convention*?

      Brief Answer: *CETA* deeming its awards valid under the *ICSID Convention* will, at best, only bind Canada and EU Member States. It would not bind the EU because the EU is not an *ICSID Convention* party. Third party states would also not be bound by this provision because the *Vienna Convention on*

the Law of Treaties (*VCLT*) Article 34 prevents treaties from creating obligations on third party states.

d. Would such an *inter se* agreement make MIC awards enforceable as ICSID awards in third party states that are party to the *ICSID Convention*?

Brief Answer: No, *VCLT* Article 34 prevents an *inter se* agreement from obliging third party states to treat MIC awards as ICSID awards.

e. If not, what kind of amendment would the *ICSID Convention* require to make MIC awards enforceable in third party states that are party to the *ICSID Convention*?

Brief Answer: The *ICSID Convention* would need to be amended to provide that: (1) ICSID state parties will enforce MIC awards even though *ICSID Convention* Article 53 prohibits appeals or other remedies except for what the *Convention* provides, and (2) MIC awards are exempt from annulment under *ICSID Convention* Article 52. The *ICSID Convention* would also need to be amended to allow the EU to become a contracting party so that MIC awards could be enforced where an award is rendered against the EU.

f. Would MIC awards be susceptible to annulment under the *ICSID Convention*?

Brief Answer: If MIC awards qualified as ICSID awards, they would not be susceptible to annulment in MIC convention state parties. However, in all other ICSID state parties, *ICSID Convention* Article 52's annulment grounds would still apply. Therefore, MIC awards would be susceptible to annulment in all other ICSID state parties.

g. What impact would implementing the EU's *Trans-Atlantic Trade and Investment Partnership* (*TTIP*) proposal to make MIC final awards not subject to annulment have?

Brief Answer: At best, the *TTIP* proposal, like *CETA*, would be an *inter se* modification between EU Member States and the United States. Thus, if the EU's *TTIP* proposal to make MIC awards not subject to annulment were implemented, at best, this would only bind EU Member States and the United States. Importantly, this would not bind the EU because the EU is not a party to the *ICSID Convention*. *VCLT* Article 34 would prevent third party states from being bound by any *TTIP* provision.

h. Assuming MIC awards qualify as ICSID awards, can MIC awards be exempted from the *ICSID Convention*'s annulment grounds without modifying the *ICSID Convention*?

Brief Answer: No, even if MIC awards qualified as ICSID awards (which they likely do not), they would be subject to *ICSID Convention* Article 52's annulment grounds. As a result, only modifying the *ICSID Convention inter se* or amending the *ICSID Convention* would result in MIC being exempt from annulment.

2. Would MIC awards be enforceable using the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (*New York Convention*)?

Brief Answer: Yes, MIC awards would likely be enforceable using the *New York Convention*. MIC awards would likely meet all of the elements for a foreign arbitral award, and would also be commercial awards.

a. Would MIC awards be enforceable using the *New York Convention* in states party to the MIC convention?

Brief Answer: Yes, MIC awards would likely be enforceable using the *New York Convention* in states party to the MIC convention.

b. Would MIC awards be enforceable using the *New York Convention* in states not party to the MIC agreement?

Brief Answer: Yes, MIC awards would likely be enforceable using the *New York Convention* in states not party to the MIC convention.

c. What conditions would MIC awards have to satisfy to be enforceable using the *New York Convention* in *New York Convention* state parties?

Brief Answer: To be enforceable under the *New York Convention*, MIC awards must be foreign arbitral awards. Depending on the jurisdiction, they may also have to be commercial awards and made in the territory of another *New York Convention* state party.

d. What is the effect of the *CETA* deeming its awards valid under the *New York Convention*?

Brief Answer: *CETA* deeming its awards valid under the *New York Convention* is an *inter se* modification that only binds treaty parties. *VCLT* Article 34 provides that it will not bind third parties. However, in this case, *CETA* awards are likely to qualify as enforceable awards under the *New York Convention* regardless.

e. Would MIC awards be susceptible to being set aside under the *New York Convention*?

Brief Answer: No, it is unlikely that MIC awards will be set aside. United Nations Commission on International Trade Law (UNCITRAL) Model Law Article 34 gives limited grounds for which awards can be set aside. Setting aside a MIC award for non-arbitrability is unlikely, although this is an unclear standard. Setting aside a MIC award on public policy grounds is also unlikely because these are narrowly construed.

f. What impact would implementing the European Union's (EU) *TTIP* proposal to make MIC final awards not subject to annulment, being set aside or other remedies?

Brief Answer: Such a provision would likely prevent MIC state parties' courts from setting aside or refusing to enforce MIC awards. This provision would not affect third parties.

3. What alternative arrangements would make MIC awards enforceable?

Brief Answer: MIC awards could be made enforceable through the MIC having its own enforcement regime. The challenge to this solution is it may take several decades for the MIC to become as popular as the *ICSID* or *New York Convention* (if indeed it ever achieves that degree of reach).

2 INTRODUCTION

The current investor-state dispute settlement system (ISDS) has its flaws and critics.[1] The EU, in particular, has criticized the current ISDS system as lacking arbitrator independence; consistency and predictability; the possibility of review; transparency; and being too costly.[2] To address these problems, in 2015 the EU proposed establishing a multilateral investment court (MIC).[3] The MIC would be a permanent, two-instance standing court system for resolving international investment treaty disputes.[4] UNCITRAL Working Group III has been tasked with developing and recommending potential ISDS reform avenues to UNCITRAL, and this includes looking at the EU's proposed MIC. [5] The EU is pursuing establishing the MIC in its recent free trade agreements.[6] In 2016, Canada and the EU signed *CETA*, where Canada also committed to pursuing the MIC's establishment.[7]

---

[1] Nicolette Butler & Surya Subedi, "The Future of International Investment Regulation: Towards a World Investment Organisation?" (2017) 64 Nethl Intl L Rev 43 at 44–45; Stephan W Schill, "Editorial: Toward a Normative Framework for Investment Law Reform" (2014) 15 J World Investment & Trade 795 at 795; Michael Waibel et al, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Netherlands: Kluwer Law International, 2010) at xli–xliii; UNCTAD, "Reforming the International Investment Regime: An Action Menu" (2015) World Investment Report 120 at 125–26; Nicolas Hachez & Jan Wouters, "International Investment Dispute Settlement in the 21st Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?" (2012) Centre for Global Governance Studies Working Paper No 81 at 5–15.

[2] EC, "Multilateral Reform of Investment Dispute Resolution" (2017) Commission Staff Working Document Impact Assessment at 11; European Parliament, "Investor-State Dispute Settlement: State of Play and Prospects for Reform" (2015) Briefing at 5; European Parliament, "Multilateral Court for the Settlement of Investment Disputes" (2017) Briefing at 2.

[3] The European Commission (EC) made its proposal in September 2015, see EC, "A Multilateral Investment Court" (2017) State of the Union at 2.

[4] *Ibid* at 2.

[5] All of UNCITRAL Working Group III's work in this area can be found online. See UNCITRAL, "Working Group III" (n.d.), online: <http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html>.

[6] States that the EU is engaging or has engaged to put forward the possible creation of a MIC include: the United States (see *Transatlantic Trade and Investment Partnership*, 2015 Proposal, art 12 [*TTIP* Proposal]), Canada (see *Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the one part, and the European Union and its Member States*, 30 October 2016, art 8.29), Vietnam (see *EU-Vietnam Investment Protection Agreement*, art 15 [*EU-Vietnam IPA*]), Singapore (see *EU-Singapore Investment Protection Agreement*, 19 October 2018, art 3.12 [*EU-Singapore IPA*]), Mexico (*EU-Mexico Modernised Global Agreement* in Principle, 23 April 2018, art 14 [*EU-Mexico FTA*])

[7] *CETA*, *supra* note 6, art 8.29; *EU-Vietnam IPA*, *supra* note 6, art 15 "[the Parties] shall enter into negotiations for an international agreement providing for a multilateral investment tribunal in combination with, or separate from, a multilateral appellate mechanism applicable to disputes under this Agreement".

In January 2019, the EU made submissions regarding a future MIC to UNCITRAL Working Group III.[8] In its submissions, the EU proposed enforcing MIC awards using a MIC enforcement regime or the *New York Convention*.[9] Notably, the EU's submissions did not address enforcing MIC awards using the *ICSID Convention*. Nonetheless, this memorandum will address enforcing MIC awards under the *ICSID Convention* as requested.

One important challenge a future MIC would face is ensuring its awards are enforceable.[10] In the current ISDS system, arbitral awards are enforced using either the *ICSID Convention* or the *New York Convention*.[11] Both are widely ratified.[12] Awards are effectively enforced under the *ICSID Convention* because state parties are obligated to enforce awards as if they were final court judgments in their state.[13] The *ICSID Convention* further sets out that awards are not subject to appeal or any other remedy except for what the Convention itself provides.[14] Notably, the *ICSID Convention* only allows annulling awards in five limited circumstances.[15] *Ad hoc* committees established under the *ICSID Convention* hear annulments. As a result, the *ICSID Convention*'s enforcement regime is one of its main advantages.[16]

---

[8] EU, "Establishing a Standing Mechanism for the Settlement of International Investment Disputes" (2019) Submission of the European Union and its Member States to UNCITRAL Working Group III [EU, Submissions to Working Group III].
[9] *Ibid* at paras 30–32.
[10] *Ibid* at para 30.
[11] Richard Happ & Sebastian Wuschka, "From the Jay Treaty Commissions Towards a Multilateral Investment Court: Addressing the Enforcement Dilemma" (2017) 6:1 Indian J Arbitration L 113 at 122.
[12] The *ICSID Convention* has 154 state parties. The *New York Convention* has 159 state parties.
[13] *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), art 54(1) [*ICSID Convention*].
[14] *Ibid*, art 53(1).
[15] *Ibid*, art 52, subject to local rules on sovereign immunity in the enforcement jurisdiction.
[16] Francisco José Pascual Vives, "Shaping the EU Investment Regime: Choice of Forum and Applicable Law in International Investment Agreements" (2014) 6:1 Cuadernos de Derecho Transnacional 269 at para 25.

The *New York Convention* is specifically dedicated to ensuring awards are enforceable.[17] The *New York Convention* requires state parties to recognize arbitral awards as binding and enforce them according to the procedural rules of the state where enforcement is sought.[18] The *New York Convention* carves out limited circumstances in which state courts may resist enforcement.[19] As a result, the *New York Convention* has been successful in ensuring arbitral awards are enforced.[20] Given that awards are effectively enforced using the present *ICSID Convention* and *New York Convention*, states are unlikely to adopt a new regime that does not effectively enforce awards. Therefore, if a MIC is to replace the current ISDS system, its awards must be enforceable with a high degree of certainty and in many states.

At the time of writing, no draft MIC provisions available to rely on. However, a future MIC is likely to be similar to the EU's proposed investment court in *CETA*, the *TTIP* proposal, and its other recent free trade agreements,[21] with some adjustments to take into account the MIC's multilateral nature. This research memorandum primarily relies on the *TTIP* proposal and *CETA* for two reasons. First, the *TTIP* proposal is purely the EU's proposal to the United States and thus is a strong basis for gleaning the EU's specific desires for the features that a MIC should have. Second, the *CETA* is a strong basis for inferring how a future MIC might be structured because the EU and Canada have already committed to working toward establishing a MIC, as seen in *CETA* Article 8.29:

> The Parties shall pursue with other trading partners the establishment of a *multilateral investment tribunal and appellate mechanism* for the resolution of investment disputes.

---

[17] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959), art I [*New York Convention*].
[18] *Ibid*, art III.
[19] *Ibid*, art V.
[20] Linda Silberman, "The New York Convention After Fifty Years: Some Reflections on the Role of National Law" (2009) 38:25 Georgia J Intl & Compe L 25 at 26.
[21] See *CETA*, *EU-Vietnam IPA*, *EU-Singapore IPA*, *EU-Mexico FTA*, *supra* note 6.

> Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.[22]

The MIC would be composed of a First Instance Tribunal and an Appellate Tribunal. A specialized MIC Committee would choose the First Instance Tribunal and Appellate Tribunal members.[23] To establish the MIC convention, Kauffman-Kohler and Potestà propose that MIC drafters create an opt-in mechanism, where interested parties would submit their disputes, arising from their existing international investment agreements, to the First Instance Tribunal. [24] The MIC would have jurisdiction to deal with investment disputes. Notably, this would likely include intellectual property disputes.[25]

The First Instance Tribunal would consist of 15 members. The specialized MIC Committee would be able to increase or decrease the number of members as necessary. The First Instance Tribunal would hear disputes in divisions of three members, chosen by the First Instance Tribunal's President on a randomized basis.[26] Each First Instance Tribunal division would render awards based on the relevant investment treaty and other international law rules and principles that apply to the parties.[27] Each First Instance Tribunal division would consider domestic law only as fact.[28]

---

[22] *CETA*, *supra* note 6, art 8.29 [emphasis added].
[23] *Ibid*, art 8.27–8.28.
[24] 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?* (Geneva: Geneva Center for International Dispute Settlement, 2016) at 94–97; Giovanni Zarra, "The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?" (2018) Chinese J Intl L 137 at 141.
[25] *TTIP* Proposal, *supra* note 6, "investment" definition; *CETA*, *supra* note 6, art 8.1.
[26] *CETA*, *supra* note 6, art 8.27.
[27] *Ibid*, art 8.31.
[28] *Ibid,* art 8.31(2).

The specialized MIC Committee would also appoint members to sit on the Appellate Tribunal. Three randomly chosen Appellate Tribunal members would review awards rendered by the First Instance Tribunal.[29] These chosen members would hear appeals on (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of facts, including the appreciation of the relevant domestic law; and (c) the grounds set out in *ICSID Convention* Article 52(1)(a) through (e).[30] First Instance Tribunal awards that have been appealed or the time to appeal has expired will be referred to as final awards. Final awards not to be subject to appeal, review, set aside, annulment or any other remedy.[31] The MIC would also presumably deem all final awards to be commercial.[32]

The remainder of this memorandum will be divided into three sections. The memorandum will address **(A)** whether MIC awards could be enforced under the *ICSID Convention*, **(B)** whether MIC awards could be enforced under the *New York Convention*, and **(C)** whether alternative MIC award enforcement methods would be preferable.

[29] *Ibid*, art 8.28(5).
[30] *Ibid*, art 8.28(2).
[31] *TTIP* Proposal, *supra* note 6, art 30(1); *CETA*, *supra note 6*, art 8.28(9).
[32] *CETA, supra* note 6, art 8.41(5); *TTIP* proposal, *supra* note 6, art 30(5).

3 MIC AWARDS WOULD LIKELY NOT BE ENFORCEABLE UNDER THE PRESENT *ICSID CONVENTION*

3.1 ICSID State Parties Are Obligated to Enforce Awards Rendered Pursuant to the *ICSID Convention*

ICSID Convention Article 54(1) provides:

> Each Contracting State shall recognize an award rendered *pursuant to this Convention* as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.[33]

Based on the above article, ICSID state parties would be obligated to enforce MIC awards if MIC awards constituted awards rendered pursuant to the *ICSID Convention*.

3.2 MIC Awards Would Not Be Awards Rendered Pursuant to the *ICSID Convention*

MIC awards would not constitute awards rendered pursuant to the *ICSID Convention* because (1) MIC awards could be appealed, contrary to the *ICSID Convention*, and (2) MIC awards could involve the EU as a respondent, but the EU is not and cannot be a party to the *ICSID Convention*. Another MIC characteristic, which would not necessarily preclude MIC awards from being recognized as ICSID awards, but should be nonetheless considered because it does not obviously conform with the *ICSID Convention* is (3) the MIC disputing parties would not be able to appoint their arbitrators.

[33] *ICSID Convention*, *supra* note 13, art 54 [emphasis added].

3.2.1 MIC Awards Could Be Appealed but the *ICSID Convention* Only Allows Annulment

The MIC would have an Appellate Tribunal that is contrary to *ICSID Convention* Article 53, which states:

> [T]he award shall be binding on the parties and shall not be subject to any appeal or other remedy except those provided in this Convention.[34]

Under the *ICSID Convention*, a party may request a special *ad hoc* committee to annul the award on limited grounds.[35] These grounds are as follows:

> (a) the Tribunal was not properly constituted;
>
> (b) the Tribunal has manifestly exceeded its powers;
>
> (c) there was corruption on the part of a member of the Tribunal;
>
> (d) there has been a serious departure from a fundamental rule of procedure; or,
>
> (e) the award has failed to state the reasons on which it is based.[36]

The MIC would have an Appellate Tribunal, broadening the scope of the review process, contrary to the express prohibition in *ICSID Convention* Article 53.[37] Annulments differ from appeals because they are only concerned with the decision-making process' legitimacy, whereas appeals evaluate the decision's merits and correctness.[38] The MIC Appellate Tribunal would hear appeals of awards from the First Instance Tribunal not only on the basis of the *ICSID*

---

[34] *Ibid*, art 53.
[35] *Ibid*, art 52.
[36] *Ibid*, art 52.
[37] *Ibid*, art 52; N Jansen Calamita, "The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime" (2017) 18:4 J World Investment & Trade 585 at 616.
[38] Freya Baetens, "Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms" (2017) 8 J Intl Dispute Settlement 462 at 440–41.

Convention's annulment grounds, but also on errors of law and fact, as mentioned above.[39] Thus, the MIC's appellate mechanism would mean that MIC awards would not be awards rendered pursuant to the *ICSID Convention.*

3.2.2 MIC Awards Could Involve the EU as a Party but the EU Is Not and Cannot Be an *ICSID Convention* Party

Tribunals established under the *ICSID Convention* hear disputes between "States and Nationals of Other States".[40] Therefore, an ICSID tribunal cannot hear a dispute involving the EU because it is a union of states. Further, the EU is not and cannot be a contracting party to the *ICSID Convention*. Article 67 states: "this Convention shall be open for signature on behalf of States members of the Bank" and "any other State which is a party to the Statute of the International Court of Justice", precluding the EU from being a party.[41] As a result, if the EU were a respondent, a MIC award against the EU would not be an award rendered pursuant to the *ICSID Convention*. Thus, ICSID state parties would not be required to enforce it.

3.2.3 MIC Disputing Parties Would Not Appoint their Arbitrators

Under *ICSID Convention* Article 37(2)(b), disputing parties are able to choose their own arbitrators, whereas under the MIC's two-instance court system, the President would randomly select members from the First Instance Tribunal to hear individual disputes.[42] However, it is

[39] 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 Economic L 761 at 779.
[40] *ICSID Convention*, *supra* note 13, art 67.
[41] *Ibid*, art 67.
[42] Reinisch, *supra* note 39 at 776.

arguable to what extent party autonomy in determining tribunal composition must be adhered to under the *ICSID Convention*.

Under the *North American Free Trade Agreement* (*NAFTA*) and other international treaties, disputing parties can disregard the *ICSID Convention*'s provisions on selecting arbitrators in the exercise of party autonomy. Pursuant to *NAFTA* Article 1124, if the parties fail to appoint their own arbitrators within 90 days from the date the claim was submitted to arbitration or the parties cannot agree on an arbitrator, the ICSID Secretary General, as the appointing authority of this article, would choose an arbitrator from a roster.[43] Although the roster was never created, this provision indicates that disputes under the *ICSID Convention* could potentially forgo the arbitrator selection provisions. Further, this provision has not prevented *NAFTA* disputes from being dealt with under the *ICSID Convention.*

3.3 MIC Awards Could Be Made Enforceable by Modifying the *ICSID Convention*

MIC awards could be made enforceable under the *ICSID Convention* by modifying the *ICSID Convention* in one of two ways. First, MIC awards could be enforced by modifying the *ICSID Convention inter se*. Second, MIC awards could be enforced by modifying or amending the *ICSID Convention* between all the state parties. Ultimately, modifying the *ICSID Convention inter se* would, at best, only make MIC awards enforceable in the territories of the modifying parties. Third-party states would not be obliged to enforce MIC awards as ICSID awards. Modifying the *ICSID Convention* itself would make MIC awards enforceable in all ICSID state

[43] Andrea Bjorklund, "NAFTA Chapter 11" in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) 465 at 513 [Bjorklund, "NAFTA Chapter 11"].

parties, but would be practically difficult because modifying the *ICSID Convention* requires unanimous consent. Thus, neither option is ideal. Enforcing MIC awards using the *New York Convention* or its own enforcement regime would likely be achieved more quickly.

3.3.1 Modifying the *ICSID* Convention *Inter Se* Would Make MIC Awards Enforceable on Modifying Parties

An *inter se* modification is an agreement where two or more parties to a multilateral treaty amend the treaty amongst themselves.[44] This modification allows parties to "contract out" of a treaty, creating a special regime that only the modifying parties must follow. The MIC convention would constitute an *inter se* modification of the *ICSID Convention*.[45] The MIC convention (a separate, multilateral treaty) would amend the *ICSID Convention* to allow MIC awards to qualify as awards enforceable under the *ICSID Convention.*

VCLT Article 41(1) provides the rules for whether the parties may modify *inter se* a treaty. The *VCLT* only applies to treaties coming into force after 1980 (whereas the *ICSID Convention* came into force in 1966). However, the principles articulated in *VCLT* Article 41 constitute customary international law and thus is applicable to the *ICSID Convention*.[46] Furthermore, ICSID tribunals and other investment tribunals have relied on the *VCLT*.[47] *VCLT* Article 41(1) provides that:

[44] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 41 [*VCLT*].
[45] Kaufmann-Kohler & Potestà, *supra* note 24 at 72.
[46] Reinisch, *supra* note 39 at 772.
[47] *Ibid* at 771–72.

1. [t]wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
   (a) The possibility of such a modification is provided for by the treaty; or
   (b) The modification in question is not prohibited by the treaty and:
      (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
      (ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.[48]

Based on the above, for a provision in the MIC to be a valid *inter se* modification: (1) the *ICSID Convention* must either allow for an *inter se* modification, or, at the very least, not prohibit one. If it the *ICSID Convention* does not prohibit *inter se* modification, (2) the MIC must not affect the rights and obligations of other *ICSID Convention* parties, and (3) the MIC must not be incompatible with the *ICSID Convention*'s object and purpose as a whole. Each will be discussed in turn below.

3.3.1.1 The *ICSID Convention* Does Not Clearly Prohibit *Inter Se* Modifications

Under *VCLT* Article 41(1)(a), a treaty must provide for the possibility of *inter se* modification. However, the *ICSID Convention* does not expressly address *inter se* modification.[49] Thus, MIC state parties cannot rely on *VCLT* Article 41(1)(a).[50]

Turning to *VCLT* Article 41(1)(b), the treaty must not prohibit the modification in question. Under *ICSID Convention* Article 53, disputes "shall not be subject to any appeal or to any other remedy except those provided for in this Convention".[51] Some have argued that *ICSID*

[48] *VCLT*, *supra* note 44, art 41(1).
[49] Reinisch, *supra* note 39 at 772–73.
[50] *Ibid* at 772.
[51] *ICSID Convention*, *supra* note 13, art 53.

Convention Article 53 is incompatible with modifying the *ICSID Convention inter se* to allow for the MIC's appeal mechanism.[52] Additionally, permitting an *inter se* modification would be contrary to the self-contained award review process that the *ICSID Convention*'s drafters intended.[53]

Others suggest that *ICSID Convention* Article 53's wording should be assessed relative to other provisions, in determining whether an *inter se* modification is possible.[54] Article 53 alludes to the *disputing parties* not being able to appeal an award, whereas Article 54 requires "Contracting States" to enforce all *ICSID* awards."[55] *ICSID Convention* Article 53's wording contains a rule from which *disputing parties* cannot depart, rather than one that "Contracting States" may not modify.[56] Thus, an argument can be made that *ICSID Convention* Article 53 is not incompatible and allows an *inter se* modification. Therefore, the *ICSID Convention* likely does not prohibit an *inter se* modification.

3.3.1.2 The MIC Would Not Likely Affect Other *ICSID Convention* State Parties' Rights or Obligations

If an *inter se* modification is not prohibited, the MIC would not likely place a burden on other *ICSID Convention* state parties because an *inter se* modification would not obligate non-modifying parties to enforce a MIC award under *ICSID Convention* Article 54.[57] Non-modifying

[52] Kaufmann-Kohler & Potestà, *supra* note 24 at 82. Calamita, "The (In)Compatibility", *supra* note 37 at 608.
[53] Calamita, "The (In)Compatibility", *supra* note 37 at 607.
[54] Calamita, "The (In)Compatibility", *supra* note 37 at 613; Brian McGarry & Josef Ostranky, "Modifying the ICSID Convention under the Law of Treaties" (11 May 2017), online: *EJIL Talk!* <https://www.ejiltalk.org/modifying-the-icsid-convention-under-the-law-of-treaties/>.
[55] Calamita, "The (In)Compatibility", *supra* note 37 at 28; McGarry & Ostranky, *supra* note 54.
[56] McGarry & Ostranky, *supra* note 54.
[57] Calamita, "The (In)Compatibility", *supra* note 37 at 615; Kaufmann-Kohler & Potestà, *supra* note 24 at 72.

parties, similar to non-*ICSID* contracting parties, are not obligated to recognize and enforce ICSID awards. Additionally, *VCLT* Article 34 provides that a treaty (the MIC convention in this case) cannot create obligations or rights for third parties without their consent.[58]

Furthermore, the *ICSID Convention* can be viewed as a "reciprocal" treaty as opposed to an "absolute" treaty.[59] Reciprocal treaties would not affect third parties' rights and obligations. Reciprocal treaties (such as the 1961 *Vienna Convention on Diplomatic Relations*) engage with the parties in a quasi-bilateral manner. Each provision can be applied on the modifying parties separately and independently from the other provisions, while still retaining the treaty's effectiveness. In contrast, absolute treaties (such as human rights conventions) require its parties to adhere to all of the treaty's provisions in order to render the treaty effective, thus forcing the non-modifying parties to comply with the modification.[60]An *ICSID Convention* provision could be modified without harming the overall effectiveness of the treaty, qualifying the *Convention* as a "reciprocal treaty". Thus, modifying the *ICSID Convention inter se* arguably would not prejudice other parties' rights.

3.3.1.3 The MIC Would Likely Not Be Contrary to the *ICSID Convention*'s Object and Purpose as a Whole

Whether the MIC would be seen as compatible or neutral to the *ICSID Convention*'s object and purpose depends on the weight of authority given to *ICSID Convention* Article 53's origins

[58] *VCLT*, *supra* note 44, art 34; McGarry & Ostranky, *supra* note 54.
[59] Kerstin Odendahl, "Article 41" in Oliver Dörr & Kirsten Schmalenbach, eds, *Vienna Convention on the Law of Treaties: A Commentary* (Heidelberg: Springer, 2012) at 723.
[60] McGarry & Ostranky, *supra* note 54; Reinisch, *supra* note 39 at 774; Kaufmann-Kohler & Potestà, *supra* note 24 at 83–84.

and its drafter's intentions.[61] If Article 53's origins and its drafter's intentions were crucial, the MIC would be contrary to the *ICSID Convention*'s object and purpose. *VCLT* Article 31 governs how to determine a treaty's object and purpose.[62] *VCLT* Article 31 provides a treaty's object and purpose can be determined by looking to the treaty's text and preamble.[63] It also provides that a treaty's object and purpose can be determined from its preparatory works as VCLT Article 32 provides.[64]

On the one hand, one can look to *ICSID Convention* Article 1(2), which states its purpose is "to provide facilities for conciliation and arbitration of investment disputes..."[65] This means the *ICSID Convention* aims to create a neutral international dispute settlement mechanism.[66] Given this "object and purpose", investment disputes must be settled through arbitration or conciliation, rather than whether the awards are reviewed by annulment or by appeal.[67] The *ICSID Convention*'s "object and purpose" can also be discerned from looking at its preamble.[68] The *ICSID Convention*'s preamble refers to facilitating private international investment, promoting economic development, and strengthening relations between countries.[69] Replacing annulments with appeals, and thus deviating from *ICSID Convention* Article 53, would not interfere in attaining any of the goals outlined in *ICSID Convention* Article 1(2) or its preamble.

---

[61] 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* (Switzerland: Springer, 2018) at 152.
[62] *VCLT, supra* note 44, art 31.
[63] *Ibid*, art 31.
[64] *Ibid,* art 32.
[65] *ICSID Convention*, *supra* note 13, art 1(2).
[66] McGarry & Ostranky, *supra* note 54.
[67] Reinisch, *supra* note 39 at 775, 779–80.
[68] *VCLT, supra* note 44, art 31(2).
[69] *ICSID Convention, supra* note 13, at preamble.

Further, the MIC's grounds for appeal already encompass the grounds for annulment, but simply broaden the scope of review.[70]

Also, in 2004, the *ICSID Convention* Secretariat notably proposed revising the system by establishing an appellate mechanism; however, this revision was not considered because of a lack of interest at the time.[71] Although it was not considered, the revision was also not rejected for being contrary to the *ICSID Convention*'s object and purpose. As a result, an appellate mechanism arguably would not necessarily be contrary to the *ICSID Convention*'s object and purpose.

On the other hand, the MIC's appellate mechanism arguably would be contrary to *ICSID Convention* Article 53 and therefore the *Convention*'s overall object and purpose.[72] The *ICSID Convention*'s preparatory work indicates that the *ICSID Convention*'s drafters intended for the treaty to have a self-contained review system, unlike the *New York Convention*, which was available at the time.[73] The drafters did not want the *ad hoc* annulment committee to consider the case's merits, but simply affirm or denounce awards.[74] The annulment grounds come from the 1953 *United Nations International Law Commission Draft Convention of Arbitral Procedure*; the International Law Commission intended that ICSID tribunal awards would be final, as an

[70] Kaufmann-Kohler & Potestà, *supra* note 24 at 84–85.
[71] Calamita, "The (In)Compatibility," *supra* note 37 at 21; Kaufmann-Kohler & Potestà at 20–21; N Jansen Calamita, "The Challenge of Establishing a Multilateral Investment Tribunal at ICSID" (2017) 32:3 ICSID Rev 611 at 622 [Calamita, "The Challenge"].
[72] Kyle Dylan Dickson-Smith, "Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model" (2016) 17 J World Investment & Trade 773 at 804; Calamita, "The Challenge" *supra* note 71 at 613; Zarra, *supra* note 24 at 179.
[73] Calamita "The Challenge", *supra* note 71 at 611.
[74] International Centre for Settlement of Investment Disputes, *History of the ICSID Convention* (Washington, DC: ICSID, 1970) at 161.

essential element of arbitral practice while balancing the need to prevent "an excess of jurisdiction and injustice."[75] The award would only be rendered invalid under a limited number of circumstances. Thus, the MIC's appeal mechanism could be viewed as an intrusion that violates the *ICSID Convention*'s intended self-contained system and thus its "object and purpose". Under this argument, it is unclear whether *ICSID Convention* Article 53 would prevent MIC awards from being incompatible with the *ICSID Convention*'s "object and purpose".

To conclude, under *VCLT* Article 41, modifying the *ICSID Convention inter se* to render MIC awards enforceable under the *Convention* is possible. First, although the *ICSID Convention* does not expressly allow for an *inter se* modification, it arguably does not prohibit one either. Second, *ICSID Convention* Article 34, combined with the *Convention's* reciprocal nature, would ensure that the *inter se* modification would not affect other parties' obligations and rights, as *VCLT* Article 41 requires. Third, the MIC may or may not be contrary to the *ICSID Convention*'s object and purpose, depending on whether *ICSID Convention* Article 53's origins and drafter's intentions are crucial for determining the *Convention*'s object and purpose.

3.3.2 The EU Cannot Modify *Inter Se* the *ICSID Convention* Because It Is Not a Contracting Party

VCLT Article 41 requires that only parties to the *ICSID Convention* may create an *inter se* modification.[76] Because the EU is not and cannot be a contracting party to the *ICSID Convention*, the EU would not be able to create an *inter se* modification. As a result, if the EU

[75] Dickson-Smith, *supra* note 72 at 808.
[76] *VCLT*, *supra* note 44, art 41.

were a respondent to a MIC dispute, the award would still not be enforceable on modifying parties.

There have been instances where the EEC (European Economic Community and precursor to the EU) was able to act on its Member States behalf without holding official contracting status. For example, the EEC was treated as a *de facto* party to the *General Agreement on Tariffs and Trade* (*GATT*) because non-EEC members had recognized that the Community had fully assumed its Member States' trade obligations.[77] As a *de facto GATT* party, the EEC was able to defend its Member States in cases brought against them.[78] However, the Court of Justice of the European Union (CJEU) made it clear that the EU had not assumed all powers relating to investment protection treaties when it declared that the *EU-Singapore FTA* had to be concluded not just by the EU, but also its Members States.[79] As a result, the EU cannot act on behalf of its Member States to create an *inter se* modification.

3.3.3 The *CETA* Could Create an *Inter Se* Modification Between Canada and EU Member States, but Not the EU Itself

The *CETA*'s drafters are similarly prevented from creating an *inter se* modification between Canada and the EU because the EU is not an *ICSID Convention* party. Under *CETA*, awards rendered through the *CETA* investment court (with its appellate mechanism) qualify as ICSID awards. *CETA* Article 8.41(6) states:

[77] *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948).
[78] Reinisch, *supra* note 39 at 770.
[79] Court of Justice of the European Union, "The Free Trade Agreement With Singapore Cannot, in Its Current Form, Be Concluded By the EU Alone" (16 May 2017), online: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170052en.pdf>.

> For greater certainty, if a claim has been submitted pursuant to Article 8.23.2(a), a final award issued pursuant to this Section shall qualify as an award under Chapter IV, Section 6 of the ICSID Convention.[80]

Because *CETA* cannot impose that a MIC award be enforced as an ICSID award on third-party states, *CETA* Article 8.41(6) would be creating an *inter se* modification.[81] However, because the EU is not and cannot be a contracting party to the *ICSID Convention*, an *inter se* modification could not be created between Canada and the EU.

3.4 Modifying the *ICSID Convention Inter Se* Would Not Effectively Permit Enforcing MIC Awards Under the *ICSID Convention*

Given the above, a future MIC convention does not obviously constitute a valid *inter se* modification to the *ICSID Convention*. *VCLT* Article 34 only permits *inter se* modifications that do not impose obligations on third parties.[82] Furthermore, the EU would not be able to create this *inter se* modification because it is not and cannot be a party to the *ICSID Convention*. Thus, awards rendered with the EU as a respondent would not be enforceable on the ICSID modifying parties. Due to the uncertainty regarding whether an *inter se* modification is available, MIC state parties should consider enforcing MIC awards an amended *ICSID Convention*. Only an amendment to the *ICSID Convention* would obligate all ICSID state parties to enforce MIC awards.[83]

3.4.1 Amending the *ICSID Convention* Between All State Parties Would Make MIC Awards Enforceable in All ICSID State Parties

[80] *CETA, supra* note 6, art 8.41(6).
[81] Calamita, "The (In)Compatibility", *supra* note 37 at 605.
[82] Happ & Wuschka, *supra* note 11 at 123; Calamita, "The Challenge", *supra* note 71 at 613; Kaufmann-Kohler & Potestà, *supra* note 24 at 85.
[83] Reinisch, *supra* note 39 at 782.

Amending the *ICSID Convention* between all state parties could lead to MIC awards being enforceable under the *ICSID Convention* and not subject to annulment. To do so, all 154 ICSID state parties would have to agree to amend the *ICSID Convention*.[84] The parties would need to amend several *ICSID Convention* provisions to make MIC awards enforceable. Specifically, the *ICSID Convention*'s revision, annulment, and enforcement provisions would need amending. Further, for a MIC award involving the EU, the *ICSID Convention*'s membership provision would need amending to allow the EU to become a contracting party. Finally, although not necessary for MIC awards to be enforceable, it may be beneficial to provide that the *ICSID Convention*'s state execution immunity provision does not apply.[85] This would help ensure that MIC awards are paid out. All of these suggested amendments will be discussed in greater detail below. However, because amending the *ICSID Convention* requires unanimous consent, doing so could be difficult and time-consuming. As a result, amending the *ICSID Convention* may not be a realistic way to ensure MIC awards would be enforceable.

3.4.1.1 The *ICSID Convention* Should be Amended to Exclude MIC Final Awards from Revision or Annulment

ICSID Convention Article 53 provides that ICSID awards are not subject to any appeal or remedy except for those found in the *Convention*.[86] The *ICSID Convention* provides grounds for revising or annulling ICSID awards at Articles 51 and 52. These provisions would be problematic for MIC final awards. To be clear, MIC final awards refer to appellate decisions or First Instance Tribunal decisions that are no longer subject to appeal because the time to appeal

[84] *ICSID Convention*, *supra* note 13, art 66; ICSID, "List of Contracting States and Other Signatories of the Convention" (2019), online: <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>.
[85] *ICSID Convention*, *supra* note 13, art 55.
[86] *Ibid,* art 53.

has expired. MIC final awards are intended not be subject to being annulled, set aside, or otherwise challenged apart from an appeal to the Appellate Tribunal.[87] Therefore, *ICSID Convention* Articles 51 and 52 must be amended to exclude MIC final awards from potential revision or annulment.[88] With these amendments, *ICSID Convention* Article 54 would apply to MIC awards and allow them to be enforced as ICSID awards.[89]

3.4.1.2 The *ICSID Convention* Should Be Amended to Allow the EU to Become a Contracting Party to Make MIC Awards Enforceable Against the EU

The *ICSID Convention* only allows states to become parties to the *Convention*.[90] The EU, as a union of many states, is not and cannot be a party to the present *ICSID Convention*.[91] This point is important because ICSID state parties are only required to enforce awards compliant with the *ICSID Convention*.[92] A MIC award with the EU as the respondent would not be compliant with the *ICSID Convention*. Thus, such a MIC award could not be enforced using the present *ICSID Convention*.[93] Therefore, the *ICSID Convention*'s membership provision, Article 67, would need amending to allow the EU to become a contracting party.[94] To be clear, this amendment is only necessary for awards against the EU, not individual EU Member States. However, even if the EU were to become an ICSID contracting party, it is unclear whether

[87] This intent is gleaned from the language used in *TTIP* proposal Article 30(1) and *CETA* Article 8.28(9)(b), *supra* note 6.
[88] *ICSID Convention*, *supra* note 13, arts 51 & 52.
[89] Albert Jan van den Berg, "Appeal Mechanism for ISDS Awards: Interaction with New York and ICSID Conventions" (2019) Hong Kong Department of Justice and Asian Academy of International Law Conference Paper at 97; Bungenberg & Reinisch, *supra* note 61 at 152.
[90] *ICSID Convention, supra* note, art 67.
[91] The EU is made up of 28 countries. See European Union, "Countries" (n.d.), online: <https://europa.eu/european-union/about-eu/countries_en>.
[92] Happ & Wuschka, *supra* note 11 at 123.
[93] Reinisch, *supra* note 39 at 769.
[94] Elsa Sardinha, "The New EU-led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and EU-Vietnam Free Trade Agreement" (2017) 32:3 ICSID Rev 625 at 670.

Poland, the only EU member state that is not an ICSID contracting party, would be obligated to enforce awards against the EU.

3.4.1.3 Amending the *ICSID Convention*'s State Execution Immunity Provision Would Help Ensure MIC Awards are Paid Out

State immunity prevents an investor from executing its award against a state's assets.[95] This means an investor could have an enforceable award, but ultimately not be able to have the award paid out. So, while state immunity is not directly related to whether awards are enforceable, state immunity is relevant to consider for ensuring the awards are paid out. State immunity can be divided into jurisdictional immunity and execution immunity. [96] The *ICSID Convention* does not deal with jurisdictional immunity, likely because an arbitration agreement's existence typically constitutes a waiver of jurisdictional immunity.[97] With regard to execution immunity, *ICSID Convention* Article 55 provides that states do not waive their execution immunity.[98] Further, the *ICSID Convention* provides that execution immunity is a matter of domestic law in the jurisdiction in which enforcement is sought.[99]

[95] Mevelyn Ong, "The Interplay of Sovereignty and Consent in the Execution of Arbitral Award Debts Against Non-Party State-Owned Enterprises" (2017) 4 McGill J Dispute Resolution 22 at 24.
[96] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 6th ed (Oxford: Oxford University Press, 2015) at 655.
[97] *Ibid* at 656; Azim Hussain et al, "State Immunity and International Arbitration" (2017) 8 Norton Rose Fulbright International Arbitration Report 43 at 44.
[98] *ICSID Convention, supra* note 13, art 55.
[99] *Ibid,* art 54(3). See also *Maritime International Nominees Establishment (MINE) v Republic of Guinea* (1988), ICSID Case No ARB/84/4, Interim Order No 1 on Guinea's Application for Stay of Enforcement of the Award at para 24 (International Centre for Settlement of Investment Disputes).

States do not all approach state immunity the same way in their domestic laws.[100] However, most states adopt either an absolute or restrictive approach to state immunity. Under the absolute approach, a state enjoys total immunity from its assets being seized.[101] Under the restrictive approach, only assets related to an exercise of sovereign power will be immune.[102] This means, under a restrictive approach, which is the more widely adopted, a state's commercial assets are not protected.[103] However, states may differ in which government assets are considered commercial and therefore differ in what assets are subject to execution.[104] Furthermore, it can be difficult for a judgment creditor to identify commercial assets. These distinctions in domestic state immunity laws can make executing an award burdensome and difficult for a successful investor. Further, scholars have criticized allowing states to assert execution immunity under the *ICSID Convention* as undermining the *Convention*'s effectiveness.[105] Thus, while not necessary to make MIC awards legally enforceable, amending *ICSID Convention* Article 55 to prevent execution immunity from applying to MIC awards would help ensure MIC awards are paid out.

3.4.1.4 Amending the *ICSID Convention* Would Be Effective but Difficult to Accomplish

Amending the *ICSID Convention* is theoretically possible and would ensure MIC awards could be enforced and exempt from *ICSID Convention* Article 52's annulment grounds.

---

[100] Andrea 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 212 [Bjorklund, "Sovereign Immunity"].
[101] Hussain et al, *supra* note 97 at 43.
[102] *Ibid*.
[103] Bjorklund, "Sovereign Immunity", *supra* note 100 at 212–13.
[104] Blackaby et al, *supra* note 96 at 658–59.
[105] Christoph Schreuer et al, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2009) at 1154; Inna Uchkunova & Oleg Temnikov, "Enforcement of Awards Under the ICSID Convention—What Solutions to the Problem of State Immunity?" (2014) 29:1 ICSID Rev 187 at 194.

However, successfully amending the *ICSID Convention* would be difficult.[106] As noted earlier, amending the *ICSID Convention* requires unanimous consent.[107] This is different from amending the ICSID Rules and Regulations, which only requires a two-thirds majority of the 154 state parties.[108] Thus, while the ICSID Rules and Regulations have been amended a number of times, the *ICSID Convention* itself has never been amended.[109] Further, one can imagine that amending the *ICSID Convention* would involve lengthy negotiations before the *Convention* could be amended to accommodate MIC awards. In addition, states may be inclined to raise other issues for negotiation, thereby making amending the *Convention* in favour of MIC awards even more difficult. Therefore, amending the *ICSID Convention* would be a difficult, if not practically impossible to achieve.[110] A better option would be to turn to the *New York Convention* or consider giving a future MIC its own enforcement regime. Both are discussed below.

[106] Bungenberg & Reinisch, *supra* note 61 at 152.
[107] *ICSID Convention, supra* note 13, art 66.
[108] *Ibid,* art 6.
[109] For details on the most recent amendment to the ICSID Rules and Regulations, see ICSID, "ICSID Rules and Regulations Amendment Process" (n.d.), online: <https://icsid.worldbank.org/en/amendments>.
[110] Schreuer et al, *supra* note 105 at 1265; Reinisch, *supra* note 39 at 769; Kate M Supnik, "Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law" (2009) 59 Duke LJ 343 at 367; David R Sedlak, "ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold" (2004) 23:1 Penn State Intl L Rev 147 at 157; Bungenberg & Reinisch, *supra* note 61 at 152; Markus Burgstaller, "Investor-State Arbitration in EU International Investment Agreements with Third States" (2012) 39:2 Legal Issues of Economic Integration 207 at 214.

4 MIC AWARDS ARE LIKELY ENFORCEABLE USING THE *NEW YORK CONVENTION*

MIC awards could likely be enforced under the *New York Convention* regardless of whether the *New York Convention* state party was party to the MIC convention. MIC awards would likely meet all of a foreign arbitral award's elements for the purposes of enforcement under the *New York Convention*.

The *New York Convention* promotes the recognition and enforcement of foreign arbitral awards. Before arbitration, if the parties have agreed to arbitrate, *New York Convention* Article II will require that the parties arbitrate before bringing their dispute to court.[111] The agreement to arbitrate could be "an arbitral clause in a contract or arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."[112]

Once the parties have arbitrated, *New York Convention* Article III requires the domestic courts of state parties to recognize and enforce the foreign arbitral award.[113] *New York Convention* Article V sets out limited grounds on which a domestic court can refuse to recognize and enforce a foreign arbitral award. Article V(1) lists five procedural grounds for domestic courts to refuse recognition and enforcement.[114] Significantly, the party resisting enforcement bears the burden of proving that there were no Article V(1) procedural defaults.[115] Article V(2) lists two other grounds for refusing recognition and enforcement: (a) the subject matter of the

[111] *New York Convention, supra* note 17, art II(3).
[112] *Ibid*, art II(2).
[113] *Ibid,* art III.
[114] *Ibid,* art V(1).
[115] Blackaby et al, *supra* note 61 at 622–23.

dispute cannot legally be arbitrated in the state where recognition and enforcement is sought, and (b) recognition or enforcement of the award would be contrary to the public policy of the state where recognition and enforcement is sought.[116] Either party can raise an Article V(2) issue. Additionally, a tribunal can raise an Article V(2) issue on its own.[117] Article V(2) is silent on who bears the burden of proof, but if an Article V(2) is raised, the party resisting enforcement still bears the burden of disproving the Article V(2) issue.[118]

With respect to scope, the *New York Convention* applies to foreign arbitral awards. Article I(1) says the *New York Convention* applies to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement is sought."[119] This assumes that the award has a place of arbitration. Article I(2) clarifies that arbitral awards 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.[120]

Importantly, the *New York Convention* leaves "arbitral awards" and "arbitral bodies" undefined.

New York Convention Article I(3) sets out two possible reservations: the reciprocity and commercial. States that make the reciprocity reservation will only enforce arbitral awards made in another *New York Convention* state party's territory:

> [A]ny State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.[121]

---

[116] *New York Convention, supra* note 17, art V(2).
[117] Blackaby et al, *supra* note 61 at 623.
[118] Christian Borris & Rudolf Hennecke, "Article V (Grounds for Refusal of Recognition and Enforcement of Arbitral Awards)" in Reinmar Wolff, ed, *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Commentary* (Munich, Germany: Verlag C H Beck, 2012) at 252.
[119] *New York Convention, supra* note 17, art I(1).
[120] *Ibid,* art I(2).
[121] *Ibid,* art I(3).

States that make the commercial reservation will only enforce awards that their domestic law classifies as commercial:

> [A]ny state…may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.[122]

4.1 The *New York Convention* Applies to Foreign Arbitral Awards

Although the *New York Convention* applies to foreign arbitral awards, it does not define "arbitral award". Therefore, "arbitral award" must be interpreted according to *VCLT* Article 31's rules. *VCLT* Article 31 sets out the rules for interpreting a treaty and is regarded as customary international law, making it applicable to all states.[123] The applicable *VCLT* Article 31 rules in this case are that the treaty term must be interpreted (i) using its ordinary meaning, (ii) according to the treaty's context, and (iii) with regard to subsequent state practice.[124] To supplement, (iv) the teachings of the most highly qualified publicists of various nations can be referred to for determining questions of international law.[125]

---

[122] *Ibid*.
[123] Christopher Greenwood, "Sources of International Law: An Introduction" (2008) *United Nations Treaty Collection* at 3.
[124] *VCLT*, *supra* note 44, art 31.
[125] *Statute of the International Court of Justice*, 26 June 1945, UNTS 1055, art 38 (entered into force 24 October 1945); Christoph Schreuer, "Sources of International Law: Scope and Application" (1999) Emirates Center for Strategies Studies and Research Emirates Series Lecture No 28 at 7–8; Greenwood, *supra* note 123 at 3–4; Bankole Thompson, "Sources of International Law" in Bankole Thompson, ed, *Universal Jurisdiction: The Sierra Leone Profile* (Netherlands: Asser Press, 2015) at 10.

4.1.1 "Arbitral Award" Does Not Have A Universal Ordinary Meaning

Tribunals and panels have used dictionary definitions to find the ordinary meaning of treaty terms.[126] However, no universal definition for "arbitral award" exists.[127] Both Black's Law Dictionary and the Oxford Dictionary of Law only define "award", not "arbitral award".[128] As a result, interpreting "arbitral award" using its ordinary meaning is not conclusive.

4.1.2 The *New York Convention*'s Context Provides That Arbitral Awards Include Awards Made by Arbitrators and Permanent Arbitral Bodies

A treaty's context under *VCLT* Article 31 includes other treaty provisions. Within the *New York Convention*, only Article I(2) elaborates on the meaning of an arbitral award. *New York Convention* Article I(2) provides that arbitral awards include awards made by arbitrators and can also include awards made by permanent arbitral bodies.[129]

---

[126] *Korea-Measures Affecting Import of Fresh, Chilled and Frozen Beef*, WTO Panel Report, 31 July 2000 at para 160; *Saluka Investments BV v The Czech Republic* (2004), Decision on Jurisdiction over the Czech Republic's Counterclaim at para 297 (UNCITRAL); *Tokios Tokeles v Ukraine* (2004), ICSID Case No ARB/02/18, Decision on Jurisdiction at para 28 (International Centre for the Settlement of Investment Disputes); *US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WTO, Appellate Body Report, 15 February 2002 at para 163.

[127] Blackaby et al, *supra* note 96 at 502.

[128] Black's Law Dictionary defines "award" as "[t]he decision or determination rendered by arbitrators or commissioners, or other private or extrajudicial deciders, upon a controversy submitted to them", see Black's Law Dictionary, "award", online: <https://thelawdictionary.org/award-n/>; Oxford Law Dictionary refers to an "award" as "the judgement of an arbitrator", see Jonathan Law, *A Dictionary of Law*, 8th ed (Oxford, Oxford University Press: 2015) at "arbitration".

[129] *New York Convention*, *supra* note 17, art I(2).

4.1.3 Subsequent State Practice Provides That Arbitral Awards Must Be Final and Binding Decisions by Arbitrators That Resolve Some or All of a Dispute

The UNCITRAL Secretariat's guide to the *New York Convention* summarizes subsequent state practice regarding how arbitral awards are defined.[130] According to the UNCITRAL Secretariat, state party courts have determined that an arbitral award under the *New York Convention* must be a final and binding decision by arbitrators that resolves some or all of a dispute.[131] Each element will be discussed below.

4.1.4 The Teachings of the Most Highly Qualified Publicists Confirm State Practice and Add Voluntarily Submitting the Claim Is Required

To supplement interpreting a treaty using *VCLT* Article 31, the teachings of the most highly qualified publicists of various nations can be referred to for determining international law questions.[132] Bungenberg and Reinisch have canvassed the existing scholarly literature and identified three consistently cited "arbitral award" characteristics.[133] First, the parties must voluntarily submit the claim for arbitration.[134] Second, the dispute settlement must be final and

[130] UNCITRAL Secretariat, *Guide on the Convention and Recognition and Enforcement of Arbitral Awards* (Geneva, UN: 2016) [UNCITRAL Secretariat Guide] at 12–14.
[131] *Ibid* at 12.
[132] *ICJ Statute, supra* note 125, art 38; Schreuer, *supra* note 125 at 7–8; Greenwood, *supra* note 123 at 3–4; Thompson, *supra* note 125 at 10.
[133] Bungenberg & Reinisch, *supra* note 61 at 153–54. Note: Bungenberg and Reinisch identify a fourth characteristic, party-appointed arbitrators, but acknowledge that it is not consistently given the same degree of attention in the literature (*ibid* at 158).
[134] Gary Born, *International Commercial Arbitration*, 2nd ed (London: Kluwer Law International, 2014) [Born, *International Commercial Arbitration*] at 291; Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 5th ed (Netherlands: Kluwer Law International, 2016) [Born, *Arbitration and Forum Selection Agreements*] at 2; Kaufmann-Kohler & Potestà, *supra* note 24 at 36.

legally binding.[135] Third, the decision-maker must be a private, non-governmental actor.[136]

These three characteristics are similar to the characteristics identified in subsequent state practice. The only difference is that scholars include voluntarily submitting the claim to arbitration as a requirement for an arbitral award. However, this is not a contentious point given that the parties' consent to arbitrate, as demonstrated through their arbitration agreement, is foundational to international arbitration.[137] This research memorandum proposes using Bungenberg and Reinisch's three characteristics to identify an arbitral award. Therefore, the *New York Convention* applies to awards with the following characteristics:

1. The award is an arbitral award, meaning:
    (a) the award stems from a voluntarily submitted arbitral claim;
    (b) the award resolves some or all of the dispute in a final and binding manner; and
    (c) the award is decided by non-state decision-makers.
2. The award is foreign.
3. Depending on the jurisdiction, the award may also need to be commercial.
4. Depending on the jurisdiction, the award may also need to be made in a *New York Convention* state party's territory.

[135] Blackaby et al, *supra* note 96 at 503; Bernd Ehle, "Article I [Scope of Application]," in Reinmar Wolff, ed, *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Commentary* (Munich, Germany: Verlag C H Beck, 2012) at 37; Born, *Arbitration and Forum Selection Agreements* at 2; Born, *International Commercial Arbitration, supra* note 134 at 291; Kaufmann-Kohler & Potestà, *supra* note 24 at 35; Ehle, *supra* note 135 at 34–36.
[136] Ehle, *supra* note 135 at 34–36; Born, *International Commercial Arbitration*, *supra* note 134 at 291; Born, *Arbitration and Forum Selection Agreements, supra* note 134 at 2; Kaufmann-Kohler & Potestà, *supra* note 24 at 36.
[137] Blackaby et al, *supra* note 96 at 71.

4.2 MIC Awards Could Be Enforced in *New York Convention* State Parties Whether or Not the States Are Parties to the MIC Convention

The following section will discuss how MIC awards satisfy the *New York Convention*'s criteria for "arbitral award". Satisfying the *New York Convention*'s criteria for "arbitral award" would make MIC awards enforceable in all *New York Convention* state parties, regardless of whether the states are party to the MIC.

4.2.1 The Arbitral Award Stems from a Voluntarily Submitted Arbitral Claim

An arbitral tribunal's jurisdiction depends on the state and investor's consent to arbitrate.[138] Consent exists when the investment treaty contains a standing offer to arbitrate and the investor accepts the offer.[139] An investor may accept a standing offer to arbitrate by filing a request for arbitration.[140] Thus, in principle, an investor filing a request to arbitrate to the MIC would satisfy the *New York Convention*'s voluntary submission criteria. However, some scholars have expressed concern that voluntary submission is not genuine when investors only have one dispute resolution option. For the MIC, this is a concern because the EU seemingly intends for the MIC to be the *only* dispute resolution forum for investors.[141] Furthermore, investors could be required to waive their right to initiate a claim before any other domestic or international court or

[138] Schreuer, *supra* note 125 at 831; Jan Paulsson "Arbitration Without Privity" (1995) 10:2 Foreign Investment L 232 at 247.
[139] Paulsson, *supra* note 138 at 247; Gustavo Laborde, "The Case for Host State Claims in Investment Arbitration" (2010) 1:1 J Intl Dispute Settlement 97 at 106; Hege Elisabeth Veenstra-Kjos, "Counterclaims by Host States in Investment Treaty Arbitration"(2007) 4:4 Transnational Dispute Management 1 at 13.
[140] *Spyridon Roussalis v Romania* (2011), ICSID Case No ARB/06/01, Award at paras 775, 866 (International Centre for Settlement of Investment Disputes).
[141] This intent can be gleaned from the drafting of the *CETA*. *CETA*, *supra* note 6, art 8.25 only allows parties to settle disputes using the *CETA*'s contemplated tribunal.

tribunal.[142] In states where domestic courts are not permitted to interpret and apply treaties, investors would only be able to resolve their investment treaty disputes using the MIC. [143] As a result, some scholars argue that voluntary submission would not be satisfied where investors have no other choice but submit their claims to the MIC.

Voluntary submission can be satisfied even where investors only have one dispute resolution option. As indicated above, voluntary submission is satisfied when both parties consent to arbitrate. Consent is found in the treaty's standing offer to arbitrate and the investor accepting this offer. [144] The fact that parties only have one dispute resolution option does not affect the validity of their consent to arbitrate. Evidence of this point can be found by looking to the Iran-United States Claims Tribunal (IUSCT) and *ad hoc NAFTA* tribunal decisions.[145]

The IUSCT was created to resolve disputes following the Iranian revolution. Part of the agreement was that claimants could only pursue their claims using arbitration before the IUSCT.[146] Any pending American claims at the time were suspended and referred to the IUSCT.[147] In the few cases where parties sought to use the *New York Convention* to enforce an IUSCT award, courts concluded that voluntary submission was satisfied by virtue of the

[142] *Ibid*, art 8.22(1)(g).
[143] The domestic courts of some states can apply and interpret treaties because the Constitutions of some states (like France) deem treaties to be self-executing. This means ratified treaties are, in principle, immediately applicable in the state's domestic legal order. As a result, domestic courts may consider and apply treaties to their domestic legal order. *See* David Sloss, "Domestic Application of Treaties" in Duncan B Hollis ed, *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012) at 367.
[144] Paulsson, *supra* note 138 at 247; Laborde, *supra* note 139 at 106; Veenstra-Kjos, *supra* note 139 at 13.
[145] David D Caron, "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution" (1990) 84 Am J Intl L 104 at 148.
[146] *Algiers Accords*, 19 January 1981, 20 ILM 223, General Declaration at General Principle B & Article 11.
[147] Reagan Executive Order No. 12, 294 (24 February 1981), reprinted at 46 Fed. Reg. 14111 (1981).

individuals having brought the case to the IUSCT.[148] Alternatively, voluntary submission was satisfied through the state's consent replacing the investor's consent to settle disputes using the IUSCT.[149] Under *NAFTA*, investors can only bring treaty breach cases against Canada and the United States to arbitration before *ad hoc NAFTA* tribunals.[150] Furthermore, Canada and the United States further restrict investors by providing that *NAFTA* provisions cannot be the basis for a private cause of action before domestic courts.[151] Notably, although investors in these cases can only bring their treaty disputes before a *NAFTA* tribunal, *NAFTA* awards have never been disputed on the ground that the investor did not voluntarily submit to arbitration.[152] Finally, Kaufmann-Kohler has argued that an investor accepting a state's arbitration offer also satisfies voluntary submission in an international investment tribunal context.[153] Therefore, a treaty can give investors only one dispute resolution option, like the MIC, and its awards would still satisfy the *New York Convention*'s voluntary submission requirement.

---

[148] *Dallal v Bank Mallat*, [1986] QB 441, 75 ILR 151 (High Court, England) is the only previous decision to have considered whether an IUSCT award could be enforced using the *New York Convention*. The court found that "in the present case the plaintiff chose to resort to the tribunal at The Hague and thereby submitted to its jurisdiction… It is true that he may have had no alternative under the law of the United States if he wished to pursue his rights as he saw them. But that does not make it any less the voluntary act" (*ibid* at 460–61). Also see *Golshani v Iran* (2005), Case no 1139-FS-P+B of 6 July 2005 at 2 where France's Cour de Cassation found that Goshani's expropriation claim excluded him from arguing that the IUSCT ruled without a valid arbitration agreement.

[149] *Ministry of Defense of the Islamic Republic of Iran v Gould Inc and others* (1988), Case no CV 87-03673-RG, U.S. District Court (Central District of California) of 14 January 1988 at 19–20 held that the "requirement that there be a writing signed by the parties serves to establish the consensual nature of the proceedings" and that the Algerian Accords establishing the IUSCT represented the "written agreement as required, on the strength of the President's authority to settle claims on behalf of United States nationals through international agreements".

[150] See *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) at Chapter 11, Section B (arts 1115–1138) dealing with settlement of disputes between a party and investor of another party.

[151] *North American Free Trade Implementation Act*, SC 1993, c 44, s 6; *North American Free Trade Implementation Act*, Pub L No 103–182, 107 Stat 2057 (1993), § 102(c)(1).

[152] Notably, under *NAFTA*, *supra* note 150, art 1126(10), parties have some freedom of choice because they can choose their arbitration rules between the *ICSID Convention*, ICSID Additional Facility Rules or UNCITRAL Arbitration Rules. The MIC would not provide this option. However, this point does not change the fact that claims against Canada or the United States only have one forum for dispute resolution under *NAFTA*.

[153] Kaufmann-Kohler & Potestà, *supra* note 24 at 36.

4.2.2 The Arbitral Award Resolves Some or All of the Dispute in a Final and Binding Manner

The MIC would likely fulfill the final binding decision element of an arbitral award.[154] In arbitration, the parties "expect a binding decision by a third, neutral party in a court-like procedure."[155] *CETA* Article 8.39 gives the *CETA* investment court the power to make final awards.[156] Given that this research memorandum assumes a MIC will be based off of *CETA*'s provisions, this should satisfy the final binding decision requirement.

Moreover, the MIC's internal appeal mechanism should not pose a problem for the final binding decision element. First, the *New York Convention* has often been held to apply to investor-state arbitration awards even if the investment treaty contains an appellate mechanism.[157] Second, the awards could be considered final after they have gone through the entire appeal mechanism. Even if the First Instance Tribunal awards are not considered final, awards may be considered final and binding after either (i) the Appellate Tribunal renders its decision on appeal or (ii) the time limit to appeal the award has expired. [158] Therefore, MIC awards will likely be final and binding.

4.2.3 The Arbitral Award is Decided by Non-State Decision-Makers

[154] *Ibid* at 36.
[155] Bungenberg & Reinisch, *supra* note 61, at 156.
[156] *CETA, supra* note 6, art 8.39.
[157] Calamita, "The (In)Compatibility", *supra* note 37 at 619.
[158] Kaufmann-Kohler & Potestà, *supra* note 24 at 59.

Relying on the current *CETA* structure, it is unclear whether MIC awards would meet the non-state decision-maker element. While a MIC would not be part of any one state's judicial system, Kaufmann-Kohler and Potestà have argued this is not determinative.[159] The International Court of Justice is also not part of a state's judicial system, but is not considered to "dispense 'private' justice."[160] At the same time, the MIC could be likened to the IUSCT, which has seemingly fulfilled the non-governmental requirement because its awards have even enforced under the *New York Convention*.[161]

However, on balance, MIC awards would likely constitute awards made by a non-state decision-maker. To ensure that the MIC is not seen as a state entity, Bungenberg and Reinisch have suggested giving the MIC "private" entity characteristics such as appointing judges for each case from a roster.[162] By appointing three judges from its roster for the First Instance Tribunal hearing, the MIC would likely do that.[163] However, notably, these judges would be appointed, not chosen by the disputing parties. Nonetheless, ultimately because the MIC would choose its judges from a roster, MIC awards would likely satisfy the "non-state decision-maker" criteria.

4.2.4 The Arbitral Award Is Foreign

An award can be foreign in different ways. First, an award is foreign under the *New York Convention* when it is made in a state other than the one where enforcement is sought.[164] The

[159] *Ibid* at 59.
[160] *Ibid* at 37.
[161] Bungenberg & Reinisch, *supra* note 61 at 157.
[162] *Ibid* at 157.
[163] See page 9 of this research memorandum.
[164] Gary Born, *International Arbitration: Law and Practice*, 2nd ed (The Netherlands: Kluwer Law International, 2015) [Born, *International Arbitration*] at 377–78.

award is located in the seat of arbitration.[165] MIC awards would be foreign awards everywhere outside of its seat of arbitration. This leaves a significant hole: a MIC arbitral award could not be enforced under the *New York Convention* in the seat of arbitration. Second, an award can also be foreign if it is a delocalized award. A delocalized award is an award made in State A, but does not apply State A's laws.[166] Such an award would be enforceable as a foreign award under the *New York Convention* in State A. Whether delocalized awards are legally possible is controversial. While scholars like Kaufmann-Kohler and Potestà maintain the possibility, the dominant perspective is that an arbitration is always rooted in a national legal system.[167]

However, if an award were delocalized, it would likely not meet the reciprocity reservation requirements. States that have made the reciprocity reservation only enforce awards made in other *New York Convention* state parties and a delocalized award is not "made" anywhere. Because 74 out of 159 state parties have adopted the reciprocity reservation, [168] this would be a significant obstacle to enforcing MIC awards under the *New York Convention*. Therefore, even if it were possible to have a delocalized award, such an award would likely not be widely enforceable.

Assuming that MIC awards are not delocalized awards, the best solution to promote *New York Convention* enforcement is likely to locate the MIC in a MIC state party and then, in the MIC, deem MIC awards to be foreign awards. Courts in the seat of arbitration would be

---

[165] *Ibid*.
[166] Bungenberg & Reinisch, *supra* note 61 at 158–160; Kaufmann-Kohler & Potestà, *supra* note 24 at 57–58.
[167] See Kaufmann-Kohler & Potestà, *supra* note 24 at 57–58; but see Ehle, *supra* note 135 at 60.
[168] UNCITRAL, "Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" (last visited 29 April 2019), online: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

obligated to consider MIC awards as foreign arbitral awards. Therefore, MIC awards would likely be enforceable under the *New York Convention* in the seat of arbitration.

4.2.5 MIC Awards Would Likely Be Commercial Awards

Depending on the jurisdiction where enforcement is sought, the award may have to be (i) a commercial award, and/or (ii) made in the territory of a *New York Convention* state party.

49 out of 159 *New York Convention* state parties have adopted the commercial award reservation.[169] These states will only enforce awards relating to "commercial matters" as defined in their domestic law. The overwhelming majority of states interpret commercial matters broadly.[170] For example, United States courts have implicitly held that IUSCT awards are commercial.[171] Isolated court decisions from India and Tunisia interpret commercial matters very narrowly.[172] However, such a narrow interpretation is inconsistent with the underlying purpose of the *New York Convention*, which *VCLT* Article 31(1) directs must be considered when interpreting a treaty.[173] Most states recognize the *New York Convention*'s pro-enforcement purpose.[174] The *New York Convention* was created to strengthen the existing regime for enforcing arbitral awards.[175] Extremely narrow interpretations of "commercial matters" makes arbitral awards difficult to enforce under the *New York Convention*, weakening the regime for

[169] *Ibid*.
[170] Ehle, *supra* note 135 at 81–82.
[171] Bungenberg & Reinisch, *supra* note 61 at 162–163.
[172] Notably, the India court case was later overturned. See *Indian Organic Chemical Ltd v Chemtex Fibres Inc*, (1978) AIR 1978 Bom 106 (High Court of Bombay, India); Ehle, *supra* note 135 at 82–83.
[173] Kronke et al, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (New York: Kluwer Law International, 2010) at 35.
[174] Blackaby et al, *supra* note 96 at 623.
[175] Ehle, *supra* note 135 at 29–30.

enforcing arbitral awards. This undermines the *Convention*'s pro-enforcement purpose and is therefore contrary to *VCLT* Article 31(1).[176]

Broadly interpreting "commercial" is popular[177] and has been found to include investor-state relations. Canadian courts held that *NAFTA* Chapter 11 awards are commercial in the *Metalclad* and *Feldman* judicial review decisions, and the Swedish Svea Court of Appeal held that the *CME v Czech Republic* award was commercial.[178] Since the MIC will also concern itself with investor-state relationships, MIC awards will almost certainly be considered commercial.

4.2.5.1 Deeming MIC Awards to Be Commercial Awards Would Not Affect Third Parties

To remind, this research memorandum assumes that the MIC will also deem its awards to be commercial awards.[179] This assumption is based on *CETA* Article 8.41(5) which reads:

> A final award issued pursuant to this Section is an arbitral award that is deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.[180]

This provision is intended to circumvent any commercial reservation issues under the *New York Convention*.[181] *CETA* Article 8.41(5) will bind courts in *CETA* state parties to recognize and enforce *CETA* awards as commercial awards.[182] However, by operation of *VCLT* Article 34, this will have no effect in states not party to *CETA*.[183] For example, when deciding

---

[176] *VCLT*, *supra* note 44, art 31(1).
[177] Ehle, *supra* note 135 at 82.
[178] See *Mexico v Metalclad Corp*, [2001] 89 BCLR (3d) 359; *United Mexican States v Karpa*, [2005] OJ No 16, 74 OR (3d) 180; *CME Czech Republic BV v Czech Republic* (2003), UNCITRAL, Final Award and Separate Opinion.
[179] See page 9 of this research memorandum.
[180] *CETA*, *supra* note 6, art 8.41(5).
[181] Happ & Wuschka, *supra* note 11 at 124.
[182] *Ibid*.
[183] *Ibid*.

whether or not to enforce a *CETA* award through the *New York Convention*, United States domestic courts would still have to consider whether a *CETA* award meets the definition of a commercial award under the United States' domestic law. Therefore, deeming MIC awards to be commercial awards would only guarantee MIC convention state parties would find them to be commercial.

Nevertheless, as discussed above, MIC awards are likely commercial awards. Therefore, whether third parties are affected by treaty provisions deeming awards to be commercial is moot. MIC awards are very likely to be commercial awards regardless of whether or not they are deemed as such in a treaty.

4.2.6 The MIC Should Be Made Within the a *New York Convention* State Party's Territory

MIC awards may also have to satisfy the reciprocity reservation. 74 out of 159 *New York Convention* state parties have adopted the reciprocity reservation.[184] These states will only enforce awards made in other *New York Convention* state parties.[185] The *New York Convention*'s widespread ratification makes the reciprocity reservation less of a hurdle, although it should still be considered because parties might be unsure where they will seek enforcement before an award being rendered.[186]

[184] Kronke et al, *supra* note 173 at 32.
[185] Blackaby et al, *supra* note 96 at 618–19.
[186] Some notable states that are not party to the *New York Convention* include: Yemen, Taiwan, Belize and others. See "Signatories' Map" (2019), online: *New York Convention 1958* <http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=4&menu=671&opac_view=-1>.
[186] *New York Convention*, *supra* note 17, art I(2).

As long as the award's seat of arbitration is located in a *New York Convention* state party's territory, the award will satisfy the reciprocity reservation. Because there are 159 *New York Convention* state parties, choosing an appropriate jurisdiction will be easy.

4.3 The MIC Is Likely an Arbitral Body

New York Convention Article I(2) allows arbitral awards to be made by either *ad hoc* arbitral tribunal or a "permanent arbitral body."[187] Courts have interpreted the term "permanent arbitral body" very broadly.[188] The "permanent arbitral body" characteristic has been considered as superfluous as long as voluntary submission exists.[189] Permanent arbitral bodies include: the Arbitration Institute of the Central Chamber of Commerce of Finland, the Chambers of Commerce and Industry of Ukraine and Bulgaria, the Vienna Commodity Exchange, and even the United States National Grain and Feed Association.[190] Therefore, as long as the arbitral award issued by the MIC meets the criteria for an arbitral award —particular voluntary submission— then the MIC would likely be an arbitral body.

4.4 Domestic Courts Would be Unlikely to Set Aside MIC Awards

Whether an arbitral award can be set aside is a domestic law question. Parties seeking to set aside an award must go to the proper court in the seat of arbitration.[191] While the *New York Convention* does not deal with setting aside arbitral awards, it does presume that an arbitral award has a seat of arbitration.[192] This means *New York Convention* awards can be set aside.

---

[187] *Ibid*.
[188] Ehle, *supra* note 135 at 54.
[189] *Ibid.*
[190] *Ibid*.
[191] Blackaby et al, *supra* note 96 at 577.
[192] Ehle, *supra* note 135 at 54.

In determining whether the MIC has a seat of arbitration, there are two options. First, if the MIC does not have a seat of arbitration, then it would likely be impossible to set aside a MIC award because there would be no proper court to do so. In that case, the MIC Appellate Tribunal would effectively replace domestic courts' ability to set aside the award. Second, if the MIC has its seat of arbitration in the state where it is located, then setting aside proceedings would be available subject to the host state's domestic law.

Domestic regimes commonly deal with set aside proceedings using the UNCITRAL Model Law.[193] UNCITRAL Model Law Article 34 sets out grounds for setting aside an arbitral award.[194] These mirror the grounds for refusing enforcement under *New York Convention* Article V.[195] The UNCITRAL Model Law has been adopted in 80 countries and 111 jurisdictions, including Germany, Russia, and all Canadian and Australian provinces and territories.[196] In the United Kingdom, it has been adopted by Scotland, and in the United States it has been adopted by nine states, including California and Texas.[197] However, it has not been adopted in important arbitral seats such as New York, England, or France.[198]

[193] UNCITRAL, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006" (2019), online: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> [UNCITRAL Status].
[194] Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006 (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/40/17, Annex I (entered into force 21 June 1985) [UNCITRAL Model Law].
[195] Blackaby et al, *supra* note 96 at 582.
[196] UNCITRAL Status, *supra* note 193.
[197] *Ibid*.
[198] *Ibid*.

Just as *New York Convention* Article V(1) sets out procedural grounds for refusing to enforce an award, UNCITRAL Model Law Article 34(2)(a) sets out procedural grounds for setting aside an award. Each ground will be discussed in turn below.

UNCITRAL Model Law Article 34(2)(a)(i) permits setting aside where a party to the arbitration agreement was under an incapacity or the agreement was not legally valid.[199] If the arbitration agreement is found in the relevant investment treaty, there should be no concerns about parties to the agreement being under an incapacity.[200]

UNCITRAL Model Law Article 34(2)(a)(ii) permits setting aside where the party making the application was not given proper notice of the arbitrator's appointment or the arbitral proceedings, or was unable to present their case.[201] Article 34(2)(a)(iii) permits setting aside where the arbitration exceeded its scope. Article 34(2)(a)(iv) permits setting aside where the arbitral tribunal's composition or the arbitral proceedings was not as agreed upon by the parties.[202] As long as the MIC follows its own procedural rules, MIC awards should not be set aside on these grounds.

UNICITRAL Model Law Article 34(2)(b) permits setting aside where (i) the subject matter of the dispute cannot legally be arbitrated in that state, or (ii) recognition or enforcement of the award would be contrary to the state's public policy.[203]

---

[199] UNCITRAL Model Law, *supra* note 194, art 34(2)(a)(i).
[200] Stephan Wilske & Todd J Fox, "Article V(1)(a)" in Reinmar Wolff ed, *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Commentary* (Munich, Germany: Verlag C H Beck, 2012) at 273.
[201] UNCITRAL Model Law, *supra* note 194, art 34(2)(a)(ii).
[202] *Ibid*, art 34(2)(a).
[203] *Ibid*, art 34(2)(b).

With respect to Article 34(2)(b)(i), arbitration is often prohibited when the subject matter is not suited to confidential dispute resolution. This arises in cases of insolvency, personal status, and patents.[204] This might cause problems if the MIC convention's defines investment as including intellectual property rights.[205]

With respect to Article 34(2)(b)(ii), each state determines its own public policy.[206] However, most developed arbitral jurisdictions have a very narrow understanding of the public policy defence.[207] For example, Ontario, Germany, and Switzerland hold that public policy refers to a fundamental element of justice or the legal system.[208] The majority of decisions also find public policy refers to international public policy, which is narrower than domestic public policy, and thus also difficult to define.[209] Therefore, the public policy defence is narrow, but nebulous. While unlikely to be a major problem, predicting when the public policy will be a problem is difficult given the MIC convention is likely to broadly define "investment".[210]

4.5 Domestic Courts Could be Prevented from Setting Aside MIC Awards

The MIC presumably would provide that final awards are not subject to appeal, review, set aside, annulment or any other remedy.[211] This provision could impact the ability of (i) a court

[204] Blackaby et al, *supra* note 96 at 586.
[205] See page 9 of this research memorandum.
[206] Blackaby et al, *supra* note 96 at 597.
[207] *Ibid* at 598.
[208] *Ibid*.
[209] Kronke et al, *supra* note 173 at 366; Blackaby et al, *supra* note 96 at 599–600.
[210] See page 9 of this research memorandum.
[211] See page 10 of this research memorandum.

in the seat of arbitration to set aside a MIC award, and (ii) a court to refuse enforcement of a MIC award under *New York Convention* Article V.

MIC convention state parties would likely prevent their own courts from setting aside awards because the MIC convention contains a provision preventing MIC awards from being set aside.[212] This provision would only bind MIC state parties.[213] Under UNCITRAL Model Law Article 34(2)(a), an award can be set aside if "the party making the application furnishes proof" of one of the enumerated procedural defaults.[214] This suggests that parties can bind themselves, through a treaty, to not argue any of Article 34(2)(a)'s grounds.[215] Under UNCITRAL Model Law Article 34(2)(b), an award can be set aside if a court finds one of the enumerated substantive defaults.[216] Some scholars suggest that where a court, under a treaty, can raise substantive defaults, states cannot prevent their courts from doing so.[217] Courts in France, Canada, and New Zealand have all taken this view on the basis that judicial review is fundamental to the parties' legal protection and national legal order.[218] Gary Born argues that such decisions are mistaken because commercial parties should be able to end their dispute on the basis of a single decision, without appeal, provided that no third party or public interests are

[212] See page 10 of this research memorandum.
[213] Calamita, "The Challenge", *supra* note 71 at 615.
[214] UNCITRAL Model Law, *supra* note 194, art 34(2)(a).
[215] Calamita, "The (In)Compatibility", *supra* note 37 at 622. Note: this source makes this argument for *New York Convention* Article V(1). However, the point is the same: both treaties require procedural defaults to be raised by one of the parties to the proceeding.
[216] UNCITRAL Model Law, *supra* note 194, art 34(2)(b).
[217] Calamita, "The (In)Compatibility", *supra* note 37 at 622–23. Note: Again, Calamita makes this argument in the context of the *New York Convention*. However, there should be no material difference becuase both treaties allow the courts to raise substantive defaults. See also: Born, *International Commercial Arbitration*, *supra* note 134 at 3365–3370.
[218] In France, see CA Paris, 27 October 1994, *Société de Diseno c Société Mendes*, [1995] 2 Revue de l'Arbitrage 263; in Canada, see *Amos Investments Ltd v Minou Enterprises Ltd*, 2008 BCSC 332 at para 22, 45 BLR (4th) 258; in New Zealand, see *Methanex Motunui Ltd v Spellman*, [2004] 3 NZLR 454 (NZCA).

involved.[219] Therefore, the MIC could likely successfully preclude domestic courts from setting aside MIC final awards.

4.6 Domestic Courts Could be Prevented from Refusing to Enforce MIC Awards Under the *New York Convention*

Enforcement of a foreign arbitral award under the *New York Convention* is disaggregated. A party seeking to recognize and enforce an arbitral award under the *New York Convention* must do so in the courts of each state where recognition and enforcement is sought. Enforcement in one jurisdiction does not guarantee enforcement in another.[220]

When seeking to recognize and enforce an award under the *New York Convention*, each domestic court must grapple with *New York Convention* Article V, which sets out grounds for refusing recognition and enforcement.[221] The grounds for refusing enforcement under *New York Convention* Article V mirror the grounds for setting aside awards under UNCITRAL Model Law Article 34(2). While differences exist between *New York Convention* Article V and UNCITRAL Model Law Article 34(2), these differences are not material.[222] Importantly, in both, parties to

[219] Born, *International Commercial Arbitration*, *supra* note 134 at 3370.
[220] Christoph Liebscher, "Preliminary Remarks" in Reinmar Wolff, ed, *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Commentary* (Munich, Germany: Verlag C H Beck, 2012).
[221] *New York Convention*, *supra* note 17, art V.
[222] Two of these differences include: First, *New York Convention* Article V(1)(e) grants domestic courts an additional procedural ground for refusing enforcement (domestic courts can refuse enforcement if the award has not yet become binding on the parties, or was set aside in the seat of arbitration). Second, UNCITRAL Model Law Article 34(2)(b) allows a court to set aside an arbitral award if it is non-arbitrable in or against the public policy of the seat of arbitration. On the other hand, *New York Convention* Article V(2) allows a court to refuse to enforce an arbitral award if it is non-arbitrable in or against the public policy of the state where recognition and enforcement is sought.

the proceeding must raise the procedural grounds, whereas courts can raise the substantive grounds. [223]

To remind, the MIC convention would provide that final awards cannot be subject to any other remedy.[224] As noted earlier, under UNCITRAL Model Law Article 34(2), MIC convention state parties can likely prevent MIC awards from being set aside. Because the N*ew York Convention* Article V and UNCITRAL Model Law Article 34(2) are not materially different, MIC convention state parties would also likely be able to prevent their courts from refusing to enforce MIC final awards under the *New York Convention*. In both the *New York Convention* and the UNCITRAL Model Law, parties to the proceeding raise procedural issues whereas the court can raise substantive issues. While some doubt exists as to whether states can prevent courts from raising substantive grounds on their own accord, MIC member states can likely prevent their courts from refusing recognition and enforcement under the *New York Convention*.[225]

[223] *New York Convention*, *supra* note 17, art V.
[224] See page 10 of this research memorandum.
[225] For those that doubt that substantive grounds can be waived, see Calamita, "The (In)Compatibility", *supra* note 37 at 622–23. For those that believe substantive grounds can be waived, see: Gary Born, *International Commercial Arbitration*, *supra* note 134 at 3368–70.

5 MIC AWARDS ALTERNATIVELY COULD BE ENFORCED USING A MIC ENFORCEMENT REGIME

Rather than relying on the *ICSID Convention* or the *New York Convention*, the MIC could set up its own enforcement regime in its treaty. This could be done in one of two ways. First, the MIC could be set up as its own treaty and institution. Second, the MIC could be set up and affiliated with an existing institution, like ICSID. With the second option, the MIC would benefit from an institution's existing expertise in administering cases. However, both options are the same with regard to how MIC awards would be enforced. As a result, this research memorandum will only discuss the specifics of what the MIC's enforcement regime could look like. Regardless of how a MIC enforcement regime is set up, it could likely take several decades for the MIC to become as widely adopted as the *ICSID Convention* or the *New York Convention*.

5.1 A MIC Enforcement Regime Should Contain an Enforcement Provision Similar to *ICSID Convention* Article 54

MIC awards could be enforced using an enforcement regime established in the future MIC convention itself. For example, the MIC convention could include enforcement provisions worded similarly to provisions in the *ICSID Convention* or *New York Convention*. Between the two, the *ICSID Convention*'s enforcement regime is recognized as more effective because domestic courts cannot refuse enforcement.[226] In contrast, the *New York Convention* allows states to refuse to recognize or enforce awards on a limited number of grounds.[227] Even if the MIC convention prohibited states from refusing enforcement, third-party states would still be able to

[226] Colin M Brown, "A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches" (2017) 32:3 ICSID Rev 673 at 688.
[227] *New York Convention*, *supra* note 17, art V.

refuse to enforce MIC awards. Thus, drafting the MIC's enforcement provisions to look more like the *ICSID Convention*'s would be preferable. Like the *ICSID Convention*, the MIC convention could restrict its use to only MIC state parties and investors from those states.

5.2 A MIC Enforcement Regime Should Account for EU Law's Autonomy

The autonomy of EU law principle prevents the EU from signing international agreements that would change the EU treaties' essential organizational structure.[228] One of the EU's two key treaties, the *Treaty of the Functioning of the European Union* (*TFEU*), provides that EU member states can only resolve disputes regarding applying or interpreting EU law using methods prescribed in the treaties.[229] The CJEU has previously found that it is incompatible with EU law for a tribunal or court, other than CJEU, to interpret EU law.[230] Currently, the CJEU is considering whether *CETA*'s investment tribunal would violate EU law for the same reason. The case is still before the CJEU, but Advocate General Bot, at Belgium's request, has opined that *CETA*'s investment tribunal does not contravene EU law.[231] Advocate General Bot elaborated that the two were not incompatible because *CETA*'s investment tribunal would only apply *CETA*'s relevant provisions and international law, whereas domestic EU law would be considered as fact.[232] Further, where *CETA*'s investment tribunal interprets EU law, it would be

[228] Love Ronnelid, "Research Report: An Evaluation of the Proposed Multilateral Investment Court System" (2018) European United Left/Nordic Green Left at 28.
[229] *Treaty on the Functioning of the European Union*, 13 December 2007, 2008 OJ C/115/47, Protocol (no 7) on the Privileges and Immunities of the European Union, art 344 [*TFEU*].
[230] *Slowakische Republik v Achmea BV* (2018), Case C–284/16, Judgment, 6 March 2018 at para 57. Notably, following the *Achmea* judgment, EU member states declared that arbitration clauses contained in intra-EU BITs are contrary to EU law and have committed to terminate all intra-EU BITs by 6 December 2019, see Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on the Investment Protection in the European Union (15 January 2019).
[231] *Compatibility of the Investment Court System with the European Treaties* (2019), Advocate General Opinion 1/17 [Bot Opinion].
[232] *Ibid* at para 134.

bound by the CJEU's interpretations.[233] Therefore, *CETA*'s investment tribunal would not violate EU law autonomy. Advocate General Bot's opinion is not binding on the CJEU's final decision. However, Advocate General decisions often guide the court's final analysis. Based on his opinion, the MIC convention's applicable law would need drafting like *CETA*'s to not contravene EU law autonomy and ensure MIC awards against the EU would be enforceable.[234]

In addition, MIC convention drafters should also consider how MIC awards would be paid. A MIC award against the EU would be hollow if it could not be paid. The EU's property and assets in the EU cannot be subject to any legal measure of constraint without the CJEU's approval.[235] In other words, no award against EU assets in the EU can be enforced unless the CJEU approves it. Thus, an arbitral tribunal (or a future MIC) that awards damages against the EU could be viewed as undermining the CJEU's competence. Consequently, future MIC decisions that award damages against the EU itself could face enforcement challenges. Given that this problem arises out of domestic EU law, it may be the case that this problem can only be addressed by amending EU law itself.

[233] *CETA*, *supra* note 6, art 8.31.2 provides in its relevant part: "In doing so [considering a party's domestic law as a matter of fact], the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party."
[234] *Ibid*, art 8.31.2 provides in its relevant part: "The Tribunal shall not have jurisdiction to determine the legality of a measure alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party…".
[235] *TFEU*, *supra* note 229, art 1.

5.3 A MIC Enforcement Regime Could Take Several Decades to Gain Widespread Adoption

Only states party to the MIC convention would be bound to enforce its awards.[236] Therefore, a large number of state parties, or at least major jurisdictions (like the EU and United States) would be necessary for the enforcement regime to be effective.[237] Getting a large number of state parties to sign on to a future MIC convention could take a significant amount of time. The *ICSID Convention* entered into force in 1966 after being ratified by 20 countries.[238] 40 years later, in 2006, the *ICSID Convention* had 143 contracting states.[239] Another example is *GATT*, which started with 23 contracting parties in 1947 and took 47 years to grow to 121 parties when the World Trade Organization (WTO) entered into force in 1994.[240] These examples show that, while the MIC could become as popular as ICSID, this would likely take several decades.

[236] *VCLT*, *supra* note 44, art 34.
[237] Jan van den Berg, *supra* note 89 at 33.
[238] ICSID, *ICSID Convention, Regulations and Rules*, ICSID/15 (2006) at 5.
[239] *Ibid*.
[240] Brown, *supra* note 226 at 688.

6 CONCLUSION

Under the current *ICSID Convention*, MIC awards would be unlikely to qualify as ICSID awards. As a result, MIC awards would not be enforceable using the *ICSID Convention*. However, enforcement using the *ICSID Convention* could be possible if the *Convention* were modified. The *ICSID Convention* could be modified *inter se* to allow MIC awards to be enforced as between the modifying parties. However, this would not apply to MIC cases where the EU is a respondent because the EU is not and cannot be a contracting party to the *ICSID Convention*. As a result, the EU cannot modify *inter se* the *ICSID Convention*. The *ICSID Convention* could be amended between all ICSID state parties could make MIC awards enforceable in all ICSID state parties. But amending the *ICSID Convention* would be practically difficult because it would require the unanimous consent of all 154 state parties. Notably, the *ICSID Convention* has never been amended.

The *New York Convention* applies to foreign arbitral awards. However, it does not contain a definition for arbitral awards. That said, based on state practice and scholarly writings, states would likely consider MIC awards to be arbitral awards to permit their enforcement under the *New York Convention*. Provisions that deem MIC awards to be commercial awards would be binding on MIC parties, but not third-party states. MIC provisions that prohibit domestic courts from setting aside MIC awards could prevent MIC state party courts from setting aside the award on procedural and substantive grounds.

Finally, MIC awards could be enforced using a MIC enforcement regime. This could be done by states signing a future MIC convention with an enforcement provision similar to the *ICSID Convention*'s and setting up a MIC institution (either independently or in affiliation with

an existing institution). Similar to the *ICSID Convention*, the MIC convention could limit the MIC to hearing cases only from investors from state parties against other state parties. MIC awards would be enforceable in the territories of its state parties. Notably, MIC convention drafters should consider how MIC awards would be enforceable against the EU given the autonomy of EU law and awards against EU assets requiring the CJEU's approval. The MIC convention could be drafted to provide that the MIC will only consider EU law as a matter of fact and, where necessary, abide by CJEU interpretations of EU law. However, EU requiring CJEU approval may be a problem that can only be resolved by amending EU domestic law. Finally, setting up a MIC enforcement regime could be challenging as it could take several decades to become widely adopted.

7 BIBLIOGRAPHY

Legislation: Treaties

Algiers Accords, 19 January 1981, 20 ILM 223.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

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).

Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the one part, and the European Union and its Member States, 30 October 2016.

EU-Mexico Modernised Global Agreement in Principle, 23 April 2018.

EU-Singapore Investment Protection Agreement, 19 October 2018.

EU-Vietnam Investment Protection Agreement.

General Agreement on Tariffs and Trade, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948).

North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994).

Statute of the International Court of Justice, 26 June 1945, UNTS 1055, art 38 (entered into force 24 October 1945).

Transatlantic Trade and Investment Partnership, 2015 Proposal.

Treaty on the Functioning of the European Union, 13 December 2007, 2008 OJ C/115/47, Protocol (no 7) on the Privileges and Immunities of the European Union.

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

Legislation: Domestic

North American Free Trade Implementation Act, SC 1993, c 44 (Canada).

North American Free Trade Implementation Act, Pub L No 103–182, 107 Stat 2057 (1993) (United States).

International Judicial or Arbitral Decisions

CME Czech Republic BV v Czech Republic (2003), UNCITRAL, Final Award and Separate Opinion.

Korea-Measures Affecting Import of Fresh, Chilled and Frozen Beef, WTO Panel Report, 31 July 2000.

Maritime International Nominees Establishment (MINE) v Republic of Guinea (1988), ICSID Case No ARB/84/4, Interim Order No 1.

Saluka Investments BV v The Czech Republic (2004), UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim.

Spyridon Roussalis v Romania (2011), ICSID Case No ARB/06/01, Award.

Tokios Tokeles v Ukraine (2004), ICSID Case No ARB/02/18, Decision on Jurisdiction.

US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WTO, Appellate Body Report, 15 February 2002.

Domestic Judicial Decisions

Amos Investments Ltd v Minou Enterprises Ltd, 2008 BCSC 332 (British Columbia Superior Court, Canada).

Dallal v Bank Mallat, [1986] QB 441, 75 ILR 151 (High Court, England).

Golshani v Iran (2005), Case no 1139-FS-P+B (Cour de Cassation, France).

Indian Organic Chemical Ltd v Chemtex Fibres Inc, (1978) AIR 1978 Bom 106 (High Court of Bombay, India).

Methanex Motunui Ltd v Spellman, [2004] 3 NZLR 454 (NZCA) (Court of Appeal, New Zealand).

Mexico v Metalclad Corp, [2001] 89 BCLR (3d) 359, 2001 BCSC 664 (British Columbia Supreme Court, Canada).

Ministry of Defense of the Islamic Republic of Iran v Gould Inc and others (1988), Case no CV 87-03673-RG, US District Court (Central District of California), reprinted in Monroe Leigh, "Ministry of Defense of the Islamic Republic of Iran v Gould, Inc. No. CV 87-03673-RG" 82:3 American J Intl L 591.

Slowakische Republik v Achmea BV (2018), Case C–284/16, Judgment, 6 March 2018 (Grand Chamber, European Union).

Société de Diseno c Société Mendes (1994), [1995] 2 Revue de l'Arbitrage 263 (CA Paris, France).

United Mexican States v Karpa, [2005] OJ No 16, 74 OR (3d) 180 (Superior Court of Justice of Ontario, Canada).

Secondary Material: Books or Book Chapters

Born, Gary, *International Arbitration: Law and Practice*, 2nd ed (The Netherlands: Kluwer Law International, 2015).

Born, Gary, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 5th ed (Netherlands: Kluwer Law International, 2016).

Born, Gary, *International Commercial Arbitration*, 2nd ed (London: Kluwer Law International, 2014).

Borris, Christian & Rudolf Hennecke, "Article V (Grounds for Refusal of Recognition and Enforcement of Arbitral Awards)" in Reinmar Wolff, ed, *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Commentary* (Munich, Germany: Verlag C H Beck, 2012).

Bjorklund, Andrea, "NAFTA Chapter 11" in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) 465.

Blackaby, Nigel *et al*, *Redfern and Hunter on International Arbitration*, 6th ed (Oxford: Oxford University Press, 2015).

Bungenberg, Marc & August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (Switzerland: Springer, 2018).

Ehle, Bernd, "Article I [Scope of Application]," in Reinmar Wolff, ed, *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Commentary* (Munich, Germany: Verlag C H Beck, 2012).

Kronke, Herbert *et al*, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (New York: Kluwer Law International, 2010).

Law, Jonathan, *A Dictionary of Law*, 8th ed (Oxford, Oxford University Press: 2015).

Liebscher, Christoph, "Preliminary Remarks" in Reinmar Wolff, ed, *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Commentary* (Munich, Germany: Verlag C H Beck, 2012).

Odendahl, Kerstin, "Article 41" in Oliver Dörr & Kirsten Schmalenbach, eds, *Vienna Convention on the Law of Treaties: A Commentary* (Heidelberg: Springer, 2012).

Schreuer, Christoph *et al*, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2009).

Sloss, David, "Domestic Application of Treaties" in Duncan B Hollis ed, *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012).

Thompson, Bankole, "Sources of International Law" in Bankole Thompson, ed, *Universal Jurisdiction: The Sierra Leone Profile* (Netherlands: Asser Press, 2015).

Waibel, Michael *et al*, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Netherlands: Kluwer Law International, 2010).

Wilske, Stephan & Todd J Fox, "Article V(1)(a)" in Reinmar Wolff ed, *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of 10 June 1958 Commentary (Munich, Germany: Verlag C H Beck, 2012).

Secondary Material: Articles

Baetens, Freya, "Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms" (2017) 8 J Intl Dispute Settlement 462.

Brown, Colin M, "A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches" (2017) 32:3 ICSID Rev 673.

Bjorklund, Andrea, "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.

Burgstaller, Markus, “Investor-State Arbitration in EU International Investment Agreements with Third States” (2012) 39:2 Legal Issues of Economic Integration 207.

Butler, Nicolette & Surya Subedi, “The Future of International Investment Regulation: Towards a World Investment Organisation?” (2017) 64 Nethl. Intl L Rev 43.

Calamita, N Jansen, “The Challenge of Establishing a Multilateral Investment Tribunal at ICSID” (2017) 32:3 ICSID Rev 611.

Calamita, N Jansen, “The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime” (2017) 18:4 J World Investment & Trade 585.

Caron, David D, “The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution” (1990) 84 Am J Intl L 104.

Dickson-Smith, Kyle Dylan, “Does the European Union Have New Clothes?: Understanding the EU’s New Investment Treaty Model” (2016) 17 J World Investment & Trade 773.

Happ, Richard & Sebastian Wuschka, “From the Jay Treaty Commissions Towards a Multilateral Investment Court: Addressing the Enforcement Dilemma” (2017) 6:1 Indian J Arbitration L 113.

Hussain, Azim *et al*, “State Immunity and International Arbitration” (2017) 8 Norton Rose Fulbright International Arbitration Report 43.

Laborde, Gustavo, “The Case for Host State Claims in Investment Arbitration” (2010) 1:1 J Intl Dispute Settlement 97.

Ong, Mevelyn, “The Interplay of Sovereignty and Consent in the Execution of Arbitral Award Debts Against Non-Party State-Owned Enterprises” (2017) 4 McGill J Dispute Resolution 22.

Paulsson, Jan, “Arbitration Without Privity” (1995) 10:2 Foreign Investment L 232.

Reinisch, August, “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 Economic L 761.

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

Schill, Stephan W, “Editorial: Toward a Normative Framework for Investment Law Reform” (2014) 15 J World Investment & Trade 795.

Sedlak, David R, “ICSID’s Resurgence in International Investment Arbitration: Can the Momentum Hold” (2004) 23:1 Penn State Intl L Rev 147.

Silberman, Linda, “The New York Convention After Fifty Years: Some Reflections on the Role of National Law” (2009) 38:25 Georgia J Intl & Compe L 25.

Supnik, Kate M, “Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law” (2009) 59 Duke LJ 343.

Uchkunova, Inna & Oleg Temnikov, “Enforcement of Awards Under the ICSID Convention—What Solutions to the Problem of State Immunity?” (2014) 29:1 ICSID Rev 187.

Veenstra-Kjos, Hege Elisabeth, “Counterclaims by Host States in Investment Treaty Arbitration”(2007) 4:4 Transnational Dispute Management 1.

Vives, Francisco José Pascual, “Shaping the EU Investment Regime: Choice of Forum and Applicable Law in International Investment Agreements” (2014) 6:1 Cuadernos de Derecho Transnacional 269.

Zarra, Giovanni, “The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?” (2018) Chinese J Intl L 137.

Secondary Material: Other

EU, “Establishing a Standing Mechanism for the Settlement of International Investment Disputes” (2019) Submission of the European Union and its Member States to UNCITRAL Working Group III.

Greenwood, Christopher, “Sources of International Law: An Introduction” (2008) *United Nations Treaty Collection*.

Hachez, Nicolas & Jan Wouters, “International Investment Dispute Settlement in the 21st Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?” (2012) Centre for Global Governance Studies Working Paper No 8.

Kaufmann-Kohler, Gabrielle & 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?* (Geneva: Geneva Center for International Dispute Settlement, 2016).

International Centre for Settlement of Investment Disputes, *History of the ICSID Convention* (Washington, DC: ICSID, 1970).

Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006 (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/40/17, Annex I (entered into force 21 June 1985).

Ronnelid, Love, “Research Report: An Evaluation of the Proposed Multilateral Investment Court System” (2018) European United Left/Nordic Green Left.

Schreuer, Christoph, “Sources of International Law: Scope and Application” (1999) Emirates Center for Strategies Studies and Research Emirates Series Lecture No 28.

UNCITRAL Secretariat, *Guide on the Convention and Recognition and Enforcement of Arbitral Awards* (Geneva, UN: 2016).

UNCTAD, “Reforming the International Investment Regime: An Action Menu” (2015) World Investment Report 120.

Jan van den Berg, Albert, “Appeal Mechanism for ISDS Awards: Interaction with New York and ICSID Conventions” (2019) Hong Kong Department of Justice and Asian Academy of International Law Conference Paper.

European Union Documents

EC, “Multilateral Reform of Investment Dispute Resolution” (2017) Commission Staff Working Document Impact Assessment at 11; European Parliament, “Investor-State Dispute Settlement: State of Play and Prospects for Reform” (2015) Briefing.

European Parliament, “Multilateral Court for the Settlement of Investment Disputes” (2017) Briefing.

Online Resources

Black’s Law Dictionary, online: <https://thelawdictionary.org/award-n/>.

Brian McGarry & Josef Ostranky, “Modifying the ICSID Convention under the Law of Treaties” (11 May 2017), online: *EJIL Talk!* <https://www.ejiltalk.org/modifying-the-icsid-convention-under-the-law-of-treaties/>.

Court of Justice of the European Union, “The Free Trade Agreement With Singapore Cannot, in Its Current Form, Be Concluded By the EU Alone” (16 May 2017), online: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170052en.pdf>.

ICSID, “ICSID Rules and Regulations Amendment Process” (n.d.), online: <https://icsid.worldbank.org/en/amendments>.

ICSID, “List of Contracting States and Other Signatories of the Convention” (2019), online: <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>.

New York Convention, “Signatories’ Map” (2019), online: *New York Convention 1958* <http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=4&menu=671&opac_view=-1>.

UNCITRAL, “Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)” (last visited 29 April 2019), online: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

UNCITRAL, “Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006” (2019), online: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

UNCITRAL, “Working Group III” (n.d.), online: <http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html>.

Other Materials

Compatibility of the Investment Court System with the European Treaties (2019), Advocate General Opinion 1/17.

ICSID, *ICSID Convention, Regulations and Rules*, ICSID/15 (2006).

Reagan Executive Order No 12, 294 (24 February 1981), reprinted at 46 Fed Reg 14111 (1981).