

## The Legal Nature of the Permanent ISDS Institutions Promoted by the EU: Are They Arbitral Institutions or International Courts?



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### Abstract

The EU has developed four separate treaties with Canada, Vietnam, Singapore and Mexico that envision the establishment of permanent dispute settlement institutions that will resolve investment disputes between investors and host States. The four treaties stipulate that decisions made by these permanent institutions, which will conduct two-tier proceedings with first instance and appeal bodies, shall be considered as arbitral awards. Whether these institutions, which have some features that resemble international courts, can be considered as arbitral institutions by non-party third states, so that their decisions can be enforced in those states as arbitral awards, is a debated issue. Although, unlike in typical arbitration, adjudicators will have pre-existing permanent judicial powers and investors will have no influence in their appointment, Article 1 (2) of the New York Convention appears to contain the necessary persuasive provision to convince courts of non-party third States to consider the decisions of, at least, the first-instance body that become final without being challenged as arbitral awards. Regarding the decisions made by the appeals body, convincing courts of non-party third states to consider them as arbitral awards appears to be more complicated. This will depend on whether these courts will interpret the provisions of their arbitration legislations, which, in line with the UNCITRAL Model Law, most likely provide that parties are free to determine the procedural rules to be followed by the arbitrators, as broadly as to allow the parties to agree that arbitrators other than those who rendered a preliminary award will review it.

### Keywords

CETA · EU-Mexico modernised EPA · New York Convention of 1958 Article 1(2) · lex arbitri · seat of arbitration · seat of proceedings · waiver of annulment actions · appeal mechanism · UNCITRAL Model Law Article 19.



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There is currently an almost unprecedented effort to address the criticisms towards the investor state dispute settlement (ISDS) system. On the one hand, the International Centre for Settlement of Investment Disputes (ICSID) amended its Arbitration Rules in 2022 to increase efficiency and transparency<sup>1</sup>, while on the other hand, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III<sup>2</sup>, tasked with reforming the existing ISDS system<sup>3</sup>, published its Draft Provisions on Procedural Reform of ISDS<sup>4</sup>. The project undertaken by the Union of South American Nations (UNASUR) for establishing a new arbitration centre aimed at resolving investment disputes<sup>5</sup> is another example of the effort to address the criticisms of the ISDS system. The European Union (EU) is also strongly committed to reforming the current ISDS system. As a matter of fact, the EU has done more than just suggest making some changes to the system<sup>6</sup>, it has taken concrete steps by developing a number of bilateral international treaties with its Treaty Parties that provide for the establishment of a permanent ISDS institution, a concept that has long been advocated<sup>7</sup>.

The treaties, which envisage the establishment of a permanent bilateral ISDS institution, were signed by the EU in 2019, 2020, and 2021, respectively, with Canada (CETA<sup>8</sup>), Singapore (EU-Singapore IPA<sup>9</sup>), and Vietnam (EU-Vietnam IPA<sup>10</sup>) as counterparts. In addition to the three bilateral treaties that have already been signed, the EU Commission recently announced<sup>11</sup> that it had concluded negotiations (on 17 January 2025)

<sup>1</sup>See generally, ICSID, 'ICSID Administrative Council Approves Amendment of ICSID Rules' <<https://icsid.worldbank.org/news-and-events/communiqués/icsid-administrative-council-approves-amendment-icsid-rules#:~:text=March%2021%2C%202022-,ICSID%20Administrative%20Council%20Approves%20Amendment%20of%20ICSID%20Rules,investors%20and%20their%20host%20States>> accessed 10 September 2025; Ignacio Torterola / Farhod Sharipov, 'The 2022 ICSID Arbitration Rules: Modernising International Investment Dispute Resolution' (2024) 39 (1) ICSID Review 52-60.

<sup>2</sup>UNCITRAL, 'Working Group III: Investor-State Dispute Settlement Reform' <[https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state)> accessed 10 September 2025.

<sup>3</sup>See generally e.g., Chiara Giorgetti, 'The Transformation of International Organisations -Specialization, New Initiatives, and Working Methods- Some Observations on the Work of UNCITRAL Working Group III' (2023) 26 Journal of International Economic Law, 40, 43-6.

<sup>4</sup>UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform) Draft statute of a standing mechanism for the resolution of international investment disputes, UN Doc. A/CN.9/WG.III/WP.256 (Note by Secretariat, June 2025) <[https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp.256\\_draft\\_statute\\_initial\\_draft\\_for\\_website.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp.256_draft_statute_initial_draft_for_website.pdf)> accessed 10 September 2025.

<sup>5</sup>See e.g., Rodrigo Polanco Lazo, 'Beyond ICSID Arbitration: The Centre for Settlement of Disputes of UNASUR' (2016) Yearbook on International Investment Law and Policy 2014-2015, 375-404.

<sup>6</sup>Stephan W. Schill, 'Authority, Legitimacy and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals' in Stefan Griller, Walter Obwexer, Erich Vranes (eds) *Mega Regional Trade Agreements: CETA, TTIP, and TISA* (Oxford University Press 2017) 111, 144.

<sup>7</sup>The idea of permanent institutions for resolving disputes between investors and states can not just be attributed to the EU; this idea has been advanced on different occasions. See generally, Hannes Lenk, 'Something Borrowed, Something New: The TTIP Investment Court: How to Fit Old Procedure into New Institutional Design' in Elaine Fahley (ed) *Institutionalisation Beyond the Nation State* (Springer 2018) 129,133; Christian Riffel, 'The CETA Opinion of the European Court of Justice and its Implications - Not that Selfish After All' (2019) 22 Journal of Economic Law 503,504. For the Arab Court of Investment, see generally Walid Ben Hamida, 'The First Arab Investment Court Decision' (2006) 7 (5) The Journal of World Investment and Trade 699-721. For the Arbitration Centre of the Organisation of Islamic Cooperation based in Tukey since 2021, see generally Fatih Serbest, 'Investment Arbitration of the Organisation of the Islamic Conference as a Multilateral Investment Protection Agreement: A Little Known but Promising Instrument' in Çiğdem Nas and Mustafa Erkan (eds) *International Investment and Trade Agreements: Recent Developments and Problems* (Onikilevha 2018) 57-80; Ibrahim Özbay and Murat Erdem, 'Thoughts on Islamic Cooperation Arbitration Centre as an Example of Organisation Institutional Arbitration Centre (Bir Kurumsal Tahkim Merkezi Örneği Olarak İslam İşbirliği Teşkilatı Tahkim Merkezi Üzerine Düşünceler)' (2020) 2 (1) Ankara Sosyal Bilimler Üniversitesi Hukuk Fakültesi Dergisi 1-58; Nuray Ekşi, 'İslam İşbirliği Teşkilatı Tahkim Merkezi' (2020) 9 (2) Uluslararası Ticaret ve Tahkim Hukuku Dergisi 267-312.

<sup>8</sup>Comprehensive Economic and Partnership Agreement (CETA) Between Canada, of the one part, and the European Union and its Member States, of the other part, signed on October 2016 (*provisionally applied in exclusion of the Investment Chapter in 21 September 2017*) available at: <[https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/ceta-chapter-chapter\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/ceta-chapter-chapter_en)> accessed 10 September 2025.

<sup>9</sup>Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part (EU-Singapore IPA), signed on 15 October 2018 (*not in force*), available at: <[https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/singapore/eu-singapore-agreements/texts-agreements\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/singapore/eu-singapore-agreements/texts-agreements_en)> accessed 10 September 2025.

<sup>10</sup>Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part (EU-Vietnam IPA), signed on 30 June 2019 (*not in force*), available at: <[https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement/texts-agreements\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement/texts-agreements_en)> accessed 10 September 2025.

<sup>11</sup>European Commission, EU-Mexico Agreement: <[https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle_en)> accessed 3 September 2025.



with Mexico on a modernised treaty (EU-Mexico EPA)<sup>12</sup>. Like the other three treaties that have already been signed, the EU-Mexico EPA contains provisions for the establishment of a permanent bilateral ISDS institution, and the text of this treaty will be finalised upon signature. It is also worth mentioning that besides these treaties, the EU has submitted proposals for the establishment of a permanent ISDS institution in its treaty negotiations with the USA, Japan, China, Myanmar, Tunisia, Morocco, the Philippines, Indonesia, Australia, New Zealand, and Chile<sup>13</sup>.

In fact, back in 2015, the EU Commission had already declared that its objective related to investment disputes is the establishment of a permanent dispute settlement body, which it named the ‘Multilateral Investment Court’<sup>14</sup>. Now that the EU and its Treaty Parties have developed four treaties providing for the establishment of permanent bilateral ISDS institutions, and that the UNCITRAL’s Working Group III is considering the establishment of a standing mechanism for the resolution of investment disputes<sup>15</sup>, it is conceivable that the idea of a ‘Multilateral Investment Court’ will become more widely accepted and implemented over time<sup>16</sup>. This is even despite the fact that the permanent ISDS institutions envisioned by the four bilateral treaties have not yet been realised because none of the four treaties, except for the provisional entry into force of some CETA rules, is yet in force<sup>17</sup>.

In each of the four treaties that the EU has developed with Canada (CETA), Singapore (EU-Singapore IPA), Vietnam (EU-Vietnam IPA) and Mexico (EU-Mexico EPA), it is provided that the Parties will make the appropriate arrangements to transfer the operation of the permanent bilateral ISDS body that will be established under the relevant treaty to the “Multilateral Court” once it is established<sup>18</sup>. The name “Multilateral Investment Court” suggests that the envisioned dispute settlement institution is intended to function as an international court. Likewise, the permanent bilateral ISDS institutions provided for in the four bilateral treaties, which also appear to be the first steps towards a Multilateral Investment Court- have some of the characteristics of courts. Despite these characteristics, all four treaties stipulate that the decisions rendered by the permanent bilateral ISDS institutions are to be considered as arbitral awards<sup>19</sup>. These inconsistent

<sup>12</sup>Economic Partnership, Political Coordination and Cooperation Agreement (EPA) between the European Community and its Member States, of the one part, and the United Mexican States, of the other part (*not in force*) available at: <<https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/9f9e6630-7c43-49df-8a5f-653a23839b94/details>> accessed 10 September 2025. It is important to note that this text is not yet final and may undergo further modifications.

<sup>13</sup>European Commission, ‘Inception Impact Assessment, Establishment of a Multilateral Investment Court for investment dispute resolution’ available at <[https://ec.europa.eu/smart-regulation/roadmaps/docs/2016\\_trade\\_024\\_court\\_on\\_investment\\_en.pdf](https://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf)> accessed 10 September 2025.

<sup>14</sup>European Commission, ‘Multilateral Investment Court project’ <[https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project\\_en](https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en)> accessed 3 September 2025.

<sup>15</sup>See (n 4).

<sup>16</sup>See e.g., Shai Dothan and Joanna Lan, ‘A Paradigm Shift? Arbitration and Court-Like Mechanisms in Investors’ Disputes’ in: European Yearbook of International Economic Law, Special Issue: Permanent Investment Courts (eds. Güneş Ünüvar, Joanna Lam and Shai Dothan) Springer 2020, 1, 12.

<sup>17</sup>The EU-Mexico EPA has not yet been signed. On the other hand, the three treaties that the EU has already signed with Canada (CETA), Singapore (EU-Singapore IPA) and Vietnam (EU-Vietnam IPA) have not yet come into force. The reason is that, on 16 May 2017 the Court of Justice of the European Union (CJEU) issued an opinion (CJEU, Opinion, 2/15, 16.05.2017) in which it found that the EU had been vested with exclusive competence only in the field of foreign direct investment but that it had no exclusive competence in the areas of portfolio investment and settlement of investment disputes, and that the competence in these areas was shared by the EU and Member States. Thus, the decision of the CJEU clarified that the consent of the EU-Parliament would not suffice for the entry into force of the treaties, and that these treaties would also need to be signed and ratified by each EU-Member State. However, Art. 30.7.3 of CETA provides for the provisional entry into force of the treaty, meaning that it can be applied before the European Parliament and all Member States have completed their national ratification procedures. As a result, many provisions of the CETA have been applied as of February 2017. On the other hand, the permanent bilateral ISDS institution provided for in the CETA has been excluded from the scope of the provisional entry into force, meaning that this permanent ISDS institution will be implemented once all Member States have concluded their national ratification procedures. See, European Commission, ‘CETA- a trade deal that sets a new standard for global trade’ <[https://ec.europa.eu/commission/presscorner/detail/en/memo\\_16\\_3580](https://ec.europa.eu/commission/presscorner/detail/en/memo_16_3580)> accessed 10 September 2025. At this point it is noteworthy that on 11 November 2022 the Irish Supreme Court has ruled that the ratification of CETA would be unconstitutional under the current Irish law. See generally Patrick Leonard, ‘Patrick Costello v. the Government of Ireland, Ireland and the Attorney General: Obstacles to the Ratification of CETA in the Irish Constitutional Context’ 2023 (38) 2 ICSID Review, 286-293.

<sup>18</sup>CETA Art. 8.29; EU-Singapore IPA Art. 3.12; EU-Vietnam IPA Art. 3.41; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 14-2.

<sup>19</sup>CETA Art. 8.41-5; EU-Singapore IPA Art. 3.22-5; EU-Vietnam IPA Art. 3.57-7; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 31-5.



arrangements give rise to questions about the legal nature of the permanent bilateral ISDS institutions provided for in the four treaties<sup>20</sup>.

As the four treaties stipulate that decisions made by the permanent bilateral ISDS institution are to be considered as arbitral awards, Contracting States are under the obligation to consider these decisions as such<sup>21</sup>. Moreover, the four treaties stipulate that the decisions of the permanent bilateral ISDS institutions shall not be subjected to annulment or similar proceedings before domestic courts; thus, signatory states are under the obligation not to hear annulment or similar cases filed with their domestic courts. However, non-signatory states are not bound by these obligations, and, as such, this discrepancy is the underlying problem of this article.

As some features of the permanent ISDS institutions resemble court litigation rather than arbitration, non-party third States may find that said features do not conform with the characteristics of arbitration. Therefore, they may not enforce the decisions of these institutions as they would arbitral awards. And even if a non-party third State were to consider the decision of a bilateral ISDS institution to be an arbitral award, its domestic courts can hear a case filed by the investor to annul this decision if the proceedings of the bilateral ISDS institution had their seat in that State. All of these potential practices contradict the intentions of the treaty drafters.

This study aims to examine whether, from the perspective of a non-party third State, decisions made by permanent bilateral ISDS institutions can be considered as arbitral awards. In order to achieve this particular aim, the relevant features of the permanent bilateral ISDS institutions envisaged in the four treaties that the EU developed with Canada, Singapore, Vietnam and Mexico will be examined. However, the rationale behind the stipulation of these features, along with the criticisms of the current ISDS system they address, will not be explained since they are not covered by the purpose of this study. In the context of this study, only the characteristics that distinguish arbitration from court litigation in light of current trends will be considered.

As only the perspective of non-party third States will be taken into consideration, the question of whether *inter se* amendments to the ICSID Convention that would only bind the Treaty Parties are acceptable will not be examined. Therefore, while the question of whether the decisions constitute arbitral awards will be addressed, the more specific question of whether decisions of permanent bilateral ISDS institutions can be considered as ICSID awards will not be examined.

The following sections will first provide a general overview of the permanent ISDS institutions and then evaluate their legal nature in light of the characteristics of arbitration.

## I. Brief Overview of the Permanent ISDS Institutions Provided by the Bilateral Treaties

In each of the four bilateral treaties that the EU has developed with Canada (CETA), Singapore (EU-Singapore IPA), Vietnam (EU-Vietnam IPA) and Mexico (EU-Mexico EPA), it is provided that a permanent bilateral ISDS institution will be established<sup>22</sup>. Consequently, upon the entry into force of all four treaties, four

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<sup>20</sup>See e.g. 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 *International Economic Law* 761, 762; Richard Happ, 'Commentary to Art. 8.35 in Marc Bungenberg and August Reinisch (eds) *CETA Investment Law Article-by-Article Commentary* (C.H. Beck 2022) 779, 781, para 7.

<sup>21</sup>E.g., Marc Bungenberg and Anna Holzer, 'Commentary to Article 8.41', in Marc Bungenberg and August Reinisch (eds) *CETA Investment Law Article-by-Article Commentary* (C.H. Beck 2022) 876, 882, para 17.

<sup>22</sup>CETA Art. 8.27; EU-Singapore IPA Art. 3.9; EU-Vietnam IPA Art. 3.38; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 11-1.

separate permanent bilateral ISDS institutions will be brought into being. In the words of a commentator, the four treaties envisage the establishment of “a mini court for each treaty<sup>23</sup>”.

The core architecture of the permanent bilateral ISDS institutions of each of the four treaties will be the same. Although these treaties have slightly different provisions regarding the creation of their own permanent bilateral institutions, such as the number of members that constitute tribunals, these differences can, for the purposes of this paper, be ignored.

The four treaties are similar not only in terms of the core architecture they envisage for the permanent bilateral ISDS institutions but also in terms of the language they use to define the organs of these ISDS institutions, with each of the four treaties employing nearly identical wording.

The two aspects that the permanent bilateral institutions have in common — their core architecture and the language used to describe them — will be briefly examined in the following paragraphs. It should be noted that the procedural rules that will be applied by these bilateral ISDS institutions are also identical. However, for the purposes of this paper, a more detailed explanation of the aspects related to the procedural rules is necessary. Therefore, the procedural rules to be applied will not be addressed in this present section, but examined in more detail in the following section, in which the question of whether the bilateral ISDS institutions can be considered as arbitral institutions will be assessed.

## A. The Common Core Architecture of the Permanent Bilateral ISDS Institutions

All four treaties envision a two-tiered adjudicatory system constituted of two levels, of which the first will serve as a ‘first-instance body’ and the second as an ‘appeals body’ that reviews the decisions of the first-instance body. To this end, two separate permanent tribunals are to be set up for each relevant treaty. These will serve as the source of the deciding members of the first-instance and appeals bodies that will hear a given case. While one of these permanent tribunals, the Permanent First Instance Tribunal, will function as the source of the ‘first-instance body’ that hears a given case, the other permanent tribunal, the Permanent Appeals Tribunal<sup>24</sup>, will function as the source of the ‘appeals body’ that reviews the decisions of the first-instance body if an appeal is made.

The members of these two permanent tribunals will be appointed<sup>25</sup> by the committee<sup>26</sup> that according to the treaties, has to be established. Each of these committees will comprise of representatives from each treaty’s Contracting States. As such, the Contracting States will have significant influence over the appointment of members to each treaty’s own Permanent First Instance Tribunal and Permanent Appeals Tribunal.

Cases will not be decided by the permanent tribunals but by ‘divisions’ of them<sup>27</sup>. Each time a new case is submitted to the relevant bilateral permanent ISDS institution, a ‘division’ of the Permanent First Instance

<sup>23</sup>Andrea K. Bjorklund, ‘Arbitration, the World Trade Organisation, and the Creation of a Multilateral Investment Court’ (2021) 37 *Arbitration International* 433, 441.

<sup>24</sup>The treaties differ in the language they use to refer to the ‘appeals tribunal’. In the CETA, it is referred to as the ‘Appellate Tribunal’ (CETA Art. 8.28), in the EU-Singapore and EU-Vietnam IPAs and the EU-Mexico EPA it is referred to as the ‘Appeal Tribunal’ (EU-Singapore IPA Art. 3.10; EU-Vietnam IPA Art. 3.39; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 12).

<sup>25</sup>The provisions regarding the appointment of members to the Permanent First Instance Tribunal by the committee can be found in the following articles: CETA Art. 8.27-2; EU-Singapore IPA Art. 3.9-2; EU-Vietnam IPA Art. 3.38-2. EU-Mexico EPA Section on Resolution of Investment Disputes Art. 11-2. On the other hand, the provisions regarding the appointment of members to the Permanent Appeals Tribunals by the committee can be found in the following articles: CETA Art. 8.28-3; EU-Singapore IPA Art. 3.10-2, EU-Vietnam IPA 3.39-3 and EU-Mexico EPA Section on Resolution of Investment Disputes Art. 12-3.

<sup>26</sup>The treaties differ in the language they use to refer to their own committees. In the CETA, it is referred to as a ‘joint committee’ (CETA Art. 26.1), in the EU-Singapore and EU-Vietnam IPAs as a ‘committee’ (EU-Singapore IPA Art. 4.1; EU-Vietnam IPA Art. 4.1), and in the EU-Mexico EPA as a ‘council’ (Section on Resolution of Investment Disputes Art. 11-2).

<sup>27</sup>CETA Art. 8.27-6; EU-Singapore IPA Art. 3.9-7; EU-Vietnam IPA Art. 3.38-6; EU-Mexico EPA, Section on Resolution of Investment Disputes Art 11.6.



Tribunal will be established<sup>28</sup>. This division will constitute the ‘first-instance body’ that will decide a given case. This deciding first-instance body will principally<sup>29</sup> consist of three members of the Permanent First-Instance Tribunal and will be appointed by its president<sup>30</sup> on a rotation basis<sup>31</sup>. Thus, the roster of the first-instance body is exclusive; only the members of the relevant Permanent First Instance Tribunal can serve as members of the first-instance body.

The decision made by the first instance body can be appealed against by one of the opposing parties, but if it is not appealed within 90 days from its issuance, the decision becomes final<sup>32</sup>. In cases where an appeal is made, a ‘division’ of the Permanent Appeals Tribunal, which will constitute the appeals body, will be established<sup>33</sup>. As is the case with the members of the first-instance body, the members of the appeals body are exclusive. Three of the members of the relevant Permanent Appeals Tribunal will be appointed to an appeals body on a rotational basis<sup>34</sup>.

It is imperative to emphasise that the appeals body can review the merits of the case as well. Thus, in addition to the grounds for annulment set out in the ICSID Convention, the appeals body can base its review on errors relating to the application or interpretation of applicable law, as well as errors relating to the assessment of facts and domestic law<sup>35</sup>.

## B. The Common Language Used to Define the Permanent Bilateral ISDS Institutions

The language used in the treaties is obscure with regard to the legal nature of the permanent bilateral ISDS institutions. The CETA’s Investment Chapter, the EU-Singapore and EU-Vietnam IPAs, and the EU-Mexico EPA’s Section on Resolution of Investment Disputes all refer to the body of the decision makers as the ‘division of the Tribunal<sup>36</sup>’ and ‘division of the Appeal (Appellate<sup>37</sup>) Tribunal<sup>38</sup>’. The term “tribunal” brings to mind courts and judges, as well as “arbitration proceedings” and “arbitrators”<sup>39</sup>. It should however be acknowledged that in the four treaties, the term “tribunal” is used in some contexts to refer to a dispute settlement platform other than courts<sup>40</sup>. Even so, the usage of the term ‘tribunal’ leaves open the question

<sup>28</sup>CETA Art. 8.27-7; EU-Singapore IPA Art. 3.9-8; EU-Vietnam IPA Art. 3.38-7; EU-Mexico EPA Section on Resolution of Investment Disputes Art 11.8.

<sup>29</sup>The parties may agree that the case be heard by a sole member of the Permanent Tribunal. In such a case, only one of the members of the Permanent Tribunal who is a third country national can be appointed (CETA, Art. 8.27-9; EU-Singapore IPA Art. 3.9-7; EU-Vietnam IPA Art. 3.38-9; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 11.7).

<sup>30</sup>The members of the ‘division’ will be appointed by the President of the Permanent Tribunal (CETA Art. 8.27-7; EU-Singapore IPA Art. 3.9-8; EU-Vietnam IPA Art. 3.38-7; EU-Mexico EPA Section on Resolution of Investment Disputes Art 11.8. The President of the Permanent Tribunal, on the other hand, will be picked by drawing lots among the members of the Permanent Tribunal who are third country nationals (CETA Art. 8.27-8; EU-Singapore IPA Art. 3.9-6; EU-Vietnam IPA Art. 3.38-8; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 11.9. Thus, the members of the deciding tribunal will be appointed by a national of a third country, not by a national of either the host State or the State of which the investor is a national.

<sup>31</sup>According to the examined treaties, “the composition of each division of the Permanent First Instance Tribunal shall be random and unpredictable while giving equal opportunity to all Members of the Permanent Tribunal to serve”; CETA Art. 8.27-7; EU-Singapore IPA Art. 3.9-8; EU-Vietnam IPA Art. 3.38-7; EU-Mexico EPA Section on Resolution of Investment Disputes Art 11.8.

<sup>32</sup>CETA Art. 8.28-9(i); EU-Singapore IPA Art. 3.18-4; EU-Vietnam IPA Art. 3-55; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 29-8.

<sup>33</sup>CETA Art. 8.28-5; EU-Singapore IPA Art. 3.10-7; EU-Vietnam IPA Art. 3.39-8; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 12-8.

<sup>34</sup>CETA Art.8.28-5; EU-Singapore IPA Art. 3.10-8; EU-Vietnam IPA Art. 3.39-9, EU-Mexico EPA Section on Resolution of Investment Disputes Art.12-9.

<sup>35</sup>CETA Art. 8.28-2; EU-Singapore IPA Art. 3.19; EU-Vietnam IPA Art. 3.54-1; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 30-1.

<sup>36</sup>CETA Art. 8.27-7; EU-Singapore IPA Art. 3.9-8; EU-Vietnam IPA Art. 3.38-7; EU-Mexico EPA, Section on Resolution of Investment Disputes Art. 11-8.

<sup>37</sup>See (n 24).

<sup>38</sup>CETA Art. 8.28-5; EU-Singapore IPA Art. 3.10-5; EU-Vietnam IPA Art. 3.39-9; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 12-5.

<sup>39</sup>According to Black’s Law Dictionary, the term ‘tribunal’ means: “A court or other adjudicatory body”; Bryan A Gamer and Henry Campbell Black, *Black’s Law Dictionary* (9th ed., 2009) 1545.

<sup>40</sup>For instance, in the provisions relating to the requirement of withdrawing any existing proceedings when submitting a claim to the permanent bilateral ISDS institutions, it is stipulated that the investor “...withdraws... any existing proceedings before a tribunal or court...” (CETA 8.22-1(f); EU-Singapore IPA Art.3.7-1(f); EU-Vietnam IPA Art. 3.34-1; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 6-1(f) In this particular context, it is evident that the word ‘tribunal’ in the treaties is used to define a distinct dispute resolution platform from that of courts.

as to what type of adjudicatory function the permanent bilateral ISDS institutions conduct. Perhaps more telling is the term used in another chapter of the CETA. The rules concerning the permanent bilateral ISDS institution are embedded in Chapter 8 of CETA, whereas Chapter 29<sup>41</sup> contains rules on State-to State dispute settlement between the Contracting States of CETA. In Chapter 29, when referring to the body that will resolve State-to-State disputes, the CETA does not use the term 'division of a Tribunal', but rather uses the term 'arbitration panel'<sup>42</sup>. Likewise, the two 'Free Trade Agreements' that the EU concluded separately<sup>43</sup> from the 'investment protection agreements (EU-Singapore<sup>44</sup> and EU-Vietnam<sup>45</sup> FTAs)' use the term 'arbitration panel'<sup>46</sup> when referring to the body that will resolve State-to-State disputes<sup>47</sup>.

Furthermore, neither the EU's investment protection agreements with Singapore and Vietnam, nor the 8th Chapter on Investment in the CETA or the Section on Resolution of Investment Disputes in the EU-Mexico EPA, refer to the decision-makers sitting in the first instance and appeals bodies, as 'arbitrators' or 'judges'; they refer to them as 'Members' composing the division of the Tribunal hearing the case<sup>48</sup>. Once again, when the wording used for investor-state disputes is compared with that used for State-to-State disputes, it will be seen that the CETA, in its 29th chapter, and the EU-Singapore and EU-Vietnam FTAs refer to the decision-making persons as 'arbitrators'<sup>49</sup>. The differences in language between the provisions relating to investor-State and State-to-State disputes also suggest that the drafters of the investment dispute provisions 'intentionally'<sup>50</sup> avoided explicitly labelling the permanent bilateral ISDS institutions as arbitral institutions.

It is only in the provisions relating to the enforcement of the decisions rendered by these permanent bilateral ISDS institutions that the four treaties use the term 'arbitral award'. According to the four treaties, a final award issued by a bilateral ISDS institution is deemed to be an arbitral award<sup>51</sup>. However, even though the four treaties stipulate that the final decisions shall be deemed as arbitral awards, this does not necessarily mean that the adjudication conducted by the ISDS institutions is in fact arbitration, nor that non-signatory States will consider the institutions' decisions as arbitral awards. Despite these provisions, non-signatory States may find that decisions rendered by the bilateral ISDS institutions are not technically arbitral awards, and therefore will not enforce them as they do arbitral awards; because these provisions are not binding on them under Art. 34 of the Vienna Convention on the Law of Treaties (VCLT).

<sup>41</sup>The coverage of the CETA is broader than the EU-Singapore and EU-Vietnam IPA's. The CETA covers both free trade and investment protection. See also (n 17).

<sup>42</sup>CETA Art. 29.6, 29.7, 29.9.

<sup>43</sup>Upon the issuance of the CJEU's opinion of 16 May 2017 (see (n 17)), to facilitate the coming into force of the trade provisions of the treaties, the EU and its counterparts Singapore and Vietnam agreed on splitting the treaties into two separate treaties, one agreement for free trade (FTA) and one agreement for investment protection (IPA).

<sup>44</sup>Free Trade Agreement Between the European Union and the Republic of Singapore, available at: <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22019A1114\(01\)&from=EN#page=1](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22019A1114(01)&from=EN#page=1)>.

<sup>45</sup>Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam, available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2020:186:FULL&from=EN#page=5>>.

<sup>46</sup>EU-Singapore FTA Art. 14.4, 14.5; EU-Vietnam FTA Art. 3.5, 3.6.

<sup>47</sup>Unlike the regulations regarding investor-state dispute resolution, for inter-state dispute resolution, the examined treaties do not provide for permanent dispute settlement institutions, but for ad hoc arbitration. One of the reasons why ad-hoc arbitration has been preferred for inter-state dispute resolution instead of permanent judicial institutions is explained as to be the high possibility of the permanent institutions to develop and implement their own jurisprudence, causing them to decide against the preferences of the Contracting States; for detailed information see e.g., Shill (n 6) 119-20.

<sup>48</sup>CETA Art. 8.27-7; EU-Singapore IPA Art. 3.9-8; EU-Vietnam IPA Art. 3.38-7; EU-Mexico EPA; Section on Resolution of Investment Disputes Art. 11-5.

<sup>49</sup>CETA Art. 29.7, 29.8.; EU-Singapore FTA Art. 14.5; EU-Vietnam FTA Art. 3.6.37.

<sup>50</sup>Reinisch (n 20) 763.

<sup>51</sup>CETA Art. 8.41-5; EU-Singapore IPA Art. 8.22-5; EU-Vietnam IPA Art. 3.57-7; Mexico-EU EPA, Section on Resolution of Investment Disputes Art. 31-5.



Last but not least, the “Joint Interpretative Instrument<sup>52</sup>” adopted by the Parties to the CETA labels the envisaged dispute resolution system as the “investment court system” (Article 6-a), thus conveying the impression that the process conducted by the permanent bilateral ISDS institution of CETA is not arbitration but a court process (litigation). Moreover, Article 6-f of the Joint Interpretative Instrument explicitly describes that the creation of the permanent investment tribunals has been contemplated under the inspiration of the public judicial systems of EU Member States and Canada as well as international courts, such as the European Court of Human Rights (ECtHR) and the International Court of Justice (ICJ). Thus, the Joint Interpretative Instrument explicitly lays down that the drafters of the treaties took domestic and international ‘courts’ as a model for the Permanent Investment Tribunals<sup>53</sup>.

In the following section, a more detailed examination of the features of the envisaged permanent bilateral ISDS institutions will be made, with the aim of evaluating whether they constitute arbitral institutions or international courts such as the ECtHR or ICJ, which the drafters of the treaties took as a model.

## II. Evaluation of Whether the Permanent Bilateral ISDS Institutions Can Be Considered as Arbitral Institutions or International Courts

As noted previously, the permanent bilateral ISDS institutions envisaged in the four treaties developed by the EU with Canada (CETA), Singapore (EU-Singapore IPA), Vietnam (EU-Vietnam IPA) and Mexico (EU-Mexico EPA) appear to be a springboard for the “Multilateral Investment Court” that the EU is promoting as its ultimate goal. However, these bilateral ISDS institutions raise questions about their legal nature. As mentioned above, the language used in the four treaties appears to intentionally avoid explicitly naming the legal nature of these bilateral ISDS institutions. Furthermore, the regulations on the features of these institutions are unclear regarding their legal nature. While certain features that the treaties prescribe for them bear the characteristics of arbitration, others appear to align with those of courts. This serves to further obscure the legal nature of these permanent bilateral ISDS institutions.

In this section, an attempt to evaluate the legal nature of the permanent bilateral ISDS institutions will be made. This will begin with an identification of the characteristics that distinguish arbitration from court litigation. Then, by assessing how closely the features of the bilateral ISDS institutions conform to the characteristics of arbitration, the nature of the bilateral ISDS institutions will be determined.

### A. Characteristics that Distinguish Arbitration from Court Litigation

It is not easy to define what arbitration is, and when it comes to defining what international arbitration is, the difficulty is even more, because differences exist between national legislations<sup>54</sup>. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is silent on the definition of arbitration<sup>55</sup>, however, some of its provisions, such as Articles I(2) and V(1)(d), offer clues as to a few of its defining features.

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<sup>52</sup>European Union, ‘Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States’ available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22017X0114%2801%29>> accessed 20 September 2025.

<sup>53</sup>For a table comparing the ECtHR and CETA rules on the appointment, qualifications and remuneration of adjudicators, see Steffen Hindelang and Teoman Hagemeyer, ‘In Pursuit of an International Investment Court, Study for the European Parliament, Policy Department Directorate-General for External Policies’ (2017) 91 ff. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3007590](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007590)> accessed 19 September 2025.

<sup>54</sup>Philippe Fouchard, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* Emmanuel Gaillard and John Savage (eds) (Kluwer Law International 1999) 10.

<sup>55</sup>Jean-François Poudret and Sebastien Besson, ‘Comparative Law of International Arbitration’ (Stephen V. Beri and Annette Ponti tr, 2nd edn, Thomson Sweet&Maxwell 2007) 2, para 2.



It is principally the court of the forum that will decide whether a decision constitutes an arbitral award according to its own law<sup>56</sup>, but it will also have to take into account the law of the seat of arbitration and will not treat decisions that are not considered arbitral awards under the law of the seat of arbitration as such<sup>57</sup>.

In contexts similar to those discussed in this article, the most important characteristics that distinguish arbitration from court litigation have been pinpointed by several authors<sup>58</sup>. These can be consolidated as follows<sup>59</sup>: (i) the manner of acceptance (voluntarily/ compulsory) of the dispute settlement method, (ii) the method of the appointment of the adjudicator, (iii) the permanency<sup>60</sup> / impermanence of the adjudicators and their role in the State's judicial system<sup>61</sup>, and (iv) presence/absence of an appeals possibility<sup>62</sup>.

One of the most significant differences between arbitration and court proceedings lies in the existence or non-existence of the right to determine the procedural rules to be followed. It is therefore suggested in this article that the freedom of the parties to determine the procedural rules to be applied by the adjudicators should also be listed under the characteristics that distinguish arbitration from court litigation. After including the element relating to the right to determine procedural rules, the suggested list, which is intended only as an initial checklist of the characteristics attributed to arbitration that distinguish it from court litigation, would be as follows:

- (i) The voluntary nature of the dispute settlement method,
- (ii) The appointment of adjudicators by the disputing parties,
- (iii) The impermanence of adjudicators' judicial powers,
- (iv) The existence of the right of the disputing parties to determine the procedural rules to be followed by the adjudicators,
- (v) The absence of an appeals possibility.

The evaluation of the legal nature of the permanent bilateral ISDS institutions envisaged by the four treaties can be conducted in light of these characteristics.

## B. Assessment of the Conformity of the Features of Permanent Bilateral ISDS Institutions with the Characteristics of Arbitration

The following headings will look at each of the above-identified characteristics of arbitration separately, and seek to assess whether the features of the permanent bilateral ISDS institutions envisaged in the four treaties that the EU developed with Canada, Singapore-Vietnam and Mexico are in conformity with them.

<sup>56</sup>See e.g., Richard Happ and Sebastian Wuschka, "From the Jay Treaty Towards a Multilateral Investment Court: Addressing The Enforcement Dilemma" (6) 1 (2017) *Indian Journal of Arbitration Law* 113, 124; Marc Bungenberg and Anna M. Holzer, 'Potential Enforcement Mechanisms for Decisions of a Multilateral Investment Court' in: Güneş Ünüvar, Joanna Jemielniak and Shai Dorhan (eds) *Investment Courts: Challenges and Perspectives*, Special Issue (2020) *European Yearbook of International Law* 75,79.

<sup>57</sup>Albert van den Berg, *The New York Arbitration Convention of 1958* (Kluwer 1982) 46.

<sup>58</sup>See e.g., Gabriella Kaufmann-Kohler and 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?', *SSRN Electronic Journal*, June 2016 < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3455511](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455511)> (accessed 10 September 2025); Reinisch (n 20) 764;; Happ and Wuschka (n 56) 126; Bungenberg and Holzer (n 56) 80.

<sup>59</sup>The element of finality has not been included as this author considers that there is no difference between arbitration and court litigation in this respect.

<sup>60</sup>Reinisch (n 20) 764.

<sup>61</sup>Kaufmann-Kohler and Potestà (n.58) 36.

<sup>62</sup>Reinisch (n 20) 764.



## 1. The Voluntary Nature of the Dispute Settlement Method

Arbitration is defined as a contractual form of dispute resolution based on the will of the parties which is expressed in an agreement which, instead of State courts, vests private persons with the power to resolve disputes<sup>63</sup>. Due to the fact that arbitration is based on the will of the parties, voluntariness constitutes a hallmark of arbitration.

With regard to the investment disputes covered by the examined four treaties, the domestic courts of the host State still constitute the “natural forum”<sup>64</sup>, thus an aggrieved investor can apply to the domestic courts of the host State. Only if the host State and the investor by way of an arbitration agreement agree that disputes shall be submitted to arbitration will they be under the obligation to submit disputes to arbitration.

The examined four treaties contain the standard clause found in most bilateral and multilateral investment treaties, whereby the host State is deemed to have made an offer to enter into an arbitration agreement, which is deemed to have been concluded by the investor’s submission of a claim to arbitration<sup>65</sup>. The investor is under no obligation to accept such an offer, however beneficial it may be; instead of submitting its claim to the bilateral ISDS institutions, the investor can submit it to the domestic courts of the host State.

The option for investors to submit claims to courts or other tribunals is also evident from the provisions in the four treaties, which stipulate that in cases where an investor wants to submit a claim to the permanent bilateral ISDS institution, it must withdraw or discontinue and waive the right to initiate proceedings before a tribunal or court<sup>66</sup>. If the submission of claims to the permanent ISDS institutions were compulsory, there would be no provision for the waiver of the right to initiate proceedings before other fora in the event of a submission to the permanent ISDS institution.

Furthermore, the voluntary nature of submitting a claim to its permanent bilateral ISDS institution is explicitly affirmed by Article 6/a of the ‘Joint Interpretative Instrument’<sup>67</sup> adopted by the Parties to the CETA. This provision reads as follows: “CETA does not privilege recourse to the investment court system set up by the agreement. Investors may choose instead to pursue available recourse in domestic courts.”

The claimant's voluntary submission of the claim to the permanent ISDS instead of domestic courts or other available tribunals demonstrates the voluntary nature of the dispute resolution method. It can therefore be concluded that the regulations regarding permanent bilateral ISDS institutions are in conformity with the characteristic of voluntariness attributed to arbitration. However, the voluntary nature of these institutions does not suffice to reach the conclusion that the permanent bilateral ISDS institutions are not judicial, but rather arbitral institutions<sup>68</sup>. It is therefore necessary to examine the compatibility of the features of the permanent ISDS institutions with the other characteristics of arbitration in the following paragraphs.

<sup>63</sup>Poudret and Besson (n 55) 2 ff.

<sup>64</sup>See e.g., Hindelang and Hagemeyer (n. 53) 51.

<sup>65</sup>CETA Art. 8.25-1; EU-Singapore IPA Art. 3.6-2; EU-Vietnam IPA Art. 3.36.

<sup>66</sup>CETA Art. 8.22-1(f), 8.22-1(g); EU-Singapore IPA Art.3.7-1(f); EU-Vietnam IPA Art. 3.34-1; EU- Mexico EPA Section on Resolution of Investment Disputes Art. 6-1(f), 6-1(g).

<sup>67</sup>See supra (n. 52).

<sup>68</sup>In order to demonstrate that the voluntary submission of the dispute to the examined permanent bilateral ISDS institutions does not necessarily indicate that they are not judicial, some authors provide the example of the International Court of Justice (ICJ). Pursuant to Article 36(2) of the ICJ Statute, the consent of the States to the jurisdiction of the ICJ has to be manifested; thus, the ICJ requires the voluntary acceptance of the States in question in order to assume jurisdiction; however, it is characterised as an international court; see e.g., Happ and Wuschka, (n 56) 128; Alvaro Galindo, David L. Attanasio and Anna Maria Durán, ‘The New York Convention’s Concept of Arbitration and the Enforcement of Multilateral Investment Court Decisions’, in: Katia Fach Gómez and Ana Mercedes López Rodrigues (eds.), *60 Years of the New York Convention* (Wolter Kluwer 2019), 459, 470.



## 2. The Appointment of the Adjudicators by the Disputing Parties: The Investor's Non-Involvement

One of the characteristics that distinguishes arbitration from court litigation is the direct or indirect involvement of the disputing parties in the selection of arbitrators<sup>69</sup>. However, according to the examined four treaties developed by the EU with Canada (CETA), Singapore (EU-Singapore IPA), Vietnam (EU-Vietnam IPA) and Mexico (EU-Mexico EPA), the investor has no involvement in the appointment of the adjudicators, that is to say the investor has no influence on the selection of the deciding members of either the first-instance body or the appeals body. On the other hand, the host State has significant influence over the appointment of the deciding members of both dispute settlement bodies because, according to the treaties, the committee<sup>70</sup> comprising of the representatives of the Contracting States will appoint the members of both the Permanent First Instance Tribunal and the Permanent Appeals Tribunal<sup>71</sup>. Cases will be heard by three members of the Permanent First Instance Tribunal, who will be appointed to the 'divisions' of this Tribunal on a rotational basis<sup>72</sup>. These divisions of the Permanent First Instance Tribunal will hear cases as a first-instance body. Thus, the adjudicators who will hear a case will be three of the members of the Permanent First Instance Tribunal, whom the representatives of the signatory States will have appointed to the Permanent Tribunal. Just as the members of the Permanent First Instance Tribunal serve as the source of the division that hears a case as a first-instance body, will the members of the Permanent Appeals Tribunal serve as the source of the appeals body that reviews the decisions of the first-instance body<sup>73</sup>. The examined treaties thus provide for an inequality between the parties to the dispute. While the investor has no say in the appointment of the deciding members, the host State, even if it does not directly appoint the deciding members<sup>74</sup>, has a substantial influence on the appointment of the deciding members through its role (facilitated by its representatives who sit on the relevant committee<sup>75</sup>) in the appointment of the members of both the Permanent First Instance Tribunal and the Permanent Appeals Tribunal. The inequality of the disputing parties in the appointment of the deciding members serving in the divisions of the Permanent First Instance or Appeals Tribunals may convey the impression that the permanent bilateral ISDS institution has the character of a court rather than an arbitral institution.

However, it needs to be underlined that, even if the right of the disputing parties to appoint an arbitrator is a fundamental right, it is "not absolute<sup>76</sup>". Indeed, it is becoming increasingly common for the parties to delegate the power to appoint the arbitrators to an intermediary, most often to an arbitral institution<sup>77</sup>. Similarly, rules of some arbitral institutions provide that arbitrators can only be appointed from a closed list maintained by the relevant institution. It can also be argued that such closed lists restrict party autonomy<sup>78</sup> and that, therefore, proceedings undertaken by dispute resolution institutions that use such closed lists cannot be considered as true arbitration<sup>79</sup>.

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<sup>69</sup>See e.g., Poudret and Besson (n 55) 7, para 8.

<sup>70</sup>See (n 26) and accompanying text.

<sup>71</sup>See (n.25).

<sup>72</sup>See (n 30) and accompanying text.

<sup>73</sup>See (n 34) and accompanying text.

<sup>74</sup>The deciding members constituting the divisions of the tribunals will be appointed by the President of the relevant tribunal. See (n 30).

<sup>75</sup>See text accompanying (n 26).

<sup>76</sup>Muhammed Bedjaoui, 'Challenge of Arbitrators' in: Albert Jan den Berg (ed), *International Arbitration in a Changing World* (Kluwer Law 1994) 85, 86.

<sup>77</sup>See e.g., Fouchard (n 54) 33; Poudret and Besson (n 55) 7, para. 8.

<sup>78</sup>E.g., Galindo, Attanasio and Durán, (n 68) 465.

<sup>79</sup>Indeed, the Higher Court of Munich found that the closed-list system used by the Court of Arbitration for Sport (CAS) arbitration created an imbalance, favouring sport bodies over athletes. However, this decision has been reversed by the German Supreme Court's decision of 7 June 2016 (German Supreme Court Decision of 7 June 2016, KZR 6/15) available at: <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/>



As a matter of fact, in the case of the permanent bilateral ISDS institutions, the problem goes beyond the question of whether the disputing parties can delegate their power to appoint arbitrators to others or whether arbitrators can be appointed from closed lists maintained by arbitral institutions. Rather, the problem is that the host State, which is a party to the dispute, has been involved in the appointment of the members of both the Permanent First Instance Tribunal and the Permanent Appeals Tribunal (even before the dispute between the investor and the host State arose) in a way that can in some respects be seen as resembling a State appointing judges with pre-existing judicial powers to its courts.

It is the author's understanding that this issue is closely connected to the question of whether adjudicators that are vested with pre-existing permanent powers to resolve disputes can be considered to be arbitrators. Accordingly, the present set of explanations will be concluded here, and the closely connected set of explanations will be continued under the following heading.

### 3. The Impermanency of the Judicial Powers of the Adjudicators:

Each of the examined four treaties stipulates that, upon their respective coming into force, the two permanent tribunals (the Permanent First Instance Tribunal and the Permanent Appeals Tribunal) of the bilateral ISDS institution they envision will be established<sup>80</sup>. As pointed out above, these tribunals will consist of appointed members which will function as the source of the members of the first instance body and the appeals body, that decide a given case<sup>81</sup>.

The members of the tribunals might be appointed to the tribunals even before a given investment dispute arises. Thus, much like judges, they will be vested with permanent pre-existing powers to resolve investment disputes. On the other hand, a characteristic feature of arbitration is defined as being that, in contrast to judges, arbitrators are not vested with pre-existing jurisdictional powers<sup>82</sup>. When this characteristic of the absence of pre-existing judicial powers attributed to arbitration is taken into consideration, it may appear that the examined permanent ISDS institutions cannot be regarded as arbitral institutions. However, Article 1(2) of the New York Convention then calls this view into question. Article 1(2) of the New York Convention reads as follows<sup>83</sup>:

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document.py?Gericht=bgh&Art=en&nr=75021&pos=0&anz=1> accessed 20 September 2025. The German Supreme Court ruled that a closed-list of arbitrators is not objectionable in itself, provided that it does not lead to the dominance of one party. The Supreme Court found that a closed list of arbitrators maintained by the relevant arbitral institution does not, by itself, reflect a sports body's predominance over a claimant athlete, and that it cannot suffice to consider that the CAS is not a 'true (*echtes*)' arbitration (paras 30-32). For an explanatory summary of the German Supreme Court Decision of 7 June 2016, see e.g., Olga Braeuer, 'Closed List Arbitrator Appointments: A Case Study' <[https://www.wilmerhale.com/-/media/files/shared\\_content/editorial/publications/documents/2017-12-18-cdr-closed-list-arbitrator-appointments-a-case-study.pdf](https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/documents/2017-12-18-cdr-closed-list-arbitrator-appointments-a-case-study.pdf)> accessed 10 September 2025. This decision of the German Supreme Court has been reversed by the German Constitutional Court (Bundesverfassungsgericht, Beschluss der 2. Kammer des Ersten Senats vom 3 Juni 2022, available at: <[https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2022/06/rk20220603\\_1bvr210316.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2022/06/rk20220603_1bvr210316.html)> accessed 10 September 2025. However, the German Constitutional Court did not address the issue of the imbalance between the disputing parties as to the appointment of arbitrators in its decision. The German Constitutional Court held that the arbitration agreement was invalid and therefore found that there was no need to address the issue regarding the imbalance between the parties as to the appointment of arbitrators (para 53). On the other hand, even before her case was heard in German courts, the complainant had unsuccessfully applied to the Swiss Federal Courts for the annulment of the CAS decision and thereafter had applied to the European Court of Human Rights for the review of the Swiss Federal Court decision. As regard the appointment of the CAS arbitrators from a close list, the European Court of Human Rights (ECtHR) found that there had been no violation of the European Convention on Human Rights (*Mutu and Pechstein v. Switzerland*, App nos 40575 /10 and 67474/10 (ECtHR, 4 October 2018). However, it should be emphasised that the ECtHR did not consider whether the CAS decision could be regarded as an arbitral award; the ECtHR decided on whether the CAS lacked independence and impartiality and, and found that 'the applicant did not submit any factual evidence such as to cast any general doubt on the independence and impartiality of th(e) arbitrators' (para 157). Therefore, the ECtHR's findings do not provide a resolution to the question of whether the closed-list system applied by some dispute resolution institutions prevents them from being considered as arbitral institutions. For a comprehensive explanation of the case, see e.g., Gerhard Wagner and Oğuzhan Samancı, 'Arbitration Meets Human Rights – the Pechstein Saga and its Implications for Commercial Disputes' (2025) 41 (2) *Arbitration International*, 257 ff.

<sup>80</sup>CETA Art.8.27-2; EU-Singapore IPA Art. 3.9-2; EU-Vietnam IPA Art. 3.38-2; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 11-2.

<sup>81</sup>See text accompanying (n 34).

<sup>82</sup>See e.g., Poudret and Besson (n 54) 7.

<sup>83</sup>For detailed explanation of the drafting history of this provision see e.g., Albert Jan van den Berg *The New York Convention* (n 57) 379-80; Kaufmann-Kohler and Potestà (n 58) 55; Albert Jan van den Berg 'Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions' (2019) 1 (34) *ICSID Review* 156,179.



“The term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted”.

This provision, which was included in the New York Convention on the request of the USSR and Czechoslovakia, has mostly been referred to in relation to arbitral tribunals concerning the former Eastern Bloc States<sup>84</sup> in the past. It has also been invoked by the US Courts in the *Gould* case<sup>85</sup>. This was a case filed by Iran for the enforcement of an US-Iran Claims Tribunal award in the United States under the New York Convention. Similar<sup>86</sup> to the examined permanent bilateral ISDS institutions, the adjudicators of the US-Iran Claims Tribunal had been appointed by the two States with pre-existing powers<sup>87</sup> to decide on numerous unspecified cases. In the *Gould* case, the US Courts, invoking Article 1(2) of the New York Convention, held that, ‘arbitral awards... include those made by permanent arbitral bodies<sup>88</sup>’. Thus, without conducting a thorough examination of the features of the Iran-US Claims Tribunal, the US courts found that it could be considered as a permanent arbitral body within the meaning of Article 1(2) of the New York Convention. This was one of the grounds on which the US courts found they had jurisdiction to enforce the *Gould* award<sup>89</sup>.

In light of this finding in the *Gould* case and the equally convincing ordinary meaning of Article 1(2), it can be suggested that at least the courts of Contracting States to the New York Convention will be unlikely to view the permanent bilateral ISDS institution's adjudicators' pre-existing judicial powers as an obstacle to considering the institution's decisions as arbitral awards<sup>90</sup>.

#### 4. The Existence of the Right of the Disputing Parties to Determine the Procedural Rules

One of the most important consequences of the contractual nature of arbitration is the right of the parties to determine the procedural rules that will be followed in arbitral proceedings. The right of the disputing parties to determine the procedural rules is expressly provided in the European Convention on International Commercial Arbitration of 1961 (Art. IV(1)(iii)) and also, even if implicitly provided, in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (Art. V(1)(d))<sup>91</sup>.

This right, described by the UNCITRAL Secretariat as the ‘Magna Carta of arbitration<sup>92</sup>’, extends beyond

<sup>84</sup>van den Berg, *The New York Convention* (n 57) 380, fn 405.

<sup>85</sup>Ministry of Defence of the Islamic Republic of Iran v. Gould Inc., Gould Marketing Inc., Hoffman Export Corporation, Gould International Inc., United States Court of Appeals, Ninth Circuit, Oct 23,1989. Available at: <[https://www.newyorkconvention.org/media/uploads/pdf/2/3/2311\\_us-103.pdf](https://www.newyorkconvention.org/media/uploads/pdf/2/3/2311_us-103.pdf)> accessed 7 September 2025, 40-47.

<sup>86</sup>Kaufmann-Kohler and Potestà (n 58) 38.

<sup>87</sup>The establishment of the Iran-United States Tribunal was provided by the Claims Settlement Declaration of 19 January 1981. Pursuant to Art. III of this Settlement, within 90 days after its entry into force, Iran and the United States had to appoint three members each. The six members appointed by Iran and the United States within 30 days after their appointment had to select three other members by mutual agreement. These appointed members constituted the Tribunal, which was divided into three chambers that would hear cases. The seat of the Iran-United States Tribunal was agreed to be the Hague (Art. VI).

<sup>88</sup>*Gould Case* (n 85) Sec. III., 13.

<sup>89</sup>See the observation that, although it “could have been disputed” the arbitral nature of the US-Iran Claims Tribunal was never disputed; and that in the *Gould* case, the issue that the adjudicators of the US-Iran Claims Tribunal were appointed by the two States with pre-existing powers to decide on numerous unspecified cases, and that the disputing individuals/corporations were not involved in their appointment had never been raised; Kaufmann-Kohler and Potestà (n 58) 38-39.

<sup>90</sup>Kaufmann-Kohler and Potestà (n 58) 56; Reinisch (n 20) 64; van den Berg, ‘Appeal Mechanism for ISDS Awards’ (n.83) 179; N. Jansen Calamita, ‘The Incompatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime’ 18 (2017) *Journal of World Investment and Trade* 585, 620; Aliz Káposznyák, ‘The Expanding Role of the New York Convention in Enforcement of International Investment Arbitral Awards’ in Katia Fach Gómez and Ana Mercedes López Rodríguez, 60 Years of the New York Convention (Wolters Kluwer 2019) 425, 439. Frank Hoffmeister and Mattijs Kempynck ‘Commentary to Art. 8.28’ in: Marc Bungenberg and August Reinisch (eds) *CETA Investment Law* (C.H. Beck 2022) 631 para 63; Moritz Keller and Maria Virginia Feliz Ball ‘Commentary to Art. 8.41’ in: Keller (ed) *EU Investment Protection Law: Article-by-Article Commentary* (Verlag CH Beck 2023) 671 para 45.

<sup>91</sup>See e.g. Fouchard (n 54) 32.

<sup>92</sup>Seventh Secretariat Note Analytical Commentary on Draft Text (A/CN.9/264) (25 March 1985), reprinted in: Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on the International Commercial Arbitration* (Kluwer 1989) 582.



the right of choosing the law applicable to the merits of the case<sup>93</sup>. The right of choosing the law applicable to the merits of the case is not a right specific to arbitration; in court proceedings, too, the disputing parties enjoy to a certain extent the right to choose the applicable law to the merits of the case. However, in court proceedings, unlike in arbitration, the parties do not have the right to determine their own procedural rules, except for the very limited procedural rules from which they may derogate. Given that the existence of the right of the disputing parties to determine the procedural rules is a distinctive feature of arbitration, when determining the legal nature of the permanent bilateral ISDS institutions, the procedural rules to be followed by the adjudicators (deciding members) of these institutions must also be considered.

Due to the fact that the examined four treaties envisage a two-tier dispute settlement mechanism, when examining the procedural rules, a distinction must be made between those to be followed by the deciding members of the first-instance body and those to be followed by the members of the appeals body. However, the issue regarding the procedural rules to be followed by the appeals body is closely connected with the question of whether the existence of an appeals mechanism prevents the decisions of the permanent bilateral ISDS institutions from being regarded as arbitral awards. As the non-existence of an appeals mechanism might be regarded to constitute one of the characteristics of arbitration, this issue will be examined under a separate heading. Therefore, the following subheading will only look at the procedural rules to be applied by the members of the first-instance body; the procedural rules to be applied by the appeals body will be examined in the subsequent heading.

#### a. Procedural Rules to be Followed by the First Instance Body

When examining the procedural rules to be followed by arbitrators, it should be noted from the outset that, with the exception of de-localised arbitration, all arbitration proceedings must first comply with the procedural rules of the seat of arbitration (*lex arbitri*)<sup>94</sup>. According to the arbitration legislations of most countries, which could potentially be the *lex arbitri* of a given arbitration proceeding, the rules they provide for 'the procedure to be followed by the arbitrators' are derogable<sup>95</sup>. Thus, the parties are free to agree that the arbitrators apply procedural rules other than those provided in the *lex arbitri*, provided these do not contradict the latter's mandatory rules<sup>96</sup>. Therefore, the explanations under this heading are based on the assumption that the rules of the *lex arbitri* do not prevent the parties from choosing the procedural rules.

In line with the freedom provided by most domestic arbitration legislations to choose "the procedural rules to be followed by the arbitrators", the four treaties that the EU developed with Canada, Singapore, Vietnam and Mexico give the disputing parties the right to agree on the procedural rules that the deciding members of the first-instance body will apply<sup>97</sup>. If such an agreement is reached, the deciding members of the first-instance body must follow the procedural rules that the parties have agreed on<sup>98</sup>.

If the parties have not agreed on procedural rules, the claimant (investor) will have the choice. The claimant may choose<sup>99</sup> to have the proceedings conducted in accordance with one of the following rules<sup>100</sup>:

<sup>93</sup>See e.g. Fouchard (n 54) 32.

<sup>94</sup>For more information on the '*lex arbitri*' see text accompanying (n 118).

<sup>95</sup>By contrast, the rules of most current arbitration legislations are non-derogable with regard to challenges to awards made by arbitrators. For more detailed explanation see text accompanying (n 128).

<sup>96</sup>E.g., Poudret and Besson (n 55), 85, para 114.

<sup>97</sup>CETA Art. 8.23-2; EU-Singapore IPA Art. 3.6; EU-Vietnam IPA Art. 3.33; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 7.2.

<sup>98</sup>However, it appears that the right set out in Art. 8.23-2 of the CETA, which allows the parties to agree on procedural rules to be followed, is not absolute due to the provision in the CETA 8.23-6, which stipulates that only the rules that are in effect on the date of the claim can be applied. Thus, the disputing parties can not agree that, for example, an earlier version of the UNCITRAL rules apply; Diaz and Khanna, 'Commentary to Art. 8.23' in: Moritz Keller (ed), *Chapter Eight of CETA, the Vietnam and Singapore Free Trade Agreements and EU Regulations: Article-by-Article Commentary* (C.H. Beck 2023) 395 para 27; 398, para 39.

<sup>99</sup>In order to further equip the investor with the capacity to submit its claim under the ICSID Rules or under the other permitted rules, the examined treaties also contain a provision stipulating that the consent of the host State contained in the treaty together with the submission of

- “(1) the rules laid down in the ICSID Convention and the Rules of Procedure for Arbitration Proceedings,  
(2) the ICSID Additional Facility Rules,  
(3) the UNCITRAL Arbitration Rules”.

There may be contradictions between the above-listed procedural rules and the provisions of the examined four treaties. As will be examined under the following heading, in such a case, the rules of the relevant treaty will be given precedence over the chosen procedural rules.

#### b. The Non-Applicability of the Chosen Procedural Rules in Case of a Contradiction with Treaty Rules

Each of the four treaties that the EU developed with Canada, Singapore, Vietnam and Mexico stipulate that the procedural rules agreed on by the parties, or the rules chosen by the claimant in the absence of such an agreement, can only be applied to the extent that they do not contradict the provisions of the relevant treaty<sup>101</sup>. Therefore, the chosen procedural rules can only be applied if they do not contradict the provisions of the relevant treaty or if the chosen rules permit derogation from their own provisions where necessary.

As the treaties provide a range of possibilities regarding the applicable procedural rules, whether or not complications may arise due to incompatibilities between the treaty provisions and the applied procedural rules depends on which procedural rules are applied.

Both the ICSID Additional Facility Rules and the UNCITRAL Rules explicitly allow for the modification of their rules<sup>102</sup>. It can thus be concluded that the application of the ICSID Additional Facility Rules or the UNCITRAL Rules, in combination with the treaty provisions, will not result in any complications. Thus, parties will be able, under the examined four treaties, to enjoy the right to choose the procedural rules that will be applied by the arbitrators. Since the existence of the right of the disputing parties to determine the procedural rules to be followed by the adjudicators is a characteristic of arbitration, it can be suggested that decisions made by the first-instance body under the ICSID Additional Facility Rules or UNCITRAL Rules (or any other rules that the parties agreed on), which become final<sup>103</sup> without being appealed against, may be considered as arbitral awards<sup>104</sup>.

Turning to the rules of the ICSID Convention, it should be noted that its rules are not as open to modification as the UNCITRAL Rules and the ICSID Additional Facility Rules. The relevant ICSID Convention rules can be examined under two groups. Articles 36 to 40 of the ICSID Convention form the first group. Articles 41 to 44 form the second group. The rules embedded in Articles 36 to 40 relate to the phase before the arbitrators become involved. These rules deal with the procedures for requesting arbitration and for constituting the

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a claim to the Permanent Court by the investor constitutes a written consent of the disputing parties that is required for submission of a claim under the ICSID Convention, ICSID Additional Facility Rules and New York Convention; CETA Art. 8.25; EU-Singapore IPA Art. 3.6-2; EU-Vietnam IPA Art. 3.36-4.

<sup>100</sup>CETA Art. 8.23-2; EU-Singapore IPA Art. 3.6-1; EU-Vietnam IPA Art. 3.33-2; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 7.2.

<sup>101</sup>CETA Art. 8.23-6; EU-Singapore IPA Art. 3.6-1 footnote 1 (a); EU-Vietnam IPA Art. 3.36-4; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 7-5.

<sup>102</sup>Art. 1 of the UNCITRAL Arbitration Rules as adopted in 2021 provides that disputes be settled in accordance with those rules “subject to such modification as the parties may agree”. Similarly, Art. 1 of the ICSID Additional Facility Arbitration Rules provides that the parties may derogate from these Rules, with the exception of Rules 1-9, as to the request for arbitration and registration of the request.

<sup>103</sup>Pursuant to the four treaties, a decision made by the first-instance body become final after the expiry of 90 days from its date of issuance provided that neither of the disputing parties have appealed it to the appeal tribunal (CETA Art. 8.28-9(i); EU-Singapore IPA Art. 3.18-4; EU-Vietnam IPA Art. 3-55; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 29-8).

<sup>104</sup>E.g., Keller and Feliz Ball (n 90) 671.



tribunal. The provisions of the four treaties align with some of these rules of the Convention<sup>105</sup>. As regard the treaty rules that do not align with the Convention rules, it is evident that the latter are, to some extent derogable<sup>106</sup>. It can thus be suggested that, with regard to the rules embedded in Articles 36-40 of the ICSID Convention, their incompatibility with the provisions of the four treaties will not constitute complications.

ICSID Convention rules embedded within Articles 41-44 relate to the phase in which arbitrators conduct the procedure. Article 44 stipulates that proceedings shall be conducted in accordance with the rules of the Convention. However, Convention rules that contain their own 'except as the parties otherwise agree' clauses may be modified by the parties<sup>107</sup>; moreover, the parties may agree that procedural rules other than those of the ICSID Arbitration Rules are to be applied (Art.44)<sup>108</sup>. This means that a considerable number of rules regarding the procedural rules to be followed by an ICSID tribunal may be agreed on by the parties. It can therefore be suggested that awards made by the first-instance body under the ICSID Convention, which are not subject to review, will not constitute complications arising out of the contradictions between the relevant treaty provisions and the ICSID Convention. As a result, first-instance body decisions that become final without being challenged can be considered as arbitral awards. And despite the fact that the present study does not address the question of whether decisions rendered by the bilateral ISDS institution can be considered as ICSID awards, it can nonetheless further be suggested that such awards (those made by the first-instance body under the ICSID Convention rules and not subjected to review) can also be considered as ICSID awards.

Unlike the provisions of the ICSID Convention that may be modified by the disputing parties, the provision on the annulment of an award set out in Article 52 of the Convention is non-derogable. Indeed, the most significant contradiction between the regulations of the four treaties and the ICSID Convention appears to be that, unlike the ICSID Convention, the treaties provide for a self-contained appeals procedure, but not for an annulment procedure.

As a matter of fact, the appeals procedure set out in the four treaties is inconsistent not only with the ICSID Convention but also with domestic arbitration legislations. This gives rise to questions of whether decisions made by the appeals body can be considered as arbitral awards. The existence of a self-contained appeals process and its effect on the nature of the decisions rendered by the permanent bilateral ISDS institutions will be examined under the following subheadings.

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<sup>105</sup>The examined four treaties provide that the secretarial services and appropriate support will be provided by the Secretariat of ICSID (CETA Art. 8.27-16; EU-Singapore IPA 3.9-16; EU-Vietnam IPA Art. 3.38-18; EU-Mexico EPA Section on Resolution of Investment Disputes Art. 11-17). Thus, the investor will commence the arbitration proceedings by addressing a written request to the Secretary of the ICSID Centre, and thereby fulfil the requirement set forth in the non-derogable Art. 36 of the ICSID Convention on the procedure for the submission of a request for arbitration and its registration.

<sup>106</sup>The examined four treaties provide that the deciding members of the first instance body will be appointed from the roster of the Permanent First-Instance Tribunal by its President, *see above text accompanying* (n 25). Even this provision appears not to directly contradict the ICSID Convention, since according to Article 37.2(b) of the Convention, the parties may agree 'upon the number of arbitrators and the method of their appointment'. Consequently, it can be deduced that the Convention allows the parties to deviate to a certain extent from its provisions concerning the appointment method of the arbitrators. *See, Christoph Schreuer, Commentary to Article 37 in: Stephan W. Schill, Loretta Malintoppi, et al. (eds) Schreuer's Commentary on the IICSID Convention (Kluwer (2022) 3<sup>rd</sup> edn) available at <<https://www.kluwerarbitration.com/document/KLI-KA-Schill-2022-Art37>> para 3 (explaining that the only mandatory rule in Article 37 is the rule found in Art 37(2)(a), which prescribes that the tribunal must consist of a sole arbitrator or an uneven number of arbitrators). Also, Article 39 of the ICSID Convention allows the parties to derogate from the rules regarding the nationality of the arbitrators, *but see: Frank Hoffmeister and Matjis Kempynck* (n 90) 629, para 59.*

<sup>107</sup>The ICSID Convention's procedural articles that contain their own 'except as otherwise agreed by the parties' clauses, include those in Articles 43, 46, and 47. *E.g., Schreuer* (n 106) Commentary to Article 44, para 14.

<sup>108</sup>*E.g., Schreuer* (n 106) Commentary to Article 44, para 1, 17,23.

<sup>109</sup>*See* (n 24) and accompanying text.

## 5. The Presence /Absence of an Appeals Possibility

The four treaties that the EU developed with Canada, Singapore, Vietnam and Mexico, not only envision the creation of a Permanent First Instance Tribunal but also an Appeals Tribunal<sup>109</sup> to review decisions made by the first instance body<sup>110</sup>.

The divisions of the Appeals Tribunal can review awards for:

- “(a) errors in the application or interpretation of the applicable law,
- (b) manifest errors in the appreciation of the facts,
- (c) the grounds set forth in Article 52(1) (a) through (e) of the ICSID Convention in so far as they are not covered by paragraphs (a) and (b)”.

While the four treaties provide for an appeals procedure, neither the domestic arbitration laws of many States nor the ICSID Convention do so. Instead, they provide (usually without giving the parties a possibility to waive from) for an annulment procedure, which does not enable errors in the application of law or the appreciation of facts to be reviewed. Contrary to this, the four treaties explicitly prohibit the seeking of the annulment of decisions rendered by the permanent ISDS institutions before other international or domestic courts or tribunals<sup>111</sup>. This contradiction between the domestic arbitration laws that provide for an annulment procedure before national courts and the provisions of the four treaties that provide for an appeals procedure which is autonomous from domestic law, raises the question of whether awards rendered by divisions of the Appeals Tribunals of the examined permanent bilateral ISDS institutions can be regarded as arbitral awards.

It should be noted that the mere existence of an appeals mechanism does not in itself give rise to the question of whether decisions made by permanent bilateral ISDS institutions can be considered as arbitral awards. As mentioned above, it is possible that none of the disputing parties will appeal against the decision of the first-instance body. In this case, the decision of the first-instance body will become final<sup>112</sup>, and the presence of an appeals mechanism will not be relevant with regard to this decision. The question of whether the decision of the first-instance body can be classified as an arbitral award has been addressed above<sup>113</sup>, and a positive answer has been reached. What has to be examined under this heading is whether the decisions rendered by the appeals body can be classified as arbitral awards.

The following paragraphs will examine whether the decisions rendered by the appeals body can be classified as arbitral awards. For this purpose, it is necessary to distinguish between appeals body decisions that have been made for claims brought under procedural rules other than those of the ICSID Convention, and decisions made for claims brought under the ICSID Convention.

<sup>110</sup>For advantages and disadvantages of an appeals mechanism as opposed to an annulment mechanism, see e.g., Julien Chaisse; ‘The Appeal in International Investment Arbitration’ in Katia Fach and Catharine Titi (eds) *The Award in International Investment Arbitration* (Oxford University Press 2024) 443, 457 ff.; Yusuf Çalışkan and Ahmet Dülger, ‘Time for the Appeal Tribunal in Investment Arbitration’ in Çiğdem Nas and Mustafa Erkan (eds) *International Investment and Trade Agreements: Recent Developments and Problems* 107, 123 ff.

<sup>111</sup>Article 3.36-3(b) of the EU-Vietnam IPA reads as follows: “...(T)he disputing parties shall refrain from seeking to appeal, review, set aside, annul, revise, or initiate any other similar procedure before an international or domestic court or tribunal, as regards an award pursuant to this Section”. Likewise, the CETA, EU-Singapore IPA and EU-Mexico EPA prohibit disputing parties to seek for annulment; CETA Art. 8.28-9(b); EU-Singapore IPA Art. 3.7-1(f-ii); EU-Mexico EPA Section on Resolution of Investment Disputes Art. 31-1.

<sup>112</sup>See (n 32) and accompanying text.

<sup>113</sup>See text accompanying (n 104).



### a. Appeals Body Decisions Rendered for Claims Submitted Under Rules Other Than Those of the ICSID Convention

With the exception of delocalised arbitration (e.g., ICSID arbitration), it is accepted that arbitration is not insulated from national law<sup>114</sup>. This means that claims submitted by the investor to the bilateral ISDS institutions under rules other than those of the ICSID Convention will be governed by a national law<sup>115</sup>, regardless of whether the case is heard by the first instance body<sup>116</sup> or the appeals body<sup>117</sup>.

The law that governs the arbitration process is referred to as the *lex arbitri /leges arbitrii* (in plural). And the prevailing understanding is that the *lex arbitri* must be determined according to the criterion of the seat of arbitration<sup>118</sup>. Thus, the law of the seat of arbitration (the *lex arbitri*) must also be taken into regard. As the *lex arbitri* is the law of the seat of arbitration, depending on where the seat of arbitration is located<sup>119</sup>, the *lex arbitri* – and, consequently, the answer to the question of whether the decisions of the appeals body can be considered as arbitral awards – will vary. Therefore, determining the location of the seat of the proceedings conducted by the bilateral ISDS institutions plays an important role.

#### i- The Seat of the Permanent Bilateral ISDS Institution Proceedings

Although the seat of arbitration plays an important role, three of the four treaties examined, namely the CETA and the EU-Singapore and EU-Vietnam IPAs, do not contain a provision regarding the seat of the proceedings conducted by the first-instance or appeals bodies.

Of the examined four treaties that the EU developed with its Treaty Parties, only the more recent EU-Mexico EPA contains a provision regarding the seat of the deciding bodies. According to the EU-Mexico EPA, the disputing parties may agree on the seat of the proceedings, and in the event that they fail to reach an agreement, the first-instance body will determine the seat, which must be in the territory of a Contracting State to the New York Convention (EU-Mexico EPA Section on Resolution of Investment Disputes Art. 7-4). It appears that the same logic will be followed by the other three treaties that don't contain a provision on the seat of the proceedings conducted by the first-instance and appeals bodies.

Consequently, depending on the agreement by the disputing parties, or, in the absence of such an agreement, depending on the decision taken by the first-instance body, the seat of the first-instance and appeals bodies may be located within one of the Contracting States, or alternatively within a State that is not a party to the examined four treaties. The following sub-paragraphs will examine the two distinct scenarios that arise depending on whether the seat of the proceedings is within a Contracting State or a non-party State.

#### ii- Cases in which the Seat of the Proceedings is in a Contracting State

Due to the fact that the four treaties provide that the decisions of the permanent bilateral ISDS institution shall be considered as arbitral awards, Contracting States to the treaties are under the obligation to consider the decisions of the first instance and appeals bodies as arbitral awards. Due to the fact that Member States

<sup>114</sup>An arbitral award, "international as it may be, is [almost] always governed by a national law"; van den Berg, *The New York Convention* (n 57) 49.

<sup>115</sup>Arbitration under the ICSID Additional Facility Rules is also governed by a national arbitration law. See e.g., Schreuer (n 106) Commentary to Art 53, para 5.

<sup>116</sup>See text accompanying (n 94).

<sup>117</sup>See e.g., van den Berg, 'Appeal Mechanism for ISDS Awards' (n 83), 169; *Contra Hoffmeister and Kempynck* (n 90) 631 para 62, stating that: "... in an UNCITRAL based CETA claim the governing law automatically changes at appeal state: rather than the national arbitration law, it is CETA itself, which governs the possibility and the conduct the appeal".

<sup>118</sup>E.g., Poudret and Besson (n 55), 84 para 113.

<sup>119</sup>The seat of arbitration is not necessarily the location where the arbitration proceedings physically take place, nor is it necessarily the place with which the dispute has material connections. It is defined as the "juridical connection which binds the parties to the arbitration and the arbitrators on the other hand, to a state court forum and a national arbitration law on the other hand" Poudret and Besson (n 55) 101, para 134.



of the EU will be Contracting Parties to the examined four treaties, all EU member States and their respective Treaty Party States (i.e., Canada, Singapore, Vietnam or Mexico), depending on which treaty is applied, are obliged to consider a decision of the appeals body as an arbitral award<sup>120</sup>.

Therefore, a Contracting State in which the seat of proceedings is located, will consider a decision of the appeals body made under rules other than the ICSID Convention as a domestic arbitral award and enforce it accordingly.

Other States that are likewise Contracting Parties to the relevant treaty, such as other EU Member States, but not the State in which the seat of the proceedings is located, will consider the decision made by the appeals body as a foreign award and will enforce the decision pursuant to the New York Convention. This is because, under the relevant treaty, they must consider the decisions of the appeals tribunal as arbitral awards, and they are all Contracting Parties to the New York Convention.

In summary, if the seat of the proceedings is in a Contracting State and enforcement is sought only in Contracting States, questions as to the legal nature of appeals body decisions made for claims brought under rules other than those of the ICSID Convention do not arise. This is because State Parties are bound by the treaty provisions which stipulate that decisions of the permanent ISDS shall be considered as arbitral awards. However, as will be examined in the following subheading, questions as to the nature of the appeals body decisions arise if the seat of the proceedings is in a non-party State or if the enforcement of the appeals body decision is sought in a non-party State.

### iii- Cases in which the Seat of the Proceedings is in a Non-Party State

Unlike the Contracting States to the four treaties, non-party States are not bound by the treaty obligations and thus are not under the obligation to consider the appeals body decisions as arbitral awards. Consequently, non-party States will determine the nature of the appeals body decisions in accordance with their national laws<sup>121</sup>.

Currently, the arbitration legislations of 93 States are formulated under the influence of the UNCITRAL Model Law on International Commercial Arbitration<sup>122</sup> (UNCITRAL Model Law), and more States are likely to enact their arbitration legislations modelled on it. Furthermore, the Model Law reflects international consensus on key aspects of arbitration, including the consensus of most States that have not adopted it<sup>123</sup>. For all these reasons, when attempting to answer the question of how non-party States will define the nature of the appeals body's decisions, the provisions of the UNCITRAL Model Law can be used to illustrate the arbitration legislation of many other third States that could be relevant.

According to the UNCITRAL Model Law, the parties have broad discretion to tailor the procedure to be followed during the 'phase when the case is being conducted by the arbitrators'. Article 19 of the UNCITRAL Model Law stipulates the following: "*Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings*". Due to the fact that recent arbitration legislations of many States (potential *leges arbitrii*) are mostly formulated under the influence of the UNCITRAL Model Law, as for the phase in which arbitrators conduct the proceedings and render an

<sup>120</sup>See text accompanying (n 51).

<sup>121</sup>See text accompanying (n 56).

<sup>122</sup>See <[https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status)> accessed 7 September 2025.

<sup>123</sup>See e.g., Gerold Herrmann, 'Power of Arbitrators to Determine Procedure under the UNCITRAL Model Law' in: Albert Jan van den Berg (ed) 'Planning Efficient Arbitration Proceedings, The Law Applicable in International Arbitration' International Council for Commercial Arbitration Congress Series no. 7 (Kluwer 1996) 37, 41.

<sup>124</sup>E.g., Poudret and Besson (n 55) 84 para 113.



award, the *leges arbitrii* usually function as a “framework-law<sup>124</sup>” that the disputing parties can, subject to their mandatory rules, derogate from<sup>125</sup>.

The provisions related to the ‘Conduct of Arbitral Proceedings’ are embedded in Chapter V, and the provisions related to the ‘Making of Award’ are embedded in Chapter VI of the UNCITRAL Model Law. On the other hand, Article 19 is embedded in Chapter V of the UNCITRAL Model Law. Therefore, it may appear that the freedom granted to the parties in Article 19 does not extend to the provisions related to the making of an award. However, the legislative history of the UNCITRAL Model Law shows that the drafters of Article 19 extended its scope to the process of making awards when drafting it. When determining the limits of the parties’ ability to tailor the procedure to be followed by the arbitrators, the drafters addressed the provisions related to the ‘making of awards’<sup>126</sup> as well.

Once it has been established that the parties’ freedom to choose the “procedure to be followed by the arbitrators” includes the procedure for “making the award” it can be accepted that the parties can agree for a group of arbitrators to deliver a preliminary award that another group of arbitrators can review, before it becomes final. The mandatory rules set out in the UNCITRAL Model Law regarding the making of the award<sup>127</sup>, such as the rule in Article 31(1) that the award must be in writing, do not conflict with such an agreement. Similarly, such an agreement does not contradict the mandatory rules set out in Article 33, which state that the parties may request the arbitrators to correct the award. Consequently, even if the seat of the proceedings is in a non-party State, the decision of the appeals body may be considered as an arbitral award under that State’s law, provided its courts are willing to broadly interpret the freedom of the parties to determine the procedure to be followed by the arbitrators.

However, even if the non-signatory State in which the seat of the proceedings is located considers the appeals body’s decision as an arbitral award, the *lex arbitri* will still be constituted by its arbitration legislation, and its mandatory rules relating to the annulment of arbitral awards will apply. Under the influence of the UNCITRAL Model law rules, the laws of many states provide an annulment procedure as a way of reviewing awards. Also under the influence of these rules, annulment proceedings can only be initiated in the courts of the seat of arbitration<sup>128</sup>. Although the arbitration laws of some States, such as Switzerland and Türkiye, allow the disputing parties to waive their right to seek annulment under certain conditions<sup>129</sup>, the provisions regarding the annulment procedure are non-derogable in most States.

The four treaties stipulate that the “disputing parties” are prohibited from initiating annulment or similar procedure<sup>130</sup>. However, it is possible that, despite this prohibition, an investor will seek to annul the decision rendered by the appeals body in the courts of the non-party State where the seat of proceedings is

<sup>125</sup>See text accompanying (n 96).

<sup>126</sup>In the Seventh Secretariat Note to the Draft Text of Article 19, it has been stated that: “ The freedom of the parties is subject only to the provisions of the model law... The most fundamental of such provisions, from which the parties may not derogate, is the one contained in paragraph (3) [Art. 18 in the final text]. Other such provisions concerning the conduct of the proceeding or the making of the award are contained in articles 23(1)...27, 30(2), 31(1), (3), (4), 32 and 33 (1), (2), (4), (5).” (emphasis added); Seventh Secretariat Note Analytical Commentary on Draft Text (n 92) 583.

<sup>127</sup>In the Seventh Secretariat Note to the draft text of the UNCITRAL Model Law, the mandatory rules relating to the ‘making the award’ have been defined by the drafters as to be Articles 30 (2), 31 (1), (3), (4), 32 and 33(1), (2), (4), (5), Seventh Secretariat Note Analytical Commentary on Draft Text (n 92).

<sup>128</sup>E.g., Poudret and Besson (n 55) 87, parag. 116.

<sup>129</sup>E.g., Mehmet Polat Kalafatoğlu, ‘Waiver of Setting Aside Action under the Turkish International Arbitration Code’ (2018) 38 (2) Public and Private International Law Bulletin 339,340.

<sup>130</sup>CETA 8.28-9(b); EU-Singapore IPA Art.3.22-1; EU-Vietnam IPA Art. 3.57-1(b); EU-Mexico EPA Section on Resolution of Investment Disputes Art. 31.1.

<sup>131</sup>Where the seat of proceedings is located in a Contracting State, the courts of that State will not hear the annulment case due to treaty provisions prohibiting remedies other than those provided in the treaty.

located<sup>131</sup>. Due to the fact that a non-party State is not bound by treaty provisions that prohibit annulment proceedings, its courts can hear the annulment claim<sup>132</sup>.

It could be argued that the courts of non-party States that allow disputing parties to waive their right to annulment proceedings may consider the treaty provisions prohibiting annulment proceedings as a permissible waiver<sup>133</sup> if the waiver requirements are met (e.g. the investor is not a national of the State where the seat of proceedings is located). In such a case, the courts of the non-party State where the seat of the proceedings is located, will not hear the annulment case brought by the investor, as intended by the treaty drafters.

#### b. Appeals Body Decisions Rendered for Claims Submitted Under the Rules of the ICSID Convention

Since proceedings under the ICSID Convention are self-contained, domestic arbitration legislation has no influence on ICSID proceedings. Therefore, unlike in the previous sub-heading, the seat of arbitration and the *lex arbitri* are irrelevant here; only the four treaties developed by the EU with its treaty parties and the ICSID Convention are relevant.

As mentioned above<sup>134</sup>, in the event of a contradiction between the provisions of the four treaties and those of the ICSID Convention, the former will prevail. Such a contradiction exists between the four treaties' provisions regarding their respective appeal mechanisms and Article 53 of the ICSID Convention. The mandatory rule embedded in Article 53 of the ICSID Convention explicitly provides that an award "shall not be subject to any appeal or any other remedy except those provided for in the Convention". On the other hand, each of the examined four treaties provides for an appeals mechanism and prohibits the disputing parties from initiating annulment proceedings. This raises the question of whether the provisions of the four treaties can be reconciled with those of the ICSID Convention.

The introduction of an appeals mechanism would inevitably require the ICSID Convention to be modified. However, according to Article 66(1) of the Convention, amending it requires a unanimous vote. Instead of this very difficult to achieve unanimous vote, the acceptability of the option of an 'inter se' modification, as provided in Article 41 of the Vienna Convention on the Law of Treaties (VCLT), that would be binding only on the parties to the four treaties, is a debated issue<sup>135</sup>, which this paper does not intend to examine.

Although the drafters of the four treaties intended that the decisions of the permanent bilateral ISDS institution made for claims brought under the rules of the ICSID Convention should be considered as ICSID awards<sup>136</sup>, this appears to be possible only for the Contracting States and only in the event of the acceptance of an 'inter se' modification of Article 53 of the ICSID Convention. It appears that even then, non-party States that are not bound by the 'inter se' modification will not consider the decisions of the appeals tribunal as ICSID awards. Even if the non-party States don't consider the decisions of the appeals body as ICSID awards, it is possible that they regard them as arbitral awards. In such a case, the *lex arbitri* becomes relevant, and the explanations in the subheading above will become applicable.

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<sup>132</sup>See, Joel Dahlquist, 'Place of Arbitration in the Proposed "Investment Court" Scenario: An Overlooked Issue?' (Kluwer Arbitration Blog, March 23, 2017) <<https://arbitrationblog.kluwerarbitration.com/2017/03/23/joel-booked/>> accessed 30 January 2025; Juliette Luycks/Eva Matheij, Art. 8.28 in: Moritz Keller (ed), 'EU Investment Protection Law', Beck (2023) 450, 466.

<sup>133</sup>Dahlquist (n 132).

<sup>134</sup>See text accompanying (n 101).

<sup>135</sup>See e.g. Reinisch (n 20) 767; van den Berg, 'Appeal Mechanism for ISDS Awards (n 83) 170; suggesting that an inter se amendment is possible But see Calamita (n 90) 23.

<sup>136</sup>CETA Art. 8.41-6; EU-Singapore IPA Art. 3.22-6; EU-Vietnam IPA Art.3.57.8; EU-Mexico EPA Section on Resolution of Investment Disputes Art.31.6)



## Conclusion

The permanent bilateral ISDS institutions envisaged in the four treaties that the EU developed separately with Canada, Singapore, Vietnam and Mexico, differ in some respects from what are known as 'typical' arbitral institutions. Nonetheless, pursuant to the treaties, the decisions of these permanent ISDS institutions have to be regarded as arbitral decisions; thus, the Contracting States, including all 27 Member States of the EU, have to consider these decisions as such. Therefore, the problem of identifying the legal nature of the permanent bilateral ISDS institutions envisaged in the four treaties will not be a concern for a significant number of States.

However, courts of non-party third States that are not bound by the treaty provisions will, in two circumstances, have to define the nature of the decisions rendered by these permanent ISDS institutions according to their own laws. Firstly, this will be the case when the seat of proceedings in a case conducted by a permanent ISDS institution is located in that non-party State. It will also be the case when the seat of proceedings in a case conducted by a permanent ISDS institution is located in a Contracting State, but the decision rendered by this ISDS institution is to be enforced in a non-party third State.

As a matter of fact, the fact that the four treaties provide for the parties to choose the procedural rules to be applied by the adjudicators is a very strong indication that the permanent ISDS institutions are arbitral institutions. Even so, some features of the permanent ISDS institutions obscure the legal nature of them. It appears that two of the features of the permanent ISDS institutions constitute the major issues that give rise to the question of whether these institutions can be considered as arbitral institutions. The first is related to the permanent nature of the judicial powers of the adjudicators over whose appointment only the home and host States, but not the investor, will have significant influence. The second one is related to the existence of a self-contained appeals mechanism.

Due to the fact that it is possible that the decisions of a first-instance body can finalise without undergoing review by the self-contained appeals body, the existence of an appeals mechanism will not constitute an issue for all decisions. The existence of an appeals mechanism will only be an issue for decisions that are subject to review. Therefore, with regard to the legal nature of the decisions made by the permanent ISDS institutions, it is possible to reach different conclusions depending on whether the decision under consideration is that of the first-instance body or the appeals body.

With regard to the decisions that will be rendered by the first-instance body and finalised without review, the main issue that will differentiate them from typical arbitral awards is that they will be rendered by adjudicators who will have pre-existing judicial powers and in whose appointment one of the disputing parties, namely, the investor, will have no influence. However, the jurisprudence relating to the USA-Iran Claims Tribunal considering its decisions as arbitral awards, and moreover the provision embedded in Article 1(2) of the New York Convention which stipulates that: "The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted" appears to be sufficiently persuasive to convince the courts of most non-party third States to consider the decisions of the permanent ISDS institution's first-instance body as arbitral awards.

Another specific feature of the four treaties is that they prohibit disputing parties from filing annulment proceedings in national courts. However, it is possible that an investor, disregarding this prohibition, seeks annulment against the decision of the first-instance body by bringing a case to the courts of the State where the seat of the proceedings is located. If the seat of the proceedings is in a Contracting State, due to the binding treaty provisions prohibiting annulment proceedings, the courts of this State will not

hear the annulment case. However, if the seat of the proceedings conducted by the first-instance body is located in a non-party third State, and if this State, as suggested, views the decision of the first-instance body as an arbitral award, then its courts will hear the annulment case. This is because the non-party third State will not be bound by the treaty provisions that prohibit remedies other than those set out in the treaties; therefore, the mandatory rules relating to the annulment of arbitral awards provided in its national arbitration legislature will apply.

With regard to the decisions of the appeals body, convincing courts of non-party third States to consider them as arbitral awards appears to be more complicated. This will depend on whether these courts will interpret the provisions of their arbitration legislation, which, under the influence of the UNCITRAL Model Law, most likely provide that parties are free to determine the procedural rules to be followed by the arbitrators, as broadly as to allow the parties to agree that arbitrators other than those who rendered the award will review it.

Lastly, regarding the decisions of the appeals body, it can be added that in cases where the seat of proceedings is located in a non-signatory third state, and the courts of this state interpret their arbitration legislation broadly, such as they consider the appeals body's decisions as arbitral awards, then these courts will hear annulment cases regarding these decisions in the same manner as has been mentioned in relation to the decisions of the first-instance body.



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