CJEU Opinion 1/17 – AG Bot Concludes that CETA's Investment Court System is Compatible with EU Law

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Introduction

On 7 September 2017, Belgium requested the opinion of the Court of Justice of the European Union ("CJEU") on the compatibility with EU law of the Investment Court System ("ICS") provided for by the Comprehensive Economic and Trade Agreement between the EU and Canada ("CETA").

In his much anticipated opinion rendered today, Advocate General ("AG") Bot considers that this mechanism for the settlement of investor-State disputes is compatible with the EU Treaties and the EU Charter of Fundamental Rights.

Although the CJEU usually follows the opinion of its AGs, the divergence of views between the Court and AG Wathelet in *Achmea* was a striking example that this pattern admits exceptions. In a *dictum* of *Achmea*, the CJEU held that the EU has competence to conclude agreements establishing an international court "*provided that the autonomy of the EU and its legal order is respected*".

Background

The inclusion of Investment Court Systems in EU free trade agreements

Since 2009, by virtue of the Lisbon Treaty, the external trade policy (including direct investment) has become an exclusive competence of the EU. As a result, Member States have been precluded from entering into new free trade agreements ("FTAs"), which have been concluded by the EU since then.

As it is well known, the use of Investor-State Dispute Settlement ("ISDS") mechanisms has been seen by certain sections of the civil society, and by the EU itself (see its December 2017 submission to the Working Group III of UNCITRAL on the ISDS Reform), as inappropriate for disputes involving States because of their alleged lack of transparency, legitimacy, consistency as well as the absence of sufficient review of the arbitral tribunals' decisions.

In order to address these criticisms, the EU's approach has been to attempt to institutionalise the resolution of investment disputes in the FTAs it concludes, through the inclusion of an Investment

Court System ("ICS"). Such a mechanism is now provided for by most of the EU FTAs, including with Canada (CETA), Singapore (the EUSFTA) and Vietnam (the EUVFTA).

In a nutshell, the ICS provides for a break from the *ad hoc* arbitration system to a permanent and institutionalised court, whose members (subject to strict independence and impartiality requirements) are appointed in advance by the States parties to the treaty instead of being appointed on a case-by-case basis by the investor and the responding State. The EU FTAs also contain appellate bodies, as opposed to traditional investment arbitration mechanisms which only provide for one instance on the merits. Subject to the mandatory provisions of the FTAs, investors' claims may still be submitted according to the ICSID or UNICTRAL Arbitration Rules (or any other rules on agreement of the parties) whilst the ICSID Secretary General and Secretariat remain entrusted with administrative tasks.

Belgium's request to the CJEU

This new approach has not overcome the general public's mistrust for investment arbitration. The ICS provided for by CETA, in particular, gave rise to heated debates in the framework of the conclusion of the treaty. This point was one of the core reasons put forward by some of Belgium's federated entities, led by the Walloon Region, for refusing to agree to the signature of the treaty by the Belgian federal Government. If the Walloon Region finally surrendered, after intense political pressure, it was subject to an agreement with the federal State and the other Belgian federated entities that Belgium would refer the validity of the CETA's ICS to the CJEU.

This was done on 7 September 2017, when Belgium requested the CJEU to render an opinion on the compatibility of the CETA's ICS with EU law – in particular with (i) the exclusive competence of the CJEU to provide the definitive interpretation of EU law, (ii) the general principle of equality, (iii) the requirement that EU law is effective, and (iv) the right to an independent and impartial judiciary – while specifying that Belgium "*does not take any position itself regarding* [those] *questions".*

CETA entered into force provisionally on 21 September 2017, with the exclusion of the ICS (among other controversial provisions).

Towards a Multilateral Investment Court?

Shortly after Belgium's request, on 13 September 2017, the European Commission introduced a recommendation for a Council decision authorising the opening of negotiations for a convention establishing a multilateral court for the settlement of investment disputes (the "Multilateral Investment Court" or "MIC"), with the aim of "*having one, multilateral institution to rule on investment disputes covered by all the bilateral agreements in place*" rather than one bilateral investment court for each FTA.

The EU Council formally gave its agreement on 20 March 2018, though the possibility of replacing the various ICSs by a single MIC had already been provided for by CETA, the EUSFTA and the EUVFTA.

International negotiations are taking place in the framework of Working Group III of UNCITRAL, which had identified the setting up of MIC as an "*option for reform*" of investor-State dispute settlements at the occasion of its 50th session last July. On 18 January 2019, the EU and its Member States submitted two papers to the working group. The first paper sets out in more detail the EU's proposal of establishing a MIC whilst the second paper proposes a work plan for the process of the working group. It remains to be seen whether the European Union will gather sufficient support from its trading

partners.

Potential impact of Achmea*?*

In its seminal *Achmea* ruling (Case C-284/16 of 5 March 2018), which has been extensively discussed on this blog, the CJEU ruled that: "*[…] according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected*" (§57).

AG Bot's opinion

Principle of autonomy of EU law (§§39-184)

Against this background, AG Bot opines that CETA's ICS does not jeopardise the principle of autonomy of EU law and the CJEU's exclusive jurisdiction over its definitive interpretation. As it could have been expected, this aspect of Belgium's request constitutes the crux of the AG's opinion.

After having underlined that the preservation of the autonomy of the EU legal order is "*not a synonym for autarchy*" (§59), AG Bot stressed that the potential asymmetry between the substantive and procedural level of investment protection existing within the EU and within third State "*necessitates the negotiation of a common standard of substantive and procedural protection*" (§87), including a neutral dispute settlement mechanism. Even if EU law could, arguably, offer a sufficient level of protection to foreign investors who invest in the EU, such a reciprocal mechanism is necessary in order to ensure the protection of EU investors when they invest in third States. This conclusion would be supported by the absence of direct effect of CETA, which precludes domestic courts from applying the standards of protection set out in the treaty.

In the second step of his reasoning, AG Bot distinguishes CETA's ICS with the CJEU's ruling in *Achmea*. He argues that the premises guiding the line of reasoning would be different since, in this latter case, the court's approach would have been "*primarily guided by the idea that the judicial system of the European Union, in so far as it is based on mutual trust and sincere cooperation between Member States, is inherently incompatible with the possibility of Member States establishing, in their bilateral relations, a parallel dispute settlement mechanism which may concern the interpretation and application of EU law*" (§105), whilst the relationship between the EU and Canada (or other third States) does not rest on the same principles.

AG Bot further considers that CETA provides sufficient guarantees in order to preserve the exclusive jurisdiction of the Court over the definitive interpretation of EU law since the applicable law before the CETA Tribunal consists exclusively of the relevant provisions of that agreement as interpreted in accordance with international law, excluding the domestic law of the Member States and EU law, which can only be taken into account by that Tribunal as a matter of fact (in particular to take account of legitimate objectives in the public interest). In addition, in the few instances where the CETA Tribunal would interpret EU law, it would be "*bound by the interpretation of EU law given by the Court, which Article 8.31.2 of the CETA requires it to follow, whereas neither the Court, nor the*

institutions of the European Union, nor the national courts or authorities are bound by the interpretation of EU law made by the Tribunal" (§138). The decisions of the CETA Tribunal are also subject to an appellate body, which offers additional guarantees that the correct interpretation of EU law would be applied.

Finally, AG Bot underscores that CETA's ICS does not affect the role of EU national courts of ensuring the effective application of EU law, nor the power (or obligation) of those courts to request a preliminary ruling from the CJEU since it "*does not restrict the substantive rights enjoyed by foreign investors under internal EU law*" nor "*does it have the effect of limiting the jurisdiction of the Court or of the courts and tribunals of the Member States to hear and determine actions brought with a view to ensuring the observance of such rights as are afforded by internal EU law*".

Principle of equal treatment (§§185-213)

A discrimination exists only where persons *in relevantly similar situations* are treated differently, without objective and reasonable justification. In this case, AG Bots is of the opinion that European investors who invest in Canada are merely in a similar situation with Canadian investors investing in the EU. Their situation cannot be equated to European investors investing within the EU. AG Bot added that "*it would, in any event, be wrong to take the view that, given their ability to bring matters before the CETA Tribunal, Canadian undertakings investing in the EU are placed in a preferential situation as compared with EU undertakings investing in the EU. That possibility merely compensates for the fact that the CETA cannot be relied on directly before the domestic courts and tribunals of the Parties*" (§205). Finally, the AG indicated that the purpose of encouraging foreign investments in the EU would, in any case, justify a difference of treatment.

Principe of effectiveness (§§214-219)

The AG considers that the effectiveness of EU competition law cannot be jeopardised by the CETA Tribunal's decisions (e.g. by awarding damages equivalent to the amount of fines imposed by the European Commission or a national competition authority). CETA acknowledges that the Parties may take appropriate measures to proscribe anti-competitive behaviours and guarantees their right to regulate in order to achieve legitimate objectives in the public interest.

Right to an independent and impartial tribunal (§§220-271)

CETA's ICS does not breach the right to an independent and impartial tribunal as it merely constitutes an *alternative* method of dispute settlement, which provides sufficient procedural guarantees (in particular as regards the tribunal members' remuneration schemes, their appointment and removal, and the rules of ethics that they have to follow).

Conclusion

In *Achmea*, the CJEU rendered its decision roughly 6 months after the publication of the opinion of its AG. Needless to say that the Court's final say will be impatiently awaited by the EU, its trading partners and the civil society. The CJEU's opinion is likely to shape the future of extra-EU investment

arbitration, as AG Bot highlighted that "*what is at issue here is the definition of a model which is consistent with the structural principles of the EU legal order and which, at the same time, may be applied in all commercial agreements between the European Union and third States*" (§86). In the meantime, AG Bot's reasoning briefly set out hereabove is likely to cause much ink to flow.

The principle of autonomy of EU law appears to be the most likely potential stumbling block to the compatibility of the ICS or a future MIC with EU law, in line with the concerns raised by the Court in *Achmea*. Arguably, an easy way out could be to provide in the EU FTAs (or a potential international convention establishing a MIC) the possibility/obligation for investment courts/their appellate bodies (or a potential MIC) to refer the case to the CJEU, as long as it is deemed compatible with the CJEU's competences under the EU Treaties. Obviously, such a clause would not merely depend on the willingness of the EU but also on the consent of the other contracting States, which may request a similar arrangement for the definitive interpretation of their domestic law by their supreme/constitutional court. As pointed out by AG Bot, "*this would run counter to the purpose of the dispute settlement mechanism, namely to be neutral and independent from the domestic courts and tribunals of the other Party*" (§182).

The views expressed herein are the author's only.