Opinion 1/17 – The CJEU Confirms that CETA's Investment Court System is Compatible with EU Law

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Introduction

In 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").

Last January, Advocate General Bot concluded that this mechanism for the settlement of investor-State disputes was compatible with the EU Treaties and the EU Charter of Fundamental Rights. The CJEU followed suit in its much anticipated opinion delivered today.

An adverse opinion would have had serious political consequences, as it would have required the amendment of CETA (pursuant to Article 218(11) of the TFEU), and potentially brought grist to the mill of part of the European civil society opposing investor-State arbitration.

Background

As further developed in a previous post reporting on AG Bot's opinion, most of the recent free trade agreements ("FTAs") concluded by the EU (including with Canada (CETA), Singapore (the EUSFTA) and Vietnam (the EUVFTA)) provide for a so-called Investment Court System ("ICS"), whereby investor disputes may be submitted 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 and whose decisions are subject to an appellate body. The EU ultimately aims to replace the bilateral investment courts of each FTA by a single multilateral investment court ("MIC"). International negotiations are currently ongoing at UNCITRAL Working Group III, where the reform of the Investor-State Dispute Settlement system is under discussion.

This break from the traditional *ad hoc* arbitration system has not overcome the general public's mistrust for investment arbitration. The ICS provided for by CETA, in particular, gave rise to heated debates among Belgium's federated entities. As a result, on 7 September 2017, 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.

CJEU's Opinion

As opposed to the striking divergence of views between the Court and AG Wathelet in *Achmea*, the CJEU has followed closely the opinion of its AG in this case.

1. Principle of Autonomy of EU law (§§106-161)

As expected, this aspect of Belgium's request constitutes the crux of the Court's opinion. Indeed, in its seminal *Achmea* ruling (Case C-284/16 of 5 March 2018), the CJEU held that "*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*", provided that *"the autonomy of the EU and its legal order is respected*" (§57).

After having recalled this principle, the Court underscored at the outset that the

mere fact that CETA's ICS stands outside the EU judicial system does not, in itself, breach the autonomy of the EU legal order. It follows from the reciprocal nature of international agreements and the need to maintain the powers of the EU in international relations that an international tribunal may have jurisdiction to interpret those agreements without being subject to their interpretation by the domestic courts of the parties to the agreements. The principle of autonomy of EU law would only be breached if the CETA Tribunal could (i) interpret and apply EU rules other than the provisions of the CETA or (ii) issue awards having the effect of the EU institutions from operating in accordance with the EU constitutional framework. The Court was satisfied that this was not the case.

As regards the first aspect, the CJEU considered on the basis of the relevant provisions of CETA (Articles 8.21 et seq.), and as opposed to the Netherlands-Slovakia BIT in *Achmea*, that the power of interpretation and application conferred on the CETA Tribunal is confined to the provisions of the CETA and that such interpretation or application must be undertaken in accordance with the rules and principles of international law applicable between the EU and Canada. Domestic laws of the Parties may only be taken into account as a matter of fact, and the CETA Tribunal is obliged to abide by the prevailing interpretation given to that domestic law by the domestic courts (whilst the domestic courts are not bound by the meaning given to their domestic law by the CETA Tribunal). It is therefore coherent that the CETA Tribunal does not have the possibility to make a reference for a preliminary ruling to the CJEU. The Court further distinguishes CETA from intra-EU BITs by highlighting that the principle of mutual trust, which was at the core of its decision in *Achmea*, is not applicable to the relations between the EU and third countries.

With respect to the effect on the operation of the EU institutions, the Court held that it would be inadmissible that the power of the CETA Tribunal to award damages to an investor where EU measures are in breach of the substantive protections offered by CETA (e.g. fair and equitable treatment, indirect expropriation, unjustified restriction to make payment and transfer capital, etc.) could "*create a situation where, in order to avoid being repeatedly compelled by the CETA Tribunal to pay damages to the claimant investor, the achievement of that level of protection needs to be abandoned by the Union*" (§149). However, CETA provides enough guarantees in this respect, as it contains various provisions guaranteeing public interest considerations and the Parties' right to regulate.

2. General Principle of Equal Treatment (§§162-186)

Turning to the principle of equal treatment, the Court held that "*the difference in treatment arises from the fact that it will be impossible for enterprises and natural persons of Member States that invest within the Union and that are subject to EU law to challenge EU measures before the tribunals envisaged by the CETA, whereas Canadian enterprises and natural persons that invest within the same commercial or industrial sector of the EU internal market will be able to challenge those measures before those tribunals*" (§179). As the situation of Canadian investors that invest within the EU are only comparable to EU investors that invest in Canada (as opposed to EU investors that invest within the Union), the Court found that there was no difference of treatment of persons in a relevant similar situation. Indeed, the reason why Canadian investors have the possibility of relying on the provisions of CETA before the CETA Tribunal is that they act in their capacity as foreign investors.

3. Principle of Effectiveness (§§185-188)

The Court also considered 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. If, "*in exceptional circumstances, an award by the CETA Tribunal might have the consequence of cancelling out the effects of a fine*", this is acceptable as "*EU law itself permits annulment of a fine when that fine is vitiated by a defect corresponding to that which could be identified by the CETA Tribunal*" (§187).

4. Right of Access to an Independent Tribunal (§§189-244)

Finally, the Court did not conclude that the CETA's ICS would breach the right to court.

As regard the CETA Tribunal's accessibility, it first highlighted that "*in the absence of rules designed to ensure that the CETA Tribunal and Appellate Tribunal are financially accessible to natural persons and small and medium-sized enterprises, the ISDS mechanism may, in practice, be accessible only to investors who have available to them significant financial resources*" (§213). However, the the Council

has undertaken to ensure that "'*there will be better and easier access to this new court for the most vulnerable users, namely [small and medium-sized enterprises] and private individuals' and provides, to that end, that the 'adoption by the Joint Committee of additional rules*" (see Statement No. 36), leading the Court to be satisfied that the approval of CETA by the EU was dependent on this commitment.

The Court also found that CETA offers sufficient procedural guarantees as to the CETA Tribunal's independence (in particular as regards the tribunal members' remuneration schemes, their appointment and removal, and the rules of ethics that they have to follow), underlying that this treaty expressly provides that the tribunal members "*shall not be affiliated with any government*".

Conclusion

The importance of this ruling goes obviously beyond CETA's ICS. As underscored by AG Bot in his opinion, "*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). The Court also envisaged the setting up of a "*multilateral investment Tribunal in the longer term*" (§108).

This opinion will therefore most certainly be welcomed with relief by DG Trade, and the investment arbitration community which had been shaken by the Court's decision in *Achmea*. A comparison of the approach taken by the Court in these two rulings would go beyond the ambit of this first report, but is likely to cause much ink to flow…