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CETA's Investment Protection Chapter: A Progress Snapshot

Caroline Kittelmann (Clifford Chance) · Saturday, June 1st, 2024

Although parts of CETA have been provisionally applied since 21 September 2017, the parts not subject to provisional application – including the investment chapter (CETA's Chapter Eight) which covers investment protection and dispute resolution – are still pending domestic ratification procedures in 10 EU Member States.

In parallel, CETA's framework for investment protection and dispute resolution has continued to be fleshed out. Key decisions to date include the CETA Joint Committee Decision No 1/2021 of 29 January 2021 Setting Out the Administrative and Organisational Matters Regarding the Functioning of the Appellate Tribunal, Committee on Services and Investment Decision No 1/2021 of 29 January 2021 Adopting a Code of Conduct for Members of the Tribunal, Members of the Appellate Tribunal and Mediators, and Committee on Services and Investment Decision No 2/2021 of 29 January 2021 Adopting Rules for Mediation for Use by Disputing Parties in Investment Disputes.

Two further key developments are under way, in the form of a draft interpretative statement on, *inter alia*, the substantive protections under CETA and a draft decision adopting rules on access and procedure for natural persons and SMEs to bring expedited claims against states. This post provides an overview of these developments and their effects, should adoption by the CETA Joint Committee follow.

Fair and Equitable Treatment and Indirect Expropriation Under the Draft Interpretative Statement

With efforts continuing more broadly to pin down the contours of the substantive standards applied in investment treaty arbitration, there has been a series of proposals on the future interpretation of CETA by the CETA Tribunal. A draft interpretative statement was initially prepared by the German Government together with the European Commission ("EC") in August 2022 (and was previously addressed on the Blog here). Revised iterations of the draft interpretative statement were issued (i) by the European Council on 1 February 2024, in advance of the fourth meeting of the CETA Joint Committee, and (ii) (with exactly the same wording) by the CETA Joint Committee, which released its draft interpretative statement on 9 February 2024.

The 9 February 2024 draft statement covers six main areas: fair and equitable treatment ("FET"), indirect expropriation, climate change, protection of essential security interests, protection of

fundamental rights, and calculation of monetary damages. The first two are of particular relevance to CETA's investment protection chapter.

On FET, the draft statement follows the approach of an exhaustive, closed list of FET elements (Article 1a), which has also been taken in other recent treatymaking discussions, including the new draft of Article 10(1)(i) of the Energy Charter Treaty proposed by the EU. Notably, the closed list does not mention aspects of FET such as consistency or stability of the regulatory framework.

As to the individual elements of the closed list, Article 1b states that for a claim of denial of justice, there must be:

"prior exhaustion of local remedies except if there are no reasonably available local remedies to provide effective redress, or if the local remedies provide no reasonable possibility of such redress."

Article 1b also emphasises that the CETA Tribunal "should be mindful that it is not a court of appeal of domestic court decisions" and "should not engage in reviewing the merits of domestic court decisions". Article 1c provides that for a denial of justice/fundamental breach of due process, there must be conduct which "shocks or surprises a sense of judicial propriety", echoing the ICJ's approach in the *ELSI* case that arbitrariness is "something opposed to the rule of law". In Article 1d, arbitrariness requires that a measure "is not rationally connected to a legitimate policy objective". On discrimination, the draft statement prohibits under Article 1e measures that "single out the investor in providing differential treatment based on illegitimate grounds such as gender, race or religious belief" while maintaining the rights of the Parties to grant "preferential treatment to promote gender or racial equality or to otherwise address under-representation of socio-economically disadvantaged groups". On abusive treatment, a finding of "serious misconduct" is required under Article 1f. Finally, for legitimate expectations to be held by an investor, representations by a respondent need to be "sufficiently specific and unambiguous" and have "the requisite degree of formality" (Article 1g). Moreover, the investor's reliance on such representations must be "reasonable", in line with the wording of other agreements, such as the EU-Singapore Investment Protection Agreement (Article 2.4.3).

On indirect expropriation (already further clarified by Annex 8-A to CETA), the draft statement sets the requirement of "radical deprivation" (Article 2a) rather than the more typical "substantial deprivation" wording. It also clarifies that where an interference is temporary, "it is unlikely to amount to an indirect expropriation" (but at the same time, "the sole fact that a measure is permanent does not establish that an indirect expropriation has occurred") (Article 2b). Further, whether an investor's expectations are reasonable is stated to depend on "whether the Party concerned provided the investor with binding written assurances and on the nature and extent of governmental regulation or on the potential for government regulation in the relevant sector" (Article 2c). Article 2d clarifies that the impact of a measure or series of measures is "manifestly excessive […] if it is clearly and obviously excessive in light of the intended policy objectives". Finally, an exception is included to avoid that acts pursuing legitimate public welfare objectives (envisaged to include measures "taken to combat climate change or to address its present or future consequences") amount to an expropriation, unless "their impact is clearly and obviously excessive in light of the intended policy objectives" (Article 2e).

The current draft, which differs in many ways from the original German/EC proposal of August 2022, remains to be formally adopted by the CETA Joint Committee.

EU Draft Decision Adopting Supplemental Rules on Certain Expedited Procedures

The current draft of CETA permits an investor to request that its claim is heard by a sole Member of the CETA Tribunal (i.e. a sole arbitrator) (Article 8.23.5 and Article 8.27.9 CETA) "in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low". Such request is to be made by an investor "when submitting its claim". The rationale behind this mechanism is clearly that of the efficiency of the proceedings.

Now, the draft decision of the EU "adopting supplemental rules on expedited procedures for the resolution of investment disputes between investors and states, in particular for natural persons and small and medium-sized enterprises" fleshes out the corresponding process for such requests as well as a procedural framework for any resulting expedited proceedings. For example, Article 2 of the draft decision sets out the information an investor should include with its request for an expedited procedure (including information on its ownership structure, its most recent financial statements, and information on the number of employees), and provides that the investor is "strongly encouraged" to provide information on why the expedited procedure is "appropriate under the circumstances of the claim".

Access to the expedited procedure is contingent upon the consent of the respondent. CETA already provides that where such a request is made, "[t]he respondent shall give sympathetic consideration to that request, in particular if the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low". Thereby, the respondent "shall take into consideration the size of the investor as an enterprise and, if the claim is submitted on behalf of an enterprise, the size of that enterprise, including the following factors: the number of employees, annual turnover, ownership structure, and any other factors that the respondent considers relevant". The respondent may also request further information from the investor.

However, the meaning of "sympathetic consideration" is not elaborated upon, nor are any consequences set out should a respondent seek to unreasonably withhold consent. Indeed, that the utilisation of this option depends on the consent of the respondent was well-noted by the CJEU at paragraph 212 of its Opinion 1/17, where it concluded that:

"[t]he CETA Tribunal's lack of accessibility [for natural persons and SMEs], with which many investors may be confronted, is not offset by the possibility, provided for in Article 8.27 9 of the CETA, of having the case heard by a sole Member of that Tribunal. That partial reduction of the financial burden will, according to the wording of that disposition, only be obtained if the respondent agrees."

Further, the scope of access to the expedited procedure would be narrowed in the event that the draft decision is approved. Different to the text of Article 8.23.5 CETA ("[t]he respondent shall give sympathetic consideration to that request, in particular if the investor is a small or medium-sized enterprise", emphasis added), the draft rules provide instead that the respondent shall give sympathetic consideration to the request "if the investor is a natural person or small or medium-sized enterprise" (emphasis added). An additional qualifier on the claim amount such as that provided in the draft rules would limit the scope of access to the expedited procedure even further. Article 8.23.5 CETA states "or the compensation or damages claimed are relatively low," thus opening the door to low-value claims from investors who are not natural persons or SMEs.

However, the draft rules instead state "and the amount of damages claimed does not exceed the equivalent of SDR 40 000 000? (40 million Special Drawing Rights currently equivalent to approximately EUR 50 million), i.e. the requirements of investor status and claim volume would become cumulative.

The proposed expedited procedure itself is set out in Articles 3-6 of the draft rules. The sole Member would be appointed by the President of the Tribunal within 30 days of the notification of the respondent of its consent to the expedited procedure (Article 3.2). The first session would be held within 30 days, preferably remotely (Articles 4.1 and 4.2), and a rapid schedule of written submissions would follow, granting the disputing parties 90 days for each of the four main written submissions, with strict page limits of 150 pages for the first round, and 100 pages for the second round (Articles 5.1(a) to 5.1(d)). The hearing would take place within 120 days of the filing of the rejoinder (Article 5.1(f)), and the award within 180 days of the last day of the hearing (Article 5.1(h)). Consolidation of expedited procedures is addressed by Article 6.

The draft decision also remains to be formally adopted by the CETA Joint Committee.

Conclusion

In line with the current trend in investor-State arbitration towards better-defined provisions with clearer scope, the draft interpretative statement seeks to further define the contours of the substantive protections of CETA, whilst the draft decision adopting supplemental rules on expedited procedures seeks to promote efficiency and expediency, while at the same time narrowing the scope of access to those procedures. However, it still remains to be seen whether the outstanding ratifications will be secured, in order that these innovative and progressive new features may be in fact utilised by disputing parties before the CETA Tribunal.

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