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Opinion of the European Court of Justice on the compatibility of CETA's dispute resolution mechanism with EU law

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CETA's Investor-State Dispute Settlement mechanism is compatible with EU law

On 30 April 2019, the Court of Justice of the European Union ("**CJEU**") rendered its opinion on the compatibility with EU law of the Investment Court System (ICS) established in the Comprehensive Economic and Trade Agreement between the European Union and Canada ("**CETA**").

The CETA is a free trade agreement that contains, in addition to provisions on the reduction of customs duties and of non-tariff barriers to trade in goods and services, rules relating, inter alia, to investment protection and Investor-State Dispute Settlement mechanisms.

The CETA establishes a mechanism for the resolution of investment disputes between investors and States ("**ISDS**") that shifts from the *ad hoc* arbitration system to a permanent, impartial, independent and institutionalised court, whose members can only be selected by a Joint Committee, not by the parties, from a group of pre-appointed judges.

In 2017, the Belgium Government requested the CJEU to render an opinion on the compatibility of the new investment tribunal system established in the CETA with the EU law. In particular, Belgium queried about the effects that the inclusion of an investor-state dispute settlement scheme in the CETA might have on the CJEU's exclusive jurisdiction over the definitive interpretation of EU law. In his opinion, Advocate General Bot had found that CETA's investor-state dispute settlement mechanism is compatible with EU primary law.

The CJEU set out a series of reasons for considering that the investment tribunal system is compatible with EU law.

As to Belgium's question regarding whether the envisaged ISDS mechanism was compatible with the autonomy of the EU legal order, the Court recalled that an international agreement providing for the creation of a court responsible for interpreting its provisions and whose decisions are binding on the European Union is, in principle, compatible with EU law.

The Court concluded that CETA does not confer on the envisaged tribunals any power to interpret or apply EU law other than the power to interpret and apply the provisions of the CETA, having regard to the rules and principles of international law applicable between the Parties. Nor does the CETA affect the EU institutions' powers. Consequently, there is no adverse effect on the autonomy of the EU legal order.

The Court noted that the CETA ensures the exclusive competence of the CJEU to rule on the competence allocation between the European Union and its Member States.

Furthermore, the Court pointed out that the autonomy of the EU legal order would be violated if the new court system had been designed in a way that, when assessing the legality of the restrictions imposed by the European Union on the free market, it had to assess or question the level of protection of the public interest that motivated those restrictions. The Court considered that the CETA complies with this requirement, since it contains provisions preventing the new tribunal mechanism from calling into question those type of choices democratically made within a Party relating to the level of protection of the public interest.

Secondly, in relation to the compatibility of the envisaged ISDS mechanism with the general principle of equal treatment and the requirement of effectiveness, the CJEU held that treating covered and non-covered investors differently is justified by the objective of contributing to free and fair trade. The CJEU also stated that the competence of the European Union to enter into investment agreements with non-Member States would be futile if the EU law principle of equal treatment were to prohibit the Union from entering into specific commitments with respect to investments from non-Member States.

Thirdly, regarding the compatibility of the envisaged ISDS mechanism with the right of access to an independent tribunal, the CJEU held that the rules in CETA regarding the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members fosters and gives sufficient guarantees to ensure the independence of the judges.

As to the accessibility to the Tribunal for investors, the Court considered that the aim of the CETA Parties is to structure the ISDS mechanism in such a way that investors who have limited resources to pursue a costly procedure, such as natural persons and small and medium-sized enterprises, have, no less than enterprises with greater resources, an effective access to the envisaged tribunals.

Nonetheless, the Court noted that the CETA does not contain legally binding commitments to ensure that the CETA Tribunal and the Appellate Tribunal are financially accessible to natural persons and small and medium-sized enterprises, concluding that in practice, the new Tribunal System might be accessible only to investors who have access to significant financial resources. However, the Court found that the commitment entered into by the Commission and the Council to ensure the accessibility of small and medium-sized enterprises was sufficient to conclude that the CETA is compatible with the requirement of accessibility.

Lastly, the Court noted that this case is different from *Achmea*. The question of the compatibility with EU law of the creation or preservation of an investment tribunal by a bilateral treaty between Member States must be distinguished from the question of the compatibility with EU law of the creation of such a tribunal by an agreement between the Union and a non-Member State, since the mutual trust concept of EU law does not apply in relations between the Union and a non-Member State.

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