

Opinion 1/17 on CETA: Advocate General Bot finds that the investment court system in CETA is compatible with EU law

INTRODUCTION

On 29 January 2019, Advocate General Bot delivered his long-awaited [Opinion](#) (the Opinion) on whether the investment court system (ICS) in Chapter Eight, Section F, of the [European Union-Canada Comprehensive Economic and Trade Agreement](#) (CETA) is compatible with European Union (EU) law, in particular with the autonomy of the EU legal order and fundamental rights. The next step in the proceedings before the Court of Justice of the European Union (CJEU), [initiated by Belgium](#) following complications in its ratification process, is for the CJEU to deliver its Opinion on the same question.

This client alert discusses the key elements of the Opinion and the implications of these CJEU proceedings on the European Union's common commercial policy and its [policy](#) of advocating reform of existing investor-State dispute settlement (ISDS) and the establishment of a multilateral investment court (MIC).

THE QUESTIONS AT ISSUE

Belgium's request, pursuant to Article 218(11) of the Treaty on the Functioning of the European Union (TFEU), for an Opinion from the CJEU was broadly formulated. It asked the CJEU for an Opinion on whether Chapter Eight, Section F of CETA is "compatible with the Treaties, including with fundamental rights".

Advocate General Bot understood that request to raise three separate questions (para. 36), namely whether the ICS in CETA is compatible with: (i) the exclusive jurisdiction of the CJEU regarding the interpretation of EU law; (ii) the principle of equal treatment and the requirement that EU (competition) law be effective; and (iii) the right of access to an independent and impartial tribunal.

He nonetheless emphasised that the request does not concern the policy decision of whether or not to include ICS in agreements with third States or the economic impact of ICS on attracting foreign investment. Those are matters falling within the discretion of the EU institutions and resulting from a democratic debate within the European Union and the Member States (paras 32-33).

THE ICS IN CETA DOES NOT UNDERMINE THE AUTONOMY OF THE EU LEGAL ORDER AND IS COMPATIBLE WITH THE EXCLUSIVE JURISDICTION OF THE CJEU

International agreements to which the European Union seeks to become a party must respect the autonomy of the EU legal order. The autonomy of the EU legal order refers to the fact that the EU Treaties establish “*a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals*” ([CJEU Opinion 2/13](#), para. 157). One important feature is that “*it is for the national courts and for the CJEU to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual’s rights under that law*” ([CJEU Opinion 2/13](#), para. 175)) As a result, international agreements, and the dispute settlement systems for which they provide, should not adversely affect the jurisdiction of the CJEU to interpret EU law and to give preliminary rulings on the interpretation and the validity of EU acts. In Case C-284/16 [Achmea](#), the CJEU found that that condition was not satisfied in case of a bilateral investment agreement between two Member States providing for the possibility that an ISDS tribunal might interpret and apply EU law (see the [VBB client alert of 13 March 2018](#)).

Advocate General Bot found that the ICS in CETA does not affect the jurisdiction of the CJEU. His view was that, given the lack of direct effect of CETA (para. 62), the ICS offers judicial protection to investors through a legal system that is separate but co-existing with the judicial remedies available before the CJEU and the courts and tribunals of the Member States (para. 63). Thus, the ICS in CETA is distinct from the ISDS mechanism at issue in *Achmea* in that the latter was a parallel dispute settlement mechanism with jurisdiction to interpret and apply EU law (para. 105).

He also emphasised that, unlike what was the case for the intra-EU agreement at issue in *Achmea*, international agreements with non-Member States such as CETA are not based on mutual trust between the parties. Instead, they are based on reciprocity between the European Union and a third State (paras 72-85, 107-109). Without adequate and reciprocal substantive and procedural protection of investments, the European Union might not be able to promote and encourage EU investors or attract foreign investment (para. 80). He signalled that requiring prior involvement of the CJEU might be difficult to reconcile with the reciprocity governing the mutual relations of parties such as the European Union and Canada (paras 179-182). Advocate General Bot therefore recognised the importance of finding a balance between protecting the autonomy of the EU legal order and enabling the European Union to exercise an effective common commercial policy which allows for external review of the actions of the European Union and of its Member States and includes the development of rules-based international legal order (paras 87, 118, 173-178, 212).

According to Advocate General Bot, CETA offers “*sufficient guarantees to safeguard, first the role of the [CJEU] as the ultimate interpreter of EU law and, second, the cooperation mechanism between the national courts and tribunals and the [CJEU], which takes the form of the preliminary ruling procedure*” (para. 116). Those guarantees are as follows:

- The ICS’s jurisdiction is limited to disputes regarding a breach of non-discriminatory treatment obligations and investment protection obligations (para. 120).
- In resolving disputes, the ICS may apply CETA and other rules and principles of international law applicable between the European Union and Canada, but not EU law (paras 110, 121, 122).
- The ICS may only review whether acts of either party comply with CETA with a view to granting compensation to investors. It has no jurisdiction to decide on the legality of an act adopted by a Member State or by the European Union or to annul such acts (paras 123-126). Nor can it rule on the reciprocal relations between the European Union and its Member States, between the Member States themselves or between an investor of one Member State and the other Member States (para 160).
- Before the ICS, EU law and the law of the Member States (which includes EU law) will be considered as a question of fact, notably in the context of assessing whether a particular measure is justified by legitimate objectives in the public interest. The ICS must take EU law as it stands and follow any CJEU interpretations of EU law. Furthermore, CETA offers the necessary safeguards in order to ensure that the ICS will interpret EU law as infrequently as possible (paras 128-136, 148-152, 154).
- In the event that the ICS would need to interpret EU law in the absence of guidance from the CJEU in order to decide a particular dispute before it, that interpretation would, in any event, not bind the EU institutions (including the CJEU) (paras 137-143).
- Finally, the ICS does not prevent foreign investors from using judicial remedies available under domestic law. Although national courts of the Member States may not directly apply CETA, they remain an available alternative forum for judicial protection and their role in making references for a preliminary ruling from the CJEU remains intact (paras 168-172).

THE ICS IN CETA COMPLIES WITH THE GENERAL PRINCIPLE OF EQUAL TREATMENT AND THE REQUIREMENT THAT EU (COMPETITION) LAW IS EFFECTIVE

Advocate General Bot found that CETA treats Canadian investors in the European Union more favourably by granting them judicial remedies (*i.e.*, allowing recourse to the ICS) that are not likewise available for EU companies investing in the European Union because these categories of investors are not comparable (para. 203). The only investors who are in a comparable situation are Canadian investors in the European Union and EU investors in Canada (paras 203-207). In any event, should the CJEU nonetheless find that Canadian and EU investors in the European Union are comparable, making the ICS available only to Canadian investors in the European Union would, according to Advocate General Bot, be objectively justified by the purpose of promoting foreign investment (para. 209).

Belgium had also raised questions relating to whether the ICS could nullify the effect of a competition law fine imposed by the European Commission or a competition authority of one of the EU Member States, by deciding to award damages in an amount equivalent to that fine. Advocate General Bot's analysis of those questions was limited. He took the view that several substantive and procedural guarantees in CETA (including in Chapter 17 on "Competition Policy") in fact limit the risk of the ICS having to decide that a fine imposed under EU competition law would infringe investment protection standards laid down in Chapter 8 of CETA (paras 214-218).

THE ICS IN CETA RESPECTS THE RIGHT OF ACCESS TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL

The final part of the Opinion responds to a number of objections raised by Belgium with respect to whether the ICS respects the right of access (of especially small and medium-sized enterprises or "**SMEs**") to an independent and impartial court under Article 47 of the Charter of Fundamental Rights of the European Union.

In his assessment of those objections, Advocate General Bot stressed the "*hybrid*" character of the ICS, which he considered to be "*a form of compromise between an arbitration tribunal and an international court*" (para. 242) and "*a step towards the creation of a [MIC] and related appellate mechanism*" (para. 246). He therefore disagreed with the premise of the objections raised by Belgium that the ICS was a genuine court (para. 244). His assessment also took into account that, pursuant to CETA, the parties (acting specifically in the context of the Joint Committee) are to adopt further detailed rules on the organisation and functioning of the ICS (para. 247).

Advocate General Bot took the view that Section F of Chapter 8 of CETA "*guarantee[s] a level of protection of [the right of access to an independent and*

impartial tribunal] *which is appropriate to the specific characteristics of the [ISDS] mechanism provided for in that section*" (para. 271). That conclusion was based on the following considerations:

- The ICS does not have exclusive jurisdiction to decide on actions brought by foreign investors in the field of investment protection. It is merely an alternative method of dispute resolution (paras 252-253).
- The rule according to which the costs of the proceedings should be borne by the unsuccessful disputing party (Article 8.39.5 of CETA) serves a legitimate objective. The application of the rule may be tempered in light of the circumstances of the claim (para. 255) or as a result of supplemental rules adopted by the Joint Committee (para. 257). Furthermore, costs may be reduced in case the parties agree to their case being heard by a sole adjudicator or reach an amicable settlement (para. 256).
- The remuneration model, comprising a fixed component and a component related to the volume and the complexity of the case-load, is consistent with the hybrid character of the ICS and the fact that the adjudicators will be working, at least initially, on a part-time basis (para. 260);
- The conditions relating to the appointment and possible removal of the adjudicators offer sufficient safeguards (in particular, in terms of rules of ethics) so as to guarantee their independence and impartiality (para. 262-270).

IMPLICATIONS AND NEXT STEPS

The central themes in the Opinion of Advocate General Bot are respect for reciprocity in relations between treaty partners and finding a balance between, on one hand, the protection of the autonomy of the EU legal order, and, on the other hand, the importance of enabling the European Union to pursue an effective common commercial policy through the negotiation and conclusion of investment agreements that provide for both substantive and judicial protection of investors. By focusing on those themes, the Advocate General has presented an analysis that helpfully distinguishes the external dimension of the ICS in CETA from the intra-EU dimension at issue in [Achmea](#).

That analysis can be transposed to other ICS models which the European Union has included in recent investment agreements and also to the MIC model which the European Union promotes as a means to reform ISDS in the context of the ongoing discussions in [Working Group III of the United Nations Commission on International Trade Law](#) (UNCITRAL). That Working Group has received a broad mandate to examine possible reforms of existing ISDS mechanisms.

Should the CJEU reach the same conclusion as Advocate General Bot, the European Commission would be strengthened in its position on the need for ISDS reform and the establishment of the MIC which builds on the ICS included in recent agreements such as CETA. In particular, the European Commission would be able to rely on the CJEU's Opinion in calling for a reform that moves from the ISDS model to, at least, the ICS model because there are no legal guarantees that, as a matter of EU law, the European Union could enter into agreements that provide for ISDS. Furthermore, in such circumstances, the European Commission might decide to argue that, taking into account that the Opinion of the CJEU would be based on a positive assessment of particular features of the ICS in CETA that render that model distinct from the ISDS model, including an ICS (or MIC) model in the European Union's investment agreements is no longer simply a policy choice but has become in essence a legal requirement.

The CJEU has not yet announced a date for delivery of its Opinion. It is therefore uncertain whether the Opinion will be available by 1-5 April 2019 when the next stage of the UNCITRAL Working Group III discussions is due to take place.

Finally, the Opinion is not binding on the CJEU. Especially in cases raising novel questions relating to possible adverse effects for the autonomy of the EU legal order, it is often difficult to anticipate the judgment of the CJEU and its response to the Advocate General's Opinion (see, for example, the [CJEU's Opinion 2/13](#) and its judgment in [Achmea](#)). The uncertainty concerns primarily how the CJEU will assess the possibility that the ICS in CETA may interpret EU law (even in the absence of an interpretation by the CJEU) as part of its assessment of the facts before it. Should the CJEU consider that feature to adversely affect the autonomy of the EU legal order, the CJEU's Opinion would have far-reaching consequences for the ICS included in agreements such as CETA as well as for types of inter-State international dispute settlement in which the European Union participates. It would also adversely affect the ongoing negotiations on investment protection with Japan and China.
