EU Commission Presents Proposals for Investment Court System in CETA and Announces Plurilateral Treaty to Terminate Intra-EU BITs

A couple of days before Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) held its 38th session on the reform of investment arbitration, the European Commission (the ***Commission***) presented four proposals (the ***Proposal(s)***) to the Council of the European Union (the ***EU***) for specific rules to put into place the Investment Court System (the ***ICS***) provisions in the EU-Canada Comprehensive Economic and Trade Agreement (the ***Agreement*** or ***CETA***).

The ICS included in CETA represents a new approach by the EU in relation to investment-related disputes and is the same approach taken in the agreements the EU has negotiated with Singapore, Viet Nam and Mexico, while also being on the table in all on-going investment negotiations.

The foundation of the ICS is already established in CETA (as discussed here, here and here), however it remains to be

applied pending ratification of the Agreement by all of the EU Member States. The Joint Interpretative Instrument on CETA agreed by the EU and Canada in October 2016 includes a commitment to make the system operational as soon as the Agreement enters into force. The Proposals are thus necessary to deliver on this commitment and these rules complete the putting together of the reformed approach to investment dispute settlement under CETA.

The Proposals themselves concern, **firstly**, rules setting out the functioning of the Appellate Tribunal to ensure an effective appeal function, which would be the first such appeal function to become operational in international investment agreements.

The Appellate Tribunal is to be composed of six Members for a nine year non-renewable term, purposefully to be made up in order to meet the principles of diversity and equality. The Members would be made up of two selected from nominations proposed by Canada, two selected from the nominations proposed by the EU, while the remaining two would be selected by the nominations proposed by the EU or Canada. The Appellate Tribunal would be competent to hear any award rendered by the first instance Tribunal (the ***Tribunal***) and, where permissible, would be able to apply its own legal findings and conclusions as well as render a final award itself.

The divisions of the Appellate Tribunal constituted to hear each case would consist of 3 Members, the composition of each division to be established in each case by the President of the Appellate Tribunal on a rotation basis (ensuring that the composition of the divisions is random and unpredictable).

Appeal proceedings would not last longer than 180 days, however, if the Appellate Tribunal were to consider it necessary, proceedings may exceed this limit but should not exceed 270 days.

Secondly, a code of conduct for members of the ICS is proposed with the aim to bolster the high ethical standards already contained in CETA.

The code of conduct would apply to Candidates, Members and former Members of the ICS with the obligation to observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved, as well as to fulfil all the necessary disclosure obligations. Obligations on Members include independence and impartiality obligations, and other obligations such as not to exceed their mandate as Members in considering only those issues raised in the proceedings necessary for a decision. There would also be further obligations on former Members, which include the obligation to avoid creating the appearance that they were biased in carrying out their duties and not to act as representatives of any of the disputing parties for 3 years after the end of their term.

Thirdly, the Proposals set out rules for mediation for investment disputes, which is an area that traditional investment agreements have largely overlooked.

The objective of the mediation mechanism would be to facilitate the finding of a mutually agreed solution through a comprehensive and expeditious procedure. To that end, the parties in dispute may either agree to follow the mediation procedure provided for in the Proposal or another mediation procedure. If the parties opt for the mediation procedure set out in the Proposal, they must endeavour to appoint a mediator within 15 days after the reply to the request for mediation. Importantly, the Proposal provides that the mediator may be a Member of either the Tribunal or the Appellate Tribunal.

Upon reaching a mutually agreed solution, each party must take the measures necessary to implement the mutually agreed solution within an agreed timeframe, however, the final report by the mediator would not include any interpretation of CETA

itself. Furthermore, the mediation procedure would not serve as a basis for dispute settlement under the Agreement and nothing in the course of the mediation procedure may be introduced as evidence in the actual dispute settlement procedures nor may any adjudicative body take into consideration matters that took place during mediation procedures. Finally, the mediation mechanism would be without prejudice to the rights and obligations of the parties arising from dispute settlement provisions under the Agreement, unless the parties agree, as part of the mediation procedure, not to commence or not to continue any other dispute settlement proceedings relating to the problems or disputes that are subject to the mediation procedure.

Lastly, the Proposals set out rules for binding interpretations to be adopted by the CETA Joint Committee.

In a situation where the European Union, one of its Member States or Canada has serious concerns as regards matters of interpretation of CETA relating to an investment issue, that party may refer the matter in writing to the special CETA Committee on Services and Investment (which comprises of representatives from both the EU and Canada). The parties then must immediately enter into consultations within that Committee in order to decide on the matter as soon as possible, upon which a recommendation may be sent to the CETA Joint Committee for the adoption of interpretations to be given to the relevant provision or provisions at issue. For its part, the Joint Committee must also adopt a decision on the matter as soon as possible, whereby any interpretation adopted by the CETA Joint Committee would then be binding on the Tribunal and the Appellate Tribunal.

The Proposals put forward by the Commission now need to be approved by both the Council and the Member States, and then formally agreed with Canada, but will only enter into force upon ratification of CETA by all of the Member States.

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In addition, on 24 October 2019, the Commission also announced that the EU Member States had agreed on a plurilateral treaty to terminate their intra-EU bilateral investments treaties (***BITs***).

The plurilateral treaty follows-up on the *Achmea* judgment handed down by the Court of Justice of the European Union on 6 March 2018 and on the EU Member States' declarations of 15 and 16 January 2019 on the legal consequences of that judgment.

This plurilateral treaty must now be signed and ratified by the EU Member States. However, based on the Commission's press release, it appears that some Member States have refused to endorse the text. As a consequence, the Commission might resume or initiate infringement proceedings against those EU Member States that do not terminate their intra-EU BITs.

This article was kindly drafted with the help of Brendan Rooney (intern at Van Bael & Bellis).
