

Opinion 1/17 on CETA: Hearing Report



On 26 June 2018, the Court of Justice of the European Union (the **CJEU**) heard the legal arguments raised by the institutions of the European Union and by some EU Member States in [Opinion 1/17](#) on the compatibility of the Investment Court System (**ICS**) provided for in the EU-Canada Comprehensive Economic and Trade Agreement (**CETA**).

[As we discussed before](#), the CJEU is requested to provide an opinion regarding the compatibility of the ICS contained in CETA with respect to: (i) the exclusive competence of the CJEU, pursuant to Article 267 of the Treaty on the Functioning of the European Union (**TFEU**), to give a binding interpretation of EU law; (ii) the general principle of equality and the practical effect (*'effet utile'*) of EU law; (iii) the right of access to courts; and (iv) the right to an independent and impartial judiciary.

I was unfortunately unable to attend this hearing. However, my friend José Rafael Mata Dona attended the hearing and has kindly provided us with a summary of the main points which were raised.

Quentin

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Report and analysis by [José Rafael Mata Dona](#)*

In this post, I highlight the key elements of the positions presented by the EU institutions and some EU Member States during the hearing in Opinion 1/17. The post is based on my notes during the oral hearing and is intended for reference purposes only. This is not an exhaustive transcription, it may contain errors of interpretation and I am solely responsible for its content.

Oral submissions were presented during the hearing by the agents of Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Lithuania, Netherlands, Slovakia, Slovenia, Spain, and Sweden. Officials of the European Commission and of the Council of the European Union (the ***Council of the EU***) were also present. The CJEU sat as a full court. The Judge-Rapporteur was Marko Ilešič (***Judge-Rapporteur Ilešič***) and the Advocate General was Yves Bot (***AG Bot***).

As a preliminary remark, it must be noted that Greece (which only presented written submissions) and Slovenia expressed strong concerns regarding the validity of the ICS provided for in CETA. Belgium also appeared to raise a number of concerns.

Positions expressed by Belgium and Slovenia

Belgium's position

During the hearing, the Belgian delegate recalled that the origins of the proceedings at hand lie in the fact that, under the Belgium's constitutional system, [all five regional governments must give their consent to the federal government to sign and ratify a trade agreement](#). Since Wallonia's regional parliament expressed strong opposition to CETA (in particular to the ICS provisions) and threatened to veto

Belgium's signature of CETA, the Belgian Federal Government agreed in October 2016 to seek (prior to the ratification of the trade agreement) an Opinion to the CJEU on the validity, with respect to EU law, of the ICS provisions contained in CETA.

During the hearing Belgium expressed the following concerns:

- Whether the ICS provided for in CETA guarantees the right of access to a tribunal and the appointment independent and impartial judges?
 - Whether the ICS provided for in CETA complies with the rule according to which the CJEU has exclusive jurisdiction to provide a final interpretation on matters relating to EU Law?
 - Whether Article 8.32 in CETA (but the Belgian delegate probably meant Article 8.31 in CETA) sufficiently guarantees the uniform interpretation of EU Law?
 - Whether Article 8.41 in CETA (on the enforcement of awards rendered by the ICS) is likely to interfere with the uniform interpretation of EU Law?
 - Whether the recent judgment in [Slovak Republic v. Achmea](#) had any effect on the validity of the ICS?
 - Whether the ICS complies with the principles of equal treatment and practical effect ('*effet utile*') of EU law.
- Belgium noted in particular:

- By establishing that indemnities granted by the ICS shall be paid to Canadian investors when such investors act on behalf of enterprises located in the EU, Article 8.39 §2 CETA could create advantages that European investors operating locally would not have.
- The ICS could consider that an antitrust fine imposed by the EU is contrary to CETA. If the ICS

grants a similar compensation, the fine would be neutralized by the damages obtained by the investor. Consequently, Canadian investors could avoid the financial consequences of their anticompetitive behaviour, while European investors acting locally would be treated in a less favourable manner.

– Whether the ICS in CETA complies with Article 47 (Right to an effective remedy and to a fair trial), Article 20 (Equality before the law) and Article 21 (Non-discrimination) of [the Charter of Fundamental Rights](#)? In this regard, Belgium raised the point that, pursuant to Articles 217 and 218 TFEU, the provisions of an international agreement concluded by the EU (such as CETA) formed an integral part of the EU legal order from the entry into force of the said Agreement. Consequently, in light of paragraphs 45 and 46 of the judgment in case [C-266/16 Western Sahara Campaign UK](#) and of paragraph 285 of the judgment in joined cases [C- 402/05 P and C- 415/05 P Kadi and Al Barakaat International Foundation v. Council and Commission](#), Belgium argued that CETA must be compatible with the treaties (including the Charter of Fundamental Rights and the European Convention on Human Rights) as well as with the constitutional principles enshrined in the treaties.

– Whether Point 6 (e) of the [Joint Interpretative Declaration](#) on CETA (which was agreed with the Canadian authorities and provides that “*in order to ensure that Tribunals in all circumstances respect the intent of the Parties as set out in the Agreement, CETA includes provisions that allow Parties to issue binding notes of interpretation. Canada and the European Union and its Member States are committed to using these provisions to avoid and correct any misinterpretation of CETA by Tribunals*”) complies with the right to a fair trial provided for in Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights?

– Finally, with respect to the facultative right of access to the ICS, Belgium observed that even though ICS is (in principle) not mandatory, investors might not have any other alternative than to launch an investor dispute through the ICS given that Article 30.6 §1 in CETA provides that “[n]othing in this Agreement shall be construed as [...] permitting this Agreement to be directly invoked in the domestic legal systems of the Parties”.

Slovenia’s position

According to the arguments advanced by Slovenia, CETA does not provide effective safeguards to guarantee the autonomy of EU law. Slovenia stated that it did not oppose the interpretation of EU law as a matter of fact by the ICS, but it claimed that that would not preclude the possibility for judges to interpret EU law.

Slovenia was of the view that ICS should not be considered as a court of an EU Member State because Canada is not part of the EU.

Finally, Slovenia submitted that the ICS would not be able to refer questions for Preliminary Rulings to the CJEU.

Positions expressed by the EU Institutions and other EU Member States

Below, I present a brief recollection of the different pro-CETA arguments developed during the hearing and the nuances thereof:

– The recent judgment of the CJEU in *Achmea* is not relevant in the present case. Contrary to the facts in *Achmea*, Opinion 1/17 does not involve an intra-EU BIT but an international agreement of the EU. The principle of autonomy has different implications in intra-EU situations than in extra-EU situations. Article 344 TFEU does not apply to Extra-EU agreements. Importantly, *Achmea* was about mutual

trust between EU Member States. CETA is about reciprocity with Canada and Canadian investors. For a more detailed insight on the potential Consequences for CETA of *Achmea*, I recommend a previous post co-authored by Quentin Declève with Isabelle Van Damme on this blog (accessible [here](#)).

– The EU has also concluded international agreements with International Dispute Mechanism Systems (e.g., WTO) and the ICS in CETA complies with Article 216 TFEU (Capacity of the Union to conclude international agreements). In Finland's opinion, the autonomy of EU law should not prevent the EU to participate in International Arbitration Mechanisms.

– Under international law, ICS in CETA must apply EU law as a matter of fact (see Article 8.31 in CETA).

– The rejection of CETA would be very detrimental. The European Commission showed itself worried not only about the impact on CETA but on the possible influence of Opinion 1/17 on, *inter alia*, the EU Trade relationships with [Singapore](#), [Vietnam](#), [Mexico](#), [Malaysia](#), [Myanmar](#), [Japan](#) and [China](#).

– ICS decisions would not be binding on the EU Institutions, notably the CJEU. Those decisions would only bind the parties to the dispute.

– CETA is favourable to European investors in Canada. Rejection of ICS in CETA would prejudice those investors.

– ICS provides for higher standards of dispute resolution than ISDS.

– Estonia argued that in cases where judges in the ICS would need to apply EU law, they would be bound by current case law of the CJEU.

– In Lithuania's view, post award control by the CJEU is not excluded during the enforcement stage of ICS awards. Lithuania also argued that the ICS in CETA should be

considered as a part of the judicial order of the European Union. In this sense, Lithuania partially endorsed the [Opinion of the Advocate General Wathelet](#) in the *Achmea* For more extensive observations on this subject, I recommend two previous posts on this blog (accessible [here](#) and [here](#)).

Questions raised by the members of the CJEU (Full Court)

During the hearing, judges and AG Bot raised many questions. Most questions were addressed to the European Commission and to the Council of the EU on the requirement (provided for under Article 8.31 of CETA) that judges to the ICS should apply and interpret domestic law as a matter of fact. [As raised in a previous post](#), the fact that Article 8.31 states that domestic laws are to be treated as matters of fact may be interpreted as avoiding any interference with the autonomy of EU legal order.

Questions raised by Judge-Rapporteur Ilešič

In the context of Article 8.9 CETA (Investment and regulatory measures), Judge-Rapporteur Ilešič seemed interested in the analysis concerning the applicable law to Canadian Investors, and whether European Regulations on environment, for instance, would be applicable to Canadian investors. The answer from the Council of the EU was that EU law should be applicable as a matter of fact. To that reply, Judge-Rapporteur Ilešič responded with a new question on fundamental rights: Should the ICS apply the Charter of Fundamental Rights? The Council of the EU replied that the Charter of Fundamental Rights was EU law and that ICS should apply it as matter of fact.

Moving to a different subject, Judge-Rapporteur Ilešič enquired before whom should Canadian investors lodge a CETA complaint (*i.e.*, the ICS or the national courts). The Council of the EU replied that this was a question of choice by the investor. An investor could still prefer to lodge his claim before national courts. Judge-Rapporteur Ilešič noted,

however, that such option could lead to forum-shopping given that the investors will be faced with a choice of either filing their claim before the ICS (which will only apply domestic law, including EU law, as a matter of fact) or before the EU domestic courts (which will be entitled to apply and interpret EU law). According to Judge-Rapporteur Ilešič, this was a clear indication that there could be inconsistencies in the final outcome.

The next question tested the possibility for a Canadian investor to challenge a measure in the abstract. The Council of the EU replied that according to Article 8.18 (Scope) of CETA, a particular measure that has caused damage to the investor is needed and that it is not possible to challenge a measure in abstract.

Finally, Judge-Rapporteur Ilešič asked about the *status quo* of other FTAs in which similar ICS provisions are contemplated. He also enquired about the progress made in relation to the code of conduct foreseen in the Joint Interpretative Declaration on CETA to further ensure (i) the impartiality of the members of the tribunals; (ii) the method and level of their remuneration; and (iii) the process for their selection.

Questions raised by AG Bot

Although under Article 8.31 in CETA domestic law should be applied as a matter of fact, AG Bot noted that Article 8.28 §2 makes a distinction between “*applicable law/droit applicable*” and “*relevant domestic law/droit interne pertinent*”. Article 8.28 §2 reads as follows:

“The Appellate Tribunal may uphold, modify or reverse the Tribunal’s award based on:

(a) errors in the application or interpretation of applicable law;

(b) manifest errors in the appreciation of the facts,

including the appreciation of relevant domestic law“

AG Bot wondered whether the “*applicable law*” or the “*relevant domestic law*” could include EU law as substantive law.

In addition, he also questioned whether Article 8.41 §4 (which provides that “*execution of the award shall be governed by the laws concerning the execution of judgements or awards in force where the execution is sought*”) could refer to EU law as substantive law.

Other questions and remarks by other members of the CJEU

– Judge Silva de Lapuerta asked whether a coordination system existed in order to avoid forum-shopping when an investor must choose to file a claim before the ICS or before domestic courts.

– The members of the CJEU also enquired whether ICS in CETA should be considered as a court or as an arbitration mechanism. The European Commission emphasized that the ICS was highly influenced by the concept of arbitration.

– Judge Lenaerts noted that on the grounds of Article 8.10 of CETA (which provides that “[a] Party [to CETA] *breaches the obligation of fair and equitable treatment [...] if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness [...]*”) it could be possible for a Canadian investor to file a claim before the ICS after having unsuccessfully litigated before EU domestic courts and before the CJEU.

– Members of the CJEU raised questions on the rules for the calculation of damages in CETA. The judges wished to know whether CETA rules on damages (See, Article 8.39 §3) were different from the rules applied by the authorities of the EU.

In particular Judge Lenaerts wondered what were the criteria for granting damages under CETA. However, it appeared from the answers that nothing has been set at this stage.

– The members of the CJEU enquired whether the ICS in CETA complies with Article 47 of the Charter of Fundamental Rights. The CJEU asked the European Commission whether it would agree with Germany and the Netherlands that the Charter of Fundamental Rights was inapplicable as substantive law. The European Commission agreed.

– The members of the CJEU also asked one question in light of [Opinion 2/13](#) in which the CJEU found that the accession of the European Union to the European Convention on Human Rights, was contrary to EU law. More particularly, the members of the CJEU enquired as to the distinction between the situation in Opinion 1/17 and the situation in Opinion 2/13. The European Commission answered that, contrary to the situation in Opinion 2/13, CETA is not a “*compilation of principles of law*”. It is an international agreement. Moreover, the judgments handed down by the ICS do not have direct effect (while judgments handed down by the European Court of Human Rights do).

– Judge Endre Juhász enquired whether CETA could work without ICS provisions.

– According to Judge Lenaerts, it seemed that access to national courts and access to ICS would be legal actions for the pursuit of clearly different objectives. ICS would rather correspond to the search for compensation for damages and payment of interests.

Conclusion

The CJEU’s response in Opinion 1/17** will affect future international agreements negotiated by the European Union. Notably, Opinion 1/17 will have a strong impact for the European Commission’s plans to establish a Multilateral Investment Court (discussed [here](#), [here](#), [here](#), [here](#) or [here](#))

which, in the long run, could eventually become the responsible legal institution to resolve conflicts between investors and states (as provided for in Article 8.29 of CETA).

Pending the CJEU's ruling and the completion of the necessary ratification process, CETA provisionally entered into force on 21 September 2017 (with the exception of some provisions including those on ICS).

AG Bot is expected to hand down his opinion on 23 October 2018.

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** Member of the Brussels, Barcelona and Caracas Bars.*

*** Importantly, it must be noted that pursuant to Article 218 (11) TFEU, Opinion 1/17 will be binding on the EU institutions. This Article indeed provides that if “the opinion of the Court is adverse, the agreement envisaged [i.e., CETA] may not enter into force unless it is amended or the Treaties are revised”.*

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