EU and Canada Adopt Rules for Implementation of Investment Court System in CETA

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On 29 January 2021, the European Union and Canada adopted four decisions (the Decisions) aimed at further implementing the Investment Court System (the ***ICS***) in the Comprehensive Economic and Trade Agreement between Canada, of one part, and the European Union and its Member States, of the other part (***CETA***). The Decisions will enter into force upon ratification of CETA by the EU Member States.

Following certain concerns expressed in relation to older models of investor-State dispute settlement (***ISDS***), the European Union has designed a new model for resolving disputes between foreign investors and States (or the European Union) which seeks to address such concerns. In particular, in recent years some have argued that the traditional form of ISDS does not guarantee fundamental rights and values relating to the independence of arbitrators, legitimacy, access to courts and transparency. In addition, traditional ISDS has been seen by

some as failing to result in a coherent body of case-law regarding the interpretation and application of investment protection standards. The ICS aims to resolve these perceived shortcomings by establishing a permanent tribunal composed of independent and publicly appointed members of a first instance Tribunal and, in case of an appeal, an Appellate Tribunal.

Although the main characteristics of the ICS were already established in CETA (see Chapter 8 on Investment), some specific features and procedural mechanisms still had to be agreed by the EU and Canada. These details were therefore agreed in the Decisions of the CETA Joint Committee which (i) set out rules and procedures regarding the functioning of the Appellate Tribunal (the Decision on the Appellate Tribunal); (ii) establish a code of conduct for mediators and judges (the Decision on the Code of Conduct); (iii) provide rules for mediation (the Decision on Mediation); and (iv) establish rules for adopting binding interpretations of CETA (the Decision on Binding Interpretations).

Decision on the Appellate Tribunal

The Decision on the Appellate Tribunal provides that the Appellate Tribunal will be comprised of six members appointed by the CETA Joint Committee for a nine-year non-renewable term, though the parties may agree to increase that number. The fact that the term is extended to nine years (instead of five in the case of Tribunal members) appears to correspond to the term set out in the European Court of Human Right procedural rules. A longer but non-renewable term can be seen as an important step to avoid a paralysis of the system similar to the one recently experienced at the WTO Appellate Body. As a general rule, the fact that members of the Appellate Tribunal will be appointed for a relatively long period of time should also further strengthen their independence.

Furthermore, in light of the EU's recent pledge for gender

equality, the members of the Appellate Tribunal will be appointed "*with a view to the principles of diversity and gender equality*" (Article 2(1) of the Decision on the Appellate Tribunal).

As is the case with the WTO Appellate Body (whose composition and rules of procedure have largely inspired those of the ICS), a division of three members of the Appellate Tribunal is to hear a case. However, when a case raises a serious question affecting the interpretation or application of Chapter 8 of CETA or when both disputing parties or a majority of the members of the Appellate Tribunal so request, the Appellate Tribunal may sit in an extended division of six members (Article 2(5) and (7) of the Decision on the Appellate Tribunal).

In principle, if the Appellate Tribunal modifies or reverses a Tribunal decision, it is to complete the analysis. Importantly, if it is not possible for the Appellate Tribunal to apply its own legal findings and conclusions, it may remand the case to the Tribunal. In that event, the Tribunal must render an award in accordance with the findings and conclusions of the Appellate Tribunal. This is a significant improvement on the WTO model of appellate review because the DSU does not confer remand power on the WTO Appellate Body (Article 3(3) of the Decision on the Appellate Tribunal).

Another novelty, compared with the WTO Appellate Body, is the power of the Appellate Tribunal to reject an appeal on an expedited basis where it is clear that the appeal is manifestly unfounded (Article 3(4) of the Decision on the Appellate Tribunal). In all other cases, the proceedings before the Appellate Tribunal must, as a general rule, not exceed 180 days and "*every effort*" should be made to ensure that the appeal proceedings do not exceed 270 days (Article 3(5) of the Decision on the Appellate Tribunal).

Finally, Article 2(14) of the Decision on the Appellate

Tribunal provides that the ICSID Secretariat will serve as the Secretariat for the Appellate Tribunal.

Code of Conduct for judges and mediators

The Decision on the Code of Conduct addresses the duties and ethical obligations which judges and mediators (including prospective judges or mediators) in investment disputes under CETA must respect.

In particular, the Decision on the Code of Conduct sets out clear and extensive obligations on the disclosure of information regarding past activities and relationships which could affect the independence and impartiality of the judges and mediators (Article 3 of the Code of Conduct). This is intended to cover a period of at least five years prior to a candidate being considered for appointment. In addition to avoid any situations which could create "*the appearance that they were biased in carrying out their duties*", judges to the ICS will be prohibited from acting as counsel in investment disputes before the ICS for a period of three years after the end of their term (Article 5(1) and (2) of the Decision on the Code of Conduct).

Decision on Mediation

The Decision on Mediation elaborates on Article 8.20 of CETA which provides that disputing parties in investment disputes may, at any time, have recourse to mediation to resolve their dispute.

In particular, the Decision on Mediation sets forth the procedure for (i) the initiation of a mediation procedure (Article 3 of the Decision on Mediation); (ii) the appointment of the mediator (Article 4 of the Decision on Mediation); (iii) the rules of the mediation procedure (Article 5 of the Decision on Mediation) and (iv) if the parties come to a mutually agreed solution, the rules on the implementation of that solution (Article 6 of the Decision on Mediation).

Importantly, the Decision on Mediation clearly provides that, subject to any extension agreed pursuant to Article 8 of the Decision on Mediation, "*the disputing parties shall endeavour to reach a mutually agreed solution within 60 days from the appointment of the mediator*" (Article 5(5) of the Decision on Mediation). Furthermore, the Decision on Mediation also emphasises that mediation does not affect the right of parties to initiate an investment claim before the ICS and that a disputing party may not introduce as evidence in other dispute settlement procedures positions taken by the other party in the course of the mediation procedure (Article 7 of the Decision on Mediation).

Decision on Binding Interpretations

In order to facilitate the process of maintaining control over the interpretation of CETA and responding to interpretations adopted by Tribunals that are of serious concern, the Decision on Binding Interpretations and its Annex have established a process for entering into consultations regarding the interpretation of the investment provisions of CETA. This includes questions of interpretation pertaining to a measure for which an investor has already entered, pursuant to Article 8.19 of CETA, into consultations with the EU, one of the EU Member States or Canada prior to the initiation of an investor-State dispute (paragraph 1 of the Annex of the Decision on CETA Interpretation). For example, a binding interpretation adopted by the CETA Joint Committee can relate to the question of whether a type of measure is compatible with Chapter 8 of CETA (Investment) and, if so, under what conditions (paragraph 3 of the Annex). Binding interpretations must be immediately made public and sent to the presidents of the Tribunal and of the Appellate Tribunal (paragraph 6 of the Annex).

Potential upcoming developments

These Decisions elaborate upon and clarify largely procedural

and technical aspects of the ICS system in CETA which were originally set out in the text of CETA without detail or elaboration. Outside the context of CETA, they may also act as a catalyst for developing new proposals for procedural rules establishing a permanent investment court system within the ongoing UNCITRAL negotiations on ISDS reform. The last round of UNCITRAL negotiations (which took place between 8 and 12 February 2021) specifically discussed the establishment of an appellate mechanism within the permanent investment court system and the elaboration of a code of conduct for adjudicators.

To the extent that the Decisions show that the ICS is not just a theoretical model, the EU may have greater success in persuading reluctant States that a multilateral investment court is a workable model for the future of investor-state dispute settlement.
