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BEYOND SELFISHNESS: THE COURT OF JUSTICE IN OPINION 1/17 ON CETA

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On 30 April 2019 the Court of Justice delivered its Opinion 1/17 on the compatibility with the Treaties of the investor-state dispute settlement (ISDS) mechanism included in the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. This ruling was long-awaited, since the Court was tasked with clarifying if the EU could take part in extra-EU investment arbitrations. ISDS is usually regarded as a key component of the protection of foreign investments, therefore the EU external action would have been hampered by not concluding agreements including ISDS clauses. This post joins other rapid-response commentaries appeared in the main law blogs (notably Croisant, Holterhus, Krajewski, Ligneul and Peers) and, in the spirit of this blog, it will focus on the comparison with previous case-law.

The Opinion originated from public criticism towards ISDS, perceived as a powerful tool favoring multinational corporations. These complaints brought the EU to negotiate in CETA an ISDS system more developed than traditional models. At the same time, it put forward a proposal aimed at reforming the whole protection of investments at the international level with an Investment Court System (ICS), based on a permanent Multilateral Investment Court (MIC). The CETA system would be just a temporary one,

in case this reform will take place. Notwithstanding, based on this and other criticisms of CETA, the Walloon parliament refused to give the assent needed by Belgium in order for the Council to unanimously authorize the signature of CETA. Eventually the crisis was solved and CETA was signed on 30 October 2016. Part of it, excluding the contentious part on ISDS (Section F of Chapter 8 of CETA), entered provisionally into force on 21 September 2017. In the meantime, Opinion 2/15, released on 16 May 2017, clarified that the competence insisting on ISDS provision in EU international agreements was shared, but nothing stated on the compatibility of the said provisions with the Treaties. Therefore, on 7 September 2017 Belgium submitted the request for the opinion of the Court under Article 218(11) TFEU. In seeking an answer to the question of compatibility with the Treaties, including fundamental rights, Belgium raised concerns on three points: the possible interpretation of EU law by the ISDS body established by CETA, with the consequence of adversely affecting the autonomy of the EU legal order; the compatibility with the general principle of equal treatment and the requirement of effectiveness of EU law; the compatibility with the right of access to an independent tribunal.

Firstly, the potential interference of a dispute settlement mechanism with the autonomy of the EU legal order is explained by the fact that, to ensure the uniformity of EU law, the Court of Justice has the right to rule on its interpretation. Internally, this prerogative is exercised through the preliminary reference procedure. Externally, an EU international agreement, once entered into force, form an integral part of EU law and can be the subject of a preliminary reference as well. However, since Opinion 1/91 the Court has stated that the EU can confer on an international court the task to interpret that agreement with binding decisions. This is precisely the case of CETA, where the reciprocity of the obligations stemming from it dissuades from leaving the interpretation of the agreement only to the courts of the parties. The power of interpretation and application conferred on the ISDS body at stake in CETA, articulated in a first instance Tribunal and an Appellate Tribunal, is confined to the provisions of CETA. Still, the CETA Tribunal could interpret

EU law, without the Court of Justice being able to have a say. In fact, the Tribunal has to assess if the challenged measure complies with CETA; in doing so it will have to undertake an examination of the effect of that measure and this, on occasion, may require to take into account EU law. At the same time, the CETA Tribunal is bound to the prevailing interpretation given to the domestic law by the parties, therefore an actual interpretation would happen only if no guidance has already been provided within the EU legal order. Moreover, that interpretation would be given solely for the purpose of that ruling and without being binding on the courts or authorities of the parties. Finally, and most importantly, the Tribunal considers "the domestic law of a Party as a matter of fact" (Article 8.31.2 CETA). This is the decisive argument on the basis of which the Court states that the examination undertaken by the CETA Tribunal "cannot be classified as equivalent to an interpretation" (para. 131), it is a non-interpretation. Furthermore, the rulings of the CETA tribunal do not even rule on the legality of the measure, annul them or require rendering a certain measure compatible with CETA. Therefore, the level of protection of a public interest established by an EU measure cannot be declared incompatible with CETA. The standards "determined by the Union following a democratic process" (para. 156) will not be called into question and CETA Tribunal will not prevent EU institutions from operating in accordance with the EU constitutional framework.

Secondly, the issue in respect of equal treatment regarded the difference in remedies available to Canadian investors in the EU and EU investors in another Member State. The Court stated that the two categories are not in a comparable situation. This conclusion does not change in the field of competition law, where remedies to ensure the annulment of a vitiated fine are available both to Canadian and to EU investors. If EU law itself guarantees annulment of a vitiated fine, also the claimed adverse impact on effectiveness due to awards of the CETA Tribunal is groundless.

Thirdly, regarding the right of access to an independent tribunal, the Court accepted that the future commitments of the Commission included in Statement no. 36 annexed to CETA ensured the accessibility to the ISDS system for SMEs and natural persons. On the same line, the Court

recognized that, on the one side the provisions in CETA and the Joint Interpretative Instrument, on the other side the composition and unanimity rule of the Joint Committee responsible for relevant decision on judges, ensure the independence of the ISDS bodies, which are meant to become gradually courts composed of full-time members.

Five years after De Witte qualified the stance taken by the Court on the autonomy of EU law as "selfish", the Court has remarkably changed lane. For the first time in an opinion on autonomy, it agrees with the Advocate General. Since Opinion 1/00, the Court has no longer given her approval to a dispute settlement mechanism with the participation of the EU, until now. The difference with *Achmea*, which banned intra-EU ISDS, based not only on the violation of the interpretative monopoly of the Court, but also of the principle of mutual trust, not applicable to EU-third states relations, is stressed. However, as shown, the potential interpretation of EU law is still present in CETA. The solution of the non-interpretation given by the Court could seem a non-solution, to escape the blind alley where a logical continuation of the doctrine developed in Opinion 2/13 and *Achmea* would have brought the Court. In other words, the Court would have had no choice but to jeopardize a major part of the new generation free trade agreements, the flagship strategy of the EU common commercial policy. Would it have been worth it? On the one end, one could wonder if, after selfishness, the Court has taken a hypocritical stance. On the other, one could look back at the previous case-law and wonder if that polemical approach was really necessary. Yet, the choice in Opinion 1/17 was not between protectionism and openness. That is a political choice, entrusted to the Commission and its DG Trade in Charlemagne. Here the Court had to decide if the hybrid nature of the CETA Tribunal, achieved by the Commission during the negotiations and fostered by the Court's own case-law, could abide by the requirements of the rule of (EU) law. If the projection of EU law onto international (investment) law had sufficiently modified the latter. Because, in the Court's own words, "the opinion of the Court as to whether an agreement envisaged is compatible 'with the Treaties', must be construed in the light of that general requirement of compatibility with the EU constitutional framework" (para. 166). In this

respect, the opinion continues the approach of *Kadi I* and Opinion 2/13. Now, after Opinion 1/17, the life of CETA appears not to be an easy one yet, since the Italian government announced its intention not to ratify it, but new encouragement has been given to the works of the UNCITRAL Working Group III, dealing with the establishment of the Multilateral Investment Court.