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The ISDS mechanism provided for under the CETA is compatible with EU law

While the Transatlantic Trade and Investment Partnership ("TTIP", also known as the Trans-Atlantic Free Trade Agreement or "TAFTA") has been abandoned, the Court of Justice of the European Union ("CJEU"), in an opinion dated April 30, 2019, ruled on the compatibility with EU law of the mechanism for the settlement of disputes provided for under the Comprehensive Economic and Trade Agreement ("CETA") entered into between Canada and the European Union.

On March 6, 2018, the CJEU ruled in the so-called Achmea case and held that a clause of a Bilateral Investment Treaty ("BIT") allowing an investor from the European Union to initiate arbitration proceedings against an EU Member State was incompatible with EU law[1]. In this context, there was every reason to believe that such decision would be applied to the mechanism for the settlement of disputes between investors and States provided for under the CETA (the mechanism is called *Investor-State Dispute Settlement*, hereinafter "ISDS").

However, on April 30, 2019, in light of the Achmea decision and previously rendered decisions, the CJEU, ruling on a request for an opinion made by the Kingdom of Belgium, issued an opinion with a challenging but yet questionable reasoning in which it held that the ISDS mechanism provided for under the CETA was compatible with EU law.

- **Compatibility of the ISDS mechanism with the autonomy of the European Union legal order**

In general, and in accordance with the position adopted in the Achmea decision, the CJEU recalled that the final interpretation of EU law should not be left to a competing court.

It specified that "*in order to ensure that the specific characteristics and the autonomy of the [EU] legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law*", making an express reference to the preliminary ruling procedure provided for in

the Treaty on the Functioning of the European Union.

Regarding in particular the provisions set forth in the CETA, the CJEU held that a tribunal, an appellate tribunal and a multilateral tribunal can be established to "*interpret and apply provisions*" but pointed out that "*since those tribunals stand outside the EU judicial system, they cannot have the power to interpret or apply provisions of EU law other than those of the CETA or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework*".

The CJEU rejects any incompatibility with the autonomy principle and further specified that the CETA includes provisions that expressly stipulate that such tribunals have no jurisdiction to call into question the "*choices democratically made within a Party relating to, inter alia, the level of protection of public order or public safety, […] the preservation of food safety, […] product safety, […] or, equally, fundamental rights*".

- **Compatibility of the ISDS mechanism with the general principle of equal treatment and with the requirement that EU law be effective**

First, concerning the general principle of equal treatment, the CJEU was asked to rule on the fact that "*the CETA provides for a preferential judicial process for Canadian investors. Canadian undertakings investing in the European Union will be able to bring a dispute either before an internal court of the European Union or before the CETA Tribunal, whereas EU undertakings investing in the European Union will not have that choice*".

In this respect, the CJEU explained that since both investors from the EU in their relationships with Canada and Canadian investors in their relationships with a EU Member State may bring their dispute before the CETA Tribunal, there is no ground to consider that the fact that a EU investor who invests in a Member State may not bring proceedings before this Tribunal leads to discrimination. The CJEU indeed considers that this difference in treatment is justified by an objective difference in the respective situations.

Secondly, on the requirement that EU law be effective, the CJEU held that the CETA may not be considered as adversely affecting the effectiveness of EU law on the sole ground that in exceptional circumstances, an award by the CETA Tribunal might have the consequence of cancelling out the effects of a fine imposed by the European Commission or by a competition authority of a Member State for infringement of applicable competition rules. Indeed, EU law itself permits the annulment of a fine wherever that fine is vitiated by a defect corresponding to that which could be identified by the CETA Tribunal.

- **Compatibility of the ISDS mechanism with the right of access to an independent tribunal**

While the CJEU pointed out that the aim of the agreement is to ensure that the CETA Tribunal will be accessible to any Canadian company and any Canadian natural person that/who invests within the European Union, and to any company and any natural person of a EU Member State that/who invests in Canada, it also noted that in the absence of rules designed to ensure that the CETA Tribunal is financially accessible to natural persons and small and medium-sized businesses, the ISDS mechanism might, in practice, be accessible only to investors with significant financial resources.

However, due to and subject to the implementation of the commitments made by the European Commission and the Council of Europe, the CJEU considers that the CETA is compatible with the requirement of accessibility and access to an independent tribunal.

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While the analysis contained in this opinion is disappointing – a gap seems to be widening between the principles to which the CJEU refers and the scope it confers on them in its opinions and decisions – it is nevertheless a first step towards the creation of a foreign private investment law that respects the aspirations of States and investors.

This was, incidentally, the ambition expressed by Advocate General BOT according to whom "*The European Union is at the forefront of a movement the future of which will determine whether — from a legal standpoint — it is likely to be continued*".

In this perspective, while the CETA can fully enter into force since April 30, 2019, subject to ratification by the Member States of the European Union, the impact of the validation of this mechanism by the CJEU on the European Commission's willingness to generalize a specific ISDS mechanism instead of the use of arbitration provided for by the existing BITs will have to be closely monitored.

[1]Cf. article entitled The arbitration clause included in a Bilateral Investment Treaty concluded between two Members States is incompatible with EU lawpublished in March 2018