



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Avis 1/17
initiated by the Kingdom of Belgium

According to Advocate General Bot, the mechanism for the settlement of disputes between investors and States provided for by the free trade agreement between the EU and Canada is compatible with EU law

The agreement does not adversely affect the autonomy of EU law and does not affect the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law

On 30 October 2016 Canada, on the one hand, and the EU and its Member States, on the other hand, signed a free trade agreement: the *Comprehensive Economic and Trade Agreement* (CETA).

That agreement includes a section that has the aim of establishing a mechanism for the settlement of disputes between investors and States concerning the interpretation and application of the agreement (Investor State Dispute Settlement System, ISDS). In that context, what is envisaged is the creation of a Tribunal and an Appellate Tribunal and, in the longer term, a multilateral investment tribunal. The aim is thus to establish an 'Investment Court System' (ICS).

On 7 September 2017 Belgium requested the Court of Justice's opinion¹ concerning the compatibility of the mechanism for the settlement of disputes (ISDS) with EU law. In essence, it expresses doubts as to the effects of that mechanism on the exclusive jurisdiction of the Court over the definitive interpretation of EU law, the general principle of equal treatment, the requirement that EU law is effective, and the right of access to an independent and impartial tribunal.

In today's Opinion, Advocate General Yves Bot holds that the mechanism for the settlement of disputes is compatible with the EU Treaty, the FEU Treaty and the Charter of Fundamental Rights of the European Union.

First, the Advocate General takes the view that the agreement does not adversely affect the autonomy of EU law and does not affect the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.

In that regard, the Advocate General states that the reason for the establishment of a dispute settlement mechanism is the requirement of reciprocity in the protection afforded to the investors of each Party and that that is consistent with the agreement not having direct effect. He also states that the approach adopted by the Court in its case-law² cannot be transposed to the examination of that mechanism.

The Advocate General considers that the safeguards surrounding the establishment of the dispute settlement mechanism are sufficient. The Tribunal has a narrowly circumscribed jurisdiction, namely, in the event of a breach of the relevant provisions of that agreement by one of the Parties, granting compensation to the investors suffering loss. The Tribunal does not have the power to order the annulment of a measure which it deems contrary to the agreement or to require that it be brought into line with that agreement. Furthermore, when considering EU law, the Tribunal is bound by the interpretation given by the Court and cannot impose a binding interpretation of that

¹ Pursuant to Article 218(11) TFEU.

² [C-284/16 Achmea](#), EU:C:2018:158, Press Release No. [26/18](#).

law within the EU legal order. In addition, the Joint Committee can adopt binding interpretations of the agreement and an appeal procedure is established.

The Advocate General also finds that the bodies provided for by the dispute settlement mechanism are not authorised to rule on the division of powers between the EU and its Member States.

Moreover, the Advocate General states that the dispute settlement mechanism does not affect the role of national courts and tribunals of ensuring the effective application of EU law. Even though, given that the agreement does not have direct effect, it is not the role of the courts and tribunals of the Member States to apply that agreement, those courts and tribunals are not, however, deprived of their status as 'general law' courts within the EU legal order, including of their role in any making of references for a preliminary ruling. Furthermore, the Court is not deprived of its power to reply, by preliminary ruling, to questions referred by those courts and tribunals. According to the Advocate General, there is no alteration of the essential character of the powers which the Treaties confer on the institutions of the EU and on the Member States.

The Advocate General is therefore of the opinion that the system for the settlement of disputes is entirely consistent with the objectives of the Union's action on the international stage by combining rules on the protection of investments and a specific dispute settlement mechanism with the express confirmation of the Parties' right to adopt legislation necessary to achieve legitimate objectives in the public interest, for example in the areas of public health, safety, the environment and social protection.

Second, the agreement does not infringe the general principle of equal treatment in respect of access to the dispute settlement mechanism. The situation of Canadian investors who invest in the EU is not comparable with the situation of European investors who invest within their own economic area. Only the investors of each Party who invest in the territory of the other Party are in comparable situations.

Third, procedural safeguards ensure a sufficient level of protection of the right of access to an independent and impartial tribunal, a right enshrined in Article 47 of the Charter. The mechanism provided for is merely an alternative method of dispute resolution relating to the application of the free trade agreement which complements the remedies offered by the Parties.

Furthermore, the provisions of the agreement set out the main features of the remuneration scheme for Members of the Tribunal, which includes a fixed component and a component dependent on the volume and the complexity of litigation brought before them. That scheme is consistent with the hybrid nature of the dispute settlement mechanism established and with the fact that, at least initially, those Members will not be working on a full-time basis.

Last, the conditions relating to the appointment and possible removal of those Members and the safeguards put in place are sufficient. In addition, the agreement contains specific rules of ethics applicable to Members and intended to guarantee their independence and their impartiality.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. The Opinion of the Court will be given at a later date.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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