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The mechanism for the resolution of disputes between investors and States provided for by the free trade agreement between the EU and Canada (CETA) is compatible with EU law

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

One of the aims of the part of the CETA concerned with investment is to establish a mechanism for the settlement of disputes between investors and States. 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 opinion¹ of the Court of Justice concerning the compatibility of the mechanism for the settlement of disputes with EU primary law. In essence, Belgium expresses doubts as to the effects of that mechanism on the exclusive jurisdiction of the Court over the definitive interpretation of EU law, and therefore the autonomy of the EU legal order, as to its compatibility with the general principle of equal treatment and the requirement that EU law should be effective, and as to whether that mechanism complies with the right of access to an independent and impartial tribunal.

In today's Opinion, the Court recalls, first, that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the EU, is, in principle, compatible with EU law. Such an international agreement entered into by the EU may, moreover, affect the powers of the EU institutions provided, however, that the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order, which is based on a constitutional framework that is unique to it. That framework encompasses the founding values of the EU, the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights.

In order to ensure that those specific characteristics and the autonomy of the legal order thus created are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. The Court states, in that regard, that EU law does not preclude the creation of a tribunal, an appellate tribunal and, subsequently, a multilateral investment tribunal or the conferral by the CETA on those tribunals of the jurisdiction to interpret and apply the provisions of that agreement, having regard to the rules and principles of international law applicable between the Parties to the CETA. On the other hand, 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 decisions which might have the effect of preventing the EU institutions from operating in the way that the EU constitutional framework requires.

¹ Under Article 218(11) TFEU.

In this case, the Court considers that the CETA does not confer on the envisaged tribunals any jurisdiction to interpret or apply EU law other than that relating to the provisions of that agreement. In that context, the Court states in particular that the agreement confers on the EU the power to determine, when a Canadian investor seeks to challenge measures adopted by a Member State and/or by the EU, whether the dispute is, in the light of the rules on the division of powers between the EU and its Member States, to be brought against that Member State or against the EU. The exclusive jurisdiction of the Court to give rulings on the division of powers between the EU and its Member States is thereby preserved.

The Court observes, further, that the jurisdiction of the CETA Tribunal and Appellate Tribunal would adversely affect the autonomy of the EU legal order if that jurisdiction were structured in such a way that those tribunals might, in the course of making findings on restrictions on the freedom to conduct business challenged within a claim, call into question the level of protection of a public interest that led to the introduction of such restrictions by the EU with respect to all operators who invest in the commercial or industrial sector at issue of the internal market. However, the CETA contains provisions that deprive those tribunals of any power to call into question the choices that have been democratically made within a Party to that agreement in relation to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals or the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights. Consequently, that agreement does not adversely affect the autonomy of the EU legal order.

As regards the compatibility of the envisaged mechanism with the general principle of equal treatment, the Court states that, while the aim of the CETA is to confer on Canadian investors who invest within the EU a specific legal remedy against EU measures, their situation is not, however, comparable to that of investors of Member States who invest within the EU. The Court also concludes that the CETA does not undermine the effectiveness of EU law on the sole ground that an award made by the tribunal established by that agreement might have the effect, in exceptional circumstances, of nullifying a fine imposed for an infringement of EU competition law by the Commission or by a competition authority of a Member State. EU law itself permits annulment of a fine when that fine is vitiated by a defect corresponding to that which could be identified by the CETA Tribunal.

As regards the compatibility of the mechanism for the settlement of disputes with the right of access to an independent tribunal, the Court finds that the agreement seeks to ensure that the CETA Tribunal is accessible to any Canadian enterprise and any Canadian natural person that invests within the EU and to any enterprise and any natural person of a Member State of the EU that invests in Canada. However, in the absence of rules designed to ensure that the Tribunal and Appellate Tribunal are financially accessible to natural persons and small and medium-sized enterprises, the mechanism might, in practice, be accessible only to investors who have available to them significant financial resources. The Court considers that the commitments made by the Commission and the Council, in order to ensure the accessibility of the envisaged tribunals to small and medium-sized enterprises are sufficient, in the context of this Opinion procedure, justification for the conclusion that the CETA is compatible with the requirement of accessibility. The approval of that agreement by the EU is dependent on those commitments.

Last, the Court concludes that the CETA contains sufficient safeguards to ensure the independence of the Members of the envisaged tribunals.

NOTE: A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties or on the power to conclude that agreement. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force, unless it is amended or the Treaties are revised.

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The <u>full text</u> of the Opinion is published on the CURIA website on the day of delivery.

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