Belgium Requests an opinion on Investment Court System in CETA

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Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

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The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

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Laurens Ankersmit

1 Introduction

On 29 of October the leaders of the Belgian federal government and the regional and community governments reached a compromise deal over the EU-Canada Comprehensive Economic and Trade Agreement (CETA). One of the key outcomes is that the Belgian federal government will seek the Opinion of the European Court of Justice on the compatibility of the Investment Court System (ICS) in Chapter Eight of CETA with the EU Treaties. As soon as the Belgian federal government makes the request for an Opinion, the Court will be able to express itself on this contentious legal issue. This article provides some background on the origins of the Walloon request before explaining why ICS could potentially pose a legal problem for the EU.

2 Wallonia’s longstanding resistance against CETA and the resolution of 25 April of 2016

To insiders, the resistance put up by Wallonia in particular should have been no surprise. Over the past few years, the Walloon and Brussels parliaments have had extensive debates on the merits of CETA and have been increasingly critical of the deal. One of the main and more principled cause for opposition was the inclusion of ICS in CETA, a judicial mechanism that allows foreign investors to sue governments over a breach of investor rights contained in the agreement.

In the Parliament of Wallonia this resulted in the adoption of a resolution on the 25th of April 2016 (6 months before the compromise deal mentioned above) listing the key concerns Wallonia has about CETA. In that resolution the very first request by the Walloon government was to ask the Belgian federal government: “de solliciter l’avis de la Cour de justice européenne (CJE) sur la compatibilité de l’accord avec les Traités européens sur la base de l’article 218 (11) du TFUE pour éviter qu’un accord incompatible avec les Traités européens soit conclu et de ne pas procéder à la ratification de cet accord tant que la CJE ne s’est pas prononcée”.

In other words, the Walloon Parliament wanted to know whether ICS is compatible with the EU Treaties, and asked the Belgian federal government to make use of the procedure of Article 218 (11) TFEU to request the CJEU’s opinion on the issue. In the words of the Court, that procedure “has the aim of forestalling complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the European Union”. In particular, the advantage of the procedure is to avoid “serious difficulties” for both the EU internally and for third parties that would result from a successful challenge of the agreement after its entry into force.

Wallonia could not make this request itself, as this power is reserved for the federal level of the Belgian Government. However, Belgium is in many ways a “little Europe”, as its regional governments need to authorize federal action at the international level in a number of fields, including trade. As a result, Wallonia had to broker a deal with the federal government of Belgium in exchange for authorising Belgium’s signature on CETA.

3 Is ICS compatible with the Treaties?

The Walloon request did not come out of the blue. The issue of the compatibility of Investor-State Dispute Settlement (ISDS) and ICS (a form of ISDS) with the Treaties has been contentious among EU law insiders for a while. Recently, 101 law professors objected to ICS in an open letter because ICS is “in strong tension with the rule of law and democratic principles enshrined in national constitutions and European law. Additionally, [ICS is] likely to affect the autonomy of the European Union’s legal order, as the investment tribunals’ binding and enforceable decisions on state liability threaten the effective and uniform application of EU law.”

An increasing number of academic contributions have also raised this issue. Moreover, the European Asso-

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3 Opinion 1/09, the European and Community Patents Court EU:C:2011:123, para. 47.
The legal service of the European Commission has itself been busy fighting intra-EU bilateral investment treaties containing ISDS. In addition to a number of ongoing infringement proceedings, the legal service also wrote several *amicus curiae* briefs contesting the jurisdiction of the investment tribunals. In the Achmea case, for instance, the Commission wrote: “There are some provisions of the Dutch-Slovak BIT that raise fundamental questions regarding compatibility with EU law. Most prominent among these are the provisions of the BIT providing for an investor-State arbitral mechanism (set out in Art. 8), and the provisions of the BIT providing for an inter-State arbitral mechanism (set out in Art. 10). These provisions conflict with EU law on the exclusive competence of the EU court(s) for claims which involve EU law, even for claims where EU law would only partially be affected. The European Commission must therefore [...] express its reservation with respect to the Arbitral Tribunal’s competence to arbitrate the claim brought before it by Eureko B.V.”

### 4. The autonomy of the EU legal order and the preliminary reference procedure as the keystone of Europe’s judicial system

So what are the main legal issues when assessing the compatibility of ICS with EU law? It is clear that the Treaties in principle permit international agreements providing for state-to-state dispute settlement between the EU and third countries (such as the WTO’s dispute settlement body). Such state-to-state dispute settlement mechanisms do not encroach on the powers of the ECJ, because TFEU Part Six, Title 1, Chapter 1, Section 5 does not grant the EU courts the power to hear such disputes. However, when it comes to claims by individuals involving questions of EU law, the situation is radically different. The preliminary reference procedure in Article 267 TFEU gives the courts of the Member States and the European Court of Justice important powers to resolve such cases. In fact, the ECJ itself refers to this procedure as the “keystone” of the EU’s judicial system. It is perhaps important to recall that Article 267 TFEU was central to the ECJ’s reasoning when it found that the Treaties constituted “a new legal order” that gives *individuals*, not just the Member States, rights and obligations, and whose uniform interpretation the European Court of Justice over-sees.

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10 European Economic and Social Committee, *Opinion of the European Economic and Social Committee on Investor protection and investor to state dispute settlement in EU trade and investment agreements with third countries* (27 May 2015) (emphasis added).
11 See European Commission, ‘Commission asks Member States to terminate their intra-EU bilateral investment treaties’ IP/15/5198 18 June 2015.
12 European Commission Amicus Curiae submission as quoted by the arbitral tribunal in Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (award on jurisdiction 7 December 2012), para. 193.
The ECJ has made clear in no uncertain terms that it has the exclusive power to give definitive interpretations of EU law and therefore ensure the uniform interpretation of EU law across Europe.\textsuperscript{15} However, as a fundamental purpose of ICS in CETA is to enable investors to challenge not only EU acts and decisions based on these acts, but also national acts which might involve EU law somehow, an ICS tribunal would have to interpret and give meaning to EU law. Similarly to the context of human rights law, ICS will therefore encroach on the powers of the EU courts to rule on questions of EU law. Furthermore, ICS in CETA does not require the exhaustion of domestic remedies, which would soften the risk of divergent interpretation as well as respect the powers of the courts of the Member States to hear claims by individuals involving questions of EU law. ICS in CETA also does not require prior involvement of the ECJ for questions of EU law faced by these ICS tribunals.

5 CETA’s safeguards

To be sure, the Commission has implicitly admitted and sought to address this problem in CETA. In contrast to the EU – Singapore Free Trade Agreement (FTA), Article 8.31 (2) of CETA states that its tribunals “may consider” domestic law “as a matter of fact”.\textsuperscript{16} The provision continues by stating that in “doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party”. The question is whether these provisions are sufficient. For one, it is hard to see how law can be considered ‘as a matter of fact’ since law is a social construction. This approach is likely derived from international law circles to make international law more acceptable to domestic legal systems.\textsuperscript{17} However, as CETA will become an integral part of the EU legal order, this concept will find its way into EU law with potentially problematic consequences.\textsuperscript{18} What if the highest courts in the Member States no longer feel required to make preliminary references because they can consider EU law as a matter of fact, as these tribunals are allowed to do?

For another, following the prevailing interpretation given to EU law, it begins the question of what happens if no such interpretation exists. CILFIT makes clear that this is anything but an exceptional situation.\textsuperscript{19} In that case, the ECJ found that the highest courts in the Member States may only refrain from the obligation to make a preliminary reference when the “correct application of [EU] law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.”\textsuperscript{20} Lastly, one may wonder whether stipulating that the interpretation of domestic law is not binding is sufficient. This is considering the substantial financial consequences of the awards that are themselves binding, and the fact that ICS contains an appeal mechanism, in which the appeal tribunal can further solidify a particular interpretation of EU law.

6 Article 340 TFEU: Suing the European Union

Another problem related to the EU courts powers is that under EU law the EU courts have exclusive jurisdiction to hear and determine actions seeking compensation for damage brought under the second paragraph of Article 340 TFEU, which covers non-contractual liability of the European Union.\textsuperscript{21} In other words, when looking to sue the European Union for damages, one must go to the ECJ. ICS in CETA introduces an alternative to such suits for foreign investors, undermining the exclusive nature of the EU courts’ powers in claims for damages.\textsuperscript{22} Under EU law a claim for damages is an autonomous remedy, but the ECJ limits its use.\textsuperscript{23} In particular, actions for damages are inadmissible if they are used improperly as a disguised action for annulment or action for failure to act. An example would be to use an action for damages to nullify the effects of a measure that has become definitive, such as a fine. It is also very difficult, if not impossible, to claim damages for lawful acts.\textsuperscript{24}

Moreover, the Court is very wary of the potential of a ‘regulatory chill’ if it were to accept damages claims too easily. The Court has held that the “exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual exist”.\textsuperscript{25}

\textsuperscript{15} Opinion 2/13 Accession to the ECHR EU:C:2014:2454, para. 244-248.
\textsuperscript{16} Article 9.19 of the EU-Singapore FTA does not contain such clauses. It merely provides that the investment tribunal shall decide whether the treatment that is the subject of the claim is in breach of an obligation under the investment protection section in accordance with the Vienna Convention on the Law of Treaties.
\textsuperscript{18} Case 181/73, Haegeman EU:C:1974:41, para. 5.
\textsuperscript{19} Case 283/81, CILFIT EU:C:1982:335.
\textsuperscript{20} Ibid, para 16.
\textsuperscript{21} Case C-377/09 Hanssens Ensch v. European Community EU:C:2010:459, para. 17.
\textsuperscript{22} See also A. Carta, supra note 8, p. 30.
\textsuperscript{24} Joined cases C-120/06 P and C-121/06 P Fabbrica italiana accumulatori motocarrr Montecchio S.p.A (FIAMM) and others v Council and Commission EU:C:2008:476, paras. 184–189.
\textsuperscript{25} Ibid, para 174.
cases that could potentially chill regulation.26

may be more inclined than the EU courts to decide
petitive pressure on those EU courts. ICS tribunals
claims before the EU courts, putt ing a pe rverse co m-
true. Bringing a claim under ICS, ther e-
29  M. Jacob and S. Schill, 'Fair and Equitable Treatment: Content, Practice,
28  R. Wish, Intel v Commission: Keep Calm and Carry on! Journal of European
27  European Commission, 'Concept paper: Investment in TTIP and beyond -

ICS in CETA also poses challenges for the proper functioning of the EU’s internal market rules. CETA’s
ICS provides for a discriminatory remedy contrary to
Articles 45, 54, and 56 TFEU, because Canadian in-
vestors can bring claims on behalf of their EU incor-
porated companies. For example, a Canadian-owned
Slovak company could be privileged over a Dutch
company operating in Slovakia, because the Canadi-
an-owned Slovak company would have recourse to an
alternative form of dispute settlement not available to
the Dutch company.

Moreover, ICS awards can counteract national and EU provisions imposing financial burdens on individuals and corporations (including provisions on fees, taxes, penalties, fines and environmental liability). While the Commission’s view seems to differ, the problem goes beyond mere questions of paying back unlawfully granted state-aid.

An undertaking such as Intel could opt to challenge the Commission’s 1 billion Euro fine for its abuse of a dominant position on the microprocessors market, because it considers the Commission to have violated several good governance principles and therefore argue a breach of due process under the ‘fair and equitable treatment’ standard.28 That standard is understood as protecting basic forms of good governance.29 It is to be recalled that Intel not only challenged the Commission’s decision before the General Court arguing a violation of the principle of presumption of innocence and adequate proof of unlawful conduct, Intel also complained to the European Ombudsman for maladministration by the Commission. The General Court dismissed Intel’s application for annulment, but the European Ombudsman partially sided with Intel.30

8 Conclusion

One of the most astounding aspects of this story is that it took the defiance of the Walloons to initiate a pre-
liminary check by the ECJ on the legality of ICS. The
Commission could have easily added the question of compatibility of ISDS in the EU-Singapore FTA to its
request for an Opinion in Opinion 2/15.31 That opinion
was requested in July 2015, after the ECJ delivered its
Opinion 2/13. It was obvious to informed Court
watchers at the time that Opinion 2/13 raised serious
questions regarding the compatibility of ISDS and ICS with the Treaties. Indeed, it is quite clear based on an
access-to-documents request made by ClientEarth that
the Commission’s legal service was well aware of the
potential negative implications.32

Instead of going for a ‘better safe than sorry’ approach
(the explicit purpose of the 218 (11) TFEU proce-
dure), the Commission took the political risk of nego-
tiating and concluding an agreement that could poten-
tially be annulled afterwards. That would have not
only embarrassed the EU internationally, it could have
resulted in serious constitutional law issues, because
the EU and its Member States might have faced ICS
awards that were internationally binding yet in con-
flict with EU law (not least because of the CETA
Article 30.9 (2) so-called ‘sunset clause’ allowing for
claims up to 20 years after termination of the agree-
ment). In that sense, it appears that Wallonia did Eu-
rope and its trade partners a huge favour by seeking
clarity on this issue before the EU entered into binding
commitments in international agreements containing
 investor-state dispute settlement.

26  J. Kleinheisterkamp, Financial Responsibility in European International
Investment Policy, International and Comparative Law Quarterly 63 (2014),
pp. 449-476.
27  European Commission, ‘Concept paper: Investment in TTIP and beyond -
the path for reform’, p. 5-6. The Commission only addresses the issue of
ISDS claims that resulted out of investors’ obligation to pay back unlawfully
granted state aid in violation of the fair and equitable treatment standard
contained in several BITs. The Commission does not consider in the con-
cept paper similar problems resulting from paying fines, penalties or other
financial obligations that the investor might incur when investing in the host
state.
28  R. Wish, Intel v Commission: Keep Calm and Carry on! Journal of European
29  M. Jacob and S. Schiff, ‘Fair and Equitable Treatment: Content, Practice,
Method’ in: M. Bungenberg, J. Griebel, S. Hobe (eds.), International Invest-
ment Law, 2015, pp. 700-763.
European Ombudsman, Decision of the European Ombudsman closing his
inquiry into complaint 1955/2008/FOR against the European Commission
(14 July 2009) available at
mark (accessed 7 December 2015).
31  Opinion 2015: Request for an opinion submitted by the European Commis-
sion pursuant to Article 218(11) TFEU, OJ 2015 C363, p. 18–19.
32  All documents available upon request with the author, for a sample please
see http://www.documents.clientearth.org/wp-content/uploads/library/2016-
02-24-redacted-document-on-isds-and-the-principle-of-autonomy-of-eu-law-