COMMENTARY

A Confident Opinion, a Looming Decision

The compatibility of the CETA investment court system with EU law

Natasha Jerome
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DISTINCTION IS THE lawyer's scalpel in the craft of legal practice. The lawyer who can distinguish is the lawyer who can convince. Take the opinion of the European Court of Justice's advocate general (AG) in the high stakes CETA decision. The decision still hangs in the balance. But the opinion has tolled the bells for progressives and tipped the scales in favour of free-traders. Wallonia, the three-million-strong Belgian province that threatened to undo Canada's Comprehensive Economic and Trade Agreement with Europe,[1] could hardly have seen this coming.

After massive protests and a protracted stand off, Wallonia cast the vote that permitted Belgium to ratify the CETA. But only on condition that Belgium ask[2] the European Court of Justice (Court) whether the CETA investment court system (ICS) is compatible with EU law.[3] At issue is the investor–state dispute settlement (ISDS) a mechanism on which the ICS is based and which corporations have used globally to try to dismantle environmental and public safety regulations, supplant the interests of host populations, and all but bankrupt the governments they have sued.[4] The AG, as advisor to the Court, has recommended that the Court endorse the ICS.

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In referring Belgium to the Court, Wallonia pointed to *Achmea*,[5] a decision in which the Court invalidated an ISDS written into an intra-EU bilateral investment treaty (BIT). The ISDS was found to violate Article 267 of the Treaty on the Functioning of the EU (TFEU)[6]—relating to the preliminary ruling procedure, a keystone of EU law[7]—and TFEU Article 344, "under which Member States undertake not to submit a dispute concerning the interpretation or application of the [EU governing] Treaties to any method of settlement other than those provided for in the Treaties."[8] As the Court ruled in *Achmea*, Wallonia reasoned, so it would rule in the CETA decision.[9] This, however, is no longer a foregone conclusion.

The Achmea decision

In a volley of distinctions, the AG retraces the Court's reasoning in *Achmea* and argues that it should move beyond that decision and endorse the ICS. First of all, he argues, *Achmea* concerned the legality of an investment treaty among EU Member States—the Kingdom of the Netherlands and the Czech and Slovak Federative Republics.[10] In contrast, the ICS proposed under Section F of Chapter 8 of CETA is "an agreement with a third State"[11]—Canada, on one hand, and the European Union and its member states, on the other.[12] Consequently, a different set of premises apply to the ICS than to the *Achmea* tribunal.[13]

To make this distinction, the AG recalls that "an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system."[14] He points out that "Member States are governed by the principle of mutual trust in the observance of EU law"[15] and are obliged by the principle of sincere co-operation of Article 4(3) TEU[16] to ensure the application of and respect for EU law in their territories.[17] Further, the preliminary ruling procedure set out in Article 267 TFEU, obliges national courts and tribunals of final instance to request clarification from the Court where there is uncertainty on the interpretation of EU law.[18] *Achmea* breached these fundamentals.

The Court found that the *Achmea* ISDS tribunal could be called on to interpret or apply EU law, "particularly the provisions concerning fundamental freedoms, including freedom of establishment and free movement of capital."[19] This trenched on Article 344 TFEU. On the other hand, such a tribunal could not "be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU."[20] It was therefore not entitled to refer to the Court for preliminary rulings. This was a further problem.

EU member states had agreed to preclude the tribunal from the jurisdiction of their own courts. They thus precluded it from the judicial remedies that "Article 19(1)

TEU required them to establish in fields covered by EU law."[21] This meant that while the tribunal could be called on to interpret EU law, its decisions were not subject to review by a court of a member state. There was, therefore, no guarantee that interpretations of EU law contemplated by the tribunal could be submitted to the Court for a preliminary ruling.[22] Neither could the tribunal itself make the reference, nor could a court or tribunal of a member state. The Court therefore found that the ISDS had an adverse effect on the autonomy of EU law.

> By means of a bilateral investment agreement, two Member States had agreed to remove EU law from the jurisdiction of their own courts, and therefore from the judicial dialogue between those courts and tribunals and the Court, which was capable of having an adverse effect on the uniformity and effectiveness of EU law.[23]

The AG summarizes the *Achmea* ruling as establishing an inherent incompatibility between the judicial system of the European Union, based as it is in mutual trust and sincere co-operation among member states, and the "possibility of Member States creating, in their bilateral relations, a parallel dispute settlement mechanism which may concern the interpretation and application of EU law."[24] In sum, member states cannot contract out of the operation of the EU legal system. They may not establish any adjudicative mechanism that forecloses the Court's ultimate jurisdiction as the final arbiter of EU law. This is not the situation with the CETA ICS, however. Therefore, the *Achmea* analysis is not applicable to determining its compatibility with EU law.[25]

Achmea is not prejudicial to the CETA ICS

Having reviewed *Achmea*, the AG makes arguments for how the ICS differs from that judgment. First, Section F of Chapter 8 of CETA flows from external relations between the European Union and Canada, not from relations among member states. Unlike member state relations, EU-Canada relations are not bound by the undertakings of mutual trust and sincere co-operation.[26] There is therefore no breach of these principles in the EU establishing a court system to govern investment relations with Canada. Further, as the Court conceded in *Achmea*, while member states may not contract out of the operation of the EU judicial system, the EU could submit to a court whose decisions bind its institutions, including the European Court of Justice, provided that court respects "the autonomy of the EU and its legal order."[27]

The Court here distinguished between member state bilateral investment treaties and investment treaties between the EU and third states. It held that the competence of the EU over international relations and external commerce necessarily entailed the power to submit to a court created as part of an international agreement—with

responsibility for interpreting and applying that agreement—so long as the autonomy of the EU and its legal order was respected.[28] The CETA ICS, flowing as it does from an international treaty concluded within the international and commercial competence of the EU, is thus consistent with EU law.

Second, where the *Achmea* tribunal could interpret EU law, the CETA tribunal will neither adjudicate nor interpret EU or member state laws.[29] "[I]t is not for the CETA to settle disputes between two parties each of whom have a different position on the validity or interpretation of an act of EU law."[30] The tribunal will solely "verify whether a particular application of EU law is consistent with the CETA."[31] This is a curious proposition. It assumes that the tribunal will employ good faith principles in its analysis such that when confronted with contrasting positions on the validity or interpretation of EU law—particularly where the Court has not yet clarified that law—the tribunal will follow the interpretation that is least prejudicial to the respondent. Domestic courts usually accord this level of deference to government action, recognizing the public welfare goals those actions envision. Arbitral tribunals generally do not. A number of cases where human welfare was at stake saw tribunals admonishing the state that its public policy (including human rights) obligations did not supersede its obligations under an investment treaty.[32]

The AG also points out that where the *Achmea* tribunal could apply EU law, the ICS may only apply provisions of the CETA in accordance with international law.[33] EU law does not form part of the applicable law. Thus, the ICS has no jurisdiction to apply member state or EU laws. Doing so would be a reversible error subject to review by the appellate tribunal. Third, where the law of a member state (of which EU law forms a part) is implicated, the ICS may consider that law only as a matter of fact. It may not interpret the law, but must follow the interpretation of domestic courts.[34] What's more, any meaning that the ICS ascribes to that law does not bind the courts and tribunals or the authorities of the defendant party.[35] As with a tribunal award, it will apply only to the disputing parties and to the instant case.[36] This conforms with Opinion 2/13,[37] since the actions of the tribunal will not disturb the EU and its institutions in the exercise of their internal powers or confine them to a particular interpretation of EU law.[38]

Szilárd Gáspár-Szilágyi of the University of Oslo has pointed to problems with these arguments, particularly with the claim that the ICS does not affect the interpretation or application of EU law.[39] He notes that where the ICS makes determinations on provisions that have not yet been interpreted by the Court, these will become part of awards that bind the parties and the member states where enforcement is sought. Member states will, in this way, be asked to enforce awards based on interpretations of EU law that lack the imprimatur of the Court. Such a situation will, in the first place, usurp the exclusive jurisdiction of the Court for interpreting EU law—since

it is tantamount to interpreting EU law.[40] Second, it will undermine the uniform application of EU law—as in the case of the *Micula 1* arbitral award. While a Romanian court proceeded to enforce that award, the court of another member state refused to do so because the award was based on an interpretation of EU law that the Court had not yet endorsed.[41]

Intention of the parties and the hybrid nature of the ICS

Deference to the intention of the parties and the hybrid nature of the ICS looms large throughout the opinion. They are themes to which the AG constantly returns.[42] He emphasizes that the parties structured the ICS to expressly preserve their right to regulate while developing a judicial system that is independent, transparent, and impartial in its membership and procedures.[43] To this end, a joint interpretative instrument clarifies that "governments may change their laws, regardless of whether this may negatively affect an investment or investor's expectations of profits."[44] What is more, Article 8.31.2 of CETA precludes the ICS from pronouncing on the legality of parties' regulations: "the Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party."[45] What the tribunal may do is rule on the compatibility of EU and member state laws with the CETA provisions, "with a view to granting compensation to the investors who suffer loss where the acts are found to be incompatible."[46]

Nor can the tribunal order that a measure be "brought into line with" the provisions of Chapter 8 of the CETA.[47] Neither can it order that an incompatible measure be annulled.[48] Monetary awards for damages or restitution of property, with the consent of the respondent, are the tribunal's only remedies.[49] Accordingly, the parties' powers "to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity"[50] through regulation will be preserved. This proposition is not without irony.

Among the perennial problems that progressives have attributed to ISDS is the phenomenon of regulatory chill—the erosion of the power and responsibility of sovereign governments to regulate in the public interest. Regulatory chill is a direct result of the risk of being subjected to investor–state disputes and the excessive awards that flow from them. In a recent paper,[51] law professors Jane Kelsey, David Schneiderman, and Gus Van Harten discuss the troubling forms that regulatory chill may take, including (1) direct or specific chill where the threat or actuality of an investment dispute deters a government action, (2) indirect chill where a government forgoes or delays a measure because it is the subject of investment dispute elsewhere,

and (3) systemic chill where policy and regulatory decisions routinely proceed on consideration of whether they carry risk of investment disputes.

The AG concedes that regulatory chill was a major reason for the backlash against the CETA: "the spirited debate which surrounded the appropriateness of, and the features of, [the ICS] are due primarily to the fact that arbitration in investment matters is a forum for clashes between public and private interests."[52] Yet he does not acknowledge that where the CETA ostensibly preserves the parties' powers to regulate, it actually proscribes their ability to do so. So long as regulatory action carries the risk of investor malcontent and concomitant litigation, regulators will be wary of enacting public welfare measures. This is why progressives have argued for the total elimination of ISDS. Investment arbitration preserves the spectre of liability and amounts to making states pay to govern. By the same token, it preserves corporations' ability to subvert public measures and purloin the public purse.

Protection for investors

From the inception, the AG takes a position that is sympathetic to investors. He says that increased use of ISDS "has emerged in response to the perceived shortcomings in the judicial systems of certain host states [which has] fostered distrust among investors in those systems."[53] He gives no indication of how he arrived at this position. Was he exercising judicial notice? Was he proceeding on evidence? Was he describing a pleading from one of the submissions? Only the AG's own authority stands behind the statement. An advocate general's analysis should be independent and impartial.[54] Yet the AG frames his opinion with an unsubstantiated assertion that sets the tone of his reasons in favour of ISDS.

Causality around investor–state dispute settlement is contentious. Where the AG states that perceived shortcomings in certain judicial systems have caused the uptick in ISDS, the causal link may in fact be reversed. Investors may have increased their resort to arbitration because the availability of ISDS makes it convenient to do so.[55] It may, likewise, be argued that ISDS has harboured the perception of shortcomings in local judicial systems—when in fact those judicial systems are stable and robust. Others have argued that ISDS is a mechanism through which global capital instrumentalizes the state and the law in order to entrench and protect its interests.[56] A whole school of thought has grown up around the notion that ISDS is part of a new constitutionalism and a new mode of global governance.[57] In sum, it is not evident that distrust of local courts has caused the proliferation of ISDS. It is, therefore, curious that the AG states this as fact.

The AG further states that ISDS seeks "to provide investors with a neutral and efficient means of settling a dispute[.]"[58] This "in turn is intended to encourage investment by offering reassurance to economic operators who decide to invest in another country."[59] It bears saying that investment arbitration can hardly be said to be neutral and efficient simply because it stands apart from the judicial system of the home country or host country. A major contention against ISDS is that it is partial to economic interests and preferences foreign investors.[60] Even the CETA parties have justified the hybrid nature of the ICS as a response to the widespread complaints about arbitrator bias.[61] They say that the ICS will resolve this problem because it will be a standing quasi-court of permanent arbitrators/judges rather than an ad hoc arbitral tribunal that the disputants convene.

The AG also states that ISDS mechanisms are guided by the desire of contracting parties to "outsource the settlement of disputes between foreign investors and the host State," to remove those disputes from "the political and diplomatic spheres."[62] He says ISDS is "an alternative to the other method of settling investment disputes involving arbitration between states."[63] Of course, having earlier referenced the untrustworthiness of domestic courts—tainting all courts with the same brush stroke—the AG can then frame the issue as a choice between ISDS on one hand and dispute settlement through political and diplomatic processes on the other.

This simplistic bifurcation vitiates the function and authority of local courts regardless of whether they offer justice.[64] In any event, it bears noting that South Africa has replaced ISDS with a domestic regime that uses state–state arbitration, rather than investor–state arbitration, at its highest levels. The CETA also preserves recourse to the political and diplomatic spheres. Per Article 8.31.3, the committee on services and investment, consisting of representatives of each party, will recommend that the CETA Joint Committee adopt interpretations of the agreement that bind the parties.

It is also not evident that ISDS has been guided, "since its inception, by the will of the Parties to outsource the settlement" of investor–state disputes.[65] The remonstrances of Thailand in its submissions to the UN Working Group III problematize this assertion.[66] In pointing to the burdens that ISDS place on developing countries, Thailand shows that not all parties give informed consent to these mechanisms. A country may sign a regional or bilateral trade and investment treaty, of which ISDS forms part, only to realize the costs of its undertaking when sidelined by an investment claim.

Those who sound the alarm against ISDS concede that there may have been uncertainties for investors in a few host countries in the past. This, however, is not the case with the CETA. The CETA is an economic treaty between Canada and the European Union. Both Parties have robust judicial systems that offer reliable fora for

investor–state dispute resolution. A separate investor court system as contemplated by CETA is therefore redundant. The AG does not ignore this objection. Instead, he rejoins that it is not salient because the parties to CETA intend to define a model dispute resolution mechanism for the global settlement of investor–state disputes:[67]

> [T]he fact that the other party to the agreement envisaged is Canada, whose judicial system is presumed to offer sufficient guarantees, does not appear to me to be decisive, since [the ICS] is in reality a standard mechanism which is intended to be inserted into international agreements with third States which could not offer the same guarantees.[68]

Reciprocity in investor protection

The AG develops reciprocity as a key principle in his defence of the ICS. He discusses it early in his opinion as the fundamental reason that investors require a separate judicial system. Ordinarily, a Canadian investor operating in an EU member state is subject to the laws of that state and can seek an order from a national court or tribunal for damages and/or annulment against regulations.[69] Indeed, any investor from a third state would have access to the remedies and protections of member state courts. It is not obvious, however, that EU investors will enjoy the same protection in third state courts.[70] EU investors, thus, have an unequal position in third states vis-à-vis third state investors in the EU. This asymmetry requires the EU to negotiate substantive and procedural investment protections with third states.[71]

> When they negotiate an agreement such as CETA, the EU institutions seek to ensure that EU investors will enjoy in third States the same level of protection as that afforded by the European Union and its Member States to foreign investors.[72]

The AG reiterates that foreign investors fear being placed at a disadvantage vis-à-vis domestic investors in third states.[73] Reciprocity must, therefore, be seen as a guiding principle of investor protection in the EU's external relations."[74]

It is interesting how the AG develops reciprocity into a binding legal principle between the EU and its trading partners analogous to principles of mutual trust and sincere co-operation that member states undertake when they join the EU. It is, similarly, interesting that he associates "fear" and "shortcomings" or lack of equivalence with domestic courts systems, but uses terms of "balance," "neutrality," and "reciprocity of protections" to characterize the CETA investment court system. These terms are sure to do some work on the psyche of the Court when it considers the AG's opinion.

Conclusion

The fierce and consistent pushback against ISDS testifies to its lack of legitimacy and the tenacious perception that it gives preference to foreign investor protection at the cost of human welfare. Many countries have become wary of the system and are restructuring or terminating their investment agreements. A decade ago, Ecuador and Bolivia withdrew from the International Centre for the Settlement of Investment Disputes, the World Bank body set up in 1966 to adjudicate investor–state disputes. Venezuela followed suit in 2012. Since then, South Africa, Indonesia and India have terminated their BITs.

In 2015, South Africa replaced ISDS with legislation that would give foreign investors the same protection as any other company operating in the country.[75] In so doing, it has reaffirmed the efficacy of its own courts to adjudicate investment disputes. Should the need for arbitration occur, it will take place at the state–state level, rather than at the investor–state level. After being subjected to investor–state claims in 2004 and 2006,[76] South Africa undertook a three-year review of its BITs to assess their impact on economic growth and regulatory power. It found that "the current system had opened the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration that may constitute direct challenges to legitimate, constitutional and democratic policy-making."[77]

This is the ambience in which the Court of Justice will decide whether the CETA is compatible with EU law. The AG has made a persuasive case for why the Court should depart from its decision in *Achmea*. His reasons have set aside *Achmea* as a possible obstacle to a ruling that the ICS is compatible with EU law. Even so, *Achmea* is only one consideration that bears on whether ISDS, and therefore the proposed investment court system, may be appropriate for resolving investment disputes. The evidence is clear that ISDS is good for investors. It is not clear that ISDS is good for host populations. Nor is it clear that ISDS promotes foreign investment—as their advocates affirm.

A Public Citizen analysis of Ecuador, Bolivia, South Africa, India and Indonesia found no negative impact on foreign direct investment inflows after these countries terminated their BITs.[78] On the contrary, "investment flows from former BIT partner countries were more likely to increase rather than decrease after BIT termination."[79] What is more, the analyses that South Africa conducted showed no correlation between BITs and increased investment flows.[80] It is therefore not clear that the proliferation of ISDS has served the purpose which its advocates promised it would. States may negotiate and enter as many free trade and investment agreements as they wish. Ultimately, however, it is the foreign investor that determines whether and where it wishes to do business and under what terms.

The fate of the proposed ICS in CETA following a decision by the Court cannot be taken for granted. Even if the Court finds the investment court system compatible with EU law, EU member states may decide not to endorse it. Otherwise, the complicated ratification procedures of some member states—as in the case of Belgium—may delay its enforcement. This would not be unprecedented. The EU has previously concluded agreements that, even eight years later, did not enter into force for want of member state support.[81] As Nils Wahl and Luca Prete point out, "[r]atification procedures at the national level can be halted, hampered or simply delayed by local politics, referenda or by national judicial procedures."[82] What's more, even if the Court sustains the AG's opinion, this does not mean that critical decision-makers, progressive lawyers, and activists will put down their placards. A compelling legal case for investment protection is not a compelling case for the welfare of local populations.

About the author

Natasha Jerome is in her final year of the Juris Doctor program at Osgoode Hall Law School, where she studies international law, trade and global economic integration. She is currently interning at the CCPA's Trade and Investment Research Project as part of Osgoode's International & Transnational Law Intensive Program.

Notes

1 Cf. "Wallonia: Thank you for blocking CETA," Leadnow.ca, 2017. https://www.leadnow.ca/thank-wallonia/. Accessed 29 Jan.2019.

2 See Opinion 1/17, Opinion of Advocate General Bot re: Request for an Opinion by the Kingdom of Belgium, 29 Jan.2019, ECLI: EU: C: 2019: 72. at paras 4, 100. http://curia.europa.eu/juris/document/document.jsf?text=&docid=210244&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11878518#Footnote38. Accessed 30 Jan. 2019 (under the EU legal system member state courts and tribunals may request a preliminary ruling from the European Court of Justice on the interpretation of EU law. The current request was submitted on 7 September 2017).

3 Ibid at paras 9, 33, 36 ("The request for an opinion is structured around the following three issues: the jurisdiction of the Court, the principle of equal treatment and the requirement that EU law is effective, and the right of access to an independent and impartial tribunal").

4 For a discussion of the public costs associated with ISDS, see Kelsey, Jane and Schneiderman, David and Van Harten, Gus, "Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters' Really Matter" (2019). Osgoode Legal Studies Research Paper. https://ssrn.com/abstract=3329332 or http://dx.doi.org/10.2139/ssrn.3329332.

5 Case C-284/16, Slovakia Republic v Achmea B.V. http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&doclang=EN.

6 Treaty on the Functioning of the European Union (2007) (the Treaties are the governing laws of the European Union).

7 Supra note 3 at para 99 (the preliminary ruling procedure requires member state courts of last instance to request direction from the European Court of Justice whenever they face ambiguity on the meaning of EU law. This is discussed below).

8 Ibid at paras 39, 56, 97, 114.

9 Ibid at para 9.

10 Ibid at para 95.

11 Ibid at para 109.

12 Ibid at para 1.

13 Ibid at paras 106, 109, 113.

14 Ibid at para 97 (a violation of one of the EU founding treaties would be analogous to a violation of the Canadian Constitution, since the Treaties have constitutional status in the EU).

15 Ibid at para 98.

16 Treaty on the European Union (2007).

17 Supra note 3 at paras 54, 98.

18 Ibid at para 99.

19 Ibid at para 100.

20 Ibid (in Achmea, the AG had recommended that the Court treat investment treaty tribunals as if they were member state courts as a way to resolve the contradiction that member states undertook obligations under EU law but were then giving ISDS tribunals the power to determine the legality of those obligations. See Gus Van Harten, "The ISDS legal industry and the European Court of Justice," Investor–state dispute settlement: Comments and Observations, 16 Oct. 2017. https://gusvanharten.wordpress.com/2017/10/16/the-isds-legal-industry-and-the-european-court-of-justice/).

21 Ibid at para 103.

22 Ibid at para 100.

23 Ibid at para 104.

24 Ibid at para 105.

25 Ibid at para 106.

26 Ibid at paras 81–82, 107–108, 208.

27 Ibid at paras 69, 111.

28 Ibid, see also Section 8, "Consistency with the objectives of the European Union's external action," at paras 32, 46, 65, 195.

29 Ibid at paras 126, 167 ("the role of the CETA Tribunal is not to apply internal EU law, rather merely the provisions of the CETA").

30 Ibid at para 126.

31 Ibid.

32 See for example, Aguas del Tunari S.A. v. Republic Bolivia (ICSID Case No. ARB/02/03) where the government cancelled a concession because the foreign investor has spiked the tariff rates so high, peasant families were paying as much as 25% of their income for water. The case was eventually settled.

33 Supra note 3 at paras 110, 121-122, 167 ("with regard to the applicable law and its interpretations, Article 8.31.1 of the CETA provides that, 'when rendering its decision, the Tribunal … shall apply this agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties [concluded in Vienna on 23 May 1969], and other rules and principles of international law applicable between the Parties'").

34 Ibid at paras 129, 134-136, 148.

35 Ibid at paras 136-137.

36 Ibid at paras 28, 127,143 ("Under Article 8.41.1 of CETA, 'an award issued pursuant to this Section shall be binding between the disputing parties and in respect of that particular case").

37 "Opinion Pursuant to Article 218(11) TFEU – Draft International Agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the Draft Agreement with the EU and FEU Treaties." https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CV0002

38 Supra note 3 at para 68.

39 "AG Bot in Opinion 1/17. The Autonomy of the EU Legal Order v the Reasons Why the CETA ICS Might be Needed," European Law Blog: News and Comments on EU Law. 6 Feb. 2019. http://europeanlawblog.eu/2019/02/06/ag-bot-in-opinion-1-17-the-autonomy-of-the-eu-legal-order-v-the-reasons-why-the-ceta-ics-might-be-needed/.

40 Cf AG reasons, supra note 3 at paras 4–43 (argument made by Kingdom of Belgium that "where there is no prevailing interpretation of EU law, the Tribunal itself would be required to interpret EU law" – moreso because there is no provision in CETA referring the Tribunal to the Court for clarifications on EU law. This was also the case of the Achmea tribunal which had no obligation to seek direction from the Court – see para 100).

41 Supra note 39.

42 See for instance, supra note 3 at paras 20-21, 131-133, 215-218, 242, 246.

43 Ibid at paras 88, 131, 167, 215, 268, 270.

44 Ibid at para 131.

45 Ibid at para 123.

46 Ibid at para 124.

47 Ibid at para 125

48 Ibid.

49 Ibid.

50 Ibid at para 132.

51 Supra note 4.

52 Supra note 3 at para 20.

53 Ibid at para 12.

54 Court of Justice of the European Union – Composition, https://curia.europa.eu/jcms/jcms/Jo2_7024/en/. Accessed 13 Feb. 2019.

55 The AG himself acknowledges that the arbitration clauses are becoming standard in trade and investment agreements: "The arbitration clauses contained in bilateral investment treaties are, under international law, regarded as a key component of the protection of foreign investments in the host State" (supra note 3 at para 14).

56 See for example, Leo Panitch & Sam Gindin, The Making of Global Capitalism, (2012) Verso, London (particularly chapter 9, "Rules of Law: Governing Globalization").

57 See for example, A. Claire Cutler, "Transformations in Statehood, the Investor–State Regime, and the New Constitutionalism," (2016) 23 Ind. J. Global Legal Stud. 95.

58 Supra note 3 at para 12.

59 Ibid.

60 This is one of the complaints of Wallonia, which led Belgium to request the Court's opinion. Ibid at para 9.

61 See, for example, Gus Van Harten's critique, supra note 20.

62 Supra note 3 at para 13.

63 Ibid.

64 Cf Kelsey, Schneiderman & Van Harten supra note 4 at 7.

65 Supra note 3 at para 13.

66 A/CN.9/WG.III/WP.145 - Possible reform of investor-State dispute settlement (ISDS) - Submissions from the European Union*, United Nations Commission on International Trade Law, Working Documents. Accessed 3 Mar. 2019 (the group has been convened by UNCITRAL to recommend reforms for ISDS).*

67 Supra note 3 at paras 8, 17, 90, 246 ("By introducing that reformed mechanism within the CETA, the European Union is supporting the initiative of a global reform of the model for settling disputes between investors and States through the development of the current ad hoc ISDS system, which is based on the principles of arbitration, into an ICS, the culmination of which would be the establishment of a permanent multilateral court").

68 Ibid at para 86.

69 Ibid at para 72-73.

70 Ibid.

71 Ibid, also paras 86-87, 89.

72 Ibid at para 82.

73 Ibid at para 76.

74 Ibid at para 77.

75 Paul Vecchiatto, "South African Law Makers Approve Foreign Investment Bill, Bloomberg," 17 November 2015. https://www.bloomberg.com/news/articles/2019-03-18/urgent-the-latest-dutch-police-considering-terrorism-in-shooting. Accessed 28 March 2019.

76 "ISDS at a Crossroads: How the Settlement of Investor–State Disputes is Being Transformed" American Society for International Law, Youtube, 6 April 2018. https://www.youtube.com/watch?v=BS9MCbHEiyQ. Accessed 27 March 2019.

77 Tarcisio Gazzini, "Traveling the National Route: South Africa's Protection of Investment Act 2015," (2018) 26.2 African Journal of International and Comparative Law 242. (HeinOnline).

78 "Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows," Public Citizen Research Brief (2018) Public Citizen Global Trade Watch. https://www.citizen.org/sites/default/files/pcgtw_fdi-inflows-from-bit-termination_0.pdf. Accessed 27 March 2019.

79 Ibid.

80 Ibid.

81 Nils Wahl & Luca Prete, "Blowing Against the Wind: On ACTA, AA, CETA, TTIP and the Forgetfulness of David Ricardo," (2017) 51 No. 5 Journal of World Trade, 763 at 774. (HeinOnline).

82 Ibid.

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