Position Paper for the Joint Committee on EU affairs, Oireachtais, 6 April 2021

CETA's investment chapter including the **'Investment Court System' (ICS)** is often presented as a **radical departure** from more traditional forms of investment protection. Commission vice-president Frans Timmermans has stated that the EU is 'breaking new ground' with ICS, while former Commissioner for Trade Cecilia Malmström considers that the 'Europe must take the responsibility to reform and modernise [ISDS]. We must take the global lead on the path to reform.'[1] Malmström has even gone so far as to suggest that 'if you disagree with the old system, support CETA because that's where take a new approach.'[2] More generally, Commission president Jean-Claude Juncker referred to CETA as "our best and most progressive trade agreement."[3] Malmström described the agreement as "progressive" on numerous occasions.[4]

These statements are remarkable if one considers the negotiating mandate of the Commission for CETA. The Council's mandate of 14 July 2011 was conservative and instructed the Commission to build upon the approach of the Member States.[5] In relation to ISDS specifically, the negotiating directives state that 'the agreement shall aim to provide for an effective and state-of-the-art investor-to-state dispute settlement mechanism. […] It should provide for investors a wide range of arbitration fora as currently available under the Member States' bilateral investment agreements (BIT's).'[6] Subsequent changes during the 'legal scrubbing' phase pertain to the selection of arbitrators and the introduction of an appeal mechanism that aim at improving consistency and predictability of the system, not making the system more 'progressive'.

This position paper outlines **why CETA's ICS is not progressive, but retains, expands and entrenches the strong system of investment protection** as developed over the past few decades. Moreover, this system cannot be easily amended by democratic institutions if future generations of politicians in national parliaments wish to do so.

1. ICS removes disputes from proper constitutional and democratic scrutiny

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[1] http://europa.eu/rapid/press-release_IP-15-5651_en.htm

[2] Cecilia Malmström, EU Commissioner for Trade, "CETA—An Effective, Progressive Deal for Europe," Speech at Civil Society Dialogue Meeting, 19 September 2016, *available at <trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154955.pdf> (referring to CETA as "a very progressive trade agreement" with "a progressive partner that shares our values");*

[3] European Commission, Press Release, "European Commission Proposes Signature and Conclusion of EU-Canada Trade Deal," IP/16/2371, 5 July 2016, *available at* <http://europa.eu/rapid/press-release_IP-16-2371_en.htm> [hereinafter CETA Press Release].

[4] *See, e.g.,* Cecilia Malmström, EU Commissioner for Trade, "CETA—An Effective, Progressive Deal for Europe," Speech at Civil Society Dialogue Meeting, 19 September 2016, *available at <trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154955.pdf> (referring to CETA as "a very progressive trade agreement" with "a progressive partner that shares our values"); European Commission, Press Release, "EU-Canada Trade Agreement Enters into Force," IP/17/3121, 20 Sept. 2017, available at <http://europa.eu/rapid/press-release_IP-17-3121_en.htm> (quoting Commissioner Malmström's statement that "CETA is a modern and progressive agreement, underlying our commitment to fair trade based on values.").*

[5] http://www.consilium.europa.eu/en/press/press-releases/2015/12/15/eu-canada-trade-negotiating-mandate-made-public/

[6] 26d

The ICS in CETA is an extraordinarily strong judicial system in international law. Investors do **not have to exhaust domestic remedies** before they can file a claim, in contrast to customary international law and for example the judicial system under the ECHR.[7] Moreover, investors can enforce such ICS rulings across the globe before courts in other countries.[8] Both of these aspects undermine important checks against undermining democracy and the Rule of Law. When proceedings go through national courts, the state has the possibility to settle the dispute at a local level, where the relevant local context and national constitutional requirements can be explicitly considered and weighed by local courts. Moreover, any threats of making claims will in such proceedings will be less effective. After all, investors cannot immediately threaten with an international lawsuit, but will have to go through the domestic judiciary first.

Moreover, rulings by ICS members (i.e. the CETA text explicitly refrains from naming them 'judges') about the appropriate weighing of the interests of investors on the one hand, and of democratically determined public interests on the other hand, **cannot be subjected to a realistic form of constitutional control**. Judgements can be automatically enforced worldwide (in contrast to judgements of, for example, the ECtHR), and these judgements can therefore not be challenged before national courts.[9] These two significant aspects made the European Court of Justice decide in *Opinion 2/15*, that Member States should have competence to decide upon such an intrusive system, because 'such a regime removes disputes from the jurisdiction of the courts of the Member States'.[10]

Perhaps more importantly, it is **practically impossible for Member State parliaments to correct any consideration of the ICS tribunal that it considers to be mistaken**. All Parties to the Agreement would have to agree and go through all the necessary ratification procedures.[11] A binding interpretation made by the Parties to the Agreement on the basis of Article 8.31(3) CETA is also not a sufficient check. Not only have arbitrators in the past plainly ignored similar binding interpretations,[12] such a

[7] Article 35(1) ECHR. International customary law prescribes even that this rule is so fundamental, that treaties can only derogate from this principle if that is explicitly in the treaty. ICJ 20 July 1989, *Elettronica Sicula S.p.A.* (*ELSI*).
[8] Article 8.41 jo 8.28(9)(e) CETA.
[9] Article 8.41 jo 8.28(9)(e) CETA. Even outside of the ICSID regime is it almost impossible to challenge judgments. When Canada challenged the *Bilcon*-ruling before the Canadian federal judiciary, the judge considered that the ISDS award raised 'significant policy concerns,' i.a. 'its effects on the ability of NAFTA Parties to regulate environmental matters within their jurisdiction, the ability of NAFTA tribunals to properly assess whether foreign investors have been treated fairly under domestic environmental assessment process, and the potential 'chill' in the environmental assessment process that could result from the majority's decision,' but this could not warrant setting aside the award.
[10] ECJ Opinion 2/15, ECLI:EU:C:2017:376, para 292.
[11] Article 30.2 CETA.
[12] Patrick Dumberry, "Moving the Goal Post! How Some NAFTA Tribunals have Challenged the FTC Note of Interpretation on the Fair and Equitable Treatment Standard under NAFTA Article 1105", 8 *World Arbitration and Mediation Review* (2014).

binding opinion is also difficult to realise: Canada would have to agree, and within the EU, the Commission would have to be convinced to make a proposal to the Council, which the Council would have to adopt by qualified majority.[13]

2. Climate: all types of investments will be protected, also in fossil fuels

To meet the objectives set out in the Paris Climate Agreement, 80% of global coal reserves, one third of the oil reserves, and half of the gas reserves should remain in the ground. Over the last years, still significant investments have been made in this sector, while the urgency to stop these kinds of investment increases every day. Intervening in the energy transition raises questions about **who will pay for this transition**.

CETA's ICS makes it more difficult to achieve such an energy transition and aims at spurring on investments, including in the sectors just mentioned: all foreign investments between the contracting parties will be protected by CETA, thus also investments in fossil fuels. The definition of 'investment' used is extremely broad.[14] The EU and the Member States are thus making an explicit choice to protect all types of foreign investment, without reference to whether these investments will undermine policy objectives and international obligations, such as those under the Paris Climate Agreement.

The **safeguards** introduced in CETA to protect regulatory freedom do not significantly change the approach to regulatory measures compared to older investment agreements. Those safeguards always start with the phrase 'for greater certainty', which signifies a moderate continuation of the weighing of interests that is done in the 'old' ISDS. The substantive rights of investors *themselves* have in the text of CETA (dating from 2014) **not** been modified with the introduction of ICS.[15] In this respect, it is important to highlight that a quarter of all ISDS claims at ICSID are of the oil, gas, and mining industry.[16] Moreover, statistically speaking, it is relatively easy to win an ISDS case for investors, which also gives a threat to litigate more weight. According to UNCTAD statistics, the percentage of cases won by investors is 28.7%. In comparison, the success rate of non-contractual liability claims against the EU before the EU Court of Justice is only 4.3%.

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[13] Article 218(9) TFEU.

[14] Accoring to the European Court of Justice, ICS procedures against states can target measures 'in any area that relates, within the Union, to business activity and the use of moveable or immovable property, securities, intellectual property rights, claims to money and any other type of investment'. ECJ, Opinion 1/17, ECLI:EU:C:2019:341, para 139.

[15] The negotiating mandate obliged the European Commission in the drafting of these rights to take care of 'the highest possible level of legal protection and certainty for European investors in Canada, provide for the promotion of the European standards of protection and seek to increase Europe's attractiveness as a destination for foreign investment'.

[16] [16] ICSID, 'The ICSID case-load statistics (Issue 2019-1)' https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf.

3. Balance and Amicus Curiae

The ICS represents a step backwards in the process of making ISDS more balanced. In recent years, there have been some (small) steps set under numerous other investment treaty regimes to include other, third parties in the process, instead of only allowing foreign investors access to the proceedings.[17] CETA rules out the possibility of counterclaims and claims of third parties.[18]

In addition, interested parties that are adversely affected by actions of foreign investors only have the possibility of filing an *amicus curiae* letter. Such a letter has to serve the court in settling the dispute at hand between an investor and a state, and can in no way be seen as a means to raise the own interests of third parties.[19] In other words, such a letter can only help in determining whether the rights of the *investor* have or have not been violated. This is problematic, because the dispute is limited to the interests of the investor, while other interested parties (employees, environmental organisations, unions) are marginalised. In this respect, the ICS in CETA again represents a step backwards from a real and proper court. Professor of Inclusive Global Law and Governance Alessandra Arcuri (Erasmus University Rotterdam) has suggested that this asymmetrical element of investment arbitration in CETA in fact undermines the Rule of Law, because the system excludes certain types of actors and does not impose any obligations on foreign investors.[20]

CETA's investment chapter is not a progressive revolution, but a continuation and expansion of an unbalanced system of investment protection that is removed from proper democratic control without a real need to do so. Canada and Europe both have proper functioning judicial systems. Given the difficulties in changing CETA or abolishing it after it has entered into force, the lack of need of the system, its risks and unbalances, Europe and Canada would be better off without it.

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[17] The model investment treaty of India, for example, explicitly allows for the possibility of counterclaims against investors. In addition, some ISDS tribunals have interpreted the clauses of investment treaties in a way that allows for states to file counterclaims against the investor. See Urbaser v The Argentine Republic, ICSID Case No. ARB/07/26, Award of 8 December 2016; Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, Award of 5 October 2012; Perenco Ecuador Ltd v Republic of Ecuador, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015.

[18] Article 8.18 CETA.

[19] Article 8.36(1) CETA jo Article 4 UNCITRAL Rules on Transparency.

[20] Alessandra Arcuri 'The Great Asymmetry and the Rule of Law in International Investment Arbitration' Yearbook on International Investment Law and Policy 2019.