

# CETA

## Chapter 8 and the Investment Court System

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### Abstract

This *Spotlight* focuses on the ongoing Irish ratification process of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. It considers the main provisions of Chapter 8 of CETA, including the proposed Investment Court System (ICS). It also examines relevant case law of the Court of Justice of the European Union, the Irish ratification procedure and the key elements of debate. The paper outlines some of the key issues raised in relation to Chapter 8 and the ICS mechanism generally, as well as the possible impacts that the agreement may have on Irish law.



## Contents

Glossary .....	3
Executive Summary .....	5
Introduction .....	8
EU Trade Agreements .....	10
EU Treaties .....	10
The Case Law .....	14
Opinion 1/09 on the creation of a unified patent litigation system .....	14
Opinion 2/13 on accession to the European Convention on Human Rights .....	14
Case T-754/14 on the European Citizens Initiative .....	16
Opinion 2/15 on the EU-Singapore Free Trade Agreement .....	16
Case C-284/16: The Slovak Republic v Achmea BV .....	17
Opinion 1/17: Chapter 8 of CETA .....	18
Ratification by Dáil Éireann .....	23
Chapter 8 of CETA .....	24
Section A – Definitions and scope .....	24
Section B – Establishment of investments .....	25
Section C – Non-discriminatory treatment .....	26
Section D – Investment protection .....	27
Section E – Reservations and exceptions .....	29
Section F – Resolution of investment disputes between investors and states .....	29
Comparison of International Investment Dispute Resolution Mechanisms .....	37
Appointment of Members and ethics .....	38
The Joint Interpretative Instrument .....	40
The CETA Joint Committee and Specialised Committees .....	41
Recommendation on Trade, Climate Action and the Paris Agreement .....	41
The 2021 decisions of the Joint Committee and the Committee on Services and Investment ...	42
Competence of the CETA Joint Committee .....	43
Key Issues Affecting Investment Provisions .....	47
The Irish Government's position on ICS .....	47
Ratification procedure .....	47
Autonomy of the EU legal order .....	51

Who's interests does the ICS promote? .....	52
The appointment and role of judges .....	53
Is ICS necessary for the proper functioning of CETA? .....	53
Other dispute mechanisms open to the parties .....	54
Comparison with national courts .....	58
Possible 'chilling effect' on regulation .....	58
Interpretation and the position of domestic law .....	60
Choice of law .....	61
Legitimate expectation and negligent misstatement .....	62
The power to change the fair and equitable treatment provision .....	64
Expropriation .....	65
Accessibility .....	65
Right of withdrawal .....	67
Possible amendments to CETA? .....	68
Conclusion .....	70

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## Glossary

<b>Appellate Tribunal</b>	Investor-state appellate mechanism envisaged by Article 8.28 CETA.
<b>Arbitration</b>	A form of dispute resolution where the dispute is determined by one or more persons called arbitrators.
<b>CCP</b>	The EU's Common Commercial Policy set out by Article 207 TFEU.
<b>CETA</b>	Comprehensive Economic and Trade Agreement. The trade agreement reached between the EU and Canada, signed on 30 October 2016 and provisionally applied since 21 September 2017.
<b>CFSP</b>	Common Foreign and Security Policy.
<b>CJEU</b>	Court of Justice of the European Union, which includes the Court of Justice and the General Court.
<b>Court of Justice</b>	One of the constituent courts of the CJEU, which hears cases appealed from the General Court, as well as preliminary rulings (requests for an interpretation of EU law) from Member States and certain requests for annulment.
<b>ECHR</b>	European Convention on Human Rights.
<b>ECI</b>	European Citizens' Initiative. A mechanism by which EU citizens may call on the European Commission to propose new legislation.
<b>EUSFTA</b>	EU-Singapore Free Trade Agreement.
<b>ECtHR</b>	European Court of Human Rights.
<b>General Court</b>	One of the constituent courts of the CJEU. It considers applications for annulment from individuals, companies and in some cases, EU governments. In practice, it considers competition law, state aid, trade, agriculture and trademarks.
<b>ICS</b>	Investment Court System. The proposed CETA Tribunal and Appellate Tribunal for the resolution of investor-state disputes.
<b>ICSID</b>	International Centre for the Settlement of Investment Disputes, which was established by the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also referred to as the Washington Convention, and forms part of the World Bank Group. Arbitration proceedings under the Convention follow the ICSID Rules of Procedure for Arbitration Proceedings.
<b>ICSID Additional Facility</b>	A facility of the ICSID which provides arbitration, conciliation and fact-finding services for certain disputes that fall outside the scope of the ICSID Convention. It operates under the ICSID Additional Facility Rules.
<b>ISDS</b>	Investor-State Dispute Settlement. A system for the resolution of investor-state disputes based on arbitration and previously included in negotiations for CETA and TTIP.
<b>Mixed Agreement</b>	An agreement containing elements that are competences of the EU and Member States.

<b>NAFTA</b>	North American Free Trade Agreement, which was signed in between Canada, the United States and Mexico in 1998 and entered into force in 1994. The agreement was superseded by the US-Mexico-Canada Agreement (USMCA) in 2020.
<b>New York Convention</b>	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was adopted by the United Nations on 10 June 1958 and entered into force on 7 June 1959. The Convention requires Contracting States to recognise and enforce foreign arbitral awards, and for their courts to give effect to arbitration clauses in private agreements.
<b>Provisional Application</b>	The entry into force of the elements of the agreement under EU competence.
<b>QMV</b>	Qualified Majority Voting. The system used for decision-making in the Council of the European Union for decisions not requiring unanimity.
<b>Ratification</b>	In the context of this <i>Spotlight</i> , the process by which a Member State may approve the elements of a mixed agreement that are under shared competence. These elements of the agreement do not enter into force until all Member States have ratified the agreement.
<b>SMEs</b>	Small and Medium Enterprises.
<b>TEU</b>	Treaty on European Union, developed from the Treaty of Maastricht by the Treaty of Lisbon.
<b>TFEU</b>	Treaty on the Functioning of the European Union, developed from the Treaty of Rome by the Treaty of Lisbon.
<b>Tribunal</b>	The Investor-State tribunal envisaged by Article 8.27 CETA.
<b>TTIP</b>	Transatlantic Trade and Investment Partnership. Proposed trade and investment agreement between the EU and United States.
<b>UNCITRAL</b>	United Nations Commission on International Trade Law, which is the core legal body of the UN in the area of international trade law.
<b>UNCITRAL Arbitration Rules</b>	Procedural rules developed by UNCITRAL, under which parties may agree to conduct arbitration proceedings. The current iteration of these rules, incorporating the UNCITRAL Transparency Rules, was adopted in 2013.
<b>UNCITRAL Transparency Rules</b>	Procedural rules developed by UNCITRAL for investor-state arbitration, which provide for transparency of, and access to the public to, arbitration proceedings.
<b>Vienna Convention</b>	The Vienna Convention on the Law of Treaties, which governs and regulates treaties between states. The Convention was signed on 23 May 1969 and entered into force on 27 January 1980.

## Executive Summary

In December 2020, a Motion was introduced in Dáil Éireann proposing the ratification of the Comprehensive Economic and Trade Agreement (CETA) agreed and provisionally applied between the EU and Canada. Since this Motion, much debate has been elicited with a strong focus on Chapter 8 of the Agreement, which addresses investment.

The procedure for ratifying an agreement that may place a charge on the State, with the exception of agreements of a technical or administrative character, is set out by Article 29.5.2 of Bunreacht na hÉireann. This is the procedure under which the ratification of CETA has been sought.

The question of whether the provisions of CETA concerning indirect foreign investment and dispute resolution should be ratified would be affected by two major issues. Firstly, can the investment provisions of CETA be separated from the trade provisions? In this regard, other trade agreements have separated their investment provisions. For example, negotiations on the investment provisions of the Economic Partnership Agreement (EPA) between the EU and Japan are to take place separately, while the UK and Canada have agreed to review the investment provisions of their Trade Continuity Agreement, which is heavily modelled on CETA. Secondly, the issue arises as to what would happen if Ireland were not to ratify the agreement. What obligation would Ireland have to ratify when looking at its relationships with the EU and other Member States? It has been argued that should Ireland decide not to put a ratification process in train, its obligations to other Member States and the EU under the principle of sincere cooperation may come under scrutiny. Notably, while it appears that there is an obligation on the State to initiate a ratification procedure, there does not appear to be any obligation as to the outcome of that procedure.

The EU maintains a role in the negotiation and conclusion of trade agreements through the Common Commercial Policy (CCP), which is set out in Article 207 of the Treaty on the Functioning of the European Union (TFEU). However, in certain areas, such as indirect foreign investment, not all competences have been retained by the European Union, and so, they may involve the acquiescence of Member States to come into effect. These trade agreements are known as mixed agreements. The Court of Justice has held that in the case of investment protection, where a Member State competence is involved, then the agreement cannot be ratified without the consent of Member States. The Court of Justice has also held that investment dispute resolution mechanisms between individual Member States are contrary to EU law.

From the perspective of the EU, a central motivation in concluding CETA is the improvement of market access to Canada, and increased competitiveness with US firms which currently benefit under the USMCA trade agreement. The agreement abolishes 98% of tariffs, provides for mutual recognition of certain qualifications, and sets a baseline of EU standards and geographical indications for certain traded goods. It also seeks to regulate trade in services and investment. CETA's provisions on investment, governed by Chapter 8 of the agreement, are formulated to ensure equal treatment for investors from one Party when conducting business in the other Party.

Chapter 8 is divided into six constituent parts, or sections, which deal with specific areas. These include definitions and scope, the establishment of investments, non-discriminatory treatment, investment protection, reservations and exceptions and the resolution of investment disputes. The

last of these areas, governed by Section F, has stimulated much debate in relation to ratification. The section establishes an Investment Court System (ICS), aimed at resolving disputes between investors and states. The validity of this section was primarily at issue in the 2019 ruling of the Court of Justice, in Opinion 1/17.

CETA in its entirety (including the provisions relating to the ICS) is overseen by a body known as the CETA Joint Committee, which is made up of representatives of, and co-chaired by, the EU and Canada. The body is empowered to adopt further decisions in pursuing the implementation of the agreement. Should CETA be ratified, the Committee has the power to add to or amend certain provisions of the agreement. The issue of whether this Committee has a valid democratic mandate has been raised, most notably in Germany.

While many of its provisions have been drafted with the purpose of alleviating concerns, CETA has continued to generate significant debate. It is argued by the Government that CETA provides an arbitration alternative, and that alternative, unlike the domestic courts, would only concern itself with proven harm. The Government also argues that the right to regulate on matter of public interest is preserved, and mere loss of profits would not provide grounds for an investor to seek redress. Rather, any claim must be based on discriminatory and unfair treatment.

The Court of Justice has held that the proposed ICS is compatible with the autonomy of the EU legal order. It is argued by opponents of the ICS that the dispute resolution system could be seen as a 'court' that functions to the exclusive use of multinationals. A further issue arises from the broad scope of the definition of investor under the agreement, which may extend to US investors with a subsidiary in Canada. Those arguing against CETA also make the point that it may afford greater substantive rights to foreign investors, and thus may be discriminatory. Whether there is a positive discrimination or not may be dependent on whether or not the domestic framework affords similar protections to CETA.

Regarding the structure of the investment court, doubts have been expressed by some bodies on whether the retainer fee and expense allowance provided for under the proposed ICS mechanism could be seen to fulfil the international criteria for the technical and financial independence of an international court. Provision does exist in CETA however for the transformation of the retainer fee into a salary.

There is also reference to possible alternatives to the ICS and whether it is necessary. A sustainability impact assessment for the agreement in 2011 suggested that a state-state arbitration mechanism may be more appropriate than the then proposed ISDS. Furthermore, there are alternative dispute resolution mechanisms presently available to the parties, such as the ICSID and UNCITRAL Arbitration Rules. While the ICS envisaged by CETA borrows procedural rules from other arbitration instruments, it also envisages that recourse to national courts is also available to an investor.

The operation of the envisaged Tribunal does raise specific concerns. Opponents of CETA argue that the possibility of action before the ICS and the prospect of compensation being paid to investors may have a 'chilling effect' on regulation, meaning that proposed regulation may be diluted or even removed. This, they argue, may have a particular impact on efforts to regulate in the interests of environmental protection. In contrast, the Joint Interpretative Instrument re-states the commitment to preserve the right to regulate and commits to address any shortcomings that



may emerge in a timely manner. There are also provisions in CETA that allow states to challenge claims that are manifestly without legal merit and unfounded as a matter of law.

The relationship between CETA and domestic law is relevant to the operation of the proposed Tribunal. Under the agreement, the envisaged Tribunal may consider domestic law as a matter of fact but is not compelled to do so. Determining the prevailing interpretation of domestic law may also raise certain issues. For example, if there is more than one interpretation of domestic law in the Member State, the Tribunal and Appellate Tribunal may make different determinations, or there may not be a prevailing determination of domestic law at all. Additionally, there are slightly different approaches in the procedural rules that may govern a claim on the law to be applied, if no provisions on domestic law are included in the relevant contract for investment. These approaches also raise the point as to whether these procedural rules require the application of domestic law.

In an Irish context, provisions in CETA on legitimate expectation and tort law may also be relevant. In particular, Irish law on legitimate expectation requires a reliance on a statement made, in a similar fashion to the provisions of CETA. The application of this requirement can also be extended to public authorities. Similarly, Irish courts have also recognised and developed the tort of negligent misstatement in domestic law.

A number of further issues in the debate are also considered. In relation to the provisions on the obligation to ensure fair and equitable treatment, the CETA Joint Committee has the power to review the obligation. This includes the power to add to the list of instances specified in CETA where a breach of this obligation may occur. The role of the Committee on Services and Investment is also relevant to this issue.

The position of SMEs, particularly on accessing the Tribunal, is an area that may require further study and development. The Court of Justice highlighted an inconsistency between the scope of Section F of Chapter and access to the Tribunal for SMEs, when rules designed to ensure such access are absent, in its opinion on CETA, but also noted the commitment by the Commission and the Council to ensure such access.

The final issue considered in this *Spotlight* is the right of withdrawal. CETA stipulates a period of 180 days for the termination of the agreement if denounced by either Party, but also stipulates that the investment provisions remain in force for a further 20 years. It is particularly noteworthy that termination may not be considered a power of Member States if there is a transfer of competence to the EU, and therefore termination of the agreement may only be undertaken by the EU.

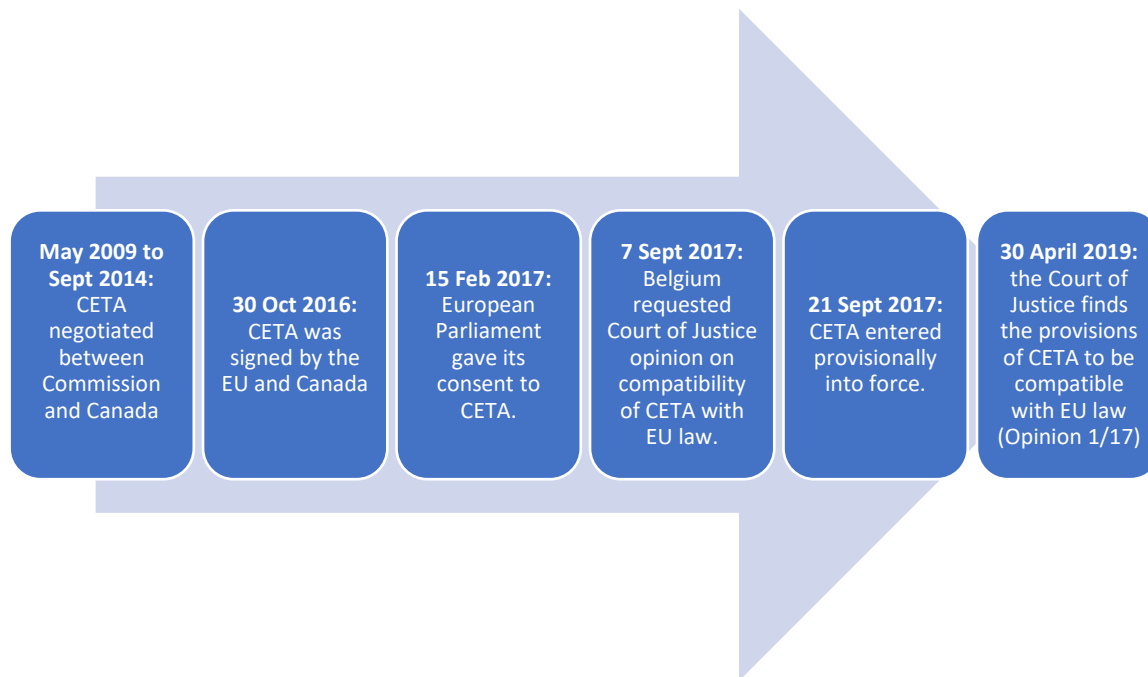
The extent of the debate on the ratification CETA further stresses the highly complex structure and operation of trade agreements. While this *Spotlight* seeks to provide an overview and analysis of the main aspects and key issues concerning the ratification process for CETA in Ireland, it is intended as an aid and is not an exhaustive, complete or definitive consideration of the matters under debate.



## Introduction

The Comprehensive Economic and Trade Agreement (CETA) is an international agreement made between the EU and Canada. The agreement was negotiated between 2009 and 2014 and signed in 2016. A timeline of events is found in Figure 1 below.

**Figure 1: CETA Timeline**



**Source:** EPRS

As highlighted by the European Parliamentary Research Service (EPRS) (2019):

“From the perspective of the EU, a key motivation was to improve market access to Canada and increase the competitiveness of EU companies seeking to export to Canada vis-à-vis US firms, which had had preferential treatment under the North American Free Trade Agreement (NAFTA) since 1996. For Canada, which has a significant economic dependency on the US trade and business cycle, CETA also represented an opportunity to diversify trade in addition to gaining market shares in the EU.”<sup>1</sup>

The majority of the provisions of CETA have been provisionally applied and implemented since 21 September 2017.<sup>2</sup>

As it stands, CETA removes 98% of duties applicable to the importation of goods (exclusions are limited to certain agricultural products), it gives mutual recognition to qualifications for certain professions and it ensures a baseline of EU standards and geographical indications on traded

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<sup>1</sup> Jana Titievskaia and Ioannis Zachariadis, European Parliamentary Research Service, [In Depth Analysis: CETA implementation – SMEs and regions in focus](#), PE 644.179, November 2019 (last accessed 27 April 2021).

<sup>2</sup> [Notice concerning the provisional application of CETA](#), OJ L 238/9 (last accessed 27 April 2021).

goods. The agreement would also look to regulate trade in services and investments across the relevant jurisdictions.

CETA is considered to form part of a 'new generation' of EU free trade agreements, taking an 'all-in' approach to the agreement. The 'all-in' approach is discussed in relation to the EU-Singapore Free Trade Agreement in Opinion 2/15 of the Court of Justice. This case is examined in more detail below.

The Court of Justice of the European Union (CJEU) has referred to these types of agreements as 'mixed agreements', as they include provisions that partially fall within the competence of the EU and provisions that fall within the shared competence of the EU and the Member States. In its Opinion 2/15, the Court of Justice found that portfolio (indirect foreign) investment and investment dispute settlement mechanisms are shared competences.<sup>3</sup> In this regard, the provisional application of CETA does **not** extend to indirect foreign investments, financial services relating to indirect foreign investment, and investment dispute resolution mechanisms. These provisions will only enter into force after the agreement has been ratified by Canada, the EU and **all** 27 EU Member States, at which point provisional application will cease and CETA will enter fully and definitively into force.

Given that the ratification of the trade aspects of CETA falls under the exclusive competence of the EU, no vote would be needed by Member States' parliaments on these aspects of the agreement. As such, this paper will focus on the foreign indirect investment and dispute resolution aspects of CETA, dealt with in Chapter 8, Articles 13.21 and 30.9 of the Agreement. It is notable that Chapters 18, 19, 26 and 29 will also be affected by indirect foreign investments.

This paper is intended to aid debate on the ratification of CETA. It examines the key cases regarding the issues concerned in establishing mixed agreements and a dispute resolution mechanism for investment. It outlines the procedure for ratification under Irish law and also provides an outline of the main provisions in Chapter 8 of CETA, the Joint Interpretative Instrument and the role of the CETA Joint Committee. Finally, it discusses the main aspects of the debate in Ireland regarding ratification under the headings of key issues.

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<sup>3</sup> See [Opinion 2/15](#) ECLI:EU:C:2017:376 (last accessed 26 April 2021).

## EU Trade Agreements

This section examines the competences of the EU and Member States relating to trade policy, as stated in the EU Treaties. It also provides a brief outline of the negotiation process and the involvement of democratically-elected actors, namely the Council of the EU and the European Parliament.

### EU Treaties

Under the relevant provisions of the EU Treaties on the competences involved in trade policy and the procedure allowed for negotiating trade agreements, trade agreements require a mandate from the Council of the European Union before negotiations may commence. On the conclusion of negotiations, the consent of the European Parliament and a decision of the Council of the European Union are required for the agreement to take effect.

### Competences

Under Article 3 of the Treaty on the Functioning of the European Union (TFEU), the EU retains exclusive competence over the Common Commercial Policy (CCP).<sup>4</sup> Article 4 TFEU sets out the areas where the EU and the Member States share competence. This provision includes the area of freedom, security and justice.<sup>5</sup>

[Article 207 TFEU](#) expands on the CCP, stating that it:

“... shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.”

In addition to the provisions of [Article 218 TFEU](#) (discussed below), [Article 207 TFEU](#) includes special provisions for negotiations with third countries relating to the CCP. Under Article 207(3) TFEU, the European Commission makes recommendations to the Council, which authorises it to open the necessary negotiations. Both institutions have a responsibility to ensure that what is negotiated is compatible with internal EU policies and rule. The Article also contains a mechanism for appointing a special committee of the Council to assist the Commission, which in turn is required to report to this committee and the European Parliament. Under Article 207(4) TFEU, the Council may act via qualified majority voting (QMV).<sup>6</sup>

The decision of the Court of Justice in [Opinion 2/15](#) clarified the position of competences with respect to trade agreements carrying investment provisions. It held that non-direct foreign investment and the mechanism for arbitration of investment disputes envisaged by the Free Trade Agreement between the EU and Singapore (EUSFTA) are shared competences of the EU and its

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<sup>4</sup> [Article 3\(1\)\(e\) TFEU](#) (last accessed 27 April 2021).

<sup>5</sup> [Article 4\(2\)\(j\) TFEU](#) (last accessed 27 April 2021).

<sup>6</sup> A more detailed description of qualified majority voting is available in a [Glossary of summaries](#) on Eur-Lex.

Member States. The Court found that as the arbitration mechanism removes disputes from the jurisdiction of Member States, it cannot be established without the consent of Member States.<sup>7</sup>

### Negotiation of trade agreements

Article 216 TFEU empowers the EU to conclude agreements with third countries and international organisations, where such a conclusion:

“... is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.”<sup>8</sup>

Article 218 TFEU sets out the procedure for concluding international agreements. This procedure includes the following elements:

- The Council is empowered to authorise the opening of negotiations, adopt negotiating directives (also known as a mandate), and authorise the signing and conclusion of agreements. It may act by qualified majority throughout the procedure. In the case of trade agreements, it cannot adopt a decision to conclude the agreement until it has obtained the consent of the European Parliament.
- The Commission is empowered to submit recommendations to the Council for adoption regarding the opening of negotiations and (depending on the subject of the agreement) the nomination of the EU's negotiator or head of the negotiating team. The decision authorising the signing of the agreement, and (if necessary) provisional application and the decision concluding the agreement, are adopted on the proposal of the negotiator.<sup>9</sup>

The European Commission has published a Guide on [Negotiating EU trade agreements: Who does what and how we reach a final deal](#) which details the full negotiation process.

Once negotiations are completed, the agreement is presented to the Council of the EU and to the European Parliament, which both examine and determine whether to approve it. If both approve the agreement, then the European Commission may sign it, and once it is ratified it may be concluded and come into effect. As already noted, if the agreement is a mixed agreement, then Member States must also sign and ratify it for it to be fully concluded.

In July 2016, the European Commission announced that CETA was to be ratified as a ‘mixed agreement’. As highlighted by a House of Commons Library Briefing Paper on CETA (2019), press reports at the time had indicated that the Commission hoped to classify the agreement as EU-only but backed down in the face of opposition from some Member States. The European Commissioner for Trade, Cecilia Malmström, said that from a strict legal standpoint, the

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<sup>7</sup> [Opinion 2/15](#) ECLI:EU:C:2017:376 at [292] (last accessed 26 April 2021).

<sup>8</sup> [Article 216 TFEU](#) (last accessed 27 April 2021).

<sup>9</sup> [Article 218 TFEU](#) (last accessed 27 April 2021).

Commission considered CETA to be an EU-only deal. However, given the political situation in the Council, CETA was put forward as a mixed agreement to allow for speedy signature.<sup>10</sup>

### The autonomy of EU law

Two leading cases have considered the potential impact of such agreements on the autonomy of the EU legal order. In [Slovak Republic v Achmea](#),<sup>11</sup> a bilateral investment treaty (BIT) between Slovakia and the Netherlands (two EU Member States) was found to be incompatible with EU law. The Court of Justice found in that case that an international agreement cannot involve the allocation of powers under the EU Treaties and the autonomy of the EU legal system.

In contrast, the Court, when considering CETA in [Opinion 1/17](#),<sup>12</sup> found that the agreement was compatible with EU law and did not infringe the autonomy of the EU legal order. In particular, it differentiated the case from *Achmea* on the basis that Canada was a non-Member State and the principle of mutual trust within the EU legal order was not applicable to Canada. It also held that the proposed CETA Tribunal would be confined to interpreting the provisions of CETA, and that the examination of EU law must be taken as a matter of fact under the agreement. Each of these cases will be discussed in more detail below.

Some of the key concepts relating to EU trade agreements are briefly summarised in Table 1 below, broadly reflecting the negotiation and ratification process and the envisaged investment court.

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<sup>10</sup> European Commission, '[European Commission proposes signature and conclusion of EU-Canada trade deal](#)', *Press Release*, 5 July 2016 (last accessed 27 April 2021); Dominic Webb, House of Commons Library, [Briefing Paper on CETA: the EU-Canada free trade agreement](#), 7 May 2019, p. 13 (last accessed 27 April 2021).

<sup>11</sup> [Slovak Republic v Achmea BV](#) (Case C-284/16) ECLI:EU:C:2018:158 (last accessed 26 April 2021).

<sup>12</sup> [Opinion 1/17](#) ECLI:EU:C:2019:341 (last accessed 26 April 2021).

Table 1: Key concepts regarding trade agreements entered into by the EU

Concept	Relevance to CETA
Competence <sup>13</sup>	<p>Article 3 TFEU stipulates that the European Union has exclusive competence of the Common Commercial Policy (CCP), which includes trade and foreign direct investment.</p> <p>However, dispute settlement and indirect foreign investment are shared competences. The case law of the Court of Justice has also clarified that these aspects of CETA would need the consent of Member States for these elements to come into effect (see Ratification below).</p> <p>It remains uncertain whether the ratification by Member States would transfer these aspects of CETA to the CCP Competence or the Common Foreign and Security Policy (CFSP) Competence of the EU.</p>
Mandate	<p>The mandate to negotiate a trade agreement is adopted by the Council of the European Union following a proposal from the European Commission. A team of negotiators is appointed by DG Trade. Upon the conclusion of an agreement, the European Parliament must approve it, after which the Council of the European Union adopts a Council Decision ratifying the agreement.</p>
Provisional Application	<p>Where ratification is yet to take place, the Council of the European Union may adopt a Council Decision permitting provisional application of the agreement. For CETA, provisional application broadly relates to the trade aspects only. Aspects requiring the consent of Member States can only enter into force when all Member States ratify the agreement.</p>
Ratification	<p>The Court of Justice of the EU has held that for ‘mixed agreements’, the approval of Member States is also required. Furthermore, at national level, the approval of Dáil Éireann is constitutionally required for any international agreement that places a charge upon public funds.<sup>14</sup> Administrative and technical agreements are exempt from this requirement.<sup>15</sup></p>
Investment Protection	<p>Investment protection refers to measures aimed at ensuring foreign investments are treated in the same way as domestic investments. The options available to investors in seeking compensation vary depending on the trade agreement. For CETA, four broad choices for investors are envisaged;</p> <ol style="list-style-type: none"> <li>1) To consult and come to an amicable resolution;</li> <li>2) To sue in the domestic courts;</li> <li>3) To seek mediation under Article 8.20 of CETA; or</li> <li>4) To bring an action in the Tribunal.</li> </ol> <p>The right to sue in domestic courts is also emphasised in the Joint Interpretative Instrument under CETA.</p>

<sup>13</sup> Exclusive competence refers to areas where the EU alone is able to legislate and adopt binding acts. Shared competence refers to areas where both the EU and Member States may legislate and adopt binding acts, but Member States may only legislate in such areas where the EU has not exercised its competence or has explicitly ceased to do so. See further [FAQ EU competences and Commission powers \(europa.eu\)](https://european-council.europa.eu/media/146744/1/1/EN/FAQ_EU_competences_and_Commission_powers.pdf) (webpage) (last accessed 28 April 2021).

<sup>14</sup> Article 29.5.2, Bunreacht na hÉireann.

<sup>15</sup> Article 29.5.3, Bunreacht na hÉireann.

## The Case Law

In recent years, the CJEU has been quite active in relation to the EU's 'new generation' trade agreements. Additionally, it has also considered questions relevant to the autonomy of the EU legal order. This section briefly considers some of these cases.

### Opinion 1/09 on the creation of a unified patent litigation system

Opinion 1/09<sup>16</sup> on the creation of a unified patent litigation system followed a request by the Council of the European Union, which asked if the agreement creating a unified system was compatible with the provisions of the Treaty establishing the European Community. The agreement sought to confer exclusive jurisdiction on the Patent Court to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply EU law in that field. This, the Court of Justice held, would deprive:

- 1) national courts of their powers in relation to the interpretation and application of EU law; and
- 2) the Court of Justice of its powers to reply, by preliminary ruling, to questions referred to it by national courts.<sup>17</sup>

The Court also observed:

“... the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties”.<sup>18</sup>

The Court ruled that the unified patent litigation system (then called the 'European and Community Patents Court') was **not** compatible with EU law. This case is relevant as it established that the interpretation of EU law by an external court was not possible, and that these powers could only be exercised by the courts of the EU and Member States.

### Opinion 2/13 on accession to the European Convention on Human Rights

Opinion 2/13<sup>19</sup> on the European Convention on Human Rights (ECHR) followed a request from the European Commission, which asked if the Draft Accession Agreement (DAA) of the EU to the ECHR was compatible with the Treaties.

The accession of the EU to the ECHR is provided for by Article 6 of the Treaty on the European Union (TEU), with Protocol 8 to TEU requiring that specific EU characteristics are preserved in the framework for accession. To avoid the risk of divergence, the negotiators of the DAA proposed mechanisms allowing the autonomy of EU law to be guaranteed, including a co-respondent

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<sup>16</sup> [Opinion 1/09](#) ECLI:EU:C:2011:123 (last accessed 26 April 2021).

<sup>17</sup> Ibid at [89].

<sup>18</sup> Ibid at [85].

<sup>19</sup> [Opinion 2/13](#), ECLI:EU:C:2014:2454 (last accessed 26 April 2021).



mechanism and a prior involvement mechanism for the Court of Justice. The co-respondent mechanism was designed to prevent the European Court of Human Rights (ECtHR) from becoming involved in the internal competence division between the EU and EU Member States. The prior involvement mechanism allowed the Court of Justice to examine an alleged violation of the ECHR by the EU, before this alleged violation was examined by the ECtHR.

The Court of Justice examined five aspects of the DAA:

- a) The specific characteristics and the autonomy of EU law;
- b) Article 344 TFEU;
- c) The co-respondent mechanism;
- d) The procedure for the prior involvement of the Court of Justice;
- e) The specific characteristics of EU law relating to judicial review in Common Foreign and Security Policy matters

The Court found that the DAA was incompatible with Article 6(2) and Protocol No 8 TEU, as:<sup>20</sup>

1. it does not allow for effective coordination between the ECHR, the Charter on Fundamental Rights and TFEU, and it brings into question the principle of mutual trust between Member States;
2. it does not preclude the possibility of disputes between Member States, or between a Member State and the EU and so it may cause a breach of Article 344 TFEU (Member States must not submit a dispute concerning the interpretation or application of the EU Treaties to a method of settlement not covered by the EU Treaties);
3. it does not formalise the operation of a co-respondent mechanism or a procedure for prior involvement of the Court of Justice; and
4. it may interfere with the autonomy of EU law on matters affecting the Common Foreign and Security Policy.<sup>21</sup>

Following the ruling in Opinion 2/13, some commentators considered the impact of the ruling in the context of CETA. O'Sullivan observed that "some analysis of EU law will inevitably be required [by the Tribunal] to reach adjudications on the alleged breach of CETA". She argues that the inescapability of the Tribunal engaging in interpretative analysis of EU law is problematic, in light of the rejection of a similar scheme in Opinion 2/13.<sup>22</sup>

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<sup>20</sup> Ibid at [258].

<sup>21</sup> Ibid at [236] – [243]. The safeguards provided for in the DAA were deemed not sufficient to ensure that the ECtHR would never assess the case law of the Court of Justice and were, thus, deemed insufficient from the perspective of preserving the special characteristics of EU law. It also observed that the DAA excluded the possibility of the Court of Justice ruling on a question of secondary law through the proposed prior involvement procedure. See also M Oberg, *Autonomy of the EU Legal Order: A Concept in Need of Revision*, European Public Law 26, no 3 (2020): 705-740 at 734-735.

<sup>22</sup> Rachel O'Sullivan, *Burning Bridges? The Court of Justice and the Autonomy of the EU Legal Order*, (2018) 17(1) *Hibernian Law Journal* 1-24 at 17.

## Case T-754/14 on the European Citizens Initiative

On 10 May 2017, the CJEU considered a decision by the European Commission not to register a petition under the European Citizens' Initiative (ECI) entitled 'Stop TTIP'. The petition invited the European Commission to recommend to the Council that it withdraws the mandate for negotiations on the Transatlantic Trade and Investment Partnership (TTIP) (a proposed trade agreement between the European Union and the United States). In addition, it also invited a similar recommendation not to conclude CETA.

The decision not to register the petition was considered by the General Court in *Efler v European Commission*.<sup>23</sup> In annulling the decision, the General Court found that as well as the signing and conclusion of international agreements, the ECI mechanism also applied to acts authorising the negotiation of such agreements. Following the case, the European Commission adopted [Commission Decision 2017/1254 \(EU\)](#) in July 2017 to register the ECI. According to the Commission's website, the ECI was subsequently withdrawn on 9 July 2018.<sup>24</sup>

This case is significant as it affirms that EU citizens may utilise the ECI to express opposition to the negotiating mandate for international agreements, including trade and investment agreements. However, it should also be noted that the threshold for a successful petition under the ECI is set at the signatures of one million citizens, from at least seven Member States.<sup>25</sup> While CETA is signed and concluded and currently undergoing Member State ratification, it is possible that the ECI mechanism may be a feature in the negotiation of future trade agreements.

## Opinion 2/15 on the EU-Singapore Free Trade Agreement

On 16 May 2017, the Court of Justice delivered its Opinion 2/15 on the competence of the EU to conclude a Free Trade Agreement with Singapore (EUSFTA).<sup>26</sup> The Opinion was requested by the European Commission which argued, with the support of the European Parliament, that the EU had exclusive competence to conclude EUSFTA and that it did not need individual Member States to ratify the agreement. On the other hand, the Council and 25 Member States argued that EUSFTA could only be concluded as a 'mixed agreement' – by the EU together with each of its members – as some of the provisions fell under the exclusive competence of the EU while others fell a shared competence with the individual Member States.

The main issue that the Court needed to deal with in its opinion was that EUSFTA was not simply a trade agreement, it also included investment chapters, resembling bilateral investment treaties (BITs). These investment chapters included provisions relating to non-direct investment and Investor-State Dispute Settlement (ISDS), as well as foreign direct investment. While Article 207 TFEU makes clear that foreign direct investment falls within the scope of the common commercial

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<sup>23</sup> [Efler v European Commission](#) (Case T-754/14) ECLI:EU:T:2017:323 (last accessed 26 April 2021).

<sup>24</sup> European Citizens' Initiative, [Initiative Detail: Stop TTIP](#) (webpage) (last accessed 27 April 2021).

<sup>25</sup> A minimum threshold from each Member State must also be reached, see [Thresholds \(europa.eu\)](#) (webpage) (last accessed 29 April 2021).

<sup>26</sup> [Opinion 2/15](#) ECLI:EU:C:2017:376 (last accessed 26 April 2021).

policy (CCP), which is an exclusive competence of the EU, the question remained as to whether non-direct investment and ISDS fell within EU exclusive competence as well.

The Court noted that non-direct foreign investment may involve the acquisition of company securities with the intention of making a financial investment, without any intention to influence the management and control of the undertaking (also called 'portfolio' investments). This category of investment may also include a similar type of investment in real-estate or the provision of loans, and these may, like acquisition of company securities, only involve capital movements or payments. Such investments within the EU would normally fall under Article 63 TFEU, which would be in the exclusive competency of the EU. However, as the free movement of capital and payments is not formally binding on third states, it could not be guaranteed in the absence an international agreement putting it into effect. The ability to make agreements for this purpose forms one of the objectives of Title IV ('Free movement of persons, services and capital') of Part Three ('Union policies and internal actions') of the TFEU, which in turn is a shared competence pursuant to Article 4(2)(a) TFEU.

With regard to ISDS, the Court highlighted that under Article 9.15 of EUSFTA, not just the EU, but the individual Member States of the EU may be made respondents to an investor dispute. In the absence of an amicable resolution, the aggrieved investor has the discretion to take the dispute to a national court of the relevant Member State. However, this decision rests with the plaintiff, who may also decide to refer the dispute to arbitration, effectively removing the dispute from the jurisdiction of the courts of the Member State. The Court concluded that such a regime cannot be established without the consent of the Member States, making it a shared competence.

Therefore, the Court of Justice found that although the EU had exclusive competence over most of the provisions in EUSFTA, it only had shared competence over non-direct investment and the ISDS provisions. This shared competence meant that the agreement required the acquiescence of all Member States before it could fully come into force.

### Case C-284/16: The Slovak Republic v Achmea BV

The 6 March 2018 Court of Justice judgment in the case of *The Slovak Republic v Achmea BV*<sup>27</sup> followed a request for a preliminary ruling on the interpretation of Articles 18, 267 and 344 TFEU with regard to a bilateral investment treaty (BIT) concluded in 1991, between the Netherlands and the then Czech and Slovak Federative Republic, prior to the accession of the latter two states to the EU. Article 8(2) of the BIT provided for disputes that could not be resolved amicably to be submitted to an arbitral tribunal.

The specific dispute arose as a result of Slovak reforms to its health insurance sector. Achmea BV, a Dutch health insurance provider, relying on the provisions of the BIT, claimed that the company sustained damages as a result of the reforms. Frankfurt am Main (Germany) was chosen as the place of arbitration and the proceedings were taken to be governed by German law.

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<sup>27</sup> [Slovak Republic v Achmea BV](#) (Case C-284/16) ECLI:EU:C:2018:158 (last accessed 26 April 2021).

In the arbitration proceedings, the Slovak Republic raised an objection. It claimed that the arbitration tribunal could not determine the dispute for want of jurisdiction, as Article 8(2) of the BIT was incompatible with EU law (Articles 18 (prohibition of discrimination on grounds of nationality within the EU), 267 (the CJEU has jurisdiction to interpret treaties) and 344 TFEU (prohibition on submitting a dispute concerning the interpretation or application of treaties to any other judicial body)).

The Court found that Article 8(2) of the BIT was incompatible with Articles 267 and 344 TFEU (departing from the opinion of Advocate General Wathelet).

In its judgment, it cited long standing case law that an international agreement cannot affect the allocation of powers under the EU Treaties and the autonomy of the EU legal system, arguing that there was a need to ensure the autonomy of EU law.

The Court concluded that the arbitral tribunal was neither:

- an EU body;
- a national court or tribunal of a Member State; nor
- a court common to several Member States, such as the Benelux Court of Justice.

Furthermore, a determination of the arbitral tribunal was not subject to review by a court of a Member State to an extent that may allow a reference to the CJEU on issues of EU law. Therefore, the arbitral tribunal established by the BIT could not ensure that disputes were solved in a manner that safeguarded the full effectiveness of EU law. This also called into question the principle of mutual trust between Member States, making it incompatible with Articles 267 and 344 TFEU.

## Opinion 1/17: Chapter 8 of CETA

Opinion 1/17<sup>28</sup> of the Court of Justice looked at the compatibility of the proposed investor-state dispute resolution mechanism in CETA with EU Treaties, including the Charter of Fundamental Rights. The reference to the Court followed the rejection of CETA by one of Belgium's constituent regions, Wallonia.

Under Belgian law, it was not possible for the Belgian government to consent to a trade agreement until all five of its regional governments gave their agreement. As provided for by Article 218(1) TFEU, the Belgian government requested a ruling from the Court of Justice on whether the dispute settlement provisions of CETA regarding the protection of investments (Section F of Chapter 8) are compatible with EU law.

The Court held that the dispute settlement mechanism in CETA is compatible with EU law and complies with:

- (i) the principle of autonomy of EU law and the exclusive jurisdiction of the CJEU for the interpretation of EU law,
- (ii) the principle of equal treatment before the law and effectiveness,

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<sup>28</sup> [Opinion 1/17](#) ECLI:EU:C:2019:341 (last accessed 26 April 2021).

- (iii) the Charter of Fundamental Rights, in particular [Article 47](#) covering the right of access to a court and right to an independent and impartial tribunal under the Charter.

The Opinion of the Court of Justice effectively allowed Member States to proceed with domestic ratification, according to the requirements of their national law. The following section will look at the decision under these three heads, while the debate on these issues is examined later in this paper.

### Autonomy of the EU legal order

On the compatibility of the envisaged dispute settlement mechanism with the autonomy of the EU legal order, the Kingdom of Belgium recalled the position of the Court in Opinion 1/09, where the Court ruled that such an incompatibility exists where an international court or tribunal established by international agreement that is binding on the EU may be called to interpret EU law.<sup>29</sup>

In considering the issue of the autonomy of the EU legal order, the Court observed that the proposed CETA Tribunal and its Appellate Tribunal (together referred to as the Investor Court System (ICS)) would not form part of the judicial system of the Parties to the agreement. The Court stated that in order to determine if this mechanism is compatible with the autonomy of EU law, it must be satisfied that Section F of Chapter 8 of CETA:

- would not confer any power to interpret or apply EU law other than the power to interpret and apply the provisions of that agreement having regard to the application rules and principles of international law between the Parties; and
- would not structure the powers of those tribunals in such a way that ... they may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.<sup>30</sup>

In considering Articles 8.31.1 and 8.31.2 of CETA, the Court held that the power to interpret and apply as conferred on the CETA Tribunal is confined only to the provisions of CETA and this must be undertaken in accordance with the rules and principles of international law applicable between the parties.<sup>31</sup>

Article 8.31.2 of CETA provides that if the CETA Tribunal considers domestic law, it must consider domestic law as a matter of fact and follow the prevailing interpretation to the domestic law by the courts or authorities of that party, which shall not be bound by any meaning given to domestic law by the CETA Tribunal. The Court observed that, due to these provisions, this 'examination' cannot be classified as an 'interpretation'.<sup>32</sup> It also added that the exclusive jurisdiction of the CJEU to give rulings on the division of powers between the EU and the Member States is preserved, as Article

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<sup>29</sup> In Opinion 1/09, this included provisions of primary and secondary EU law, general principles of EU law or fundamental rights of EU law.

<sup>30</sup> [Opinion 1/17](#) ECLI:EU:C:2019:341 at [119] (last accessed 26 April 2021).

<sup>31</sup> Ibid at [122].

<sup>32</sup> Ibid at [131].

8.21 of CETA provides that the EU gets to choose the respondent to an investor dispute; the EU determines if a dispute is brought against the EU or one or more Member State(s).<sup>33</sup>

The Court also differentiated the case of CETA from the circumstances of Opinion 1/09 (the unified patent litigation system), where it had ruled that the proposed patent court would be incompatible with EU law as it would have had the power to interpret and apply not just the agreement in question, but also future EU legislation. This, according to the Court, would have “altered the essential character of the powers that the Treaties confer on the EU institutions and on the Member States”.<sup>34</sup>

Some governments made submissions that the proposed CETA Tribunal might skew the balance between the freedom to conduct business and public interests. This includes weighing up public interests to determine if a measure is ‘fair and equitable’, if a measure constitutes indirect expropriation or if a measure is an unjustified restriction on the freedom to make payments and transfers of capital.<sup>35</sup> The Court considered the possibility of the jurisdiction of the Tribunal being structured in such a way that, in the course of making findings on restrictions on the freedom to conduct business, it calls into question the level of protection of the public interest that led to the introduction of those restrictions with respect to all investors in a particular sector. This, the Court observed, could result in that level of protection being abandoned, thereby avoiding the payment of damages on a repeated basis to a claimant investor. The Court held that the consequence of having to amend or withdraw legislation would undermine the capacity of the EU to operate autonomously within its own constitutional framework.<sup>36</sup>

The Court also found that various ‘safeguards’ were included in the text of CETA, relating to the provisions on the right to regulate and fair and equitable treatment, and the subsequent interpretation of CETA that came in the form of the Joint Interpretative Instrument.<sup>37</sup> It further observed that by expressly restricting the scope of Sections C and D of Chapter 8 of CETA (by enshrining the ‘right to regulate’), the Parties have:

“... have taken care to ensure that those tribunals have no jurisdiction to call into question the choices democratically made within a Party relating 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, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights.”<sup>38</sup>

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<sup>33</sup> Ibid at [132].

<sup>34</sup> Ibid at [123] – [125].

<sup>35</sup> Ibid at [137] – [138].

<sup>36</sup> Ibid at [148] – [150].

<sup>37</sup> Ibid at [151] – [159].

<sup>38</sup> Ibid at [160].



### Equal treatment before the law and effectiveness

The Kingdom of Belgium expressed doubts on the compatibility of the ICS with the principle of equal treatment before the law, noting that under the agreement a Canadian enterprise may bring a dispute to the CETA Tribunal against an EU Member State, but an EU enterprise could not. A further issue was noted, associated with locally-established enterprises, enterprises established in the EU and owned or controlled by the investor. Belgium also expressed doubts about CETA's compatibility with EU competition rules, where bringing an action before the CETA Tribunal would enable an investor to evade a fine levied for a breach of competition and state aid rules.

In addressing these issues, the Court observed that Canadian enterprises and natural persons that invest in the EU are in a comparable situation to EU enterprises and natural persons that invest in Canada, but not in a comparable situation to EU enterprises and natural persons that invest in the EU – as those enterprises are subject to EU law. In considering the issue of locally-established enterprises, the Court found that such enterprises are a type of investment, and Article 8.39.2(a) of CETA provides that any award made by the Tribunal would have to be paid to the enterprise within the EU that the investor owns or controls.<sup>39</sup>

The Court further considered the application of the ICS to cases where an award is made to a Canadian investor in respect of a fine issued for the breach of competition rules. It noted (at paragraph 185) that such an award “is conceivable solely in a scenario where the decision imposing the fine were to be vitiated by one of the defects specified in Article 8.10.2” or if the decision imposing the fine deprived the investor of the fundamental attributes of the property within the meaning of point 1(b) to Annex 8-A to CETA (covering indirect expropriation).<sup>40</sup> It went on to hold that while this only conceivable circumstance for an award by the CETA Tribunal would have the effect of cancelling out the effects of a fine, the award would not create a situation of unequal treatment to the disadvantage of an EU investor on which a similar fine was imposed.<sup>41</sup>

### Access to an independent tribunal

The Kingdom of Belgium raised five concerns in relation to the right to access an independent tribunal. It noted that the costs of proceedings and bearing of costs by the unsuccessful party, as well as CETA not currently offering the possibility to grant legal aid, may make it excessively difficult for small and medium enterprises to access the Tribunal. It also raised concerns in relation to the remuneration of Members of the Tribunal, their appointment, their removal and the rules of ethics with which Members of the Tribunal would have to comply.

With regard to the issue of accessibility, the Court stated that it is apparent from Articles 8.1 and 8.18 of CETA that the aim of the agreement is to ensure the CETA Tribunal is accessible to any enterprise or natural person of one Party that invests in the other.<sup>42</sup> It also noted that Article 8.39.6 of the agreement states that it will be a task for the CETA Joint Committee to consider

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<sup>39</sup> Ibid at [182] – [183].

<sup>40</sup> Ibid at [185].

<sup>41</sup> Ibid at [186].

<sup>42</sup> Ibid at [205].



supplemental rules aimed at reducing the financial burden of claimants who are natural persons or SMEs. These costs, according to the Court, may include the costs associated with legal representation and the costs of the proceedings; there is also provision for having a case heard by one member of the Tribunal (Article 8.27.9 of CETA) if the respondent agrees.<sup>43</sup>

The Court acknowledged mechanisms within CETA to reduce potential costs, such as allowing the retainer fee and other expenses of judges to be transformed into a salary. It also noted the commitment made by the Commission and Council in Statement No 36 to “ensure the accessibility of envisaged tribunals to small and medium enterprises”, holding that the agreement is an “agreement envisaged” within the meaning of Article 218(11) TFEU.<sup>44</sup>

The Court found that neither the appointment nor removal of any member of the ICS will be subject to conditions other than those laid down in, *inter alia*, Article 8.27.4 and Article 8.30.1 of CETA. It also addressed concerns in relation to the independence of ICS members, noting that Article 8.30.1 states that members “shall not be affiliated with any government”.<sup>45</sup>

Finally, the Court held that while Article 8.30 contains a general prohibition on a direct or indirect conflict of interest, including rules of ethics in relation to outside activities, the Committee of Services and Investment is empowered to make ‘supplemental’ rules in this regard.<sup>46</sup> It determined that the use of the word ‘supplemental’ ensures that the Committee is not empowered to diminish the effect of the prohibition on the conflict of interest contained in the agreement.

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<sup>43</sup> Ibid at [207] – [212].

<sup>44</sup> Ibid at [216] – [219]. Statement No 36 is included in [Statements to be entered in the Council minutes](#), OJ L 11, 14.1.2017, pp 9-22, at p. 20 (last accessed 27 April 2021).

<sup>45</sup> Ibid at [240]. In this regard, the Court cited the example of a law professor.

<sup>46</sup> The Committee on Services and Investment is a specialised committee of the CETA Joint Committee. It is co-chaired by representatives of Canada and the EU – see further below.

## Ratification by Dáil Éireann

The involvement of Dáil Éireann in the ratification of international agreements is set out in Article 29.5 of Bunreacht na hÉireann. Article 29.5.1 requires that every international agreement to which the State becomes a party shall be laid before Dáil Éireann. However, as per *Hutchinson v Minister for Justice*, an agreement does not have to be laid before Dáil Éireann until it is ratified by the government of the day.<sup>47</sup>

Article 29.5.2 of Bunreacht na hÉireann states that “[t]he State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann”. Article 29.5.3 however stipulates that the section shall not apply to agreements or conventions of a technical and administrative character.

In *State (Gilliland) v Mountjoy Prison*, the Supreme Court identified three classifications of international agreement:

1. An agreement of convention of a technical and administrative character which does not have to be laid before the Dáil and whose terms do not require the approval of Dáil Éireann<sup>48</sup>;
2. An international agreement involving a charge upon public funds, by which the State shall not be bound unless the terms of the agreement have been approved by Dáil Éireann; and
3. An international agreement falling into neither of the aforementioned categories, which must be laid before the Dáil, but the terms of which need not be approved by Dáil Éireann.<sup>49</sup>

In a Parliamentary Question answered on 19 November 2019, the then Minister for Business, Enterprise and Innovation, Heather Humphreys TD, confirmed that following the necessary steps, she would “submit a Memorandum to Government requesting the Government to authorise the moving of a motion in Dáil Éireann (in accordance with Article 29.5.2 of the Constitution), seeking approval on the terms of the Agreement”.<sup>50</sup> It therefore appears that the government has acknowledged that CETA falls into the second category identified by the Supreme Court, requiring the approval of Dáil Éireann.

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<sup>47</sup> *Hutchinson v Minister for Justice* [1993] 3 IR 567 at 571.

<sup>48</sup> Gerard Hogan et al, *JM Kelly: The Irish Constitution*, 5<sup>th</sup> ed. Bloomsbury, 2018 at [5.3.120], where the authors note that this is apparently irrespective of whether the agreement or convention involves a charge on public funds. They also note at fn. 264 that the Constitutional Review Group proposed amending Article 29.5.3 to require Dáil approval for such agreements involving public funds, while the Oireachtas All-Party Committee on the Constitution recommended the deletion of Article 29.5.3.

<sup>49</sup> *State (Gilliland) v Mountjoy Prison* [1987] IR 201. See also Gerard Hogan et al, *JM Kelly: The Irish Constitution*, 5<sup>th</sup> ed. Bloomsbury, 2018 at [5.3.120].

<sup>50</sup> Heather Humphreys T.D., Minister for Business, Enterprise and Innovation, [Response to Parliamentary Question No 295 on the Comprehensive Economic and Trade Agreement](#), *Dáil Éireann Debate*, 19 November 2019.

## Chapter 8 of CETA

This section will examine Chapter 8 of CETA, dealing with investment. Most of the provisions that fall to be ratified by Member States are found in this chapter, including the investment dispute resolution mechanism (the Investment Court System (or ICS)).

### Section A – Definitions and scope

**Article 8.1** of CETA contains definitions on what is an investment and an investor:

- **Investment:** Every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. A list of the forms an investment may take are set out in this provision.
- **Investor:** A Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party.

Furthermore, the same article expands on what is meant by a natural person and an enterprise:

- **Natural person:** In the case of Canada, a natural person who is a citizen or permanent resident of Canada. In the case of the EU Party, a natural person having the nationality of one of the Member States of the EU according to their respective laws.

In the case of Latvia, the term natural person also includes a natural person who permanently resides in Latvia and holds a non-citizen's passport. It is further clarified that a natural person who has the nationality of one Party, but is a permanent resident in the other Party, is deemed to be exclusively a natural person of the Party of their nationality or citizenship.

- **Enterprise:** There are two definitions of an enterprise under Article 8.1:
  - One that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party;
  - One that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise meeting the first definition above.

There is also a definition for a **locally established enterprise**, which means:

“... a juridical person that is constituted or organised under the laws of the respondent and that an investor of the other Party owns or controls directly or indirectly”

The EPRS observes that the first definition of an enterprise above only requires ‘substantial business activities’ in the geographical area of that Party. This would allow an enterprise that not is owned and controlled by a Canadian or European natural or legal person to bring a claim under Chapter 8 – it need only be incorporated under the laws of a Party and have substantial business

activity in that State.<sup>51</sup> In contrast, the definition of locally established enterprise drops the requirement of ‘substantial business activity’, but requires that the enterprise is directly or indirectly owned or controlled by a natural person as defined by Article 8.1.<sup>52</sup>

The purpose for the inclusion of the term ‘substantial business activity’, according to the EPRS, is to prevent letter-box companies<sup>53</sup> owned by third-country nationals from obtaining the right to make legal claims under CETA. Additionally, it notes that in most treaties, it is used as a requirement for the State to exercise its right to denial of benefits.<sup>54</sup>

It has been argued by civil society groups such as Public Citizen that many US corporations with subsidiaries in Canada may be able to rely on the provisions under Chapter 8 of CETA. According to recent estimates, 81% of US enterprises active in the EU (about 42,000 firms) could fit the definition of a Canadian ‘investor’.<sup>55</sup>

**Article 8.2** does limit the scope of the investment provisions. A ‘carve out’ is granted to:

- services supplied in the exercise of governmental authority (public service carve-out);
- audio-visual services for the EU;
- cultural industries for Canada;
- public procurement;
- subsidies or other government support provided for services and investments; and
- air services, related services in support of air services and other services supplied by means of air transport (with some exceptions).<sup>56</sup>

**Article 8.3** provides that any investments are not covered by Chapter 8 if they are covered under Chapter 13 on Financial Services.

## Section B – Establishment of investments

**Article 8.4** provides for greater market access. It would prohibit the imposition of certain restrictions that may act to limit the capacity of an investor to establish an investment. Specifically, the Parties could not restrict:

- the number of enterprises that may carry out an economic activity;
- the total value of transactions or assets;

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<sup>51</sup> Laura Puccio and Roderick Harte, [From arbitration to the investment court system \(ICS\)](#), European Parliamentary Research Service, PE 607.251, June 2017, at p. 23 (last accessed 27 April 2021).

<sup>52</sup> Ibid at p. 23.

<sup>53</sup> A letter-box company refers to a company registered in one jurisdiction, but its substantial economic activity is carried out in another.

<sup>54</sup> Ibid at p. 24.

<sup>55</sup> PowerShift and The Canadian Centre for Policy Alternatives (CCPA), (2016) [Making Sense of CETA: An analysis of the final text of the Canada–European Union Comprehensive Economic and Trade Agreement](#) (2<sup>nd</sup> ed.) , p. 14 (last accessed 27 April 2021).

<sup>56</sup> See Article 8.2 CETA and Laura Puccio, Wilhelm Schöllmann and Giulio Sabbati, [CETA and Public Services](#), European Parliamentary Research Service, PE 599.268, February 2017, at p. 6 (last accessed 27 April 2021).

- the number of operations or the total quantity of output;
- the number of individuals that may be employed in a particular sector; or
- the type of legal entity or joint venture through which an enterprise may carry out its activity.

The prohibition would not extend to:

- zoning and planning regulations affecting the development or use of land;
- specified measures put in place to ensure fair competition;
- laws targeted at conservation and protection of natural resources and the environment;
- limitations on the number of authorisations to be granted due to technical or physical constraints; and
- professional qualification requirements.

**Article 8.5** would prohibit the Parties from imposing certain performance requirements that would have the effect of distorting trade. For example, requiring local content, or restricting the volume or value of an enterprise's imports to the volume or value of its exports. Moreover, the prohibited performance requirements could not be set as conditions for receiving subsidies or other government incentives.

A Party could make a condition for the receipt or continued receipt of a subsidy, in connection with an investment in its territory, contingent upon compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development in its territory. Moreover, the prohibitions would not apply to:

- acts of public procurement (where it is not conducted with a view to commercial resale); and
- acts mandated by a court, administrative tribunal or competition authority, to remedy a violation of competition laws.

Also, certain prohibitions would not apply to requirements for a good or service with respect to participation in export promotion and foreign aid programs and to requirements imposed by an importing Party relating to the content of a good necessary to qualify for preferential tariffs or preferential quotas.

## Section C – Non-discriminatory treatment

**Article 8.6** would require a Party to treat the other Party's investors and investments no less favourably than the most favourably-treated domestic investor or investment, in the same situation. This means that governments (and state institutions) could not unfairly discriminate against foreign investors in the application of their laws and regulations.

**Article 8.7** would give the investors from the other Party 'most-favoured-nation' (MFN) treatment. It obliges the Parties to provide each other's investors and their investments with treatment and protections no less favourable than those granted to investors from a third country in like situations, ensuring that those investors may benefit from any preferable treatment granted to a third-country investor. An exception exists for accreditation of certain services and service suppliers, and the certification of qualifications of or work done by those service suppliers.

**Article 8.8** is a short provision prohibiting a Party from requiring an enterprise taking the form of a covered investment from having to appoint natural persons of any particular nationality to senior management or board of director positions.

## Section D – Investment protection

### Right to regulate

**Article 8.9** affirms the rights of the Parties to regulate within their territories to achieve legitimate policy objectives. These include public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. Articles 8.9.2 to 8.9.4 set out circumstances which do not amount to, or are not to be construed as, a breach of the provisions of Section D of Chapter 8 of CETA.<sup>57</sup>

### Right to fair and equitable treatment

**Article 8.10** provides that each Party must provide fair and equitable treatment to covered investments of the other Party and to investors with respect to their covered investments. Article 8.10.2 provides a Party breaches this obligation if a measure or a series of measures constitutes one of the following:

- (a) denial of justice in criminal, civil or administrative proceedings;
- (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
- (c) manifest arbitrariness;
- (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- (e) abusive treatment of investors, such as coercion, duress and harassment; or
- (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article. (Paragraph 3 provides for the review of the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may also develop recommendations in this regard and submit them to the CETA Joint Committee for decision.)

Article 8.10.4 provides that in the case of a dispute the CETA Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that

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<sup>57</sup> Article 8.9.2. states that the ‘the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section’.

Article 8.9.4. states that “nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement where such measure is necessary in order to comply with international obligations between the Parties or has been ordered by a competent court, administrative tribunal or other competent authority<sup>10</sup>, or requiring that Party to compensate the investor therefor”.

created a legitimate expectation, and upon which the investor relied upon that representation when deciding to make the investment, but that the Party subsequently frustrated.

### Equal compensation

**Article 8.11** requires each Party to afford the same levels of compensation to investors of the other Party as it would afford to domestic investors (or third-country investors, whichever is more favourable) for losses suffered as a result of armed conflict, civil strife, a state of emergency or natural disaster within its territory.

### Expropriation

**Article 8.12** relates to expropriation and provides that a Party shall not nationalise or expropriate a covered investment directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation, apart from an exception where the expropriation must include four elements:

- (a) for a public purpose;
- (b) under due process of law;
- (c) in a non-discriminatory manner; and
- (d) on payment of prompt, adequate and effective compensation.

Article 8.12 also provides that compensation be at the fair market value and include interest at a normal commercial rate. An affected investor also has the right under the law of the expropriating party to a prompt review of its claim and of the valuation of its investment by a judicial or other independent authority of that Party, in accordance with the principles set out in the Article.

**Annex 8-A** to CETA outlines what is considered direct and indirect expropriation. Point 3 of the Annex states:

“For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, **do not** constitute indirect expropriations.” (Emphasis added)

### Transfers

**Article 8.13** sets out rules applicable to transfers relating to a covered investment, requiring that each Party shall permit such transfers without restriction or delay, in a freely convertible currency and at the market rate of exchange on the date of the transfer. It also provides that a Party cannot require its investors to transfer, or penalise its investors for failing to transfer, the income, earnings, profits, or other amounts derived from, or attributed to, investments in the territory of the other Party. It also clarifies that nothing in Article 8.13 shall be construed to prevent a Party from applying its laws to certain policy areas in an equitable and non-discriminatory manner and not in a way that would constitute a disguised restriction on transfers.



## Subrogation

**Article 8.14** confirms the right of a Party or an agency of the Party that makes a payment under an indemnity, guarantee or contract of insurance entered into in respect of an investment made by one of its investors, to legally pursue the matter with a mind to recovering any loss incurred.

## Section E – Reservations and exceptions

**Article 8.15** allows the Parties to exclude measures listed in Annexes I and II from certain obligations of the investment chapter, as well as to maintain future policy flexibility in key areas.

**Annex I** lists the specific measures that are exceptions to the specified investment chapter obligations. **Annex II** sets out areas where the Parties wish to preserve policy flexibility for existing and future measures that might not conform to the investment chapter obligations.

**Article 8.16** allows a Party to deny benefits to an investor (and their investments) on grounds of international peace and security and the need to uphold international financial sanctions. The relevant investor would need to be an enterprise owned or controlled by an investor of a third country that is subject to sanctions.

**Article 8.17** provides that a Party may require an investor (or covered investment) to provide routine information concerning the investment, solely for informational or statistical purposes, provided that any request is reasonable and not unduly burdensome. The Party must ensure any confidential or protected information is not disclosed in a manner that could prejudice the competitive position of the investor or the covered investment.

## Section F – Resolution of investment disputes between investors and states

Section F of Chapter 8 sets out the mechanism for the resolution of investment disputes. The mechanism provides investors with recourse to compensation when there is evidence that a Party has acted in breach of its obligations and an investor has suffered financial loss as a result.

This part of the paper will be limited to a broad description of the dispute resolution process. This section does not purport to provide a detailed description of the provisions linked to the investor dispute resolution mechanism. A more in-depth discussion of the provisions will be provided in later sections of this paper.

**Article 8.18** sets out the scope for dispute resolution under Section F. It states that without prejudice to the rights and obligations of the Parties, an investor of a Party may submit two types of claim to the Tribunal constituted by Section F of Chapter 8, where the investor claims to have suffered loss or damage as a result of the alleged breach. These are claims under:

- 1) Section C (non-discriminatory treatment), with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment; or
- 2) Section D (investment protection).

It also provides that a Tribunal constituted under Section F shall not decide claims that fall outside this scope.

## Consultations and mediation

**Article 8.19** provides that an investment dispute “should as far as possible be settled amicably”. An aggrieved party must make a formal request for consultation before resorting to arbitration. This request must generally be submitted no later than three years after the investor has acquired knowledge of the alleged breach of obligations. However, this period is limited to two years from the date proceedings have ended in domestic courts or tribunals. Where the claim is sitting in the domestic system, but the processes have not concluded, the request for consultations may be made up to 10 years after the date the investor became aware of the potential breach.

**Article 8.20** provides that the disputing parties may at any time agree to have recourse to mediation. The provision confirms that recourse to mediation is without prejudice to the legal position or rights of a disputing party. Where mediation is attempted, the clock (as it affects other provisions) is deemed to be suspended for the period in which mediation is ongoing.

**Article 8.21** provides the method by which the respondent to the dispute is determined.

## Procedural and other requirements for the submission of a claim to the Tribunal

Under **Article 8.22**, an investor must satisfy certain conditions before a claim may be submitted to arbitration. For example, the investor must allow 180 days to pass from the date a formal request for consultations was made, the investor must formally consent to arbitration and to the formalities outlined in Section F, and the investor must fulfil any formal notice requirements. The investor must also withdraw from any proceedings in other domestic or international courts or tribunals relating to the same dispute and waive its right to initiate such proceedings in the future. The measures pursued in the arbitration claim must strictly align with those included in the formal request for consultation.

**Article 8.23** provides only investors of a Party may submit a claim in arbitration. Article 8.23.2 provides that a claim may be made subject to subject to the following rules:

- a) The [ICSID Convention and Rules of Procedure for Arbitration Proceedings](#);
- b) The [ICSID Additional Facility Rules](#), where the conditions under option (a) do not apply (this is required to satisfy the conditions of Article 25.1 of the ICSID Convention);
- c) The [UNCITRAL Arbitration Rules](#); or
- d) Any other rules on agreement of the disputing parties.

If chosen by the investor, the ICSID rules can be considered residual rules covering matters not covered in the provisions of CETA. Articles 36 to 55 of the ICSID Convention are available [here](#). The procedural requirements regarding the submission to the Tribunal are set out in Article 8.22. However, it should also be noted that there are specific requirements for financial services – see Article 13.21 of CETA.

Article 8.23.7 provides that a claim is considered to have been submitted for dispute settlement under Section F when the request is submitted in accordance with the relevant procedural rules as agreed by the parties. Therefore, if the agreed procedure is that of the ICSID Convention a claim is considered to be submitted upon receipt of a request under **Article 36.1 of the ICSID Convention** by the Secretary-General of ICSID. Alternatively, if the agreed procedure is the Additional Facility,

a claim is taken to be made upon receipt of a request under Article 2 of Schedule C of the ICSID Additional Facility by the Secretary General of ICSID. A claim could also be submitted via a notice under Article 3 of the UNCITRAL Rules or by another mechanism as agreed between the parties. Under **Article 8.25** the respondent must consent to the settlement of the dispute by the Tribunal in accordance with the specified procedures.

**Article 8.24** covers situations where there a claim is brought both under Section F and under the provisions of another international agreement. The links between CETA and other Conventions will be looked at in more detail below.

**Article 8.25** again borrows the procedure from other agreements. The article provides that the respondent to the dispute is considered to have consented to a the settlement of the dispute by the Tribunal if that consent, and the submission of the claim, is completed in a manner that satisfies the requirements of Article 25 of the ICSID Convention and Chapter II of the ICSID Additional Facility Rules regarding written consent, and Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) for an agreement in writing.

**Article 8.26** requires parties to the dispute in receipt of third-party funding to disclose the nature of the funding to the other party to the dispute and to the arbitration tribunal.

## The Tribunal

**Article 8.27** provides for the establishment of a permanent arbitration tribunal (the Tribunal). The Tribunal is initially composed of 15 Members appointed by the CETA Joint Committee: five nationals of Canada, five nationals of the Member States of the EU, and five nationals of third countries. These numbers may be proportionately increased or decreased in multiples of three by the Joint Committee. Members must be qualified to hold a judicial office or be jurists of recognised competence, and they must be able to demonstrate expertise in public international law. Members are generally appointed for a five-year term. They are paid a monthly retainer fee and they are expected to make themselves available when called on. The Article provides for the determination of Member's fees and expenses and for the transformation of these costs into a regular salary by the CETA Joint Committee.

Matters would be heard before divisions of the Tribunal, each comprising three Members (one from Canada, one from an EU country and one from a third country), selected by the President of the Tribunal on a rotation basis, ensuring that the composition of the divisions is random and unpredictable. Alternatively, the disputing parties may agree that a case be heard by a sole Member of the Tribunal, appointed at random from the third country Members.

## The Appellate Tribunal

**Article 8.28** establishes an Appellate Tribunal which may, on specific grounds, uphold, modify or reverse awards issued by the Tribunal, based on errors in law and manifest errors in fact. It follows that the hearing envisaged is not quite a hearing *de novo*, but it is very similar. The Appellate Tribunal only comes into operation after the administrative and organisational matters regarding its functioning are formally determined by the CETA Joint Committee. After this, the Members of the Appellate Tribunal are to be appointed by the Joint Committee. As with the Tribunal, the Appellate Tribunal must hear matters in divisions, consisting of three randomly appointed Members (one

from Canada, one from the EU and one from a third country). The Committee on Services and Investment is given the job of monitoring the Appellate Tribunal periodically and reporting to the Joint Committee. A final award made by the Appellate Tribunal is binding.

**Article 8.29** sets out the long-term objective of establishing a multilateral investment tribunal and appellate mechanism. It also requires, once this is achieved, that the CETA Joint Committee adopts a decision providing for investment disputes under the ICS to be decided by the multilateral mechanism and makes appropriate transitional arrangements.

### Ethics and removal of Members

Under **Article 8.30**, Members of both Tribunals are bound on ethics that require them:

- to be independent and not affiliated to governments;
- not to take instructions from organisations or governments on matters related to the dispute;
- not to participate in consideration of any disputes that would create a direct or indirect conflict of interest; and
- to comply with the International Bar Association *Guidelines on Conflicts of Interest in International Arbitration* and any additional rules adopted under Article 8.44.2 of CETA.

Members are also prohibited from acting as counsel or experts in any investment dispute arising from CETA. A party to a dispute may request the President of the International Court of Justice to determine whether a Member holds a conflict of interest in a case. Where a challenge is made, it may result in disqualification or resignation of the Member. Where a Member's behaviour is found to be inconsistent with their obligations and incompatible with membership of the Tribunal, the Member may be removed by the Joint Committee, upon a reasoned recommendation of the President of the Tribunal or the joint initiative of the Parties.

### Applicable law and interpretation

Under **Article 8.31**, the Tribunal must interpret the provisions of CETA in accordance with the [Vienna Convention on the Law of Treaties](#). Article 31 of the Vienna Convention requires a treaty to be interpreted in good faith, in accordance with the ordinary meaning of the terms of the treaty, and in light of the object and purpose of the treaty. The treaty comprises other instruments made in connection with the treaty and any recognised practice in the application of the treaty. Preparatory work of the treaty and the circumstances of its conclusion may provide a supplemental means of interpretation where deemed necessary (where the primary means of interpretation leave matters ambiguous or obscure, or where they lead to a result that is manifestly absurd or unreasonable).

The Tribunal does not have jurisdiction to determine legality of a measure under domestic law and the decisions of the Tribunal are not binding on domestic courts. Instead, the Tribunal **may** consider, as appropriate, the domestic law of a Party as a matter of fact. When it does use domestic law, it must follow the prevailing domestic interpretation given to the law by the courts or authorities.

### Expedited dismissal of claims

Under **Articles 8.32** and **8.33** the respondent to the claim may raise an objection to the Tribunal that the claim is manifestly without legal merit, or unfounded as a matter of law. Where an objection is raised, and the Tribunal agrees, after hearing from the parties on the matter, the Tribunal may dismiss the claim or part of the claim in an expedited manner. In both scenarios, the Tribunal must assume the alleged facts to be true. Also, under **Article 8.35** an investor who has submitted a claim and has been inactive for a continuous period of six months is deemed to have withdrawn its claim from arbitration.

**Article 8.34** provides for interim measures of protection that may be ordered by the Tribunal. This includes orders to preserve the rights of a disputing party or ensure that the Tribunal's jurisdiction is made fully effective, e.g. preserving evidence in possession or control of a disputing party, but does not extend to ordering attachment or ordering a party to refrain from applying a measure alleged to constitute a breach.

### Structure of actions under the investment dispute resolution process

The structure of an action through the investment dispute resolution mechanism involves three main phases: consultation; arbitration tribunal; and appeal.<sup>58</sup> It should also be noted that under the provisions of CETA, an investor retains the options of mediation and bringing proceedings to the domestic courts. The full process is outlined in Figure 2 below.

### Transparency of proceedings

**Article 8.36** again borrows procedures from other agreements on the transparency of proceedings. It provides that the UNCITRAL Transparency Rules shall apply to proceedings under Section F, setting out rules for the making available of exhibits to the public and for exceptions to those rules, e.g. confidential or protected information. Provision is also made for proceedings to be open to the public. Article 8.36 further stipulates that Chapter 8 does not require a respondent to a claim to withhold any information from the public that is required to be disclosed under its laws.

**Article 8.37** sets out provisions for the sharing of unredacted documents by a disputing party to other persons in connection with proceedings, including witnesses and experts, but requires that party to ensure that confidential or protected information is protected by such persons. It also sets out similar provisions for the disclosure of such information to officials of the EU, Member States of the EU and sub-national governments, as is applicable.

**Article 8.38** covers provisions concerning the Party to CETA that is not the respondent to an investment dispute (non-disputing Party). This includes provision for documents that must be delivered to, or may be requested by, the non-disputing Party. It also makes provision for the non-disputing party to make submissions to the Tribunal on the interpretation of CETA and to attend

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<sup>58</sup> For a detailed summary of the procedure, see Laura Puccio and Roderick Harte, [From arbitration to the investment court system \(ICS\)](#), European Parliamentary Research Service, PE 607.251, June 2017, at pp 17-20 (last accessed 27 April 2021).

hearings. The Tribunal is required to ensure that disputing parties have the opportunity to present observations on the non-disputing Party's submission.

### Final award enforcement

**Article 8.39** sets out the provisions for determining a final award. Such an award may only consist of monetary damages and any applicable interest and/or restitution of property. Where a claim is made by an investor with a locally established enterprise, any monetary damages, applicable interest and restitution of property is paid to the locally established enterprise, while any award of costs is made in favour of the investor. Monetary damages are also limited to the value of the loss suffered by the investor or locally established enterprise (if applicable) and are required to be offset against prior damages or compensation and any restitution of property. The award of punitive damages is expressly prohibited.

Article 8.39 also contains provisions on the calculation of costs, supplementary rules aimed at reducing the financial burden on natural persons and SMEs, and the timeframe for the conclusion of the dispute settlement procedure.

**Article 8.40** expressly prohibits that any indemnification or other compensation, received by an investor or (if applicable) locally established enterprise under an insurance or guarantee contract, may be argued by the respondent, or accepted by the Tribunal, with regard to all or part of the compensation sought in a dispute.

**Article 8.41** sets out the procedure for the enforcement of a **final award**, requiring that an award issued under Section F shall be binding on the disputing parties, and that subject to provisions on the revision, setting aside or annulment of an award, a disputing party must recognise and comply with an award without delay.

However, as regards the above, it is very important to note that since the adoption of the **Appellate Tribunal Decision**<sup>59</sup> by the CETA Joint Committee, the procedure in Article 8.41.3 no longer applies. Article 8.28.9 provides that a disputing party may appeal an award within 90 days after it is issued, but also provides that a disputing party cannot seek review, set aside, annul, revise or initiate any other similar procedure. **Figure 2** below describes the position of the appeal mechanism in the overall ICS structure.

The procedures regarding enforcement are also changed by the adoption of the 2021 decision, and an award is not considered final and no action for its enforcement may be brought until:

- 90 days after the award has been issued by the Tribunal and no appeal has been initiated;
- An initiated appeal has been either rejected or withdrawn; or
- 90 days after an award by the Appellate Tribunal and the Appellate Tribunal has not referred the matter back to the Tribunal.

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<sup>59</sup> This decision was adopted on 29 January 2021 and provides for its entry into force upon the ratification of Chapter 8 of CETA by all Member States. See below for further discussion.



Article 8.28.9 further provides that the final award of the Appellate Tribunal is considered the final award for the purposes of Article 8.41. Article 8.28.9(e) is the specific provision that requires Article 8.41.3 to no longer apply once the Appellate Tribunal Decision is adopted. It would therefore appear that the provisions of 8.41.3 were residual rules in the event that the CETA Joint Committee did not adopt an Appellate Tribunal Decision. This would have had the effect of aligning the rules on review and annulment where the ICSID Convention would have been applicable, as well as placing alternative enforcement provisions in place for other procedural rules.

Article 8.41 makes further provision on the nature of the award as regards the New York and ICSID Conventions. Article 8.41.5 states that an award under Section F is an award deemed to relate to claims arising out of a commercial relationship or transaction under Article 1 of the New York Convention. Article 8.41.6 clarifies that where a claim is brought under the ICSID Convention, the final award shall qualify as an award under Chapter IV, Section 6 of that Convention.

**Article 8.42** clarifies the role of the Parties to CETA, providing that a Party cannot bring a claim against the other Party, unless the latter has failed to abide by and comply with the award in an investor-state dispute. However, this provision does preclude dispute settlement under Chapter 29, which deals with disputes between the EU and Canada on the application or interpretation of CETA. Furthermore, it does not preclude informal exchanges solely aimed at facilitating the settlement of the dispute.

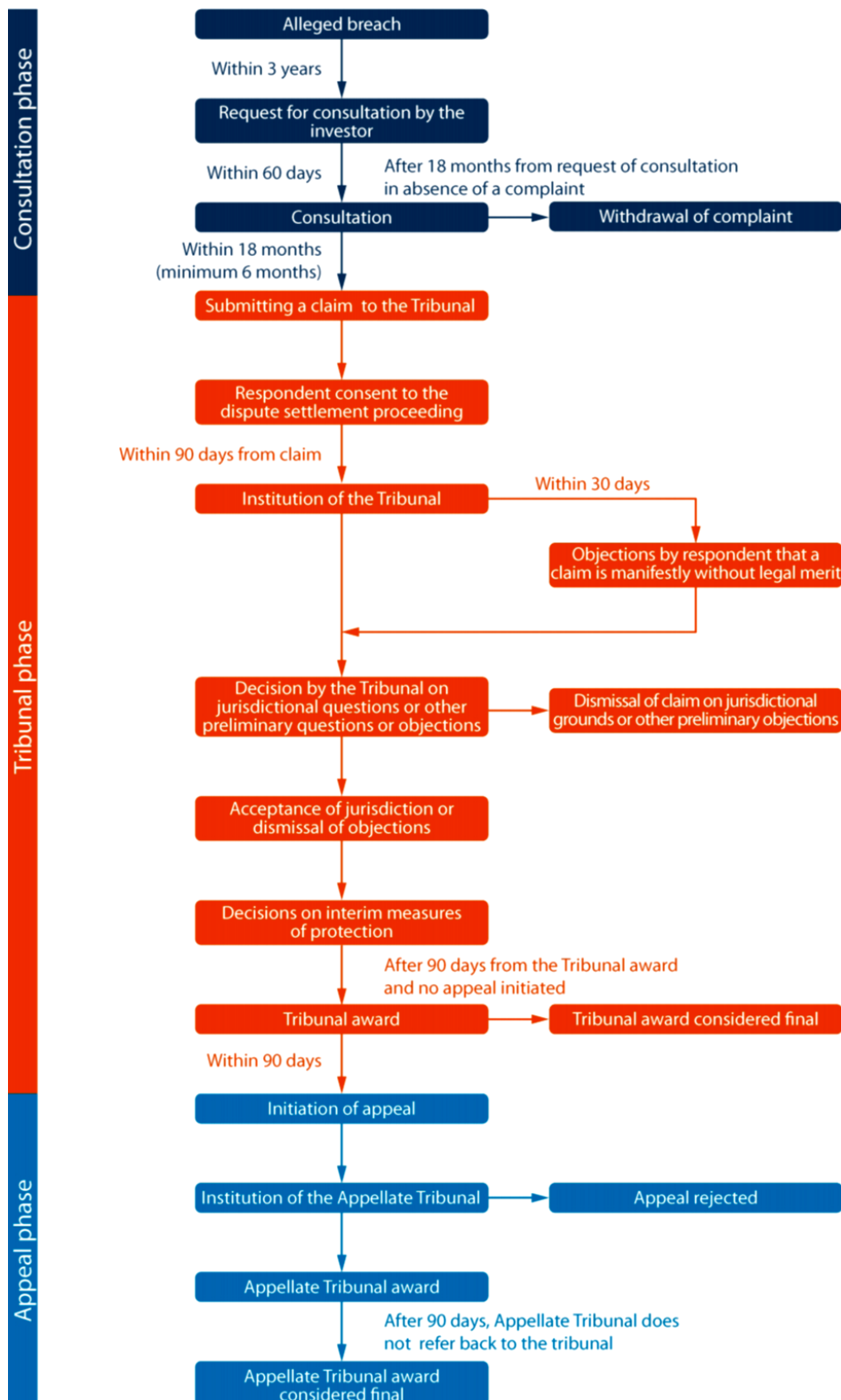
**Article 8.43** provides for the consolidation of claims made to the Tribunal, where there is a question of law or fact in common and arise out of the same events or circumstances. In such cases, a separate division of the Tribunal, called a consolidation division, is established with jurisdiction over the claims as appropriate. Provisions concerning the procedural rules to be followed are also set out.

**Article 8.44** defines the role of the **Committee on Services and Investment**, which is established to provide a forum for the Parties to consult on issues related to Chapter 8, including difficulties that may arise in its implementation, or possible improvements of the Chapter. Under this provision, the Committee has a number of specified roles:

- It is required to adopt a code of conduct for the Tribunal.
- It may make recommendations to the CETA Joint Committee on the adoption of interpretations of the Agreement, the adoption of any further elements to the fair and equitable treatment obligation, and the functioning of the Appellate Tribunal.
- It may adopt and amend rules supplementing the applicable dispute settlement rules and amend the applicable rules on transparency, which are binding on the Tribunal.
- It may also adopt rules for mediation.

**Article 8.45** is a final, procedural provision, which excludes the dispute settlement provisions of Section F of Chapter 8, and of Chapter 29, from applying to [Annex 8-C](#) to the agreement. This excludes decisions on the review of investments under Canadian law from being subject to the dispute settlement mechanisms under CETA.



Figure 2: From consultation to appeal under CETA<sup>60</sup>

Source: EPRS

<sup>60</sup> Laura Puccio and Roderick Harte, *From arbitration to the investment court system (ICS)*, European Parliamentary Research Service, PE 607.251, June 2017, at p. 16 (last accessed 27 April 2021).

## Comparison of International Investment Dispute Resolution Mechanisms

In an answer to a Parliamentary Question on 13 January 2021, the Tánaiste and Minister for Enterprise Trade and Employment, Leo Varadkar T.D., provided an explanation of why dispute resolution provisions are included in international trade (and investment) agreements:

“International trade agreements are not part of domestic law, so this is why separate adjudication arrangements are required in the event of disputes under the Agreement. All international trade agreements have dispute resolution arrangements. Moreover, where such agreements cover investment rules and protections, then there must be a dispute resolution mechanism that covers investments e.g. Investor State Dispute Settlement (ISDS).”<sup>61</sup>

The Tánaiste also highlighted concerns in relation to the ISDS mechanism, including the view of the European Commission that the mechanism is outdated:

“ISDS which has been in existence since the 1950s, enables overseas investors to resolve disputes with the government of the country where their investment is made through binding international arbitration. ISDS has been included in more than 2,000 investment treaties but has proved controversial in recent times and is now regarded as outdated by the European Commission. In this regard, the Irish Government considered the European Commission was right to seek to address the concerns raised by NGOs and others regarding ISDS in seeking to develop a new replacement mechanism – the Investment Court System (ICS) – to address concerns on transparency, legitimacy and public interest - and ICS is the Investment Dispute Settlement system incorporated in CETA.”<sup>62</sup>

According to the European Parliamentary Research Service (EPRS), the ICS is to have the following characteristics:

- it provides a double instance ‘court-like’ system with an appeal mechanism;
- it is actionable only under specific conditions;
- it is composed of publicly appointed judges following transparent proceedings; and
- it is set to address concerns over earlier provisions on investment protection and ISDS.<sup>63</sup>

The European Commission argues that a key innovation in CETA has been the move away from the existing system of ISDS, towards an ICS, comprising a new permanent multilateral investment

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<sup>61</sup> Leo Varadkar T.D., Tánaiste and Minister for Enterprise, Trade and Employment, ‘[Answer to Parliamentary Question Nos. 19 and 20 on the Comprehensive Economic and Trade Agreement](#)’, *Dáil Éireann Debate*, 13 January 2021 (last accessed 27 April 2021).

<sup>62</sup> Leo Varadkar T.D., Tánaiste and Minister for Enterprise, Trade and Employment, ‘[Answer to Parliamentary Question Nos. 19 and 20 on the Comprehensive Economic and Trade Agreement](#)’, *Dáil Éireann Debate*, 13 January 2021 (last accessed 27 April 2021).

<sup>63</sup> Wilhelm Schollmann, [Comprehensive Economic and Trade Agreement \(CETA\) with Canada](#), European Parliamentary Research Service, PE 595.895, January 2017, at p. 6 (last accessed 27 April 2021).

tribunal (the 'Tribunal') and an Appellate Tribunal.<sup>64</sup> **Article 8.29** of CETA provides that the Parties must pursue the establishment of (but not necessarily establish) a multilateral investment tribunal (MIT). Such a tribunal was proposed by the EU Commission to the United States in November 2015 during negotiations for the Transatlantic Trade and Investment Partnership (TTIP).

## Appointment of Members and ethics

One of the key differences between established ISDS and the proposed ICS is that proceedings under the latter will be presided over by judicially-qualified Members, rather than arbitrators. Article 8.27.4 provides that Members must be able to demonstrate expertise in public international law and that it is desirable that they have expertise in international investment law, international trade law and the resolution of disputes arising under international investment or trade agreements.<sup>65</sup> Further ethics considerations have been added via a decision of the CETA Committee on Services and Investment on 29 January 2021. This is examined below, in the section on the Joint Committee.

The Tribunal as envisaged would consist of 15 appointed Members; five appointed by the European Union, five by Canada and five by third countries. Normally, three Members would be selected by the President of the Tribunal, on a rotating and random basis. This approach differs from the ICSID model of arbitration, where the parties to the dispute could choose members of the tribunal from a list of arbitrators.<sup>66</sup>

Figures 3 and 4 below compare the structure of the first instance and appellate mechanisms in the CETA ICS with the WTO Dispute Settlement Body and the ICSID.

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<sup>64</sup> Roderick Harte, [CETA ratification process: Latest developments](#), European Parliamentary Research Service, PE 608.726, October 2017 (last accessed 27 April 2021). The decision in *Achmea* was seen by some commentators as indicating that the Court of Justice would find against the investment provisions of CETA in Opinion 1/17.

<sup>65</sup> Under Article 8.28.4, members of the Appellate Tribunal must meet the same requirements.

<sup>66</sup> Laura Puccio and Roderick Harte, [From arbitration to the investment court system \(ICS\)](#), European Parliamentary Research Service, PE 607.251, June 2017, at pp 14-15 (last accessed 27 April 2021). See generally, pp 11-15 for a background on the development of the ICS model.

Figure 3: Comparison of Investor-State Dispute Settlement Mechanisms<sup>67</sup>

	CETA Tribunal	WTO DSB: Panels	ICSID (under the Convention rules)
Administrative structure	ICSID	WTO secretariat	ICSID
Permanent tribunal structure vs list of individuals	1 President 1 Vice President (Chosen among third-country judges) 15 judges (5 EU, 5 Canada and 5 third-country)	Indicative list of individuals drawn up by the WTO Secretariat	Arbitrators from the ICSID Panel of arbitrators or other arbitrators chosen by the parties
Selection procedure for specific configuration	Appointed by the President on a rotational basis	Appointed by the secretariat (nominations can be opposed by parties for compelling reasons)	Appointed by the parties or by default by the President of the World Bank
Specific configuration	3 judges (1 EU, 1 Canada and 1 third-country) OR 1 judge (from third-country)	3 or 5 panelists	3 judges (1 EU, 1 Canada and 1 third-country) OR 1 judge (from third-country)

Figure 4: Comparison of Appellate Systems<sup>68</sup>

	CETA appellate Tribunal	WTO DSB: Appellate Body	ICSID Appeal facility: 2004 proposal
Administrative structure	CETA Joint Committee must decide: • administrative support • remuneration • number of members • other administrative decisions	WTO secretariat	ICSID
Permanent tribunal structure vs list of individuals	EU judges Canada judges Third-country judges	7 Appellate Body members appointed for four-year terms	15 elected members composing the Appeal Panel
Selection procedure for specific configuration	Appointed by the president on a rotational basis	Appointed on a rotational basis	Appointed by the Secretary General of ICSID
Specific configuration	Judges (Numbers to be determined)	3 Appellate Body Members	3 Appeal Tribunal members

Source: EPRS

<sup>67</sup> Laura Puccio and Roderick Harte, *From arbitration to the investment court system (ICS)*, European Parliamentary Research Service, PE 607.251, June 2017, at p. 14 (last accessed 27 April 2021).

<sup>68</sup> Ibid. This comparison includes a 2004 proposal for an ICSID appeal facility.

## The Joint Interpretative Instrument

In addition to CETA, the Parties adopted a [Joint Interpretative Instrument](#) which, as stated in its Preamble, provides:

“... a clear and unambiguous statement of what Canada and the European Union and its Member States agreed in a number of CETA provisions that have been the object of public debate and concerns and provides an agreed interpretation thereof”.

The Instrument affirms a ‘right to regulate’ (paragraph 2), makes commitments in the areas of labour (paragraph 8) and environmental protection (paragraph 9) and expressly sets out the position of the Parties regarding investment protection (paragraph 6). Agreed interpretations are set out in Paragraph 6, including the following:

- The right to regulate in the public interest;
- That compensation to an investor will be based on an objective determination and not exceed the loss suffered; and
- Clearly defined investment protection standards, including on fair and equitable treatment and expropriation.

As provided by Article 31 of the [Vienna Convention on the Law of Treaties](#) and Article 8.31.1 of CETA, it would seem the Joint Interpretative Instrument should be interpreted as forming part of the Agreement.

## The CETA Joint Committee and Specialised Committees

### Recommendation on Trade, Climate Action and the Paris Agreement

In September 2018, in Montreal, the CETA Joint Committee adopted a [Recommendation](#) on trade, climate action and the Paris Agreement.<sup>69</sup> In relation to environmental protection, the Recommendation makes reference to paragraph 9(b) of the [Joint Interpretative Instrument](#).

At Recital 5 of the **Recommendation**, it is noted that “CETA explicitly recognises the right of the Parties to set their own environmental priorities, to establish their own levels of environmental protection and to adopt or modify their relevant laws and policies accordingly, mindful of their international obligations, including those set by multilateral environmental agreements”. However, it should also be noted that the text of paragraph 9(b) in the **Joint Interpretative Instrument** also includes the following text:

“At the same time in CETA the European Union and its Member States and Canada have agreed not to lower levels of environmental protection in order to encourage trade or investment and, in case of any violation of this commitment, governments can remedy such violations regardless of whether these negatively affect an investment or investor's expectations of profit.”

While the joint commitment to recognise the right of both Parties to regulate in the area of environmental protection is outlined in the Recommendation, the Joint Interpretative Instrument provides that governments can remedy a violation of their commitment to not lower levels of environmental protection to encourage investment.

France has argued that this ‘climate clause’ should go further and that a ‘climate veto’ should be introduced as part of EU trade policy. This would involve making it a precondition that a third country entering into a trade agreement with the EU is compliant with the Paris Agreement, and non-compliance with the Paris Agreement can justify the suspension of a trade agreement or arbitration.<sup>70</sup> In addition, some stakeholders have suggested that the mention of the Paris Agreement is not a legal guarantee.<sup>71</sup>

Since CETA, the policy of the European Commission now appears to require a ‘climate clause’ to be included in all new trade agreements. For example, the EU-Japan trade agreement includes a specific provision reaffirming the Parties commitment to effectively implement the [United Nations Framework Convention on Climate Change](#) and the Paris Agreement.<sup>72</sup>

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<sup>69</sup> Megan Darby, [EU and Canada add climate clause to trade pact](#), EurActiv/Climate Home News, 28 September 2018 (last accessed 27 April 2021).

<sup>70</sup> Cécile Barbière, [Inclusion of Paris Agreement in CETA at risk](#), EurActiv, 9 October 2018 (last accessed 27 April 2021).

<sup>71</sup> Oisín Coghlan, Director, Friends of the Earth Ireland, [Q&A: What is CETA?](#) (opinion), *The Irish Examiner*, 16 December 2020 (last accessed 27 April 2021).

<sup>72</sup> [Article 16.4.4](#), Agreement between the European Union and Japan for an Economic Partnership (last accessed 27 April 2021).

The European Commission has published a [Joint Activity Report](#) outlining the key activities undertaken between the EU and Canada since the adoption of the Recommendation on trade, climate action and the Paris Agreement.

Although this Recommendation does not appear to be binding, it could provide interpretative value under Article 32 of the [Vienna Convention on the Law of Treaties](#) and Article 8.31.1 of CETA.

## The 2021 decisions of the Joint Committee and the Committee on Services and Investment

On 29 January 2021, the EU and Canada adopted four decisions, which put in place specific rules expounding on the ICS under CETA. The decisions set out additional rules, procedures and structures for the ICS concern.<sup>73</sup> These decisions are:

1. A [code of conduct](#) for the Members of the ICS and their staff;<sup>74</sup>
2. [Rules setting out the functioning of the Appellate Tribunal](#);<sup>75</sup>
3. [Rules for binding interpretations](#) to be adopted by the CETA Joint Committee;<sup>76</sup> and
4. [Rules for mediation](#).<sup>77</sup>

The four decisions were unanimously approved by the members of the Council of the EU in May 2020.

The [Code of Conduct Decision](#) adds to the ethics requirements for the appointment of Tribunal Members under Article 8.30 covering the areas of disclosure, independence, impartiality and confidentiality. Moreover, the Decision extends the requirements to Members' staff. Finally, the decision expressly prohibits former Members from acting as representatives of any of the disputing parties in investment disputes for a period of three years after the end of their term.

The [Appellate Tribunal Decision](#) develops the CETA provisions by clarifying that although the Appellate Tribunal may consist of three members, it will comprise six members (or a greater multiple of three) for cases that raise a serious question affecting the interpretation of Chapter 8 of CETA. The Decision also reiterates that the ICS under CETA is aimed at ensuring efficiency and speed of the dispute resolution process confirming a requirement that 'every effort' should be

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<sup>73</sup> European Commission, '[The EU and Canada adopt rules putting in place the CETA investment court](#)', Press Release, 29 January 2021 (last accessed 27 April 2021). See further, Dr Patricia Nacimiento and Olga Dementyeva, Herbert Smith Freehills, '[The EU and Canada adopt procedural rules for the CETA Investment Court System](#)', 11 February 2021 (last accessed 27 April 2021).

<sup>74</sup> [Decision No 1/2021 of the Committee on Services and Investment](#) of 29 January 2021 adopting a code of conduct for Members of the Tribunal, Members of the Appellate Tribunal and mediators [2021/263].

<sup>75</sup> [Decision No 1/2021 of the CETA Joint Committee](#) of 29 January 2021 setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal [2021/264].

<sup>76</sup> [Decision No 2/2021 of the CETA Joint Committee](#) of 29 January 2021 adopting a procedure for the adoption of interpretations in accordance with Articles 8.31.3 and 8.44.3(a) of CETA as an Annex to its Rules of Procedure (2021/265).

<sup>77</sup> [Decision No 2/2021 of the Committee on Services and Investment](#) of 29 January 2021 adopting rules for mediation for use by disputing parties in investment disputes [2021/266].



made to avoid an appeal lasting more than 270 days. The Decision highlights that the Appellate Tribunal has the power to reject an appeal on an expedited basis where it is found to be ‘manifestly unfounded’. Finally, the Decision requires the plaintiff to the appeal to provide security for the costs of the appeal.

The [Interpretation Decision](#) clarifies the roles of the CETA Committee on Services and Investment and the Joint Committee regarding the adoption of interpretations of CETA, under Articles 8.31.3 and 8.44.3. The decision provides that a Party with serious concerns regarding matters of interpretation that could affect investment, may refer the matter in writing to the Committee on Services and Investment. Once a matter is referred, Canada and the EU would be compelled to consult within the Committee on Services and Investment forum, and that specialist Committee may then recommend the adoption of a particular interpretation to the Joint Committee. A decision on interpretation made by the Joint Committee is binding on the Tribunal and Appellate Tribunal.

The [Mediation Decision](#) sets out rules applicable to mediation entered into under Article 8.20. It outlines the procedure under which the mediation process may be commenced and concluded, the method by which mediators are appointed, the means of presenting a case to a mediator, and suggestions for how mediators may determine an issue. The decision goes on to explain that mediation “is not intended to serve as a basis for dispute settlement under other dispute settlement procedures” and it prohibits the disputing parties from later relying on, or introducing as evidence, any information pertaining to the mediation process.

## Competence of the CETA Joint Committee

In October 2016, the German Federal Constitutional Court (*Bundesverfassungsgericht*) examined the question of whether the decision of the Council of the EU to sign CETA violated the individual rights of the claimants relating to [Articles 20\(1\) and \(2\)](#), [38\(1\)](#) and [79\(3\)](#) of the Basic Law (*Grundgesetz*).<sup>78</sup> The Basic Law provides that all state authority is derived from the people and that it must be exercised through democratic processes and through specific legislative, executive and judicial bodies. One of the claimants, DIE LINKE challenged the validity of the decision arguing among other things that CETA would establish committees that would have the power to regulate matters that should fall within the competence of the Member States, and participation of the Member States in these committees is not guaranteed (given that the parties to CETA are the EU and Canada).

The Court found that the committee system under CETA might violate the principle of democracy, in the Basic Law, or at least that a violation is not entirely impossible. To avoid any potential violation the German Government committed to three things:

1. It would not agree with the provisional application of any part of CETA that may fall outside the exclusive competence of the European Union (such as Chapter 8);
2. It would ensure that the decisions of the CETA Joint Committee are of a sufficiently democratic provenance for the duration of the provisional application of the treaty; and

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<sup>78</sup> BVerfG, Judgment of 13 October 2016 ([2 BvR 1368/16](#)) (last accessed 29 April 2021).

3. If it were unable to ensure that the decisions of the Joint Committee are of a sufficiently democratic provenance, it would unilaterally terminate the provisional application of CETA under Article 30.7(3)(c).<sup>79</sup>

Dr Sonja Heppner, Adjunct Assistant Professor at Trinity College Dublin's School of Law, has argued that since certain decisions of the Joint Committee are authoritative and binding (see Articles 8.31.3, 26.1.5(e) and 26.3.2, for example), it must be accepted that the Joint Committee has an 'authority to govern' – either directly or indirectly. She goes on to suggest that to avoid a violation of the German Basic Law, the provenance of decisions made by the CETA Joint Committee must be sufficiently democratic. The issue of whether the decisions of the Joint Committee are sufficiently democratic would hinge on whether the European Union has the competence to create the Joint Committee.<sup>80</sup>

Although the Joint Committee may be established, and may operate, under provisional implementation of Chapter 26, the Articles in Chapter 8 pertaining to the Joint Committee (for example, Articles 8.10.3, 8.31.3 and 8.44.3) would only come into effect upon ratification by the Parties (see further, for example, [Article 4 of Decision No 2/2021 of the CETA Joint Committee of 29 January 2021](#)). Furthermore, the decision-making powers of the Joint Committee affecting ICS, such as Article 26.1.5(e) would only be binding on tribunals that are already established (i.e. after Chapter 8 has been ratified). In this way, it could be said that any decisions made by the Joint Committee prior to the ratification of the treaty may help to inform the ratification process.

The Court of Justice, in [Opinion 1/17](#) stated (at para. 235):

“It must be observed that the participation of the Union in the determination, by the CETA Joint Committee, of such binding interpretations, is governed by Article 218(9) TFEU.”

[Article 218\(9\) TFEU](#) requires the Council of the EU, on a proposal from the European Commission or the High Representative of the Union for Foreign Affairs and Security Policy (HRFASP), to adopt a decision establishing the EU position in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement. In other words, when a body like the CETA Joint Committee is called upon to make a decision affecting interpretation of the treaty, the Commission (or the HRFASP) may propose a position that then goes to the Council for adoption.

The Court of Justice has determined that as [Article 218\(9\) TFEU](#) does not lay down any voting rule for the purpose of adoption by the Council of the categories of decisions which it covers, the applicable voting rule must be determined by reference to [Article 218\(8\) TFEU](#).<sup>81</sup> The voting rule that would be applicable in the adoption of a Council decision must be determined in the light of its main or predominant purpose. Therefore, if the main purpose of the decision falls within a field in respect of which unanimity is not required for the adoption of an EU measure, that decision must,

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<sup>79</sup> Ibid at [68] – [72].

<sup>80</sup> Sonja Heppner, 'A Critical Appraisal of the Investment Court System Proposed by the European Commission' (2016) *Irish Journal of European Law* Vol. 19(1), pp 38-63.

<sup>81</sup> [European Commission v Council of the European Union](#) (Case C-244/17) ECLI:EU:C:2018:662 at [27] (last accessed 26 April 2021).

in accordance with the first subparagraph of [Article 218\(8\) TFEU](#), be adopted by qualified majority. However, if the main purpose of the decision falls within a field in which unanimity is required, a unanimous vote is needed to adopt the decision.<sup>82</sup>

It appears that the ratification of Chapter 8 of CETA by Member States would have the effect of moving the competence to deal with foreign indirect investment and investor-state dispute resolution away from the Member States to the EU. It is presumed that the EU would then have competence to deal with Chapter 8 under its treaty-making powers under the Common Foreign and Security Policy (CFSP). If this were the case, then the part of CETA that has already been provisionally applied would continue to sit within the EU's CCP competence, while the parts of CETA that require ratification would fit under the CFSP. Thus, it is arguable, after ratification, that Council decisions would need to be taken unanimously if it sought to adopt an EU position in the Joint Committee that predominantly relates to an interpretation of Chapter 8, as the basis of the EU's power would sit within the CFSP, for which unanimity is needed. On the other hand, the case of [European Commission v Council of the European Union](#)<sup>83</sup> dealt with the issue of which voting method would be needed where an agreement includes aspects of both the CCP and CFSP. The Court of Justice found that where the principal purpose of the agreement falls under the CCP and the provisions that fall into the CFSP are incidental to the agreement, qualified majority voting (QMV) would be the required voting method.<sup>84</sup>

If the competence to deal with foreign indirect investment under CETA is deemed to fall under [Article 207 TFEU](#) (the CCP, not the CFSP), then the default position of QMV would apply. However, this may lead to a situation where Member States are ratifying an agreement that may be affected by a binding interpretation that derives from a decision of the Council of the EU for which only a qualified majority is required. As highlighted by Prof. Dr Wolfgang Weiß on behalf of Food Watch, once a decision is made by a Treaty Committee:

“... the decision is taken and binding and must be followed and implemented by the EU Member States on a regular basis **without any ratification**.”<sup>85</sup> (emphasis added)

Another question that arises from this discussion is whether the Council of the EU has the legal competence to adopt decisions under Article 218(9) relating to Chapter 8 of CETA, prior to the ratification of that Chapter?

As the decisions of the CETA Joint Committee affecting Chapter 8 are non-binding and cannot come into effect until ratification, it is conceivable that any actions by the EU (either by the Commission, the HRFASP or the Council) and Canada conducted within the Joint Committee simply amount to continued negotiations in the form of subsequent agreements between the

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<sup>82</sup> [European Commission v Council of the European Union](#) (Case C-244/17) ECLI:EU:C:2018:662 at [27] – [30] (last accessed 26 April 2021).

<sup>83</sup> [European Commission v Council of the European Union](#) (Case C-244/17) ECLI:EU:C:2018:662 (last accessed 26 April 2021).

<sup>84</sup> Ibid at [38].

<sup>85</sup> Prof. Dr Wolfgang Weiß on behalf of Food Watch, ‘[The role of Treaty Committees in CETA and other recent EU free trade agreements](#)’, *Questions and Answers*, Q4.

Parties about interpretation, removing the Council decisions from Article 218(9) TFEU.<sup>86</sup> In its proposal for a Council Decision (2018/175), the Commission argues that the Council does have the power to adopt decisions under Article 218(9), even where the relevant Chapter of the agreement has not come into effect. The Commission, citing the Court of Justice, states:

“The concept of ‘acts having legal effects’ [as used in Article 218(9) TFEU] includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are ‘capable of decisively influencing the content of the legislation adopted by the EU legislature.’”<sup>87</sup>

As current discourse on CETA does not appear to consider this issue in any depth, some clarification may be needed on the legal basis of decisions adopted by the Council of the European Union and, subsequently, the CETA Joint Committee, on provisions of CETA not yet in force.

### Withdrawal or amendment of Committee decisions

As noted by Prof. Dr Wolfgang Weiß, the withdrawal or amendment of a Treaty Committee decision is not specifically regulated by CETA. Therefore, in accordance with general principles of international law, a decision could only be amended or repealed through the same procedure by which it was adopted. Hence, the decision to revoke or amend would need to be made by the relevant committee, by consensus of the Parties. The preparation of the EU position is again the responsibility of the Commission or HRFASP, with the Council having the power of adoption. As with other Council decisions of this nature, the European Parliament is informed under [Article 218\(10\) TFEU](#), but not consulted.<sup>88</sup>

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<sup>86</sup> At present, the procedure of the Council is to adopt decisions on the position of the Union on such negotiations, which themselves represent the collective exercise of the powers of the Member States. The European Court of Justice has ruled that ‘agreements’ as referenced in Article 218 may be construed broadly as “any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation”. See [Opinion 1/75](#) ECLI:EU:C:1975:145 and [Commission v France](#) (Case C-327/91) [ECLI:EU:C:1994:305](#) (last accessed 26 April 2021).

<sup>87</sup> [Germany v Council](#) (Case C-399/12) ECLI:EU:C:2014:2258, at [61] to [64] (last accessed 27 April 2021); European Commission, Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, in the CETA Joint Committee established by the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, as regards the adoption of the Rules of Procedure for the CETA Joint Committee and specialised committees, [COM\(2018\) 344 final](#), 2018/175(NLE) at [4.1.1] (last accessed 26 April 2021).

<sup>88</sup> Prof. Dr Wolfgang Weiß on behalf of Food Watch, [‘The role of Treaty Committees in CETA and other recent EU free trade agreements’](#), *Questions and Answers*, Q6 (last accessed 27 April 2021).

## Key Issues Affecting Investment Provisions

### The Irish Government's position on ICS

The proposed ICS has elicited much debate in recent years, particularly around the ability of corporations to sue states outside the domestic courts, and the potential impact this may have on states' ability to regulate in the public interest. This debate is discussed later in this paper.

By way of introduction to the position of the Irish Government on the ICS, the Tánaiste has commented:

"Investors may utilise either national courts or the ICS but cannot 'forum-shop'. Equally, it is important to remember that a Canadian firm can seek to sue the government for alleged unfair treatment or discrimination in our Courts whether CETA exists or not. CETA simply provides an arbitration alternative. That alternative, unlike a challenge in the Courts, cannot find any act by Government to be *ultra vires* or unconstitutional - it is only concerned with redress for proven harm.

...

Under CETA the right of EU Member States (and Canada) to regulate for public policies (e.g. in health, environment, security) is fully preserved, and it is made clear that the deal does not imply an expectation that public policies will remain unchanged. Further, an investor's loss of profits will not be sufficient grounds for making a claim against a Government. Any claim must be based on discriminatory and unfair treatment."<sup>89</sup>

The Tánaiste also highlighted that while EU investors in Canada have one legal system, Canadian investors in the EU have 27 legal systems, so CETA provides a single, consistent mechanism where investors can seek redress.<sup>90</sup>

### Ratification procedure

Investment is a relatively new EU competence, having been included in the Common Commercial Policy with the adoption of the Treaty of Lisbon in 2009. It would therefore follow that investment has been a feature of EU trade agreements for the last 12 years. Reflecting this, the Council added investment protection to the negotiating mandate of the European Commission in July 2011.<sup>91</sup> However, while foreign direct investment is an explicit competence of the EU under Article 207 TFEU, other aspects of investment are not. In Opinion 2/15, it was established that agreements containing such provisions are to be considered 'mixed agreements'.

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<sup>89</sup> Leo Varadkar T.D., Tánaiste and Minister for Enterprise, Trade and Employment, '[Answer to Parliamentary Question Nos. 19 and 20 on the Comprehensive Economic and Trade Agreement](#)', *Dáil Éireann Debate*, 13 January 2021 (last accessed 27 April 2021).

<sup>90</sup> Ibid.

<sup>91</sup> Council of the European Union, [Recommendation from the Commission to the Council on the modification of the negotiating directives for an Economic Integration Agreement with Canada in order to authorise the Commission to negotiate, on behalf of the Union, on investment](#), 14 July 2011 (last accessed 27 April 2021). This document was partially declassified by the Council on 15 December 2015.

There is some commentary on the ratification of mixed agreements generally, which is linked to the shared competences of the EU and Member States. It has been noted that Opinion 2/15 does not give clear guidance with respect to the division of competences in agreements with non-trade provisions going beyond the EUSFTA, covering areas such as security, migration and policing cooperation.<sup>92</sup> In discussing the concept of 'mixity' in trade agreements, Conconi et al identify three types of agreement:

- (i) Policy areas that do not require mixity<sup>93</sup>;
- (ii) Policy areas that require mixity;
- (iii) Policy areas that require mixity or not depending on the specific aim and content covered by the agreement.<sup>94</sup>

The risk for the EU in relation to mixed trade agreements arises from the requirement for **all** Member States to ratify the agreement as well as the EU. Agreements that are beneficial for the EU as a whole may be blocked by legislators from one Member State, or even one region within a Member State.<sup>95</sup> Additionally, some Member States may choose to hold a referendum on ratification, as was the case with the Netherlands with respect to the EU-Ukraine Association Agreement. Although the referendum was not passed, the Dutch parliament ratified the agreement after a declaration from EU leaders addressing the concerns of voters for the 'No' side.<sup>96</sup>

### Splitting Trade and Investment Agreements

Following the Court of Justice decision in Opinion 2/15, it has been suggested that the EU may split free trade agreements into separate parts covering trade and areas of shared competence, with the former only requiring the approval of the EU.<sup>97</sup> However, it is also argued that splitting the agreement is not always possible or desirable.<sup>98</sup>

It has been suggested that the investment protection chapter may be renegotiated or even omitted from CETA entirely. Prior to the ruling in Opinion 1/17, this was raised as a prospect in the event the Court of Justice found that Section F of Chapter 8 was incompatible with EU law. A further point of interest is that the Economic Partnership Agreement with Japan does not include provisions on investor-state dispute resolution, on which further negotiations are taking place.<sup>99</sup>

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<sup>92</sup> Paola Conconi et al, [EU Trade Agreements: To Mix or not to Mix, That is the Question?](#), May 2020 at p. 7 (last accessed 27 April 2021).

<sup>93</sup> These will correspond to areas where the EU has an express exclusive competence under Article 3(1) TFEU.

<sup>94</sup> Paola Conconi et al, [EU Trade Agreements: To Mix or not to Mix, That is the Question?](#), May 2020 at p. 7 (last accessed 27 April 2021). A detailed analysis of these policy areas is included in the same paper at p. 8 and pp 23-25.

<sup>95</sup> Ibid at pp 10-11.

<sup>96</sup> Ibid at pp 11-12.

<sup>97</sup> Ibid at p. 17.

<sup>98</sup> Ibid.

<sup>99</sup> Krisztina Binder, [Bilateral trade deal with Japan – largest to date for EU](#), European Parliamentary Research Service, PE 633.164. February 2019, at p. 6 (last accessed 27 April 2021).



Appearing before the Joint Committee on European Union Affairs on 30 March 2021, former EU Director General for Trade, David O'Sullivan, also addressed the issue of renegotiation:

"If both sides really agree that renegotiation only happens on a very limited part, perhaps that can happen. However, a state runs the risk, in any situation where it reopens a package, that all sides involved can then come to the table with additional issues. The scope for containing a new negotiation only to this area is, in my view, probably very limited."<sup>100</sup>

As noted above, the trade-related elements of CETA have already entered into force through what is known as provisional application (see the Introductory section above). Some elements of Chapters 8 and 13 have also entered into force, but none relate to foreign indirect investment.<sup>101</sup> However, the issue of subsequent free trade agreements not including a separate investment protection element was recently raised as a Parliamentary Question, where the Dáil was told that ICS still forms part of the EU's ambition for investment protection agreements.<sup>102</sup> Yet, in the case of Vietnam and Singapore the trade and investment agreements were negotiated as parallel agreements, while the investment protection elements of the Comprehensive Agreement on Investment with China are continuing on a separate track.<sup>103</sup> Additionally, the negotiating directives for free trade agreements with Australia and New Zealand do not include investment protection elements.<sup>104</sup>

The issue of investment protection has also arisen in the context of Brexit. Following recent negotiations for a post-Brexit trade agreement between the UK and the EU, the resulting Trade and Cooperation Agreement (TCA) includes a limited investment protection component. While the agreement does contain substantive legal protections for investors, there is no investor-state mechanism for the resolution of disputes. Furthermore, investors are prohibited by the TCA from invoking it before national courts in the UK or EU Member States and there is no direct relief for investors for any breaches of the TCA by the UK or EU.<sup>105</sup> The UK has signed a trade agreement with Canada, which entered into force on 1 April 2021. This agreement mirrors CETA, but with regard to investment, the UK and Canada agreed to suspend the provisions of Chapter 8 of the UK-Canada Trade Continuity Agreement pending a review by both Parties.<sup>106</sup>

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<sup>100</sup> David O'Sullivan, Former EU Director General for Trade, [Engagement on the Comprehensive Economic and Trade Agreement: Mr David O'Sullivan](#), *Joint Committee on European Union Affairs Debate*, 30 March 2021 (last accessed 27 April 2021).

<sup>101</sup> [Notice concerning the provisional application of CETA](#), OJ L 238/9 (last accessed 27 April 2021). Some elements, such as criminal offences, review and appeal, and taxation on investments are also not provisionally applied.

<sup>102</sup> Leo Varadkar T.D., Tánaiste and Minister for Enterprise, Trade and Employment, [Response to Parliamentary Question No 36 on Investor-State Dispute Settlement](#), *Dáil Éireann Debate*, 3 February 2021 (last accessed 27 April 2021).

<sup>103</sup> *Ibid.*

<sup>104</sup> Paola Conconi et al, [EU Trade Agreements: To Mix or not to Mix, That is the Question?](#), May 2020 at p. 18 (last accessed 27 April 2021).

<sup>105</sup> Ben Sanderson and Lucia Bizikova, [Investment Protection falls victim to Brexit – The analysis of the EU-UK Trade and Cooperation Agreement](#), Jus Mundi (blog), 25 January 2021 (last accessed 27 April 2021).

<sup>106</sup> Government of Canada, [Canada-UK Trade Continuity Agreement \(Canada-UK TCA\) – Summary](#), accessed 15 April 2021 (last accessed 27 April 2021).



That is not to say that investment protection was not considered. Prior to the conclusion of the Withdrawal Agreement and TCA, the Institute for Government set out some of the key arguments for and against an ISDS mechanism. The arguments in favour include the positive effect investment protection may have on foreign direct investment, provides direct access to a tribunal, the rarity of claims against the UK government and the benefits of ISDS to UK companies. However, arguments against include the reliability of European courts, possible undermining of the rule of law through the lack of transparency or an appeal mechanism, as well as possible bias, the incompatibility of ISDS with the objective of ‘taking back control’ (the slogan underlining the Brexit movement), and the potential for ISDS to cause deadlock in negotiations.<sup>107</sup> The suggestion that investment protection may be included in a separate agreement, negotiated either in parallel or subsequently, was also noted.<sup>108</sup> The approach of the UK in reviewing the application of Chapter 8 does raise a possible issue that the UK and Canada may agree a separate agreement, or that investment protection provisions between the UK and Canada could diverge from those agreed between the EU and Canada.

### Non-ratification and sincere cooperation

One issue that still needs to be addressed is what would happen if there is no ratification of CETA by Ireland. It has been argued that at EU level that provisions for sincere cooperation under Article 4(3), and the case of the European Court of Justice, may require Member States to address difficulties arising from agreements such as CETA with the EU. On 6 April 2021, Dr David Fennelly outlined this issue to the Joint Committee on European Union Affairs:

“There may be an obligation on member states to engage at least with the Union institutions in teasing out the implications and outcomes arising from non-ratification. Ultimately, of course, these matters would have to be resolved at the political level, whether by amendment to the treaties or otherwise, which would not be a straightforward process... ”<sup>109</sup>

Article 4(3) TEU requires that the Union and the Member States “shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”. In Opinion 1/94, the then European Court of Justice (ECJ) considered the issue of close cooperation and concluded:

“... where it is apparent that the subject-matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the

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<sup>107</sup> Raphael Hogarth, [Dispute Resolution after Brexit](#), Institute for Government (UK), 6 October 2017, at pp 41-42 (last accessed 27 April 2021). One of the central arguments of advocates for UK withdrawal was the consideration of cases involving the UK before UK courts.

<sup>108</sup> Ibid at pp 43-44.

<sup>109</sup> Dr David Fennelly, Assistant Professor, Law, Trinity College, [Comprehensive and Economic Trade Agreement: Discussion \(Resumed\)](#), *Joint Committee on European Union Affairs Debate*, 6 April 2021 (last accessed 27 April 2021).

commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community.”<sup>110</sup>

Whether or not this extends to an obligation to ratify an agreement has been considered by the CJEU and academics. It has been noted that there is an obligation on Member States to initiate a ratification process, but there is no obligation on Member States regarding the result of that process.<sup>111</sup> As noted above, in Opinion 2/15, the Court of Justice concluded that a mechanism that removes investment disputes from the courts of Member States cannot be established without the prior consent of the Member States.<sup>112</sup>

## Autonomy of the EU legal order

Prior to the ruling in Opinion 1/17, various parties argued that the establishment of ICS would violate the principle of autonomy of the EU legal order. These arguments included the following circumstances where the Tribunal may require an interpretation:

- An ICS Tribunal might have to interpret and apply EU law, either indirectly or directly, as its purpose is to enable investors to challenge national acts or EU acts and decisions.
- An ICS Tribunal might be faced with a situation in which no prevailing interpretation given to EU law exists and it would have to come up with an interpretation itself. Even though an ICS Tribunal’s interpretation of EU is ultimately not binding upon courts in the EU, it does carry a certain value and could set a precedent for future rulings.
- An ICS Tribunal faced with a question on the interpretation of EU law would have to consult the CJEU. No possibility exists for a preliminary reference procedure as investors are not obliged to go through national courts before initiating proceedings before an ICS Tribunal.<sup>113</sup>

This issue was central to the ruling of the Court of Justice in Opinion 1/17, with the court ultimately holding that the investment provisions in CETA are compatible with the autonomy of EU law. Before the ruling, the Legal Service of the European Parliament had concluded that the distinctive

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<sup>110</sup> [Opinion 1/94](#) ECLI:EU:C:1994:384 at [108] (last accessed 29 April 2021). In this ruling, the ECJ ruled that the European Union had sole competence to conclude agreements regarding the trade of goods, but the EU and Member States were jointly competent in relation to GATS and TRIPs. The ECJ made a similar finding in [Opinion 2/91](#) ECLI:EU:C:1993:106 at [36] (last accessed 29 April 2021).

<sup>111</sup> Peter Van Elsuwege, *The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations: Member State Interests and European Union Law* (chapter), *Between Compliance and Particularism*, M Varju (ed.), Springer, 2019, at p. 290.

<sup>112</sup> [Opinion 2/15](#) ECLI:EU:C:2017:376 at [292] (last accessed 26 April 2021). Also, the [Advocate General opinion](#) relating to Opinion 2/15 noted at [77] that the participation of each Member State in the EUSFTA is as a sovereign State Party. AG Sharpston also suggested that a Member State may unilaterally terminate an agreement according to the procedure outlined in that agreement.

<sup>113</sup> Laura Puccio and Roderick Harte, [From arbitration to the investment court system \(ICS\)](#), European Parliamentary Research Service, PE 607.251, June 2017, at p. 27 (last accessed 27 April 2021).

features of CETA ensured its compatibility with EU constitutional law, with Article 8.31.2 being an important provision in this regard.<sup>114</sup>

Although the EPRS previously maintained that a ruling that CETA is compatible with EU law would strengthen CETA's legitimacy, some stakeholders have directly addressed the ruling. Corporate Europe Observatory argued that the decision "dangerously legitimises a mechanism that enables companies to claim multi-billion sum damages from governments that dare to stand up to their power".<sup>115</sup>

In Ireland, it was recently suggested that although the Court of Justice has ruled at EU level that the ICS is legal, this does not mean that it is fair, and that a parallel system of 'corporate courts' may give big business rights to challenge social, environmental and health standards.<sup>116</sup>

### Who's interests does the ICS promote?

The House of Commons Library has noted that "[c]ritics of the investment provisions say that they are still unduly favourable to multinational companies and argue that the change from ISDS to ICS does little to address the problem of foreign companies having recourse to special tribunals, outside the domestic legal system".<sup>117</sup>

In Ireland, Comhlámh has opined that CETA gives corporations sweeping rights to challenge environmental, social and health regulations in 'special corporate courts'. It also cites questions regarding its legality from the European Association of Judges, the German Magistrates' Association, 101 professors of law from 24 countries and 122 legal scholars.<sup>118</sup> It has also suggested that CETA would enable US investors with a Canadian subsidiary to access ICS and sue European governments.<sup>119</sup>

A further argument put forward in relation to the protection of investors is that the ICS may result in positive discrimination of foreign investors, where foreign investors (and only foreign investors) have the right to bypass domestic legal systems and, depending on interpretation, may have greater substantive rights.<sup>120</sup> The EPRS however notes that "[w]hether the investment protection

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<sup>114</sup> Rachel O'Sullivan, Burning Bridges? The Court of Justice and the Autonomy of the EU Legal Order, (2018) 17(1) *Hibernian Law Journal* 1-24 at 15.

<sup>115</sup> Corporate Europe Observatory, [ECJ confirms legality of unfair corporate tribunals in EU trade deals](#), 30 April 2019 (last accessed 27 April 2021).

<sup>116</sup> Oisín Coghlan, Director, Friends of the Earth Ireland, [Q&A: What is CETA?](#) (opinion), *The Irish Examiner*, 16 December 2020 (last accessed 27 April 2021).

<sup>117</sup> Dominic Webb, House of Commons Library, [Briefing Paper on CETA: the EU-Canada free trade agreement](#), 7 May 2019 at p. 8 (last accessed 27 April 2021).

<sup>118</sup> Comhlámh, [CETA: The Implications for Ireland](#), 2017, at p. 3 (last accessed 27 April 2021).

<sup>119</sup> Ibid at p. 13.

<sup>120</sup> Ante Wessels, FFII, [Multilateral investment court strengthens investments vis-à-vis democracy and fundamental rights](#), March 2017 (last accessed 27 April 2021).

under CETA consists of positive discrimination depends on the domestic framework and whether it affords similar protection as that granted under CETA”.<sup>121</sup>

## The appointment and role of judges

A further issue is the appointment of judges to the ICS. The EPRS has noted that although the appointment of judges differs from ISDS, the procedure does not change much from traditional arbitration proceedings. However, it does note that the Commission has maintained the innovations<sup>122</sup> introduced to avoid issues connected to *inter alia* forum shopping and frivolous claims.<sup>123</sup>

The EPRS also references criticism of the system proposed for the remuneration and selection of judges.<sup>124</sup> In considering the ICS proposed for TTIP, the *Deutscher Richterbund* (German Magistrates Association) has argued that the pool of judges “will be limited to the circle of persons already professionally predominantly engaged in international arbitration”.<sup>125</sup> It also argues that the retainer fee and expense allowance cast doubt on whether the criteria for the technical and financial independence of judges of an international court are fulfilled.<sup>126</sup>

The CETA Joint Committee may determine that the retainer fee may be transformed into a salary, as provided for by Article 8.27.15 of CETA.

## Is ICS necessary for the proper functioning of CETA?

In considering if the ICS is necessary to the proper functioning of CETA, it has been previously suggested that a state-to-state mechanism, rather than an investor-state mechanism, may be more appropriate.

In January 2021, Dáil Éireann was told that the Sustainability Impact Assessment published by the European Commission found that “the sustainability impacts to Canada and the European Union would not be significant”.<sup>127</sup> However, it is noteworthy that the same Sustainability Impact Assessment made the following observation in relation to investment protection and the ICS:

“Regarding investor-state dispute settlement (ISDS) specifically, the conflicting costs and benefits of such a mechanism make it doubtful that its inclusion in CETA would create a net/overall (economic, social and environmental) sustainability benefit for the EU and/or

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<sup>121</sup> Laura Puccio and Roderick Harte, [From arbitration to the investment court system \(ICS\)](#), European Parliamentary Research Service, PE 607.251, June 2017, at p. 25 (last accessed 27 April 2021).

<sup>122</sup> Ibid at pp 11-12.

<sup>123</sup> Ibid at p. 15.

<sup>124</sup> Ibid at p. 22.

<sup>125</sup> Deutscher Richterbund, [Opinion on the establishment of an investment tribunal in TTIP – the proposal from the European Commission on 16.09.2015 and 11.12.2015](#) (translation), No 4/16, February 2016, available via Friends of the Earth Europe ([www.foeeurope.org](http://www.foeeurope.org)) (last accessed 29 April 2021).

<sup>126</sup> Ibid.

<sup>127</sup> Leo Varadkar T.D., Tánaiste and Minister for Enterprise, Trade and Employment, [Response to Parliamentary Question No 2: Comprehensive Economic and Trade Agreement](#), *Dáil Éireann Debate*, 28 January 2021 (last accessed 27 April 2021).

Canada. There is no solid evidence to suggest that ISDS will maximise economic benefits in CETA beyond simply serving as one form of an enforcement mechanism, just as state-state dispute settlement is also an enforcement mechanism. And the policy space reductions caused by ISDS allowances in CETA, while less significant than foreseen by some parties, would be enough to cast doubt on its contribution to net sustainability benefits. As such, the study's assessment suggests **that a well-crafted state-state dispute settlement mechanism** might be a more appropriate enforcement mechanism in CETA than ISDS." (emphasis added)<sup>128</sup>

Since the impact assessment, the European Commission has sought to alleviate concerns regarding ISDS by introducing the ICS, containing more characteristics of a court than a forum of arbitration. However, this is still structured in an investor-state format, which remains a focus of opponents to the ICS. Additionally, the issue of a state-to-state mechanism in currently the format for dispute resolution between the EU and the UK, which raises issues around the ability of investors to access relief.<sup>129</sup>

Concerns about the CETA dispute resolution mechanism have been raised by civil society groups. One group, PowerShift and the Canadian Centre for Policy Alternatives states:

"To date, no convincing arguments for including investment protection and ISDS in CETA have been put forward. In the EU and Canada, foreign investors already enjoy extensive protection through the legal system: property rights are fully enforceable in impartial courts. There is thus no need for securing special rights for foreign investors under international law ... Equally important[ly], CETA grants these privileges to investors without demanding they take on any responsibilities in return. Investor obligations, such as the provision of employment opportunities, respect for human, workers' and consumer rights, or the observance of health and environmental standards, are not enforceable through ISDS and notoriously difficult to enforce through other international channels."<sup>130</sup>

## Other dispute mechanisms open to the parties

In 2017, the European Parliamentary Research Service outlined that CETA uses ICSID as an administrative secretariat, charged with providing organisational and logistical assistance for ICS proceedings.<sup>131</sup> It also stated:

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<sup>128</sup> [A Trade SIA Relating to the Negotiation of a Comprehensive Economic and Trade Agreement \(CETA\) Between the EU and Canada](#), Trade 10/B3/B06, Final Report, June 2011 (last accessed 27 April 2021).

<sup>129</sup> Ben Sanderson and Lucia Bizikova, [Investment Protection falls victim to Brexit – The analysis of the EU-UK Trade and Cooperation Agreement](#), Jus Mundi (blog), 25 January 2021 (last accessed 27 April 2021).

<sup>130</sup> PowerShift and The Canadian Centre for Policy Alternatives (CCPA), (2016) [Making Sense of CETA: An analysis of the final text of the Canada–European Union Comprehensive Economic and Trade Agreement](#) (2nd ed.), at p. 15 (last accessed 27 April 2021).

<sup>131</sup> Laura Puccio and Roderick Harte, [From arbitration to the investment court system \(ICS\)](#), European Parliamentary Research Service, PE 607.251, June 2017 at pp 20-21 (last accessed 27 April 2021).

“ ... under CETA, the ICSID convention, the ICSID Additional Facility, the UNCITRAL rules, or any rules agreed upon by the parties can be considered **residual rules**, i.e. rules which cover issues not included in the provisions of the agreement”.<sup>132</sup> (emphasis added)

It has been noted that the reasoning in *Achmea* can be extended to extra-EU bilateral investment treaties which are silent on the applicable law. In such cases, the matter is resolved through the application of residual rules provided for in the arbitration rules chosen by the parties to the dispute.<sup>133</sup>

## ICSID Convention

The International Centre for Settlement of Investment Disputes (ICSID) itself is one of the five constituent organisations of the World Bank Group, with the function of providing facilities for the conciliation and arbitration of international investment disputes. Ireland and Canada are listed as contracting states to ICSID on its website.<sup>134</sup> However, the EU is not a party to the ICSID Convention, as Article 67 of the Convention limits membership to states.

The Department of Finance describes the ICSID as follows:

“ICSID is an international institution sponsored by the World Bank and founded in 1966. It was designed to facilitate the settlement of investment disputes between foreign investors and host states. It encourages foreign investment by providing neutral international facilities for conciliation and arbitration of investment disputes, thereby helping foster an atmosphere of mutual confidence between states and foreign investors.”<sup>135</sup>

The ICSID is an institution that provides a facility for *ad-hoc* arbitration and investor-state dispute settlement (ISDS), including the convening of arbitration panels and tribunals. It is a present system that may be used to settle investor-state disputes. However, it should also be noted that there is no bilateral investment treaty (BIT) between Ireland and Canada.<sup>136</sup> This would mean that at present any cases taken by a Canadian investor against Ireland, or an Irish investor against Canada, would be taken subject to the requirements of the [ICSID Convention](#). Most notably, the **respondent must consent** to arbitration<sup>137</sup> and there must be agreement on the choice of law.<sup>138</sup>

The 2019 Department of Finance Annual Report on Ireland’s participation in the International Monetary Fund and World Bank outlines Ireland’s position on the ICSID Convention, stating

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<sup>132</sup> Ibid at p. 15.

<sup>133</sup> Quentin Declève, [Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements](#), European Papers, Vol. 4, 2019, No 1, at pp 104-105 (last accessed 27 April 2021).

<sup>134</sup> ICSID, [About ICSID – Member States](#) (webpage) (last accessed 27 April 2021).

<sup>135</sup> Department of Finance, [2019 Annual Report on Ireland’s Participation in the International Monetary Fund and the World Bank](#) at pp 38-39.

<sup>136</sup> Ireland has no active BITs in place with any other state. Ireland’s only BIT was concluded with the Czech Republic in 1996 and terminated in 1997.

<sup>137</sup> [Article 25\(1\)](#), ICSID Convention (last accessed 28 April 2021).

<sup>138</sup> [Article 42](#), ICSID Convention (last accessed 28 April 2021).



Ireland signed the Convention in 1966 and ratified it in 1980.<sup>139</sup> The ratifying legislation was originally the [Arbitration Act 1980](#) and the current legislation giving force of law to the ICSID Convention in Ireland is the [Arbitration Act 2010](#).

[Section 25](#) of the *Arbitration Act 2010* expressly provides that the Act shall not apply to proceedings under the ICSID Convention, save in certain circumstances.

The Department of Finance further states that:

“ICSID maintains a Panel of Conciliators and a Panel of Arbitrators to service proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Ireland, as a member of ICSID, designates four persons to each Panel.”<sup>140</sup>

CETA has set out specific requirements for investor-state disputes that fall under its scope, including the establishment of a Tribunal made up of pre-appointed judges, rather than on the nomination of the disputing parties. These provisions also incorporate ICSID as one of the options available to disputing parties in deciding the rules under which the claim is considered. The main provisions incorporating ICSID are set out below.

### ICSID outside of the ICS

Based on the above, in terms of whether an investor can sue in ICSID without any involvement of the ICS, it would appear that in practice this would only be possible on matters not included in the CETA agreement and would require the consent of the respondent state to arbitration. Matters within the scope defined by Article 8.18 CETA fall within the jurisdiction of the CETA Tribunal and Appellate Tribunal. However, ICSID arbitration may still apply to a dispute **if both parties agree** to settle a dispute in this way.

Should the investment provisions of CETA come into force, consent from Ireland would still be required prior to engagement of ICSID arbitration taken outside of the scope of Section F of Chapter 8 of CETA. As Ireland does not have any active BIT with Canada, it would thus appear that such consent would have to be given on a case-by-case basis. Under ICSID rules, if the respondent consents to arbitration, then it cannot withdraw that consent.<sup>141</sup>

While the ICSID is open to contracting parties and investors from contracting parties that consent to arbitration, it is noteworthy that the European Union is not a contracting party to ICSID and this may impact the jurisdiction of the ICSID over cases brought against an entity that is not a party to the ICSID Convention.<sup>142</sup>

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<sup>139</sup> Department of Finance, [2019 Annual Report on Ireland's Participation in the International Monetary Fund and the World Bank](#) at p. 39.

<sup>140</sup> Ibid.

<sup>141</sup> [Article 25\(1\)](#), ICSID Convention (last accessed 28 April 2021).

<sup>142</sup> August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration', *Journal of International Economic Law*, Volume 19, Issue 4, December 2016, 761-786 at 768-769.



## ICSID Additional Facility

ICSID normally has jurisdiction over disputes between member parties to the ICSID. However, the ICSID Additional Facility rules may still allow for the ICSID to have jurisdiction in disputes where only one of the parties is a signatory or an investor from a signatory. Arbitration under the mechanism is voluntary. Again, once a party consents to arbitration under the jurisdiction of the ICSID, it cannot withdraw that consent.<sup>143</sup>

The Additional Facility was created as a means of offering arbitration, conciliation and fact-finding services for certain disputes that fall outside the scope of the ICSID Convention. These services apply as follows:

- Arbitration or conciliation of investment disputes between a State and a foreign national, one of which is not a member state of ICSID or a national of a member state of ICSID;
- Arbitration or conciliation of disputes that do not directly arise out of an investment between a State and a foreign national, at least one of which is a member state of ICSID or a national of a member state of ICSID; and
- Fact-finding proceedings instituted by any state or a national of any state.<sup>144</sup>

## UNCITRAL

The United Nations Commission on International Trade Law (UNCITRAL) has also adopted [Arbitration Rules](#) which set out procedural rules for arbitration proceedings upon which parties to a dispute may agree. In force since 1976, these rules were revised in 2010 and incorporated further UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration in 2013. The transparency rules apply to arbitration proceedings initiated pursuant to an investment treaty concluded on or after 1 April 2014, unless the Parties to the treaty agree otherwise.

Article 8.23.2 of CETA provides that a claim may be submitted under the UNCITRAL Arbitration Rules. Furthermore, Article 8.36 of CETA incorporates the UNCITRAL Transparency Rules into the agreement, providing that these rules, as modified by Chapter 8, shall apply in connection with Section F proceedings. Article 8.36 further sets out the documents that may be made available to the public and allows either Canada or EU to make documents available subject to the redaction of private or confidential information. Similar provision is made in CETA for the Tribunal to protect private or confidential information by holding the relevant part of the hearings in private.

## Other rules

Finally, as noted above, Article 8.23 also allows the parties to a dispute to agree on any other alternative rules to the three stipulated in the agreement. Furthermore, the rules relate to claims relating to CETA itself, and parties to arbitration rules, such as ICSID, may still agree to arbitration outside of the agreement.

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<sup>143</sup> [Article 25\(1\)](#), ICSID Convention and [Articles 2\(a\) and 4\(2\)](#), ICSID Additional Facility Rules (last accessed 28 April 2021).

<sup>144</sup> ICSID, [Resources – ICSID Additional Facility Rules](#) (webpage) (last accessed 27 April 2021).

## Comparison with national courts

The ICS mechanism is envisaged to consist of a CETA Tribunal and an Appellate Tribunal, allowing for a right of appeal. The Joint Interpretative Instrument clarifies that CETA does not privilege recourse to the ICS mechanism and investors may also choose to pursue available recourse in the domestic courts instead of the ICS.<sup>145</sup> Article 8.20 of CETA also offers a third option of mediation, where a mediator is appointed by agreement of the disputing parties (Article 8.20.3) and the disputing parties are required to endeavour to reach a resolution within 60 days of the appointment of the mediator (Article 8.20.4).

The ability of investors to sue in domestic courts was also acknowledged by the Tánaiste, Leo Varadkar TD, in a recent parliamentary question:

“It is important to remember that a Canadian firm can seek to sue Government for alleged unfair treatment or discrimination in our courts whether CETA exists or not. CETA simply provides an arbitration alternative. That alternative, unlike a challenge in the courts, cannot find any act by Government to be ultra vires or unconstitutional – it is only concerned with redress for proven harm.”<sup>146</sup>

It has been pointed out, however, that investors can access the ICS without first going before national courts, as is customary in international law, while the level of judicial protection in the EU and Canada is relatively high.<sup>147</sup>

## Possible ‘chilling effect’ on regulation

The European Parliamentary Research Service published a paper on CETA in June 2017, [From arbitration to the investment court system \(ICS\)](#). In the paper, it references the ‘chilling effect’, where States prefer not to regulate where it may result in compensation being paid to investors, in respect of ISDS.<sup>148</sup> This, according to the paper, arises from a “fear of potential reduction in states’ sovereign power to regulate; as the introduction of particular types of legislation to pursue legitimate policy objectives could lead to claims under ISDS from foreign investors whose business operations are affected”.<sup>149</sup>

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<sup>145</sup> Joint Interpretative Instrument, para. 6(a).

<sup>146</sup> Leo Varadkar T.D., Tánaiste and Minister for Enterprise, Trade and Employment, [Response to Parliamentary Question No 10 on Trade Agreements](#), *Dáil Éireann Debate*, 20 January 2021 (last accessed 27 April 2021).

<sup>147</sup> Dr Laurens Ankersmit, Assistant Professor, University of Amsterdam, [Comprehensive and Economic Trade Agreement: Discussion \(Resumed\)](#), *Joint Committee on European Union Affairs Debate*, 6 April 2021 (last accessed 27 April 2021).

<sup>148</sup> Laura Puccio and Roderick Harte, [From arbitration to the investment court system \(ICS\)](#), European Parliamentary Research Service, PE 607.251, June 2017, at p. 9 (last accessed 27 April 2021); See also J. Kelsey and L. Wallach, *Investor-state’ disputes in trade pacts threaten fundamental principles of national judicial systems*, University of Auckland and Public Citizen’s Global Trade Watch, Washington DC, 2012, at p. 2, which sets out examples arising from the NAFTA Investor-State system.

<sup>149</sup> Laura Puccio and Roderick Harte, [From arbitration to the investment court system \(ICS\)](#), European Parliamentary Research Service, PE 607.251, June 2017, at p. 9 (last accessed 27 April 2021).

Prior to publication of the judgment in Opinion 1/17, it was suggested by Comhlámh that CETA is likely to hinder the implementation of current and future EU regulation for the protection of health, the environment and consumers due to this chilling effect.<sup>150</sup> Even after the judgment in Opinion 1/17, some civil society groups have argued that the ICS could exert a chilling effect on government, preventing the adoption of laws in the public interest that might otherwise trigger such a challenge.<sup>151</sup>

In a recent press release, An Taisce have noted that the process of allowing corporations to sue states before arbitration tribunals is a one-way process, and that by simply threatening to sue government, foreign corporations can pressurise states to dilute or remove regulations in areas such as climate, environment, health, finance, or taxation, and make the Government fearful of advancing progressive policies and regulations.<sup>152</sup> It further argues that such 'regulatory chill' would be a serious imposition on the ability of Ireland to manage its environmental protection, and may impact the forthcoming EU Green Deal.<sup>153</sup>

As the ICS has not yet come into operation, arguments suggesting the possibility of 'regulatory chill' are hypothetical. Writing in 2012, Kelsey and Wallach state that "attempts at clarifications and interpretative annexes have recognized and sought to limit the legal risks" but note that these provisions are untested.<sup>154</sup>

As noted in this paper above, point 3 of Annex 8-A to CETA clarifies that non-discriminatory measures that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.<sup>155</sup>

It is also noteworthy that Articles 8.32 and 8.33 of CETA allow respondent States to challenge claims that are considered to be manifestly without legal merit or unfounded as a matter of law, prior to an ICS hearing. These provisions may go some way to limiting any costs faced by the State to defend 'spurious' claims.

Commitments from Canada and the EU in relation to Investment Protection are set out in paragraph 6 of the [Joint Interpretative Instrument](#), including the following:

- **Paragraph 6(a)** states that CETA includes 'modern rules' which preserve the right of governments to regulate in the public interest including when such regulations affect a foreign investment.

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<sup>150</sup> Comhlámh, [CETA: The Implications for Ireland](#), 2017, at p. 11 (last accessed 27 April 2021).

<sup>151</sup> Irish Congress of Trade Unions, [Congress seeks delay in tabling CETA motion in Oireachtas](#), (letter to TDs) 14 December 2020 (last accessed 27 April 2021).

<sup>152</sup> An Taisce, [CETA Vote Imperils Irish Climate and Nature Action](#), Press Release, 13 December 2020 (last accessed 27 April 2021).

<sup>153</sup> Ibid.

<sup>154</sup> Jane Kelsey and Lori Wallach, *Investor-state' disputes in trade pacts threaten fundamental principles of national judicial systems*, University of Auckland and Public Citizen's Global Trade Watch, Washington DC, 2012, at p. 2.

<sup>155</sup> As also noted above, there is an exception for the "rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive".

- **Paragraph 6(b)** clarified that governments may change their laws, regardless of whether this may negatively affect an investment or investor's expectations of profits, further clarifying that any award of compensation will be objectively determined by the Tribunal and will not be greater than the loss suffered.
- **Paragraph 6(g)** states that CETA is the first agreement to include an appeal mechanism which will allow the correction of errors and ensure the consistency of the decisions of the Tribunal of first instance.
- **Paragraph 6(h)** states a commitment from Canada and the EU to monitor the operation of all these investment rules, to address in a timely manner any shortcomings that may emerge, and to explore ways in which to continually improve their operation over time.

## Interpretation and the position of domestic law

As noted above, Article 8.31 allows the Tribunal to consider domestic law as fact. However, the Tribunal is **not compelled** to do so. Rather, it may do so as it deems appropriate.

As noted by Sonja Heppner:

“... the requirement of treating domestic law as a matter of fact is designed to protect the monopoly of the competent authorities of the EU and its Member States, and of Canada, to determine the legality of a measure, alleged to constitute a breach of CETA, under the applicable domestic law.”<sup>156</sup>

As also noted above, this was a central issue in Opinion 1/17, where the Court of Justice found that Section F of Chapter 8 did not infringe upon the autonomy of the EU legal order and was thus compatible with EU law.

A further consideration is that Article 8.31.2 does not mention the Appellate Tribunal, and how it would need to apply domestic law. However, Article 8.28(2)(b) provides that the Appellate Tribunal may uphold, modify or reverse a Tribunal's award, based on manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law. The Court of Justice considered this point in Opinion 1/17, holding that it is “nonetheless clear from the preceding provisions that it was in no way the intention of the Parties to confer on the Appellate Tribunal jurisdiction to interpret domestic law”.<sup>157</sup> Furthermore, Heppner observes that it is “only realistic” that the Tribunal and Appellate Tribunal may differ on their determination of the prevailing interpretation of domestic law, and that this may be difficult where no prevailing interpretation prevails, e.g. where two dominant interpretations exist.<sup>158</sup> However, it is also noteworthy that Ireland, like Canada, is a common law

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<sup>156</sup> Sonja Heppner, ‘A Critical Appraisal of the Investment Court System Proposed by the European Commission’ (2016) *Irish Journal of European Law* Vol. 19(1), pp 38-63.

<sup>157</sup> [Opinion 1/17](#) ECLI:EU:C:2019:341 at [133] (last accessed 26 April 2021).

<sup>158</sup> Sonja Heppner, ‘A Critical Appraisal of the Investment Court System Proposed by the European Commission’ (2016) *Irish Journal of European Law* Vol. 19(1), pp 38-63.

jurisdiction, so the doctrine of *stare decisis*<sup>159</sup> and precedent in Irish case law may mean that in an Irish context such an occurrence is unlikely, but may be relevant in federal jurisdictions.

Another issue that may arise on this point is whether the determinations of the prevailing domestic law of a Member State by the Tribunal and Appellate Tribunal must be consistent and thus bind future decisions. This raises the question of whether determinations of the Tribunal and Appellate Tribunal on the prevailing interpretation of domestic law are equally authoritative or unauthoritative, or whether the Appellate Tribunal would develop its own *jurisprudence constante*.<sup>160</sup>

## Choice of law

Where a dispute is grounded in a contract, unless the parties expressly agree otherwise, international best practice would suggest that the Tribunal would apply the law specified in the contract. Where no law is specified, or the dispute does not arise from a contract, the Tribunal would follow the rules under which the claim was submitted (under Article 8.23.2 of CETA). Presumably, none of this would restrict the Tribunal from developing interpretative jurisprudence on matters not covered by the agreed rules of the claim.

Article 27 of the Vienna Convention specifically prohibits a party from invoking the provisions of its domestic law as justification for its failure to perform its obligations under a treaty. Sonja Heppner explains:

“Inasmuch as Article 8.31 (1) CETA states that the Tribunal shall interpret CETA in accordance with the Vienna Convention on the Law of Treaties (the ‘Vienna Convention’) and other rules and principles of international law applicable between the Parties, this statement does not deviate from rules otherwise applicable in traditional investor-state arbitration. The Vienna Convention is applicable to treaties between States (Article 1 of the Vienna Convention). That includes international investment agreements. Article 31(3)(c) of the Vienna Convention further states that, when interpreting a treaty, any relevant rules of international law applicable in the relations between the Parties shall be taken into account. Article 8.31(1) CETA does not go beyond what is already established in the Vienna Convention and is therefore merely declaratory in nature.”<sup>161</sup>

A further consideration is the issue of choice of law in proceedings before the Tribunal. As noted above, Article 8.23 sets out three rules of procedure that an investor may make a claim under, while also reserving the right of parties to a dispute to select other procedural rules. However, while each of the three procedural rules listed contain provisions for deciding the dispute in

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<sup>159</sup> Murdoch and Hunt’s Encyclopedia of Irish Law, 6<sup>th</sup> ed. Bloomsbury, 2016, defines *stare decisis* as a doctrine by which previous judicial decisions must be followed. It is not a binding, unalterable rule, and circumstances in which a court may depart from the doctrine are extremely rare.

<sup>160</sup> Sonja Heppner, ‘A Critical Appraisal of the Investment Court System Proposed by the European Commission’ (2016) *Irish Journal of European Law* Vol. 19(1), pp 38-63. According to Merriam Webster, [jurisprudence constante](#) is a doctrine of civil law that holds that a long series of previous decisions applying a particular rule of law carries great weight and may be determinative in subsequent cases (last accessed 28 April 2021).

<sup>161</sup> Sonja Heppner, ‘A Critical Appraisal of the Investment Court System Proposed by the European Commission’ (2016) *Irish Journal of European Law* Vol. 19(1), pp 38-63.

accordance with rules designated by the parties, each contain slightly different choice of law provisions where there is no such designation:

- **ICSID Convention:** Under Article 42 of the ICSID Convention, where no rules are designated, the Tribunal must apply the law of the Contracting State party to the dispute, including provisions on the conflict of laws, and such rules of international law as may be applicable.
- **ICSID Additional Facility:** Article 54 of the ICSID Additional Facility applies slightly different rules to the Convention. Where no rules are designated, the Tribunal must apply the law determined by the conflict of laws rules, and such rules of international law, it considers applicable.
- **UNCITRAL:** Under Article 35 of the UNCITRAL Arbitration Rules, where no rules of law are designated by the parties, the Tribunal is required to apply the law which it determines to be appropriate.

In considering the above choice of law provisions, a possible issue arises in the use of the word “apply” in these provisions, although CETA also requires that domestic law may be interpreted as a “matter of fact”. Some clarification on this point may be required.

### Legitimate expectation and negligent misstatement

The European Parliamentary Research Service considered the issue of legitimate expectation in a research briefing it published on [CETA: Investment and the right to regulate](#) in February 2017. While it notes that the right to regulate is reaffirmed, it does discuss the issue of legitimate expectation and notes that this is “linked strictly” to the concept of a specific representation made by the State to induce the investor to make an investment. It further notes that this definition effectively codifies existing case law.<sup>162</sup>

As noted above, Article 8.31.2 of CETA provides that if the Tribunal considers domestic law, it must consider domestic law as a matter of fact and follow the prevailing interpretation to the domestic law by the courts or authorities of that party, which shall not be bound by any meaning given to domestic law by the CETA Tribunal.

The doctrine of legitimate expectation is already well established in Irish administrative law. In Ireland, the doctrine of legitimate expectation may be applied to confer a procedural and/or substantive entitlement on an individual to the extent that damage or loss has been incurred as a result of reliance on a statement or representation by an administrative body or executive agency or a minister.

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<sup>162</sup> Laura Puccio, European Parliamentary Research Service, [CETA: Investment and the right to regulate](#), PE 599.265, February 2017 at p. 2 (last accessed 27 April 2021).



### The Glencar case

In Ireland, the leading case on legitimate expectation is *Glencar Explorations plc v Mayo County Council (No 2)*.<sup>163</sup> In the case, heard before the High Court, the applicants challenged a county-wide mining ban that had been inserted in the County Development Plan on the basis (they argued) that this breached their legitimate expectation. It was held by the then Justice Peter Kelly that a legitimate expectation was not established by the applicants and, even if it had been, damages would not be available in the absence of a subsisting contractual or equivalent relationship between the parties.

On appeal to the Supreme Court, it was held that legitimate expectation did not arise, since the applicants had not been deprived of a benefit, namely a planning permission, which they reasonably and legitimately expected to receive. It was expressly held by Justice Fennelly that, in order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it is necessary to establish three factors:

1. the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity;
2. this representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation; **and**
3. it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it.<sup>164</sup>

Consequently in Ireland, to satisfy a finding of legitimate expectation, the public authority would have to have made a specific promise or representation directly or indirectly to the plaintiff and the plaintiff would have to show that he or she reasonably relied on that promise when entering into an agreement (i.e. he or she would not have entered into the relevant relationship in the absence of the promise) and it would be reasonable to hold the public authority to that representation.

### Negligent misstatement

Further to the concept of legitimate expectation, it was established in the House of Lords judgment of *Hedley Byrne v Heller & Partners* that liability for economic loss may arise from the tort of negligent misstatement.<sup>165</sup> According to McMahon and Binchy, although there was a disclaimer that relieved the defendant of liability, the case is important as the speeches of the House of Lords

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<sup>163</sup> *Glencar Explorations plc v Mayo County Council (No 2)* [2002] 1 I.R. 84.

<sup>164</sup> David Browne, *The Law of Local Government* (2<sup>nd</sup> edn.), Round Hall, Dublin: 2020, [6-479].

<sup>165</sup> *Hedley, Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.



“were to the effect that there can be liability for negligent misstatement in cases where a party seeking information from the defendant relies on his special skill and trusts him to exercise due care”.<sup>166</sup> The decision in *Hedley Byrne* was also recognised by the Irish courts.<sup>167</sup>

The Supreme Court further developed the requirements for establishing a duty of care in relation to the tort of negligent misstatement in *Wildgust v Bank of Ireland*.<sup>168</sup> This decision established that the statement did not necessarily have to be made to the plaintiff. The court held the statement could also be made to a “limited and identifiable class”, where it could be reasonably expected by the person making the statement that it would be relied upon by such persons to act or not act in a particular manner. Irish courts have also extended the tort to holding public authorities vicariously liable in certain circumstances.<sup>169</sup>

### The power to change the fair and equitable treatment provision

The circumstances where the obligation of fair and equitable treatment under CETA are breached are listed exhaustively in Article 8.10, with Article 8.10.2(f) referencing Article 8.10.3, which provides that the Parties are required to regularly, or upon the request of a party, review the content of the obligation to provide fair and equitable treatment. Article 8.10.2(f) has raised some concerns in civil society groups as, while the list appears to be exhaustive, the CETA Joint Committee has the power to add to this list.<sup>170</sup> Article 8.10.3 also provides that the Committee on Services and Investment (CSI) may develop recommendations in this regard. The CSI is a specialised Committee established under CETA, consisting of representatives from the EU and Canada. Specialised Committees under CETA are co-chaired by a representative of each of the Parties, with some provisions of CETA stipulating the membership of certain specialised committees.

Under the [Rules of Procedure](#) for the CETA Joint Committee, Rule 14.4 states that the rules shall apply *mutatis mutandis*<sup>171</sup> to the specialised committees of the CETA Joint Committee. Rule 2 provides that each Party to CETA will notify the other Party to the Agreement of the list of its members of the CETA Joint Committee. The list is administered and kept current by the Secretariat of the CETA Joint Committee. Rule 5 also provides that members of the CETA Joint

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<sup>166</sup> Bryan ME McMahon & William Binchy, *Law of Torts*, 4<sup>th</sup> ed. Bloomsbury, 2013, at [10.75].

<sup>167</sup> See *Securities Trust Ltd v Hugh Moore & Alexander Ltd* [1964] IR 417, and *Bank of Ireland v Smith* [1966] IR 646.

<sup>168</sup> *Wildgust v Bank of Ireland* [2006] 1 IR 570. A further point of note is the decision of the Supreme Court in *Walsh v Jones Lang Lasalle* [2017] IESC 38, which considered whether a disclaimer affected the imposition of a duty of care.

<sup>169</sup> See *Bates v Minister for Agriculture, Fisheries and Food* [2011] IEHC 429. [2018] IESC 5, and *Walsh v South Tipperary County Council* [2011] IEHC 503. See further Bryan ME McMahon & William Binchy, *Law of Torts*, 4<sup>th</sup> ed. Bloomsbury, 2013, at [10.71] – [10.208].

<sup>170</sup> *Ibid.*

<sup>171</sup> Latin phrase meaning “with the necessary changes”. In this context, it means that the rules of the CETA Joint Committee also apply to the special committees unless otherwise decided by a specialised committee.

Committee may be accompanied by government officials and the co-chairs are informed of the intended composition of the delegation of each Party before each meeting.

## Expropriation

As noted above, Article 8.12 sets out the four circumstances that must be present for expropriation to be permitted under CETA. According to the EPRS, these are the four requirements necessary for expropriation to be legal under international law.<sup>172</sup> However, it also notes that claimants can bring actions based on indirect expropriation, and that interpretations by tribunals on what constitutes this have varied. Some tribunals will only find illegitimate indirect expropriation in situations where substantial deprivation of the right to property can be proved, while others have engaged in a balancing exercise between State interests and the impact on investors' rights.<sup>173</sup>

## Accessibility

The issues of investment protection and access to trade opportunities in the context of SMEs has also been highlighted in discourse on CETA. It is noteworthy that in Opinion 1/17, the Court of Justice noted a possible inconsistency with regard to who may have access to the Tribunal as the mechanism may, in practice, only be accessible to investors with significant financial resources.<sup>174</sup> However, it also noted the "commitment" of the Commission and the Council to ensure accessibility to the investment protection mechanisms by SMEs in Statement No 36.<sup>175</sup>

Since the provisional application of CETA, the CETA Joint Committee has adopted a [Recommendation on SMEs](#), which sets out key observations and recommendations from the CETA Joint Committee. This includes a recognition of the importance of SMEs in EU-Canada bilateral trade relations and provisions in CETA that are of particular benefit to SMEs, while also committing to measures aimed at ensuring awareness of CETA, including a publicly accessible website and SME Contact Points. The CETA Joint Committee also published a Joint Activity Report, [Working together to advance trade and SMEs](#) (the Activity Report), which sets out a Work Plan on the implementation of the SME Recommendation. This work plan contains activities in two areas; 1) bilateral policy engagement and 2) stakeholder engagement.

In terms of investment protection, neither the Recommendation nor the Activity Report include any development of the commitment referenced in Opinion 1/17, although it is also the case that Article 8.39.6 has yet to enter into force and is not yet law. The European Commission however published a document in April 2019 on the potential benefits for SMEs under CETA, where it suggests that the provisions in the chapter on investment make it less costly for SMEs to engage in investment dispute resolution than what is the case under other trade agreements. It notes:

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<sup>172</sup> Laura Puccio, European Parliamentary Research Service, [CETA: Investment and the right to regulate](#), PE 599.265, February 2017 at p. 1.

<sup>173</sup> Ibid.

<sup>174</sup> [Opinion 1/17](#) ECLI:EU:C:2019:341 at [213] (last accessed 26 April 2021).

<sup>175</sup> Ibid at [217] – [218].

- The specific provisions in the agreement on mediation, which represents a low-cost option for SMEs compared to full litigation;
- Provisions allowing parties to hold consultation via videoconference;
- Procedural deadlines that make proceedings faster and reduce the cost of litigation for SMEs;
- The possibility for SMEs to submit claims to a single judge instead of three judges; and
- The loser pays principle under CETA would mean that a successful SME would have no costs, and the EU and Canada can adopt supplementary rules on introducing cost ceilings for SMEs.<sup>176</sup>

The document also notes that SME issues can be raised in the relevant Committees responsible for implementing CETA.<sup>177</sup> Furthermore, in Opinion 1/17, the Court of Justice has interpreted the implementation of Article 8.39.6 of CETA, and ensuring access to the Tribunal for SMEs, as a commitment from the Commission and Council “even if work within the CETA Joint Committee were to be fruitless”.<sup>178</sup> The court also opined that approval of CETA would be dependent on this commitment.<sup>179</sup>

### Use of Irish in proceedings

A final consideration regarding the issue of accessibility is that of language requirements, particularly in relation to the Irish language. The three sets of procedural rules borrowed by CETA in relation to the ICS each provide for the determination of the language, or languages, to be used in the proceedings.<sup>180</sup>

Should domestic courts be chosen for resolving the dispute, under Irish law the basic principle is that a litigant may argue their case in Irish, but cannot impose their choice of language on the other parties to the litigation.<sup>181</sup> Furthermore, [section 8\(1\) of the Official Languages Act 2003](#), permits a person to “use either of the official languages in, or in any pleading in or document issuing from, any court”. Section 8 also sets out a duty on every court to ensure that persons appearing or giving evidence before it may be heard in either official language. It also provides courts with a discretion to determine if simultaneous or consecutive interpretation may be used, and provides that where the State or a public body is party to civil proceedings before a court, it must use the language

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<sup>176</sup> European Commission, [How the EU-Canada Comprehensive Economic and Trade Agreement \(CETA\) benefits small and medium-sized enterprises \(SMEs\)](#), April 2019 at pp 2-3. (last accessed 28 April 2021).

<sup>177</sup> Ibid at p.3.

<sup>178</sup> [Opinion 1/17](#) ECLI:EU:C:2019:341 at [218] (last accessed 26 April 2021).

<sup>179</sup> Ibid at [221].

<sup>180</sup> See for example Rules 20 and 22 of the [ICSID Convention Rules of Procedure for Arbitration Proceedings](#); Articles 28 and 30 of the [ICSID Arbitration \(Additional Facility\) Rules](#); Article 19 of the [UNCITRAL Arbitration Rules](#) (last accessed 27 April 2021).

<sup>181</sup> Gerard Hogan et al, *JM Kelly: The Irish Constitution*, 5<sup>th</sup> ed. Bloomsbury, 2018 at [3.2.189].

chosen by the other party. The use of Irish in court proceedings and on official documents has also been considered by constitutional law experts.<sup>182</sup>

It is noteworthy that Article 30.11 of CETA provides for duplicate authentic texts of the agreement in all EU languages except Irish.

## Right of withdrawal

During provisional application, a Party may terminate the provisional application of the agreement under Article 30.7.3.c. From this definition, it appears that **at present** Ireland, as a Member State of the EU, retains the capacity to withdraw from provisions of CETA. This is supported by the judgment of the German Constitutional Court, which stated the following:

“As the Agreement has yet to be finally ratified and signed by all Member States of the European Union, it will not be final and binding under international law until further steps are taken. Member States may terminate the provisional application of the Agreement at any time by written notice ... to the other Parties pursuant to Art. 30.7(3) letter c of the CETA draft.”<sup>183</sup>

Article 30.9.1 of CETA would also apply during the provisional application of the agreement, and it extends to the period following full implementation. That Article specifies that:

“A **Party** may denounce this Agreement by giving written notice of termination to the General Secretariat of the Council of the European Union and the Department of Foreign Affairs, Trade and Development of Canada, or their respective successors.” (emphasis added)

Article 1.1 of CETA, defines the Parties as:

“... on the one hand, the European Union or its Member States **or** the European Union and its Member States **within their respective areas of competence** as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the 'EU Party'), and on the other hand, Canada”. (emphasis added).

The broad nature of the term ‘Party’ in Article 1.1 may be interpreted, following full implementation, as providing for the inclusion of Member States in their own right, only insofar as they retain competence in areas as provided for in the TEU and TFEU. Therefore, were ratification to be viewed as transferring the shared competence to an exclusive competence of the EU, this may result in Member States no longer coming within the definition.

If termination is triggered, the agreement is terminated 180 days after the date of the written notice, which must be made to the General Secretariat of the Council of the European Union, and the Canadian Department of Foreign Affairs, Trade and Development.<sup>184</sup> However, Article 30.9.2

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<sup>182</sup> For example, see Gerard Hogan et al, *JM Kelly: The Irish Constitution*, 5<sup>th</sup> ed. Bloomsbury, 2018 at [3.2.189] – [3.2.223].

<sup>183</sup> BVerfG, Judgment of 13 October 2016 ([2 BvR 1368/16](#)) at [38] (last accessed 29 April 2021).

<sup>184</sup> There is also a further requirement to copy the notice to the CETA Joint Committee.

provides that Chapter 8 of the Agreement, which deals with investment, shall continue to remain in force for a further 20 years after the date of termination.

It would thus appear that for the purposes of this Article, once CETA is ratified only the EU or Canada may terminate the agreement. At a recent Joint Committee of European Union Affairs hearing, the Committee was told the following by Dr Oisín Suttle of NUI Maynooth:

“[O]nce ratified, there is nothing Ireland can do to pull back from the investor court system under CETA. Only Canada and the EU, rather than individual member states, can terminate this agreement. Termination is not a member state power. Even if the agreement is terminated, these rights for investors will continue for a further 20 years so this is not a decision that can be revised lightly once made ...”<sup>185</sup>

## Possible amendments to CETA?

Before concluding, it must be emphasised that CETA is an international treaty, not a commercial agreement or a contract with investors. Therefore, the Parties (the EU and Canada) continue to retain control over any future amendments even after the treaty has been fully implemented.

Article 30.2 of CETA provides:

“The Parties may agree, in writing, to amend this Agreement. An amendment shall enter into force after the Parties exchange written notifications certifying that **they have completed their respective applicable internal requirements and procedures** necessary for the entry into force of the amendment, or on the date agreed by the Parties.” (emphasis added)

As has been seen with the recent proposals brought forward by the EU to amend the Energy Charter Treaty,<sup>186</sup> where the Parties to the treaty determine that the treaty would not be in their best interests, it remains open to them to amend the treaty, by mutual agreement. This may be a more effective means of protecting sovereign interests than outright withdrawal, which would involve a 20-year exit period for investment.

In the case of CETA, some issues may arise.

Firstly, and most importantly, the Parties would need to reach agreement. Following this, it would be necessary for each Party to bring the amendments into force. For the EU, this could involve a relatively complicated process, depending on how amendments are classified in respect of competences. Should the power to amend be considered an exclusive competence of the EU, any amendments could be ratified without reference to the individual Member States.

This may affect whether Member States choose to ratify the agreement in the first place, as such a ratification would involve giving away a level of State sovereignty.

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<sup>185</sup> Dr Oisín Suttle, Assistant Professor of Law, NUI Maynooth, [Comprehensive and Economic Trade Agreement: Discussion \(Resumed\)](#), *Joint Committee on European Union Affairs Debate*, 6 April 2021.

<sup>186</sup> European Commission, [‘Fourth negotiation round to modernise Energy Charter Treaty’](#), *Press Release*, 5 March 2021 (last accessed 29 April 2021).

The question of how this could be achieved, whether by QMV or by unanimous decision of the Council of the EU could come down to whether CETA (once fully in force) is considered to fall within the CCP or the CFSP competence of the EU. The case of *European Commission v Council of the European Union*<sup>187</sup> dealt with the issue of which voting method would be needed where an agreement includes aspects of both the CCP and CFSP. The Court of Justice found that where the principal purpose of the agreement falls under the CCP and the provisions that fall into the CFSP are incidental to the agreement, QMV would be the required voting method. On the other hand, if, like the agreement as a whole, the amendments are considered to concern a shared competence, then they could only be approved through the ratification of each of the Member States, which could be a slow and unwieldy process.

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<sup>187</sup> [European Commission v Council of the European Union](#) (Case C-244/17) ECLI:EU:C:2018:662 (last accessed 29 April 2021).



## Conclusion

In considering the application of CETA in Ireland, it is important to understand that most of the agreement has been in provisionally in force since September 2017. The matters at issue on ratification concern very specific but significant areas falling within the competence of Member States. These areas include the proposed Investment Court System, which forms part of a longer-term EU ambition to establish a global Multilateral Investment Court.

While foreign direct investment is, since the Treaty of Lisbon, a competence of the EU pursuant to the Common Commercial Policy, indirect investment and dispute resolution remain shared competences, with approval of such competences within a mixed agreement confirmed as an explicit requirement in Opinion 2/15. The ratification procedure in Ireland would be completed pursuant to Article 29.5.2 of the Constitution, which requires Dáil Éireann to approve any international agreement placing a charge upon public funds, although agreements that are of a technical or administrative character are exempt from this requirement.

While the Court of Justice has held that the provisions of Chapter 8 of CETA are compatible with EU law, debate continues as regards the possible effects and impact of its provisions. Some aspects of the debate concern the structure of the agreement itself, such as the powers of the CETA Joint Committee, particularly on provisions allowing for additions and amendments to the agreement and how these may be democratically mandated. There is also the question of whether the trade and investment provisions of the agreement can be separated, as has been done for other agreements, e.g. the EU-Japan EPA. It is also noteworthy that the UK has agreed with Canada to review investment protection mechanisms in the UK-Canada Trade Continuity Agreement, which is largely modelled on CETA. Linked to this, there is also the question of what may happen if Ireland chooses not to ratify the agreement.

Further issues in the debate focus on the operation of the proposed investment court. These include how the ICS may be seen as an improvement upon national courts and other international dispute resolution mechanisms, including those mechanisms from which the ICS borrows procedural rules. Furthermore, it is also argued by some parties that the ICS may precipitate a chilling effect on regulation. Moreover, the interaction between the ICS and Irish domestic law may raise some issues regarding duty of care and legitimate expectation. The CETA Joint Committee also retains the power to review the list of breaches of the fair and equitable treatment obligation set out in CETA, which raises the possibility of further breaches being added to the list. The accessibility of the ICS and the withdrawal period of 20 years, as stipulated for the investment provisions, are also relevant in the context of this debate.

Before concluding, it must be said that the European Union and Canada have undertaken numerous actions to allay concerns on many of these matters. Furthermore, how any future changes or amendments, or interpretations, to CETA are managed, including the relevant voting method and process of approval for such changes, is a consideration that might also be relevant to the debate on ratification.

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