II LAwTTIP Roundtable

“CETA and Beyond: Rethinking International Dispute Settlement the 'EU' Way”

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CETA AND BEYOND: RETHINKING INTERNATIONAL DISPUTE SETTLEMENT THE 'EU' WAY”

On 12 June 2019 the Centre of European Law of King's College London hosted the II LAwTTIP Roundtable on “CETA and Beyond: Rethinking International Dispute Settlement the 'EU' Way." The seminar, delivered by Dr Sonja Boelaert, Senior Legal Adviser at the Council of the European Union, analysed the impact of Opinion 1/17 on the evolution of dispute settlement mechanisms in the EU, which provided the compatibility of the “Investment Court System” envisaged in the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) with the autonomy of the EU legal order.

Dr Boelaert observed that most of the formidable legal obstacles that the Court had to be overcome to achieve that outcome had in great part been erected by the Court itself in its previous case law: reference was made in particular to the interpretation of the concept of autonomy of EU law in Opinions 1/09 (European Patent Court) and 2/13 (Accession to the ECHR), together with the Achmea judgment. Dr Boelaert noted that, while the narrow understanding of autonomy previously espoused by the Court had raised doubts on the EU’s role in the international relations, the Court's Opinion 1/17 has confirmed that there remains room for such a role.

Dr. Boelaert continued its presentation noting that several of its elements appear remarkable and appear to signal not only a change tone but also a change in substance in the Court’s understating of the external relations of the EU.

First, Opinion 1/17 includes an unprecedented warning to the CETA tribunals to refrain from interfering with the EU’s internal decision-making on matters in the public interest.

Secondly, Opinion 1/17 contains a subtle and almost hidden reminder of one of the noteworthy points that the Court made earlier in Opinion 2/15 (Singapore FTA): as far as the EU side is concerned, ultimately, the decision as to whether to bring the ISDS/ICS part of the CETA to life rests, not with the Commission, nor with the Council or the European Parliament, but with the EU’s Member States, whose unanimous consent is needed for this purpose. This reminder can be found in paragraph 221 of Opinion 1/17, where the Court of Justice refers to Statement No 36 agreed with Canada, according to which ‘ (…) the entry into force of the provisions of Section F of Chapter Eight

of the CETA will not occur before the ratification of the CETA by all the Member States (…).'

Thirdly, there is the question of what lessons can be drawn from Opinion 1/17 for other EU agreements where the legality of existing, agreed or proposed external dispute settlement remains a live subject. Dr Boelaert noted that, at least from a scholarly perspective, Opinion 1/17 marks yet another important milestone in the evolving jurisprudence of the Luxemburg-based Court regarding the protection of the autonomy of the EU legal system. The answers given by the CJEU in Opinion 1/17 to the doubts expressed civil society should, consequently and logically, also serve as guidance for all other agreements and dossiers where such questions arise.

Dr Boelaert concluded her presentation observing that Opinion 1/17 leaves open the question of whether this apparent change of heart of the Court in relation to real or perceived threats to the autonomy of the EU legal order in the external sphere will be durable or whether it will remain one-off special case, where the Court was persuaded that the safeguards set out in the CETA texts.

Professor Takis Tridimas from the School of Law of King's College London in his remarks focused on the possible implications of the CETA judgment on the ongoing EU – UK withdrawal negotiations. The draft EU –UK Withdrawal Agreement, to prevent and defuse probable future disputes, a Joint Committee comprised of both EU and UK representatives should be set up in order to monitor, review, and possibly settle, the potential divergences between the EU and the UK. The position of the UK Government is to press for the 'tailored approach' on possible disputes arising in cases no solution can be found within the Joint Committee. As for trade disputes, the preferred option of the UK Government would be arbitration. However, the 'arbitration' option seems particularly problematic from the EU perspective. In Opinion 2/15 relating to the division of competences between the EU and the Member States for the ratification of the EU/Singapore FTA, the Court of Justice held that the State-to-State arbitral mechanism provided in the agreement impaired the 'autonomy' of EU law because it removes "disputes from the jurisdiction of the courts of the Member States or of the European Union". Consequently, both the arbitration mechanisms governing dispute settlements between investors and the contracting parties ("ISDS") and the contracting parties among themselves (State-to-State) fell within the mixed competences of the EU and its Member States, implicitly making the future

ratification of a UK/EU agreement containing such a clause more complicated. The Court of Justice's 'unfriendly' approach to arbitration has been confirmed in it recent judgment in Slovak Republic v Achmea where it held that an arbitration clause contained in the Netherlands/Slovakia Bilateral Investment Treaty was incompatible with EU law because it breached its 'autonomy'. Although, on a cursory reading of the two decisions, the possible use of an arbitration a settlement dispute mechanism seems to be excluded, the CETA judgment seems to offer some more leeway. Arguably the issue of arbitration impinging on the autonomy of EU law in Achmea seems to be limited to the specific investor/State dispute settlement mechanism included in the Netherlands/Slovakia agreement, as the Court of Justice's judgment revolved around an arbitration agreement which, in its applicable law clause, expressly attributed to the arbitral tribunal the competence to interpret EU law, thereby manifestly violating the Court of Justice's monopoly to interpret EU law provided by Article 344 TFEU. This issue manifestly does not arise in state-to-state arbitration, such as the EU –UK Agreement, which regards inter-state relationships removed by definition from the jurisdiction of national courts. A variation of state-to-state arbitration is provided in the Moldova, Ukraine and Georgia Association Agreements, which allow the settlement of disputes between the parties to be referred to an arbitration panel, but require the arbitral panel to make a preliminary reference to the Court of Justice where specific questions of EU law arise.

Jean Monnet Network LAwTTIP

Based on a consortium among the **International Research Centre on European Law of the University of Bologna**, the **Centre of European Law of the King's College London** and the **Institut de l'Ouest Droit et Europe of the University of Rennes 1**, the Jean Monnet Network **LAwTTIP – Legal Ambiguities withstanding TTIP** intends to promote a large-scale legal reflection of both the existing EU Free Trade Agreements of new generation and the ongoing negotiations on the Transatlantic Trade and Investment Partnership (TTIP).

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