

# OPINION 1/17: TOWARDS A MODERN EU APPROACH TO INVESTOR-STATE DISPUTE SETTLEMENT

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## KEY POINTS

- The EU is playing a leading role in the reform of Investor-State Dispute Settlement Systems (ISDS).
- The EU role is multi-faceted; it is an important player in the current United Nations Commission on International Trade Law (UNCITRAL) Working Group III discussions on the alternative models of ISDS; it is developing new forms of trade agreements which include independent courts; and the Court of Justice of the EU (CJEU) has contributed to the endorsement of the legality of new forms of court systems to settle Investor-State disputes in modern EU trade Treaties.
- The role of the EU as a significant moderniser of trade agreements will have implications for the UK in negotiating any future trade deals with the EU.

## INTRODUCTION

An important aspect of modern trade agreements is the ability to encourage and secure foreign direct investment (FDI) and foreign indirect investment (FII) by providing the mechanisms to give confidence in institutions designed to protect the rights and property interests of foreign investors. But Investor-State Dispute Settlement (ISDS) mechanisms have been globally criticised as out-dated and inappropriate fora for the settlement of disputes involving States.

The attempted reform of ISDS is underway at UNCITRAL Working Group III, which began work in November 2017. The discussions reveal that the criticisms are wide ranging, embracing, inter alia, excessive costs of proceedings (including insufficient recoverability of cost awards); excessive duration of proceedings; lack of consistency and coherence in the interpretation of legal issues; incorrectness of

decisions; a lack of diversity among adjudicators; and a lack of independence, impartiality, and neutrality of adjudicators.<sup>1</sup>

Concerns about the ISDS are raised at the international level by a range of stakeholders because of the perceived lack of transparency, legitimacy and consistency in the decision-making process. Such dispute mechanisms are challenged as being undemocratic, allowing multinational companies to influence policymaking. In contrast, it is argued that small and medium sized businesses (SMEs) find it difficult to access ISDS and non-governmental organisations and other representatives of civil society argue that wider public policy interests (such as the protection of the environment, or employment) cannot be aired in the secretive processes. Concerns are

<sup>1</sup> Gabrielle Kaufmann-Kohler & Michele Potestà, *ACADEMIC FORUM ON ISDS, Concept Paper Project: Matching Concerns and Solutions*, "Introduction", available at: [https://www.cids.ch/images/Documents/Academic-Forum/0\\_Introduction\\_to\\_project\\_-\\_Kaufmann-Kohler\\_Potest.pdf](https://www.cids.ch/images/Documents/Academic-Forum/0_Introduction_to_project_-_Kaufmann-Kohler_Potest.pdf)

also raised over the protection of fundamental rights ideas, especially the right to access justice by small and medium sized undertakings, and the lack of access for non-governmental public interest groups. Also, there are few ways to review the decision of an arbitral tribunal since most tribunals are ad hoc, deciding a case on the merits. There is also no appeal mechanism. Awards can be set aside but on limited grounds that do not include errors of law or fact.

The EU has been a key player in the reform process of ISDS, either through participation in the UNCITRAL forum, or through changes in the way new trade agreements are made with third countries, and through the judicial review of ISDS clauses in intra-EU Investor Agreements and a review of the new EU trade policy of creating a judicial forum for the resolution of investment disputes in new trade agreements.

The recent Court of Justice of the European Union (CJEU) *Opinion 1/17*<sup>2</sup> on the validity of the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA) accepts that in modern trade agreements the EU may create a permanent court composed of judges appointed by the signatory states to settle Investor - State Disputes. This is a major step forward in endorsing the creation of a uniform, independent and open judicial protection system for the legal interests of investors in the EU.

## OPINION 1/17: A CHANGE OF PERSPECTIVE BY THE CJEU

In 2016, a number of Regions in Belgium, led by Wallonia, refused to authorize the Federal Government of Belgium to sign the CETA, stating that the Agreement lacked guarantees on social, health and environmental issues. They also challenged the creation of an Investment Court System (ICS) to handle investment disputes. The Belgian Government therefore asked the CJEU to give an Opinion, using the Article 218 Treaty on the Functioning of the European Union (TFEU) process, of the compatibility of the CETA with EU law.

*Opinion 1/17* is significant in analysing how the CJEU was persuaded to reach the conclusion that the new judicial fora in international Treaties are compatible

<sup>2</sup> 30 April 2019: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=707133>.

See Erika Szyszczak, "Perils of a No Deal Brexit: Opinion 1/17 and the Case of CETA", UKTPO Blog, 6 February 2019: <https://blogs.sussex.ac.uk/uktpo/2019/02/06/perils-of-a-no-deal-brexite-opinion-1-17-and-the-case-of-ceta/>

with EU law. Previously, the CJEU jealously protected its monopolist position as the guardian of the EU Treaties, declining to accept that another court or tribunal<sup>3</sup> could safeguard the rule of law in the EU.<sup>4</sup> Relying upon the principle of *the autonomy the EU legal order*<sup>5</sup> the CJEU accepted that while the EU may sign international treaties where an international court is created there must be in place mechanisms to protect the autonomy of the EU legal order.

Thus in 2018, in *Achmea*, the Court, departing from the advice of its Advocate General, sent shockwaves through the arbitration community by ruling that a bilateral investor protection agreement between Slovakia and The Netherlands<sup>6</sup> was incompatible with Articles 267<sup>7</sup> and 344 TFEU<sup>8</sup> and therefore did not conform with EU law.

The CJEU found that the tribunal appointed to handle investment disputes could be asked to interpret EU law, but its interpretation could not be effectively challenged by a court process, stripping the CJEU of its role as the final arbiter of EU law. The Court ruled that a court or tribunal must be capable of ensuring the full effectiveness of EU law. To achieve this end, either the tribunal must be situated within the judicial system of the EU, or its rulings must be subject to review by a court or tribunal of a Member State so that questions of EU law can ultimately be submitted to the Court by means of a reference for a Preliminary Ruling.

<sup>3</sup> The most high profile, and controversial case was *Opinion 2/13*, EU:C:2014:2454, with the refusal to allow the EU Institutions to accede to the ECHR.

<sup>4</sup> ECJ 20 April 2018, Case C-284/16, *Slovak Republic v Achmea*, EU: C:2018:158. See *Opinion 2/13* (Accession of the EU to the ECHR), EU: C:2014:2454; *Opinion 1/09* (Unified patent litigation system), EU: C:2011:123; ECJ 30 May 2006, Case C-459/03, *Commission v Ireland (MOX Plant)*, EU: C:2006:345; *Opinion 1/00* (European Common Aviation Area), EU: C:2002:231; *Opinion 2/94* (Accession of the EC to the ECHR), EU: C:1996:140; *Opinion 1/92* (Renegotiated European Economic Area), EU:C:1992:189; *Opinion 1/91* (European Economic Area), EU: C:1991:490; *Opinion 1/76* (European Laying-up Fund for Inland Waterway Vessels), EU:C:1977:63.

<sup>5</sup> ECJ 20 April 2018, Case C-284/16, *Slovak Republic v Achmea*, EU: C:2018:158

<sup>6</sup> Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, signed on 29 April 1991, 2242 UNTS 224.

<sup>7</sup> Article 267 TFEU provides for a Preliminary Ruling procedure whereby a national court may suspend national proceedings and refer questions of EU law (interpretation and validity) to the CJEU. National Courts of Final Instance (not necessarily Supreme Courts, merely courts where there is no appeal/review of the decision) should normally make a Reference to the CJEU. This procedure is designed to ensure a symbiotic relationship between national courts and the CJEU but in effect allows the CJEU to fulfil its role as guardian of EU law and supreme interpreter of EU law.

<sup>8</sup> Article 344 TFEU states that "*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.*"

Eyebrows were raised at the breadth and severity of this ruling since an arbitration tribunal would not necessarily engage with EU law directly.

As a consequence of this ruling, on 15 January 2019, the Member States of the EU agreed to terminate all bilateral investment Treaties within the EU.<sup>9</sup>

This political move by the Member States played neatly into the policy of the European Commission. The Commission held the view that that the dispute settlement mechanisms provided in these Treaties as well as the intra-EU application of the Energy Charter Treaty are incompatible with EU law and discriminate between EU investors.<sup>10</sup>

The Commission's concerns about the interpretation and application of the Energy Charter Treaty by arbitration tribunals justifies the wider concerns of handing over competence to decide investment disputes to tribunals is seen by comparing the different approaches of two arbitration tribunals. For e.g. in *Electrabel SA v Hungary*<sup>11</sup> the tribunal found that EU law

*“would prevail over the Energy Charter Treaty where there was a case of any material inconsistency” ( § 4.191).*

In contrast, the tribunal in *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Spain*<sup>12</sup> stated that

*“Should it ever be determined that there existed an inconsistency between the Energy Charter Treaty and EU Law ... the unqualified obligation in public international law of any arbitration tribunal constituted under the ECT would be to apply the former. This would be the case even were this to be the source of possible detriment to EU law. EU law does not and cannot “trump” public international law.” ( § 87)*

The European Commission takes the position that protection for all EU investors against unlawful interference by Member States is provided by EU law, which ensures that all investors are treated equally.

<sup>9</sup> Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection: [https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties\\_en](https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en)

<sup>10</sup> See COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Protection of intra-EU investment, COM/2018/547 final. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0547>

<sup>11</sup> ICSID CASE NO. ARB/07/1930, November 2012; available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf>

<sup>12</sup> ICSID Case No. ARB/13/13, Decision on Jurisdiction, 6 June 2016. <https://www.italaw.com/sites/default/files/case-documents/italaw7429.pdf>

But after the ruling in *Achmea* there was some doubt as to whether the same approach to independent investment tribunals would also be applied to trade agreements made between the EU and third states where international law governs the situation.

## EU PROPOSALS FOR A MULTILATERAL INVESTMENT COURT

On 13 September 2017, after Belgium's request to the CJEU for an Opinion on the CETA, the European Commission introduced a Recommendation<sup>13</sup> for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes (MIC), with the aim of having one, multilateral institution to rule on investment disputes covered by all the bilateral agreements in place instead of a bilateral investment court for each Free Trade Agreement (FTA).

On 20 March 2018, the EU Council agreed to allow the European Commission to negotiate at the Working Group III of UNCITRAL on behalf of the EU for a Multilateral Convention establishing a multilateral court for the settlement of investment disputes (MIC).<sup>14</sup> On 18 January 2019, the EU and its Member States submitted two papers to the UNCITRAL Working Group III. The first paper, “Establishing a standing mechanism for the settlement of international investment disputes”<sup>15</sup> sets out in detail the EU position on the creation of a MIC. The second paper, “Establishing a standing mechanism for the settlement of international investment disputes”, proposed a work plan for the process of the working group.<sup>16</sup>

## ISDS AND EU COMPETENCE TO NEGOTIATE AND CONCLUDE TRADE AGREEMENTS

The ISDS raises concerns for the EU as to whether the EU has exclusive competence to negotiate these aspects of trade agreements or whether the competence is shared with the Member States.

<sup>13</sup> Recommendation for a COUNCIL DECISION authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes COM/2017/0493 final.

<sup>14</sup> <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>

<sup>15</sup> Available at: [http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc\\_157631.pdf](http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf)

<sup>16</sup> [http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc\\_157631.pdf](http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf)

The Treaty of Lisbon 2009 allocated exclusive competence to the EU over foreign direct investment as an integral part of the EU common commercial policy, including trade in goods, services and trade-related aspects of intellectual property.

In *Opinion 2/15* concerning the EU-Singapore FTA<sup>17</sup>, the CJEU was given the opportunity to examine the new competence allocation. The Court concluded that ISDS were not fully part of the EU common commercial policy, but fell within the shared competence of the EU with the Member States. This requires national ratification of such agreements. And the opportunity for any government (or where there are regional governments with competence to ratify Treaties) to stall, or stop, the ratification process.

In the new generation of trade talks the EU has adopted different approaches towards ISDS: a case by case approach.<sup>18</sup> This has resulted in avoiding including ISDS in the trade talks with Australia<sup>19</sup> and New Zealand<sup>20</sup> and the current trade negotiations with the US.<sup>21</sup>

In other instances trade agreements were concluded without an investment agreement. For example, in the Economic Partnership Agreement (EPA) between the EU and Japan which entered into force on 1 February 2019.<sup>22</sup> In the trade agreements with Singapore<sup>23</sup> and Vietnam<sup>24</sup> trade and investment issues were dealt with in two distinct treaties: a Free Trade Agreement and an Investment Protection Agreement.

But a distinct shift towards modernisation of ISDS is seen by including an Investment Court System (ICS)

17 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=en&mode=lst&dir=&occ=firs&t&part=1&cid=1023216>. See Erika Szyszczak, “The Singapore and Ukraine Trade Deals: EU Trade Policy in a post-Brexit World”, UKTPO Blog, available at: <https://blogs.sussex.ac.uk/uktpo/2017/01/13/the-singapore-and-ukraine-trade-deals-eu-trade-policy-in-a-post-brexit-world/>

18 See: COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A Balanced and Progressive Trade Policy to Harness Globalisation, COM(2017) 492 final, available at: [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156038.pdf](http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156038.pdf) and Draft Council conclusions on the negotiation and conclusion of EU trade agreements in 2018, 8 May 2018, available at: <http://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf>

19 <http://ec.europa.eu/trade/policy/in-focus/eu-australia-trade-agreement/>

20 <http://ec.europa.eu/trade/policy/countries-and-regions/countries/new-zealand/>

21 <https://www.consilium.europa.eu/en/press/press-releases/2019/04/15/trade-with-the-united-states-council-authorises-negotiations-on-elimination-of-tariffs-for-industrial-goods-and-on-conformity-assessment/>

22 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1976>

23 <http://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/>

24 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>

in the Free Trade Agreements with Canada (CETA), Singapore (EUSFTA) and Vietnam (EU-VFTA). The new ICS departs from the old ad hoc arbitration system by creating a permanent and institutionalised court. The members of the court are appointed in advance by the States that are parties to the Treaty. There is a requirement in the new ICS that the members of the court should be impartial and independent.<sup>25</sup> Previously, tribunals were ad hoc and appointed on a case-by-case basis by the investor and the responding State, with a third arbitrator, usually appointed by the other two appointed arbitrators, deciding a case on the merits with no appeal or review of the decision.

A second feature of the modernised system is the provision for appellate bodies. Under the FTA the claims of investors may still be submitted according to the ICSID or UNICTRAL Arbitration Rules (or any other rules on agreement of the parties), provided that the mandatory rules of the FTA are followed.

## OPINION 1/17: ENDORSEMENT OF THE ICS BY AG BOT AND THE CJEU

For the purposes of this Briefing Paper we shall focus only on the question of the compatibility of the ICS provisions of the CETA investment provisions with EU law. There were three broad complaints surrounding the compatibility question: compatibility with the autonomy of the EU legal order; compatibility with the principles of equal treatment and effectiveness; and the fundamental right of access to an independent tribunal. The CJEU sets out the general principles of EU law and then examines whether the CETA complies with them.

### The Principle of Autonomy of EU law (§§106-161)

This is at the heart of previous case law of the Court, limiting the ability of the EU to develop new fora for the resolution of disputes. In *Achmea* the CJEU had not ruled out the possibility that

*“... an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law”,*

Provided that

*“... the autonomy of the EU and its legal order is respected” (§57).*

25 This requirement also technically applies to investment arbitrators, although it is debatable as to whether this can be achieved.



In *Opinion 1/17* the Court accepted that while the ICS in CETA was separate from the EU judicial system this would not automatically be in conflict with the principle of the autonomy of the EU legal order. The CJEU takes the line of co-existence of EU law and international law. From the reciprocal nature of international agreements and the necessity to maintain the powers of the EU in international relations, it is possible that an international tribunal may have jurisdiction to interpret international agreements without being subject to interpretation by the domestic courts of the parties to the agreements.

The principle of autonomy of EU law would only be breached if the CETA ICS could:

- (i) interpret and apply EU rules other than the provisions of the CETA, or
- (ii) issue awards having the effect of the EU institutions from operating in accordance with the EU constitutional framework.

The CJEU found that neither condition was satisfied.

The CJEU distinguished the *Achmea* ruling by finding that the power of interpretation and application conferred on the CETA ICS is confined to the provisions of the CETA and that such interpretation or application must be undertaken in accordance with the rules and principles of international law applicable between the EU and Canada.

The national laws of the Parties may only be taken into account as a matter of fact, and the CETA ICS is obliged to follow the prevailing interpretation given to that national law by the national courts. But the national courts are not bound by the interpretation of national law by the CETA ICS. This explains why the CETA ICS does not have the power to make a Preliminary Reference to the CJEU.

The Court also distinguishes the *Achmea* ruling by pointing out that the principle of mutual trust, which was at the core of its decision in *Achmea*, is not applicable to the relations between the EU and third countries.

Examining the liability of the EU Institutions, the CJEU found that it would be inadmissible that the power of the CETA ICS to award damages to an investor where EU measures are in breach of the substantive protections offered by CETA<sup>26</sup> could

*“create a situation where, in order to avoid being repeatedly compelled by the CETA Tribunal to pay damages to the claimant investor, the achievement of that level of protection needs to be abandoned by the Union” (§149).*

<sup>26</sup> For e.g. fair and equitable treatment, indirect expropriation, unjustified restriction to make payment and transfer capital.

The CJEU found that the CETA provides enough guarantees in this respect, as it contains various provisions guaranteeing public interest considerations and the Parties' right to regulate.

#### General Principle of Equal Treatment (§§162-186)

The majority of the governments that submitted observations to the CJEU, and also the Council and the Commission, observed that the Canadian enterprises and natural persons that invest within the EU, on the one hand, and enterprises and natural persons of Member States that invest within the EU, on the other, are not in comparable situations, since the former make international investments and the latter intra-EU investments. The only situations that are comparable are that of Canadian enterprises and natural persons that invest within the EU and that of enterprises and natural persons of the Member States that invest in Canada.

One of the concerns raised by Belgium was whether CETA was compatible with the principle of equality before the law (Article 20 Charter of Fundamental Rights of the EU (CFR)) and the principle of non-discrimination on grounds of nationality (Article 21(2) CFR). The CJEU reiterated its previous rulings that Treaties concluded by the EU must be compatible with fundamental rights (including the rights found in the Charter) and this was a relevant inquiry in Article 218 TFEU proceedings.

But, the CJEU found that Article 21(2) CFR did not apply, since it banned discrimination on grounds of nationality only as between EU citizens holding the nationality of a Member State.

However, Article 20 CFR could apply, as its personal scope was not limited to nationals of the Member States. Article 20 CFR does not require that the EU should treat all citizens of non-EU countries the same. But it would apply if there is a difference of treatment within the EU of non-EU citizens and EU citizens.

In relation to CETA the Court held that:

*“... the difference in treatment arises from the fact that it will be impossible for enterprises and natural persons of Member States that invest within the Union and that are subject to EU law to challenge EU measures before the tribunals envisaged by the CETA, whereas Canadian enterprises and natural persons that invest within the same commercial or industrial sector of the EU internal market will be able to challenge those measures before those tribunals” (§179).*

As the situation of Canadian investors that invest within the EU is only comparable to EU investors that invest in Canada (as opposed to EU investors that invest within the Union), the Court found that there was no difference of treatment of persons in a relevant similar situation. The reason why Canadian

investors have the possibility of relying on the provisions of CETA before the CETA Tribunal is that they act in their capacity as foreign investors.

### Principle of Effectiveness (§§185-188)

The Belgian government was uncertain as to the compatibility of the ISDS mechanism with the requirement that EU law be effective, alluding to the possibility that the CETA Tribunal might hold that a fine imposed by the European Commission or by a competition authority of a Member State on a Canadian investor was contrary to a substantive provision of Chapter Eight of the CETA and might award compensation equivalent to the amount of that fine.

The possible breach of the principle of effectiveness could arise where a CETA Tribunal might find that a fine implementing EU competition law was a breach of the investment guarantees. The CJEU found that the effectiveness of EU competition law cannot be jeopardised by the CETA ICS (e.g. by awarding damages equivalent to the amount of fines imposed by the European Commission or a national competition authority).

However, the majority of the other Member States that had made observations to the Court did not think this was an issue.

The CJEU found that the CETA acknowledges that the Parties to the Agreement may take appropriate measures to combat anti-competitive behaviour and guarantees their right to regulate in order to achieve legitimate objectives in the public interest:

*“In exceptional circumstances, an award by the CETA Tribunal might have the consequence of cancelling out the effects of a fine”, this is acceptable as “EU law itself permits annulment of a fine when that fine is vitiated by a defect corresponding to that which could be identified by the CETA Tribunal” (§187).*

### Right of Access to an Independent Tribunal (§§189-244)

Finally, Belgium sought clarification as to whether the CETA is compatible with the fundamental right of access to an independent tribunal, as enshrined, in particular, in Article 47 CFR.

The CJEU refers to Article 47 CFR as constraining the EU when entering into international treaties. A number of the Member States, along with the Council, submitted observations, arguing that Article 47 CFR was inapplicable to the envisaged ISDS mechanism. They argued that the Charter was not binding on Canada and that the CETA falls within the scope, not of EU law, but of international law.

The CJEU took the view that the CETA ICS bodies were similar to courts, bound by principles of independence.

The CJEU was concerned about the lack of legal aid and the accessibility of ISDS, especially for SMEs:

*“... in the absence of rules designed to ensure that the CETA Tribunal and Appellate Tribunal are financially accessible to natural persons and small and medium-sized enterprises, the ISDS mechanism may, in practice, be accessible only to investors who have available to them significant financial resources” (§213).*

This this might deter an investor with limited resources from lodging a claim.

The CJEU referred to a statement by the Commission and Council that:

*“... there will be better and easier access to this new court for the most vulnerable users, namely [small and medium-sized enterprises] and private individuals’ and provides, to that end, that the ‘adoption by the Joint Committee of additional rules’ (see Statement No. 36<sup>27</sup>), leading the Court to be satisfied that the approval of CETA by the EU was dependent on this commitment.*

The CJEU found that CETA offers sufficient procedural guarantees as to the independence of the CETA ICS, for e.g., the tribunal members’ remuneration schemes, their appointment and removal, and the rules of ethics that they have to follow. CETA expressly provides that the tribunal members “**shall not be affiliated with any government**”.

## THE INFLUENCE OF OPINION 1/17 FOR FUTURE EU TRADE AGREEMENTS AND THE ISDS

*Opinion 1/17* will cement the form of future trade agreements developed by the EU, giving the EU greater confidence to include ICS in trade talks and agreements, and it will play an important role in legitimising the global reform of dispute settlement in the investment field.

Both the AG and the CJEU are aware of the need to provide an alternative model to arbitration tribunals. AG Bot states that

*“... what is at issue here is the definition of a model which is consistent with the structural principles of the EU legal order and which, at the same time, may be applied in all commercial agreements between the European Union and third States” (§86).*

<sup>27</sup> OJ L11, 14 January 2016 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:011:FULL&from=CS>

The CJEU also refers to the establishment of a “*multilateral investment Tribunal in the longer term*” (§108).

In effect, the CJEU has endorsed the modernisation of the trade strategy of the EU and Opinion 1/17 will have a strong impact for the European Commission’s plans to establish a Multilateral Investment Court which eventually could become the model for the resolution of disputes between investors and States.<sup>28</sup> This further embeds the EU as a leader and promoter of new institutional models for future trade agreements.

### ... AND BREXIT

In the event of a no-deal Brexit the litigation around the modern trade agreements of the EU is a warning signal that conducting trade agreements from scratch with the EU is not painless. Where ratification of a trade Treaty is required by national parliaments, recent legal challenges to the Ukraine, Singapore and Canadian trade Treaties reveal that local interests may impact upon the national ratification of the trade talks. This could result in prolonging the ratification process until the CJEU has given an Opinion; interest groups may bring pressure to challenge the FTA at the national level when they fail to influence the negotiation process.<sup>29</sup> The CJEU continues to endorse the position that trade Treaties may be assessed against fundamental rights principles and this opens the possibility of questioning the content of trade Treaties against a wider range of constitutional benchmarks beyond the pure competence issues found in earlier litigation.

CETA was partially put into effect pending the CJEU *Opinion* and the Court has confirmed that this is permissible. Fortunately, the CETA *Opinion* was positive. If the Court had decided otherwise, and found that the provisions in CETA were incompatible with EU law, the practical and legal consequences would be significant for traders who had taken advantage of the operation of the FTA.

The UK relies upon FDI for jobs, economic growth and stability and recent years have seen a steady increase in FDI. The uncertainty of Brexit has led to some headline stories of the exit of major companies from their UK bases. Empirical research conducted by

Serwick and Tamperi at the UKTPO<sup>30</sup> examined the impact of the Brexit process on global inward foreign investment to the UK. Their analysis suggested that the Brexit Referendum vote may have reduced foreign direct investment to the UK by some 19-24%. Similar findings are also seen in research carried out at LSE by Breinlich, Leromain, Novy and Sampson<sup>31</sup> which found that after the EU referendum the number of new EU investments in the UK dropped by 11%, (amounting to £3.5 billion of lost investment). The research also found that there has been a rise in the number of new investments made by British firms in the EU; an exodus to locate and establish within the EU should the UK leave the EU without a trade deal.

Positively, Opinion 1/17 should provide reassurance that in any future trade deal between the EU and the UK it would be possible to include an ICS to encourage future investment in the UK. It also points the way to how a new Treaty dispute resolution mechanism might be included in a future UK-EU Trade agreement since the UK is reluctant to accept the jurisdiction of the CJEU.<sup>32</sup>

<sup>28</sup> See the references at fn 16 and 17. European Commission, “The Multilateral Investment Court project”. Available at: [trade.ec.europa.eu/doclib/press/index.cfm?id=1608](https://trade.ec.europa.eu/doclib/press/index.cfm?id=1608)

<sup>29</sup> See for e.g. Amandine Van den Berghe, “Opinion Piece Advocate General Bot in Opinion 1/17 on CETA”, available at: <http://bilaterals.org/?advocate-general-bot-in-opinion-1>;

Client Earth, “EU Parliament-approved investment agreement may be illegal”. Available at: <https://www.clientearth.org/eu-parliament-approved-investment-agreement-may-be-illegal/>

<sup>30</sup> <http://blogs.sussex.ac.uk/uktpo/publications/not-backing-britain-fdi-inflows-since-the-brexite-referendum/>, *Not Backing Britain: FDI Inflows Since the Brexit Referendum*, UKTPO Briefing Paper 23 – October 2018, available at: <http://blogs.sussex.ac.uk/uktpo/publications/not-backing-britain-fdi-inflows-since-the-brexite-referendum/>

<sup>31</sup> Holger Breinlich, Elsa Leromain, Dennis Novy and Thomas Sampson, *Voting with their Money: Brexit and Outward Investment by UK Firms*, PaperBrexit 13, LSE Centre for Economic Performance. Available at: <http://cep.lse.ac.uk/pubs/download/brexit13.pdf>

<sup>32</sup> For a discussion of how the model of dispute resolution set up in the EU-Ukraine Association Agreement would not satisfy the [current] UK negotiating position see: Erika Szyszczak, *A UK Brexit Transition: to the Ukraine Model?*, UKTPO Briefing Paper 11 – November 2017, available at: <http://blogs.sussex.ac.uk/uktpo/publications/a-uk-brexite-transition-to-the-ukraine-model/>

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## FURTHER INFORMATION

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- 2) trains British policy makers, negotiators and other interested parties through tailored training packages.

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