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"New" CETA Tribunals

Old ISDS system

Analysis of the new codes of conduct for Members of the CETA Tribunals

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Prepared by

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"New" CETA Tribunals – Old ISDS system

Analysis of the new code of ethics of the CETA Tribunals

Provisional application of CETA

On 21 September 2017, CETA provisionally entered into force. Some parts of the agreement, especially its investment-related chapters, are not in force before the full ratification of CETA by all Member States. To date, CETA has been ratified by 9 member states.

Investment is the most controversial part of CETA. The controversy has led the Commission to rebrand ISDS (Investor-State Dispute Settlement) as ICS (Investment Court System). However, the changes are minor and only procedural while the main points of criticism against ISDS have not been addressed.

"There is no firewall for arbitrators between the new CETA Tribunals and the old ISDS arbitration system in those new conflict of interest rules. We will see the same old gang of ISDS arbitrators and counsellors taking over the CETA tribunals," said Paul de Clerck, programme coordinator of the Economic Justice Campaign, Friends of the Earth Europe

New rules, old manners

The additional rules for the CETA Tribunals provide no guarantees whatsoever that there will be a strong and effective firewall between those that are now involved in the ISDS system and those that will be arbitrators in the new ICS tribunals. To the contrary, a number of elements in the code of conduct make it very likely that there will be a huge overlap between the new ICS arbitrators and past and future ISDS counsellors, arbitrators and experts.

Main messages

- There are no absolute restrictions on incoming members of the CETA Tribunals. They can include all the usual ISDS lawyers, arbitrators and experts.
- After leaving the Tribunal, they can become again counsel, arbitrator or expert in old-style ISDS tribunals when it concerns new cases.
- The obligations do not include a general bar on any work as arbitrator in any investment adjudication outside of the ICS system. The text leaves open the option that judges can still be arbitrators in ISDS tribunals while they are on the roster for the ICS.
- Sanctions for former members are extremely weak.

Analysis of the leaked documents

New rules – same system?

The Secretariat of the CETA Appellate Tribunal will be ICSID (Article 1.14 of the Appellate Tribunal)

ICSID (The International Centre for Settlement of Investment Disputes) is one of the core institutions of the ISDS system. This reveals that neither the EU nor Canada are willing to break apart from the current ISDS system. This is very significant as ICSID lawyers (who are often close to the ISDS industry) will now run the process, advise the Appellate Tribunal members, probably draft opinions, and have significant influence in the CETA Appellate Tribunal.

Conflicts of interest

Article 5 of the Code of Conduct mentions how Members of the Tribunal will have to be independent and impartial.

The obligations however do not include a more specific bar on any work as counsel, arbitrator, expert, or other paid role in any investment adjudication outside of the ICS system.

Furthermore, there is a structural bias in CETA Tribunals. As only the investor is able to start an ICS claim against a Member State, the EU or Canada, the members of the CETA Tribunal have a structural bias towards the investor, as the latter is the only party which can ensure them to earn, on top of a retainer fee, fees per days worked.

Members of the tribunal only need to disclose what they did the last 5 years and only when it is "likely to affect their independence or impartiality or that might reasonably create an appearance of impropriety or bias" (art 3.1 of the Code of Conduct).

This leaves it up to the tribunal members to decide what they disclose – there is no general obligation to disclose paid and unpaid (side) jobs.

The Members of the Appellate Tribunal, when they serve on a full-time basis, cannot be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Appellate Tribunal (Article 1.13 of the Appellate Tribunal)

There is thus a possibility for members of the Appellate Tribunal, exceptionally, to be arbitrators or lawyers in another ISDS case. There are no strong safeguards or guarantees that this side job could not conflict with the role of the member in the appellate tribunal (i.e. lawyer for an investor, whilst having to judge on a CETA appeal which concerns the same investor)

CETA agreements says (art 8.30.1) that 'judges, upon appointment, shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement'. 'They shall not be affiliated with any government'. 'They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest'. 'They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration'.

The CETA text leaves open the option that they can still arbitrators in ISDS tribunals while they are on the roster for the ICS. Furthermore, because some ISDS cases proceed in secret, such double-roles would not even necessarily be published. The obligations do not include a general bar on any work as arbitrator in any investment adjudication outside of the ICS

Lastly, there is no definition of a conflict of interest in the new code of Conduct.

Revolving doors

There are no restrictions on incoming members of the tribunal. They need to be transparent about their former interests (but only to the parties, not the public) but nothing is ruled out (art 3.1 of the Code of Conduct).

Members of the Tribunal can include all the former old-style ISDS lawyers, arbitrators and experts.

Outgoing Members of the Tribunal have fairly limited restrictions: not mingle in disputes that were in the ICS Tribunal when they worked there and in disputes that are connected with disputes they dealt with in the ICS Tribunal. For 3 years they cannot work for one of the parties in a dispute before the ICS Tribunal (art 6.2 and 6.3 of the Code of Conduct). Sanctions for former members are extremely weak. The President of the Tribunal can only inform their new bosses and publish that information (art 6.4 of the Code of Conduct).

That means that former members of the Tribunal can become counsel, arbitrator or expert in old-style tribunals after their position in CETA tribunals when it concerns new cases (with a small restriction related to parties in an old dispute). They could also become party-appointed expert witnesses in front of the ICS immediately afterwards.

Members and former members of the (appellate) tribunal are not clearly prohibited from working as arbitrator in investment adjudication during and up to five years after their service on the tribunal

Transparency

In case of mediation, the settlement between the investor and the EU, the Member State or Canada can be withheld from public knowledge if a Party (an investor or Canada, the EU or EU Member State) thinks it is confidential (art. 4.6 of the rule for mediation)

This is problematic as mediation could be an avenue to avoid a costly procedure for States. An investor could start an ICS case against Canada, the EU or a Member State, and the latter, due to time, expertise and/or financial constraints, could choose mediation. In the mediation phase, a standard could be lowered or a new law amended without public knowledge.

Checks and balances

The proper application of this code of conduct is the responsibility of Members of the CETA Tribunal and Appellate Tribunal (Article 11 on the Consultative Committee of the Code of Conduct)

This provides very little incentive for the code of conduct to be strongly enforced as any decision from the Consultative Committee will have a direct or indirect impact on the working conditions of the members of the Consultative Committee.

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