

The Investment Court System in CETA: Constitutionality dissected

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dissected

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Introduction

- 1. The Investment Court System in CETA**
- 2. Compatibility of ICS under the EU Treaties**
- 3. The road to Luxembourg**

From ISDS to ICS: what is the Investment Court System?

CETA Joint Interpretative Instrument

“CETA represents an important and radical change in investment rules and dispute resolution”

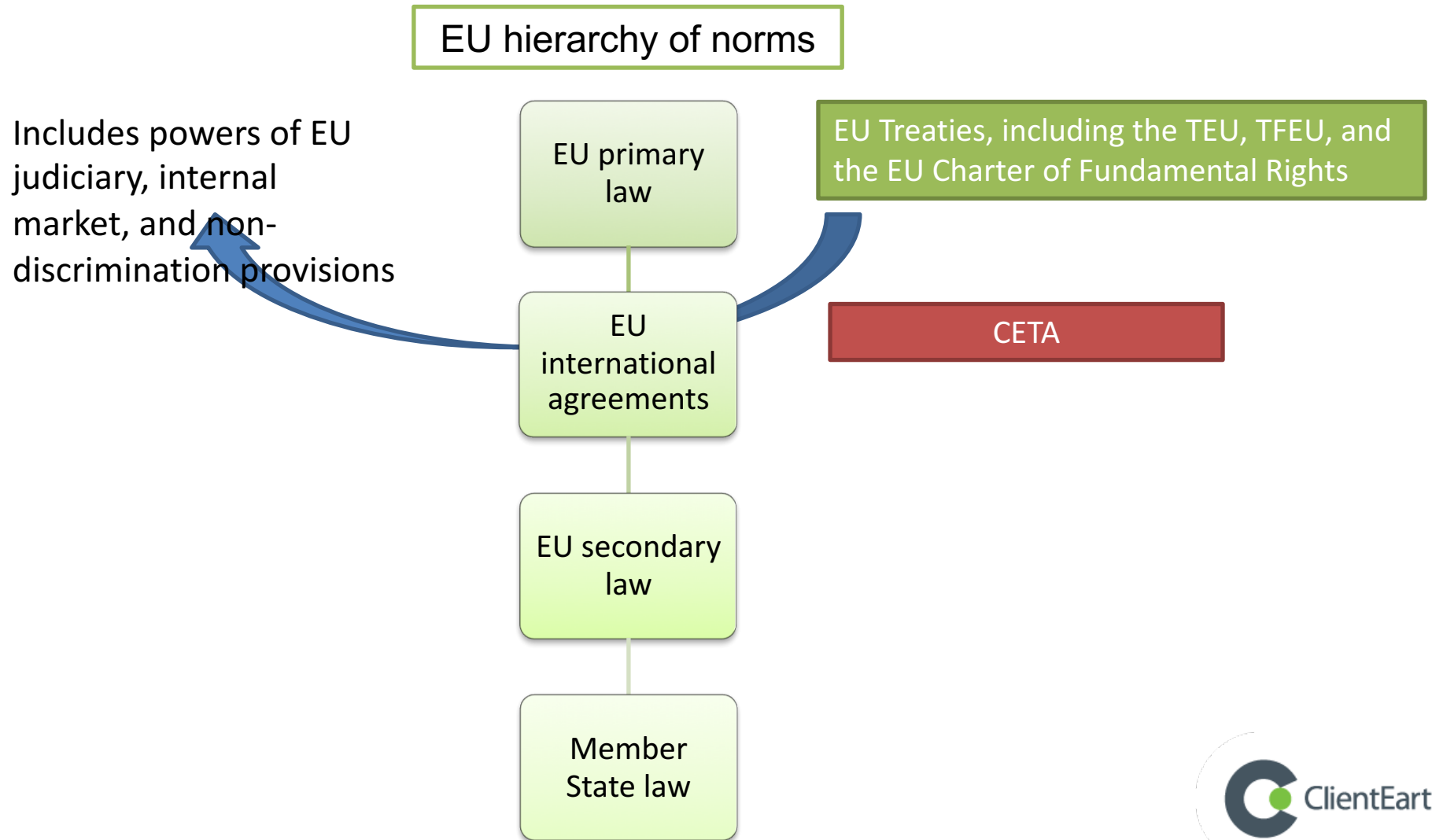
- ISDS was included in CETA text of 26 September 2014
- Replaced by ICS on 29 February 2016 which was a ‘new approach’ and a ‘clear break’ from ISDS
- **What changed?**
 - WTO approach: selection of arbitrators, composition of tribunals, and appeal mechanism
 - Transparency rules

From ISDS to ICS: what is the Investment Court System?

What did not change?

- No requirement to exhaust domestic remedies
- No obligations for investors
 - No counterclaims possible
 - No loss of rights for investors that meet certain criteria
- No third party rights

Legality of ICS under EU law

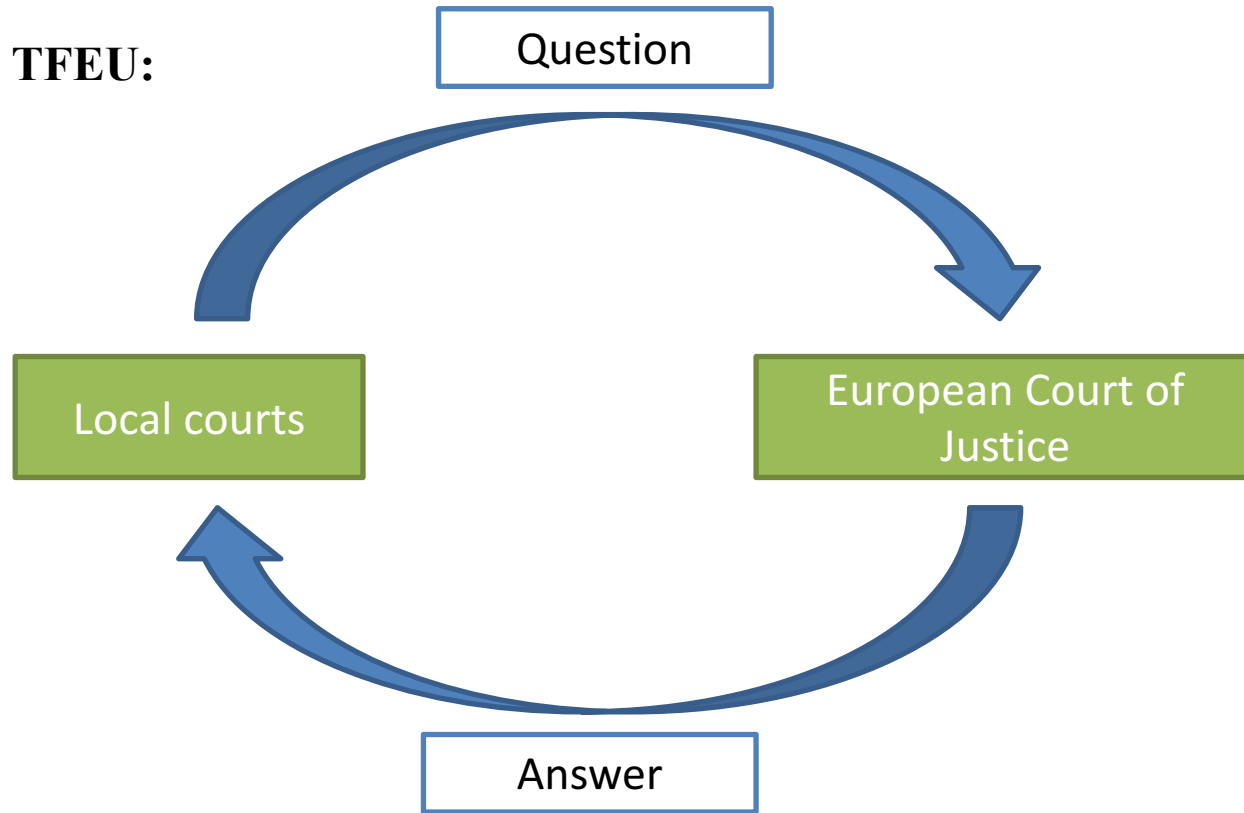


Legality of ICS under EU law

- *Opinion 2/13*
 - EU can conclude international agreements with dispute settlement provisions **BUT**
 - only if there is '*no adverse effect on the autonomy of the EU legal order*'
- What is that legal order?
 - *Van Gend & Loos*: EU Treaties 'a new legal order'
- Who protects that legal order?
 - *Opinion 1/09* :ECJ and national courts are the '*guardians*' of that EU legal order
- What are the powers of those guardians?
 - *Opinion 2/13* Article 267 TFEU '*is the **keystone** of the judicial system established by the Treaties*'

The EU judicial system

Article 267 TFEU:



Investment Court System

The autonomy of EU law

- Commission legal service *amicus curiae* in *Achmea v. Slovakia*:

*“an investor-State arbitral mechanism [...] conflict[s] with EU law on the **exclusive competence of the EU court for claims which involve EU law**, even for claims where EU law would only partially be affected.”*

- Commission legal service *amicus curiae* in *EURAM v. Slovakia*:

*“The arbitral tribunal is not a court or tribunal of an EU Member State but a parallel dispute settlement mechanism **entirely outside the institutional and judicial framework of the European Union**. Such mechanism deprives courts of the Member States of their powers in relation to the interpretation and application of EU rules imposing obligations on EU Member States.”*

The autonomy of EU law (II)

- *Opinion 2/13* on the EU's accession to the ECHR

*“If the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the **principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.**”*
(para. 246)

- Similarities between the ECtHR and ICS
 - No jurisdiction to annul domestic legislation
 - Only allows for declaratory decisions and damages
 - Concerns proceedings between an individual and a State/EU over a breach of the rights contained in the international agreement

CETA's safeguards

Article 8.31 (2) CETA

“The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party.”

Similar to the ECHR

“For greater certainty, in determining the consistency of a measure with this Agreement, the **Tribunal may consider**, as appropriate, **the domestic law of the disputing Party as a matter of fact.**”

???

“In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal **shall not be binding** upon the courts or the authorities of that Party.”

CILFIT

The road to Luxembourg

- A Request for an Opinion

Article 218 (11) TFEU:

‘A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.’

- Dutch minister of Foreign Affairs Bert Koenders in the Dutch parliament on 28 April 2016:

“We do not see the added value [of making a Request for an Opinion pursuant Article 218 (11) TFEU]. The European Commission, including the Legal Service of the Commission, has publically announced that the proposal [on ICS in CETA] is compatible with the Treaties”

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Belgium

- Debates in Walloon and Brussels Parliaments
- **Resolution of 25 April 2016**
 - In that resolution the very first request by the Walloon parliament was to ensure that the Belgian federal government:
“de solliciter l’avis de la Cour de justice européenne (CJE) sur la compatibilité de l’accord avec les Traités européens sur la base de l’article 218 (11) du TFUE pour éviter qu’un accord incompatible avec les Traités européens soit conclu et de ne pas procéder à la ratification de cet accord tant que la CJE ne s’est pas prononcée.”
- **27 October 2016** Belgium federal government reaches compromise deal with the Walloon government
 - Minutes to the Council of 28 October state:
“Belgium will ask the European Court of Justice for an opinion on the compatibility of the ICS with the European treaties, in particular in the light of Opinion A-2/15”