CETA and ICS Fact Check

This briefing note has been developed by the Comhlámh Trade Justice group. It addresses some of the assertions and misunderstandings there are about the decision facing Ireland on the ratification of the EU-Canada Comprehensive Economic and Trade Agreement, CETA. It is hoped it will assist your informed consideration of this matter. Ireland's decision on the ratification of highly controversial elements of CETA, will have very significant economic, social and environmental consequences in Ireland and requires more substantial consideration.

What is CETA and its current status?

CETA is the Comprehensive Economic and Trade Agreement between the European Union and Canada. It eliminates most tariffs between Canada and the EU but it also deals with, public procurement, competition, intellectual property protection and investment. CETA, including those elements that relate to trade and tariffs, have already been agreed at EU level and provisionally applied since 21st September 2017, except for the aspects relating to investment protection. However, for CETA to come into full effect it must be approved by each EU Member State. While less than half of the Member States have said yes, roughly half have still to decide, and the decision and associated debates have been very fraught and contentious in many countries.

What is investment protection under CETA?

CETA establishes an investment protection tribunal also known as Investment Court System (ICS). ICS is a rebranded version of the highly contentious Investor State Dispute Settlement (ISDS) system. This new ICS envisioned, but yet to be established, would be a dispute settlement tribunal where foreign investors can take a case against a state for perceived breaches in CETA's investment protection standards. It allows investors to go straight to these special tribunals and sideline domestic courts and those of the European Union.

Fact checking some common commentary about CETA/ICS

All other states are voting yes, Ireland must push ahead or lose the perceived economic benefits of CETA.

CETA has already been provisionally applied and implemented (all except the investor protection chapter and some of the more sweeping economic aspects of the agreement relating to financial services, tax and intellectual property[1]). The focus of this vote is on the investment protection element of the deal (the ICS mechanism).

The issue remains very contentious in several Member States. Roughly half of the Member States including countries such as Germany, France & Italy have yet to ratify and have various ongoing legal and political debates over it.

It makes no sense to push ahead with this vote. Holding a vote and voting yes at this time commits Ireland to accepting the introduction of the ICS mechanism that will open Ireland up to **unnecessary risks, with no gain.**

'States will be free to continue to regulate in all areas of public interest (e.g. health and education), without any fear of being sued by foreign investors.'

Every state has the right to regulate - this is not in question. However, if a government's change of regulation results in a loss of profit for a company which an investor interprets as discriminatory or unfair, they can use the ICS mechanism to seek compensation for that loss and for future losses.

CETA and the associated Joint Interpretative Document agreed between the EU and Canada, talk about protecting standards or regulation. However, the ICS arbitrators are under no obligation to consider, or balance different aspects of legislation, in the same way as a national court or the European Court of Justice. Their primary focus is on compensation claims. That it is what ISDS/ICS is designed for.

Furthermore, the threat of being sued under CETA, with the associated expensive legal costs and potentially huge compensation bill, may create what is called a 'regulatory chilling effect'. This is where a government (national or local) may fear to change public policy, as to do so could be prohibitively expensive if challenged under ICS and therefore choose not to (even if the change of policy has public support).

'The deal ensures that governments can not be challenged for increasing environmental standards e.g. regulating for the 2016 Paris Agreement on climate change'

This is unfortunately not true. The Environment Chapter of CETA is very weak when it comes to legal enforceability, which is in stark contrast to the strong provisions that the agreement has put in place to protect investors. References to sustainability, environmental protection, and adherence to

[1] https://businesshumanrightsireland.wordpress.com/2021/01/07/guest-post-the-comprehensive-economic-trade-agreement-ceta-and-the-battle-for-the-future/

international climate agreements are aspirational, voluntary and will be very difficult to enforce in practice.

The Environment Chapter does empower the EU and Canada to set up committees to discuss how trade related to CETA could impact the environment, and this is to be welcomed as a first in international trade agreements. However, the CETA Committee on Trade and Sustainable Development has no mechanism to make binding rulings.

While the investment protection chapters of CETA make it clear that no one can take a case challenging the EU's subsidies regime, no mention is made there of environmental or climate issues. The Paris climate change agreement is not referred to in the CETA text. An aspirational statement on the Paris agreement is contained in the EU-Canada Joint Interpretative Statement but arbitrators are not bound by this when ruling on the legitimacy of an investor's claim for compensation due to future climate legislation.

In the context of the 2020 environmental vision for an EU Green New Deal, it is important to remember that the 2016 CETA text is fundamentally out of date.

It is worth noting that of the 10 largest pay-outs in ISDS, all but one were above 1 billion euros. Seven of those were fossil fuel companies and two were mining companies. So environmentally sensitive sectors are the ones that are using the system and getting the largest pay-outs. For example, the Netherlands is being sued for around €1 billion for a new policy and regulation which would reduce fossil fuel energy production. This demonstrates that the pursuit of policies and regulation to tackle climate change is undermined.

'ICS is a reformed version of the discredited ISDS system. It is now fair, transparent and in line with EU law'

ICS is a rebranded Investor State Dispute Settlement (ISDS) making *some* procedural improvements on transparency and appeals:[2]

- While previously tribunals were ad-hoc, ICS now has a panel of adjudicators from which the arbitrators on a claim will be drawn. However, this doesn't change the fact that these adjudicators do not need to be judges and they are paid thousands per day of trial which can create a perverse incentive to lengthen trials.
- CETA also allows for an appellate body. However, that 'appeals process' is simply to another arbitration panel. ICS still grants foreign corporations a special status that allows them to seek compensation outside national legal systems that are used by everyone else.

[2] https://businesshumanrightsireland.wordpress.com/2021/01/07/guest-post-the-comprehensive-economic-trade-agreement-ceta-and-the-battle-for-the-future/

‘The European Court of Justice (ECJ) gave a green light to CETA’

There are two very important opinions from the EU Court of Justice, when it comes to considering CETA:

1. In 2017, an ECJ judgement made clear that any agreement to introduce ISDS/ICS must be considered and decided by each member state and that decision cannot be delegated to EU level.

2. On the CETA agreement itself, The European Court's 2019 judgement did not give CETA the green light - it very specifically clarified a question around sovereignty and legal autonomy – that its ICS does not have the potential to interpret or override EU law. It did not confirm anything about the ICS structure or function itself. Furthermore, the ECJ opinion on how ICS might be used is in no way binding on the ICS arbitrators. - Furthermore the ECJ highlighted that the agreement did not give effective access to small and medium enterprises and this needed to be addressed.

‘Investor Protection provided by ICS is needed to attract Foreign Direct Investment.’

These investor protection provisions are not essential to attract foreign investors. Ireland has been able to attract a very high level of Foreign Direct Investment, (FDI) without conceding to such arrangements. This is because companies, when undertaking their due diligence on investment decisions in Ireland, have been happy to rely on the national court system. Under EU law it is illegal to discriminate against foreign companies so we already have the mechanisms in place to deal with any complaints - there is no need for the ICS system.

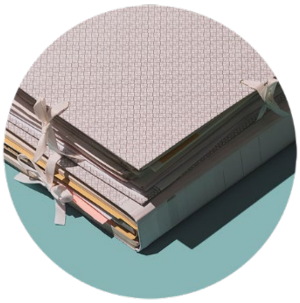
‘All modern trade agreements must have a dispute resolution mechanism such as ICS or ISDS’

This is not true, many new trade deals are actively avoiding these unnecessary and controversial elements. Examples of 2020 agreements with no ISDS or ICS include the trade deal between the EU and Britain; The EU-China Comprehensive Agreement on Investment (CAI); and the EU-Japan Economic Partnership Agreement. Furthermore, some countries are removing the ISDS from trade agreements including Canada who have decided not to participate in the ISDS provisions of the USMCA, the United States–Mexico–Canada Agreement (which has replaced NAFTA).

KEY ICS FACTS:

- Only foreign investors, usually big corporations, can sue governments through ICS.
- Once CETA is ratified, the final outcome of any ICS procedures or decisions cannot be challenged by either the State or the EU.
- ICS introduces uncertainty in the conduct of the State's safeguarding measures
- Foreign investors already have access to well tried judicial procedures through national courts and ultimately the ECJ.
- After CETA is ratified, even if EU or Canada exit the treaty, ICS will still apply for 20 years

Examples that are typical of investor dispute claims under ISDS.

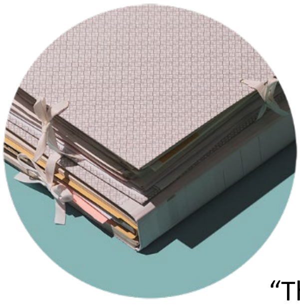


Case example 1: France and Vermilion

Issues: Environment, 'chilling effect'

In 2017, the French Environment Minister, Hulot, in an attempt to make steps to implement the Paris Agreement and tackle the climate crisis, drafted a law to put an end to fossil fuel extraction on all French territory by 2040. It would have been a progressive phase-out of fossil fuels as it banned the renewal of exploitation permits. Several companies lobbied against this including the Canadian oil and gas company Vermilion who is France's largest oil producer (almost 75% of France's oil). They threatened to sue France under ISDS if it pushed ahead with the Hulot law. The law was reformed to allow all current exploration and exploitation projects to continue being developed without any constraints for more than 20 years. Even allowing, in some cases, for exploitation permits to be renewed after the 2040 deadline. The new law now had the opposite effect to its original aim. Hulot resigned a year later, stating that corporate lobbies had too much influence on environmental policy-making.[3]

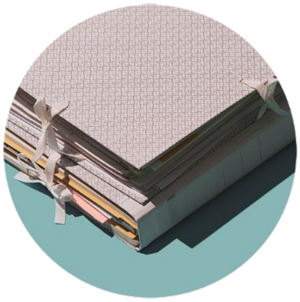
[3] https://10isdsstories.org/cases/case5/



Case Example 2: Bilcon (US) vs. Canada

Issues: Environment, mining

"The US industry challenged in 2008 Canadian environmental requirements affecting their plans to open a basalt quarry and a marine terminal in Nova Scotia. The investors planned to blast, extract and ship out large quantities of basalt from the proposed 152-hectare project, located in a key habitat for several endangered species, including one of the world's most endangered large whale species. A government-convened expert review panel concluded that the project would threaten the local communities. On these recommendations, the government of Canada rejected the project. In 2015 the ISDS tribunal decided that the government's decision hindered the investors' expectations. Bilcon won and received US$7 million in damages, plus interest (NAFTA invoked)."[4]



Case example 3: Canada & Lone Pine

Issues: Environment, fracking

Lone Pine Resources, an oil and gas corporation, were given permission to explore possibilities for fracking for shale gas between 2006 & 2011 in Quebec. However, there was a huge public opposition to fracking and one of the largest environmental demonstrations took place in the province. Surveys revealed that 78% of the public in Quebec did not support fracking. This led to the cancellations of the Lone Pine's permits, which were only ever for exploration rather than mining permits. Lone Pine used NAFTA's ISDS to sue the Canadian government as it wanted compensation for the future profits it had hoped to make. The case started in 2013 and is still ongoing. There are currently over a €100 million at stake – if Lone Pine wins, this money has to be paid by Canadian taxpayers. CETA would open up more possibilities for companies suing governments. This is a particularly significant case as the exploration permit (without even a mining permit) sufficed for an ISDS case, it also highlights how lengthy these court cases can be.[5]

[4] http://isds.bilaterals.org/?-key-cases-

[5] https://waronwant.org/sites/default/files/ISDS-file-Lone-Pine.pdf