

# *The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future*

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## Abstract

In April 2019, the Court of Justice of the EU ('CJEU') handed down its Opinion (C-1/17) on the compatibility of the Investment Court System ('ICS'), that is the Investor-State Dispute Settlement ('ISDS') mechanism under the EU-Canada Comprehensive and Economic Trade Agreement ('CETA'), with EU law. This article puts Opinion 1/17 in its broader (policy and legal) context, focusing on the salient issue of compatibility with the principle of autonomy of the EU legal order. It argues that the Court's openness to this judicial competitor was an acknowledgment of the need to maintain the powers of the Union in international relations. However, Opinion 1/17 should not be perceived as an automatic green light for any future investment court (such as the Multilateral Investment Court) as the autonomy test it introduces is a rather difficult one to pass.

**Keywords:** Opinion 1/17 (C-1/17), principle of autonomy, CETA, Investment Court System (ICS), Multilateral Investment Court System (MIC), EU investment policy, ISDS, *Achmea*

## I. INTRODUCTION

It took several years for the Court of Justice of the European Union ('CJEU' or the 'Court') to declare an external system of judicial review compatible with EU primary law, and in particular with the principle of principles, the autonomy of the EU legal order. Previously, the Court had not displayed much tolerance towards judicial competition, even though it has had a handful of opportunities in a number of different contexts. Such tolerance was not displayed, for example, in the case of the European Patent Convention creating a European and Communities Patent Court.<sup>1</sup> Or, rather disappointingly, in the case of the draft agreement providing for the accession of the EU to the European Convention on Human Rights ('ECHR'),<sup>2</sup> a much-criticised example in the Court's record.<sup>3</sup> Instead, in its recent Opinion

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<sup>1</sup> Opinion 1/09 (Patent Court) EU:C:2011:123.

<sup>2</sup> Opinion 2/13 (EU Accession to the ECHR) EU:C:2014:2454.

<sup>3</sup> See indicatively among rich scholarship, B de Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement beyond the European Union' in M Cremona and A Thies

1/17,<sup>4</sup> the Court decided to give a green (albeit very cautious) light to the Investment Court System ('ICS'), that is the Investor-State Dispute Settlement ('ISDS') mechanism provided in a bilateral mixed agreement, the EU-Canada Comprehensive and Economic Trade Agreement ('CETA').<sup>5</sup>

The timing of this green light is interesting in many ways. Firstly, Opinion 1/17 was rendered a little more than a year after the Court's landmark judgment in *Achmea*,<sup>6</sup> a case that concerned the compatibility of the ISDS clause provided in an intra-EU Bilateral Investment Treaty ('BIT') with EU law. Despite the different contexts (an intra-Member State BIT on the one hand and an agreement concluded by the EU on the other), the extra-EU relevance of this intra-EU case is significant.

Secondly, Opinion 1/17 was rendered almost a decade after the entry into force of the Treaty of Lisbon,<sup>7</sup> that is when exclusive competence in common commercial policy ('CCP'), including foreign direct investment ('FDI'), was conferred on the EU, and slightly less than two years after the Court opined on the contours of this competence (Opinion 2/15).<sup>8</sup> Notably, over the course of this decade, the EU emerged as a significant actor in the investment field.<sup>9</sup> In the context of its bilateral negotiations with several of its trade partners, the EU introduced the idea of establishing a permanent investment court to replace the traditional *ad hoc* ISDS.<sup>10</sup> Tellingly, this court proposal soon moved beyond the limits of these bilateral negotiations. The

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(*F*'note continued)

(eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart, 2014), pp 33; E Spaventa, 'A Very Fearful Court: The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22(1) *Maastricht Journal of European and Comparative Law* 35; P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) 38(4) *Fordham International Law Journal* 955. Cf Daniel Halberstam, 'It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16(1) *German Law Journal* 105.

<sup>4</sup> Opinion 1/17 (CETA Opinion) EU:C:2019:341.

<sup>5</sup> Council Decision 2017/37 (28.10.2016) on the signing on behalf of the EU of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the EU and its Member States, of the other part, (2017) OJ L11/1. For the text of the Agreement, see (2017) OJ L11/23.

<sup>6</sup> *Achmea*, C-284/16, EU:C:2018:158. The case has become a shorthand for the entire intra-EU BITs controversy.

<sup>7</sup> Treaty on the Functioning of the EU ('TFEU'). Entered into force on 1 December 2009.

<sup>8</sup> Opinion 2/15 (EU-Singapore FTA) EU:C:2017:376.

<sup>9</sup> See indicatively, European Commission, 'Trade for All – Towards a More Responsible Trade and Investment Policy' (2015), pp 21ff, [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf).

<sup>10</sup> An investment court that grants standing to a private individual is also a form of dispute settlement between an investor and a state, and, thus, a form of ISDS. With this in mind, and without any intention to attribute any connotation to the acronym, in this article the term 'traditional ISDS' or '*ad hoc* ISDS/system/regime' will be used to encapsulate pure arbitration-solutions as opposed to a permanent court solution. Relatedly, in this article, the term *ad hoc* is used in its ordinary meaning. However, in international arbitration practice, the term *ad hoc* is 'technical' and used to juxtapose non-administered (also known as *ad hoc*) with administered arbitration (ie arbitration that takes place under the auspices of an arbitral institution).

prospect of a Multilateral Investment Court ('MIC') is now part of the reform agenda discussed under the auspices of the United Nations Commission on International Trade Law ('UNCITRAL').<sup>11</sup>

Thirdly, Opinion 1/17 comes at a time when the traditional *ad hoc* ISDS (in the form of investor-State arbitration) is subject to rampant public criticism, while debates on its reform are ongoing in different forums. Of course, the so-called backlash against traditional ISDS is not a new phenomenon.<sup>12</sup> Briefly, it encapsulates critiques concerning the independence and impartiality of the arbitral tribunals, the lack of systemic checks and a second degree of review of arbitral awards, as well as an alleged dearth of transparency.<sup>13</sup> All these critiques often reflect a widespread perception that *ad hoc* ISDS is an inherently pro-investor system and, ultimately, they relate to the concerns that investor-State awards may negatively impact the states' regulatory powers.<sup>14</sup> These critiques are mirrored in (and to some extent have also been legitimised by) the reform solutions proposed by the EU.

Against this background, Opinion 1/17 forms part of the discussion of the impact that the EU internal (constitutional) order, and more precisely the principle of autonomy, may have on the EU's participation in international dispute resolution mechanisms. This article is structured as follows. First, for context purposes, some light is shed on the legal and policy landscape that led to CETA (Section II). The Court's reasoning can be better understood when having in mind the determined way in which the EU exercised its new competence and shaped its policy towards the creation of a permanent investment court. Subsequently, and among the various compatibility questions raised in Opinion 1/17, the focus of this article is on the salient issue of compatibility with the autonomy of the EU legal order (Section III). Accordingly, the

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<sup>11</sup> UNCITRAL characterized the European Commission's negotiations with Canada, Vietnam, and the US as 'pioneering innovations'. See UNCITRAL, Fiftieth Session, 'Possible Future Work in the Field of Dispute Settlement: Reforms of (ISDS). Note by Secretariat' (20 April 2017) (A/CN.9/917), para 29 (n 23), <https://undocs.org/en/A/CN.9/917>. See also European Commission, 'A Multilateral Investment Court-Factsheet' (2017), p 2, [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156042.pdf](http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf). For a discussion on the dynamics (and the role of the EU) in UNCITRAL, see A Roberts, 'UNCITRAL and ISDS Reforms: The Divided West and the Battle by and for the Rest' (*EJIL Blog*, 30 September 2019), <https://www.ejiltalk.org/uncitral-and-isds-reforms-the-divided-west-and-the-battle-by-and-for-the-rest>.

<sup>12</sup> See eg M Waibel et al (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010).

<sup>13</sup> See indicatively among many different summaries, UNCTAD, 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap', IIA Issues Note-No.2, United Nations (2013), [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf); IBA Arbitration Subcommittee on Investment Treaty Arbitration, 'Consistency, Efficiency and Transparency in Investment Treaty Arbitration', Report (11-2018); Opinion of Advocate General (AG) Bot in *CETA*, EU:C:2019:72, para 15.

<sup>14</sup> See generally on the issue of regulatory chill: S Spears, 'Making Way for the Public Interest in International Investment Agreements' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011); C Titi, *The Right to Regulate in International Investment Law* (Nomos, 2014); T Broude et al, 'Who Cares about Regulatory Space in BITs? A Comparative International Approach' in A Roberts et al (eds), *Comparative International Law* (Oxford University Press, 2018).

article explores certain aspects of the Court's reasoning and dissects the Opinion 1/17 autonomy test. The potential implications of the 'compatibility check-list/conditions' for other extra-EU investment agreements are examined (Section IV). The final section presents a conclusion (Section V).

## II. A COMPLEX LEGAL AND POLICY PATH TOWARDS A 'NO RETURN TO OLD ISDS' EU POLICY

*'Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilizing role worldwide and to point the way ahead for many countries and people?'*<sup>15</sup>

Every time the EU Members States amended the Treaties, they granted more external powers to the EU, enhancing its growing aspirations to emerge as a global actor that *points the way ahead*. The Lisbon Treaty incorporates the most notable expansion of EU external powers to date as exclusive competence in FDI was conferred on the Union (Article 207 TFEU). This new competence offered the legal channel for the emergence of the EU as a rule-shaper in the context of FDI and, controversially, ISDS. However, the nature and the scope of this new competence were not straightforward. The issue made its way to Luxembourg following a request made by the European Commission under Article 218(11) TFEU.<sup>16</sup> A few quick observations on Opinion 2/15 are necessary for context purposes, taking into account that the Court's analysis in Opinion 1/17 [began] ... where the Court left off in its Opinion 2/15'.<sup>17</sup>

### A. Shared Competence over ISDS (Opinion 2/15)

Briefly, the Court was asked to answer the question whether the Union had the required competence to sign and conclude alone the EU-Singapore Free Trade Agreement ('EUSFTA', one of the first new generation 'deep and comprehensive' trade deals which were bringing together trade and investment provisions), and what the nature of such competence was (exclusive, shared, no competence) depending on each type of provision in the agreement.<sup>18</sup> According to the Commission's

<sup>15</sup> Council, Laeken Declaration on the Future of the European Union, Annex to the Presidency Conclusions (14–15 December 2001), p 3, <http://ec.europa.eu/dorie/fileDownload.do;jsessionid=BfT1JXCLqsj0GqG1GmTSb6PW0fPIZyQq7k7z2hxnqtQ8xJmJZJQP!-172979321?docId=344249&cardId=344249>. The Laeken Declaration led to the (soon to prove unsuccessful) negotiation of the Constitution for Europe that subsequently led to the Treaty of Lisbon.

<sup>16</sup> On the Opinion process, see generally, S Adams, *La procédure d'avis devant la Cour de Justice de l'Union Européenne* (Bruylant, 2011).

<sup>17</sup> Opinion of AG Bot in *CETA*, note 13 above, para 45.

<sup>18</sup> The EU-Singapore FTA was signed on 19 October 2018. In February 2019, the European Parliament gave its consent and the trade and investment agreements will now continue their ratification process for their entry into force. See European Commission, Trade, <http://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/>. See also for text, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

broad interpretation, its exclusive competence was covering the investment chapter of the EUSFTA, including the ISDS mechanism therein.<sup>19</sup> By contrast, certain Member States and the Council took the view that this was a matter of shared competence.

The Court, after emphatically highlighting that the Opinion was rendered without prejudice to the question of the compatibility of said ISDS mechanism,<sup>20</sup> left no doubt as to the exclusiveness of the EU's competence in relation to FDI<sup>21</sup> but found that ISDS is not part of the EU's exclusive competence.<sup>22</sup>

One would expect that the procedural provisions of an agreement should have the same treatment as the substantive ones since they are of an 'ancillary nature'.<sup>23</sup> To make this clearer, the general rule is that dispute resolution mechanisms are to secure compliance with substantive obligations. Therefore, they have the same legal basis as the substantive obligations and follow the allocation of competence.<sup>24</sup> Nevertheless, the Court departed from this general rule finding that competence in relation to ISDS is shared,<sup>25</sup> and this is because, notably, the ISDS is not of a purely ancillary nature.<sup>26</sup>

The Court's reasoning on why ISDS is not ancillary to the substantive investment obligations is very opaque. In the relevant and short but still revelatory passage, the Court's vision of the EU judicial system emerges once again. It is worthy of being recorded in full:

Such a regime, which *removes disputes from the jurisdiction of the courts of the Member States*, cannot be of a purely ancillary nature ... and cannot, therefore, be established without the Member States' *consent*.<sup>27</sup>

By deciding that ISDS provisions are a shared competence,<sup>28</sup> the CJEU did not make the Commission's negotiations any easier.<sup>29</sup> Despite having proclaimed that the question of competence is a preliminary issue that cannot be influenced by

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<sup>19</sup> Commission, 'Trade for All', note 9 above, p 18 ('the EU gained responsibility for investment protection and dispute settlement with the Lisbon Treaty'). Originally, EUSFTA was providing for investor-State arbitration under ICSID.

<sup>20</sup> Opinion 2/15, note 8 above, para 30. Note that the Commission had left out of its request the question of substantive compatibility.

<sup>21</sup> *Ibid*, para 87.

<sup>22</sup> *Ibid*, para 290. For an analysis of the Court's findings, see M Cremona, 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017' (2018) 14 *EU Constitutional Law* 231.

<sup>23</sup> *Ibid*, paras 274–76.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*, para 293.

<sup>26</sup> *Ibid*, para 292.

<sup>27</sup> *Ibid* (emphasis added).

<sup>28</sup> *Ibid*, paras 292–93.

<sup>29</sup> For the related complexities that arise from mixity, see C Ekes, *EU Powers Under External Pressure: How the EU's External Actions Alter Its Internal Structures* (Oxford University Press, 2019), pp 149ff. See also G van der Loo and R Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54 *Common Market Law Review*

political or other similar considerations,<sup>30</sup> it seems that in this case, the CJEU did not disregard the noise surrounding these *all-inclusive* trade deals. The Court implicitly invited the Commission to make these trade deals less complicated, perhaps further implying that investment deals (and mainly their ISDS provisions) are politically sensitive. In light of the Court's Opinion, if all these new-era trade deals were to include an ISDS chapter, they would have to be concluded as mixed agreements, unless Member States make a political choice and offer their consent in order for the EU to act alone.<sup>31</sup>

The Council 'took note' of the Court's Opinion.<sup>32</sup> Indeed, the EUSFTA, as well as other agreements (but not CETA), are now split into two parts: one FTA and one Investment Protection Agreement ('IPA').<sup>33</sup>

With the scope of the EU FDI competence in mind and the Court's decision to exclude ISDS, we shall now move on to explore the determined way in which the EU has been developing its investment/ISDS policy.

### B. A Matrix of Parallel and Intermingling Negotiations

In the early exploratory days of its new competence, the EU seemed willing to work out its participation in the existing *ad hoc* regime.<sup>34</sup> In fact, it had expressed its intention to explore the possibility of accession to the ICSID Convention<sup>35</sup> and thus include ICSID arbitration among the available ISDS alternatives in its International Investment Agreements (IIAs).<sup>36</sup> In one of the first documents outlining the new investment policy, the European Commission made two interesting acknowledgements: first, that not being a member of ICSID was the main obstacle to opting in to this regime,<sup>37</sup> and second, that the EU 'has not historically been a

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(*F*'note continued)

735; A Dashwood, 'Mixity in the Era of the Treaty of Lisbon' in C Hillion and P Koutrakos (eds) *Mixed Agreements Revisited: The EU and Its Member States in the World* (Hart, 2010).

<sup>30</sup> Opinion 1/94 (WTO) EU:C:1994:384, para 107. See also Opinion of AG Sharpston in Opinion 2/15 EU:C:2016:992, paras 77 and 565-69 (noting that the difficulties of mixity cannot influence the decision).

<sup>31</sup> However, it does not seem easy to achieve a qualified majority in that regard. On the facultative (non-compulsory) nature of mixity, see *Germany v Council*, C-600/14, EU:C:2017:935.

<sup>32</sup> See Draft Council Conclusions on the Negotiation and Conclusion of EU Trade Agreements (8 May 2018), paras 2-3, <http://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf>.

<sup>33</sup> See also for the text of the EU-Singapore IPA, COM(2018) 194 final, *Annex to the Proposal for a Council Decision on the Conclusion of the Investment Protection Agreement between the European Union and its Member States of the One Part, and the Republic of Singapore, of the Other Part*.

<sup>34</sup> The example of the investment chapter of the EUSFTA is a tangible indication of this willingness. Moreover, originally, both CETA and TTIP envisaged to include a *traditional* ISDS mechanism.

<sup>35</sup> The Convention on the Settlement of Investment Disputes between States and the Nationals of Other States, 18 March 1965, 575 UNTS 159.

<sup>36</sup> COM(2010) 343 final, *Towards a Comprehensive European International Investment Policy*, p 10. This note did not cover intra-EU BITs (p 4, n11).

<sup>37</sup> The ICSID Convention does not provide for the accession of Regional Economic Integration Organisations (REIOs). Membership is only open to states (Art 67). The EU could only accede to

significant actor in this field'. It then observed that the 'current structures [were] to some extent ill-adapted to the advent of the Union'.<sup>38</sup>

These realisations, combined with the backlash against investor-State arbitration, made opting for traditional ISDS clauses almost a non-option.<sup>39</sup> The EU had to come up with a new 'modern' ISDS policy. The gradual shift was reflected in the parallel and intermingling negotiations of the various international trade agreements the Commission has been having with trade partners around the globe.

### 1. *Creating the CETA ICS through TTIP negotiations*

In September 2015, the Commission released a draft text in the context of the Transatlantic Trade and Investment Partnership ('TTIP') negotiations aiming to make publicly known its positions. Interestingly, this document was originally almost a non-paper since it came with the *warning* that 'this is not a formal text proposal ... but an internal document of the EU'.<sup>40</sup> Only a few months later, the EU made public a slightly edited version which then became officially 'tabled for discussion' with the United States ('US').<sup>41</sup> Although the TTIP Proposal had been tabled for discussion for quite some time, there had been no official reaction on behalf of the US. In light of the change of administration in 2017, it soon became clear that TTIP would remain an exercise on paper. Of course, although the reasons why the TTIP negotiations did not lead to a deal are political, it is certain that, under any administration, ISDS would be one of the points on which parties would not easily reach an agreement.<sup>42</sup>

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*(Footnote continued)*

the ICSID Convention had the latter been amended. Amending the ICSID Convention is rather unrealistic taking into account that it requires unanimity (Arts 65–66). See also discussion in C Schreuer et al, *The ICSID Convention. A Commentary* (Cambridge University Press, 2009), p 1265.

<sup>38</sup> COM(2010) 343 final, note 36 above, p 10. Cf also European Parliament Resolution of 6 April 2011 on the future European International Investment Policy, P7\_TA(2011)0141, (2010/2203(INI)), para 33 (The European Parliament '[i]s aware that the EU cannot use existing ... (ICSID) and ... (UNCITRAL) dispute settlement mechanisms since the EU as such is a member of neither organisation'.).

<sup>39</sup> Furthermore, traditional ISDS clauses seemed as a non-option also in the light of the European Parliament's expected refusal to approve an agreement containing such a clause. See Resolution of 8 July 2015 containing the Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)).

<sup>40</sup> European Commission, 'Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations', IP/15/5651 (16 September 2015), [http://europa.eu/rapid/press-release\\_IP-15-5651\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5651_en.htm). See also European Commission, 'Reading Guide – Draft Text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP)' (16 September 2015), [http://europa.eu/rapid/press-release\\_MEMO-15-5652\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm).

<sup>41</sup> European Commission, 'TTIP – Chapter II – Investment' (12 November 2015), [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) (TTIP Proposal).

<sup>42</sup> Notably, according to a Joint Declaration of the EU and the US evaluating the progress of the TTIP negotiations since their kick off, ISDS was one of the 'important areas' in which significant work should be done to resolve the differences of the two parties. See 'U.S.-EU Joint Report on TTIP Progress to Date' (17 January 2017), <http://trade.ec.europa.eu/doclib/html/155242.htm>.

When we examine the shaping of the EU investment policy, the TTIP Proposal still remains a point of reference for a number of reasons. It was the first text in which the new EU court-based approach was crystallised and then it was transplanted to all subsequent trade deals, which all include very similar provisions in their majority. In a way, the TTIP Proposal has played informally and implicitly the same role as an EU Model BIT with the EU showing to the rest of the world what its starting point in future negotiations will be.<sup>43</sup> The Proposal was also an indication of the EU's determination and commitment to this project: being aware that the US was not positively leaning towards abandoning the crystallised *ad hoc* system,<sup>44</sup> it still did not hesitate to make it part of the deal.

The Council of the EU had unanimously authorised the European Commission to negotiate TTIP (including the adoption of a new ISDS mechanism) two years before the release of the TTIP Proposal, in June 2013.<sup>45</sup> According to the relevant Council mandate, it was made clear that 'the inclusion of investment protection and [ISDS] will depend on whether a satisfactory solution ... is achieved'.<sup>46</sup> The 'satisfactory' nature of the solution depended *inter alia* on the consultation with Member States and its compatibility with EU law. In addition, the Council went further and provided some more specific features of the envisaged enforcement mechanism. Indicatively, the Council asked for an agreement aiming to 'provide for an effective and state-of-the-art [ISDS] mechanism, providing for transparency, independence of arbitrators and predictability of the Agreement .... It should provide for investors as wide a range of arbitration fora as is currently available under the Member States' bilateral investment agreements'. The Council also requested that '[c]onsideration should be given to the possibility of creating an appellate mechanism applicable to investor-to-state dispute settlement'.<sup>47</sup> The CETA Council Directives to the Commission were along the same lines.<sup>48</sup>

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<sup>43</sup> Cf the conclusion in European Commission, 'Investment in TTIP and beyond – the Path for Reform' (5 May 2015), [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF) (TTIP Concept Paper) ('what will be proposed in the TTIP context will set the standard for the further development of investment protection provisions and investment arbitration in EU investment negotiations'), as well as the words of the authors (both with the European Commission) in F Hoffmeister and G Alexandru, 'A First Glimpse of Light on the Emerging Invisible EU Model BIT' (2014) 15 *Journal of World Investment and Trade* 379.

<sup>44</sup> See among available reports highlighting the US preference for *ad hoc* ISDS, A Roberts, 'UNCITRAL and ISDS Reforms: The Divided West and the Battle by and for the Rest' (*EJIL Blog*, 30 September 2019), <https://www.ejiltalk.org/uncitral-and-isds-reforms-the-divided-west-and-the-battle-by-and-for-the-rest>.

<sup>45</sup> Council of the EU, 'Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America' (9 October 2014), <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>.

<sup>46</sup> *Ibid*, para 22.

<sup>47</sup> *Ibid*.

<sup>48</sup> Council of the EU, 'Recommendation from the Commission to the Council on the Modification of the Negotiating Directives for an Economic Integration Agreement with Canada in Order to Authorise the Commission to Negotiate, on Behalf of the Union, on Investment' (15 December 2015), para 26d, <http://data.consilium.europa.eu/doc/document/ST-12838-2011-EXT-2/en/pdf> (NegDir-CETA). See

From its end, the European Parliament in its recommendations to the European Commission on the negotiations for TTIP invited the Commission ‘to ensure that agreement on any dispute settlement mechanism regarding investment protection ... explicitly state[s] the Member States’ *right to regulate* and under no circumstances restrict or hinder legislators from passing and enforcing laws both in the area of employment and in the area of social policy for their countries; ... the inclusion of any form of private arbitration courts in TTIP *must be ruled out*’.<sup>49</sup>

CETA negotiations were concluded in August 2014, and the then agreement was providing for a traditional ISDS mechanism. However, in the aftermath of the finalisation of another deal, the EU-Vietnam Free Trade Agreement (‘FTA’),<sup>50</sup> and the new mechanism introduced in the (then still pending) TTIP negotiations, in January 2016, the EU invited the Canadian federal government to revisit the ISDS chapter of the agreement. Almost immediately, the parties revisited the ISDS chapter and agreed to implement the new court approach to ISDS.<sup>51</sup>

The CETA ICS is envisaged as a two-tier permanent body,<sup>52</sup> comprising a Tribunal of First Instance and an Appeal Tribunal.<sup>53</sup> Provisions on the composition of these bodies (including the number of members, the appointment process, term, retainers, and availability), the qualifications and ethics of their members, and a few procedural rules (including transparency of the proceedings) are also included.

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(*F*note continued)

also Council of the EU, ‘Recommendation from the Commission to the Council in Order to Authorize the Commission to Open Negotiations for an Economic Integration Agreement with Canada’ (15 December 2015), <http://data.consilium.europa.eu/doc/document/ST-9036-2009-EXT-2/en/pdf>.

<sup>49</sup> Report of the European Parliament Containing the European Parliament’s Recommendations to the European Commission on the Negotiations for the TTIP (2014/2228(INI)) (Lange Report) (1 June 2015) (emphasis added). An express reference to the right to regulate as well as to the need to take the concerns about the current mechanisms seriously was also made in the European Commission’s trade strategy paper ‘Trade for All’, note 9 above, p 21 (‘the status quo is not an option’).

<sup>50</sup> The EU-Vietnam FTA was finalised on 2 December 2015, following three years of negotiations. See Press Statement by the President of the European Commission Jean-Claude Juncker, the President of the European Council Donald Tusk and the Prime Minister of Vietnam Nguyen Tan Dung, [http://europa.eu/rapid/press-release\\_STATEMENT-15-6217\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-15-6217_en.htm) (02.12.2015). The text (providing for an ‘investment tribunal system’) was made available in February 2016. The Council of Ministers of the EU approved both the trade and the investment chapters opening the way for its signature in late June 2019. For the text of the EU Vietnam Agreement, see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> and for the investment chapter (dispute resolution) see [http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157394.pdf](http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157394.pdf).

<sup>51</sup> European Commission, ‘CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement’ (29 February 2016), [http://europa.eu/rapid/press-release\\_IP-16-399\\_en.htm](http://europa.eu/rapid/press-release_IP-16-399_en.htm).

<sup>52</sup> This is a notable difference from the WTO DSU which provides for the appointment of the first instance adjudicators *ad hoc*, whilst only at the second degree there is a permanent pool of adjudicators.

<sup>53</sup> The term ‘Appellate Tribunal’ is used in CETA (Art 8.28); while the term ‘Appeal Tribunal’ is chosen in other agreements, eg EU-Vietnam IPA (Art 3.39), TTIP Proposal, note 41 above (Art 10). See also Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and Its Member States, OJ L11/3 (14 January 2017), Point 6(g) to which the Court makes express reference (Opinion 1/17, note 4 above, para 196), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017X0114\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017X0114(01)&from=EN).

The little time that was required for Canada and the EU to agree upon the new ISDS approach leaves little doubt as to the role of TTIP and the EU's strategy. Notably, Canada might have agreed to the ICS in CETA but has shown no intention to depart from the traditional arbitration solution in other instances, such as in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPTPP').<sup>54</sup> On the contrary, the EU has made the ICS part of the deals it has been negotiating with Mexico<sup>55</sup> and other partners.<sup>56</sup>

Representatives from both the Canadian government and the European Commission had expressed their confidence that CETA would enter into force in 2017.<sup>57</sup> This proved to be a rather optimistic expectation, especially after the 'Wallon' problem arose, leading to Opinion 1/17.

## 2. From Wallonia to Luxembourg

The path towards the signature of CETA (30 October 2016) was not an easy one to tread and it illustrates the difficulties that the EU faces in putting forward these mega-deals. By way of a reminder, at the time (ie before Opinion 2/15), the Commission was still arguing that it had exclusive competence to sign CETA alone as an EU-only agreement.<sup>58</sup> Nevertheless, in light of the reactions from a number of Member States,<sup>59</sup> it altered its stance. In July 2016, the Commission submitted a proposal to the Council according to which the EU would treat CETA as a mixed agreement enjoying provisional application until its entry into force.<sup>60</sup>

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<sup>54</sup> The CPTPP is an FTA between Canada and countries in the Asia-Pacific region: Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. CPTPP, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng>.

<sup>55</sup> An agreement in principle has already been reached. See European Commission, 'EU and Mexico Reach New Agreement on Trade' (21 April 2018), [http://europa.eu/rapid/press-release\\_IP-18-782\\_en.htm](http://europa.eu/rapid/press-release_IP-18-782_en.htm). See also European Commission, 'The EU-Mexico Agreement in Principle' (23 April 2018), [http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc\\_156791.pdf](http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156791.pdf).

<sup>56</sup> The EU has launched negotiations with other trade partners, including New Zealand (<http://ec.europa.eu/trade/policy/in-focus/eu-new-zealand-trade-agreement>), Australia (EU-Australia Trade Agreement) (<http://ec.europa.eu/trade/policy/in-focus/eu-australia-trade-agreement>), and the four founding Mercosur states (Argentina, Brazil, Paraguay, Uruguay) (<http://ec.europa.eu/trade/policy/in-focus/eu-mercotur-association-agreement>).

<sup>57</sup> Joint Statement of EU Commissioner for Trade, Cecilia Malmström and the Honorable Chrystia Freeland, Minister of International Trade of Canada (29 February 2016), [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154330.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154330.pdf).

<sup>58</sup> CETA would have been the first trade agreement to be concluded as an EU-only agreement in the history of European integration.

<sup>59</sup> Council of the EU, 'Outcome of the Council Meeting at 3463rd Council Meeting Foreign Affairs Trade Issues', Doc.No.8737/16 (13 May 2016), p 4, <http://data.consilium.europa.eu/doc/document/ST-8737-2016-INIT/en/pdf>.

<sup>60</sup> See generally on the provisional application of an international treaty Article 25 Vienna Convention on the Law of Treaties (hereafter VCLT), 23 May 1969, 1155 UNTS 331. See also D Kleimann and G

The Walloon problem arose immediately after. The parliament of a Belgian region, Wallonia, rejected CETA's signature, expressing concerns about threats relating to beef imports and the ISDS provisions. This led to a series of dramatic moments marked by political and diplomatic negotiations between the Belgian federal government and the Commission on the one hand and the regional government in Wallonia on the other. Quite indicative of the climate were the statements made by the Canadian trade minister following Wallonia's veto:

It seems obvious that the EU is now not capable of having an international agreement, even with a country that shares European values such as Canada, even with a country that is so kind and patient. Canada is disappointed. I am personally very disappointed.<sup>61</sup>

The Belgian government managed to reach an agreement with Wallonia. Accordingly, the signature of CETA would be approved in Wallonia but Belgium would instantly submit a request to the CJEU for an Opinion on the compatibility of CETA with EU law. Indeed, in September 2017, Belgium kept its promise<sup>62</sup> and CETA made its way to Luxembourg.

### *C. From Several Bilateral Courts to a Multilateral Investment Court ('MIC')*

The CETA ICS is 'only the first stage',<sup>63</sup> an interim measure in the ambitious EU policy. The EU had previously foreshadowed that having multiple bilateral permanent courts (one under each specific agreement) would not be a viable solution.<sup>64</sup>

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*(Footnote continued)*

Kübek, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15' (2018) 45(1) *Legal Issues of Economic Integration* 13.

<sup>61</sup> J Rankin, 'EU-Canada Trade Deal in Crisis as Canadian Minister Walks Out' (*The Guardian*, 22 October 2016), <https://www.theguardian.com/world/2016/oct/21/eu-canada-ceta-trade-deal-melt-down-canadian-minister-walks-out>.

<sup>62</sup> Request for an Opinion Submitted by the Kingdom of Belgium Pursuant to Article 218 (11) TFEU OJ 2017/C 369/02. See Kingdom of Belgium, 'CETA Belgian Request for an Opinion from the European Court of Justice', [https://diplomatie.belgium.be/sites/default/files/downloads/ceta\\_summary.pdf](https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf) (where it is noted that the request is made without Belgium taking any position), and Walloon Parliament, Resolution (26 April 2016), [http://nautilus.parlement-wallon.be/Archives/2015\\_2016/RES/212\\_4.pdf](http://nautilus.parlement-wallon.be/Archives/2015_2016/RES/212_4.pdf). For a summary of Belgium's concerns, see Opinion 1/17, note 4 above, paras 46–50.

<sup>63</sup> Opinion 1/17, note 4 above, para 7.

<sup>64</sup> European Commission, 'Inception Impact Assessment: Establishment of a Multilateral Investment Court for Investment Dispute Resolution' (1 August 2016), p 5, [http://ec.europa.eu/smart-regulation/roadmaps/docs/2016\\_trade\\_024\\_court\\_on\\_investment\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf) ('However, operating a large number of ICSs is likely to give rise to a number of operational challenges, in particular in terms of the costs and administrative complexity for the EU as opposed to having one single cost'). See along the same lines COM(2017) 493 final, SWD(2017) 303 final, *Commission Staff Working Document – Impact Assessment Accompanying the Document Recommendation for a Council Decision Authorizing the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes*, p 17 (making reference to 'the administrative burden in terms of time, workforce and financial resources').

Instead, the ultimate plan has always been the establishment of an MIC<sup>65</sup> for all its trade partners but also with a view to having individual EU Member States opt in to the MIC in their extra-EU BITs.<sup>66</sup>

The envisaged transition from multiple bilateral courts to one multilateral court has been reflected in the provisions of the various agreements. For instance, as stipulated in CETA:

The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.<sup>67</sup>

In addition, in the Joint Interpretative Instrument, the parties have also clearly stipulated that CETA ‘lays the basis for a multilateral effort to develop further this new approach to [ISDS] into a [MIC]’ and that they ‘will work expeditiously’ towards its creation.<sup>68</sup>

Notably, the idea for the establishment of an investment court is not new. Indicatively, as far back as 1948 the International Law Association (‘ILA’) published the Draft Statutes of the Arbitral Tribunal for Foreign Investment,<sup>69</sup> whilst in the 1960s the alternative of a permanent court was also discussed and juxtaposed to that of *ad hoc* arbitration.<sup>70</sup> The element of permanence is also present in the establishment of the Iran-US Claims Tribunal.<sup>71</sup> Since then, it has been part of the discussions on reforming the system in different contexts and forums, including the UN

<sup>65</sup> TTIP Concept Paper, note 43 above, pp 11–12 (‘The EU should pursue the creation of one permanent court. This court would apply to multiple agreements and between different trading partners, also on the basis of an opt-in system. The objective would be to multilateralise the court either as a self-standing international body or by embedding it into an existing multilateral organization’).

<sup>66</sup> For example, such a transition clause has already been introduced in the very recent Dutch 2019-Model Investment Agreement (22 March 2019), Art 15.

<sup>67</sup> Art 8.29 CETA.

<sup>68</sup> Joint Interpretative Instrument, note 53 above, Point 6(i).

<sup>69</sup> ILA, 1948, ‘Draft Statutes of the Arbitral Tribunal for Foreign Investment and of the Foreign Investments Court’, reproduced in *International Investment Instruments: A Compendium, Vol III*, compiled by UNCTAD, UNCTAD/DTCI/30 (Vol III), pp 259–72, [https://unctad.org/en/Docs/dtci30vo-13\\_en.pdf](https://unctad.org/en/Docs/dtci30vo-13_en.pdf).

<sup>70</sup> See ILA, ‘Nationalization’ (1958) 48 *Int’l L Ass’n Rep Conf* 130; ‘Juridical Aspects of Nationalization and Foreign Property’ (1960) 49 *Int’l L Ass’n Rep Conf* 175; ‘Juridical Aspects of Nationalization and Foreign Property’ (1962) 50 *Int’l L Ass’n Rep Conf* 101. See also T St John and Y Chernykh, ‘Déjà vu? Investment Court Proposals from 1960 and Today’ (*EJIL Blog*, 15 May 2018), <https://www.ejiltalk.org/deja-vu-investment-court-proposals-from-1960-and-today/comment-page-1>.

<sup>71</sup> Briefly, the Iran-US tribunal was created by an international treaty to arbitrate cases between individuals and one of the two contracting states under UNCITRAL rules. See generally C N Brower, ‘The Iran-United States Claims Tribunal’ (1990) 224 *Collected Courses of the Hague Academy of International Law* 123.

Conference on Trade and Development ('UNCTAD'),<sup>72</sup> the World Trade Organization ('WTO'),<sup>73</sup> and the Organisation for Economic Co-operation and Development ('OECD').<sup>74</sup> Its resurgence, however, should be credited to the EU's persuasiveness as a global actor (and the world's largest exporter and importer of FDI).

In 2017, UNCITRAL initiated its work on 'ISDS Reform', entrusting the Working Group-III ('WG-III') with the relevant mandate.<sup>75</sup> The EU is not a member of UNCITRAL (but all its Member States are).<sup>76</sup> It has the status of an observer relying on its Member States' duty of loyalty.<sup>77</sup> As noted in the Council Negotiating Directives, the Union and its Member States 'shall fully coordinate positions and act accordingly throughout the negotiations'.<sup>78</sup>

With this background in mind, and particularly the leading role that the EU has played in the global reform initiatives, we shall now analyse in more detail the Court's approach in Opinion 1/17.

### III. THE SALIENT 'AUTONOMY OF THE EU LEGAL ORDER': UNRAVELLING THE OPINION 1/17 TEST

EU law is not simply the law of the Union. It is the law that makes the Union. The principle of autonomy, as construed by the Court, thus serves existential purposes. It is the glue that makes the Union a legal order, a rules-based self-contained regime. As such, it vindicates its own claim of primacy vis-à-vis the other structural principles emerging as the principle of principles.<sup>79</sup> Premised on Articles 19 TEU, and 267

<sup>72</sup> See eg in 2013, UNCTAD included the alternative of a 'standing international investment court' in its paper under the title 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap' Special Issue for the Multilateral Dialogue on Investment, [https://unctad.org/en/PublicationsLibrary/web-diaepcb2013d4\\_en.pdf](https://unctad.org/en/PublicationsLibrary/web-diaepcb2013d4_en.pdf).

<sup>73</sup> Quite indicatively, discussions on investment were part of the Doha Round Agenda (2001) but, as it was confirmed two years later, governments were unable to reach consensus on the start of negotiations.

<sup>74</sup> Note eg the negotiations that were initiated in 1995 and led to a draft on a Multilateral Agreement on Investment (MAI) in 1997, that is a multilateral treaty open to all OECD members to the EU (then European Communities) and non-OECD members. See 'The Multilateral Agreement on Investment – Draft Consolidated Text', DAF/MAI(98)7/REV1 (22 April 1998). The negotiations were discontinued in 1998.

<sup>75</sup> UNCITRAL, 'Report of the United Nations Commission on International Trade Law', Fiftieth Session, 3–21 July 2017, A/72/17, <https://undocs.org/A/72/17>, para 264.

<sup>76</sup> Where the Member States but not the EU are members of an organisation dealing with matters falling within EU competence, Member States should only act to express an EU position. *Commission v Greece*, C-45/07, EU:C:2009:81; Opinion 1/13, EU:C:2014:2303.

<sup>77</sup> Art 4(3) Treaty on European Union ('TEU').

<sup>78</sup> Council of the EU, 'Negotiating Directives for a Convention Establishing a Multilateral Court for The Settlement of Investment Disputes', 12981/17 ADD1DCL1 (20 March 2018), <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> (MIC-NegDir).

<sup>79</sup> See among formulations supporting the principle of autonomy as a premier league principle: J van Rossem, 'The Autonomy of EU Law: More Is Less?' in R.A. Wessel and S Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organizations*

and 344 TFEU, the principle of autonomy grants the Court the exclusive right to ensure that EU law is observed. This can be translated into the Court's exclusive right to determine questions of competence between the EU and its Member States, the legality of EU law,<sup>80</sup> and the relative powers and functions of the institutions.

Against this background, the salience of the autonomy of the EU legal order in the context of dispute resolution mechanisms in international agreements that the EU and/or its Member States conclude can hardly come as a surprise. It also explains why this article has focused on this aspect of the Opinion. In passing, in addition to the autonomy concerns (the question of the compatibility with the exclusive jurisdiction of the CJEU and the autonomy of the EU legal order),<sup>81</sup> Belgium also raised concerns about the compatibility with the principle of equal treatment<sup>82</sup> and the requirement of effectiveness of EU law (discrimination and effectiveness concerns),<sup>83</sup> as well as the right of access to an independent and impartial tribunal (independence concerns).<sup>84</sup> The Court examined all these concerns and found the CETA ICS compatible with EU law.<sup>85</sup>

In what follows, after we glimpse the EU dogma of autonomy as recapped didactically by the Court in Opinion 1/17, we shall move on to unravel and critically discuss the two-step autonomy test it introduces.

#### A. A Systematic Recap of the EU Dogma

The Court, unsurprisingly and according to its usual analytical, almost academic approach, began its analysis with a general section recalling the general principles.<sup>86</sup> The Court reiterated the presumption of, in principle, compatibility for all

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(*F*'note continued)

(Springer, 2013), pp 13, 18; J Odermatt, 'Unidentified Legal Object: Conceptualising the European Union in International Law' (2018) 33(2) *Connecticut Journal of International Law* 215.

<sup>80</sup> *Foto-Frost*, C-314/85, EU:C:1987:452.

<sup>81</sup> Belgium's autonomy concerns were based on the fact that, despite the applicable law provision, the CETA ICS would have to take into account provisions of EU primary law (when they formed the basis for a contested measure), while it lacked the possibility to make requests for preliminary rulings. Opinion 1/17, note 4 above, paras 46–50, 106–61; Opinion of AG Bot in *CETA*, note 13 above, paras 39–184.

<sup>82</sup> Opinion 1/17, note 4 above, paras 51–55, 162–86; Opinion of AG Bot in *CETA*, note 13 above, paras 185–213.

<sup>83</sup> Opinion 1/17, note 4 above, paras 187–88; Opinion of AG Bot in *CETA*, note 13 above, paras 214–19.

<sup>84</sup> Opinion 1/17, note 4 above, paras 56–69, 189–244; Opinion of AG Bot in *CETA*, note 13 above, paras 220–71.

<sup>85</sup> This time, and contrary to the approach taken in *Achmea*, the Court agreed with the Advocate General's conclusion and made references to his Opinion. See Opinion 1/17, note 4 above, paras 108, 174, 183, 228, 231.

<sup>86</sup> *Ibid*, paras 106–19. Cf Opinion 2/13, note 2 above, 'Preliminary Considerations' in paras 153–77.

international agreements providing for the creation of a court ‘responsible for the interpretation of its own provisions’.<sup>87</sup> The CETA court (and, eventually, the MIC)<sup>88</sup> may be compatible with EU law *only if* it has no adverse effect on the autonomy of the EU legal order.<sup>89</sup> The Court then devoted two paragraphs to listing the ingredients of this autonomy.<sup>90</sup>

Autonomy has a dual aspect (internal and external) and results from the *essential characteristics* of the EU and its law. Of course, the Court’s case law is replete with such references to the essential characteristics or to similar, synonymous, albeit slightly altered terminology.<sup>91</sup> In fact, it was in the counterpart to Opinion 1/17, Opinion 1/00, that the Court, when asked to opine on a highly integrationist agreement between the European Community and non-Member States on the establishment of the European Common Aviation Area (‘ECAA’), declared the preservation of the essential characteristics as the first requirement for the preservation of the EU (then Community) legal order.<sup>92</sup> The second requirement that the Court set was the lack of a binding effect of the rules provided therein for the resolution of disputes.<sup>93</sup>

In Opinion 1/17, the Court expressly mentions three such essential characteristics of EU law: primacy, direct effect, and the fact that it stems from an independent source of law (ie the EU treaties). Furthermore, these characteristics have led to a structured network of principles and, ultimately, the autonomy of the EU legal order is premised on the fact that the EU possesses a *unique* constitutional framework.<sup>94</sup> The preservation of all these characteristics and the autonomy of the legal order is the *raison d’être* of the EU judicial system as premised in Articles 19 TEU and 267 TFEU.<sup>95</sup>

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<sup>87</sup> Ibid, para 106.

<sup>88</sup> See express references to the MIC ‘in the longer term’ in *ibid*, paras 108, 118.

<sup>89</sup> Ibid, para 108.

<sup>90</sup> Ibid, paras 109–10.

<sup>91</sup> *Achmea*, note 6 above, para 33; C-2/13, note 2 above, para 167. See also C Contartese, ‘The Autonomy of the EU Legal Order in the ECJ’s External Relations Case Law: From the “Essential” to the “Specific Characteristics” of the Union and Back Again’ (2017) 54(6) *Common Market Law Review* 1627.

<sup>92</sup> Opinion 1/00 (*ECAA Opinion*) EU:C:2002:231, para 12 (‘the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered’). In Opinion 1/00, the Court showed how a dispute settlement mechanism can be found compatible with the autonomy of the EU legal order. In Opinion 1/17, the Court showed how these conditions can be satisfied in an arms-length agreement where there is no question of preserving a homogenous interpretation between the agreement and EU law. See also Opinion 1/17, note 4 above, para 107 for the only explicit reference to Opinion 1/00.

<sup>93</sup> Ibid, para 13.

<sup>94</sup> Opinion 1/17, note 4 above, para 110. Article 19 TEU is a provision that emerged as central in the Court’s ruling in *Achmea*. See further on this point M Fanou, ‘Intra-EU Investor-State Arbitration Post-*Achmea*: R.I.P.? An Assessment in the Aftermath of the CJEU, Case C-284/16, *Achmea*, Judgment of 6 March 2018, EU:C:2018:158’ (2019) 26(2) *Maastricht Journal of European and Comparative Law* 316, pp 322–24.

<sup>95</sup> Opinion 1/17, note 4 above, para 111.

Following this concise recap of the EU dogma of autonomy, the Court framed the test it has to apply. The main question is this: *does the envisaged ISDS mechanism (ie the CETA ICS, a mechanism that ‘stands outside’ the EU judicial system and the judicial system of Canada) prevent the Union from operating in accordance with its unique constitutional framework as defined by the CJEU?*<sup>96</sup> For the question to be answered in the negative (and thus for the CETA Court to be found compatible with EU law), we need to ask two further sub-questions:<sup>97</sup>

- (1) Does the CETA ICS have the power to *apply and interpret EU law* or only the provisions of CETA and the ‘rules and principles of international law applicable between the parties’? (first limb of the test);
- (2) Even if there is no possibility that the CETA ICS applies and interprets EU law, is its jurisdiction determined in such a way that the awards it will issue may have the *effect of preventing the EU institutions from operating in accordance with the EU constitutional framework?* (second limb of the test).

#### *B. The First Limb: Does the CETA ICS Apply or Interpret EU Law?*

This first question,<sup>98</sup> in short, requires a determination of the applicable law in CETA. Article 8.31 CETA incorporates the applicable law clause and provides for five (a–e) guarantees introduced to keep CETA ICS separate from EU law.

Accordingly, under the provision of Article 8.31, the ICS (a) applies only ‘this Agreement’ (ie CETA), ‘as interpreted’ in accordance with the VLCT<sup>99</sup> ‘and other rules and principles of international law applicable between the Parties’. Furthermore, (b) the CETA 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 a Party’. For ‘greater certainty’, (c) the CETA ICS, in determining the consistency of a measure with CETA, ‘may consider, as appropriate, the domestic law of a Party *as a matter of fact*’ and, in doing so, (d) it ‘shall follow the *prevailing interpretation* given to the domestic law by the courts or authorities of that Party’, whilst (e) ‘any meaning given to domestic law by the Tribunal shall *not be binding* upon the courts or the authorities of that Party’.<sup>100</sup>

Clearly, the drafters of the provision were very careful and seemingly had in mind this potential moment of scrutiny. The Court examined this applicable law clause under the microscope and concluded that the guarantees offered therein suffice to exclude any possibility that the ICS will apply or interpret EU law. In the Court’s ‘applicable law’ analysis, there are four noteworthy features to which we will now turn. More precisely, three points that the Court made (B1–B3) and one point that the Court remained reticent about (B4).

<sup>96</sup> Ibid, paras 112–14.

<sup>97</sup> Ibid, para 119.

<sup>98</sup> Ibid, paras 120–36.

<sup>99</sup> Note 60 above.

<sup>100</sup> Art 8.31(1–2) CETA (emphasis added).

1. *Navigating extra-EU waters: Reciprocity in lieu of mutual trust (Opinion 1/17 v Achmea)*

First, the Court had to determine how the CETA applicable law clause differs from the applicable law clause in earlier relevant cases. The Court started with the applicable law clause contained in the draft agreement for the Patent Court (ie the envisaged agreement in Opinion 1/09).<sup>101</sup> Distinguishing CETA from Opinion 1/09 was an almost frictionless endeavour, as the envisaged Patent Court's jurisdiction was extending to future EU regulation on patents, other related EU law instruments, the general principles of EU law and fundamental rights. Hence, EU law was intentionally part of the applicable law clause.<sup>102</sup>

Inevitably, the Court also had to distinguish the case of the CETA ICS from *Achmea*<sup>103</sup> and the relevant ISDS clause in the Netherlands-Slovakia BIT, namely an intra-EU agreement 'which was concluded *not* by the EU but by Member States'.<sup>104</sup> Both *Achmea* and Opinion 1/17 are cases in which the Court, while ruling on the compatibility of two different but, at the same time, similar mechanisms, continues to paint the picture of the autonomy of the EU legal system, a construction that serves existential needs in that it creates the EU legal order. Although the Court only decides upon the case it has before it on each occasion, it is true that the heavily criticised ruling in *Achmea* was handed down at a time when Opinion 1/17 was already pending before it. Unsurprisingly, a number of diverging views came to light, ranging from warnings about the potential far-reaching *Achmea* impact on any ISDS<sup>105</sup> to suggestions that the Court might have offered a boost to the Commission's permanent court solution.<sup>106</sup>

However, the only proposition for which *Achmea* serves as a *clear* authority is that Articles 267 and 344 TFEU have the combined effect of precluding an intra-EU ISDS clause having the specific characteristics of the one provided in Article 8 of the Netherlands-Slovakia BIT. Beyond this starting point of certainty, the implications of the judgment for other types of ISDS, such as intra-EU cases under the Energy Charter Treaty (ECT), intra-EU BIT cases under ICSID or extra-EU BITs, remain open to debate. Indeed, such debate is prompted and permitted by the

<sup>101</sup> Opinion 1/09, note 1 above.

<sup>102</sup> Opinion 1/17, note 4 above, paras 123–25.

<sup>103</sup> *Ibid*, paras 126–27. Cf also Opinion of AG Bot in *CETA*, note 13 above, paras 95ff. *Achmea* and the extent to which the Court's reasoning therein can be transplanted in the case of the ICS, was also discussed at length at the hearing, see eg E Stoppioni, 'L'audience dans l'avis 1/17 sur le CETA' (*BlogDroitEuropeen*, 29 June 2018), <https://blogdroiteuropeen.com/2018/06/29/audience-dans-lavis-1-17-sur-le-ceta-par-edoardo-stoppioni>.

<sup>104</sup> *Achmea*, note 6 above, para 58 (emphasis added).

<sup>105</sup> See among scholarship discussing the extra-EU impact of *Achmea*, C Eckes, 'Some Reflections on *Achmea*'s Broader Consequences for Investment Arbitration' (2019) 4(1) *European Papers* 79.

<sup>106</sup> See eg C Brower and J Ahmad, 'From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court' (2018) 41(4) *Fordham International Law Journal* 791, pp 801–02 (discussing the acceleration of the efforts to establish the permanent court after *Achmea*).

characteristic high level of abstraction of the Court's reasoning. That being said, it is true that the Court's construction of autonomy in *Achmea* was so expansive that no one can put their heads on the block and state what is (or is not) *Achmea*'s reach, and if the *Achmea* test were to be taken literally, no dispute settlement mechanism could escape from it.

The Court found that the CETA ICS differs from the ISDS mechanism provided in the intra-EU BIT at issue in *Achmea* on three grounds. First, in *Achmea*, the tribunal 'would be called upon to give rulings on disputes that might concern the interpretation or application of EU law'.<sup>107</sup> This was the case because, according to the wording of the applicable BIT, the arbitral tribunal could '[take] into account' among others 'the law in force of the Contracting Party concerned'.<sup>108</sup> Second, *Achmea* differs in that it concerned 'an agreement between Member States'<sup>109</sup> and, third, the principle of mutual trust does not apply in relations between the EU and a third state.<sup>110</sup>

The Court's reference to the principle of mutual trust is another indication of the role it played in its reasoning in *Achmea*, where it seemed to have approached the intra-EU ISDS clause at issue as a public international law expression of mistrust between new and old EU Member States originating from (and allegedly belonging to) a different era.

Hence, in Opinion 1/17, the Court drew a line between the sphere of intra-EU relations (where mutual trust applies) and operating in an extra-EU context (where reciprocity comes into play and reigns).<sup>111</sup> In the specific case of the ISDS, there is a 'demand for neutrality'<sup>112</sup> that the ICS comes to meet. So long as this projected body completely 'stands outside' the EU legal system, reciprocity allows EU's participation.

## 2. EU law as a fact: 'Examination' versus interpretation

In the context of the inquiry into the applicable law, the Court also evaluated the exercise that the CETA tribunal will be called to undertake when determining the consistency of a contested measure with CETA. It 'may consider, as appropriate, the domestic law of a Party *as a matter of fact*'. Further, in the context of this consideration, it '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'.<sup>113</sup>

Interestingly, the Court drew a distinction between the *examination* of EU law as a fact on the one hand and the legal exercise of *interpretation* of EU law on the other. The challenge against a measure brought by an investor will 'inevitably' lead to 'an

<sup>107</sup> Opinion 1/17, note 4 above, para 126.

<sup>108</sup> Art 8(6) Netherlands/Slovakia BIT.

<sup>109</sup> Opinion 1/17, note 4 above, para 127.

<sup>110</sup> *Ibid*, paras 128–29.

<sup>111</sup> Opinion of AG Bot in *CETA*, note 13 above, paras 72–90.

<sup>112</sup> *Ibid*, para 88.

<sup>113</sup> Art 8.31(2) CETA.

examination of the effect of that measure'. Hence, 'on occasion', this may 'require that the domestic law of the respondent Party be taken into account'. However, the Court held that this inevitable exercise cannot 'be classified as equivalent to an interpretation' by the CETA tribunal.<sup>114</sup> Put differently, the Court seemed to acknowledge the realistic necessity that arises before all courts and tribunals to 'take into account' laws over which they have no jurisdiction.

Generally, and particularly in the contemporary landscape, all courts at some point have to deal with issues originating in other (than their own) legal orders as a matter of course. The CJEU is not an exception. Its jurisdiction is confined only to EU law. Yet, in an Article 267 TFEU reference case, the CJEU still takes into account the national law of a Member State without (at least theoretically) interpreting or applying it, in the sense of giving the national court an authoritative interpretation. Certainly, this exercise, labelled by the Court 'examination', is not at odds with the approach investment tribunals (as well as other international courts) have expressly taken in the past.<sup>115</sup> As a matter of fact, the legal exercise arbitral tribunals conduct is not aimed strictly to interpret and apply EU law in order to produce binding effects beyond resolving the specific dispute.<sup>116</sup>

Rather quickly, the Court also dealt with the applicable law of the appellate tribunal, the second degree in the CETA ICS. Indeed, the relevant provision in CETA, lists among the grounds on the basis of which the appellate tribunal may 'uphold, modify or reverse' the award, 'manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law'.<sup>117</sup> The Court, however, found that this reference to domestic law does not amount to an indirect inclusion of EU law in the applicable law. Instead, the Court noted that it was 'clear' in light of the other provisions 'that it was in no way *the intention* of the Parties to confer on the Appellate Tribunal jurisdiction to interpret domestic law'.<sup>118</sup> This is another instance of the CJEU interpreting the jurisdiction of the CETA tribunal.

<sup>114</sup> Opinion 1/17, note 4 above, para 131. See also Opinion of AG Bot in *CETA*, note 13 above, para 129 ('CETA Tribunal is to interpret *as little as possible* the domestic law of each of the Parties' (emphasis added)).

<sup>115</sup> See eg *Certain German Interests in Polish Upper Silesia (Germany v Poland)*, Merits, 1926 PCIJ (ser A) No 7, p 19 (25 May) ('The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention'.).

<sup>116</sup> Of course, 'binding' is a concept that needs to be nuanced. In the context of an arbitration, there is no concept of precedent. Any interpretation provided by a tribunal even of the same BIT or of similar concepts under different BITs does not bind other tribunals. The ruling applies only between the parties with no broader precedential effect. See also discussion in A Dimopoulos, 'Achmea: The Principle of Autonomy and Its Implications for Intra- and Extra-EU BITs' (*EJIL:Talk!*, 27 March 2018) <https://www.ejiltalk.org/achmea-the-principle-of-autonomy-and-its-implications-for-intra-and-extra-eu-bits>.

<sup>117</sup> Art 8.28(2)(b) CETA.

<sup>118</sup> Opinion 1/17, note 4 above, para 133 (emphasis added).

### 3. *Determination of the respondent*

Another consideration that strengthened the Court's conclusion that there is not even a mere possibility of the CETA ICS interpreting EU law was drawn from the CETA provision on the determination of the respondent (Article 8.21). In more detail, it is the EU that determines, in light of the contested measures and the internal division of powers, who should be the respondent in each case (the Union or the Member State). Such determination is binding upon the CETA tribunal and, therefore, the Court retains exclusive jurisdiction to determine the division of powers.<sup>119</sup>

### 4. *An ICS standing outside the EU judicial system and the removal of disputes from domestic courts*

The Court concluded its analysis of this first limb by making reference to the lack of direct effect of CETA and the finality of the awards rendered by the ICS.<sup>120</sup> The lack of direct effect has been used both as an argument in support of the inclusion of the ISDS mechanism in CETA and as evidence of complete separation, namely that the ICS will not touch EU law.<sup>121</sup>

In addition, in light of its finding that there is not even a mere possibility that the CETA ICS can apply or interpret EU law,<sup>122</sup> the Court found unproblematic the absence of any provision allowing or requiring the CETA ICS to make requests for preliminary references to the Court. This is a logical and consistent finding. If a tribunal does not apply or interpret EU law, there is no reason for requests for preliminary rulings to the Court.<sup>123</sup>

Nevertheless, it should be stressed that the Court remained conspicuously reticent about the fact that the domestic courts of the Member States are deprived of some of their jurisdiction. To put it differently, had CETA had direct effect and had it not provided for an ICS, any Canadian investors' claims should have been brought before domestic courts of the host Member State. Of course, reciprocity plays its part here. Still, the Court has repeatedly emphasised the 'rhetorical shield' of the domestic

<sup>119</sup> Ibid, para 132. Cf also the importance that the lack of this safeguard played in Opinion 1/91 (EEA Opinion), EU:C:1991:490, paras 34–35; Opinion 2/13, note 2 above, paras 224–25; *Mox Plant*, C-459/03, EU:C:2006:345, para 177.

<sup>120</sup> Opinion 1/17, note 4 above, para 135. See also Art 30.6(1) CETA (express exclusion of direct effect). Explicit exclusion of direct effect is a common practice among EU IIAs (see also on that point Opinion of AG Bot in *CETA*, note 13 above, paras 91, 94, where a link between reciprocity and lack of direct effect is drawn).

<sup>121</sup> Opinion of AG Bot in *CETA*, note 13 above, para 205.

<sup>122</sup> Opinion 1/17, note 4 above, para 136.

<sup>123</sup> The CJEU has no jurisdiction to provide a ruling under Article 267 TFEU 'on the interpretation of provisions of international law which bind Member States outside the framework of EU law'. *Magdalena Vandeweghe and others v Berufsgenossenschaft für die chemische Industrie*, C-130/73, EU:C:1973:131, para 2. See also *Matteo Peralta*, C-379/92, EU:C:1994:296, para 15.

courts in previous cases.<sup>124</sup> In *Achmea*, impliedly, mutual trust meant trust in the system of remedies that the EU is postulated on and in their effectiveness, as well as mutual trust in the EU judicial system as a whole. Predominantly, in Opinion 1/09, the Court found troublesome that the domestic courts were ‘divested’ of some of their jurisdiction ‘retain[ing] only those powers which are not subject to the exclusive jurisdiction of the [Patent Court]’.<sup>125</sup> In Opinion 1/17, EU Member States courts are not the protagonists.

### *C. The Second Limb: ‘Effects of the Award’ and EU Regulatory Autonomy*

The Court then moved on to the second limb of the test.<sup>126</sup> What is the concern here? The concern is that, despite the separation and lack of direct effect, the CETA tribunal ‘examines’ the contested measures, which might relate to laws and regulations, in light of the facts of the case. EU law (secondary EU law but also primary law that formed the basis for the adoption of a measure) is one aspect of the facts.<sup>127</sup> Thus, the CETA tribunal will ‘often’ decide on the effects of these EU law measures (facts) and breaches of the substantive standards of CETA, such as the fair and equitable treatment (FET) (Article 8.10), expropriation (Article 8.12), and freedom of transfers (Article 8.13).<sup>128</sup>

In addressing this concern, the Court made four preliminary observations on the features of the jurisdiction of the CETA tribunal.<sup>129</sup> It observed the broad definition of covered investments<sup>130</sup> but the limitation of covered investors to those ‘who have a real link with Canada’,<sup>131</sup> as well as the compulsory jurisdiction of the CETA tribunal, in the sense that the respondent’s consent is unequivocal.<sup>132</sup> Thereafter, the Court made the observation that the ICS only grants compensation for the damage that the investor suffered because of the breach, and therefore it does not have the power to request a change to the regulatory framework or impose a penalty on the state.<sup>133</sup>

<sup>124</sup> B de Witte, ‘European Union Law: How Autonomous Is Its Legal Order?’ (2010) 65(1) *Zeitschrift für öffentliches Recht* 141, p 150. As we will see, the Court put this shield down for a while in Opinion 1/17 where it remained reticent on the role of EU courts.

<sup>125</sup> Opinion 1/09, note 1 above, para 72 (‘The courts of the Member States, are divested of that jurisdiction and accordingly retain only those powers which are not subject to the exclusive jurisdiction of the PC’.).

<sup>126</sup> *Ibid.*, paras 137–61.

<sup>127</sup> Art 1.1 CETA and definition of ‘measure’ therein.

<sup>128</sup> Opinion 1/17, note 4 above, paras 137–38.

<sup>129</sup> *Ibid.*, para 147 (where the Court finds these features ‘consistent with the protection of foreign investors’). Note also the distinction that the Court draws between the case of FDI/ISDS and the WTO dispute resolution system (para 146 leading to the conclusion in paras 148–49).

<sup>130</sup> *Ibid.*, paras 139, 142–43.

<sup>131</sup> *Ibid.*, para 141.

<sup>132</sup> *Ibid.*, para 140.

<sup>133</sup> *Ibid.*, para 144. See for the remedies provided under Art 8.39(1)(4) CETA (monetary damages including applicable interest and restitution of property, punitive damages are excluded). Cf Opinion 1/09, note 1 above, para 78.

It was after these observations that the Court set the negative condition for compatibility: the ICS shall not ‘call into question the level of protection of a public interest that led to the introduction of such restrictions by the Union’.<sup>134</sup> Otherwise, the Court held, the Union would have to abandon that level of protection ‘in order to avoid being repeatedly compelled’.<sup>135</sup>

So, how is the Court reassured that the CETA ICS, which does not apply or interpret EU law, still will not present a threat to EU regulatory autonomy? Three reassurances have entertained the concerns. First, the *expressis verbis* recognition of the right to regulate followed by a long indicative list of legitimate policy objectives.<sup>136</sup> Second, and rather strikingly, the Court relied on the *commitment* contained in the CETA Joint Interpretative Statement that the standards and regulations of each Party will not be lowered.<sup>137</sup> Third, the Court considered the formulation of the *substantive standards* contained in CETA and the restrictive manner in which they are drafted. In particular, it took note of the clarification on the notion of indirect expropriation<sup>138</sup> and the exhaustive enumeration of situations in which a breach of FET may be found.<sup>139</sup>

The Court’s reasoning contains a few novel elements. Leaving aside the reliance on the Joint Statement (which after all is a political statement), what is striking is the Court’s attempt to predetermine the jurisdiction of the CETA tribunal (that is an international and completely separate tribunal). Put differently, and borrowing the Court’s terminology from another part of the Opinion,<sup>140</sup> a risk to the EU regulatory autonomy would be ‘unimaginable’ if the CETA tribunal interprets its powers correctly, and that is in the way the Court suggests.

However, it seems that the Court takes its chances and departs from the suspicious stance it had adopted in the past. The CETA ICS, as any other tribunal, has *kompetenz kompetenz*, so it will define its own jurisdiction independently. Moreover, there is nothing in CETA that prevents the ICS from doing so and, where applicable, it might rule that the respondent, say an EU Member State or the EU, breached one of the substantive standards in CETA (eg by falling into the scope of the exceptions provided therein) and this breach was due to the implementation of an EU law.

Is this the beginning of a new era of ‘EU law objections to jurisdiction’ raised before the CETA ICS? In other words, shall we expect the respondent EU (Member State) to argue that the CETA ICS lacks jurisdiction because the contested measure is taken to

<sup>134</sup> Ibid, para 148.

<sup>135</sup> Ibid, para 149. The choice of the word ‘repeatedly’ is also interesting. It seems to introduce a quantitative factor. Arguably, the Court has in mind examples of EU countries that have been facing several claims arising out of similar factual and legal scenarios (eg Spain and the large number of renewables cases).

<sup>136</sup> Ibid, para 154. See also Art 8.9(1–2) CETA.

<sup>137</sup> Ibid, para 155. See also Joint Interpretative Instrument, note 53 above, Points 1(d), 2.

<sup>138</sup> Ibid, para 157. See also CETA, Annex 8-A (Point 3).

<sup>139</sup> Ibid, para 158. See also Art 8.10(2) CETA.

<sup>140</sup> Ibid, para 185 (where the Court touches upon the ‘unimaginable’ scenario of a clash between EU competition law and CETA, as long as the competition rules have been correctly applied).

protect the public interest? Is this reference to the ‘effects’ simply the CJEU’s way of emphasising the importance of EU regulatory autonomy, while acknowledging deep inside that there is no immunity for any measures?<sup>141</sup> The intra-EU experience has shown that these questions are not of a pure academic interest. Assuming *arguendo*, that the awards rendered by the ICS are to be enforced under the New York Convention,<sup>142</sup> and there is an award (unimaginably but conceivably) that finds a breach of CETA on the basis of a measure that was taken in view of a significant EU public interest, will Opinion 1/17 serve as the legal basis for the award debtor’s non-compliance/denial of enforcement?<sup>143</sup> Such objection, in this scenario, would be brought in the enforcement proceedings before domestic courts.

Overall, following the Court’s analysis, it seems that had CETA not come with these reassurances as understood by the Court (or if, in the future, an agreement comes without similar ones), ‘it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework’.<sup>144</sup>

#### *D. An Autonomy Checklist of Full Separation*

Regardless of the view one may take on the Court’s findings and/or reasoning in Opinion 1/17, it seems that we have a dispute resolution mechanism that pleased the Court, and thus (perhaps for the first time) a test of compatibility with the principle of autonomy for future reference. Is this an easy test? Certainly not. On the contrary, it is a difficult one to pass (especially in light of its second limb). Nevertheless, it is the closest we have to a workable checklist applicable to both first instance and appellate tribunals forming part of an ICS-type dispute resolution mechanism (ICS-DRM). In a nutshell, the components of this checklist can be summarised as follows.

First, the ICS-DRM should not have the power to apply and interpret EU law. The mere possibility that EU law might be brought in the proceedings as applicable law is eliminated by (1) the inclusion of an express and clear applicable law clause;<sup>145</sup> and (2) a provision that only the EU will exclusively determine the respondent in each case.<sup>146</sup> These guarantees shall be, broadly speaking, accompanied by evidence, including (3) the lack of direct effect of the said agreement (ie no direct action by investors in national courts) and, coherently, the absence of a provision for the

<sup>141</sup> In a seminar on Opinion 1/17, CJEU President Lenaerts also noted that EU measures of general application are not immune from the CETA ICS’s review (K Lenaerts, ‘Modernising Trade Whilst Safeguarding the EU Constitutional Framework: An Insight into the Balanced Approach of Opinion 1/17’ Brussels (06 September 2019), p 16 (copy on hold with the author).

<sup>142</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3. It goes beyond the scope of this article to discuss the complex (and not thoroughly thought out by the drafters) issue of enforcement of awards rendered by the ICS and whether, in the light of the ‘hybrid’ nature of the ICS, its awards can be deemed awards within the meaning of the Convention.

<sup>143</sup> For instance, on the basis of breach of EU public policy (Art V(2)(b) New York Convention).

<sup>144</sup> Opinion 1/17, note 4 above, para 151.

<sup>145</sup> *Ibid*, para 119.

<sup>146</sup> *Ibid*, para 132.

possibility to send requests for preliminary reference rulings (ie no recourse from the ICS to the EU judicial system).<sup>147</sup>

Even if there is no possibility that the CETA ICS applies and interprets EU law, the inquiry does not stop there. Its jurisdiction should be determined in such a way that its awards do not have ‘the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework’.<sup>148</sup> Under which circumstances could the ICS awards have this *unconstitutional* effect? When they could have a regulatory chill, is the answer.<sup>149</sup> And how can the drafters prevent this risk? At least in the following three ways, the Court held: (1) by including an express, broad and declaratory provision on the parties’ right to regulate;<sup>150</sup> (2) by granting to the ICS the power to order compensation instead of any other remedy;<sup>151</sup> and (3) by drafting narrowly the substantive standard clauses (such as the FET clause in CETA).<sup>152</sup>

With the above-sketched checklist in mind, we will now turn to reflect on the implications it signals for other extra-EU scenarios in the future, namely ISDS provisions contained in both extra-EU BITs and other EU agreements, including notably a future Convention establishing an MIC.<sup>153</sup>

#### IV. FUTURE IMPLICATIONS FOR OTHER EXTRA-EU SCENARIOS

##### *A. ISDS in Other EU Agreements Including the Future Convention Establishing an MIC*

The envisaged opt-in Convention establishing the MIC (MIC Convention) is for now an exercise on paper. In the absence of a final sketch of the MIC Convention, it is at least somewhat premature to fully discuss its compatibility with EU law.<sup>154</sup> Atop the complexities arising out of the compatibility of the MIC (and ICS) with existing international law instruments,<sup>155</sup> and other practical considerations,<sup>156</sup> any MIC

<sup>147</sup> *Ibid*, paras 134–35.

<sup>148</sup> *Ibid*.

<sup>149</sup> *Ibid*, paras 148–51.

<sup>150</sup> *Ibid*, para 154.

<sup>151</sup> *Ibid*, para 144.

<sup>152</sup> *Ibid*, para 158.

<sup>153</sup> *Ibid*, para 108 (explicit reference to establishing ‘in the longer term, a multilateral investment Tribunal).

<sup>154</sup> There is little doubt that the CETA ICS is the blueprint for its structure. For some of the features under discussion, see Council of the EU, ‘Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes’, 12981/17 ADD1DCL1, in particular paras 9–13 (20 March 2018), <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>.

<sup>155</sup> Note 142 above.

<sup>156</sup> For example, the new MIC will have to convince all EU Member States and their national (perhaps in some instances also regional) parliaments, that it is indeed a real reform. It remains to be seen if a new saga, similar or worse to the one that led to the provisional application of CETA, is to take place.

Convention (having the EU on board) will have to take into account the CJEU's construction of autonomy and compatibility requirements (as set forth in Opinion 1/17).

It should be stressed from the outset that compatibility of the CETA ICS does not automatically guarantee the compatibility of the MIC with EU law. It will largely depend on the content of this future agreement. What can be noted already at this stage is that a future MIC Convention will have to take into account the EU's *sui generis* character<sup>157</sup> and include a minimum set of guarantees. One such guarantee should incorporate a very carefully drafted applicable law clause that will exclude the interpretation/application of EU law (as law), provide for its compulsory jurisdiction and grant to the EU the exclusive power to determine the respondent when it comes to a case brought against an EU Member State. Importantly, it will have to include a disconnection clause to exclude an *inter se* application if it is to be concluded as a mixed agreement.<sup>158</sup>

This will be the easy part. However, a future MIC Convention will also have to introduce sufficient safeguards for the states' regulatory powers. This last point (that is meeting the second limb of the test) might prove particularly challenging. For instance, in CETA, the parties drafted a very narrow FET clause. However, a FET clause is a substantive standard. Intentionally, substantive provisions are not part of the MIC negotiations. The MIC Convention is envisaged to determine procedure only,<sup>159</sup> premised on the idea of the ICSID Convention, and aimed to be used by reference in a large number of different IIAs. Such IIAs will have their own substantive provisions and references (or, often, not) to the states' regulatory powers. It is these IIAs that will have to comply with the above-sketched Opinion 1/17 'effects' test. Will the CJEU be at ease declaring compatible with the EU legal order an agreement comprising of procedural only provisions and, thus, take the risk of it applying potentially non-compliant substantive provisions contained in different texts?

### B. Member States' Extra-EU BITs

Extra-EU BITs touch upon the role of Member States as international actors. Member States should not conclude an extra-EU BIT that might require it to breach its EU law obligations. In the aftermath of Opinion 1/17, it can be said with certainty that extra-EU BITs are not discriminatory. However, conclusions in relation to their compatibility with the autonomy of the EU legal order cannot be drawn with the same degree of certainty.

<sup>157</sup> Cf MIC-NegDir, note 78 above, para 6, where the Council notes that the Convention establishing the MIC should have provisions 'drafted in a way which allows their effective use by the EU'.

<sup>158</sup> These are for the MIC's compatibility with the autonomy of the EU legal order. Of course, additionally, guarantees for the appointed adjudicators' independence and impartiality, as well as guarantees for its accessibility subject to proportionate restrictions shall be introduced.

<sup>159</sup> The approach procedure first substance next was the approach followed by Aron Broches in the establishment of ICSID. See eg R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012), p 9.

Different extra-EU BITs include different applicable law clauses. In some (especially if concluded before the Grandfathering Regulation),<sup>160</sup> the applicable law clause might be similar to the applicable law clause in Article 8 of the Netherlands-Slovakia BIT (the applicable ISDS clause in *Achmea*) and, thus, bring in the parties' domestic law and EU law. Certainly, an extra-EU BIT (that predates CETA) containing a clear-cut exclusion of EU law (in the way CETA does) is not common. On the other hand, extra-EU BITs raise different concerns than intra-EU BITs. For example, in an extra-EU BIT scenario, the EU is not bound by any interpretation rendered by an arbitral tribunal,<sup>161</sup> whilst, certainly, they do not raise the mutual trust concerns that the intra-EU BITs arguably do.

Moving to the link between autonomy and the effects of the awards that the Court drew in Opinion 1/17,<sup>162</sup> can we argue that an extra-EU BIT (which does not contain the elaborated FET/indirect discrimination clauses that the new-era treaties tend to include) cannot live up to the Opinion 1/17 test? Even under an extra-EU BIT (to which the EU is not a party), an EU measure might relate to the breach claimed. Does this call into question the 'level of protection of a public interest'? And if yes, is this problematic in the context of an extra-EU BIT (as the Court held it is in the context of an EU IA)?

The question will remain open until (and if ever) the Court is called to rule upon another extra-EU scenario, this time not on the basis of an extra-EU agreement but on the basis of an extra-EU BIT. For instance, this could arise in the context of an enforcement of a non-ICSID award before an EU domestic court. The party objecting to the enforcement could argue that the award has the effect of breaching EU law (eg a breach of state aid laws, for instance in an extra-EU solar case) or is a breach of the EU constitutional law/principle of autonomy within the meaning the CJEU attributed to it. As the effects-limb of the autonomy test in Opinion 1/17 is so flux, the concern is that it could convert the intra-EU objection to jurisdiction into a general EU-autonomy-objection invocable in extra-EU cases.<sup>163</sup>

<sup>160</sup> Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries, OJ 2012 L351/40–46.

<sup>161</sup> Binding is used almost as a technical EU law term. Binding under EU law means that the CJEU and EU domestic courts will have to follow this non-EU court's interpretation. A judgment might be binding under international law but not binding in the EU law sense. How 'binding' an interpretation coming from any investment arbitral tribunal is, of course, questionable (in light of lack of precedent) but this discussion goes beyond the scope of the analysis here. See also note 116 above.

<sup>162</sup> Section III.C above. Opinion 1/17, note 4 above, paras 148–51. In addition to the autonomy concerns, there might be further implications for extra-EU BITs arising from Opinion 1/17 and the Article 47 inquiry, namely: an extra-EU AT is not a tribunal (of the Member States) within the meaning of Article 267 TFEU. However, is it a tribunal for Article 47 of the Charter and would this provision apply in this case? If it were to apply, would the *ad hoc* nature of the arbitral tribunal impact on the finding?

<sup>163</sup> See eg how the intra-EU objection to jurisdiction was invoked in an extra-EU BIT case in *CMC Muratori Cementisti and others v Republic of Mozambique*, ICSID Case No. ARB/17/23, Award (24 October 2019), paras 296–39 (both *Achmea* and Opinion 1/17 were invoked).

Overall, the extent of the implications of Opinion 1/17 (read together with *Achmea*) for the extra-EU BITs remains to be seen.

## V. CONCLUSION

In Opinion 1/17, the Court safeguarded the ability of the Union to enter into reciprocal commitments with partners around the globe and saved, for now, its credibility as an international actor. The complex (from a legal, political, and policy perspective) pathway towards the conclusion of CETA and the EU's leading role in shaping the debate on ISDS reforms globally played a pivotal role. A 'no' to the ICS from the Court would have amounted to a global embarrassment for the Commission and the EU. The Court's explicit acknowledgment of the 'need to maintain the powers of the Union in international relations'<sup>164</sup> (and hence the need to allow the Union to be a subject of international law), leaves no doubt that the Court was mindful of the context and stakes.

Mindful as it may have been, the Court still took the opportunity to build upon its constitutional framework.<sup>165</sup> The autonomy test it introduced (premised on the principle of reciprocity that underpins external relations) stresses the importance of keeping this body 'that stands outside' the parties' (and thus the EU's) legal system as separate as conceivably possible. Importantly, the EU regulatory powers form part of the autonomy test. In finding that the CETA ICS presents no threat to the EU regulatory autonomy, the Court relied primarily upon the formulation of the substantive standards included in CETA and, strikingly, on its own interpretation of the projected CETA tribunal's jurisdiction.

Overall, the Court, unable in the past to tolerate the mere possibility that a challenge, even in its remotest form, to the autonomy of EU law could occur, explained in Opinion 1/17 how autonomy cannot be a problem in reciprocal external relations. Still, in light of the conditions set, this openness should not be taken for granted, as no guarantee of automatic compatibility of a future body (such as the projected MIC Convention, most likely to be a procedure-only text) is offered.

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<sup>164</sup> Opinion 1/17, note 4 above, para 117. Cf AG Bot's declaration, note 13 above, para 33, that the case does not touch upon 'the appropriateness' of the ICS from a political perspective' or its economic impacts.

<sup>165</sup> Lenaerts, note 141 above, pp 3, 15, also referred to the balancing exercise in Opinion 1/17, mentioning explicitly the 'political objectives of promoting and modernizing investment protection' and how 'vital for modernising investment protection in new-generation trade and investment agreements' mechanisms such as the ICS are.