ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

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OPINION 1/17 AND ITS THEMES: AN OVERVIEW

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ABSTRACT: This *Article* introduces the Special Section on "Opinion 1/17: Between European and International Perspectives", by providing an overview on the Opinion's main issues, that is, autonomy, the principle of equal treatment and effectiveness, and the right of access to an independent tribunal.

KEYWORDS: Opinion 1/17 – autonomy – principle of equal treatment and effectiveness – right of access to an independent tribunal – CETA – international investment law.

I. INTRODUCTION

This Special Section examines Opinion 1/17[1] by the Court of Justice of the European Union (CJEU) from different angles that take into consideration its European and international dimensions. It contains some of the *Articles* presented at the workshop "Opinion 1/17: European and international perspectives", which was held in Paris on 12 and 13 June 2019, and organised under the auspices of the University of Oslo, Faculty of Law, the European Law and Governance School/EPLO (Athens), the Hague University of Applied Sciences and

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[1] Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341.

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the *Centre Universitaire de Norvège à Paris*.[2] The purpose of this *Article* is to present Opinion 1/17 together with the structure of this Special Section.

In Opinion 1/17, which was delivered on 30 April 2019, the CJEU was asked to rule on the compatibility of the Investor-State Dispute Settlement Chapter (ISDS) under the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (CETA) with the EU Treaties and the EU Charter of Fundamental Rights (EU Charter). Both the AG Bot[3] and the CJEU held that the CETA Chapter on ISDS was compatible with EU primary law. As is well known, Opinion 1/17 is one of the most recent CJEU's rulings on the complex relationship between the EU and international investment law.[4] Even if the request for an opinion was addressed by Belgium under art. 218(11) TFEU for mainly internal reasons,[5] it raised important concerns that were widely shared in the European and international community. Opinion 1/17 was, somehow, requested with perfect timing. First of all, the EU was negotiating and/or concluding several agreements containing an ISDS mechanism similar to the CETA model.[6] Secondly, increasing criticisms towards ISDS progressively materialised in a proposal to create a Multilateral Investment Court (MIC).[7] Concerns on the rule of law, transparency, independence and impartiality of investment arbitration were all at stake within this debate. As the CJEU recalls in Opinion 1/17, the CETA Investment Court System ("ICS") is a step towards the establishment of a MIC.[8]

[2] For the programme of the workshop, see www.elgs.eu. This event was part of a series of annual workshops on pressing issues in international law, held in Paris in 2017-2019, that also addressed the EU and bilateral investment treaties and CJEU's judgment in case C-284/16 *Achmea* ECLI:EU:C:2018:158.

[3] Opinion of Advocate General Bot in Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:72, for a comment on the AG Opinion, see H Schepel, *A Parallel Universe: Advocate General Bot in Opinion 1/17* (7 February 2019) European Law Blog europeanlawblog.eu.

[4] See, in particular, the *Achmea* judgment cit. For a comment, see C Contartese and M Andenas, 'EU Autonomy and Investor-State Dispute Settlement Under *Inter Se* Agreements Between EU Member States: *Achmea*' (2019) CMLRev 157.

[5] See L Ankersmit, 'Investment Court System in CETA to be Judged by the ECJ' (2016) European Law Blog europeanlawblog.eu.

[6] See L Pantaleo, *The Participation of the EU in International Dispute Settlement* (Springer 2019).

[7] On the path towards the MIC, see M Bungenberg and A Reinisch (eds), 'From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court. Options Regarding the Institutionalization of Investor-State Dispute Settlement' (2018) European Yearbook of International Economic Law; S Puig and G Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' 112 (2018) AJIL 361, 363-66.

[8] Opinion 1/17 cit. paras 7, 44, 108, 118. See European Commission, 'The Multilateral Investment Court Project' (10 October 2018) trade.ec.europa.eu; Negotiating Directives of the Council of the European Union for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes EU Doc 12981/17 ADD 1.

The questions that Belgium asked to the CJEU were redefined by the Court into the three following issues of compatibility: "the autonomy of the EU legal order";[9] "the general principle of equal treatment and the requirement of effectiveness";[10] "the right of access to an independent tribunal".[11] The Opinion, in sum, assessed both institutional and substantive aspects of the compatibility of the CETA ICS with the EU Treaties as well as with the EU Charter.[12] It is around these themes that this Special Section has been conceived and structured. It proves the relevance of this ruling for the relationship between EU and international investment law, nevertheless, it is only a piece of this complex puzzle. To what extent extra-EU Member States Bilateral Investment Treaties are compatible with EU law,[13] how the *Achmea* judgment will impact on the Energy Charter Treaty (ECT),[14] what role the EU will play in the development of the proposed MIC,[15] and how the *Micula*-scenario will evolve,[16] are only some of the issues that are already attracting the attention of European and international legal scholars, and will continue to do so in the near future.

[9] Opinion 1/17 cit paras 106-161.

[10] *Ibid*. paras 162-188.

[11] *Ibid*. paras 189-244.

[12] For comments on Opinion 1/17, see, amongst others, the Special issue on 'Reflections on Opinion 1/17 (CETA)' (2020) Europe and the World: A law review; A Berramdane, 'Les implications de l'avis 1/17 de la CJUE sur le mécanisme de RDIE prévu dans les accords commerciaux et d'investissements de l'UE' (2020) Revue de droit des affaires internationales 819; F Iorio, 'Opinion 1/17: Has the EU Made Peace with Investment Arbitration?' (2019) Revue de droit des affaires internationales 407; L Pantaleo, 'The Autonomy of the EU Legal Order and International Dispute Settlement in the Wake of Opinion 1/17' (2019) Studi sull'integrazione europea 775; C Rapoport, 'Balancing on a Tightrope: Opinion 1/17 and the ECJ's Narrow and Tortuous Path for Compatibility of the EU's Investment Court System (ICS)' (2020) CMLRev 1725; L Bosek, 'On the CETA's Compatibility with European Union Law in Light of Opinion No 1/17 of the Court of Justice of 30 April 2019' (2020) Zeitschrift für Europarecht, internationales Privatrecht und Rechtsvergleichung 248.

[13] See JR Vidal Puig, 'Investment Arbitration in the EU Following *Achmea* and Opinion 1/17' (European Central Bank Working Paper Series 19-2019) 20, 24-25.

[14] In Opinion 1/20, the CJEU will have to rule on the compatibility of the ECT with EU law, more specifically, on whether the draft modernised Energy Charter Treaty is compatible with art. 19 TEU and art. 344 TFEU; and whether art. 26 ECT or other ECT provisions allow for intra-EU disputes. See M Happold, 'Belgium asks European Court of Justice to Opine on Compatibility of Energy Charter Treaty's Investor-State Arbitration Provisions with EU law', www.ejiltalk.org.
On the possible impact of Opinion 1/17 on the MIC, see C Titi, 'Opinion 1/17 and the Future of Investment Dispute Settlement: Implications of the Design of a Multilateral Investment Court' (2020) SSRN ssrn.com or dx.doi.org; C Jamieson, 'Assessing the CJEU's Decisions in *Achmea* and Opinion 1/17 in Light of the Proposed Multilateral Investment Court' (2020) European Investment Law and Arbitration Review 213.

[16] The *Micula* saga started as an intra-EU arbitration dispute between two Swedish investors and Romania, and continued as a State aid case before the EU judiciary. In case T-624/15 *European Food and Others v Commission* ECLI:EU:T:2019:423, the General Court concluded that the EU Commission, according to whom the implementation of the compensation award by Romania was in breach of EU State aid rules, exceeded its powers in State aid review. In August 2019, the Commission brought an appeal against the judgment of the General Court (case C-638/19 P *Commission v European Food and Others*, pending).

II. Autonomy

The first of the three themes is autonomy. Although external autonomy was for a long time a somehow marginal topic in academic debate, its increasing relevance strongly emerged as a reaction to two rulings of the CJEU, in particular: the *Kadi* case, in 2008,[17] and Opinion 2/13, in 2014.[18] Nowadays, autonomy has attracted the attention of European and international legal scholars. However, autonomy still remains a nebulous concept. Under EU law, it is not only difficult to know how to define it, but it is also problematic to identify clearly when it applies and what legal consequences it generates.[19] Compared to the most recent rulings of the CJEU, where the Court strongly stressed the autonomous nature of the EU legal orders *vis-à-vis* other international regimes, the tone of Opinion 1/17 appears somehow softer. Unlike *Kadi* and Opinion 2/13, one may perceive a sort of "sensitivity" for the EU as an international actor in the field of international investment law. If in *Kadi*, the Court categorically excluded a balancing exercise between the safeguarding of EU autonomy and deference towards the UN Security Council, and in Opinion 2/13 between the safeguarding of EU autonomy and the protection of human rights, in Opinion 1/17 the need to allow the path towards a MIC may have played a role.[20] The Court, in sum, did not want to interfere

[17] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461. As is well known, the Kadi saga is composed of a set of judgements, but it is in the judgment delivered in 2008, that the CJEU used a strong language to assert EU autonomy.

[18] Opinion 2/13 *Adhésion de l'Union à la CEDH* ECLI:EU:C:2014:2454.

[19] Amongst the abundant literature, see in particular, C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review 19; V Moreno-Lax, 'The Axiological Emancipation of a (Non-) Principle: Autonomy, International Law and the EU Legal Order' in I Govaere and S Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Hart Publishing 2019) 45; NN Shuibhne, 'What is the Autonomy of EU Law, and Why Does that Matter?' (2019) Nordic Journal of International Law 9; I Govaere, 'Interconnecting Legal Systems and the Autonomous EU Legal Order: A Balloon Dynamic' (2018) Research Papers in Law, College of Europe; J Odermatt, 'The Principle of Autonomy: an Adolescent Disease of EU External Relations Law?' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Oxford 2018) 291; C Contartese, 'The Autonomy of the EU Legal Order in the CJEU's External Relations Case-Law: From the "Essential" to the "Specific Characteristics" of the Union and Back Again' (2017) CMLRev 1627; M Klamert, 'The Autonomy of the EU (and of EU law): Through the Kaleidoscope' (2017) ELR 815; S Vezzani, 'L'autonomia dell'ordinamento giuridico dell'Unione europea. Riflessioni all'indomani del Parere 2/13 della Corte di Giustizia' (2016) RivDirInt 68; K Ziegler, 'Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law' in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Human Rights Law* (Cheltenham, Edward Elgar 2017), 267-307.

[20] For an analysis of Opinion 2/13 in the light of Opinion 1/17 from the perspective of international responsibility, see V Pergantis and SO Johansen, 'The EU Accession to the ECHR and the Responsibility Question: Between a Rock and a Hard Place' in N Levrat, Y Kaspiarovich, C Kaddous and RA Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing, forthcoming).

with the current negotiations under the auspices of the United Nations Commission on International Trade Law (UNCITRAL).[21] The AG's statement confirms this perception: "the assessment [of the CETA ICS] should be conducted by also taking into account the fact that [it] is merely a step towards the creation of a multilateral investment court and related appellate mechanism [...]. I am therefore of the view that account should be taken of both the experimental and dynamic nature of the mechanism under examination".[22] One may be tempted to conclude that the "selfish" era of the CJEU's case-law is over.[23] Upon a closer look, however, Opinion 1/17 turns out to be in line with the previous strong protectionist approach of EU autonomy. The jurisdiction of the CETA ICS is, in fact, interpreted narrowly to the extent that the tribunal "has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures [...] and, on that basis, to order the Union to pay damages".[24] The CJEU has, in sum, neutralised any potential impact of the ICS on the EU legal order. Whereas in the academic debate, it has also been argued that the CETA ICS could still have "unwanted" "indirect" effects on the EU legal order,[25] what emerges is that the CJEU has established a high threshold for an international court to be compatible with the EU Treaties.[26] Most importantly, in Opinion 1/17, the CJEU extends the application of the principle of autonomy from the structural/institutional dimension of the EU legal order to its substantive aspects.[27] This is what the Court does with its emphasis on the EU democratic process and the level of protection of public interests. As Lenaerts points out, in this part of the reasoning Opinion 1/17 "innovates the most".[28]

As was mentioned above, the debate on autonomy increasingly attracts the attention of EU and international legal scholars, not surprisingly, therefore, four out of the seven

[21] M Cremona, 'The Opinion Procedure Under Article 218(11) TFEU: Reflections in the Light of Opinion 1/17' (2020) Europe and the World: A Law Review 7-8; P Koutrakos, 'The Anatomy of Autonomy: Themes and Perspectives on an Elusive Principle, Building bridges: Central Banking Law in an Interconnected World' (2019) ECB Legal Conference 96, who refers to it as "policy pragmatism".

[22] *Accord ECG UE-Canada*, opinion of AG Bot cit. para. 246.

[23] See C Riffel, 'The CETA Opinion of the European Court of Justice and its Implications–Not that Selfish After All' (2019) JIEL 503.

[24] Opinion 1/17 cit. para. 153.

[25] S Hindelang, 'The Price for a Seat at the ISDS Reform Table – CJEU's Clearance of the EU's Investment Protection Policy in Opinion 1/17 and its Impact on the EU Constitutional Order' in A Biondi and G Sangiuolo (eds), *Judicial Protection and EU Free Trade Agreements* (Edward Elgar Publishing forthcoming); GC Leonelli, 'CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test' (2020) Legal Issues of Economic Integration 43.

[26] N Lavranos, 'CJEU Opinion 1/17: Keeping International Investment Law and EU Law Strictly Apart' (2019) European Investment Law and Arbitration Review 240.

[27] P Koutrakos, 'The Anatomy of Autonomy: Themes and Perspectives on an Elusive Principle, in Building Bridges: Central Banking Law in an Interconnected World' (2019) ECB Legal Conference 99; C Contartese, '*Achmea* and Opinion 1/17: Why Do *Intra* and *Extra*-EU Bilateral Investment Treaties Impact Differently on the EU Legal Order?' (European Central Bank Legal Working Paper Series 19-2019) 7, 13-15.

[28] K Lenaerts, 'Modernising Trade whilst Safeguarding the EU Constitutional Framework: an *Insight* into the Balanced Approach of Opinion 1/17' (2019) Belgian Ministry of Foreign Affairs-Brussels diplomatie.belgium.be 9.

Articles of this Special Section are devoted to this topic. The first one is written by Antonis Metaxas who looks at Opinion 1/17 in light of the CJEU's previous judgments and opinions on autonomy. After defining autonomy as a concept, the author focuses on three aspects: the vertical allocation of competences between the EU and its Member States, the role of the preliminary reference mechanism, and the CJEU's exclusive competence on the interpretation and application of EU Law. Whereas the CJEU hold that the ICS does not undermine EU autonomy, the author raises concerns on the possibility that the ICS Appellate Tribunal could still be able to interpret EU law. In the second *Article*, Arman Melikyan compares Opinion 1/17 with some previous CJEU's cases and observes that "in this particular context the international law of investment court system is being designed by the EU itself, taking into account EU internal constitutional structure". The author stresses the role of the European Commission, that "made sure that the investment court system and the transformed international investment order would be in perfect harmony with the EU internal integrity". Melikyan also analyses the impact of Opinion 1/17 on the future establishment of the MIC, and on the development of the autonomy of EU law. In the third *Article*, Szilárd Gáspár-Szilágyi criticizes the academic analysis that investigates autonomy through − what he defines as − a formalistic approach. The author argues that autonomy can rather be understood when examined in the context of legal and non-legal considerations. Amongst these latter, he identifies the strength of the international dispute settlement mechanism under consideration, the parties to the agreement, and the implications for EU policies. Gáspár-Szilágyi challenges the definition of autonomy as a structural principle, as elaborated by some legal scholars. He concludes that the CJEU would essentially use autonomy as a "shapeshifter" *vis-à-vis* international law: "A mechanism that depending on not just legal conditions, but also *non-legal* considerations, can morph into a shield against international law or it can embrace it". The last of the four *Articles* links Opinion 1/17 to Opinion 2/13, and raises an important question on the future negotiations of the EU accession to the European Convention on Human Rights (ECHR), that is, whether some aspects of the Draft agreement on the EU accession to the ECHR could be amended in light of Opinion 1/17. Specifically, Luca Pantaleo and Fabienne Ufert ask whether the co-respondent mechanism − as conceived under the Draft agreement on the EU accession to the ECHR and rejected by the CJEU in Opinion 2/13 − could be replaced by what the authors call the "internalisation model" under the CETA. This latter, which is compatible with the EU Treaties, foresees that the EU should identify who − the EU or its Member State − will act as the respondent before the CETA ICS. After examining the main European Court of Human Rights' case-law concerning the responsibility of EU Member States, and describing the internationalisation model, the two authors conclude that "the extension of the internalisation model to the ECHR, while not being immune from critical aspects, appears to be a safe avenue to be followed also in the field of human rights litigation − at least from an EU law perspective".

III. The principle of equal treatment and effectiveness

Another concern that Belgium raised refers to the alleged difference in treatment between enterprises and natural persons of EU Member States that invest within the EU and Canadian investors. The latter are entitled to bring a case before the CETA ICS, whereas the former cannot. The second aspect that the CJEU examines is, therefore, the general principle of equal treatment. More specifically, the Court assessed whether the ISDS mechanism under the CETA complies with art. 20 EU Charter, which guarantees "equality before the law",[29] and with art. 21(2) EU Charter, which prohibits discrimination on grounds of nationality.[30] First of all, the Court recalls that the EU Charter enjoys the same legal status as the EU Treaties and, as a consequence, the compatibility of an international agreement, under art. 218(11) TFEU, can be assessed in light of the EU Charter as well.[31] Then, it considers the scope of application of these two provisions. Whereas art. 21(2) EU Charter, which corresponds to art. 18(1) TFEU, is not meant to apply to cases where the difference at stake is that between nationals of EU Member States and nationals of non-Member States, the right enshrined in art. 20 EU Charter is "available to all persons whose situations fall within the scope of EU law, irrespective of their origin".[32] Art. 21(2) EU Charter, in sum, brings no relevance on the alleged discrimination in the treatment of EU investors as compared with Canadian investors, and the analysis focuses on art. 20 EU Charter. Following its well-settled case-law, the CJEU recalls that "equality before the law" requires that "comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified",[33] and that their comparability "must be assessed in the light of all the elements that characterise them and, in particular, in the light of the subject matter and purpose of the act that makes the distinction in question, while the principles and objectives of the field to which the act relates must also be taken into account".[34] According to the Court, the situations of Canadian investors that invest within the Union is not comparable to that of investors of EU Member States that invest within the Union:[35] "those Canadian persons, in their capacity as foreign investors, are to have a specific legal remedy against EU measures, whereas enterprises and natural persons of the Member States who, like those Canadian persons, invest within the Union, are not foreign investors there and will therefore not have access to that specific legal remedy and nor will they be able [...] to invoke directly the provisions contained in that agreement before the courts and

[29] Art. 20 EU Charter "Equality before the law": "Everyone is equal before the law".

[30] Art. 2 EU Charter" Non-discrimination": (2) "Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited".

[31] Opinion 1/17 cit. paras 164-167.

[32] *Ibid*. paras 168-175, 172.

[33] *Ibid*. para. 176.

[34] *Ibid*. para. 177.

[35] *Ibid*. para. 180.

tribunals of the Member States and of the European Union".[36] As for the requirement of effectiveness of EU law, the Court focuses, as requested in the Opinion, on EU competition law, and holds that the CETA does not affect it.[37]

Whereas the CJEU relies on its consistent case-law to reach these conclusions, the explanation on the reasons why Canadian investors in the EU are in a different position compared to EU investors are not satisfactory.[38] The *Article* by Tarjei Bekkedal tackles this issue by identifying a conflict between EU law's autonomy and unity. According to the author, the CJEU's interest in strongly protecting the autonomy of the EU and EU law goes to the detriment of unity. This is due to the fact that autonomy, in light of the CJEU's case-law, requires the separation between the EU and an international legal order, whereas unity of law would entail coherence within a legal system. As for the interpretation of art. 20 EU Charter, the systemic requirement of unity would require that "within EU law itself, there is only one Law, which applies to all", whereas the CETA ISDS mechanism amounts to an exception since it establishes "a specific legal system with specific rights for investors of a specific nationality". Therefore, there would no longer exist one law for all. Bekkedal argues that this outcome, far from being the result of an objective legal reasoning, is rather "a legal, constitutional and political choice that is decisive as to how the reasoning must be constructed". The Court, in sum, aimed at supporting the development of international investment law over the promotion of equality.

IV. The right of access to an independent tribunal

The third and final issue assessed in Opinion 1/17 concerns the compatibility of the CETA ICS with art. 47 EU Charter, that is, the right to a remedy before an "independent and impartial tribunal previously established by law" (second paragraph), and to "effective access to justice" (third paragraph).[39] As is very well known, this topic is part of the broader debate on the rule of law, which is currently one of the most sensitive issues within the EU. Poland and Hungary have been under the spotlight of the European Parliament and the Commission under art. 7 TEU procedure. The "Polish case", finally, was brought before the CJEU.[40]

[36] *Ibid*. para. 181.

[37] *Ibid*. paras 178-188.

[38] See C Riffel, 'Does Investor-State Dispute Settlement Discriminate Against Nationals?' (2020) German Law Journal 197.

[39] Art. 47 EU Charter "Right to an effective remedy and to a fair trial": "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this *Article*. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

[40] See, in particular, case C-192/18 *Commission v Poland* ECLI:EU:C:2019:924; case C-619/18 *Commission v Poland* EU:C:2019:531; case C-216/18 PPU *Minister for Justice and Equality v LM (Deficiencies in the system of*

Seen from this perspective, Opinion 1/17 is also interesting because it adds an international dimension to such a debate, that is, it raises the question as to what extent certain guarantees must be upheld under an EU international agreement.[41]

In Opinion 1/17, the CJEU emphasizes that, whereas some procedural rules of the CETA ICS are based on traditional ISDS mechanisms, they foresee innovative elements on the ICS' composition and on how it will deal with its cases: this is a permanent tribunal of 15 Members; each case will be heard by three Members who are not pre-selected; the appeal will be heard by the CETA Appellate Tribunal.[42] According to the CETA Parties, these features imply that they want to create an investment system which is "independent, impartial and permanent", "inspired by the principles of public judicial systems", and has moved "decisively away from the traditional approach of investment dispute resolution".[43] Without questioning the formal classification of the CETA ICS − as "judicial bodies" or "judges" − for the CJEU, it is undisputed that those tribunals will exercise judicial functions. The issue is whether the CETA ICS meets the (EU law) requirements of independence and impartiality, and guarantees accession to it.

As for the requirement of independence, the CJEU recalls its previous case-law by distinguishing between its two aspects: external and internal.[44] The external independence requires that the CETA ICS acts autonomously, that is, in absence of a hierarchical or subordinate relationship with other sources. In this respect, certain guarantees are essential, such as guarantees against removal from office, and a level of remuneration commensurate to their functions. The internal dimension of independence is related to impartiality, and aims to ensure objectivity and the absence of interests in the outcome of the proceedings. In sum, "those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it".[45] The CJEU seems satisfied with the fact that, despite the lack of detailed provisions, the CETA will have to comply, *inter alia*, with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("the IBA Guidelines").

justice) ECLI:EU:C:2018:586. See P Van Elsuwege and F Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) EuConst 8.

[41] See C Vajda and S Mair, 'The Applicability of Article 47 of the Charter of Fundamental Rights to International Agreements to which the Union is a Contracting Party' in D Petrlik, M Bobek, J Passer and A Masson (eds), *Evolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux, Liber amicorum Jiri Malenovsky* (Bruylant 2020) 551.

[42] Opinion 1/17 cit. para. 195.

[43] *Ibid*.

[44] See, in particular, case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117.

[45] Opinion 1/17 cit. para. 204.

As for the guarantee of accessibility, it implies the possibility that any investor that falls under the category identified by the CETA may bring a dispute before the CETA ICS. On the accessibility to the CETA ICS, the CJEU notes that the CETA does not provide any legally binding commitments on the financial accessibility for small or medium-sized investors. Nevertheless, the Court relies on Statement n. 36 according to which "there will be better and easier access to this new court for the most vulnerable users, namely [small and medium-sized enterprises] and private individuals", and on the adoption of additional rules by the CETA Joint Committee.[46] In assessing the compatibility of the CETA ISDS with art. 47 EU Charter, the CJEU consistently relies on its settled case-law, what strikes, however, is its "trust" on what the CETA does not say expressly and on other texts, such as Parties statements and guidelines.

Two *Articles* of this Special Section examine the right of access to an independent tribunal from different perspectives: the first one focuses on a purely internal procedural issue, whereas the second one links the CJEU's analysis to the international debate. Eleftheria Neframi's *Article* questions whether art. 47 EU Charter, taken autonomously, is the appropriate ground for review under the Opinion procedure. The author, after analysing the different scope of this provision's paragraphs and observing that it enjoys a specific function in the EU legal order, concludes that "external relations are outside the scope of art. 47 of the Charter". There are two solutions that Neframi suggests in order to safeguard the principle of judicial protection and the right of access to an independent tribunal without recourse to art. 47 EU Charter. The first one relies on the principle of autonomy; the second solution refers to the assessment of compatibility of the CETA's ISDS mechanism with the substantive provisions of the common commercial policy. According to the author, this latter is to be preferred. The *Article* by Güneş Ünüvar analyses the requirements of independence and impartiality of the CETA ICS investigating their interplay with the legal ethics rules codified under international treaties or guidelines. Ünüvar, more specifically, identifies some inconsistencies in the CJEU's approach towards these latter. In particular, the author points out that the CJEU wrongly refrained from properly distinguishing between international court judges and international arbitrators, and emphasises that this could also undermine the ongoing reform of international investment law. The Court, the author argues, was probably aware that the Commission would have replaced the reference to the IBA's Guidelines with an *ad hoc* Code of conduct for permanent judges in line with the nature of the ICS.

[46] *Ibid*. paras 216-217.