ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

edited by Mads Andenas, Cristina Contartese, Luca Pantaleo *and* Tarjei Bekkedal

OPINION 1/17: AUTONOMY OF EU LEGAL ORDER AND THE CONFLICTING CONTEXT OF INTERNATIONAL INVESTMENT ARBITRATION

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ABSTRACT: Opinion 1/17 generated substantial scientific debate about the impact of Investor State Dispute Settlement mechanisms on the dynamic notion of the "autonomy" of the EU legal order. While analysing Opinion 1/17, it is important to evaluate the arguments that convinced the Court in reaching the conclusion that the creation of an Investment Court System provided in CETA to handle investment disputes is compatible with EU law. Focus on the merits of these arguments is amplified by the constant efforts of the CJEU to safeguard its strategic position as the sole guardian of the EU Treaties and of the EU legal order as a whole. The present analysis primarily explores the critical points in the Court's arguments that are related to the notion of autonomy. The primary argument put forth is that the rationale behind Opinion 1/17 leaves an existent, however narrow, risk for the adequate preservation of the autonomy of EU legal order that needs to be addressed. This enhances the need for the CJEU to find in the future ways for an *inclusion* of the arbitral dispute settlement structures. Inevitably so, the present analysis highlights the fundamental necessity to preserve the autonomy of EU legal order while exploring the pathway to reconcile two necessities: the need for an autonomous 'self-dependence' of the Union's legal system and the need of conciliation in the field of international investment arbitration. The strategic importance of safeguarding the autonomy of EU Law, a *conditio sine qua non* for the overall EU integration process, should better rely on practical, technical ways for its observance than to policy influenced fluctuations of its normative substance.
KEYWORDS: Opinion 1/17 – autonomy – preliminary reference procedure – EU legal order – interpreting EU law – international investment arbitration.

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/492

I. Introduction

The relationship between existing Investor State Dispute Settlement (hereafter ISDS) mechanisms and EU law has been an issue of great debate in the past years relating to the fundamental principle of autonomy of the EU legal order. The 2018 landmark *Achmea* ruling has been the most debated judgment in this context until Opinion 1/17.[1]

The Court of Justice of the European Union (CJEU) handed down its Opinion 1/17[2] on the compatibility of the Comprehensive Economic and Trade Agreement (CETA) agreement between Canada and the EU with EU law, on the 30th of April 2019.[3] CETA is one of the most recent free trade agreements adopted by the EU, including European Union-Singapore Free Trade Agreement (EUSFTA) with Singapore and European Union-Vietnam Free Trade Agreement (EUVFTA) with Vietnam, that include provisions on investment protection. Opinion 1/17 of the CJEU on CETA keeps the debate on the principle of autonomy topical, claiming that the establishment of the CETA Tribunal and Appellate Tribunal for disputes between investors and the contracting parties is consistent with EU law. In particular, the Court found that the relevant provisions in CETA do not violate the principles of autonomy, equal treatment, and effectiveness. The request for an opinion by the Court originated from a fierce dispute within Belgian internal politics, with Wallonia demanding from the Government in Brussels to expressly consult the CJEU on the legal merits of that agreement. Respecting that decision from its regional parliament, Belgium asked the CJEU, *inter alia*, whether such an agreement was compatible with the principle of autonomy of the EU legal order.

Opinion 1/17 touches a number of important and controversial issues. The following analysis does not intend to provide an overview of all key issues raised by the Court but will rather focus predominantly on the approach adopted by the CJEU as regards safeguarding the autonomy of EU legal order. The primary objective is to identify the elements in the Court's argumentation that could potentially pose a risk for the autonomy of the EU legal order. The basic argument put forth is that the reasoning behind Opinion 1/17 raises a narrow but nevertheless existent risk-potential as regards the adequate preservation of EU Law autonomy; a risk that needs to be addressed. At a second level, this analysis argues in favour of the need for the CJEU to find ways for a comprehensive inclusion of the arbitral dispute settlement structures. If anything is clear after Opinion 1/17 is that autonomy of EU Law should better rely on practical, technical ways for its observance of its scope and fluctuations of a judicial standpoint. A practical tool in this direction could be, as it is here argued, inter alia a 'smart' use of the preliminary reference procedure, provided for in art. 267 TFEU.

[1] Case C-284/16 *Achmea* ECLI:EU:C:2018:158.

[2] Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:72.

[3] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [14 January 2017] 23.

The substantiation of these arguments can be materialized through the examination of the elements that constitute the *concept* of autonomy of the EU legal order, as well as how these elements have been identified, featured and interpreted before – and throughout – Opinion 1/17.

II. The concept of autonomy

An independent legal system, should it aim to remain "independent" must safeguard its autonomy. Autonomy could be defined as the lack of normative *control* (not mere influence) from outside sources as regards (at least) the central structural decisions it entails and the values it reflects. In this sense, safeguarding its autonomy is not an "egoistic" perception and tendency but rather a precondition of the very existence of a given coherent legal order. Given that the EU, seen as a project with a mainly political *telos*, is founded on the legitimation of a distinctive and autonomous legal order,[4] the concept of autonomy constitutes a structural existential principle which is inextricably linked to the development so far as well as the further evolution of the European integration process.[5] Further than "merely" a system with primacy over the laws of the Member States, the principle of autonomy of EU law essentially provides that the common set of rights and obligations deriving from the Treaties to form the EU legal order will be sheltered from external factors that would undermine its coherence.

The normative substance of the autonomous EU legal order takes of course, its more concrete form precisely at the extreme crucial constellation, when there is a genuine *collision* with national and/or international law.[6] In addition to the above, it needs to be underlined that the existential cornerstone of the EU Legal order, the supremacy principle, is also predominantly based on the basic assumption of structural autonomy of the EU legal order. Since the *Costa* case, the CJEU's jurisprudence has highlighted the principle of supremacy as the *key* methodological tool of conflict resolution. The legal consequence of the principle of supremacy is the inapplicability of national rules that are in conflict

[4] A Metaxas, 'Reflections on the Distinctive Character of the EU Legal Order' (2016) Efimerida Dioikitikou Dikaiou 346.

[5] See NN Shuibhne 'What is the Autonomy of EU Law, and Why Does that Matter?' (2019) ActScandJurisGent 9. See also on the principle of autonomy B De Witte 'European Union Law: How Autonomous is its Legal Order?' (2010) Zeitschrift für Öffentliches Recht 141; 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 2018) 291.

[6] NN Shuibhne 'What is the Autonomy of EU Law, and Why Does that Matter?' cit. 4. See also A Metaxas 'State of Exception as the New *Legitimitas*: Some Thoughts on the Necessity of an Interdisciplinary Approach of EU Law' (2018) Efimerida Dioikitikou Dikaiou 642.

with EU law (*Anwendungsvorrang*).[7] The notion of autonomy has been particularly constructed in the Court's case law. The pivotal role of the CJEU is illustrated in many respects, as the Court is acting as the "guardian" of the EU normative framework, under the EU's *sui generis* status. Historically, the CJEU did not hesitate to act as an activist court that *constructed* and *ab initio* formed to a large extent the dogmatic pillars of the EU legal order even in cases where those pillars did not have a clear foundation in the Treaties.[8]

The Court founded the approach of the EU as a *Rechtsgemeinschaft*, a "community of law", whose dogmatic constitution is based on a sequence of interrelated theoretical doctrines and procedural mechanisms: supremacy of EU Law, direct effect and the principle of State liability for breaches of EU Law, are the most symbolic fundamental principles based on which the EU Legal order was (is) not just shaped but indeed constructed.[9] In the landmark judgment *Van Gend en Loos*, the CJEU claimed that at stake with the principle of autonomy is the control or monopoly of jurisdiction of the Court aiming to protect the essential characteristics of the EU and its legal order. This approach of the Court inevitably leads to the necessity to identify and analyse the ways and forms in which CJEU's monopoly of jurisdiction is manifested and legitimized, thus identifying the various aspects of autonomy itself.

III. The fundamental aspects of the principle of autonomy in the light of Opinion 1/17

There are three dominant criteria structuring the principle of autonomy and highlighting its legitimacy and necessity, namely the allocation of competences between the EU and the Member States, the importance of the preliminary reference mechanism, and the control *of* and *on* EU Law.[10]

[7] A Metaxas 'Reflections on the Distinctive Character of the EU Legal Order' cit 3. See also case-6/64 *Costa v E.N.E.L.* ECLI:EU:C:1964:66.

[8] *Ibid*.

[9] Case 26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1; *Costa v E.N.E.L.* cit. 6, 597-598; Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italian* ECLI:EU:C:1991:428. See also M Dougan 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in G De Búrca and PP Craig (eds) *The Evolution of EU Law* (2nd Edition, Oxford University Press 2011) 407.

[10] F De Abreu Duarte 'Autonomy and Opinion 1/17 –A Matter of Coherence' (31 May 2019) European Law Blog europeanlawblog.eu; See also B De Witte 'European Union Law: How Autonomous is its Legal Order?' cit. 4; S Gaspar-Szilágyi 'A Standing Investment Court under TTIP from the Perspective of the CJEU' (2019) The Journal of World Investment & Trade 701; J Odermatt 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (EUI Working Papers 7-2016); P Eeckhout 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?' (2013) CLP 169; I Govaere and S Garben (eds) *The Interface Between EU and International Law: Contemporary Reflections* (Bloomsbury 2019).

III.1. Opinion 1/17 and the allocation of competences

The first aspect of autonomy is about the division of competences between the Union and Member States. Essentially, this is related to the definition of the scope of the sovereignty of the Member States in the field of law making. On this issue, Opinion 1/17 seems to offer solid ground on the argument that provisions in CETA essentially offer CJEU undisputed monopoly of jurisdiction for the determination of the division of competencies. Already in Opinion 1/91 the Court identified autonomy in terms of protection against adverse effects on the allocation of responsibilities defined in the Treaties, while special emphasis was placed on its own competence both to articulate and to assure respect for that definition.[11]

The power to effectively control external interaction is therefore highly concentrated on the Court. This dimension is clearly reflected in the jurisprudence of the CJEU. In Opinion 1/91, the Court claimed that if the European Economic Area (EEA) Court could be called upon to interpret the expression "Contracting Party", then the autonomy would be breached as it "is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice pursuant to art. 164 of the EEC Treaty".[12] Furthermore, in Opinion 2/13 the Court stated that:

> "However, the fact remains that, in carrying out that review, the ECHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member states and on the EU. [...] Such a review would be liable to interfere with the division of powers between the EU and its Member states".[13]

Last, it should be also noted that the Court has constantly defended its monopoly to declare an unlawful act of EU law to be void (case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*),[14] this being also an expression of this profound fundamental assumption: the autonomy of the EU legal order.[15] In CETA, art. 8.21 on the determination of the respondent

[11] Opinion 1/91 *Accord EEE - I* ECLI:EU:C:1991:490 para. 2.

[12] *Ibid*. paras. 34-35. F De Abreu Duarte 'Autonomy and Opinion 1/17 – A Matter of Coherence' cit. 9, refers also to the *Mox Plant* case (case C-459/03 *Commission v Ireland* ECLI:EU:C:2006:345 para. 177) where the Court stated: "The act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member states pursuant to Community law".

[13] Opinion 2/13 *Adhésion de l'Union à la CEDH* ECLI:EU:C:2014:2454 paras 224-225.

[14] Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452.

[15] See J Bast 'Autonomy in Decline? A Commentary on Rimšēvičs and ECB v Latvia' (13 May 2019) Verfassungsblog verfassungsblog.de, with reference to the very important recent judgment of the Court in the *Rimšēvičs* case (case C-202/18 *Rimšēvičs v Latvia* ECLI:EU:C:2019:139) where the CJEU for the first time declared a national legislative act of a Member State void.

for disputes, states that "the European Union shall, after having made a determination, inform the investor as to whether the European Union or a Member State of the European Union shall be the respondent".[16] In Opinion 1/17, the Court makes a clear mention on the weight of this element for the autonomy of EU Law. The Court argues that, by explicitly providing the power to determine whether a possible dispute should be brought against a Member State or against the Union is granted on the Union and not on the CETA Tribunal, the exclusive jurisdiction of the Court to give rulings on the division of powers between the Union and its Member States is preserved.[17]

III.2. Opinion 1/17 and the preliminary reference procedure

The second crucial aspect of autonomy as well as an indispensable tool for safeguarding its essence, is the respect for the mechanism of preliminary reference that safeguards the fundamental link of the Court with national courts. This link is a *conditio sine qua non* for the strategic structural task assigned to the CJEU under art. 267 TFEU, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals.[18] In this framework, the responsibilities but also the privileges of national courts and tribunals to ensure their functioning as EU courts within that system must be protected.[19] Legal redress for the individual is thus safeguarded and further homogenous evolution of EU law is guaranteed through the preliminary ruling procedure.[20] Such provisions are present in the *Achmea* case, based by the CJEU actually on art. 19(1) TEU, thus hinting towards a connection between the principle of autonomy of EU law and the rule of law.[21]

Opinion 1/17 seems -at a first glance- to be departing from the requisitions of this element, since CETA does not provide of any function that could simulate a system of preliminary ruling in the Investment Court System it introduces. The CJEU however, assesses that this does not pose a threat to the application of EU law due to the way it -EU law- is described in CETA. In several occasions in Opinion 1/17, the Court of Justice refers to art. 8.31(2) of the CETA stipulating that "the Tribunal will have to confine itself to an examination of EU law 'as a matter of fact' and will not be able to engage in interpretation of points of law".

[16] Art. 8(21) CETA.

[17] Opinion 1/17 cit.

[18] *Van Gend en Loos v Administratie der Belastingen* cit. 8 para. 7. See also, Opinion 2/13 cit. 12 para. 176.

[19] NN Shuibhne 'What is the Autonomy of EU Law, and Why Does that Matter?' cit.4.

[20] JHH Weiler 'Revisiting Van Gend en Loos: Subjectifying and Objectifying the Individual' in A Tizzano, J Kokott and S Prechal (eds) *50th Anniversary of the Judgment in Van Gend en Loos 1963-2013* (Office des Publications de l'Union Européenne 2013) 11. See also C Closa, D Kochenov and JHH Weiler, 'Reinforcing Rule of Law Oversight in the European Union' (EUI Working Papers 87/2014).

[21] See also S Hindelang 'Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU's Judgement in Achmea Put in Perspective' (2019) ELR 383.

Overall, in contrast to traditional regional or international courts, the CJEU is not only assigned with the application, interpretation and validation of secondary EU legal instruments and with the interpretation of primary EU law, but it has also established itself as a constitutional-type court. In this latter capacity, well before Opinion 1/17, the Court has developed principles and mechanisms (primacy, direct effect) to define the relationship between the EU and Member State legal orders. The Court has been engaged in a constant dialogue with the Member State courts through the preliminary reference mechanism under art. 267 TFEU. More importantly, the Court has created an intricate case-law on the relationship between the EU legal order and international law.[22] The preliminary ruling procedure is therefore inherently linked to the autonomy of EU Law, being described as "essential" and "indispensable to the preservation of the very nature of European Union law".[23] This statement can be originally found in Opinion 1/09, on the establishment of a European and Community Patents Court, and provides the principal argument for the CJEU to not allow the possibility for such a court to ignore domestic courts and acquire exclusive jurisdiction over that part of EU law. CJEU underlined that "the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties".[24]

In 2018, in the landmark *Achmea* case, the significant role of the preliminary reference procedure was highlighted extensively. According to the CJEU, arbitral courts could not be seen as courts in the sense of art. 267 TFEU, as they stood outside the EU's legal system and could not interpret EU law.[25] In *Achmea*, the Court argued that "the judicial system as thus conceived, has as its keystone the preliminary ruling procedure provided for in art. 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties".[26] In addition, as aptly mentioned by Biltgen "the scope of Achmea is essentially limited to arbitration clauses in BITs between Member

[22] S Gaspar-Szilágyi 'A Standing Investment Court under TTIP from the Perspective of the CJEU' cit. 9. See also B De Witte 'Direct Effect, Primacy, and the Nature of the Legal Order' in G De Burca and PP Craig (eds) *The Evolution of EU Law* cit. 346.

[23] Opinion 1/09 *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets* ECLI:EU:C:2011:123 paras 3 and 89.

[24] *Ibid*. para. 85.

[25] J Hillebrand Pohl 'Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?' EuConst 767.

[26] *Achmea* cit.1 para. 37.

States and does not destroy bridges between the Courts of the EU and those of Member States".[27]

Regarding the future of investment treaty arbitration, the *Achmea* ruling may urge Member States to terminate their intra-EU BITs, even though most such BITs provide for "sunset clauses" – an extended period of applicability following termination.[28] However, it has been often argued that autonomy means different things in different contexts, thus its practical implementation remains unclear.[29] For example, it has not been clarified yet what autonomy means in relation to the Energy Charter Treaty (ECT) and arbitral tribunals have consistently refused to accept the relevance of *Achmea* in that context.[30] However, intra-EU investment arbitration based on the ECT seem to have the capacity to generate distressful conditions with the possibility of conflicting obligations originating on the one hand from EU law and on the other hand from an arbitral award based on the ECT when EU Member States act as respondents. This situation is practically similar to *Achmea*, regardless the obvious differentiation of the EU being also a party to the ECT together with each Member State.[31]

It needs to be noted that the debate on the role of EU public policy in arbitration, when confronted with the recent discussion on the potential inclusion of ISDS in EU investment and trade agreements, does entail proposals to soften EU procedural law in the field of preliminary reference procedure under art. 267 TFEU to allow arbitral panels to seek preliminary rulings before the CJEU.[32] In particular, as it has been concluded in several decisions, ISDS arbitration tribunals acting under a BIT of a Member State would be entitled to request the Court of Justice for preliminary rulings where the claimant investor had the alternative option to bring its case to a national Court.[33] In the *Achmea* case however, the Court raised the question with regard to the necessary mechanisms that would ensure the uniform and consistent interpretation of Union law as EU law formed part of the applicable law. In assessing whether an *ex ante* mechanism (the investment tribunal

[27] See F Biltgen 'The Concept of Autonomy of EU Law: from Opinion 2/13 (Accession to the ECHR) to Achmea and Opinion 1/17 (CETA) in *Building Bridges: Central Banking Law in an Interconnected World* (December 2019) ECB Legal Conference, 80 www.ecb.europa.eu.

[28] F Biltgen 'The Concept of Autonomy of EU Law: from Opinion 2/13 (Accession to the ECHR) to Achmea and Opinion 1/17 (CETA) cit. See also S Hindelang 'Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU's Judgement in Achmea Put in Perspective' cit. 19.

[29] See 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 -2019).

[30] P Koutrakos 'More on Autonomy—Opinion 1/17 (CETA)' (2019) ELR 293.

[31] A Pinna 'The Incompatibility of Intra-EU BITs with European Union Law, Annotation Following ECJ, 6 March 2018, Case 284/16, *Slovak Republic v Achmea BV*' (2018) Paris Journal of International Arbitration, Cahiers de l'arbitrage 73. See also J Kokott and C Sobotta 'Investment Arbitration and EU Law' (2016) CYELS 3, 7.

[32] BA Warwas 'The State of Research on Arbitration and EU Law: Quo Vadis European Arbitration?' (EUI Working Papers –23-2016).

[33] J Basedow 'EU Law in International Arbitration: Referrals to the European Court of Justice' (2015) JIntlArb 367.

seeking a preliminary ruling from the CJEU) or an *ex post* control (the investment tribunal's award being reviewed by a domestic court in the EU), could consist such mechanisms, the Court held that neither approach was legally feasible or, at the end, satisfactory.[34]

Returning to Opinion 1/17, the provision in CETA regarding the Tribunal's position to confine itself to an examination of EU law 'as a matter of fact' seems to be the critical point in CJEU's rationale. In this provision the CJEU finds sufficient support and legitimacy in its objective that the Investment Court System is not given the competence to interpret EU law, thus such a competence remains an exclusive privilege of the CJEU.[35] The same confidence is shared by the Opinion of Advocate General Yves Bot delivered on 29 January 2019. On the CETA provision that the Tribunal may consider the domestic law of a Party as "a matter of fact", the Advocate General states that "consideration of the Parties domestic law must not entail the CETA Tribunal amending that law. It must take account of that law as it stands".[36]

AG Bot makes a comparison with the *Achmea* judgment stating that "unlike in the case of bilateral investment treaties between Member States such as that at issue in the case which gave rise to the judgment in Achmea, EU law does not form part of the international law applicable between the Parties".[37] Opinion 1/17 is therefore resting on the element that the Investment Court System (ICS) cannot interpret EU law and, consequently, on the notion that by considering the domestic law "as a matter of fact", the ICS must follow the prevailing interpretation given by the courts or authorities accepted by the institutions or the courts of the European Union. Further protection against the possibility of misinterpretation of EU law seems to be entrusted in the establishment pursuant to CETA art. 8.28(1) of an Appellate Tribunal set to review awards rendered by the ICS. This is based again on the notion that the Appellate Tribunal will be taking EU law into consideration as "a matter of fact". In this context, the Appellate Tribunal can revise or overturn an award of the CETA Tribunal on the basis of "manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law".[38] It can be assumed that such a provision is meant as an additional reassurance against the possibility of an error by the Tribunal in its appreciation of the relevant domestic law, that would then be corrected through the process of the review of its awards by the Appellate Tribunal.

The issue that arises by the aforementioned analysis relates directly to the critical element of EU law being considered as "a matter of fact" -an element through which the CJEU builds its assurances on the autonomy of EU legal order- being used as a tool to secure the proper function of both the CETA Tribunal and Appellate Tribunal. Keeping in mind that the concept is new in CETA, a structure in which the Appellate Tribunal will

[34] See C Contartese 'Achmea and Opinion 1/17: Why Do Intra and Extra-EU Bilateral Investment Treaties Impact Differently on the EU Legal Order?' cit.27.

[35] *Ibid*.

[36] Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:72, opinion of AG Bot.

[37] *Ibid*. para. 110.

[38] *Ibid*. para. 27.

review an ICS award on its merit to take account of EU law "as it stands", entails a specific risk: the Appellate Tribunal in order to deliver its judgment on the ICS award, risks eventually interpreting EU law thus deconstructing the fundamental argumentation behind Opinion 1/17.

It needs to be noted however, that there are cases where investment tribunals need to come to an interpretation of domestic law when for example it needs to be clarified whether a contract was lawfully dismissed under domestic law. A typical example was *Malicorp v Egypt* where such a clarification was necessary in order to confirm whether any rights susceptible of expropriation persisted.[39] In order, for example, to decide whether an expropriation was done "under due process of law", as art. 8.12(1)(b) requires, a tribunal may need to examine if the State complied with domestic legal procedures when expropriating the investor. Such an assessment of a local court judgment's consistency with domestic law could be considered as partial interpretation of the local court's engagement in abuse of domestic law, leading to a denial of justice and a breach of CETA art. 8.10(2)(a). It should therefore be considered that however slim, the possibility of infringement of art. 8.31.2 of the CETA does exist.

III.3. Opinion 1/17 and the control of EU law

A third aspect linked to autonomy relates to the level of control the CJEU holds over the proper application of EU law in case a dispute settlement body misinterprets and/or violates EU law. Member States can be on the receiving end of violation measures imposed by the Commission should the CJEU find that a domestic court failed to uphold EU law. Following the insofar analysis, Opinion 1/17 needs to be evaluated on this critical aspect too. In his Opinion AG Bot comments that "infringement of Article 8.31.2 of the CETA would constitute an error in the application of applicable law".[40] AG Bot identifies such an infringement in the event the Tribunal would end up formulating its own interpretation of EU law, without considering the interpretation of that law accepted by the institutions or the courts of the European Union.

Furthermore, AG Bot emphasises that a review by the Appellate Tribunal should be conducted only in the event that there is nothing in the EU legal order to clarify the meaning to be given to a provision of EU law. In Opinion 1/17 we find that the CJEU responds to the question by emphasizing that such an examination by the Appellate Tribunal could not be considered as the equivalent to an interpretation of domestic law. Again, the Court's argumentation is based on the notion that in such a case the domestic law would be taken 'as a matter of fact' thus the risk of ending up with an interpretation by the CETA Tribunal does not exist. It needs to be noted that the aforementioned argumentation

[39] International Centre for Settlement of Investment Disputes (ICSID) judgement of 27 February 2011 *Malicorp Limited v The Arab Republic of Egypt*.

[40] *Accord ECG UE-Canada*, opinion of AG Bot, cit. para. 154.

essentially denies the possibility of infringement of CETA art. 8.31(2) rather than stipulating – or even indicating – on the suggested action taken in case of such an infringement.

So far, in cases where national courts in Member States fail to uphold EU law, either by not complying with the interpretation offered by the CJEU following an answer to a preliminary ruling, or by not requesting a mandatory preliminary ruling in the first place, the CJEU retains its competence to submit corresponding sanctions.[41] Not only that: according to the famous *Köbler* judgment, Member States are obliged to compensate the damage caused to individuals in cases where an infringement of EU law stems from a decision of a Member State court adjudicating at last instance.[42] In the landmark judgment *Commission v France* rendered in 2018, the CJEU condemned for the first time a Member State for a breach of art. 267(3) TFEU in the context of an infringement action, after the French administrative Supreme Court (*Conseil d'Etat*) failed to make a necessary preliminary reference. This decision is undoubtedly a crucial step towards a more complete system of safeguards put by the Court in order to be able to remain in full control of the system of the EU legal order as a whole. All these instruments cannot be activated in the case of tribunals that are not competent to apply EU law like ICS provided for by CETA as described in the following analysis (see Section IV).

Corresponding examples related to this issue can be found in Opinion 1/09 where it is stated that "…it is clear that if a decision of the Patent Court were to be in breach of European Union law, that decision could not be the subject of infringement proceedings nor could it give rise to any financial liability on the part of one or more Member State…".[43] This is due to the fact that the European and Community Patents Court (PC) is not attached to a Member State that could be held responsible for the infringement of EU law.

Similar concerns rose, in CJEU's Opinion 2/13 regarding the procedure established by Protocol No 16 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Protocol provided for the highest courts and tribunals of the Contracting Parties to be able to request the ECHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or the Protocols thereto. CJEU expressed its concerns that the procedure established by Protocol No 16 may apply "even though EU law requires those same courts or

[41] J Covelo de Abreu 'Infringement Procedure and the Court of Justice as an EU Law's Assurer: Member States' Infringements Concerning Failure to Transpose Directives and the Principle of an Effective Judicial Protection' in D Moura Vicente (ed) *Towards a Universal Justice? Putting International Courts and Jurisdictions into Perspective* (Brill Nijhoff 2016) 468.

[42] Case C-224/01 *Köbler* ECLI:EU:C:2003:513. See A Metaxas 'Member State Liability for judicial breaches of EU Law' (2013) Efimerida Dioikitikou Dikaiou 727.

[43] Opinion 1/09 cit. para. 88.

tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU".[44]

In Opinion 1/17 however, CJEU's prospective on the issue seems to alter from its previous concerned standpoint. The Court accepts that CETA art. 8.28.2(b) allows the Appellate Tribunal to identify possible errors in the appreciation of relevant domestic law. However, the CJEU rests confident on the concept that preceding provisions in CETA offer assurance that the intention of the Parties to the agreement was not to attribute jurisdiction to the Appellate Tribunal to interpret domestic law.[45] It is therefore evident that while with Opinion 1/17 the Court does not change its prospective on the importance of retaining its competence to submit corresponding sanctions in case of infringement, it accepts that in CETA such an infringement is simply not possible, thus no concerns need to be raised. However indicative of the Court's intention to offer a "softer" approach towards its safeguarding tone on the issue of control of EU law, it needs to be highlighted that such an approach is not without risk. The simple notion that the intention of the Parties was not to confer jurisdiction to the Appellate Tribunal to interpret domestic law, does not actually avert the possibility for such a development. In such a case, Opinion 1/17 offers no clarification neither on what would follow such an infringement nor on what would that -in essence- mean for its control of EU law.

IV. Evaluating the principle of autonomy after Opinion 1/17

Out of the three afore mentioned aspects of autonomy, the significance of the mechanism of preliminary reference as a fundamental element structuring the relationship between the CJEU and domestic courts has been intensively outlined. Opinion 1/17 could come here as a surprise, since in essence, it opens the possibility for the ICS provided by CETA to override the mechanism of preliminary reference. It needs, however, to be noticed that it was the Commission itself that first came with a proposal on the integration of arbitration with the EU legal regime, a proposal that although not eventually materialized, did renew the scientific debate on the need to combine arbitration within the EU procedural law system. In its 2015 Communication to the European Parliament, the Commission declares its resolve to ensure that "EU bilateral agreements will begin the transformation of the old investor–state dispute settlement into a public Investment Court System composed of a Tribunal of first instance and an Appeal Tribunal operating like traditional courts".

The Commission proposed engaging in an effort with other international partner to build consensus for a fully-fledged, permanent International Investment Court and to support the incorporation of investment rules into the World Trade Organization (WTO). Ac-

[44] Opinion 2/13 cit. para. 196.
[45] Opinion 1/17 cit. paras 131 and 133.

cording to the Commission, such action could lead to a clear code of conduct to avoid conflicts of interest, with "independent judges with high technical and legal qualifications comparable to those required for the members of permanent international courts, such as the International Court of Justice and the WTO Appellate Body" offering an opportunity to "simplify and update the current web of bilateral agreements and to set up a clearer, more legitimate and more inclusive system".[46]

The Commission's proposal is indicative of the pressuring necessity to establish a connection between investor-state dispute settlement bodies and the EU procedural legal order.[47] Discussion, on the position EU public policy holds towards ISDS in EU investment agreements should be expected to eventually result in a framework that eases EU procedural law in the field of preliminary reference procedure to allow arbitral tribunals to seek preliminary rulings before the CJEU. Opinion 1/17 should be considered as a ruling that will undoubtedly impact negotiations on ISDS going forward well beyond Europe. At the ongoing negotiations at United Nations Commission on International Trade Law (UNCITRAL) Working Group III, EU is indeed proposing establishing a permanent multilateral investment court with an appeal mechanism and full-time adjudicators as the only reform option that can effectively respond to all the concerns on multilateral reform of ISDS. CETA's investment dispute settlement mechanism could constitute the basis for potential bilateral agreements to which the EU is party.[48]

It needs to be stressed however that, on the issue of the interpretation of EU Law, under the CETA provisions the "risk" of the Appellate Tribunal eventually de facto ending up interpreting EU law, is still present. On this critical issue, as presented earlier in this analysis, CJEU's argument in Opinion 1/17 is that while art. 8.28(2)(b) of the CETA offers the Appellate Tribunal the ability to identify possible errors in the appreciation of relevant domestic law, the preceding provisions make it clear that it was not the *intention* of the Parties to confer on the Appellate Tribunal jurisdiction to interpret domestic law. Referring simply to the *intention* of the Parties does not seem to offer adequate argumentation against the aforementioned risk.

This, in turn, leads to a final issue raised by Opinion 1/17 regarding the provision that "any meaning given to domestic law by the Tribunal shall not be binding upon the courts or authorities of that Party".[49] Although such a provision solves the issue of not changing the nature of EU law or case-law for the CJEU, it does not eliminate the possibility of exposing the Member-States to conflicting situations between the ICS and CJEU. In the -slim but not eliminated- possibility that the ICS makes a "mistake" interpreting domestic law

[46] Communication COM(2015) 497 final from the Commission of 14 October 2015 Trade for All: Towards a more responsible trade and investment policy.

[47] G Bermann 'Reconciling European Union Law Demands with the Demands of International Arbitration' (2011) FordhamIntlLJ 1193, 1197.

[48] See more on: M Bungenberg and C Titi 'CETA Opinion – Setting Conditions for the Future of ISDS' (5 June 2019) EJIL:Talk! www.ejiltalk.org.

[49] Opinion 1/17 cit. para. 130.

"as a matter of fact", the respective MS would be exposed to rulings by the ICS for acts which could even have been enacted by imposition of EU law, while on the other hand the CJEU could impose sanctions to a MS that would be moving to legislative changes in order to comply with rulings by the ICS triggered by Canadian investors.

V. Conclusions

Opinion 1/17 has rightfully generated substantial scientific debate regarding the future of EU law autonomy and its relationship with Investor State Dispute Settlement mechanisms. The interest in analysing Opinion 1/17 lies on examining the arguments that convinced the Court in reaching the conclusion that the creation of an Investment Court System provided in CETA to handle investment disputes, is compatible with EU law. Focus on the merits of these arguments is amplified by the fierce efforts of the CJEU to safeguard its central position as the guardian of the EU Treaties. Following an analysis of the fundamental aspects that determine the autonomy of EU legal order, it can be concluded that the critical point in Opinion 1/17 that holds the CJEU rationale together, is its resolve that the Tribunal provided by CETA will have to confine itself to an examination of EU law "as a matter of fact". This concept seems to be the key in Opinion 1/17 since by taking EU law "as a matter of fact", the ICS provided in CETA will neither be able to engage in interpretation of points of law nor make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU's constitutional framework. According to the Court, these two elements safeguard that autonomy of EU legal order is preserved. Regardless of the Court's resolve though, concerns could be raised with regard to the small -but nevertheless present- possibility of the Appellate Tribunal ending up interpreting EU law, as well as the CJEU's limited, if not non-existent, ability to control the situation in case of such an infringement of CETA's art. 8.31(2). The Court's resolve that the mere *intention* of the Parties as regards the Appellate Tribunal's jurisdiction to interpret domestic law is adequate safeguard against the aforementioned risk, could be interpreted as an indication of the CJEU's inclination towards a more flexible stance regarding the standards under which autonomy of EU legal order is preserved. One should expect that these concerns will be the topic of fierce scientific dialogue as well as further Opinions and judgements by the CJEU in the future.