Articles

Opinion 1/17: Between European and International Perspectives

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

Article 47 of the Charter in the Opinion Procedure: Some Reflections Following Opinion 1/17

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Abstract: In Opinion 1/17 the CJEU held that the ISDS Mechanism under the CETA is compatible with Union law, including the right of access to an independent tribunal, as enshrined in art. 47(2) and (3) of the Charter. Although the emphasis on access to an independent tribunal, as a separate ground in the compatibility review, has a constitutional dimension, the applicability of art. 47(2) and (3) with regard to an independent dispute settlement mechanism, that stands outside of the judicial systems of CETA's Parties, invites to discuss the place of art. 47 of the Charter in the Opinion procedure. The *Article* suggests distinguishing the right of access to an independent tribunal, which is to be preserved in CETA's ISDS mechanism, from art. 47 of the Charter, in light of its specific scope of application and function in the EU legal order. The CETA's guarantees of judicial protection could be assessed from the perspective of the autonomy claim. However, this would lead to conceptual difficulties that could be circumvented by assessing the guarantee of a right of access to an independent court from the perspective of CETA's compatibility with art. 207 of the TFEU, as the standards of judicial independence can enter substantive primary EU law through their absorption by the Union's objectives in the field of common commercial policy. Promoting judicial protection as part of the trade policy could reinforce the credibility of the Union as an actor in international trade and in international procedural law.

Keywords: ISDS – CETA – art. 47 of the Charter – independence of investment courts – Opinion procedure – autonomy.

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/497

I. Introduction

In Opinion 1/17, the Court of Justice of the European Union (CJEU or Court) held that the Investor-State Dispute Settlement (ISDS) Mechanism in Chapter 8 of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States is compatible with the right of access to an independent tribunal, as enshrined in art. 47(2) and (3) of the Charter of Fundamental Rights of the European Union.[1] Its holding is based on the Charter's applicability in the framework of the CJEU's advisory Opinion of art. 218(11) TFEU; in the advisory Opinion procedure, the CJEU addresses the Union's competence to conclude an envisaged agreement and that agreement's material compatibility with primary law, which is "a general requirement of compatibility with the EU constitutional framework".[2] As the Court affirmed in Opinion 1/17:

> "A judgment on the compatibility of an agreement with the Treaties may, in that regard, depend, *inter alia*, not only on provisions concerning the powers, procedure or organisation of the institutions of the European Union, but also on provisions of substantive law. The same is true of a question relating to the compatibility of an envisaged international agreement with the guarantees enshrined in the Charter, since the Charter has the same legal status as the Treaties".[3]

In other words, the Court affirmed that the Charter, in general, and its art. 47, in particular, are primary EU law to which the Union is subject when it "enters into an international agreement that encompasses the establishment of bodies that are primarily judicial in nature and that are called on to resolve disputes between, in particular, private investors and States, such as the CETA Tribunal and Appellate Tribunal".[4]

Of course, as the Charter applies in situations covered by EU law, it also applies when the Union takes external action.[5] From an EU-legal-order point of view, international agreements concluded by the Union are acts of the institutions, hence they must comply with

[1] Art. 47 of the Charter of Fundamental Rights of the European Union [2012] states: "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".

[2] Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341 para. 166.

[3] *Ibid*. para. 167. The Court refers to Opinion 1/15 *Accord PNR UE-Canada* ECLI:EU:C:2016:656 para. 70.

[4] Opinion 1/17 cit. para. 190.

[5] C Briere and A Navasartian, 'Lex Generalis and the Primacy of EU Law as a Source of the EU's Duty to Respect Human Rights Abroad: Lessons Learned from the Case-Law of the CJEU' in E Kassoti and R Wessel (eds), 'EU Trade Agreements and the Duty to Respect Human Rights Abroad' (CLEER Papers 1-2020) 18; T Destailleur, 'La Charte et l'action extérieure de l'Union européenne. Du déni à l'acceptation ?' in R Tinière and C Vial (eds), *Les dix ans de la Charte des droits fondamentaux de l'Union européenne* (Bruylant 2020) 155; P Cruz Villalon, 'Un principe de continuité? Sur l'effet extraterritorial de la Charte des droits fondamentaux

the Charter when their normative objective interferes with the protection of fundamental rights.[6] An assessment of the compatibility of CETA's ISDS Mechanism with art. 47(2) and (3) related to access to an independent tribunal, thus, does not question the Charter's applicability to the Union's external action. Rather, it raises a question about the applicability of art. 47(2) and (3) with regard to an independent dispute settlement mechanism that stands outside of the judicial systems of CETA's Parties,[7] when art. 47(1) only concerns the Union's own judicial system. The external projection of art. 47 could raise some issues of consistency,[8] given its specific scope and application in the EU legal order.

CETA's Investment Court System (ICS) and the objective to establish a Multilateral Court for the settlement of investment disputes (MIC) unequivocally fall under the Union's external action objectives, related not only to an efficient common commercial policy, but also to promoting the rule of law.[9] The negotiating directives for a Convention establishing a MIC emphasise the need to guarantee its independence and the right of access thereto.[10] The Court's assessment of the compatibility of the CETA's ISDS mechanism with the right of access to an independent court is not put under question. The present *Article* rather discusses the place of art. 47 of the Charter in the Opinion procedure.

In light of the specific role art. 47 plays in the EU legal order, its examination as an autonomous ground for a compatibility assessment could raise, on the one hand, some consistency questions (II). On the other hand, the compatibility of CETA's ISDS mechanism with the right of access to an independent tribunal needs to be ensured, which raises a question as to whether the issue should fall under the autonomy claim or under the substantive provisions of the common commercial policy (III).

de l'UE' in J Wildermeersch and P. Paschalidis (eds), *L'Europe au présent! Liber Amicorum Melchior Wathelet* (Bruylant 2018) 317; E Neframi, 'La Charte dans l'action extérieure de l'Union européenne' in A Iliopoulou-Penot and L Xenou (eds) *La Charte des droits fondamentaux, source de renouveau constitutionnel européen?* (Bruylant 2020) 149.

[6] See Opinion 1/15 cit. note 3. M Mendes, 'Opinion 1/15: The Court of Justice Meents PNR Data (Again!)' (2017) European Papers www.europeanpapers.eu 803; A Vedaschi, 'The European Court of Justice on the EU-Canada Passenger Name Record Agreement' (2018) EuConst 410.

[7] Opinion 1/17 cit. para 113.

[8] A Hervé, 'Défendre l'ordre juridique de l'Union en exportant ses valeurs et instruments fondamentaux' (2020) RTDE 121; 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.

[9] M Bungenberg and A Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (Springer 2020) 3; G Sangiulo, 'An International Court System for a Transformative Europe?' in I Bosse Platiere and C Rapoport (eds), *The Conclusion and Implementation of EU Free Trade Agreements* (Edward Elgar 2019) 271; E Sardinha, 'Towards a New Horizon in Investor-State Dispute Settlement? Reflections on the Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA)' (2016) ACDI 311.

[10] 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.

II. Questioning Art. 47's Role in the Opinion Procedure

Art. 47's role in the Opinion procedure set out in art. 218(11) TFEU is questionable for two reasons: because of first, its scope of application (II.1) and, second, its specific function in the EU legal order (II.2).

II.1. Art. 47's specific scope of application

It is common knowledge that art. 47 applies when there is a violation of rights stemming from EU law, not just with regard to rights guaranteed in the Charter.[11] As international agreements concluded by the Union are integral part of the EU's legal order,[12] any investor rights guaranteed by CETA are rights stemming from EU law. As such, they fall under the obligation to provide an effective remedy fulfilling the requirements of a fair hearing.

However, the compatibility of CETA's ISDS mechanism with art. 47 of the Charter is assessed by the Court only with regard to paras 2 and 3 related to the independence of the CETA tribunals and their accessibility. Thus, the question is: Can the guarantees set out in art. 47(2) and (3) be dissociated from (1)?

Indeed, art. 47(1) concerns the obligation incumbent upon the Member States, as also enshrined in art. 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. Hence, their domestic courts are part of the Union's judicial system.[13] In Opinion 2/15, concerning the Union's competence to conclude a free trade and investment agreement with Singapore,[14] the Court held that the establishment of an ISDS mechanism allows an investor, in case of dispute with a Member State, to submit the claim to arbitration. Unlike State-to-State dispute settlement mechanisms, "[s]uch 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".[15] The fact that provisions establishing an ISDS mechanism are

[11] H Hoffmann, 'Article 47' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights, A Commentary* (Oxford Hart Publishing 2014) 1211. See for example, case C-682/15 *Berlioz Investment Fund* ECLI:EU:C:2017:373 para. 49.

[12] Art. 216(2) TFEU. Case 181/73 *Haegeman v Belgian State* ECLI:EU:C:1974:41 para. 5; case 104/81 *Hauptzollamt Mainz v Kupferberg & Cie.* ECLI:EU:C:1982:362 para. 13.

[13] H Van Harten '(Re)search and Discover: Shared Judicial Authority in the European Union Legal Order' (2014) Review of European Administrative Law 20; K Lenaerts, 'L'apport de la Cour de justice à la construction européenne' (2017) Journal de droit européen 134; A Rosas, 'The National Judge as EU Judge: Opinion 1/09' in P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising the EU Judicial System, Essays in Honor of Pernilla Lindh* (Hart Publishing 2012) 105. C Vajda and S Mair in 'The Applicability of Article 47 of the Charter of Fundamental Rights to International Agreements to which the Union is a Contracting Party' cit. underline also the difference between the remedies regime in the CETA and the rights stemming from EU law that the right to an effective remedy is supposed to preserve.

[14] Opinion 2/15 *Accord de libre-échange avec Singapour* ECLI:EU:C:2017:376.

[15] *Ibid*. para. 292.

not absorbed by the Union's substantive competence,[16] but instead fall under the Member States' implementing competence,[17] could lead to the conclusion that art. 47(1) is projected into the external field. In other words, affirming that recourse to an ISDS mechanism removes competence from the domestic courts means that implementing an investment protection agreement – be it EU-only or mixed – would fall under the domestic courts' competence, in the absence of such mechanism. As the ISDS mechanism in an international agreement is not, in principle, incompatible with EU law,[18] the impact on the domestic courts' implementing competence demands that the Union cannot conclude such an agreement without its Member States.[19] That does not mean, however, that such an ISDS mechanism falls under art. 47(1). In Opinion 1/17, the Court confirmed that CETA's ISDS mechanism stands outside the judicial systems of the parties.[20]

The question, thus, is whether art. 47(2) and (3) apply in a situation that does not fall under (1). The Court of Justice acknowledged that the Member States' obligation to provide an effective remedy under art. 19 TEU corresponds to the rights guaranteed in art. 47.[21] The link between the two provisions implies that the effective remedy guarantees

[16] In principle, provisions related to dispute settlement between the parties "form part of the institutional framework for the substantive provisions of the envisaged agreement" and as such, they "are of an ancillary nature and therefore fall within the same competence as the substantive provisions which they accompany". *Ibid*. paras 303 and 276.

[17] The Court of Justice highlighted that the obligation of the Member States to establish a system of legal remedies ensuring effective judicial review in the fields covered by EU law stems from the obligation of loyal cooperation to ensure the application and respect of EU law, following art. 4(3) TEU (See case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 para. 34). This obligation corresponds to the Member States' implementing competence following art. 291(1) TFEU ("Member States shall adopt all measures of national law necessary to implement legally binding Union acts").

[18] The Court of Justice acknowledged that "the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions" (Opinion 2/15 cit. para. 298).

[19] In its judgment *Germany v Council* (Case C-600/14 ECLI:EU:C:2017:935) the CJEU referred to the shared competence to approve provisions concerning other types than foreign direct investments, but not to the shared competence to approve ISDS provisions, when it held that the Union's shared competence can be exercised directly in the external field and that the conclusion of a mixed agreement is not mandatory (para. 68).

[20] Opinion 1/17 cit. para. 113.

[21] In *Berlioz Investment Fund* cit. the Court of Justice held that: "According to art. 47 of the Charter, entitled '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. The obligation imposed on the Member States in art. 19(1)(2) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, corresponds to that right" (para. 44). In *Associação Sindical dos Juízes Portuguese* cit. the Court held that: "[T]he principle of the effective judicial protection of individuals' rights under EU law, referred to in art. 19(1)(2) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in arts 6 and 13 of the

in art. 47's paras 2 and 3 also apply with regard to the Member States' obligation, regardless of the concrete exercise of the right to an effective remedy. In order words, as the Court held in *Associação Sindical dos Juízes Portugueses*, a Member State "must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection".[22] The Member States' obligation is a systemic one that stems from art. 19 TEU, independent of a concrete violation of a right guaranteed by EU law.[23] In that case, the Court confirmed that the Member States must ensure that domestic courts that may be called upon to apply EU law meet the requirements "essential to effective judicial protection, in accordance with the of art. 19(1)(2) TEU",[24] one of which being judicial independence "as confirmed by the second subparagraph of art. 47 of the Charter".[25]

The right of access to an independent tribunal is, of course, one component of the principle of effective judicial protection, a general principle of EU law, set out in art. 47 of the Charter. However, in Opinion 1/17, the compatibility of the CETA's ICS with EU law is assessed with regard to art. 47 and, consequently, the standards of judicial protection that apply with regard to the Union's system of legal remedies. Indeed, even if art. 47(2) and (3) may apply where (1) does not, their application is linked to the obligation stemming from art. 19 TEU, which concerns the CJEU[26] and the Member States' courts. In other words, art. 47 invites the Court to determine the standards of judicial protection as part of the common values at the base of the mutual trust that those values are recognized in all Member States.

Reading the Court's judgments in *Achmea*[27] and in *Associação Sindical dos Juízes Portugueses* together, it is clear that the standard of judicial independence assured by art. 47 is "essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under art. 267 TFEU",[28] which is the foundation of the EU legal order's autonomy, as expression of the mutual trust and guarantee of the particular nature of the law established by the Treaties.[29] Requiring the envisaged ISDS mechanism to respect the conditions of art. 47, in order to be judged compatible with the Treaties, would contradict the main argument of Opinion 1/17 on the basis of which the Court confirmed

European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by art. 47 of the Charter" (para. 35).

[22] *Associação Sindical dos Juízes Portuguese* cit. para. 37.

[23] E Neframi, 'La portée intégrative du système juridictionnel de l'Union européenne sous le prisme des obligations incombant aux Etats membres' in A Kämmerer, M Kotzur and J Ziller (eds), *Integration und Desintegration in Europa* (Nomos 2019) 147.

[24] *Associação Sindical dos Juízes Portuguese* cit. para. 40.

[25] *Ibid*. para. 41.

[26] For a recent example of the application of art. 47 with regard to the CJEU, see joined cases C-542/18 *RX-II* and C-543/18 *RX-II* ECLI:EU:C:2020:232.

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

[28] *Associação Sindical dos Juízes Portuguese* cit. para. 43.

[29] *Achmea* cit. para. 58.

the compatibility of such mechanism with the autonomy of the EU legal order. Indeed, the Court of Justice acknowledged that the principle of mutual trust obliges each of the Member States "to consider, other than in exceptional circumstances, that all the other Member States comply with EU law, including fundamental rights, such as the right to an effective remedy before an independent tribunal laid down in art. 47 of the Charter".[30] While creating an investment tribunal by means of an agreement among the Member States would call the principle of mutual trust into question and, thus, have an adverse effect on the autonomy of EU law, the same cannot be said of an agreement between the Union and a third State.[31] According to the Court of Justice, "that principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State."[32]

In that regard, suggesting that CETA's ISDS mechanism must comply with art. 47(2) and (3), when (1) does not apply in the same circumstances, could be inconsistent with the Court's statement. In Opinion 1/17, the Court made clear that its reasoning in *Achmea* cannot reach the compatibility of CETA's ISDS mechanism with the principle of autonomy. As a consequence, suggesting art. 47 has a role to play in an art. 218(11) of the TFEU Opinion procedure is inconsistent with art. 47's scope of application.

II.2. The specific function of Art. 47

In the EU legal order, art. 47 of the Charter has a specific function, which is linked to its limited scope of application. This provision is not at the base of legislative intervention from the Union's institutions, as fundamental rights guaranteed by the Charter are not autonomous objectives extending EU competence.[33] Of course, fundamental rights guaranteed by the Charter, such as non-discrimination or the protection of personal data, can find specific expression in acts of secondary EU law that are instead based on substantive provisions of the Treaties, which aim to protect the corresponding rights in a specific field. As far as effective judicial protection is concerned, secondary EU law may require the Member States to establish effective legal remedies in certain situations. However, the

[30] Opinion 1/17 cit. para. 128.

[31] On the impact of the judgment in *Achmea,* see C Contartese and M Andenas, 'Case C-284/16' (2019) CMLRev 157; M Gatti 'Opinion 1/17 in Light of Achmea: A Chronicle of an Opinion Foretold?' (2019) European Papers www.europeanpapers.eu 109. On the distinction between *Achmea* and Opinion 1/17 see the Opinion of Advocate General Szpunar in case C-741/19 *République de Moldavie* ECLI:EU:C:2021:164 paras 84 ff. Advocate General Szpunar argues that, following *Achmea,* the arbitration mechanism of the Energy Charter Treaty is not compatible with Union law as far as it applies to an intra-EU dispute, while there is no issue of compatibility concerning disputes involving a Union investor and a third country.

[32] Opinion 1/17 cit. para. 129.

[33] On the function of art. 47, see for example, M Safjan and D Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge Through the Lens of Article 47 CFREU' (2014) YEL 3; S Prechal, 'Effective Judicial Protection: Some Recent Developments - Moving to the Essence' (2019) Review of European Administrative Law 175.

effective remedies such secondary EU law creates are not based on art. 47 of the Charter, but rather, they are based on the underlying substantive law provisions that the legal remedies are supposed to ensure.[34]

The obligation to provide effective remedies that meet art. 47's standards, then, must be understood in the framework of the Member States' implementing competence and procedural autonomy. Secondary EU law may oblige a Member State to establish legal remedies in a specific field, but the standards of judicial protection are only assessed thereafter, through a balancing exercise that takes account of national procedural rules. Of course, if there is a systemic deficiency in a Member State's judicial system, or if no legal remedies exist, there can be no balance; but, in those cases, the offending Member State's obligations arise from art. 19 TEU,[35] rather than art. 47. On the other hand, art. 47 acts as a limit on national procedural rules and practices by limiting the powers of the Member States' domestic courts when acting in their – key – role as EU law judges.

It should be noted that the principle of effective judicial protection in the EU legal order is often closely linked to the principle of effectiveness, according to which national procedural rules must not render the exercise of rights conferred by EU law practically impossible or excessively difficult.[36] The difference between art. 47's guarantees and the principle of effectiveness – both act as limits on national procedural autonomy – remains somewhat ambiguous;[37] nevertheless, both establish the limits of national procedural autonomy by relying on a balancing exercise that takes account of the principles and rules of the national legal order. Thus, even though art. 47 reflects a fundamental right to an effective remedy, while the principle of effectiveness only emphasises a balance with national procedural autonomy,[38] art. 47 and national procedural rules are not in direct conflict. In other words, art. 47 does not – and cannot – give rise to substantive rules of EU law that take precedence over national procedural rules. Rather, when secondary EU law provides a remedy in a specific field, art. 47 acts as the lens through which such secondary law is interpreted, in its balancing with national procedural rules,[39] rather

[34] O Dubos, 'The Origins of the Proceduralisation of EU Law: A Grey Area of European Federalism' (2015) Review of European Administrative Law 18.

[35] See case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531; Case C-824/18 *A.B. and Others (Nomination des juges à la Cour suprême - Recours)* ECLI:EU:C:2021:153.

[36] Case 33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG c Landwirtschaftskammer für das Saarland* ECLI:EU:C:1976:188. See among others, A Arnull, 'Remedies Before National Courts' in R Schutze and T Tridimas (eds), *Oxford Principles of European Union Law* (OUP 2018) 1011.

[37] S Prechal and R Widdershoven, 'Redefining the Relationship between Rewe-Effectiveness and Effective Judicial Protection' (2011) Review of European Administrative Law 31.

[38] See joined cases C-439/14 and C-488/14 *Star Storage*, Opinion of Advocate General Sharpston, ECLI:EU:C:2016:307 para. 37.

[39] See, e.g., case C-300/17 *Hochtief AG* ECLI:EU:C:2018:635 para. 58. R Caranta, 'The Interplay between EU Legislation and Effectiveness, Effective Judicial Protection and the Right to an Effective Remedy in Public Procurement Law' (2019) Review of European Administrative Law 63.

than as an EU-level provision that takes precedence over those national rules. Even where the Court of Justice refers to the primacy of art. 47 over national procedural rules,[40] its reasoning is based on balancing with national procedural autonomy, which confirms that art. 47 does not impose an autonomous, substantive obligation on the Member States.

In that way, the Court affirms that art. 47's guarantees only establish standards of judicial protection within the judicial system of the Union, with its limited scope of application confirmed by its function in the EU legal order. Even when it acts as the basis for a substantive obligation on the Member States' part to establish access to a tribunal or court,[41] or to ensure the independence of domestic courts[42] – and not only in case of systemic deficiency – art. 47 only regulates the exercise of the judicial function in a composite judicial system intended to ensure effective implementation of EU law.[43] Art. 47's "effective remedy" guarantee is not, and has never been, an autonomous Union objective, is not mirrored in a substantive EU-law provision, and, thus, cannot be projected into the external field.

In Opinion 1/17, the Court of Justice recalled that, in the context of the procedure provided for in art. 218(11) TFEU, "all questions that are liable to give rise to doubts as to the substantive or formal validity of the agreement with regard to the Treaties" are to be examined.[44] Art. 47, in light of its specific function and scope of application, cannot – by definition – be infringed by a rule contained in an international agreement to which the Union is a party.[45] On the contrary, provisions of the Charter the external effect of which has been recognized, such as art. 20 which enshrines the guarantee of equality before the law,[46] and which are mirrored in substantive provisions of the Treaties, could be infringed by rules of an agreement the normative objective of which contravenes the content of such provisions.

Another question that could arise with regard to the function of art. 47 relates to the Member States' obligation to provide an effective remedy according to the standards of art. 47. In line with the Court's focus on the allocation of the competences in its Opinion

[40] Joined cases C-585/18, C-624/18 and C-625/18 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* ECLI:EU:C:2019:982 paras 157-162.

[41] See case C-562/12 *Liivimaa Lihaveis* ECLI:EU:C:2014:2229 para. 71; case C-414/16, *Egenberger* ECLI:EU:C:2018:257 para. 78.

[42] *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* cit. para. 154.

[43] The Court of Justice confirmed that, beyond the case of systemic deficiency in the rule of law, the requirement of judicial independence of art. 19 TEU does not apply in the absence of direct link with the implementation of EU law. See, joined cases C-558/18 and C-563/18 *Miasto Łowicz (Régime disciplinaire concernant les magistrats)* ECLI:EU:C:2020:234 para. 49.

[44] Opinion 1/17 cit. para. 167.

[45] S Adam, *La procédure d'avis devant la Cour de justice de l'Union européenne* (LGDJ 2011) 265 ff.

[46] Opinion 1/17 cit. paras 171-178. See also Opinion 1/15 cit., as well as the application of the Charter in the *Front Polisario* case (Case C-266/16 *Western Sahara Campaign UK* ECLI:EU:C:2018:118). See K Szepelak, 'Judicial Extraterritorial Application of the EU Charter of Fundamental Rights and EU Trade Relations- Where We Stand Today?' in E Kassoti and R Wessel (eds), 'EU Trade Agreements and the Duty to Respect Human Rights Abroad' (CLEER Papers 2020) 52.

2/15, and given that the Member States are bound by the Charter when they exercise a competence in a field covered by EU law, would the CETA's ISDS mechanism be subject to art. 47 as expression of the Member States' obligation to provide an effective remedy in the implementation of an international agreement of the Union? One could affirm, however, that the Member States' obligation is fulfilled within the EU judicial system and does not imply establishing an international tribunal. Creating the ICS is a choice in the external action of the Union, covered by its substantive competence. The participation of the Member States in an agreement establishing an ISDS mechanism is necessary because of the implementing Member States' competence at the judicial level. As a consequence, there is no autonomous Member States' competence to provide an effective remedy. The Member States' implementing competence is linked to the Union's substantive competence, the basis of which is not art. 47, but rather art. 207 TFEU.[47]

It could thus be affirmed that art. 47 is not a substantive provision with an external aspect. Asserting the external effect of art. 47 would imply, in the context of the judicial review of restrictive measures, submitting to the Union's standards of judicial protection the assessment of the respect of the fair trial principles in third States. However, the Court of Justice has dissociated the principle of judicial protection as a value of the EU legal order conditioning the respect of its autonomy,[48] from its application in the EU judicial system on the basis of art. 47 of the Charter. Besides, it is precisely because of the absence of an external effect of art. 47 that the ICS in the EU investment agreements needs to comply with the guarantees of judicial protection pursuant to the principle of reciprocity.[49] As a consequence, the right of access to an independent tribunal is to be preserved in CETA's ISDS mechanism, but not in virtue of art. 47. The dissociation of that principle from art. 47 is in line with the specific scope and function of the provision and would ensure consistency with the case law of the Court of Justice.

III. Judicial protection standards in the Opinion procedure

Recognising that art. 47 does not apply in the Opinion procedure does not affect, however, the need to assess the CETA's ISDS mechanism's compatibility with the principle of effective judicial protection, which is part of EU primary law. The question, in that circumstance, is whether such an assessment should fall under the principle of autonomy (III.1) or under an analysis of compliance with the substantive provision on which the exercise of Union competence is based, the common commercial policy (III.2).

[47] See *infra*, under III.2, as well as the negotiating directives for the Convention establishing a MIC, cit.

[48] The case law related to the judicial review of restrictive measures in the field of the Common Foreign and Security Policy refers indeed to the need to preserve the principle of effective judicial protection and not to art. 47 of the Charter. See L Leppavirta, 'Procedural Rights in the Context of Restrictive Measures: Does the Adversarial Principle Survives the Necessity of Secrecy?' (2017) European Papers www.europeanpapers.eu 649.

[49] See the opinion of AG Bot in Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:72 para. 94.

III.1. Judicial protection as part of the autonomy claim?

The principle of autonomy of the EU's legal order occupied an important place in Opinion 1/17 and was the key legal issue raised in Belgium's request. The Court of Justice examined its two dimensions: the preservation of its exclusive competence to interpret and apply EU law and, in a broader sense, the exercise of the EU institutions' powers in accordance with the EU constitutional framework.[50] The factors that led the Court to conclude that CETA's ISDS mechanism complies with the principle of autonomy relate to the CETA tribunals' limited jurisdiction: they may apply EU law only as a matter of fact and they may not question the level of protection of any public interest provided by the EU legal order.[51] The guarantee of the EU legal order's autonomy thus depends on the CETA tribunal's exercise of judicial power.

The principle of effective judicial protection, on the other hand, could intervene as a parameter when the CETA tribunals' exercise their jurisdiction. Indeed, effective judicial protection covers not only access to an independent tribunal, but also the tribunal's exercise of judicial power to preserve the parties' interests. However, CETA's procedural protection is aligned with a substantive concern – that of preserving the regulatory autonomy of the Union and its Member States.[52] While access to an independent tribunal is an element of judicial protection that must be guaranteed, judicial protection via the exercise of judicial review is limited by the principle of autonomy. In order to include access to an independent tribunal in the autonomy claim, the tribunal's independence must be considered as part of any guarantee of the exercise of judicial review in accordance with the EU level of protection of public interests. In that sense, CETA's procedural protection standard must include a substantive requirement to preserve regulatory autonomy and the CETA tribunal's independence must be considered as part of any guarantee of the autonomy of the EU legal order. However, the limits of judicial review that the preservation of autonomy requires is not necessarily in line with the effectiveness of judicial protection for investors. Dealing with the independence of the CETA tribunals as a guarantee of a judicial review balancing protection against the EU regulatory autonomy would allow the parameter of independence to be included in the autonomy claim, but would also risk undermining the standard of independence as part of the Union's objective to promote the rule of law. Besides, only the concern related to independence, and

[50] 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.

[51] Opinion 1/17 cit. paras 106-161. See C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review ; L Leonelli, 'CETA and the External of the EU Legal Order: Risk Regulation as a Test' (2020) Legal Issues of Economic Integration 43.

[52] J Klett, 'National Interest vs. Foreign Investment – Protecting Parties through ISDS' (2016) TulJIntl&CompL 213; 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.

not that related to the guarantee of access to the CETA tribunals, can be linked to the exercise of judicial review in a way that preserves regulatory autonomy, and hence, in accordance with autonomy's requirements.

Another possibility to deal with judicial protection as part of the autonomy claim would be to consider judicial protection standards as values to be preserved from external impact, in line with the *Kadi* case law. It is indeed in the name of the autonomy that the Court of Justice requires respect of the principle of judicial protection in the adoption by external bodies or third States of acts at the base of the Union's restrictive measures.[53] Access to an independent tribunal could thus be a requirement in order to ensure compatibility with the value of judicial protection as element of the autonomy claim. However, such assessment of CETA's guarantee of the right of access to an independent tribunal would rather apply with regard to the enforcement of the decisions of the CETA tribunals. In other words, the autonomy claim in the Opinion procedure requires an assessment of the impact of the envisaged agreement's provisions on the exercise of the powers of the institutions in accordance with the EU constitutional framework. The CETA's provisions on access to an independent tribunal can affect the exercise of powers of the institutions in the event they are expected to enforce an award arising out of the ISDS mechanism, which would need to fulfil the relevant standards of judicial protection. As a consequence, this approach to the autonomy claim cannot apply to an *ex ante* compatibility review in the Opinion procedure.

Besides, the Union's objective to be a credible international actor in the establishment of permanent investment courts implies that the prior guarantee of judicial protection standards is preferred to the preservation of the autonomy of the EU legal order via the limits in the enforcement of the investment courts' decisions.

Indeed, the assessment of the CETA's guarantees of judicial protection as a compatibility review between the CETA's provisions and substantive provisions of EU primary law avoids the conceptual difficulties of including judicial protection standards in the autonomy claim. Such a compatibility review does not require recourse to art. 47.

III.2. Judicial protection as a part of the common commercial policy

In Opinion 1/17, the Court of Justice acknowledged the absence of any impact of art. 47 on the non-Member State with which the Union negotiates an international agreement. The Court held that "while Canada is indeed not bound by those safeguards, the Union is so bound and therefore cannot, as follows from the case-law cited in paras 165 and 167

[53] See case T-292/19 *Pshonka v Council* ECLI:EU:T:2020:449 paras 81 ff. L Grzegorczyk, 'Contentieux des mesures restrictives: le contrôle des faits par le juge de l'Union, entre règles spécifiques et principes transversaux' (2016) Revue des affaires européennes 479; I Govaere, 'The Importance of International Developments in the Case Law of the Court of Justice: Kadi and the Autonomy of the EU Legal Order' (2009) Research Papers in Law College of Europe aei.pitt.edu.

of the present Opinion, enter into an agreement that establishes tribunals with the jurisdiction to issue awards that are binding on the Union and to deal with disputes brought before them by EU litigants if those safeguards are not provided".[54]

As, on the one hand, the paragraphs to which the Court refers concern the compatibility of an international agreement with the guarantees enshrined in the Charter, on the other hand, art. 47 does not bind Canada, and given the principle of reciprocity,[55] any guarantees of judicial protection must be verified on the basis of substantive provisions of primary EU law. It should be noted that establishing an independent, multilateral investment court and the right of access to it are part of the Commission's negotiating mandate.[56] However, that negotiation is based on art. 207 TFEU. Assessing the guarantee of a right of access to an independent court from the perspective of CETA's compatibility with said art. 207 TFEU would circumvent the conceptual difficulties of including art. 47 in the Opinion procedure.

Indeed, in Opinion 1/17, the Court of Justice found that the objective of establishing CETA tribunals, which guarantee non-discriminatory treatment and protection of investments, is "to give complete confidence to the enterprises and natural persons of a Party that they will be treated, with respect to their investments in the territory of the other Party, on an equal footing with the enterprises and natural persons of that other Party, and that their investments in the territory of that other Party will be secure".[57] As a consequence "the independence of the envisaged tribunals from the host State and the access to those tribunals for foreign investors are inextricably linked to the objective of free and fair trade that is set out in art. 3(5) TEU and that is pursued by the CETA".[58]

The Court's reference to the "free and fair trade" objective links judicial protection to the competence question, thereby including the right of access to an independent tribunal in the Court's compatibility review with regard to the effectiveness of the common commercial policy. While access to the CETA tribunals may also be reviewed in conjunction with the principle of equal treatment,[59] the standards of judicial independence can enter substantive primary EU law through their absorption by the Union's objectives of the common commercial policy. Of course, Opinion 2/15 makes clear that foreign indirect investments do not fall under art. 207 TFEU.[60] However, the competence of the Union to approve provisions establishing investment courts stems from the main objective of the investment protection agreements themselves, which is a trade objective. Thus, it is on

[54] Opinion 1/17 cit. para.192.

[55] *Supra*, footnote 49.

[56] *Supra*, footnote 10.

[57] Opinion 1/17 cit. para. 199.

[58] *Ibid*. para. 200.

[59] Indeed, Belgium asked the Court whether Section F of Chapter 8 is compatible with art. 47 of the Charter, considered in isolation or in conjunction with the principle of equal treatment.

[60] Opinion 2/15 cit. para. 244.

the substantive legal basis of art. 207 TFEU that the Council adopted decisions related to the position of the Union in the framework of the CETA Joint Committee that elaborated the functional rules for CETA tribunals.[61] It is, thus, consistent with the Court's global approach to the common commercial policy, as confirmed in Opinion 2/15, to include judicial protection standards in art. 207 TFEU.

Indeed, pursuant to the global approach of external action objectives arising out of art. 21 TEU and art. 205 TFEU (which led the Court, in Opinion 2/15, to include sustainable development objectives in the scope of the common commercial policy),[62] it could be affirmed that investment tribunals established in the framework of the common commercial policy need to meet the requirements of effective judicial protection. In that manner, consistency between external action and internal values would be preserved, as the Union acts as a global actor, promoting the rule of law through its trade policy.

IV. Concluding remarks

The emphasis on art. 47 of the Charter in Opinion 1/17, as a separate ground in the compatibility review, has a constitutional dimension. Once again, as in *Achmea*, the specific characteristics of the EU legal order, especially with regard to the affirmation and development of the rule of law, are analysed in the investment protection legal framework.

However, art. 47 has a specific role and function in the EU legal order, establishing the guarantees for a composite judicial system at the basis of the principle of autonomy. Preserving the specific function of art. 47 in the balance between effectiveness, procedural protection, and national autonomy in the EU legal order is also of utmost importance in the current rule of law crisis.

[61] Proposal COM(2019) 457 final of the Commission of 11 October 2019 for a Council Decision on the position to be taken on behalf of the European Union in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of a decision setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal; Proposal COM (2019) 458 final of the Commission of 11 October 2019 for a Council Decision on the position to be taken on behalf of the European Union in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of a decision on the procedure for the adoption of interpretations in accordance with arts 8.31.3 and 8.44.3(a) of CETA as Annex to its Rules of Procedure; Proposal COM (2019) 459 final of the Commission of 11 October 2019 for a Council Decision on the position to be taken on behalf of the European Union in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of a decision setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal; Proposal COM (2019) 460 final of the Commission of 11 October 2019 for a Council Decision on the position to be taken on behalf of the European Union in the Committee on Services and Investment established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of rules for mediation for use by disputing parties in investment disputes.

[62] Opinion 2/15 cit. paras 141-167.

This *Article* affirms that external relations are outside the scope of art. 47 of the Charter. This does not however mean that the principle of judicial protection and the right of access to an independent tribunal have only an internal EU law dimension. The Union's contribution to the development of the WTO dispute settlement mechanism and to the establishment of permanent investment courts confirms that promoting the rule of law is part of the Union's external action. The Court of Justice could assess the CETA's compatibility with the right of access to an independent tribunal without having recourse to art. 47 of the Charter, on the ground either of the principle of autonomy or of the compatibility with the substantive provisions of the common commercial policy. This *Article* argues that while judicial protection as part of the autonomy claim could meet some conceptual limits, promoting judicial protection as part of the common commercial policy could reinforce the perception that the Union is a credible and influential actor in international trade and in international procedural law.