ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

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THE LEGACY OF OPINION 1/17: TO WHAT EXTENT IS THE AUTONOMOUS EU LEGAL ORDER OPEN TO NEW GENERATION ISDS?

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ABSTRACT: The EU-led investor-state dispute settlement (ISDS) reforms have recently gathered significant attention. The EU obligation to contribute to the development of international law through its post-Lisbon exclusive competences in the area of foreign direct investments is what set the stage for the EU to become a fully-fledged global investment actor. As a result, since 2018 the EU has launched an ambitious reform agenda, aimed at transforming the traditional ISDS mechanisms into Investment Court System (ICS) with the ultimate goal of establishing a Multilateral Investment Court. This project, however, could not have circumvented the long-standing sensitive issue of the interplay between international dispute settlement systems and the autonomy of EU law, thus positioning the Court of Justice of the European Union (CJEU) as the ultimate arbitrator of this global agenda. This *Article* scrutinises how the CJEU conciliated the doctrine of the autonomy of EU legal order with the Investment Court System in Opinion 1/17 departing from its well-known autonomy-preservationist saga. It also examines the key institutional transformations of Investment Court System and how it differs from traditional

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ISDS and other dispute settlement mechanisms. Finally, the *Article* analyses the impact of the conclusions of Opinion 1/17 on the future of global investment reforms, in particular, the establishment of the Multilateral Investment Court and further development of the doctrine of the autonomy of EU law.

KEYWORDS: CETA – ISDS – CJEU – Investment Court System – autonomy of EU legal order – Opinion 1/17.

I. INTRODUCTION

In 2018, following a large flow of criticism against the traditional investor-state dispute settlement (ISDS) mechanisms and political discussions, the European Commission officially launched an ambitious global ISDS reform agenda promising to address all concerns.[1] The purpose of the reforms was re-institutionalisation of the investment arbitration in order to ensure that transparency, legitimacy and consistency are observed.[2] In particular, the lack of legitimacy and consistent case-law is to be solved through interim and long-lasting solutions. The plan to establish a multilateral investment court is seen through and conditional upon the success of a transitional investment court system. By now, the EU has included Investment Court System (ICS) clauses in a number of free trade agreements, including the Comprehensive Economic and Trade Agreement with Canada (CETA), Investment Protection Agreement with Vietnam, EU-Mexico Free Trade Agreement, EU-Singapore Investment Protection Agreement. As anticipated, this global constitutional agenda raised some fundamental political and legal questions. Primarily, beyond the scepticism towards the substance of the reforms, this initiative brought up the long-standing issue of conciliation of the autonomous EU legal order and international law in the field of investment.

The question reached its existential importance when one of the regional parliaments of the Kingdom of Belgium (Parliament of Wallonia) threatened to block one of the biggest EU trade projects (CETA) based on this very issue. Subsequently, at the request of Belgium, the Court of Justice of the European Union (the Court) was called on to rule on the question of the compatibility of the CETA Investment Court System with the autonomy of the EU legal order.[3] Especially, after the radical outcome of *Achmea* case on the question of the compatibility of intra-EU ISDS, the European Commission, the keen supporter of the abolishment of ISDS between Member States, found itself in its own trap – how to reconcile the autonomy of EU law and the EU-third State ISDS mechanisms given the legacy of the existing EU case-law. This time the stakes were even higher. It would not constitute yet another episode in "(in)compatibility case" saga, but would rather decide the destiny of a global reform agenda. The approach of the Court in Opinion 1/17 was to determine the future of the international investment arbitration in the form of an investment court system between

[1] European Commission, *The Multilateral Investment Court Project* trade.ec.europa.eu.

[2] EU Trade Stakeholder Meeting, *Establishment of a Multilateral Investment Court* trade.ec.europa.eu.

[3] Diplomatie Belgium, CETA: *Belgian Request for an Opinion from the European Court of Justice* diplomatie.belgium.be.

the EU and third countries, as well as the feasibility of establishing a multilateral investment court, and the interrelation between the EU law and international law, in general.

The transformation of the EU legal order throughout the European integration process has seen a number of novelties. The never-defined *sui generis* legal order has been attributed certain constitutional characteristics in order to differentiate it from both national and international legal orders. Over the years the borderline between the EU and international legal orders has become more and more fragile and sometimes explosive. Whether the diverse international dispute settlement instruments can peacefully coexist with the *autonomous new legal order*,[4] has become a question of constitutional importance. The EU expansion of common commercial policy, its increasing global engagement in almost all spheres of international law particularly sharpens the problem of how the EU should open itself to international legal order.

Traditionally, CJEU has been portraited as an "autonomy protectionist" court when faced with the choice of accepting or rejecting the submission of the EU under an international dispute settlement mechanism. However, in Opinion 1/17 the CJEU gave a new perspective to the fundamental question of interplay between the autonomous EU law and international dispute settlement mechanisms. It found that investment court system is compatible with the EU legal order, giving a green light to the global investment system re-institutionalisation efforts of the EU and favouring the development of the international law. By doing this, it set a new standard of what kind of international dispute resolution mechanisms could potentially be compatible with the autonomy of the EU legal order.

The purpose of this *Article* is to examine the approach of the EU towards the emerging ISDS reforms, the effects of those reforms on the internal EU legal *aquis*, and how the Court rebranded autonomy of EU law to allow the continuity of the global reforms in Opinion 1/17. This *Article* will demonstrate that the choice the EU made for the new generation ISDS reforms was not between *globalism* and *preservationism* in a classic sense. Different from the other cases of EU-international law clashes, in this particular context the international law of investment court system is being designed by the EU itself, taking into account EU internal constitutional structure. Thus, this *Article* argues that the EU puts forward a third option between the polarised black and white. In particular, when designing the reform, the European Commission made sure that the investment court system and the transformed international investment order would be in perfect harmony with the EU internal integrity. The first part of this *Article* will hence examine the issue of setbacks of the traditional ISDS, the need for the Commission-initiated reform agenda and the creation of ICS and related potential risks. It then tackles the interrelation of the international investment law with the *sui generis* legal system of the EU. It focuses on the critical analysis of the umbrella concept of autonomy of EU law, under the light of key case-law. Finally, the *Article* analyses the impact of the conclusions of Opinion 1/17 on the future of global investment

[4] Case 26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1.

reforms, in particular, the establishment of the multilateral investment court and further development of the doctrine of the autonomy of EU law.

II. EU and a reformed international investment order

II.1. Post-Lisbon intra-EU developments and traditional ISDS clauses

The entry into force of the Treaty of Lisbon marked a new area in the international economic law on a European and global scale. The transformation of EU common commercial policy has not only further empowered the EU to act as a single voice on international scene but has also created a powerful international economic actor. Among other areas, the inclusion of foreign direct investments (FDI) into art. 207 of the Treaty on the Functioning of the European Union was a major step forward and allowed the EU to negotiate and conclude international investment agreements. However, art. 207 covers only *direct* foreign investment. As it pertains to the other crucial aspects of investment protection agreements, such as non-direct foreign investments and especially investor-state dispute resolution mechanisms, they fall outside the ambit of exclusive competences of the EU and thus must be exercised with the Member States.[5] Such internal structural complexity undoubtedly has resulted in longer and more complicated procedures of negotiating and concluding trade/investment agreements. Another major issue has been the growing criticism of civil society towards the traditional structure of investor-state dispute settlement mechanisms as the EU started negotiating some of its biggest trade deals with the United States and Canada.[6]

Present investment arbitration-like mechanisms have always existed in various forms throughout history with the prototype being the trade concessions in the 10th century.[7] The objective of an international investment treaty is to grant additional guarantees and legal sustainability to foreign businesses to invest in other countries. The ISDS was introduced as procedural protection of substantive guarantees of foreign investors, in the form of an impartial and independent forum from the judicial system of the host state.[8] This was a solution to the politically explosive state-to-state diplomatic protection mechanism[9] and potentially biased and government-oriented national court system of

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

[6] BO Giupponi, 'Recent Developments in the EU Investment Policy: Towards and Investment World Court' (2016) J. Arb. Stud. 183.

[7] C Tietje and F Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership' (2014) Parlementaire Monitor www.parlementairemonitor.nl 15-16. See also J Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010) 80. See also R Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press 1984) 7.

[8] R Sappideen and LL He, 'Dispute Resolution in Investment Treaties: Balancing the Rights of Investors and Host States' (2015) JWT 87-88.

[9] I Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1992) ICSID Rev 5.

the host state,[10] which became an effective means to directly enforce the protection of the substantive rights deriving from international agreements.[11] Throughout the time, ISDS has proven to be an effective means of solving disputes under public international law between the states and the investors. The growing trust in investment arbitration and "the million-dollar awards" rendered annually by arbitral tribunals demonstrate the success of these mechanisms. While being a meaningful instrument for the states to solve their investment disputes circumventing the diplomatic roads, ISDS mechanisms started to be heavily questioned mainly based on their lack of democratic legitimacy.[12] Other areas of criticism include lack of transparency, consistency, predictability, as well as the absence of an appeals mechanism.[13]

Much of the present-day criticism comes from the so-called "over-empowerment" of investors through these "neutral platforms". In recent years, a trend was noticed to contest some of the sovereign regulations and laws of the host states if the investor sees them unfavourable for its own business activity.[14] While the numbers demonstrate clearly suppressed risks,[15] NGO-driven vigorous criticism continues to contest the legitimacy of ISDS mechanisms. With no right or wrong answer, it all boils down to be a matter of perspective, exigence of time and influence of social-political dynamics. As Puig and Strezhnev described in the article "The David Effect and ISDS": "This debate about ISDS' role and purpose within a global governance system can be framed as a tale of two types of underdogs: relatively weak governments fighting corporate power or defenceless private actors fighting arbitrariness".[16]

II.2. ISDS novelty outdated? EU reform agenda and the comprehensive economic and trade agreement with Canada (CETA)

In recent years the ISDS mechanisms have become an indispensable part of the growing number of EU-third country investment agreements or comprehensive trade agreements containing substantive investment clauses. Initially the "new generation" comprehensive agreements with Canada, as well as the suspended Transatlantic Trade and Investment

[10] C Tietje and F Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership' cit. 22.

[11] *Ibid*.

[12] A Dimopoulos, 'The Involvement of the EU in Investor-state Dispute Settlement: A Question of Responsibilities' (2014) CMLRev 1672.

[13] United Nations Conference on Trade and Development UNCTAD, World Investment Report 2013: *Global Value Chains: Investment and Trade for Development* unctad.org 172.

[14] I Austen, 'TransCanada Seeks $15 Billion from U.S. over Keystone XL Pipeline' (6 January 2016) New York Times, www.nytimes.com.

[15] As of 31 July 2020, 37% of all 740 concluded ISDS cases were decided in favour of state and 20% settled according to United Nations Conference on Trade and Development (UNCTAD) Investment Dispute Settlement Navigator, investmentpolicy.unctad.org

[16] S Puig and A Strezhnev, 'The David Effect and ISDS' (2017) EJIL 731.

Partnership Agreement, included substantive investment clauses and procedural guarantees of investors' rights through traditional ISDS mechanisms.[17] From the start of negotiations of these agreements, the civil society organisations gradually became dissatisfied with the investment chapter and particularly the ISDS clauses[18] and blamed the institutions for trading away the rule of law and democracy of the Union.[19]

The main criticism towards the traditional model of ISDS mechanism emerged especially after the start of negotiations of the Transatlantic Trade and Investment Partnership Agreement with the US, an agreement between the two largest economies. It was identified that the main problems were the lack of guarantees of independence of the arbitrators, the lack of consistency and foreseeability of the awards, the inexistence of appeals procedure and the high costs of arbitration.[20] The idea was to reform and legitimise the existing traditional investor protection system in order to allow the Union to freely exercise its Common Commercial Policy competences and pursue public policy objectives. With the ultimate objective being the establishment of Multilateral Investment Tribunal, the EU identified the transition from ISDS to Investment Court System in separate EU-third country agreements, as the first step and the short-term goal. Following the results of the online public consultation on the ISDS mechanism of TTIP of 2014[21] (which were equally relevant for CETA ISDS), the EU launched a reform project of ISDS which was soon suggested to be discussed with Canada in order to be incorporated into the CETA Agreement, and later in the Investment Partnership Agreement with Vietnam.

Inspired by the World Trade Organisation (WTO) Dispute Settlement model, the Investment Court System in CETA has a number of differences in comparison with traditional ISDS. The two key components of the ICS are the appointment of judges and the appellate system. The long criticized *ad hoc* nature of the ISDS and the appointment of judges – found their solutions.[22] According to art. 8.27 of CETA, the EU and Canada establish a permanent

[17] The international arbitration approach of the World Bank's International Center for Settlement of Investment Disputes (ICSID). See also, H Lenk, 'An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada' (2016) 1 European Papers, 1, 665-677, www.europeanpapers.eu

[18] I Laird and F Petillion, 'Comprehensive Economic and Trade Agreement, ISDS and the Belgian Veto: A Warning of Failure for Future Trade Agreements with the EU?' (2017) Global Trade and Customs Journal 168.

[19] P Eberhardt, B Redlin and C Toubeau, 'Trading Away Democracy How CETA's Investor Protection Rules Threaten the Public Good in Canada and the EU' (November 2014) Corporate Europe Observatory corporateeurope.org 4-6.

[20] Opinion 1/17 *Compatibility of ISDS with EU Law* ECLI:EU:C:2019:341, opinion of AG Bot, para. 15.

[21] European Commission, *Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in Transatlantic Trade and Investment Partnership Agreement (TTIP)* trade.ec.europa.eu.

[22] MN Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law*, *Alternative Approaches*, *and Improvement Suggestions* (Brill 2017) 219.

tribunal consisting of fifteen judges to rule on disputes between the parties of the Agreement (EU, Member States and Canada) and the investors. The appointment of judges by the CETA Joint Committee was another forward-moving step by the Parties,[23] since previously agreed traditional method was the choice of arbitrators by the disputing parties on an *ad hoc* basis.[24] This, of course, gave rise to questions, such as why should undemocratically elected arbitrators decide the legality of actions of the legitimate authorities. The solution found in CETA allows to cut the direct ties and dependency between the parties and the arbitrators, and puts the judges under the obligation to comply with the rules of ethics[25] which gives more guarantees for the latter to act more independently and impartially. Furthermore, the reform suggests almost the same requirements for the ICS judges as those put on the judges of the International Court of Justice and WTO.[26]

The second important aspect of the ISDS reform concerns the insertion of the Appellate Tribunal. One of the most criticized aspects of traditional ISDS found its solution in art. 8.28. This marks a clear departure from the definitively binding nature of ISDS tribunal decisions and submits the latter under an institutionalized appeal mechanism. As for the appointment procedure, the members of the Appellate Tribunal are appointed through the same procedure as the judges of the Tribunal. The case before the Appellate Tribunal is reviewed by a three-judge panel.[27]

The reformed model has, as AG Bot called, a "hybrid nature that is a form of compromise between an arbitration tribunal and an international court".[28] This innovative mechanism, however, does not tackle all the shortcomings. One of the major sources of inspiration for the critics – the lack of guarantees of independence of judges and the whole fairness of ICS trials – still remains only partially tackled.[29]

II.3. Main legal issues connected to the new generation ISDS mechanisms and the constitutionality of the EU legal order

The beginning of 2018 marked a big shock for the arbitration world with the release of the *Achmea* case and the complete rejection of the intra-EU ISDS with the conviction of being

[23] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017], art. 8.27(2) eur-lex.europa.eu (entered into force provisionally on 21 September 2017).

[24] F Baetens, 'The European Union's Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges' (2016) LIEI 370.

[25] CETA cit. art. 8.30.

[26] *Ibid*. art. 8.27(4).

[27] *Ibid*. art. 8.28.

[28] Opinion 1/17, opinion of AG Bot, cit. para. 18.

[29] GV Harten, 'The EU-Canada Joint Interpretative Declaration on the CETA' (Osgoode Hall Law School Legal Studies Research Paper, 6-2017). See also, I Laird and F Petillion, 'Comprehensive Economic and Trade Agreement, ISDS and the Belgian Veto: A Warning of Failure for Future Trade Agreements with the EU?' cit. 167-174.

by its very nature incompatible with the constitutional-judicial order of the EU. The Court was, however, particularly prudent and specifically provided that *Achmea* judgment does not concern the EU-third country ISDS and that those international control mechanisms are not by default incompatible with the EU legal order.[30] In conceptualizing its reforms, the Commission was very careful not to fall into its own trap of the *Achmea* arguments. In order to create a safe environment and minimize the future possible discussions on ICS incompatibility with the EU law, the Commission produced a carefully designed framework in order not to trespass into the "intimate space" of CJEU or put the "EU balloon"[31] under the threat of unexpected deformation. How did CETA circumvent the *Achmea effect* and become an example of EU-international investment law reconciliation?

The answer to the above question demands a thorough analysis of a number of features found in the Investment and Dispute Settlement Chapters of CETA. First and foremost, it must be recalled that CETA is an international agreement signed by the EU and its Member States on one side and Canada on the other side. This means that as any EU international agreement, CETA does not enjoy the advantage of direct effect, unless explicitly granted by the CJEU.[32] Lack of direct effect means that the individuals and companies within the EU and Canada cannot directly benefit from their rights and protections under the agreement in front of their domestic courts. The investment court system remains the only functioning platform to exercise CETA's investor protections. The explicit mentioning of no direct effect in the Agreement, as well as a clear statement of dissociation of the two systems from each other.[33] Therefore, the investor has to choose whether to go through the protections prescribed under either the domestic/EU law or those under the international protection mechanisms of CETA. The triggering of any of those means automatically excluding the possibility of invoking the other.

As it pertains to the judicial interrelation and the immunity guarantees of the autonomy of EU law, CETA explicitly provides a clearly defined scope of jurisdiction of the Investment Court System.[34] It is competent to rule only on issues concerning non-discriminatory treatment and investment protection, where the investor claims to have suffered damages.[35] Any claims falling outside the scope of art. 8.18 will be discontinued.[36] Furthermore, the Agreement moves on with some strict delimitations of the applicable law and the interpretation of law by CETA Tribunals. It can only base its decisions on the CETA

[30] Case C-284/16 *Achmea* ECLI:EU:C:2018:158 para. 57.

[31] An expression used in articles by Inge Govaere. See I. Govaere, 'Interconnecting Legal Systems and the Autonomous EU Legal Order: A Balloon Dynamic' (Research Paper in Law 2-2018); 'TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order' (Research Papers in Law 1-2016).

[32] I Govaere, 'TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order' cit. 7.

[33] CETA cit. art. 30.6

[34] *Ibid*. art. 8.18.

[35] *Ibid*. art. 8.18(1).

[36] *Ibid*. art. 8.18(5).

rules, interpreted under the light of international public law, primarily, the Vienna Convention on the Law of Treaties. The tribunal does not have the jurisdiction to rule on the cases based on the domestic law of the parties, including the EU law or interpret them. The only exception would be a case where "for greater certainty" ICS can take the domestic law into account. In this case, it would be compulsory to follow the interpretation of the specific legal norms given by the relevant courts. Moreover, the appreciations of the Tribunal or Appellate Tribunal shall not bind the courts of the parties.[37]

Apart from the procedural issues, CETA also solved one of the major setbacks of traditional investment agreements. It strengthens the right of national democratically elected governments of the parties to freely regulate in the public interest[38] without being dependent on the objectives of a specific international arrangements at the price of democracy and rule of law.

This being said, the Investment Court System is not only characterized with accomplishments but also a number of setbacks, which caught the eye of the civil society organisations that qualified it as "an equally dangerous twin of ISDS".[39] While it seems that the Commission did everything to prevent the possible anger of the Court on the issue of its exclusive jurisdiction on the matters of EU law, many NGOs and Member States are not convinced that in practice there will be no overlaps. There are some firm doubts about the re-politicization of the appointment procedure of judges by delegating it to the Joint Committees composed of the political representatives of the parties.[40] Also, the independence of judges remains controversial, since the ethics rules are not advanced enough to ban any engagement in a parallel case as an arbitrator[41] and the compensation of judges is done on a case-by-case basis.[42] Furthermore, some critics raise the issue of non-compliance of the very idea of foreign investor protection mechanism with the principle of non-discrimination which is an EU general principle of law. All these issues have been raised before CJEU by Belgium in Opinion 1/17. It is interesting that none of those questions were regarded to be problematic in the eyes of Canadian courts or the public.

[37] *Ibid*. art. 8.31(2).

[38] *Ibid*. art. 8.9(1) and (2).

[39] P Eberhardt, 'The Zombie ISDS Rebranded as ICS, rights for Corporations to Sue States Refuse to Die' (17 February 2016) Corporate Europe Observatory corporateeurope.org 18.

[40] MN Cleis, *Analysis of Existing Reform Proposals in The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* cit. 219.

[41] I Laird and F Petillion, 'Comprehensive Economic and Trade Agreement, ISDS and the Belgian Veto: A Warning of Failure for Future Trade Agreements with the EU?' cit. 170.

[42] *Ibid*. 170-171; P Eberhardt, 'The Zombie ISDS Rebranded as ICS, Rights for Corporations to Sue States Refuse to Die' cit. 18.

III. Autonomy of EU law and international legal order

III.1. Architecture and meaning of autonomy of EU legal order

The principle of autonomy is not referred anywhere in the EU Treaties. Yet its usage and high standard attributed by the CJEU dictates particular caution. Originally the word "autonomous" meant "having its own laws" (*auto* meaning "self" and *nomos* meaning "law"). An entity that can be described as autonomous is capable of choosing its actions without external influence, direction or control.[43] Currently, the principle of autonomy of EU law has become one of the general principles of EU law.[44] Through several landmark judgments, the CJEU shaped the constitutional principles and conditions of EU law that govern the participation of the EU in international dispute settlement mechanisms. The concept of autonomy of EU law was first implied in the landmark cases *Van Gend en Loos*[45] and *Costa v Enel.*[46] The key element of those judgments is the differentiation of the Union from national and international legal orders and the creation of a new legal order. The underlying reason why we need an "autonomous and not an ordinary union" according to the two landmark decisions lies in the objectives of the integration. In particular, it would not have been possible to establish a common market without internal frontiers, if the Union was not autonomous. Furthermore, the autonomy of EU law over time has also encompassed the idea of constitutional order, as a self-sufficient and coherent system of norms, which is different from an ordinary international legal order.[47] What makes the principle of autonomy even more mysterious and specific is "the umbilical cord" with its inventor and defender – the CJEU, which is the ultimate decision-maker for the matters of EU law. As it was stated in the landmark Opinion 2/13, "in order to ensure that the specific characteristics and the autonomy of [...] are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law".[48]

Furthermore, the European Union is an "ever closer union", which means an ongoing and dynamic integration with the continuous transfer of more competences. The multifac-

[43] J Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (EUI Working Papers, MWP 2016-2017) 1.

[44] D Gallo and FG Nicola, 'The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication' (2016) FordhamIntlLJ 1081.

[45] *Van Gend en Loos v Administratie der Belastingen* cit., "The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."

[46] Case 6/64 *Costa v E.N.E.L* ECLI:EU:C:1964:66.

[47] K Lenaerts, 'The Autonomy of European Union Law' (2019) I Post di Aisdue 10.

[48] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 174.

eted progressive augmentation of the powers of the Union throughout the integration process brought even more interrelations and clashes with the international law.[49] The overarching question remains whether the term autonomy also means "absolute". Advocate General Bot in Opinion 1/17 argued that the word autonomy should not be understood as a synonym of "autarchy".[50] The broader view at the concept of autonomy seems to concern the interrelation between several entities, rather than complete independence from each other.[51] The actual wording of the landmark judgment *Van Gend en Loos* was never about limitlessness or absolutism of the European Community or its isolation from the universe of the international legal order, but about *defining the relationship of the EU vis-à-vis other entities*. Together with the preservationism of the *EU aquis* and autonomy *from* international and national law, the EU is also bound by the concept of loyalty towards "the strict observance and development of international law", as a fundamental principle of EU law.[52]

III.2. Participation of the EU in international dispute settlement: dynamics before Opinion 1/17

The umbrella concept of autonomy of EU legal order that encompasses the special characteristics of the EU has become an assessment standard for compatibility of EU's participation in international dispute resolution mechanisms. In general terms, the existence of any international dispute settlement mechanism for the European Union is conditioned upon the respect of the autonomy of the EU legal order.[53] Several landmark cases contributed to the development of this doctrine, including Opinion 1/91 on Draft Agreement on the European Economic Area, Opinion 2/13 on Draft Agreement of Accession of the European Union to the European Convention of Human Rights, Opinion 1/09 on the Draft Agreement on the European Patent Court, Opinion 1/00 on the establishment of European Common Aviation Area, *Achmea* case, and finally, Opinion 1/17 on the hybrid ISDS of CETA Agreement. When examining the question of the compatibility of EEA Draft Agreement with the EU Treaties in 1991, the Court admitted that "an international agreement providing for a system of courts, including a court with jurisdiction to interpret its

[49] I Govaere, 'Interconnecting Legal Systems and the Autonomous EU Legal Order: A Balloon Dynamic' cit. 1-2.

[50] Opinion 1/17, opinion of AG Bot, cit. para. 59.

[51] J Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' cit. See also, B De Witte, 'European Union Law: How Autonomous is its Legal Order?' (2010) Zeitschrift für öffentliches Recht 141-142: "the autonomy of EU law is not absolute but relative; it does not mean that EU law has ceased to depend, for its validity and effective application, on the national law of its member states, nor that it has ceased to belong to international law".

[52] J Etienne, 'Loyalty towards International Law as a Constitutional Principle of EU Law' (Jean Monnet Working Paper 03-2011) 21.

[53] *Achmea* cit. para. 57. See also Opinion 2/13 cit. para 183; Opinion 1/09 *Draft agreement – Creation of a unified patent litigation system* ECLI:EU:C:2011:123 para. 76.

provisions, is not in principle incompatible with the Community law".[54] The international agreement that was duly concluded by the EU and entered into force, should respect the specific characteristics of EU legal order.[55] The analysis of participation of the EU in international dispute settlement mechanisms shall be conducted not on a case-by-case basis or a chronological order. I will rather scrutinise the special characteristics, principles and conditions of EU autonomy that have been developed through the case-law of the CJEU.

In its first case about the external aspects of the autonomy of EU law – Opinion 1/76 on Draft Agreement establishing a European laying-up fund for inland waterway vessels – CJEU found that *legal-institutional link* between two different legal orders is not compatible with the Treaties.[56] In particular, the Court demonstrated that the fact that its members were required to serve as judges on Fund Tribunal established under the Draft Agreement is incompatible with the nature of EU legal order. A similar approach can be found in Opinion 1/91 on Draft Agreement relating to the creation of the European Economic Area.[57]

Another important element in the principle of autonomy of EU law is the exclusion of the power of international tribunals to issue *binding interpretations of EU law*. This issue is closely related to the exclusion of *power to rule on the EU's internal division of competence.* In Opinion 1/00 on the establishment of European Common Aviation Area, the Court established that its role is to ensure that the fundamental characteristics of the power balance of the Union and its institutions remain unaltered in compliance with the Treaties.[58] The CJEU highlighted the fact that it should have exclusive authority and a final say in the matters concerning the interpretation and application of EU Treaties. In particular, it was stated that, "Any interpretation of EU Treaties by other international courts would not have binding effect on the Union and its institutions".[59] Another landmark decision by the CJEU commenting on this aspect of autonomy of EU law is Opinion 1/09 on Draft Agreement on the Creation of a unified patent litigation system.[60] The European Patent Convention aimed to establish a two-stage judicial body and listed sectorial EU law as applicable law. Hence, the European Patent Court would have jurisdiction *ratione materiae* to hear disputes concerning EU law. The agreement, nevertheless, allowed for the prior involvement of CJEU in cases before the European Patent Court that would re-

[54] Opinion 1/91 *Draft agreement between the Community*, *on the one hand*, *and the countries of the European Free Trade Association*, *on the other*, *relating to the creation of the European Economic Area* ECLI:EU:C:1991:490 para. 40.

[55] K Lenaerts, 'Droit international et monisme de l'ordre juridique de l'Union' (2010) Revue de la Faculté de droit de l'Université de Liège 506-507.

[56] Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* ECLI:EU:C:1977:63 paras 21, 22.

[57] Opinion 1/91 cit.

[58] Opinion 1/00 *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* ECLI:EU:C:2002:231 para. 12.

[59] *Ibid.* para. 13.

[60] Opinion 1/09 cit.

quire examination, application and interpretation of EU law. In its analysis, the Court recalled that the special nature of the EU as a new legal order separate from ordinary international agreements. One of the special characteristics is that only EU courts and courts of the Member States have the right to apply and interpret the EU law. The European Patent Court is placed "outside the institutional and judicial framework" of the Union.[61] Thus, the Court found that despite the fact that the ECJ may be asked to deliver a preliminary ruling on certain matters, the fact that an international court can apply and interpret EU law would "alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law".

According to art. 344 of the Treaty on the Functioning of the European Union, "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein". This means that *it must be excluded that the international court's jurisdiction extends over intra-EU disputes where EU law issues are at stake.* This issue was scrutinised in one of the most controversial and political decisions of the Court. In Opinion 2/13 on the Draft Agreement of Accession of the European Union to the European Convention of Human Rights and Fundamental Liberties, the Court noted that "an international agreement cannot affect the allocation of powers fixed by the Treaties or, *consequently*, the autonomy of the EU legal system, observance of which is ensured by the Court".[62] From this perspective, the mere possibility that the Member States or the EU are able to submit an application to the European Court of Human Rights against each other on a question governed under EU law will go counter to the objective of art. 344 TFEU, and the overall nature of the EU law.[63] A similar reasoning can be found in *Achmea* case.

The issue of *EU acts not subject to judicial review at the EU level* has only been examined in Opinion 2/13.[64] In this opinion, the CJEU noted that the conferral of the jurisdiction to carry out judicial review of EU acts (such as CFSP acts) exclusively to a non-EU body would undermine the autonomy of the EU legal order.

To summarise, there are five main principles that need to be respected as constituting elements of the umbrella concept of autonomy of EU law, when it comes to the design of an international dispute settlement to which the EU is a party. First and foremost, there can be no organic link between the CJEU and the established international court, secondly, the latter cannot have the power to rule on the EU's internal division of competence, thirdly, it cannot have the power to issue binding interpretations of EU law, fourthly, it must be excluded that such international court's jurisdiction extends over intra-EU disputes where EU law issues are at stake, and finally, an international court or

[61] *Ibid*. para. 71.
[62] Opinion 2/13 cit. para. 201, emphasis added.
[63] *Ibid*. para. 212.
[64] *Ibid*. paras 249-257.

tribunal cannot exceed the CJEU's own jurisdiction so as to include EU acts not subject to judicial review at EU level.

IV. Game of Thrones in the Opinion 1/17: lessons and prospects

IV.1. A new *de minimis* for the principle of autonomy of EU law?

With Opinion 1/17 the guardian of the autonomy of the EU legal order has once again been challenged to rule on the possible implications of an external control mechanism on the internal integrity of the Union. The Court stood in front of a new opportunity to change the evolution of the external dimension of EU autonomy or to contribute to the traditional saga. The debates and discussions before the Court's ruling was published, mainly rolled around the fear of whether Opinion 1/17 would follow the steps of Opinion 2/13 and *Achemea* judgment, or whether it would accept the opinion of AG Bot. The questions referred to the Court in Opinion 1/17 are to a large extent similar to the ones the Court answered in *Achmea* and Opinion 2/13, however, it is undisputed that the objects in the three cases are different. Therefore, as much as some elements can be analogical, the Investment Court System of the CETA Agreement does not interrelate with the autonomy of the EU law the same way as the European Court on Human Rights and intra-EU ISDS. The particular importance of this opinion lied in its potential global consequences and timing, given the EU initiated international investment reform agenda in times of continuous collapse of the multilateral rules-based order.

As noted in previous chapter, despite few examples of compatibility, the CJEU had frequently blocked EU's accession to international dispute settlement mechanisms. Whether it was due to unreasonably high standard of the principle of autonomy or actual deficiencies of international courts and tribunals in question has become a topic of large-scale academic, political and legal debates over the past years. In particular, the Court has been heavily criticised for being too protectionist of its own jurisdiction. Pursuant to the Belgian submission, the Court found itself between EU's political objectives of promoting and modernizing investment protection and advancement of international law, on one side, and the need to safeguard the EU's constitutional framework, on the other side. It was given the opportunity to provide further clarification, elaborate on the exigencies of characteristics constituting the general principle of autonomy governing to a large extent EU's external action.

While the outcome of Opinion 1/17 gave rise to more questions than answers, it made clear that the Court does not view the principle of autonomy of EU law from an absolutist perspective. The implications of acceptance of CETA investment court system are far-reaching, spreading beyond this specific dispute settlement mechanism and even beyond green lighting ISDS reforms and establishment of multilateral investment court. Above all, it became proof that it is possible to interpret the principle of autonomy in a

way to conciliate two rivalling phenomena of securing internal constitutional integrity of the Union and boosting its involvement in international legal order.

The questions referred to the CJEU in Opinion 1/17 were whether Chapter 8 ("Investments") Section F ("Resolution of Investment Disputes between Investors and States") of the CETA Agreement is compatible with: 1) the exclusive jurisdiction of the Court over the definitive interpretation of EU law; 2) the general principle of equal treatment; 3) the requirement of the effectiveness of EU law; 4) the right of access to an independent and impartial tribunal[65].

Opinion 1/17 repeats CJEU's earlier jurisprudence on the autonomy of EU law. Primarily, it reiterates the general statement of presumption of compatibility of international courts with the autonomy of EU law that can be found in earlier case-law. In particular, "an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law".[66] Then the Court stresses that the only condition for creation or accession to such an international court is "that there is no adverse effect on the autonomy of EU legal order".[67] It then explains that the very *raison d'être* of autonomy of EU law "resides in the fact that the Union possesses a constitutional framework that is unique to it".[68] And thus, it concludes that it is necessary to examine whether Investment Court System in CETA may prevent the Union from operating in accordance with its constitutional framework.[69] When assessing compliance with the special characteristics comprising umbrella principle of autonomy of EU law, the Court paid particular attention *to the institutional interplay between CETA judicial system and CJEU*, *the issues of applicable law and exclusion of binding interpretations of EU law* and *EU institutional framework and protection of level of public interest*. The Court did not make assessments under art. 344 TFEU and the issue regarding EU acts not subject to judicial review at EU level, as they were not applicable in the case of CETA.

IV.2. Breakdown of the "umbrella principle" under the light of ICS

The CJEU has a central role in the principle of autonomy, as it is not only just another EU institution, but the guardian of EU's constitutional framework. Over the years through its case-law, the Court has stated multiple times that it has "exclusive jurisdiction over definitive interpretation of EU law".[70] In Opinion 1/17 the Court stressed that the Treaties have established a judicial system to preserve the autonomy of EU legal order through

[65] Opinion 1/17 paras 46-69.
[66] *Ibid*. para. 106.
[67] *Ibid*. para. 107.
[68] *Ibid.* para. 110.
[69] *Ibid*. para. 112.
[70] Opinion 2/13 cit. para. 246.

consistent and uniform interpretation of EU law.[71] In its assessment of whether there is any adverse effect by the establishment of Investment Court System to its exclusive jurisdiction, the Court took into account two elements: first, there is no legal-institutional linkage between the CJEU and ICS, and second, ICS does not in any way interfere with the exclusive jurisdiction of CJEU over the definitive interpretation of EU law. In particular, unlike in Opinion 1/76 where CJEU and Fund Tribunal were institutionally connected through its judges expected to serve in an international court, CETA creates a completely separate universe of law and judicial mechanisms, which stand "outside the judicial system of Parties".[72] The Court also observes that the fact that ICS stands outside the judicial systems of its parties derives from the very purpose of CETA and its judicial system "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".[73] The Court also states that not providing for a preliminary ruling procedure between the courts is consistent as CETA tribunals do not interpret any law other than CETA under the light of international law.[74] Therefore, there is *no legal-institutional linkage between the Investment Court System and CJEU which would have adverse effects on the autonomy of EU legal order*. As it pertains to the exclusion of any interference to CJEU's power to interpret EU law, the Court found that CETA's judicial mechanism is designed in a way that its exclusive jurisdiction to give rulings on the division of powers between the Union and its Member States is preserved. This is explained by the exclusion of EU law from the "applicable law" of CETA and thus the law which can potentially be interpreted and applied by ICS.

Another key concern rightfully raised by the referring government was the *issue of applicable law, and the effects of the legally binding CETA Tribunal decisions on the EU institutions*. As it is provided in CETA, the disputing party "recognises and complies with the award without delay".[75] Consequently, the decisions of the CETA ICS are binding on the Union. Given the nature of the decisions, the European Commission was very careful when designing and negotiating CETA in order to avoid possible incompatibility issues. In particular, the drafters explicitly mentioned that Investment Court System has jurisdiction to apply and interpret CETA rules in the light of international law in general and Vienna Convention on the Law of the Treaties in particular.[76] As for the other aspect of the issue – the effect of such binding decision – the Court stated that as long as the EU measure is not "amended or withdrawn" by the international dispute settlement mechanism,

[71] Opinion 1/17 cit. para. 111.
[72] *Ibid*. para. 200.
[73] *Ibid*. para. 119.
[74] *Ibid*. para. 134.
[75] CETA cit. art. 8.41(2)
[76] *Ibid*. art. 8.31(1).

the constitutional framework of the EU institutions, the cornerstone of which is the autonomous and democratic EU legislative procedure, is preserved.[77]

It can be observed that as a general rule the ICS is not conferred with the power to apply and interpret domestic law of the parties, including the EU law. However, understanding that in judicial practice as an investment tribunal it would be impossible for the CETA Tribunals to completely avoid reviewing EU law, the European Commission stipulated the exact framework within which an EU rule can come under scrutiny. In particular, art. 8.31(2) states

> "The Tribunal *shall not have jurisdiction* to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal *may consider*, as appropriate, the domestic law of a Party *as a matter of fact*. In doing so, the Tribunal shall *follow the prevailing interpretation* given to the domestic law by the courts or authorities of that Party and *any meaning given to domestic law* by the Tribunal *shall not be binding* upon the courts or the authorities of that Party."[78]

By the virtue of the first sentence of art. 8.31(2) of CETA, Investment Court System is different from the international dispute settlement mechanisms that have been examined by the Court, such as the United Patent Court, as domestic laws are excluded from the jurisdiction of ICS.[79] The Court further noted that inevitably CETA Tribunals, on the basis of the information and arguments presented by investors may need to consider the domestic measures in question as "a matter of fact", which means that this type of examination cannot be regarded as an interpretation of EU law.[80] Consequently, ICS can only examine EU law as a matter of fact, and follow the prevailing interpretation given to it by the courts of the EU. Finally, the last sentence of this provision clarifies that any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.[81] This means that CJEU will not be bound by the "meanings" given to particular EU provisions by ICS Tribunals when interpreting and applying EU law. Without engaging into an overall, substantive analysis of this question, the Court concluded that that the safeguards under CETA are sufficient to ensure that the Investment Court System will not threaten its exclusive jurisdiction in interpreting and applying EU law.

In Opinion 1/17 the Court for the first time explicitly acknowledged to what extent and in which form can the EU law be considered by an international tribunal differentiating between considering domestic law as a matter of fact and as a matter of law concepts. Even though this is a new phenomenon in CJEU's vocabulary of the principle of EU autonomy, it has a long history of usage in international public law. Being created in Common

[77] Opinion 1/17 cit. paras 150-151.
[78] CETA cit. art. 8.31(2), emphases added.
[79] Opinion 1/17 cit. paras 121-125.
[80] *Ibid*. para. 131.
[81] CETA cit. art. 8.31(2).

Law, the notion of "law as a matter of fact" has been applied by various international courts. In *Certain German Interests in Polish Upper Silesia (1925)*, the Permanent Court of International Justice (hereinafter PCIJ) considered municipal laws as "mere facts". In particular, PCIJ stated that its role is limited within the assessment of whether by applying a certain law Poland acted in compliance with Geneva Convention vis-à-vis Germany, without having to interpret the Polish law as such.[82] WTO Appellate Body has also stated multiple times that domestic law can be regarded as evidence of facts on state practice, as well as evidence on state compliance with international obligations.[83] As it pertains to the EU law itself, in *AES v Hungary*, when deciding the nature of the applicable law, the arbitration tribunal stated that the EU competition law regime will be considered as a matter of fact. In particular, it stated that EU law:

> "has a dual nature: on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders [...] It will be considered by this Tribunal as a fact, always taking into account that a state may not invoke its domestic law as an excuse for alleged breaches of its international obligations".[84]

Along these lines, it is equally worth mentioning, that *domestic law as a fact* phenomenon cannot be regarded as an absolute concept. In certain situations, even though the international treaties explicitly mention only international agreements as applicable law, the domestic law can nonetheless be applied as a law rather than a fact.[85]

This particularly concerns situations which are entirely regulated by domestic laws, such as property rights or breach of contracts. This issue was raised in front of the North American Free Trade Agreement (NAFTA) tribunals, given that the North American Free Trade Agreement provided that only international law can constitute applicable law. Despite this explicit rule, the NAFTA tribunals in different cases concluded that in certain cases it would be impossible to resolve a dispute without regarding the *domestic law as a matter of law*.[86]

[82] PCIJ, *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) [25 August 1925] 19.

[83] WTO Appellate Body Report, 16 January 1998, WT/DS50/AB/R, India – US, Patent Protection for Pharmaceutical and Agricultural Chemical Products, para. 66; WTO Appellate Body Report, 15 December 2008, WT/DS342/AB/R, China - Canada, Measures Affecting Imports of Automobile Parts, para. 225.

[84] International Centre for Settlement of Investment Disputes (ICSID), 23 September 2010, ARB/07/22, AES Summit Generation Ltd and AES-Tisza Erömü Kft v Republic of Hungary, para. 7.6.6. www.italaw.com.

[85] J Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press, 2017) 106. A Bjorklund, 'Applicable Law in International Investment Disputes' in C Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill 2014) 274; International Centre for Settlement of Investment Disputes (ICSID), 12 September 2014, ARB/08/6, Perenco Ecuador Ltd v Ecuador (Decision on Remaining Issues of Jurisdiction and on Liability), para. 522. www.italaw.com.

[86] J Hepburn, *Domestic Law in International Investment Arbitration* cit. 107. See also, International Centre for Settlement of Investment Disputes (ICSID), 22 May 2012, ARB(AF)/07/4, Mobil Investments Canada Inc v Canada, https://www.italaw.com/sites/default/files/case-documents/italaw1145.pdf.

The biggest concern, however, is that in practice there is no water-tight division between regarding law "as a matter of fact" and "as a matter of law", as all searches for meaning demand a certain level of interpretation. Thus, it brings up some valid concerns on whether the Court of Justice agreed to advance a legal fiction. Yet, what the CJEU seems to find affordable guarantee on the part of CETA is that ICS must follow prevailing interpretation given to domestic law by the courts and authorities of parties and even the so-called meanings given to municipal law are not binding on the parties. CJEU considers it a matter of principle that EU law interpretation is its *exclusive* competence immune from national and international courts and tribunals. The mere fact that CETA tribunals could interpret EU law could have been sufficient for the CJEU to consider such an event incompatible with the autonomy of the EU legal order as it did in *Achmea* case.

Despite a certain lack of clarity and potential risks, it must be nonetheless noted that Opinion 1/17 is a milestone in Court's practice as it differentiated the acceptable extent of the binding nature of decisions of international dispute settlement mechanisms – as long as the EU law is perceived as factual evidence under international public law. After a long line of incompatibility cases by CJEU, the impact of Opinion 1/17 goes beyond CETA and investment court system. The CJEU gave clarity on its exigencies of the principle of autonomy of EU law vis-à-vis EU's engagement in international dispute settlement mechanisms. In particular, the Court elaborated what it means to not be bound by interpretations of EU law by international tribunals. By further modulating the principle of autonomy, the CJEU opened a door for safe interconnection with international legal order.

The third important aspect of the principle of autonomy tackled by the Court in Opinion 1/17 is whether there is *an adverse effect by ICS Tribunals on the EU institutions* to act in accordance with the EU's constitutional framework. In particular, the Kingdom of Belgium and other governments argued: "CETA Tribunal might, in the course of its examination of the relevant facts, which may include the primary law on the basis of which the contested measure was adopted, weigh the interest constituted by the freedom to conduct business, relied on by the investor bringing the claim, against public interests, set out in the EU and FEU Treaties and in the Charter".[87] In other words, the argument stated that Investment Court System could be called upon to decide on the effect of an EU measure, adopted on the basis of a public interest set out in primary EU law, violates the investment treaty. To answer this question, the CJEU engaged itself in the examination of several substantive provisions of CETA, namely art. 8.9(1). CJEU explicitly stated several times that ICS does not have jurisdiction to call into question the level of protection of public interest by the EU institutions.[88] In particular, the Court established that having to withdraw or amend an EU legislation following assessments made by a tribunal "outside EU legal order" would adversely affect the autonomous institutional set-up of the Union.

[87] Opinion 1/17 cit. para. 137.
[88] *Ibid*. paras 153, 156, 159, 160.

The Court stated several times that it is incompatible with the EU constitutional framework for an international tribunal to interfere with the EU's right to regulate with an aim of achieving legitimate policy objectives. As it was mentioned by the President of CJEU, the examination of the CJEU of the right to regulate in the public interest vis-à-vis international courts is the protection of "essence of democratic process leading to adoption of EU norms" which is an integral part of the institutional autonomy of EU.[89] Furthermore, in Opinion 1/17 the Court admitted that an investor may complain from a measure of general application.[90] What the Court protects within the assessment of the right to regulate in the public interest is the internal institutional processes of law-making of the EU to be immune from international courts.[91] Thus, it can be concluded that the CJEU differentiates two distinct judicial assessments regarding the right to regulate in the public interest by an international court operating outside the institutional system of the EU. On one hand, the Court found that the sole fact that a legal measure of general application can come under scrutiny of the ICS Tribunals as a matter of fact under the light of CETA is not *per se* incompatible with the unique constitutional framework of the EU. On the other hand, what the Court finds intolerable is conducting an assessment regarding "the level of protection of a public interest that led to the introduction of such restrictions by the Union with respect to all operators who invest in the commercial or industrial sector at issue of the internal market".

Therefore, the Court distinguished the assessment of law as a matter of fact which led to a breach of EU's obligations under CETA, and examination of the level of protection of public interest itself as a guideline for sovereign EU law-making in a particular field. The latter can lead to adverse effects on the competences of EU institutions. It must also be noted that a quantitative increase in the number of individual cases where an EU measure of general interest was found to be discriminatory vis-à-vis investors by the ICS Tribunals, will inevitably over time lead to qualitative changes, i.e. legislative amendments. Nonetheless, this process must remain entirely sovereign from an external judicial system.

Another delicate question regarding the power division between the EU and its Member States concerns the power balance of responsibilities of the EU and the Member States and one of the core elements propelling the incompatibility of the EU accession to the Strasbourg Court.[92] CETA provides for a so-called "rule of proceduralisation"[93] under art. 8.21, leaving the right of internally determining the responsible entity for each case

[89] K Lenaerts, 'Modernising Trade whilst Safeguarding the EU Constitutional Framework: An Insight into the Balanced Approach of Opinion 1/17' (6 September 2019) Speech at the Belgian Ministry of Foreign Affairs.

[90] Opinion 1/17 cit. para. 143.

[91] *Ibid*. para. 150.

[92] Opinion 1/17, opinion of AG Bot, cit. para. 159.

[93] C Contartese and M Andenas, 'EU Autonomy and Investor-state Dispute Settlement under Inter Se Agreements between EU Member States: *Achmea*' (2019) CMLRev 157.

on the EU.[94] By doing this the negotiators made sure that the agreement would not alter the power balance or the reciprocal relations between the EU and its Member States.[95] The Court of Justice has also referred to this issue[96] as a part of its analysis on the possible adverse effects of the decisions of the tribunal on the EU institutions and their autonomy to regulate autonomously.[97] CJEU noted that the Union shall decide whether "the Union will itself be the respondent, or the whether it shall leave that position to the investment host Member State". This means that the Court will be the final decision-maker on the issue of the respondent,[98] and therefore, exercise its exclusive jurisdiction on preserving the power balance between the EU and Member States.

IV.3. Other issues in Opinion 1/17

Belgium has raised another painful question for the CJEU – whether CETA ISDS is compatible with the right to an independent and impartial court provided and guaranteed by the EU law. The examination of this question coincides with the issue of utmost sensitivity for CJEU these days – the rule of law and independence of the judiciary. Hungary[99] and Poland[100] are facing backslide regarding the independence of judges and their Treaty commitments concerning the rule of law, in general.[101] The Court has previously stated the importance of these principles for European integrity. In *Associação dos Juizes Portugueses*, the Court found that the independence of judges is crucial in order to ensure the effective application of EU law, including to allow individuals to benefit from the principle of fair trial provided for by the Charter of Fundamental Rights.[102] In Opinion 1/17, the Court stated that the EU is bound by those principles when it enters into relations with other countries, regardless of whether the latter shares them.[103] Furthermore, the Court recognised that the "hybrid" ISDS of CETA exercises judicial functions[104] and the very existence of creating such a judiciary outside the legal systems of the parties is to "give

[94] Regulation (EU) 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.

[95] Opinion 1/17, opinion of AG Bot, cit. para. 159.

[96] Opinion 1/17 cit. para. 140.

[97] *Ibid*. paras 137-138.

[98] Opinion 1/17, opinion of AG Bot, cit. para. 162.

[99] R. Staudenmaier, 'EU Parliament Vvotes to Trigger Article 7 Sanctions Procedure against Hungary' (12 September 2018) DW p.dw.com.

[100] European Commission Press Release of 24 September 2018, *Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court* ec.europa.eu.

[101] A Brzozowski, 'France and Germany Pile Pressure on Poland and Hungry over Rule of Law' (10 April, 2019) EURACTIV www.euractiv.com.

[102] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 para. 34.

[103] Opinion 1/17 cit. paras 190-192.

[104] *Ibid*. para. 197.

complete confidence" in ensuring fair and equitable trial and effective protection of their legitimate interests.[105]

Despite the current rule of law crisis in the Union, the Court was eager to base its favourable conclusions on "commitments" and "statements" of the parties using rather futuristic vocabulary, such as "there will be" or "may transform".[106] It is quite surprising for the Court to state that a commitment is a sufficient justification.[107] The Court refers to the fact that the approval of CETA by the Union is conditional upon fulfilling the commitments under Statement 36 of CETA.[108] It is worth mentioning that CETA has already been ratified by the European Parliament on February 15, 2017[109] and the parts regarding the shared competences of the Union are pending approval of the national legislators. The Commission and the Council assure that the agreement will not enter into force until the realisation of the commitments regarding fair and equal access to all investors.[110]

IV.4. Significance of Opinion 1/17

As the President of CJEU stated, "No one has won or lost in Opinion 1/17".[111] But the legacy of Opinion 1/17 is undoubtedly beyond the CETA's Investment Court System and beyond investment arbitration. It gives a model of safe interconnection between two rivalling legal orders. Thus, it breaks the absolutist and protectionist autonomy saga of recent years and demonstrates the tolerant side of CJEU. Why CETA Investment Court System? Whether the Court gave in to a political pressure to not "killing" CETA, whether not upholding the international reputation of the EU and its global reform agenda would be a big price to pay, or whether CETA indeed provided enough guarantees, are all questions with valid arguments. However, it is impossible to overlook that the European Commission was well-aware of the exigencies of the principle of autonomy. The drafters of CETA carefully accommodated guarantees to avoid clashes between two legal orders based on CJEU's previous "incompatibility" saga. Despite some controversies in the opinion, the Court provides certain criteria on the compatibility of an international dispute settlement mechanism with the autonomy of the EU law, that can open doors to future international mechanisms. The baptism of CETA as a "good law", makes it an example of what CJEU would tolerate as a parallelly existing separate judicial system. Opinion 1/17 becomes a new *de minimis* rule for the principle of autonomy of EU law. It also opens the door for future EU-third country ICS until the establishment of Multilateral Investment Court.

[105] *Ibid*. paras 199-200.

[106] *Ibid*. paras 214-218.

[107] CETA cit. art. 30.1.

[108] Opinion 1/17 cit. para. 221.

[109] European Parliament Press Release of 15 February 2017 *CETA: MEPs back EU-Canada trade agreement* www.europarl.europa.eu.

[110] Opinion 1/17 cit. para. 221.

[111] K Lenaerts, 'Modernising Trade whilst Safeguarding the EU Constitutional Framework: An Insight into the Balanced Approach of Opinion 1/17' cit.

IV.5. Alternative of an alternative: can multilateral investment court tackle the legitimacy crisis of ISDS, reformed ICS and comply with CJEU's golden principle?

The long-term intention of the EU is not only to tackle the legitimacy and effectiveness crisis of investment protection mechanisms in separate agreements, but to adopt a more global and institutionalized approach – establish a multilateral investment court (hereinafter MIC). This commitment can be found in CETA[112] and EU-Vietnam Investment Protection Agreement.[113] Those articles are also transitional clauses providing a succession of jurisdiction from ICS to MIC, upon the establishment of the latter. The EU acknowledges that the Investment Court System is not able to tackle the growing pool of FTA's and Investment Agreements and the issues of legitimacy and legal consistency that the existence of different ICS mechanisms can cause.[114] As it was already mentioned by the Court in Opinion 1/17, the establishment of the MIC is possible, only if it does not undermine the autonomy of the EU legal order.[115] This section concentrates on two essential aspects of MIC (applicable law and judicial structure). It will analyse MIC's possible interrelation with the European Court of Justice under the light of Opinion 1/17.

The negotiations between stakeholder states on the establishment of MIC are currently underway under the auspices of UNCITRAL. The very *raison d'être* of creating a multilateral investment court is to establish a permanent, independent, transparent and legitimate international body which would rule on disputes deriving from international investment agreements and develop a uniform, consistent and predictable case-law. While establishing a functioning legal framework of binding and consistent case-law, account should be taken of how MIC jurisdiction interacts with other international courts and the domestic law of its potential member states. The substantive applicable law is one of the fundamental challenges that needs to be clarified in order for the EU to accede to it. Court of Justice has stated multiple times that no exercise of international legal personality of the Union shall put its exclusive right of interpretation and definitive decision-making on the matters of EU law under question.[116] Even though nothing is found in the present Commission proposal on the jurisdictional delimitations of the MIC, the scope of applicable law and interpretative functions of the MIC, given the degree of guarantees found in the CETA agreement on this

[112] CETA cit. art. 8.29.

[113] Decision 2019/1096/EU of the European Council of 25 June 2019 on the signing, on behalf of the Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part, art. 3.41.

[114] European Commission COM(2017) 493 final of 13 September 2017, Recommendation for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes.

[115] Opinion 1/17 cit. para. 108.

[116] M Bungenberg and A Reinisch, 'From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options regarding the Institutionalization of Investor-State Dispute Settlement' (2018) European Yearbook of International Economic Law 111.

matter, it is not likely that the Commission does not consider this as the negotiations advance. The Working Group III of UNCITRAL has held several meetings so far on certain structural and substantive issues related to the establishment of the court.[117]

The two possible scenarios of applicable law at the MIC could be either base on the international investment treaty signed between the parties or to go through the International Centre for Settlement of Investment Disputes (ICSID) model and allow the contracting parties to choose their applicable law, which can be domestic law of the party.[118] The latter situation is not, as such, problematic from the point of view of international law or international investment practice, but can become a future deadlock from the EU law autonomy point of view. In 2020 UNCITRAL Working Group III on Investor-State Dispute Settlement Reform, suggested to include both existing and future investment treaties within the jurisdiction of MIC.[119] On the one hand, this could relax the possible excessive burden of launching massive amendments to bilateral investment treaties, however, this could give rise to issues of applicable law, including interpretations of such applicable law.

In particular, EU Member States individually have more than 1300 Bilateral Investment Treaties (BIT) in force with non-member states. Those BITs have been concluded in different periods of time and are regulated by different methods. For example, the BIT between Spain and Ukraine provides that the arbitration would be based on the provisions of the present agreement, the national law of the party where the investment was made, including the rules regarding conflicts of laws, and the rules and principles universally recognized by International Law.[120] The fact that some BITs between EU Member States and third countries provide for solving disputes arising between the parties based on domestic laws, puts the EU law, which is integrated into the domestic legal orders of the Member States, under the assessment of the MIC. This could amount to an unacceptable interference into CJEU's exclusive sphere by MIC. Thus, the European Commission will need to ensure that the CETA-model of safeguards are in place in the agreement

[117] General Assembly, United Nations Commission on International Trade Law Working Group III (Investor State Dispite Settlement Reform), Possible reform of investor-State dispute settlemet (ISDS) Multilateral instrument on ISDS reform of 16 January 2020 A/CN.9/WG.III/WP.194 documents-dds-ny.un.org. See also General Assembly, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform, Possible reform of investor-State dispute settlement (ISDS) Appellate and multilateral court mechanisms of 29 November 2019 A/CN.9/WG.III/WP.185 documents-dds-ny.un.org.

[118] International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 18 March 1965 art. 42: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".

[119] Possible reform of investor-State dispute settlement (ISDS) Multilateral instrument on ISDS reform cit. 6.

[120] Acuerdo para la Promocion y Proteccion Reciproca de Inversiones entre Espana y Ucrania of 5 May 2000 art. 11(3), www.boe.es.

establishing MIC. CETA standard on applicable law must be observed. In particular, EU law should not be the applicable law in any case, except being assessed as a matter of fact, without its meanings becoming binding on the EU. The treaty establishing the Multilateral Investment Court should consider all the risks connected to the interpretative mandate of the Court and provide for clear and precise delimitations in order to exclude the overlaps with domestic legal orders.

Another possible issue is compliance with the European standard of judicial independence and fairness. Firstly, the EU has the obligation to promote its values through its external actions,[121] including the rights and values enshrined in the Charter of Fundamental Rights of the EU. Art. 47 of the Charter provides for a right to an effective remedy and to a fair trial.[122] The biggest shift from the ISDS was, of course, the amendment of the appointment procedure of the judges, which made the international dispute settlement more democratically legitimate but also more state – rather than investor-friendly. The standards of independence of the Court is already included as one of the objectives of the reform. It is provided that the judges will be subject to "stringent requirements regarding their qualifications and impartiality" and that they will be appointed according to "an objective and transparent process".[123] There is no clarity around the exact procedure of appointment and the requirements, but it can be deduced that those requirements will not fall below the standards already set by CETA ICS. Also, given that it is an international court, the judges will most definitely be appointed by the member states or a committee composed of the representatives of the member states. Given this one-sided appointment approach the independence and impartiality of the judges would be needed to be reinforced with additional guarantees that are found in the Commission proposal "appointed for a fixed, long and non-renewable period of time".[124] This will decrease the dependency of the judges on the states. This reform also marks a shift from traditional arbitrational confidentiality to judicial transparency. With the appointment of judges and a strict court system, as well as the principle of transparency and uniform and accessible case-law, the loss of confidentiality principle would become one of the major prices to pay for this *reform*. Although, the Court was quite tolerant with its approach towards the CETA judicial structure, the designing of the MIC judges should be done without any "future commitments" from the establishing parties.

[121] Treaty on the European Union, arts 3(1) and 3(5).

[122] Charter of Fundamental Rights of the European Union [2012] art. 47: "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".

[123] Recommendation for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes cit. para. 9.

[124] *Ibid*.

Apart from legal challenges, the establishment of MIC seems to also face some political and geopolitical challenges. An establishment of a certain type of world court supposes a global consensus. It is true that the EU and its Member States are the pulses of the global foreign investments comprising the biggest investing and investment hosting market, with the Members States having 1400 out of 3000 international investment treaties in force worldwide.[125] Does it, however, have sufficient global legitimacy? What about other big economies, like China, Japan, India, Russia and the US? The second biggest investor across the Atlantic, which has long opposed even the WTO Appellate Body, has been clear of its position on the possible establishment of MIC, especially the idea of having an appeal mechanism with wide interpretative powers.[126] Furthermore, the withdrawal of the US from the compulsory jurisdiction of the International Court of Justice after the Nicaragua case and its general stance on the continuous undermining of the primacy of international legal order,[127] casts some doubts on the effectiveness of this initiative.

In conclusion, the Multilateral Investment Court is yet to be transformed from idea into a concrete plan and finally a reality. A multilateral solution, whatever the form it might take, could result in increased substantive coherence, legal certainty and consistency, complete institutionalization and legitimacy of judgments. The establishment of such a court however contains some risks of overlapping with the functions of the EU supreme court unless there are precise delimitations on the jurisdiction of the MIC.

V. Conclusion

The legal aspects of the external relations of the EU are complex. This complexity is fuelled by external and internal constitutional issues. The EU is a living organism and thus is not only shaped by the Treaties, but also by the dynamic interpretations of the CJEU. From *Van Gend en Loos* to Opinion 1/17, from the first to the last episode of the autonomy saga to date, much has changed. Firstly, the Union has acquired and applied its increasingly growing competences in different areas of international law. The global emerging economic interconnections pushed the EU to act faster and more effectively as a single entity and enter into comprehensive trade relations for the survival of its own internal market. This changed the evolving perceptions about the autonomy of the EU legal order from *dissociation* from the international law to harmonious *interconnection* with it. In order to secure the latter, the EU has proactively launched a tremendous global investment

[125] European Commission Concept Paper of 5 May 2015, Investment in TTIP and beyond – the path for reform 1 trade.ec.europa.eu.

[126] K Hughes and P Blenkinsop, 'U.S. Wary of EU Proposal for Investment Court in Trade Pact' (29 October 2015) Reuters www.reuters.com.

[127] SD Murphy, 'The United States and the International Court of Justice: Coping with Antinomies in the United States and International Courts and Tribunals' (2008) George Washington University Law School, GW Law Faculty Publications and Other Works scholarship.law.gwu.edu.

governance reform agenda to democratise and legitimise the international dispute settlement methods. In light of those developments, Opinion 1/17 became a new milestone of the interplay between international legal order and EU law.

The legal value of Opinion 1/17 is multidimensional, but above all, it is a statement by the EU's top court that the concept of autonomy of EU law is not an immovable shield if there are enough guarantees in place to ensure the uniformity and immunity of EU law from external impact. The opinion demonstrated how the Court has modulated its understanding of autonomy of EU law, by further elaborating its limits in order to accommodate the investment court system and boost the EU's ISDS reform efforts. The impact of Opinion 1/17 can be translated into four main points:

a) Investment reforms as "Good Law": The question in front of CJEU was not simply whether this new mechanism is consistent with the principle of autonomy as developed by the Court. It was rather deep and multifaceted bringing the entire reform agenda under question. Opinion 1/17 acknowledged that CETA is a *"good law"* that can potentially be applied in other international investment agreements of the EU. The Court gave its blessing for the EU initiated massive reforms of the global governance system of international investments. Beyond investment, this mechanism can become a standard acceptable model for other areas too. It must be noted that the death of CETA Investment Court System would also be the death of the whole ambitious global investment governance reforms including the establishment of Multilateral Investment Court, and another step away from EU's obligation of contributing to the development of international law.

b) International dispute settlement mechanisms can be EU autonomy-friendly: The core of this case concerned the difficulty of reconciling the principle of autonomy with EU's participation in international dispute settlement mechanism. This issue has increasingly become pressing with CJEU's recent case-law, in particular Opinion 2/13, *Achmea* judgment. After the autonomy-loyal saga of cases, in Opinion 1/17 the Court demonstrated a more flexible and tolerant approach towards an international dispute settlement mechanism. Should this be considered as disloyalty or inconsistency vis-à-vis its own reasoning? The answer lies in the characteristics of CETA Investment Court System. As noted by the Court, the specific features and the unique hybrid nature of the CETA ICS allows us to distinguish it from other international dispute settlement mechanisms previously analysed by the CJEU. Due to the proactivity of the European Commission from the early stages of negotiation, it became possible to ensure that the International Investment law and the model of the dispute settlement in CETA comply with the Court's exigencies of autonomy. In other words, the EU was able to transform the international investment arbitration in a way to adjust to its constitutional architecture. And this approach was praised by the Court.

c) Softening principle of autonomy of EU law through "as a matter of fact" doctrine and guarantees for the right to regulate: For the first time in history the CJEU explicitly drew the dividing line between what is acceptable and what is not in terms of immunity of EU law.

The Court found that the EU can be bound by the decisions of the international arbitration tribunal *as a matter of fact*, but not as a matter of law. Since the guardian of EU rule of law is the CJEU, therefore, the interpretation and application of EU law should stay autonomous from international law. However, a question that arises is where is the boundary in practice? Should several decisions of the arbitration tribunal regarding certain facts implicitly foster qualitative changes in terms of EU law? These are all hypothetical risks which will become clearer once CETA ICS functions. As for the other condition, the Court ruled that the sovereign right to regulate in the public interest must be secured in order for the international dispute resolution mechanism to be compatible with the EU's autonomy at the same time allowing EU law of general interest to be examined by CETA Tribunals as a matter of fact.

d) Multilateral Investment Court: Opinion 1/17 does not provide legal analysis on the question of the interrelation of the MIC legal order with the EU law. However, the reasoning of Investment Court System was an implicit green light to the future establishment of MIC. The main possible obstacles on the way of its creation, according to the analysis of this *Article*, are the framework of applicable law, independence of judiciary and the lack of geopolitical legitimacy. Firstly, the applicable law for the disputes at MIC, the nature of its decisions and its interpretative powers would be the first aspects CJEU will be referred to review in case a question of compatibility of the MIC with the EU legal order is challenged. The issue is even more complex, given that each BIT has its own established applicable legal framework, and a vast number of BITs between Member States and third countries mention the domestic law as the applicable law. Secondly, the political will to grant the MIC judges the highest possible guarantees of independence and impartiality found in the proposal of the European Commission is yet to turn into reality. Given that this issue also remains unfinished for the interim investment governance mechanism of ICS, regardless of the "tolerant" position of the CJEU towards CETA ISDS, the lack of clarity around the exact framework could become a critical setback to this court system and the entire reform agenda. Finally, proposed by the EU, a world investment court would not be efficient and serve its global purpose unless it is upheld by the major investment actors. The current lack of global political legitimacy, namely the opposition by the United States, and the crisis of multilateral governance could constitute a major obstacle for the establishment of the Court.

After the recent cases of protecting the principle of autonomy of EU law, Opinion 1/17 became a turning point in the legend of autonomy of the EU law. The Court did not give precedence to international law over EU law in a broad sense. It rather modulated its well-known creation – autonomy of EU law – to accommodate the Commission's carefully designed CETA Investment Court System. Nevertheless, by saving CETA ICS, the Court elaborated what kind of model of international dispute settlement mechanism it considers to be safe and compatible. By this move it saved the principle of autonomy of

EU law from a gradual petrifaction. An opposite outcome would have had serious consequences on European and global levels. It could give wrong signal about the lack of EU internal unity, question the international reputation of the EU, as well as cease the process of EU initiated ISDS reforms.

The implications of Opinion 1/17 go beyond Investment Court System and even international investment law. By passing CJEU's heavy test of autonomy, CETA Investment Court System has become a conciliated model of interplay between international legal order and the EU law. It means that now international dispute settlement mechanisms have to comply with CETA standards in order to be greenlighted by the CJEU. This is a reminder that Opinion 2/13, *Achmea* case and the rest of the autonomy saga should not be overestimated. In fact, it became a step to reverse the growing criticism towards the Court being rather "protectionist".