ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

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INVESTMENT COURT JUDGES AND THE "RIGHT TO AN INDEPENDENT TRIBUNAL": AN ASSESSMENT OF THE QUALIFICATION AND ETHICS RULES IN EU FTAS IN LIGHT OF OPINION 1/17

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ABSTRACT: This *Article* examines an often overlooked aspect of Opinion 1/17 issued by the Court of Justice of the European Union (CJEU): the ethics and qualifications of the new CETA adjudicators. The subject was raised as an additional concern by Belgium in the context of its request for an opinion from the CJEU. More specifically, Belgium asked whether the prospective ethics and qualifications framework applicable to the newly-established investment tribunal members was compatible with the EU legal order, in particular the right to access an independent tribunal, enshrined under the EU Charter of the Fundamental Rights. After laying forth the provisions contained in the CETA, as well as the EU – Vietnam and EU– Singapore Investment Protection Agreements (IPAs), the *Article* analyses the Opinion text in juxtaposition with the legal ethics rules, found in treaties or guidelines worldwide, governing the domain of international adjudicator ethics. The *Article* in particular flags some controversies linked to the Court's analysis of the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration and its (now suspended) referral in the CETA text in connection with the ethics framework governing international judges.

KEYWORDS: international arbitration – European Union – Canada – independence – impartiality – ethics.

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I. Introduction

This *Article* examines the ethics rules and Codes of Conduct as included in the Comprehensive Economic and Trade Agreement between Canada and the European Union (EU) (CETA)[1], the EU – Vietnam Investment Protection Agreement (EUVIPA)[2], as well as the EU – Singapore Investment Protection Agreement (EUSIPA – hereinafter collectively referred to as the "Agreements")[3] in the light of recent Opinion 1/17[4] of the Court of Justice of the European Union (EU). First, it lays forth the provisions in these agreements. In order to avoid repetition, the *Article* generally refers to relevant provisions of CETA, then compares the similarities and differences in EUVIPA and EUSIPA. It juxtaposes the principles and implications contained in these new Agreements with the arguments raised by Belgium and the CJEU in the context of the latter's Opinion 1/17. The primary issue attached to the ethics and qualifications of prospective Investment Court System (ICS) judges relates to whether the establishment of an investment court complies with the fundamental right to access to an independent tribunal.[5] The *Article* ultimately assesses whether the ethics rules and qualification requirements are sufficient to guarantee this right, particularly noteworthy as an issue raised by Belgium with its request for the Opinion and subsequently addressed by the Court in its Opinion 1/17.

It also takes into account the recent proposal submitted by the European Commission to the Council with regard to a new Code of Conduct for CETA, overriding the earlier structure largely relying on the International Bar Association (IBA)'s Guidelines (which highlight arbitrators, and not judges, as adjudicators).[6] While Opinion 1/17 was indeed rendered in connection with the CETA framework only, the structure laid forth below demonstrates that seemingly similar, if not identical, considerations have been driving the making of each Code of Conduct, in their projected final versions. Most conclusions reached by the CJEU while answering the question of access to an independent tribunal *vis-à-vis* the framework established under CETA will therefore apply to EUVIPA and EUSIPA by analogy, due to near-identical provisions in each of these agreements.

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

[2] EUVIPA Council Decision (EU) 2019/1096 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 1-2.

[3] EUSIPA Council Decision (EU) 2018/1676 of 15 October 2018 on the signing, on behalf of the European Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part 1-2.

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

[5] This right was enshrined in art. 47 of the Charter of Fundamental Rights of the European Union [2012] (hereinafter Charter).

[6] International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (IBA 2014), hereinafter IBA Guidelines.

II. Provisions on ethics and qualifications of adjudicators in the New Generation FTAs

II.1. CETA, EUVIPA and EUSIPA: what is across the board?

A "Tribunal" is established pursuant to art. 8.27 of CETA. In subsequent paragraphs, the provision further stipulates that fifteen "Members of the Tribunal" shall be appointed ex ante. Its para. 4 notes that "the Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements".[7]

Art. 8.30, entitled "Ethics", lists a number of features and qualifications that must be possessed by the Members of the Tribunal. According to the first paragraph of this article, the Members

> "[...] shall be independent. They shall not be affiliated with any government. They shall not take instructions from any organisation, or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted [...] In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement".[8]

Art. 3.9 of the EUSIPA similarly regulates the constitution of a first instance tribunal.[9] Para. 4 outlines the qualifications required from the Members of the Tribunal: *a)* they shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence; *b)* they shall have specialized knowledge of, or experience in, public international law; and that *c)* it is desirable that they have expertise, in particular, international investment law, international trade law, or the resolution of dispute arising under international investment or international trade agreements.[10]

[7] Art. 8.27(4) of CETA cit.
[8] *Ibid*. art. 8.30.
[9] Art. 3.9 of EUSIPA cit.
[10] *Ibid*.

Finally, except for minor wording differences[11] and two distinct elements under the Ethics provision, the corresponding arts in EUVIPA (3.38[12] and 3.40[13]) are identical to that in CETA.[14] One possibly important divergence between the two agreements is that whereas CETA only refers to "this or any other international agreement" excluding investment disputes under domestic laws of the EU and Canada, EUVIPA bars the Members to act "as counsel or party-appointed expert or witness in any pending or new investment dispute" both in international and domestic law. Another difference is that EUVIPA requires that its Members comply with the Code of Conduct under Annex 11 and not the IBA Guidelines or a similar set of rules.

II.2. Codes of conduct in the Agreements

As indicated, the Agreements contain either referenced (external sets of rules) or integrated (treaty annexes) Codes of Conduct for its Members. Up until the proposal submitted by the European Commission concerning the adoption of a new Code of Conduct in October 2019, the CETA only contained a reference to the IBA Guidelines instead of a dedicated Code of Conduct.[15] While this is no longer expected to be the case, Opinion 1/17 predates the October 2019 proposal and therefore addresses the IBA Guidelines as the CETA Code of Conduct. The IBA Guidelines are soft law instruments that can be adopted voluntarily by disputing (or contracting) parties as General Standards (GS) to regulate the conduct of arbitrators. In its standard text,[16] each GS is accompanied by an "Explanation" that elaborates on the content and meaning of the said GS.

At first glance, the IBA Guidelines appear to be more detailed in comparison with the Code in the EUVIPA and the proposed Code for the CETA. Under the explanation of the GS 2 concerning the conflicts of interest and situations in which an arbitrator's impartiality and independence is in question, it expressly offers a definition for "impartial" and "independent" by way of referring to art. 12 of the UNCITRAL Model Law.[17] The GS 2 further explains that doubts regarding the impartiality of an arbitrator "are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances,

[11] One such difference is that whereas EUVIPA requires "independence beyond doubt", CETA refers to "independent".

[12] Art. 3.38 of EUVIPA cit.

[13] *Ibid*. art. 3.40.

[14] They differ with regard to the number of appointed judges, as well as their terms; however, the predetermined qualification requirements stated under art. 8.27(4) is identical to those under art. 3.38(4) EUVIPA cit.

[15] European Commission, News of 11 October 2019 Commission presents procedural proposals for the Investment Court System in CETA, trade.ec.europa.eu; IBA Guidelines cit.

[16] *Ibid*.

[17] Art. 12 of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter UNCITRAL Model Law) [2006].

would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case".[18]

The GS refers to non-exhaustive lists of conflicts of interests, such as the 'Non-Waivable Red List' annexed to the IBA Guidelines, which illustrate situations where the conflict of interest is so substantial that the parties cannot allow the arbitrator who fits one of these situations to perform as an adjudicator.[19] The list, *inter alia*, includes the following situations: (a) "the arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity"; (b) "the arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case"; and (c) "the arbitrator or his or her law firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her law firm derives significant financial income therefrom."[20] The Guidelines also contain another list of conflict of interests (Waivable Red List), but those that can be overlooked by the parties if they so wish. The IBA Guidelines aim to capture possible specific situations, possibly in an attempt to address what its drafters may have perceived as common or conceivable situations in international economic disputes.[21]

The GS 6, entitled "Relationships", brings an interesting angle to these rules by asserting that

> the arbitrator is in principle considered to bear the identity of his or her law firm, but when considering the relevant of facts or circumstances to determine whether a potential conflict of interest exists, or whether disclosure should be made, the activities of an arbitrator's law firm, if any, and the relationship of the arbitrator with the law firm, should be considered in each individual case. The fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict [...][22]

The GS 6 does not only recognize the possibility that the arbitrators (or in the context of the CETA, the Members of the Tribunal) could be lawyers affiliated with law firms. It also specifically notes that the existence of such affiliation (even with a law firm whose activities involve one of the disputing parties) cannot be considered as a *prima facie* conflict of interest. This acknowledgment has also been clarified in the Explanation for the GS 6, which observes (largely from an arbitral perspective) that "[t]here is a need to balance the interests of a party to appoint the arbitrator of its choice, who maybe a partner at a large law firm, and the importance of maintaining confidence in the impartiality and

[18] GS 2 of IBA Guidelines cit.

[19] The reference to "Non-Waivable" refers to parties' ability to waive any conflict of interest present for an arbitrator. Likewise, the IBA Guidelines also include a list of "waivable" situations, which can be overlooked by the parties, if they give mutual consent.

[20] GS 2 of IBA Guidelines cit.

[21] This goal is express in the part II of the IBA Guidelines, entitled "Practical Application of the General Standards".

[22] GS6 of IBA Guidelines cit.

independence of international arbitrators [...] the activities of the arbitrator's firm should not automatically create a conflict of interest."[23]

The connection with other applicable rules, provisions and clarifications, such as the Non-Waivable Red List in the IBA Guidelines and art. 8.30 of the CETA is also noteworthy. Pursuant to all rules and standards regarding qualifications and eligibility of a Member of the Tribunal, Members who are affiliated with law firms should be able to maintain their relationship with their law firms, provided neither the Member nor their law firm regularly advises one of the disputing parties and extracts a significant financial gain (the Non-Waivable List). They must also not be acting as counsel, witness or expert under any other investment dispute.[24] Under these principles, as long as the Member is not personally involved, the affiliated law firm would be able to continue advising or otherwise working on other investment disputes. This being said, the Members, notwithstanding the existence of any affiliation with a law firm, would have to ascertain at all times that they are not involved, at any capacity, in the consideration of any other dispute that could potentially affect their impartiality or independence.

In comparison with the EUVIPA, EUSIPA and the proposed CETA Codes, the IBA Guidelines provide for a more (arbitrator-)specific framework, and clarify a few potential interpretative deadlocks by contextualizing notions. It expressly acknowledges that lawyers, in their practice, might assume multiple roles as counsel, experts, and adjudicators. It is noteworthy that the parties to CETA, by refraining from introducing any modifications or reservations to these 'arbitration-centric' guidelines *vis-à-vis* the new Tribunal put in place, had arguably considered it acceptable that the Members may continue their private practice during their term as appointed Members, subject to abovementioned conditions. Such express recognition and clarifications regarding "double-hatting"[25] does not exist under the EUVIPA and EUSIPA frameworks, and such affiliation *per se* with any law firm could, at least theoretically, serve as a basis for any disputing party claiming that the Member is biased, partial, or has the appearance of such.

Following the prospective adoption of the new Code proposed by the Commission, CETA will reaffirm its original, narrow reading of what kinds of "double-hatting" could be permitted. The current reference to the IBA Guidelines will be replaced by the CETA Code of Conduct, effectively replacing the elaborative framework applicable to issues such as disclosure obligations, independence and impartiality, as well as conflicts of interest. According to the Commission, the Code includes in particular

[23] *Ibid*. Explanation to GS6.

[24] Art. 8.30 of CETA cit.

[25] For a recent empirical analysis of double-hatting in investment arbitration, a phenomenon explained as "individuals [acting] sequentially and [...] simultaneously as arbitrator, legal counsel, expert witness, or tribunal secretary", see M Langford, D Behn and R Lie, 'The Revolving Door in International Investment Arbitration' (2017) JIEL 1.

> "detailed rules of conduct applicable to candidates for appointment [...], in particular concerning of disclosure of their past and current activities [...]; detailed rules of conduct applicable to members [...] during [and] at the end of their term of office, including the prohibition of the exercise of specific duties or professions for a specified period after the end of their term of office; a sanction mechanism in the event of non-compliance with the rules of conduct which is effective and fully respects the independence of judicial power".[26]

As alluded to above, the proposed Code of Conduct is comparable to those of EUVIPA and EUSIPA. All Codes, *inter alia*, state that members shall be independent and impartial (in CETA Code, they shall also "appear to be independent and impartial"); shall avoid direct and indirect conflicts of interest; they shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party or fear of criticism. They all prohibit members of their respective tribunals to incur any obligation and accept any benefit that would in any way interfere, affect or appear to affect their independence and impartiality. The CETA Code additionally notes that members shall not "enter into any relationship, or acquire any financial interest" in this regard.[27] CETA proposal does not include the abovementioned provision in EUVIPA concerning the members using their position "to advance any personal or private interests", and instead specifically refers to financial interests as noted above. Furthermore, the new Code denotes that the members "shall not engage in *ex parte* contacts concerning the proceeding."[28]

III. Opinion 1/17 and the Ethics and Qualifications of Members of ICS Tribunals

III.1. The Issues Raised by Belgium

On 7 September 2017, the Kingdom of Belgium made a request for an opinion, submitted to the Court. The request was as follows: "Is Section f ('Resolution of investment disputes between investors and states') of Chapter Eight ('Investment') of the [CETA] compatible with the Treaties [TEU[29] and TFEU[30]], including with fundamental rights [emphasizing the Charter of Fundamental Rights of the EU]?"[31]

[26] Communication COM(2019) 459 final from the Commission of 11 October 2019 on the position to be taken on behalf of the EU in the Committee on Services and Investment established under CETA 2.

[27] art. 4 of CETA (Code of Conduct) cit.

[28] *Ibid*.

[29] Treaty on European Union (TEU) [2009].

[30] Treaty on the Functioning of the European Union (TFEU) [2009].

[31] Opinion 1/17 cit. para. 1; Kingdom of Belgium Foreign Affairs, Foreign Trade and Development Cooperation *Minister Reynders submits request for opinion on CETA* (6 September 2017) diplomatie.belgium.be.

The request articulates a number of doubts expressed by Belgium. The first and foremost issue is unsurprisingly the question of "compatibility of the envisaged ISDS mechanism with the autonomy of the EU legal order",[32] a subject comprehensively dealt with in this Special Section. There have been no issues raised regarding the rules of ethics and qualifications applicable to the members of the ICS tribunals *vis-à-vis* the *autonomy* of the EU legal order *per se*. The request made by Belgium generally maintains that the Court "has exclusive jurisdiction over the definitive interpretation of EU law", and therefore binding interpretations by an external court or adjudicatory organ is considered a potential threat to the EU's legal autonomy. At its core, the Opinion concerns the prospective adjudicatory activities conducted by the tribunal members themselves. However, none of the primary arguments on the autonomy of the EU legal order relate to the ethics or qualifications of the appointees. Instead, the doubts raised by Belgium concern the rules on ethics and qualifications under the "right of access to an independent tribunal" – a principle enshrined under art. 47 of the Charter.[33] This *Article* (and this Section in particular) will therefore only focus on the impact of the rules on ethics and qualifications of tribunal members as addressed exclusively under Section III.C of the Opinion entitled 'Doubts as to the compatibility of the envisaged ISDS mechanism with the right of access to an independent tribunal'.

Belgium put forth several arguments as to how the CETA framework might hinder the right of access to an independent tribunal. First argument relates to the difficulties of accessing the CETA Tribunal due to the distribution of fees and expenses related to disputes excessively burdening small and medium-sized enterprises.[34] The Court stipulated that "[T]he risk of being obliged to bear the entire costs in expensive proceedings might, according to the Kingdom of Belgium, deter an investor that has only limited financial resources from lodging a claim."[35] Second, Belgium raised a few concerns regarding the method and procedure of remuneration for judges.

It argued that the facts that a) the CETA Joint Committee, as a so-called executive entity, was to decide on remuneration conditions might put the compatibility of the applicable rules "with the principles applicable in relation to the separation of powers", and b) ICS judges would be paid a 'monthly retainer fee' depending on the number of working days dedicated to a dispute (as opposed to a fixed salary) might fail to "shield [the judges] from pressures aimed at influencing their decisions."[36]

Belgium raised a third set of concerns with regard to the appointment and removal of judges. Belgium remarked that appointments made by an executive "must necessarily take place following a recommendation by an independent authority", and that "any decision to remove a judge must involve an independent body, be given in accordance with

[32] *Ibid*. para. 46.
[33] Art. 47 of the Charter cit.
[34] Opinion 1/17 cit. para. 57.
[35] *Ibid*. para. 59.
[36] *Ibid*. para. 61.

a fair procedure that respects the rights of defence, and be open to an appeal before a higher judicial body."[37]

Finally and most importantly for the purposes of this *Article*, Belgium expressed further doubts with regard to the fact that judges "will have to comply with the IBA Guidelines, pending the adoption of a code of conduct".[38] Belgium further stipulated that "since the IBA Guidelines are intended for arbiters and not for judges, they may contain standards of independence that are not adapted to those acting in a judicial capacity."[39]

III.2. The Court's Opinion

The Court eventually delved into the question of whether the envisaged 'ISDS mechanism' was a) "judicial in nature and that are called on to resolve disputes between [...], in particular, private investors and States", and b) compatible with the right to access to an independent tribunal in light of the request and subsequent submissions outlined above. Indeed, since art. 47 of the Charter will only apply to *judicial* organs, the Court's categorization of the CETA Tribunal as such is of utmost importance.[40] As the first order of business, the Court asserted that the EU "must ensure [that] the tribunals that are established [pursuant to CETA] will [...] have characteristics of an accessible and independent tribunal."[41] According to the Court, notwithstanding the Parties' classification of the CETA Tribunal as judicial or arbitral in nature, "those tribunals will [...] exercise judicial functions."[42] This being said, despite its categorization of the CETA Tribunal as a judicial organ for the purposes of the applicability of art. 47, the Court acknowledges that many rules and procedures contained in CETA in fact build upon the arbitral framework. It distinguishes this framework from the old one in connection with the appointment and permanency of its adjudicators, called "judges". On this point, the Court also seems to emphasize on the 'judges' and their

[37] *Ibid*. para. 64-65.

[38] *Ibid*. para. 67. It was known in advance that eventually, IBA Guidelines would be replaced.

[39] *Ibid*. para. 68.

[40] EU law guarantees right to an effective remedy and to a fair trial before a *court*. Whether or not an adjudicative body qualifies as a 'tribunal' (and is therefore subject to art. 47 of the Charter) depends on whether it is a) established by law, b) permanent, c) independent and impartial, d) include an *inter partes* procedure, e) have compulsory jurisdiction, and f) apply rules of law. See, Explanations Relating to the Charter of Fundamental Rights; European Union Agency for Fundamental Rights and Council of Europe, *Handbook of European law relating to access to justice* (January 2016, Luxembourg) 30; Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta v Autoridade Tributária e Aduaneira* ECLI:EU:C:2014:1754; Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* ECLI:EU:C:1997:413 para. 23.

[41] Opinion 1/17 cit. para. 191.

[42] *Ibid*. para. 197.

exercise of 'judicial functions', and the task of applying "rules of law", exercising "their functions autonomously and will issue decisions that are final and binding."[43]

The Court then contended that for CETA to be deemed compatible with the right to access to an independent court, it should give "complete confidence to the enterprises and natural persons of a Party that they will be treated [...] 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."[44] It is further added that "the independence of the envisaged tribunals [...] and the access to those tribunals for foreign investors are inextricably linked to the objective of free and fair trade [...] pursued by the CETA."[45]

After elaborating further on the accessibility of the CETA tribunals, the Court eventually focused on the independence of the envisaged dispute settlement framework *vis-à-vis* the aforementioned right to access to justice. It distinguished between what it called "the external aspect" of independence, whereby a judge is expected to be free from outside influence; as well as "the internal aspect", whereby a judge is expected to have "an equal distance" from the parties as well as their interests.[46]

For the external aspect, the Court pointed out that the CETA text ensures that the judges are appointed for a fixed term, that they have specific expertise, and that they will receive a remuneration corresponding to the importance of their duties. It further noted that the removal of judges, pursuant to the CETA, can be relevant only where a member's behaviour "is inconsistent with the obligations [set out in CETA], in particular the prohibition of taking instructions or being in a position of conflict of interest."[47] Same guarantees exist for the appeal tribunal.

[43] *Ibid*. para. 197. The Court further deems the jurisdiction of CETA tribunals "compulsory" for the respondent as well as the claimant, only if the latter choose to rely on the provisions on CETA (paras 90 and 198) While the CETA tribunals are surely not arbitral tribunals, the *ratione voluntatis* or the so-called voluntary jurisdiction, largely emulates arbitration and its consent-based formation. In many IIAs, states indeed consent to arbitration and specific *fora*. However, this is not sufficient for establishing jurisdiction – let alone declaring that CETA has compulsory jurisdiction *as is*. Therefore, there is no jurisdiction whatsoever until the claimant, in this case foreign investor, chooses to bring a claim against the host state, agreeing to the jurisdictional "offer". This contrasts an inter-state international court, where states accept jurisdiction of a court *vis-à-vis* disputes among themselves from the outset, thereby "completing" the *voluntatis* cycle. As noted elsewhere in detail, there is no jurisdiction without the submission of a foreign investor at all. Thus, deeming the CETA tribunals as having "compulsory" jurisdiction calls for further qualification of such statement. It surely can have compulsory jurisdiction when the parties both consent to it, however, there is no standing compulsory jurisdiction without a claim. UNCTAD, *Dispute Settlement: International Centre for Settlement of Investment Disputes, Consent to Arbitration* (United Nations 2003) unctad.org 5.

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

[45] *Ibid*. para. 200.

[46] The internal and external aspects of independence is well-embedded in the Court's practice. See, Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 paras 43-44; Case C-216/18 *PPU Minister for Justice and Equality v LM (Deficiencies in the system of justice)* ECLI:EU:C:2018:586 paras 63-65; Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531 paras 71–73.

[47] Opinion 1/17 cit. para. 225.

The Court generally examined the CETA Joint Committee, its role as an "executive" and whether any of its tasks, prescribed under the CETA, undermines the "external" independence (*inter alia*, independence from the CETA parties). The Court found what while the CETA Joint Committee "has the power to adopt, by mutual consent, decisions that are binding, such as [...] decisions on the interpretation of that agreement [...] without any breach of the requirements under art. 47 of the Charter and, in particular, the requirement of independence."[48] These decisions are equated with art. 31(3) of the Vienna Convention, which stipulates that while interpreting an international treaty, attention should be given to "any subsequent agreement between the parties".[49] Ultimately, it finds nothing that might hinder this external independence within the framework of the CETA Joint Committee's tasks and powers. This is immediately followed by a caveat: "it is important [...] that interpretations determined by the CETA Joint Committee have no effect on the handing of disputes that have been resolved or brought prior to those interpretations. If it were otherwise, the CETA Joint Committee could have an influence on the handling of specific disputes and therefore participate in the ISDS mechanism."[50]

The next point of elaboration in the Opinion was the "internal aspect" of the requirement of independence, "in particular impartiality".[51] The Court emphasized that an equal distance to the parties of the dispute as well as the absence of any interest in the outcome of the proceedings of the dispute has to be maintained. By reference to three-member panels (one from each Contracting Party, and one from a third country), as well as the IBA Guidelines' requirements on impartiality and independence, the Court dismissed Belgium's concerns on whether the mode of payment, a retainer's fee as opposed to a regular salary, could hinder the impartiality of the members of the CETA Tribunal.[52]

Other concerns, such as those related to government payments to Tribunal members, were also addressed. The Court eventually concluded that Members "who receive remuneration from a State but are not however involved [...] in the determination of the policies of the government of that State" should be eligible to act as members without any repercussions or risk of removal, such as professors at public universities.

Before eventually ruling that "the agreement envisaged [CETA] is compatible with the requirement of independence", the Court briefly refers to the IBA Guidelines and the fact that they provide guidance and rules on personal interests with regard to the outcome of

[48] *Ibid*. para. 234.

[49] Art. 31(3) of the Vienna Convention on the Law of Treaties (1980).

[50] Opinion 1/17 cit. para. 236. The issue of *ex post* clarifications provided by treaty parties has stirred immense controversy, particularly in the context of the July 2001 Notes of Interpretation issued by the North American Free Trade Agreement (NAFTA) Free Trade Commission while arbitrations directly relevant to the reaffirmations continued. It was noted that the "reaffirmations" by the states were so fundamental that they effectively constituted amendments. C Brower II, 'Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105' (2005) VaJIntlL 347.

[51] Opinion 1/17 cit. para. 238.

[52] *Ibid*. paras 238-239.

the dispute. Most notably, the Court completely sidesteps the Belgian arguments regarding the compatibility of the IBA Guidelines with judges as opposed to arbitrators, in particular its seemingly generous take on double-hatting and outside activities, as detailed above.

IV. Reflections on the Opinion in light of the agreements' framework

IV.1. Arbitration *versus* a (hybrid) Court

The arbitration-based dispute settlement system embedded within the current IIA network has come under attack in recent years for a variety of reasons. Some of the criticisms include the inconsistency of awards, incoherent interpretations and the consequent unpredictability and uncertainty; excessive curbing effect on states' right to regulate (due to extensive protection granted to foreign investors); the perceived risk of "forum-shopping" activities by foreign investors in order to be covered by an (more favourable) IIA;[53] a general silence on, or the outright lack of, transparency in arbitral proceedings; legal ethics concerning adjudicators, potential conflicts of interests of arbitrators as "double-hatters", and so on.[54] Last but not least, the appropriateness of arbitration itself as the method of settlement of disputes with public interest angles has been a long-running critique of the current framework.[55] Opinion 1/17 itself and the preceding Belgian concerns are consequential off-products of these collective and systemic criticisms and shortcomings, as well as their perceived effect on the EU legal order.

It is in the face of such criticism that the EU has sought to overhaul the ISDS system in favour of an institutionally-grounded and permanent mechanism, as is also evident from its position at the WGIII proceedings with regard to the ICS, and an eventual Multilateral Investment Court (MIC), stemming from its Union-wide foreign investment policy.[56] In a 2017 submission to the WGIII, the Union justified the use of permanent bodies to settle investment-related disputes as follows:

[53] LR Helfer defines "forum-shopping" as follows: "it is not limited to 'an individual petitioner's strategic choice to litigate her claims in one of several available adjudicatory fora', but also 'other consequential choices engendered by the concurrent, overlapping jurisdiction of [...] treaties and tribunals, including attempts by petitioners to litigate identical or related claims in multiple fora at the same time, and attempts to engage in sequential litigation of claims". L Helfer, 'Forum Shopping for Human Rights' (1999) UPaLRev 285; Opinion 1/17 cit. para. 240.

[54] European Parliamentary Research Service, *From Arbitration to the Investment Court System (ICS): The Evolution of CETA Rules* (European Union 2017) 9.

[55] See generally G Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2008).

[56] This policy is part and parcel of the EU's overall position at the Working Group III proceedings, as well as its bilateral negotiations with other countries. In January 2020, in its resumed 38th session, the WGIII extensively discussed issues related to, *inter alia*, a permanent, multilateral investment court and the envisaged appellate body that would be embedded within this court. The EU is one of the strongest proponents of more permanency, and its support for the appellate body stems from the appellate mechanism's perceived role in

> "Permanent bodies, by their very permanency, deliver predictability and consistency and manage the fact that multiple disputes arise, since they can elaborate and refine the understanding of a particular set of norms over time and ensure their effective and consistent application. [...] When appointing adjudicators in a permanent setting, thought is given to a long-term approach. States have an interest that public actions can be taken and at the same time individual interests protected and they know that the balance between these interests is to be maintained in the long term. Permanent bodies with full-time adjudicators also free the adjudicators from the need to be remunerated from other sources and typically provide some form of tenure. This prevents the adjudicators from coming under pressure to take short-term considerations into account and ensures that there are no concerns as to their impartiality".[57]

As a result, the new EU investment agreements, all of which contain a *judicial* mechanism that borrows from both arbitral and international court practice, push for more permanency; and seek to achieve more consistency, accountability, as well as more reflexivity *vis-à-vis* the public and its investment-related concerns. The new Codes of Conduct are the very specific response the European Commission has devised to address these issues. Codes are devised as a moral compass for the adjudicator (as well as other actors such as counsel and experts) and they ensure that the adjudicators conduct their duties independently and impartially. As Rogers observes, "vague, open-ended disclosure standards and informal reputational sanctions are no longer a sufficient substitute for formal regulation"[58] in ISDS, and that the meanings of "independent" and "impartial" have evolved "in response to perceived changes in party expectations and the market for dispute resolution services".[59] Given the shift from *arbitration* to *a more permanent mode of dispute settlement* is a perceived "remedy", it only follows that this shift brings about another shift from *arbitrators* to *judges* as adjudicators[60] – and a recontextualization of these Codes from the judges' perspective is therefore necessary.

While it is crucial to flag these topical debates and public controversies, it must also be noted that Opinion 1/17 does not delve into the question of whether a court, or an arbitration, is more fitting for the settlement of investor-State disputes *vis-à-vis* the authority through which they exercise adjudicatory functions. It simply is not a core element in Opinion 1/17 in its own right, and this general issue was not raised by Belgium outside the context of the impact of an external judicial organ's (the CETA Tribunal) interpretation of the EU law.

bolstering consistent and correct awards. See, UNCITRAL, *Working Group III Submission from the European Union and Its Member States*, A/CN.9/WG.III/WP.159 and Add.1 uncitral.un.org.

[57] UNCITRAL, Working Group III (WGIII), Submission from the European Union Possible reform of investor-State dispute settlement (ISDS) of 12 December 2017 undocs.org.

[58] C Rogers, *Ethics in International* Arbitration (Oxford University Press 2014) 60.

[59] *Ibid*. 67.

[60] This is a distinction flagged by Giorgetti and Abdel Wahab in their draft working paper submitted to the WGIII Academic Forum in October 2019. C Giorgetti and M Abdel Wahab, 'A Code of Conduct for Arbitrators and Judges' (2019) www.jus.uio.no.

IV.2. ARBITRATORS *VERSUS* "MEMBERS OF TRIBUNAL" (OR JUDGES)

Having explicit Codes of Conduct governing international adjudicators tasked to settle investor-State disputes is a relatively new idea. Generally, one can observe that the current IIA system spanning thousands of treaties does not provide for a comprehensive normative framework on ethics and qualifications on adjudicators. In the absence of such a framework, the Codes of Conduct envisaged in the new EU FTAs represent "an advance in terms of systematization, visibility, transparency and accountability"[61] not only for the adjudicators themselves, but also for the institutional framework constructed around them. The devised Codes of Conduct embedded within the proposed ICS, represents "a rapprochement to highly critical public opinion".[62]

Most Codes of Conduct available to disputing parties, particularly those tailored for arbitration such as the IBA Guidelines and CIArb Code[63], are devised and engineered as soft law instruments, and their application is left at the discretion of the disputing parties. These rules, while different in their exact wording, generally maintain that the adjudicators possess "the required degree of independence and impartiality", both in appearance and in fact.[64]

What this *required* or *expected* degree threshold for independence and impartiality entails for arbitrators on the one hand, and judges on the other, is not immediately clear.[65] The assessment of the independence and impartiality of an adjudicator should take into account whether the adjudicator is, for instance, a practitioner acting as a party-appointed arbitrator, or a government-appointed judge at an international institution. It is uncontroversial that certain requirements applicable to arbitrators and judges overlap; such as not being affiliated to a government, not taking instructions from a disputing party, or not having vested financial interest in one of the parties. Given the source and nature of their adjudicatory authority, what kinds of actions could constitute, at the least, an appearance of impartiality for an *ad hoc* arbitrator and a permanent judge may not always be the same. Over the years, several international courts and arbitration institutions have devised provisions addressing these matters, and they seem to indicate that different thresholds exist for international arbitrators and judges.

[61] K Fach Gomez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (Springer 2019) 191.

[62] *Ibid*. 9.

[63] The Chartered Institute of Arbitrators (CIArb), 'Code of Professional and Ethical Conduct for Members' (CIArb Code) October 2009.

[64] Rule 3 (Conflicts of Interest) of CIArb Code cit.

[65] For a more detailed account of this discussion, see G Ünüvar and T Kreft, 'Impossible Ethics? A Critical Analysis of the Rules on Qualifications and Conduct of Adjudicators in the New EU Investment Treaties' in G Ünüvar, J Lam and S Dothan (eds) *Permanent Investment Courts: The European Experiment* (Special Issue European Yearbook of International Economic Law) (Springer 2020) 119.

For instance, art. 16 of the Statute of the International Court of Justice states that "[n]o members of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature."[66] The subsequent art. 17 notes that "[n]o member of the Court may act as agent, counsel, or advocate in any case."[67] While the Statute does not provide further explicit guidance on what would qualify as such, it is accepted that the judges *a)* must give precedence to their duties as ICJ judges, and *b)* should not accept appointments concerning cases that might be submitted to the ICJ later on.[68] However, seeing it a tradition dating back to the Permanent Court of International Justice, the ICJ had held the view that "a limited participation of Judges in other judicial or quasi-judicial activities of an occasional nature" as well as "occasional appointments as arbitrators" of its judges were not prohibited.[69] This being said, the Court has also asserted that it "will continue to keep under review any questions that may arise of their compatibility of the functions of the judges with the [SICJ] and with their supervening obligations."[70]

According to a November 2017 report by Bernasconi-Osterwalder and Brauch, "at least 7 current ICJ judges and 13 former ICJ judges have worked – or are currently working – as arbitrators [...] [t]hose 20 individuals were appointed at least 92 times, either during or before the start of their ICJ terms, and served as arbitrators in at least 90 cases while sitting as ICJ judges [corresponding to] roughly 10 per cent of all known investment treaty cases".[71] The report further asked whether their "simultaneous role as ICJ judge and arbitrator affect their perceived and actual independence and impartiality", and observed that this practice "appears to entangle the ICJ in situations that undermine its reputation for independence as the highest authority on public international law."[72] This warning seems to have resonated with the Court. In the Seventy-Third Session of the UN General Assembly on October 2018, the President of the ICJ Abdulqawi A. Yusuf said the following:

> "Over the years, the Court has taken the view that, in certain circumstances, its Members may participate in arbitration proceedings. However, in light of its ever-increasing workload, the Court decided a few months ago to review this practice and to set out clearly defined rules regulating such activities. As a result, Members of the Court have come to the decision last month, that they will not normally accept to participate in international

[66] Art. 16 of the Statute of the International Court of Justice (SICJ).

[67] *Ibid*. art. 17.

[68] UN Secretary-General, Report of the Secretary-General Conditions of service and compensation for officials other than Secretariat officials, Members of the International Court of Justice of 2 November 1995, UN Document A/C.5/50/18 () www.un.org paras 31-32.

[69] *Ibid*.

[70] *Ibid*. para. 33.

[71] N Bernasconi Osterwalder and M Brauch, 'Is "Moonlighting" A Problem? The Role of ICJ Judges in ISDS' (2017) International Institute for Sustainable Development (IISD) Commentary 1.

[72] *Ibid*. 5.

arbitration. In particular, they will not participate in investor-State arbitration or commercial arbitration".[73]

While Mr. Abdulqawi refers only to "its ever-increasing workload" while explaining why the Court decided as such, the emphasis on investor-State arbitration and commercial arbitration indicates that these *fora* are now expressly considered to be incompatible with the Court's and its judges' practices, even if they are occasional. Given ICJ judges are expected, at all times, to prioritize their Court duties as opposed to every other professional engagement, the Court has possibly contended that the time dedicated to ISDS cases might in fact curb the time spent on ICJ cases not only going against the long-held conditions by the Court, but also the high quality expected from the ICJ rulings. In any case, it is clear that commercial and investment arbitrations called for specific mention and an explicit and clear stance on the side of the Court. It is possible that the involvement of ICJ judges in investor-State cases bear the risk of creating an impression of bias.

This approach towards "other professional engagements" appears less stringent in some Codes prepared by bar associations or arbitral institutions, applicable to arbitrators. A case in point is the IBA Guidelines outlined above, and it is particularly relevant as it was the principal ethics guideline for the CETA prior to the proposed Code in October 2019. As noted, the IBA Guidelines GS 6 explicitly states that "[t]he arbitrator is in principle considered to bear the identity of his or her law firm" and that "[t]he fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure."[74]

This explanation is a big departure from the conditions applicable to the ICJ judges, who are, as is evident from the recent limitations imposed on them *vis-à-vis* arbitral appointments, expected not to engage in a broad spectrum of extra-Court conduct. They cannot engage in activities of professional nature – let alone being "in principle considered to bear the identity of his or her law firm".

In arbitration, the fact that a selected arbitrator performs other professional, legal or commercial actions is not only permitted, it is a presupposition and often a default acknowledgment found in voluntary texts set to regulate the ethics of these adjudicators. A judge, appointed by the state to an international court, as the ICJ framework exemplifies, not only primarily identifies as a judge of that institution, but is also expected not to take upon any other professional engagements, and their tasks as ICJ judges will always take precedence. This does not mean that parallel professional engagements in case of arbitrators cannot, under any circumstances, create an impression of bias; however, the threshold will arguably be more permissive and accommodating of the fact that arbitrators are ad hoc appointees. A complete detachment from the rest of the legal practice in favour of arbitral appointments, unless prompted by personal motivations, is not an expectation one might

[73] Speech by H.E. Mr Abdulqawi A Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly, 25 October 2018 www.icj-cij.org 11.

[74] GS 6 of IBA Guidelines cit.

have from an arbitrator. Upon this contextual difference, what might constitute "an appearance of impartiality and independence" might differ in case of an arbitrator and an international court judge. More specifically, the fact that an arbitrator works as a lawyer in a law firm is not a *prima facie* violation and does not create an impression of bias or partiality, pursuant to the GS 6 of the IBA Guidelines. An ICJ judge spontaneously working as a lawyer and principally identifying with his or her law firm would arguably create that impression, particularly in light of the recent views on arbitral appointments.

As the CJEU refers to the International Criminal Court (ICC) as an example in its Opinion,[75] a brief look at its framework is also informative. The Code of Ethics for the ICC judges is similarly vague, but it bears the mark of prioritization of its judges' activities at the court. Art. 7, for instance, notes that "[j]udges shall act diligently in the exercise of their duties and shall devote their professional activities to those duties."[76] Art. 10 entitled "Extra-judicial activity" bars judges from engaging "in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the Court, or that may affect or may reasonably appear to affect their independence and impartiality."[77] Furthermore, judges "shall not exercise any political function".[78]

Last but not least, emphasis must be made on the persistence and perpetual relevance of this distinction in international law. The perception of arbitrators *vis-à-vis* judges as international adjudicators have always differed throughout the 21st century. Manley O. Hudson, conducting an early comparison of the Permanent Court of Arbitration and the then-new Permanent Court of International Justice in 1922, observed that fundamental differences exist between arbitral tribunals and international courts. He noted:

> "The Court of Arbitration is 'permanent' in the sense that a panel is always in existence, from which arbitrators may at any time be chosen; the Court of Justice is 'permanent' in the sense that eleven definite judges are always ready to sit, without any necessity of their being specially selected after a dispute arises. [...]In the seventeen cases before tribunals formed from the Permanent Court of Arbitration, there has been a decided tendency for the same persons to be chosen as arbitrators. [...] In the new court, the eleven judges or some of the four deputies will be sitting in every case. The possibility of building up a continuous and harmonious system of international law, therefore, seems more promising through the new court than through the Permanent Court of Arbitration. The essential advantages of "permanence" have at last been achieved".[79]

[75] Opinion 1/17 cit. para. 101.

[76] Art. 7 of the ICC Code of Judicial Ethics www.icc-cpi.int.

[77] *Ibid*. art. 10.

[78] *Ibid*.

[79] MO Hudson, 'The Permanent Court of International Justice' (1923) Advocate of Peace Through Justice 22 24.

These different approaches to rules on ethics applicable to judges and arbitrators assign different public *personae* to arbitrators and judges, and prescribe degrees of restrictions on certain activities, such as double-hatting, to alleviate the professional engagements these adjudicators might pursue. A judge, may it be an international or national judge (notwithstanding the differences between these two groups), differs markedly from an arbitrator with regard to the manner in which it exercises a judicial function, in part due to institutional features attributed to international courts. As Malintoppi observes, "the professional distinction existing on a national level between Bench and Bar has been elevated to the international plane, albeit in a somewhat informal manner."[80] Judges as envisaged under the CETA Tribunal are not party-appointed, and are far more restricted than their arbitrator counterparts handling similar disputes in terms of their extra-judicial activities. Arbitrators, on the other hand, are appointed specifically for disputes, from among professionals who often conduct private practice and bring about a specific expertise stemming from such practice. This distinction is marked by the CJEU in its Opinion, as noted above.[81] Because of these distinctions mentioned (which are by no means exhaustive) between arbitrators and judges, and what might be expected of them regarding their independence and impartiality, the new EU FTA/IPA rules must be evaluated on the basis of their application to *judges* and not *arbitrators*. In light of this additional legal layer, the Court opines not on ethics and qualifications of ISDS *arbitrators* – it delivers an opinion on the CETA "Members of Tribunal".

IV.3. The relevance of the compatibility of the IBA guidelines with judges

Opinion 1/17 of the Court does not elaborate on all topics outlined under these reflections. The Court issues an Opinion only in the context of the question posed at it, and answers whether or not the CETA Tribunal, as envisaged under CETA, complies with the right of access to an independent judicial body. It further looks into whether it gives "complete confidence to the enterprises and natural persons of a Party that they will be treated [...] 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."[82]

As detailed above, most issues raised by Belgium, such as the remuneration in the form of a retainer fee, appointment and removal of judges, as well as the executive role of the Joint Committee, were addressed to varying degrees of scrutiny. In general, the CJEU is of the opinion that the CETA Tribunal, within the framework as it stood before the new Code proposal of October 2019, did not violate, nor pose a challenge to, the right to

[80] L Malintoppi, 'Independence, Impartiality, and Duty of Disclosure of Arbitrators' in P Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 813.

[81] Opinion 1/17 cit. para. 197.

[82] *Ibid*. para. 199.

access to an independent tribunal. However, the CJEU arguably misses an important opportunity to make a meaningful distinction between international court judges and international arbitrators, in the context of the reference made to the IBA Guidelines as ethical guidance envisioned for judges.

The CJEU is silent on the appropriateness of the IBA Guidelines' application to judges, as they are rules envisaged for arbitrators. This silence is controversial, in particular, because it leaves an express and relevant concern raised by Belgium in the context of its submission unanswered. It is clear that the CETA (and EUSIPA and EUVIPA by analogy) seeks to prohibit its judges to act as counsel, party-appointed experts, or witnesses in any pending or new investment protection dispute under CETA or any other international agreement.[83]

This prohibition presents a possible contradiction to several GSs (and, by extension, their Explanations). As alluded to above, the Guidelines are prepared explicitly for arbitrators and with their multiple roles within the arbitration community. In fact, the Guidelines clearly stipulate that they "apply to international commercial arbitration and investment arbitration [...] irrespective of whether or not non-legal professionals serve as arbitrators."[84] Several other issues, such as the duration of the obligation of independence and impartiality under GS 1, could also create conflicting and contradictory situations when applied to the CETA Tribunal.[85]

Under the aforementioned Waivable Red List, the IBA Guidelines generally allow parties (subject to all parties' consent) to waive conflicts of interest that otherwise would not be allowed under the CETA structure. For instance, parties can waive a conflict of interest when "[t]he arbitrator holds shares, either directly or indirectly, in one of the parties", or when "[t]he arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties."[86]

Particular attention must be given to GS 6, which acknowledges extra-Court activities and considers arbitrators as principally affiliated to their law firms. GS 6 notes that "[t]he arbitrator is in principle considered to bear the identity of his or her law firm".[87] Its Explanation further notes that "[t]here is a need to balance the interest of a party to appoint the arbitrator of its choice, who may be a partner at a large law firm, and the importance of maintaining confidence in the impartiality and independence of international arbitrators."[88] None of these observations apply to CETA Tribunal. Contrary to arbitrators, a

[83] EUSIPA and EUVIPA contain identical language to CETA, save the additional "domestic laws and regulations", as noted above.

[84] IBA Guidelines cit. 3.

[85] GS 1 stipulates that independence and impartiality extends "until the final award has been rendered or the proceedings have otherwise finally terminated" – given the Members of the CETA Tribunal are not ad hoc, this specification does not carry much substance in a court setting.

[86] Waivable Red List of IBA Guidelines cit. 21.

[87] Explanation to GS 6 of IBA Guidelines cit.

[88] *Ibid*.

judge is primarily considered to bear the identity of the court in which she operates. Extra-judicial appointments are severely restricted under CETA as well as other international courts, and party appointment is an arbitration-specific mechanism that does not exist under CETA. Because of this, not only are arbitration rules and international courts contradictory in principle, but the Guidelines directly come in conflict with the novel aspects of CETA that are perceived to elevate its permanency and institutional legitimacy.

Despite these significant incompatibilities, one explanation as to why the CJEU did not delve deeper into the question is that the Court was aware that the Commission would in fact seek to replace this seemingly "placeholder" reference with a more "appropriate" Code, a better fit to permanent judges.[89] As it is very likely that the IBA Guideline reference will cease to exist (and that such reference does not exist in EUVIPA, EUSIPA or any other publicly available FTA), its relevance is now arguably moot as far as the CETA framework is concerned. However, as a general policy, the EU should refrain from adopting ethical codes cut out for arbitrators in its future IIAs, if the treaty-making practice is to follow the examples of EUVIPA, EUSIPA, and the CETA.

V. Conclusion

As an overlooked aspect of Opinion 1/17, the Belgian inquiry into provisions on the ethics and qualifications of CETA Tribunal members has important implications for arbitrators and judges as international adjudicators. The Opinion comes at a high time for global ISDS reform, and in addition to its analysis of the CETA Framework *vis-à-vis* the autonomy of the EU legal order, reflects upon a fundamental systemic shift from arbitration to an international court. As detailed above, the Court is generally of the opinion that the CETA Framework provides for a system that has the necessary checks and balances in order to maintain impartial and independent decision-making. However, intentionally or not, it leaves some very relevant concerns raised regarding the application of ethics rules made for arbitrators to judges unanswered.

The domain of legal ethics applicable to judges, arbitrators, counsel, witnesses, or any other stakeholder or actor, is already based on profoundly vague and unspecific rules and principles.[90] This *Article*, while analysing Opinion 1/17, sought to delve deeper into the distinction between arbitrators, ad hoc adjudicators, often with professional affiliations; and judges, who are state-appointed individuals set to resolve (and prioritize) disputes in the context of the international court to which they are appointed. While now seemingly in the past, the reference made to the IBA Guidelines in the CETA text would have been the reflection of a gross confusion of these two fundamentally different

[89] Opinion 1/17 cit. para. 67.

[90] K Fach Gomez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* cit. 9; C Rogers, *Ethics in International* cit. 60.

groups of adjudicators – particularly given how the shift from arbitrators to state-appointed "judges" is seen part and parcel of the EU Commission's new common investment protection policy. Similar contextual mismatches might jeopardize the ongoing reform and legitimization process of international investment law and its instruments. It could further undermine the collective effort to find a compromise and a common ground on how these groups differ, and how their responsibilities manifest and overlap.