

EU'S INTERNATIONAL TREATIES, THE NEW INVESTMENT COURT SYSTEM (ICS) AND HUMAN RIGHTS\*

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**Sommario**

1. Premise. – 2. The autonomy of the EU legal order and the true “revolution” of the ICS. – 3. The applicability of the principle of equality before the law. – 3.1. The requirement that the situations of foreign and EU investors be “comparable”. – 3.2. The historical evolution of ISDS and the question of whether the difference in treatment between foreign and European investors is (still) justified. – 4. The individual right of access to an independent tribunal. – 4.1. Accessibility. – 4.2. The requirement of independence. – 5. Conclusions.

**Abstract**

*With Opinion 1/17, the ECJ has declared the compatibility with EU primary law of the mechanism for the international settlement of disputes between investors and States (ISDS), established under the CETA, a free trade agreement between Canada, on the one hand, and the EU and its Member States, on the other.*

*The present article focuses on the challenges raised by the Belgian government on the basis of human rights, in addition to that based on the autonomy of the EU legal order. In relation to the principle of equal treatment before the law, it argues that the Court erred in holding that Canadian enterprises and natural persons that invest within the Union are in a situation that is not comparable to that of Member States' investors in the same commercial or industrial sector of the EU internal market. It further submits that as a result of the historical evolution of ISDS and the remedies currently available under EU law and the national law of the member states to European and foreign investors alike, the finding that the latter are to have a specific legal remedy against EU and domestic measures might be no longer justified. It finally considers that in the assessment of whether the ICS will be an accessible and independent tribunal, the Court exceeded the level of speculation allowed under Art. 218(11) of the Treaty on the Functioning of the EU (TFEU) and understated the guarantees generally required from national judiciaries.*

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### 1. Premise

In addition to a general competence for its “common foreign and security policy”, the European Union (EU) enjoys, as is well known, various specific external powers. Institutional matters related to such special external policies (competence, procedures and legal effects) are dealt with in Articles 216-219 of the Treaty on the Functioning of the EU (TFEU). The EU is a unique treaty-making actor and – this is not often noticed<sup>1</sup> – one of the most prolific makers of treaties. According to the EU’s treaty office, the Union is currently party to 977 bilateral and 289 multilateral treaties<sup>2</sup>.

Agreements concluded by the Union (either alone or jointly with the member states) and third countries are part of the EU legal order<sup>3</sup>: a source superior to ordinary legislation but subordinated to the Treaties<sup>4</sup>. Any Union institution and the member states are entitled to challenge the “constitutionality” of a draft agreement prior to its conclusion. This judicial safeguard is found in Art. 218(11) TFEU, according to which: a “Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties.” Where the Court in the exercise of this competence finds that the agreement the Union intended to ratify or to accede to, is not compatible with the Treaties,

<sup>1</sup> A notable exception is M. CREMONA, *Who Can Make Treaties? The European Union*, in D. B. HOLLIS (ed.), *The Oxford Guide to Treaties*, Oxford University Press, Oxford, 2012, p. 93-124: “The EU uses treaties to structure and define its relations with third countries, to devise different models of agreement for groups of partners, to promote its vision of ‘an international system based on stringer multilateral cooperation and good global governance’ (Art. 21(2) TEU) and engages actively in the construction of new multilateral conventions and campaigns for their ratification.”

<sup>2</sup> Treaties Office Database of the European External Action Service, last updated 2 July 2019, available at: <http://ec.europa.eu/world/agreements/default.home.do>.

<sup>3</sup> Pursuant to Art. 216(2) TFEU: “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”

<sup>4</sup> On the legal effects of treaties concluded by the EU in the European legal order, including their enforcement and interpretation by the ECJ, see M. MENDEZ, *The Legal Effects of EU Agreements*, Oxford University Press, Oxford, 2013. See also, P. CRAIG, G. DE BÚRCA, *EU Law: Text, Cases, and Materials*, Oxford University Press, Oxford, VI ed., 2015, ch. 11; R. SCHÜTZE, *European Union Law*, Cambridge University Press, Cambridge, 2015, p. 109-112; and, in Italian, G. GAJA, A. ADINOLFI, *Introduzione al diritto dell’Unione europea*, Laterza, Bari, 2019, p. 203-234.

the agreement may not enter into force<sup>5</sup> – unless the Treaties themselves are amended<sup>6</sup>.

This article examines the recent Opinion 1/17<sup>7</sup>, whereby the ECJ has declared the Comprehensive Economic and Trade Agreement (CETA) between Canada, on the one part, and the Union and its member states, on the other<sup>8</sup>, compatible with the Treaties, including fundamental rights. The request for an opinion, submitted by the Belgian government, concerned the CETA provisions on the new Investment Court System (ICS) for the resolution of investment disputes between investors and states (ISDS)<sup>9</sup>.

With respect to traditional ISDS mechanisms based on *ad hoc* tribunals composed of party-appointed arbitrators<sup>10</sup>, CETA provides for a permanent investment Tribunal of First Instance and an Appellate Tribunal, the members

<sup>5</sup> This was most notably the case of Opinion 2/13, which found the Draft Accession Agreement of the EU to the European Convention on Human Rights (ECHR) contrary to EU primary law. ECJ, Opinion 2/13, *Accession of the Union to the ECHR*, of 18 December 2014, on which see N. LAZZERINI, “Questo matrimonio (così) non s’ha da fare”: il parere 2/13 della Corte di giustizia sull’adesione dell’Unione europea alla Convenzione europea dei diritti dell’uomo, in *Osservatorio sulle fonti*, 2015, p. 1-26, (available at: <http://www.osservatoriosullefonti.it>) and *ex plurimis* see C. KRENN, *Autonomy and effectiveness as common concerns: a path to ECHR accession after Opinion 1/13*, in *German Law Journal*, 2015, p. 147 ff.; J. ODERMATT, *A Giant Step Backwards – Opinion 2/13 on the EU’s Accession to the European Convention on Human Rights*, in *New York University Journal of Int. Law and Politics*, 2014-2015, p. 783 ff.; L. STORGAARD, *EU Law Autonomy versus European Fundamental Rights Protection—On Opinion 2/13 on EU Accession to the ECHR*, in *Human Rights Law Review*, 2015, 485 ff.; S. DOUGLAS-SCOTT, *Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell From the European Court of Justice*, in *UK Const. L. Blog*, 24 December 2014, <http://ukconstitutionallaw.org>; S. PEERS, *The CJEU and the EU’s Accession to the ECHR: A Clear and Present Danger to Human Rights Protection*, in *EU L. Analysis Blog*, 18 December 2014, <http://eulawanalysis.blogspot.de>; M. WENDEL, *Mebr Offenheit wagen! Eine kritische Annäherung an das Gutachten des EuGH zum EMRK-Beitritt*, in *Verfassungsblog*, 21 December 2014, [www.verfassungsblog.de](http://www.verfassungsblog.de). See also L. BESSELINK, *Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13*, in *Verfassungsblog*, 23 December 2014, available at <http://www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213>.

<sup>6</sup> Art. 218(11) TFEU continues as follows: “Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.”

<sup>7</sup> ECJ (Full Court), Opinion 1/17 of 30 April 2019, available at: <http://curia.europa.eu/ju-ris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=706718>.

<sup>8</sup> *Comprehensive Economic and Trade Agreement between Canada, on the one part, and the European Union and its Member States, on the other part*, Brussels, 30 October 2016. CETA provides for a free trade area characterized by a significant liberalization of goods market, protection of foreign investors and limited liberalization of services; commitments about the terms of competition on the parties’ markets; and safeguards for labour and environmental law. The Treaty entered into force provisionally (with the exclusion of the Investment Chapter) on 21 September 2017. Before it takes full effect, it needs to be ratified by national parliaments in the member states. For an overview and current updates see <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/>.

<sup>9</sup> The ISDS provisions are provided in Chapter Eight (‘Investments’), Section F (‘Resolution of investment disputes between investors and states’).

<sup>10</sup> On traditional ISDS mechanisms see *infra*, para. 3.2.

of which are appointed by the EU and Canada in advance and subject to strict rules of independence, integrity, and ethical behaviour. The EU and Canada will only appoint Tribunal members who have demonstrated expertise in public international law and possess the qualifications required in their respective countries for appointment to judicial offices or be jurists of recognised competence. All Tribunal members shall comply with a binding code of conduct included in the Agreement. Proceedings before the tribunals are fully transparent, with documents made publicly available, hearings open to the public and the possibility for interested third parties to make submissions.

Two equally compelling, mutually reinforcing reasons make this Opinion relevant for scholars interested in the sources of international law, EU law and constitutional law.

First of all, CETA is the first in series of international agreement promoted by the EU to include the new ICS. A standing investment court and an appellate tribunal are a feature in the agreements the Union has concluded with Singapore, Viet Nam and Mexico, and in all on-going negotiations of economic agreements including an investment chapter<sup>11</sup>. The ICS represents the EU's new approach to investment-related disputes, with a view to rebalancing foreign investment protection with the regulatory powers of the host State and making ISDS more predictable, consistent, and transparent<sup>12</sup>. The Union is also working, in parallel, at the multilateral level to seek support for the establishment of a permanent Multilateral Investment Court (MIC)<sup>13</sup>. In the words

<sup>11</sup> See H. HOANG, D. SICURELLI, *The EU's preferential trade agreements with Singapore and Vietnam. Market vs. normative imperatives*, in *Contemporary Politics*, 2017, p. 369 ff.; G. VAN HARTEN, *The European Union's Emerging Approach to ISDS: A Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA*, in *University of Bologna Law Review*, 2016, p. 138 ff.

<sup>12</sup> The original proposal dates back to 2015 (*European Union's proposal for Investment Protection and Resolution of Investment*, 12 November 2015, available at: [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf)) and was first discussed during the EU-US negotiations on the Transatlantic Trade and Investment Partnership (TTIP). The TTIP negotiations ended without conclusion at the end of 2016. A. REINISCH, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, in *Journal of International Economic Law*, 2016, p. 761-786.

<sup>13</sup> On 20 March 2018, the Council of the EU adopted the negotiating directives authorising the Commission to negotiate, on behalf of the EU, a convention establishing a MIC that would eventually replace the bilateral investment court systems included in EU trade and investment agreements. The MIC shall be based on the following principles: the court should be a permanent international institution; the judges should be tenured, qualified and receive permanent remuneration; their impartiality and independence should be guaranteed; proceedings before the court should be conducted in a transparent manner; the court should give the possibility of appeal against a decision; effective enforcement of the decisions of the court would be vital; the court should rule on disputes arising under future and existing investment treaties that countries decide to assign to the authority of the court. On the basis of the mandate provided by the Council, the Commission started negotiations with its trading and investment partners in the framework of the United Nations Commission on International Trade Law (UNCITRAL) and submitted a concept paper setting out how a multilateral investment

of European Commissioner for Trade, Cecilia Malmstrom, the EU “has been including a new investment court system in its latest agreements. Canada, Singapore, Vietnam, Mexico. All these agreements now contain the investment court system. These are crucial stepping-stones towards multilateral reform”<sup>14</sup>.

Opinion 1/17 is thus bound to have far reaching implications beyond the case-specific CETA provisions, for a potentially large number of EU international agreements (both bilateral and multilateral).

The Belgian government had challenged the ISDS provisions in the investment Chapter of CETA on three different grounds: the autonomy of the EU legal order and the exclusiveness of the ECJ jurisdiction over the interpretation of EU law; the principle of equal treatment and the requirement of effectiveness of EU law; and the right of access to an independent tribunal. The ECJ rejected all three challenges and found the ICS established under CETA to be compatible with EU law<sup>15</sup>. The first challenge, related to the autonomy of the European legal order, is the one that has received the most attention in the proceedings before (and by) the Court itself, as well as by commentators<sup>16</sup>. It is tackled here only to highlight the various basis on which the Court distinguished the case at hand from its previous case-law and laid the grounds for addressing the other two challenges based on human rights – which are the focus of the present article. This is the first time that a mechanism which allows foreign investors to seek compensation from the host state before an investment tribunal, is examined by the ECJ in relation to its compatibility with the Charter of Fundamental Rights of the EU (the Charter).

Also in this respect, the ramifications of Opinion 1/17 are considerable. The Court’s reasoning in this Opinion could affect analogous challenges that might be brought in the future against CETA (and CETA-like international agreements) in and beyond the EU legal order, before national courts (including the

court could be established. On the EU proposed MIC currently under discussion in Working Group III of UNCITRAL see [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state).

<sup>14</sup> Speech of the European Commissioner for Trade, Cecilia Malmstrom, to the Belgian Ministry of Foreign Affairs, 22 November 2018, available at: <http://trade.ec.europa.eu/doclib/press/in-dex.cfm?id=1943>.

<sup>15</sup> Advocate General (AG) Bot also found that the new mechanism for the settlement of disputes between investors and host states provided in CETA, was compatible with EU law. AG Bot Opinion of 29 January 2019, available at: <http://curia.europa.eu/juris/document/document.jsf?docid=210244&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=13279134>.

<sup>16</sup> See e.g. P. KOUTRAKOS, *More on Autonomy – Opinion 1/17 (CETA)*, in *European Law Review*, 2019, p. 293-294; C. RIFFEL, *The CETA Opinion of the European Court of Justice and its Implications - Not that Selfish After All*, in *Journal of International Economic Law*, 2019, 503-521; C. FAVARETTO, *Beyond Selfishness: The Court of Justice in Opinion 1/17 on CETA*, in *Diritti comparati. Comparare i diritti fondamentali in Europa*, 10 June 2019, available at: <http://www.diritticomparati.it/beyond-selfishness-court-justice-opinion-1-17-ceta/>.

Italian Constitutional Court) and/or other international courts, such as the European Court of Human Rights (ECtHR).

## 2. The autonomy of the EU legal order and the true “revolution” of the ICS

The “autonomy” of the EU legal order is a sort of bulwark framed by the ECJ in order to protect and preserve the exclusivity of its jurisdiction to ensure the uniform interpretation and application of European law and thereby its “solitude” as the court with ultimate jurisdiction in the European legal space<sup>17</sup>.

On the basis of the autonomy of the EU legal order, the ECJ had previously found incompatible with the EU Treaties the EU accession to the European Patent Convention (Opinion 1/09)<sup>18</sup> and the ECHR (Opinion 2/13)<sup>19</sup> as well as the arbitral clause of a bilateral investment treaty (BIT) between The Netherlands and the Slovak Republic (Judgment of 6 March 2018)<sup>20</sup>.

In Opinion 1/17, the Court recalls that the autonomy of the EU legal order “exists with respect both to the law of the member States and to international law” and “stems from the essential characteristics of the European Union and its law” (para. 109): a “unique” constitutional framework, with a “judicial system intended to ensure consistency and uniformity in the interpretation of EU law”, and “the Court having exclusive jurisdiction to give the definitive

<sup>17</sup> One of its fundamental underpinnings is the principle of mutual trust between the EU member States. This in turn is informed by the presumption that each state complies with the rule of law within its domestic legal order, and carries with it, as its most natural corollary, the principle of mutual recognition of legal rules or acts of other member States – subject to rebuttal only under exception circumstances. See A. CIAMPI, M. STELLA, *Principio della protezione equivalente fra UE e CEDU e mutuo riconoscimento delle decisioni tra Stati membri: la sentenza della Corte EDU nel caso Avotins c. Lettonia*, in *Osservatorio sulle fonti*, 2017, p. 1-18, available at: <http://www.osservatoriosullefonti.it>.

<sup>18</sup> ECJ, Opinion 1/09, *Agreement on the creation of a unified patent litigation system*, 8 March 2011, on which see e.g.: S. ADAM, *Le mécanisme préjudiciel, limite fonctionnelle à la compétence externe de l'Union. Note sur l'avis 1/09 de la Cour de justice*, in *Cahiers de droit européen*, 2011, p. 227-302; D. SIMON, *Avis négatif sur le projet de création d'une juridiction des brevets (CJUE, ass. plen., avis n. 1/09, 8 mars 2011)*, in *Europe: actualité du droit communautaire*, 2011, p. 4-7; J.-F. GUILLOT, C. DE HAAS, *La malediction s'acharne sur le projet de brevet européen à effet unitaire*, in *Contratto e impresa / Europa*, 2012, p. 543-556.

<sup>19</sup> ECJ, Opinion 2/13, *Accession of the Union to the ECHR*, of 18 December 2014, *supra* note 5.

<sup>20</sup> ECJ, Judgment of 6 March 2011, *Achmea* (Case C-284/16). In the vast literature, see M. STELLA, *Cala il sipario sull'arbitrato degli investimenti “intra-UE”: la Corte UE esige che le liti tra investitori e Stati membri siano decise da giudici togati*, in *Giur. it.*, 2018, p. 1969 ff.; C. CONSOLO, *Postilla. La foglia di fico del (negato, ma per gli arbitri ICSID ancor più insostenibilmente) rinvio pregiudiziale. Da Denuit ad Achmea, ibid.*; A. CIAMPI, *Postilla. Perché il diritto europeo rimanga com'è, la nozione autonoma di “giurisdizione nazionale” deve cambiare, ibid.* See also S. WUSCHKA, *Investment protection and the EU after Achmea*, in *Zeitschrift für Europarechtliche Studien – ZeuS*, 2018, p. 25 ff.; C. CANDELMO, *La sentenza Achmea, un anno dopo: l'impatto sull'ordinamento europeo e il futuro degli intra-EU BITs*, in *Studi sull'integrazione europea*, 2019, P. 447 ff.; A. ANDOLFI, *L'arbitrato in materia di investimenti alla prova dell'effettività del diritto dell'Unione*, in *Rivista dell'arbitrato*, 2019, p. 36 ff.; and ID., *Il difficile equilibrio tra primauté del diritto dell'Unione e autonomia dell'arbitrato: riflessioni all'indomani della sentenza Achmea*, in *Riv. trim. dir. proc. civ.*, 2019, p. 87.

interpretation of that law” (paras. 110-111). It distinguishes, however, the case of CETA from all its previous case-law.

The ICS envisaged under CETA is first distinguished from the court under the European Patent Convention. The patent court would have been called upon to interpret and apply the provisions of the agreement in question, the future regulation on the Community patent and other instruments of EU law. That court might also have been called upon to determine a dispute pending before it in the light of the fundamental rights and general principles of European law, or even to examine the validity of an act of the Union. The CETA Tribunal, instead, lacks jurisdiction to interpret and apply rules of EU law *other than the provisions of the CETA*: “that Tribunal is to apply, as provided in Article 8.31.1 of the CETA, ‘this Agreement as interpreted in accordance with the [Vienna Convention], and other rules and principles of international law applicable between the Parties’. However, that Tribunal will not have jurisdiction, as is made clear by the first sentence of Article 8.31.2 of that agreement, ‘to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party’” (para. 121).

Opinion 2/13 and its underlying rationale are equally dismissed as not relevant. Unlike the respondent mechanism envisaged under the Draft Accession Agreement of the EU to the ECHR, CETA preserves the exclusive jurisdiction of the ECJ to give rulings on the division of powers between the Union and its member states: CETA “confers not on the CETA Tribunal, but on the Union, the power to determine, when a Canadian investor seeks to challenge measures adopted by a Member State and/or by the Union, whether the dispute is, in the light of the rules on the division of powers between the Union and its Member States, to be brought against that member State or against the Union” (para. 132).

Similarly, the Court distinguishes CETA investment provisions from the arbitral clause at issue in the case that gave rise to the *Achmea* judgment. In *Achmea*, the Court considered incompatible with the EU Treaties the arbitral clause provided for in a BIT between two EU member states (an intra-EU BIT), because that “that agreement established a tribunal that would be called upon to give rulings on disputes that might concern the interpretation or application of EU law” (para. 126)<sup>21</sup>. The distinction is again primarily based on the limits

<sup>21</sup> Despite this distinguishing, the impact of the *Achmea* judgment remains significant. According to the statistics released by UNCTAD on intra-EU investor-state arbitration cases by 31 of July 2018: the overall number of known treaty-based arbitrations initiated by an investor from one EU member state against another EU member state totalled 174 (20 per cent of the 904 known ISDS cases globally); most known intra-EU cases were brought against three EU member states: Spain (40 cases), Czechia (30) and Poland (19); investors from the Netherlands, Germany, Luxembourg and the United Kingdom initiated about half of the known intra-EU arbitrations. By 31 July 2018, some 91 intra-EU ISDS cases had been concluded and 83 were pending; out of the concluded cases, 47 per cent were

of the jurisdiction of the CETA tribunals: the CETA tribunals do not have jurisdiction to interpret the rules of EU law other than the provisions of CETA.

Referring to *Achmea*, however, the Court adds: “That judgment concerned, moreover, an *agreement between Member States*. The question of the compatibility, with EU law, of the creation or preservation of an investment tribunal by means of such an agreement must be distinguished from the question of the compatibility, with EU law, of the creation of such a tribunal by means of an *agreement between the Union and a non-Member State*” (para. 127, emphasis added).

The Court does not further elaborate upon it. This is, it is submitted, the most relevant difference between the new CETA (and CETA-like) ICS and the ISDS mechanisms provided for under intra-EU BITs: the fundamental difference between the two systems is in their respective *source*. While they are both provided in an international treaty, CETA is a free trade agreement between Canada, on the one hand, and the EU and its Member States, on the other – i.e. an international agreement of the EU and as such part of the European legal order. Instead, intra-EU BITs are *not* part of EU law. Moreover, at the origin of the ICS under CETA is a proposal of the European Commission containing draft provisions on investment protection and resolution of investment disputes<sup>22</sup>, to be included in *all* international agreements of the EU concerning foreign direct investment. There exists therefore a compelling policy reason for the Court to uphold the compatibility with the Treaties of a mechanism not only negotiated and adopted but conceived and promoted by the EU as the new frontier of ISDS.

Albeit understated, this is the true “revolution” of the ICS under CETA (and the analogous trade agreements concluded or being negotiated by the EU). As it will be shown, this is also the real ground of the Court’s dismissal of the challenges raised in relation to human rights.

### 3. The applicability of the principle of equality before the law

The Court seems to have taken the challenges based on human rights quite seriously, devoting in total 88 paragraphs to the compatibility of the ICS with the general principle of equal treatment and the requirement of effectiveness of EU law (paras. 162-186), and the right of access to an independent tribunal (paras. 189-243) (24 and 54 paragraphs, respectively)<sup>23</sup>. However, because of continued cross-references to previous (or even subsequent) paragraphs, the

decided in favour of the state and 27 per cent in favour of the investor, with monetary compensation awarded. The remaining cases were settled, discontinued or the tribunal found a treaty breach, but did not award monetary compensation. See <https://investmentpolicy.unctad.org>.

<sup>22</sup> See *supra*, note 12 and corresponding text.

<sup>23</sup> The first challenge, based on the autonomy of the EU legal order, is dismissed in 55 paragraphs (paras. 106-161).



Court's reasoning is nonlinear in many parts and, in many respects, far from satisfying.

Preliminarily, the Court recognizes that the Charter of Fundamental Rights of the EU applies in relation to CETA, including its provisions on the new ICS: "Article 218(11) TFEU, which states that a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court as to whether an agreement envisaged is compatible 'with the Treaties', must be construed in the light of that general requirement of compatibility with the EU constitutional framework" (para. 166). This includes "the guarantees enshrined in the Charter, since the Charter has the same legal status as the Treaties" (para. 167, *in fine*).

Addressing the various challenges individually, the Court dismisses the challenge under the *principle of non-discrimination based on nationality*. This principle, enshrined in Art. 21(2) of the Charter, is one and the same with the guarantee of Art. 18(1) TFEU<sup>24</sup> – which the Court has consistently stated "is not intended to apply to cases where there is a possible difference in treatment between nationals of Member States and nationals of non-Member States" (para. 169)<sup>25</sup>.

The Court considers, instead, that the scope of application of the *principle of equality before the law* is not confined to nationals of EU member states but covers all situations within the scope of application of European law: "Article 20 of the Charter, which provides that 'everyone is equal before the law', does not contain any express limitation on its scope and is therefore applicable to all situations governed by EU law, including those falling within the scope of an international agreement entered into by the Union" (para. 171). As CETA is part of EU law, the relationship between EU nationals and Canadian investors investing in the EU is one that must comply with the equal treatment guarantee: "Subject to certain conditions, investments made within the Union by Canadian enterprises and natural persons, no less than investments made within the Union by the enterprises and natural persons of the Member States, fall within the scope of EU law and, therefore, within the scope of the equality before the law guaranteed in Article 20 of the Charter. That fundamental right is available to all persons whose situations fall within the scope of EU law, irrespective of their origin" (para. 172).

<sup>24</sup> Art. 21(2) of the Charter provides: "Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited". According to the Explanations relating to the Charter of Fundamental Rights, this provision "corresponds to the first paragraph of Article 18 of the Treaty on the Functioning of the European Union and must be applied in compliance with that Article."

<sup>25</sup> The Court quoted ECJ, judgment of 4 June 2009, *Vatsouras and Koupatantze* (Joined Cases C-22/08 and C-23/08), on which see E. FAHEY, *Interpretive legitimacy and the distinction between "social assistance" and "work seekers allowance"*, in *European Law Review*, 2009, p. 933 ff.

### 3.1 The requirement that the situations of foreign and EU investors be “comparable”

The Court recalls that principle of equality before the law “requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified” (para. 176).

It also recognizes that CETA does establish a difference in treatment, within the Union itself, between enterprises and natural persons of member states and Canadian enterprises and natural persons, also when investing in the same commercial or industrial sector of the EU internal market: “The difference in treatment referred to in the request for an opinion arises from the fact that it will be impossible for enterprises and natural persons of Member States that invest within the Union and that are subject to EU law to challenge EU measures before the tribunals envisaged by the CETA, whereas Canadian enterprises and natural persons that invest within the same commercial or industrial sector of the EU internal market will be able to challenge those measures before those tribunals” (para. 179).

In the Court’s opinion, however, this difference in treatment is not an actual breach of the principle of equal treatment, contrary to Art. 20 of the Charter, because the requirement that the situations be “comparable” is not met. For the Court, “*it is clear* that, while Canadian enterprises and natural persons that invest within the Union are [...] in a situation that is comparable to that of enterprises and natural persons of Member States that invest in Canada, their situation is not, on the other hand, comparable to that of enterprises and natural persons of Member States that invest within the Union” (para. 180; emphasis added).

Yet, the explanation of this apparent clarity sounds like a mere tautology: “the *reason why* Canadian enterprises and natural persons that invest within the Union have the possibility of relying on the provisions of the CETA before the envisaged tribunals is that *those Canadian persons, in their capacity as foreign investors, are to have a specific legal remedy against EU measures*, whereas enterprises and natural persons of the Member States who, like those Canadian persons, invest within the Union, are *not* foreign investors there and will therefore not have access to that specific legal remedy [...]” (para. 181, emphasis added).

The exclusion of the comparability between the situations of European and Canadian investors in the EU internal market because of the foreign nationality of the latter, confines the first in a situation similar to that of so-called “reverse

discrimination” of the ECJ’s early case-law<sup>26</sup>, when the Court declined to deal with purely national cases, i.e. situations “located” within a single member state without any connection with one or more different member states. With the important consequence that the detrimental treatment of EU enterprises and natural persons that invest in the EU investors could only be remedied by national courts applying the principle of equal treatment under national laws, constitutions and applicable treaties, trans-passing the exclusive competence of the Union on all matters relating to foreign direct *investment*<sup>27</sup>.

The exclusion of the comparability between Canadian and European enterprises and natural persons investing in the Union also seems to contrast with the Court’s own analysis of the ICS in relation to the requirement of effectiveness of EU law<sup>28</sup>. The Court finds that the relevant CETA provisions do not adversely affect the effectiveness of European law, because in those very same exceptional circumstances where an award by the CETA Tribunal might have the consequence of cancelling out the effects of a fine imposed on a Canadian investor by the Commission or a national competition authority for a breach of competition rules (Arts 101-102 TFEU), EU law itself permits an EU investor the cancelling out of a fine similarly vitiated (see paras 187-188, referring to paras 184-184). Despite having denied it, the Court here states that the situations of Canadian and European investors in the Union are – at least for the purposes of EU competition law – “comparable”.

### **3.2 The historical evolution of ISDS and the question of whether the difference in treatment between foreign and European investors is (still) justified**

The Court stated at the level of applicable principles that “the Charter has the same legal status as the Treaties” and therefore requires compliance with the principle of equal treatment before the law in “all situations governed by EU law”. Having dismissed the comparability between Canadians and Europeans investing in the Union, however, it did not need to rule on the important question of whether the difference in treatment between foreign and European investors (with the latter having no access to traditional ISDS as well as to the new ICS) is objectively justified or contrary to Art. 20 of the Charter.

<sup>26</sup> ECJ, judgment of 16 June 1994, *Steen II*, Case C-132/93, ECLI:EU:C:1994:254, on which see E. ADOBATI, A. GRATANI, *È legittima la discriminazione alla rovescia secondo il diritto comunitario in caso di situazione puramente interna ad uno Stato membro*, in *Dir. com. e degli scambi int.*, 1995, p. 663 ff. On the follow-up by the Italian Constitutional Court, see G. GAJA, *Introduzione al diritto comunitario*, VI ed., Laterza, Roma-Bari, 2005, p. 83-84.

<sup>27</sup> See our concluding remarks, *infra*, para. 5, *in fine*.

<sup>28</sup> On this part of the Opinion, see T. SCHREPEL, S. SADDEN, J. ROTH, *The Effectiveness of European Competition Law After Opinion 1/17*, in *Competition Policy International*, 2019, available at <https://www.competitionpolicyinternational.com/wp-content/uploads/2019/05/EU-News-Column-May-2019-2-Full.pdf>.

As it has been effectively stated, “[t]here can be no denying that the advent of investment arbitration marks a leap forward for the right of access to justice. Nonstate actors are granted access to an international remedy. But it bestows this favor upon a single class of beneficiary”<sup>29</sup>.

ISDS is a relatively recent phenomenon in international law. Under the traditional rules on the protection of the person and property of aliens, foreign investors had no international venue to bring their claims in case of alleged breaches by the host state of its international obligations. Treaty commitments as well as obligations under customary international law were due to the state of nationality of the investor, and the ensuing international disputes – whether aimed to stop the continuous breach or the reparation of damages – were of a purely inter-state nature. The ancient institute of diplomatic protection allowed the state of nationality of the investor to “espouse” the claim of its nationals. With diplomatic protection, however, in principle, the state has a discretionary power as to whether bring the claim and to the ways through which to pursue it – diplomatic, judicial or otherwise<sup>30</sup>. It also has the power to abandon the claim anytime as well as to settle on whatever terms it so wishes. And should it claim and obtain reparation, there is no obligation to transfer it to the affected party<sup>31</sup>. A further hurdle is the general requirement to exhaust domestic remedies, before the private investor’s claim can be brought up internationally. When foreign investment took place mostly by developed countries’ investors in developing countries, this put on the investor the onus to access the domestic courts of states with hardly efficient and working judicial systems.

In the 90’s, when ISDS mechanisms became standard provisions included in BIT’s, allowing private investors to invoke treaty breaches and directly bring a suit against the host state before an arbitral tribunal, they represented a significant development in international adjudication, something “dramatically

<sup>29</sup> J. KERN, *Investor Responsibility as Familiar Frontier*, in *AJIL Unbound*, 2019, p. 28-32, at 31.

<sup>30</sup> In the early years, a few famous cases were brought before the International Court of Justice (ICJ) in investment related matters, giving this Court the opportunity to define and clarify the contours of diplomatic protection, such as: the need of a genuine link for the purpose of nationality (ICJ, judgment of 6 April 1955, *Nottebohm (Liechtenstein v. Guatemala)*), the determination of nationality in case of exercise of diplomatic protection of behalf of legal, rather natural persons (ICJ, judgment of 5 February 1970, *Barcelona Traction (Belgium v. Spain)*), or the exhaustion of local remedies (ICJ, judgment of 20 July 1989, *Electronica Sicula s.p.a. (ELSI) (United States of America v Italy)*).

<sup>31</sup> See, however, Art. 19 (“Recommended practice”) of the *Draft Articles on Diplomatic Protection*, adopted by the International Law Commission in 2006 ([http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_8\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf)): “A State entitled to exercise diplomatic protection according to the present draft articles, should: (a) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred; (b) take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and (c) transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.”

different from anything previously known in the international sphere<sup>32</sup>. Not only they prevented disputes either to go unaddressed or to escalate into conflict between States<sup>33</sup>; they were also an unprecedented achievement in a human rights perspective: the decision as to whether to advance a claim and of what kind lies with the investor itself, not the state of nationality – thus avoiding the historical sensitive political implications of state to state dispute settlement in the exercise of diplomatic protection. ISDS also “elevated” investors to equal standing with countries, providing for a principled parity of arms between private and public parties at all stages of the proceedings.

Historically, therefore, investment treaties comprehensive of both substantive standards of protection of foreign investment and ISDS provisions, have responded to the need to attract foreign investors<sup>34</sup>. This explains why ISDS are by their very nature one-way dispute settlement mechanisms: they grant special privileges to international investors to sue governments – not the other way around. The same “asymmetry”, so to say, is to be found in human rights systems: human rights courts as well as other human-rights monitoring bodies receive complaints by individuals against states. States can defend themselves as respondent parties but can never initiate an action against a private party.

Until recently, the study of ISDS was largely confined to the “specialized” field of international investment law. Only in the last few years, has international investment arbitration, now governed by over 3000 BITs, become the object of public debate and increased attention in larger circles of academics and policy makers. This shift is the result of the “crisis” that has affected the legitimacy of the normative and institutional settings on foreign investment protection and prompted the flourishing of proposals of various nature and source, aiming at improving or substituting ISDS altogether<sup>35</sup>. Increased

<sup>32</sup> This expression is by J. PAULSSON, *Arbitration Without Privity*, in *ICSID Review*, 1995, p. 232 ff., at 256.

<sup>33</sup> In this respect, account must also be taken of the existence in early years of the so-called gunboat diplomacy – originated in the XIX century but very much in use also in the first decades of the XX century and the post WWII world – whereby foreign policy objectives including the protection of investment abroad (or reparation for injury thereto) were pursued through the display of military forces and the threat of warfare.

<sup>34</sup> The first BITs were entered into by developing states with developed states in order to meet their own economic development goals, to protect foreign investors from the uncertainties of customary international law on the economic rights of aliens, weak governance in ‘new’ States and the only recent adoption by many of them of the market economy model. On the evolution of investment protection treaties see R. DOLZER-C. SCHREUER, *Principles of International Investment Law*, II ed., Oxford University Press, Oxford, 2012, p. 6 ff.; C. LENG LIM, J. HO, M. PAPANINSKIS, *International Investment Law and Arbitration*, Cambridge University Press, Cambridge, 2018, p. 22 ff.; M. SORNA-RAJAH, *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2017, p. 23 ff.

<sup>35</sup> Although the numbers of investment disputes continue to grow, many states are withdrawing from or at least re-examining their commitments. Unlike some other BRICS that have shied away from investor protection and ISDS, China has extended the jurisdiction of existing commercial arbitral

recognition that Western power has become less extensive, while certain non-Western states are more active in the investment treaty system in recent years, has led to the current efforts of reform, with a view to rebalancing foreign investment protection with the regulatory powers of the host state and making ISDS more predictable, consistent and transparent<sup>36</sup>. Some of these proposals have already turned into (national or international) law, others are the stage of drafting or negotiation, or still at level of imagination. Among the solutions that have emerged is the EU-proposed ICS.

The real hurdle of ISDS, including the new ICS, remains the difference in treatment between foreign and domestic investors to the detriment of the latter, who have no access to ISDS mechanisms.

In Opinion 1/17, the ECJ recalls that “the purpose of inserting in the CETA provisions concerning non-discriminatory treatment and protection of investments, and the creation of tribunals that stand outside the judicial systems of the Parties to ensure compliance with those provisions, is to give complete confidence to the enterprises and natural persons of a Party that they will be treated, with respect to their investments in the territory of the other Party, on an equal footing with the enterprises and natural persons of that other Party, and that their investments in the territory of that other Party will be secure” (para. 199). The Court further states that CETA investment provisions are also in line with the “objective of free and fair trade that is stated in Art. 3(5) TEU and that is pursued by the CETA” (para. 200, *in fine*).

The promotion of foreign investment thus remains a valid objective of the new generation of free trade agreements, including CETA, although this is not their exclusive purpose. It is doubtful, however, whether this purpose today justifies the difference in treatment between foreign and European investors in the EU legal order, where the domestic remedies are generally accessible and effective.

In the Union, more and more often foreign investors tend to pursue, in parallel, for the protection of their investment, two sets of remedies: the traditional ISDS mechanisms available under the applicable investment treaty and the legal remedies generally available under EU law (or the relevant domestic law)<sup>37</sup>.

institutions in the country to cover foreign investment disputes and has created new Chinese institutions to deal with such disputes, as well as joint arbitration centers with states in regions where China invests heavily, such as Africa. H. CHEN, *China's Innovative ISDS Mechanisms and Their Implications*, in *AJIL Unbound*, 2018, p. 207 ff.

<sup>36</sup> The debate relates in particular to the power of arbitral tribunals formed by unelected individuals who review decisions of lawfully-elected representatives in matters that touch upon a state's sovereignty. The recent US\$50 billion award against Russia in the *Yukos* arbitration demonstrates the far-reaching powers of an investor-state tribunal.

<sup>37</sup> For example, on 25 September 2019 Nord Stream 2 AG, a subsidiary of Russia's Gazprom, served a notice of arbitration against the EU, in which it has asked the arbitral tribunal to determine that the EU is in breach of its international law commitments under the European Charter Treaty and

Account should also be taken of the “hybrid”, yet “primarily judicial” nature of the Tribunal and Appellate Tribunal to be established under the CETA (and the other international agreements concluded or being negotiated by the EU). In examining the features of the new ICS, the Court recognises that while based on traditional investment arbitration mechanisms, the ICS also shows distinct features relating to the composition of the tribunals and the treatment of cases, including in particular: the establishment by law of permanent tribunals that will apply rules of law, exercise their functions wholly autonomous and issue final and binding decisions, the composition of a division in a random and unpredictable manner, the availability of an appeal mechanism, and the compulsory character of the jurisdiction of the tribunals (paras 190-198). These features reflect the intention of the parties, expressed in a Joint Interpretative Instrument, that “CETA moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment Tribunals, inspired by the principles of public judicial systems” (para. 195). If these features will be turned into reality, CETA (and CETA-like) tribunals will offer not only a parallel, but also a very similar, venue to the legal remedies provided under EU law and generally available to all investors (foreign and European alike).

There exists therefore both empirical and theoretical grounds to question the proposition that modern foreign investors are to have a specific legal remedy against EU and national measures, *qua* foreign investors, and that this complies with the principle of equal treatment before the law.

#### **4. The individual right of access to an independent tribunal**

The *scope* of the Court’s reasoning concerning the compatibility of the envisaged ICS with the right of access to an independent tribunal provided for in Art. 47 of the Charter of Fundamental Rights<sup>38</sup> suffers, so to say, from the

to make orders requiring the EU to discontinue its breach. This follows the company’s decision of 25 July 2019 to bring an action for annulment before the General Court, requesting that Directive (EU) 2019/692 amending the EU Gas Directive be annulled on the basis that it infringed the EU law principles of equal treatment and proportionality. Information on both courses of action is available at: <https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/042419-nord-stream-2-invokes-energy-charter-treaty-to-challenge-eu-gas-link-rules>; <https://globalarbitrati-on-review.com/article/1200602/pipeline-developer-launches-ect-claim-against-eu>; and <https://www.nord-stream2.com/media-info/news-events/nord-stream-2-calls-on-court-of-justice-of-the-european-union-to-annul-discriminatory-measures-133/>.

<sup>38</sup> Art. 47 of the Charter on the right to an effective remedy and to a fair trial, reads in para. 2: “Everyone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial tribunal* previously established by law.” Under para. 3: “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*” (both emphases are added).

“original sin” of having ruled out the comparability between Canadian and EU investors in the Union<sup>39</sup>.

Also, the Court rightly recognizes that Canada is under no obligation to comply with the guarantees of accessibility and independence of courts provided in the Charter: “Canada is indeed not bound by those safeguards” (para. 192). It refers, however, to “EU litigants” as the only category of beneficiaries of the right of access to an independent tribunal under EU law (*ibidem*). It thus discusses the third challenge solely in relation to persons and enterprises of member states investing in Canada – as if Canadian investors operating in the Union and seeking justice under CETA, an international agreement concluded by the Union, were not entitled to the same guarantees.

On the *merits*, Opinion 1/17 seems affected by a level of speculation beyond that necessarily implied – and allowed – in the determination of “whether an agreement *envisaged* is compatible with the Treaties” pursuant to Art. 218(11) TFEU (emphasis added)<sup>40</sup>. Moreover, the Court’s determination that the ICS complies with the guarantees of independence and impartiality falls short of the thorough and rigorous analysis articulated in other cases.

#### 4.1 Accessibility

The assessment of whether the CETA tribunals are *accessible* is focused primarily on the financial burden for investors – in particular, natural persons and small and medium-sized enterprises (SMEs) –, when using that mechanism. The financial burden of using the CETA Tribunal comprises the costs of legal representation and assistance and the cost of the proceedings (see paras 209 and 210).

The Court states the principle that access to the ICS can be limited provided that any restrictions (including those relating to court costs) are proportionate, pursue a legitimate aim and do not adversely affect the very essence of the right of access (para. 201).

The determination of whether the tribunals established under CETA will have the characteristics of an accessible tribunal once that Agreement has been concluded and implemented, however, is based on a statement adopted by the Commission and the Council at the time of signature of the CETA – Statement No. 36 on investment protection and the ICS –, rather than on the provisions of CETA itself.

Statement No. 36 provides that: “The adoption by the Joint Committee of additional rules, provided for in Article 8.39.6 of the CETA, intended to reduce the financial burden imposed on applicants who are natural persons or small and medium-sized enterprises, will be expedited so that these additional

<sup>39</sup> *Supra*, para. 3.1.

<sup>40</sup> See *supra* note 6 and corresponding text.



rules can be adopted as soon as possible.” It further states: “Irrespective of the outcome of the discussions within the Joint Committee, the Commission will propose appropriate measures of (co)-financing of actions of small and medium-sized enterprises before that Court and the provision of technical assistance.”

This Statement (like any other statement or declaration made in connection with the conclusion of a treaty) forms an integral part of the context in which the Council adopts the decision to authorise the signature of CETA on behalf of the Union. As such it is to be taken into account for the purposes of interpretation, in accordance with the law of treaties<sup>41</sup>. The Court, however, does not refer to it for the purposes of determining the meaning of the relevant CETA provisions. It relies on Statement N. 36 because of the commitment it purportedly contains – by the Union, and the Union alone (not by its counterpart, Canada, or the member States) – that: “There will be better and easier access to this new court for the most vulnerable users, namely SMEs and private individuals”. This commitment is “sufficient justification” for the conclusion that the CETA is compatible with the requirement that the tribunals should be accessible (para. 219).

*The Court* makes a “connection” between the financial accessibility of CETA tribunals and the conclusion of CETA and holds “that that the conclusion of the CETA by the Council is envisaged subject to the premise that the financial accessibility of the CETA Tribunal and Appellate Tribunal for all EU investors concerned will be ensured” (para. 221, *in fine*).

#### 4.2 The requirement of independence

Concerning the requirement of *independence*, the Court distinguishes an external and an internal aspect, the latter linked to impartiality.

First, it passes in review the rules concerning: the composition of the CETA Tribunal and Appellate Tribunal; the appointment, length of service and level of remuneration of their members; and the grounds for their abstention, rejection and dismissal. “[T]he Members of the CETA Tribunal will be appointed for a fixed term and will have to possess specific expertise” (para. 223). “The CETA ensures [...] that the Members will receive a level of remuneration commensurate with the importance of their duties” (para. 224). “The CETA guarantees, last, the protection against removal of those Members” (para. 225). The same guarantees apply to the members of the Appellate Tribunal (para. 226).

<sup>41</sup> Art. 31 of the Vienna Convention on the Law of Treaties states as follows the general rule of interpretation of treaties: “(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty”.

The Court also considers the role of the CETA Joint Committee: a “non-judicial”, political body composed of representatives of the EU and of Canada and co-chaired by the Minister for International Trade of Canada and the EU Trade Commissioner (or their respective designees). The Joint Committee is “responsible for all questions concerning trade and investment between the parties and the implementation and application of [CETA]”<sup>42</sup>. Decisions are taken by “mutual consent”.

The main area in which the CETA Joint Committee has decision-making powers, is dispute resolution<sup>43</sup>. *Inter alia*, the Committee has the power: to appoint the members of the Tribunal and of the Appellate Tribunal and to determine or adjust their number by establishing a list of arbitrators where necessary; to determine the amount of the monthly retainer fee and to decide to transform that retainer fee and fees and expenses into a regular salary, and to decide applicable modalities. It also decides on administrative and organisational issues when setting up the appellate mechanism.

The ECJ does not consider any of these powers of the Joint Committee to conflict with the guarantee of judicial independence and impartiality of the ICS.

The Court also examines the power of the CETA Joint Committee to adopt decisions on the interpretation of the CETA that will be binding not only on the Parties but also on the CETA tribunals. According to the Court, the binding interpretations of the CETA determined by that Committee will “have no effect on the handling 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” (para. 236). The “safeguard of no retroactive effect and no direct effect on pending cases is not expressly provided for in [...] the CETA” (para. 237). In the Court’s view, the fact that the CETA Joint Committee only adopts decisions “by mutual consent” (therefore, representatives of the parties can always veto committee decisions at the committee level) and that the Union’s participation is bound by the Treaties and the sources having

<sup>42</sup> The whole governance of the CETA is built on the CETA Joint Committee. Under its auspices, there will be eleven specialised committees dealing with specific detailed issues in relation to the Treaty chapter for which they will be responsible. For the proposition that “[t]he powers currently conferred upon CETA bodies are more extensive than in any previous EU trade agreement”, see R. REPASI, *Dynamisation of international trade cooperation. Powers and limits of Joint Committees in CETA*, in *Questions of International Law*, 2017, p. 73-95, available at: [http://www.qil-qdi.org/wp-content/uploads/2017/08/05\\_CETA\\_REPASI\\_FIN.pdf](http://www.qil-qdi.org/wp-content/uploads/2017/08/05_CETA_REPASI_FIN.pdf).

<sup>43</sup> CETA also provides for a general power of the Joint Committee to amend the Treaty protocols and annexes. This power is not available *inter alia* for amendments to the annexes concerning investment. However, in the field of investment protection, the Committee can add other categories than the one mentioned in the definition in Article 8.1 to the intellectual property rights covered by the investment chapter or it can add new categories of measures that are considered a breach of the ‘fair and equitable treatment’ obligation in Article 8.10(2).

the same legal status as the Treaties, is sufficient guarantee that all Committee's decisions will comply with EU primary law and, in particular, with the right to an affective remedy enshrined in Art. 47 of the Charter.

The Court's conclusion seems to be based on the best possible and desirable interpretation and application of the relevant CETA provisions, beyond the level of speculation necessarily allowed in the exercise of its jurisdiction under Art. 218(11) TFEU.

Moreover, it is arguably that had the Court been called to determine the compatibility with the Charter of a political body endowed with powers similar to those of the CETA Joint Committee, *vis-à-vis* a national judiciary, the outcome would have been different.

In this regard, as recently as 19 November 2019<sup>44</sup>, the ECJ answered a preliminary question referred by the Polish Supreme Court asking it to determine if the new Disciplinary Chamber of the Supreme Court offered "sufficient guarantees of independence under EU law" to rule on cases of the retiring of judges of the Supreme Court. According to the AG, the Chamber does not satisfy the requirements of independence under EU law, as the body that chooses its members, the National Council of the Judiciary, is dependent on the executive and legislative branches. The way the National Judicial Council is appointed "discloses deficiencies that appear likely to compromise its independence from the legislative and executive authorities". As a result, there are "legitimate reasons to objectively doubt the independence of the Disciplinary Chamber"<sup>45</sup>. The Court pointed to the case "where the objective circumstances in which such a court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it." It is for the referring court to determine, in the light of all the relevant factors established before it, whether that does in fact apply to the new Disciplinary Chamber of the Polish Supreme Court. If the Polish Supreme Court so decides, its verdict would question the legality of all new judges appointed by the National Council of the Judiciary, and of their judgments.

The Disciplinary Chamber of Poland's Supreme Court is part of deep reforms to the Polish judicial system carried out by the ruling Law and Justice

<sup>44</sup> ECJ (Grand Chamber), Judgment of 19 November 2019, *A.K. v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy* (Joined Cases C-585/18, C-624/18 and C-625/18).

<sup>45</sup> AG Tanchev, Opinion of 27 June 2019, available at: <http://curia.europa.eu/juris/document/document.jsf?docid=215565&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=3452727>.

Party, in relation to which the Court already upheld two actions for failure to fulfil obligations brought by the European Commission.

With judgment of 5 November 2019<sup>46</sup>, the Court held that Poland failed to fulfil its obligations under EU law, first, by establishing a different retirement age for men and women who were judges or public prosecutors in Poland and, second, by lowering the retirement age of judges of the ordinary courts while conferring on the Minister for Justice the power to extend the period of active service of those judges. The judgment contains an interesting discussion on the applicability and scope of the second subparagraph of Article 19(1) TEU, which obliges the Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. The Court considered that the requirement that courts be independent, as confirmed by the second paragraph of Article 47 of the Charter, “forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial” (para. 105). It further recalled that the requirement has two aspects. “The first aspect, which is external in nature, requires that the court concerned exercise its functions *wholly* autonomously, without being subject to any hierarchical constraint or subordinated to *any other body* and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (para. 109, emphasis added). “The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of *any interest* in the outcome of the proceedings apart from the strict application of the rule of law” (para. 110, emphasis added). “Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel *any reasonable doubt* in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it” (para. 111, emphasis added),

<sup>46</sup> ECJ (Full Court), Judgment of 5 November 2019, *Commission v Poland* (Case C-192/18). The laws introduced in 2017 by Poland’s ruling Law and Justice party, established a different retirement age for male and female judges and prosecutors. They also lowered the retirement age of ordinary court judges, while giving the justice minister the power to extend their active service. The Court held that the combination of these measures violates the principle that judges should be protected from removal from office. It also said that the rules breach a ban on gender discrimination. “The combination of measures is such as to create, in the minds of individuals, reasonable doubts regarding the fact that the new system might actually have been intended to enable the minister to remove, once the newly set normal retirement age was reached, certain groups of judges while retaining other judges in post”.

having regard in particular to “the cardinal importance of the principle of irremovability” (para. 115)<sup>47</sup>.

There is an important difference between the Polish courts and the ICS established in CETA (and CETA-like EU’s international agreements). Polish courts like the national judges of any member state are part of the EU-wide judicial system and as such, may be called upon to rule on questions connected to EU law. Instead, “the CETA Tribunal will have to apply and interpret international law, constituted of the CETA itself and rules of international law, and not EU law. The CETA Tribunal, on the one hand, and the Court, on the other, operate within *legal orders that are wholly separate*. The fact that the CETA has no direct effect in the domestic legal systems of the Parties [...] highlights that *separation*” (para. 77 of Opinion 1/17, emphasis added).

Whit the topic of judicial independence remaining high on the ECJ’s agenda<sup>48</sup>, however, this difference might soften but does not eliminate the contrast between the thorough assessment of the guarantees of independence and impartiality of national judiciaries and the altogether summary character of the Court’s reasoning concerning the same guarantees when applied to the powers of the Joint Committee *vis-à-vis* the ICS.

Again, Opinion 1/17 reveals the Court’s concern to uphold the validity of the new ICS. As with the claim that the CETA tribunals would impinge upon the autonomy of the EU legal order, the explanation of the Court’s rejection of this human rights challenge seems to be in the nature of CETA as an

<sup>47</sup> ECJ (Full Court), Judgment of 24 June 2019, *European Commission v. Republic of Poland* (Case C-619/18), where the Court decided that the reform lowering the retirement age of Supreme Court judges violated EU law, on which see M. BONELLI, *Il lato positivo: Commissione c. Polonia e l’inizio di una fase per la tutela dello stato di diritto dell’Unione Europea*, in *SIDIBlog*, 5 July 2019, available at: <http://www.sidiblog.org/2019/07/05/il-lato-positivo-commissione-c-polonia-e-linizio-di-una-fase-per-la-tutela-dello-stato-di-diritto-nellunione-europea>; N. VAN DE PASCH, *Court of Justice disapproves reform of Polish Supreme Court*, in *Rechtters voor Rechtters*, 26 June 2019, available at: <https://www.rechttersvoorrechtters.nl/court-of-justice-disapproves-reform-of-polish-supremecourt>. On the *ex parte* Order of interim measures issued in the case, A. CIAMPI, *Can the EU Ensure Respect for the Rule of Law by its Member States? The Case of Poland*, in *Osservatorio sulle fonti*, 2018, available at: <https://www.osservatoriosullefonti.it/archivi/archivio-note-e-commenti/note-e-commenti-fasc-n-3-2018/1357-can-the-eu-ensure-respect-for-the-rule-of-law-by-its-member-states-the-case-of-poland/file>. Poland had changed the law in 2018 – evened the retirement age of male and female judges and shifted the power to defer retirement from the ministry of justice to the National Judiciary Council. Nevertheless, the Commission decided to continue with the case.

<sup>48</sup> On 2 November 2019, a Maltese judge upheld a civil society group’s – Republika – request for a referral to the Court to determine whether the current system of judicial appointments in terms of the Maltese Constitution is in breach of the EU Treaties and/or the Charter of Fundamental Rights. Republika argued that the current system gives the Prime Minister “arbitrary discretion,” is not subject to “clear and objective rules or criteria” and is lacking any need for explanation or motivation nor subject to any judicial authority. The Judicial Appointments Committee merely expresses an opinion and final discretion rests with the Prime Minister. The referring court requested that the ECJ adopts the accelerated procedure, given the “urgency” of the matter.

international agreement negotiated and (to be) concluded by the Union – as opposed to a treaty to be acceded to by the EU (like the ECHR), an agreement between member states (such as an intra-EU BIT) or *even* national laws.

## 5. Conclusions

If the analysis above is correct, the true reason of the Court’s upholding of the new court system for the settlement of disputes between states and foreign investors is not to be found in its specific features – it will incorporate not only elements of judicial dispute resolution, but also elements drawn from international arbitration proceedings – but rather in the distinct character of its *source*: an international treaty between the Union and its member states on the one hand, and a third state, on the other, as such part of EU law. Moreover, at the origin of the ICS is a specific proposal of the European Commission and a new general approach to ISDS that the Union pursues at the bilateral and multilateral (UNCITRAL) levels. The Court mentions the source of the ICS is an international treaty of the EU when discussing the autonomy of the EU legal order<sup>49</sup>, but does not elaborate upon it. Although policies reasons do not generally form part of the reasoning of the Court’s judgments and opinions, a more articulate reference thereto would have reinforced and given more plausibility to the express reasons of Opinion 1/17.

This is particularly true of the Court’s rejection of the claim that the new ICS does not meet the requirements of the right of access to an independent and impartial tribunal. As highlighted above<sup>50</sup>, there exist grounds to argue that Court would have concluded otherwise, if called upon to determine the compatibility with the Charter of a body established under an intra-EU treaty or national law, endowed with powers analogous to those of the CETA Joint Committee (independently of the judicial, arbitral or hybrid nature of the mechanism *sub judice*).

“The courts envisaged by the CETA are indeed separate from the domestic courts of Canada, the Union and its Member States. The CETA Tribunal and Appellate Tribunal cannot, consequently, be considered to form part of the judicial system of either of the Parties” (para. 114). However, the fact that the envisaged ISDS mechanism stands outside the EU judicial system does not mean that that mechanism is outside the scope of the guarantees of the Charter of Fundamental Rights of the EU.

The Charter applies in all situations governed by EU law. The ECJ should not allow it to afford different levels of protection, depending on the *source* (national, international or otherwise) at the origin of the alleged breach of human rights.

<sup>49</sup> *Supra*, para. 2.

<sup>50</sup> *Supra*, para. 4.2

The least convincing part of Opinion 1/17, however, is the exclusion of the comparability between the situations of Canadian and member states' persons and enterprises investing in the EU. It can only be regretted that the ECJ – as the first international court to be confronted with such a challenge – missed the opportunity to address the question of whether in the light of the particular historical evolution of international investment law and the legal remedies currently available under EU law (and the law of the member states) to all investors, the different treatment of foreign and European enterprises and natural persons that invest within the Union is objectively justified.

We argued that the situations of foreign and European investors are in fact comparable. The difference in treatment exists, with the latter not being able to challenge EU and domestic measures through a specific legal remedy, which is available to the former simply because they are foreign investors. The “hybrid”, yet “primarily judicial” nature of the Tribunal and Appellate Tribunal provided for under CETA (and other trade agreements concluded or being negotiated by the EU) poses in even more serious terms the question of compliance with the principle of equal treatment before the law<sup>51</sup>.

Opinion 1/17 shows that the European project remains in large part a project of *economic* integration, despite the significance expansion and evolution of EU aims and policies over the decades. These questions, however, are bound to resurface sooner or later before national constitutional courts and international human rights courts acting – directly or indirectly – upon a claim by EU investors invoking their right to equal treatment *vis-à-vis* foreign investors (either under the national constitution and/or a human rights treaty such as the ECHR).

<sup>51</sup> *Supra*, paras 3.1 and 3.2.