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The independence and impartiality of the hybrid CETA Investment Court System: Reflections in the aftermath of Opinion 1/17

Maria Fanou

PhD Researcher, European University Institute, Florence, Italy; maria.fanou@eui.eu

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Abstract

In its recent Opinion 1/17, the Court of Justice of the EU (CJEU) examined the compatibility of an external judicial body, the Investment Court System (ICS) under the EU–Canada Comprehensive and Economic Trade Agreement (CETA), with EU law. At a time when judicial independence has arisen as one of the main challenges for the rule of law in the EU, this article discusses the Court's findings in relation to the compatibility of the ICS with the right of access to an independent and impartial tribunal.

Keywords: Opinion 1/17; judicial independence; ICS; CETA; Investment Court System; Multilateral Investment Court System; MIC; SMEs

1. Introduction

The Court of Justice of the EU (CJEU or the Court) was called to opine on the compatibility of the Investor-State Dispute Settlement (ISDS) mechanism provided for in the EU–Canada Comprehensive and Economic Trade Agreement (CETA),¹ that is, the so-called Investment Court System (ICS), with EU law.² By way of background, Belgium (driven by the objections raised by its Wallonia region)³ submitted to the Court a request for an Opinion (pursuant to Article 218(11) Treaty on the Functioning of the European Union (TFEU)) raising three sets of compatibility concerns.⁴ First, the issue of compatibility with the exclusive jurisdiction of the CJEU (and thus, the autonomy of the EU legal order);⁵ second, the issue of compatibility with the principle of equal treatment⁶ and effectiveness of EU law;⁷ and, third, the compatibility with the right of access to an independent and impartial tribunal.⁸ The Court upheld the compatibility of the CETA ICS with EU law on all grounds.

This article does not aim to provide a full account of the Opinion or discuss all the above-mentioned compatibility issues. It will also resist the temptation to discuss the question of compatibility with the autonomy of EU law, which, unsurprisingly in light of the Court's prior record,⁹ and in particular in the aftermath of the Court's seminal judgment in *Achmea*,¹⁰ has been the focal point in the debates.¹¹ Instead, taking into account that Opinion 1/7 comes at a time when the principle of judicial independence is in the spotlight in the EU as it presents one of the main challenges for the rule of law,¹² this article focuses on the Court's findings in relation to the third set of compatibility concerns, that is the ICS vis-à-vis the right of access to an independent and impartial tribunal.

In what follows, the analysis starts with an examination of the envisaged 'hybrid' CETA ICS (Section 2). In addition to an overview of its main features, a very brief account of the independence and

¹Council Decision 2017/37 (28 October 2016) on the signing on behalf of the EU of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the EU and its Member States, of the other part, [2017] OJ L11/1. For the text of the Agreement see [2017] OJ L11/23.

²C-1/17 EU:C:2019:341 (30 April 2019) (Opinion 1/17). Notably, this is an issue the Court had reserved its right to rule upon in Opinion 2/15 EU:C:2017:376 (16 May 2017) para 30 (where the Court clarified that its position on competence was 'entirely without prejudice to the question whether the content of the agreement's provisions is compatible with EU law'). See also Advocate General Bot Opinion in C-1/17, EU:C:2019:72 (29 January 2019) para 45.

³The parliament of Wallonia (a Belgian region) refused CETA's signature. Following several negotiations, the Belgian government managed to reach an agreement with Wallonia that included a promise to submit a request for an Opinion to the CJEU.

⁴Kingdom of Belgium, 'CETA Belgian Request for an Opinion from the European Court of Justice' <https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf> accessed 30 November 2019. For a summary of the concerns, see Opinion 1/17 (n 2) paras 46–69.

⁵Opinion 1/17 (n 2) paras 46–50 and 106–61. AG Bot (n 2) paras 39–184.

⁶Opinion 1/17 (n 2) paras 51–5 and 162–86. AG Bot (n 2) paras 185–213.

⁷Opinion 1/17 (n 2) paras 187–8. AG Bot (n 2) paras 214–19.

⁸Opinion 1/17 (n 2) paras 56–69 and 189–244. Cf also AG Bot (n 2) paras 220–71.

⁹C-459/03 (*Mox Plant*) EU:C:2006:345 (30 May 2006); Opinion 1/91 (*EEA Agreement*) EU:C:1991:490 (14 December 1991); Opinion 1/09 (*Patents Court*) EU:C:2011:123 (08 March 2011); Opinion 2/13 (*Accession to the ECHR*) EU:C:2014:2454 (18 December 2014). Cf Opinion 1/00 (*ECAA Opinion*) EU:C:2002:231 (18 April 2002).

¹⁰C-284/16 (*Achmea*) EU:C:2018:158 (6 March 2018). Among the rich scholarship discussing the judgment see C Eckes, 'Some Reflections on Achmea's Broader Consequences for Investment Arbitration' (2019) 4(1) *European Papers* 79; M Fanou, 'Intra-EU investor-State Arbitration Post-Achmea: R.I.P.? An Assessment in the Aftermath of the CJEU, Case C-284/16, Achmea, Judgment of 6 March 2018, EU:C:2018:158' (2019) 26(2) *MJECL* 316; P Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' (2019) 88 *Nord J Intl L* 41; S Hindelang, 'Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU's Judgment in Achmea Put in Perspective' (2019) 44(3) *ELR* 383; C Contartese and M Andenas, 'Court of Justice EU Autonomy and Investor-State Dispute Settlement under *Inter Se* Agreements between EU Member States: *Achmea*' (2019) 56(1) *CMLR* 157.

¹¹See, indicatively, other contributions in this Special Issue.

¹²See, e.g., among the Court's recent case law C-64/16 (*Associação Sindical dos Juízes Portugueses v Tribunal de Contas*) EU:C:2018:117 (27 February 2018) (*Portuguese Judges*); C-216/18 (*LM, Minister for Justice and Equality*) EU:C:2018:586 (25 July 2018); C-619/18 (*Commission v Poland*) EU:C:2019:531 (24 June 2019); C-49/18 (*Escribano Vindel*) EU:C:2019:106 (7 February 2019). See also pending cases C-127/19 (*Forumul Judecătorilor Din România*), C-272/19 (*Land Hessen*); C-564/19 (*IS*); C-896/19 (*Repubblika*).

impartiality critiques of the traditional investor-State arbitration is offered.¹³ Teasing out the main features of the envisaged court solution, while keeping in mind its hybrid nature, is an important preliminary exercise before pondering on the Court's findings on its compatibility with the right to access to an independent tribunal (Section 3). Against the background of the Court's case law on the issue of judicial independence, the analysis aims to unfold the compatibility analysis that the Court deployed in Opinion 1/17 and draw inferences for future reference. Section 4 concludes.

2. The envisaged 'hybrid' CETA ICS

The European Commission introduced the idea of a permanent court system in the context of the (now obsolete) negotiations of the Transatlantic Trade and Investment Partnership (TTIP) with the US.¹⁴ This idea was crystallised into the ICS a bit later, in CETA. It presents 'the EU's new approach on investment',¹⁵ which aims to address the perceived flaws of the traditional ISDS.¹⁶ This approach allegedly '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'.¹⁷ This 'major reform',¹⁸ as the EU Trade Commissioner stated illustratively, 'will ensure that citizens can trust it to deliver *fair and objective judgements*'.¹⁹ The message that the EU wishes to convey is clear: at all levels (bilaterally or multilaterally), it aspires to a purely judicialised regime in the form of an international court that will be for investment cases what the World Trade Organization (WTO) has been (at least until recently)²⁰ for trade dispute settlement.²¹

The EU vision goes beyond the CETA ICS, which is not the only investment court envisaged. Following the model of the CETA ICS, a similar investment court is provided for in other EU investment

¹³All forms of dispute settlement, including the ICS, are forms of ISDS. Confusingly, ISDS is sometimes presented as a synonym for arbitration. In this article, there is no attempt to attribute, implicitly or explicitly, connotations to any of the two acronyms. Only for purposes of clarity will the term 'traditional ISDS' be used to encapsulate pure arbitration solutions as opposed to a court solution.

¹⁴The European Union's proposal for investment protection and resolution of investment disputes tabled for discussion with the United States (12 November 2015) <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf> accessed 30 November 2019.

¹⁵European Commission, Press Release, 'CETA: EU and Canada agree on new approach on investment in trade agreement' (29 February 2016) <http://europa.eu/rapid/press-release_IP-16-399_en.htm> accessed 30 November 2019.

¹⁶See indicatively among the various summaries of the critiques, UNCTAD, 'Reform of Investor-State Dispute Settlement: In Search of A Roadmap', IIA Issues Note No 2, United Nations (2013) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf> accessed 30 November 2019 ('[a] perceived deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures'). See also AG Bot (n 2) para 15.

¹⁷Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States OJ L11/3 (14 January 2017) <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017X0114\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017X0114(01)&from=EN)> Point 6(f), accessed 30 November 2019. See also Opinion 1/17 (n 2) para 195.

¹⁸Statement No 36 by the Commission and the Council on investment protection and the Investment Court System, entered into the Council minutes in relation to the signature of the CETA and annexed to Decision 2017/37 ([2017] OJ L11, 20) <<https://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf>> accessed 30 November 2019.

¹⁹European Commission, 'CETA: EU and Canada agree on new approach on investment in trade agreement', Press Release (29 February 2016) <https://europa.eu/rapid/press-release_IP-16-399_en.htm> accessed 30 November 2019 (emphasis added).

²⁰The WTO Appellate Body faces a blockage in light of which the European Commission and Canada have concluded an interim arbitration arrangement which is meant to be extended to third countries. See indicatively 'Interim Appeal Arbitration Pursuant to Article 25 of the DSU' (25 July 2019) <https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158273.pdf> and 'European Commission adopts mandate to extend interim appeal arbitration arrangement' (4 September 2019) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=2059&title=European-Commission-adopts-mandate-to-extend-interim-appeal-arbitration-arrangement>> both accessed 30 November 2019.

²¹European Commission, 'A multilateral investment court – Factsheet' (2017) <http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf> accessed 30 November 2019.

agreements (IAs).²² The EU aspiration, however, is that a Multilateral Investment Court (MIC) will be established, and once this happens, all relevant provisions in each agreement will cease to apply.²³

2.1. Independence and impartiality concerns about the 'old' ad hoc system

Among the invoked criticisms of the traditional ISDS regime, concerns about the independence and impartiality of the arbitrators have a leading role. Notably, the European Commission has named 'the safeguards to guarantee judicial independence' provided by its envisaged permanent court solution as a significant difference between ISDS and judicial systems.²⁴

By way of background, the independence and impartiality concerns in the context of traditional ISDS mechanisms stem from the role of party autonomy in the appointment of arbitrators. More precisely, a core element of international arbitration (both commercial and investor-State) is the possibility of the disputing parties to 'agree to submit their disagreement to a person whose expertise or judgment they trust'.²⁵ In other words, each party appoints the person of their choice, subject to the applicable disqualification rules. In practice, the selection of arbitrators is a crucial part of every case. The ability to appoint *your* arbitrator and, in fact, *ex post* (i.e. after the dispute has arisen) has two main advantages.²⁶ First, the parties know the issues that are at stake in their dispute and are thus in a better position to appoint someone with the relevant expertise and knowledge. Second, the parties feel more comfortable with the procedure since they have more confidence in the abilities and skill set of the chosen adjudicators.

This core feature of international arbitration makes clear why the traditional ISDS is inherently ad hoc. Either under the auspices of an arbitral institution or not, the synthesis of each arbitral tribunal is different in each case. This lack of permanence coupled with the role of the parties (including investors/claimants) in the appointment process is still perceived as almost inconceivable by some voices.²⁷ In addition, it is often the case that some hyphenated terms or labels are deployed to distinguish arbitrators who are *pro-investor* from those who are *pro-State*. This distinction (based on the fact/tendency of a certain individual being appointed more often by investors or States respectively) presents an unhelpful and often ideologically charged black or white dichotomy. It has also been argued that arbitrators have personal (financial) interests in preserving this regime and thus that their motive is not doing justice.²⁸

The absence of independence and impartiality is inferred from several circumstances or types of conduct that might call into question an arbitrator's independence and/or impartiality and thus give rise

²²In sketching the main features of the ICS, I will also refer, where appropriate, to the relevant provisions in other similar deals, and in particular to the investment chapter of the EUSFTA (the envisaged agreement in Opinion 2/15) (the EU-Singapore-IA <https://eur-lex.europa.eu/resource.html?uri=cellar:55d54e18-42e0-11e8-b5fe-01aa75ed71a1.0002.02/DOC_2&format=PDF#page=29> hereinafter: EU-Singapore-IA), the EU-Vietnam-IA (i.e. the investment chapter of the EU-Vietnam FTA <https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157394.pdf> hereinafter: EU-Vietnam-IA), the EU-Mexico FTA (on which an agreement in principle has been reached and which still includes an investment chapter <https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156814.pdf> hereinafter: EU-Mexico-IA) all accessed 30 September 2019.

²³CETA, art 8.29; see also TTIP-Proposal, art 12; EU-Vietnam-IA, art 3.41. Cf also Opinion 1/17 (n 2) paras 7 and 108 (ICS is 'only the first stage').

²⁴'Commission Staff Working Document – Impact Assessment Accompanying the Document Recommendation for a Council Decision authorizing the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes' COM(2017) 493 final, SWD(2017) 303 final (13 September 2017) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017SC0302&from=EN>> 11, accessed 30 November 2019.

²⁵N Blackaby and C Partasides, *Redfern and Hunter on International Arbitration* (Kluwer 2015) 1. See also J Paulsson, *The Idea of Arbitration* (OUP 2013) 1 (the very idea of arbitration 'is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers').

²⁶Parties appointing a member of the adjudication organ is not unusual in international practice. Indicatively, in ICJ proceedings, when there is no judge of the involved State's nationality that State has the right to appoint an ad hoc judge (ICJ Statute, art 31).

²⁷See, e.g., B Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41(3) *Vanderbilt J Transnatl L* 775, 819.

²⁸See, e.g., R Howse, 'International Law and Arbitration: A Conceptual Framework' IILJ WP 2017/1 (MegaReg Series) 1. See also 'Commission Staff Working Document – Impact Assessment Accompanying the Document Recommendation for a Council Decision authorizing the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes' COM(2017) 493 final, SWD(2017) 303 final (13 September 2017) 11–12 (and fn 16) referring (in general) to these criticisms.

to a challenge.²⁹ Among such circumstances are included a few heavily debated situations, such as (i) the so-called double-hatting (that is the situation in which an arbitrator acts also as a counsel in other cases simultaneously or sequentially),³⁰ (ii) the issue conflict, that is a challenge on the basis of prior positions an arbitrator has taken on a particular matter and expressed on a number of occasions (e.g. views expressed in academic publications,³¹ dissenting opinions in other cases,³² in press interviews,³³ or the mere fact of participation in other cases raising similar issues³⁴); and (iii) the phenomenon of repeated appointments of the same arbitrator by the exact same party (e.g. the same country),³⁵ side (e.g. only by claimants/investors or by respondents/states)³⁶ or counsel.³⁷

Parties can challenge the appointment of an arbitrator according to the institutional rules applicable to the case and on the basis of the procedure/standards provided therein. The challenge is decided by the non-challenged members of the tribunal. If parties have opted into them, the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Rules)³⁸ provide another basis for the grounds for the challenge. The standard of independence and impartiality varies depending on the applicable rules and ranging from that of a manifest lack of the required qualities³⁹ to justifiable doubts as to the arbitrator's impartiality or independence.⁴⁰ Although, in the early days, challenges were rather rare,⁴¹ their number has increased significantly in the past few years. The contradiction when compared with today's landscape is stark. Indicatively, headlines were recently dominated by challenges not against one of the arbitrators but against the entire tribunal (including the State's appointee) in the notorious *intra-EU* (ECT) cases.⁴²

With this background in mind, we will now move to looking more closely at the main features of the CETA ICS.

²⁹Cf the phrasing of the arbitral tribunal in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentina*, ICSID Case No ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (22 October 2007) para 30.

³⁰See, e.g., M Langford, D Behn and R Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 *JIEL* 301–31; P Sands, 'Conflict of Interest for Arbitrators and/or Counsel' in M Kinnear et al. (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer 2015) 655–8.

³¹*Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, ICSID Case No ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (12 August 2010).

³²*Mathias Kruck and others v Spain*, ICSID Case No ARB/15/23 Decision on Proposal to Disqualify (16 March 2018).

³³See PCA Case No IR-2009/1, In the matter of a challenge to be decided by the Secretary General of the permanent court of arbitration pursuant to an agreement concluded on 02.10.2008 in *Perenco v Ecuador*, ICSID Case No ARB/08/6, Decision on Challenge to Arbitrator (8 December 2009).

³⁴*Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, ICSID Case No ARB/03/19, Decision on the proposal for the disqualification of a member of the arbitral tribunal (22 October 2007).

³⁵See, e.g., *Universal Compression International Holdings v Venezuela*, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil (20 May 2011). The respondent's arbitrator was challenged because she had been appointed by Venezuela in three prior cases.

³⁶See, e.g., *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v Croatia*, ICSID Case No ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov (17 May 2018); *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v Venezuela*, ICSID Case No ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern (23 December 2010).

³⁷See, e.g., *Burlington Resources Inc. v Ecuador*, ICSID Case No ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (13 December 2013); *Caratube International Oil Company LLP & Mr Devinci Salah Hourani v Kazakhstan*, ICSID Case No ARB/13/13, Decision on the Proposal for Disqualification of Bruno Boesch (20 March 2014).

³⁸The IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council (23 October 2014) <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 30 November 2019. See, e.g., art 8.30(1) CETA incorporating the IBA Rules. Cf also Opinion 1/17 (n 2) paras 238–9, 242–3.

³⁹See, e.g., ICSID Convention, arts 14(1) and 57, as well as ICSID Rule 6 and the declaration of independence and impartiality that arbitrators must sign.

⁴⁰See, e.g., art 10.1 London Court of International Arbitration Rules.

⁴¹See for one of the first known challenges *Amco Asia Corporation et al. v Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction (25 September 1983) (the threshold was put very high requiring 'certainty' that the challenged arbitrator is not independent and/or impartial).

⁴²See, e.g., *Vattenfall AB and others v Germany*, ICSID Case No ARB/12/12 PCA Case No IR-2019/1, Recommendation pursuant to the request by ICSID dated 24.01.2019 on the respondent's proposal to disqualify all members of the arbitral tribunal dated 12 November 2018 (4 March 2019).

2.2. Sketching the core features of the ICS

2.2.1. Composition

The CETA ICS is a two-tier permanent system⁴³ composed of a Tribunal of First Instance and an Appellate Tribunal.⁴⁴ The Tribunal of First Instance is composed of 15 ‘members’.⁴⁵ Five of them will be nationals of an EU Member State, five nationals of the other contracting party (that is Canada for CETA) and five nationals of third countries.⁴⁶ In a footnote, however, there is a different alternative, namely that either party ‘may instead propose to appoint up to five members of the tribunal of any nationality. In this case, such Members shall be considered to be nationals of the Party that proposed their appointment.’⁴⁷ Therefore, it might be the case that there will be no actual nationality link but it will suffice that a party chose certain members as ‘their’ members. Thus, conceivably, the ICS could be exclusively composed of non-EU and non-Canadian nationals.

Their appointment, in the case of CETA, will be made by the CETA Joint Committee (upon the entry into force of CETA),⁴⁸ which might also decide to increase or decrease the number by multiples of three.⁴⁹ They will be appointed for a fixed five-year term,⁵⁰ which can be renewed only once.⁵¹ CETA further provides for a President and a Vice President of the ICS.⁵² A monthly retainer fee will be paid to the members of the tribunal as a means to ensure their availability⁵³ ‘at all times and on short notice’.⁵⁴ The amount of such a fee will be determined by the CETA Joint Committee⁵⁵ and both disputing parties should be equally liable to pay this retainer fee into an account managed by the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID).⁵⁶

Contrary to these more detailed provisions in relation to the First Instance Tribunal, CETA defers the determination of the composition (including the number) of the Appellate Tribunal to the CETA Joint Committee.⁵⁷ The permanent Appellate Tribunal will review the *awards*⁵⁸ on the basis of (a) errors in

⁴³The plural ‘tribunals’ that is used by the Court in Opinion 1/17 refers to both the First-Instance and the Appeal Tribunal. In this article, I use the terms ‘CETA tribunals’, ‘CETA ICS’ or simply ICS interchangeably.

⁴⁴CETA art 8.28. Cf EU-Vietnam-IA (art 3.39), EU-Singapore-IA (art 3.10) and EU-Mexico-IA (art 12) (where this is called ‘Appeal Tribunal’).

⁴⁵The use of the term ‘members’ is found in CETA, EU-Vietnam-IA, EU-Singapore-IA and EU-Mexico-IA. Conversely, the term ‘judges’ was used in the TTIP proposal (n 14).

⁴⁶CETA, art 8.27(2). Cf also EU-Vietnam-IA, art 3.38(2) and EU-Mexico-IA art 11(2) (both providing for nine members); EU-Singapore-IA, art 3.9(2) (providing for six); TTIP-Proposal, art 9(2) (fifteen ‘judges’).

⁴⁷CETA art 8.27(2) fn 11. The same conception of ‘nationality’ (i.e. national means ‘nominated by’) is also found in EU-Vietnam-IA, art 3.38(2) fn 1.

⁴⁸CETA, art 8.27(2). Similarly, under the EU-Mexico-IA, the members will be appointed by the EU-Mexico Joint Council (art 11(2)) and under the EU-Vietnam-IA by the Committee of Article 4.1(5)(a). See also, EU-Singapore-IA, art 3.9(2).

⁴⁹CETA, art 8.27(3). Cf EU-Mexico (art 11(3)).

⁵⁰CETA, art 8.27(5). Cf six-year term under TTIP (art 9(5)), eight-year term under EU-Singapore-IA (art 3.9(5)) and four-year term under EU-Vietnam-IA (art 3.38(5)). They all provide specifically for an extension of the term of the members appointed immediately after the entry into force of the respective agreement.

⁵¹CETA, art 8.27(5); EU-Vietnam-IA, art 12(5); TTIP-Proposal, art 9(5). The EU-Mexico FTA does not provide for a renewal at all, while the EU-Singapore-IA provides for an extension ‘by decision of the Committee upon expiry’ without specifying if such renewal can only take place once (art 3.9(5)). Cf that the EU Council in its Negotiating Directives for the MIC had provided for ‘a fixed, long and non-renewable period of time’, see ‘Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes’ (20 March 2018), 12981/17 ADD1DCL1 <<http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>> para 11, accessed 30 November 2019.

⁵²CETA, art 8.27(8). See also EU-Vietnam-IA, art 3.38(8). Cf EU-Mexico-IA, art 11(9) where there is a provision only for a President.

⁵³CETA, art 8.27(12); cf also TTIP-Proposal, art 9(12); EU-Vietnam-IA, art 3.38(14); EU-Mexico-IA, art 11(12)–(13).

⁵⁴CETA, art 8.27(11). See also EU-Vietnam-IA, art 3.38(13); EU-Mexico-IA, art 11(11); EU-Singapore-IA, art 3.9(11); TTIP-Proposal, art 9(11).

⁵⁵Ibid.

⁵⁶CETA, art 8.27(13)–(14). Cf also EU-Vietnam-IA, art 12(15); EU-Mexico FTA, art 11(13). The Convention on the Settlement of Investment Disputes between States and the Nationals of Other States, 18 March 1965, 575 UNTS 159.

⁵⁷CETA, art 8.28(7). Cf other investment agreements that provide for a delineation of the permanent appellate tribunal’s composition. See, e.g., EU-Vietnam-IA, art 3.39; EU-Mexico-IA, art 12; EU-Singapore-IA, art 3.10(2) (all providing for a six-member appeal tribunal).

⁵⁸CETA, art 8.39.

the application or interpretation of the law, (b) manifest errors in the appreciation of facts, including the appreciation of relevant domestic law and, lastly, (c) the grounds set out in Article 52(1)(a)–(e) of the ICSID Convention.⁵⁹

2.2.2. Qualifications and ethics

The appointed members of the tribunal ‘shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence’ with ‘demonstrated expertise in public international law’, with ‘expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements’ being desirable.⁶⁰ The same requirements must be met by the members of the CETA Appellate Tribunal.⁶¹

Emphasis is put on the ethics applying to the ICS members. They must be independent, with no government affiliations. CETA does not elaborate much on this blanket lack of any government affiliations. In a footnote, it is clarified that this does not amount to a general ineligibility of any person receiving remuneration from a government.⁶² The EU intentions seem to be revealed when looking at the text of other agreements which attempt to clarify the meaning of ‘government affiliations’ to exclude academics, persons receiving pensions or having other family relationships with government officials⁶³ as well as persons who were previously government employees (e.g. diplomats).⁶⁴

The members of the CETA ICS must, furthermore, comply with the IBA Guidelines on Conflicts of Interest in International Arbitration.⁶⁵ In addition, as a next step, the CETA Committee on Services and Investment ‘shall adopt a code of conduct’ which may either ‘replace or supplement’ the IBA Guidelines and other applicable rules.⁶⁶ This code may address indicatively issues of ‘(a) disclosure obligations; (b) the independence and impartiality of the members of the tribunal; and (c) confidentiality’.⁶⁷

Indicatively, among the ethical requirements provided, ICS members must be independent and they should not act as ‘counsel or as party-appointed expert or witness in any pending or new investment dispute under [CETA] or any other international agreement’. A procedure to challenge them is provided in case of conflicts of interest.⁶⁸ In such case, the President of the International Court of Justice (ICJ) may be invited to decide.

2.2.3. Procedural provisions, secretariat and the CETA Joint Committee

Cases will be heard in three-member divisions chaired by the member holding the third country’s nationality.⁶⁹ These three members will be appointed by the President of the Tribunal, who will ensure

⁵⁹CETA, art 8.28(1)–(2). See also EU-Mexico-IA, art 30(1); EU-Vietnam-IA, art 3.54(1); EU-Singapore-IA, art 3.19(1).

⁶⁰CETA, art 8.27(4). Cf EU-Vietnam-IA, art 3.38(4); EU-Mexico-IA, art 11(4); TTIP-Proposal, art 9(4). Cf more specific wording in EU-Singapore-IA, art 3.9(4) (‘shall have specialised knowledge of, or expertise in, public international law’).

⁶¹CETA, art 8.28(4). Under other IAs there are slight variations as to the framing of the requirements for the appellate tribunals. See, e.g., in EU-Singapore-IA, art 3.10(4) (‘qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognised competence’).

⁶²CETA, art 8.30(1) (fn 12). Cf also EU-Vietnam-IA, art 3.40(1) (fn 1); EU-Mexico-IA, art 13(1) (fn 4); EU-Singapore-IA, art 3.11(1) (fn 1); TTIP-Proposal, art 11(1) (fn 6).

⁶³EU-Mexico-IA, art 13(1) (fn 4).

⁶⁴EU-Vietnam-IA, art 3.40(1) (fn 1) and EU-Singapore-IA, art 3.11(1) (fn 1).

⁶⁵The IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council on 23 October 2014.

⁶⁶CETA, art 8.44(2) and European Commission, ‘Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Committee on Services and Investment established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of a code of conduct for Members of the Tribunal, the Appellate Tribunal and mediators’, COM(2019) 459 final (11 October 2019). Notably, the other IAs avoid this reference to the IBA rules and provide directly for the adoption of a Code of Conduct. EU-Mexico-IA, art 13(1) (Annex I); EU-Vietnam-IA, art 3.40(1) (Annex 11); EU-Singapore-IA, art 3.11(1) (Annex 7). Cf also discussions on the adoption of a code of conduct in UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Background information on a code of conduct – Note by the Secretariat A/CN.9/WG.III/WP.167 (31 July 2019).

⁶⁷Ibid.

⁶⁸CETA, art 8.30(1)–(4), clearly mirroring the concerns about traditional ISDS.

⁶⁹CETA, art 8.27(6). See also EU-Vietnam-IA, art 3.38(6); EU-Mexico-IA, art 11(7).

that they are chosen ‘on a rotation basis’, randomly and unpredictably.⁷⁰ ‘The disputing parties may agree that a case be heard by a sole Judge who is a national of a third country’.⁷¹ Furthermore, ‘[t]he respondent shall give sympathetic consideration to such a request from the claimant, in particular where the claimant is a small or medium-sized enterprise [SME] or the compensation or damages claimed are relatively low’.⁷² The UNCITRAL Transparency Rules apply to the ICS proceedings,⁷³ while submissions of non-disputing parties are also permitted.⁷⁴

The CETA ICS, surprisingly, will have no permanent secretariat. Instead, it will use the ICSID Secretariat as its secretariat, which will provide ‘appropriate support’, without detailing the nature of such support.⁷⁵

The claimant may submit the claim choosing among the following rules: (a) the ICSID Convention and the ICSID Rules; (b) the ICSID Additional Facility Rules when the conditions for the application of the ICSID Convention do not apply; (c) the UNCITRAL Rules; and (d) any other rules on agreement of the disputing parties.⁷⁶

Lastly, following the example of the North American Free Trade Agreement (NAFTA),⁷⁷ CETA provides for a CETA Joint Committee. It will be composed of an as yet unknown number of members but certainly of an equal number of representatives from each party. The CETA Joint Committee is entrusted with a number of significant tasks, in which are included, indicatively, the adoption of authoritative interpretations of CETA which shall be binding on the two-tier ICS from a specific date (i.e. potentially, also, retrospectively); the determination of the number of members of both the First Instance Tribunal and the Appeal Tribunal and appointing them; the adoption of a code of conduct; as well as determination of the retainer fee for the members of the ICS and the eventual transition to a system of a regular salary.⁷⁸

3. The judicial independence analysis in Opinion 1/17

The Court devoted several paragraphs of the Opinion to the examination of the doubts raised on the compatibility of the envisaged ICS with the right of access to an independent tribunal.⁷⁹ The inquiry was made in light of Article 47 of the EU Charter of Fundamental Rights (the Charter).⁸⁰ It is worth recording the provision of Article 47 of the Charter in full:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an *effective remedy* before a *tribunal* in compliance with the conditions laid down in this Article.

Everyone is entitled to a *fair and public hearing* within a *reasonable time* by an *independent and impartial tribunal* previously *established by law*.

Everyone shall have the possibility of being advised, defended and represented. *Legal aid* shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. (Emphasis added)

⁷⁰CETA, art 8.27(7); EU-Mexico-IA, art 11(8); EU-Singapore-IA, art 3.9(8); EU-Vietnam-IA, art 3.38(7).

⁷¹CETA, art 8.27(9); cf EU-Vietnam-IA, art 12(9); EU-Mexico-IA, art 11(7); EU-Singapore-IA, art 3.9(10).

⁷²Ibid.

⁷³CETA, art 8.36. See also EU-Mexico-IA, art 19(10); EU-Vietnam-IA, art 3.46(1).

⁷⁴CETA, art 8.38; EU-Mexico-IA, art 23; EU-Singapore-IA, art 3.17; EU-Vietnam-IA, art 3.51.

⁷⁵CETA, art 8.27(16). Cf also other IAs, where there is an additional provision for the allocation of the relevant expenses among the disputing parties: EU-Vietnam-IA, art 3.38(18); EU-Mexico FTA, art 11(17); EU-Singapore-IA, art 3.9(16) (where reference to the PCA is also made).

⁷⁶CETA, art 8.23(1)–(2).

⁷⁷North American Free Trade Agreement, 17 December 1992, 32 ILM 612 (1993), arts 2001(2) (establishing a Free Trade Commission) and 2202.

⁷⁸See in more detail, Decision 001/2018 of the CETA Joint Committee of 26 September 2018 adopting its Rules of Procedure and of the Specialised Committees (OJ L190, 27 July 2018, 13) <http://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157677.pdf> accessed 30 November 2019.

⁷⁹Opinion 1/17 (n 2) paras 189–244.

⁸⁰OJ C326/391 (26 October 2012), Charter of Fundamental Rights of the European Union.

CETA, as an agreement concluded by the EU, is, upon its entry into force, an integral part of EU law.⁸¹ The Court reiterated that the Union ‘must ensure’ that the CETA tribunal will ‘have the characteristics of an accessible and independent tribunal’.⁸² This obligation that the EU bears when it ‘enters into an international agreement that encompasses the establishment of bodies that are primarily judicial in nature and that are called on to resolve disputes between, in particular, private investors and States’ is not ‘invalidated’ by the fact that its counterparty, Canada, is not bound by the provisions of the Charter.⁸³

With this clarification on the binding nature of the Charter made, and after discussing the hybrid nature of the CETA ICS as a threshold issue, the Court examined both the independence of the ICS (Article 47(2) of the Charter (see Section 3.1)) and its accessibility (Article 47(3) of the Charter (see Section 3.2)). Accordingly, in what follows, we will look into the Court’s analysis. Following the flow of the Court’s reasoning, we will aim to distil lessons for future reference. The section concludes by observing the interesting link the Court drew between judicial independence and the free and fair trade goals under Article 3(5) Treaty on European Union (TEU) (see Section 3.3).

3.1. *Is the ICS an independent and impartial court?*

The Court started its analysis on the compatibility with the independence threshold set in Article 47 of the Charter by discussing the ‘hybrid’ nature of the ICS.

3.1.1. The starting point: The hybrid nature of the ICS

The EU-proposed court system has been presented and largely perceived as a radical change⁸⁴ that ‘directly addresses all the concerns that have emerged so far’ targeting traditional ISDS.⁸⁵ Nevertheless, the hybrid nature of this ICS, as envisaged, leaves margin for doubt as to the extent of the achieved *radicality*. This becomes clearer if we look a bit more closely at the language used by the drafters of CETA (i.e. arbitration terminology). For instance, we have a judicial body rendering ‘awards’ and not ‘judgments’, we have ‘members of the tribunal’ and not ‘judges’. The linguistic choices are not the only indications that this new CETA ICS is juggling between a court and an arbitral body. CETA provides for recourse to the ICSID Secretariat and incorporates the IBA Guidelines for conflicts of interest *in international arbitration*.⁸⁶ Even further, the ICS aspires to use the legal instruments that the arbitral regime created and utilises for the enforcement of its awards, such as the New York Convention.⁸⁷

In Opinion 1/17, both the Court, and previously Advocate General Bot, made an excellent diagnosis of the nature of the envisaged ISDS mechanism. The Court expressly qualified it as one that is hybrid in nature⁸⁸ in that it ‘contains, in addition to characteristics of judicial bodies, a number of elements that continue to be based on traditional arbitration mechanisms’.⁸⁹ Similarly, Advocate General Bot defined the ICS as ‘a form of compromise between an arbitration tribunal and an international court, a path that moves towards further institutionalization but one that aims to strike a balance between tradition and innovation’.⁹⁰

⁸¹C-266/16 (*Western Sahara*) EU:C:2018:118 (7 February 2018) para 46.

⁸²Opinion 1/17 (n 2) para 191.

⁸³Ibid, para 192, as well as paras 165–7; AG Bot (n 2) para 195. Cf also the Court’s review in Opinion 1/15 (*EU-Canada PNR Agreement*) EU:C:2017:592 (26 July 2017).

⁸⁴See, e.g., L. Pantaleo, *The Participation of the EU in International Dispute Settlement – Lessons from EU Investment Agreements* (Springer 2019) 70.

⁸⁵European Commission, Karel De Gucht, Statement on CETA (16.09.2014) <https://europa.eu/rapid/press-release_SPEECH-14-603_fr.htm?locale=en> accessed 30 November 2019.

⁸⁶IBA Guidelines (n 65).

⁸⁷The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), 330 UNTS 3. It is beyond the scope of the article to discuss the various complexities that such reliance entails as well as the thorny issue of the enforcement of the ICS awards.

⁸⁸Opinion 1/17 (n 2) paras 90, 193.

⁸⁹Ibid, para 193.

⁹⁰AG Bot (n 2) paras 18 and 242. Cf summary of government observations, Opinion 1/17 (n 2) para 90.

Be that as it may, the Court's conclusion was that the branding, namely the formal classification by the parties, is not critical.⁹¹ Even if the members of the '*largely inspired* by traditional ISDS mechanisms'⁹² ICS are not called judges, the critical consideration, the Court clarified, is that 'those tribunals will, in essence, exercise judicial functions'.⁹³ The Court reasoned that there are several factors in support of this conclusion. These factors also differentiate the ICS from a traditional ISDS mechanism (i.e. an ad hoc arbitral tribunal). The ICS, the Court held, differs from an ad hoc arbitral tribunal in two ways: first, the inspiration from arbitration does not extend to the rules on the *composition* of the CETA tribunals and, second, it differs on the '*dealing with those cases*'.⁹⁴

With regard to the *composition* of the tribunal, the Court explains that the difference from traditional ISDS lies in the fact that the ICS is permanent and that the composition of the divisions which will hear a case is 'random and unpredictable'.⁹⁵ It further noted the fact that the CETA tribunals will be 'established by law', the adversarial character of the procedure, the application of rules of law, the autonomous exercise of their functions, and the final and binding nature of their decisions.⁹⁶ The Court, further in support of the 'clear' distinction, cites the declaration of the parties' intention in the Joint Interpretative Statement, which was to 'move decisively away from the traditional approach of investment dispute resolution'.⁹⁷ These references sound as if the CETA ICS is different from traditional ISDS because the parties have so intended and declared. The Court's reference to a *different dealing* is less straightforward. The Court exemplifies its finding by making an express reference to the CETA provision for an appeal mechanism,⁹⁸ as well as to the compulsory jurisdiction of the CETA ICS in the sense that CETA lacks direct effect.⁹⁹

Although the Court did not make any explicit comments, impliedly, the above-delineated search for factors (that differentiate the two dispute resolution types) could be read as an indication that an ad hoc tribunal could not meet the standards of Article 47 of the Charter. To phrase this differently, we should wonder how important the answer to the nature of the ICS question is, when asked in the context of the inquiry under Article 47 of the Charter. Would it have mattered if the Court had not felt that there were differences between the ICS and traditional investor-State arbitration? Would the findings be different if the exact same body had been provided but the contracting parties had not called it a 'court' and they had not made grandiose statements of intent?

⁹¹It is not uncommon for the Court to go for its own evaluation of the nature of a body, although in the past this has been done in a wholly different context (that is, preliminary reference cases. See discussion in Section 3.1.2). See, e.g., C-203/14 (*Consorti Sanitari*) EU:C:2015:664 (6 October 2015) paras 17–21 (where the body *sub judice*, the 'Tribunal Català de Contractes del Sector Públic', was regarded under Spanish law as an administrative body but this was not in itself conclusive for the Court's assessment).

⁹²Opinion 1/17 (n 2) para 194 (emphasis added).

⁹³Ibid, para 197.

⁹⁴Ibid, para 194 ('that is not the case').

⁹⁵Ibid, para 195. In substance, a traditional ad hoc tribunal meets all these criteria, except for the permanence and, relatedly, the 'randomness and unpredictability'. It thus seems that it all comes down to the role of party autonomy, i.e. the ability of the parties to appoint the arbitrators.

⁹⁶Ibid, paras 197–8. These elements are not novel: the Court has enumerated them on other occasions, including in its case law on what constitutes a tribunal that can make requests for preliminary reference rulings (a power that the ICS does not (have any reason to) have. See also discussion in Section 3.1.2).

⁹⁷Opinion 1/17 (n 2) para 195. See also Joint Interpretative Instrument on [CETA] between Canada and the [EU] and its Member States OJ L11/3 (14 January 2017).

⁹⁸Opinion 1/17 (n 2) para 196.

⁹⁹Ibid, para 198. Note that the 'compulsory' character of an arbitral tribunal's jurisdiction has been understood differently by the Court in the context of commercial cases, where it was linked with whether the national legislation specifically provides for arbitration as an alternative to court proceedings (and the jurisdiction does not stem from the will of the parties). See C-377/13 (*Ascendi*) EU:C:2014:1754 (12 June 2014) paras 27–9 and C-555/13 (*Merck*) EU:C:2014:92 (13 February 2014) para 19.

3.1.2. From the independence requirement under Article 267 TFEU to the judicial independence of national courts as a primary law obligation

Before moving to further digging into the Court's analysis in Opinion 1/17, it is useful, for context purposes, to briefly look at the Court's previous case law on the principle of 'judicial independence' (a component of the rule of law on which the Union is based).¹⁰⁰

For many years, 'judicial independence' was touched upon by the Court in relation to bodies that were not part of national judiciaries.¹⁰¹ More precisely, this was in the context of setting the criteria for the 'keystone' of the EU judicial system, that is the preliminary reference system under Article 267 TFEU.¹⁰² For a body (which is called to 'give judgment in proceedings intended to lead to a decision of a judicial nature')¹⁰³ to be considered a court within the meaning of Article 267 TFEU, and thus to be allowed to send preliminary reference requests, it should (i) be established by law, (ii) be permanent, (iii) have compulsory jurisdiction, (iv) follow a procedure *inter partes*, (v) apply rules of law and (vi) be independent.¹⁰⁴ In addition to meeting these criteria, and as unequivocally confirmed in *Achmea*, the said body must be a court or tribunal 'of the Member States'.¹⁰⁵ Independence is one of the criteria that a body must meet for it to send preliminary reference requests to the Court. Conversely, a body that is not independent cannot be part of the dialogue with the Court.

It was only recently that the Court decided to engage with the required guarantees for the judicial independence, this time, of a domestic court of an EU Member State. This shift that caused ripples (as the design of their judiciaries lies at the heart of Member States' competence)¹⁰⁶ took place in light of serious concerns about the rule of law in a few EU Member States.¹⁰⁷ The Court, clearly, did not want to remain a silent observer in the face of this challenge for the rule of law in the Union.

The ground for the shift was set gradually. The first piece of the puzzle was placed in the landmark *Portuguese Judges* case.¹⁰⁸ In *Portuguese Judges*, the Court converted a prima facie austerity case (and the question raised therein regarding the temporary cuts of the remuneration owed to the Portuguese judges of the Court of Auditors) into a constitutional case in which it continued the construction of the EU judicial edifice. Interestingly, the discussion on the independence of the referring court in *Portuguese Judges* was based on a creative interpretation of Article 19(1) TEU and marked by an intentional avoidance

¹⁰⁰Article 2 TEU. See C-294/83 *Les Verts* EU:C:1986:166 (23 April 1982) para 23; C-455/14 (*H v Council and Commission*) EU:C:2016:569 (19 July 2016); C-72/15 (*Rosneft*) EU:C:2017:236 (28 March 2017) para 72. See also on the relation between judicial independence and the rule of law Council of Europe, 'European Commission for Democracy through Law (Venice Commission)' (Study 711/2013, March 2016) <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)> 20ff, accessed 30 November 2019.

¹⁰¹See, e.g., the bodies *sub judice* in C-110/98 (*Gabalfrija*) EU:C:2000:145 (21 March 2000) (concerning the Tribunal Económico-Administrativo Regional de Cataluña and its ability to rule on tax complaints without instructions from the tax authority, and to be read with (pending at the time of writing) C-274/14 (*Banco de Santander*)); C-53/03 (*Syfait*) EU:C:2005:333 (31 May 2005) (concerning the Hellenic Competition Authority); C-196/09 (*Paul Miles/European Schools*) EU:C:2011:388 (14 June 2011) (concerning the Complaints Board of the European Schools); *Ascendi* (n 99) (concerning the Tribunal Arbitral Tributário in Portugal); see also in relation to commercial arbitral tribunals: C-102/81 (*Nordsee*) EU:C:1982:107 (23 March 1982) and C-126/97 (*Eco Swiss*) EU:C:1999:269 (1 June 1999).

¹⁰²*Achmea* (n 10) para 37. See, e.g., the applicable criteria as listed in C-125/04 (*Denuit*) EU:C:2005:69 (27 January 2005) para 12 and *Syfait* (n 101) para 29.

¹⁰³C-394/11 (*Belov*) EU:C:2013:48 (31 January 2013) para 39; *Syfait* (n 101) para 29.

¹⁰⁴See indicatively on the independence criterion in this context C-503/15 (*Margarit Panicello*) EU:C:2017:126 (16 February 2017) paras 27, 36–43; *Ascendi* (n 99) para 28; *Merck* (n 99) para 23. Some of these criteria are echoed in the Court's analysis in Opinion 1/17 as indicators of the fact that the ICS exercises in essence judicial functions (see n 96).

¹⁰⁵*Achmea* (n 10) paras 46–49. Cf *Paul Miles/European Schools* (n 101) paras 37–46; C-377/95 (*Parfums Christian Dior*) EU:C:1997:517 (4 November 1997) paras 21–2 (a court common to a number of Member States, such as the Benelux Court of Justice).

¹⁰⁶*Commission v Poland* (n 12) para 52.

¹⁰⁷Notably in Poland and Hungary. See discussion in L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *CYELS* 3; D Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries' (2019) 56 *CML Rev* 623. See also for a pending case involving Malta C-896/19 (*Repubblika*).

¹⁰⁸C-64/16 (*Portuguese Judges*) (n 12). See among commentaries M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses' (2018) 14(3) *EuConst* 622.

of discussing Article 47 of the Charter.¹⁰⁹ Further, in *Achmea*, the Court continued setting the scene for its ruling in the Polish cases¹¹⁰ in a twofold manner: first, by reinventing its jurisdiction on the basis of Article 19(1) TEU (this time, marginalising inter alia Article 344 TFEU) and, importantly, by over-emphasising the role of the principle of mutual trust.¹¹¹ The role that mutual trust played in *Achmea* and its link with judicial independence was further revealed in a subsequent European arrest warrant case, *LM*.¹¹² As affirmed, an exception to the principle of mutual recognition and execution of a European arrest warrant can be justified on the grounds of lack of judicial independence.¹¹³

Against this landscape, the European Commission boldly brought infringement proceedings against Poland. This led to the Court's judgment in *Commission v Poland*,¹¹⁴ concerning the independence of the Polish Supreme Court following the highly controversial judicial reforms and the removal of judges from office using the age of retirement as a pretext. In this key part of the drama, the Court left no doubt that Article 19(1) TEU is the source of a primary law obligation that the Member States bear in relation to effective judicial protection. Moreover, no doubt was left that the independence requirement under Article 47 of the Charter is 'part of the essence of the right to effective judicial protection and the fundamental right to a fair trial'.¹¹⁵ Lastly, a few days after the judgment in *Commission v Poland* was rendered, the Court handed down its judgment in another 'Polish' case in which it answered a preliminary reference on the independence of the Disciplinary Chamber of the Polish Supreme Court. In this context, it confirmed its jurisdiction 'to interpret Article 47 of the Charter and the second subparagraph of Article 19(1) TEU'.¹¹⁶ In light of these Polish cases, it is clear that we are in a new phase for the EU judicial system. In this new phase, national procedural autonomy is not unconditional.¹¹⁷

These 'judicial independence' cases are clearly in the background of Opinion 1/17 and hence form the backdrop of our analysis. Nevertheless, attention to the differences between this case law and the scenario in Opinion 1/17 should also be drawn. To make this point clear, in all these cases the Court's approach has been inward looking and systemic. The judicial independence inquiry has been deeply intertwined with the application of EU law (and its autonomy) and the trust in the EU judicial system as a system involving not only the CJEU but the domestic courts as EU courts. Impliedly, judicial independence (enshrined in the Charter) becomes a precondition for the principle of mutual trust (created by the Court). Mutual trust evolves and means trust in the system of remedies that the EU is postulated on and to their effectiveness. This mutual trust in the EU judicial system as a whole is underpinned by the CJEU and its ultimate authority.¹¹⁸ Invoking Article 19 TEU, as it was invoked in *Achmea* and the *Portuguese Judges* case, the Court reminded that the task of the judicial protection of individuals' rights under EU law is entrusted to the national courts and to itself.¹¹⁹

Contrariwise, in Opinion 1/17, the CETA ICS is, above all, *independent of* the EU legal/judicial system. As the Court made emphatically clear, the ICS is a judicial body that is and should be separate from the EU legal/judicial system and the remedies provided therein.¹²⁰ It was this separation that saved its compatibility with the autonomy of EU law. This separation means that it cannot and must not apply or interpret EU law, and accordingly, it cannot request preliminary references from the Court. Therefore, evidently, examining its independence and impartiality is a different (in many ways) inquiry (and this

¹⁰⁹See also on that point Bonelli and Claes (n 108) 628ff.

¹¹⁰And notably, *Commission v Poland* (n 12) para 45 (where the Court cites *Achmea*).

¹¹¹*Achmea* (n 10) paras 34, 58. By way of reminder, the referring court (BGH) in *Achmea* neither included art 19(1) TEU among the legal bases for the preliminary references sent to the CJEU nor asked about the principle of mutual trust. Cf also *LM* (n 12) para 35 (where the Court cites *Achmea* exactly where it discusses mutual trust) and *Portuguese Judges* (n 12) para 30. See further on these points, Fanou (n 10) 322–30.

¹¹²*LM* (n 12) para 58. For multiple explicit references to this judgment see Opinion 1/17 (n 2) paras 202–3.

¹¹³*LM* (n 12), para 59.

¹¹⁴*Commission v Poland* (n 12). The judgment was preceded by the Court accepting the Commission's request for interim measures. See Order of the Court EU:C:2018:1021 (17 December 2018).

¹¹⁵*Commission v Poland* (n 12) para 105. See also Bonelli and Claes (n 108) 628–32.

¹¹⁶C-585/18 (*AK Krajowa Rada Sądownictwa*) EU:C:2019:982 (19 November 2019) para 86.

¹¹⁷*Ibid*, para 75. *Commission v Poland* (n 12) para 52.

¹¹⁸Opinion 1/09 (n 9).

¹¹⁹*Ibid*, para 36.

¹²⁰Opinion 1/17 (n 2) paras 77–8, 114.

further explains why the Court seems to have been satisfied with a lower standard of independence in the case of this external judicial body). Importantly, the focal point is directly the individual (foreign investor) and her right to an independent tribunal. Relatedly, in Opinion 1/17, we are in an *extra*-EU context, that is a context in which mutual trust does not apply. Instead, reciprocity does and the focus is on the EU as a rules-based actor in its external relations.¹²¹

3.1.3. The judicial independence analysis in Opinion 1/17

The Court started with restating the well-established distinction between the external and the internal aspect of the requirement of independence.¹²² The external aspect requires that the judicial body ‘exercises its functions wholly autonomously’.¹²³ The internal aspect refers to impartiality. Impartiality is defined as equal distance from the parties, objectivity and lack of a personal interest with regard to the outcome of the case.¹²⁴ The Court’s examination of whether and how these general principles are satisfied in CETA was approached in a piecemeal way, which can be explained by the fact that there is a lot of fluidity around the relevant provisions of CETA and, in fact, a lot is yet to be determined by the CETA Joint Committee.

The Court enumerated the types of rules that are able to safeguard the autonomous exercise of the judicial functions of the ICS. Such rules relate to guarantees against removal from office (including length of term and grounds for dismissal),¹²⁵ the receipt of a level of remuneration adequate for the ‘importance of the functions’ carried out by the said body,¹²⁶ the qualifications/expertise of the members of the tribunal,¹²⁷ and the lack of instructions from any external source (government, organisation or other).¹²⁸

In view of these guarantees, the Court discusses the conferral on the CETA Joint Committee of the power to appoint the members of the ICS. The Court held that this power raises no independence concerns. The reason, according to the Court, is that the said Committee is composed of representatives of both parties (i.e. Canada and the EU) and any decisions shall be adopted by ‘mutual consent’.¹²⁹ Consent becomes again the epicentre of attention¹³⁰ but this time it is not the consent of the parties to the dispute but the consent of the parties to the envisaged agreement (that is the two contracting states). Therefore, implicitly, the fact that all members of the tribunal will be appointed by the contracting states does not raise any independence and impartiality concerns in the Court’s view.

The Court also found unproblematic the provisions on the CETA ICS members’ remuneration, as well as the issue (left open in the text) whether a regular salary or a retainer fee will be provided.¹³¹ Equally unproblematic, the Court held, is the fact that at least for a certain period of time the members’ fees will consist not only of the retainer fee, but also of fees calculated on the basis of the number of days’ work on a given dispute.¹³² The Court almost seems to praise the fact that the relevant provisions are to ‘evolve’ as this serves the goal of conversion into a court with full-time members.¹³³ Also, rather strikingly, the Court made an express reference to the fact that the fees and expenses applicable to the ICS members will be determined on the basis of the relevant Administrative and Financial Regulations of ICSID.¹³⁴

¹²¹ Article 21(1) TEU. See also C-402/05 P and C-415/05 P (*Kadi*) EU:C:2008:461 (3 September 2008) para 285.

¹²² Opinion 1/17 (n 2) paras 202–3. On the external aspect (independence) see in particular paras 223–7 and on the internal aspect (impartiality) see paras 238–43. This distinction is not new, see, e.g., C-506/04 (*Wilson*) EU:C:2006:587 (19 September 2006) paras 51–2; *LM* (n 12) paras 63ff.

¹²³ Opinion 1/17 (n 2) para 223. See also *Portuguese Judges* (n 12) para 44; *Commission v Poland* (n 12) para 108.

¹²⁴ Opinion 1/17 (n 2) para 203.

¹²⁵ *Ibid.*, para 225. See also on that, *Commission v Poland* (n 12); *LM* (n 12) paras 66–7.

¹²⁶ *Ibid.*, paras 202, 224 (level ‘commensurate with the importance of their duties’). See also *Wilson* (n 122) para 51; *Vindel* (n 12) para 66.

¹²⁷ Opinion 1/17 (n 2) paras 204, 221 (‘specific expertise’).

¹²⁸ *Ibid.*, para 241. See also C-452/16 PPU (*Poltorak*) EU:C:2016:858 (10 November 2016), para 35 (emphasising the importance of safeguarding the separation of powers).

¹²⁹ Opinion 1/17 (n 2) para 228.

¹³⁰ Cf reference to consent made by the Court in *Achmea* (n 10) para 55.

¹³¹ Opinion 1/17 (n 2) paras 229–30.

¹³² *Ibid.*, para 239. These additional fees and the method of their calculation were allegedly triggering impartiality concerns.

¹³³ *Ibid.*, para 231.

¹³⁴ *Ibid.*, para 230. See also CETA, art 8.27.14.

This was not the only reliance on a source external to the text of CETA. In addition to the ICSID Regulations and to the political commitments offered, the Court further yielded quickly to the requirements set by the IBA Guidelines, namely a soft-law instrument created by and for the traditional regime (accused of lack of independence and impartiality).¹³⁵ The Court adheres to the threshold offered therein for the removal from office and this leads to the conclusion that no impartiality concerns are raised by the CETA ICS nor is there any risk of conflict of interest.¹³⁶

Another point worth discussing is the ‘safety valve’¹³⁷ of binding interpretations that the CETA Joint Committee may adopt, and the Court’s findings in that regard.¹³⁸ The Court observed that such joint interpretations are standard practice¹³⁹ and they have the legal effects of a subsequent agreement by the parties in accordance with Article 31(3) Vienna Convention on the Law of Treaties.¹⁴⁰ CETA does not expressly exclude the retroactive effect of such interpretations. However, the Court found, and correctly, that such authoritative interpretations present no risk for the CETA tribunals’ independence *so long as* their decisions have no retroactive effect (i.e. no impact on pending or concluded cases).¹⁴¹ A different interpretation of the relevant CETA provision would not be compatible with the right to an effective remedy under Article 47 of the Charter and the Union would be prevented from consenting (Article 218(9) TFEU).¹⁴² The potential retroactive application of such interpretations is the only incompatibility that the Court would clearly be ready to declare.

Overall, despite the degree of fluidity as to the final structure of the ICS, and regardless of the view one takes in relation to the Court’s approach towards the various concerns raised (and views certainly vary), Opinion 1/17 is the closest we have to, if not strictly speaking a test, a guide (or a set of indicators) for future reference applicable to ICS-type ISDS.¹⁴³ And this is important because, as highlighted in the preceding analysis, the CETA ICS is only one of the various bilateral courts the EU plans and, certainly, a step towards further multilateralisation of the court solution.¹⁴⁴

With this in mind, we can summarise the Opinion 1/17 independence and impartiality compatibility indicators as follows. As a matter of composition, an ICS provided for in an EU investment agreement should be permanent¹⁴⁵ and include an appeal mechanism.¹⁴⁶ Its members, although they might not be employed full time,¹⁴⁷ should be appointed randomly¹⁴⁸ and exercise judicial functions.¹⁴⁹

¹³⁵See discussion in Section 2.1 and n 65.

¹³⁶Opinion 1/17 (n 2) paras 239, 241.

¹³⁷European Commission, ‘Investment provisions in the EU–Canada free trade agreement’ (CETA) (February 2016) <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf> 7, accessed 30 November 2019.

¹³⁸CETA art 8.31(3). See discussion in Opinion 1/17 (n 2) paras 232–7 and discussion in Section 2.2.3.

¹³⁹Opinion 1/17 (n 2) para 233. See also Opinion 1/00 (n 9) paras 45–6 as well as among scholarship on Joint Committees, D Gaukrodger, ‘The legal framework applicable to joint interpretive agreements of investment treaties’, OECD 2016 <<http://oecdinsights.org/2016/02/15/joint-government-interpretation-of-investment-treaties/>> accessed 30 November 2019; J Lee, ‘Taming Investor-State Arbitration?’ in J Chaisse and T Lin (eds), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (OUP 2016) 131.

¹⁴⁰Opinion 1/17 (n 2) para 234. Vienna Convention on the Law of Treaties (VCLT) (23.05.1969) 1155 UNTS 331.

¹⁴¹Ibid, paras 236–7. See by analogy *Consorti Sanitari* (n 91) para 19 (expressly noting that an independent court should ‘not occup[y] a hierarchical or subordinate position in relation to any other body [or take] orders or instructions from any source whatsoever’).

¹⁴²Note, however, that an explicit exclusion of retroactive effect of such interpretations was not included in the European Commission’s Proposal, which was issued after Opinion 1/17 was handed down. See ‘Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of a decision on the procedure for the adoption of interpretations in accordance with Articles 8.31.3 and 8.44.3(a) of CETA as Annex to its Rules of Procedure’ COM(2019) 458 final 2019/0218 (NLE) (11 October 2019), p 2 (where it is repeated that the ‘CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date’).

¹⁴³This ‘test’ will not necessarily apply to other types of external dispute resolution systems (e.g. state–state arbitral systems).

¹⁴⁴See discussion in Section 2.

¹⁴⁵Opinion 1/17 (n 2) para 195.

¹⁴⁶Ibid, para 196.

¹⁴⁷Ibid, para 240.

¹⁴⁸Ibid, para 195.

¹⁴⁹Ibid, para 197.

Their independence and impartiality is not impaired by the fact that they might receive, except for a retainer fee, ‘fees calculated on the basis of the days of work devoted to a dispute’.¹⁵⁰ The IBA Guidelines offer a good source of rules for addressing potential conflicts of interest and removal from office. Government officials cannot be appointed as members of such ICS-like bodies, but this limitation does not extend to anyone receiving remuneration from a government such as, for example, academics.¹⁵¹ Lastly, for such an external quasi-judicial body to be an Article 47-compliant, independent and impartial tribunal, it should exercise its functions ‘wholly autonomously’ and this means inter alia that if a Joint Committee (such as the CETA Joint Committee) is provided, it may adopt binding interpretations on the ICS so long as these interpretations have no retroactive effect on concluded or pending cases.¹⁵²

3.2. Is the ICS an accessible court?

The replacement of an ad hoc ISDS with a court does not automatically make the system less costly.¹⁵³ Although the investment court solution has been advertised as a more cost-efficient choice, in reality, except for the fees (court fees or arbitrators’/arbitral institutions’ fees) the main costs of (arbitral) proceedings are costs relating to counsel’s and experts’ fees. Both types of fees further relate to a number of factors such as (predominantly) the complexity of the dispute and will remain unchanged by the fact that the forum will be a permanent court, in the present case the CETA tribunal(s). The financial expenditure that a natural person or a small and medium-sized enterprise (SME) will have to bear might have a deterrent effect in bringing the claim.¹⁵⁴ Therefore, it is necessary to consider how accessible the ICS is.

SMEs are important users of the traditional arbitration system as foreign investors.¹⁵⁵ As a result, the issue of accessibility to international arbitration has received attention in relevant scholarship.¹⁵⁶ Furthermore, the European Commission seems to be aware of the issue. Indicatively, it has raised it not only in relation to CETA,¹⁵⁷ but also on a number of other occasions, such as in the context of the discussions on reforming traditional ISDS in different fora.¹⁵⁸

The Court discussed in some detail the accessibility of the ICS to ‘any’ investor, that is, including natural persons and SMEs.¹⁵⁹ It evaluated the CETA rules, but also other commitments provided not in the text, to make the CETA ICS accessible to all covered investors within the meaning of Article 47(3).¹⁶⁰

Despite the broad *ratione personae* scope of CETA, which is phrased in such a way that clearly aims to make the ICS available to any protected Canadian or EU investor,¹⁶¹ in its text, there are no specific

¹⁵⁰Ibid, para 239.

¹⁵¹Ibid, para 240.

¹⁵²Ibid, paras 232–7.

¹⁵³Ibid, para 209.

¹⁵⁴Ibid, para 211. For the EU definition of SMEs see Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ L124/36–41 (20 May 2003). For the concerns of SMEs with regard to costs, see also discussions at UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018) <<https://undocs.org/en/A/CN.9/964>> paras 111, 131, accessed 30 November 2019.

¹⁵⁵UNCTAD, Press Release, ‘Smaller firms have major potential as foreign investors’, TAD/INF/PR/9815 (28 May 1998) <<https://unctad.org/en/pages/PressReleaseArchive.aspx?ReferenceDocId=3245>> accessed 30 November 2019.

¹⁵⁶See, e.g., LM Caplan, ‘Making Investor-State Arbitration More Accessible to Small and Medium-Sized Enterprises’ in CA Rogers and RP Alford (eds), *The Future of Investment Arbitration* (OUP 2009) 297ff; A Gebert, ‘Legal Protection for Small and Medium-Sized Enterprises through Investor-State Dispute Settlement’ in T Rensmann (ed), *Small and Medium-Sized Enterprises in International Economic Law* (OUP 2017) 291–306.

¹⁵⁷European Commission, ‘How the EU-Canada Comprehensive Economic and Trade Agreement (CETA) benefits small and medium-sized enterprises’ <https://trade.ec.europa.eu/doclib/docs/2019/april/tradoc_157842.pdf> accessed 30 November 2019.

¹⁵⁸See indicatively, European Commission, ‘Comments to the proposed amendments to the ICSID Rules submitted on behalf of the European Union and its Member States’ <<https://icsid.worldbank.org/en/amendments/Documents/ICSID%20reform-comments%20on%20behalf%20of%20the%20European%20Union%20and%20its%20Member%20States.pdf>> paras 5, 13, 33, accessed 30 November 2019.

¹⁵⁹Opinion 1/17 (n 2) paras 201 and 205–22.

¹⁶⁰See in relation to a legal person’s right to access to legal aid C-279/09 (DEB) EU:C:2010:811 (22 December 2010) paras 31, 59–60.

¹⁶¹CETA arts 8.1, 8.18. The Court took note of the breadth of the scope, Opinion 1/17 (n 2) para 205.

provisions to accommodate financial accessibility. The only exception, perhaps, is the possibility to have a case heard by a sole member of the CETA tribunal. However, this possibility does not suffice to ensure accessibility as it reflects only a partial reduction of the financial burden and it depends on the agreement of the respondent State.¹⁶² Instead of including further provisions, CETA entrusts the Joint Committee with the task to ‘consider supplemental rules aimed at reducing the financial burden’ on claimants who are natural persons or SMEs.¹⁶³ This provision in the text of the agreement is coupled with the commitment undertaken in the *separate* Statement 36 to expeditiously implement such supplemental rules as well as with the Commission’s commitment to propose measures of co-financing.¹⁶⁴

Interestingly, the Court repeatedly referred to these (political in nature) commitments and expressly conditioned compatibility (with Article 47 of the Charter) upon their ‘rapid and adequate’ materialisation and, accordingly, the achievement of accessibility to *all EU* investors,¹⁶⁵ subject ‘solely’ to proportionate restrictions, as the right to access to a court is not an absolute one.¹⁶⁶

In light of the Court’s conditional compatibility finding (as well as of what was not discussed in Opinion 1/17), a few observations can be made at this juncture. Although making the system accessible to all is generally important and, concretely, required by the personal scope of CETA, the ways in which this can be achieved is a difficult puzzle to resolve. And, in fact, a puzzle that will have to be resolved not only in the context of CETA, but also of all other bilateral investment courts that the EU envisages, including in the context of the aspired-to MIC. Additionally, CETA (correctly) adopts, in principle, the ‘loser pays’ rule,¹⁶⁷ a factor that the Court lists among those that aggravate the risk of initiating a claim.¹⁶⁸ Could accessibility be the basis on which the CETA Joint Committee would shift the rule to a ‘pay your own way approach’ when it comes to SMEs? CETA also provides for third-party funding.¹⁶⁹ Third-party funding is a means that SMEs have to finance their claims. The Court makes no reference to this option. This silence might mean nothing but it might also mean a lot, such as that third-party funding is a means of using private actors in the system that the Court did not want to touch upon.

Overall, in practice, guaranteeing accessibility is hard to achieve. The Court showcased, however, an unprecedented readiness to find the political commitments concerning the envisaged application of the agreement satisfactory.¹⁷⁰

3.3. *The purposes of the ICS and the ‘level’ of independence and impartiality*

This section will conclude with one final observation. Interestingly, in the context of the independence and impartiality analysis, the Court took note of the *purpose* of the creation of tribunals that stand outside the judicial systems of the parties. The Court did not make this reference to take an abstract position on the justification for an out-of-domestic-courts ISDS mechanism. After all, it is beyond the Court’s role to evaluate the political choices of the Commission, even if, as it seems in this instance, the Court was

¹⁶²Opinion 1/17 (n 2) para 212.

¹⁶³CETA art 8.39(6). See also Opinion 1/17 (n 2) para 207.

¹⁶⁴Statement No 36 by the Commission and the Council on investment protection and the Investment Court System, entered into the Council minutes in relation to the signature of the CETA and annexed to Decision 2017/37 [2017] OJ L11/20, p 20 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:011:FULL&from=CS>> 27, accessed 30 November 2019. This Statement was part of the context on the basis of which the Council also authorised the signature of the agreement by the EU. See also Opinion 1/17 (n 2) paras 217–19.

¹⁶⁵Opinion 1/17 (n 2) paras 214–22.

¹⁶⁶Ibid, para 201, where C-205/15 (*Toma*) EU:C:2016:499 (20 June 2016) para 44 is also cited.

¹⁶⁷CETA art 8.39(5). In passing, it should also be noted that CETA is silent on the CETA tribunals’ powers to order security for costs (cf security for costs provisions in EU-Vietnam-IA, art 3.48), which might also prove a serious problem for states. Investment tribunals operating under the traditional ad hoc ISDS have also been reluctant to order security for costs. One notable exception was *RSM Production Corporation v Saint Lucia*, ICSID Case No ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs (13 August 2014). See also generally A Redfern and S O’Leary, ‘Why It Is Time for International Arbitration to Embrace Security for Costs’ (2016) 32(3) *Arbitration International* 397.

¹⁶⁸Opinion 1/17 (n 2) paras 209–11.

¹⁶⁹CETA art 8.26.

¹⁷⁰Opinion 1/17 (n 2) paras 219–22. Note also that expected compliance was not a sufficient guarantee in the past, e.g. Opinion 2/13 (n 9).

very mindful of the stakes and the ‘need to maintain the powers of the Union in international relations’.¹⁷¹ Instead, the Court proceeded to the identification of its purposes in order for it to assess ‘the level of accessibility and independence’ of the tribunal within the meaning of Article 47 of the Charter.¹⁷²

The purpose that the Court identified is twofold. First, this mechanism is a means to ‘give complete confidence’ to the investors of the one party that they and their investments will be ‘on an equal footing’ with the investors/investments of the other party, as well as that their investments will be secure in the territory of the host State.¹⁷³ Second, these out-of-domestic-courts solutions for foreign investors and their ‘independence from the host State’ are ‘inextricably linked to the objective of free and fair trade’.¹⁷⁴

The first purpose echoes some of the common justifications for providing foreign investors with mechanisms that stand outside the judicial systems of the State parties to the agreement. However, the second purpose, as identified by the Court, has an element of novelty. Apparently, the Court finds that the adoption of a (compliant with the independence and accessibility criteria of Article 47 of the Charter) dispute resolution mechanism is ‘inextricably related’ to Article 3(5) TEU and the free and fair trade objective contained therein. Thus, Opinion 1/17 draws an interesting link between the Union’s objective to contribute to, *inter alia*, free and fair trade under Article 3(5) TEU and the requirements of Article 47 of the Charter.

4. Conclusion

This article has sought to shed some light on a few aspects of the Court’s reasoning on the compatibility of the envisaged CETA ICS with the right of access to an independent and impartial tribunal. Opinion 1/17 offered an opportunity to discuss judicial independence in a context where the focus is exclusively on the Charter and the individual’s right to a fair trial (Article 47 of the Charter). The added value of this opportunity lies in the timing, namely that we live in times when judicial independence is challenged and is a top priority in the EU. Still, the Court did not fully utilise this opportunity in this external relations context and adopted a rather broad-brush approach.

The CETA ICS was found to be independent primarily in the sense that it has been designed to be sufficiently independent of the EU judicial system. Further, its independence was upheld ‘having regard to the nature and specific features of such bodies and to the international framework of which [they] form part’.¹⁷⁵ This is the essence of the independence analysis. It is a court provided in an EU agreement the conclusion of which is the outcome of long multi-level efforts on behalf of the EU. Moreover, despite its hybrid nature, it is branded as a move away from the old (and accused of biases) traditional ISDS regime. The Court’s unprecedented reliance on hypotheses, political commitments outside the text of the agreement and tools that come from the arbitration world leaves little doubt that it took account of the above considerations and chose to be less strict. At the same time, reasonable doubt is cast on what the Court’s findings on independence would have been, had it been the case of a tribunal established under a different type of agreement (e.g. an *extra*-EU BIT or the ECT).

Declarations and conflict of interests

The author declares no conflicts of interest with this work.

¹⁷¹Opinion 1/17 (n 2) para 117. In light of this need, the Court appeared ready to accept, in the case of the ICS, limitations that it would presumably never accept for another tribunal or a domestic court of the EU Member States, which could be part of the EU judicial dialogue (art 267 TFEU).

¹⁷²Ibid, paras 199–200, as well as para 213 (last sentence). Cf also the more detailed discussion in AG Bot Opinion (n 2) paras 179–184. It is worth noting the emphasis the AG put on the policy context of the ICS regime.

¹⁷³Opinion 1/17 (n 2) para 199.

¹⁷⁴Ibid, para 200. Cf also para 213 (‘as well as with the objective of free and fair trade, laid down in Article 3(5) TEU, which the CETA seeks to achieve *by means of, inter alia*, the legal remedy made available to foreign investors before tribunals that stand outside the judicial system of the host State’ (emphasis added).

¹⁷⁵Ibid, para 191.