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Article

Values and objectives of the EU in light of Opinion 1/17: ‘Trade for all’, above all

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Abstract

In Opinion 1/17 the Court of Justice of the European Union (CJEU) ruled that the new Investment Court System (ICS) in the Canada–EU Comprehensive Economic and Trade Agreement (CETA) is compatible with the EU constitutional framework. This article examines the CJEU’s analysis of the ICS in its Opinion through the prism of EU values and objectives. Given the judicial nature of the ICS, the article unfolds around the concept of the rule of law. The scope and the content of this core EU value are considered under both EU law and the European Convention on Human Rights (ECHR). In particular, the ICS is analysed in light of the two core rule-of-law requirements: equal treatment and the independence of courts, enshrined in Articles 20 and 47 of the Charter of Fundamental Rights (CFR). Importantly, in Opinion 1/17 the CJEU for the first time applied Article 47 CFR to a court outside the EU judicial system. While the CJEU ruled that the ICS complies with the CFR rule-of-law criteria,

this article argues that it nevertheless falls short of the rule-of-law standards required for judicial bodies under EU law. The article demonstrates that the CJEU prioritises free and fair trade as the CETA's core objective, rather than the rule of law, and endorses the ICS as the *conditio sine qua non* of guaranteeing such trade. The Court's findings have wider consequences for the rule of law in international law as the EU continues to pursue the establishment of a Multilateral Investment Court (MIC).

Keywords: rule of law; equal treatment; judicial independence; effective judicial protection; Investment Court System

1. Introduction

Following the Lisbon Treaty, the new EU international investment policy has been subject to much political controversy, in particular with respect to Investor-State Dispute Settlement (ISDS). In light of a fierce public debate, the Juncker Commission reformed the existing system for the settlement of investment-related disputes by irrevocably denouncing investment treaty arbitration and replacing it with the Investment Court System (ICS).¹ This new ICS is the EU's interim solution for addressing ISDS concerns at the bilateral level, which should eventually be replaced by a similarly conceived Multilateral Investment Court (MIC),² currently negotiated in the framework of the United Nations Commission on International Trade Law (UNCITRAL). Following the request made by the Kingdom of Belgium as part of the CETA compromise in that Member State,³ in Opinion 1/17 the CJEU confirmed the compatibility of the ICS with EU law. The Court of Justice of the European Union's (CJEU) positive Opinion extends to all EU agreements including the ICS and the future MIC, allowing the EU to continue pursuing its international investment policy objectives.⁴

Apart from these policy repercussions, Opinion 1/17 has important legal implications. From an international law perspective, this Opinion provides a number of EU constitutional criteria intended to preserve the autonomy of the EU legal order. It provides clear EU law criteria that any future court outside the EU judicial system must fulfil when established under an international agreement to which the EU is a party. From the perspective of international investment law, Opinion 1/17 provides an important insight into the CJEU's understanding of the ICS and the promotion of EU values and objectives in EU external trade and investment more broadly. Given the judicial nature of the ICS, of particular importance is the rule of law, as one of the core values in Article 2 Treaty on European Union (TEU), also enshrined in Articles 20 and 47 of the Charter of Fundamental Rights (CFR).⁵ The focus of this article is accordingly placed on the CJEU's analysis of the ICS through the prism of EU values and objectives, and in particular the rule of law.

The article is structured as follows. Section 2 explains the external EU trade and investment policy in the Treaty law framework. The concepts of values, objectives, principles and rights are discussed and differentiated. Given that these concepts are deemed to underpin new EU trade and investment agreements, their practical implementation is considered with the particular emphasis on the right to regulate in the Canada–EU Comprehensive Economic and Trade Agreement (CETA), addressed by the CJEU in Opinion 1/17. In Section 3 the focus is narrowed to the rule of law as one of the core values enshrined in Article 2 TEU. The Belgian request for Opinion 1/17 implicitly questioned whether the EU standards of the rule of law have been correctly implemented in the ICS. Accordingly, the scope and content of the rule of law in the EU context are analysed here in light of the latest CJEU case law, and their applicability in an international context is considered. The remaining sections of the article then assess the application of the EU rule-of-law standards to the ICS. We analyse the ICS against the requirements of equality enshrined in Article 20 CFR (Section 4) and independence in Article 47 CFR (Section 5). The emphasis is placed on the effects of the ICS internally (equality between foreign and domestic investors in the EU) and externally (the EU's approach to the rule of law in international context, as opposed to the domestic context in the EU).

The final part of the article draws conclusions on the extent to which the standard of the rule of law, as conceived in the EU, has been incorporated into the ICS and the extent to which it has been genuinely

¹European Commission, *A new EU trade agreement with Japan*, Factsheet, 1 July 2017 and 8 December 2017, 6.

²See Article 8.29 CETA. For the EU proposal for a MIC, see *Possible reform of Investor-State Dispute Settlement (ISDS), Submission from the European Union and its Member States* (UNCITRAL, A/CN.9/WG.III/WP.159/Add.1, 29 January 2019) <<https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1>> last accessed 12 June 2020.

³In particular, predominantly the French-speaking Belgian region of Wallonia conditioned its consent to the national government's consent to CETA on the CJEU's ruling on the compatibility of the ICS with EU law. Under Belgian constitutional law, Belgium's national government cannot give its consent to the EU's Council Decision on the signing of an EU international free trade agreement without the agreement of all regional parliaments. Consequently, a Belgian request for an Opinion of the CJEU was made in accordance with Article 218(11) TFEU.

⁴For this conclusion, see Opinion 1/17, paras 108, 118.

⁵Adopted 7 December 2000, OJ C 364/1, into force 1 January 2009.

applied by the CJEU in its Opinion 1/17. While the ICS in CETA indeed must have complied with a set of criteria determined by EU law, the Opinion suggests that the assessment of the ICS against these criteria has been made in light of the objective of free and fair trade rather than the rule of law. It accordingly falls short of the rule-of-law standard required for domestic judicial bodies under EU law. The article sheds light on the EU practice in implementing its judicial standards in external trade and investment relations, and consequently, the EU's ability to promote its vision of the rule of law in international law.

2. Understanding the constitutional framework of EU external trade and investment in light of EU values and objectives

Opinion 1/17 relies explicitly and implicitly on an array of intertwined legal concepts encompassing values, objectives,⁶ principles⁷ and rights⁸ in EU primary law. As a starting point of the analysis in this article, of importance is to identify these core elements on a more general basis (Section 2.1), examine how they interact in the realm of the Common Commercial Policy (CCP) (Section 2.2) and what role they play more specifically in the context of the right to regulate in CETA (Section 2.3).

Values are the core beliefs that can be used as standards for evaluating ideas. They illustrate what institutions and systems, including legal ones, represent. They have significant influence on *modus operandi* and decision-making, guiding judgments on what might be the most appropriate course of action in a given context.⁹ Values inform norms, which are the 'action aspect' of values and provide foundations for laws.¹⁰ Further, values inform objectives to be pursued by laws. Therefore, objectives must be congruent with a set of values.¹¹ Finally, values are supported by principles. A principle can be defined as a proposition with general scope that is presented in a synthetic form and expresses a legal norm of particular importance; moreover, a principle can serve as a basis for legal rules according to deductive reasoning.¹² From the perspective of the civil law tradition, courts create general principles of law in order to provide greater coherence to the legal system and to fill *lacunae*.

In the EU legal order, as in every other legal system, its values should be reflected in its laws and actions. Further, EU objectives, including those related to the international sphere, should be aligned with these values. Values are further underlined by general principles and rights in the EU legal order. Together these elements shape the EU constitutional order and its international engagement. It is therefore important to identify them and determine their normative status under EU law.

2.1. Values, objectives, principles and rights in EU Treaty law

In accordance with Article 2 TEU, the EU 'is founded' on six key *values* ranging from human rights to the rule of law. The frequency with which the Treaty drafters refer to these values is testament to their prominence in the EU legal system. As stressed in the Preamble to the CFR and in the CJEU case law, values are common to the Member States.¹³ Abiding by them is a condition for States to join the Union.¹⁴ Member States that infringe these values can face the suspension of certain rights deriving from the application of the Treaties.¹⁵ Several observations about the values and their legal nature should be noted at this stage.

First, although their legal nature is imprecise, values, including the rule of law, are not political slogans; they are binding core components of the EU constitutional order. In effect, several provisions of the TEU confer on them a normative dimension ('shall respect', 'must be founded', etc). Given

⁶Opinion 1/17, para 213.

⁷ibid, para 235.

⁸ibid, para 172.

⁹L Boulle and R Field, *Australian Dispute Resolution: Law and Practice* (LexisNexis 2017) 119–20.

¹⁰M Lippman, *Law and Society* (Sage 2015) 4–5.

¹¹Boulle and Field (n 9) 120.

¹²J Salmon, *Dictionnaire de Droit International Public* (Bruylant, AUF 2001) 877.

¹³Case C-64/16 *Associação Sindical dos Juizes Portugueses* [2018] C:2018:117, para 30.

¹⁴Article 49 TEU.

¹⁵Article 7(3) TEU.

the effective judicial review under EU law, the EU, unlike most other international organisations, has mechanisms available to ensure the compliance of its action with its core values.

Secondly, *ratione personae*, values, including the rule of law, are binding upon both the EU institutions and its 27 Member States. In particular, EU law is based on the ‘fundamental premise that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values’.¹⁶ As expressed by the CJEU in a flurry of landmark judgments, these values are the keystone of the EU judicial system. Mutual trust between the Member States, and in particular their courts and tribunals, is ‘based on the premise that the Member States share a set of common values on which the EU is founded’.¹⁷

Thirdly, *ratione materiae*, values cover any action and policy carried out by the EU. They have both an internal and an external dimension.¹⁸ Under Article 21 TEU, the Article 2 values are defined as ‘principles’ which the EU must ‘respect’ in the development and implementation of the different areas of the Union’s external action.¹⁹ Accordingly, the CCP has to abide by the values enshrined in the TEU irrespective of its mercantile nature.

Fourthly, given that values underpin the EU legal order, they have to be enshrined in secondary EU law and EU agreements concluded with international organisations and third States. A legal act that would infringe or depart from one of these values is deemed to be void and consequently has to be nullified.²⁰ It follows that these values, including the rule of law, have to be fleshed out in trade and investment agreements concluded with third non-EU States.

Values are distinguished from objectives and principles, although the borderline between these different concepts is blurred even in Treaty law. For instance, the rule of law is coined both as a ‘value’ and as a ‘principle’.²¹ Likewise, judicial protection is defined as a general principle stemming from the constitutional traditions common to the Member States and as a right for the purpose of Article 47 CFR.

The EU acts implementing EU values may pursue an array of *objectives* stated either in Article 3 TEU or in more specific policy provisions. These objectives are pursued in the internal domain of EU integration among the Member States but also in EU relations ‘with the wider world’.²² On the one hand, the EU is obliged to ‘promote its values and interests and contribute to the protection of its citizens’ while on the other, it must contribute to higher interests that surpass the narrower sphere of EU interests. These higher goals include peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, *free and fair trade*, eradication of poverty and the protection of human rights, and the strict observance and the development of international law.²³ EU objectives are rather political in nature compared to values and general principles of EU law;²⁴ however, they enter the legal sphere whenever courts review the proportionality of EU and national measures.

EU actions are further guided by a set of *principles* or have to be consistent with general principles of EU law. The term ‘principle’ is, however, ambiguous as it encompasses customary law principles, general principles of international law,²⁵ general principles of EU law,²⁶ the principles embodied in the CFR, sectoral policy principles,²⁷ and policy principles.²⁸ Some principles are expressly stated in fundamental legal texts (Member States’ constitutions and the founding Treaties), while others can be implied in more substantive rules. They may be the product of a purely judicial construction (those set forth by the

¹⁶Case C-621/18 *Wightman* [2018] C:2018:999, para 63, and Case C-619/18 *Commission v Poland* [2019] C:2019:531, para 42.

¹⁷See Case C-284/16 *Achmea* [2018] C:2018:158.

¹⁸Article 21(3) TEU.

¹⁹Article 21(2)(a) TEU.

²⁰Joined Cases C-402/05 P & C-415/05 P *Kadi* [2008] ECR I-6381.

²¹Articles 2 and 21(1) TEU respectively.

²²Article 3 TEU.

²³Article 3(5) TEU.

²⁴See the Common Agriculture Policy objectives listed in Article 43(1) TFEU.

²⁵See the principle of reciprocity, mentioned by Advocate General (AG) Bot in his advisory Opinion to Opinion 1/17.

²⁶Article 6 TEU.

²⁷For instance, the environmental principles listed in Article 191(2) TFEU.

²⁸Articles 35, 37 and 38 of the Charter of Fundamental Rights (CFR).

CJEU, constitutional courts, and administrative high courts), or enshrined in Treaty law and developed by courts, like the general principle of judicial protection proclaimed in the European Convention on Human Rights (ECHR)²⁹ and the CFR. Lastly, principles can be stated in soft law documents, such as the Council of Europe Magna Carta for Judges.³⁰ Although non-binding, they influence interpretation of binding rules regarding judicial independence. The term ‘principle’ thus encompasses both rules that form the foundations of the meta rules, such as the rule of law (for instance, equality and legal certainty) and the rules of legal technique (for instance, proportionality).

Finally, principles are closely connected to *rights*. Under the CFR, institutions and bodies of the Union and the Member States, when implementing Union law, shall ‘respect the rights, and observe the principles’ enshrined in it.³¹ Nevertheless, the term ‘right’ must be opposed to the term ‘principle’.³² The CFR principles³³ must be ‘observed’ and ‘promoted’³⁴ and ‘may be implemented’ either by EU institutions or by the Member States when implementing EU law, often requiring the adoption of implementing measures.³⁵ The CFR rights are justiciable and can be invoked by litigants before EU courts and domestic courts only if the subject matter is covered by EU law. Therefore, in essence, CFR rights impose *duties* on State authorities when implementing EU law.

2.2. Values and objectives in EU trade and investment agreements

As EU values and objectives have been incorporated in the founding Treaties, they define the normative framework for the action of EU institutions and Member States. The Commission’s ‘trade for all’ approach,³⁶ promoted in a new generation of trade and investment agreements, is based on values as one of its key three principles. This approach envisages ‘safeguarding the European social and regulatory model at home’, while utilising trade and investment agreements ‘as levers to promote, around the world, European values like sustainable development, human rights, fair and ethical trade and the fight against corruption’.³⁷ New agreements negotiated and concluded by the EU are thus meant to sustain the higher level of protection for EU citizens guaranteed under EU law, while exporting to the ‘wider world’ not only these higher regulatory standards, but also EU values. The relevant issue is, however, whether EU agreements live up to this ambition.

The new post-Lisbon generation of EU trade and investment agreements integrates different regulatory issues that intersect with trade, such as the sustainable development agenda and environment and health policies. By way of illustration, CETA embodies chapters on trade and sustainable development, trade and labour, and trade and environment.³⁸ In its Opinion 2/15, the CJEU took the view that the objective of sustainable development ‘forms an integral part’ of the CCP.³⁹ Moreover, the sustainable development chapter plays an essential role in EU trade agreements. The breach of the provisions concerning social protection of workers and environmental protection in the sustainable development chapter could amount to a breach sufficiently serious to give rise to the termination or suspension of liberalisation of trade.⁴⁰ Accordingly, the requirements of sustainable development must be met when trade liberalisation takes place.

²⁹ Adopted 4 November 1950, 213 UNTS 221, entered into force 3 September 1953.

³⁰ Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies).

³¹ Article 51(1) CFR.

³² Article 52(5) CFR.

³³ The principles are not designated as such. The CJEU considered in *Glatzel* that the integration of persons with disabilities laid down in Article 26 of the Charter is a principle. See Case C-356/12 *Glatzel* [2014] C:2014:350, para 74.

³⁴ Article 51(1) CFR.

³⁵ Article 52(5) CFR. AG Trstenjak Opinion in Case C-282/10 *Dominguez* [2011] C:2011:559, para 74.

³⁶ European Commission, *Trade for all: Towards a more responsible trade and investment policy* (Communication, 2015).

³⁷ *Trade for All: European Commission presents new trade and investment strategy* (Brussels, 14 October 2015) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1381>> last accessed 12 June 2020.

³⁸ See chapters 22–4 CETA.

³⁹ Opinion 2/15, para 147.

⁴⁰ *ibid.*, para 161.

EU institutions have claimed that regulatory cooperation through EU trade and investment agreements serves as a tool to promote high EU regulatory standards within the other party to a free trade agreement (FTA).⁴¹ However, it remains questionable whether export of higher EU standards can be achieved through such regulatory cooperation. Importantly, sustainable development chapters do not create new labour and environmental standards beyond those that have already been agreed at the international level. For example, regarding environmental protection, CETA includes the obligation of the Contracting Parties to implement very basic environmental multilateral agreements that have already been ratified by the parties.⁴² The majority of these agreements date back to the 1990s and do not provide mechanisms for addressing new environmental risks. The parties did not seize the opportunity to embrace a more ambitious agenda, in particular for sensitive goods such as fish stocks and timber. With respect to climate change, some more recent agreements include only rather vague reference to the Paris Agreement.⁴³ It is therefore legitimate to question whether the EU exports its higher environmental standards to international law through its trade and investment agreements.

With respect to labour standards, the focus is placed on the existing fundamental International Labour Organization (ILO) Conventions. For example, the EU–Korea FTA includes an obligation on the side of Korean authorities to implement into their domestic legislation ILO labour rights. From a European perspective, these conventions offer a minimal level of protection, such as freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.⁴⁴ In addition, this FTA does not include an enforcement mechanism for reviewing Korea’s compliance with these FTA obligations besides a consultation process.⁴⁵ In assessing the contribution of the EU–Korea FTA to the overarching FTA objectives of ‘harmonious development and expansion of world trade, promotion of economic growth and stability, poverty reduction, raising standards of living, improvement of the general welfare and contribution to sustainable development’, the Commission considered that it is ‘too early to draw definitive conclusions because these objectives require a longer period of time to produce tangible results’.⁴⁶

With reference to the existing sustainable development chapters in EU trade and investment agreements, it is notable that the export of EU values is rather rhetorical. Regulatory cooperation through FTAs with Western States, such as Canada, concerns cooperation in the framework of the existing international standards rather than a more ambitious agenda that could embrace a genuine vision of sustainable trade. On the other hand, regulatory cooperation with Asian States is focused on achieving the compliance of these States with the basic international labour and environmental standards. In this sense, so far, the EU has not been exporting any new standards but has merely been achieving one of its objectives in external relations – compliance with international law.

The other side of the coin is the effect that these EU agreements have on the EU regulatory space. Both trade and investment agreements guarantee the right of States to regulate, and accordingly regulatory cooperation cannot call into question EU regulatory procedures. However, the question is whether regulatory cooperation through FTAs can provide an avenue for *lowering* EU regulatory standards.⁴⁷

⁴¹See, for example, European Commission, *A Balanced and Progressive Trade Policy to Harness Globalisation* (2017) COM(2017) 492, 4.

⁴²For example, the CITES Convention.

⁴³See, for example, Articles 16.5 and 16.12, EU-Japan Economic Partnership Agreement.

⁴⁴Article 13.04 EU–Korea FTA

⁴⁵Article 13.14 EU–Korea FTA. See M Bronckers and G Gruni, ‘Taking the Enforcement of Labour Standards in the EU’s Free Trade Agreements Seriously’ (2019) 56(6) *Common Market Law Review* 1591.

⁴⁶Commission Staff Working Document, Executive Summary of the Evaluation of the Implementation of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, SWD(2019) 103 final, 7.03.2019, p 1.

⁴⁷For example, in the framework of CETA, the concerns relate to the impact of CETA on EU food standards. In this regard, Canada has competing demands between the US approach to food standards, which strongly embraces strictly scientifically proven threats to health, and the EU approach, which embraces the precautionary principle and allows for considerations other than just science to be taken into account when faced with scientific uncertainty. See JB Wiener, ‘The Rhetoric of Precaution’ in JB Wiener, MD Rogers, JK Hammitt and PH Sand (eds), *The Reality of Precaution* (RFF Press 2011) 12–23.

With respect to investment agreements, the issue is whether the ISDS mechanism can have similar effects or even contribute to a ‘regulatory chill’.⁴⁸ The ‘right to regulate’ in CETA was discussed by the CJEU in Opinion 1/17, however without providing any conclusive guarantees on how this ‘right’ could be effectively protected in the EU.

2.3. ‘The right to regulate’ in CETA: A meta-principle?

In Opinion 1/17, the CJEU stressed that the EU’s right to regulate in sensitive areas such as health and environment is guaranteed under CETA. This ‘right’ can be linked to the several CFR principles obliging EU institutions and Member States to achieve a high level of protection.⁴⁹ The relevant issue is how this newly proclaimed ‘right’ interacts with EU principles and what are its practical implications for the EU legal order.

In Opinion 1/17, the CJEU proclaimed the ‘right to regulate’ as a new substantive standard for EU legislation. The Court was satisfied that CETA provisions such as the fair and equitable treatment (FET) standard offer sufficient limitations on the discretionary powers of the CETA Tribunals, depriving them of jurisdiction to question public interest choices made following a democratic process at the EU level in areas relating to: the level of protection of public order or public safety, public morals, health and life of humans and animals, food safety, plants and the environment, welfare at work, product safety, consumer protection or fundamental rights.⁵⁰ The CJEU’s reference to these areas as ‘inter alia’ indicates that this list is non-exhaustive. These references are inevitably linked to the CFR principles. In this sense, the ‘right to regulate’ amounts to a meta-principle⁵¹ that encompasses, inter alia, the principles embedded in CFR Articles 35 (health care), 37 (environment) and 38 (consumers).

As a meta-principle, ‘the right to regulate’ can be linked to the EU’s constitutional objectives. Every piece of EU legislation must be both appropriate and necessary to achieve a legitimate objective of the EU for which that legislation is being created.⁵² If the EU public interest legislation had to be changed in reaction to an ICS award, the right to regulate would be undermined. More importantly, the ICS in such situations would also undermine the prescribed role of EU institutions under the founding Treaties. In this sense, it would challenge the role of the EU legislator with respect to democratic law-making and the role of the CJEU as the highest interpretative authority for EU law. As EU institutions and procedures serve to achieve different EU objectives defined by the EU Treaties, the achievement of these objectives would be undermined if the right to regulate were not guaranteed. Ultimately, therefore, the ‘right to regulate’ implemented in CETA serves to protect the achievement of EU objectives and the EU project more generally.

However, the issue is whether this ‘right’ in CETA has any practical meaning in the EU legal order. As discussed, CFR principles are ‘judicially cognisable’ *only* when implemented in EU and domestic acts, through the review of the legality of these acts under EU law.⁵³ According to the CFR Commentary, principles can serve as a shield when a party initiates proceedings against EU and domestic acts calling

⁴⁸While ‘regulatory chill’ is extremely difficult to demonstrate empirically, some studies have examined the effects of investment treaties on regulatory activity of the State. See G Van Harten and D N Scott, ‘Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada’ (2016) 7(1) *Journal of International Dispute Settlement* 1–25.

⁴⁹According to the President of the CJEU, Mr K Lenaerts, ‘the CETA tribunal should not call into question the level of protection of any public interest reflected in measures limiting a Canadian investor’s freedom to conduct business, for example the precautionary principle in environmental and health matters or the protection of public order’. K Lenaerts, ‘Modernising trade whilst safeguarding the EU constitutional framework: An insight into the balanced approach of Opinion 1/17’, 6 September 2019, Seminar on Opinion 1/17, Belgian Ministry of Foreign Affairs.

⁵⁰Opinion 1/17, para 160.

⁵¹Early in the development of the EU’s international investment policy, the Commission emphasised the need for the right to regulate to be confirmed as ‘a basic underlying principle’ in the Transatlantic Trade and Investment Partnership (TTIP), which is supposed to be taken into account by tribunals when assessing any dispute settlement case: European Commission, Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), Commission staff working document, Report (2015) SWD(2015) 3 final, 13 January 2015, p 72.

⁵²See Opinion 1/17, para 151.

⁵³*ibid.*

into question the level of protection *already achieved*. However, they cannot act as a sword for obliging the authorities to achieve policy goals.⁵⁴

That said, the CJEU case law is rather restrictive regarding the justiciability of the CFR principles. For example, the CJEU held that CFR Articles 26 (integration of persons with disabilities) and 27 (workers' right to information and consultation) do not require the EU legislature to adopt any specific measure. Accordingly, to be fully effective, these principles must be given a more specific expression in EU or national law. They cannot by themselves confer on individuals a subjective right.⁵⁵ Further, principles embody obligations placed upon the public authorities but do not confer subjective rights 'whose purpose is the protection of directly defined individual legal situations'.⁵⁶ These obligations placed upon public authorities are more general than the individual legal situation guaranteed by 'rights'. Public authorities, and in particular the legislature, are only called upon to promote and transform the 'principle' into a judicially cognisable reality.⁵⁷

Accordingly, the right to regulate is not a subjective right that imposes a *duty* on EU authorities to protect a directly defined individual legal situation. Moreover, its applicability is limited to EU acts. It is rather a negative obligation that cannot be reviewed, either by being invoked by individual litigants, or by being used as a standard for reviewing the legality of a specific EU or domestic act in the same manner as the CFR principles. On the other hand, CETA endows Canadian investors with subjective rights, for example the right to FET by the host State's authorities. While CETA does not empower the ICS tribunals to review the legality of EU acts, CETA tribunals are empowered to review the *effect* of EU acts on the investor in each particular case. An EU act that complies with the CFR principles and high regulatory standards under EU law but nevertheless breaches investors' rights under CETA cannot be invalidated. However, the tribunal can still order the payment of compensation to such investor, which can indirectly entice the EU to lower regulatory standards in order to avoid compensation payments.

The resulting regulatory chill is already a well-known ill of ISDS.⁵⁸ The CJEU relies on the clearer language of the investment protection standards and higher threshold for reviewing State measures in CETA to serve as a shield to the EU's right to regulate. However, CETA arguably only codifies the existing practice of investment tribunals and leaves sufficient margin of appreciation to CETA tribunals in interpreting these standards.⁵⁹ It remains to be seen whether these provisions sufficiently protect the right to regulate in practice.

To sum up, on the one hand, the right to regulate does not impose any duty on EU authorities to achieve high regulatory standards. With respect to its normative nature, the right to regulate could be considered a meta-principle, which encompasses the existing CFR principles but which cannot be reviewed in the same manner as the CFR principles implemented in EU legislation. On the other hand, the right to regulate is supposed to act as a shield of the EU's regulatory space against investors' claims and the subsequent 'regulatory chill'. However, it remains to be seen how effective it is.⁶⁰

⁵⁴EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union (June 2006) 407.

⁵⁵Case C-176/12 *Association de médiation sociale* [2014] C:2014:2, para 45; Case C-356/12 *Glatzel* [2014] C:2014:350, para 78.

⁵⁶AG Cruz Villalon Opinion in Case C-176/12 *Association de médiation sociale* (n 55), para 50.

⁵⁷*ibid.*

⁵⁸See, for example, K Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7(2) *Transnational Environmental Law* 229; Ch Côté, 'Is Chilling Out There? International Investment Agreements and Government Regulatory Autonomy' (2016) 16(1) *Academy of International Business Insights* 14.

⁵⁹For the argument about codification, see Y Radi, "'Much Ado About Nothing?'" An Appraisal of CETA's Investment Chapter' (2017) 6(4) *ESIL Reflection* 1; P Dumberry, 'Fair and Equitable Treatment' in MM Mbengue and St Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer 2019) 95–126. Both authors, however, claim that States' regulatory action is sufficiently protected under CETA.

⁶⁰In this regard, the correct application of CETA standards by the CETA tribunals could be achieved through Joint Interpretative Statements envisaged in CETA. However, being joint, such a mechanism will require the consent of Canada, which might be reluctant to agree to the interpretations of the right to regulate, which go against Canada's regulatory interests.

3. The rule of law in light of EU values and objectives

In Opinion 1/17 the CJEU assessed the new ICS with reference to the general principles of equal treatment, enshrined in Article 20 CFR, and the right of access to an independent tribunal, enshrined in Article 47 CFR. In the legal doctrine the principles of equality and judicial protection form the core of the rule of law. As discussed, the rule of law is also one of the core EU values. Accordingly, given the adjudicative nature of the ICS, of particular relevance is to consider how the ICS complies with the rule-of-law standards under EU law.⁶¹ Such assessment allows us to draw conclusions on whether the ICS contributes to the promotion of the rule of law in international law. As a starting point for this analysis, it is relevant to define the rule of law in domestic and international contexts, and in particular to consider its application in the EU legal order.

The rule of law has different meanings across jurisdictions and legal systems. As an expression of liberal democracy, it places restrictions on the exercise of regulatory powers of the State rather than duties on citizens.⁶² The Secretary-General of the UN has described the rule of law as ‘a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, *equally enforced* and *independently adjudicated*, and which are consistent with international human rights norms and standards’. The rule of law requires measures ‘to ensure adherence to the *principles* of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency’.⁶³ Along similar lines, the Commission of Venice of the Council of Europe has identified several formal core components of the rule of law: (1) legality, (2) legal certainty, (3) prohibition of arbitrariness, (4) access to justice before an independent and impartial court, (5) non-discrimination and equality before the law, and one substantial component, the ‘respect for human rights’.⁶⁴

In this context, the principles of equality before the law and judicial protection are deemed to be the key components of the rule of law. With respect to equality, which is the fundamental liberal principle expressed in the Universal Declaration of Human rights,⁶⁵ and the International Covenant on Civil and Political Rights,⁶⁶ the emphasis is on the equal treatment of individuals before the law, mirroring the liberal vision of procedural rather than substantive equality. However, according to the Venice Commission, equality is not only a formal criterion but should be directed towards substantive ends, whereby differentiation in the form of affirmative action may be tolerated and even required.⁶⁷ With respect to judicial protection, as stressed in the Magna Carta of Judges, ‘the judiciary is to guarantee the very existence of the rule of law and thus to ensure the proper application of the law in an impartial, just, fair and efficient manner’.⁶⁸ Judicial bodies must ensure procedural justice encompassing the right to a fair hearing (*audi alteram partem*) and the rule against bias (*nemo iudex in causa sua*).

In the EU, the rule of law was enunciated in 1986 by the CJEU in its judgment *Les Verts*, before being explicitly included in Treaty law.⁶⁹ In that connection, the principle of equality has a central role. It is enshrined in Articles 18 Treaty on the Functioning of the European Union (TFEU) and 21(2) CFR, which apply to internal discrimination based on the grounds of nationality, and Article 20 CFR applicable in the external EU dimension.⁷⁰ Equally important, the general principle of judicial protection is embodied in Articles 6 and 13 of the ECHR and Article 47 of the CFR. Article 19 TEU entrusts the

⁶¹ See Sections 4 and 5.

⁶² St Bottomley and S Bronitt, *Law in Context* (The Federation Press 2012) 42.

⁶³ UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General (S/2004/616)* [emphasis added].

⁶⁴ Commission of Venice, *The Rule of Law Checklist* (Council of Europe 2016) 33.

⁶⁵ Article 7.

⁶⁶ Article 26.

⁶⁷ Commission of Venice (n 64) 32.

⁶⁸ Magna Carta of judges, principle 1.

⁶⁹ Case 294/83 *‘Les Verts’ v European Parliament* [1986] C:1986:166.

⁷⁰ See, to that effect, Case C-617/10 *Åkerberg Fransson* [2013] C:2013:105, paras 19–21; Case C-418/11 *Texdata Software* [2013] C:2013:588, para 72; and Case C-682/15 *Berlioz Investment Fund* [2017] C:2017:313, para 49; Opinion 1/17, para 176.

CJEU and domestic courts with the application of EU law and ‘gives concrete expression to the value of the rule of law’.⁷¹

The standard of judicial protection has recently been clarified by a swath of landmark judgments. The essence of the judicial protection under the rule of law in the EU includes the right of individual parties ‘to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act’.⁷² Accordingly, the rule of law includes:

- (i) judicial review in the EU legal order by the CJEU and domestic courts and tribunals;⁷³
- (ii) the duty entrusted to them jointly to observe the law in the interpretation and application of the Treaties;⁷⁴
- (iii) the duty of the Member States to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law;⁷⁵
- (iv) independent courts and tribunals under EU law⁷⁶ that can conduct effective judicial review and provide effective judicial protection. Moreover, independence of courts and tribunals is essential for guaranteeing effective judicial protection.⁷⁷

The relevant issue is whether these same criteria apply to judicial bodies outside the EU judicial system, such as the ICS when established under an EU international agreement.⁷⁸ In Opinion 1/17, the CJEU assessed whether the ICS is consistent with the right of access to an independent tribunal enshrined in Article 47 CFR, derived from the general principle of judicial protection. Article 47 CFR obliges the EU and the Member States to provide litigants with effective remedies and ensure that their courts are fully independent.

The request of the Kingdom of Belgium was made on the assumption that the ICS, as a mechanism established under an EU instrument, must comply with the EU constitutional framework and the notion of the rule of law under EU and ECHR law. This assumption implies that international courts should fulfil the same criteria as domestic courts. In our discussion we expose the limitations of this assumption, which equates the international with the domestic rule of law. Accordingly, the article now turns to the analysis of the ICS in light of the rule-of-law standards under EU law and the CJEU’s reasoning in Opinion 1/17. Section 4 examines equality before the law in the EU and the effects of the ICS in the internal EU dimension, while Section 5 critiques the level of independence of the ICS tribunals. Hence, the analysis serves to shed light on the ability of the EU to export its rule-of-law standards to international investment law.

4. Equality before the law in the EU

In its Opinion 1/17, the CJEU ascertains that differentiated investment regimes under EU law and international law do not undermine the principle of equality in the EU. The consideration of equality in this Opinion was assessed with respect to the equal application of EU legislation in the EU and the availability of equal judicial protection for EU investors abroad. In both cases, the differentiation in treatment due to the ICS was justified by comparing EU investors in Canada with Canadian investors in the EU, and not by comparing foreign investors with domestic investors in the EU.

⁷¹ *Associação Sindical dos Juizes Portugueses* (n 13) para 32.

⁷² *ibid*, para 31.

⁷³ *ibid*, para 32.

⁷⁴ *ibid*, para 33. Opinion 1/09 (Agreement creating a Unified Patent Litigation System) [2011] C:2011:123, para 69, and Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] C:2013:625, para 99.

⁷⁵ *Associação Sindical dos Juizes Portugueses* (n 13) para 34. See, to that effect, Case C-583/11 P *Inuit Tapiriit Kanatami* (n 74) paras 100 and 101 and the case law cited therein. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields: *Associação Sindical dos Juizes Portugueses* (n 13) para 34.

⁷⁶ The factors for assessing whether a body is a ‘court or tribunal’ include, *inter alia*, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent: Case C-503/15 *Margarit Panicello* [2017] C:2017:126, para 27 and the case law cited therein.

⁷⁷ *Associação Sindical dos Juizes Portugueses* (n 13) para 41. The notion of judicial independence encompasses an external as well as an internal dimension, as discussed in Section 5.

⁷⁸ As an international agreement to which the EU is a party, CETA forms part of the EU legal order.

According to the CJEU, the right to regulate in CETA guarantees the equal application of EU legislation in the EU, to both foreign and domestic investors. In proclaiming ‘the right to regulate’ the CJEU was adamant that individual investors’ claims cannot lead to changes in EU legislation. If that were the case, individual claims could induce restrictions in the internal market regulation that otherwise apply to *all* operators who invest in a particular commercial or industrial sector.⁷⁹ Such outcome would run counter to the principle of democracy⁸⁰ as the interest of the majority – the public – would be superseded by the interests of a special category of foreign investors. Additionally, and for the CJEU more importantly, such outcome would run counter to the principle of equality as it would allow the special category of foreign investors to escape restrictions that apply to all investors in a particular sector under that particular legislation. The *rationale* of the Court thus seems to be directed towards protecting the level playing field between foreign and other investors in the EU. Nevertheless, it could still be argued that the special remedy under the ICS available only to particular foreign investors inevitably disturbs the level playing field in the EU.

In the CJEU’s view, the availability of this special remedy is exactly the guarantee of the level playing field. In this regard, the Court distinguishes between internal and external dimensions. In the internal EU dimension, both foreign and domestic investors enjoy a high level of protection under EU law. In the external dimension, the special remedy is justified in order to ensure the same level of protection for EU investors abroad which they otherwise would not enjoy under the legal systems of third States.

According to the CJEU, the EU legal order offers sufficient protections for *all* investors incorporated in the EU – both domestic and foreign. In the CJEU’s view, domestic investors are all intra-EU investors and they are equally protected across the internal market, regardless of the Member State in which they have been incorporated. The principle of mutual trust that applies in the relations between the Member States requires the compliance with the right to an effective remedy before an independent tribunal, and thus ensures effective judicial protection guaranteed in Article 47 CFR across the EU.⁸¹ The Court therefore perceives the EU as a federation and endorses a very integrationist approach of EU law. In doing so, it follows its earlier approach in *Achmea*. The principle of mutual trust is likely to remove all hurdles faced by intra-EU investors, offering equal level of justice across the EU.

This internal EU dimension is, however, different from the external dimension in which the principle of mutual trust is not applicable in relations between an EU and non-EU State.⁸² Therefore, under EU law, it is assumed that effective remedies are guaranteed before any domestic court in the EU while it cannot be assumed that the same effective judicial protection would be guaranteed in third States.⁸³ In light of this, the Court considers it important to ensure the same remedies and equal judicial protection for EU investors in third States. As noted by the CJEU, the purpose of CETA ‘is to give complete confidence’ to EU investors investing in Canada, and vice versa.⁸⁴ For this reason, the CJEU reached the conclusion that the two categories of investors in the EU – domestic and foreign – do not find themselves in a comparable situation and consequently cannot be treated in the same way. It is only the category of EU investors in Canada and vice versa that find themselves in a comparable situation and therefore must be treated in the same way.⁸⁵ Accordingly, the special remedy is justified in order to provide the same level of judicial protection for EU investors in third States, which they otherwise would not have.

Differentiated treatment that the CJEU endorses in its reasoning is an exception to the principle of equality before the law and it is allowed whenever the situations are not comparable. The difference in

⁷⁹Opinion 1/17, para 148 [emphasis added].

⁸⁰Article 2 TEU.

⁸¹Opinion 1/17, para 128.

⁸²ibid, para 129.

⁸³The President of the CJEU, Mr K Lenaerts, stressed that the fact that a State is a respondent in investment proceedings raises the question ‘whether its courts are effectively in a position to settle the dispute impartially, without political influence or interference or indeed the appearance of such influence or interference. The answer to that question may not be clear in certain third States in which the separation of powers and the rule of law may not apply consistently and reliably in practice. Lack of trust in a host State’s judicial system may discourage EU foreign investment and thus undermine the Union’s objective of contributing to free and fair trade, set out in Article 3(5) TEU.’ See Lenaerts (n 49).

⁸⁴Opinion 1/17, para 199.

⁸⁵ibid, paras 180–1; AG Bot Opinion, paras 201–3.

treatment in such situations must be objectively justified.⁸⁶ While the CJEU did not delve into this issue, the objectivity of the criteria underpinning different regimes and the legality of the justification leading to such different treatment were emphasised by Advocate General (AG) Bot. According to him, Canadian investors in the EU are not placed in a preferential situation compared to EU domestic investors because access to a CETA tribunal merely compensates for the absence of direct effect of the CETA treaty.⁸⁷ Several observations must be made with respect to the AG's reasoning.

First, the objectivity of the criterion differentiating the two categories is undermined by the fact that a number of subsidiaries of Canadian undertakings investing in the EU are incorporated in accordance with Member States' law. Therefore, they can avail themselves before domestic courts of the same internal market fundamental freedoms as their domestic EU counterparts. In such situation, the need to 'compensate' Canadian investors with access to a specific adjudicative regime is not clearly justified. In effect, the Canadian mother company can sue the host Member State before the ICS given that it cannot directly invoke the CETA rights before the Member State's domestic courts. On the other hand, locally established enterprises,⁸⁸ as subsidiaries of that company, have a choice to litigate either before the ICS and invoke CETA, or before domestic courts and invoke the EU internal market rights.

Secondly, AG Bot emphasised the German argument, according to which EU domestic investors are likely to be more familiar with domestic law and administrative practice of another Member State compared to a Canadian investor.⁸⁹ Given the equal application of EU law across the EU this might be the case in theory; however, the situation is much more complex in practice given the diversity of legal systems. As a matter of understanding foreign legislation, a Finnish investor is likely to face more hurdles in Romania than a French-speaking firm from Quebec investing in France or an English-speaking Canadian undertaking investing in Ireland. It is unclear how Finnish investors have not assumed the risks and costs of their investment in Romania since they operate in a legal environment that is unfamiliar to them.⁹⁰

Lastly, justification for differentiated treatment is deemed to be valid in law given the broad policy discretion vested in the EU institutions' decision-making process.⁹¹ However, such approach can be criticised from a legitimacy point of view. AG Bot as well as the Court emphasised the necessity of the ICS in fostering a trade relationship between the EU and Canada in particular, and in achieving the objective of free and fair trade more generally.⁹² In this sense, it is assumed that the ICS is needed to ensure the confidence of EU investors investing in third countries such as Canada.⁹³

Three further observations can be made concerning the CJEU's reasoning regarding the requirement of equal treatment. The CJEU seems to emphasise the need for sufficient protection of EU investors abroad. The focus of the CJEU is not on the likelihood of substantively more favourable treatment of external investors in the EU compared to intra-EU investors but on the equal level of judicial protection for EU investors abroad. In assuming that EU investors would not be equally protected abroad due to the absence of mutual trust in external relations, the CJEU endorses the traditional ISDS narrative. The quintessential nature of ISDS is precisely about the mistrust in domestic courts of third States and their ability to afford judicial protection to foreign investors. The ISDS mechanism has been envisaged to

⁸⁶Case C-101/12 *Schaible* [2013] C:2013:661, para 76, and, of 12 July 2018, Case C-540/16 *Spika and Others* [2018] C:2018:565, para 35.

⁸⁷AG Bot Opinion, para 205.

⁸⁸Under the definition of the concept of investor pursuant to Article 8.1 CETA, locally established enterprises have to be organised or constituted pursuant to the law of the host State. See also Article 8.22.2 CETA.

⁸⁹AG Bot Opinion, para 207.

⁹⁰The assertion of an equal level of protection across the EU cannot be taken for granted given that the procedures, the substantial protection (remedies), national languages, the level of compensation etc vary significantly from one Member State to another. Given that the free movement of capital, and freedom of establishment fall within the ambit of a shared competence (Article 4 TFEU), it comes as no surprise that the differences are sometimes significant, in harmonisation through directives (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p 36). What is more, the mode of administration of justice is a sovereign right of the Member States. So far, there is no harmonisation of judicial remedies at EU level.

⁹¹Case C-272/15 *Swiss International Air Lines* [2016] C:2016:993, para 24.

⁹²AG Bot Opinion, paras 173–8, Opinion 1/17, paras 199–200.

⁹³Opinion 1/17, para 200.

provide a neutral forum for foreign investors. The absence of trust in third States' domestic institutions is exactly the reason why special substantive and procedural rights have been provided to foreign investors in treaties such as CETA. Nevertheless, such narrative potentially undermines the rule of law in host States by allowing foreign companies to avoid host States' courts altogether. Consequently, it does not entice the host States to improve their judicial systems.⁹⁴

Secondly, in focusing on free and fair trade in CETA, the CJEU endorses a somewhat narrow view of the objectives pursued by EU external action. Trade is interconnected with other EU objectives given the trans-sectoral nature of EU policies and the integration clauses. By and large, it surpasses the narrow focus on the protection of EU citizens (investors) abroad.⁹⁵ In stressing the objective of free and fair trade the CJEU also assumes that trade cannot be free and fair without the ICS. In that sense, the ICS is taken as the *conditio sine qua non* of free and fair trade. This reasoning of the Court is akin to the legal and political discourse of traditional ISDS.

Lastly, the CJEU emphasised the access to the ICS for a certain category of subjects as an all-inclusive category, embracing any foreign investor, be it an individual or an SME. Although access to the ICS at the outset seems to be very broad, other categories of potential litigants have been excluded. One of the general criticisms of ISDS that has been levelled for years is that parties other than investors and the host States and investors can neither initiate nor intervene in the proceedings. While it was not for the CJEU to say it, the approach endorsed by the CETA parties is testament to a lack of ambition in the reform of the system.

5. Exporting the rule of law to the 'wider world': Access to an independent ICS

In addition to the principle of equality in Article 20 CFR, the ICS must also comply with the principle of judicial protection in Article 47 CFR, which guarantees effective access to justice and a remedy before an independent and impartial tribunal previously established by law.⁹⁶ In order to verify the compatibility of the ICS with the EU legal order, the CJEU had to assess whether the ICS qualifies as a judicial body, and if so, whether it complies with the criteria for judicial independence under EU law.

5.1. Qualification of the ICS: Judicial albeit hybrid?

The CJEU ruled that the ICS is primarily a judicial body. However, given its peculiar characteristics, such qualification was not straightforward. AG Bot's Opinion offers some relevant political considerations which do not emerge in the CJEU's Opinion.

AG Bot repeatedly emphasised the 'hybrid' or 'quasi-judicial'⁹⁷ nature of the ICS, which would 'gradually acquire characteristics of a genuine court'.⁹⁸ He contextualised the request for Opinion 1/17,⁹⁹ inter alia referring to the criticism of ISDS and challenges which the Commission had to face and address in developing a new ICS model. On the political side, these challenges relate to 'the functioning of arbitration tribunals' and the 'legitimacy of an arbitration scheme between investors and States',¹⁰⁰ in particular the lack of guarantees of arbitrators' independence, the lack of consistency and foreseeability of awards, the inability to review the awards, the risk of 'regulatory chill' and the high costs of the proceedings.¹⁰¹

⁹⁴On the inconclusiveness of effects of ISDS on domestic legal systems, see BK Guthrie, 'Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law' (2013) 45(4) *New York University Journal of International Law and Politics* 1151.

⁹⁵In accordance with Article 3(5) TEU.

⁹⁶In that sense, the Belgian request asked the CJEU to ascertain whether the CETA Investment Chapter was compatible with Article 47 CFR.

⁹⁷Opinion AG Bot, para 165.

⁹⁸ibid, paras 33, 242, 260–1.

⁹⁹See Opinion 1/17, Opinion AG Bot, Section 3 (paras 10–33).

¹⁰⁰Opinion AG Bot, para 17.

¹⁰¹ibid, para 15. All ISDS elements that AG Bot refers to as being subject to criticism are, according to the Commission, being addressed through the ICS and EU's proposal for an MIC: see European Commission, Investment provisions in the EU-Canada free trade agreement (CETA), factsheet <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf> last accessed 12 June 2020.

Against this contested background, AG Bot took stock of the reality of international investment law, where arbitration clauses continue to be ‘regarded as a key component of the protection of foreign investments in the host State’.¹⁰² With the EU’s urge to develop bilateral free trade relations with third States in mind,¹⁰³ AG Bot implicitly recognised the Commission’s limited space for manoeuvre. On the one hand, the EU could have abandoned the system – an unrealistic and rather unthinkable option if it wanted to develop its trade relations with third States. On the other hand, the EU could have made improvements to the traditional arbitration model in order address the criticism.¹⁰⁴ In opting for the second option, the EU developed a ‘hybrid’ model, which not only depicts a ‘*compromise* between an arbitration tribunal and an international court’, but also epitomises the EU’s leading role in this ‘experiment’, which will likely determine the future of the whole system.¹⁰⁵ AG Bot’s task was thus to examine whether this pragmatic hybrid compromise, which on the one hand adopts the practice of investment arbitration, and on the other has been developed ‘with a view to *moving towards* a judicial model’, is compatible with primary EU law.¹⁰⁶

Referring to the Belgian assessment of the ICS as falling short in meeting the criterion of independence for courts with respect to remuneration of tribunal members, their appointment and removal, the AG noted:

It is important to point out from the outset that the assessment which the Kingdom of Belgium asks the Court to conduct in relation to various aspects of the organisation and functioning of the ICS *cannot*, in my view, *disregard* the fact that the model adopted by the CETA negotiators is characterised by a number of original features which give it a *hybrid* nature, making it a form of *compromise* between an arbitration tribunal and an international court. Accordingly, the dispute resolution mechanism established by the CETA will include not only characteristic features of a court but also elements taken from the system of international arbitration. Although the term ‘tribunal’ has been chosen in the agreement envisaged, *which could suggest that it is a genuine court*, it is, however, a mechanism which remains greatly inspired by the rules of arbitration.¹⁰⁶

The AG listed the CETA ICS provisions, which were ‘explicitly’ inspired by arbitration rules: the submission of a claim to the Tribunal,¹⁰⁸ the consent to the settlement of the dispute by the Tribunal,¹⁰⁹ the transparency of proceedings,¹¹⁰ and the enforcement of awards.¹¹¹ As the final point, the AG observed that ‘the CETA Tribunal does not give judgments but rather issues awards’.¹¹² Therefore, the new mechanism should not be equated with a genuine court; it should rather be assessed in the context of its ‘*experimental* and *dynamic* nature’.¹¹³ Given that the ICS is only a step towards the creation of an MIC,¹¹⁴ and it offers room for improvement with respect to procedural safeguards that could not have been all clarified in the CETA text,¹¹⁵ it does not need to perfectly satisfy the conditions of a genuine court, as suggested by the Kingdom of Belgium. It should only ensure a ‘*sufficient* level’ of safeguards and protection of the right to access an independent and impartial tribunal.¹¹⁶

In contrast, the CJEU avoided delving into the political background and made no reference to ISDS or ICS controversies, beyond what was presented before the Court in the submissions made by the parties

¹⁰²Opinion AG Bot, para 14.

¹⁰³ibid, para 16.

¹⁰⁴See ibid, para 17.

¹⁰⁵ibid, para 18 [emphasis added].

¹⁰⁶ibid, para 33 [emphasis added].

¹⁰⁶ibid, para 33 [emphasis added].

¹⁰⁸Article 8.23 CETA.

¹⁰⁹Article 8.25 CETA.

¹¹⁰Article 8.36 CETA.

¹¹¹Article 8.41 CETA.

¹¹²Opinion AG Bot, para 242.

¹¹³ibid, para 246 [emphasis added].

¹¹⁴ibid, para 246.

¹¹⁵ibid, para 247. In particular, the AG refers to additional rules regarding the Appellate Tribunal mandatory code of conduct, which will further strengthen the guarantees of impartiality and independence, and the rules on mediation.

¹¹⁶Opinion AG Bot, paras 245, 251 [emphasis added].

(mostly the Kingdom of Belgium). The Court held that, although the ICS is largely inspired by the traditional ISDS mechanism, it is nevertheless ‘primarily judicial in nature’.¹¹⁷ In the CJEU’s view, regardless of whether tribunals are formally classified as ‘judicial bodies’ and their members as ‘judges’, they will in any case, ‘in essence’ constitute judicial bodies with judicial functions.

The CJEU justified the judicial nature of the ICS in accordance with the EU criteria for ‘courts or tribunals’:¹¹⁸ it will be permanent and established by law (CETA); it will follow an adversarial procedure; apply rules of law; exercise its functions autonomously; and issue final and binding decisions.¹¹⁹ Importantly, the Court endorsed the view that judicial bodies must ensure procedural justice: the right to a fair hearing (*audi alteram partem*) and the rule against bias (*nemo iudex in causa sua*). In line with this, the Court in particular emphasised the difference between the ICS and ISDS with respect to ‘the rules on the composition of [CETA] Tribunal and on dealing with cases [before that Tribunal]’.¹²⁰ At the same time, the CJEU did not deny the ICS’s hybrid nature.¹²¹

In qualifying the ICS as primarily a judicial body, the CJEU diverts the focus from impliedly *political* issues associated with ‘hybrid’ bodies towards *legal* issues related to the compliance of judicial bodies with the basic legal principles for the functioning of such bodies. This reasoning seems to be logical since the ICS replaces domestic courts in adjudicating investment disputes. Although this differentiation might seem somewhat pedantic, it is of utmost importance. If ICS tribunals are ‘experimental’, ‘dynamic’, ‘hybrid’ and a political ‘compromise’, it is valid to ask how they could comply with the legal principles for judicial bodies. On the other hand, if ICS tribunals are essentially judicial bodies, their compliance with the essential principles for judicial bodies is justified, just as the EU’s ISDS reform is. Ultimately, this distinction enabled the CJEU to nuance the political background of the AG’s argumentation and eventually justify the legitimacy of the ICS under international law. It accordingly justified the evolution from investment treaty arbitration towards the ICS, although the mechanism falls short of the ‘rule-of-law’ standard under EU law and the Court’s own standards for a ‘genuine’ court.

5.2. Independence and impartiality of the ICS but according to which standard?

In Opinion 1/17, the CJEU ruled that the ICS would not qualify as an EU court because it stands outside the EU judicial system. However, the ICS must comply with standards for EU courts under Article 47 CFR. The CJEU implicitly acknowledged that ICS standards are lower than EU courts’ standards but are to be considered sufficient as long as they satisfy the minimum standards of Article 47 CFR.

The right to effective remedy before an independent and impartial tribunal prescribed in Article 47 CFR constitutes ‘a reaffirmation of the principle of effective judicial protection’¹²² and a general principle of EU law.¹²³ By virtue of Article 52(3) CFR, Article 47 must be interpreted in light of Article 6 ECHR. Moreover, the provisions of the Charter must be interpreted in light of the case law of the European Court of Human Rights (ECtHR).¹²⁴ Accordingly, the case law of the ECtHR is relevant for assessing the requirements of the independence and impartiality of Article 47 CFR. Furthermore, as a general principle, the right to effective judicial protection in Article 47 CFR is broader than that of Article 6 ECHR, which is restricted to ‘civil rights and obligations’ and criminal proceedings.¹²⁵ In contrast to Article 6 ECHR,

¹¹⁷ *ibid.*, para 190.

¹¹⁸ See Section 3 above.

¹¹⁹ Opinion 1/17, para 197.

¹²⁰ *ibid.*, paras 193–4.

¹²¹ *ibid.*, para 193.

¹²² See, to that effect, Case C-432/05 *Unibet* [2007] C:2007:163, para 37, and Case C-93/12 *Agrokonstulting-04*, EU:C:2013:432, para 59. This provision provides that ‘everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article’: Case C-562/13 *Centre public d’action sociale d’Ottignies-Louvain-la-Neuve v Abdida* [2014] C:2014:2453, para 45.

¹²³ Case C-97/91 *Borelli* [2012] ECR-6313.

¹²⁴ This is stated in the *travaux préparatoires* of the Charter. See F Kern, ‘Article 47. Droit à un recours effectif’ in *Charte des droits fondamentaux de l’Union européenne* (Larcier 2018) 985.

¹²⁵ D Shelton, ‘Article 47’ in S Peers, T Harvey and J Kenner (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1210, n° 47.44. For instance, the review of a decision of a national regulatory authority by a national court is subject to Article 47 CFR. Case C-231/15 *Prezes Urzędu Komunikacji Elektronicznej* [2016] C:2016:769, para 24.

Article 47 CFR imposes obligations and restrictions on the EU both internally and externally. This is confirmed in Opinion 1/17, where the CJEU for the first time applied Article 47 CFR to a court outside the EU judicial system.

Judicial independence is an essential prerequisite for the operation of justice.¹²⁶ According to the CJEU, it is an ‘essential’ element of the rule of law, as emphasised in a swath of judgments regarding domestic courts.¹²⁷ The question is whether the CJEU is keen to apply similar standards to international courts, in particular those created by the EU. Given that the judicial nature of the ICS was acknowledged in Opinion 1/17, the issue is whether the ICS complies with the international and European standards of independence (Magna Carta of Judges, European Charter on the Statute for judges, UN Basic Principles on the Independence of Judiciary, etc.) as well as the CJEU and ECtHR case law. That was precisely the issue raised by the Belgian authorities.

In this regard, the ECtHR highlights four elements of judicial independence that are either external or internal: the appointment of its members, the term of office, the existence of guarantees against outside pressures – including in budgetary matters; and whether the judiciary *appears* independent and impartial.¹²⁸ Similarly, the notion of independence in the CJEU’s case law encompasses an external as well as an internal dimension. The rationale of these two dimensions is related to the public perception of the independence of courts. The aim is ‘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’.¹²⁹ In that way, ‘justice must not only be done, it must also be seen to be done’.¹³⁰ Thus, the standard of independence and impartiality is set by the ECtHR case law and endorsed by the CJEU.

5.2.1. External dimension of independence

According to the settled case law of the CJEU, the concept of independence in its external dimension presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subjected to any hierarchical constraint or subordinated to any other body and without taking orders or instructions *from any source whatsoever*, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.¹³¹

As a matter of principle, the ICS must be fully immune from external influence. However, the ICS is subject to the control of the CETA Joint Committee (hereafter CETA JC) in a number of ways: through binding interpretations, appointment and removal of members, and remuneration. In this context, three issues require closer consideration: first, to what extent the principled autonomy of the ICS could be hampered by the CETA JC and its binding interpretations (i); secondly, whether the procedures for the removal of ICS members could have an adverse impact on the autonomy of the ICS (ii); and finally, whether the manner in which ICS members will be remunerated offers sufficient guarantees of independence (iii).

(i) *Autonomy of the ICS in relation to the CETA JC*

If the standard of judicial independence is to be applied, the ICS must be fully immune from instructions *from any source whatsoever*. However, the CETA JC can adopt interpretations of the CETA agreement that would be binding on the ICS tribunals.¹³² One of the observations made by the Belgian authorities was that the CETA JC can be qualified as an executive body exerting a significant influence

¹²⁶Magna Carta of Judges, Principle 2.

¹²⁷See Section 3 for an analysis of this standard in EU law.

¹²⁸*Campbell and Fell v the UK* App nos 7819/77 and 7878/77 (ECtHR, 28 June 2014) para 78 [emphasis added].

¹²⁹Case C-222/13 *TDC* [2014] C:2014:2265, para 32 and the case law cited therein.

¹³⁰See, for example, *De Cubber v Belgium* App no 9186/80 (ECtHR, 26 October 1984) para 26; *Micallef v Malta* App no 17056/06 (ECtHR, 15 October 2009) para 98; *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013) para 106.

¹³¹See, to that effect Case C-506/04 *Wilson* [2006] C:2006:587, para 51, and Case C-503/15 *Margarit Panicello* [2017] C:2017:126, para 37 and the case law cited therein. See also Magna Carta of Judges, Principle 12.

¹³²Article 8.31.3 CETA.

on the ICS's adjudication, thus being likely to undermine the autonomy of the ICS. The Court discarded this remark on the basis of two arguments. First, the binding interpretations are accepted practice in international law.¹³³ Secondly, such decisions are to an extent subject to EU law and can be reviewed by the CJEU itself.¹³⁴

The argument of Belgium has to be placed in the context of the standard of judicial independence stemming from the rule of law. In that connection, the ECtHR has stressed in different cases that the separation of powers is the cornerstone of the independent judiciary in domestic legal systems. For instance, in *Beaumartin v France*¹³⁵ the ECtHR held that the guarantee of independence was not satisfied where the tribunal can refer a question of interpretation of the law to the executive. In *Van der Hurk v The Netherlands*,¹³⁶ the Court observed that the requirement of independence was not fulfilled when the executive can decide whether or not to implement a judgment of a tribunal.¹³⁷

There lies a paradox: separation of powers is engrained in domestic legal systems, not in the international realm, to which CETA belongs. At the same time, CETA is also part of the EU legal order. The challenge is to safeguard the independence of the new court in a regime that is ill-tailored to guarantee full independence from political influence.

In its Opinion 1/17, the CJEU resolved this paradox in touting the middle ground. It embraced an international law standard of binding interpretations issued by States, while conditioning these interpretative instruments to a basic rule-of-law-standard: 'no retroactive effect and no direct effect on pending cases'.¹³⁸ The Court particularly noted that it is 'neither illegitimate nor unusual under international law' for the 'joint wishes' of the parties to be expressed in such binding statements.¹³⁹ In other words, the Court expressly distinguished the standard of judicial independence in a domestic context (where the ECtHR case law applies) and where political interference is absolutely excluded, from the international context in which politics – expressed through the wishes of the parties to international agreements – interferes with adjudicatory regimes.

With respect to the correct application of EU law, the CJEU sets forth a safeguard: the CETA JC's binding interpretations are governed by Article 218(9) TFEU. Nevertheless, such safeguard has its limitations. The CETA JC decisions cannot be challenged per se, only the consent of the EU to such decisions can be subject to judicial review by the CJEU. In that respect, the standing for this judicial review is restricted to the Member States, the European Parliament and the Council.¹⁴⁰ In practice, only a few Member States have initiated such proceedings. It is rather the Council that challenges the positions adopted by the European Commission, and vice versa. While judicial control exists as a matter of principle, it remains to be seen whether the review of the consistency of the CETA JC decisions with primary EU law would be effective. Furthermore, the issue of the CETA JC's accountability is unresolved: if the ICS is under the control of the CETA JC, under whose control is the CETA JC? An additional issue would be the difficulty of correcting flawed interpretations of the Appellate Tribunal in the case of a disagreement at the CETA JC level. In the absence of a consensus between the Contracting Parties, a breach of EU law principles (for instance, the compliance with the right to regulate) could not be corrected. Lastly, a possibility of judicial review of the EU consent to the CETA JC decisions compounds the risk of a disagreement between the EU and Canada in issuing binding interpretation.

¹³³Opinion 1/17, para 233.

¹³⁴ibid, para 235.

¹³⁵*Beaumartin v France* App no 15287/89 (ECtHR, 23 October 1994) paras 38–39.

¹³⁶*Van der Hurk v The Netherlands* App no 16034/90 (ECtHR, 19 April 1994).

¹³⁷ibid, para 52.

¹³⁸ibid, para 237.

¹³⁹ibid, para 233 [emphasis added].

¹⁴⁰Under Article 263 TFEU, the CJEU is called on to review the legality of acts of the institutions provided that they are 'intended to produce legal effects vis-à-vis third parties'. In accordance with the Court's settled case law, acts open to action for annulment are any measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects. Therefore, a decision made on behalf of the EU in a body set up by an international agreement can be challenged. See Case C-687/15 *Commission v Council* [2017] C:2017:803.

(ii) *Appointment and removal of ICS members*

In addition to issuing binding interpretations, the CETA JC exerts other powers over the ICS, in particular regarding the appointment and the removal of its members. According to a non-binding statement by the Commission and the Council,¹⁴¹ in order to be appointed, the members nominated by the EU will have to comply with the standards for candidates to the CJEU pursuant to Article 253(1) TFEU. This calls for several observations.

First, this statement does not guarantee that Canada would comply with similar standards. Secondly, in contrast to the Venice Commission Guidelines on the rule of law, the appointment of ICS members could be political in nature. In effect, there is no independent judicial council intervening in the assessment of the quality of the candidates that could offset the politicisation of the appointment regime.¹⁴² In addition, given the significant impact that investment awards have on communities and decision-makers, a degree of democratic control in the appointment of ICS members, in the form of parliamentary involvement, would be a welcome development towards a more legitimate system. Although there is no requirement of that sort in the TFEU for the appointment of EU judges,¹⁴³ in several Member States the national parliaments intervene in the appointment of their constitutional court judges. *Mutatis mutandis*, the same arguments could be made with respect to the removal of ICS members.

The CJEU nevertheless noted that decisions of the CETA JC would be made by mutual consent. In the Court's reasoning this should amount to a sufficient guarantee that both the appointment and the removal of ICS members would not be subject to any other conditions but those laid down in CETA.¹⁴⁴ Bipartite and equal composition of the CETA JC also provides such a guarantee.¹⁴⁵ Nevertheless, the arrangement falls short of meeting the standards of independence laid down by the Venice Commission.

(iii) *Remuneration of ICS members*

In its request Belgium stressed, referring to Article 6 of the European Charter on the Statute for Judges, that remuneration of members must be fixed 'so as to shield them from pressures aimed at influencing their decisions'.¹⁴⁶ The German Magistrates Association also questioned whether the criteria for the financial independence of judges had been met.¹⁴⁷

The AG noted that the CETA rules on remuneration of the tribunal members refer to the rules applicable in the field of arbitration¹⁴⁸ and that these rules have not yet been fully developed.¹⁴⁹ The Court follows his reasoning, noting that the remuneration rules permit 'the gradual establishment of a court composed of members who will be employed full time'.¹⁵⁰ In other words, the CJEU assumed that the parties to CETA would progressively enhance the financial independence of ICS members.¹⁵¹

¹⁴¹Statement No. 36, <<https://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf>> last accessed 12 June 2020.

¹⁴²Commission of Venice, *Rule of Law Checklist* (n 64) para 2, p 36.

¹⁴³Article 253(1) TFEU. Pursuant to Article 253 TFEU, a panel made up of former judges gives an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court. On another note, the judges of the ECtHR are elected by the Parliamentary Assembly of the Council of Europe from lists of three candidates proposed by each State.

¹⁴⁴Opinion 1/17, para 228.

¹⁴⁵AG Bot Opinion, para 267.

¹⁴⁶Opinion 1/17, para 61.

¹⁴⁷German Magistrates Association, Opinion N° 04/16 on the establishment of an investment tribunal in TTIP, February 2016.

¹⁴⁸Article 8.27.14 CETA.

¹⁴⁹AG Bot Opinion, paras 260–1.

¹⁵⁰Opinion 1/17, para 231.

¹⁵¹In the judgment in Case C-64/16 *Associação Sindical dos Juízes Portugueses* (n 13), the CJEU ruled that a reduction in judges' salaries did not amount to a breach of Article 19(1) TEU (the principle of the effective judicial protection of individual rights under EU law). However, in this case, the reduction was applied across the whole public sector and it did not target one single jurisdiction (the members of the Portuguese Court of Auditors). In addition, these measures were justified in the general interest – the elimination of the excessive budget deficit.

Secondly, impartiality could also be undermined by the CETA's remuneration scheme, which includes the payment of a monthly retainer fee and other fees and expenses rather than a regular salary.¹⁵² The Belgian authorities took the view that it might be possible that remuneration that is dependent on the CETA case load could lead to the development of case law favourable to investors, which could consequently give rise to conflicts of interest.¹⁵³ The CJEU did not settle that issue.

5.2.2. Internal dimension of independence

Apart from its external dimension, the requirement of independence must also be met in the internal dimension for the standard of the rule of law to be correctly applied. The internal dimension in the CJEU's case law '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'. It requires 'objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law'.¹⁵⁴ In the context of this dimension two issues must be addressed: first, whether the rules of ethics ensure equal distance of ICS members from the interests at stake (prevention of conflicts of interest) (i), and secondly, whether the composition requirements sufficiently ensure the objectivity of ICS members in balancing different general public interest considerations (ii).

(i) Impartiality, objectivity and potential conflicts of interest

According to the ECtHR, the judiciary must *appear* independent and impartial. The impartiality should be examined from a subjective as well as an objective perspective since bias can be either manifest or apparent.¹⁵⁵ The subjective approach relates to 'the personal conviction of a given judge in a given case', while the objective approach determines whether s/he 'offered guarantees sufficient to exclude any legitimate doubt'. In this respect, any judge 'of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society'.¹⁵⁶ The appearance of lack of impartiality is thus sufficient to demonstrate that the guarantees under Article 6(1) have been breached.¹⁵⁷ What is decisive is whether the fear of impartiality can be objectively justified.¹⁵⁸ As a result, whenever a judge is under legitimate suspicion of lack of impartiality, s/he must withdraw.¹⁵⁹

Along the same lines, the Statute of European Judges stresses that previous activities of a candidate for a judge, or those with whom s/he is in close relations, which *can give rise to legitimate and objective doubts* as to her/his impartiality and independence, constitute an impediment to his/her appointment to a court.¹⁶⁰ It follows that a trial is unfair not only if the judge is not impartial, but also if s/he is not *perceived* to be impartial.

Article 8.30 CETA endorses a narrow approach of the requirement of impartiality. First, it limits the scope of potential conflict of interests to those 'related to the dispute' at stake, mandating that members of the tribunal shall not take instruction from any organisation or government, or participate in the consideration of any dispute that would create a direct or indirect conflict of interest. Given that the terms 'direct or indirect conflict of interest' are rather vague, Article 8.30 further refers to the International

¹⁵²Articles 8.27.12 and 8.27.14 CETA. Fees and expenses of the members of the ICS tribunals are determined in accordance with the ICSID schedule of fees.

¹⁵³Opinion 1/17, para 62.

¹⁵⁴Case C-506/04 *Wilson* (n 131) para 52.

¹⁵⁵The subjective and objective approach is strongly embedded in the case law of the ECtHR. See *Nortier v The Netherlands* App no 13924/88 (ECtHR, 24 August 1993); *Procola v Luxembourg* App no 14570/89 (ECtHR, 18 September 1995). See also International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Practitioner Guide n°1 (Geneva, 2007) 28. If this standard is applied to the sphere of arbitration, for instance, a manifest bias would be in the case of identity between a party and the arbitrator. In contrast, an apparent bias would be if the arbitrator has previously been advising the party.

¹⁵⁶*Piersack v Belgium* App no 8692/79 (ECtHR, 1 October 1982) para 30.

¹⁵⁷*Campbell and Fell v The United Kingdom* App no 8342/95 (ECtHR, 28 June 1984) para 85.

¹⁵⁸*Gautrin v France* App no 7819/77 (ECtHR, 20 May 1988) para 58.

¹⁵⁹*Hauschildt v Denmark* App no 10486/83 (ECtHR, 24 May 1989) para 44. The same is envisaged under the Bangalore Principles of Judicial Conduct, which were adopted by the Judicial Group on Strengthening Judicial Integrity, Principle 2.5.

¹⁶⁰Article 3.2.

Bar Association (IBA) Guidelines on conflict of interest in international arbitration.¹⁶¹ These guidelines offer insights as to the types of conflict at stake. Arbitrators' direct or indirect interest in the dispute is classified under the 'Waivable Red List', referring to only three situations (holding shares, close family members having significant interest in the outcome, close relationship with a non-party who may be liable on the part of the unsuccessful party).¹⁶² Such situations clearly mirror manifest biases. In addition, CETA proscribes double-hatting, however this prohibition is rather loosely worded. It only requires that members of the tribunals 'refrain from acting as a counsel or as a party appointed expert or witness in any pending or new investment dispute' under CETA or any other international agreement.¹⁶³

Additionally, and more generally, the concept of impartiality has been defined as creating a correlative duty for a judge to withdraw from the case in which s/he is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.¹⁶⁴ This duty relates to cases of both manifest and apparent bias. Contrary to this, CETA does not provide for a duty of withdrawal in the case of apparent bias. In the IBA Guidelines the concept of conflict of interest does include a 'reasonable third person' test but limits justifiable doubt to a very narrow list of situations which amount to a serious conflict of interest and thus a manifest bias.¹⁶⁵ In addition, the IBA Guidelines enumerate, albeit non-exhaustively, different situations that do not mandate a duty for an arbitrator to step down.¹⁶⁶ Moreover, the IBA's list of situations referring to 'specific situations where no appearance and no actual conflict of interest exist from an objective point of view' would create an apparent bias in the eyes of the public if such standard were applied to judges.¹⁶⁷

Therefore, the rules on impartiality in CETA follow the approach endorsed in the IBA Guidelines. These Guidelines nominally refer to both subjective and objective impartiality but in fact endorse only a narrow concept of subjective impartiality. Accordingly, both the Guidelines and CETA do not envisage apparent bias under which the member of the tribunal should withdraw if a legitimate doubt exists *in the eyes of the public*. This is not surprising given that the IBA Guidelines have been conceived for arbitrators and not judges. In addition, they are meant to be applied in a dispute resolution framework that relies on the consent of the disputing parties. Conversely, the ICS is deemed to be a body performing judicial functions and should be subject to court standards. Although the Commission claimed that the ICS amounts to a paradigmatic shift of ISDS from private arbitration to the public sphere, the reference to the IBA Guidelines does not support this claim. The CJEU recognised that the rules of the IBA Guidelines must be 'adapted' to the 'realities of an investment tribunal that is primarily judicial in nature'.¹⁶⁸ It remains doubtful whether, given their private law nature, these rules can be adapted accordingly.

(ii) *Composition of the ICS: prevalence of the investment protection paradigm*

CETA prescribes that the members of the tribunal 'shall possess the qualifications required in their respective countries for the appointment to judicial office or to be jurist of recognised competence', with demonstrated expertise in public international law.¹⁶⁹ This requirement repositions the ICS towards the judiciary sphere and public law. Nevertheless, it remains 'desirable' that future members have particular expertise 'in international investment law, in international trade law, and the resolution of disputes arising under international investment or international trade agreements'.¹⁷⁰

¹⁶¹ Approved on 22 May 2004 by the IBA Council.

¹⁶² See Waivable Red List in Part II, point 2.2, p 20.

¹⁶³ Article 8.30.1 CETA [emphasis added]. While the provision prescribes that members of the tribunal 'shall not participate' in disputes creating a direct or indirect conflict of interest, double-hatting is worded with reference to 'shall refrain'.

¹⁶⁴ The Bangalore Principles of Judicial Conduct, which were adopted by the Judicial Group on Strengthening Judicial Integrity, Principle 2.5.

¹⁶⁵ See Non-Waivable Red List in Part II, p 20.

¹⁶⁶ See Waivable Red List, Orange List, and Green List.

¹⁶⁷ See the Green List, pp 25–6. This list includes, inter alia, 'the arbitrator and counsel for one of the parties have previously served together as arbitrators' (4.3.2); 'The arbitrator holds an insignificant amount of shares in one of the parties or an affiliate of one of the parties which is publicly listed' (4.4.2).

¹⁶⁸ Opinion 1/17, para 243.

¹⁶⁹ Article 8.27.4 CETA.

¹⁷⁰ *ibid.*

One could regret that the specialisation in investment law remains the dominant paradigm. Reference to international law in international investment agreements, as understood by arbitral tribunals, does not ‘incorporate the universe of international law’ but only the body of law relevant to the protection and promotion of foreign investment.¹⁷¹ The CETA Contracting Parties have missed the opportunity to open the system to a wider legal competence. The disputes to be adjudicated by the forthcoming ICS touch upon a number of facets of the general public interest. In effect, the ICS will have to deal with an array of legal disciplines ranging from property to administrative law. CETA narrows down the general level of competence of the ICS members.¹⁷² Given that the newly appointed members would shape the ICS case law, a specialisation in trade and investment law could easily disregard the judicial techniques appropriate to adjudicating disputes involving conflicts between private and public interests.¹⁷³ The umbilical cord with the traditional ISDS is only seemingly cut.

5.2.3. Why a lower standard?

Why did the CJEU relax the standards of independence in assessing the ICS’s compliance with Article 47 CFR? The criteria of ‘independence’ and ‘accessibility’ in Article 47 CFR must primarily be seen in the specific circumstances of international investment rather than assessed against the absolute normative standard of the rule of law. In this regard, the requirement of independence principally necessitates *independence* of ICS tribunals *from the host State*, while the *access* to ICS tribunals refers to such access *for foreign investors*. Importantly both requirements seen through these lenses serve ‘the objective of free and fair trade’.¹⁷⁴ In other words, free and fair trade is dependent upon the existence of international investment tribunals, in line with the traditional ISDS narrative.

In stressing the disconnection between the host State’s judiciary, the CJEU emphasised the importance of EU objectives as political goals. Nevertheless, the Court’s approach represents a trade off between *one single objective* and the value of the rule of law as discussed in the first section. Instead of exporting its rule-of-law standard to international law and requiring from such courts the same high standards that it demands from its own courts, the CJEU adjusted its own standards to the given international trade and investment context. The EU thus also missed an opportunity to be a genuine leader of the change in international investment law.

Ultimately, from an international law perspective, one could question what is the added value of the ICS compared to the existing ISDS, in particular if the CJEU’s emphasis is placed on the protection of EU investors abroad as a means of achieving free and fair trade. Given that ISDS already provides effective remedies to EU investors before (imperfectly independent) arbitral tribunals, the issue is whether the new (imperfectly independent) ICS, which falls short of pursuing higher rule-of-law standards under EU law, is indeed necessary.

5.3. *The compliance of the lower standard with EU law: A disproportionately lower standard of the rule of law*

The Belgian request for an Opinion gave the CJEU its first opportunity to consider in detail whether an international jurisdiction set up by the EU complied with the right to effective judicial protection, a key component of the rule of law.

It is settled case law that EU fundamental rights do not ‘constitute unfettered prerogative’; they may be restricted provided the restrictions ‘correspond to objectives of general interest’.¹⁷⁵ The CJEU repeatedly emphasised the restrictions that CETA places on the rule of law. For instance, the Court

¹⁷¹ See, for example, *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Procedural Order No 2, 26 June 2012, para 57. The tribunal rejected that reference to international law in the applicable law clause incorporates international human rights law on indigenous people.

¹⁷² *German Magistrates Association*, Opinion N° 04/16 on the establishment of an investment tribunal in TTIP, February 2016.

¹⁷³ One way to overcome investment bias could be by establishing a special roster of arbitrators for environmental (as the Permanent Court of Arbitration did) or human rights issues.

¹⁷⁴ Opinion 1/17, paras 199–200 [emphasis added].

¹⁷⁵ *Joined Cases C-317/08 to C-320/08 Alassini* [2010] ECR-2213, para 63.

discussed the indeterminacy of the remuneration of the tribunal members.¹⁷⁶ Further, it was accepted by the Court that the unclear rules regarding the conflict of interest for CETA members could limit the requirement of independence. In addition, the Court acknowledged the financial burden of the ICS proceedings for SMEs.¹⁷⁷

The question is thus whether the limitations on Article 47 CFR accepted by the CJEU in its Opinion 1/17 ‘touch the essence of the right or only one element at the periphery of the scope of protection’.¹⁷⁸ In other words, the issue is whether the limitations on the rule of law in the context of the ICS discussed above affect the hard core of the rule of law or whether they are peripheral. Limitations touching the periphery are permissible provided that they are pursuing a legitimate public policy objective and are proportionate.¹⁷⁹ Although the principle of proportionality, a general principle of EU law that is binding on EU institutions, should have been at the core of the CJEU’s assessment of the validity of the restrictions on the rule of law placed by CETA’s investment chapter, the CJEU mentions proportionality only in relation to access to justice.¹⁸⁰

Proportionality in EU law entails a test of suitability and necessity. The test of suitability concerns the appropriateness of the measure for attaining the legitimate objective. It requires a causal relationship between the measures (restrictions on the rule of law) and the objectives pursued (protection of EU investors abroad, free and fair trade). It seems that such relationship could likely be established. Further, it is the settled case law that the restrictions affecting a protected interest (the rule of law) or a fundamental right (effective judicial protection) must prove to be necessary in achieving the purpose being pursued (free and fair trade). If it appears that an alternative less burdensome measure would make it possible to achieve the same goal in a less restrictive manner, the contested measure does not appear to be necessary. In that case the institution must refrain from action or replace the contested restriction with a less burdensome measure if the latter allows the institution to achieve the same goal.¹⁸¹

It follows that if the ICS cannot entirely comply with Article 47, EU institutions have to demonstrate that the restrictions at issue are not entirely unreasonable and could not be replaced by less burdensome measures. In light of this reasoning we shall assess how the CJEU verified the proportionality of the restrictions placed on the rule of law by the ICS. In particular, the necessity test involves a comparison of measures. The reasoning of the CJEU calls for three observations.

First, in sharp contrast with its case law on economic freedoms, the CJEU does not apply proportionality. In particular, it does not compare the restrictions placed by CETA on access to justice and on independence with measures that could appear less burdensome. The CJEU instead stresses the evolving character of the ICS mechanism under CETA.¹⁸² The focus thus is placed on ‘the work in progress’ in order to conclude that at this stage the measures are sufficient not to impair the rule of law. It is not unusual for the CJEU to take stock of the evolving character of the restrictions at issue. The CJEU has already endorsed such pragmatic approach with respect to the principle of equal treatment.¹⁸³ By way of illustration, in *Arcelor*, the Court held that whenever EU regulatory schemes are new and complex, the EU lawmaker may lawfully make use of a step-by-step approach that at the outset imperfectly applies the principle of equal treatment.¹⁸⁴

Secondly, the CJEU takes for granted that the arrangements will be improved. In effect, it regularly refers to the ‘gradual establishment of a court’. In so doing, the CJEU implicitly endorses what AG

¹⁷⁶Opinion 1/17, paras 229–30.

¹⁷⁷Ibid, paras 208–13.

¹⁷⁸HCH Hoffman, ‘Article 47’ in S Peers, Tamara Harvey and J Kenner (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1225, n° 47.83.

¹⁷⁹ibid.

¹⁸⁰Opinion 1/17, para 201. The requirement that judicial proceedings before domestic courts should not be prohibitively expensive has been decided only once by the CJEU in relation to a directive implementing the Aarhus Convention. See Case C-260/11 *David Edwards and Lilian Pallikaropoulos v Environment Agency and Others* [2013] C:2013:221.

¹⁸¹X Groussot, *General Principles of Community Law* (Europa Law Publishing 2006) 147.

¹⁸²See, for instance, Opinion 1/17, para 231.

¹⁸³Case C-127/07 *Arcelor* [2008] ECR I-9895, para 69.

¹⁸⁴ibid, paras 60–2.

Bot explicitly stated in his Opinion.¹⁸⁵ However, what happens if there is no improvement remains an open question.

Thirdly, the Court assessed the relationship between the means (the limitations placed on access to justice and independence) and the ends (e.g. free trade) in a rather utilitarian way, whereby the new scheme becomes acceptable because the benefits of the ICS outweigh its costs. However, the CJEU did not focus on how the protected interests could be directly or indirectly affected by the new scheme. To the contrary, proportionality requires the assessment whether some legally recognised right has been unacceptably infringed.¹⁸⁶ That question remains unanswered by the CJEU.

The CJEU accepts the restrictions on the rule of law as long as they would be attenuated in the future. This may have significant consequences for ICS schemes under future EU investment agreements with third States. The CJEU's review of the validity of the ICS involves a dynamic and not a static approach. The EU has concluded other investment treaties (Singapore, Vietnam) and is negotiating further agreements (Mexico etc.)¹⁸⁷ that incorporate the ICS. As already mentioned, Opinion 1/17 applies *mutatis mutandis* to the planned MIC. The establishment of the MIC will entail a multilateral agreement to which the EU will also be a party. With respect to all these future agreements a new Opinion on the compatibility of the new arrangements with the rule of law could be requested pursuant to Article 218(11) TFEU. In effect, a number of Member States (Austria, Italy) or regional entities (Wallonia, Brussels) could be sceptical due to the ongoing public opposition. In such a case, the Court would have to take into consideration whether EU institutions have reasonably improved the independence and access to justice standards. If that is not the case, the Court would logically have to conclude that the 'work in progress' has been insufficient. Accordingly, the standards laid down by the CJEU in its Opinion 1/17 are deemed to be the minimal standards that have to be improved in order to fulfil the required standard of the rule of law.

6. Conclusion

EU trade relations with third States are subject to a set of constitutional values underpinning the EU legal order. Pursuant to Article 21(1) TEU, a flurry of values is to be exported to third States through the EU external trade relations in order to make the EU and the wider world a fairer place. Trade treaties are thus the vehicle for promoting EU regulatory standards fleshing out these values. Already in Opinion 2/15, the CJEU confirmed the importance of values in foreign trade. It held that the breach of sustainable development obligations may lead to the termination of an FTA. Nevertheless, the EU attempt to make the wider world a fairer place is strewn with political realities. First, the sustainable development commitment is rather toothless. Secondly, the regulatory cooperation through FTAs has so far been focused on achieving compliance with the existing international labour and environmental standards rather than promoting stricter standards. Therefore, in this connection the EU merely achieves one of its objectives in external relations – compliance with international law. Thirdly, Opinion 1/17 proclaims a new meta-principle – the right to regulate – that is defensive rather than proactive. Whether and how this new principle will be applied in practice remains to be seen.

Opinion 1/17 is breaking new ground in developing the rule of law. It offers a new perspective on free trade and its place within the EU constitutional requirements. The new ICS is the cornerstone of the EU international investment policy but stands outside the EU judicial system. Nevertheless, it complies with the general EU principles of equal treatment and the right of access to an independent tribunal, guaranteed under Articles 20 and 47 CFR respectively. Given that these two principles form the core of the rule of law, it follows that the ICS also complies with the rule-of-law requirements. Opinion 1/17 thus confirms the role played by the CFR not only with respect to the internal dimension, but also with respect to the external dimension of the EU. The CJEU therefore endorsed its well-known vision of constitutionalism in international law.¹⁸⁸

¹⁸⁵See Section 5.1 above.

¹⁸⁶G de Burca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 Yearbook of European Law 125.

¹⁸⁷The EC publishes a periodic list of its ongoing trade negotiations. For the most recent list see, European Commission, *Overview of FTA and other trade negotiations*, February 2020 <http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf> last accessed 12 June 2020.

¹⁸⁸See M Koskeniemi, *The Politics of International Law* (Hart 2011) 345–50.

A closer reading of Opinion 1/17 further challenges the assumptions about the export of EU values. In conceiving the ICS, the question arose as to whether the EU would be able to export its own values, in particular the value of the rule of law, to international investment law. Or would it rather adjust its own value system to international law in the pursuit of a traditional commercial objective? The focus of the CJEU is placed on protecting EU investors in Canada and ensuring that they operate in the EU trading partner States on equal footing with third countries' investors, such as the Americans or the Mexicans, which enjoy protections in Canada under the North American Free Trade Agreement (NAFTA). Accordingly, following similar conclusions reached by AG Bot, the Court emphasised the necessity of the ICS in fostering trade relations between the EU and Canada. Opinion 1/17 reaffirms the EU's practice in international trade relations, where EU values have been framed through the lenses of its one particular objective: 'free and fair trade'. At the same time, while the export of EU values remains unclear, with new EU agreements such as CETA the EU imports international investment law standards with uncertain consequences for its own standards.

Given the relaxed standards of the rule of law applied to the ICS, Opinion 1/17 also questions the ambition of the EU's international investment reform. The AG highlighted the hybrid nature of the ICS. Such interpretation questions the need for its compliance with the CFR. In order to circumvent this logical problem, the CJEU instead emphasised the ICS's judicial nature. Put simply, although the ICS displays ISDS characteristics, it primarily harbours judicial features. Regardless, the CJEU's reasoning rather embraces the traditional ISDS narrative according to which the absence of ISDS undermines foreign investors' effective judicial protection. As a matter of course, the lack of specific investors' protection might not be a problem in the particular case of Canada, which is endowed with a robust judicial system. However, the absence of such a protection could certainly pose a problem in relation to third States whose judicial systems are less independent than that of Canada. Accordingly, the CJEU's Opinion is more relevant in the context of what the future might bring as it allows the Commission to pursue its diplomatic efforts in establishing an international court for the settlement of investment disputes (MIC).

In a wider political context, Opinion 1/17 also sends a clear message that in the multilateral rules-based order that is currently under threat, having rules, albeit imperfect, is still better than having no rules. In this context, even if only 'rearranging the deck chairs on the Titanic', the EU is in need of the ICS in order to pursue its geo-economic goals. Henceforth, CETA becomes the gold-standard for the conception of the new generation of EU trade and investment treaties. The CJEU may have recognised the practical realities of international trade but it has also confirmed that the EU's ambition to export its own values to international investment law, at least for now, remains only an aspiration.

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Declarations and conflict of interests

The authors declare no conflicts of interest with this work.