To be published in: Andrea Biondi and Giorgia Sangiuolo (eds), *Judicial Protection and EU Free Trade Agreements*, LAwTTIP Book Series (Edward Elgar Publishing, forthcoming 2020).

The Price for a Seat at the ISDS Reform Table –

CJEU's clearance of the EU's investment protection policy in Opinion 1/17 and its impact on the EU constitutional order

by Steffen Hindelang[*]

The CJEU in Opinion 1/17 concluded that the CETA's investment provisions are in compliance with the EU Treaties; a decision not just of considerable importance for the Commission's investment protection policy and reform agenda. It also shows significant consequences for the EU constitutional order. This chapter seeks to explore the said consequences – or the price, so to say – which will come with clearing the way for ISDS in EU agreements in three dimensions. First, the CJEU possibly finding itself more often in judicial conflicts with adjudicative bodies established on the basis of EU agreements, ISDS may sooner or later face its 'Kadi moment'. Second, by allowing for different standards for reviewing the exercise of sovereign power inside and outside the EU judicial system, Opinion 1/17 gave its blessings to a reshape of the Union's rule of law. Third, 'strategic ambiguity' having been displaced by clarity, the EU unconstitutionality of many EU Member State BITs with third countries as well as of the application of the ECT in disputes with non-EU investors can hardly be denied.

A. Introduction

About ten years ago, in 2009, the European Union (EU)'s Common Commercial Policy was explicitly extended to foreign direct investment. Since then, the EU has expanded on an increasingly ambitious agenda on both negotiating investment agreements with major trading partners as well as reforming the prevalent investment law regime and its encrusted structures.

The EU's policy approach has undergone a remarkable development. At the beginning, the EU largely sought to adhere to and to perpetuate the protection regime essentially created in the course of decolonisation after the Second World War,[1] as evidenced by the 2013 and 2014 drafts of the Comprehensive Economic and Trade Agreement (CETA) with Canada.[2] Public

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[1] The first 'modern' bilateral investment agreement which contained essentially the same substantive protection standard found in the majority of todays' bilateral investment agreements was the Germany-Pakistan Treaty for the promotion and protection of investments (with protocol and exchange of notes), 25 November 1959, 457 UNTS 23. Arguably, the first bilateral investment agreement with a bifurcated consent to arbitrate was the Netherlands-Indonesia Agreement on economic cooperation (with protocol and exchanges of letters), 7 July 1968, 799 UNTS 13. See Love Rönnelid, 'The Emergence of Routine Enforcement of International Investment Law' (Ph.D. dissertation, Uppsala University, 2018) 130 and 135.

[2] See Steffen Hindelang, 'Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law' in Pieter Jan Kuijper, Ingolf Pernice, Steffen Hindelang, Michael

pressure forced the EU to explore different avenues. Investment agreements, such as the CETA,[3] or those with Singapore and Vietnam respectively have brought about the so-called 'Investment Court System' (ICS).[4] The ICS is a hybrid form of arbitration with, inter alia, a government-appointed roster of arbitrators and an appeals mechanism. Even more ambitious, the EU in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III is currently pressing for the establishment of a multilateral investment court[5] to eventually replace the widely used arbitration model to settle investor-state disputes.

All these developments could have been brought to an abrupt hold, perhaps even an end, if the Court of Justice of the European Union (CJEU) had decided differently in its Opinion 1/17 on the CETA.[6] The CJEU, however, came to conclude that the CETA's investment provisions are in compliance with the EU Treaties; a decision not just of considerable political importance, but also with significant consequences for the EU constitutional order. This chapter seeks to explore the said consequences – or the price, so to say – which will come with clearing the way

Schwarz and Martin Reuling, *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements. Volume 2 – Studies* (European Parliament 2014) 51-114.

[3] Comprehensive Economic and Trade Agreement [2016]. In October 2019, the European Commission presented its procedural proposals for the so-called Investment Court System contained in the Comprehensive Economic and Trade Agreement: European Commission, 'Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of a decision setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal' COM (2019) 457 final; 'Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of a decision on the procedure for the adoption of interpretations in accordance with Articles 8.31.3 and 8.44.3(a) of CETA as Annex to its Rules of Procedure' COM (2019) 458 final; 'Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the Committee on Services and Investment established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part of the other part as regards the adoption of a code of conduct for Members of the Tribunal, the Appellate Tribunal and mediators' COM (2019) 459 final; 'Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the Committee on Services and Investment established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of rules for mediation for use by disputing parties in investment disputes' COM (2019) 460 final.

[4] Steffen Hindelang and Carl-Philipp Sassenrath, *The Investment Chapters of the EU's International Trade and Investment Agreements in a Comparative Perspective* (European Parliament 2015); Steffen Hindelang and Teoman Hagemeyer, *In Pursuit of an International Investment Court. Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective* (European Parliament 2017); Steffen Hindelang, Teoman M. Hagemeyer and Simon Richtmann, *Study on Free Trade Agreement between the EU and the Socialist Republic of Vietnam submitted to the European Parliament* (unpublished 2018). Somewhat problematic – at least from a capital export perspective – is the fact that substantive investment protection standards saw a significant reduction of its protective scope.

[5] See Submission of the European Union and its Member States to UNCITRAL Working Group III: establishing a standing mechanism for the settlement of international investment disputes [2019].

[6] Opinion 1/17 *EU-Canada CET Agreement* [2019] ECLI:EU:C:2019:341; see the assessments by Nikos Lavranos, 'CJEU *Opinion 1/17*: Keeping International Investment Law and EU Law Strictly Apart' [2019] 4 European Investment Law and Arbitration Review Online 240; Christian Riffel, 'The CETA Opinion of the European Court of Justice and its Implications – Not that Selfish After All' [2019] 22 Journal of International Economic Law 503; Patricia Sarah Stöbener de Mora and Stephan Wernicke, 'Riskante Vorgaben für Investitionsschutz und Freihandel – Das CETA-Gutachten des EuGH' [2019] 30 Europäische Zeitschrift für Wirtschaftsrecht 970; Panos Koutrakos, 'More on Autonomy – Opinion 1/17 (CETA)' [2019] 44 EL Rev 293; Simas Grigonis, 'Investment Court System of CETA: Adverse Effects on the Autonomy of EU Law and Possible Solutions' [2019] 5 International Comparative Jurisdiction 127.

for investor-state dispute settlement (ISDS) in EU agreements with third countries. In order to do so, this chapter first briefly presents the CJEU's analysis of the CETA, focusing on the principle of autonomy of EU law which proved again to be one of the major touchstones when it comes to providing for dispute settlement in international agreements (below B.).[7] On this basis, the chapter proceeds to highlighting three dimensions in which Opinion 1/17 will possibly impact (the further development of) the EU constitutional order (below C.). First, the CJEU might find itself more often in judicial conflicts with those adjudicative bodies established on the basis of EU agreements. This may eventually lead to ISDS's '*Kadi* moment' (below C. I.). Second, by allowing for different standards for reviewing the exercise of sovereign powers inside and outside the EU judicial system,[8] Opinion 1/17 gave its blessings to a reshaping of the EU's rule of law (below C. II.). Third, the EU constitutionality of both the Member States' bilateral investment agreements (BITs) with third countries and the application of the Energy Charter Treaty (ECT)[9] in disputes with non-EU investors must also be reassessed in light of the CJEU's reading of the principle of autonomy of EU law in Opinion 1/17 and the clarity gained in that respect (below C. III.). The chapter closes with a summary assessment of the observed impacts (below D.).

B. The requirements stipulated by the principle of autonomy of EU law for a dispute settlement body adjudicating disputes between private entities and the EU and its Member States

In order to secure the uniform interpretation and equal application of EU law, the EU Treaties in article 19 of the Treaty on European Union (TEU) as well as articles 251 through 281 and 344 of the Treaty on the Functioning of the European Union (TFEU) have vested the CJEU with a monopoly in authoritatively determining the content and meaning of EU law and controlling its lawful application. To secure this monopoly, the CJEU has developed the

[7] Developed in a series of opinions and judgements, most recently in Case C-284/16 *Slovak Republic v Achmea BV* [2018] ECLI:EU:C:158; see also Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1991] ECLI:EU:C:1991:490, para 35; Opinion 1/00 *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* [2002] ECLI:EU:C:2002:231, paras 11-12; Opinion 1/09 *Draft agreement – Creation of a unified patent litigation system – European and Community Patents Court – Compatibility of the draft agreement with the Treaties* [2011] ECLI:EU:C:2011:123, para 77; Opinion 2/13 *Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties* [2014] ECLI:EU:C:2014:2454; and Case C-196/09 *Paul Miles and Others v Écoles Européennes* [2011] ECLI:EU:C:2011:388.

[8] The EU judicial system relates to the CJEU and the EU Member State courts and tribunals, see Case C-192/18 *Commission v Poland (Independence of the ordinary courts)* [2019] ECLI:EU:C:2019:924, paras 98-106.

[9] The Energy Charter Treaty [1994] 2080 UNTS 95.

principle of autonomy of EU law.[10] Over time, the principle has turned into a comprehensive concept of EU self-assertion to also limit the effects on EU law of public international law.[11]

While the CJEU applied the principle to an intra-EU context in *Achmea*,[12] in Opinion 1/17, it stipulated a two-pronged test for assessing the constitutionality of a dispute settlement body adjudicating disputes between *third country* private entities and the EU and its Member States. The opinion held, first, that courts or tribunals established on the basis of an agreement between the EU, its Member States, and third countries may not interpret or apply EU law. They shall treat it as fact only (below I.). Second, activities of the aforesaid courts or tribunals may not produce (significant) spill-over effects on the operation of EU constitutional order (below II.).

I. Jus Nostrum: No outsourcing of the definitive determinations on the application and interpretation of EU law

The CETA constitutes an agreement between a third country, Canada, on the one hand, and the EU and its Member States, on the other. An adjudicative body[13] established on the basis of the agreement may decide a dispute by applying and interpreting the CETA and other rules and principles of international law applicable between the parties to the agreement.[14] EU law may be taken into consideration as fact only.[15]

Looking at the CETA's applicable law clause from a perspective of international investment law, it is not an unusual choice – though not compelling[16] – to exclude the respective 'local law' of the parties to the agreement from the spectrum of applicable law.[17] From an EU law angle, it is – to follow the CJEU – not just an option, but a constitutional *conditio sine qua non* to prevent a 'non-EU court', not being able to refer questions for preliminary ruling to the CJEU in accordance with article 267 of the TFEU, from the application of EU law as law: to secure a

[10] See most recently Niamh Nic Shuibhne, 'What is the Autonomy of EU Law, and Why Does that Matter' [2019] 88 Nordic Journal of International Law 9; Panos Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' [2019] 88 Nordic Journal of International Law 41; Violeta Moreno-Lax, 'The Axiological Emancipation of a (Non-)Principle: Autonomy, International Law and the EU Legal Order' in Inge Govaere and Sacha Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Hart Publishing 2019) 45-71.

[11] Opinion 1/17 (n 6) paras 106-111; see the assessments in Steffen Hindelang, 'Conceptualisation and application of the principle of autonomy of EU law – the CJEU's judgment in Achmea put in perspective' [2019] 44 EL Rev 383; Steffen Hindelang, 'Repellent Forces: the CJEU and Investor-State Dispute Settlement' [2015] 53 Archiv des Völkerrechts 68.

[12] Case C-284/16 (n 7); see Hindelang, 'Conceptualisation and Application of the Principle of Autonomy of EU Law' (n 11).

[13] The Comprehensive Economic and Trade Agreement (n 3) in article 8.27 refers to 'Tribunal' and in article 8.28 to an 'Appellate Tribunal', while according to article 8.29, eventually this arbitration solution shall be replaced by a permanent international court.

[14] Ibid, Article 8.31.1.

[15] Ibid, Article 8.31.2.

[16] See the CJEU's considerations on applicable law in relation to the BIT underpinning the arbitration in the *Achmea* judgment: Case C-284/16 (n 7), paras 39-60.

[17] According to a report by the Organisation for Economic Cooperation and Development, in the early 2010s, about 32 percent of the sample investment treaties contained language on the applicable law, and 23 percent of sample investment treaties referenced domestic law: Organisation for Economic Co-operation and Development, 'Dispute settlement provisions in international investment agreements: A large sample survey' (Organisation for Economic Co-operation and Development 2012) paras 80-81 <www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf> accessed 11 February 2020.

uniform interpretation and application of EU law, the EU Treaties through article 19 of the TEU have vested the CJEU with the *exclusive* jurisdiction to render *definite* decisions in this respect.[18] For the sake of maintaining 'the power of the Union in international relations',[19] however, an adjudicative body established on the basis of an international agreement with a third country and outside the EU judicial system may be allowed to render binding decisions upon the EU (and its Member States) by the way of applying and interpreting the respective *agreement*.[20]

To avoid the role of an outsider to the EU on the international scene, the Court's further development of the principle of autonomy of EU law in Opinion 1/17 may appear sensible and balanced. It was, however, neither compelling nor necessarily expectable when considering the CJEU's previous jurisprudence.[21] According to this, an international agreement to which the EU is a party also forms an integral part of EU law.[22] If the CJEU had emphasised this perspective on the CETA, it could well have concluded that its jurisdictional monopoly extended to the said international agreements, thereby excluding essentially any dispute settlement mechanism external to the EU judicial system. Apparently, this was a step that even the CJEU had possibly deemed too daring to take. Thus, the interpretation and application of EU law – as a kind of *jus nostrum* – is the exclusive domain of the CJEU, bound together with the courts and tribunals of the EU Member States in the 'judicial dialogue' enshrined in article 267 of the TFEU.[23] International agreements with third countries such as the CETA are not perceived as *jus nostrum,* but law 'shared' among the EU and the third country parties to the agreement, in which no claim to jurisdictional exclusivity is made.

Further, the CJEU in Opinion 1/17 also notes in this context[24] that its 'exclusive jurisdiction […] to give rulings on the division of powers between the Union and its Member States' is preserved in the agreement, as CETA-based adjudicative bodies do not enjoy

> the power to determine, when a Canadian investor seeks to challenge measures adopted by a Member State and/or by the Union, whether the dispute is, in the light of the rules on the division of powers between the Union and its Member States, to be brought against that Member State or against the Union.[25]

The CJEU, seeking to justify this very statement against the backdrop of its earlier jurisprudence, limited itself to the brief declaration that the CETA, in this respect, is different from the draft agreement on the accession of the EU to the Convention for the Protection of

[18] Opinion 1/17 (n 6), para 111.
[19] Ibid, para 117.
[20] Ibid, para 118.
[21] Cf Jacob Grierson, The Court of Justice of the European Union and International Arbitration' [2019] 2 b-Arbitra – Belgian Review of Arbitration 309.
[22] See Case C-240/09, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky Slovak Ministry* [2011] ECLI:EU:C:2011:125, paras 29-36 and the cases cited therein.
[23] The EU Member States by virtue of the EU Treaties have chosen to have their relationship inter se 'governed by EU law to the exclusion ... of any other law,' if EU law so requires: Opinion 2/13 (n 7), para 212.
[24] That the CJEU mentions this issue in the context of discussing the applicable law question is a bit surprising as it actually relates to the factual spill-over effects on the EU constitutional order to which the Court turns later in its analysis.
[25] Opinion 1/17 (n 6), para 132.

Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights (ECHR) that was the subject of Opinion 2/13.[26] A closer look at both CJEU opinions reveals, however, that such assertion may be more motivated by legal policy than prudent comparative analysis. In fact, both agreements, the CETA and the ECHR, allow for a determination on the division of powers in the EU's constitutional order, binding both the EU and its Member States, *without* recourse to the CJEU.[27] That is due to the fact that, according to CETA, the investor receives a residual right to determine the proper respondent in case the EU fails to do so. In exercising this right, among others, the investor must establish whether it was adversely affected by 'exclusively measures of a Member State' or also by 'measures of the European Union'.[28] The two phrases are nowhere further defined in the CETA and, thus, leave the investor with complicated questions on attribution and division of competences between the EU and its Member States. It appears that there is considerable leeway – and margin for error – for an investor to qualify a measure as being either attributable to the EU or to a Member State, especially when it comes to acts of the EU Member States implementing EU law. In Opinion 2/13 on the ECHR, the CJEU was not prepared to accept the allocation of any such competence to the recognised international adjudicative body of the European Court of Human Rights (ECtHR).[29] With regard to the CETA, however, the CJEU seems to have considerable (more) faith in the legal abilities of the investor (and its advisors). Coming as a bit of a surprise perhaps, the CJEU in Opinion 1/17 indeed teaches us that handing over such powers to a disputing party, i.e. the investor – and this is indeed the difference between the CETA and the ECHR, where the ECtHR would make such determinations –, is apparently connected with considerably lower risk to the principle of autonomy of EU law.

II. Autonomy also from those not formally applying and interpreting EU law – the CJEU's spill-over test

Even if an international adjudicative body does not apply and interpret EU law as law, but treats it as fact[30], its decisions can nonetheless create an adverse factual impact – i.e. spill-over effects[31] – on the EU legal order and its autonomy from international law. Indeed, Opinion 1/17 remarks that if an adjudicative body, such as one formed on the basis of the CETA,

> were to have jurisdiction to issue awards finding that the treatment of a Canadian investor is incompatible with the CETA because of the level of protection of a public interest established by the EU institutions, this could create a situation where, in order to avoid being repeatedly compelled by the CETA Tribunal to pay damages to the

[26] Referring to Opinion 2/13 (n 7), paras 224-231.
[27] For a closer analysis, see Hindelang, 'Repellent Forces: the CJEU and Investor-State Dispute Settlement' (n 11), 80-83.
[28] Comprehensive Economic and Trade Agreement (n 3), article 8.21.4.
[29] Opinion 2/13 (n 7), paras 223–5.
[30] Opinion 1/17 (n 6), paras 120-136.
[31] Hindelang, 'Repellent Forces: the CJEU and Investor-State Dispute Settlement' (n 11) 74-76. Already in the opinion on the accession of the EU to the ECHR, the CJEU established a violation of the principle of autonomy of EU law based on mere factual impact on the EU legal order as the ECtHR does not apply EU law as law, but as facts: Opinion 2/13 (n 7), paras 187-189.

> claimant investor, the achievement of that level of protection needs to be abandoned by the Union.[32]

Already, the mere possibility that 'the Union – or a Member State in the course of implementing EU law – has to amend or withdraw legislation' as a consequence of such an adjudicative body's findings is deemed inacceptable.[33] The CJEU's statement renders it abundantly clear that the principle of autonomy of EU law is not formalistic, but one of effect. Inapplicability or deselection of EU law as applicable law in a dispute based on an EU agreement with a third country does by no means save the respective dispute settlement mechanism from falling foul of the principle of autonomy of EU law.[34] Rather, the principle of autonomy of EU law prohibits referring jurisdiction upon the respective adjudicative bodies if those bodies might

> in the course of making findings on restrictions on the freedom to conduct business challenged within a claim, *call into question the level of protection of a public interest that led to the introduction of such restrictions by the Union* with respect to all operators who invest in the commercial or industrial sector at issue of the internal market.[35]

In Opinion 1/17, the CJEU specifically points to a number of safeguards[36] allegedly precluding 'call[ing] into question the level of protection of public interest that led to the introduction of such restrictions by the Union'. The opinion stressed that, first, in accordance with Article 28.3.2. of the CETA, the rules on non-discriminatory treatment of an investment[37] shall not be construed to prevent the adoption or enforcement of measures necessary to protect public security or public morals, to maintain public order, or to protect human, animal or plant life or

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[32] Opinion 1/17 (n 6), para 149; see also Hindelang, 'Repellent Forces: the CJEU and Investor-State Dispute Settlement' (n 11) 75.

[33] Opinion 1/17 (n 6), para 150.

[34] With regard to the EU Member States internally as well as in their dealings among each other, EU law is always the applicable law. Irrespective of whether there is an express stipulation in domestic law that EU law is applicable law, 'every national court must, in a case within its jurisdiction, apply [EU] law in its entirety … and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the [EU] rule.': Case 106/77 *Administrazione delle Finanze dello Stato v Simmenthal S.p.A.* [1978] ECLI:EU:C:1978:49, para 21. The same holds true when the EU Member States resort to public international law in their dealings between them. There is no 'contracting-out' of the EU Treaties by deselecting EU law as applicable law. The CJEU made the point clear that 'the very nature of EU law . . . requires that relations *between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law*.' [emphasis added]: Opinion 2/13 (n 7), para 212. See also Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECLI:EU:C:2008:461, para 285. Investment tribunals display a remarkable 'creativity' in ignoring the aforesaid CJEU's jurisprudence by developing arguments impossible to square with very basic legal rules of the EU constitutional order and general public international law. This ignorance allows them to preserve their jurisdiction – *honi soit qui mal y pense*. A case in point is the statement by the tribunal in the ICSID Case No. ARB/15/50, *Eskosol s.p.a. in liquidazione v. Italian Republic, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes* [2019] para 175 <www.italaw.com/sites/default/files/case-documents/italaw10512.pdf> accessed 11 February 2020: 'it appears that EU Member States may bring arbitral tribunals into being for the purposes of deciding treaty disputes under general principles of international law, but are no longer allowed to authorize such disputes to apply EU law in addition.' It is difficult not to characterise this statement as a purpose-driven misconstruction in light of the CJEU's standing case law cited above and general public international law.

[35] Opinion 1/17 (n 6), para 137 [emphasis added].

[36] Ibid, para 148.

[37] Comprehensive Economic and Trade Agreement (n 3), articles 8.6-8.8.

health.[38] Second, the CJEU pointed to provisions of the CETA on regulatory measures.[39] These contain first a reaffirmation of the CETA parties' 'right to regulate' and then, that the mere fact that a CETA party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including expectations of profit, does not amount to a breach of the (absolute) standards of protection of an investment ensured by the agreement's section on investment.[40] Third, the opinion referred to Point 1(d) (Preamble) and Point 2 (Right to regulate) of the Joint Interpretative Instrument on the CETA between Canada and the EU and its Member States.[41] There, the CETA parties declared that they will interpret the agreement in a way not to 'lower [the treaty parties'][…] respective standards and regulations' and to preserve 'the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives' regarding the right to regulate.[42] Last, but not least, fourth, the CJEU referred to Point 3 of Annex 8-A of the CETA on expropriation and to Article 8.10.2 of the CETA on fair and equitable treatment.[43] Both provisions specifically circumscribe and limit the said protection standards to grave abuse of sovereign power so that adjudicative bodies 'cannot call into question the level of protection of public interest determined by the Union following a democratic process'.[44]

On the basis of analysis sketched above, the CJEU concluded that an adjudicative body established on the basis of CETA has 'no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by an EU measure'[45] and, thus, found the investment chapter compatible with the principle of autonomy of EU law.

Apparently, policing the level of protection of public interests established by EU legislation is essentially a task reserved for the CJEU.[46] By expressly referring to the EU legislator and to the 'democratic process',[47] the Court of Justice seeks to carve out *legislative* acts from the jurisdiction of adjudicative bodies standing outside the EU judicial system. Such carve-out, however, is not comprehensive. Legislative acts which, for example, are applied 'in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade between the Parties'[48] can be scrutinised by adjudicative bodies standing outside EU judicial system. Although the CJEU is concerned with 'application', not 'adoption' of such acts, it can be safely assumed that a measure which, for example, has already been adopted as 'a means of arbitrary or unjustifiable

[38] Opinion 1/17 (n 6), para 152.
[39] Ibid, para 154.
[40] Comprehensive Economic and Trade Agreement (n 3), articles 8.9.1. and 8.9.2.
[41] Opinion 1/17 (n 6), para 155.
[42] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States [2017], OJ L 11/3, point 1(d) and 2.
[43] Opinion 1/17 (n 6), para 156.
[44] Ibid, paras 155-157.
[45] Ibid, para 153; see also paras 156 and 160.
[46] Ibid, paras 148-151.
[47] Ibid, para 151.
[48] Comprehensive Economic and Trade Agreement (n 3), article 28.3.2.

discrimination' would also be applied in such a defective way.[49] This, in turn, opens up the (back-)door to an external review of EU legislative acts; albeit an indirect one.[50] Hence, the safeguards contained in the CETA in fact do not preclude, but *merely restrict,* the potential of an adjudicative body established on the basis of the said agreement to 'call into question the level of protection of public interest that led to the introduction of such restrictions by the Union'.[51]

C. The impact of the CJEU's Opinion 1/17 on the EU constitutional order

After the CJEU had rendered its Opinion 1/17, one could almost hear the gasp of relief at the European Commission's *Berlaymont* headquarters. The EU could go on with its treaty making activities. It was also allowed to continue on the chosen path in the current policy debate on reforming the international investment protection regime. In particular, in the current UNICTRAL Working Group III policy process,[52] Opinion 1/17 provides the European Commission with a valuable bargaining chip: basically, any accord struck on a new ISDS model can, at least politically, hardly fall short off the one contained in the CETA.[53] However, the CJEU's decision allowing the EU to take part in the current reform debate will not be without consequences for the EU constitutional order. In the following, three facets are identified and explored in which the Court's Opinion 1/17 impacts its further development. First, the CJEU might be confronted more often with judicial conflicts in the future, which could eventually lead to ISDS' '*Kadi* moment' (below I.). Second, by allowing for different standards for reviewing the exercise of sovereign power, Opinion 1/17 allows for reshaping the current state of the EU's rule of law (below II.). Third, the EU constitutionality of the EU Member State BITs with third countries and the ECT relied on in disputes with non-EU investors has become questionable (below III.).

I. Looming judicial conflicts and investor-state dispute settlement's 'Kadi moment'

It is hard to resist the impression that, this time, the CJEU was clearly concerned not to create further obstacles for the EU's international treaty making agenda. Whether it was the ideal moment to strike a more moderate chord, only time can tell. In light of both the predominantly

[49] CETA's provision on fair and equitable treatment, for example, seems also to restrict a comprehensive review of administrative acts in its provision on fair and equitable treatment: ibid, article 8.10.2. This, however, appears necessitated by the principle of autonomy of EU law which the CJEU in Opinion 1/17 expressly links to legislative acts.

[50] Laws which are self-executing might in fact be carved out.

[51] Opinion 1/17 (n 6), para 148.

[52] United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Appellate and multilateral court mechanisms, Note by the Secretariat* (A/CN.9/WG.III/WP.185 2020).

[53] Whether Opinion 1/17 also prescribes an EU constitutional minimum standard with regard to the autonomy of EU law for transferring jurisdiction up on an international adjudicative body is up for discussion. See for an argument in favour of this view Stöbener de Mora and Wernicke (n 6) 977; and Markus Krajewski, 'Ist CETA der "Golden Standard"?: EuGH hält CETA-Gericht für unionsrechtskonform' (*Verfassungblog.de*, 30 April 2019), <verfassungsblog.de/ist-ceta-der-golden-standard-eugh-haelt-ceta-gericht-fuer-unionsrechtskonform/> accessed 11 February 2020. The CJEU simply states that the safeguards provided in CETA – as a whole – are satisfactory to preserve the autonomy of EU law: Opinion 1/17 (n 6), para 132. Whether a different quality of safeguards or different means would have been insufficient is speculative.

expansive interpretation of the protective scope of investment agreements by arbitral tribunals[54] and their outright hostility towards the EU legal order in intra-EU ISDS disputes,[55] the CJEU's assessment must be perceived as a particular generous gesture, seeking to foster co-existence with adjudicative bodies operating outside the EU's judicial system despite potential judicial conflicts in the horizon.

How generous this opening-up to outside adjudication could prove, may become somewhat clearer when recalling that adjudicative bodies established on the basis of the CETA can in fact call into question the 'democratic choice' by the EU legislature made with regard to the level of protection of public interests vis-à-vis the freedom to conduct business. It is only the extent to which an adjudicative body can do so which the CETA seeks to limit to only grave situations of abuse of sovereign power, as shown above.[56] The CETA even allows, in exceptional situations, for an outside determination of the division of powers in the EU constitutional order by choice of the investor.[57]

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[54] Cf Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' [2018] 29 European Journal of International Law 507; and Katherine Jonckheere, 'Practical Implications of an Expansive Interpretation of Umbrella Clauses in International Investment Law' [2015] 11 South Carolina Journal of International Law and Business 143. Of a different view and disputing that arbitrators are activists and tend to exceed their authority is Andrea K. Bjorklund, 'Are Arbitrators (Judicial) Activists?' [2018] 17 The Law & Practice of International Courts and Tribunals 49. The decision in ICSID Case No ARB/98/2 *Victor Pey Casado and President Allende Foundation v Republic of Chile: Decision on Provisional Measures* [2001] may provide an example for an expansive interpretation. The wording of the ICSID convention is that tribunals can 'recommend' provisional measures: Convention on the settlement of investment disputes between States and nationals of other States, 18 March 1965, Article 47, 575 UNTS 579. The Tribunal reasoned however that provisional measures indicated by ICSID tribunals were binding. According to Fuad Zarbiyev, 'Judicial Activism in International Law – A Conceptual Framework for Analysis' [2012] 3 Journal of International Dispute Settlement 247, 273 note 153, this reasoning built essentially on the one by the International Court of Justice in *LaGrand (Germany v. United States of America), Judgment* [2001] I.C.J Reports 2001, paras 92-110, where the court asserted its authority to order provisional measures on account of the 'power to indicate' them mentioned in its statute: Statute of the International Court of Justice [1945], article 41. The significance of the two most recent decades' development of arbitral tribunals holding that they actually can order provisional measures, regardless of the wording of the ICSID Convention, is discussed by Tarcisio Gazzini and Robert Kolb, 'Provisional Measures in ICSID Arbitration from "Wonderland's Jurisprudence" to Informal Modification of Treaties' [2017] 16 The Law & Practice of International Courts and Tribunals 159.

[55] See for example, *ICSID Case No. ARB/15/50, Eskosol s.p.a. in liquidazione v. Italian Republic* (n 34), paras 112-123 for a rather 'creative' interpretation of the applicable law clause of Art. 26(6) of the Energy Charter Treaty (n 9) which, by its terms, includes all 'applicable rules of international law', meaning not only international law binding between all Contracting Parties, but international law applicable to 'the issues in dispute'. This is not the place to provide a comprehensive analysis of the tribunal's argument, and, therefore, this chapter limits itself to a note: It is at least surprising that, in the course of interpreting the ECT's applicable law clause about what constitutes 'applicable rules and principles of international law', the international commitments created among the EU Member States by the EU Treaties did not come into the picture. Furthermore, the reliance on the Permanent Court of International Justice (PCIJ) case in *SS Lotus (France v. Turkey)* [1927] PCIJ Ser A No 10, 16-17, seems to take the PCIJ's reading on the applicable law clause in that case completely out of its specific context and arbitrarily imposes this reading on the ECT. This dubious interpretive practice – estranged from the Vienna Convention on the Law of Treaties rules on treaty interpretation – is witnessed ever more often in arbitral awards and entails the danger that the will of the state parties to the agreement (i.e. here the ECT) gets confused with the will of the arbitrators in the course of the interpretative exercise. See on this Hindelang, 'Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law' (n 2) 69-71.

[56] See above B. II. and Simon Lester, 'CETA ISDS Upheld by CJEU', (*International Economic Law and Policy Blog*, 30 April 2019) <ielp.worldtradelaw.net/2019/04/ceta-isds-upheld-by-cjeu.html> accessed 11 February 2020.

[57] See above B. II.

It remains the CJEU's secret why it placed the draft agreement on the EU's accession to the ECHR and the ensuing role for the ECtHR under the microscope and ultimately met these prospects with rejection,[58] yet, investment tribunals were endowed with trust in respecting and preserving the CETA's envisaged jurisdictional limits and with it the autonomy of EU law. In the past, investment tribunals have not exactly been best in upholding such limits, recalling the non-compliance with the CJEU's *Achmea* judgment[59] and the misrepresentation of EU law as not a part of the relevant international law applicable to an intra-EU dispute.[60] Furthermore, the above-discussed safeguards in CETA,[61] intended to prevent an adjudicative body established on the agreement's basis from 'second-guessing' the balance between private and public interests struck in EU legislation, are phrased quite openly. It will be for the CETA adjudicative body to establish the meaning of such terms as 'manifestly excessive', 'arbitrary or unjustifiable discrimination', or 'disguised restriction on trade'. Apparently, the CJEU in its Opinion 1/17 hopes for judicial constraint.

In the event that this hope will be disappointed, arbitral practice with regard to article 1105(1) of the NAFTA on fair and equitable treatment is telling how challenging it can be to keep the genie in the bottle. Despite repeated efforts by all three NAFTA treaty parties to restrict fair and equitable treatment to the international minimum standard,[62] NAFTA arbitral tribunal nonetheless largely converged the standard with the fair and equitable treatment standard included in other investment agreements not containing NAFTA-like restrictions on the standard.[63] Arbitral tribunals achieved such a result by an 'unorthodox' interpretation of the international minimum standard that they found rapidly evolving[64] and by employing a means of interpretation alien to the Vienna Convention on the Law of Treaties' rules on treaty interpretation: 'de facto precedents'.[65]

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[58] Opinion 2/13 (n 7).

[59] Case C-284/16 (n 7). See for an example ICSID Case No. ARB/15/50, *Eskosol s.p.a. in liquidazione v. Italian Republic* (n 34), para 175 and the cited arbitral awards therein.

[60] Beyond *Eskosol s.p.a. in liquidazione v. Italian Republic* (n 34), paras 115, 121 and 130, this point of view has been recently taken by the arbitral tribunals in SCC Case No. 2015/095 *Greentech Energy Sys. A/S v Italy: Final Award* [2019] para 397 <www.italaw.com/sites/default/files/case-documents/italaw10291.pdf> accessed 11 February 2020; ICSID Case No. ARB15/20 *Cube Infrastructure Fund SICAV v Spain: Decision on Jurisdiction, Liability and Partial Decision on Quantum* [2019] paras 129-130 and 158 <www.italaw.com/sites/default/files/case-documents/italaw10692.pdf> accessed 11 February 2020; ICSID Case No. ARB/217/14 *Rockhopper Italian S.p.A. v Italy: Decision on the Intra-EU Jurisdictional Objection* [2019] para 174 <www.italaw.com/sites/default/files/case-documents/italaw10646_0.pdf> accessed 11 February 2020.

[61] See above B. II.

[62] See NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions (Article 1105 and the Availability of Arbitration Documents), 31 July 2001' <http://www.sice.oas.org/TPD/NAFTA/Commission/CH11understanding_e.asp> accessed 11 February 2020.

[63] Andrew Paul Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Walters Kluwer 2009) 27.

[64] Arbitrators reacted in a 'flexible' manner to the perceived 'challenge' by holding that 'both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development': ICSID Case No. ARB (AF)/00/1 *ADF Group v. United States of America: Award* [2003] para 179, <http://www.italaw.com/sites/default/files/case-documents/ita0009.pdf> accessed 11 February 2020.

[65] On the potential 'power-grabbing' effects of non-compliance with the Vienna rules on treaty interpretation, see Hindelang, 'Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law' (n 2) 66-68.

In light of these experiences, it may not be a completely theoretical exercise to consider the question of what to do if adjudicative bodies established on the basis of the CETA 'trespass' on the CJEU's exclusive jurisdiction to determine 'the [appropriate] level of protection of a public interest established by an EU measure'.[66] The CETA itself provides for an instrument of binding authoritative interpretation.[67] The CJEU diminished the instrument's effectiveness by restricting it to future disputes.[68] Its operation in practice can also be burdened with significant uncertainties as the NAFTA example above has shown.

In the event that binding authoritative interpretation should fail to keep tribunals at bay, ISDS may face its '*Kadi* moment': should the CJEU be confronted with an award at the stage of enforcement[69] which does not comply with the EU constitutional limits stipulated in Opinion 1/17, it might frustrate any such enforcement efforts within the EU. This situation would in effect be similar to the situation in *Kadi,* where an EU regulation implementing an act of the United Nations Organisation was annulled.[70] Thus, we may see a residual control of adjudicative bodies established on the basis of the CETA and similar EU investment agreements. Its effectiveness, however, will be limited. The CJEU has no authority to declare the 'trespassing award' itself invalid. The award remains enforceable outside the EU.

However, seen from a policy perspective, such limited effectiveness in shielding the EU legal order from outside influence may just be tolerable for the CJEU. With its Opinion 1/17, it avoided criticism to be the 'spoilsport' again, leading the EU into 'isolationism' in international economic relations.[71] Should the judicial activities of adjudicative bodies established on the basis of the CETA and similar agreements indeed produce unwanted spill-over effects on the EU constitutional order, contrary to the CJEU's assumption, it can hardly be blamed, except maybe for its endless optimism and good will.[72] Attempts seeking to force the genie back into the bottle – as the experiences with the intra-EU investment arbitration saga and the NAFTA's 'elevated minimum standard' tell[73] – will possibly be met with some robust resistance by adjudicative bodies if they are determined to expand their jurisdiction. Having to assume that the CJEU was aware of the incentive structures inherent in an ISDS mechanism relying on non-tenured adjudicators,[74] perhaps the CJEU took a gamble that 'all will play out just fine' with the establishment of a multilateral investment court and/or permanent appeals mechanism

[66] Opinion 1/17 (n 6), paras 153; see also paras 156 and 160.
[67] Comprehensive Economic and Trade Agreement (n 3), article 8.13.3.
[68] Opinion 1/17 (n 6), para 153; and paras 235-237.
[69] That even ICSID awards may face a stay on the enforcement stage in an EU Member States court is, for example, evidenced by *Micula and Others v Romania* [2018] EWCA Civ 1801.
[70] Case C-402/05 P and C-415/05 P (n 34).
[71] Cf Riffel (n 6). For a viewpoint to the contrary, see Stöbener de Mora and Wernicke (n 6) 972-973.
[72] By not comprehensively ruling out the review of EU legislative acts, the CJEU also, at least on principle, did not close the door for an accession of the EU to the ECHR. However, whether other members of the Council of Europe would be prepared to accept such a carefully circumscribed jurisdiction of the ECtHR is open to question.
[73] See the references above (n 55 and 64).
[74] Regarding the debate on the incentive structure issue, see Hindelang, 'Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law' (n 2) 100-104. The CJEU, in Opinion 1/17 (n 6), paras 239-244, seems to be of a different view, as it held that attached risks would be mitigated by following the guidelines provided by the International Bar Association, 'IBA Guidelines on Conflicts of Interest in International Arbitration adopted by resolution of the IBA Council on Thursday 23 October 2014' (International Bar Association 2014) <acica.org.au/wp-content/uploads/IBA_Guidelines/IBA-Guidelines-on-Conflict-of-Interest.pdf> accessed 11 February 2020.

mentioned in the CETA[75] and currently under negotiation in the UNCITRAL Working Group III. Indeed, if the EU should succeed in the talks, a permanent mechanism will possibly be staffed with tenured, full time judges.[76]

II. The rule of law and alternative standards of review of sovereign power

Potential judicial conflicts, however, may not be the only price to be paid for the EU's participation in the ISDS reform debate. Tacitly, the CJEU gave its blessings to a by-pass of its most important sparring partner in upholding the rule of law within the EU, the domestic courts of the EU Member States, which are entrusted 'the responsibility for ensuring the full application of EU law […] and the judicial protection that individuals derive from EU law'.[77]

According to provisions of the CETA, if a Canadian investor submits a claim to a CETA adjudicative body, it needs to withdraw or discontinue ongoing proceedings in the CJEU or in the EU Member State courts or to waive its right to initiate such proceedings.[78] In *Achmea,*[79] also in *Commission v. Poland*[80] and in *Associação Sindical dos Juízes Portugueses*,[81] the CJEU was eager to uphold the role and to secure the proper functioning of the EU Member State courts as the prime guardian of the rule of law and the entry point for the 'judicial dialogue' between them and itself.[82] Different, however, in Opinion 1/17: with the CETA, the very same courts were relegated to a mere alternative to ISDS when it comes to reviewing the exercise sovereign power in the EU towards Canadian, i.e. *third country* investors.

Providing for a separate dispute settlement venue on the basis of the CETA comes along with an alternative standard of review of sovereign power. While the CJEU or an EU Member State court reviews an EU or Member State measure in light of the entire EU legal order, a CETA adjudicative body reviews the same measure in light of a very small number of generically phrased substantive protection standards contained in the said agreement. Interestingly, the alternative standard of review of the exercise of sovereign power has not attracted the CJEU's attention in Opinion 1/17.

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[75] Comprehensive Economic and Trade Agreement (n 3), article 8.29.
[76] Submission of the European Union and its Member States to UNCITRAL Working Group III (n 5), point 16.
[77] Case C-192/18 (n 8) para 98. An issue to be separated is the one of whether the domestic courts and tribunals actually live up to their envisaged role, which has been waged as a criticism against the CJEU's position on arbitration tribunals in both intra-EU BITs and the CETA: see Stöbener de Mora and Wernicke (n 6) 974. However, factual deficiencies in certain EU Member States currently addressed by the Commission, even if they may require further attention in the years to come and, in fact, also an even more robust EU intervention into these EU Member States, do not call into question the constitutional conceptualisation of an, in principle, full reviewability and accountability of the exercise of sovereign power enshrined in Articles 2 and 19 of the TEU.
[78] Comprehensive Economic and Trade Agreement (n 3), articles 8.22.1 (f) and (g) and 8.23.
[79] Case C-284/16 (n 7).
[80] Case C-192/18 (n 8), paras 98-107. See also C-619/18, *European Commission v Republic of Poland (Independence of the Supreme Court)* [2019] ECLI:EU:C:2019:531, paras 47-50; and Case C-216/18, *PPU Minister for Justice and Equality (Deficiencies in the system of justice)* [2019] ECLI:EU:C:2018:586.
[81] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contes* [2018] ECLI:EU:C:2018:117, paras 29-37. For the link between the principle of autonomy of EU law and the constitutional role of the courts and tribunals of the EU Member States, see Hindelang, 'Conceptualisation and application of the principle of autonomy of EU law' (n 11) 391-392.
[82] Cf Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C326/47, article 267.

Arguably, to the extent that investors move from domestic courts to the CETA adjudicative bodies, the EU and its Member States may evade – unintendedly or in collusion with the investor – the sanctioning of violations of the EU law, as not all breaches of EU law amount to breaches of the CETA.[83] Put differently, by 'switching' from 'comprehensive review' of legality of especially administrative conduct in light of the whole EU legal order[84] to a 'minimal review' in light of the CETA, the bond of compliance with the EU legal order is loosened. This is not without consequence for the principle of legality (*Gesetzesbindung der Verwaltung, principe de légalité*) as part of the rule of law which exactly seeks to prevent an administration from loosening 'the chains of law' which ties it back to the legislature and, ultimately, to the will of the people.[85] The principle is recognised as a general principle of EU law[86], and as such, it takes part in the protective scope of the autonomy of EU law.[87]

The degree to which the just described band can be loosened and still be perceived as satisfying the principle of legality of administration varies not only among the EU Member States according to their constitutional traditions, but there seems, as of yet, also no clear position in EU law on this point.[88] Within an EU-internal context, the CJEU – arguably – does not seem to demand an extremely tight judicial control of the administration. Rather, it advocates in favour of a margin of appreciation which is governed by 'reasonableness' of the respective administrative decision.[89] Concluding from the CJEU's non-addressing of the issue in Opinion

[83] This is at least the declared intention of the parties to the CETA as they wish to limit the review to grave abuses of sovereign power, see, for example, the specification of what amounts to a breach of the obligation of fair and equitable treatment: Comprehensive Economic and Trade Agreement (n 3), article 8.10. See, in contrast, the jurisdiction of the CJEU which extends to 'lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.': Consolidated Version of the Treaty on the Functioning of the European Union [2012] (n 82), article 263(2).

[84] It is important to stress that the degree to which administrative conduct is reviewable by courts varies from EU Member State to EU Member State due to different traditions, which is not without problem when it comes to EU law: Ulrich Stelkens, 'Paneuropäische allgemeine Rechtsgrundsätze guter Verwaltung zum Ermessen und ihre Bedeutung für die georgische Verwaltung' [2018], 6 <www.researchgate.net/publication/323759368_Paneuropaische_allgemeine_Rechtsgrundsatze_guter_Verwaltung_zum_Ermessen_und_ihre_Bedeutung_fur_die_georgische_Verwaltung> accessed 11 February 2020.

[85] While the question of how strict the administration is bound to legislative programming or to what degree it can exercise own discretion defines the relationship between executive and legislative branch, the intensity of judicial review of an administrative measure defines the relationship of administration and judiciary. Both are equivalent expressions of the principle of legality.

[86] Recognised as general principles of EU law, see Jörg Philipp Terhechte, 'Europäisches Verwaltungsrecht und europäisches Verfassungsrecht' in Jörg Philipp Terhechte (ed), *Verwaltungsrecht der Europäischen Union* (Nomos 2011), 288-289, with reference to Case C-402/05 P and C-415/05 P (n 34) and Cases 38/70 *Deutsche Tradax GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1971] ECLI:EU:C:1971:24; and 113/77 *NTN Toyo Bearing Company Ltd and others v Council of the European Communities* [1979] ECLI:EU:C:1979:91.

[87] Opinion 1/17 (n 6), para 110.

[88] On principle, 'The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions.': Case C-70/88 *European Parliament v Council of the European Communities. Capacity of the European Parliament to bring an action for annulment* [1990] ECLI:EU:C:1990:217, paras 21 and 22. For a general account of the principle of constitutional balance in the Common Commercial Policy, see Jörg Philipp Terhechte, 'Im Dienste der Demokratie? - Das institutionelle Gleichgewicht in der gemeinsamen Handelspolitik der EU' (Europa-Kolleg Hamburg, Institute for European Integration 2019) <europa-kolleg-hamburg.de/wp-content/uploads/2019/08/Das-institutionelle-Gleichgewicht.pdf> accessed 11 February 2020.

[89] Case 55/75 *Balkan-Import Export GmbH v Hauptzollamt Berlin-Packhof* [1976], ECLI:EU:C:1976:8, para 8; Case C-120/97 *Upjohn Ltd v The Licensing Authority established by the Medicines Act 1968 and Others* [1999]

1/17, in case judicial control is transferred to an international adjudicative body with the view to allow the EU a meaningful foreign policy in general and a common commercial policy in particular, the principle of legality cannot mean that the CETA review standard must equal the EU domestic review standard.[90] As a minimum, however, a review standard must not be so minimal that an encroachment upon the essence – the *Wesensgehalt* – of the EU fundamental rights by the administration cannot be remedied.[91] According to the jurisprudence of the CJEU, the essence of rights is encroached upon if the 'right as such' is called into question.[92] This level of review seems still to be guaranteed by the substantive standards provided for in the CETA. For example, the provision on fair and equitable treatment of the CETA renders compensable a fundamental breach of due process, including a fundamental breach of transparency, in administrative proceedings or manifest arbitrariness.[93]

What is more, while advanced domestic administrative law systems,[94] the EU legal system,[95] and general public international law[96] prioritise restitution[97] over pecuniary remedies, the

ECLI:EU:C:1999:14, paras 27 and 32-37; Case C-55/06 *Arcor AG & Co. KG v Bundesrepublik Deutschland* [2008] ECLI:EU:C:2008:244, paras 160-170. The CJEU stresses the necessity to adhere strictly to the administrative procedure in order to make decisions reviewable by the judiciary: Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECLI:EU:C:1991:438, paras 13-14; Case C-405/07 P, *Kingdom of the Netherlands v Commission of the European Communities* [2008] ECLI:EU:C:2008:613, para 55. Courts of the EU Member States can however employ a stricter standard of review, see BVerwG 6 C 13.12 [2013] ECLI:DE:BVerwG:2013:250913U6C13.12.0, para 33.

[90] Opinion 1/17 (n 6), paras 106 and 117.

[91] See Charter of Fundamental Rights of the European Union [2016] OJ C 202, article. 52 (1), 1. sentence.

[92] See Case C-73/16 *Peter Puškár v Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy* [2017] ECLI:EU:C:2017:725, para 64; Case C-18/16 *K. v Staatssecretaris van Veiligheid en Justitie* [2017] ECLI:EU:C:2017:680, para 35; Case C-601/15 *J. N. v Staatssecretaris van Veiligheid en Justitie (PPU N)* [2016] ECLI:EU:C:2016:84, para 52; Case C-524/15, *Criminal proceedings against Luca Menci* [2018] ECLI:EU:C:2018:197, para 43; Case C-129/14 *Zoran Spasic* (*PPU Spasic)* [2014] ECLI:EU:C:2014:586, paras 58-59 ; Case C-528/13 *Geoffrey Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Établissement français du sang* [2015] ECLI:EU:C:2015:288, para 54; Case C-650/13 *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde* [2015] ECLI:EU:C:2015:648, para 48.

[93] Comprehensive Economic and Trade Agreement (n 3), article 8.10.

[94] David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (Organisation for Economic Co-operation and Development 2013) 79-87 <www.oecd-ilibrary.org/docserver/5k46b1r85j6f-en.pdf?expires=1581448044&id=id&accname=guest&checksum=2BF3471DB7A493185100659B7E43C8DC> accessed 11 February 2020.

[95] Cf Consolidated Version of the Treaty on the Functioning of the European Union (n 82), articles 263 and 264.

[96] See International Law Commission, 'Articles on State responsibility', annex to United Nations General Assembly Resolution 56/83, 12 December 2001, A/RES/56/83, article 34-39. Restitution is said to conform 'most closely to the general principle of the law on responsibility according to which the author State is bound to 'wipe out' all the legal and material consequences of its wrongful act by re-establishing the situation that would exist if the wrongful act had not been committed': Gaeteno Arangio-Ruiz, 'Preliminary Report on State Responsibility', in International Law Commission (ed), *Yearbook of the International Law Commission*, *Volume II* (United Nations Publications 1988), UN Document No. A/CN.4/416 & Corr. 1 & 2 and Add.1 & Corr.1, para 114. In fact, the question of whether investment tribunals are or should be allowed to order restitutio in rem is contentious, see Steffen Hindelang, 'Restitution and Compensation – Reconstructing the Relationship in International Investment Law', in Rainer Hofmann and Christian J. Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration* (Nomos 2011) 161-199; possibly of a different view James Crawford, 'The ILC`s Articles on Responsibility of States for Internationally Wrongful Acts – A Retrospective', [2002] 96 AJIL 874, 881; and Irmgard Marboe, 'State responsibility and Comparative state liability for administrative and legislative harm to economic interest', in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 377-411.

[97] For example (the order) to repeal a challenged administrative act or law or to restitute property previously taken.

CETA provides for essentially the opposite: i.e. that an adjudicative body may *only* award pecuniary damages (and interest), except for restitution of property, under certain conditions.[98]

Prioritising restitution is, first, an expression of the idea that property is protected in its integrity, not just in value. Second, and more importantly for our purposes, giving priority to restitution emphasises the primacy of the legislator in shaping the social function of property and fundamental rights and is as such a specific expression of the principle of legality of administration with an emphasis on the role of parliament. This is because an administrative act not reflecting the legislator's choice expressed in a given law is declared void instead of merely being compensated for violating the law but otherwise persisting.

With the CETA, the EU legislator together with the legislators of the EU Member States[99] retreat to some degree from prioritising restitution over pecuniary remedies. This choice, together with the 'minimal review' discussed above, further softens the compliance pressure on the administration, although, admittedly, also pecuniary damages exercise some of this pressure. Nonetheless, it could allow an administration, by colluding with the investor, to 'buy' its way out of a situation illegal under EU law if the investor chooses the remedies available under the CETA. While a domestic court, on the basis of domestic law which includes EU law, or the CJEU, on the basis of EU law, would possibly void the administrative act and demand restitution, a CETA adjudicative body, on the basis of article 8.39 of the CETA, would (only) award pecuniary damages. The illegal administrative act would persist. Whether the CETA, in prioritising pecuniary damages – in combination with opting for 'minimal review' – actually infringes the principle of legality of the administration may still be doubted in view of the limited overall scope of the CETA agreement. However, the more EU agreements actually allow for an opt-out of domestic courts (including the CJEU), and the more accessible ISDS in EU agreements becomes[100], the more palpable is the decline of a comprehensive judicial control of administrative conduct.

III. Reassessing the EU constitutionality of the EU Member State BITs with third countries and the application of ECT in disputes with non-EU investors

With Opinion 1/17, the Court added another piece to the puzzle of understanding the EU constitutional principle of autonomy of EU law. Beyond the CETA, the Court's findings have implications for other investment agreements of the EU and its Member States, most prominently the ECT, and the bilateral investment agreements of the EU Member States with third countries.

With regard to the ECT, Opinion 1/17 made it abundantly clear that the contained ISDS mechanism violates the principle of autonomy of EU law. The intra-EU scenario was already

[98] Comprehensive Economic and Trade Agreement (n 3), article 8.39 (1).
[99] CETA is a so-called mixed agreement.
[100] Recalling the CJEU's petition in Opinion 1/17 (n 6), paras 205-219 for proper financial assistance of natural persons and small- and medium-sized investors in order to make use of the respective investor-state dispute settlement mechanism, Canada could make similar assistance available to its own investors.

conclusively addressed by the Court in *Achmea.*[101] Opinion 1/17 reconfirms this finding and, as discussed further below, adds another striking ground to the argument that any existing intra-EU ISDS mechanism, irrespective of whether based on a bilateral or multilateral investment protection agreement, is contrary to EU law in general[102] and the principle of autonomy in particular.[103]

Investor-state dispute settlement *in a third country scenario*, i.e. a third country investor is bringing a claim against the EU or an EU Member State based on a 'pre-CETA' ISDS model, like the one contained in the ECT, is also in violation of the principle of autonomy of EU law. The ECT lacks – to a large extent – the safeguards intended to preserve the autonomy of EU law in a third country scenario, identified in Opinion 1/17. Functional equivalent safeguards to prevent an investment tribunal established on the basis of the ECT to not declare incompatible the level of protection of public interests determined by the EU legislature are not contained in the said treaty.

For example, the substantive standards on indirect expropriation in article 13 of the ECT and fair and equitable treatment in article 10(1) of the ECT are not specifically circumscribed. They catch situations which go beyond the grave abuse of sovereign power to which the CETA has been limited to in Point 3 of Annex 8-A of the CETA on expropriation and article 8.10.2 of the CETA on fair and equitable treatment. Thus, the aforesaid protection standards in the ECT allow for – or at least do not rule explicitly out – calling 'into question the level of protection of public interest that led to the introduction of such restrictions by the Union'.[104]

The general clause governing exceptions from the substantive standards in article 28.3.2 of the CETA appears to be broader than the corresponding provision in article 24 of the ECT. Moreover, article 28.3.2 of the CETA does not apply to substantive protection standards of the CETA Investment Chapter contained in its Section D. This indicates that a CETA adjudicative body, in the course of assessing of whether the host state violated the substantive protection

[101] See Steffen Hindelang, opinions in support of the Kingdom of Spain in US District Court for the District of Columbia, *Novenergia II – Energy & Environment (SCA) v. The Kingdom of Spain,* No. 1:18-cv-1148; *Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L. v. The Kingdom of Spain*, No. 1:1818-cv-114801686-CKK; *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v. The Kingdom of Spain*, No. 1:18-cv-1753 (EGS); *Masdar Solar & Wind Cooperatief U.A. v. The Kingdom of Spain*, No. 1:18-cv-02254-JEB, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. The Kingdom of Spain*, No. 19-cv-01618-TSC; *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 19-cv-1871-TSC; US District Court for the Southern District of New York, *Foresight Luxembourg Solar 1 S.À.R.L. v. The Kingdom of Spain*, No. 1:19- cv-3171. See also Steffen Hindelang, opinion in support of the Republic of Poland in Högsta Domstolen (the Swedish Supreme Court), *Republiken Polen (Republic of Poland) v. PL Holdings S.Á.R.L*, Case No. T 1569-19.

[102] It can also be doubted that the ISDS mechanism in the ECT fulfils the criteria formulated in Opinion 1/17 (n 6), paras 189-222 in regard to the right of access to an independent tribunal (see Article 47 of the Charter).

[103] Of a different view is Nikos Lavranos, 'Court of Justice approves CETA Investment Court System' (*Thomson Reuters Arbitration Blog*, 14 June 2019) <arbitrationblog.practicallaw.com/court-of-justice-of-the-eu-approves-ceta-investment-court-system/> accessed 27 January 2020, who suggests that the 'analysis of the Vattenfall and most recently *Ekosol* tribunals contain particularly convincing reasons why the Achmea judgment is not relevant and applicable in intra-EU ECT disputes.' However, as explained above (n 34), the finding that in an intra-EU dispute EU law does not form part of the applicable law in the arbitration is fundamentally flawed.

[104] Opinion 1/17 (n 6), para 156.

standards contained,[105] shall, on principle, *not* enter into second-guessing the *balance* between interests of the common good and those interests of the investor. A violation of the substantive protection standard – so at least seems the conceptualisation – requires such an outrageous act of abuse of sovereign power that no public interests could possibly justify such conduct. Article 24 of the ECT, in contrast, invites for a balancing test and, thus, does not rule out such 'second-guessing' by the tribunal.

Furthermore, a similarly comprehensive pronouncement[106] of the so-called right to regulate, and its interpretative safeguarding in the CETA,[107] is lacking in the ECT. Especially, article 8.9(2) of the CETA shall prevent a tribunal's second-guessing of the level of protection of public interests determined by the Union following a democratic process. The provision reads: 'the mere fact that a [treaty] Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section'. The ECT, in contrast, merely acknowledges state sovereignty and refers to a right to regulate environmental and safety aspects, both exercised *in accordance with and subject to the rules of international law*.[108] In comparison to the CETA, such reference to state sovereignty, and its element of the right to regulate, seems to be largely declaratory.

In an intra-EU scenario, i.e. an investor from an EU Member State is bringing a claim against another EU Member State, *argumentum a fortiori*, the fact that the ECT is falling short of the safeguard requirements described in Opinion 1/17 only underlines and reconfirms that its ISDS provisions are in violation of the principle of autonomy of EU law also in such a scenario. This is because considerations 'of the reciprocal nature of international agreements [with third countries] and the need to maintain the powers of the Union in international relations' which guided the CJEU's reasoning in Opinion 1/17[109] and led to a 'softening' of the prerequisites flowing from the principle of autonomy of EU law, are misplaced in an intra-EU context. Therefore, if Opinion 1/17 supports one conclusion, then it is this one: the ISDS provisions in the ECT are in any scenario in obvious conflict with the principle of autonomy of EU law.

As concerns the EU Member States' BITs with third countries, they have been grandfathered by Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.[110] Such grandfathering extends, however, only to the BITs' non-compliance with the allocation of competences between the EU

[105] In particular, fair and equitable treatment and full protection and security, see Comprehensive Economic and Trade Agreement (n 3), article 8.10.
[106] Ibid, article 8.9.
[107] See Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (n 42), point 2.
[108] See Energy Charter Treaty (n 9), articles 18(1) and (3): 'The Contracting Parties recognize state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised *in accordance with and subject to the rules of international law.* […] Each state continues to hold *in particular* the rights to […] regulate the environmental and safety aspects of such exploration, development and reclamation within its Area […], and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises.' [Emphasis added].
[109] Opinion 1/17 (n 6), para 117.
[110] Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351/40.

and the Member States contained in the EU Treaties.[111] However, the EU cannot discretionarily dispense the EU Member States from other EU obligations in the EU Treaties. While a number of EU Member State BITs have already been found in violation with the TFEU provisions on free movement of capital,[112] many, if not all, will possibly fall foul of the principle of autonomy of EU law as interpreted in Opinion 1/17. In the same way as an EU agreement, also EU Member State agreements can be 'capable of having the consequence […][that] a Member State in the course of implementing EU law […] has to amend or withdraw legislation because of an assessment made by a tribunal standing outside the EU judicial system of the level of protection of a public interest established, in accordance with the EU constitutional order, by the EU institutions'.[113] Such danger was found in Opinion 1/17 to be inacceptable, violating the principle of autonomy of EU law. Since most of the EU Member State BITs lack safeguards equivalent to the CETA, tribunals can 'call into question the level of protection of a public interest that led to the introduction of such restrictions by the Union with respect to all operators who invest in the commercial or industrial sector at issue of the internal market'.[114]

Overall, Opinion 1/17 replaces what one may term 'strategic ambiguity' with clarity on the EU unconstitutionality of a large number of existing legal instruments protecting EU investments abroad. In terms of the rule of law, this clarification is to be welcomed. However, clarity increases the political pressure to come forward with some lawful instrument which, at the same time, sufficiently secures economic interests of EU businesses abroad – something which could prove challenging in the current political climate not anymore unreservedly embracing globalisation.[115]

D. Concluding remarks

Opinion 1/17 allows for a ratification of the CETA and frees the Commission's present investment protection policy of the shadow of illegality. At the same time, three facets – i.e. (1) looming judicial conflicts and the CJEU's limited effectiveness in shielding the EU legal order from outside influence, (2) alternative standards of review of sovereign power and the reshaping of the rule of law in the EU, and (3) the unavoidable revaluation of a large number of existing investment protection agreements in light of the further specification of the EU constitutional principle of autonomy of EU law – show that Opinion 1/17 is also significantly impacting the

[111] See the most recent list of the bilateral investment agreements published in accordance with ibid, article 4(1): List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2019], OJ C 198.

[112] See CJEU, Case C-205/06 *Commission of the European Communities v Republic of Austria* [2009] ECLI:EU:C:2009:118; Case C-249/06 *Commission of the European Communities v Kingdom of Sweden* [2009] ECLI:EU:C:2009:119; Case C-118/07 *Commission of the European Communities v Republic of Finland* [2009] ECLI:EU:C:2009:715.

[113] Opinion 1/17 (n 6), para 150.

[114] Ibid, para 137.

[115] Cf the Netherlands' new model BIT: Ministerie van Buitenlandse Zaken, *Netherlands model investment agreement* (2019), <www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden/nieuwe+modeltekst+investeringsakkoorden.pdf> accessed 11 February 2020. The work on the model investment agreement predates Opinion 1/17. Due to the fact that the text was modelled closely to the CETA provisions, it seems to address at least some of the EU constitutional deficits of EU Member State BITs with third countries. It is, however, beyond the scope of this chapter to analyse whether the safeguards provided therein are indeed sufficient in terms of the principle of autonomy of EU law.

EU constitutional order. Whether it is worth paying this 'price' for allowing the EU to take a seat at the ISDS reform table can ultimately be judged only over time when adjudicative practice on the basis of the CETA (and similar agreements) can be included in the equation.

On a positive note, a continuing engagement of the EU in the ISDS reform process might indeed help overcome the weaknesses identified with regard to the traditional forms of ISDS.[116] Equally or even more importantly, such engagement allows EU businesses to take advantage of a *legal* mechanism providing protection – albeit on a lower level than previous agreements of the EU Member States – against the realisation of political risk when they engage in investment activities in third countries.

The clarity gained with regard to the incompatibility with EU law of a large number of existing EU Member State agreements and the ECT protecting EU investments abroad one possibly encounters with mixed feelings. It is high time that lawful instruments which sufficiently secure economic interests of EU businesses abroad are deployed.

Turning to the more challenging parts of the CJEU's Opinion 1/17, accepting that an investor can choose between domestic courts, including the CJEU, and CETA's ICS, is not unproblematic. Each forum comes with a different standard of review of the exercise of sovereign power as well as different legal remedies. While the courts and tribunals of the EU Member States and the CJEU provide on principle for a 'comprehensive review' of the exercise of sovereign power, the ICS – if operating as envisaged by the parties to the agreement – provides only for a 'minimal review'. A 'minimal review' diminishes the judicial overall control of administrative conduct and reshapes the specific expression of the principle of legality of administration in the EU constitutional order to the detriment of the legislature. This reshaping, however, seems to be still *within* the spectrum of political choices available to the EU legislator. Nonetheless, it is a victory for an errant ideology that domestic courts must be distrusted to the extent that they may not even receive a first try to get it right. It is, moreover, a choice against subsidiarity, one of the core building principles of the EU.[117] It is also a choice against a close tying of administration to the democratic will of parliament. A flexible, ECHR-like[118] local remedies rule[119] could have addressed the competing interests at stake in a more nuanced fashion. Not this time, though.

[116] On these weaknesses, see Hindelang, 'Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law' (n 2) 56-113.
[117] Cf Consolidated Version of the Treaty on European Union [2012] OJ C 326/13, article 5(1) and (3).
[118] See Convention for the Protection of Human Rights and Fundamental Freedoms [1950] 87 UNTS 103, article 35(1) which requires, in principle, the exhaustion of local remedies before turning to the ECtHR. However, the requirement is not an absolute one. If the local remedies are not to be considered accessible or effective, the applicant may turn to the ECtHR directly, see William Schabas, *The European Convention of Human Rights: A Commentary* (Oxford University Press 2015) 764-769; David J. Harris, Michael O'Boyle, Ed P. Bates and Carla M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edn. Oxford University Press 2018) 60-62; and the cases referred to therein.
[119] Hindelang, 'Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law' (n 2) 91-92.