



## Reports of Cases

### OPINION OF ADVOCATE GENERAL

BOT

delivered on 29 January 2019<sup>1</sup>

### Opinion 1/17

### Request for an opinion by the Kingdom of Belgium

(Opinion pursuant to Article 218(11) TFEU — Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA) — Resolution of disputes between investors and States (ISDS) — Establishment of a Tribunal and an Appellate Tribunal — Compatibility with primary EU law — Requirement to respect the autonomy of the EU legal order and of the judicial system of the European Union — Applicability of the Charter of Fundamental Rights of the European Union to the exercise, by the European Union, of its competence to conclude an international agreement — Articles 20 and 21 of the Charter — Principle of equal treatment — Article 47 of the Charter — Right of access to an independent and impartial tribunal)

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<sup>1</sup> Original language: French.

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## I. Introduction

1. On 30 October 2016 Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels a 'Comprehensive Economic and Trade Agreement', better known by the acronym 'CETA'.<sup>2</sup>

2. Like, *inter alia*, the agreement to which Opinion 2/15 (Free Trade Agreement with Singapore) of 16 May 2017 relates,<sup>3</sup> the CETA is a 'new generation' free trade agreement in that it contains, in addition to the classical provisions on the reduction of customs duties and of non-tariff barriers to trade in goods and services, rules relating, *inter alia*, to investment, public procurement, competition, intellectual property protection and sustainable development.

3. Although it has been signed, the CETA has not yet been concluded within the meaning of Article 218(6) TFEU. It is, however, partly applicable on a provisional basis.<sup>4</sup>

<sup>2</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (OJ 2017 L 11, p. 23). The decision of the Council of the European Union on the signing of the CETA is published in OJ 2017 L 11, p. 1 (Council Decision (EU) 2017/37 of 28 October 2016).

<sup>3</sup> EU:C:2017:376, 'Opinion 2/15'.

<sup>4</sup> See Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of 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 (OJ 2017 L 11, p. 1080).

4. The present case concerns a request for an opinion submitted to the Court on 7 September 2017 by the Kingdom of Belgium pursuant to Article 218(11) TFEU.

5. The request for an opinion submitted by the Kingdom of Belgium reads as follows:

‘Is Chapter 8 (‘Investments’), Section F (‘Resolution of investment disputes between investors and states’) of the [CETA] between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, compatible with the Treaties, including with fundamental rights?’

6. The purpose of Section F of Chapter 8 of the CETA, which contains Articles 8.18 to 8.45 of that agreement, is to establish a mechanism for the resolution of disputes between investors and States (ISDS), also known as the Investor-State Dispute Settlement system.

7. To that end, that section provides for the establishment of a Tribunal (‘the Tribunal’ or ‘the CETA Tribunal’) and an Appellate Tribunal (‘the Appellate Tribunal’ or the ‘the CETA Appellate Tribunal’) as well as, in the longer term, a multilateral investment tribunal and appellate mechanism which would bring to an end the functioning of the initial tribunals. The aim is thus to establish an ‘Investment Court System’ (ICS), of which the CETA Tribunal would be merely a first stage. That Tribunal would therefore constitute the first actual step to implement the reform of the ISDS system outlined by the European Commission in 2015,<sup>5</sup> in response to the public consultation on investment protection and ISDS.<sup>6</sup> Section F of Chapter 8 of the CETA thus provides for an institutionalised procedural framework with the aim of settling any disputes between an investor of one Party and the other Party concerning the interpretation and application of the CETA, which is intended to remedy the shortcomings ascribed to the classical ISDS system.

8. By introducing that reformed mechanism within the CETA, the European Union is supporting the initiative of a global reform of the model for settling disputes between investors and States through the development of the current ad hoc ISDS system, which is based on the principles of arbitration, into an ICS, the culmination of which would be the establishment of a permanent multilateral court.<sup>7</sup>

9. In its request for an opinion, the Kingdom of Belgium makes known to the Court its doubts as to whether Section F of Chapter 8 of the CETA is compatible with the Treaties. In essence, those doubts concern the effects of that part of the agreement on the exclusive jurisdiction of the Court over the definitive interpretation of EU law, the general principle of equal treatment, the requirement that EU law is effective and the right of access to an independent and impartial tribunal.

## II. The context in which the request for an opinion was made

10. International investment law has two separate components: substantive law consisting of rules which seek to protect foreign investments and a procedural component pertaining to matters of transnational arbitration.

<sup>5</sup> See Commission Concept Paper of 5 May 2015, entitled ‘Investment in TTIP and beyond — the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court’, available at the following webpage: [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF).

<sup>6</sup> See Commission Staff Working Document, Report of 13 January 2015, entitled ‘Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)’ (SWD(2015) 3 final), available at the following webpage: [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf).

<sup>7</sup> See, in this regard, negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes. Council Document of 20 March 2018, No 12981/17, available at the following webpage: <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>.

11. In that regard, the ISDS system enables disputes to be settled where an investor considers that a State has infringed its obligations under an international investment agreement. The insertion of clauses relating to an ISDS system into an international investment agreement thus offers foreign investors the opportunity to bring a dispute between them and the State in which the investment was made not before the courts of that State but before an ad hoc arbitration tribunal, in accordance with the rules to which that agreement refers.

12. The increasing recourse to arbitration between investors and States is a relatively recent phenomenon which has emerged in response to the perceived shortcomings in the judicial systems of certain host States, which have fostered distrust amongst investors in those systems. This method of dispute settlement thus seeks to provide investors with a neutral and efficient means of settling a dispute, which in turn is intended to encourage investment by offering reassurance to economic operators who decide to invest in another country.

13. The dispute settlement method involved in investment arbitration has therefore been guided, since its inception, by the will of the Parties to outsource the settlement of disputes between foreign investors and the host State.<sup>8</sup> This method of dispute settlement is also intended to replace the diplomatic protection whereby the State of nationality of the investor takes over the latter's claim vis-à-vis the host State of the investment.<sup>9</sup> It is, therefore, a continuation of the tendency of seeking to remove investment-related disputes from the political and diplomatic spheres. The investor-State dispute settlement system is thus an alternative to the other method of settling investment disputes involving arbitration between States, which has the same disadvantages as diplomatic protection, that is to say, from the investor's perspective, a relationship of dependence vis-à-vis his State of origin and, from the perspective of that State, the risk that the action brought may be an imposition on its relations with other States.

14. In parallel with the acquisition of an external competence in relation to direct investments, the European Union had to devise a model for the settlement of disputes linked to compliance with the standards of protection contained in the free trade agreements which it has concluded with third States.<sup>10</sup> The arbitration clauses contained in bilateral investment treaties are, under international investment law, regarded as a key component of the protection of foreign investments in the host State.

15. However, investment arbitration in its traditional form is the subject of criticism, in particular as regards the lack of legitimacy and of guarantees that the arbitrators are independent, the lack of consistency and foreseeability of the awards, the inability to review the award made, the risk of 'regulatory chill'<sup>11</sup> and the high costs of the proceedings.

16. In the light of the criticisms made of investment arbitration, the acceleration of the negotiations between the European Union and third States with a view to developing bilateral free trade relations which cover the issue of investment poses a number of challenges, both political and legal.

<sup>8</sup> See Jean, G-A., *Le droit des investissements internationaux face à l'Union européenne*, doctoral thesis defended on 28 November 2016, paragraph 847.

<sup>9</sup> As the German Government pointed out at the hearing, investment protection, as it is conceived in an agreement such as the CETA, liberates the investor from his State. Thus, agreements on investment protection allow investors to bring an action themselves, without being dependent on the goodwill of their State of nationality.

<sup>10</sup> At the hearing, the Commission stated that it has completed the negotiation of three other agreements containing virtually identical provisions with the United Mexican States, the Republic of Singapore and the Socialist Republic of Vietnam, and that similar agreements are being negotiated with the Republic of Chile, the People's Republic of China, the Republic of Indonesia, Japan, Malaysia, the Union of Myanmar and the Republic of the Philippines.

<sup>11</sup> One of the major criticisms of the ISDS system is in fact the indirect dissuasive effect on public policies, in that, taking into account the risk of an action, some governments might be prompted to censor themselves as regards their political choices in order to limit the risks of having arbitration proceedings brought against them and having to pay any fines imposed as well as the costs of the proceedings.

17. One of the most significant of those challenges is to define a model which allows the European Union and its Member States to take as a basis an arbitration practice which constitutes the rule in relation to the settlement of disputes concerning the protection of foreign investments, whilst making improvements to the traditional model in order, first, to address the criticisms relating to the functioning of arbitration tribunals as well as the legitimacy of an arbitration scheme between investors and States and, second, to be consistent with the main principles governing the dispute settlement mechanisms within the EU legal order.

18. The model chosen is, in several respects, marked by certain original features which give it a hybrid nature, a form of compromise between an arbitration tribunal and an international court. Accordingly, the path chosen by the European Union within the framework of the CETA is that of institutionalisation and of a process of legislating the mechanism for settling investment disputes, striking a balance between tradition and innovation in terms of investment arbitration. The experimental dimension in this regard must be highlighted, since the European Union is at the forefront of a movement the future of which will determine whether — from a legal standpoint — it is likely to be continued.<sup>12</sup>

19. The European Union had to adopt a pragmatic approach to the negotiations on this point with third States, taking into account the fact that arbitration between investors and States is regarded by its partners, as well as by the investors themselves, as an essential component in the protection of investors.<sup>13</sup> The immediate focus for the European Union was thus to adopt that method of dispute settlement whilst at the same time making improvements to it, with a view, in the longer term, to achieving more substantial developments, such as the proposal for a multilateral investment tribunal.<sup>14</sup>

20. The CETA thus contains a dispute settlement mechanism the form of which has developed in the course of the negotiations so as, *inter alia*, to take into account the findings of a related public consultation launched by the Commission.<sup>15</sup> The spirited debate which surrounded the appropriateness of, and the features of, such a mechanism are due primarily to the fact that arbitration in investment matters is a forum for clashes between public and private interests. It therefore necessarily raises issues which may have an impact on public policy.

21. At present, the reform initiated by the European Union, as expressed in the CETA, is based on two main aspects, namely, first, the explicit reference to the right of the Parties to regulate in the general interest, coupled with more specific rules pertaining to investment protection in order to bring to an end certain exorbitant interpretations of the rules in question,<sup>16</sup> and, second, the will to move towards a judicial system characterised, *inter alia*, by the independence and the impartiality of its members and the transparency of its procedures.

<sup>12</sup> See Jean, G-A., *op. cit.*, paragraph 25.

<sup>13</sup> See, in this regard, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, entitled 'Towards a comprehensive European international investment policy' (COM(2010) 343 final), p. 11.

<sup>14</sup> Article 8.29 of the CETA, entitled 'Establishment of a multilateral investment tribunal and appellate mechanism', thus provides that 'the Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements'.

<sup>15</sup> See footnote 6 of this Opinion.

<sup>16</sup> The precision of the protection clauses contained in the CETA thus allows the relatively broad margin for interpretation usually enjoyed by the arbitration tribunals to be restricted: see Tercier, P., 'Voies de recours', in Kessedjian, C., *Le droit européen et l'arbitrage d'investissement*, éditions Panthéon-Assas, Paris, 2011, pp. 165 to 177, which states that, faced with 'textes des traités ... le plus souvent très vagues, se bornant à l'énoncé de quelques principes généraux', arbitration tribunals 'ont une fonction interprétative voire créative considérable', thus performing 'une activité quasi-normative' (p. 171).



22. This request for an opinion concerns the latter system, in its current state of development, which is moving away from traditional arbitration to move closer to a judicial system. The provisions of the CETA which relate to that system are not amongst those which are provisionally applied.<sup>17</sup>

23. Although it is entitled ‘Resolution of investment disputes between investors and states’, that system covers not only those cases in which an investor of a Member State submits a claim against Canada and those in which a Canadian investor submits a claim against a Member State, but also those cases in which a Canadian investor submits a claim against the European Union.

24. The main provisions on the organisation and establishment of the ICS are contained in Section F of Chapter 8 of the CETA. Certain matters are, however, referred for decisions to be taken by the CETA Joint Committee provided for in Article 26.1 of that agreement.

25. The main feature of this dispute settlement mechanism is the constitution of a permanent tribunal to handle claims submitted by investors against a Party.<sup>18</sup> The Tribunal is composed of fifteen Members appointed by the CETA Joint Committee<sup>19</sup> for a five-year term, renewable once.<sup>20</sup>

26. The Members of the Tribunal must possess the qualifications required in their respective countries for appointment to judicial office or be jurists of recognised competence, and must have demonstrated expertise in public international law.<sup>21</sup> The Members of the Tribunal must be independent and comply with rules to avoid conflicts of interest.<sup>22</sup> The Tribunal is to hear cases in divisions generally consisting of three of its Members, all of whom are appointed by the President of the Tribunal on a rotation basis, ensuring that the composition of the divisions is random and unpredictable.<sup>23</sup>

27. An appeal against the Tribunal’s awards may be brought before a permanent Appellate Tribunal.<sup>24</sup> The appeals may be based inter alia on errors of law or manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law.<sup>25</sup> The Members of the Appellate Tribunal are to be appointed by the CETA Joint Committee.<sup>26</sup> They must possess the same qualifications as the Members of the Tribunal and are subject to the same rules of ethics.<sup>27</sup>

28. Under Article 8.41.1 of the CETA, ‘an award issued pursuant to this Section shall be binding between the disputing parties and in respect of that particular case’.

29. As regards the substantive provisions, the new approach couples the assertion of the Parties’ right to regulate<sup>28</sup> with an effort to clarify the definition of the fundamental protective rules.<sup>29</sup>

17 Article 1(1)(a) of Decision 2017/38 provides that, of the provisions of Chapter 8 of the CETA, only Articles 8.1 to 8.8, 8.13, 8.15 and 8.16 are, to some extent, provisionally applied.

18 Article 8.27 of the CETA.

19 Article 8.27.2 of the CETA.

20 Article 8.27.5 of the CETA. However, the terms of seven of the fifteen persons appointed immediately after the entry into force of the envisaged agreement, to be determined by lot, are to extend to six years.

21 Article 8.27.4 of the CETA.

22 Article 8.30 of the CETA, entitled ‘Ethics’.

23 Articles 8.27.6 and 8.27.7 of the CETA.

24 Article 8.28 of the CETA. It is apparent from Statement No 36 by the Commission and the Council on investment protection and the Investment Court System (OJ 2017 L 11, p. 20, ‘Statement No 36’), that the appeal mechanism is intended to ‘ensure consistency of decisions rendered at first instance and thus to contribute to legal certainty’.

25 Article 8.28.2 of the CETA.

26 Article 8.28.3 of the CETA.

27 Article 8.28.4 of the CETA.

28 See Article 8.9 of the CETA.

29 Namely, national treatment (Article 8.6 of the CETA), most-favoured-nation treatment (Article 8.7 of the CETA), fair and equitable treatment (Article 8.10 of the CETA) and protection in the event of expropriation (Article 8.12 of the CETA).

30. Thus, the CETA seeks to promote cross-border investment between the European Union and Canada by affording the investors of the Parties a high level of protection of their investments whilst protecting the regulatory power of each Party.<sup>30</sup>

31. I would further point out that, when the CETA was signed, a joint interpretative instrument<sup>31</sup> was established, paragraph 6 of which lays down specific interpretative guidance concerning the ICS. In addition, at the time of the signature of that agreement, the Commission and the Council lodged Statement No 36, in which those institutions set out the measures to be adopted in order to establish the ICS.

32. Having provided the above description, I observe first of all that, in order to respond to the request for an opinion made by the Kingdom of Belgium, I will set aside, despite their significance, the political and economic aspects of the issue brought before me, in that, as I believe it necessary to point out, it falls entirely within the discretion of the EU institutions to choose to adhere to a well-established international arbitration practice in implementation of the common commercial policy.

33. Accordingly, it is not for me to take a view on the appropriateness, from a political perspective, of providing for a method of dispute settlement of this kind in the agreements which the European Union negotiates with third States, or on the economic impact which the ISDS system may have in terms of attracting foreign investors and the development of their operations. Those factors fall within the discretion of the EU institutions.<sup>32</sup> Furthermore, they are the outcome of the democratic debate conducted within the European Union and in the Member States. The only issue to be examined by me is whether, by adopting the practice of investment arbitration whilst at the same time developing it with a view to moving towards a judicial model, the agreement envisaged is, from a purely legal perspective, compatible with primary EU law.

### III. The request for an opinion from the Kingdom of Belgium

34. By its request for an opinion, the Kingdom of Belgium seeks to assist in clarifying the legal context within which the CETA must be incorporated, without itself taking a view on how, in its opinion, the questions put to the Court should be answered.

35. The Kingdom of Belgium also states that it is aware that certain measures are to be adopted in implementation of the CETA and of Statement No 36, which could influence the opinion of the Court.

36. The request for an opinion is structured around the following three issues: the jurisdiction of the Court, the principle of equal treatment and the requirement that EU law is effective, and the right of access to an independent and impartial tribunal.

37. As a preliminary point, with regard to the admissibility of the request from the Kingdom of Belgium, the preventive nature of the opinion procedure must be stressed. I observe, in that regard, that, 'under Article 218(11) TFEU, the Parliament, the Council, the Commission or a Member State may obtain the Opinion of the Court of Justice as to whether an envisaged agreement is compatible with the provisions of the Treaties. That provision has the aim of forestalling complications which would result from legal disputes concerning the compatibility with the Treaties of international

30 See, in general terms, Bonomo, S., *Les traités bilatéraux relatifs aux investissements: entre protection des investissements étrangers et sauvegarde de la souveraineté des États*, Presses universitaires d'Aix-Marseille, Aix-en-Provence, 2012.

31 Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (OJ 2017 L 11, p. 3; 'the Joint Interpretative Instrument').

32 See, inter alia, judgment of 21 December 2016, *Swiss International Air Lines* (C-272/15, EU:C:2016:993, paragraph 24), in which the Court stated that 'the institutions and agencies of the Union have available to them, in the conduct of external relations, a broad discretion in policy decisions' and that 'the conduct of external relations necessarily implies policy choices'.

agreements binding upon the EU'.<sup>33</sup> After all, 'a possible decision of the Court of Justice, after the conclusion of an international agreement binding upon the EU, to the effect that such an agreement is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaties could not fail to provoke, not only in the internal EU context, but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries'.<sup>34</sup>

38. As I have previously stated, although it has been signed, the CETA has not yet been concluded within the meaning of Article 218(6) TFEU. That agreement therefore remains 'envisaged' within the meaning of Article 218(11) TFEU.

***A. The compatibility of the CETA with the exclusive jurisdiction of the Court over the definitive interpretation of EU law***

39. The Kingdom of Belgium observes that, in paragraph 246 of Opinion 2/13, the Court set out 'the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law'.

40. That Member State likewise recalls the reasons why the Court took the view, in Opinion 1/09 of 8 March 2011,<sup>35</sup> that the draft international agreement establishing a European and Community Patents Court was incompatible with EU law.

41. After pointing out that Article 8.18.1 of the CETA authorises the Tribunal to examine whether an instrument of secondary EU law is compatible with the provisions of Sections C and D of Chapter 8 of that agreement, the Kingdom of Belgium observes that, within the context of that examination, that Tribunal may regularly be faced with questions of interpretation of EU law. Referring to Article 8.31.2 of the CETA, the Kingdom of Belgium notes that, where there is no prevailing interpretation, the Tribunal would itself be required to interpret EU law.

42. Although, according to that Member State, the CETA differs from the mechanism envisaged in Opinion 1/09 in so far as the Tribunal will not be directly called upon to decide a dispute pending before it in the light of EU law as the applicable law, nor to examine the validity of an act of the European Union, rather — like the mechanisms envisaged in Opinions 1/09 and 2/13 — the ICS allows the Tribunal to examine the compatibility of the provisions of secondary EU law with the relevant provisions of the CETA and, to that end, to determine the interpretation of EU law.

43. Since the ISDS system laid down in the CETA does not provide either that the Tribunal must or that it may refer to the Court a preliminary question on the interpretation of EU law (that is to say, there is no mechanism for prior involvement), the Kingdom of Belgium asks whether that system, which may result in final awards of a binding nature, in accordance with the provisions of Article 8.41.1 of that agreement, is compatible with the principle of the exclusive jurisdiction of the Court over the definitive interpretation of EU law.

33 See, inter alia, Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014 (EU:C:2014:2454, paragraph 145 and the case-law cited) ('Opinion 2/13').

34 See Opinion 2/13 (paragraph 146 and the case-law cited).

35 EU:C:2011:123, 'Opinion 1/09'.



44. In short, the Kingdom of Belgium wishes to establish whether or not the CETA infringes the principle of the exclusive jurisdiction of the Court over the definitive interpretation of EU law. More specifically, it wants the Court to state whether Article 8.31.2 of that agreement is sufficient to guarantee the uniform interpretation of EU law or whether, on the contrary, given the binding nature of the award, pursuant to Article 8.41.1 of the agreement, that requirement of uniform interpretation, which it is for the Court to ensure, must be found to have been infringed.

45. In order to address this aspect of the request for an opinion, I will begin my analysis where the Court left off in its Opinion 2/15. In that opinion, the Court limited its examination to the division of competences between the European Union and its Member States vis-à-vis the substantive and procedural aspects of the external policy of the European Union relating to investment.

46. In that regard, it must be stated that the Treaty of Lisbon conferred on the European Union exclusive competence in relation to direct investment by providing that such investment falls within the area of the common commercial policy, as is apparent from Article 3(1)(e) and Article 207(1) TFEU. The European Union further has shared competence as regards investment other than direct investment.<sup>36</sup>

47. The Court has made clear that the exclusive competence enjoyed by the European Union under Article 207 TFEU in relation to foreign direct investment extends to all the substantive provisions usually found in a bilateral investment treaty.<sup>37</sup> However, the European Union shares its competence with the Member States in relation to the provisions on the settlement of disputes between investors and States.<sup>38</sup> In that regard, in Opinion 2/15, the Court observed that the system in question ‘removes disputes from the jurisdiction of the courts of the Member States’ and that that system must, therefore, be established with the Member States’ consent.<sup>39</sup>

48. In Opinion 2/15, the Court did not, however, examine the issue of the compatibility of the dispute settlement mechanism provided for in an agreement on international investment with EU law, from the perspective of the preservation of its own jurisdiction.

49. The Court is now required, in relation to an agreement of the same kind with Canada, to rule on the possibility of such a dispute settlement mechanism and how such a system might co-exist with the EU judicial system.

### *1. The EU judicial system as a guarantee of the autonomy of the EU legal order*

50. As the Court stated in Opinion 2/13, ‘in order to ensure that the specific characteristics and the autonomy of [the EU legal order] are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law’.<sup>40</sup>

51. In that context, ‘it is for the national courts and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual’s rights under that law’.<sup>41</sup>

<sup>36</sup> See Opinion 2/15 (paragraph 243).

<sup>37</sup> See Opinion 2/15 (paragraphs 78 to 109).

<sup>38</sup> See Opinion 2/15 (paragraph 293).

<sup>39</sup> Opinion 2/15 (paragraph 292).

<sup>40</sup> See Opinion 2/13 (paragraph 174).

<sup>41</sup> See Opinion 2/13 (paragraph 175 and the case-law cited).

52. The Court's mission is to 'ensure that in the interpretation and application of the Treaties the law is observed', as provided for in Article 19(1) TEU. That function of the Court entails responsibility to 'ensure respect for the autonomy of the European Union legal order thus created by the Treaties'.<sup>42</sup>

53. In Opinion 1/09, the Court pointed out that it shares that responsibility with the national courts. The Court stated that, 'as is evident from Article 19(1) TEU, the guardians of that legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States'.<sup>43</sup>

54. The Court also takes Article 4(3) TEU as the basis for its finding that 'the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law'.<sup>44</sup>

55. The Court also pointed out that 'the national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed'.<sup>45</sup>

56. In particular, 'the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law ..., thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties'.<sup>46</sup>

57. The Court has thus firmly asserted 'the importance of cooperation between the European Union judicature and the national courts and tribunals of the Member States in order to guarantee the constitutional structure of the [EU legal] system'.<sup>47</sup>

58. That specific relationship between the Court and the national courts and tribunals, which is characterised by constant dialogue, both gives expression to and protects the specific legal order, namely the EU legal order. It is for that reason that the Court seeks to protect that relationship from anything which might affect it.

59. That said, I observe, first of all, that the preservation of the autonomy of the EU legal order is not a synonym for autarchy.<sup>48</sup> It requires merely that the integrity of that legal order, which is based to a great extent on the jurisdiction of the Court to have the final say on EU law and on its cooperation, to that end, with the courts and tribunals of the Member States, is not undermined.

<sup>42</sup> Opinion 1/09 (paragraph 67).

<sup>43</sup> Opinion 1/09 (paragraph 66). See also judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117, paragraph 32 and the case-law cited).

<sup>44</sup> See, inter alia, Opinion 2/13 (paragraph 173 and the case-law cited). See also judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117, paragraph 34 and the case-law cited).

<sup>45</sup> Opinion 1/09 (paragraph 69). See also judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117, paragraph 33 and the case-law cited).

<sup>46</sup> See Opinion 2/13 (paragraph 176 and the case-law cited).

<sup>47</sup> Simon, D., 'Avis négatif sur le projet de création d'une juridiction des brevets', *Europe*, No 5, LexisNexis, Paris, 2011, pp. 4 to 7, paragraph 20.

<sup>48</sup> See Lenaerts, K., 'Les fondements constitutionnels de l'Union européenne dans leur rapport avec le droit international', *La Cour de justice de l'Union européenne sous la présidence de Vassilios Skouris (2003-2015): Liber amicorum Vassilios Skouris*, Bruylant, Brussels, 2015, pp. 367 to 385, which states that 'l'autonomie constitutionnelle de l'Union ne contient pas, parmi ses traits caractéristiques, de vocation isolationniste' (p. 369).

*2. The conditions for the establishment of a specific dispute settlement mechanism by means of the international agreements concluded by the European Union*

60. It is settled case-law that international agreements concluded by the European Union pursuant to the provisions of the Treaties constitute, as far as the Union is concerned, acts of the institutions of the European Union.<sup>49</sup> As such, those agreements are, from the date of their entry into force, an integral part of the EU legal order.<sup>50</sup> Pursuant to Article 216(2) TFEU, ‘agreements concluded by the Union are binding upon the institutions of the Union and on its Member States’. Therefore, in accordance with settled case-law of the Court, ‘those agreements prevail over provisions of secondary [EU] legislation’.<sup>51</sup> From the date of its entry into force, the CETA will therefore be integrated automatically into the EU legal order, of which it will form part in the same way as other sources of EU legislation.<sup>52</sup>

61. In addition, it follows from Article 19(3)(b) TEU and from point (b) of the first paragraph of Article 267 TFEU that ‘the Court has jurisdiction to give preliminary rulings on the interpretation and the validity of acts adopted by the EU institutions, without exception’,<sup>53</sup> which includes international agreements concluded by the European Union. The Court also has jurisdiction ‘to give rulings on the interpretation of the decisions adopted by the authority established by the Agreement and entrusted with responsibility for its implementation’.<sup>54</sup>

62. That said, it must be recalled, first and foremost, that the applicability before the European Union judicature or before national courts and tribunals of agreements concluded by the European Union may be subject to certain limits, in particular where the Court takes the view that those agreements do not confer on individuals rights upon which they may rely before the courts. In that regard, the Court is called upon to examine the nature and the broad logic of the international agreement at issue and to ascertain whether, as regards their content, the provisions of that agreement are unconditional and sufficiently precise.<sup>55</sup>

63. With regard to the CETA, any examination by the Court as to whether or not that agreement is capable of having a direct effect is unnecessary, since Article 30.6 of the agreement expresses the explicit will of the Parties to rule out such an effect. Paragraph 1 of that article provides that the CETA cannot be invoked ‘directly ... in the domestic legal systems of the Parties’.<sup>56</sup> It follows that, whilst forming an integral part of the EU legal order when it enters into force, the agreement envisaged may not be relied on directly in its own right. Neither the courts of the European Union nor the courts or tribunals of the Member States may therefore apply that agreement directly in the disputes which are brought before them. There are therefore two co-existing legal systems, interference between which has been deliberately limited.

49 See, inter alia, judgment of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118, paragraph 45 and the case-law cited).

50 See, inter alia, judgment of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118, paragraph 46 and the case-law cited).

51 See, inter alia, judgment of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraph 35 and the case-law cited).

52 See, on this issue, Lenaerts, K., ‘Droit international et monisme de l’ordre juridique de l’Union’, *Revue de la Faculté de droit de l’Université de Liège*, No 4, Larcier, Brussels, 2010, pp. 505 to 519.

53 See, inter alia, judgment of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118, paragraph 44 and the case-law cited).

54 See, inter alia, judgment of 20 September 1990, *Sevince* (C-192/89, EU:C:1990:322, paragraph 10 and the case-law cited). According to the Court, that finding is reinforced by the fact that the function of Article 267 TFEU is to ensure the uniform application throughout the European Union of all provisions forming part of the EU legal order and to ensure that the interpretation thereof does not vary according to the interpretation accorded to them by the various Member States (paragraph 11 and the case-law cited).

55 See, inter alia, judgment of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312, paragraph 45 and the case-law cited).

56 See also Article 30.6.2 of the CETA, which provides that ‘a Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement’.

64. In the case of an international agreement concluded by the European Union, forming an integral part of the EU legal order means that the provisions of that agreement must be entirely compatible with the Treaties and with the constitutional principles stemming therefrom.<sup>57</sup> In order for the constitutional autonomy of the EU legal order to be respected, it is therefore essential that the international agreements concluded by the European Union with third States do not undermine the delicate balance struck between ‘the international derivation and the specificity of EU law’.<sup>58</sup>

65. In that regard, the Court has held on several occasions that ‘an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law’.<sup>59</sup> According to the Court, ‘the competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit itself to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions’.<sup>60</sup> In Opinion 2/15, the Court stated that, in the same way, the competence of the European Union to conclude international agreements necessarily entails the power to submit itself to the decisions ‘of a body which, whilst not formally a court, essentially performs judicial functions’.<sup>61</sup>

66. The Court has, however, clarified that ‘an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order’.<sup>62</sup>

67. According to the Court, ‘preservation of the autonomy of the [EU] legal order requires therefore, first, that the essential character of the powers of the [European Union] and its institutions as conceived in the Treaty remain unaltered’.<sup>63</sup> Second, it requires that the procedure for resolving disputes will not ‘have the effect of binding the [European Union] and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of [EU law]’.<sup>64</sup>

68. In particular, in Opinion 2/13, the Court observed that ‘any action by the bodies given decision-making powers by the [Convention for the Protection of Human Rights and Fundamental Freedoms<sup>65</sup>], as provided for in the agreement envisaged, must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law’.<sup>66</sup>

69. As the Court stated in Opinion 1/09, it has given opinions in favour of the establishment, by means of international agreements, of judicial systems designed, in essence, to resolve disputes on the interpretation or application of the actual provisions of the international agreements concerned, and which did not affect the powers of the courts and tribunals of Member States in relation to the interpretation and application of EU law, or the power, or indeed the obligation, of those courts and

57 See, to that effect, judgment of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118, paragraph 46 and the case-law cited).

58 See Lenaerts, K., ‘Droit international et monisme de l’ordre juridique de l’Union’, op. cit., in particular p. 506.

59 See, inter alia, Opinion 2/13 (paragraph 182 and the case-law cited).

60 Ibid.

61 Opinion 2/15 (paragraph 299).

62 See, inter alia, Opinion 2/13 (paragraph 183 and the case-law cited).

63 See, inter alia, Opinion 1/00 (Agreement on the establishment of a European Common Aviation Area) of 18 April 2002 (EU:C:2002:231, paragraph 12 and the case-law cited) (‘Opinion 1/00’).

64 See, inter alia, Opinion 1/00 (paragraph 13 and the case-law cited).

65 Signed in Rome on 4 November 1950, ‘the ECHR’.

66 See Opinion 2/13 (paragraph 184 and the case-law cited). In its Opinion 1/92 (EEA Agreement — II) of 10 April 1992 (EU:C:1992:189), the Court also took the view that the preservation of the autonomy of EU law means that the bodies established by the international agreement at issue cannot disregard the binding nature of decisions of the Court within the EU legal order or affect the case-law of the Court (paragraphs 22 to 24). According to the Court, that principle constitutes ‘an essential safeguard which is indispensable for the autonomy of the [EU] legal order’ (paragraph 24).

tribunals to request a preliminary ruling from the Court and the power of the Court to reply.<sup>67</sup> By contrast, the Court opposed the establishment of an international court called upon to interpret and apply not only the provisions of the agreement which established it but also other instruments of EU law, and which might be called upon to determine a dispute pending before it in the light of the fundamental rights and general principles of EU law, or even to examine the validity of an act of the European Union.<sup>68</sup>

70. It is therefore necessary to examine whether the jurisdiction conferred by Section F of Chapter 8 on the CETA Tribunal as regards the interpretation and application of the provisions of the CETA might result in the EU institutions and, in particular, the Court being required to adopt a particular interpretation of the rules of EU law in the exercise of the powers conferred on them by the Treaties. More specifically, does Section F of Chapter 8 of the CETA constitute a breach of the ‘principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law’<sup>69</sup>?

71. Before addressing the core of that issue, it is first necessary, in my view, to explain the reasons why the requirement of reciprocity in the protection afforded to the investors of each Party must be taken into account when examining whether Section F of Chapter 8 of the CETA adversely affects the autonomy of the EU legal order.

### *3. The requirement of reciprocity in the protection afforded to the investors of each Party*

72. When an investment is made by a natural or legal person in a Member State of the European Union, that investment is subject to the application of the law of that State, of which EU law forms an integral part. Where the application of that law is contested, the courts or tribunals of the State concerned will have to settle the dispute on the basis of the law which it is their duty to ensure is observed, where appropriate after making a reference to the Court for a preliminary ruling. By bringing proceedings before a national court or tribunal, the investor may seek an order annulling a national measure and/or damages.

73. Thus, any Canadian undertaking investing in a Member State of the European Union is, in relation to that investment, subject to the law of that Member State, which includes EU law. It is clear that an investor from a third State who wishes to invest in a Member State will have at his disposal a body of law protecting that investment as well as legal remedies to assert his claims. Without preaching to or making groundless accusations about the commercial partners of the European Union, it cannot however be taken for granted that, in the third States with which the European Union wishes to develop relations in terms of investment, EU investors will enjoy an equivalent level of protection from a substantive and procedural point of view. It is for this reason that the European Union must, in order to conduct its commercial policy, negotiate with such third States, on a reciprocal basis, substantive and procedural rules on the protection of the investments made between the two Parties.

74. The existence of different standards of protection in the domestic law of the Parties therefore makes it necessary to conclude a bilateral agreement which enables the investors of each Party to obtain the same protection when they make an investment in the territory of the other Party.

<sup>67</sup> See Opinion 1/09 (paragraph 77).

<sup>68</sup> See Opinion 1/09 (paragraph 78).

<sup>69</sup> Opinion 2/13 (paragraph 246).



75. The CETA was negotiated on the basis of reciprocity between the Parties. That agreement thus seeks to grant the investors of each of those Parties equivalent substantive and procedural protection. This type of agreement therefore seeks to ensure that EU undertakings investing in third States, on the one hand, and the undertakings of third States investing in the European Union, on the other, operate on an equal footing. With that in mind, it is therefore essential that the substantive and procedural standards of protection enjoyed by EU undertakings investing in third States are equivalent to those enjoyed by the undertakings of third States investing in the European Union.

76. More specifically, the fear of foreign investors of being placed at a disadvantage as compared with national investors when they bring proceedings before national courts or tribunals is thus expressed in the reciprocal grant of the possibility of accessing a specific dispute settlement mechanism.

77. In that regard, it must be observed that reciprocity must be regarded as being one of the guiding principles of the EU's external relations.<sup>70</sup> The application of the principle of reciprocity to the EU's external treaty relations is justified by the fact that, as a subject of international law, the European Union is subject to the rules of international law by which it has voluntarily agreed to be bound, of which the obligation of reciprocity is an integral part.<sup>71</sup>

78. Since the CETA is based on a requirement of reciprocal protection of the investors of each Party, the negotiators of that agreement took the view that that agreement had to contain provisions, such as those found in Sections C and D of Chapter 8 of the CETA, which require each of the Parties to afford adequate and equivalent protection to the investors of the other Party. Such efforts to ensure reciprocity were taken into account by the Court in Opinion 2/15 where it stated that, 'in the light of the fact that the free movement of capital and payments between Member States and third States, laid down in Article 63 TFEU, is not formally binding on third States, the conclusion of international agreements which contribute to the establishment of such free movement on a reciprocal basis may be classified as necessary in order to achieve fully such free movement, which is one of the objectives of Title IV ('Free movement of persons, services and capital') of Part Three ('Union policies and internal actions') of the FEU Treaty'.<sup>72</sup>

79. As the Commission observed in its concept paper of 5 May 2015,<sup>73</sup> 'as the EU upholds a high standard in promoting and protecting investment in its territory, [it] has a natural interest in obtaining similarly credible and enforceable guarantees for EU investments and investors abroad'.<sup>74</sup>

80. Accordingly, the EU's ability to promote and encourage the activity of EU investors in third States and to attract foreign investors in its territory turns to a great extent on the conclusion of agreements with third States in order to provide for adequate and reciprocal protection of such investments.

81. The adoption, within the context of an international agreement between, of the one part, the European Union and its Member States and, of the other part, a third State, on a reciprocal basis, of substantive and procedural rules on investments can be explained by the fact that the relations between those Parties are not based on mutual trust, contrary to the situation prevailing as regards the relations between Member States.

70 See Dero, D., *La réciprocité et le droit des Communautés et de l'Union européennes*, Bruylant, Brussels, 2006, p. 227.

71 See Dero, D., *op. cit.*, p. 230.

72 Opinion 2/15 (paragraph 240).

73 See footnote 5 of this Opinion.

74 See p. 1 of that concept paper.

82. As the Court recently observed in its judgment of 6 March 2018, *Achmea*,<sup>75</sup> ‘EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected’.<sup>76</sup> However, the relations which the EU establishes with third States are not based on such a premiss. Therefore, when they negotiate an agreement such as the CETA, the EU institutions seek to ensure that EU investors will enjoy in third States the same level of protection as that afforded by the European Union and its Member States to foreign investors. Accordingly, reciprocity is sought on the basis of a standard of protection freely negotiated between the Parties, with those Parties seeking to agree on the rules of protection which they are prepared to grant, on a reciprocal basis, to the investors from each of those two Parties.

83. Defining such rules on the protection of foreign investments also necessitates determining the nature of and the rules governing the dispute settlement mechanism which will allow compliance with those rules to be guaranteed.

84. Neither of the Parties necessarily trusts the judicial system of the other Party to ensure that the rules contained in the agreement are observed. Those two Parties must therefore agree on a neutral dispute settlement mechanism which, by virtue of its characteristics, will gain their trust and that of the investors. By reassuring foreign investors vis-à-vis the protection of their investments, the host State will be able to attract new investment. That is the main objective of investment agreements. From that perspective, establishing a dispute settlement mechanism may appear to be the cornerstone of the system of protection introduced.

85. It is therefore impossible to examine whether the autonomy of EU law is sufficiently preserved by the CETA unless account is taken of that reciprocal aspect of the desired substantive and procedural protection.<sup>77</sup>

86. As part of such examination, the fact that the other Party to the agreement envisaged is Canada, whose judicial system is presumed to offer sufficient guarantees, does not appear to me to be decisive, since it is in reality a standard mechanism which is intended to be inserted into international agreements with third States which could not offer the same guarantees. Thus, the analysis should not vary according to the third State concerned, since what is at issue here is the definition of a model which is consistent with the structural principles of the EU legal order and which, at the same time, may be applied in all commercial agreements between the European Union and third States. In any event, in the course of the present proceedings, it has become clear that there are differences in the substantive protection afforded to foreign investors in each of the Parties.<sup>78</sup>

87. It follows from the foregoing that, even assuming that, from the European Union’s perspective, it may appear redundant to make provision in an international investment agreement for rules on the protection of investors which might, in certain respects, overlap with rules of EU law in force and, therefore, call into question the introduction of a specific dispute settlement mechanism, it must be observed that such reasoning fails to take account of the fact that there is not necessarily symmetry between the substantive and procedural level of protection existing within the European Union and within the third States with which the European Union wishes to develop its relations in the field of

<sup>75</sup> C-284/16, EU:C:2018:158 (‘the judgment in *Achmea*’).

<sup>76</sup> Judgment in *Achmea* (paragraph 34 and the case-law cited).

<sup>77</sup> Accordingly, as Dero, D. observes, op. cit. (p. 287), reciprocity ‘se trouve au cœur d’une dialectique entre autonomisation et subordination du droit [de l’Union] par rapport au droit international’.

<sup>78</sup> As the Commission stated at the hearing, and as several Member States have observed, the law of the other Party, in the present case Canadian law, does not necessarily offer adequate protection to European investors in relation to discrimination or expropriation.

investment. It is indeed such potential asymmetry which necessitates the negotiation of a common standard of substantive and procedural protection, the only means of guaranteeing reciprocity in the application of the agreement concerned and of ensuring effective and uniform protection for EU investors when they make investments in third States.

88. Contrary to what is sometimes claimed, establishing a dispute settlement mechanism such as that under examination does not, in my view, mean calling into question the judicial system of the European Union and of its Member States or the ability of that system to deal effectively, independently and impartially with actions brought by foreign investors. By establishing such a mechanism in its bilateral relations in the field of investment, the European Union intends to satisfy a demand for neutrality and speciality in the resolution of disputes between investors and States, bearing in mind that it will also benefit European investors when they invest in a third State.

89. In order to rule on the compatibility of the dispute settlement mechanism provided for in Section F of Chapter 8 of the CETA with EU primary law, it is therefore necessary to broaden the perspective and to take account of the need to protect EU investors when they invest in third States.

90. Viewing the matter from that perspective is also liable to undermine significantly the argument that there would be a considerable overlap between the rules on investment protection contained in EU law and those laid down in the CETA, which would render redundant the introduction of a dispute settlement mechanism in addition to the possible remedies before the courts of the European Union and of the Member States.

#### *4. A mechanism consistent with the CETA's lack of direct effect*

91. I observe that the Court has already held that 'EU institutions which have power to negotiate and conclude [an agreement concluded by the European Union with third States] are free to agree with the non-Member States concerned what effects the provisions of the agreement are to have in the internal legal order of the contracting parties'.<sup>79</sup> As the Commission points out in its observations, in practice all the free trade agreements recently concluded by the European Union expressly exclude their direct effect. The main reason for excluding the direct effect of those agreements is to guarantee effective reciprocity between the parties, in a manner consistent with the objectives of the common commercial policy.

92. With regard to the ability to rely on the Agreement establishing the World Trade Organization (WTO), signed in Marrakesh on 15 April 1994, as well as the agreements contained in Annexes 1 to 3 of that agreement (jointly 'the WTO agreements'),<sup>80</sup> before the European Union judicature with a view to reviewing the conformity with EU law of those agreements, the Court adopted, with a view to ruling out in principle the ability to rely on those agreements,<sup>81</sup> a line of reasoning which takes account of the requirement of 'reciprocity' so as not to 'deprive the European Union's legislative or executive bodies of the discretion which the equivalent bodies of the European Union's trading partners enjoy'.<sup>82</sup> In that regard, in order to adopt its own position, the Court takes account of the position adopted by those partners on the ability to rely directly on the WTO agreements, by observing that 'some of the contracting parties, including the European Union's most important trading partners, have concluded

<sup>79</sup> See, *inter alia*, judgment of 13 January 2015 *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe* (C-404/12 P and C-405/12 P, EU:C:2015:5, paragraph 45 and the case-law cited).

<sup>80</sup> Agreements approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

<sup>81</sup> See, *inter alia*, judgment of 4 February 2016, *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2016:74), in which the Court observed that, 'given their nature and structure, the WTO agreements are not in principle among the rules in the light of which the legality of measures adopted by the EU institutions may be reviewed' (paragraph 85). The Court extended that finding to the rulings and recommendations of the WTO Dispute Settlement Body (DSB) (paragraphs 94 to 96).

<sup>82</sup> *Ibid.*, paragraph 86 and the case-law cited.

from the subject matter and the purpose of the WTO agreements that they are not among the rules applicable by their courts when reviewing the legality of their rules of domestic law'.<sup>83</sup> The Court points out that 'such lack of reciprocity, if accepted, would risk introducing an imbalance in the application of the WTO agreements'.<sup>84</sup> Thus, the approach adopted bears witness to the Court's wish, in the interests of preserving reciprocity in the application of the agreement, not to place the European Union at a disadvantage as compared to its most important trading partners, thereby preserving the European Union's position on the international stage.<sup>85</sup>

93. As I have previously stated, the Parties expressly chose to rule out the direct effect of the CETA.<sup>86</sup>

94. In order to preserve the balance between the Parties in the application of that agreement, and thus to maintain reciprocity in the implementation of the undertakings entered into by them, the Parties decided to establish a specific mechanism for the resolution of disputes between investors and States. Excluding the direct effect of the agreement thus strengthens the value of such a mechanism. Since it is not the role of the domestic courts of each of the Parties to apply the standards of protection defined in the CETA, it is consistent to provide for a dispute settlement mechanism which lies outside the Parties' domestic judicial system.

*5. The judgment in Achmea is not prejudicial to the compatibility of the ICS with the requirement of the autonomy of the EU legal order*

95. In the case which gave rise to the judgment in *Achmea*, the Court was asked to rule on whether Articles 267 and 344 TFEU are to be interpreted as precluding a provision contained in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic ('the BIT'), under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitration tribunal, whose jurisdiction that Member State has undertaken to accept.

96. In the judgment in *Achmea*, the Court answered that question in the affirmative.

97. In order to arrive at that solution, it began by recalling that, according to settled case-law, 'an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties'.<sup>87</sup>

98. The Court went on to emphasise the fact that the relations between Member States are governed by the principle of mutual trust in the observance of EU law and that it is in that context that 'the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU'.<sup>88</sup>

83 Ibid. The Court thus makes it clear that 'la réciprocité dans l'application d'un accord peut venir conditionner la reconnaissance de l'effet direct de ses dispositions' (see Dero, D., op. cit., p. 496).

84 Ibid.

85 See Dero, D., op. cit., p. 499.

86 See Article 30.6.1 of the CETA.

87 Judgment in *Achmea* (paragraph 32 and the case-law cited).

88 Judgment in *Achmea* (paragraph 34 and the case-law cited).



99. After stressing the fundamental role conferred by Article 19 TEU on the national courts and tribunals and on the Court to ‘ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law’<sup>89</sup> and emphasising the fact that ‘the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU’,<sup>90</sup> the Court examined the characteristics of the dispute settlement mechanism established by the BIT.

100. In that regard, it found, firstly, that the arbitration tribunal referred to in Article 8 of the BIT could be ‘called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital’.<sup>91</sup> Secondly, according to the Court, a tribunal of that type ‘cannot be regarded as a “court or tribunal of a Member State” within the meaning of Article 267 TFEU, and is not therefore entitled to make a reference to the Court for a preliminary ruling’.<sup>92</sup> Thirdly, the Court took into account the fact that an arbitration award made by such a tribunal is not subject systematically and in full to review by a court of a Member State,<sup>93</sup> and consequently it is not guaranteed ‘that the questions of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling’.<sup>94</sup>

101. In relation to that final point, the Court drew a distinction between commercial arbitration proceedings, which originate in the freely expressed wishes of the parties, and arbitration proceedings between an investor and a Member State resulting from a treaty concluded between Member States.

102. With regard to commercial arbitration proceedings, which are established in accordance with the express wishes of the parties, the Court held in its judgments of 1 June 1999, *Eco Swiss*<sup>95</sup> and of 26 October 2006, *Mostaza Claro*<sup>96</sup> that ‘the requirements of efficient arbitration proceedings justify the review of arbitration awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a preliminary ruling’<sup>97</sup>.

103. However, according to the Court, such considerations do not apply to arbitration proceedings such as those referred to in Article 8 of the BIT, since they ‘derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law ..., disputes which may concern the application or interpretation of EU law’.<sup>98</sup> In the Court’s view, this ‘could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law’.<sup>99</sup>

<sup>89</sup> Judgment in *Achmea* (paragraph 36 and the case-law cited).

<sup>90</sup> Judgment in *Achmea* (paragraph 37 and the case-law cited).

<sup>91</sup> Judgment in *Achmea* (paragraph 42).

<sup>92</sup> Judgment in *Achmea* (paragraph 49).

<sup>93</sup> Indeed, ‘such judicial review can be exercised by that court only to the extent that national law permits’ (paragraph 53 of the judgment in *Achmea*).

<sup>94</sup> Judgment in *Achmea* (paragraph 50).

<sup>95</sup> C-126/97, EU:C:1999:269 (paragraphs 35, 36 and 40).

<sup>96</sup> C-168/05, EU:C:2006:675 (paragraphs 34 to 39).

<sup>97</sup> Judgment in *Achmea* (paragraph 54).

<sup>98</sup> Judgment in *Achmea* (paragraph 55 and the case-law cited).

<sup>99</sup> Judgment in *Achmea* (paragraph 56).



104. The Court therefore found that the arbitration clause at issue in the BIT had an adverse effect on the autonomy of EU law.<sup>100</sup> By means of a bilateral investment agreement, two Member States had agreed to remove EU law from the jurisdiction of their own courts, and therefore from the judicial dialogue between those courts and tribunals and the Court, which was capable of having an adverse effect on the uniformity and effectiveness of EU law.

105. The approach adopted by the Court thus appears to me to have been primarily guided by the idea that the judicial system of the European Union, in so far as it is based on mutual trust and sincere cooperation between Member States, is inherently incompatible with the possibility of Member States establishing, in their bilateral relations, a parallel dispute settlement mechanism which may concern the interpretation and application of EU law. To that extent, Article 344 TFEU has been interpreted by the Court as precluding such a mechanism; the fact that the disputes in question are between investors and States is not a bar to such preclusion. Article 267 TFEU was supplementary, since the preliminary ruling procedure was necessarily affected by the operation of such a mechanism.

106. In my view, the approach adopted by the Court in its judgment in *Achmea* cannot be transposed to the examination of the ICS, because the premises which must guide the line of reasoning are different.

107. I have already stated that the relations between Parties such as, on the one hand, the European Union and its Member States and, on the other, Canada are not based on mutual trust,<sup>101</sup> and this is, moreover, the reason why those Parties intend to define, on a reciprocal basis, a standard of substantive and procedural protection in the agreement envisaged.

108. To that extent, that agreement cannot adversely affect either the principle of mutual trust between Member States<sup>102</sup> or the principle of sincere cooperation which Member States are required to observe.

109. Accordingly, since Section F of Chapter 8 of the CETA is contained in an agreement with a third State, which is intended to be concluded by the European Union and its Member States and governs relations between those Parties and not the mutual relations between Member States, the line of reasoning developed by the Court in its judgment in *Achmea* in the light of Articles 267 and 344 TFEU does not appear to me to be capable of applying to the ICS.

110. I would add, in this regard, that, contrary to the situation in the BIT at issue in the case which gave rise to the judgment in *Achmea*, which contained a clause on the applicable law which could suggest that the arbitration tribunal concerned had jurisdiction to hear and determine disputes relating to the interpretation and application of EU law, the CETA clearly states, as I will have occasion to expand upon later, that the applicable law before the CETA Tribunal consists exclusively of the relevant provisions of that agreement, as interpreted in accordance with international law. The domestic law of each Party, of which EU law forms part in the case of the Member States,<sup>103</sup> can be taken into account by that Tribunal only as a matter of fact, and the meaning ascribed to domestic law is not binding on the courts and tribunals or the authorities of the defendant Party. In addition, unlike in the case of bilateral investment treaties between Member States such as that at issue in the case which gave rise to the judgment in *Achmea*, EU law does not form part of the international law applicable between the Parties.

<sup>100</sup> Judgment in *Achmea* (paragraph 59).

<sup>101</sup> Thus, EU law does not require trust in the judicial systems of third States, regardless of the level of reliability of the judicial system of those States.

<sup>102</sup> In particular, unlike the BIT at issue in the judgment in *Achmea*, the CETA has no adverse effect whatsoever on 'the trust which the Member States accord to one another's legal systems and judicial institutions' (see, inter alia, judgment of 10 February 2009, *Allianz and Generali Assicurazioni Generali* (C-185/07, EU:C:2009:69, paragraph 30)).

<sup>103</sup> Judgment in *Achmea* (paragraph 41).

111. Furthermore, in order to distinguish clearly between the case of bilateral investment treaties between Member States and that of investment agreements such as the CETA, the Court took care in its judgment in *Achmea* to recall its settled case-law that ‘an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected’.<sup>104</sup>

112. In connection with that case-law and in order to highlight clearly the reasons why the dispute settlement mechanism provided for in the BIT at issue adversely affected the autonomy of the EU legal order, the Court observed that, ‘in the present case ... apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation’.<sup>105</sup>

113. Those points having been made, even though the analytical framework cannot be identical to that applied by the Court with regard to a bilateral investment treaty between Member States, the fact remains that the establishment of a mechanism to settle disputes between investors and States by means of an agreement between, of the one part, the European Union and its Member States and, of the other part, a third State, must respect the autonomy of the EU legal order.

114. Viewed from that perspective and bearing in mind the factors which I have just set out above, consideration must now be given, as the Kingdom of Belgium asks me to do in its request for an opinion, to whether or not the ICS, as provided for in Section F of Chapter 8 of the CETA, may have an adverse effect on the autonomy of the EU legal order, in particular by affecting the exclusive jurisdiction of the Court to provide a definitive interpretation of EU law.

*6. The guarantees provided for by the Parties in order to preserve the exclusive jurisdiction of the Court over the definitive interpretation of EU law*

115. The role assigned to the Court and to the national courts and tribunals by Article 19(1) TEU, which consists in ensuring that EU law is observed within the EU legal order, is not, to my mind, affected by the establishment of a mechanism to settle disputes between investors and States such as that provided for in Section F of Chapter 8 of the CETA.

116. That agreement contains sufficient guarantees to safeguard, first, the role of the Court as the ultimate interpreter of EU law and, second, the cooperation mechanism between the national courts and tribunals and the Court, which takes the form of the preliminary ruling procedure.

117. The negotiators of the CETA thus deliberately ensured that the rules which it lays down interfere as little as possible with the rules of EU law.

<sup>104</sup> Judgment in *Achmea* (paragraph 57 and the case-law cited).

<sup>105</sup> Judgment in *Achmea* (paragraph 58).

118. In my view, Section F of Chapter 8 of the CETA therefore succeeds in guaranteeing a balance between, on the one hand, acceptance of the external review of the actions of the European Union and of its Member States in the light of the rules on investment protection contained in that chapter and, on the other, the preservation of the autonomy of EU law.

119. In that regard, it is essential to examine over which rules of law specifically the CETA Tribunal has jurisdiction and how it must construe the domestic law of the Parties, of which EU law forms part.

120. I observe that the CETA Tribunal enjoys a narrowly circumscribed jurisdiction. Pursuant to Article 8.18.1 of the CETA, that Tribunal has jurisdiction solely to rule on a breach of an obligation under Section C ('Non-discriminatory treatment')<sup>106</sup> or Section D ('Investment protection') of Chapter 8 of the CETA. That restriction of jurisdiction is underlined in Article 8.18.5 of that agreement, which provides that the CETA Tribunal 'shall not decide claims that fall outside of the scope of this Article'. Furthermore, it is clear from the wording of Article 8.18.1 of the CETA that an investor can submit a claim concerning a measure adopted by the European Union or by a Member State only where he can prove that that measure has caused him damage. He cannot contest such a measure in the abstract.

121. In addition, with regard to the applicable law and its interpretation, Article 8.31.1 of the CETA provides that, 'when rendering its decision, the Tribunal ... shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties [concluded in Vienna on 23 May 1969], and other rules and principles of international law applicable between the Parties'.

122. It is apparent from that provision that, when rendering its decision, the CETA Tribunal is confined to applying that agreement and other rules and principles of international law applicable between the Parties, and consequently it does not have jurisdiction to apply rules of EU law.<sup>107</sup> Thus, the rules of law applicable to the disputes which the CETA Tribunal is called on to settle do not include the domestic law of the Parties.

123. Furthermore, pursuant to Article 8.31.2 of the CETA, 'the Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party'. This means, in other words, that the Tribunal is in no way authorised to rule on the legality of an act adopted by a Member State or by the European Union in the light, as the case may be, of the national law of that State or indeed of EU law. In view of that exclusion of jurisdiction, the view may be taken that the Tribunal does not encroach upon the jurisdiction of the national courts or tribunals or of the European Union judicature vis-à-vis the review of the legality of legal acts forming part of the legal orders of the Member States and of the EU legal order.<sup>108</sup>

124. Thus, although it is true that the Court has made clear that the judicial system of the European Union is a 'complete set of legal remedies and procedures designed to ensure review of the legality of acts of the institutions',<sup>109</sup> the dispute settlement mechanism established by the CETA does not adversely affect that system since it is not intended to review the legality of acts of the European

<sup>106</sup> With respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of the covered investment, and subject to the conditions laid down in Article 8.18.2 of the CETA.

<sup>107</sup> I am referring here to the rules of EU law other than those contained in the CETA since, as I have previously stated, from the date of its entry into force, that agreement will be integrated automatically into the EU legal order, of which it will form part in the same way as other sources of EU legislation.

<sup>108</sup> See, by contrast, Opinion 1/09, in which the Court took into account the fact that the European and Community Patents Court could be called on to examine the validity of an act of the European Union (paragraph 78).

<sup>109</sup> See, inter alia, Opinion 1/09 (paragraph 70 and the case-law cited). It follows from the case-law of the Court that 'the review of the legality of acts of the Union that the Court is to ensure under the Treaties relies ... on two complementary judicial procedures. The FEU Treaty has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union' (see, inter alia, judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 66 and the case-law cited)).

Union. That mechanism is intended solely to review the compatibility of the acts adopted by the Parties with the relevant provisions of the CETA, with a view to granting compensation to the investors who suffer loss where the acts are found to be incompatible. The monopoly of the role of reviewing the legality of acts of the European Union, conferred on the Courts of the European Union by the Treaties, is therefore not called into question.

125. When exercising its jurisdiction to rule on the conformity with the CETA of a measure adopted by one of the Parties, the CETA Tribunal does not have the power, as is apparent from Article 8.39.1 of the CETA, to order the annulment of a measure which it deems contrary to the provisions of Chapter 8 of the CETA or to require that it be brought into line with those provisions.<sup>110</sup> Under that provision, the CETA Tribunal may only award monetary damages or, with the agreement of the respondent, restitution of property of which an investor has been dispossessed.<sup>111</sup> The ICS thus stems from litigation in the field of investment arbitration, which primarily involves proceedings for compensation.

126. As the French Government rightly observes, it is not for the CETA Tribunal to settle disputes between two parties each of whom have a different position on the validity or interpretation of an act of EU law nor, a fortiori, to order the annulment of such an act or recommend that it be brought into line. On the contrary, the CETA Tribunal will have jurisdiction solely to verify whether a particular application of EU law is consistent with the CETA, in the same way that the DSB examines only whether a particular application of EU law is compatible with the WTO agreements.

127. It must thus be observed, on the basis of safeguards which enable infringement of the principle of the autonomy of the EU legal order to be ruled out, that the effects that the awards made by the CETA Tribunal may produce are limited. I would add, in this regard, that it follows from Article 8.41.1 of the CETA that those awards must be binding ‘between the disputing parties and in respect of that particular case’.

128. In the implementation of that jurisdiction thus defined, the margin of interpretation enjoyed by the CETA Tribunal is also circumscribed.

129. With regard to the domestic law of each Party, Article 8.31.2 of the CETA states that, ‘for greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact’. That provision illustrates the approach adopted by the Parties, in accordance with which the CETA Tribunal is to interpret as little as possible the domestic law of each of the Parties and is to take account of it as it stands.

130. On this point, it must be observed that it is, in my view, absolutely essential that the CETA Tribunal be authorised to ‘consider’ the domestic law of each Party. It is consistent with the logic of the new free trade agreements negotiated by the European Union and, more specifically, with their provisions on international investments, to strike a new balance between the private interests of investors and the public interests pursued by the Parties. This means that the Parties can rely on their domestic rules before the Tribunal where those rules provide for the protection of a public interest, with a view to justifying the measure or conduct complained of. If the Tribunal were unable to consider rules contained in the Parties’ domestic law, it would be impossible for it to take account of legitimate objectives in the public interest.

<sup>110</sup> See, by contrast, Opinion 2/13 (paragraph 22), which describes the range of steps which the Parties are required to take in order to comply with final judgments of the European Court of Human Rights in disputes to which they are parties, including the amendment of their domestic law.

<sup>111</sup> Even in the second case, the respondent must have the possibility, rather than making restitution of the property, of paying corresponding compensation.



131. With regard to the balance thus expressed in the CETA, paragraph 6(a) of the Joint Interpretative Instrument states that that agreement ‘includes modern rules on investment that preserve the right of governments to regulate in the public interest including when such regulations affect a foreign investment, while ensuring a high level of protection for investments and providing for fair and transparent dispute resolution’. Paragraph 6(b) of the Joint Interpretative Instrument adds that ‘[the] CETA clarifies that governments may change their laws, regardless of whether this may negatively affect an investment or investor’s expectations of profits’.<sup>112</sup>

132. Giving concrete expression to that idea, Article 8.9 of the CETA, entitled ‘Investment and regulatory measures’, provides, in paragraph 1 thereof, that, ‘for the purposes of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity’. Article 8.9.2 of that agreement states that, ‘for greater certainty, the mere fact that a 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’.

133. Those provisions illustrate the balance struck between the economic interests of investors and the sovereign right of States to regulate in the public interest. The economic imperative of promoting and protecting investments is thus weighed against the pursuit of objectives in the public interest.

134. However, consideration of the Parties’ domestic law must not entail the CETA Tribunal amending that law. It must take account of that law as it stands. This is what is meant by the rule that, where the Tribunal considers the domestic law of a Party, it may do so only ‘as a matter of fact’. It must be observed, in that regard, that the international courts which are required to examine whether a State has complied with the obligations under an international treaty and, to that end, to examine the law of that State, traditionally regard the meaning to be given to that national law as being a matter of fact.<sup>113</sup>

135. Accordingly, it is as matters of fact that the CETA Tribunal may consider the rules contained in the Parties’ domestic law in order to rule on the consistency with that agreement of the conduct or measure forming the subject matter of the dispute.<sup>114</sup>

136. In addition, a further limitation is provided for in Article 8.31.2 of the agreement envisaged, in order to prevent the CETA Tribunal from exercising creative licence in relation to domestic law. When considering the domestic law of a Party as question of fact, the Tribunal is required to follow ‘the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to the domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party’. The CETA Tribunal cannot therefore issue binding interpretations of EU law.

<sup>112</sup> See also paragraph 2 of the Joint Interpretative Instrument which states that ‘[the] CETA preserves the ability of the [Union] and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest [and] to achieve legitimate public policy objectives ...’.

<sup>113</sup> The theory that State law is merely a fact in the light of international law has its origin in international case-law. Thus, according to the words used by the Permanent Court of International Justice, ‘from the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures’ (judgment of 25 May 1926, Case concerning certain German interests in Polish Upper Silesia (The Merits), PCIJ, Series A, No 7, p. 19). See, in this regard, Santulli, C., *Le statut international de l’ordre juridique étatique — Étude du traitement du droit interne par le droit international*, Éditions A. Pedone, Paris, 2001, p. 259 et seq. For a re-statement of this principle in the case-law of the International Court of Justice, see also judgment of 12 July 2005, Frontier Dispute (Benin/Niger) (ICJ Reports 2005, p. 90, § 28).

<sup>114</sup> See, in this regard, Nouvel, Y., Commentaire de l’arrêt Achmea, *Journal du Droit International (Clunet)*, LexisNexis, Paris, No 3, July 2018, Commentary 14, p. 903, in accordance with which, pursuant to Article 8.31.2 of the CETA, ‘statuer sur le fondement du droit de l’Union — autrement dit faire produire à la règle de droit la conséquence qui s’y attache en vertu de celle-ci — constitue une mission qui n’appartient pas au Tribunal; en revanche, prendre en considération la règle de droit européen comme donnée factuelle est une tâche qu’il est loisible aux arbitres d’accomplir pour autant que cela soit pertinent. En s’acquittant de sa fonction juridictionnelle, le Tribunal arbitral peut être amené à prendre connaissance d’un état du droit européen qui relève alors des faits de la cause et dont il cherchera à établir la consistance comme une donnée matérielle pertinente’.



137. Thus, although it is indeed conceivable that, in order to conduct its review, the Tribunal may be called upon to undertake some interpretation of EU law, for example where it is required to define the scope of the conduct complained of, the CETA Tribunal is, however, required, pursuant to Article 8.31.2 of the CETA, to follow the interpretation that the Court has given, as the case may be, of EU law, without, in any event, the European Union being bound by the meaning that the CETA Tribunal might give to EU law. Accordingly, any interpretation of domestic law by the CETA Tribunal would not have the effect of binding the authorities or the courts of the Party complained against.

138. It follows from the foregoing that the CETA Tribunal is bound by the interpretation of EU law given by the Court, which Article 8.31.2 of the CETA requires it to follow, whereas neither the Court, nor the institutions of the European Union, nor the national courts or authorities are bound by the interpretation of EU law made by the Tribunal.

139. Article 8.31.2 of the CETA therefore guarantees that the CETA Tribunal can interpret EU law only if there is no guidance in that regard within the EU legal order and if, when such an interpretation is made by that Tribunal, it is made solely for the purposes of ruling on the dispute brought before it, without that interpretation being binding on the authorities or the courts of the European Union.

140. Thus, Article 8.31.2 of the CETA contains sufficient safeguards to prevent the CETA Tribunal from being able to impose an interpretation of EU law within the EU legal order. To that extent, the essential functions of the Court are not affected. In particular, the dispute settlement mechanism established by Section F of Chapter 8 of the CETA does not affect the Court's role as the definitive interpreter of EU law, with binding effect.

141. That provision shows that account is taken of the case-law of the Court, under which the bodies given decision-making powers within the context of an agreement concluded by the European Union must be incapable of 'binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law'.<sup>115</sup>

142. It is true that, in Opinion 2/13, the Court observed that 'the interpretation of a provision of EU law, including of secondary law, requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation'.<sup>116</sup> According to the Court, 'if [it] were not allowed to provide the *definitive interpretation* of secondary law, and if the [European Court of Human Rights], in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of *the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law*'.<sup>117</sup> Nevertheless, that principle is not breached where, provided that it is possible and effectively implemented by the CETA Tribunal, its interpretation of EU law would not have binding effect on the authorities and the courts of the European Union.

143. This is not called into question by the finding that, as I have previously stated, pursuant to Article 8.41.1 of the CETA, an award by the CETA Tribunal will be binding between the disputing parties in respect of that particular case. If the CETA Tribunal were itself required to provide an interpretation of EU law, in a situation in which there is no interpretation of which it should have taken account, the Court would retain the jurisdiction to give a definitive interpretation of EU law. The award by the CETA Tribunal will be binding only between the disputing parties in respect of that

<sup>115</sup> See, inter alia, Opinion 2/13 (paragraph 184 and the case-law cited).

<sup>116</sup> See Opinion 2/13 (paragraph 245).

<sup>117</sup> See Opinion 2/13 (paragraph 246, emphasis added).

case. Accordingly, if an interpretation of EU law by the CETA Tribunal appears to the Court to be incorrect, the Court may, without triggering a breach by the European Union of its international obligations, dismiss such an interpretation and adopt the interpretation which appears to it to be the most appropriate.

144. In addition, the margin of interpretation enjoyed by the Tribunal is limited by the ability of the Parties to ‘issue binding notes of interpretation’ intended to ‘avoid and correct any misinterpretation of CETA by Tribunals’.<sup>118</sup>

145. Thus, Article 8.31.3 of the CETA provides that, ‘where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date’.<sup>119</sup>

146. It must also be pointed out that, under Article 26.3.3 of the CETA, ‘the CETA Joint Committee shall make its decisions and recommendations by mutual consent’. By analogy with the Court’s finding in Opinion 1/00, such a decision-making method is a guarantee, for the European Union, that it will not, in its relations with Member States or nationals of Member States, be bound by an interpretation which is at variance with the case-law of the Court.<sup>120</sup> I also note that the wording of the CETA does not preclude the position adopted by the European Union within the Joint Committee from being referred to the Court, where appropriate, by means of the remedies provided for by the FEU Treaty.<sup>121</sup>

147. In addition, it is important to note that, pursuant to Article 8.28.1 of the CETA, ‘an Appellate Tribunal is hereby established to review awards rendered under this Section’. Under Article 8.28.7 of the CETA, it falls to the CETA Joint Committee to adopt ‘promptly a decision setting out the ... administrative and organisational matters regarding the functioning of the Appellate Tribunal’ in relation to the points listed in that same provision.

148. The very existence of the Appellate Tribunal is an additional guarantee that, when a decision is taken within the context of the dispute settlement mechanism provided for in Section F of Chapter 8 of the CETA, EU law — taken into consideration as a matter of fact — will not be misinterpreted. Pursuant to Article 8.28.2(b) of the CETA, the Appellate Tribunal may also modify or reverse an award of the CETA Tribunal on the basis of ‘manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law’. This means that, with regard to the meaning to be given to EU law, any error on the part of the CETA Tribunal may still be corrected as part of the review of its awards by the Appellate Tribunal.

149. In accordance with Article 8.28.2(b) of the CETA, the applicant at the appeal stage who contests the Tribunal’s appreciation of the relevant domestic law must therefore show, in order to satisfy the requirement of demonstrating a manifest error, that the Tribunal was influenced by considerations which are clearly at odds with the content of the provisions of domestic law at issue or indeed gave that law a scope which it clearly does not have.

<sup>118</sup> See paragraph 6(e) of the Joint Interpretative Instrument.

<sup>119</sup> See also Article 26.1.5(e) of the CETA which provides that the CETA Joint Committee may ‘adopt interpretations of the provisions of this Agreement, which shall be binding on tribunals established under Section F of Chapter Eight (Resolution of investment disputes between investors and states) and Chapter Twenty-Nine (Dispute Settlement)’. Under Article 26.1.1 of the CETA, the Joint Committee comprises representatives of the European Union and representatives of Canada.

<sup>120</sup> See Opinion 1/00 (paragraph 40).

<sup>121</sup> See, by analogy, Opinion 1/00 (paragraph 39).

150. The restriction of the review, at the appeal stage, to manifest errors in the appreciation of the facts is consistent with the idea that the Tribunal must interpret the Parties' domestic law as little as possible. It is therefore necessary, both at first instance and at the appeal stage, to ensure that the point of contention does not concern the meaning of that domestic law.

151. It must be observed that that review at the appeal stage, as provided for in Article 8.28.2(b) of the CETA, corresponds to the jurisdiction enjoyed by the Court on appeal. In that regard, I note that, in accordance with the settled case-law of the Court, 'it has jurisdiction, on appeal, only to verify whether the national law was distorted, which must be obvious from the documents on its file'.<sup>122</sup>

152. The review by the Appellate Tribunal, which is limited to manifest errors, should, however, be conducted only in the event — which will arguably be relatively rare — that there is nothing in the EU legal order to clarify the meaning to be given to a provision of EU law.

153. However, if it is shown that the CETA Tribunal has departed from an existing interpretation of EU law, its appreciation could, in my opinion, be declared unlawful simply by demonstrating that an error in law has been committed, in accordance with Article 8.28.2(a) of the CETA, since the Tribunal could then be deemed to have infringed Article 8.31.2 of the CETA, which limits its jurisdiction.

154. As I have previously stated, it follows from Article 8.31.2 of the CETA that the Tribunal is required, when considering the domestic law of a Party as a matter of fact, to follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party. Accordingly, in my view, infringement of Article 8.31.2 of the CETA would constitute an error in the application of applicable law within the meaning of Article 8.28.2(a) of that agreement; such an infringement could be found to exist if the Tribunal were to formulate its own interpretation of EU law, without considering the interpretation of that law accepted by the institutions or the courts of the European Union, even though Article 8.31.2 of the CETA requires the Tribunal to rely on the prevailing interpretation of EU law. In other words, the infringement of that obligation would constitute an error in law which would not require a finding that that error is manifest, within the meaning of Article 8.28.2(b) of the CETA, in order to be established.

155. It follows from the foregoing that the CETA Tribunal has jurisdiction to interpret and implement the CETA and that, in view of that precisely defined jurisdiction, it cannot undermine the objective of the uniform interpretation of EU law or the role of reviewing the legality of the acts of the institutions, for which the European Union judicature is responsible.

156. In view of the guarantees surrounding the establishment of the dispute settlement mechanism provided for in Section F of Chapter 8 of the CETA, I take the view that the European Union is capable of submitting itself to an external review of compliance with the investment protection standards contained in that agreement, without thus adversely affecting the autonomy of the EU legal order.

157. In addition, as several interveners in these proceedings have observed, it must be noted that the CETA cannot be compared with the draft agreement relating to the creation of the European Economic Area (EEA), in the version thereof at issue in Opinion 1/91 (EEA Agreement — I) of 14 December 1991,<sup>123</sup> or with the proposed agreement on the establishment of a European Common Aviation Area (ECAA Agreement) at issue in Opinion 1/00.<sup>124</sup> Sections C and D of Chapter 8 of the CETA have neither the object nor the effect of extending the *acquis* of the European Union to Canada by restating provisions of EU law. Although there are, indeed, substantive overlaps with the

<sup>122</sup> See, *inter alia*, judgment of 20 December 2017, *Spain v Commission* (C-81/16 P, EU:C:2017:1003, paragraph 42 and the case-law cited).

<sup>123</sup> EU:C:1991:490 (paragraphs 4 and 5 as well as paragraphs 41 and 42) ('Opinion 1/91').

<sup>124</sup> See Opinion 1/00 (paragraph 3).

investment protection provided for in internal EU law, the rules contained in Sections C and D of Chapter 8 of the CETA cannot be regarded as ‘identical’. Those rules reflect the customary standards in international investment protection, whilst also clarifying and strengthening them. Furthermore, nor does the CETA include the obligation to guarantee a uniform interpretation of the protection standards which it contains and of those contained in the Parties’ domestic law.<sup>125</sup> From that perspective, there is no risk of the interpretation of Sections C and D of Chapter 8 of the CETA by the Tribunal having repercussions on the interpretation of internal EU law, which the Court found to be incompatible with the principle of the autonomy of the EU legal order in Opinion 1/91.<sup>126</sup>

158. In any event, the important point is that, in the light of the guarantees which I have listed in my earlier comments, even in the case of rules of protection which are essentially identical, the mechanism established by the CETA does not have the effect of binding the European Union and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law which could find equivalent expression in that agreement, with each category of rules being distinct as to form and capable of continuing to be interpreted autonomously.<sup>127</sup>

159. The provisions of the CETA on the CETA Tribunal must also be distinguished from those of the draft agreement on the accession of the European Union to the ECHR, which formed the subject matter of Opinion 2/13. In that opinion, the Court drew attention to several reasons pointing to an adverse effect on the autonomy of EU law, including inter alia the fact that the agreement envisaged could affect the reciprocal relations maintained by the European Union and the Member States, as well as the division of powers between the European Union and its Member States.

160. However, the CETA Tribunal has no jurisdiction to rule on the reciprocal relations between the European Union and its Member States, between the Member States themselves or between the investors of one Member State and the other Member States. The CETA Tribunal differs from the courts which were the subject of Opinions 1/09 and 2/13 because if the agreement envisaged in each of those opinions had been concluded by the European Union both the European and Community Patents Court and the European Court of Human Rights would have had jurisdiction to rule on disputes internal to the European Union. That is not the case with the CETA Tribunal, which can hear and determine only disputes between the investors of one Party and the other Party.

161. Furthermore, the CETA Tribunal is not called on to rule on the division of powers between the European Union and its Member States. Article 8.21 of the CETA has laid down automatic procedures for determining the respondent in the context of proceedings initiated by a Canadian investor, without prejudice to Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.<sup>128</sup> Thus, Article 8.21.1 of the CETA provides, in the event of an alleged breach of that agreement by the European Union or by a Member State, that an investor who intends to submit a claim pursuant to Article 8.23 of the agreement must deliver ‘to the European Union a notice requesting a determination of the respondent’. The European Union then determines whether it or one of its Member States will be the respondent and informs the investor accordingly.<sup>129</sup> In the

<sup>125</sup> Contrary to the provisions in the draft agreement on the creation of the EEA, at issue in Opinion 1/91 (paragraphs 8, 9 and 43). See also, in relation to the ECAA, Opinion 1/00 (paragraphs 4, 5 and 10).

<sup>126</sup> In that regard, I recall that the Court held, in essence, that an agreement which provides for the jurisdiction of a court other than the Court to interpret and apply its provisions, even where that agreement takes over an essential part of the rules — including the rules of secondary legislation — which govern economic and trading relations within the European Union and which constitute, for the most part, fundamental provisions of the EU legal order, which thus have the effect of introducing into the EU legal order a large body of legal rules which is juxtaposed to a corpus of identically-worded EU rules, undermined the autonomy of the EU legal order (see Opinion 1/91 (paragraphs 41 and 42)).

<sup>127</sup> See Opinion 1/00 (paragraph 41).

<sup>128</sup> OJ 2014 L 257, p. 121.

<sup>129</sup> See Article 8.21.3 of the CETA.



event that the investor has not been informed of the determination within 50 days of delivering its notice requesting such determination, and if the measures identified in the notice are exclusively measures of a Member State, that Member State is to be the respondent. If the measures identified in the notice include measures of the European Union, the European Union is to be the respondent.<sup>130</sup> The CETA Tribunal is bound by that determination made pursuant to Article 8.21.3 or 8.21.4 of the CETA.<sup>131</sup>

162. The rules for determining whether the European Union or the Member State concerned must be the respondent are contained in Regulation No 912/2014. Decisions adopted by the Commission are implementing acts. They are therefore acts which may be subject to a review of their legality before the European Union judicature. As the Council rightly observes, the Court therefore remains the ultimate judge as regards the issue of who should be the respondent.

163. In the light of those factors, the present case differs from Opinion 2/13, in which the Court found that the arrangements for the operation of the co-respondent mechanism laid down by the agreement envisaged did not ensure that the specific characteristics of the EU and EU law were preserved. Those arrangements undermined the exclusive jurisdiction of the Court to rule on the division of powers between the European Union and its Member States.<sup>132</sup>

164. Accordingly, since the CETA Tribunal is not authorised, by virtue of the provisions of Article 8.21 of the CETA, to rule on the division of powers between the European Union and its Member States, the CETA cannot be regarded as adversely affecting the autonomy of the EU legal order in this regard.

*7. The ICS does not affect the role of national courts and tribunals of ensuring the effective application of EU law*

165. Section F of Chapter 8 of the CETA establishes a mechanism which could be classified as ‘quasi-judicial’, whilst retaining in certain respects the imprint of the rules applicable in investment arbitration, and which seeks, in essence, to resolve disputes concerning the interpretation or the application of the actual provisions of the international agreement concerned. In addition, since it is an alternative method of settling disputes on the protection of investments, relating to the application of the CETA, that mechanism does not affect the powers of the courts or tribunals of the Member States in relation to the interpretation and application of EU law, nor the power, or indeed the obligation, of those courts and tribunals to request a preliminary ruling from the Court and the power of the Court to reply to the questions referred by those courts and tribunals.<sup>133</sup>

166. Although, like the European and Community Patents Court which formed the subject matter of Opinion 1/09, the Tribunal stands outside the institutional and judicial framework of the European Union, exclusive jurisdiction to rule on actions brought by foreign investors in the field of investment protection or to interpret and apply EU law in that field is not conferred on the Tribunal, contrary to the position of the European and Community Patents Court in relation to a significant number of actions brought by individuals in the field of the Community patent.<sup>134</sup>

<sup>130</sup> See Article 8.21.4 of the CETA.

<sup>131</sup> See Article 8.21.7 of the CETA.

<sup>132</sup> See Opinion 2/13 (paragraphs 215 to 235). The CETA likewise differs, in this regard, from the agreement which gave rise to Opinion 1/91 (paragraphs 30 to 36).

<sup>133</sup> See, in that regard, Opinion 1/09 (paragraph 77).

<sup>134</sup> Opinion 1/09 (paragraph 89).



167. As the Commission rightly states in its observations, the role of the CETA Tribunal is not to apply internal EU law, rather merely the provisions of the CETA. That agreement offers additional protection under international law and provides for a specific mechanism which allows the investors of the other Party to rely on that protection. That being said, it does not, however, restrict the substantive rights enjoyed by foreign investors under internal EU law. Nor does it have the effect of limiting the jurisdiction of the Court or of the courts and tribunals of the Member States to hear and determine actions brought with a view to ensuring the observance of such rights as are afforded by internal EU law.

168. Accordingly, the establishment of the ICS does not prevent foreign investors from seeking to protect their investments by bringing proceedings before the courts and tribunals of the Parties with a view to the domestic law of those Parties being applied.<sup>135</sup> I note, in this regard, that, since the CETA does not have direct effect, foreign investors will be unable in those circumstances to rely directly on a breach of that agreement before the courts and tribunals of the Parties, but can rather rely merely on the Parties' domestic law, provided of course that it contains adequate standards of protection. In addition to the fact that the two types of action are therefore based on different legal rules of reference, the subject matter of those actions is not necessarily the same. Unlike the case of a claim submitted to the CETA Tribunal, referral of the matter to the domestic courts and tribunals of the Parties may go beyond just an action seeking compensation and seek the annulment of a measure forming part of the domestic law of those Parties. These are therefore two complementary legal remedies and not substitutes for one another.

169. The Parties have laid down rules which circumscribe the choice available to foreign investors.

170. Under Article 8.22 of the CETA, entitled 'Procedural and other requirements for the submission of a claim to the Tribunal':

'1. An investor may only submit a claim pursuant to Article 8.23 if the investor:

...

- (f) withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim; and
- (g) waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim.'

171. Those provisions show that solely an alternative jurisdiction is conferred on the CETA Tribunal. Thus, as is made clear in paragraph 6(a) of the Joint Interpretative Instrument, 'CETA does not privilege recourse to the [ICS] set up by the agreement. Investors may choose instead to pursue available recourse in domestic courts'. Furthermore, the inability to bring an action before the courts or tribunals of the Parties at the same time as, or indeed after, the referral of the matter to the CETA Tribunal could have the effect of encouraging investors to bring proceedings first before those courts and tribunals. Even though it is not laid down as a prerequisite for referral of the matter to the CETA Tribunal, exhaustion of the domestic remedies is therefore encouraged by those provisions.

172. In the light of those factors, the view must be taken that, even though, given that the CETA does not have direct effect, it is not the role of the courts and tribunals of the Member States to apply that agreement, those courts and tribunals are not, however, deprived of their status as 'general law' courts within the EU legal order, including their role in any making of references for a preliminary ruling.

<sup>135</sup> In Opinion 2/15, the Court states, in this regard, that this is a 'possibility in the discretion of the claimant investor' (paragraph 290).

Furthermore, the Court is not deprived of its power to reply, by preliminary ruling, to questions referred by those courts and tribunals. There cannot therefore be held to be any alteration of the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States, powers which are indispensable to the preservation of the very nature of EU law.<sup>136</sup>

#### *8. Consistency with the objectives of the European Union's external action*

173. It is my view that examination of the compatibility of Section F of Chapter 8 of the CETA with the principle of the autonomy of EU law must be carried out taking due account of the need to preserve the European Union's capacity to contribute to achieving the principles and the objectives of its external action.

174. As the Slovak Government rightly pointed out at the hearing, the Court should interpret the principle of the autonomy of EU law not only in such a way as to maintain the specific characteristics of EU law but also to ensure the European Union's involvement in the development of international law and of a rules-based international legal order.

175. In my opinion, the provisions contained in Chapter 8 of the CETA enable a balance to be struck between preserving the specific constitutional structure of the European Union and developing its external action.

176. Under Article 3(5) TEU, 'in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to ... the sustainable development of the Earth, ... free and fair trade, ... as well as to the strict observance and the development of international law ...'. That last objective logically means that the European Union should favour initiatives and control mechanisms which enhance the effectiveness of the international treaties to which it is party.<sup>137</sup>

177. In accordance with Article 21(2) TEU, the European Union's action on the international stage must seek to work for a 'high degree of cooperation in all fields of international relations', in particular by consolidating and supporting 'the rule of law ... and the principles of international law',<sup>138</sup> via 'the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade',<sup>139</sup> by helping to 'develop international measures ... in order to ensure sustainable development'<sup>140</sup> and by the promotion of 'an international system based on stronger multilateral cooperation and good global governance'.<sup>141</sup> Under Article 207(1) TFEU, 'the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'.

<sup>136</sup> Opinion 1/09 (paragraph 89).

<sup>137</sup> See, in this regard, De Witte, B., 'A selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union', *The European Court of Justice and external relations law: constitutional challenges*, Hart Publishing, Oxford, 2014, pp. 33 to 46, in particular p. 34.

<sup>138</sup> Article 21(2)(b) TEU.

<sup>139</sup> Article 21(2)(e) TEU.

<sup>140</sup> Article 21(2)(f) TEU.

<sup>141</sup> Article 21(2)(h) TEU.

178. In my view, Chapter 8 of the CETA is entirely consistent with those objectives by combining rules on the protection of investments, which contribute to the legal certainty of investors and to the development of trade between the European Union and Canada,<sup>142</sup> and a specific dispute settlement mechanism together with the express statement of the Parties' right to adopt the legislation necessary to achieve legitimate objectives in the public interest, for example in the areas of public health, safety, the environment and social protection.

*9. The establishment of a mechanism for the prior involvement of the Court and the possibility of a full review of the awards by the courts and tribunals of the Member States are not necessary*

179. I would observe that the purpose of a dispute settlement mechanism such as that provided for in Section F of Chapter 8 of the CETA is to guarantee the neutrality and the autonomy of the resolution of investor-State disputes vis-à-vis the judicial systems of the Parties. From that perspective, it is understandable that those Parties have not provided either a mechanism for the prior involvement of the Court or that the awards issued by the Tribunal should systematically be subject to full review by the courts and tribunals of the Parties. Providing for such a link to the judicial system of the Parties would have been at odds with the intention of those Parties to establish a dispute settlement mechanism which specifically stands outside their judicial systems.

180. Provided that it is accepted that Section F of Chapter 8 of the CETA contains sufficient guarantees to prevent that mechanism from undermining the exclusive jurisdiction of the Court to provide a definitive interpretation of EU law, it does not appear to me that the choice thus made by the Parties can be called into question.

181. That said, it must be observed that, depending on the choice of arbitration rules under which a claim has been submitted,<sup>143</sup> a review by the courts or tribunals of the Member State in which enforcement is sought, in particular in the event of conflict with the public policy of that State,<sup>144</sup> is not ruled out.<sup>145</sup> The compatibility with the principle of the autonomy of EU law of the investor-State dispute resolution mechanism provided for in Section F of Chapter 8 of the CETA is not, however, in my view, conditional on the existence of such a review.

182. Furthermore, with regard to the sometimes proposed idea of providing in that type of agreement a mechanism for the prior involvement of the Court, should issues arise relating to the interpretation of EU law, due account must be taken of the requirement of reciprocity, as the German Government and the Commission rightly observe. In addition to the fact that such a mechanism would be difficult, if not impossible, to negotiate with third States,<sup>146</sup> if those States were to agree to that mechanism, the Union would also have to afford its partners, on account of the reciprocity governing their mutual relations, the ability to provide that their domestic courts or tribunals have jurisdiction to give a preliminary ruling in relation to the interpretation of domestic law. From the perspective of EU investors, this would run counter to the purpose of the dispute settlement mechanism, namely to be neutral and independent from the domestic courts and tribunals of the other Party. This would significantly reduce the interest in and attraction of such a mechanism, in particular where the

<sup>142</sup> See, to that effect, Opinion 2/15 (paragraph 94).

<sup>143</sup> See, in this regard, Article 8.23.2 of the CETA. With regard to the enforcement of awards, see also Article 8.41.3 to 8.41.6 of the CETA.

<sup>144</sup> See, in this regard, Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958, which lists a limited number of grounds on which enforcement may be refused.

<sup>145</sup> However, an award issued under Chapter 8 of the CETA could evade such judicial review if the investor were to opt for the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of the International Centre for Settlement of Investment Disputes (ICSID), signed in Washington on 18 March 1965. Nevertheless, for a more nuanced view on this issue, see Jean, G.-A., *op. cit.*, paragraph 1036 *et seq.*

<sup>146</sup> As the Commission rightly states in its observations, there would be a risk that third States might regard the prior intervention of the Court as a unilateral privilege which would jeopardise the neutrality of the dispute settlement mechanism.

European Union establishes relations with third States whose domestic courts and tribunals do not satisfy the criteria of impartiality, independence and expeditiousness, or do not fully do so, and would ultimately be liable to undermine the level of protection of the investments made in those States by EU investors.

183. I therefore approve of the approach adopted by the CETA negotiators, which involved paying particular care, in the provisions of that agreement, to ensuring that the dispute settlement mechanism put in place interferes as little as possible with the Parties' judicial systems.

184. In the light of all those considerations, I take the view that the investor-State dispute resolution system provided for in Section F of Chapter 8 of the CETA does not undermine the autonomy of EU law and, in particular, does not affect the principle that the Court has exclusive jurisdiction over the definitive interpretation of EU law.

### ***B. The general principle of equal treatment and the requirement that EU law is effective***

185. In this section of its request for an opinion, the Kingdom of Belgium observes, first of all, that the CETA provides for a preferential judicial process for Canadian investors. Canadian undertakings investing in the European Union will be able to bring a dispute either before an internal court of the European Union or before the CETA Tribunal, whereas EU undertakings investing in the European Union will not have that choice.

186. Consideration must be given to whether such a situation is compatible with Article 20 of the Charter of Fundamental Rights of the European Union,<sup>147</sup> under which 'everyone is equal before the law', and with Article 21(2) of the Charter, which provides that, 'within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited'.

187. Next, the Kingdom of Belgium notes that Article 8.39.2(a) of the CETA provides that, where a Canadian investor brings an action before the CETA Tribunal on behalf of a 'locally established enterprise' (that is to say, an enterprise established in the European Union which that Canadian investor owns or controls, directly or indirectly),<sup>148</sup> any damages awarded by that Tribunal will have to be paid to that local enterprise.

188. The Kingdom of Belgium accepts that that rule could be justified by the objective, specific to international agreements for the protection of investments, of promoting the economy of the Party where that enterprise is established. However, consideration would have to be given to the compatibility of that rule with Articles 20 and 21 of the Charter.

189. Finally, the Kingdom of Belgium asks whether, in the event that the CETA Tribunal were to conclude that a fine imposed on a Canadian investor (or on a locally established enterprise) by the Commission or by a competition authority of one of the Member States infringes a provision of Section C or D of Chapter 8 of the CETA and awards compensation equivalent to that fine, the removal of the effects of that fine would be compatible with the principle of equal treatment, as well as with the requirement that EU law is effective.

190. According to the Kingdom of Belgium, it follows from Article 8.9.3 and 8.9.4 of the CETA that, where the Union has declared State aid incompatible with Article 108 TFEU and ordered its reimbursement, the CETA Tribunal cannot find that decision to be contrary to the CETA and nor can it therefore award damages in an amount equivalent to the amount of that State aid. However,

<sup>147</sup> 'The Charter'.

<sup>148</sup> See, in this regard, Article 8.23.1(b) of the CETA.

the CETA does not include a similar rule intended to protect the decisions taken by the Commission or by the competition authorities of the Member States within the context of Articles 101 and 102 TFEU. Accordingly, it cannot be ruled out that a Canadian investor may evade the financial consequences of a breach of EU competition law, whereas EU investors cannot escape those consequences.

191. In short, the Kingdom of Belgium wishes to ascertain whether the awards issued by the Tribunal could, in certain circumstances, infringe Articles 20 and 21 of the Charter as well as the requirement that EU law is effective. In this regard, that Member State identifies two situations, namely, first, where damages are paid to a locally established enterprise, pursuant to Article 8.39.2(a) of the CETA, and, secondly, the situation in which the Tribunal might award damages on account of a fine imposed in accordance with EU competition law.

192. The first set of questions raised by the Kingdom of Belgium stem from the fact that, under Article 8.23.1 of the CETA, a claim may be submitted either by an investor of a Party on its own behalf or by an investor of a Party on behalf of a locally established enterprise which it owns or controls, directly or indirectly. In that latter scenario, it is apparent from Article 8.39.2(a) of the CETA that the compensation fixed by the award should be paid to the locally established enterprise. In my view, that finding cannot give rise to discrimination vis-à-vis EU investors who invest within the European Union.

193. In this regard, it must be observed that the locally established enterprise, as referred to in those two provisions, itself constitutes a form of investment. Under Article 8.1 of the CETA, a ‘covered investment’ means, with respect to a Party, an investment which is inter alia ‘directly or indirectly owned or controlled by an investor of the other Party’, and an ‘investment’ means ‘every kind of asset that an investor owns or controls, directly or indirectly’, and which may inter alia take the form of an enterprise. In view of the control thus exercised by the investor of one Party over the locally established enterprise in the territory of the other Party, compensation awarded by the CETA Tribunal, even though it would be paid to the locally established enterprise, would ultimately benefit the investor of the first Party, who is, moreover, the only person authorised to submit a claim to the Tribunal pursuant to Article 8.23.1 of the CETA.

194. Since the investor of one Party and the locally established enterprise in the territory of the other Party must in reality be treated as one and the same,<sup>149</sup> the question raised by the Kingdom of Belgium is whether or not discrimination exists between foreign investors, who enjoy specific substantive and procedural protection, and local investors, who do not benefit from such protection.

195. In relation to this issue, it is necessary to clarify that it follows from the second sentence of Article 207(1) TFEU, read in conjunction with Article 21 TEU, that the European Union must, when exercising the competences conferred on it by the EU and FEU Treaties, including those relating to the common commercial policy, respect fundamental rights, of which the principle of equal treatment forms part.<sup>150</sup> The European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights.<sup>151</sup> This also includes the European Union’s external action.<sup>152</sup> I note, in this regard, that, in accordance with settled case-law, international agreements concluded by the European Union ‘are, from the date of their entry into force, an integral part of the EU legal order ... The provisions of such agreements must therefore be entirely compatible with the

<sup>149</sup> As the Commission states in its observations, locally established enterprises are an extension of the foreign investor and, therefore, it is justified to equate them with the foreign investor who owns or controls them.

<sup>150</sup> Reference is made to the principle of equality in Article 21(1) TEU.

<sup>151</sup> See, inter alia, judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 60 and the case-law cited).

<sup>152</sup> See, inter alia, judgments of 19 July 2016, *H v Council and Commission* (C-455/14 P, EU:C:2016:569, paragraph 41) and of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 72).



Treaties and with the constitutional principles stemming therefrom'.<sup>153</sup> This of course includes the Charter, pursuant to Article 51 thereof, which has 'the same legal value as the Treaties' in accordance with Article 6(1) TEU. Even prior to the formal entry into force of the Charter, the Court had already established the principle that the conduct of the European Union's external relations must be consistent with the fundamental rights of the European Union.<sup>154</sup>

196. It is true that, according to the Explanations relating to the Charter,<sup>155</sup> Article 21(2) of the Charter 'corresponds to the first paragraph of Article 18 [TFEU] and must be applied in compliance with that Article'. In addition, under Article 52(2) of the Charter, rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those Treaties. It follows that Article 21(2) of the Charter must be construed as having the same scope as the first paragraph of Article 18 TFEU.

197. The first paragraph of Article 18 TFEU provides that, 'within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'. That provision appears in Part Two of that treaty entitled 'Non-discrimination and citizenship of the Union'. It covers the situations falling within the scope of EU law in which a national of a Member State suffers discriminatory treatment as compared with the nationals of another Member State solely on the basis of his nationality. According to the Court, the provision is not, therefore, intended to apply in the event of a potential difference in treatment between nationals of the Member States and those of third States.<sup>156</sup>

198. This does not, however, in my view exempt an international agreement such as the CETA from observing the principle of equal treatment, which is a general principle of EU law, enshrined in Article 20 of the Charter.<sup>157</sup>

199. I would add, in this regard, that the case-law which seeks to maintain the international freedom of action of the institutions and agencies of the European Union in terms of policy by allowing their treatment of third States to be different is not called into question here.<sup>158</sup>

200. With regard to investment protection, I note that Point 6(a) of the Joint Interpretative Instrument provides that 'CETA will not result in foreign investors being treated more favourably than domestic investors'.

201. As regards establishing whether the general principle of equal treatment is observed in the context of the establishment of the ICS, it must be recalled that, in accordance with the Court's settled case-law, the principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified.<sup>159</sup>

<sup>153</sup> See, inter alia, judgment of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118, paragraph 46 and the case-law cited).

<sup>154</sup> See judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 285).

<sup>155</sup> OJ 2007 C 303, p. 17.

<sup>156</sup> See, to that effect, judgments of 4 June 2009, *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344, paragraphs 51 and 52) and of 7 April 2011, *Francesco Guarnieri & Cie* (C-291/09, EU:C:2011:217, paragraph 20). See also judgment of 20 November 2017, *Petrov and Others v Parliament* (T-452/15, EU:T:2017:822, paragraphs 39 to 41). For an opinion to the effect that Article 21(2) of the Charter could be interpreted as meaning that it applies to differences in treatment between citizens of the Union and nationals of third States, see Bribosia, E., Rorive, I., and Hilaire, J., 'Article 21 — Non-discrimination', *Charte des droits fondamentaux de l'Union européenne, Commentaire article par article*, Bruylant, Brussels, 2018, pp. 489 to 514, in particular paragraphs 10 and 11.

<sup>157</sup> See, inter alia, judgment of 22 May 2014, *Glatzel* (C-356/12, EU:C:2014:350, paragraph 43).

<sup>158</sup> See, inter alia, in this regard, judgment of 21 December 2016, *Swiss International Air Lines* (C-272/15, EU:C:2016:993, paragraph 25 et seq.). In accordance with the Court's settled case-law, 'there is in the FEU Treaty no general principle obliging the Union, in its external relations, to accord in all respects equal treatment to different third countries' (paragraph 26 and the case-law cited).

<sup>159</sup> See, inter alia, judgment of 7 March 2017, *RPO* (C-390/15, EU:C:2017:174, paragraph 41 and the case-law cited).

202. Most of the governments which submitted observations as well as the Council and the Commission are of the view that the Kingdom of Belgium wrongly assumes that Canadian undertakings investing in the European Union, on the one hand, and EU undertakings investing in the European Union, on the other, are in the same situation.

203. That is specifically not the case: one category of undertakings referred to above is making international investments, whereas the other is making intra-Community investments. The situation is not comparable. Intra-Community investments are inevitably, to some extent, subject to different rules than international investments. The only comparable situations are that of Canadian undertakings investing in the European Union, on the one hand, and that of EU undertakings investing in Canada, on the other.

204. The difference in the fact that Canadian undertakings investing in the European Union may bring disputes before the CETA Tribunal, whereas EU undertakings investing in the European Union will be unable to do so, cannot therefore be deemed discriminatory. In this regard, the abovementioned interested parties refer, by analogy, to the case-law of the Court, in accordance with which the difference in treatment between individuals who benefit from the rules laid down in an agreement concluded between Member States for the avoidance of double taxation, on the one hand, and individuals who do not benefit from such rules, on the other, does not constitute discrimination since the situations of those two categories of persons are not comparable.<sup>160</sup>

205. It would, in any event, be wrong to take the view that, given their ability to bring matters before the CETA Tribunal, Canadian undertakings investing in the European Union are placed in a preferential situation as compared with EU undertakings investing in the European Union. That possibility merely compensates for the fact that the CETA cannot be relied on directly before the domestic courts and tribunals of the Parties.

206. I concur with most of the interested parties who submitted observations in holding that only the investors of each Party who invest in the territory of the other Party are in comparable situations.

207. As the German Government rightly observed at the hearing, the situation of Canadian investors who invest in the European Union is not comparable with the situation of European investors who invest within their own economic area. Canadian or European investors can be compared only in relation to the investments which they make in the territory of the other Party. On the basis of that comparison, all investors who are in a comparable situation are treated comparably. It is true that the investors of each Party do not have access to the CETA Tribunal in relation to investments made in the territory of the Party in which they are resident. As the German Government pointed out, this can be explained by the fact that those investors have not assumed the risks and the costs of an investment in a foreign economic area and are operating in a legal environment which is familiar to them.

208. Furthermore, I observe that the relations between Parties such as, of the one part, the European Union and its Member States and, of the other part, Canada, are not based on mutual trust, and that it is for that reason that those Parties intend to define, on a reciprocal basis, a standard of substantive and procedural protection in the agreement envisaged. Thus, the fact that the reciprocal rights and obligations created by the CETA apply only to investors from one of the two Parties is a consequence inherent in the bilateral nature of that agreement,<sup>161</sup> the purpose of which is to protect the investors of each Party from the disadvantages that they might suffer by investing in the other Party. It follows from this that an EU investor is not in the same situation as a Canadian investor as regards an investment made within the territory of the European Union.

<sup>160</sup> See judgment of 5 July 2005, *D.* (C-376/03, EU:C:2005:424, paragraphs 53 to 63).

<sup>161</sup> See, in this regard, Opinion of Advocate General Wathelet in *Achmea* (C-284/16, EU:C:2017:699, point 75).

209. In any event, even if Canadian investors who make investments within the European Union and EU investors who make investments within the European Union should be regarded as being in a comparable situation, the fact that only the first category of investors can benefit from the investor-State dispute settlement mechanism established by the CETA is objectively justified by the purpose of encouraging foreign investments in the territory of each Party.

210. In this regard, it must be stated that, according to the Court, ‘where a difference in treatment between two comparable situations is found, the principle of equal treatment is not infringed in so far as that difference is duly justified’.<sup>162</sup> That is the case, in accordance with the settled case-law of the Court, ‘where the difference in treatment relates to a legally permitted objective pursued by the measure having the effect of giving rise to such a difference and is proportionate to that objective’.<sup>163</sup>

211. As I have already noted, the Court has held that ‘the institutions and agencies of the Union have available to them, in the conduct of external relations, a broad discretion in policy decisions’ and that ‘the conduct of external relations necessarily implies policy choices’.<sup>164</sup> Accordingly, the EU institutions should, in that context, be accorded broad discretion, so that judicial review of whether a difference in treatment relates to a legally permitted objective pursued by the measure which brings about such a difference and whether it is proportionate to that objective must be limited to a review as to manifest errors.<sup>165</sup>

212. It cannot reasonably be doubted that the objective pursued in the context of establishing the ICS is legally permitted. I refer, in this regard, to points 173 to 178 of this Opinion, in which I stated that the establishment of the ICS is compatible with the objectives assigned by the Treaties to the European Union in the context of its external action and, in particular, in the implementation of its common commercial policy, which include the objective of encouraging foreign investments on a reciprocal basis. The investor-State dispute settlement mechanism established by the CETA forms an integral part of the protective framework provided for by that agreement, meaning that the negotiators of that agreement could legitimately take the view, in the exercise of the discretion afforded to them, that, without such a mechanism, the CETA would not be as effective in achieving its goal of encouraging and attracting foreign investments.

213. It follows from the arguments set out above that, in my view, the provisions of Chapter 8 of the CETA do not infringe the general principle of equal treatment.<sup>166</sup>

214. With regard to the Kingdom of Belgium’s second set of questions, which relate, in essence, to whether the CETA Tribunal could nullify the effects of a fine imposed by the Commission or by a competition authority of one of the Member States by deciding to award damages in an equivalent amount to a Canadian investor, I take the view, as do the majority of the interested parties who submitted observations, that several rules limit the risk of the CETA Tribunal being called on to rule, without exceeding its jurisdiction, that a fine imposed on a Canadian investor under EU competition law infringes a rule on investment protection laid down in Chapter 8 of the CETA.

<sup>162</sup> See, inter alia, judgment of 7 March 2017, *RPO* (C-390/15, EU:C:2017:174, paragraph 52 and the case-law cited).

<sup>163</sup> Ibid. (paragraph 53 and the case-law cited).

<sup>164</sup> See, inter alia, judgment of 21 December 2016, *Swiss International Air Lines* (C-272/15, EU:C:2016:993, paragraph 24).

<sup>165</sup> See, to that effect, judgment of 7 March 2017, *RPO* (C-390/15, EU:C:2017:174, paragraph 54 and the case-law cited).

<sup>166</sup> See, in the same vein, decision No 2017-749-DC of the Conseil constitutionnel (Constitutional Council, France) of 31 July 2017, on the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (JORF of 11 August 2017).

215. Thus, it must be observed that Article 8.9.1 and 8.9.2 of the CETA acknowledge the right of the Parties to regulate within their territories in order to achieve legitimate objectives in the public interest. As the Council rightly points out in its observations, that right includes the right to maintain and to give effect to policies intended to combat anti-competitive conduct on the EU internal market.<sup>167</sup>

216. Moreover, in Chapter 17 of the CETA, entitled ‘Competition policy’, Article 17.2.1 provides that ‘the Parties recognise the importance of free and undistorted competition in their trade relations. The Parties acknowledge that anti-competitive business conduct has the potential to distort the proper functioning of markets and undermine the benefits of trade liberalisation’. In addition, Article 17.2.2 states that ‘the Parties shall take appropriate measures to proscribe anti-competitive business conduct, recognising that such measures will enhance the fulfilment of the objectives of this Agreement’.

217. In the light of the provisions contained in Article 8.9.1 and 8.9.2 of the CETA and in Chapter 17 of that agreement, the risk of decisions taken by the Parties to penalise anti-competitive conduct being nullified appears to me to be narrowly circumscribed.

218. In addition to those substantive guarantees, there are also the procedural guarantees mentioned in my earlier comments which consist, firstly, in the obligation on the CETA Tribunal, pursuant to Article 8.31.2 of that agreement, to follow the interpretation given to domestic law by the courts and authorities of the Party concerned, and, secondly, in the correction, if necessary, of a misinterpretation made by that Tribunal, thanks to the existence of an appeal mechanism or the ability of the Joint Committee to adopt binding interpretations of the CETA.

219. It follows from those considerations that the requirement that EU competition law should be effective does not appear to me to be affected by the establishment of the ICS.

***C. The compatibility of Section F of Chapter 8 of the CETA with the right of access to an independent and impartial tribunal***

220. The Kingdom of Belgium asks whether Section F of Chapter 8 is compatible with Article 47 of the Charter, considered in isolation or in conjunction with the principle of equal treatment enshrined in Articles 20 and 21 of the Charter. In this part of its request for an opinion, that Member State also refers to the case-law of the European Court of Human Rights on Article 6 ECHR.

221. In this regard, the Kingdom of Belgium observes, firstly, that the system provided for in Section F of the CETA may make access to the CETA Tribunal excessively difficult for small and medium-sized enterprises, since Article 8.27.14 of the CETA provides that the fees and expenses of the Members hearing the dispute will have to be paid by the disputing parties, and Article 8.39.5 of the CETA states that both the costs of the proceedings — which include the costs of the ICSID Secretariat — and the costs of legal representation and assistance will — save in exceptional circumstances — be borne by the unsuccessful party.

222. In addition, the Kingdom of Belgium states that the CETA does not currently offer the possibility of being granted legal aid, even though the third paragraph of Article 47 of the Charter expressly enshrines the right to such aid in so far as necessary to ensure effective access to justice, and, in paragraph 59 of its judgment of 22 December 2010, *DEB*,<sup>168</sup> the Court clarified that that right extends to undertakings.

<sup>167</sup> Furthermore, I note that paragraph 6(a) of the Joint Interpretative Instrument states that the CETA ‘includes modern rules on investment that preserve the right of governments to regulate in the public interest including when such regulations affect a foreign investment, while ensuring a high level of protection for investments and providing for fair and transparent dispute resolution’. Paragraph 6(b) of the Joint Interpretative Instrument adds that ‘[the] CETA clarifies that governments may change their laws, regardless of whether this may negatively affect an investment or investor’s expectations of profits’. See also, in more general terms, paragraph 2 of the Joint Interpretative Instrument.

<sup>168</sup> C-279/09, EU:C:2010:811.



223. The risk of having to bear all the costs in inherently expensive proceedings may, according to the Kingdom of Belgium, deter an investor with only limited financial resources from submitting a claim. The CETA could thus be regarded as undermining the right of access to a tribunal.

224. Second, the Kingdom of Belgium questions the compatibility of the conditions governing the remuneration of the Members of the Tribunals envisaged, as provided for in Article 8.27.12 to 8.27.15 and in Article 8.28.7(d) of the CETA, with the right of access to ‘an independent and impartial tribunal previously established by law’, which is laid down in the second paragraph of Article 47 of the Charter.

225. Since those conditions governing remuneration are not primarily laid down in the provisions of the CETA themselves but are rather, to a great extent, left to the discretion of the Joint Committee established by the CETA, it is, according to the Kingdom of Belgium, questionable whether they are compatible with the principles relating to the separation of powers.

226. In that regard, the Kingdom of Belgium takes the view that the arrangements for the remuneration of judges must be laid down in advance by the legislature and cannot be determined by the executive. That Member State refers, in this context, to the case-law of the European Court of Human Rights and to the Magna Carta of Judges adopted on 17 November 2010 by the Consultative Council of European Judges (CCJE).

227. The fact that the CETA provides that the remuneration of the Members of the Tribunals envisaged will not (or at least not yet) take the form of a fixed and regular salary but rather consist in a monthly retainer fee, plus fees depending on the number of working days devoted to a dispute, may also, according to the Kingdom of Belgium, prove to be incompatible with the right of access to an independent and impartial tribunal.

228. In this regard, the Kingdom of Belgium refers to Article 6.1 of the European Charter on the statute for judges, adopted on 8 to 10 July 1998 by the Council of Europe, in accordance with which the remuneration of judges must be fixed ‘so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality’. The Kingdom of Belgium also cites several recommendations adopted within the framework of the Council of Europe, in accordance with which the remuneration of judges must be determined on the basis of a general scale and not according to their performance.

229. It follows from the conditions governing remuneration currently provided for by the CETA that the remuneration is partially dependent on the number of disputes brought by investors. Accordingly, the development of case-law favourable to investors could have a positive impact on remuneration.

230. Third, the Kingdom of Belgium questions the compatibility with the second paragraph of Article 47 of the Charter of the mechanism for the appointment of the Members of the Tribunals envisaged, as provided for in Article 8.27.2 and 8.27.3 and Article 8.28.3 and 8.28.7(c) of the CETA.

231. It observes that those Members are to be appointed by the Joint Committee, that is to say the executive body of the CETA, which is co-chaired by the Minister for International Trade of Canada and the Member of the Commission responsible for Trade (or by their respective designees).<sup>169</sup>

232. However, it follows from the European Charter on the statute for judges, on which the European Court of Human Rights has already relied and to which the recommendations of the CCJE also refer, that, where judges are appointed by the executive, such appointments must necessarily take place following a recommendation by an independent authority composed, in significant numbers, of members of the judiciary.

<sup>169</sup> Article 26.1.1 of the CETA.



233. Fourth, the Kingdom of Belgium questions the compatibility with the second paragraph of Article 47 of the Charter of the conditions for the removal of Members of the Tribunals envisaged, as provided for in Article 8.28.4 and Article 8.30.4 of the CETA.

234. It observes that those provisions allow a Member to be removed by decision of the Joint Committee, on the joint initiative of the Parties and with no possibility of an appeal. However, it follows from the European Charter on the statute for judges and from the recommendations of the CCJE that any decision to remove a judge must involve an independent body, be given in accordance with a fair procedure which respects the rights of defence, and be open to an appeal before a higher judicial body. In any event, in order to guarantee the independence of judges, it should not be possible for them to be removed by the executive.

235. Fifth and last, the Kingdom of Belgium questions the compatibility with the second paragraph of Article 47 of the Charter of the rules of ethics with which the Members of the Tribunals envisaged will have to comply, pursuant to Article 8.28.4, Article 8.30.1 and Article 8.44.2 of the CETA.

236. It observes that those provisions essentially provide that those Members will have to comply with the International Bar Association ('IBA') Guidelines on Conflicts of Interest in International Arbitration, approved on 22 May 2004 by the IBA Council ('the Guidelines'), pending the adoption of a code of conduct by the Committee on Services and Investments.

237. It follows from the recommendations of the CCJE and from the Magna Carta of Judges that the rules of conduct applicable to judges must be developed by the judges themselves. At the very least, judges should play a major role in the adoption of those rules.

238. The Kingdom of Belgium observes that the Guidelines are intended for arbitrators and not for judges. In addition, the standards of independence and impartiality might be different for arbitrators, on the one hand, and for judges, on the other.

239. The Kingdom of Belgium also notes that, although it is true that Article 8.30.1 of the CETA does provide that the Members 'shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement', it does not, however, require that they declare their additional activities, nor a fortiori that those activities are subject to prior approval. The relevant international instruments, such as the European Charter on the statute for judges, do, however, state that the exercise of an outside activity giving rise to remuneration must be declared and be the object of a prior authorisation.

### *1. General considerations*

240. With a view to answering the questions raised by the Kingdom of Belgium, I note that, when the European Union envisages, within the framework of its powers, concluding an international agreement, it is required to observe fundamental rights,<sup>170</sup> which include those enshrined in Article 47 of the Charter. Accordingly, when the Council wishes to conclude an international agreement establishing a dispute resolution mechanism, such as that provided for in Section F of Chapter 8 of the CETA, it must ensure that the conditions of access to that mechanism and the arrangements for its functioning are consistent with the fundamental rights guaranteed by the European Union.

<sup>170</sup> See point 195 of this Opinion.

241. The Court has had occasion to find, with regard to bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within the judicial system of each Member State in the fields covered by EU law, that ‘maintaining the independence of those bodies is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an “independent” tribunal as one of the requirements linked to the fundamental right to an effective remedy’.<sup>171</sup>

242. That said, 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. Within Section F of Chapter 8 of the CETA, the influence of the rules on investment arbitration is thus quite explicit, in particular in Article 8.23 on the submission of a claim to the Tribunal, Article 8.25 on the consent to the settlement of the dispute by the Tribunal, Article 8.36 on the transparency of proceedings, and Article 8.41 on the enforcement of awards. In addition, with regard to the remuneration of Members of the Tribunals and the question of ethics, a reference to the rules applicable in the field of arbitration appears, respectively, in Article 8.27.14 and Article 8.30.1 of the CETA. Finally, it must be observed that the CETA Tribunal does not give judgments but rather issues awards.

243. There is, admittedly, an expression of the wish of the Parties to move towards a new system inspired by the judicial systems in force within the legal orders of those Parties.<sup>172</sup> As the Commission rightly stated at the hearing, the fact that that body is inspired by judicial systems does not, however, make that body a court, in the full and comprehensive meaning of the term, but nor does it make it merely a traditional arbitration body.

244. However, the questions put by the Kingdom of Belgium are based on the premiss that the investor-State dispute settlement mechanism provided for in Section F of Chapter 8 of the CETA must be equated with a genuine court. On the basis of that premiss, that Member State calls into question several aspects relating to the organisation and functioning of that mechanism in the light of the standards which have been defined to apply to courts. Nevertheless, in view of the hybrid nature of the mechanism, that premiss appears to me to be incorrect. It follows that the standard of independence and impartiality required for a body of that kind must be in keeping with the abovementioned specific features.

<sup>171</sup> See, inter alia, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 53 and the case-law cited). In that same judgment, according to the Court, ‘the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded’ (paragraph 48). Moreover, in its judgment of 14 June 2017, *Online Games and Others* (C-685/15, EU:C:2017:452), the Court held that, ‘as regards the right to an independent and impartial tribunal set out in the second paragraph of Article 47 of the Charter, the concept of “independence”, which is inherent in the court’s task, has two aspects. The first aspect, which is external, entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them’ (paragraph 60). The Court goes on to state that ‘the second aspect, which is internal, is linked to “impartiality” and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect ... requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law’ (paragraph 61). According to the Court, ‘those guarantees of independence and impartiality require rules, particularly statutory and procedural rules, in order to dismiss any reasonable doubt in the minds of individuals as to the impartiality of that body to external factors and its neutrality with respect to the interests before it’ (paragraph 62).

<sup>172</sup> See paragraph 6(f) of the Joint Interpretative Instrument.

245. In that context, the Court's assessment should, in my view, be guided by the finding that the negotiators of the agreement envisaged reached agreement on a model which introduces improvements, in a number of respects, as compared with the rules in force in traditional investment arbitration, whether in terms of the transparency of proceedings or independence in the handling of claims. Although a model of this kind can, it is true, always be improved upon, the Court should, in my view, take account of the fact that it is a model negotiated bilaterally on a reciprocal basis and assess, from that perspective, whether that model offers a sufficient level of safeguards.

246. In connection with the foregoing, the assessment sought by the Kingdom of Belgium should be conducted by also taking into account the fact that the model established in Section F of Chapter 8 of the CETA is merely a step towards the creation of a multilateral investment court and related appellate mechanism, as is clear from the intention expressed in this regard by the Parties in Article 8.29 of the CETA.<sup>173</sup> I am therefore of the view that account should be taken of both the experimental and dynamic nature of the mechanism under examination.

247. Furthermore, it must be observed that the procedural provisions contained in Section F of Chapter 8 of the CETA require, on several issues, the adoption of rules by the Joint Committee or by the Committee on Services and Investment for the implementation of those provisions. In the course of the present opinion procedure, the Commission informed the Court that it has begun work, firstly, on the organisation and functioning of the Appellate Tribunal, secondly, on a mandatory code of conduct intended to strengthen the guarantees of impartiality and independence of the Members of the Tribunals and the mediators, and, thirdly, on rules on mediation intended for use by the disputing parties. In my view, the Court should take account of the undertakings made by the Parties to clarify the procedural safeguards provided for in Section F of Chapter 8 of the CETA, which cannot contain all the details on the organisation and functioning of the ICS.

248. In addition, in order to answer a question posed by the Kingdom of Belgium on several occasions in its request for an opinion, there do not appear to me to be any grounds for criticism *per se*, having regard to the rights enshrined in Article 47 of the Charter, of the fact that, in the context of an international agreement such as the CETA, a body composed of equal numbers of representatives of the European Union and of Canada, whose decisions are adopted by mutual consent,<sup>174</sup> such as the Joint Committee provided for in Article 26 of that agreement,<sup>175</sup> has the task of implementing several provisions relating to the organisation and functioning of the ICS, while Section F of Chapter 8 of the CETA lays down the general framework of the mechanism by specifying the essential features of that mechanism.

249. As several interested parties have observed, the composition of the Joint Committee, with bipartite, equal representation, as well as its method of making decisions by mutual consent, favour the adoption by that Committee of decisions consistent with the rules contained in Section F of Chapter 8 of the CETA. In order for a decision to be adopted by the Committee, it must have the support, on the one hand, of the European Union and its Member States and, on the other, of Canada, with each Party able to object to a decision which in its view departs from the principles of independence and impartiality or from the right to an effective remedy. In this regard, it should be observed that, as a result of the very operation of the principle of reciprocity which lies at the heart of the agreement envisaged, each Party will be led to favour decisions capable of guaranteeing a means of dispute settlement consistent with the objectives of expeditiousness, expertise, independence and impartiality for its investors when they operate in the territory of the other Party. The same likewise applies to the interest of each Party when it assumes the role of respondent in a dispute.

<sup>173</sup> See also, in the same vein, paragraph 6(i) of the Joint Interpretative Instrument, as well as Statement No 36.

<sup>174</sup> See Article 26.3.3 of the CETA.

<sup>175</sup> For its part, the Committee on Services and Investment is a specialised committee established under the auspices of the CETA Joint Committee (see Article 26.2.1(b) of the CETA).

250. I would add that the positions which the European Union will advocate within the CETA Joint Committee will have to be adopted in accordance with Article 218(9) TFEU, meaning that they will have to observe the requirements of EU law, including fundamental rights, which will be subject to review by the Court.<sup>176</sup>

251. It is on the basis of these considerations that I will set out, in the following points, the procedural safeguards which make it possible, in my view, in relation to each of the aspects highlighted by the Kingdom of Belgium, to ensure a sufficient level of protection of the right of access to an independent and impartial tribunal, a right enshrined in Article 47 of the Charter.

## *2. Access to the CETA Tribunal for small and medium-sized enterprises*

252. I observe that the CETA Tribunal does not have exclusive jurisdiction to rule on actions brought by foreign investors in the field of investment protection. It is merely an alternative method of dispute resolution in that field, relating to the application of the CETA, which complements the remedies offered by the Parties. Thus, in so far as the domestic law of the Parties contains adequate standards of protection,<sup>177</sup> the establishment of the ICS does not prevent foreign investors from seeking to protect their investments by bringing proceedings before the courts or tribunals of those Parties for the purposes of ensuring that the domestic law of the Parties is applied. Those investors will therefore be able to benefit from procedural guarantees, inter alia in relation to legal aid, which exist before the courts and tribunals of the Parties.

253. Furthermore, where foreign investors opt instead to refer the matter to the CETA Tribunal, they voluntarily waive their right<sup>178</sup> to bring proceedings before the courts or tribunals of the Parties and therefore to the procedural safeguards which exist before those courts or tribunals.

254. In any event, the concern expressed by the Kingdom of Belgium vis-à-vis the account taken of the financial situation of investors who wish to submit a complaint to the CETA Tribunal, in particular in the case of small and medium-sized enterprises, was taken into consideration by the Parties with a view to providing answers which mean that effective access to this method of dispute settlement can be guaranteed.

255. Accordingly, although the rule laid down in Article 8.39.5 of the CETA, which provides that the costs of the proceedings and other reasonable costs, including costs of legal representation and assistance, are to be borne by the unsuccessful disputing party, does pursue a legitimate goal, namely that of discouraging abusive litigation, that same provision allows the Tribunal to derogate from that rule where the 'circumstances of the claim' justify such derogation, which could, in my view, be interpreted as encompassing the applicant's financial situation.<sup>179</sup> Accordingly, the Tribunal enjoys some leeway to temper automatic application, which could be too strict in certain specific cases, of the principle that the costs of the proceedings and other reasonable expenses must be borne by the unsuccessful party.

256. I would also mention, as a measure enabling the costs of the proceedings to be reduced, Article 8.27.9 of the CETA, which allows the disputing parties to 'agree that a case be heard by a sole Member of the Tribunal to be appointed at random from the third country nationals. The respondent shall give sympathetic consideration to a request from the claimant to have the case heard by a sole

<sup>176</sup> See, to that effect, Opinion 1/00 (paragraph 39).

<sup>177</sup> There can be little doubt of this in relation to the European Union and its Member States.

<sup>178</sup> With regard to the investor's consent to the settlement of the dispute by the Tribunal in accordance with the procedures set out in Section F of Chapter 8 of the CETA, see Article 8.22.1(a) of that agreement. With regard to the withdrawal, discontinuance or waiver of the right to bring an action before the courts or tribunals of the Parties, see Article 8.22.1(f) and (g) of the CETA.

<sup>179</sup> In addition, Article 8.39.5 of the CETA provides that 'if only parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims'.



Member of the Tribunal, in particular where the claimant is a small or medium-sized enterprise ...'. It should also be observed that, as is apparent from Article 8.19 of the CETA, the amicable settlement of disputes is encouraged, and a system of consultations between the parties is organised to that end.<sup>180</sup> In that context, Article 8.19.3 of the CETA provides that 'the disputing parties may hold the consultations through videoconference or other means where appropriate, such as in the case where the investor is a small or medium-sized enterprise'.

257. Finally, Article 8.39.6 of the CETA provides that 'the CETA Joint Committee shall consider supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium-sized enterprises. Such supplemental rules may, in particular, take into account the financial resources of such claimants and the amount of compensation sought'.

258. Due account is taken of this issue in Statement No 36, which contains the following commitments:

'There will be better and easier access to this new court for the most vulnerable users, namely [small and medium-sized enterprises] and private individuals. To that end:

- The adoption by the Joint Committee of additional rules, provided for in Article 8.39.6 of the CETA, intended to reduce the financial burden imposed on applicants who are natural persons or small and medium-sized enterprises, will be expedited so that these additional rules can be adopted as soon as possible.
- Irrespective of the outcome of the discussions within the Joint Committee, the Commission will propose appropriate measures of (co)-financing of actions of small and medium-sized enterprises before that Court and the provision of technical assistance'.

259. In the light of those factors, I take the view that Section F of Chapter 8 of the CETA does not undermine the right of access to a tribunal, enshrined in Article 47 of the Charter.

### *3. The conditions governing remuneration of the Members of the Tribunal and Appellate Tribunal*

260. I observe that Article 8.27.12 to 8.27.15 of the CETA sets out the main features of the remuneration scheme for Members of the CETA Tribunal, namely, as a first stage, a monthly retainer fee, paid equally by both Parties, supplemented by fees and expenses pursuant to Regulation 14(1) of the ICSID Administrative and Financial Regulations, which are allocated by the Tribunal among the disputing parties in accordance with Article 8.39.5 of the CETA. That dual component of the remuneration of the Members of the Tribunal, which includes a fixed component and a component dependent on the volume and the complexity of the litigation brought before them, is consistent with the hybrid nature of the dispute settlement mechanism established and with the fact that, at least initially, those Members will not be working on a full-time basis at the Tribunal. Furthermore, the independence and impartiality of the Members of the Tribunal do not appear to me to be affected, as such, by the rule laid down in Article 8.27.12 of the CETA, under which the amount of the fee is to be determined by the CETA Joint Committee.<sup>181</sup>

<sup>180</sup> In the same vein, see also Article 8.20 of the CETA, which allows the disputing parties to have recourse to mediation.

<sup>181</sup> I refer, in this regard, to my general considerations concerning the CETA Joint Committee (see points 248 to 250 of this Opinion). With regard to the remuneration of the Members of the Appellate Tribunal, see also Article 8.28.7(d) of the CETA.



261. The same is true, in my view, of the rule laid down in Article 8.27.15 of the CETA, which would enable a second stage to be initiated, under which ‘the CETA Joint Committee may, by decision, transform the retainer fee and other fees and expenses into a regular salary, and decide applicable modalities and conditions’. That rule corresponds to the intention expressed in Statement No 36 to ‘progress towards judges who are employed full time’ and reflects the dynamic nature of the mechanism desired by the Parties, which is to gradually acquire the characteristics of a genuine court.

*4. The conditions relating to the appointment and possible removal of Members of the Tribunal and of the Appellate Tribunal*

262. The procedure for appointment of Members of the Tribunal and of the Appellate Tribunal is laid down in Article 8.27.2 and 8.27.3 and in Article 8.28.3 and 8.28.7 of the CETA, from which it follows inter alia that they are appointed by a decision of the CETA Joint Committee.

263. Section F of Chapter 8 of the CETA contains the main rules on the basis of which that power of implementation entrusted to the CETA Joint Committee can be circumscribed with a view to guaranteeing the independence and impartiality of the Members who will be appointed.

264. Thus, it follows from Article 8.27.4 of the CETA that the Joint Committee is to choose candidates who ‘possess the qualifications required in their respective countries for appointment to judicial office, or [are] jurists of recognised competence’. That same provision also states that ‘they shall have demonstrated expertise in public international law’ and that ‘it is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements’.<sup>182</sup>

265. Once appointed, the Members of the Tribunal and of the Appellate Tribunal are required to comply with the provisions of Article 8.30 of the CETA, entitled ‘Ethics’, paragraph 1 of which is more specifically intended to guarantee their independence and their impartiality.<sup>183</sup>

266. Under Article 8.30.4 of the CETA, ‘upon a reasoned recommendation from the President of the Tribunal, or on their joint initiative, the Parties, by decision of the CETA Joint Committee, may remove a Member from the Tribunal where his or her behaviour is inconsistent with the obligations set out in paragraph 1 and incompatible with his or her continued membership of the Tribunal’.

267. The abovementioned safeguards, which stem from the composition of the Joint Committee, with bipartite and equal representation, and from its method of decision-making by mutual consent, mean, in my view, that it may be held that neither the appointment nor the possible removal of a Member of the Tribunal or of the Appellate Tribunal is subject to conditions other than those laid down, respectively, in Article 8.27.4 and in Article 8.30.1 of the CETA.

<sup>182</sup> With regard to the Appellate Tribunal, see Article 8.28.4 of the CETA.

<sup>183</sup> Ibid.

*5. The rules of ethics applicable to Members of the Tribunal and of the Appellate Tribunal*

268. It is necessary to mention Article 8.30.1 of the CETA, which contains specific rules intended to guarantee the independence and impartiality of the Members of the Tribunal and of the Appellate Tribunal:

‘The Members of the Tribunal are independent. They shall not be affiliated with any government [<sup>184</sup>]. They shall not take instructions from any organisation or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. They shall comply with the [Guidelines] or any supplemental rules adopted pursuant to Article 8.44.2. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement’.

269. With a view to ensuring compliance with those requirements, reference should be made, in addition to Article 8.30.4 of the CETA which I have mentioned above, to Article 8.30.2 of that agreement, which provides that a disputing party who considers that a Member of the Tribunal has a conflict of interest may ‘invite the President of the International Court of Justice to issue a decision on the challenge to the appointment of such Member’.

270. Furthermore, the provisions contained in Section F of Chapter 8 of the CETA in relation to independence and impartiality are intended to be supplemented by a code of conduct, which Article 8.44.2 of the CETA provides must be adopted by the Committee on Services and Investment.<sup>185</sup> In accordance with that provision, that code of conduct will deal with matters including disclosure obligations, the independence and impartiality of Members and confidentiality. The code of conduct will thus help to clarify and strengthen the safeguards already expressly contained in Article 8.30.1 of the CETA, with a view to avoiding conflicts of interest, in particular as regards the outside activities of Members and their prior authorisation.<sup>186</sup>

271. For all the foregoing reasons, and taking due account of the general considerations which I have set out, I take the view that the provisions contained in Section F of Chapter 8 of the CETA do not infringe the right of access to an independent and impartial tribunal, a right enshrined in Article 47 of the Charter, since they guarantee a level of protection of that right which is appropriate to the specific characteristics of the investor-State dispute resolution mechanism provided for in that section.

<sup>184</sup> The footnote which appears at this point in the text clarifies in this regard that, ‘for greater certainty, the fact that a person receives remuneration from a government does not in itself make that person ineligible’. In this regard, the Commission stated, at the hearing, that the category of persons more specifically targeted by that clarification is that of university professors, who receive remuneration from the State but who also satisfy the criteria of independence and impartiality. The Commission also referred to the category of persons who receive a pension from the State. In any event, it is clear that those persons remain subject to all the rules laid down in Article 8.30 of the CETA with a view to avoiding and, where appropriate, penalising any conflict of interest which could affect their independence and their impartiality.

<sup>185</sup> Under the second subparagraph of that provision, ‘the Parties shall make best efforts to ensure that the code of conduct is adopted no later than the first day of the provisional application or entry into force of this Agreement, as the case may be, and in any event no later than two years after such date’. See also paragraph 6(f) of the Joint Interpretative Instrument and Statement No 36, which provides that ‘the ethical requirements for members of the Tribunals ... will be set out in detail as soon as possible ... in an obligatory and binding code of conduct ...’.

<sup>186</sup> In that regard, the German Government points out in its observations that General Standard 3 of the IBA Guidelines, with which the Members of the Tribunal and of the Appellate Tribunal will have to comply pursuant to Article 8.30.1 of the CETA, provides for a broad disclosure obligation in relation to all factors capable of affecting the impartiality or independence of the arbitrators.

#### **IV. Conclusion**

272. In the light of all the foregoing considerations, I propose that the Court should give the following opinion:

Section F of Chapter 8 of 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, establishing an investment dispute resolution mechanism between investors and States, is compatible with the Treaty on European Union, the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union.