The CETA Opinion of the CJEU

Redefining the Contours of the Autonomy of the EU Legal Order

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Abstract

In its Opinion 1/17, the CJEU confirmed that the investor-state dispute settlement mechanism of the Comprehensive Economic and Trade Agreement (CETA or the Agreement) entered into between Canada and the EU is compatible with EU law. In the view of the CJEU, the CETA does not have an adverse effect on the autonomy of the EU legal order; it does not violate the principle of equality, the effectiveness of EU law and the right of access to an independent tribunal. Some of the findings of the Opinion are, however, controversial. In particular, it is questionable whether the autonomy of EU law is indeed unaffected by the Agreement, because it seems that in certain situations an interpretation of EU law is hardly avoidable for the CETA Tribunal and the Appellate Tribunal to make. With its Opinion, the CJEU not only lends support to similar trade and investment protection agreements, but it also paves the way for the participation of the EU in creating a multilateral investment court as long as the limits set by the CJEU are observed.

Keywords: CETA, settlement of investment disputes, autonomy of EU law, Achmea, multilateral investment court.

1. The CETA and the Settlement of Investment Disputes

The Comprehensive Economic and Trade Agreement (CETA or the Agreement) entered into between Canada and the EU belongs to the new generation free trade agreements, because beyond the traditional subject of free trade agreements, the elimination of tariffs and non-tariff barriers, it contains provisions, among others, on state subsidies, investments, anti-competitive practices, government procurement and the protection of intellectual property.

Decision 2017/37 of the Council of the European Union gave authorization to sign the CETA on behalf of the EU, which took place in Brussels on 30 October 2016.[1] In addition, Council Decision 2017/38 provided for the provisional

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1 Council Decision (EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union 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.

doi: 10.5553/HYIEL/266627012020008001003

application of most of the rules of the CETA.[2] The full entry into force of the Agreement requires ratification in all Member States, which presupposes approval by national – and in certain Member States by regional – parliaments.

The CETA has established a peculiar mechanism for the settlement of investment disputes. Its forerunner has already appeared in the course of negotiations with the US on the Transatlantic Trade and Investment Partnership (TTIP),[3] and similar rules may be found in the trade and investment protection agreements concluded with Vietnam,[4] Singapore[5] and Mexico.[6] At the same time, the CJEU found the accession of the EU to the ECHR (*Opinion 2/13*)[7] as well as the creation of the unified patent litigation system (*Opinion 1/09*)[8] incompatible with EU law. Then, in its *Achmea* judgment in the more specific context of investment protection law, it qualified arbitration clauses in bilateral investment treaties (BITs) entered into between the Member States as contrary to EU law.[9] Hence, the question necessarily emerged whether the rules of the CETA on the settlement of investment disputes are in accordance with EU law.

In Belgium, although the federal government supported it, the government of Wallonia protested against the adoption of the CETA and this was primarily because of the dispute settlement mechanism contained therein. The CETA enables investors, in the event of an alleged breach of their rights laid down by the Agreement, to bring proceedings against the parties, including the EU and its Member States. According to the argumentation of the Walloon government, this can call into question the Belgian and EU-level regulation.[10] Signing the CETA by the federal government required authorization by the regions. Since the CETA is a mixed agreement, the parties of which in addition to Canada and the EU are also the Member States, without the Belgian ratification the agreement could not have entered into force. Finally, a compromise was reached between the Belgian federal government and Wallonia, according to which the federal government requested the opinion of the CJEU on the conformity of CETA rules on dispute settlement

2 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.

3 EU's Proposal for Investment Protection and Resolution of Investment Disputes, at https://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf; Balázs Horváthy, 'A transzatlanti kereskedelmi tárgyalások és a beruházási vitarendezés reformja', *in* Judit Glavanits *et al.* (eds.), *Az európai jog és a nemzetközi magánjog aktuális kérdései – Ünnepi tanulmányok a 65 éves Milassin László tiszteletére*, Széchenyi István Egyetem Deák Ferenc Állam- és Jogtudományi Kar Nemzetközi Köz- és Magánjogi Tanszék, Győr, 2016, pp. 83-97.

4 EU-Vietnam Investment Protection Agreement, Chapter 3 [Dispute Settlement], Section B.

5 EU-Singapore Investment Protection Agreement, Chapter 3 [Dispute Settlement], Section A.

6 EU-Mexico Trade Agreement, Section X [Resolution of Investment Disputes].

7 Opinion of 18 December 2014, *Opinion 2/13 pursuant to Article 218(11) TFEU*, ECLI:EU:C:2014:2454.

8 Opinion of 8 March 2011, *Opinion 1/09 pursuant to Article 300(6) EC*, ECLI:EU:C:2011:123.

9 Judgment of 6 March 2018, *Case C-284/16*, *Achmea*, ECLI:EU:C:2018:158; Tamás Szabados, 'Az Európai Unió Bíróságának Achmea-döntése', *Jogesetek Magyarázata*, Vol. 10, Issue 1, 2019, pp. 29-36.

10 Laurens Ankersmit, 'Belgium Requests an Opinion on Investment Court System in CETA', *Environmental Law Network International Review*, 2016/2, p. 54.

with EU law. The legal basis for this was Article 218(11) TFEU that permits Member States to obtain the opinion of the CJEU on the compatibility of an envisaged agreement with the Treaties.

The Kingdom of Belgium posed the question, whether Section F ('Resolution of investment disputes between investors and states') of Chapter Eight ('Investment') of the CETA is compatible with the Treaties, including fundamental rights, and in particular with the autonomy of EU law, the principle of equal treatment, the requirement of effectiveness of EU law and the right of access to an independent and impartial tribunal. It is to be noted here that, as an exception, the provisions related to the settlement of investment disputes are not applied by the parties on a provisional basis. The request for an opinion was crucial, since if the opinion of the CJEU would have been unfavorable, the planned Agreement could have entered into force only after it had been duly amended.

The rules of the CETA on investments create a Tribunal for the settlement of disputes before which an investor of a party may bring proceedings if it finds that the other party has breached an obligation under Sections C and D of Chapter Eight of the CETA. These sections provide for typical investment protection standards, such as national treatment, the most-favored-nation treatment, fair and equitable treatment, full protection and security, protection in the case of expropriation and free transfers. The dispute settlement mechanism of the CETA introduces significant novelties.

First, disputes between investors and the EU or its Member States or Canada are decided by a division of three members designated randomly from the permanent membership of the Tribunal instead of an arbitral tribunal traditionally seized in international investment disputes. This, rules out the influence of the parties to the dispute on the composition of the proceeding division. The Tribunal consists of fifteen members who are appointed for five years and the appointment is renewable once.[11] Appointment is made by the CETA Joint Committee responsible for the implementation and application of the CETA. Five members of the Tribunal are nationals of EU Member States, five are nationals of Canada and the remaining five members have to be nationals of third countries.[12] The members of the Tribunal may be persons who comply with the conditions for appointment to judicial office in their respective countries, or who are recognized jurists, and have expertise in public international law, and in particular, in the field of international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.[13] The divisions hearing the cases consist of three members of the Tribunal: one member each is a national of an EU Member State and a Canadian national, while the division is chaired by the member who is a third-country national.[14] At the same time, the parties to the dispute can agree

11 CETA, Articles 8.27(2) and (5).
12 Id. Article 8.27(2).
13 Id. Article 8.27(4).
14 Id. Article 8.27(6).

doi: 10.5553/HYIEL/266627012020008001003

that their case be heard by a sole member of the Tribunal to be appointed randomly from those members who are nationals of a third country.[15] The Tribunal can oblige the condemned party to pay damages, or in the case of expropriation, to restitute property, or instead of restitution, to pay damages.[16]

Another novelty of the system is that the parties may request the review of the awards rendered by the Tribunal from the Appellate Tribunal. The review is more broadly available in comparison to the possibility of annulment of awards under the ICSID Convention[17] or under domestic laws. In addition to the narrow grounds for annulment laid down by the ICSID Convention, the Appellate Tribunal may modify or reverse an award of the Tribunal in case of an erroneous application or interpretation of the applicable law, as well as in case manifest errors occurred in the appreciation of the facts, including the appreciation of relevant domestic law.[18] Administrative and organizational matters regarding the functioning of the Appellate Tribunal, including its composition, are decided by the CETA Joint Committee. Divisions of the Appellate Tribunal also consist of three members who must have the same skills and expertise as required from the members of the Tribunal. The CETA also provides that the dispute settlement mechanism outlined above may be replaced in the future by a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes.[19]

2. The CETA Opinion of the CJEU

In its *Opinion 1/17*,[20] the CJEU concluded that the dispute settlement mechanism introduced by the CETA concerning investments is in accordance with EU law. First, the Agreement does not violate the autonomy of EU law. In the field of international relations, the competence of the EU extends not only to the conclusion of international agreements, but also to the establishment of a court by such international agreements, for the purpose of the interpretation and application of the underlying agreement. The EU also has the competence to submit itself to the decisions of such a court provided that the creation and operation of that court does not violate the autonomy of the EU legal order, including the power of the CJEU to provide the definitive interpretation of EU law. Although the dispute settlement mechanism of the CETA stands outside the judicial system of the EU, in the view of the CJEU it does not violate the autonomy of the EU legal order, first, since the fora established by the CETA do not have the competence to interpret and apply EU law, and second, because they

15 Id. Article 8.27(9).
16 Id. Article 8.39(1).
17 Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), Article 52(1).
18 CETA, Article 8.28(2).
19 Id. Article 8.29.
20 Opinion of 30 April 2019, *Opinion 1/17 pursuant to EU-Canada CET Agreement,* ECLI:EU:C:2019:341.

cannot render decisions which could prevent EU institutions from operating in accordance with the constitutional framework of the EU. The jurisdiction of the Tribunal and the Appellate Tribunal is limited to the interpretation and application of the provisions of the CETA. The CETA expressly declares that the Tribunal does not have jurisdiction to determine the legality of a measure allegedly breaching the Agreement, under the domestic law of the disputing party, and this includes EU law.[21] To establish the incompatibility of a measure with the CETA, the Tribunal can only consider the parties' domestic law, including EU law, as a matter of fact, and in doing so, it is bound to follow the prevailing interpretation given to the domestic law by the courts or authorities of the party concerned.[22] Moreover, any meaning given to domestic law by the Tribunal is not binding upon such courts and authorities. The CJEU stressed here that the provisions of the CETA must be distinguished from the unified patent litigation system and investment arbitration. The envisaged patent court would have had competence to apply EU law and, similarly in the investment arbitration proceedings affected by the *Achmea* judgment the interpretation and application of EU law could potentially emerge. The *Achmea* decision ruled out the application of the arbitration clauses contained in BITs entered into between the Member States, while in the case of the CETA, an agreement concluded between the EU, its Member States and a third state, establishes the tribunals. As opposed to the relationship between Member States, the principle of mutual trust does not apply in the relationship between the EU, its Member States and third countries. Considering that the Tribunal and the Appellate Tribunal are outside the EU judicial system and they do not have the competence to apply EU law, the autonomy of the Union legal order cannot be adversely affected by the fact that they cannot have recourse to the CJEU through a reference for a preliminary ruling, and that the review of an award of the Tribunal or the Appellate Tribunal is not available before the CJEU or before a court of the host Member State. The dispute settlement mechanism of the CETA does not prevent EU institutions from operating in accordance with the constitutional framework of the EU, since the CETA recognizes the freedom of the EU to adopt measures, among others, for the purpose of the protection of public order, public safety, public morals, the health and life of humans and animals, the preservation of food safety, the protection of plants and the environment, welfare at work, product safety, consumer protection as well as the protection of fundamental rights. The Tribunal and the Appellate Tribunal cannot call into question such decisions and the level of protection of public interest determined by the EU in a democratic process.

Second, the CJEU stated that the CETA dispute settlement mechanism is not contrary to the general principle of equal treatment or to the requirement of effectiveness of EU law. Interpreted in accordance with Article 18 TFEU, Article 21(2) of the Charter of Fundamental Rights of the EU, which prohibits any discrimination based on nationality, forbids only discrimination between Union

21 Id. Article 8.31(2).
22 Id.

doi: 10.5553/HYIEL/266627012020008001003

citizens, but this does not extend to a possible difference in the treatment of EU and Canadian investors. However, the requirement of equality before the law protected under Article 20 of the Charter also had to be examined, for the latter applies without such a limitation. It does not give rise to a different treatment that only Canadian investors can challenge the measures of the EU or its Member States before the CETA tribunals, while this is not available to the investors of the Member States. This is because Canadian investors investing in the territory of the EU are not in a comparable situation with companies and citizens of the Member States investing within the EU. The CJEU did not find a violation of the requirement of the effectiveness of EU competition law considering that the CETA Tribunal can find that the imposition of a fine on a Canadian investor for the breach of EU competition law rules by the European Commission or a national competition authority is incompatible with the provisions of the CETA, since such a case may only arise if the Commission or the national competition authority applied competition law rules erroneously violating the fair and equitable treatment standard or giving rise to expropriation. In such a case, Union law also admits the annulment of the fine vitiated by a legal defect.

Third, the dispute settlement mechanism does not breach the right of access to an independent tribunal. The right of access to justice is not violated even in the case of natural persons or small and medium-sized enterprises which have limited resources to pursue a costly procedure, because the Commission and the Council made a commitment that all EU investors will have access to the CETA Tribunal, and this is a prerequisite for the approval of the CETA by the EU. The Agreement does not violate the requirement of independence, either. The CETA tribunals comply with both the external (they exercise their functions wholly autonomously, without any hierarchical constraint or subordination and without external interventions or pressure) and internal (equal distance from the parties is maintained) elements of independence. The external independence of the CETA fora are safeguarded by those rules which provide that the tribunals perform their functions fully autonomously, the members of the tribunals are appointed for a definite period of time and they have to possess the required expertise. The members are entitled to an appropriate remuneration and cannot be removed from their office. Internal independence is guaranteed by a general prohibition on conflict of interest and by rules of ethics. In particular, members may not be affiliated with any government and cannot take instructions in the course of performing their functions. The same is ensured through the adjudication of disputes by divisions appointed in a random and therefore unpredictable way, chaired by the third-country member in addition to a member from an EU Member State and Canada.

3. Questions Following the Opinion Given by the CJEU

The *Opinion* given by the CJEU raises doubts as far as its findings on the autonomy of the EU legal order is concerned. Questions emerge regarding both assessment criteria applied by the CJEU: first, that the CETA tribunals may not

apply and interpret EU law and second, that the rules on the competence of the CETA do not prevent the EU institutions from operating in accordance with the constitutional framework of the Union.

As to the autonomy of the legal order of the EU, it is questionable whether the application of law and its consideration as a matter of fact can be actually razor-sharply distinguished. As we have seen, under the CETA, the Tribunal applies the CETA, while it may consider domestic law, including EU law, only as a matter of fact. The distinction between the application of law and taking it into consideration as a fact is not new in the practice of the CJEU. In the context of EU private international law, in its *Nikiforidis* judgment the CJEU distinguished these two processes, although that case did not concern the consideration of EU law, but national law as a matter of fact.[23] In conflict of laws, this distinction is crucial, since those foreign overriding mandatory norms may be taken into consideration at the level of substantive law, which does not or cannot constitute part of the governing law, because they do not belong to the *lex causae* or because the law of the forum excludes the application of foreign public law rules. Interestingly, in the field of investment protection law the CJEU probably borrowed this distinction from arbitration practice. Arbitral tribunals considered EU law together with national law as a fact in several cases raising the issue of the relationship between EU law and BITs.[24] Remarkably, in *Eureko*, the later *Achmea* case, the arbitral tribunal itself stated that its competence is limited to establishing a violation of the BIT, but does not extend to establish a breach of EU law.[25] Referring back to this, Advocate General Wathelet found in his opinion to *Achmea* that EU law is one of the relevant factors that must be taken into account in the course of the assessment of the conduct of the state in light of the BIT.[26] In the *Achmea* judgment, however, the CJEU did not accept the distinction between the applicable law and a relevant fact. Meanwhile, in its *Opinion 1/17* it was the CJEU itself that invoked and confirmed the very same distinction regarding the relationship with third countries.

Despite all intended efforts, the text of the CETA cannot unequivocally rule out the interpretation of Union law as part of domestic law by the Tribunal and the Appellate Tribunal. In accordance with Article 8.31(2) of the CETA, when the Tribunal takes into account the domestic law of one of the parties to the dispute as a matter of fact, 'the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party'. Although this provision intends to take all leeway from the Tribunal to exclude any interpretation of the domestic law of a party, this is unavoidable in certain cases. It is conceivable, for example, that the CJEU or courts of the Member States have

23 Judgment of 18 October 2016, *Case C-135/15*, *Nikiforidis*, ECLI:EU:C:2016:774.

24 *See e.g. AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 7.6.6.

25 *Eureko B.V. v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, UNCITRAL, PCA Case No. 2008-13, 26 October 2010, para. 290.

26 Opinion of Advocate General Wathelet delivered on 19 September 2017, *Case C-284/16*, *Achmea*, ECLI:EU:C:2017:699, para. 175.

doi: 10.5553/HYIEL/266627012020008001003

not had yet the occasion to interpret a rule of EU law.[27] It cannot be fully excluded either that a rule is subject to divergent interpretations without the possibility to establish which is the dominant view. Moreover, it is not always the dominant position that is correct, and it is not certain that this position will be later confirmed by the CJEU. The interpretation of EU law is not fully stiffened even by a judgment of the CJEU. A previous interpretation given by the CJEU concerning a rule of EU law does not bind the CJEU; it can later deviate from a previous ruling.[28] On the basis of Article 8.28(2) of the CETA, the Appellate Tribunal may modify or reverse an award of the Tribunal if a manifest error was made in the appreciation of the facts, including the appreciation of relevant domestic law. Although the wording refers to 'appreciation', if the appreciation of the law by the Tribunal and the Appellate Tribunal is divergent, this can be the result of the fact that they interpreted it differently.[29]

Pursuant to Article 8.31(2), any meaning given to domestic law by the Tribunal does not bind the courts or the authorities of any party to the dispute. Although the English version of the CETA speaks about 'any meaning given to domestic law by the Tribunal', other equally authentic language versions,[30] such as the German and Hungarian texts, use the term interpretation (*Auslegung*, *értelmezés*). The same is repeated in para. 131 of the *Opinion*, where the German and Hungarian versions refer again to interpretation. Concerning investor-state dispute settlement, the CETA provides that the Tribunal applies the provisions of the Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties (VCLT), and other rules and principles of international law applicable between the parties.[31] An additional, more general rule of interpretation may be found in Chapter Twenty-nine of the CETA on dispute settlement applicable to disputes regarding the interpretation or application of the provisions of the Agreement. If, in the event of such a dispute, an arbitral panel is seized, the arbitration panel has to interpret the provisions of the CETA in accordance with customary rules of interpretation of public international law, including those set out in the VCLT.[32] Under Article 33 of the VCLT, to which the CETA rules of interpretation made a reference twice, as a main rule, if a treaty has been authenticated in two or more languages, the text is equally authoritative in each language and the terms of the treaty are presumed to have the same meaning in each authentic version. When there is a divergence in the meaning of

27 Laurens Ankersmit, 'Judging International Dispute Settlement: From the Investment Court System to the Aarhus Convention's Compliance Committee', *Amsterdam Law School Legal Studies Research Paper*, No. 2017/46, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080988, p. 22; Mauro Gatti, 'Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold?', *European Papers*, Vol. 4, Issue 1, 109-121, pp. 117-118; Nikos Lavranos, 'CJEU Opinion 1/17: Keeping International Investment Law and EU Law Strictly Apart', *European Investment Law and Arbitration Review*, Vol. 4, Issue 1, 2020, p. 247.

28 Tamás Szabados, "Precedents' in EU Law – The Problem of Overruling', *ELTE Law Journal*, 2015/1, p. 130; Ankersmit 2017, p. 22.

29 *Gatti* 2019, p. 117.

30 CETA, Article 30.11.

31 Id. Article 8.31(1).

32 Id. Article 29.17.

the terms used in the various language versions and the problem of interpretation cannot be solved with the help of the general rules of interpretation, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, is to be adopted. If this rule is followed, most probably the purpose of the drafters of the CETA was to comply with EU law and the earlier judgments (*Achmea*) and opinions (*Opinion 1/09*, *Opinion 2/13*) of the CJEU, therefore their intention was to exclude not only the application, but also the interpretation of EU law from the jurisdiction of CETA tribunals. However, the wording of the German or Hungarian language versions are telling that interpretation of EU law may not be always avoided and they may be considered as an acknowledgment that the Tribunal and the Appellate Tribunal are sometimes compelled to interpret EU law. In the *Achmea* judgment, the possibility that EU law may be applied or perhaps interpreted outside the judicial system of the EU, was already sufficient for the CJEU to establish a violation of the autonomy of the EU legal order.

Nothing excludes that the CETA Tribunal or Appellate Tribunal give a decision which is contrary to EU law.[33] In principle, an award issued by the Tribunal or the Appellate Tribunal is binding only between the parties to the dispute and in respect of that particular case.[34] Even if such a decision does not bind generally the EU and the Member States regarding the interpretation and application of EU law, it may have the consequence that the EU or a Member States has to pay damages as a result of an award which is otherwise contrary to EU law. This also raises the question whether an award incompatible with EU law can be enforced in the territory of the EU.[35] Pursuant to Article 8.41(2) of the CETA, the parties recognize and comply with an award without delay. The fact that under the CETA from the perspective of enforcement an award qualifies as an award issued under the New York Convention and the ICSID Convention, narrows down the possibility to deny recognition and enforcement.[36] At the same time, the CETA adds that the execution of an award is governed by the law of the state where execution is sought. This may give rise to the denial of recognition and enforcement, for instance, on the grounds of public policy. It follows from the principle of primacy of EU law that awards which are incompatible with EU law cannot be enforced in the territory of the EU. It is conceivable, however, that enforcement is not sought in the territory of an EU Member State, but in a third country. The provisions of the CETA do not bind third states and Union law is not necessarily taken into consideration when a decision is rendered in such countries

33 Arnaud de Nanteuil, 'Un tribunal permanent en matière d'investissement compatible avec le droit de l'UE', *International Business Law Journal*, 2019/4, p. 433; *see* also Francisco de Abreu Duarte, 'Autonomy and Opinion 1/17 – A Matter of Coherence?', *European Law Blog*, 31 May 2019, at https://europeanlawblog.eu/2019/05/31/autonomy-and-opinion-1-17-a-matter-of-coherence/.

34 CETA, Article 8.41.

35 Nanteuil 2019, p. 433.

36 Ankersmit 2017, p. 27.

doi: 10.5553/HYIEL/266627012020008001003

on the recognition and enforcement of a CETA award.[37] These problems may not be separated from the issue of the autonomy of EU law.

To guarantee the immunity of the autonomy of the legal order of the EU, the other criterion examined by the CJEU was that the investment settlement mechanism does not prevent EU institutions from operating in accordance with the constitutional framework of the Union and that it does not call into question the decisions of the parties taken on the grounds of public interest following a democratic process which may affect investments. In relation to this, the CJEU stated that the CETA tribunals cannot call into question the level of protection of public interest determined by the Union Such an approach also implies that legislative choices, such as the level of protection determined by the EU, cannot be called into question in light of public international law.[38] In the event of the accession of the EU to the ECHR, the ECtHR could do just this.[39] While the CETA does not exclude the parties from introducing measures affecting investments on the grounds recognized also in EU law, these can be applied only to the extent that, *e.g.* from the perspective of fair and equitable treatment they are not manifestly arbitrary;[40] this may still give some room for review for the Tribunal and the Appellate Tribunal. Therefore, there is nothing to bar that some burden imposed based on the law of the Member States or EU law, such as a tax, is challenged by an investor before the Tribunal and the CETA tribunals deviate from the position of EU law as a result of a different view on the necessity or arbitrariness of the measure concerned.[41] In so far as, based on the CETA, a CETA tribunal would establish a different standard than EU law, and this would lead to the condemnation of the EU or a Member State, this could influence the level of protection of public interest in the EU or in the Member States. This entails the risk that in an indirect way, as an effect of the damages to be paid, the level of protection will be subsequently relaxed.

Consequently, the arguments of the CJEU on the autonomy of EU law are not fully convincing. The questions raised above and the answers to be given by the CETA tribunals will be highly important, because thanks to the positive opinion of the CJEU the CETA will serve as a model for the trade and investment protection agreements to be concluded by the EU in the future, as well as for the establishment of the planned multilateral investment tribunal.

37 Generally, on the recognition and enforcement of awards of investment tribunals, including the CETA Tribunal, in third countries, *see* Aliz Káposznyák, 'Beruházásvédelmi bírósági rendszer és a multilaterális beruházásvédelmi bíróság. Az általuk hozott határozatok elismerése és végrehajtása harmadik országokban', *Jogi Tanulmányok*, 2018, pp. 553-562.

38 Till Patrik Holterhus, 'CETA-Gutachten des EuGH – Neue Maßstäbe allerorten…', *Verfassungsblog*, 3 May 2019, at https://verfassungsblog.de/das-ceta-gutachten-des-eugh-neue-massstaebe-allerorten/.

39 Id.

40 CETA, Article 8.10(2)(c).

41 *See* Ankersmit 2016, p. 57.

4. The Significance of the CETA Opinion and the Future of the Settlement of Investment Disputes

Since the CETA is a mixed agreement, the parties to it are Canada as well as the EU and its Member States, the entry into force of the Agreement presupposes ratification in the EU Member States. As the *Opinion* dispels doubts over its compatibility with EU law, there is no need for the renegotiation of the CETA with Canada, and there is no other obstacle based on EU law to the ratification of the Agreement. The ratification of the CETA in the Member States is ongoing. In Germany, the Constitutional Court was asked to decide on whether the CETA is compatible with the German Basic Law. Accordingly, ratification in Germany is dependent upon the outcome of the case currently pending before the Constitutional Court.

A negative ruling by the CJEU would have had the consequence that the rules on the investment dispute settlement mechanism should have been taken out from the CETA, and it could not have constituted part of other trade agreements concluded or envisaged by the EU. In this way, the *CETA Opinion* confirms similar dispute settlement procedures contained in agreements entered into with other states, such as the provisions of the EU–Vietnam Investment Protection Agreement signed two months following the *Opinion* of the CJEU.

The introduction of a new dispute settlement mechanism for resolving disputes initiated by investors from the EU and Canada is a crucial step on the part of the EU to replace traditional investment arbitration procedures. Permanent tribunals established by the EU in trade agreements for the settlement of investment disputes can gradually replace traditional arbitration procedures in relation with third states.[42] This leads us to the related question whether the *CETA Opinion* has any effect on investment arbitration, in particular with regard to the regime of the Energy Charter Treaty (ECT). Like the CETA, the ECT is based on a mixed agreement entered into between the EU and its Member States and third states, under which investors may bring claims against the respondent before arbitral tribunals. It is a multilateral agreement as opposed to intra-EU BITs. Furthermore, arbitral tribunals established under the ECT have to decide disputes based on the ECT and the applicable rules and principles of international law. EU law is excluded from the governing law. From these features of the ECT, several authors inferred that the *Achmea* judgment governs exclusively intra-EU BITs and does not apply to ECT disputes.[43] Instead of *Achmea*, the *CETA Opinion* applies to ECT disputes and arbitral proceedings under the ECT are compatible with EU law. This view finds some support also in recent arbitral practice. Arbitral tribunals have rejected the *Achmea* defence put forward by EU Member States as respondents claiming the incompatibility of intra-EU

42 Nanteuil 2019, p. 436.

43 Lavranos 2020, pp. 257-258; Patricia Sarah Stöbener de Mora & Stephan Wernicke, 'Riskante Vorgaben für Investitionsschutz und Freihandel – Das CETA-Gutachten des EuGH', *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 30, Issue 23, 2019, p. 976.

doi: 10.5553/HYIEL/266627012020008001003

investor-state arbitration proceedings under the ECT with EU law.[44] However, a qualification must be made here. It is to be noted that the ECT admits not only claims by EU investors against third states, and claims by third-country investors against the EU or a Member State. The ECT makes it also possible to bring a claim by an EU investor against an EU Member State. As such, it also covers intra-EU relations. This distinguishes the ECT regime from potential CETA disputes and can bring the ECT under the purview of the *Achmea* judgment, at least as far as intra-EU relations are concerned. This was the reason why the Declaration of the Member States on the legal consequences of the *Achmea* judgment and on investment protection concluded that intra-EU ECT arbitration is incompatible with EU law.[45]

The *Opinion* is also significant because it indicates the admissibility of a multilateral investment tribunal. The Proposal of the EU for Investment Protection and Resolution of Investment Disputes regarding the TTIP[46] and the investment agreements entered into with Singapore,[47] Vietnam[48] and Mexico[49] showed commitment for the establishment of a multilateral investment court on the part of the EU and its Member States.

In the last years, the Commission repeatedly urged for the creation of a multilateral investment dispute settlement mechanism. In 2018, the Council authorized the Commission to commence negotiations on behalf of the Union by determining negotiating directives with the aim of creating a multilateral court for the settlement of investment disputes in the framework of the UN Commission on International Trade Law (UNCITRAL).[50] In accordance with the directives, the jurisdiction of the multilateral court would extend to agreements concluded by the EU and the Member States with third countries provided that the parties submit their disputes arising under those agreements to the jurisdiction of the multilateral court. Similarly to the solution of the CETA, the multilateral court would consist of a tribunal of first instance and an appeal tribunal. The multilateral framework would replace the traditional investor-state arbitration. Accordingly, in the course of the negotiations pursued on the reform

44 *See Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras. 678-683.

45 Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, p. 2.

46 EU's Proposal for Investment Protection and Resolution of Investment Disputes, Article 12.

47 EU-Singapore Investment Protection Agreement, Article 3.12.

48 EU-Vietnam Investment Protection Agreement, Article 3.41.

49 EU-Mexico Trade Agreement, Section X: Resolution of Investment Disputes, Article 14.

50 Council of the European Union, *Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes,* Brussels, 20 March 2018, at http://data.consilium.europa.eu/doc/document/ST–12981–2017–ADD–1–DCL–1/en/pdf; Council of the European Union, Press release, *Multilateral Investment Court: Council Gives Mandate to the Commission to Open Negotiations,* 20 March 2018, at www.consilium.europa.eu/en/press/press–releases/2018/03/20/multilateral–investment–court–council–gives–mandate–to–the–commission–to–open–negotiations/.

of investor-state dispute settlement in the framework of the UNCITRAL,[51] the EU proposed the establishment of a multilateral investment court.[52] Since the EU is an important actor of these negotiations, the *CETA Opinion* of the CJEU is a significant step from the perspective of the future of the settlement of investment disputes. This is because the *CETA Opinion* opens the door towards the establishment of a multilateral investment court from the point of view of EU law. In its *Opinion*, the CJEU laid down that it is not incompatible with EU law that the CETA provides for a multilateral investment tribunal and appellate mechanism.[53] However, the actions of the EU in creating such a multilateral system are subject to limits. As it happened in the case of the dispute settlement mechanism of the CETA, the competence of a future multilateral court must be limited: it cannot apply and interpret EU law; it cannot establish the legality of a measure in light of EU law; and the assessment of Union law by the multilateral court cannot be binding on the CJEU, or the courts and authorities of the Member States.

It is clear that the EU is a main actor in establishing investment protection instruments and has a significant negotiating power. However, the creation of a multilateral regime goes beyond the EU. It presupposes endorsement by other states. In order to establish a mechanism for a multilateral investment tribunal, it does not suffice that it is compatible with EU law. It is also necessary that third states accept the limits set by the *CETA Opinion* of the CJEU.

51 UN Commission on International Trade Law Working Group III (Investor–State Dispute Settlement Reform), *Possible Reform of Investor-State Dispute Settlement (ISDS)*, 5 September 2018, A/CN.9/WG.III/WP.149, at https://undocs.org/A/CN.9/WG.III/WP.149.

52 Submission of the EU and its Member States to UNCITRAL Working Group III, 18 January 2019, *Establishing a Standing Mechanism for the Settlement of International Investment Disputes,* at https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157632.pdf.

53 *Opinion 1/17*, para. 118.

doi: 10.5553/HYIEL/266627012020008001003