

*LOOKIN' OUT MY BACKDOOR – THE CJEU
AND THE SELECTIVE ACCEPTANCE
OF INTERNATIONAL TRIBUNALS**

*Lookin' out my backdoor – El TJUE y la aceptación
selectiva de los Tribunales internacionales*

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Abstract

In absence of a global political authority, the dialogue between international, supra-national and domestic courts has played a fundamental role over the years in harmonizing regulations among states and promoting the recognition and enforcement of common rights and principles. In Europe, the Court of Justice of the European Union (CJEU) has been at the centre of this process. Over the years, the CJEU has acted as a “gatekeeper” in the selection of other judges (whether national or international) with which it engages in a meaningful dialogue. The CJEU’s approach has not always been coherent, as opposite outcomes in two recent decisions demonstrate.

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¹ The views expressed in this article should not be attributed to the WTO Secretariat or to the WTO Members. I am grateful to Petros Mavroidis and Mislav Mataija for extensive discussions on these topics.

Recent developments, however, show that the CJEU can reconsider its inclination and show greater openness to the acceptance of other international tribunals.

Keywords

Constitutional Law; sovereignty; regional or international courts.

Resumen

En ausencia de una autoridad política global, el diálogo entre tribunales internacionales, supranacionales y nacionales ha desempeñado un papel fundamental a lo largo de los años para favorecer la armonización jurídica y el reconocimiento y la ejecución de derechos y principios comunes. En Europa, el Tribunal de Justicia de la Unión Europea (TJUE) ha estado en el centro de este proceso. A lo largo de los años, el TJUE ha actuado como “guardián” en la selección de otros interlocutores judiciales para el desarrollo de un verdadero diálogo. El enfoque del TJUE no ha sido siempre coherente. Sin embargo, desarrollos recientes muestran que el TJUE a veces ha reconsiderado su inclinación y mostrado mayor apertura a la aceptación de otros tribunales internacionales.

Palabras clave

Derecho Constitucional; soberanía; Tribunales regionales o internacionales.

SUMARIO: I. INTRODUCTION: GLOBALIZATION, CONSTITUTIONALISM, AND IMPLICATIONS FOR INTERNATIONAL ECONOMIC LAW. II. “DANCING WITH MYSELF”: ACHMEA. 1. *Interim conclusion on Achmea*. III. “DANCE WITH ME, MAKE ME SWAY”: OPINION 1/17. 1. *Autonomy revisited*. 2. *No effects on the operation of eu institutions*. 3. *Equal treatment*. 4. *Access to an independent Tribunal*. 5. *Interim conclusion on Opinion 1/17*. IV. FINAL REMARKS.

I. INTRODUCTION: GLOBALIZATION, CONSTITUTIONALISM, AND IMPLICATIONS FOR INTERNATIONAL ECONOMIC LAW

Prof. Carrozza characterises the process of globalization, and the ensuing increase in political and legal forums, as one of the causes of the crisis of constitutionalism. In fact, the development of supra-national and international law, in Prof. Carrozza’s view, calls for a rethinking of the notion of constitutionalism, which can no longer be linked with the legal and political space of the state and its absolute sovereignty.

Prof. Carrozza draws three main lessons from this problem. First, in light of its “global” dimension, the crisis of constitutionalism cannot be addressed by focusing exclusively on domestic constitutional reform.² Instead, Prof. Carrozza argues in favour of collaborative development and implementation of coordinated policies among states.³ Second, Prof. Carrozza notes that the crisis of western constitutionalism is also a crisis of judicial review and constitutional adjudication, particularly in legal systems with long and value-oriented constitutions. According to Prof. Carrozza, this has led courts to focus on the specific circumstances of the cases (thus addressing “one case at the time”, à la Sunstein⁴) or on politically neutral constitutional principles (such as reasonableness or proportionality) for the resolution of disputes.⁵ Third, Prof. Carrozza is of the view that these developments call for greater openness of domestic legal systems, which should engage in a dialogue with each other in order to foster mutual understanding. Prof. Carrozza calls this phenomenon “open constitutionalism”, and notes that dialogue is a fundamental component thereof, in light of the transformation of constitutionalism from a

² See Carrozza in this issue. See also Dobner, Petra and Martin Loughlin, eds. 2010. *The Twilight of Constitutionalism?* Oxford: Oxford University Press.

³ See Carrozza in this issue.

⁴ Sunstein, Cass, 1999. *One case at a time – Judicial Minimalism on the Supreme Court*. Cambridge MA: Harvard University Press.

⁵ See Carrozza in this issue. See also Zagrebelsky, Gustavo. 1992. *Il diritto mite. Legge, diritti, giustizia*. Torino: Einaudi.

domestic to a supra-national issue and the proliferation of regional or international agreements, many of which accompanied by the establishment of regional or international courts.⁶

Quoting from Prof. Carrozza:

The dialogue among international, supra-national and domestic Courts is gradually replacing the lack of a global political authority capable of creating an effective political and legal order (if it will ever assume a concrete existence) common to every people, since this dialogue is directed to the elaboration and development of a new global constitutional law based upon the presumption of equality of citizens' rights⁷.

Prof. Carrozza concludes that a new open constitutionalism (a “global rule of law”, in his words) is emerging as a process of dialogue between different legal systems and their courts, through the recognition of the rights of others.⁸ Interestingly, Prof. Carrozza speaks of a “patient and gradual” construction of common values, which will require compromise and the reciprocal modification of positions and perspectives among international legal orders and tribunals.⁹

The focus of Prof. Carrozza's reflection is mostly related to the development of citizens' social and political rights. However, *mutatis mutandis*, this lesson is useful also in the attempt to capture developments taking place in the domain of international economic law. As economic phenomena have progressively reduced the meaningfulness of the boundaries of Westphalian states, a new set of rules governing the rights of foreign investors and the prerogatives of host states has gradually emerged.

Until recently, this process had only marginally affected the European Union (EU), as “foreign direct investment” (FDI) was traditionally part of the *domaine réservé* of EU Member States. However, the situation changed with the advent of the Lisbon Treaty. The revised version of Article 207 of the Treaty on the Functioning of the European Union (TFEU) now includes FDI in the common commercial policy, which falls within exclusive competence of the EU. This is clear from the text of the provision and was further reaffirmed by the CJEU in its *Opinion 2/15* on the Free Trade Agreement (FTA) between the EU and Singapore.

The transition was not uneventful and represented a stress-test for the Court of Justice of the European Union (CJEU), which has not always

⁶ Not all of them, however, as masterfully documented in Koremenos, Barbara. 2007. “If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?”. *The Journal of Legal Studies* 36, n. 1: 189-212.

⁷ Carrozza, in this issue.

⁸ See Carrozza in this issue.

⁹ See Carrozza in this issue.

accepted with enthusiasm the idea that it could co-exist with other international adjudicating systems. CJEU judges, in fact, have been routinely referred to as “the gatekeepers” of the autonomy of EU law, both regarding how they “filter” the interaction between the EU obligations under international treaties and EU law¹⁰, as well as in relation to how they engage in a constructive dialogue with lower domestic EU courts and tribunals¹¹. With specific regard to investment protection, two main issues arose. First, in light of the transformation of the TFEU, a conflict between the European Commission and certain Member States emerged as to whether bilateral investment treaties (BITs) among EU Member States concluded before the Lisbon Treaty should be terminated. Second, certain Member States vigorously opposed the inclusion of discipline concerning FDI and investor-state dispute settlement (ISDS) in FTAs between the EU and third countries. In the following sections, this article will discuss these developments before providing conclusive remarks.

II. “DANCING WITH MYSELF”: *ACHMEA*¹²

On 6 March 2018, The CJEU rendered its preliminary ruling in a case brought by the Government of the Slovak Republic against Achmea BV (Achmea), a Dutch insurance company, before German courts. The story started a few years before. The Netherlands and Czechoslovakia concluded a BIT in 1991, which entered into force the following year. At that time, Czechoslovakia was not an EU Member and the Slovak Republic, its successor in the rights and obligations ensuing under the BIT, only became an EU Member in 2004.

In 2004, the Slovak Republic partially opened its private sickness insurance market, so as to allow foreign private suppliers of insurance services to operate. Achmea was one of the foreign companies that applied and obtained the necessary authorizations, and established a subsidiary in the Slovak Republic. In 2006 and 2007, the Slovak Republic partially amended its laws

¹⁰ Snyder, Francis. 2003. “The gatekeepers: The European courts and WTO law”. *Common Market Law Review* 40, n. 2: 313–67

¹¹ Wahl, Nils and Luca Prete. 2018. “The Gatekeepers of Article 267 TFEU: On Jurisdiction and Admissibility of References for Preliminary Rulings”. *Common Market Law Review* 55, n. 2: 511-48.

¹² This section draws, in part, from Cantore, Carlo M. and Petros C. Mavroidis. 2018. “Another one BITes the dust. The distance between Luxembourg and the world is growing after Achmea”, *EUI Robert Schuman Centre for Advanced Studies – Working Paper 47/2018*. Last accessed on 6 May 2019. http://cadmus.eui.eu/bitstream/handle/1814/59004/RSCAS_2018_47.pdf?sequence=1&isAllowed=y

and prohibited the redistribution of profits generated by private providers in the health insurance market.

Achmea sued the Slovak Republic before an arbitration tribunal, which chose Frankfurt as its seat, as per the applicable United Nations Commission on International Trade Law (UNCITRAL) rules. Therefore, the arbitral proceedings were conducted under German law, which foresees the possibility to submit the arbitral award to judicial review before German courts under certain circumstances.

The arbitral tribunal upheld Achmea's claim and awarded damages for more than 22 million euros. The Slovak Government challenged the award before German courts and asked that the decision be set aside. The Higher Regional Court in Frankfurt dismissed the action and, subsequent to an appeal, the Federal Court of Justice requested the CJEU to issue a preliminary ruling. In particular, the questions submitted by the referring court concerned the compatibility of the arbitration clause contained in the Dutch-Slovak BIT with the TFEU. In other words, the issue before the CJEU concerned the consistency with EU law of a provision in an international agreement between two Member States pursuant to which a foreign investor can sue the host State before an ISDS arbitration tribunal instead of resorting to domestic court proceedings.

The CJEU recalled its established case law according to which international agreements signed by the EU or its Member States cannot alter the allocation of powers and competences laid down in the EU Treaties and, more in general, the “autonomy” of EU law.¹³ As part of the arsenal that the EU legal order can rely on to preserve the autonomy of EU law, Article 344 of the TFEU establishes that EU Member States cannot submit disputes concerning the application or interpretation of EU Treaties to dispute settlement mechanisms that are not explicitly established in the Treaties themselves. The assumption behind this legal construction is that the Treaties are the primary law of the EU and have primacy over the national law of the EU Member States, which in turn have the duty to loyally cooperate with the EU institutions with a view to ensuring that EU law is fully implemented. As the

¹³ See the judgment in Case C-284/16, *Slovak Republic v. Achmea* (Request for a preliminary ruling), para. 32. See also *Opinion 1/91* and *Opinion 2/13*. Lenaerts has defined the notion of “autonomy” of the EU legal order as follows: “[T]he autonomy of EU law is governed by two different, albeit intertwined, dynamics. Negatively, autonomy seeks to define what EU law is not, i.e. it is not ordinary international law. Positively, autonomy seeks to define what EU law is, i.e. an autonomous legal order that has the capacity to operate as a self-sufficient system of norms”. See Lenaerts, Koen. 2019. “The autonomy of European Union Law”. *I Post di Aisdue*, I/2019. Last accessed on 6 May 2019. https://www.aisdue.eu/web/wp-content/uploads/2019/04/001C_Lenaerts.pdf.

CJEU has the monopoly to ensure the consistent interpretation and application of EU law, Article 267 of the TFEU allows the courts of Member States to submit requests for preliminary rulings to the CJEU concerning the interpretation of the Treaties or the validity of acts of the EU institutions. When such courts or tribunals are of last instance, they must submit a request for a preliminary ruling to the CJEU.¹⁴

Not all adjudicating bodies can be a “court or tribunal” of the EU for the purposes of having the right to refer issues for preliminary ruling to the CJEU. Based on established case law, the referring court must be based in a Member State, it must be a “body established by law” that is “permanent”, is vested with “compulsory jurisdiction”, is “independent”, applies “rules of law” and whose procedure is “inter partes”.¹⁵ It follows that a court that is not based in a Member State is under no obligation to refer to the CJEU a question for preliminary ruling. As a result, if a “third” court were to discuss an issue involving interpretation of EU law, the autonomy of the EU legal order would be in danger, as there is no guarantee at all that the “third” court would observe prior CJEU jurisprudence dealing with the same issue.

The CJEU thus examined the content of the Dutch-Slovak BIT and, in particular, Article 8 thereof which includes an arbitration clause, allowing for the establishment of arbitral tribunals to rule on cases concerning the alleged infringement of the BIT.¹⁶ Article 8(6) of the BIT, in particular, provides that arbitrators must take into account the law in force of the parties as well as any other relevant agreements between them. On the one hand, thus, Article 8 specifies that arbitrators would evaluate whether an infringement of the BIT had occurred. On the other hand, the contextual reference to agreements between the states concerned might imply that the arbitral tribunal could interpret or apply EU law in order to solve a matter before it. In fact, EU law is both part of the domestic law of the Slovak Republic and the Netherlands as well as an agreement between the two states.

The CJEU found that the tribunal envisaged in the BIT was not part of the judicial system of the two Member States concerned and, therefore, could not be considered to be a court or tribunal of a Member State for purposes of Article 267 TFEU.¹⁷

The CJEU distinguished between the arbitral tribunal in the Dutch-Slovak BIT and (the relatively few) other mechanisms for the resolution of disputes that had survived its scrutiny before the decision. For instance, the Court had previously ruled that a tribunal common to two or more Member

¹⁴ Case C-284/16, *Slovak Republic v. Achmea*, paras. 37-39.

¹⁵ See Case C-394/11, *Belov v. CHEZ Elektro Balgaria AD*, paras. 39 and ff.

¹⁶ Case C-284/16, *Slovak Republic v. Achmea*, paras. 45 and ff.

¹⁷ Case C-284/16, *Slovak Republic v. Achmea*, para. 49.

States such as the Benelux Court of Justice was not incompatible with the EU treaties.¹⁸ According to the CJEU, whilst the Benelux Court of Justice represents a “step in the proceedings” before the national courts of the three Member States concerned, it is not possible to establish such link between intra-EU BITs and the judiciary of the relevant Member States. As a result, the Benelux Court can submit requests for preliminary rulings, and an arbitral tribunal like the one established under an intra-EU BIT cannot.¹⁹

The CJEU further examined the issue of whether EU courts and tribunals could somehow exercise control over the decisions rendered by an arbitration tribunal such as the one envisaged in the Dutch-Slovak BIT. This question is crucial for two sets of reasons. First, an affirmative answer to this question would have meant that the “controlling” court could ask the CJEU to step in and ensure the uniform interpretation of EU law by means of a preliminary ruling request. Second, it is ironic to note how the matter before the CJEU did originate in a request for a preliminary ruling submitted by a “controlling” tribunal of a Member State. The CJEU was not impressed. The CJEU noted that the decisions of the arbitral tribunal are final. It further noted that the arbitral tribunals can determine their own procedure and choose their seat and the applicable law to the proceedings. The CJEU acknowledged that in the case before it the arbitral tribunal chose Frankfurt as its seat and, as a result, that the German rules on the judicial review of arbitral awards applied to that case. Admittedly, this allowed the Government of the Slovak Republic to bring a case against the decision. However, the BIT did not guarantee that a similar situation would always materialise. Therefore, the CJEU concluded that, in absence of review of the arbitral awards from domestic courts, the arbitral tribunal envisaged in the Dutch-Slovak BIT is not consistent with the EU treaties.²⁰

The CJEU's decision is concluded with the caveat that, in principle, an international agreement establishing a court tasked with the application and interpretation of the rules set forth therein is not necessarily incompatible with EU law. To be accepted, an international agreement must provide guarantees concerning the respects of the autonomy of the EU legal order. The case law cited by the CJEU to support this finding consists of decisions where the CJEU systematically blocked the accession of the EU to international agreements because of aspects relating to the dispute settlement mechanisms laid down therein.²¹

¹⁸ Case C-337/95, *Parfums Christian Dior v. Evora BV*.

¹⁹ Case C-284/16, *Slovak Republic v. Achmea*, paras. 46-49.

²⁰ Case C-284/16, *Slovak Republic v. Achmea*, para. 57.

²¹ *Opinion 1/91* on the EEA Agreement, *Opinion 1/09* on the Unitary Patent Court, and *Opinion 2/13* on the accession of the EU to the European Convention on Human

1. *Interim conclusion on Achmea*

The *Achmea* decision has been met favourably by a growing share of the EU's public opinion that is very critical of investment arbitration and, particularly, of the possibility for corporations to sue regulating states before tribunals where they can nominate one of the sitting judges. Others have argued that, in the aftermath of *Achmea*, “investors in Europe will suffer from uncertainty, higher legal costs, and less legal protection”.²²

The CJEU's decision in *Achmea* did not come as a surprise to many commentators and practitioners. Ever since its Opinion 1/91 on the compatibility of the European Economic Area with EU law, the CJEU has been reluctant to accept the creation of international tribunals that could apply or interpret EU law without guarantees that the CJEU would keep a final word on the uniform interpretation of EU law. Therefore, *Achmea* sounded as the natural consequence of the CJEU's case law. The problem with this approach is that it leads to uncertainty and could have far reaching effects.

The uncertainty derives from the fact that the Court, while routinely holding that the establishment of certain international courts or tribunals would be consistent with Article 344 of the TFEU, had not made clear when that would be the case. Second, although the Court was careful in distinguishing intra EU-BITs from agreements signed by the EU, it was not clear whether the rationale followed in *Achmea* would be transposed in future cases concerning the inclusion of investor-stated dispute settlement clauses in EU FTAs. Commentators were holding their breath until the Court would pronounce itself on the compatibility with EU law of the investment court system (ICS) envisaged in the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. We will turn to this in the subsequent section. Before we do so, it is important to give account of certain developments in the aftermath of the CJEU's decision in *Achmea*.

Twenty-two EU Member States signed a political declaration on 15 January 2019 whereby they announced their decision, *inter alia*, to terminate all intra-EU BITs and to inform investment tribunals that new proceedings should not be initiated and that pending proceedings should be withdrawn.²³ It may take a while, however, before the dust settles. As long as intra-EU BITs are still in force, in fact, they express the automatic consent to

Rights (ECHR). See also Case C-284/16, *Slovak Republic v. Achmea*, paras. 57 and 58.

²² Arp, Björn. 2018. “Slowakische Republik (Slovak Republic) v. Achmea B.V.”. *American Journal of International Law* 112, n. 3: 466-72.

²³ Declaration of the Member States of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.

arbitration by the host states. As a result, intra-EU arbitration proceedings were initiated even after *Achmea*. Arp (2018) reports that in *Masdar Solar & Wind Cooperatief U.A. v. Spain*, the arbitral tribunal found against the host state (Spain) in a dispute concerning claims under the Energy Charter Treaty (ECT). In that context, Spain argued that, following *Achmea*, the dispute resolution clauses of the ECT were not valid. The arbitration tribunal dismissed the objection, ruling that *Achmea* was of no relevance in that context.

III. “DANCE WITH ME, MAKE ME SWAY”: *OPINION 1/17*

The European Commission has devoted substantial energy and resources in the attempt to reform the international arbitration landscape. As part of these efforts, the EU now includes chapters on investor-stated dispute resolution in its FTAs with third parties that follow the investment court system (ICS) approach, promoted by the European Commission since 2015. The main features of the ICS are, *inter alia*: (a) the reaffirmation of the governments' right to regulate in pursuance of legitimate policy objectives; (b) the entrustment of the adjudicative function to a permanent court, composed of a Tribunal of First Instance and an Appeal Tribunal; (c) the judges of these tribunals are appointed for a fixed term (i.e. they are not nominated on an *ad hoc* basis by the parties to the dispute); and (d) the inclusion of rigid rules to avoid conflicts of interest. The CETA is one of the first FTAs where the ICS is featured. The declared aim of the European Commission is to use these examples as building blocks towards the establishment of a multilateral investment court.

Particularly, it was to be seen how the CJEU would have reacted to the possibility for the CETA Tribunals to interpret EU law in the process of settling the disputes before it. In an Opinion issued on 30 April 2019, the CJEU gave the CETA's ICS the green light, and held that it is fully compatible with EU law. We will now summarise the main conclusions of the Court.

1. *Autonomy revisited*

The Court started its analysis with a reaffirmation of the notion of the “autonomy” of the EU legal order (paras. 106 and ff.). The Court then noted that the CETA Tribunals are separated from the EU judicial system, but that does not necessarily affect the autonomy of the EU legal order adversely.²⁴ To impair such autonomy, an international tribunal would need to: (a) have the power to interpret or apply EU law beyond the provisions of the underlying international agreement; and (b) be able to issue awards whose effects

²⁴ *Opinion 1/17*, paras. 114 and 115.

would limit the prerogatives of EU institutions under the EU Treaties.²⁵ According to the Court, none of the above is true for the CETA.

As regards the applicable law, the CJEU found that the CETA should be distinguished from the Dutch-Slovak BIT scrutinized in *Achmea*, because the CETA Tribunals only have the power to interpret and apply the provisions of the CETA, in accordance of the rules and principles of international law applicable between the parties.²⁶ On the contrary, the Court noted that an arbitration tribunal established under the Dutch-Slovak BIT could be called to interpret or apply the domestic law of the parties and EU law.²⁷ The Court made similar considerations to distinguish the CETA's ICS from the Unified Patent Court, which was found to be incompatible with EU law in *Opinion 1/09*. In that occasion, the Court was concerned with the inclusion in the applicable law of the Unified Patent Court of EU law and the national law of the contracting states.²⁸

In the attempt to accommodate the CJEU's concerns, the EU and Canada had included a narrowly framed language as regards the CETA tribunals' consideration of the domestic law of the parties. Article 8.31 of the CETA establishes that a CETA Tribunal, when determining the consistency of a measure with the CETA, may consider domestic law only "as a matter of fact". This clarification is line with long-established public international law doctrines (See *Certain German Interests in Polish Upper Silesia*). Elsewhere, we argued that this clarification would not necessarily constitute a sufficient guarantee for the CJEU. Although considered as "fact", EU law could admittedly still be used and interpreted by an international tribunal placed outside the EU judicial system and with no possibility to file preliminary rulings requests to the judges in Luxembourg.²⁹

The CJEU took a different view. The CJEU emphasized the clarification in Article 8.31.2 that, in interpreting the domestic law of the parties "as a matter of fact", the Tribunal is bound to follow "the prevailing interpretation given to the domestic law by the Courts or authorities of that Party", and that any meaning assigned to the domestic law of any of the parties shall not be binding upon the courts of that Party.³⁰

Quoting from the Court's Opinion:

Those provisions serve no other purpose than to reflect the fact that the CETA Tribunal, when it is called upon to examine the compliance with the

²⁵ *Opinion 1/17*, para. 119.

²⁶ *Opinion 1/17*, para. 122.

²⁷ *Opinion 1/17*, para. 126.

²⁸ *Opinion 1/17*, para. 124 and *Opinion 1/09*, para. 89.

²⁹ Cantore and Mavroidis, 2018.

³⁰ *Opinion 1/17*, para. 130.

CETA of the measure that is challenged by an investor and that has been adopted by the investment host State or by the Union, will inevitably have to undertake, on the basis of the information and arguments presented to it by that investor and by that State or by the Union, an examination of the effect of that measure. That examination may, on occasion, require that the domestic law of the respondent Party be taken into account. However, as is stated unequivocally in Article 8.31.2 of the CETA, that examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law, but consists, on the contrary, of that domestic law being taken into account as a matter of fact, while that Tribunal is, in that regard, obliged to follow the prevailing interpretation given to that domestic law by the courts or authorities of that Party, and those courts and those authorities are not, it may be added, bound by the meaning given to their domestic law by that Tribunal³¹.

Since the CETA Tribunals are only concerned with the provisions of the CETA and stand outside the EU judicial system, the Court saw nothing wrong with the fact that the CETA does not envisage the possibility (or the obligation) for the CETA Tribunals to submit preliminary ruling requests to CJEU.³²

2. *No effects on the operation of EU institutions*

The Court was also satisfied that the right for suing investors to obtain the payment of damages was carefully limited by the provisions of the CETA so as not to call into question the level of protection of public interest chosen by the Parties through democratic processes as well as their right to regulate.³³ According to the Court, this is sufficient to avoid “a situation where, in order to avoid being repeatedly compelled by the CETA Tribunal to pay damages to the claimant investor, the achievement of that level of protection needs to be abandoned by the Union”.³⁴

3. *Equal Treatment*

The Court addressed the circumstance that EU investors would not be given the right to challenge measures of EU law before a CETA Tribunal, a right that is conferred upon Canadian investors. The Court found that the situation does not give rise to problems as regards the principle of equal

³¹ *Opinion 1/17*, para. 131.

³² *Opinion 1/17*, para. 134.

³³ *Opinion 1/17*, paras. 152 and 156.

³⁴ *Opinion 1/17*, para. 149.

treatment, since the same is true for Canadian investors (as opposed to EU investors) in Canada.³⁵

4. *Access to an independent tribunal*

The Court was also satisfied that the CETA did not undermine the right to access an independent and impartial tribunal. The Court first held that, in practice, ISDS might be a privileged avenue only for investors with significant financial resources.³⁶ While the Court expressed its concern in that regard, it further noted that the Commission and the Council made a Statement “on investment protection and the Investment Court System”, in relation to the signature of the CETA (‘Statement No 36’), whereby they committed to ensure the easier access to justice for small and medium sized enterprises and, in general, the most vulnerable users.³⁷ According to the Court, that commitment constitutes sufficient guarantee that the CETA is compatible with the requirement that its Tribunals be accessible.³⁸

5. *Interim conclusion on Opinion 1/17*

As said before, *Opinion 1/17* was not necessarily expected. The CJEU, partially rethinking its prior case law and stretching the differences between the CETA and other international agreements that came under its scrutiny, found a way to reconcile itself with international law. The separation between international law and EU law expressed in the Opinion is a particularly welcome development, as it reinforces the credibility of the EU institutions in their attempt to consolidate and improve the international rules on the protection of investors and ISDS. The decision further contributes to legal certainty, as EU and Canadian investors now know that they can have recourse to these instruments in case they will need in the future.

IV. FINAL REMARKS

One of the most interesting lessons that can be drawn from Prof. Carrozza’s article reproduced in this issue is the idea that the notion of dialogue is intimately connected with the acceptance that renunciation of existing positions and concessions to others could and should be made.³⁹

³⁵ *Opinion 1/17*, paras. 179-181.

³⁶ *Opinion 1/17*, para. 213.

³⁷ *Opinion 1/17*, para. 217.

³⁸ *Opinion 1/17*, para. 219.

³⁹ See Carrozza in this issue.

The CJEU has a unique (and privileged) position in the non-linear evolution of supranational law, because it shares features of both domestic and international courts. In addition, the rules governing its functioning – and specifically, the possibility (or the obligation, depending on the circumstances) for other EU courts and tribunals to refer questions for a preliminary ruling – provide a procedural framework to govern judicial dialogue.

The Court has not engaged in this dialogue consistently. Internally, the Court has not always followed a coherent approach in the selection of the EU courts or tribunals that are entitled submit preliminary ruling requests.⁴⁰ Externally, the Court has routinely found that international agreements providing for a mechanism for the resolution of disputes were incompatible with the EU Treaties, because they would allow non-EU judges to interpret EU law. The Court repeatedly rejected such agreements, based on the idea that the interpretation and application of EU law is a prerogative of EU judges, under the close supervision of the CJEU.

The recent *Opinion 1/17*, whereby the Court concluded that the ICS embedded in the CETA is compatible with the EU treaties, marks a new era in the CJEU's jurisprudence. Although the Court was careful to mark out a line of separation between the CETA and previous international agreements that had come under its scrutiny, *Opinion 1/17* nevertheless accounts for a (partial) *revirement* of prior case law. *Opinion 1/17* shows that is possible to formally distinguish and separate international law from EU law. The provisions of the CETA are international law disciplines, they belong to a different order, and even if the CETA judges were to interpret the domestic law of the parties, they could only do so as a matter of fact and relying on the prevalent interpretation rendered by the relevant domestic courts and tribunals. *Opinion 1/17* allows EU law and international law to recognize each other and to make reciprocal concessions.

By constructively engaging in an open dialogue with other jurisdictions, while at the same time preserving the autonomy of EU law, the CJEU can bolster its contribution to the understanding and evolution of key concepts in international economic law. In light of the unicity of the EU as an experiment of economic integration, this contribution is very much needed. *Opinion 1/17* is, therefore, a positive development.

As a final but equally important point, *Opinion 1/17* is also relevant because it represents a signal to the world that the EU institutions can be trusted as a reliable negotiating partner, and that third countries can sign international agreements like the CETA with the EU without running the risk that the CJEU will eventually block them before they enter into force.

⁴⁰ See Wahl and Prete (2018) for a comprehensive overview of the case law.

*LOOKIN' OUT MY BACKDOOR – THE CJEU
AND THE SELECTIVE ACCEPTANCE
OF INTERNATIONAL TRIBUNALS*

*Lookin' out my backdoor – El TJUE y la aceptación
selectiva de los Tribunales internacionales*

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