CETA Investment Court and EU External Autonomy: Did Opinion 1/17 Strengthen the EU´s Room for Manoeuvre in External Relations?

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CETA Investment Court and EU External Autonomy: Did Opinion 1/17 Strengthen the EU´s Room for Manoeuvre in External Relations?

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Keywords: EU investment treaties, investment arbitration, EU external relations, EU treaty making capacity, constitutional constraints, operation of democratic processes, level of protection of public policy interests

Abstract:

The present contribution analyses the Opinion 1/17 of the CJEU on CETA, which, in a surprisingly uncritical view of conceivable conflicts between the competences of the CETA Investment Tribunal on the one hand and those of the CJEU on the other hand, did not raise any objections. In first reactions, this opinion was welcomed as an extension of the EU's room for manoeuvre in investment protection. The investment court system under CETA, however, is only compatible with EU law to a certain extent, which the Court made clear in the text of the opinion, and the restrictions are likely to confine the leeway for EU external contractual relations. Due to their fundamental importance, these restrictions, derived by the CJEU from the autonomy of the Union legal order form the core subject of this contribution. In what follows, the new emphasis in the CETA opinion on the external autonomy of Union law will be analyzed first (II). Subsequently, the considerations of the CJEU on the delimitation of its competences from those of the CETA Tribunal will be critically examined. The rather superficial analysis of the CJEU in the CETA opinion is in contrast to its approach in earlier decisions as it misjudges problems and therefore only superficially leads to a clear delimitation of competences (III.). An exploration of the last part of the CJEU's autonomy analysis will follow, in which the CJEU tries to respond to the criticism of *regulatory chill* (IV). Here, by referring to the unhindered operation of the EU institutions in accordance with their constitutional framework, the CJEU identifies the new restrictions for investment protection mechanisms just mentioned, which takes back the previous comprehensive affirmation of jurisdiction of the CETA Tribunal in one point and which raises many questions about its concrete significance, consequence, and scope of application.

I. **Introduction**

With the negotiations between the EU and Canada on the conclusion of the CETA, a hitherto little-noticed legal area moved into the attention of the general public, namely the law of bilateral investment treaties, so-called BIT. In its Chapter 8, the CETA contains extensive provisions for the protection of investments of Canadian investors in the EU and vice versa. It provides for both substantive investment protection standards and an investor-state arbitration mechanism in the form of an investment tribunal. This investment tribunal differs significantly from the arbitration mechanism of an ISDS system that has been used in international investment protection law up to now. It has a more judicial structure and also provides for a second instance.[1] Since this investment court (ICS) model was developed by the EU in response to the legitimacy crisis of investment protection law[2] and represents the gold standard for the EU, which serves as template also for other bilateral investment protection agreements of the EU (e.g. with Singapore or Vietnam), the question of its compatibility with EU (constitutional)

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[1] *See* Christian Riffel, The CETA Opinion of the European Court of Justice and its Implications – Not that Selfish After All, *Journal of International Economic Law*, Vol. 22, Issue 3, 2019, pp. 503-521, at p. 504.

[2] Susan D. Frank, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, *Fordham Law Review*, Vol. 73, Issue 4, 2005, pp. 1521-1625; Charles Brower & Stephan Schill, Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?, *Chicago Journal of International Law*, Vol. 9, 2009, pp. 471-498.

law is of utmost importance. This is because investment protection was already highly controversial during the negotiations on CETA, particularly with regard to investor–state dispute settlement (ISDS). Investment protection mechanisms meet various constitutional objections.[3] There were fears of an impairment of the legislator´s room for manoeuvre. Allegedly, the mere possibility that an investor may regard a state measure as an impairment of his investment and thus as an indirect expropriation or as unfair treatment in the sense of an investment protection agreement and therefore, by invoking this, could claim damages before an arbitral tribunal, confines the legislator's decision-making freedom. Hence, a situation could arise in which the state authorities refrain from taking measures that could impede economic activity, for example, for reasons of environmental, consumer or climate protection. This fear is further supported by the fact that the interpretation of investment protection standards by arbitration tribunals is often perceived as quite arbitrary and extremely business-friendly. In legal literature, the resulting reluctance of the legislator is referred to as the so-called chilling effect.[4] Although the empirical situation regarding these negative effects has not been researched very much[5], there are examples, such as the events surrounding the Moorburg coal-fired power plant in Hamburg[6], in respect of which the authorities did not carry out an environmental impact assessment in compatibility with EU law[7], probably also for fear of negative consequences. The criticism of negative consequences of possible actions for compensation for the openness of the democratic process is combined with very fundamental constitutional objections to investor-state dispute settlement, which is regarded as inadmissible special justice for the benefit of multinational companies, in violation of legal equality. Furthermore, there are complaints about deficits in the rule of law with regard to the judicial process, such as judicial independence, transparency of the proceedings, and insufficient legitimation of the arbitrators[8]. In Germany, the criticism has led to a still pending constitutional complaint before the Federal Constitutional Court, in which, inter alia, the indeterminacy of the investment protection standards, namely of indirect expropriation and fair and equitable treatment, are criticized.[9]

In Belgium as well, the decision in the EU Council on the signing and provisional application of CETA in October 2016 was highly controversial. Belgium has therefore linked its approval inter alia with the application for an opinion to the CJEU under Article 218 (11) TFEU. The concerns raised related to the compatibility of the provisions on the Investment Court System

[3] For this discussion in Germany *see* Claus-Dieter Classen, Der EuGH und die Schiedsgerichtsbarkeit in Investitionsschutzabkommen, *Europarecht*, Vol. 47, Issue 6, 2012, pp. 611-627; id., Die Unterwerfung Demokratischer Hoheitsgewalt Unter eine Schiedsgerichtsbarkeit, *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 25, Issue 16, 2014 ,pp. 611-616; id., Die Unterwerfung unter Völkerrechtliche (Schieds-)Gerichte: Kein Verfassungsverstoß!, *Zeitschrift für Europarechtliche Studien*, Vol. 19, Issue 4, 2016, pp. 449-458; Steffen Hindelang, Repellent Forces: The CJEU and Investor-State Dispute Settlement, *Archiv des Völkerrechts*, Vol. 53, Issue 1, 2015, pp. 68-89; Christoph Ohler, Die Vereinbarkeit von Investor-Staat-Schiedsverfahren mit Deutschem und Europäischem Verfassungsrecht, *Juristenzeitung*, Vol. 70, Issue 7, 2015, pp. 337-346; Stephan Schill, Investor-Staat Schiedsverfahren Sind Verfassungskonform, *Recht und Politik*, Vol. 51, Issue 1, 2015, pp. 10-11, at p. 11; id., Investitionsschutz in EU Freihandelsabkommen: Erosion Gesetzgeberischer Gestaltungsmacht?, *Heidelberg Journal of International Law*, Vol. 78, Issue 1, 2018, pp. 33-92; Christian Tietje, Investitionsschutzgerichtsbarkeit in CETA und Anderen Freihandelsabkommen der EU: Völkerrecht als Verfassungsverstoß?, *Zeitschrift für Europarechtliche Studien*, Vol. 19, Issue 4, 2016, pp. 421-432.

[4] Or: "Regulatory Chill", Peter-Tobias Stoll *et al*, *Investitionsschutz und Verfassung*, Mohr Siebeck, Tübingen, 2017, p. 115.

[5] For nuanced view *see* Kyla Tienhaara, "Regulatory Chill and the Threat of Arbitration: A View From Political Science" *in* Chester Brown & Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, Cambridge, 2011, p. 606.

[6] Markus Krajewski, Umweltschutz und Internationales Investitionsschutzrecht am Beispiel der Vattenfall-Klagen und des Transatlantischen Handels- und Investitionsabkommens (TTIP), *Zeitschrift für Umweltrecht*, Vol. 25, Issue 7-8, 2014, pp. 396-403.

[7] Judgement of 26 April 2017, *Case C-142/16, (Commission v Germany)*, ECLI:EU:C:2017:301.

[8] For the latter *see* for example Katrin Groh, Endstation Karlsruhe! – Schiedsgerichtsbarkeit in Freihandelsverträgen, *Zeitschrift für Europarechtliche Studien*, Vol. 19, Issue 4, 2016, pp. 433-448, p. 442.

[9] For the argumentation in the pending constitutional complaint *see* https://www.mehr-demokratie.de/fileadmin/pdf/2016-08-30_CETA-Klage.pdf. The German Federal Constitutional Court (BVerfG) did not comment on this in its decisions on interim relief (BVerfG, Beschl. v. 13.10. 2016 – 2 be 3.16 – BVerfGE 143, 65-101,; BVerfG, Beschl. v. 07.10.2016 – 2 BvR 1444.16 – BVerfGE 144, 1-17).

(ICS) in CETA (Chapter 8, Section F, Article 8.18 et seq.) with EU primary law, including fundamental rights. Specifically, the compatibility with the autonomy of EU law and the related competence of the CJEU to interpret EU law in an authoritative, binding manner was doubted, as was the compatibility with the principle of equality, the right of access to an independent court and the "effet utile" of EU law.[10] On 30 April 2019, the CJEU, sitting in plenary, accepted the compatibility of the ICS with primary EU law.[11] At the latest since the Achmea decision of the CJEU, which rejected the ISDS system in intra-EU BITs[12], the decision had been eagerly awaited.[13]

The present contribution analyses the CETA opinion of the CJEU, which - in comparison to earlier decisions - in a surprisingly uncritical, and - in terms of argumentation and result - quite surprising[14] consideration of conceivable conflicts between the competences of the CETA Tribunal on the one hand and those of the CJEU on the other hand, did not identify any objections against CETA ICS, although the CJEU had been quite hostile to external jurisdiction in the last years.[15] Initial reactions have welcomed this report as an extension of the EU's room for manoeuvre in the area of investment protection. Consequently, the CETA ICS - and thus also plans for a comparatively structured Multilateral Investment Court - are compatible with EU law, albeit with certain conditions which are not made explicit in the operative part of Opinion 1/17 but in its text, and which are likely to restrict the scope for EU external contractual relations to a considerable extent. These restrictions on the autonomy of the Union's legal order, as established by the CJEU, are the central focus of the present contribution.

The CJEU examined the complaints against the ICS in three blocks: First, it addressed the question of compatibility with the autonomy of the EU legal order (paragraphs 106-161), then the alleged violation of the principle of equal treatment (paragraphs 162-188) and finally the compatibility of the ICS with the right of access to an independent court (paragraphs 189-244). What is remarkable about this opinion - apart from the explicite use of constitutional terminology in the area of trade law – are two things. On the one hand, the CETA opinion extends the concept of the autonomy of EU law to include the protection of certain democratic decision-making processes from international jurisdiction. More concretely, the CJEU has protected not so much the processes themselves but rather the political results of the process, as far as the determination of the level of protection of public interests is concerned; this raises the question what this restriction of the EU´s capacity to enter into international agreements and be bound be international law, denoted a fundamental constitutional statement by the President of the CJEU, Koen Lenaerts[16] may mean for other international treaties, in particular EU obligations under WTO law.[17] On the other hand, it follows from the CJEU's examination of

[10] OJ EU 2017 C 369/2. https://diplomatie.belgium.be/de/newsroom/minister_reynders_reicht_antrag_auf_gutachten_zum_ceta_abkommen_ein.

[11] Opinion 1/17 of 30 April 2019, CJEU, *Opinion 1/17*, ECLI:EU:C:2019:341.

[12] Judgement of 6 March 2018, *Case C-284/16, Slowakische Republik v Achmea BV (Achmea)*, ECLI:EU:C:2018:158. GA Wathelet, however, had no objections to the compatibility of intra-EU arbitration mechanisms with EU law, *see* his Opinion in *Case C-284/16, Achmea,* ECLI:EI:C:2017:669. He even regarded such arbitral tribunals as having the right to refer a case to the CJEU under Article 267 TFEU.

[13] *See* Panos Koutrakos, More on Autonomy - Opinion 1/17 (CETA), *European Law Review*, Issue 3, 2019, pp. 293-294.

[14] *See* Marc Bungenberg & Catharine Titi, CETA Opinion – Setting Conditions for the Future of ISDS, 2019, available at https://www.ejiltalk.org/ceta-Gutachten-setting-conditions-for-the-future-of-isds.

[15] This applies both to the EEA Court in its initial form, to the Unified Patent Court and the ECtHR, *see* CJEU Opinions 1/91, 1/09 and 2/13.

[16] Koen Lenaerts, Modernising Trade whilst Safeguarding the EU Constitutional Framework: An Insight Into the Balanced Approach of Gutachten 1/17, 2019, p. 16, available at:https://diplomatie.belgium.be/sites/default/files/downloads/presentation_lenaerts_Gutachten_1_17.pdf.

[17] *According to* Riffel 2019, p. 519, as a consequence of the CETA Opinion, a necessity test in the narrower sense under WTO law (as required by Article XX GATT, Article XIV GATS) must now be regarded as in violation of EU law. *Similarly*, the criticism of Patricia Sarah Stöbener de Mora & Stephan Wernicke, Riskante Vorgaben für Investitionsschutz und Freihandel – Das CETA-Gutachten des EuGH, *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 30, 2019, pp. 970, at p. 973, which criticize a contradiction between the leeway parliaments have in a democracy with regard to their legislation, on the one hand,

fundamental rights that the fundamental rights of the EU Charter on Fundamental Rights (FRC) also clearly extend to external action.[18] The CJEU takes two concrete requirements from Art 47 FRC. On the one hand, a kind of legal aid for small and medium-sized enterprises is to be established until CETA enters into force, and on the other hand, no retroactive interpretative decisions are to be issued to safeguard the independence of the CETA Tribunal.[19]

Due to their fundamental importance for the international treaty making capacity of the EU, this article focuses on the autonomy argumentation of the CJEU in the CETA opinion, while the fundamental rights issues just mentioned are reserved for a different analysis. In what follows, the new accentuation of the external autonomy of EU law in the CETA opinion is analyzed (II). Subsequently, the deliberations of the CJEU on the delimitation of its competences from those of the CETA Tribunal are critically examined. The rather superficial analysis of the CJEU which can be observed in this context is in contrast to the approach of the CJEU in earlier decisions, misjudges problems and therefore only apparently leads to a clear delimitation of competences by limiting the CETA Tribunal to the interpretation and application of the CETA only (III.). This is followed by a consideration of the last part of the CJEU's autonomy analysis, in which it turns to the criticism of regulatory chill (IV). Here, by referring to the unhindered function of the EU institutions in accordance with their constitutional framework, the CJEU identifies the new barrier for investment protection mechanisms just mentioned, which takes bac the previous affirmation of comprehensive competences of the CETA Tribunal for the CETA in one point and which, in addition, raises many questions about their concrete significance, consequence, and scope of application. This barrier considerably limits the extension of the EU's competence granted by the CJEU to act under international law.

II. The autonomy of EU law as a yardstick: the CJEU on new paths

A key question for the compatibility of the ICS with EU primary law is the impact of the jurisdiction of an international court on the EU legal order. In this respect it is an issue of the autonomy of EU law, i.e. the fundamental autonomy and independence of EU law in its development and unfolding of law; the CJEU has always claimed this autonomy both internally with respect to the national constitutional law of the Member States and externally with respect to international law.[20] The CJEU has developed the autonomy of EU law in its decisions on international courts into a core yardstick for assessing their jurisdiction´s compatibility with the legal order of the EU, most clearly in Opinion 2/13 on the Draft Accession Agreement to the ECHR.[21] The fact that the autonomy was particularly important there and that the CJEU was expansive in its conceptualization had a primary legal basis in Protocol No. 8 on accession to the ECHR, but the decision went far beyond that. The autonomy of EU law had already been used previously as a yardstick for the assessment of the jurisdiction of international courts, starting with the EEA Court, although there the CJEU had essentially limited its deliberations on the autonomy to its relevance for the constitutional order of the EC.[22] The CJEU was primarily concerned with preserving its own ultimate responsibility for the interpretation and

and their capacity to enter into international legal obligations, on the other hand. Such statements neglect the differences between WTO dispute settlement and CETA ICS. More on this below.

[18] On this externalization *see* Heiko Sauer, Europarechtliche Schranken Internationaler Gerichte, *Juristenzeitung*, Vol. 74, Issue 19, 2019, pp. 925-935, at p.928f.

[19] *See* CJEU, *Opinion 1/17*, paras. 221, 237.

[20] *See* Judgement of 5 February 1963, *Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1, para. 12; Judgment of 15 July 1964, *Case 6/64, Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66. For more on the external autonomy *see* Loic Azoulai, "Structural Principles in EU Law: Internal and External", *in* Marise Cremona (ed.), *Structural Principles in EU External Relations Law*, Hart Publishing, Oxford, 2018, p. 31.

[21] Opinion 2/13 of 18 December 2018, CJEU, *Opinion 2/13*, ECLI:EU:C:2014:2454, para. 158.

[22] Opinion 1/91 of 14 December 1991, CJEU, *Opinion 1/91, EEA I*, ECLI:EU:C: 1991:490, para. 35.

application of EU law.[23] In the CETA opinion, the autonomy of EU law also in relation to international law now refers to the "essential characteristics of the European Union and its law", which the CJEU identifies as being an independent source of law, namely the Treaties, characterized “by its primacy over the laws of the Member States, and by direct effect of a whole series of provisions that are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States” which the CJEU refers to as "a constitutional framework” in its own right encompassing "founding values set out in Article 2 … , the general principles of EU law, the provisions of the Charter, and the provisions of the EU and FEU Treaties, which include, inter alia, rules on the conferral and division of powers, rules governing how the EU institutions and its judicial system are to operate, and fundamental rules in specific areas, structured in such a way as to contribute to the implementation of the process of integration described in the second paragraph of Article 1 TEU”.[24] Thus, autonomy of EU law now, going far beyond safeguarding the jurisdiction of the CJEU, includes the central elements of the legal effects of EU law in and between the Member States, which are in turn judged by the CJEU[25], but also fundamental procedural and substantive rules of EU primary law of constitutional dignity, such as the protection of fundamental rights, the institutional order and the allocation of competences between the institutions.[26] In the CETA opinion this definition of EU´s autonomy is expanded: The CJEU not only examines whether the jurisdiction of the CETA Tribunal interferes with the jurisdiction of the CJEU to decide on the validity and interpretation of EU law, but also discusses whether the jurisdiction of the CETA Tribunal affects the competence and function of the democratic legislator of the EU according to the EU constitutional framework (paragraphs 137-160). Thus, a violation of EU autonomy also occurs if the CETA Tribunal influences the EU legislator's exercise of competence. The unimpaired function of the other EU institutions thus becomes another yardstick for the legality of international courts´ jurisdiction. In the CETA opinion, the CJEU for the first time declares the protection of EU political processes (although, as will be shown, limited to the definition of the level of protection) from the effects of international court rulings to be an element of the autonomy of EU law. Thus the CJEU goes beyond the self-referential standards of past decisions in determining what autonomy of the EU legal order actually implies.[27] The opinion, however, establishes new barriers, within the concept of autonomy, to the participation of the EU in international law as far as treaties establishing international courts are concerned. What exactly the protection of democratic decision-making actually means, however, remains quite unclear, even on closer inspection of the CJEU's opinion. Before going into this in more detail under IV., the first, more traditional part of the autonomy analysis related to the CJEU´s jurisdictional competences must be analyzed.

[23] *See* CJEU, *Opinion 1/91, EEA I*, para. 46.

[24] For the quotes *see* CJEU, *Opinion 1/17*, paras. 109-110.

[25] The CJEU emphasizes its particular importance for safeguarding these special characteristics, *Opinion 1/17*, para. 111.

[26] Also the function of the national courts as Union courts is one of these essential elements of the constitutional order of the EU, *see* Opinion 1/09 of 8 March 2011,CJEU, *Opinion 1/09, Unified Patent Court*, ECLI:EU:C:2011:123, , paras. 68 et seq., CJEU, *Opinion 2/13*, para. 175. This is the corollary of the CJEU´s competence to secure its exclusive jurisdiction for preliminary rulings under Article 267 TFEU and thus again serves the CJEU. The role of the national courts was wrongly ignored in the CETA opinion; *see* below.

[27] *See also* Koutrakos, More on Autonomy- Opinion 1/17. For criticism of the self-referential attitude of the CJEU in previous decisions on international courts, which in effect denies legal dialogue, *see* Bruno de Witte, “A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the EU, *in* Marise Cremona & Anne Thies (eds.), *The European Court of Justice and External Relations Law*, Hart Publishing, Oxford, 2014, pp. 32, at p.46, id., The Relative Autonomy of the European Union's Fundamental Rights Regime, *Nordic Journal of International Law*, Vol. 88, Issue 1, 2019, pp. 65-85, at p. 71; Jed Odermatt, “The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?”, *in* Marise Cremona (ed.), *Structural Principles in EU External Relations Law*, Hart Publishing, Oxford, 2018, pp. 291-316, at p. 316; Steve Peers, The EU's Accession to the ECHR: The Dream Becomes a Nightmare, *German Law Journal*, Vol. 16, Issue 1, 2015, pp. 213-222; Riffel 2019, p. 506; Eleanor Spaventa, A Very Fearful Court?, *Maastricht Journal of European and Comparative Law*, Vol. 22, Issue 1, 2015, pp. 35-56, at p. 47.

III. Preserving the CJEU's jurisdiction to interpret EU law: the Court´s cursory examination

1. Starting point: CETA to the CETA Tribunal

It is settled case-law that the EU's participation in international treaties establishing their own international courts is as such in conformity with the EU Treaties.[28] The CJEU's definitive jurisdiction over EU law is preserved if an international court has jurisdiction only to interpret the specific agreement, especially as this is done according to interpretive rules of international law, and not of EU law, and if this Court´s activities do not affect the interpretation of EU law.[29] The CJEU emphasizes that the exclusive jurisdiction of the CJEU and of national courts to interpret EU law, as laid down in Article 19 TEU, does not conflict with this. Although the agreements concluded by the EU form part of EU law[30] and are thus also subject to Article 19 TEU, the CJEU considers that its jurisdiction insofar does not take precedence over the jurisdiction of the international courts established by international treaties.[31] The CJEU does not give any reasons for this statement. This statement is probably caused by the distinction between jurisdiction over EU, internal or international law; the CJEU cannot claim a monopoly on the interpretation of international agreements of the EU as such.[32] It has the task of interpreting the EU's international agreements internally - and only with internal effect - and of assessing their effects within the EU, but this leaves open the question as to what significance an interpretation of a treaty by the international court has for the application of this treaty in the EU. The CJEU also stresses that the EU must be capable of concluding agreements which establish an autonomous Court independent from national courts in order to maintain its competence to enter into international relations.[33] The CJEU, however, for the first time restrains the EU´s capacity insofar by requiring that these courts must not be empowered to issue judgments that prevent EU institutions from functioning in accordance with the constitutional framework of EU law.[34]

2. The Court´s cursory analysis of the CETA provisions on jurisdiction

When examining whether the CETA provisions ensure that the CETA Tribunal only has jurisdiction to interpret CETA, the CJEU takes a purely formal, textual, and rather uncritical approach. Indeed, the CJEU rightly emphasizes the provisions of Article 8.18 and Article 8.31 (1) and (2) CETA, which attribute the interpretation of CETA to the CETA ICS and explicitly exclude the application of national law of a contracting party as law from its jurisdiction. In this respect, the CJEU also rightly highlights the factual differences between the jurisdiction under CETA and the jurisdictions the CJEU had to assess in its decisions on the Unified Patent Court and on the Intra-EU BITs in the Achmea case.[35] However, Article 8.31 (2) CETA does allow an interpretation of national law by the CETA ICS when it states that it is not binding on national courts. The CJEU does not consider this unclear ("fuzzy"[36]) provision to be relevant because it allegedly only deals with the use of national law as fact.[37] This distinction between the application of national law as fact and its interpretation as law is not further discussed by

[28] CJEU, *Opinion 1/91, EEA I,* para. 40.

[29] CJEU, *Opinion 1/91, EEA I,* paras. 49 et seq.; CJEU, *Opinion 1/09, Unified Patent Court,* paras. 73 et seq.

[30] *See* Judgment of 30 April 1974, *Case 181/73, R. & V. Haegeman v Belgian State,* ECLI:EU:C:1974:41, paras. 5f.

[31] CJEU, *Opinion 1/17*, para. 116.

[32] Riffel 2019, p. 513.

[33] CJEU, *Opinion 1/17*, para. 117.

[34] CJEU, *Opinion 1/17*, paras. 118f..

[35] CJEU, *Opinion 1/17*, paras. 120-126.

[36] Giulia Claudia Leonelli, CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test, *Legal Issues of Economic Integration*, Vol. 47, Issue 1, 2020, 43-70, at p. 50.

[37] CJEU, *Opinion 1/17*, para. 131.

the CJEU as if it were easy to apply and generally accepted, which it is not.[38] Of course, it is the task of an investment tribunal to examine national measures for compliance with the protection standards for foreign investments enshrined in the international treaty; whether these measures are legal under national law is largely irrelevant for the examination by the tribunal. However, the exact determination of the national measure and the assessment whether it is in conformity with the protection standards may require a more detailed examination of the content and effect of national law and thus may lead to its interpretation by the tribunal. The Advocate General in his opinion on CETA recognized this, but did not assess it as a problem because of the lack of binding force.[39] Both the CJEU and the AG fail to see that the interpretation carried out by the CETA Tribunal is the basis for its judgment on damages, which is absolutely and irrevocably binding on the national authorities and courts in the context of its enforcement under Article 54 of the ICSID Convention.

The CJEU also regards the provision in Art. 8.21 CETA on the designation of the correct defendant as uncritical. For the CJEU it merely states the competence of the EU to designate whether a claim should be brought against the EU or a Member State.[40] Indeed, the EU is given the opportunity under Article 8.21(3) CETA to determine the correct defendant, so that - if this possibility is used - the CJEU's jurisdiction over the allocation of competences between the EU and the Member States is preserved. However, Art. 8.21(4) CETA determines what happens if the EU does not make such a designation within 50 days: In that case, the determination of the defendant will depend on whether the measure is imputed to a Member State or the EU which to determine is up to the plaintiff company. This determination can then neither be questioned by the CETA ICS nor by the EU or the Member States, cf. Art. 8.21 (5-7) CETA. Thus, the determination of the correct defendant does not fall within the jurisdiction of the CETA Tribunal, but in the absence of a designation by the EU, the choice of the plaintiff is binding and is thus taken as a basis by the CETA Tribunal, without the CJEU being able to correct it.

3. Constellations not considered by the CJEU

In the absence of pertinent complaints by Belgium, the CJEU did not address further problem constellations, although a comprehensive legal analysis is certainly the task of the court.

(a) Interpretation of reservations

CETA contains definitions and reservations that refer to EU secondary legislation.[41] Assessing the compatibility of EU or Member State measures falling within the scope of the reservations with the CETA investment protection standards will require the CETA Tribunal to determine their scope. Insofar as the scope of the EU's reservations in Annexes I and II to the CETA is determined by reference to existing EU secondary law, it is inevitable that, in order to determine the content of a measure when examining it under CETA standards, the provisions and scope of the relevant secondary law will have to be considered, which may lead to its interpretation by the CETA Tribunal. This differs from the situation in which EU law, as contested measure, is examined for its compatibility with the CETA investment protection standards. While in the latter case EU law is the object of the examination, in the former case EU law itself is the yardstick for the CETA Tribunals examination as the EU reservations in CETA determine the

[38] *See* Hindelang2015, pp.76 ff.; Leonelli 2020, pp. 55f. The assessment required by Article 8.31 (2) CETA as to whether the CETA Tribunal follows the prevailing interpretation of national law, is less a question of fact rather than of interpretation.

[39] Opinion of Advocate General Bot delivered on 29 January 2019, *GA Yves Bot in Opinion 1/17*, ECLI:EU:C:2019:72, paras. 136, 142 The problem that the CETA Tribunal then determines the content of the EU act in a decisive manner as this determination is binding and unalterable in the investment protection trial, is also ignored by *GA Yves Bot in Opinion 1/17,* para. 143.

[40] CJEU, *Opinion 1/17*, para. 132.

[41] *See* e.g. Article 1 of the Protocol on Mutual Recognition of the Results of Conformity Assessment, OJ EU 2017 L 11/567 regarding the notion of in-house body, or Annex I on Reservations for Existing Measures in which the EU in several instances refers to specific EU legislation, OJ EU 2017 L 11/722 et seq. The same applies to Annex II regarding reservations for future measures, OJ EU 2017 L 11/920 et seq.

scope of exception. The treatment of EU law by the CETA Tribunal as a mere fact hardly seems possible in the latter case. Since the CETA Tribunal also has no right to refer for a preliminary ruling by the CJEU[42], the question remains open as to how the exact scope of the EU reservations can be determined by the CETA Tribunal, if it had no power of interpretation. For the examination of whether an investor was treated in a manner incompatible with the CETA standards, it is important to clarify whether the EU is entitled to an exception in this respect by virtue of the reservation. For, if so, the obligations triggering liability according to Article 8.18 CETA in connection with Section C and D of Chapter 8 CETA are not applicable due to Article 8.15 CETA.

(b) Function of Article 267 TFEU and role of national courts

As noted above, in previous decisions the safeguarding of the function of the preliminary ruling procedure under Article 267 TFEU and of the role of national courts has been an important focus of the examination of the jurisdiction of international courts in light of EU autonomy. In the CETA opinion, the CJEU does not address this issue, although there was reason to do so. Also with regard to the CETA Tribunal, the repercussions of the ICS on the ability of national courts to submit references for a preliminary ruling to the CJEU must be critically examined, as the CJEU had done with regard to the Unified Patent Court[43] or with regard to the accession to the ECHR.[44] For, the initiation of proceedings before the CETA Tribunal presupposes that the plaintiff terminates or waives national proceedings (see Art. 8.22 (1) f), g) CETA), either of which deprives national courts of the possibility to clarify questions of EU law by means of a referral; termination of national proceedings leads to a termination of an already pending referral before the CJEU.[45] By raising a claim before the CETA Tribunal, the plaintiff is thus in a position to prevent a decision by the CJEU or of a national court which could eliminate or confine the disputed measure, or which could define the facts to which the CETA Tribunal is bound (it must adopt the Union act in the interpretation given to it by the EU courts, see Art. 8.31 (2) CETA). Here, the CJEU would certainly have had reason to derive requirements from the restriction on jurisdiction enshrined in Art. 8.31 CETA as to how the interaction with national courts is to be handled by the plaintiff. The CJEU could have shown limits to Article 8.22 CETA that gives the plaintiff considerable leeway with regard to the relationship with national courts. But the CJEU failed to do so in the CETA opinion. Instead, the opinion might aggravate the danger for the uniform interpretation and application of EU that is rooted in the fact that the CETA Tribunal itself, in the absence of an opinion of the CJEU, interprets the EU legal situation in a certain way and, on this basis, identifies unfair or expropriating treatment of a Canadian investor in the EU, and awards compensation, even though the CJEU might later be given the opportunity in a different proceeding to adopt a different interpretation of Union law, which could remove the factual basis for the finding of unfair treatment or expropriation by the CETA Tribunal.[46] In its opinion on the Patent Court, the CJEU had also requested that the jurisdiction of international courts must not "affect the powers of the courts and tribunals of Member States in relation to the interpretation and application of European Union law, nor the power, or indeed the obligation, of those courts and tribunals to request a preliminary ruling from the Court of Justice and the power of the Court to reply".[47] Nevertheless,

[42] So explicitly CJEU, *Opinion 1/17*, para. 134.

[43] CJEU, *Opinion 1/09, Unified Patent Court*, para. 80. Admittedly, the jurisdiction of the Patent Court to interpret relevant Union law was intended to be exclusive (*see* Riffel 2019, p. 512), which is not the case with the CETA Tribunal.

[44] *See* CJEU, *Opinion 2/13*, paras. 236 et seq. The CJEU raised concerns insofar even though the Draft Accession Agreement to the ECHR provided for a preliminary referral mechanism to the CJEU, which is completely absent in CETA.

[45] *See* para. 24 of the CJEU´s Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings, OJ EU 2018 C 257/1.

[46] For a case scenario insofar *see* Leonelli 2020, pp. 59-61.

[47] CJEU, *Opinion 1/09, Unified Patent Court*, para 77; *see also GA Yves Bot in Opinion 1/17*, para. 69.

the Advocate General neither does identify any problems here; instead he assumes that the fact that the CETA Tribunal is outside national jurisdiction perfectly corresponded to the lack of direct effect of CETA.[48] This approach fails to understand that demanding respect for the jurisdiction of national courts, as is submitted here, has nothing to do with them being able to interpret CETA, but with their (and the CJEU´s) jurisdiction to interpret the EU measures in dispute before the CETA ICS.

4. Conclusion

By its rather uncritical and incomplete consideration of the CETA provisions on the jurisdiction of the CETA Tribunal, the CJEU enables the EU to continue to participate in investment protection mechanisms establishing investment courts having exclusive definitive jurisdiction[49], and to advance the project of a multilateral investment court, provided that the jurisdiction of the investment courts is limited to the interpretation and application of the respective treaty, and not EU law. The latter requirement must always be explicitly agreed upon by the EU and its treaty partners because of Article 42 (2) ICSID (according to which the national law of the Contracting States is the applicable law for investment arbitration[50]).[51] The CJEU was obviously concerned to keep the EU's external policy leeway open with regard to establishing international courts, even though the EU only has shared competence with regard to investment courts.[52] This attitude of the CJEU is in clear contrast to the extremely critical, self-referential examination of the possible effects of arbitration mechanisms under investment protection law on EU law in Achmea[53] and of the fundamental rights jurisprudence of the ECtHR on the protection of fundamental rights in the EU following the accession of the EU to the ECHR in the Accession to the ECHR opinion.[54] What the CJEU was rather too critical at that time, it now, in the CETA opinion, is too uncritical, as it confines itself to a purely formal, text-based analysis without examining the effects of the CETA ICS in greater depth.[55]

IV. Protecting democratic decision-making processes, or political determinations of levels of protection?

1. A new autonomy postulate

For the CJEU, respecting the autonomy of the EU includes, for the first time, the stipulation that the jurisdiction of international courts must not prevent EU institutions from functioning in accordance with the EU constitutional framework.[56] Basically, one can agree with this postulate, since the protection of one's own constitutional foundations may also be maintained when international agreements are concluded (see Article 46 of the Vienna Convention on the Law of Treaties, which permits the invocation of a manifest violation of national law of fundamental importance); one must grant this to the EU just as much as to a nation state.[57]

[48] *GA Yves Bot in Opinion 1/17* para. 94; *see also* id. paras. 167 et seq.

[49] *See* in this respect CJEU, *Opinion 1/17*, para. 135.

[50] In general international law, this is quite different, *see* PCIJ, Reports 1926, A, p. 19.

[51] CJEU, *Opinion 1/17*, para. 117, *see also GA Yves Bot in Opinion 1/17*paras. 77 et seq.

[52] Opinion 2/15 of 16 May 2017, ECLI:EU:C:2017:376, paras. 292f. and Judgement of 5 December 2017, *Case C-600/14*, ECLI:EU:C:2017:935, paras. 66ff., where the CJEU caused some uncertainty as to the nature of EU external competences (exclusively or still shared?) in the case of shared internal competences.

[53] *Case C-284/16, Achmea* paras. 50 et seq.

[54] CJEU, *Opinion 2/13,* paras. 187 et seq. For criticism of the different approaches *see also* Panos Koutrakos, "The Anatomy of Autonomy: Themes and Perspectives on an Elusive Principle", *in* ECB (ed.), *Building Bridges: Central Banking Law in an Interconnected World,* 2019, pp. 90 -103, at pp. 96, 98.

[55] *See also* Leonelli 2020, pp.44, 48ff.

[56] CJEU, *Opinion 1/17*, para. 119.

[57] Sauer 2019, p. 932.

However, in the CETA opinion, the CJEU goes far beyond the protection of constitutional rules and even the substance of the constitution. The CJEU in this respect took issue with the competence of the CETA Tribunal (also) to review EU measures of general application as it could lead to a situation in which the Tribunal makes the level of protection of a public interest as defined by the EU legislator the subject of a review, instead of limiting itself to assessing whether the treatment of an investor meets the CETA investment protection standards.[58] Although the CJEU had clarified before that the CETA Tribunal may neither annul an EU act nor demand its conformity with the investment protection standards, but is limited to a mere award of compensation for damages[59], the CJEU recognizes a problem in that the EU would be forced to stop seeking this level of protection by repeated[60] awards.[61] The CJEU holds that the Union's autonomous functioning within its constitutional framework would be impaired if examinations by international courts of a level of protection set by the EU were to lead to the EU having to amend or repeal a rule.[62] The justification given for this refers to the fact that it is only the CJEU (and no other court) that is competent to review the level of protection against the EU's primary law requirements.[63] With this argumentation, the CJEU does not leave it at the purely formal consideration, according to which the CETA Tribunal may not judge on the level of protection or generally on the legality of an EU measure; instead, the CJEU includes the effects of judgments on claims for compensation on the EU legislator in the sense of a "regulatory chill". The CJEU assesses the *de facto* pressure for change on the legislator as a danger to the functioning of the EU constitutional order.

One may wonder why the CETA Tribunal should have reason to deal with the level of protection defined by an EU act, as its competence is limited to the examination of the investment protection standards enshrined in CETA Chapter 8, Sections C and D. Its task is (only) to examine whether the contested measure constitutes unfair treatment or unlawful expropriation or discrimination. However, CETA contains some provisions which uphold the national right to regulate: the exception to the prohibition of discrimination according to Art. 28.3 para. 2 CETA, the affirmation of national regulatory sovereignty in Art. 8.9 CETA, bullet point 1 and 2 of the General Interpretative Instrument, and No. 3 of Annex 8-A on the definition of the notion of indirect expropriation. These provisions stipulate – generally speaking - that it does not constitute a violation of investment protection standards if a Contracting Party takes measures which pursue legitimate objectives; in some cases, the additional requirement of the necessity or of the non-discriminatory character of the measure must be respected. These rules serve as a justification for otherwise incompatible measures or as a guideline for the interpretation of investment protection standards; they must therefore be observed and taken into account by the CETA Tribunal when applying and interpreting the investment protection standards. From these rules, the CJEU, “reading those provisions together"[64], draws the conclusion that “the discretionary powers of the CETA Tribunal and Appellate Tribunal do not extend to permitting them to call into question the level of protection of public interest determined by the Union following a democratic process.”[65] The CJEU also held “that … the CETA Tribunal has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established …and, on that basis, to order the Union to pay

[58] CJEU, *Opinion 1/17*, paras. 143, 148.

[59] CJEU, *Opinion 1/17*, para. 144.

[60] This wording has led to considerations that a one-time award of damages could not yet be a problem. What speaks against such an understanding of the CJEU, however, is the fact that in the following paragraphs of the opinion the frequency of awards does not play a role in the CJEU´s argument. The CJEU formulates its conclusions on the lack of jurisdiction of the CETA Tribunal to assess levels of protection in absolute terms.

[61] CJEU, *Opinion 1/17*, para. 149.

[62] CJEU, *Opinion 1/17*, para. 150.

[63] CJEU, *Opinion 1/17*, para. 151.

[64] CJEU, *Opinion 1/17*, paras. 152, 154-155, 157.

[65] CJEU, *Opinion 1/17*, para. 156.

damages.[66] In conclusion, the CJEU states that the contracting parties have limited the scope of the investment protection standards, taking care to exclude the power of the CETA ICS to challenge democratic decisions on the levels of protection.[67]

2. Critical analysis of the CJEU´s argumentation

It is important to present this sequence of reasoning of the CJEU in such detail because the statements raise a number of questions and also invite misunderstandings, such as the misunderstanding that the CJEU has rejected any external control over EU acts. First of all, it should be noted that the CJEU determines the scope of jurisdiction of the CETA Tribunal on the basis of the relevant provisions in the CETA. Thus, it mainly interprets an international treaty and restricts the jurisdiction of the CETA Tribunal to examine contested EU measures in one respect, namely with regard to the EU's determination of levels of protection. However, the CJEU dresses this in a language of protection of constitutional institutions. If the CJEU, in accordance with the heading to paragraphs 137 ff of the CETA opinion, had been concerned with the function of the constitutional organs of the EU in accordance with their competences, it would have had to identify dangers to their function. However, the fact that an international court examines a national measure cannot immediately and without further ado be seen as a danger to the constitutional functioning of the EU legislator. To identify such a danger requires further and deeper argumentation and analyses, which the CJEU does not provide.

The legislator is not automatically endangered in its function if one of its decisions is reviewed by a court (even an international one) established with its consent. The restriction of national leeway through international legal ties is not a new process, nor does it meet with democratic objections *a priori*. Entering into binding treaty obligations is an expression of democratic self-determination. The fact that international obligations are more difficult to reverse than that of a national law, does not oppose.[68] Therefore, any influence on national (or EU) laws that results from an international agreement that has been approved by the competent parliament can, in principle, be considered as legitimate. The same applies to an external judicial control of legislation, which the legislator has agreed to. Binding the own sovereignty (and the autonomy of Union law is the variety of the EU "sovereignty"[69]) - including that of the legislator - is a necessary, almost phenotypical consequence of entering into international treaties; the ability and willingness to do so is a prerequisite for the conclusion of international treaties and for the participation in contemporary international law-making, which is characterized by a proliferation of international courts, not least in an effort to promote the rule of law in international relations. The democratically legitimate legislator may certainly confine the autonomy of its legal system, as long as there are no constitutional obstacles. The function of the legislator is not affected by this – in contrast to what the CJEU insinuates in paragraphs 148 et seq of the CETA opinion, even though the CJEU shares the starting point that the legislator is capable of harmonizing rules by entering into a treaty.[70]

WTO law, for example, contains numerous disciplines that limit the national design of foreign trade law and which were subject to an (until recently) effective WTO jurisprudence. Should this now be inadmissible? If the CJEU's statement on the protection of legislative protection levels against international court´s jurisdiction (or: against restrictions under

[66] CJEU, *Opinion 1/17*, para. 153.

[67] CJEU, *Opinion 1/17*, para. 160: "Tribunals have no jurisdiction to call into question the choices democratically made within a Party relating to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights."

[68] For further details *see* Stoll *et al* 2017, pp. 118 ff.

[69] *See* Christina Eckes, The Autonomy of the EU legal Order, *Europe and the World: A Law Review*, Vol. 4; Issue 1, 2020, pp. 1- 19, at pp. 8ff.

[70] *Cf.* CJEU, *Opinion 1/17*, para. 148 "without prejudice to a situation where the Parties have agreed, within the framework of the CETA, to harmonise their legislation".

international law generally), derived from the protection of institutional democratic processes, were to be understood in such a general way, it would likely undermine any competence of the EU to enter into international legal obligations, and would also have to negate the leeway of the legislator to decide to restrict its autonomy. Certainly, the legislator's capacity for self-restraint through entering into international treaties is subject to constitutional limits. However, the CJEU does not discuss these in its opinion. According to the interpretation of the CJEU, the legislature has in any case not subjected itself to external control as far as the levels of protection of public interests are concerned.

With regard to CETA, the CJEU is concerned with the protection of certain legislative decisions. It is not about the protection against dangers for the constitutional institutions and their decision-making processes, but about the protection of decisions taken regarding the level of protection. The two are to be separated. Why and to what extent the CJEU wants to protect secondary legislation on levels of protection as an expression of the EU's autonomy against international obligations is not really clear. For justifying the protection of the level of protection adopted by the EU legislator against international obligations, the CJEU merely refers to the function of the EU institutions according to their framework.

One could therefore consider taking as a justification the protection of democracy in the EU, which assigns essential decisions solely to the legislator (cf. Article 290 (2) sentence 2 TFEU); however, this is not the approach of the CJEU. For the CJEU, the protection of occupational welfare, food safety, environmental protection or plant protection, for example, is just as important as that of fundamental rights[71]; for a constitutional argumentation, this is a stunning, even treacherous equalization. It is reasonable to assume that the CJEU was ultimately concerned with safeguarding its own ultimate responsibility for monitoring EU legislation with regard to the definition of protection levels.[72] For, the CJEU assigns to itself the power to examine whether the level of protection of public interests "inter alia" complies with EU primary law.[73] The wording "inter alia" leaves room for the possibility that international law, insofar as part of the *acquis communautaire*, is also one of the control standards to be examined exclusively by the CJEU. Interestingly, the CJEU again bases this on Article 19 TFEU[74], although it had previously stated that this provision does not take precedence over the jurisdiction of international courts (see above).

Article 216(2) TFEU is also not a suitable justification, to the contrary. As agreements concluded by the EU take precedence over secondary law, according to the case law of the CJEU (see also Article 216 (2) TFEU), the protection of secondary law against obligations resulting from international agreements is in need of justification. The yardstick for controlling the legality of international agreements of the EU is primary EU law, not secondary law and thus neither the level of protection laid down therein. Secondary law therefore cannot be used as a yardstick for assessing the legality of international treaties (to be) entered into by the EU (see also Article 218 (11) TFEU).

Even though the reasoning of the CJEU is not convincing, it is nevertheless correct to confine the scope of the jurisdiction of the CETA Tribunal because of the protection of the right to regulate in the CETA. Those who allow the control of legislative decisions by international courts in principle and with good reason (for what is the profession of international courts other than the control and containment of national measures?) will not immediately affirm that every international court does have this jurisdiction at all or in full. The CJEU in its CETA opinion

[71] CJEU, *Opinion 1/17*, para. 160.

[72] On EU autonomy as a rhetorical shield for the protection of the competences of the CJEU *see* Bruno de Witte, European Union Law: How Autonomous is its Legal Order?, *Zeitschrift für Öffentliches Recht*, Vol. 65, Issue 1, 2010, pp. 141-155, at p. 150.

[73] CJEU, *Opinion 1/17*, para. 151.

[74] *See again* CJEU, *Opinion 1/17*, para. 151.

derived from an interpretation of CETA provisions that the CETA Tribunal does not have this competence only insofar as the determination of the level of protection is concerned.[75] Indeed, investment protection standards do not directly deal with disciplining national regulation. Indirect effects nevertheless exist. Investment protection provisions providing for an obligation to pay compensation in the case of indirect expropriation or unfair treatment of foreign investors, lead to claims for compensation before an arbitral tribunal, because the arbitral tribunal may, in individual cases, consider a particular national provision to be an impermissible expropriation. A national decision laying down a specific reconciliation or balancing of interests (for example, between economic interests and environmental protection) may be assessed as liable for compensation under the investment protection standards, thus this national act in the end is at least partially inadmissible in view of the investment treaty obligations, namely, if measured against the international legal standards in the individual case. However, the provisions in CETA which uphold the right to regulate aim to limit or completely exclude precisely such findings of the CETA ICS. The emphasis on the right to regulate in the CETA provisions mentioned above demonstrates that the investment protection standards and their enforcement by the CETA ICS should not restrict national regulation insofar. Therefore, it is consistent that the CJEU takes up this protection of national regulations, to which the parties to the agreement attributed such great importance, and enforces its observance by confining the scope of jurisdiction of the CETA Tribunal.

The CJEU's reasoning, however, is not very consistent.[76] The CJEU denies the CETA Tribunal the power to examine the compatibility of the legislator´s level of protection with the CETA obligations. In this respect, it probably determines a restriction to the scope of the Tribunal´s jurisdiction, although the above-mentioned CETA provisions on the protection of the right to regulate, in their wording, represent rather a justification provision or a guideline for interpretation which confine the control power and thus rather concern the standard of review to be applied by the CETA Tribunal[77]; these provisions are not formulated as carve-outs from the Tribunal´s jurisdiction. Furthermore, it is not entirely clear whether the CJEU always excludes the jurisdiction to award compensation for damages when the level of protection is at stake. The exclusion of compensation awards insofar is mentioned or at least insinuated in paragraphs 149, 153 and 159, but not in paragraphs 156 and 160, where the CJEU does not infer a prohibition against compensation awards. May the CETA Tribunal therefore nevertheless award damages if and because it accepts the legislature's level of protection and recognizes it as a fact, i.e. does not call it into question, but nevertheless finds in its examination that it (and not in other provisions of an EU legal act[78]) amounts to an indirect expropriation in the individual case before the Tribunal? In any case, paragraph 159 of the CETA Opinion excludes the jurisdiction of the CETA Tribunal to award compensation for unfair treatment insofar. Or does the exclusion of compensation awards on the basis of paragraph 152 (to which paragraph 153 refers) only apply in the context of an assertion of Art 28.3(2) CETA, but not in the case of the other above-mentioned CETA provisions which provide justification for the EU to exercise its right to regulate or which prescribe a specific interpretation of the investment protection standards? Is the CETA Tribunal also not allowed to examine the restrictive conditions of these CETA provisions (no arbitrary or unjustifiable discrimination, no disguised

[75] Lenaerts 2019,"emphasise[d] that what the Court is protecting here is not EU measures of general application as such. Nothing in Chapter 8 of the CETA suggests that measures of that kind are 'immune' from review before the CETA tribunals. On the contrary, as the Court expressly confirms, such measures may give rise to the award of monetary compensation under the ISDS mechanism when, for example, they amount to discrimination or arbitrary treatment affecting a Canadian investor. That is not incompatible with EU primary law …What the Court is protecting instead is the essence of the democratic process leading to the adoption of EU norms protecting public interests, a process which forms part of the EU constitutional framework."

[76] *See also* the criticism by Koutrakos The Anatomy of Autonomy, p.100.

[77] The opinion of *GA Yves Bot in Opinion 1/17* paras. 133f., only considers them duties to take into account.

[78] In this respect, the competence of the CETA Tribunal to award damages should remain, *according to* Lenaerts 2019, (fn. 75).

restriction on trade), in so far as this would entail looking at the level of protection of the EU? Is there not a certain contradiction between paragraph 153 and paragraph 156, as the former excludes the power of holding the level of protection incompatible with the CETA, whereas the latter prohibits already calling the level of protection into question, i.e. prohibits any examination at all? Actually, the CETA Tribunal is only competent to examine a level of protection with a view to its compatibility with CETA provisions, i.e. to examine whether this EU determination of protection level means or in effect leads to discrimination, unfair treatment or unlawful indirect expropriation (which the CJEU prohibits in paragraphs 153 and 159). In any case, an investment tribunal never is competent to call into question a national level of protection of public interests, so that the CJEU´s prohibition insofar in paragraph 156 actually goes without saying (except in the context of the examination of the necessity of a measure within the meaning of Article 28.3 (2) CETA and No. 3 of Annex 8-A). The difference between paragraph 153 and paragraph 156 with regard to the award of compensations could also be resolved if one granted the power to award compensations to the CETA Tribunal at the level of international law, but would disregard such decision in the EU internally because of the priority of EU law insofar. However, the CJEU has not in the least hinted at such a differentiation between the binding effect (only) under international law of a judgment of the CETA Tribunal and its lack of internal enforceability.[79] If the CJEU were to imply such differentiation, the CJEU would have disregarded or even denied the largely unconditional enforceability of arbitral awards under the CETA pursuant to Article 54 ICSID Convention. There is no hint for this in the opinion. Therefore, it appears quite obvious that the CJEU, by excluding an award of compensation, not only rejects its internal effect, but a priori denies the CETA Tribunal jurisdiction in this respect already at the level of international law; furthermore, this exclusion of jurisdiction applies to all exceptions due to and affirmations of the right to regulate in CETA.[80]

In sum, the CJEU in its CETA opinion postulates that no compensation may be awarded if this would undermine the determination of a level of protection by the EU legislator. These findings of the CJEU are valid for the EU, but the CJEU missed the issue of how these findings can become binding on the level of international law. The CJEU does not address the issue of how the limitation to the jurisdiction of the CETA ICS that the Court has drawn in its opinion can become binding under international law.[81] Making the findings of the CJEU effective at the level of international law requires a corresponding declaration of interpretation by the CETA parties or a reservation at the time of ratification by the EU side. Furthermore, uncertainties remain, such as the question why the CETA Tribunal should not be able to examine the restrictive conditions in the exception clauses of the CETA (necessity, non-discrimination), since the parties to the CETA have qualified and hence confined the protection of the right to regulate in this respect. The conceptualizations of the CJEU seems to amount to classifying these provisions as *self-judging*, i.e. the competence to assess their requirements appears to lie solely with the contracting parties.[82] There is, however, no hint in the CETA to a comprehensive self-judging nature of the provisions on the right to regulate. Nor is there any hint in CETA why the respect for the legislator´s decision-making leeway should only apply to the level of protection and not to more aspects of the relevant legislation. The CETA provisions mentioned above protect the freedom of the legislator not only with regard to its determination of levels of protection.

3. Drawbacks on other Courts?

[79] This differentiation is also not obsolete due to the lack of direct effect of CETA.

[80] *See also* Catharine Titi, *Opinion 1/17 and the Future of Investment Dispute Settlement: Implications for the Design of a Multilateral Investment Court*, 2020, p. 17, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3530875.

[81] *See also* Sauer 2019, p. 928.

[82] *See* Catharine Titi 2020, p. 18.

The above analysis of the opinion demonstrates that the emphasis on the protection of national regulatory sovereignty and the results of political processes with regard to the determination of the levels of protection, which the CJEU emphasizes in Opinion 1/17, applies to the investment protection mechanism in CETA and the pertinent provisions in CETA insofar. They did play a pivotal role in the Court´s reasoning. Hence, the ruling must not be regarded as a general guideline for and limitation to all types of obligations of the EU under international law or for any existing international court. The latter question actually was not at stake. Therefore, one may not infer from broadly drafted statements of the CJEU CETA opinion, such as in paragraph 150, that the CJEU rejects a control of legislative determinations of levels of protection from the outset and for all international courts. The CJEU simply did not comment on this.[83] The sentencing formulated by the CJEU expressly applies to CETA. It can only be applied to comparable constellations. The statements of the CJEU must be understood against their background: They were made in the field of international investment protection law and arbitral jurisdiction in this regard. They refer to a court established by an international treaty that particularly emphasizes national regulatory sovereignty. The jurisdiction of the CETA Tribunal should find its limit at the regulatory sovereignty of the Contracting States with regard to the determination of protection levels. Respect for the right to regulate can indeed be seen enshrined in the CETA regulations quite deeply.[84] A comparison to WTO law may be useful here. While WTO law – while upholding, similarly to CETA, the freedom of regulation in various provisions - contains specific obligations which impose limits on the WTO parties in their foreign trade and internal economic regulation and thus restrict the domestic legislative leeway in this respect, also with regard to the determination of protection levels (suffice it to recall the requirement for scientific assessments insofar in the SPS Agreement), this is not the case with investment protection law. The latter does not directly affect national regulatory leeway. Investment protection courts can only award compensation but not issue statements which oblige states to alter or amend their domestic regulations. The difference between the CETA Tribunal and the WTO jurisdiction is also emphasized by the CJEU in the CETA opinion. However, in this respect the Court only emphasizes the greater flexibility in the implementation of WTO dispute settlement decisions[85] and therefore remains limited in its awareness of the differences between CETA and WTO law because the Court does not take into account the clearly different regulatory structure, objectives and subject matter of WTO law compared to investment protection law and the differences in the judicial system (protection of individual investors by awarding compensations in investment law versus state action in WTO law leading to obligations to amend domestic law). Although the parallelism between the developments of WTO law and investment protection law is now often emphasized, this does not allow drawing premature conclusions. With the conclusion of the CETA investment protection law, the EU legislator in its treaty-making capacity does not make use of its constitutional competence to restrain the autonomy of the EU legal order by setting certain limits (this may be different in other chapters of CETA, where the parties might have agreed on harmonisation of their legislation, which the CJEU explicitly refers to[86]), whereas it did so by become a founding party of the WTO. This is a pivotal difference to WTO law.

However, the attempt made here to confine the scope of the statements made by the CJEU in the CETA opinion by emphasizing their context and analyzing the argumentation is subject to considerable doubts. Koen Lenaerts has described the constitutional protection of the level of protection established by the EU legislator as "a major contribution to what I often describe as

[83] CJEU, *Opinion 1/17*, para. 119.

[84] On the protection of the "Right to Regulate" in CETA, *see* Catharine Titi, "Right to Regulate", *in* Makane Moïse Mbengue & Stefanie Schacherer (eds.), *Foreign Investment under the Comprehensive Economic and Trade Agreement (CETA)*, Springer International Publishing, Heidelberg, 2019, pp. 159-183, at pp. 159ff.; Schill 2018, pp. 70 ff.

[85] CJEU, *Opinion 1/17*, para. 146.

[86] CJEU, *Opinion 1/17*, para. 148: "However, without prejudice to a situation where the Parties have agreed, within the framework of the CETA, to harmonise their legislation".

the EU's *functional constitution*, that is to say a Union founded upon democracy, justice and rights".[87] It can thus be expected that, at least in the view of the President of the Court, the CJEU's commitment to the protection of the legislative protection level as a barrier to the jurisdiction of international courts or even beyond, to the external treaty making capacity of the EU in general, is meant as a fundamental, universally valid imperative of EU constitutional law. For such a broad purview, however, this limitation is too poorly justified in the CETA opinion. The reasoning and argumentation of the CJEU does not explain why and to what extent the determination on the level of protection is supposed to be the "essence of the democratic process"[88] which is to be shielded from obligations under international law. Further questions remain open: What does the protection of the level of protection mean in concrete terms? Which provisions of a legislative act, within which a level of protection is established, are covered by the constitutional protection?

If the protection of the level of protection were to be a constitutional obligation universally applicable to all sorts of external treaties, even if only vis-à-vis international courts, this could have considerable consequences for the EU's capacity to submit to international dispute settlement, e.g. within the WTO. The WTO dispute settlement bodies would then not be allowed to judge on general obligations under WTO law which imply an assessment of the EU's level of protection. The only exception from this prohibition would apply to those WTO rules in which WTO members had more or less explicitly agreed to harmonize their legislation, as the CJEU has alluded to.[89] It is not clear what this would mean in practice for each individual provision in WTO law.

Would the exception of harmonization already apply to general limitations of domestic legislative action, as is actually consistently the case with WTO disciplines (see also Article XVI:4 of the WTO Agreement, according to which each member undertakes to bring its laws into conformity with its obligations under WTO law)? Or would it only apply to explicit positive harmonisation or standardisation obligations in WTO law, which is only rarely found in WTO law? Such instances of explicit alignment would be the disciplines under Art. VI:4 GATS, but also the requirements of scientific risk assessment, as demanded by Article 5 SPS Agreement for the determination of an appropriate level of sanitary or phytosanitary protection? WTO law is largely limited to negative integration, which restrains the domestic legislator's room for manoeuvre by virtue of rather general obligations such as non-discrimination, or the obligation to rationalise domestic legislation, without requiring any harmonization of domestic regulations. Nevertheless, when applied by the WTO dispute settlement bodies, WTO law definitively has an impact on domestic determinations of levels of protection of policy interests. This can be clearly observed when analyzing the practice on the necessity test in the exception provisions in Art. XX GATT, Art. XIV GATS, or in Article 2.2 TBT Agreement and Article 2.2 SPS Agreement.[90] If one sticks to Koen Lenaerts' generalising view, which does not emerge from the wording of the CJEU's CETA opinion, the legality of the jurisdictional competence of the WTO dispute settlement system under EU constitutional law would be subject to considerable doubt. The CJEU in CETA opinion makes an obiter dictum with regard to the WTO dispute resolution´s flexibility[91] whose importance for the scope or applicability of the constitutional limitation is not clear. Maybe the CJEU wanted to stress the differences to signal

[87] Lenaerts 2019, italicization in the original.

[88] Id.

[89] *See again* CJEU, *Opinion 1/17*, para. 148.

[90] For more detail on their effects on domestic regulatory autonomy *see* Wolfgang Weiß, *WTO Law and Domestic Regulation*, C.H. Beck, München, 2020, pp. 246ff. and 289ff.

[91] *See* CJEU, *Opinion 1/17*, para. 146.

that its reasoning does not apply to the WTO jurisdiction. In light of Koen Lenaerts´ statement, a general carve-out for the WTO dispute settlement might be at least partially invalid. Although the implementation of WTO panel/Appellate Body reports always allows for a considerable degree of flexibility, this flexibility cannot be maintained in the long term against the will of a complainant that was victorious against the EU. Furthermore, if the CJEU's statements applied to a WTO report against the EU in which the panel holds a level of protection of EU law incompatible with WTO obligation, such a report would overstep the jurisdiction of the international body as the WTO panel would already have been incompetent to settle such dispute. Furthermore, a closer look at the factual effects of the WTO panel reports shows that they are implemented in the vast majority of cases, including by the EU (with the exception of the hormone meat conflict with the USA, with which an alternative solution has been agreed upon, at least for the time being) so that they have an established impact on the EU legislator´s choices.

The far-reaching consequences for the EU's capacity to conclude treaties and its participation in the WTO advise reconsidering the CJEU's commitment to the protection of the level of protection, if it is meant as a general statement. The conclusions the CJEU in the CETA opinion derives from EU autonomy with regard to the protection of levels of protection can only be welcomed insofar as it makes a clear case for appealing to the WTO judiciary to pay greater respect to a level of protection laid down by a democratic legislator and to limit its standard of review in this respect. But to postulate this as an EU limitation to establishing jurisdictional competences of international courts in general goes far beyond this.

4. Conclusion

Even though one might share the result of the CJEU´s assessment of conformity of the CETA ICS with EU primary law with regard to concerns raised regarding the domestic legislator´s leeway, there still remain the considerable deficiencies of the opinion´s reasoning. While the CJEU actually engaged in simple treaty interpretation of CETA provisions, it came up with an exaggerated dictum of applying constitutionally termed limitations to EU´s international treaty making power by allegedly protecting the operation of the EU legislator according to the constitutional framework, which resulted in the small coin of an absolute protection of legislative determination of levels of protection and which was then even transformed into a general constitutional limit by Koen Lenaerts´ subsequent comments. The Court´s argumentation is not convincing, even though one might excuse it by the necessities of the opinion procedure (which requires the CJEU to develop arguments based on primary law) and of the intense political dispute over CETA investment protection. The CJEU could have restrained itself to a mere statement that an impairment of the legislator's leeway in public policies by CETA investment protection is not to be feared, simply by referring to the confines to the adjudicative powers of the CETA Tribunal resulting from the guarantees of the right to regulate enshrined in CETA. Furthermore, instead of decreeing an absolute limitation of the CETA ICS jurisdiction, it would have been sufficient to postulate a considerably reduced standard of control. The CJEU has made completely unnecessary statements here, and has given insufficient reasons for them, without considering how the Court´s decree can be made binding under international law (its jurisdiction is binding only for the EU side). In addition, questions remain unanswered: Are the CETA provisions which protect the right to regulate a *necessary* condition for the compatibility of international jurisdiction with primary EU law[92], or do they represent mere *sufficient* conditions for finding their compatibility with EU primary law? What is the legal situation if in other EU BITs the provisions on right to regulate are formulated differently? To what extent does the exclusion of compensations in the CETA, as inferred by

[92] *In this sense* Sauer, 2019, p. 935.

the CJEU, apply to EU regulations that determine a level of protection, i.e. which provision of an EU legislative act would be covered by the exclusion of compensation?

V. Conclusion

The CETA Opinion of the CJEU has instigated further development of EU law of external relations in constitutional parlance. On the one hand, the significance of fundamental rights is strengthened and the external autonomy of EU law is expanded. On the other hand, the CJEU's examination of the scope of the jurisdiction of the CETA Investment Tribunal remains incomplete and surficial. The Court´s obvious and, in the light of the values of Article 3.5 and 21.2 b) TEU, constitutionally demanded[93] effort to expand the EU's leeway to enter into international treaties establishing international courts, is undermined by an overly constitutional stipulation derived from EU external autonomy, which prescribes absolute protection for legislative determination of protection levels for policy interests against international adjudication. This stipulation which considerably confines the EU´s capacity to contribute to international courts is poorly reasoned and hardly justifiable, as far as it amounts to protection of specific political results and decisions of the legislator instead of the legislative decision-making process itself. A sound alternative would be to protect the legislature's ability to shape the law, and to identify the constitutional limitations to the legislator´s capacity to bind itself.[94] The protection of the function of democratic processes is likely to remain as a permanent postulate of EU autonomy by the CJEU against obligations flowing from international treaties, but it deserves a careful development of its concrete stipulations and a clear justification derived from the principle of democracy. Furthermore, making such limitations to international adjudication effective at the international level requires a corresponding declaration by the parties or a reservation at the time of ratification by the EU side.

[93] *See* Opinion of *GA Yves Bot in Opinion 1/17* paras. 176, 178; de Witte 2014, p. 45. However, this does not imply a constitutional obligation for the EU to submit to any kind of international jurisdiction without limits.

[94] Developing this further was beyond the scope of this paper. For more on this *see* Wolfgang Weiß, forthcoming in *Europarecht*, Vol. 55, Issue 6, 2020.