ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

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AUTONOMY OR UNITY? INVESTMENT PROTECTION (ISDS) AND THE PRINCIPLE OF EQUALITY BEFORE THE LAW

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ABSTRACT: According to Opinion 1/17, the ISDS mechanism contained in CETA is in conformity with the fundamental requirement of art. 20 of the Charter of Fundamental Rights that "everyone is equal before the law". The assessment rests on two assumptions. First, in the substantive sense, CETA does not afford a higher level of protection to Canadian investors than EU law affords to European investors. In this respect, investors of different origins are equals who are treated equally. Secondly, ISDS provides specific procedural rights to foreign investors, which cannot be invoked by domestic investors. According to the ECJ, Canadian investors are not legally obliged to have the same trust in the institutional system of the EU as domestic investors. In this respect, Canadian investors are different from European investors, thus it is justified to treat them differently. The *Article* shows that in addition to the Court's assessment of substantive and procedural aspects, art. 20 CFR can be constructed to contain a systemic requirement of unity. The paper identifies a looming conflict between EU law's autonomy and Law's unity that may explain why the Court chose not to engage in a more open-hearted attempt to identify the values inherent in art. 20 CFR. Due to its strong protection of the autonomy of EU law, the ECJ has embraced what is in fact the main problem of the ISDS mechanism – its complete disentanglement from the legal order that it scrutinizes. In the absence of unity, autonomy's guarantor – "everyone" – is cut off.

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I. INTRODUCTION

The protection of Foreign Direct Investment (FDI) and the mechanisms for Investor-State Dispute Settlement (ISDS) in (envisaged) trade agreements between the EU and third States, is a topic marked by a high level of agreement – albeit on a very general level. For example, we can all agree that ISDS is both politically and legally controversial. Further, notwithstanding the controversies, everyone also seems to agree that, in one way or the other, ISDS relates to fundamental notions such as "equality" and "the rule of law". This makes the political and legal controversy somewhat different than in other fields. Quite often, fierce disagreement relates to the balancing of incommensurable values and interests such as freedom to conduct business *versus* the protection of the environment, freedom of movement *versus* mandatory requirements, or employer's rights *versus* employees' rights, and so on. Not so in our field. The thousands of people who took to the streets in demonstrations against the envisaged trade agreement between Europe and the United States (The Transatlantic Trade and Investment Partnership (TTIP))[1] argued that the substantive and institutional provisions that constitute the ISDS mechanism are a threat to equality and undermine the rule of law.[2] The proponents of ISDS argue that it promotes equality and provides complete confidence that the rule of law is observed.[3]

Opinion 1/17 on the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) is the first occasion in which the European Court of Justice (ECJ) has grappled with these issues.[4] The Court was asked to assess the compatibility of the envisaged ISDS mechanism in CETA with art. 20 of the Charter of Fundamental Rights of the European Union (CFR).[5] The provision states, shortly but emphatically, that *everyone is equal before the law*.

[1] On TTIP, see e.g., M Cremona, 'Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (2015) CMLRev 351. On TTIP with references to CETA, see e.g. M Krajewski, *Modalities for Investment Protection and Investor-State Dispute Settlement (ISDS) in TTIP from a Trade Union Perspective* (Friedrich Ebert Stiftung 2014).

[2] In more academic terms, see, e.g. PH Chase, 'TTIP, Investor–State Dispute Settlement and the Rule of Law' (2015) European View 217; M Kumm, 'An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege' (2015) ESIL Reflections 1; G Van Harten, 'A Parade of Reforms: The European Commission's Latest Proposal for ISDS' (Osgoode Legal Studies Research Paper 21–2015); I Alvik, 'The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy' (2020) EJIL 289.

[3] See in particular W Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' (2018) CMLRev 1025.

[4] The Court left the question on discrimination unanswered in case C-284/16 *Achmea* ECLI:EU:C:2018:158 para. 61.

[5] Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341 paras 51-55.

According to the explanations relating to the Charter, art. 20 CFR "corresponds to a general principle of law which is included in all European constitutions and has also been recognized by the Court of Justice as a basic principle of Community law".[6] Pompous as the provision may be, it suited the fundamental and very basic question: whether ISDS promotes or undermines equality and the rule of law. Those who expected a conceptual and principled answer were, however, disappointed. While the Court confirmed that the ISDS mechanism in CETA is in conformity with art. 20 CFR, its analysis left the big questions unanswered.

Contartese and Andenas have observed that the Court's prior judgment in *Achmea*[7] "is so concise that it leaves questions unanswered".[8] Precisely the same is true for Opinion 1/17. The assessment of the ECJ is thorough with regard to the issues that the Court actually addressed, but, as we shall see, the analysis starts and ends in the middle of things. The Court reduced the fundamental issues at stake to a nitty-gritty technical question that obscured the fact that, principally speaking, the protection of Foreign Direct Investment in conjunction with ISDS implies that everyone is *not* equal before the law. Canadian investors are not "everyone".

The *Article* undertakes a critical examination of the Court's approach to art. 20 CFR in Opinion 1/17 to identify the issues that were not raised by the Court, and thus not answered. I will not engage in a strictly dogmatic analysis of whether the Court's overall conclusion that the ISDS mechanism in CETA is in conformity with art. 20 CFR was correct or not. Nor shall I argue that the Court suppressed important legal questions to avoid issues that are politically sensitive. After all, the integrity of the Court is remarkable, and it has not at all been afraid to enact controversial opinions.[9] To the contrary, I proceed on the assumption that the Court knows very well what it is doing, and that it acts both consciously and quite politically, even when the text it delivers gives the opposite impression.

My main aim is to make transparent the important constitutional choices that I believe the Court implicitly made. A more engaged application of art. 20 CFR makes it possible to pose the more nuanced questions: Under what circumstances, and pursuant to which conditions, is the ISDS mechanism constitutionally acceptable? I shall argue that this is the case if the ISDS mechanism does not substitute domestic law, but refines it, to promote the protection of the rule of law "within the union itself".[10] Such justification requires some kind of systemic integration between EU law and the substantive rights

[6] Explanations relating to the Charter of Fundamental Rights [2007].

[7] *Achmea* cit.

[8] C Contartese and M Andenas, 'EU Autonomy and Investor-State Dispute Settlement Under Inter se Agreements Between EU Member States: *Achmea*' (2019) CMLRev 157, 159.

[9] It suffices to mention Opinion 2/13 *Adhésion de l'Union à la CEDH* ECLI:EU:C:2014:2454.

[10] Opinion 1/17 cit. para. 174.

that flow from the trade agreement, and in particular between national courts, the ECJ and the investment tribunals/court.

Integration in this sense, where, in one way or the other, the systems work together and constitute a coherent whole, is referred to in this paper as "unity". The perfect example would be the close interrelation between national legal orders and the EU legal order. With regard to external relations, such unity would however be at odds with the Court's established approach, which pursues a formal notion of autonomy that values strict separation between the domestic system and the external system.[11] Separation entails that the other system, in our regard the ISDS mechanism, is autonomous as well.[12] Two autonomous systems, operating side by side, is the juxtaposition of "unity".[13]

"Unity" is about having or controlling supremacy.[14] Conversely, fragmentation might actually undermine the autonomy of separate systems. If there is a conflict between two autonomous legal orders,[15] one must in fact be supreme, and the formal autonomy of the other becomes of theoretical value only.[16] What I want to show is that there is a looming conflict between the requirement of unity that flows from an engaged attempt to identify the values inherent in art. 20 CFR and the Court's established,[17] but rather old fashioned, concept of autonomy in the field of external relations.[18] This might explain why the Court chose not to engage.

The object of the *Article* is part V B n. 1 and 2 of Opinion 1/17, where the Court reviewed the "compatibility of the envisaged ISDS mechanism with the general principle of equal treatment". Section II presents the ECJ's analysis of art. 21(2) CFR, the prohibition

[11] *Ibid*. paras 113, 114, 134 and 199.

[12] Cf. GC Leonelli, 'CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test' (2020) LIEI 43, 48 and 62.

[13] For the purposes of this *Article*, this distinction suffices to set out my unpretentious use of the notions "unity" and "autonomy". For a detailed analysis of the concept of autonomy, see e.g. C Contartese, 'The Autonomy of the EU Legal Order in the CJEU's External Relations Case-law: From the "Essential" to the "Specific Characteristics" of the Union and Back Again' (2017) CMLRev 1627 with further references to a vast literature.

[14] In EU law, the unity between national law and EU law is considered a prerequisite for the autonomy of the latter. EU law claims to have supremacy, and, as a habit of obedience, the Member States accept the claim. Still, due to their sovereignty and the residual capacity of acting disobedient, the Member States control supremacy (cf. the *Solange*-saga or Brexit).

[15] See K von Papp, 'Clash of "Autonomous Legal Orders": Can EU Member State Courts Bridge the Jurisdictional Divide Between Investment Tribunals and the ECJ? A Plea for Direct Referral from Investment Tribunals to the ECJ' (2013) CMLRev 1039.

[16] Historically, the ISDS mechanism was invented to provide a system that was both autonomous and supreme.

[17] See e.g. SØ Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences' (2015) German Law Journal 169, 171 with further references.

[18] This is often referred to as "external autonomy", which should be distinguished from "internal autonomy".

of discrimination on grounds of nationality. The Court found this provision to be inapplicable. Section III examines the Court's analysis of art. 20 CFR. On the one hand, the six words of the provision express the principle that is most fundamental to any legal order: "Everyone is equal before the law." On the other hand, the statement is broad and open to interpretation. The "pre-assessment" of art. 21 provided guidance to the Court's application of art. 20 in three regards. First, it made the Court assess the effects of the ISDS mechanism in CETA "within the union itself".[19] Secondly, the Court reapplied the substance of art. 21 CFR within the ambit of art. 20. Thirdly, the inapplicability of art. 21 CFR signalled the outcome of the Court's substantive analysis of art. 20 CFR.

Section IV sketches out an alternative manner in which to interpret art. 20 CFR. It is possible to understand the provision not only as a substantive protection against discrimination, closely related to art. 21 CFR, but also as a systemic requirement that protects Law's unity. The alternative, systemic reading of art. 20 CFR makes it possible (Section V) to make transparent important constitutional choices that the Court implicitly made. Section VI further assess how *a prima facie* violation of art. 20 CFR could have been justified, if the Court had chosen to approach art. 20 CFR differently. The increased transparency brings me to my conclusion in Section VII: With regard to external relations, there is a difference, and a potential conflict, between the autonomy of EU law and the unity of Law. By suppressing the systemic component of art. 20 CFR, the Court conserved the former (autonomy) at the cost of the latter (unity). In my view, this is not a position that flows objectively from legal reasoning; rather the opposite. It is a legal, constitutional and political choice that is decisive as to how the reasoning must be constructed.

II. The pre-assessment

II.1 The legal question

Chapters on the protection of Foreign Direct Investment in trade agreements such as CETA are inspired by the protection offered to foreign investors in Bilateral Trade Agreements (BITS). They provide a specific set of rights, a specific dispute settlement system, specific procedures, specific tribunals/courts and specific remedies (compensation) to foreign investors. CETA attributes such rights to Canadian investors operating in Europe, in return for the same protection of European investors operating in Canada. I will not further elaborate upon the details here, but refer instead to the presentation provided by the Court in Part II of Opinion 1/17. The short version is that ISDS is a mechanism that establishes a separate and autonomous legal system, completely cut off from the ordinary legal system.[20] It was invented by developed countries as a way in which to provide

[19] Opinion 1/17 cit. para. 174.

[20] I Alvik, *Contracting with Sovereignty. State Contracts and International Arbitration* (Hart 2011) 97 ff. Cf. Opinion 1/17 cit. paras 113, 114 and 134.

protection to national businesses investing in less developed countries with weak institutions and an unreliable legal system. Contartese and Andenas note that investment courts and tribunals are "an *alternative* to the courts and tribunals of the EU Member States rather than part of their judicial system, since the ISDS was mainly an answer to the alleged bias of the domestic courts towards the host government".[21] The alternative system is not open to *everyone*; it exclusively applies to private investors holding the nationality of the state-party to the Treaty. In addition to this formal exclusivity, ISDS is "elitist in the sense that it requires claims of large size to justify commercially the start of the procedure".[22] In the public debate it has been argued, in non-legal terms, that ISDS creates super-rights and that the VIP status of the small group of rights-holders is a threat not only to equality, but also to democracy. If the argument is redressed in legal clothing, it would be that ISDS is contrary to the principle that "everyone is equal before the law". In the words of the Court in Opinion 1/17: "The doubts set out in the request for an opinion on the compatibility of the envisaged ISDS mechanism with the general principle of equal treatment concern the issue of whether that mechanism complies with Article 20 of the Charter, which enshrines the guarantee of 'equality before the law', and with Article 21(2) of the Charter, which prohibits discrimination on grounds of nationality."[23]

The Court proceeded to analyse first the compatibility of the ISDS mechanism with art. 21 CFR, then with art. 20 CFR. While I have structured my presentation of Opinion 1/17 accordingly, the approach deserves a remark. I do not "give away" the opinion by revealing that the Court found art. 21 CFR, the prohibition of discrimination, to be inapplicable. On the contrary, the Court considered art. 20 CFR to be applicable. In practical terms, what the Court did was to re-employ the substance of art. 21 within the framework of art. 20. Therefore, art. 21 CFR played a more important role than its irrelevance suggests, first because it framed the issue and provided a pre-understanding of what the whole matter was about: discrimination in substantive terms. Secondly, the assessment of art. 21 CFR made the Court's application of art. 20 look rather generous. By accepting to assess the principle of non-discrimination within the ambit of that provision, the Court made art. 20 CFR look "bigger" than art. 21 CFR. In that sense the Court gave lip service to its fundamental nature. However, as the analysis will show, the Court's approach is conceptually unconvincing. If the finding that art. 21 CFR is inapplicable to matters such as those in Opinion 1/17 is legally sound, it cannot be due to some incidental formality: it must rest on rational reasons that can be substantively justified. Put differently: The inapplicability of art. 21 CFR indicates that if it were applied, ch. 8 of CETA would neverthe-

[21] C Contartese and M Andenas, 'EU Autonomy and Investor-State Dispute Settlement Under Inter se Agreements Between EU Member States: *Achmea*' cit. 174.

[22] W Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' cit. 1031.

[23] Opinion 1/17 cit. para. 162.

less not entail discrimination in the substantive sense. To re-apply the substantive content of art. 21 CFR within the ambit of art. 20 CFR appears rather pointless. Later, I shall argue that what art. 20 CFR has to add is a systemic component. But – without further ado – let us first examine the Court's pre-assessment.

II.2 The Court's rejection of Article 21 CFR

The main concern that motivated the Court's analysis under art. 21 CFR was that the ISDS mechanism in CETA provides a preferential system to Canadian investors as compared to European investors.[24] The favourable treatment of Canadians can be constructed as discrimination of Europeans.

By reference to the explanations relating to the Charter,[25] the Court noted that art. 21(1) CFR corresponds to art. 18 TFEU.[26] Further, by reference to the judgment in *Vatsouras and Koupatantze*, the Court observed that the first paragraph of art. 18 TFEU is not intended to apply to cases where there is a possible difference in treatment between nationals of Member States and nationals of non-Member States.[27] Consequently, the Court regarded art. 21(2) CFR to be irrelevant to the issue of "examining whether the envisaged ISDS mechanism may lead to discrimination in the treatment of EU investors as compared with Canadian investors".[28]

The Court's analysis of art. 21 CFR touches upon the notoriously difficult concept of the scope of EU law. AG Bot noted that "it follows from the second sentence of Article 207(1) TFEU, read in conjunction with Article 21 TEU, that the European Union must, when exercising the competences conferred on it by the EU and FEU Treaties, including those relating to the common commercial policy, respect fundamental rights, of which the principle of equal treatment forms part".[29] This indicates that the matter, as such, was regarded to be within the scope of EU law. On the other hand, the crucial passage in *Vatsouras and Koupatantze* on the interpretation of art. 18 TFEU, from which the inapplicability of art. 21 CFR was derived, reads: "That provision concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries."[30]

[24] Opinion 1/17 cit. para. 168, compare opinion of AG Bot, ECLI:EU:C:2019:72 para. 185.

[25] Explanations relating to the Charter of Fundamental Rights, 17.

[26] Opinion 1/17 cit. para. 168.

[27] *Ibid*. para. 169, making reference to joined cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* ECLI:EU:C:2009:344 para. 52.

[28] Opinion 1/17 cit. para. 170.

[29] *Ibid*. opinion of AG Bot cit. para. 195

[30] *Vatsouras and Koupatantze*, cit. para. 52.

Thus, the Court found art. 21 CFR to be irrelevant, as discrimination of Europeans as compared to third country citizens is not "within the scope of application of the Treaties".[31] Whether a matter can be within the scope of EU law on the one hand, but outside the scope of the Treaties on the other, is a puzzling question. As noted by Fontanelli, the distinction between measures that are outside the scope of EU law and measures that are within the scope of EU law, but which are not precluded by the Treaties, is not clear.[32]

As a general observation, it is not satisfactory to consider all non-precluded measures to be within the scope of EU law, as effectively that will entail that every measure that potentially can be made subject to a legal analysis is within the scope of EU law. However, the opposite finding is not satisfactory either. In our regard it suffices to note that the Court proceeded to analyse art. 20 CFR. This marks that, as such, the measure was within the scope of EU law.

The remaining alternatives are that *a)* the discrimination of nationals of the Member States is *formally* outside the scope of the specific provision, in our regard art. 21 CFR; or *b)* that the specific provision does not provide any *substantive* protection to nationals under the specific circumstances. The two alternatives are closely connected. Generally, if the reach of a provision is formally fixed, it is because the fixation is regarded as justified on substantive terms. In other words, if we assume that an application of a provision based on substantive reasoning would (almost) always produce the same outcome, we will normally introduce a formal/fixed definition of its reach, because we know that this will (almost) always be substantively correct. Art. 21 CFR, read in conjunction with art. 18 TFEU, illustrates the point perfectly. The provisions have a general wording and prohibit "discrimination on grounds of nationality." At the outset, there is nothing that clearly suggests that the provisions do not "apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries". Rather, this is an interpretation. The fixation is introduced because the substantive justification on which the interpretation rests is deemed to be of general validity. In such instances, continuous reassessment is of no value.

If, for substantive reasons, continuous reassessment is of no value, there is of course no point in giving it another name. We shall keep that in mind when we proceed to analyse the Court's assessment of art. 20 CFR. As we shall see, what the Court did was to reemploy the substance of art. 21 CFR within the ambit of art. 20. The outcome was then given.

[31] Art. 21.2 CFR.

[32] On the notoriously difficult distinction between measures that are outside the scope of EU law and measures that are within the scope of EU Law but not precluded, see F Fontanelli and A Arena 'The Charter of Fundamental Rights and the Reach of Free Movement Law' in M Andenas, T Bekkedal and L Pantaleo (eds.) *The Reach of Free Movement* (Springer 2017) 293.

III. The Court's assessment of art. 20 CFR

III.1. "Within the Union itself"

The court proceeded to analyse art. 20 CFR by reference to the formalistic observation that "On the other hand, Article 20 of the Charter, which provides that 'everyone is equal before the law', does not contain any express limitation on its scope and is therefore applicable to all situations governed by EU law, including those falling within the scope of an international agreement entered into by the Union." [33]

According to the Court, art. 20 "is available to all persons whose situations fall within the scope of EU law, irrespective of their origin"[34] – but not quite. In the following paragraph, the Court referred to settled case law that establishes that art. 20 of the Charter does not oblige the Union to accord, in its external relations, equal treatment to different non-Member States.[35]

While trade agreements are being concluded between States, it is not States that benefit from such agreements, but their citizens. The Court's observation about the reach of art. 20 CFR is the mirror image of art. 21 CFR. Principally, the point is that nationals and third-country nationals are not comparable because they belong to different legal regimes. This is a stronger difference than the one we are familiar with from the classical discrimination test. The classical discrimination test asks us to treat those who are equals equally, and those who are different differently, but assumes that those that are subject to the assessment are equals in the fundamental sense: that they fully belong to the same legal regime. The non-applicability of art. 21 CFR and the judgment in *Swiss International Air Lines* do not only prove that third-country nationals are different from EU-citizens, but that they are incomparable.

As we shall see, the Court's analysis of art. 20 CFR is difficult both to access and to understand. The observations above reveal why. It is conceptually difficult to re-apply the substantive content of art. 21 CFR within the ambit of art. 20 CFR to compare that which the preceding analysis has shown to be incomparable. Nevertheless, the Court proceeded on the basis of the classic, textbook definition of the principle of non-discrimination: "Equality before the law, as laid down in that article, enshrines the principle of equal treatment, which requires that comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified".[36]

[33] Opinion 1/17 cit. para. 171.
[34] *Ibid*. para. 172.
[35] Case C-272/15 *Swiss International Air Lines* ECLI:EU:C:2016:993 paras 24–26.
[36] Opinion 1/17 cit. para. 176.

The only thing that provides rationality to the Court's analysis is the clarification that its scope is the examination of differences in treatment "within the union itself".[37] I will use this clarification as a catalyst to understand the different parts of the Court's analysis.

III.2. Procedural rights – different differently

The Court mentioned first that the ISDS mechanism in CETA affords the same protection to EU citizens investing in Canada as compared to Canadian citizens investing in the EU. Correctly, the ECJ dismissed this observation as legally irrelevant.[38] It does not concern the effects "within the union itself".[39] The Court then proceeded to address the more intriguing problem: that the ISDS mechanism introduces a difference between Canadian persons and enterprises that make investments within the Union, and European persons and enterprises that make investments within the Union. Canadian persons and enterprises that invest in the Union can invoke the ISDS mechanism in CETA; European investors cannot.[40] The difference is not at all theoretical, as on many occasions the Canadian investor will act on behalf of an enterprise established within the Union, a fact that the Court was well aware of.[41]

To understand the Court's analysis, it is of seminal importance to draw a strict distinction between the procedural and the substantive components of the ISDS mechanism. With regard to the procedural aspects, the Court noted in para. 180 that the situation of Canadian enterprises and natural persons that invest in the EU is not comparable to the situation of European enterprises and natural persons. The explanation is given in para. 199 of the Opinion:

> "the purpose of inserting in the CETA provisions concerning non-discriminatory treatment and protection of investments, and the creation of tribunals that stand outside the judicial systems of the Parties to ensure compliance with those provisions, is to give complete confidence to the enterprises and natural persons of a Party that they will be treated, with respect to their investments in the territory of the other Party, on an equal footing with the enterprises and natural persons of that other Party, and that their investments in the territory of that other Party will be secure."

At first glance, the explanation is confusing. Read as a whole, it looks like the Court argued that because Canadians and Europeans in Europe should be treated on an equal footing, i.e. because they are equals, it is justified to treat them differently. However, as noted above, it is conceptually difficult to fit the assessment of the incomparable into the textbook definition of non-discrimination. What the Court really said is that, with regard

[37] *Ibid*. para. 174.
[38] *Ibid*. para. 180.
[39] *Ibid*. para. 174.
[40] *Ibid*. paras 179 and 180.
[41] *Ibid*. para. 182.

to the *confidence* that they should be treated as equals, Canadians and Europeans may legitimately have different expectations, which justifies a difference in treatment with regard to procedural issues:

> "In that regard, it must be observed that the reason why Canadian enterprises and natural persons that invest within the Union have the possibility of relying on the provisions of the CETA before the envisaged tribunals is that those Canadian persons, in their capacity as foreign investors, are to have a specific legal remedy against EU measures, whereas enterprises and natural persons of the Member States who, like those Canadian persons, invest within the Union, are not foreign investors there and will therefore not have access to that specific legal remedy and nor will they be able, having regard to the rule stated in Article 30.6.1 of the CETA, to invoke directly the provisions contained in that agreement before the courts and tribunals of the Member States and of the European Union."[42]

It is possible to justify the Court's finding by recourse to art. 2 TEU. The provision is Janus faced. On the one hand, it requires each and every Member State to recognize and respect the law and the common values on which the Union is based.[43] On the other, the principle of mutual trust obliges the Member States to consider (other than in exceptional circumstances) that the other Member States actually comply with EU law.[44] Art. 2 TEU does not oblige third countries, or third-country nationals, to act upon the same expectation.[45] In this sense they are different. This may explain why the Court found it to be justified to provide to the foreign investor a procedural right that is not available to Europeans.

III.3. Substantive rights – equals equally

With regard to substantive protection, the Court applied the other component of the principle of non-discrimination. It considered that European enterprises held by Canadian investors should be treated on an equal footing compared to European undertakings, and found that to be the case. Seminal in this regard is the Court's preceding analysis of the impact of CETA on the autonomy of EU law. According to the Court: "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".[46]

In other words, according to the Court's assessment of CETA, its substantive provisions do not afford more protection or better rights than EU law, correctly applied. This explains why, in its assessment under Article 20 CFR, the Court observed:

[42] *Ibid*. para. 181.
[43] *Achmea* cit. paras 33 and 34.
[44] Opinion 1/17 cit. para. 128; *Achmea* cit. para. 58.
[45] *Ibid*. para. 129.
[46] *Ibid*. para. 156.

> "Nor is the equality of treatment of those two categories of persons affected by the fact that the Parties chose not to exclude the possibility of the CETA Tribunal issuing an award in terms of which a fine imposed by the Commission or by a competition authority of a Member State on a Canadian investor, because of an infringement of Article 101 TFEU or Article 102 TFEU, constitutes a breach of one of the provisions of Sections C and D of Chapter Eight of the CETA."[47]

According to the Court, it is highly unlikely ("unimaginable")[48] that a decision vitiated by such defects that it can fall fault of the protection afforded by CETA, will ever be enacted. Further the Court noted that:

> "If a fine vitiated by such a defect or resulting in such expropriation was imposed by the Commission or by a competition authority of a Member State on an EU investor, that investor would have available to it the legal remedies necessary to ensure the annulment of that fine. It follows that, while it is not inconceivable that, in exceptional circumstances, an award by the CETA Tribunal such as that described in the request for an opinion might have the consequence of cancelling out the effects of a fine that has been imposed because of an infringement of Article 101 TFEU or Article 102 TFEU, the effect of that award will not however be to create a situation of unequal treatment to the disadvantage of an EU investor on which a fine vitiated by a similar defect has been imposed".[49]

The rationale of these paragraphs is the equal-equal paradigm: with regard to substantive protection, Canadian investors and European investors holding enterprises established in Europe are to be treated equally. According to the Court they are, because in this respect CETA, correctly applied, and EU law, correctly applied, will produce the same outcomes. Obviously, both the assumption of substantive equivalence and of correct application may be questioned, but I leave that to others.[50]

IV. An alternative way to make sense of art. 20 CFR

In Opinion 1/17, the Court approached the notion of "equality" as a substantive right, i.e. as a prohibition of discrimination. The approach assumes that arts 20 and 21 CFR are closely intertwined. While I do not reject that art. 20 CFR protects equality in the substantive sense, I shall argue that the provision can be interpreted so as also to have a systemic component. To identify the systemic and formal requirements that might flow from art. 20 CFR, I shall revisit the wording of the provision. Section IV.1 assesses the meaning of "everyone", Section IV.2 assesses the word "equal", and Section IV.3 assesses the reference to "the law".

[47] *Ibid*. para. 184.

[48] *Ibid*. para. 185.

[49] *Ibid*. para.186.

[50] Cf. GC Leonelli, 'CETA and the External Autonomy of the EU Legal order: Risk Regulation as a Test' cit. 54, 61.

IV.1. "Everyone"

The main argument voiced by the general public against ISDS is that a separate and autonomous legal system is established, to the benefit of private investors holding the nationality of the state-party to the Treaty. As a starting point to which I believe all can agree: Private investors holding the nationality of the state-party to a free trade agreement are not "everyone".

How is the notion "everyone" to be approached? The CFR Commentary introduces an important perspective: "Whereas Article 20 enounces a universalistic claim that 'everyone is equal before the law' Article 21 prohibits 'any discrimination based on any ground'".[51] The prohibition of discrimination on grounds of nationality appears as an individual right, in the sense that *no one* should be discriminated against. The universality of art. 20 CFR gives a more systemic character to the provision. The term "everyone" does not seem to presuppose the identification of discrimination in the traditional sense. After all, it is probably quite rare that "everyone" or a majority is being discriminated against. ISDS illustrates the point perfectly. The general public do not claim that they are being discriminated against in the individual and substantive sense. What they argue is that there should be one legal system for all: that "the law" shall apply equally to "everyone".

From a systemic point of view, the comparison conducted by the Court in Opinion 1/17 is questionable. As we have seen, the Court applied the paradigm of Canadian and European investors, which implies that art. 20 CFR was applied as a guarantor of the rights of the latter. A more inclusive paradigm would have been to compare the interests of "everyone", i.e. the general public, with the interests of Canadian *and* European businesses. From a systemic point of view, the Court's approach to art. 20 CFR is peculiar, first because European businesses are not "everyone". Secondly, both groups that appeared within the paradigm of the Court's comparison (European and Canadian investors) are actually the beneficiaries of Free Trade Agreements (FTAs) and ISDS. European businesses do not claim that they are being discriminated against. To the contrary, the interests of European businesses are the main incentive that explains why the EU negotiates trade agreements that include Chapters on FDI and ISDS.

A straightforward, literal reading of art. 20 CFR, as sketched out above, also makes it possible to question the coherence of the Court's assessment in Opinion 1/17. As shown, the Court found art. 21 CFR to be inapplicable, but reapplied its substantive content within the ambit of art. 20 CFR. To make sense, there must exist some rationale that justifies this manoeuvre.[52] A possible explanation is found in the academic discussion that

[51] S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Nomos 2014) 565.

[52] Cf. Section II.2 *supra*.

preceded Opinion 1/17. In his PhD thesis, Hannes Lenk argues in favour of a broad understanding of the principle of non-discrimination enshrined in arts 21 CFR and 18 TFEU. He submits that these provisions not only protect against discrimination in the narrow sense, but also that their main purpose is of a structural character: "to maintain the equality of competitive relationships on the internal market".[53] From that perspective, it is problematic that the ISDS mechanism in CETA provides extra protection to some specific European businesses that operate on the internal market: those who can invoke the ISDS mechanism on behalf of a Canadian investor.

The way in which the Court cut off the reach of art. 21 CFR is, in the first place, a rejection of the structural argument made by Lenk, and marks a more limited individual rights reading.[54] On the other hand, the reapplication of the substance of art. 21 CFR within the ambit of art. 20 may be regarded as recourse to a similar way of reasoning, underpinned by the fact that the Court referred to the effects "within the union itself".[55] To leave the structural issues to art. 20 CFR is in conformity with its systemic character (provided of course that one is willing to acknowledge that art. 20 CFR has a systemic component).[56] A fundamental question, however, is what these structural issues are. It is difficult to reemploy the internal market rationale of arts 21 CFR and 18 TFEU, referred to by Lenk, within the ambit of art. 20 CFR. Instead, the universal nature of the word "everyone" indicates that the main concern of art. 20 CFR is the constitutional structure of the Union: that there is one law for all. In constitutional terms, the notion of equality is much the same as a requirement of unity.

IV.2. "Is equal"

In Opinion 1/17 the Court referred to a massive amount of case law that establishes that art. 20 CFR provides a substantive right to equal treatment.[57] With regard to purely substantive issues, it is clear that the protection afforded by art. 20 CFR is much the same as the protection afforded by art. 21 CFR. The question is whether the principle that everyone is equal before the law and the principle that no one should be discriminated against are interchangeable in every respect. A simple example proves that they are not.

Let us say that we all agree that people with blonde hair and people with dark hair should be treated equally, but that we fear that that blondes are subject to arbitrary behaviour. If the latter is true, there exists, in the practical and factual sense, a difference between people with dark hair and people with blonde hair. If we cope with this difference by setting

[53] H Lenk, *The EU Investment Court System* (University of Gothenburg 2019) 210.

[54] Cf. the arguments submitted to the Court, referred to in Opinion 1/17 cit. para. 83.

[55] Opinion 1/17 cit. para. 174.

[56] At least, this distinction maintains the settled line of case law that makes clear that art. 18 TFEU and thus art. 21 CFR has no external effects, cf. Section II.2 *supra*. It is in a sense cleaner to cope with the structural effects on the basis of art. 20 CFR.

[57] Opinion 1/17 cit. paras176–178.

up a separate, autonomous legal system for people with blonde hair that provides easier access to justice, smoother procedures, better compensation and so on, we constitutionalize the difference between people with dark hair and people with blonde hair that, in the first place, was deemed to be unacceptable from the normative point of view.

The ECJ's basic premise in Opinion 1/17 is that Canadian investors should be treated on an equal footing with domestic investors. The Court found ISDS to be justified because its main rational is to provide complete confidence that discrimination will not occur. It is questionable whether the risk of arbitrary treatment is in itself a relevant difference. Different treatment is a problem only if those who are being compared are equals, constitutionally speaking. But then you are not different; you should only be treated better than you actually are. Arguably, Opinion 1/17 treats the Canadian investor as the "blonde" in the example above.

It could be argued that the constitutional argument is too theoretical, while, on the other hand, the fear of the Canadian investor is a practical concern that is well founded.[58] It is, however, easy to think of groups that are more vulnerable and marginalized than huge Canadian multinational corporations, such as e.g. immigrants, foreign workers, the uneducated and the poor. Still, no one has ever come up with the idea of establishing a specific legal system for such groups. There may be several reasons for this; our constitutional instinct is probably one of them. Constitutional principles do not deny practical needs, but foresee them. In the absence of constitutional principles, there is a risk that pragmatic short-term interests and concerns would prevail over more abstract values that are fundamental in the long term. One such value is that within the Union, everyone is equal before the law.

The arguments above show that while the notions of equality and non-discrimination have much in common, they are not in every respect interchangeable. Rather, arts 20 and 21 CFR seem to work in tandem. Art. 21 CFR prohibits discrimination, appears purely substantive and is, like a police officer, ready to act on short notice. Art. 20 CFR might have something to add on how instances of discrimination should be coped with, if they occur; it is more like a Statesman. The systemic, constitutional requirement would be that the legal system must meet its own standards. If the short-term and the long-term constitutional requirements are applied in conjunction, they stipulate not only that discrimination of those who are to be regarded as equals should not occur, but also that if it does, it must be remedied from "within the union itself".[59] Understood in this sense, the substantive notion of non-discrimination and the systemic notion of equality are not interchangeable, but complementary. Art. 20 CFR suggests that there exists only one Law within the Union, and that it is this Law that must be used to counter occurrences of discrimination, not its substitute i.e. ISDS.

[58] However, this was not assessed by the Court.

[59] Opinion 1/17 cit. para. 174.

IV.3. "The law"

The notion of "equality" in art. 20 CFR makes the relationship to art. 21 CFR obvious. Further, the two provisions are neighbours. Still, while art. 21 CFR is important, it would be to overstate matters to equate it with "the law". It is "the law", however, and not art. 21 CFR that art. 20 CFR refers to.

The obvious reference to understand the notion "the law" is the axiom on which EU law rests: that the Union is based on the rule of law.[60]

The notion "the rule of law" is sometimes used in a thick and substantive sense; on other occasions in the thin and formal sense. I shall not engage in this important yet eternal debate. A practical approach is to consult art. 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

Art. 2 TEU lists "the rule of law" on a par with other fundamental values upon which the Union is founded. Nothing in the list suggests that "the rule of law" is an overarching value from which the others flow. Rather, it is a value that complements the other values and principles. While I do not exclude thicker understandings of the notion of "the rule of law", I proceed on the assumption that the notion covers at least the "thin" and formal components of the concept. Armin von Bogdandy provides a minimum account: "In any event, under all understandings, the rule of law requires, as a minimum that the law actually *rules*. There is only rule of law if the law is generally and widely observed and is effective in actually guiding the conduct of persons, both in their general capacities (if they have them) and as private persons".[61]

I deduct two fundamental propositions from the minimum account of the rule of law. The first proposition is that it is not sufficient that the law exists; it must also be applied and work in practice: It must "rule". The Court's acceptance of the ISDS mechanism in Opinion 1/17 can be understood from this perspective.[62]

The second proposition that can be deducted from the formal and "thin" notion of the rule of law applied in conjunction with the formal notion of "equality" is that there is one law for all. If a specific legal system for every man existed, there would be no equality. The latter observation was actually recognized by the Court in Opinion 1/17. Of course, it is for this very reason that the Court so easily cut off the reach of art. 21 CFR. As mentioned above, EU citizens and third-country citizens are incomparable in the strong sense

[60] E.g. case C–216/18 PPU *Minister for Justice and Equality (Deficiencies in the. system of justice)* ECLI:EU:C:2018:586 para. 49.

[61] A von Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law: What it Is, What Has Been Done, What Can Be Done' (2014) CMLRev 59, 63.

[62] Opinion 1/17 cit. para. 199.

because they belong to different legal systems.[63] In the absence of unity, any meaningful notion of equality ceases to exist. To the contrary, when equality is assessed "within the union itself", the unity of the EU legal order is the axiomatic starting point.[64]

IV.4 A CONSTITUTIONAL CHOICE

A linguistic interpretation of art. 20 CFR as conducted above is not sufficient to state that the Court's assessment in Opinion 1/17 was wrong. Instead, it is an alternative way in which to make sense of the provision. Apart from the fact that the reading flows directly from the wording, the quality of the alternative approach is that it addresses one of the biggest issues in our time: that international (trade) law does not sufficiently take the interests of ordinary people into account.

What I want to highlight is that the choice between a systemic reading of the notion of the rule of law as a requirement of unity, and a reading which instead focuses on compliance, is a constitutional choice. It concerns important values. Because the analysis of the ECJ starts and ends in the middle of things,[65] the Court did not make the choice transparent, nor did it elaborate upon it. In Section V below I shall cast light over important constitutional dilemmas that were suppressed.

V. THE CONSTITUTIONAL DILEMMAS

In the introduction to this *Article* I noted that the discussion on ISDS is marked by a high level of agreement with regard to the values that are concerned, but fierce disagreement over how these values are to be assessed. The analysis of art. 20 CFR above showed that different approaches and choices are possible.

In its Communication to the Council and the European Parliament on art. 7 TEU, the Commission concludes that: "The European Union is first and foremost a Union of values and of the rule of law. The conquest of these values is the result of our history. They are the hard core of the Union's identity and enable every citizen to identify with it".[66]

This Section takes the rule of law as the point of reference, and identifies where opinions start to differ. Section V.1 assesses two different approaches to the rule of law, the first one being that the notion marks something that must be *complied* with, the second being that it is a value on which the legal order of the Union is *founded*. Section V.2 addresses another constitutional dilemma, the choice between measures that promote the

[63] Section III.1, *supra*.

[64] Opinion 1/17 cit. para. 174.

[65] Section I, *supra*.

[66] Communication COM(2003)606 final from the Commission to the Council and the European Parliament of 15 October 2003 on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based.

rule of law in the short and in the long term. Section V.3 discusses inclusion *versus* exclusion of national courts.

V.1. *Compliance* with the rule of law *versus* the rule of law as *a foundational* value

In a paper in which he defends ISDS, Wojchiech Sadowski observes that the fundamental question is what set of values should be common to all Member States and how such values can most effectively be protected. He asserts that: "Necessarily, any such discussion of European Union values must begin with the bedrock principle of respect for the rule of law, which is a fundamental value of the EU recognized in Article 2 TEU".[67]

I agree to this common point of reference. I think we all do. Sadowski proceeds on the basis of the

> "common-sense starting point that, in order to confront and overcome vital threats to fundamental values, EU institutions should approach them with an open mind, looking for solutions not only inside the EU legal system but also beyond it, in order to ensure the promotion of and *compliance* with the rule of law in its Member States through all reasonable means. The rationale underlying this proposition is that ensuring *compliance* with the rule of law in each EU Member State should be the most critical strategic objective of the EU".[68]

Interestingly, Opinion 1/17 may be regarded as a response to this "common-sense" claim. The Court found the ISDS mechanism in CETA to be justified, first because in the substantive sense, it does not provide better rights to Canadian investors as compared to European investors,[69] secondly because: "the purpose of inserting in the CETA provisions concerning non-discriminatory treatment and protection of investments, and the creation of tribunals that stand outside the judicial systems of the Parties to ensure *compliance* with those provisions, is to give complete confidence…".[70]

The constitutional dilemma is that if compliance with the rule of law is being outsourced to an external institution, there is a risk that it loses its foundational character.

With regard to trade agreements with third countries, it may be argued that compliance is a goal in itself. Such agreements have a contractual character and do not pursue a purpose that is bigger than themselves, i.e. the creation of a union. Further, externalization of the dispute resolution mechanism contributes to ensure neutrality. Arguably, this is a good thing. After all, trade agreements with third countries establish rights that

[67] W Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' cit. 1026.

[68] W Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' cit. 1027 (emphasis added).

[69] Section III.3 *supra*.

[70] Opinion 1/17 cit. para. 199 (emphasis added).

provide that those who are different, and continue to be different,[71] shall be treated (more) equally. In Opinion 1/17 the Court noted:

> "at the outset, that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law. Indeed, the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court that is created or designated by such agreements as regards the interpretation and application of their provisions".[72]

In this respect it is, however, important to emphasize that the substantive and procedural protection offered by ISDS is different from the substantive rights that flow from the general part of trade agreements such as CETA. Somewhat simplified, a main purpose of ISDS is to ensure that those who, according to domestic law, are equals, are actually treated as equals,[73] even though they are under the influence of foreigners. The way in which the ISDS mechanisms supervise and control the application of domestic law is the root of the constitutional dilemma. According to art. 1 TEU, the Member States have conferred competences to the Union to attain objectives they have in common. Art. 2 TEU asserts that the rule of law is among the values that are common to the Member States. Further, according to art. 197(1) TFEU, the "effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest". Within EU law, compliance is a means to achieve a higher purpose, a Union founded upon the rule of law. Its foundation is the basis for the common trust on which the proper functioning of the Union is dependent.

If compliance is taken out of the hands of the Member States, it indicates that the rule of law is a value that is *not* common to all of the Member States (indeed, this is what Sadowski suggests).[74] The assertion that the rule of law is among the values that are common to the Member States is, however, not descriptive, but normative. If the values are not shared descriptively speaking, the normative requirement of art. 2 TEU is that they shall be.[75] Compliance by externalization serves no purpose in this respect.

Art. 20 CFR is an open invitation to discuss the dilemma above. Principally speaking, if the values of art. 2 TEU constitute the "hard core of the Union's identity and enable every citizen to identify with it",[76] it indicates that the rule of law must be protected from

[71] Cf. the analysis of art. 21 CFR in Section II *supra*.

[72] Opinion 1/17 cit. para. 106.

[73] *Ibid*. para. 199.

[74] W Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' cit. 1028-1031.

[75] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 para. 37.

[76] Communication COM(2003) 606 final cit.

"within the union itself".[77] Practically speaking, the message voiced by the citizens is that "everyone"[78] is not able to identify with ISDS. While the Court chose not to openly discuss the matter, this does not imply that it did not make a choice.

V.2. Quick fix *versus* long-term refinement

Art. 7 TEU provides a legal basis to remedy national institutional deficiencies from within. The main argument of Sadowski seems to be of a practical nature: art. 7 TEU is not sufficiently effective.[79] I will leave that question open to discussion and instead focus on the insights art. 7 TEU provides with regard to the functioning of the EU legal system.

The first insight is that art. 7 TEU requires the identification of "systemic deficiencies" to be triggered. Isolated infringements are not enough. As observed by von Bogdandy and Ionnadis, "in well-functioning legal systems, [...] infringements trigger social and institutional responses that are essential for sustaining and even developing normative expectations; hence they serve the function of law. There are few better examples of this than within EU law itself. Without the operation of the Union courts, triggered by violations, European Union law would not be as important, both in breath and in depth, as it is today".[80]

Ginsburg notes that "adjucation is a public good, contributing to the stock of law and enhancing private arrangements that exist in the shadow".[81] A first problem with ISDS mechanisms, such as in CETA, is that they hastily remedy an alleged problem without a prior assessment of how serious the problem actually is. Below the threshold of art. 7 TEU, non-compliance is a necessary production factor to make law, to refine law, and to promote the rule of law. If the handling of such instances is externalized, the public good is taken out of the hands of those who, according to art. 20 CFR, are Law's beholders: "everyone".

Secondly, if ISDS is regarded as a way in which to cope with "illiberal tendencies" and weak institutions in specific Member States,[82] the insight of art. 7 is that the approach is too sweeping. Art. 7(1) TEU justifies the use of measures addressed to specific Member States as an exception to the principle of equality enshrined in art. 4(2) TEU. In comparison, the ISDS mechanism applies to every Member State, including Member States with well-functioning institutions. To apply the rhetoric of the discrimination test: If ISDS is a measure the justification of which is to counter illiberal tendencies in Europe, its problem is that it treats that which is different alike.

[77] Compare Opinion 1/17 cit. para. 174.

[78] Art. 20 CFR.

[79] W Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' cit. 1044-1047.

[80] A von Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law: What it Is, What Has Been Done, What Can Be Done' cit. 72.

[81] T Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) International Review of Law and Economics 107, 119.

[82] W Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' cit.

Thirdly, and rather fundamentally: art. 7 TEU acknowledges that the rule of law is a value upon which the Union is founded, thus it is this value that must be repaired. In comparison, ISDS is a way in which to provide reparation to an investor because the (rule of) law has been violated. With regard to art. 7 TEU, it goes without saying that any measure that does not promote the rule of law is without any value. The ISDS mechanism, to the contrary, is indifferent in this regard. Its main purpose is to protect the economic interests of the investor. Whether this is achieved by respecting the law, or by way of economic compensation if the law is not respected, is irrelevant.

Against this background, it is not surprising that the principles for compensation in EU law and in International Investment Law are quite different. International Investment Law is constructed upon contractual principles. Such principles have a transactional character. Although contractual relationships do not necessarily have a short-term perspective, that is often the case. Therefore, contract law assesses every breach as an isolated instance. The general rule in investment law is that "state responsibility entails a secondary obligation to provide reparation for the breach. This means that the claimant so far as possible ought to be put in the position in which he would have been had the breach not occurred".[83]

Within public law, the starting point is different. The State and its citizens have a long-term, not to say eternal, relationship. This does not exclude a principle of state liability. The basic premise in EU law is the same as in International Investment Law, namely that "the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained".[84] However, the substantive principles are crafted to fit the public and constitutional character of the long-term relationship:

> "First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterized by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers".[85]

Sadowski acknowledges the difference and notes that:

> "investment arbitration is not as lenient to respondent States as most other international or domestic courts in terms of damages. Domestic courts often feel constrained from ruling against States with respect to the consequences of measures taken in pursuit of their sovereign powers, and even if such judgments are rendered, high damages are rare. In

[83] I Alvik, *Contracting with Sovereignty. State Contracts and International Arbitration* cit. 222.

[84] Joined cases C-46/93 and C-48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte: Factortame and Others* ECLI:EU:C:1996:79 para. 22.

[85] *Ibid*. para. 45.

> proceedings before the European Court of Human Rights, settled case law regarding breach of Article 1 of Protocol No.1 confirms that the compensation need not be full. Confronted with such benchmarks, the approach of investment treaty arbitration favouring the full compensation model (in accordance with the Chorzów Factory principle) is clearly the preferred option for eligible individuals".[86]

Rather than "lenient", the principles on State Liability in public law should be described as constitutional. They are constructed to avoid unnecessary regulatory chill. In a long-term relationship, it is more important to preserve, correct and refine the institutional system than to ensure the fullest possible compensation for damages. Instead, the balancing of different concerns aims at the fullest possible realization of the rule of law. To the contrary, the reference to the notion of the "rule of law" appears exaggerated in contractual relationships. Such relationships are marked by the fluid and coincidental relationship between two parties tied together by a contract. Contractual principles on liability protect the short-term economic interest of investors. In Opinion 1/17 the Court chose not to assess the important differences between the principles for compensation and the dilemmas that these differences introduce.

V.3. Inclusion *versus* exclusion of national courts

ISDS provides a system for the protection of individual rights that is completely detached from the domestic system.[87] In comparison, the EU judicial system is constructed to ensure that national courts are the primary fora for individuals to assert their rights. As Joseph Weiler taught us some 25 years ago, "The national courts and the European Court are … integrated into a *unitary* system of judicial review".[88]

Unity promotes important considerations. First, it ensures that national Courts become familiar with EU law, assisted by the preliminary reference procedure. Secondly, it brings EU law closer to the domestic domain and is thus a way of legitimizing it. Thirdly, it makes EU law a common heritance, as national Courts are accessible to everyone. Fourthly, when international law finds its way into national law through the national court system, a mechanism of checks and balances is established. External (international) courts "check" the functioning of the national system. On the other hand, they have no formal authority, but are dependent on the loyalty and acceptance of national Courts. Here lies the balance.

[86] W Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' cit. 1042.

[87] Cf. the criticism of I Alvik, 'The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy' cit. 301.

[88] JHH Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors' (1994) Comparative Political Studies 510, 515 (emphasis added).

Von Bogdandy has raised the fundamental question: "Wherein lies the ultimate reason for the quest for unity?" His answer is that: "Unity of the State and unity of administration are both based on the unity of the democratic origin of all sovereign power. All public authority originates with the people. With the enactment, continuation and development of the constitution, this authority is passed on to the various organs within the constitutional framework. All bodies exercising sovereign power continue to be dependent on the unifying origin of that power".[89]

Art. 20 CFR is an open invitation to discuss whether unity is a mere practical arrangement or a legal requirement. It does not take much creativity to argue that the provision expresses the fundamental principle that all public authority originates with the people. The dilemma of whether to include or exclude national courts is thus a big one. The Court preferred strict separation, autonomy, over unity, but again, it did not provide any reasons for its choice.

VI. Justification

If the Court had chosen to interpret and apply CFR art. 20 in a different manner, the focus would have shifted to justification. In Section VI.1 below I assess possible justifications for the ISDS mechanism and refer to them as the "hidden rational". By that I imply that the Court was influenced by these considerations, but chose an approach that kept them in the dark. One reason might be that it is somewhat unclear to what extent the principle in art. 20 CFR is open to exceptions. Another – and in my view important – reason, is that there is a looming conflict between the Court's preservation of the autonomy of EU law in external relations and Law's unity (Section VI.2).

VI.1. The hidden rational

In their written observations, Belgium and the UK submitted that:

> "The difference in treatment referred to in the request for an opinion is, in any event, justified by the objective of contributing to free and fair trade, within the meaning of Article 3(5) TEU, and by the objective of integrating all countries into the world economy, as laid down in Article 21(2)(e) TEU. The competence of the Union to conclude, under Article 207 TFEU, agreements concerning direct investments with non-Member States and, under Article 4(1) and (2)(a) TFEU, agreements concerning investments other than direct investments with such States, would be meaningless if the EU law principle of equal treatment were to prohibit the Union from entering into specific commitments with respect to investments deriving from non-Member States".[90]

[89] A von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System' (1999) CMLRev 887, 899.

[90] Opinion 1/17 cit. para. 84.

The Court's approach made it unnecessary to refer to the arguments quoted above. Still, it is reasonable to believe that they influenced the choices made by the Court.

First, the contribution to the promotion of international trade makes agreements such as CETA different from intra-EU agreements.[91] In addition, the ISDS mechanism in CETA "aims at a major reform of investment dispute resolution, based on the principles common to the courts of the European Union and its Member States and of Canada, as well as to international courts recognized by the European Union and its Member States and Canada".[92] This is an important consideration, having regard to the fact that there exist numerous agreements between the EU-Member States and third countries that include ISDS clauses.[93]

Secondly, with regard to an international agreement such as CETA, it is relevant to look not only at EU law, but also at the principles of international law. The ECJ's reasoning in Opinion 1/17 seems inspired by the judgment of the European Court of Human Rights (ECtHR) in *James and others v The United Kingdom*, although the latter was not referred to.[94] *James and others v The United Kingdom* concerned domestic legislation that conferred on tenants residing in houses held on "long leases" (over, or renewed for periods totalling over, 21 years) at "low rents" the right to purchase compulsorily the "freehold" of the property on favourable terms.[95] The applicants argued amongst other things that the reference of art. 1 of Protocol No. 1 to the European Convention of Human Rights to "the general principles of international law" meant that the international law requirement of prompt, adequate and effective compensation for the expropriation of property of foreigners also applied to nationals.[96] To the contrary, the ECtHR found that "the general principles of international law are not applicable to a taking by a State of the property of its own nationals".[97] It dismissed the argument voiced by the applicant that arts 1 and 14 of the ECHR do not permit differentiation on the ground of nationality. The ECtHR noted that differences in treatment do not constitute discrimination if they have an "objective and reasonable justification".[98] With regard to the latter, the ECtHR observed that:

[91] Compare *Achmea* cit.

[92] Opinion 1/17 cit. para. 45.

[93] Particularly emphasizing this point, JHH Weiler, 'European Hypocrisy: TTIP and ISDS' (21 January 2015) EJIL: Talk! www.ejiltalk.org.

[94] ECtHR *James and Others v The United Kingdom* App n 8763/79 [21 February 1986]. See also ECtHR *Lithgow and Others v The United Kingdom* App n 9006/80; 9262/81; 9263/81/ 9265/81; 9266/81; 9313/8;1 9405/81 [8 July 1986]. See I Alvik, 'The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy' cit. 293, 305.

[95] For a more detailed account, see *James and Others v The United Kingdom* paras. 10 and 11.

[96] Compare in this regard CETA cit., art. 8.12 (1)(d), which requires "prompt, adequate and effective compensation" cf. Opinion 1/17 cit. para.17.

[97] *James and Others v The United Kingdom* cit. para. 66.

[98] *Ibid*. para. 63.

> "Especially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals".[99]

Arguably, third-country nationals are more vulnerable in at least one sense: They are unfamiliar with the domestic system in the country of investment. Their ability to assess the quality of local institutions is inferior to that of the locals. ISDS is a way in which to remedy the information problem. Further – and this is a big argument: To the extent that local institutions suffer from deficiencies, it may be argued that the locals must bear the cost of the tidy process of improving the rule of law, while in the meantime foreigners must be provided guarantees that the law is complied with.

The hidden considerations above may explain why the Court chose not to enter into justification mode. As is well known, reasons that can objectively justify discrimination can be applied in two manners: either to allow for an exception, or, alternatively, to prove that the measure was not in fact discriminatory in the first place. The Court's finding in Opinion 1/17, that equality before the law was not affected, seems to presume that a justification would have existed if the reach of art. 20 CFR had been constructed more broadly.

VI.2. Autonomy or unity? The silent choice

There is a problem, however. *If* art. 20 CFR is constructed more broadly, its systemic component must be acknowledged. The requirement of unity cannot first be recognized and then totally disregarded. Instead, the question is: Pursuant to which systemic requirements is ISDSs justifiable? Two requirements stand out:

The first requirement would be that national remedies must be exhausted before the ISDS mechanism can be invoked.[100] Several arguments go in the same direction. First, this is the standard approach in international law. Secondly, this is the only way in which to confirm whether the fear that domestic institutions are hostile to foreigners is real or unfounded. Thirdly, the structure provides that domestic courts can familiarize with foreign investors and their rights. Fourthly, it is the only way in which the ISDS mechanism can serve as an external corrective to dysfunctional domestic institutions. In short: It is the only way in which ISDS can promote international trade *and* the rule of law.

[99] *Ibid*. para. 63.

[100] Cf. I Alvik, 'The Justification of Privilege in International Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy' cit. 311; M Kumm, 'An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege' cit.

The second requirement would be that the ISDS mechanism, in one way or the other, must work in tandem with the national system. Different forms of integration is the common approach in international law. It is not, however, the way in which the Court has approached ISDS. In the field of external relations, the choice between autonomy on the one hand, and unity on the other, has already been made. The Court has embraced full separation: autonomy. In my view, this choice explains why it was difficult for the Court to undertake a more engaged interpretation of art. 20 CFR in Opinion 1/17, and why, instead, it resorted to a nitty-gritty, seemingly impeccable, textbook-style assessment. The door was already shut. Instead of trying to open it, the Court locked and bolted it.

VII. Conclusion

In Opinion 1/17, the ECJ re-employed the substantive content of art. 21 CFR within the ambit of art. 20 CFR. According to the Court, the ISDS mechanism contained in CETA is in conformity with the fundamental requirement that "everyone is equal before the law".

The Court's assessment rests on two pillars. First, in the substantive sense, CETA does not afford a higher level of protection to Canadian investors than EU law affords to European investors. In this respect, investors of different origins are equals who are treated equally. Secondly, ISDS provides specific procedural rights to foreign investors, which cannot be invoked by domestic investors. According to the ECJ, Canadian investors do not have the same confidence in the institutional system of the EU as domestic investors, or, at least, Canadian investors are not legally obliged to have the same trust. In this respect, Canadian investors are different from European investors, thus it is justified to treat them differently.

An important insight of theories on legal realism is that legal findings are not necessarily the outcome of a preceding analysis. Sometimes it is vice versa. In this paper I have shown that it is possible to interpret art. 20 CFR so as to include a systemic requirement of unity: that within EU law itself, there is only one Law, which applies to all. Art. 20 CFR hints at this understanding due to its universalistic character, its use of the word "everyone", and its reference to the notion of "the law". If this reading of art. 20 CFR is acknowledged, the ISDS mechanism in CETA stands out as an exception. It creates a specific legal system with specific rights for investors of a specific nationality. There is not one law for all.

I have not argued that the Court was wrong in not choosing a thicker, systemic interpretation of art. 20 CFR. Instead, I have tried to highlight the values that I believe that the Court consciously but silently balanced when it constructed its approach to art. 20 CFR and the accompanying reasoning. The Court favoured short-term compliance with the law over the promotion of the rule of law. It favoured the promotion of international trade over the interests of the population at large.

I hope also to have shown that an important difference exists between the autonomy and the unity of the legal system. Due to its strong protection of its own autonomy and the autonomy of EU law, the ECJ has embraced what is in fact the main problem of the

ISDS mechanism – its complete disentanglement from the legal order(s) that it scrutinizes.[101] It is probable that this choice rests on another hidden balancing act, between principled concerns and practical realities. While it is doubtful whether the ISDS mechanism would have been legally acceptable if it were a new invention, it is not. The Court's practical attitude has been to curtail the use of ISDS intra-EU,[102] but to support the initiative that aims to reform the system at the international level.

As with other political choices, the Court's way forward is not without its risks. The preservation of the unity of the legal system is the foundation for its legitimacy. Further, as mentioned in the introduction to this paper, unity is about having or controlling supremacy. In Opinion 1/17, the Court acknowledged that the autonomy of EU law would be adversely affected if external tribunals and courts can call into question the level of protection of a public interest within the Union, enacted on the basis of a democratic procedure,[103] i.e. by "everyone".[104] At surprising length, the Court stressed why, in its view, "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".[105] The pressing question is how this is to be controlled. In the absence of unity, autonomy's guarantor – "everyone" – is cut off. If the two systems clash there is a risk that the European legal order remains formally autonomous but *de facto* inferior.

[101] Cf. Opinion 1/17 cit. paras 113, 114 and 134.
[102] *Achmea* cit.
[103] Opinion 1/17 cit. paras 150–151.
[104] Charter art. 20.
[105] Opinion 1/17 cit. para. 156.