

Belgian Ministry of Foreign Affairs - Brussels  
Seminar on Opinion 1/17 of the European Court of Justice  
and on the reform of investment protection

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**Modernising trade whilst safeguarding the EU constitutional  
framework: an insight into the balanced approach of Opinion 1/17**

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Dear Deputy Prime Minister,

Ladies and gentlemen,

It is a great pleasure for me to deliver the keynote speech at this seminar on Opinion 1/17 of the Court of Justice and on the reform of investment protection. As you all know, the Full Court decided in that Opinion, on a request from Belgium, that the Investor-State Dispute Settlement (ISDS) Mechanism in Chapter 8 of the CETA<sup>1</sup> is compatible with EU primary law. That landmark Opinion clarifies the concept of ‘autonomous legal order’, which is essential in the law of EU external relations, and contains important guidance on how other fundamental principles of EU law apply in new-generation trade and investment agreements, in particular equal treatment and the right of access to an effective remedy before an independent tribunal. In this speech, I will shed some light on the balance struck by the Court between the political objectives of promoting and modernising

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<sup>1</sup> Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016 (*O.J.* 2017, L 11, p. 23). The CETA has nevertheless not yet been concluded.

investment protection, on the one hand, and the need to safeguard the constitutional framework on which the EU is based, on the other hand. Since it establishes the conditions under which the EU may submit to ISDS mechanisms in future agreements, Opinion 1/17 clearly has significance beyond the ratification of the CETA.

### **1. The legal and political context of the Opinion**

Let me first recall briefly the context of Opinion 1/17.

It is common ground that effective investment protection requires that ‘foreign’ investors should be able to obtain judicial review of measures adopted by the State in which their investments have been made. Such review aims to verify whether that State, including all its organs, has treated those investments in accordance with its international commitments, for example rules on national treatment, the most-favoured nation treatment and protection against unfair or inequitable treatment. However, the fact that a State is a respondent in such proceedings raises the question whether its courts are effectively in a position to settle the dispute impartially, without political influence or interference or indeed the appearance of such influence or interference. The answer to that question may not be clear in certain third States in which the separation of powers and the rule of law may not apply consistently and reliably in practice. Lack of trust in a host State’s judicial system may discourage EU foreign investment and thus undermine the Union’s objective of contributing to free and fair trade, set out in Article 3(5) TEU. In order to overcome that difficulty,

an increasing number of trade and investment agreements establish common tribunals having jurisdiction to adjudicate investment disputes between investors of each Party and the other Party. As in the context of arbitration, no Party is overrepresented in those tribunals. Their members are moreover subject to strict guarantees of competence and independence. In the longer term, bilateral ISDS mechanisms might be replaced by a permanent, multilateral investment court.

In *Opinion 2/15* of 16 May 2017 on the EU-Singapore Free Trade Agreement, the Court decided that *competence* to enter into an ISDS mechanism is shared between the Union and its Member States.<sup>2</sup> That is because such a mechanism ‘removes disputes from the jurisdiction of the courts of the Member States’ and cannot therefore be regarded as ‘ancillary’ to the substantive rules of the agreement in which it is included.<sup>3</sup>

Since there is no qualified majority in the Council to decide that the EU should exercise that competence alone,<sup>4</sup> ISDS mechanisms in recently negotiated trade and investment agreements have to be accepted by the Union and all Member States. That explains why the ISDS mechanism in the CETA, unlike many other provisions of that agreement, has not yet entered into force provisionally. Following refusal by the Walloon Parliament to approve ratification of the CETA

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<sup>2</sup> Opinion 2/15 ([EU-Singapore Free Trade Agreement](#)) of 16 May 2017, EU:C:2017:376, para. 293.

<sup>3</sup> *Ibid.*, para. 292.

<sup>4</sup> On the possibility for the Union to exercise alone an external competence that it shares with the Member States, see judgment of 5 December 2017, [Germany v Council](#), C-600/14, EU:C:2017:935, para. 68.

in October 2016, a political deal was sealed with the Belgian federal government to request an opinion from the Court on the compatibility of the ISDS mechanism in the CETA with EU primary law, in accordance with the procedure set out in Article 218(11) TFEU.

The key *legal issue* raised in Belgium's request was *autonomy*. It is true that the Union's external competence and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court as regards the interpretation and application of those agreements.<sup>5</sup> However, such a mechanism, which is external to the EU judicial system, may not be allowed to alter the autonomy of the Union's legal order. The Court emphasised, in particular in *Opinion 2/13* on accession of the EU to the ECHR,<sup>6</sup> that an international agreement of the EU may not undermine the Court's role in ensuring consistency and uniformity in the interpretation of EU law.

*Essentially three factors* were behind Belgium's doubts concerning the compatibility of the ISDS mechanism in the CETA with autonomy.

*First*, unlike the Dispute Settlement Mechanism in force within the WTO, the ISDS mechanism at issue enables private individuals and businesses of one Party to challenge directly measures adopted by the

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<sup>5</sup> Opinion 1/91 ([First Opinion on the EEA Agreement](#)) of 14 December 1991, EU:C:1991:490, para. 70.

<sup>6</sup> See, *inter alia*, Opinion 2/13 ([Accession of the European Union to the ECHR](#)) of 18 December 2014, EU:C:2014:2454, para. 174.

other Party and to obtain an award of damages should that challenge succeed.

*Second*, the ‘applicable law’ before the CETA tribunals will be the CETA itself, supplemented by other rules and principles of international law applicable between the Parties.<sup>7</sup> Moreover, when applying the domestic law of a Party ‘as a matter of fact’, including EU law, the CETA tribunal should ‘follow the prevailing interpretation given to [that law] by the courts or authorities of that Party’.<sup>8</sup> However, there is no guarantee that an interpretation of the relevant EU law by the Court of Justice will be available in all instances. Situations will therefore inevitably arise in which the CETA tribunal ‘interprets’ EU rules for the first time in order to establish the ‘facts’ that are relevant to the dispute. Although that interpretation would not be directly binding upon the EU and its Member States,<sup>9</sup> it is liable to entail serious consequences for them when it contributes to the finding of a violation of the CETA and the award of damages.

*Third*, the ISDS mechanism provides for a ‘no U-Turn’ rule: once an investor has opted for that mechanism, it may not revert to the domestic courts of the Party concerned in the same dispute.<sup>10</sup> Furthermore, decisions of the CETA tribunals are binding upon the Parties and cannot be challenged before domestic courts.<sup>11</sup> Therefore, in proceedings in which the EU or a Member State is a respondent,

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<sup>7</sup> Article 8.31(1) CETA.

<sup>8</sup> Article 8.31(2) CETA.

<sup>9</sup> Article 8.31(2) *in fine* CETA.

<sup>10</sup> Article 8.22(1)(g) CETA.

<sup>11</sup> Article 8.41 CETA.

courts or tribunals of the Member States would be precluded from referring questions to the Court for a preliminary ruling. That raised doubts because *Opinions 1/09*<sup>12</sup> and *2/13*<sup>13</sup> had underscored the pivotal importance of that judicial dialogue for ensuring the uniform interpretation of EU law, ‘thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of th[at] law’.<sup>14</sup>

Belgium raised three additional issues of compatibility with EU primary law.

In the first place, the ISDS mechanism is accessible only to Canadian investors in the EU, including in the form of a ‘locally established enterprise’, and for EU investors in Canada. Conversely, EU investors do not have access to that mechanism with respect to their investments in the EU. Belgium doubted whether that difference of treatment is compatible, in particular, with the *equal treatment principle* laid down in Article 20 of the Charter of Fundamental Rights of the EU (‘the Charter’). Next, a Canadian investor could obtain damages from the CETA tribunals following a decision of the Commission or of a national competition authority (NCA) imposing a sanction for a violation of competition rules, in a situation where that decision violates investment protection rules contained in the CETA. Belgium asked the Court whether that possibility, which does not exist for

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<sup>12</sup> Opinion 1/09 ([Agreement creating a Unified Patent Litigation System](#)) of 8 March 2011, EU:C:2011:123, paras 67 and 83.

<sup>13</sup> Opinion 2/13 ([Accession of the European Union to the ECHR](#)) of 18 December 2014, EU:C:2014:2454, para. 176.

<sup>14</sup> Para. 176 of Opinion 2/13, cited above.

investors outside the scope of the CETA, is compatible with the *equal treatment principle* and whether it is *liable to undermine the effectiveness* of EU law. Finally, Belgium referred to the *right of access to an independent tribunal* enshrined in Article 47 of the Charter. Its doubts here focused on the costs of proceedings for SMEs, the fact that the remuneration of members of the CETA tribunals would not consist of a fixed and regular salary, the rules governing their appointment and removal by the CETA Joint Committee, and the fact that those members would be subject to ethical rules designed for arbitrators which they did not, moreover, establish themselves.

## **2. The Court's answers to the questions raised in the request for an Opinion**

I turn now to the Court's examination of each of those issues.

### *a. The issue of autonomy*

*Opinion 1/17* provided an opportunity for the Court to clarify further what the 'autonomy of the Union's legal order' actually entails. Paragraph 110 explains that it 'resides in the fact that the Union possesses a *constitutional framework* that is unique to it'.<sup>15</sup> That framework encompasses the values on which the Union is founded, the general principles of EU law, the provisions of the Charter, and the treaty provisions containing, *inter alia*, rules on the conferral and division of powers, rules governing how the EU institutions and its judicial system operate, and fundamental rules in specific areas. The

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<sup>15</sup> Emphasis added.

structure and content of that part of the Opinion show that the Union may submit to an ISDS mechanism, which is external to the EU judicial system,<sup>16</sup> subject to two conditions.

*In the first place*, the Court confirms unsurprisingly that any such mechanism may not undermine that judicial system, including the preliminary ruling procedure, which aims to ensure the consistency and uniformity of interpretation of EU law. It therefore verified that the CETA did not confer on the envisaged tribunals ‘any power to interpret or apply EU law other than the power to interpret and apply the provisions of that agreement [...]’.<sup>17</sup> The CETA passed that test without great difficulty. The envisaged tribunals would only apply that agreement itself and the rules and principles of international law applicable between the Parties, and would not have jurisdiction to determine the legality of a measure under the domestic law of a Party.<sup>18</sup> That clearly distinguished the CETA from the agreement examined in *Opinion 1/09*, which envisaged conferring upon a patent court that was to be external to the EU judicial system competence to interpret and apply future EU secondary law relating, *inter alia*, to the Community patent.<sup>19</sup> The Court also distinguished the CETA from the bilateral investment treaty at issue in *Achmea*.<sup>20</sup> It explained that, insofar as relations between the Union and *non-Member States* are

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<sup>16</sup> Opinion 1/17 of 30 April 2019 (EU:C:2019:341), paras 113 and 114.

<sup>17</sup> *Ibid.*, para. 119.

<sup>18</sup> Art. 8.31.2 CETA.

<sup>19</sup> Opinion 1/17 of 30 April 2019 (EU:C:2019:341), para. 124.

<sup>20</sup> Judgment of 6 March 2018, [Achmea](#) (C-284/16, EU:C:2018:158).

concerned, there is no mutual trust that the right to an effective remedy before an independent tribunal is effectively respected.

The ISDS mechanism also differs significantly from the court system envisaged in the first draft EEA agreement that was declared to be incompatible with the principle of autonomy in *Opinion 1/91*.<sup>21</sup> The CETA does not aim to create a legal area in which a common judicial organ would ensure the homogeneous application of common rules largely overlapping with internal market rules. Moreover, as I have already said, interpretations of EU law by the CETA tribunals will not be binding upon the EU and Member States authorities, including the Court, whereas decisions of the EEA court interpreting EEA law were supposed to be binding upon all Community institutions.<sup>22</sup>

It is, however, in the *second part of the reasoning* on autonomy that *Opinion 1/17* innovates the most. The focus in previous cases concerning autonomy was clearly on the Court's *own competences* within the EU judicial system. That said, *Opinion 1/00* concerning the draft agreement on the establishment of a European Common Aviation Area already contained an indication that autonomy has a broader scope.<sup>23</sup> At paragraph 21 of that Opinion, the Court briefly explained that an international agreement concluded by the Union

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<sup>21</sup> Opinion 1/91 ([First Opinion on the EEA Agreement](#)) of 14 December 1991, EU:C:1991:490.

<sup>22</sup> Opinion 1/91 ([First Opinion on the EEA Agreement](#)) of 14 December 1991, EU:C:1991:490, para. 39.

<sup>23</sup> Opinion 1/00 ([Agreement on the establishment of a European Common Aviation Area](#)) of 18 April 2002 (EU:C:2002:231).

cannot ‘alter the essential character’ of the powers of each of the Union’s institutions.<sup>24</sup>

*Opinion 1/17* specifies further the scope of that test. The Court examined whether the ISDS mechanism conferred on the envisaged tribunals competences *such as to prevent the EU institutions ‘from operating in accordance with the EU constitutional framework’*.<sup>25</sup>

Those tribunals, although not applying EU law as such, would have jurisdiction to determine whether a given EU measure violates investment protection rules in the CETA, for example the requirement of ‘fair and equitable’ treatment. In so doing, they would necessarily weigh the freedom to conduct business against the public interests set out in the EU and FEU Treaties or in the Charter. Such findings would therefore be of the same nature as those of the Court when it reviews the validity of EU secondary law. Moreover, the CETA defines ‘investment’ and challengeable ‘measure’ broadly and confers upon the CETA tribunals competence to award monetary compensation. It is against that background that paragraphs 148 to 151 of the Opinion establish the following limit: the envisaged tribunals should not call into question the *level of protection of any public interest* reflected in measures limiting a Canadian investor’s freedom to conduct business, for example the precautionary principle in environmental and health matters or the protection of public order. If such a limitation did not

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<sup>24</sup> It concluded that no such alteration resulted from the fact that that agreement extended the Commission’s powers by entrusting that institution with some responsibilities for ensuring that the competition rules of the ECAA are complied with throughout that area, including vis-à-vis States Parties that are not Member States (*ibid.*, para. 22).

<sup>25</sup> Opinion 1/17 of 30 April 2019, EU:C:2019:341, para. 119 (emphasis added).

exist, there would be a clear risk that the EU institutions might have to abandon that level of protection in order to avoid being repeatedly compelled to pay damages to claimant investors. In the case of measures of general application, that would undermine the democratic legislative process leading to their adoption and therefore compromise the capacity of political institutions of the EU to exercise their powers in accordance with the EU constitutional framework. It is moreover for EU Courts alone to review the compatibility of the level of protection of public interests established by EU legislation with EU primary law, including the proportionality principle set out in Article 5 TEU.<sup>26</sup>

In this respect too, the Court nevertheless concluded that the CETA contains sufficient guarantees. A number of its provisions protect each Party's right to regulate.<sup>27</sup> Read together with the Joint Interpretative Instrument,<sup>28</sup> they were construed as precluding the CETA tribunals from calling into question the level of protection of public interests determined by the Union following a democratic process.<sup>29</sup>

I should add that there is no rigid dividing line between those two elements of the Court's reasoning as the first one can be regarded as a specific expression of the second. Indeed, verifying whether an agreement encroaches upon the Court's role in ensuring the consistency and uniformity of interpretation of EU law forms part of

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<sup>26</sup> *Ibid.*, para. 151.

<sup>27</sup> In particular, Article 28.3.2 (concerning non-discriminatory treatment under Section C of Chapter 8) and Article 8.9.1 (concerning investment protection rules under Section D of Chapter 8).

<sup>28</sup> Points 1(d) and 2.

<sup>29</sup> Opinion 1/17 of 30 April 2019, EU:C:2019:341, para. 156.

the broader test of whether that agreement undermines the capacity of EU institutions to act in accordance with the EU constitutional framework.

*b. The other issues raised by Belgium*

On the other issues raised by Belgium, the Court confirmed *first* that the ISDS mechanism is compatible with the *equal treatment principle* guaranteed in Article 20 of the Charter. The situation of Canadian businesses and natural persons investing in the Union and therefore benefitting from investment protection under the CETA is simply not comparable to that of enterprises and natural persons of Member States investing in the Union.<sup>30</sup> It is entirely consistent with the purpose of a trade and investment agreement to provide that an ISDS mechanism such as that at issue only benefits foreign investors.<sup>31</sup>

In that context, the Court also rejected the view that proceedings before the CETA tribunals following a decision of the Commission or of a NCA sanctioning a violation of *competition law* constitutes discrimination *vis-à-vis* undertakings that are subject to analogous decisions but have no access to those tribunals. Considering the grounds on which those tribunals may award damages, as well as the Parties' recognition of the importance of free and undistorted competition,<sup>32</sup> such an award is 'unimaginable' where the Commission or the relevant NCA has applied the competition rules

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<sup>30</sup> *Ibid.*, para. 180.

<sup>31</sup> *Ibid.*, para. 181.

<sup>32</sup> Article 17.2 CETA.

correctly. If those rules have been applied incorrectly, the EU investor concerned may seek the annulment of the fine before EU or national courts. Essentially on the same grounds, the Court took the view that the ISDS mechanism does not undermine the *effectiveness of EU competition rules*.<sup>33</sup>

The last part of the analysis concerned *access to an effective remedy* before an independent tribunal. The Court directly applied the Charter here, which is in line with the compatibility review of the EU-Canada PNR Agreement carried out in *Opinion 1/13*.<sup>34</sup> It concluded that the ISDS mechanism is compatible with Article 47 of the Charter.

Concerning first *accessibility* to the CETA tribunals, the Court acknowledged that access to the proceedings before them will require ‘significant financial resources’. That is due, in particular, to the fact that parties to a dispute themselves bear the fees and expenses of the members of the CETA tribunal appointed to deal with that dispute. Although the CETA does not yet contain any rules guaranteeing the access of SMEs to the mechanism, the Court referred to Statement No 36, under which the EU commits to reduce the financial burden on natural persons and SMEs seeking to initiate proceedings before the CETA tribunal. Compatibility with Article 47 is thus conditional upon the actual adoption of effective rules ensuring financial accessibility to the CETA tribunals.<sup>35</sup>

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<sup>33</sup> Opinion 1/17 of 30 April 2019, EU:C:2019:341, paras 187 and 188.

<sup>34</sup> Opinion 1/15 ([EU-Canada PNR Agreement](#)) of 26 July 2017, EU:C:2017:592.

<sup>35</sup> Opinion 1/17 of 30 April 2019, EU:C:2019:341, paras 219 and 221.

Similarly, the ISDS mechanism at issue is compatible with the *requirement of independence*. The Court considered in particular that that requirement does not preclude a non-judicial body such as the CETA Joint Committee from appointing members of the envisaged tribunals, nor from removing those members from office.<sup>36</sup> Moreover, it was open to the Parties to agree that the CETA Joint Committee is to determine the amount of the monthly retainer fee ensuring the availability of the members of the tribunals, and decide at a later stage whether that retainer fee and fees and expenses should be transformed into a regular salary.<sup>37</sup> The Court also accepted that the CETA Joint Committee will have the power to adopt interpretations of the agreement that will be binding upon the CETA tribunals.<sup>38</sup> Such clarifications by a body jointly established by the parties to an international agreement is neither illegitimate nor unusual.<sup>39</sup> In order to ensure the independence of the CETA tribunals, however, such interpretations may not have an effect on disputes which have already been resolved or which have been brought prior to their adoption.<sup>40</sup> Lastly, the ISDS mechanism contains sufficient guarantees that equal distance will be maintained between members of the envisaged tribunals and the parties to the disputes. In particular, ethical rules contained in Article 8.30 CETA require those members to be impartial and independent both at the time when a claim is brought and

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<sup>36</sup> *Ibid.*, para. 227.

<sup>37</sup> *Ibid.*, para. 229.

<sup>38</sup> Art. 8.31.3 CETA.

<sup>39</sup> Opinion 1/17 of 30 April 2019, EU:C:2019:341, para. 233.

<sup>40</sup> *Ibid.*, paras 236 and 237.

throughout the proceedings, and preclude them from being affiliated to any government. The fact that failure to meet those requirements may result in the removal of the member concerned undoubtedly reinforces their effectiveness.

### **3. Concluding remarks**

Time has come to conclude briefly.

As I explained in an interview given to *Le Soir* last May, ‘No one has won or lost’ in *Opinion 1/17*. Instead, that Opinion strikes a balance between two equally important parameters. On the one hand, the Court fully respects the position of the EU political institutions and most Member States that ISDS mechanisms such as that established under the CETA are vital for modernising investment protection in new-generation trade and investment agreements. As a judicial body, the Court takes decisions on the basis of the law alone. Accordingly, nothing in *Opinion 1/17* calls that political choice into question, a choice which, as you all know, still has to be confirmed through ratification by the EU and each one of its Member States. On the other hand, that modernisation cannot undermine the EU constitutional framework. The CETA contains guarantees in that respect, including – but not only – the right to regulate. Those guarantees required some clarification, as the most innovative part of the Opinion demonstrates: when ascertaining whether a measure allegedly affecting a Canadian investor violates investment protection rules in the CETA, the envisaged tribunals shall not be entitled to call into question the level

of protection of a public interest which that measure pursues. I would emphasise 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,<sup>41</sup> 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, not least because a dispute-settlement mechanism such as that at issue is established by an agreement which, pursuant to Article 216(2) TFEU, is ‘binding upon the institutions of the Union’.<sup>42</sup> 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. That aspect of *Opinion 1/17* in particular constitutes a major contribution to what I often describe as the EU’s *functional constitution*, that is to say a Union founded upon democracy, justice and rights.<sup>43</sup>

Thank you very much.

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<sup>41</sup> *Ibid.*, para. 143.

<sup>42</sup> As well as the Member States.

<sup>43</sup> See, *inter alia*, the speech that I delivered at the Constitutional Day in Ljubljana (Slovenia) on 21 December 2017 (‘The role of national constitutions in EU law. From shared values to mutual trust and constructive dialogue’).