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Between the Autonomy of EU Law and the Principle of Mutual Trust: A Framework for the Conclusion by the Union of Investment Agreements Following Opinion 1/17[1]

The Court has, on numerous occasions, affirmed the competence of the European Union to conclude international agreements involving the conferral of competence on judicial bodies outside the European Union. It follows from the case law of the Court since Opinion 1/91 that 'the competence of the [European Union] in matters of international relations and its capacity to conclude international agreements necessarily include the power to submit to the decisions of a court created or designated under such agreements as regards the interpretation and application of their provisions'.[2]

At the same time, however, EU law imposes certain limits on the creation by the Member States or by the Union of judicial bodies outside the Union. Those limits stem not only from the Treaties themselves, but also from the principles developed by the Court in its case law, primarily the principle of the autonomy of EU law and the principle of mutual trust.

At the time when the request for Opinion 1/17 was made, the outlines of those two principles had been clarified, inter alia, in Opinion 2/13[3] and in the *Achmea* judgment.[4] In both cases, the practical implications of the principles of autonomy of EU law and mutual trust had also emerged, which led legal scholars to question whether the European Union could still conclude agreements with third countries providing for a dispute settlement mechanism.[5]

It against this background that the leading French lawyer Yves Bot drew up his Opinion in the case concerning the compatibility of the 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 (OJ 2017 L 11, p. 23; 'CETA') with EU law and which gave rise to Opinion 1/17.[6]

1 The article is a translation of a book chapter first published in French: M. Szpunar, 'Entre autonomie du droit de l'Union et principe de confiance mutuelle : un cadre pour la conclusion par l'Union d'accords d'investissements à la suite de l'avis 1/17', in : *SA JUSTICE, L'Espace de Liberté, de Securité et de Justice--Liber amicorum en homage à Yves Bot*, V. Beaugrand, D. Mas & M. Vieux (eds.), 785–806, Bruxelles, 2022.

2 CJEU, Opinion 1/91 *(EEA Agreement — I)* of 14 December 1991, EU:C:1991:490, para. 40. *See* also, more recently, CJEU, Opinion 1/09 *(Agreement on the creation of a unified patent litigation system)* of 8 March 2011, EU:C:2011:123, para. 76, and Opinion 2/13 *(Accession of the Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, para. 182.

3 CJEU, Opinion 2/13.

4 CJEU, judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158.

5 *See*, by way of illustration, P. Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky*, 38 Fordham International Law Journal, 955–992, No. 4 (2015); E. Hervé, *Chronique Action extérieure de l'UE – Coup de tonnerre sur le droit des investissements étrangers, en attendant le séisme?*, *Revue trimestrielle de droit européen*, 649, No. 3 (2018); M. Gatti, *Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold?*, 4 European Papers, 109–121, No. 1 (2019), and B. Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, MPILux Research Paper Series, No. 3 (2018).

6 CJEU, Opinion 1/17 *(EU-Canada ECG Agreement)* of 30 April 2019, EU:C:2019:341.

I. Presentation of the problem

When looking at the somewhat complex relationship between EU law and international law, I think that the fact that European law has its origins in international law is not a crucial element. I would say that the most interesting questions about this relationship are rather the result of the fact that the European Union is itself an international player.

Indeed, since the entry into force of the Lisbon Treaty, there is no doubt that the Union is vested with legal personality under international law and can therefore assume that role *vis-à-vis* the international community. Article 216 TFEU thus provides that '[t]he Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope'.

Article 207 TFEU also provides for the conclusion of agreements with one or more third countries or international organizations in the context of the common commercial policy, which, according to Article 206 TFEU, covers, inter alia, 'the harmonious development of world trade [and] the progressive abolition of restrictions on international trade and on foreign direct investment'. In the area of investment protection, the Union as such may therefore be a party to a dispute based on the rules of an international agreement concluded by it.[7]

However, the European Union's international jurisdiction, which entails the possibility of submitting to decisions of a court outside its legal order, is not unconditional. Opinion 1/17 is a perfect illustration of this, as we will explore. Since that opinion follows Opinion 2/13 and the *Achmea* judgment, I consider it necessary to briefly recall the main elements underlying the Court's reasoning in those two cases, in order to delimit the scope of the principles of autonomy of EU law and mutual trust.

A. Opinion 2/13

Opinion 2/13 concerned the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), and, therefore, the mechanisms for monitoring compliance by States Parties with the provisions of that convention.

Several factors have led the Court to hold that the accession agreement is incompatible with EU law, in connection with the specific characteristics of EU law, in particular in so far as such accession would undermine the autonomy of EU law and the principle of mutual trust.

The Court noted in particular that the ECHR governs not only the relations between the Member States of the European Union and third countries, but also their relations with each other, including where those relations are governed by EU law, which would imply that Member States monitor the observance of other Member States of fundamental rights, whereas EU law requires mutual trust between Member States. In those circumstances, accession to the ECHR would be liable to upset the underlying balance on which the European Union is founded and to undermine the autonomy of EU law.[8]

Furthermore, accession to the ECHR would also allow the preliminary ruling procedure provided for in Article 267 TFEU to be circumvented and could lead to the European Court of Human Rights ('ECtHR') hearing disputes between Member States or between a Member State and the EU, when EU law is at issue. Such cases are sufficient to undermine the autonomy of EU law.[9]

B. The *Achmea* judgment

The *Achmea* judgment concerned the compatibility with EU law of a bilateral investment treaty ('BIT') concluded between two Member States.

While the problems relating to the compatibility with EU law of the investment promotion and protection treaties concluded by the Union or by the Member States are multiple,[10] one of the major difficulties in this respect is the possibility, provided for by those BITs, for an investor to resort to arbitration to resolve certain disputes in relation to those instruments.[11]

In so far as such procedures could lead to certain disputes being excluded from the EU legal order and, consequently, disregard both the primacy and autonomy of EU law, the issues relating to the compatibility of BITs with EU law have essentially focused on the dispute settlement mechanisms for which they provide. It is precisely that issue which was the main subject matter of the Court's ruling in *Achmea*.

In that case, the Court began by recalling the importance of the principle of the autonomy of EU law, 'justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law',[12] before pointing out that, in accordance with Article 19 TEU, it is for the national courts and the Court of Justice to ensure judicial protection of individuals' rights under EU law. In that context, the Court describes the preliminary ruling procedure as the cornerstone of the judicial system of the European Union. According to the Court, an arbitral tribunal constituted on the basis of a BIT concluded between two Member States cannot be regarded as a court or tribunal of a Member State under Article 267 TFEU, which is why such an arbitral tribunal cannot refer questions to the Court, whereas, at the same time, it may be 'led to interpret, or even apply, EU law and, in particular, the provisions concerning the fundamental freedoms, including freedom of establishment and the free movement of capital'.[13]

7 In that regard, the rules for determining whether the European Union or a Member State is a party to the dispute at issue have been clearly defined in Regulation (EU) No. 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-State dispute settlement tribunals established by international agreements to which the European Union is a party (OJ 2014 L 257, p. 121).

8 CJEU, Opinion 2/13, para. 194.

9 CJEU, Opinion 2/13, paras 198 and 199.

10 Some of them are, moreover, the subject of cases currently pending before the Court.

11 For a study of *Achmea*, *see* L. Malferrari, 'Protection des investissements intra-UE post Achmea et post avis CETA: entre (faux) mythes et (dures) réalités', in A. Berramdane & M. Trochu (eds.), *Union européenne et protection des investissements*, 43–94, Brussels, 2021.

12 CJEU, judgment of 6 March 2018, *Achmea*, para. 33.

13 CJEU, judgment of 6 March 2018, *Achmea*, para. 42.

In addition, the Court recalled the foundations and substance of the principle of mutual trust. EU law is thus based on the fundamental premise that each Member State shares with all the other Member States and recognizes that they share with it a series of common values on which the Union is founded. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognized and, therefore, that the law of the Union that implements them will be respected.[14] It follows that Member States are required to consider, save in exceptional circumstances, that all other Member States comply with EU law, including fundamental rights, in particular the right to an effective remedy before an independent tribunal, laid down in Article 47 of the Charter of Fundamental Rights of the European Union[15] (the 'Charter'). The EU institutions, primarily the EC, are responsible for ensuring respect for these values.[16]

For the above reasons, the Court concluded that, under EU law, in particular Articles 267 and 344 TFEU, a dispute settlement clause providing for investment arbitration, contained in a BIT between two Member States, 'is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties'.[17]

C. The consequences drawn from the *Achmea* judgment and Opinion 2/13

Those two cases demonstrate the fundamental importance, first, of the principles of autonomy and mutual trust in the activity of the Member States and of the European Union as international actors concluding agreements between themselves or with third countries and, second, of the limits which those principles may constitute for such activity, in particular the possibility for the European Union to subject itself to the jurisdiction of a court outside its legal order under such agreements. Although those principles have been developed in two cases concerning, *inter alia*, relations between Member States and, therefore, within the European Union, their scope is such that their impact goes beyond that framework alone and justifies their study in the context of the conclusion by the European Union of an agreement with a third country.

On the eve of the submission of the request for Opinion 1/17, the question therefore arose as to whether or not the European Union could, by means of an international agreement, submit itself to a court established or designated under such an agreement, in particular for the purposes of settling investment disputes.

The exclusion of such a possibility would clearly have far-reaching practical implications. First, in the absence of provisions on the settlement of disputes in an investment protection agreement concluded with a third country, the state courts[18] alone are responsible for the judicial protection of investors' rights, provided, of course, that the provisions of such an agreement have direct effect. Second, if it were impossible to provide in agreements concluded with third countries for alternative dispute resolution mechanisms, this would make it excessively difficult, if not impossible, for the European Union to negotiate such agreements and thus prevent the exercise of the powers provided for in Articles 206, 207 and 216 TFEU. Indeed, the interest of investment protection and promotion agreements lies essentially in the establishment of dispute settlement mechanisms outside the legal orders of the states parties.[19] The states parties to investment protection and promotion agreements, which do not necessarily trust the state courts of other states parties in order to ensure compliance with the rules contained in the agreement in question and the rights which investors derive from it, have been prompted to outsource such a transnational dispute, with a view to entrusting it to arbitral tribunals enjoying, at least apparently, greater neutrality.

II. The dispute settlement mechanism under the CETA

The dispute settlement mechanism under the CETA has some particularities compared to the dispute settlement mechanisms usually provided for in investment protection and promotion agreements. The negotiators of this agreement moved away from traditional arbitration towards an independent and impartial judicial system to settle disputes that may arise from the application of the agreement.

From a procedural point of view, the CETA provides for the establishment of a dual level of jurisdiction, a Tribunal and an Appellate Tribunal. These two tribunals will both be permanent, the first being composed of 15 judges appointed by the CETA Joint Committee, while the composition of the latter will still need to be specified in a decision of the CETA Joint Committee. This feature of the CETA dispute settlement mechanism distinguishes it very clearly from 'usual' arbitral tribunals, whose composition is determined by the parties to the dispute and whose awards are — in principle — without appeal.

However, this mechanism is not fully detached from its arbitral origins as it does not provide for any defined procedural rules to be followed. At the time of lodging their claim, investors choose rules of procedure governing arbitration bodies such as the International Centre for the Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL). The dispute settlement mechanism under the CETA is at the crossroads between an arbitral tribunal and an international court.

As regards its substantive jurisdiction, the Tribunal established under the CETA also has certain specific features.

First, the jurisdiction of the CETA Tribunal is narrowly defined and limited to the interpretation of that agreement itself. Article 8.31(1) CETA provides that, when making its decision, the Tribunal shall apply the Agreement 'as interpreted in accordance with the Vienna Convention on the Law of

14 CJEU, judgment of 6 March 2018, *Achmea*, para. 34.
15 CJEU, Opinion 2/13, para. 128.
16 *See* my Opinion in Case C-741/19, *Komstroy,* EU:C:2021:164, point 66.
17 CJEU, judgment of 6 March 2018, *Achmea*, para. 58.
18 More specifically, because of state immunity, the courts of a Member State in respect of disputes involving an investor from a third country and the jurisdiction of a third country with regard to disputes involving an investor of a Member State.
19 Advocate General Bot thus describes the dispute settlement mechanisms contained in investment protection and promotion agreements as 'the cornerstone of the system of protection introduced'. *See* CJEU, Opinion of Advocate General Bot in Opinion 1/17, *EU-Canada ECG Agreement*, EU:C:2019:72, para. 84.

Treaties [of 23 May 1969][20] and other rules and principles of international law applicable between the Parties'. In addition, that limitation of jurisdiction is emphasized in Article 8.18(5) of that agreement, which provides that the CETA Tribunal 'shall not decide claims which fall outside the scope of this Article'. Furthermore, it is apparent from the wording of Article 8.18(1) CETA that an investor may submit a claim relating to a measure adopted by the European Union or a Member State only where the investor can prove loss or damage suffered because of that measure, with the result that it is not possible to challenge such a measure in the abstract.

Second, under Article 8.18(1) CETA, the CETA Tribunal has jurisdiction only to penalize contracting parties when they adopt measures giving rise to expropriation of foreign investors, discrimination against them or a breach of the obligation to treat them fairly and equitably. In that regard, it must be pointed out that the CETA differs from traditional investment treaties in that it takes care, in Chapter 8, to limit the discretion enjoyed by judges, in particular as regards the concept of 'fair and equitable treatment'. That concept, which is sometimes interpreted too broadly by 'usual' arbitration bodies, is thus defined in Article 8.10 CETA. In a similar vein, Article 8.12 CETA specifies the method of calculating the compensation to be paid for expropriation.

Third, according to the first sentence of Article 8.31(2) CETA, the Tribunal does not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of the CETA under the domestic law of the disputing party. The Tribunal can only rule on the conformity of such a measure with the provisions of the CETA. It follows from that provision, read in conjunction with Article 8.39(1), that the Tribunal may only award the payment of damages or, with the consent of the defendant, the restitution of property which an investor has been expropriated of. On the other hand, it has no jurisdiction to rule on the annulment of a measure which it considers to be contrary to the provisions of Chapter 8 of the CETA, or to require such a measure to be brought into conformity with the CETA.

Fourth, the second and third sentences of Article 8.31(2) of the CETA specify how the Tribunal can take into account the norms contained in the domestic law of the Contracting Parties in order to rule on the conformity with that agreement of the conduct or measure which is the subject of the dispute. On the one hand, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. On the other hand, in that exercise, the Tribunal is required to follow 'the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party'. As Advocate General Bot rightly points out, those clarifications make it possible to 'prevent the CETA Tribunal from exercising creative licence in relation to domestic law.'[21]

III. The arguments of the Court

In making its decision on the compatibility with the Treaties of the dispute settlement mechanism provided for in the CETA, the Court distinguished it, on the one hand, from the investment arbitration mechanism referred to in *Achmea* and, on the other, from the powers of the ECtHR, which is the subject of Opinion 2/13, in order to hold, as we know, that that mechanism is compatible with EU law.

Both the exceptionally detailed considerations of Advocate General Bot and the arguments in the Opinion of the Court itself set out the elements allowing such a distinction between the CETA dispute settlement mechanism and the instruments referred to in Opinion 2/13 and the *Achmea* judgment. I would therefore seek to identify the decisive factors which led to the conclusion that a dispute settlement system provided for by an international agreement does not infringe either the principle of autonomy of EU law or the principle of mutual trust, since other agreements concluded by the European Union in the exercise of the powers conferred on it by Article 207 TFEU may not contain rules on dispute settlement identical to those of CETA.

IV. Article 47 of the Charter

The Court has made it clear that a dispute settlement system provided for in an international agreement must comply with Article 47 of the Charter. As the Court has pointed out, international agreements concluded by the European Union must be fully compatible with the Treaties and with the constitutional principles deriving therefrom.[22] In exercising its external competence, the Union is therefore required to comply with the requirements arising from Article 47 of the Charter. It follows that a body with predominantly jurisdictional characteristics, which is called upon to settle disputes, *inter alia*, between private investors and states, such as the CETA Tribunal, is subject to Article 47 of the Charter, as regards the arrangements for access to it and its independence.[23]

This issue of the CETA Tribunal's compatibility with the requirements of accessibility and independence was carefully considered by the Court in Opinion 1/17, in order to reach the conclusion that both requirements were met in that case.

In particular, it must be held, considering Opinion 1/17, that the compatibility with Article 47 of the Charter of a dispute settlement mechanism provided for in an international agreement does not depend on the prior involvement of the Court or on the making of the awards issued in the context of that mechanism subject to full review by national courts.

However, an important question arises in this context in relation to one of the points raised by Advocate General Bot in his Opinion. He actually examines the manner in which the compatibility with Article 47 of the Charter of a tribunal such as that of CETA, the characteristics of which differ significantly from a classic state court, should be assessed, since it is a hybrid mechanism, which can be compared to either investment arbitration or permanent courts. [24]

In those circumstances, Advocate General Bot rightly points out, in his analysis, that the Court should take account of the fact that the dispute settlement model in question is negotiated bilaterally on the basis of reciprocity and assess, from that point of view, whether that model contains a sufficient level of

20 United Nations Treaties Series, volume 1155, p. 331.
21 CJEU, Opinion of Advocate General Bot in Opinion 1/17, para. 136.
22 CJEU, Opinion 1/17, para. 165.
23 CJEU, Opinion 1/17, para. 190.
24 *See* CJEU, Opinion of Advocate General Bot in Opinion 1/17, para. 18.

safeguards. In concluding his analysis, Advocate General Bot confirms that the dispute settlement provisions of CETA are compatible with Article 47 of the Charter, 'since they guarantee a level of protection of that right which is *appropriate to the specific characteristics of the investor-State dispute resolution* mechanism'.[25]

It seems to me that it is from that perspective that the Court's Opinion on the compatibility of the CETA dispute settlement mechanism with Article 47 of the Charter must be read. Like Advocate General Bot, I am convinced that the criteria for determining whether the functioning of a judicial body complies with Article 47 of the Charter differ according to whether it is a national judicial body or a court established to interpret and apply the provisions of international agreements concluded by the European Union.

V. The principle of mutual trust

Determining the precise scope of the principle of mutual trust is not an easy task, particularly in an international context going beyond relations between Member States alone. That principle was resorted to by the Court both in *Achmea* and in Opinion 2/13.

However, the principle of mutual trust plays a different role in the Court's reasoning in *Achmea* and Opinion 2/13.

In the first case, the Court examined, in the light of EU law, the possibility of providing a body outside the judicial system of the European Union with jurisdiction to settle disputes relating to an international agreement concluded between Member States. In that case, that jurisdiction is such as to call into question the principle of mutual trust in so far as it implies that such a body could be called upon to interpret and apply EU law. In other words, in relations between Member States, the only bodies able to interpret and apply EU law are the Court of Justice and the courts and tribunals of the Member States. There is no doubt that, in the case of investment protection dispute settlement, it is highly probable, or even certain in practice that arbitrators will have to take into account Union law, in particular the rules of the internal market in the broad sense. This conclusion is supported by the wording of Article 344 TFEU.

In the second case, the principle of mutual trust played a slightly different role. The ECHR is an international convention, which binds not only all Member States but also third countries. One of the obstacles to the accession of the European Union to that convention was that the accession agreement did not provide for any mechanism capable of ensuring compliance with certain rules governing relations between the Member States arising, in particular, from the principle of mutual trust. As the Court has pointed out, the principle of mutual trust between the Member States is, in EU law, of fundamental importance since it allows an area without internal borders to be created and maintained.[26] That principle requires, in particular as regards the area of freedom, security and justice, each of those states to consider, save in exceptional circumstances, that all the other Member States comply with EU law and, in particular, with the fundamental rights recognized by EU law. Paraphrasing the wording of the Court in a nutshell, it can be said that it follows from the principle of mutual trust that Member States must trust each other more than they can trust third countries. That particularity of EU law should have been reflected in the agreement on the accession of the EU to the ECHR.

In those circumstances, as regards the compliance of the CETA dispute settlement mechanism with EU law, compliance with the principle of mutual trust does not, in principle, raise any problems. While the Member States are required to comply with that principle, such a principle does not apply to relations between the Union and third countries. More specifically, relations with third countries are not based on the fundamental premise that each Member State shares with all the other Member States and recognizes that the latter share with it a series of common values and, therefore, comply with EU law which gives effect to those values.

As Advocate General Bot has pointed out, in the context of an agreement with non-member States, each of the contracting parties does not necessarily trust the judicial system of the other party in order to ensure compliance with the rules contained in that agreement. The lack of mutual trust, which only exists between Member States of the Union, is precisely the reason why the Contracting Parties decide to agree on a neutral dispute settlement mechanism.[27] Such a mechanism, which is external to both parties, ensures the confidence of the contracting parties as regards the application of the agreement, without that trust being confused with mutual trust, which is the basis of relations within the EU legal order.[28]

It follows from the foregoing that neither the Court nor Advocate General Bot had any doubts as to the compatibility of the CETA dispute settlement mechanism with the principle of mutual trust, since that principle does not apply in relations with third states.

In this context, a hypothetical question remains. What about an investment protection and promotion agreement concluded by the European Union with a third country which does not provide for any specific dispute resolution mechanism and the interpretation of which is left to the national courts of the contracting parties? The Union could envisage the conclusion of such an agreement, the provisions of which would be applied only by national courts, provided that the relevant of the agreement had direct effect. An EU investor could therefore rely on its rights under such an agreement before the courts of a third country, whereas an investor from a third country could rely on it before the EU courts. Such a solution would then require a significant degree of trust between the European Union and that third country, without, however, being confused with mutual trust as it exists in the EU legal order. It cannot be excluded that such a solution – albeit for the time being only hypothetical – could be compatible with the Treaties, possibly subject to some other conditions.

VI. The principle of the autonomy of EU law

The question of the compatibility of an investment protection and promotion agreement concluded by the Union with the principle of autonomy of EU law represented the biggest

25 *See* CJEU, Opinion of Advocate General Bot in Opinion 1/17, para. 271, emphasis added.
26 CJEU, Opinion 2/13, para. 191.
27 CJEU, Opinion of Advocate General Bot in Opinion 1/17, para. 82.
28 *See* my Opinion in *Komstroy*, point 87.

challenge for the Court in Opinion 1/17. A very detailed analysis allowed the Court to conclude that the dispute settlement mechanism provided for in the CETA was not incompatible with this principle. The Opinion of Advocate General Bot is very extensive in this regard. While the arguments of the Advocate General and the Court overlap, the emphasis placed on certain arguments differs.

First and foremost, it is necessary to clarify how the principle of autonomy of EU law is to be understood in the context of the dispute settlement powers of the bodies established by an international agreement concluded between the Union and third countries. To that end, I refer to the text of the Opinion itself.

According to the Court, in order to determine the compatibility of the CETA dispute settlement mechanism with the autonomy of the EU legal order, it is necessary to be satisfied that Section F of Chapter 8 of CETA:[29]

– 'does 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 having regard to the rules and principles of international law applicable between the Parties, and
– […] does not structure the powers of those tribunals in such a way that, while not themselves engaging in the interpretation or application of rules of EU law other than those of that agreement, they may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework'.

These criteria can thus be formulated as follows: where an international agreement concluded by the European Union provides for a dispute settlement mechanism, first, the powers of the body thus constituted must be limited to the interpretation and application of the provisions of that agreement and, second, such a body must not issue decisions which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.

A. Limitation of powers to the interpretation and application of the provisions of an international agreement

That first criterion appears, at first sight, to raise the least problems with regard to the dispute settlement mechanism provided for in the CETA, because of the express wording of those provisions.

It is true that, in order to assess whether a contracting party to an international agreement has infringed the agreement in question, it is generally necessary to examine the domestic law of that state. Thus, if the European Union were to be accused of having infringed an obligation arising from an international agreement, the provisions of EU law would have to be taken into account when examining such a breach. However, it follows from international law that, in the context of such an examination, the domestic law of a contracting party is generally regarded only as a matter of fact.[30]

That is precisely the case with regard to a challenge based on the provisions of CETA. In that case, the CETA Tribunal would also have to examine EU law, but both Advocate General Bot and the Court of Justice emphasized that that examination 'cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law, but consists, on the contrary, of that domestic law being taken into account as a matter of fact'.[31] This follows clearly from the wording of the second sentence of Article 8.31(2) CETA.

However, it is true that, in practice, the distinction between the application of national law and taking it into account as a matter of fact is difficult.[32] In investment arbitration, the examination of the domestic law of a contracting party is normally limited to the question whether or not a contracting party has breached international obligations by adopting and applying its domestic legal rules.

This difficulty is well illustrated in the analysis of Advocate General Bot, who highlights the difference between the investment arbitration that is the subject of the *Achmea* judgment and the CETA Tribunal, only the former having jurisdiction to interpret and apply EU law, since the BIT at issue does not provide for a provision similar to the second sentence of Article 8.31(2)[33] CETA. Moreover, while the dominant arbitration practice may take national law into account as a matter of fact, in practice it is often impossible to determine whether, in ruling on the breach of an international agreement, an arbitral body applied domestic law or merely took it into account as a matter of fact.

For that reason, and except where it follows expressly from the provisions of an agreement that national law constitutes, in the context of a dispute settlement mechanism, a matter of fact, I believe that, in order to determine whether a dispute settlement mechanism complies with the principle of autonomy of EU law, reference must rather be made to the second criterion formulated by the Court in its Opinion, that is to say, whether the functioning of such a mechanism prevents the EU institutions from operating in accordance with the EU constitutional framework.

That is all the more so since, in my view, the question whether an arbitral body takes EU law into account as a matter of fact or whether it interprets it and applies it is a different question. Finally, it is necessary to determine whether the functioning of the arbitral body thus established undermines the constitutional framework of the European Union, as regards both the functioning of its institutions and relations between the Member States and between the European Union and the Member States. As regards agreements the application of which is likely to affect relations between the Member States, such an interference may, in particular, be established with regard to the jurisdiction of the courts of the Member States – as bodies primarily responsible for applying EU law – which to that end resort to the preliminary ruling mechanism, which is the 'keystone' of the judicial system of the European Union.[34]

29 CJEU, Opinion 1/17, para. 119.
30 The Permanent Court of International Justice stated as follows: From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States', Decision of 25 May 1926, Case concerning certain German interests in Polish Upper Silesia, (CPJI, Series A, No. 7, p. 19).
31 CJEU, Opinion 1/17, para. 131.
32 F. Iorio, *Opinion 1/17: Has the EU Made Peace with Investment Arbitration?*, International Business Law Journal, 407–420, at 411, No. 4 (2019).
33 CJEU, Opinion of Advocate General Bot in Opinion 1/17, paras 106 *et seq*.
34 CJEU, Opinion 1/09, para. 83; judgment of 6 March 2018, *Achmea*, para. 37, and Opinion 1/17, para. 111.

B. Respect for the constitutional framework of the Union

Before turning to this question, it should be noted that the concept of 'autonomy of EU law' is understood very broadly in the case law of the Court. Thus, the Court has repeatedly emphasized that that principle exists in the light of both the domestic law of the Member States and international law and that it follows from the essential characteristics of the European Union and its law.[35] EU law is characterized by the fact that it is derived from an independent source, by the fact that it is constituted by the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions applicable to their nationals and to themselves. Such characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relationships binding both the Union itself and its Member States, and in the Member States relations with one another.[36]

According to the Court, the autonomy of EU law lies in the fact that the European Union has its own constitutional framework. That framework includes the founding values set out in Article 2 TEU, according to which 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', which constitute the constitutional identity of the Union. It also covers the general principles of EU law, the provisions of the Charter, and the provisions of the EU and FEU Treaties, which contain, *inter alia*, the rules on the conferral and distribution of powers, the operating rules of the institutions of the European Union and its judicial system, and the fundamental rules in specific areas, structured in such a way as to contribute to the achievement of the integration process referred to in the second paragraph of Article 1 TEU.[37]

In order to safeguard the autonomy of EU law, the Treaties have established a judicial system designed to ensure consistency and unity in the interpretation of EU law. In accordance with Article 19 TEU, it is for the national courts and tribunals and the Court to ensure full application of that law in all the Member States and to ensure effective judicial protection, the Court having exclusive jurisdiction to give the definitive interpretation of that law[38]

Such a broad definition of the concept of 'autonomy of EU law' makes it difficult to distinguish that concept from that of the principle of mutual trust or from the scope of the prohibition contained in Article 344 TFEU. Such a distinction was not necessary in the *Achmea* case or in Opinion 2/13. In the first case, investment arbitration established by an international agreement, in relations between the Member States, results in a breach not only of the autonomy of EU law in general, but also of the principle of mutual trust, of Article 344 TFEU or of Article 267 TFEU. In the second one, the Court identified a number of obstacles, not arising solely from the need to preserve the autonomy of EU law, to the conclusion by the European Union of the agreement on the accession of the European Union to the ECHR.

Moreover, as regards a dispute settlement mechanism provided for in an agreement concluded between the European Union and a third State, such as CETA, it is difficult to see it as an infringement of the principle of mutual trust or of Article 344 TFEU. Assuming that such a mechanism is consistent with Article 47 of the Charter, its incompatibility with EU law could therefore only result from a breach of the autonomy of EU law in its 'substantial' dimension.

The Court has therefore correctly identified that aspect of the broader concept of 'autonomy of EU law', according to which it is necessary to ascertain whether awards rendered in the context of a dispute settlement mechanism, said mechanism established by an international agreement concluded by the European Union with a third country, affect the principles supporting the EU legal order.[39] In such a situation, it is irrelevant whether EU law is understood as a matter of fact or law in the context of the dispute settlement mechanism.

As regards the CETA, it provides for several instruments which aim to ensure that the effects of the decisions of the CETA Tribunal are limited and do not interfere with the EU legal order as such. Only the most important ones deserve to be mentioned here.

First of all, as already mentioned, according to the first sentence of Article 8.31(2) of that agreement, the Tribunal does not have jurisdiction to rule on the legality of a measure which is alleged to constitute a breach of the Agreement on the basis of the domestic law of a contracting party. The Tribunal can only rule on the conformity of such a measure with the CETA.

Moreover, according to the same provision, even if the Tribunal considers the domestic law of a Contracting Party, or even EU law, it is required to follow 'the prevailing interpretation of domestic law given by the courts or authorities of that Party, and the meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party' and, therefore, of the European Union.

For the Court of Justice those provisions confirm that the jurisdiction of the CETA Tribunal cannot prevent the European Union from operating autonomously. As legal scholars have observed, in order to reach that conclusion, it was necessary to ensure that the Court of Justice and the CETA Tribunal evolve in two legislative orders which are hermetically separate from each other.[40]

Finally, it should be stressed that protection of the autonomy of EU law is also confirmed in other provisions of the CETA, including its non-binding provisions. Accordingly, Article 8.9 CETA provides in paragraph 1 that '[f]or the purpose of this Chapter, the Parties reaffirm their right to regulate within their

35 CJEU, Opinion 1/17, para. 109.

36 *See, inter alia*, CJEU, judgment of 6 March 2018, *Achmea*, para. 33; Opinion 1/17, para. 109, and judgment of 2 September 2021, *Republic of Moldova*, C-741/19, EU:C:2021:655, para. 43.

37 CJEU, Opinion 1/17, para. 110, and judgment of 2 September 2021, *Republic of Moldova*, para. 44.

38 CJEU, Opinion 1/17, para. 111, and judgment of 2 September 2021, *Republic of Moldova*, para. 45.

39 For criticism of the principle of autonomy thus defined, *see* E. Gaillard, Journal du droit international (Clunet), 833–854, No. 3 (2019).

40 *See* J.-F. Delile, *L'avis 1/17 ou le retour en grâce des juridictions internationales auprès de la Cour de justice de l'Union européenne*, Revue des Affaires Européennes, 347–370, at 352, No. 2 (2019). *See also* Opinion of Advocate General Bot in Opinion 1/17, para. 63, according to which the CETA and the EU legal order are 'two co-existing legal systems, interference between which has been deliberately limited'.

territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity'.

Similarly, paragraph 6(a) of the Joint Interpretative Instrument on the CETA between Canada and the European Union and its Member States[41] states that that agreement 'includes modern rules on investment that preserve the right of governments to regulate in the public interest including when such regulations affect a foreign investment, while ensuring a high level of protection for investments and providing for fair and transparent dispute resolution'. Paragraph 6(b) of that Joint Interpretative Instrument adds that '[t]he CETA clarifies that governments may change their laws, regardless of whether this may negatively affect an investment or investor's expectations of profits '.

There is no doubt that for the Court of Justice, in the context of the CETA, the abovementioned provisions constituted sufficient guarantees of preserving the autonomy of EU law. However, when this issue is considered in a broader context, it should be noted that the existence of similar provisions does not always ensure that a dispute settlement mechanism, established by an international agreement concluded by the Union with a third country, allows the EU institutions to operate in accordance with the EU constitutional framework.

In each case, the scope of the international agreement in question and the particularities of its application should be examined more closely. It may be impossible in practice to separate the EU legal order from the international agreement at issue, in particular in the case of international agreements covering a wide range of matters, such as agreements relating to fundamental rights or wider aspects of the internal market than investment protection alone.[42] This is the case, in particular, of the ECHR: the protection of fundamental rights for which it provides overlaps with that derived from EU law, so that the scope of agreements concluded by the European Union must be limited in order to safeguard the autonomy of EU law. The wider the scope of the agreement at issue, the greater the risk that it will overlap with the EU legal order, and the greater the threats to the constitutional framework of the Union. Moreover, as evidenced by the judgment in *Achmea*, the risk of infringement of the principle of autonomy of EU law may arise from the application of international agreements which govern relations between Member States in so far as those agreements may affect the functioning of the internal market.

VII. Conclusion

Opinion 1/17, delivered following the brilliant Opinion of Advocate General Bot, shed new light on the question of the conclusion by the European Union of international agreements.

In the first place, while the focus had essentially been on the principles of autonomy and mutual trust as regards relations between the Member States, on which international agreements concluded by the European Union or by the Member States could have an impact, Opinion 1/17 brings to light their application in relations with third countries.

Firstly, the principle of autonomy of EU law underwent some refinement. Thus, it is no longer a question merely of determining whether the international agreement permits the interpretation and application of EU law by a body outside the judicial system of the European Union, but of verifying that the international agreement does not have the effect of preventing the EU institutions from operating in accordance with the constitutional framework of the European Union. The scope of the principle of autonomy of EU law is therefore considerably extended following Opinion 1/17.[43]

Furthermore, it is clear from Opinion 1/17 that although the principle of mutual trust is, prima facie, unrelated to the question of the conclusion by the European Union of an international agreement, this is so on condition, however, that the international agreement at issue governs only relations between the European Union and third countries. It is only in that case that mutual trust, which underpins relations between the Member States in the European Union, can be safeguarded.

It follows from the analysis of the application of those two principles, which was conducted anew in Opinion 1/17, that the conclusion of international agreements by the European Union with third countries will be made possible only for certain agreements which do not govern relations between Member States and whose substantive scope should be limited in order to ensure that the agreement in question does not contain too many overlaps with the essential aspects of the EU legal order, which could render it incompatible with both the principle of autonomy of EU law and the principle of mutual trust.[44]

Secondly, Advocate General Bot and the Court of Justice each carried out an extremely detailed analysis of the provisions of the CETA in order to determine their compatibility with EU law, which was recognized, *inter alia*, because of the express nature of certain provisions making it possible to remove any ambiguity as regards compliance with the principles of autonomy of EU law and mutual trust.

For those two reasons, I believe that the principles set out in Opinion 1/17 can easily constitute a framework for the future conclusion of international agreements by the European Union.[45] Apart from having put an end to certain questions as to the scope of the principles of autonomy of EU law and mutual trust in the context of relations with third countries,[46] the detailed study of each provision of the CETA, which is the subject of Opinion 1/17, makes it a model for an international agreement, compatible with EU law, on which the European Union can now rely in its role as an international actor.

41 OJ 2017 L 11, p. 3.

42 *See* M. Szpunar, *Is the Court of Justice Afraid of International Jurisdictions?,* 37 Polish Yearbook of International Law, 125–141, at 141 (2017).

43 *See* C. Maubernard, *L'avis 1/17 ou les contours de l'autonomie procédurale et substantielle de l'ordre juridique de l'Union,* Revue de l'Union européenne, 573–581, No. 632 (2019).

44 Where, as was the case, in particular, in Opinion 2/13, it is not possible to limit the material scope of an agreement, and where, consequently, the risk of overlap exists, it is appropriate to provide in the agreement for certain express guarantees intended to preserve the EU legal order.

45 On this point, *see* E. Gaillard, n. 38 *supra*, 853.

46 *See* C. Riffel, *The CETA Opinion of the European Court of Justice and its Implications – Not That Selfish After All*, 22 Journal of International Economic Law, 503–521, No. 3 (2019), and F. Iorio, n. 31 *supra*, 416.