



UvA-DARE (Digital Academic Repository)

Regulatory autonomy and regulatory chill in Opinion 1/17

Ankersmit, L.

DOI

[10.14324/111.444.ewlj.2020.25](https://doi.org/10.14324/111.444.ewlj.2020.25)

Publication date

2020

Document Version

Final published version

Published in

Europe and the World: A Law Review

License

CC BY

[Link to publication](#)

Citation for published version (APA):

Ankersmit, L. (2020). Regulatory autonomy and regulatory chill in Opinion 1/17. *Europe and the World: A Law Review*, 4(1), [7]. <https://doi.org/10.14324/111.444.ewlj.2020.25>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

Europe and the World: A law review



 UCLPRESS

Special issue: *Collection of Reflection Essays on Opinion 1/17*

Article

Regulatory autonomy and regulatory chill in Opinion 1/17

Laurens Ankersmit

Assistant Professor, University of Amsterdam, the Netherlands; l.j.ankersmit@uva.nl

How to cite: L. Ankersmit, 'Regulatory autonomy and regulatory chill in Opinion 1/17' [2020] 4(1): 7. *Europe and the World: A law review* [21]. DOI: <https://doi.org/10.14324/111.444.ewlj.2020.25>.

Submission date: 5 November 2019; Acceptance date: 16 June 2020; Publication date: 3 July 2020

Peer review:

This article has been peer-reviewed through the journal's standard double-blind peer review, where both the reviewers and authors are anonymised during review.

Copyright:

© 2020, Laurens Ankersmit. This is an open access article distributed under the terms of the Creative Commons Attribution Licence (CC BY) 4.0 <https://creativecommons.org/licenses/by/4.0/>, which permits unrestricted use, distribution and reproduction in any medium, provided the original author and source are credited • DOI: <https://doi.org/10.14324/111.444.ewlj.2020.25>.

Open access:

Europe and the World: A law review is a peer-reviewed open access journal.

Abstract

This article analyses the aspect of the Court's reasoning in Opinion 1/17 that focuses on the regulatory autonomy of the Parties to the Comprehensive Economic and Trade Agreement (CETA) to decide on levels of protection of public interests. The European Court of Justice's (ECJ) introduction of regulatory autonomy under EU law coincides with the wider debate around 'regulatory chill' under international investment law. This article finds the ECJ's concept of regulatory autonomy to be narrower than that of the regulatory chill hypothesis put forward by critics of investor-state dispute settlement (ISDS). It further analyses the ECJ's reasoning that the CETA's investment tribunals do not have jurisdiction to call into question the levels of protection sought by the EU. In so doing, it will critically evaluate the certainty of the ECJ's promise that there will be no negative effect on public interest decision-making through CETA's investment chapter. Finally, it will explore the legal consequences of Opinion 1/17 for future awards and investment agreements.

Keywords: regulatory chill; regulatory autonomy; Investment Court System; CETA; Opinion 1/17; climate change mitigation; investor-state dispute settlement; autonomy of EU law

1. Introduction

The lively public debate on investment arbitration in recent years is in part the result of public fears of ‘regulatory chill’ that may result from investor claims against government public interest action under investment agreements.¹ It is not the only ground for opposing investor-state dispute settlement (ISDS)² but concerns over regulatory chill have made the debate more prominent. The debate around regulatory chill and ISDS is often based on a number of well-known examples of actual litigation resulting in a regulatory change on the part of a government. For instance, the government of New Zealand delayed the introduction of its plain packaging legislation for tobacco products for six-and-a-half years until the investment arbitration case initiated by Philip Morris against Australia had been resolved.³ The government of Indonesia reversed its ban on open-cast mining in several protected forests following the threat of ISDS arbitration.⁴ The government of Romania requested that a World Heritage Site nomination be referred back following a claim brought by a Canadian mining company because of delays in permitting procedures surrounding the biggest open-cast gold mine in Europe.⁵ Regulatory chill can take various forms and essentially comes down to an effect whereby the government delays, waters down, or otherwise negatively affects public interest decision-making out of fear of investment arbitration litigation.

Regulatory chill caused by investment arbitration played a significant part in debates surrounding the negotiations of both the Comprehensive Economic and Trade Agreement (CETA) with Canada and the proposed Transatlantic Trade and Investment Partnership (TTIP) with the United States. On the one hand, academics, civil society organisations, and various political groups have warned that regulatory chill may result from the investment arbitration provisions contained in these agreements.⁶ On the other hand, the Commission has argued that these agreements contain sufficient guarantees that public interest decision-making would not be affected.⁷

The request for Opinion 1/17 by the Belgian government did *not* concern a request for a clarification on this debate. The request had raised four different points for legal clarification by the European Court of Justice (ECJ), none of which touched upon the issue of regulatory chill, even indirectly.⁸ In fact, the scope

¹ ‘The Arbitration Game’, *The Economist*, (London, 11 October 2014); James Surowiecki, ‘Trade Agreement Troubles’, *The New Yorker* (New York, 15 June 2015); Chris Hamby, ‘Inside The Global “Club” That Helps Executives Escape Their Crimes’, *BuzzFeedNews* (28 August 2016).

² Martti Koskeniemi, ‘It’s not the Cases, It’s the System’ (2017) 18 *The Journal of World Investment & Trade* 343; Alessandra Arcuri, ‘The Great Asymmetry and the Rule of Law in International Investment Arbitration’ in Lisa Sachs, Lise Johnson and Jesse Coleman (eds), *Yearbook on International Investment Law and Policy 2018* (Oxford University Press 2019), who argues that the asymmetry between rights and obligations of foreign investors in investment agreements poses a rule of law challenge; Gus Van Harten, Jane Kelsey and David Schneiderman, ‘Phase 2 of the UNCITRAL ISDS Review: Why “Other Matters” Really Matter’, Osgoode Legal Studies Research Paper, 2019.

³ Jane Kelsey, ‘Regulatory Chill: Learnings from New Zealand’s Plain Packaging Tobacco Law’ (2017) 17 *QUT Law Review* 21; Kyla Tienhaara, ‘Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement’ (2018) 7 *Transnational Environmental Law* 229.

⁴ Stuart G Gross, ‘Inordinate Chill: Bits, Non-NAFTA MITs, and Host-State Regulatory Freedom – An Indonesian Case Study’ (2003) 24 *Michigan Journal of International Law* 893.

⁵ On 4 July 2018, the World Heritage Committee of the World Heritage Convention took Decision 42 COM 8B.32, which referred Romania’s nomination of Rosia Montana as a world heritage site back to Romania at Romania’s request ‘due to the ongoing international arbitration’. See <<https://whc.unesco.org/archive/2018/whc18-42com-18-en.pdf>> accessed 10 October 2019.

⁶ Pia Eberhardt, ‘The Zombie ISDS’ (*Corporate Europe Observatory*, March 2016) <https://corporateeurope.org/sites/default/files/attachments/the_zombie_isds_0.pdf> accessed 7 October 2019; Gus Van Harten, ‘A report on the flawed proposals for investor-state dispute settlement (ISDS) in TTIP and CETA’, Osgoode Legal Studies Research Paper, 2015; Jan Kleinheisterkamp, ‘Financial Responsibility in European International Investment Policy’ (2014) 63 *International and Comparative Law Quarterly* 449.

⁷ European Commission, *Investment in TTIP and beyond – the path for reform* (Concept Paper, May 2015); European Commission, ‘Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations’ (Press release IP/15/5651, 16 September 2015) <https://europa.eu/rapid/press-release_IP-15-5651_en.htm> accessed 7 October 2019.

⁸ These four issues for legal clarification were: (1) the competence of the Court of Justice; (2) the principle of equal treatment and the effectiveness of EU law; (3) access to justice; and (4) the right to an independent and impartial tribunal. The Request for an Opinion is on file with the author.

of Belgium's request was limited to Section F of Chapter Eight of CETA (the Investment Court System – ICS), not the entire investment chapter including the substantive provisions. In that sense, the request was by and large inspired by the ECJ's decision in Opinion 2/13, which dealt with the possible negative effects of the EU's accession to the European Convention on Human Rights (ECHR) on the ECJ's own powers. The Court's case-law on autonomy and external oversight mechanisms under international law had so far focused on a judicial understanding of autonomy based primarily on the powers of the EU's judiciary. Nonetheless, the ECJ decided to weigh in on this public debate in Opinion 1/17, providing the Commission with a helpful formal legal authority in the public debate in Europe.⁹

In Opinion 1/17 the Court moved away from that *judicial* understanding of the autonomy of the EU legal order in order to add a *regulatory* understanding of that concept. This regulatory understanding of the autonomy of the EU legal order focuses more on the independence of the institutions involved in the EU's regulatory processes. The ECJ thus introduced a new test for the constitutional limits of the EU and the Member States to conclude agreements with dispute settlement provisions in general. It held that

if the Union were to enter into an international agreement capable of having the consequence that the Union – or a Member State in the course of implementing EU law – has to amend or withdraw legislation because of an assessment made by a tribunal standing outside the EU judicial system of the level of protection of a public interest established, in accordance with the EU constitutional framework, by the EU institutions, it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework.¹⁰

However, after scrutinising the relevant substantive investment standards in CETA the Court concluded that the ICS tribunals would not be in the position to require the EU institutions to change the level of protection of a public interest. The Court concluded that

by expressly restricting the scope of Sections C and D of Chapter Eight of that agreement . . . the Parties have taken care to ensure that those tribunals have no jurisdiction to call into question the choices democratically made within a Party relating to, inter alia, the level of protection of the public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights.¹¹

On the face of it, the ECJ's Opinion appears positive from the perspective of those concerned that these public interests may be affected by agreements such as CETA. After all, the ECJ suggests that the investment chapter of CETA will not have a negative impact on the level of protection set by any of the Parties to the agreement. However, these guarantees offered by the ECJ do raise questions. It is, after all, up to ICS tribunals and not the ECJ to interpret and apply the investment provisions in CETA and weigh public interests against the freedom to conduct business and *not* the ECJ. Will these tribunals follow the ECJ's assessment of CETA and what exactly are the parameters of that assessment of the ECJ? When are tribunals calling into question the choices democratically made within a Party relating to the level of protection of various public interests and when are they merely 'confining' themselves to applying the CETA investment provisions without affecting the level of protection of a public interest sought by one of the Parties? What is more, the ECJ focuses solely on the actions of the *tribunals* themselves whereas regulatory chill is a more dynamic concept. It focuses on *government* action that can be *anticipatory* but also a *reaction to threats* and *claims* by investors, as well as actual *awards* by tribunals. In addition, while the Court suggests it is vouching for CETA's investment chapter's guarantee of autonomy of regulatory action in general, in reality it is only concerned with regulatory autonomy of the EU institutions, and thus not with the regulatory autonomy of third states or the Member States.

⁹The Court apparently decided to take up this issue because Belgium and 'some' of the governments submitting observations had alluded to the fact that the ICS tribunals would be required to weigh public interests against 'the freedom to conduct business'. See para 137 of the Opinion. This was sufficient for the Court to proceed with its analysis on the autonomy of EU decision-making in the public interest. The Court proceeded with the need to 'respond to those doubts'.

¹⁰Opinion 1/17 (CETA) ECLI:EU:C:2019:341, para 150.

¹¹*ibid*, para 160.

This article proceeds in the context of one policy area where the issue of regulatory chill and investment arbitration is particularly relevant: climate change mitigation. It will use this context for two reasons. First, regulatory chill over climate change measures has been a particular concern for elected representatives in the EU as well as within Member States. The European Parliament's resolution of 14 October 2015 adopted in the wake of the Paris Agreement, for instance, calls on the Commission and the Member States to

ensure that any measure adopted by a Party to the Paris Agreement relating to the objective of stabilising greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, or relating to any of the principles or commitments contained in Articles 3 and 4 of the United Nations Framework Convention on Climate Change, will not be subject to any existing or future treaty of a Party to the extent that it allows for investor-state dispute settlement.¹²

Second, as this article will argue below, climate change policies may be susceptible to regulatory chill because, on the one hand, typical measures to promote renewables such as feed-in tariffs are vulnerable to challenge under trade and investment agreements and, on the other, investment arbitration presents an opportunity for the fossil fuel industry to stall government action harming its investments.

This article will proceed as follows. The second section will analyse the relationship between the ECJ's definition of regulatory autonomy and 'regulatory chill'. It will explore how 'regulatory chill' is understood in the context of international investment law and then compare it with the ECJ's definition of regulatory autonomy in relation to ICS in CETA. The third section will analyse the ECJ's application of its test of regulatory autonomy to the investment chapter in CETA. It will describe the ECJ's test and then comment on various aspects of the ECJ's analysis and conclusions. The fourth section will explore the possible legal consequences of CETA tribunals exceeding their jurisdiction by calling into question the levels of protection of public interests set by the EU as understood by the ECJ. The final section will conclude.

2. Regulatory autonomy in Opinion 1/17 and regulatory chill

2.1. *The regulatory chill hypothesis and ISDS*

Tienhaara has developed a useful understanding and dichotomy of the concept of regulatory chill in the context of investment arbitration. According to her, investment arbitration has no *direct* impact on public interest regulation because governments cannot be forced by investment tribunals to roll back regulations that have been put in place. However, there may be significant *indirect* effects. Regulatory chill is then understood as the phenomenon whereby 'governments will fail to enact or enforce bona fide regulatory measures (or modify measures to such an extent that their original intent is undermined or their effectiveness is severely diminished) as a result of concerns about ISDS'.¹³

These concerns are about both the substantial financial risks involved in investment arbitration cases and the difficulty in predicting the outcome of a given investment arbitration case.¹⁴ Importantly, this definition of regulatory chill concerns *delays* in regulatory action, as well as *modification* or *abandonment* of a particular course or regulatory action.

Furthermore, when analysing the concept of regulatory chill, it is important to keep in mind *when* regulatory chill occurs, *what* causes regulatory chill in the context of ISDS, and the *factors* that may influence decision-makers to negatively change the course of regulatory action.

In relation to *timing*, regulatory chill is predominantly anticipatory or may be the result of a settlement between the investor and the government subject to a claim. Thus, a government may at the very early stage of regulatory action, when rules are being developed, decide to opt for one course of action over the other for fear of any potential claims it may face in the future. At the very end of this spectrum is when

¹²European Parliament resolution of 14 October 2015 on Towards a new international climate agreement in Paris (2015/2112(INI)) 80.

¹³Tienhaara (n 3) 233.

¹⁴*ibid.*

the government decides to either settle a case with an investor, or where it takes regulatory action in order to limit the amount of damages awarded to the investor. For instance, in the *Vattenfall I* case, Germany and Vattenfall reached an amicable settlement as a result of the commitments by the Hamburg government to lower the environmental restrictions imposed on the Moorburg coal-fired power plant in Hamburg, which made the project ‘uneconomical’.¹⁵ In relation to the latter, the CETA text is an example of an agreement that explicitly provides governments with a financial incentive to take regulatory action to limit the amount of damages awarded to the investor. Article 8.39(3) CETA provides that for ‘the calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure’. More unusual is the hypothetical situation whereby a government takes regulatory action after it has been ordered to pay damages. In other words, regulatory chill happens as the result of an award, not because of the claim itself, the threat of a claim, or because a regulatory action may in the design of a measure anticipate such a claim. While such regulatory action may be too late to avoid paying damages to the investor obtaining the award, it may prevent similar claims from arising in the future.¹⁶

On the second point (*what* causes regulatory chill in the context of ISDS), regulatory chill may be caused by a claim, an award or the terms of the investment agreement itself. These causes may be specific and direct, in the sense that they respond to a particular claim by an investor against the regulator itself, or may be more indirect and a response to a claim or award against another country.

Lastly, factors that may be relevant in causing regulatory chill are diverse and in essence revolve around a risk-assessment by the regulator in relation to ISDS. *Structural aspects* of the investment agreement itself may determine the likelihood of regulatory chill, such as the procedural ease by which a claim can be brought. This may include provisions that require an investor to exhaust domestic remedies first, by limiting the ability to bring claims on behalf of shell companies, or by allowing for counterclaims against investors. Substantive provisions that may limit the risk of regulatory chill are carve-out provisions or limitations on the rights of investors in an investment agreement. Factors *connected to the regulator* may be the willingness of a regulator to comply with the standards in an investment agreement compared to the degree of importance attached to a particular regulatory measure. For instance, a regulator may be more keen to not pursue a particular course of regulatory action if the regulator is not particularly attached to obtaining a regulatory goal, but does attach great importance to compliance with investment agreements. Factors *connected to the investor* may be the credibility of a particular claim or threat of a claim, or the amount of damages demanded.

Lastly, *factors connected to a particular policy field or type of regulatory action* may increase the risk of regulatory chill. Some policies are simply more difficult to square with what investment agreements protect. An obvious example is the UK Labour Party’s idea to renationalise the UK’s electricity network in order to decarbonise the economy.¹⁷ The feasibility of this plan may to a large extent depend on how and under what conditions investors will be compensated, something that most investment agreements provide for. What is more, two structural features of climate change policies, in particular, make such policies susceptible to regulatory chill. The first is that climate change policies are often discriminatory in nature. Government action promoting renewables consists of various forms of support of *domestic* renewables and for that reason is vulnerable to challenge before the World Trade Organization (WTO), EU courts, and investment arbitration tribunals. The international framework to combat climate change takes a bottom-up approach focusing heavily on domestic efforts to mitigate climate change. The Paris Agreement, for instance, stipulates that in order to achieve the Paris goals of staying below two degrees of global warming, a Party ‘shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.’¹⁸ Government efforts have in large part focused on

¹⁵ *Vattenfall v. Germany*, ICSID Case No. arb/09/6 (award of 11 March 2011); see the request for arbitration by Vattenfall.

¹⁶ This appears to be the concern identified by the ECJ in Opinion 1/17, see Section 2.1.

¹⁷ Angela Monaghan, ‘Labour to end energy consumer “rip-off” and renationalise network’ (*The Guardian*, 15 May 2019) <<https://www.theguardian.com/business/2019/may/15/corbyn-to-reveal-labour-plans-to-nationalise-uks-energy-network>> accessed 10 October 2019.

¹⁸ Article 4(2) of the Paris Agreement [2016] OJ L 282/4.

promoting the production of renewables within their own territories in order to achieve international climate change goals. Such measures allow governments to be more directly in control of greenhouse gas (GHG) emission reductions within their own territory rather than more diffuse consumer-oriented policies.

EU efforts are subdivided into efforts by Member States that individually have mitigation targets contributing to the EU's overall target to reduce GHGs. According to the preamble of the EU's renewables Directive,

Member States have different renewable energy potentials and operate different support schemes at national level. The majority of Member States apply support schemes that *grant benefits solely to energy from renewable sources that is produced on their territory*. For the proper functioning of national support schemes, it is vital that Member States continue to be able to control the effect and costs of their national support schemes in accordance with their different potentials.¹⁹

Governments, including those of EU Member States, employ a variety of mechanisms through which domestic renewables production is supported. These vary from introducing quota obligations and green certificates requiring electricity suppliers to purchase a certain quantity of domestic renewables, to price-based mechanisms such as feed-in tariffs that guarantee renewables producers a certain price for their supply. In addition, governments (including in the EU) resort to local content requirements in promoting renewables policy.²⁰

Second, most investment agreements protect investors against significant and sudden changes in the regulatory framework that harm their investments.²¹ It is this type of regulatory action that is currently needed in order to achieve the goals of the Paris Agreement, and such regulatory action may harm investments in the fossil fuel industry; such a revocation or restrictions of exploitation permits, restrictions on the sale or use of fossil fuels, or fuel quality standards may equally be susceptible to challenge. An example is the announcement by the German company Uniper that it was preparing a billion-euro claim under the Energy Charter Treaty (ECT) against the Netherlands for the decision to ban the use of coal in power plants in 2030. Uniper had committed to constructing a coal-fired power plant in the Netherlands that became operational in 2016 and now argues that the ban on the use of coal amounts to indirect expropriation without compensation as required by the ECT. Uniper has stated that it will file the claim as soon as the Netherlands adopts the coal use ban in Parliament. As Tienhaara has argued,

investment agreements have been designed primarily to protect the status quo. Conversely, compliance with the objectives of the Paris Agreement will require radical change: a future in which governments have met the collective goal of keeping below the 2°C guardrail is a future without fossil fuels. Civil society and governments at all levels will have to fight for this future, regardless of whether any of the recently negotiated regional trade agreements ever actually come into force. However, providing fossil fuel corporations with ISDS under these agreements is akin to handing your opponent extra weapons and ammunition before stepping onto the battlefield. Fossil fuel corporations will always have sufficient incentive to bring ISDS cases because they are fighting for their survival. For as long as there is any ambiguity in the substantive provisions of investment agreements – allowing cases to play out over several years, cost millions, and leave governments uncertain about outcomes – there will be policy delays. In a rapidly warming world, we simply cannot afford these delays.²²

As of 2019, the International Centre for Settlement of Investment Disputes (ICSID), a major investment arbitration institution of the World Bank, had already recorded that 24% of its registered cases involve the oil, gas and mining sector.²³ Moreover, political and economic dynamics suggest that the

¹⁹Recital 22 of Directive 2018/2001/EU on the promotion of the use of energy from renewable sources [2018] OJ L 328/82, emphasis added.

²⁰Joanna I Lewis, 'The Rise of Renewable Energy Protectionism: Emerging Trade Conflicts and Implications for Low Carbon Development' (2014) 14 *Global Environmental Politics* 10, 14.

²¹Tienhaara (n 3) 229.

²²*ibid.*, 250.

²³ICSID, 'The ICSID case-load statistics' (Issue 2019-1) <[https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf)> accessed 11 October 2019.

fossil fuel industry may resort to investment arbitration in the future. Global fossil fuel investments – generally long-term upstream extraction projects – are still expanding, totalling US\$935 billion in 2018 alone, while government action necessary to achieve the goals of Paris may result in many of these investments becoming stranded investments.²⁴ Research suggests that no less than 80% of current global coal reserves, a third of oil reserves and half of the world’s gas reserves should not be exploited from 2010 to 2050.²⁵ Investors in fossil fuel extraction thus have a clear financial incentive to turn to tools such as investment arbitration to secure their investments. Several other exacerbating factors – climate change policies posing an existential threat to the business model of the fossil fuel industry, past experience and knowledge of investment arbitration, the financial benefits of *delays* to introduction of climate change policies alone, and the lack of any clear disadvantages of using investment arbitration for the fossil fuel industry – all add to a heightened risk for claims targeting climate change policies.²⁶

Tienhaara suggests that three forms of regulatory chill can be distinguished: internalisation chill, threat chill and cross-border chill. *Internalisation chill* is the effect whereby decision-makers take into account the potential of investment disputes before drafting policy, pre-empting disputes in a more general way, and thereby ‘prioritizing the avoidance of such disputes over the development of efficient regulation in the public interest’.²⁷ Internalisation chill is very difficult to measure and evidence of this type of chill is at best mixed.²⁸ However, governments that have regulatory policies in place that screen public interest measures for their potential impacts on trade and investment before such measures are adopted could lead to this particular chill effect. Within the EU, the Commission’s regulatory policy requires officials to take account of the impact of any regulatory proposal on international trade and investment flows and agreements to which the EU is party among various other issues.²⁹ In the context of international trade law, a prominent example of an initiative that has so far not materialised because of fears over its legality under international trade law is the French idea of a carbon border tax. Resisted so far within the EU out of concerns over compatibility with the EU’s trade commitments, the new President of the Commission, Ursula von der Leyen, has promised the European Parliament that it will be introduced, with the caveat that it would need to be ‘fully compliant with WTO rules’.³⁰

Threat chill ‘concerns the chilling of *specific* regulatory measures that have been proposed by governments following an investor’s threat to arbitrate’.³¹ This type of chill is the most familiar form of chill and does not depend on prior knowledge of investment agreements by government officials. In fact, the lack of prior knowledge may exacerbate the chilling effects because government officials may lack the ability to properly assess the viability of the threat. The use of investment claims as a threat is well documented. When such threats are made, government officials, bound by constraints in time and resources, will have to assess the viability of such threats. In other words, there is an element of risk analysis involved on the part of the government as to whether to pursue a particular measure. Lastly, *cross-border chill* is where a government fails to enact or enforce a measure, or modifies a measure that is contemplated and easily transferrable in several jurisdictions, because of an investment arbitration claim against another country. A clear example of this form of chill is New Zealand’s decision to delay its plain

²⁴International Energy Agency, World Energy Investment (May 2019) 6.

²⁵Tienhaara (n 3) 230, referring to C McGlade and P Ekins, ‘The Geographical Distribution of Fossil Fuels Unused when Limiting Global Warming to 2°C’ (2015) 517(7533) Nature 186, 187.

²⁶Tienhaara (n 3) 230.

²⁷*ibid.*, 233–5.

²⁸Gus van Harten and Dayna Nadine Scott, ‘Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada’ [2016] Journal of International Dispute Settlement 92.

²⁹European Commission, ‘Chapter III: Guidelines on Impact Assessment’ <<https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-impact-assessment.pdf>> accessed 11 October 2019, pp 22, 23, 31. The Commission’s impact assessment guidelines require officials when designing policy options to explain possible inconsistencies with obligations undertaken at the WTO or in international agreements. When options are considered officials are required to redraft options when they have a disproportionate negative effect on trade partners.

³⁰Ursula von der Leyen, ‘A Union that strives for more: My agenda for Europe’ <https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf> accessed 11 October 2019.

³¹Tienhaara (n 3) 236.

packaging legislation for tobacco products until the investment arbitration case initiated by Philip Morris against Australia had been resolved.³²

2.2. *Assessing Opinion 1/17 and regulatory autonomy*

2.2.1. The Court's test

The Court's position in Opinion 1/17 on the autonomy of the regulatory process starts with the observation that Belgium and some of the governments involved in the proceedings have stated that the CETA Tribunal 'might ... weigh the interest constituted by the freedom to conduct business ... against public interests' set out in EU law.³³ The Court then proceeds by seeking to answer the question whether situations in which tribunals would give rulings on acts of secondary EU law would adversely affect the exclusive jurisdiction of the Court over the definitive interpretation of EU law. The Court notes in that regard that such situations 'are likely to occur often' and notes that the definition of the concept 'investment' in CETA 'is particularly broad' and may 'concern measures in any area that relates, within the Union, to business activity and the use of moveable or immovable property, securities, intellectual property rights, claims to money and any other type of investment'. The Court also notes that the EU would not be in a position to object to the jurisdiction of the tribunals in question. Moreover, in terms of the types of acts that may be brought before the tribunal, the Court states that CETA does not 'preclude that measure from being one of general application or from implementing an act of general application'.³⁴

The Court's reasoning then takes a notable turn away from the question of interpretation of EU law after it finds that the tribunals in question can only award damages and not annul or order changes to domestic legislation. In paragraphs 148 to 151, the Court finds that

the jurisdiction of those tribunals would adversely affect the autonomy of the EU legal order if it were structured in such a way that those tribunals might, in the course of making findings on restrictions on the freedom to conduct business challenged within a claim, call into question the level of protection of a public interest that led to the introduction of such restrictions by the Union with respect to all operators who invest in the commercial or industrial sector at issue of the internal market, rather than confine itself to determining whether the treatment of an investor or a covered investment is vitiated by a defect mentioned in Section C or D of Chapter Eight of the CETA.

If the CETA Tribunal and Appellate Tribunal were to have jurisdiction to issue awards finding that the treatment of a Canadian investor is incompatible with the CETA because of the level of protection of a public interest established by the EU institutions, this could create a situation where, in order to avoid being repeatedly compelled by the CETA Tribunal to pay damages to the claimant investor, the achievement of that level of protection needs to be abandoned by the Union.

If the Union were to enter into an international agreement capable of having the consequence that the Union – or a Member State in the course of implementing EU law – has to amend or withdraw legislation because of an assessment made by a tribunal standing outside the EU judicial system of the level of protection of a public interest established, in accordance with the EU constitutional framework, by the EU institutions, it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework.

It must be emphasised, in that regard, that EU legislation is adopted by the EU legislature following the democratic process defined in the EU and FEU Treaties, and that that legislation is deemed, by virtue of the principles of conferral of powers, subsidiarity and proportionality laid down in Article 5 TEU [Treaty on European Union], to be both appropriate and necessary to achieve a legitimate objective of the Union. In accordance with Article 19 TEU, it is the task of the Courts of the European Union to ensure review of the compatibility of the level of protection of public interests

³²See n 3.

³³Opinion 1/17 (CETA) ECLI:EU:C:2019:341, para 137.

³⁴ibid, para 143.

established by such legislation with, inter alia, the EU and FEU Treaties, the Charter and the general principles of EU law.³⁵

2.2.2. Comparing regulatory chill and regulatory autonomy

A first notable aspect of the ECJ's test is the ECJ's recognition that claims for damages by investors may have an impact on the public decision-making process. The ECJ's test does not consider the autonomy of the regulatory process in the EU to be affected only if external tribunals would have jurisdiction to invalidate EU rules, but considers *indirect* effects also relevant. Similar to the understanding of regulatory chill described above, the ECJ does not understand an adverse effect on the autonomy of the EU legal order to solely come from a power to directly force repeal or amendment of a particular measure. Instead, repeated awards of damages may result in the same effect and can therefore also result in an adverse effect on the autonomy of the EU legal order.

A second notable aspect is that the ECJ's test centres around *amending* or *withdrawing* legislation because of the level of protection set by the EU. The ECJ's test thus appears not to be concerned with any *delays* in regulatory action that may result from ICS litigation. Similarly, the ECJ's test is backward-looking in the sense that the test does not appear to concern anticipatory action of governments as a result of ISDS in relation to public interest decision-making. Governments may simply decide to not *introduce* legislation because of ISDS. The Court, however, refers to abandonment of a particular level of protection in order to avoid being 'repeatedly' compelled to pay damages. This suggests a higher threshold before the autonomy of the EU legal order is adversely affected than when simply as a result of being compelled to pay damages the EU abandons the achievement of a level of protection. In fact, the ECJ's test appears to centre around a very narrow set of factual circumstances where governments have enacted legislation first, a foreign investor subsequently obtains an award that calls into question the level of protection set by the EU and then as a result of this award the government is 'repeatedly' forced to pay damages because of subsequent litigation by that same investor. Only in this situation, according to the ECJ, is the EU forced to abandon its level of protection. It is hard to imagine when and how such a situation would occur. A level of protection may of course also be abandoned simply in order to avoid paying damages a single time. Indeed, the text of CETA expressly provides for this possibility. Article 8.39(3) CETA provides: 'For the calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure.'

The ECJ's test further concerns only those structural aspects of the jurisdiction of tribunals that relate to the substantive standards of the agreement. It does not concern procedural aspects, such as the procedural ease with which a claim may be brought (e.g. the potential existence of a clause to exhaust domestic remedies, a clause on frivolous claims, or third-party funding), or the height of claims or the way damages may be calculated. The ECJ's focus is on whether or not tribunals would be calling into question the levels of protection set by the EU rather than confining themselves to finding a breach or not of the investor rights contained in the agreement.

Lastly, the ECJ's test is applicable to EU regulatory action and to Member State regulatory action in so far as they are implementing EU law. It is thus not concerned with any adverse effects on the regulatory process that may occur in third countries party to an agreement with the EU. The ECJ's test is thus strictly internal and contains no reference to Treaty provisions that suggest that the EU has as its task to uphold and promote its democratic values in its relations with the wider world.³⁶ While the ECJ's test may certainly indirectly contribute to less intrusive investment standards being adopted between the EU and third countries, Opinion 1/17 would have little legal value in restraining tribunals deciding on regulatory action of those third countries, for instance in the course of annulment proceedings of an award before a court in an EU Member State.

³⁵ *ibid*, paras 148–51.

³⁶ For instance, Articles 2, 3(5) and 21 TEU. See more generally a discussion on the value and nature of these constitutional provisions: Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016) and Marise Cremona, 'Distinguished Essay: A Quiet Revolution – The Changing Nature of the EU's Common Commercial Policy' in Marc Bungenberg (ed), *European Yearbook of International Economic Law 2017* (Springer 2017) 3–34.

2.2.3. The ECJ's own case-law on non-contractual liability

The ECJ's test on preserving the regulatory autonomy of the EU legal order under EU external relations law differs from the ECJ's own case-law on non-contractual liability of the EU institutions under Article 340 Treaty on the Functioning of the European Union (TFEU). While the ECJ in its case-law on non-contractual liability is also wary of the deterrent effect of damages claims by individuals on the EU's decision-making process, the ECJ also appears to be more protective of the EU decision-making process. What is more, that standard on non-contractual liability may have undergone some erosion as a result of Opinion 1/17.

Currently, the Court of Justice employs a high standard in allowing claims for damages for EU discretionary acts.³⁷ The ECJ considers that EU institutions should have a 'wide discretion' in implementing EU policy and therefore takes a 'strict' approach towards liability.³⁸ This means that not only is the applicant required to demonstrate a breach of a superior rule of law which is intended to give rights to individuals, but also that this breach must be flagrant, meaning that the EU institution manifestly and gravely disregarded the limits on its discretion.³⁹ Factors that are relevant in this regard are intent, justifiability and clarity of the rule breached.⁴⁰

The reason for this high standard is that the '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'.⁴¹ Accordingly, it is very difficult to claim damages under Article 340 TFEU.⁴² For illustrative purposes for this very strict approach, it is perhaps worthwhile to compare the success rate of claimants in proceedings under Article 340 TFEU and under investment agreements containing ISDS. Even though the sheer number of 'superior rules of law' is considerably larger than the three or four investor rights generally contained in investment agreements, the success rate for claimants under the latter provisions is significantly higher. The ECJ's deferential case-law towards the EU institutions in damages claims has resulted in only 23 claims out of 530 damages claims brought against the EU institutions being successful. This is a success rate of 4.3%. Eight of these cases involved disputes over milk quotas and the majority of the cases involved matters that fell within the Common Agricultural Policy. With the notable exception of the *Schneider Electric* case, the amounts of compensation were insignificant. Investors, by contrast, have been almost seven times as successful before ISDS tribunals. According to statistics of the United Nations Conference on Trade and Development (UNCTAD), of the 942 cases concluded so far, 173 resulted in an award in favour of the investor. This is a success rate of 28.7%. A 2018 UNCTAD study found that

on average, successful claimants were awarded about 40 per cent of the amounts they claimed. In cases decided in favour of the investor, the average amount claimed was \$1.3 billion and the median \$118 million. The average amount awarded was \$504 million and the median \$20 million. These amounts do not include interest or legal costs, and some of the awarded sums may have been subject to set-aside or annulment proceedings.⁴³

The ECJ's rationale in preserving regulatory autonomy in Opinion 1/17 is different from the rationale in preserving regulatory autonomy for EU institutions in the context of damages claims under Article 340 TFEU. First of all, under Article 340 TFEU there is no reference to claims being made 'repeatedly' before there may be an effect on the decision-making process. Second, the ECJ's reasoning under Article

³⁷Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt* ECLI:EU:C:1971:116, para 11; Case C-352/98P *Bergaderm* ECLI:EU:C:2000:361, para 43.

³⁸Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA* ECLI:EU:C:1996:79, paras 44–5.

³⁹*ibid*, para 55.

⁴⁰Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2011) 563.

⁴¹Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA* ECLI:EU:C:1996:79, para 45.

⁴²Joined Cases C-120 and 121/06P *FIAMM and Fedon* ECLI:EU:C:2008:476, paras 175–6.

⁴³UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2017' (Issue 2, June 2018) 5. Whether the safeguards and procedural changes introduced with CETA will result in a success rate similar to that of damages claims within the EU remains to be seen. While the standards in CETA are generally more circumscribed than some of the broadly worded agreements from the early 1990s, CETA maintains the basic tenets of international investment agreements and it contains the same rights and the same standards for calculating the level of monetary awards as the more modern investment agreements concluded by, for instance, the United States and Canada.

340 TFEU is prospective in nature, whereas the test in Opinion 1/17 is retroactive. The ECJ focuses on withdrawal and amendments of legislation in Opinion 1/17 whereas under Article 340 TFEU the ECJ is concerned with the ‘exercise of the legislative function’, which must not be hindered by the ‘prospect’ of actions for damages. In other words, the ECJ has sought under Article 340 TFEU to develop a test so strict that the legislator does not need to worry about damages actions when introducing legislation, whereas in Opinion 1/17 the ECJ considers damages claims only problematic for the legislative function if repeated successful damages claims result in amendments or even withdrawal of already existing rules. Third, Opinion 1/17 does not require the ‘defect’ introduced by the EU institutions of the agreement in question to be ‘flagrant’ or ‘sufficiently serious’ in order to preserve any ‘wide discretion’ of the EU institutions, as is the case under Article 340 TFEU. Rather, the ECJ considers the autonomy of the EU legal order preserved if the tribunals in question merely apply the CETA Agreement. Thus, whereas under Article 340 TFEU the ECJ requires a breach to be a flagrant breach in order to protect the legislative function of the EU institutions, no such additional requirement is necessary under the ECJ’s test in Opinion 1/17. Rather, the ECJ looks at the substantive provisions themselves in order to determine whether the tribunals in question would have the jurisdiction to call into question the level of protection set by the EU.

Moreover, that standard on non-contractual liability may have undergone some erosion as a result of Opinion 1/17. Under Article 340 TFEU it is not possible to claim damages for lawful acts under EU law.⁴⁴ However, in Opinion 1/17 the Court attaches no such preconditions to damages claims in the context of the autonomy of the EU legal order. This widens the scope for damages claims against the EU institutions as acts that are lawful under EU law and as such are not susceptible to damages claims under Article 340 TFEU may also result in damages claims by individuals under international agreements to which the EU is party.

3. An analysis of the ECJ’s application of its own test of regulatory autonomy to CETA

3.1. The ECJ’s assessment of CETA Chapter Eight Sections C and D

After setting out the general conditions for the jurisdiction of international tribunals to adjudicate upon public interest decision-making by EU institutions, the Court proceeds by applying the test to the CETA provisions. First, the Court refers to one of the general exceptions contained in Article 28.3 of CETA, namely paragraph 2 of that article. This provision is similarly worded to General Agreement on Tariffs and Trade (GATT) Article XX and Article 36 TFEU and does not include the protection of the environment or combating climate change as an exception. This provision only applies to Section C of CETA’s investment chapter (three provisions), which includes the national treatment and most favoured nation standards. Article 28.3 provides that subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in the agreement should be construed to prevent the adoption or enforcement by a Party of measures necessary for the listed public interests. From this provision, the Court infers that ‘the CETA Tribunal has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures specified in [Article 28.4.2 CETA] and, on that basis, to order the Union to pay damages’.⁴⁵

The Court then proceeds to cite Article 8.9.1 and 8.9.2 in Section D of CETA and Point 1(d) and Point 2 of the Joint Interpretative Instrument in CETA. Article 8.9.1 ‘reaffirms’ for the purposes of that section the Parties’ ‘right to regulate’ in the public interest. Article 8.9.2 states that ‘*the mere fact* that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section’.⁴⁶ The point in the Joint Interpretative Instrument provides that CETA will not lower public interest standards, that investors must respect domestic requirements and that it preserves the ability of the EU and its Member States and Canada to

⁴⁴Case 81/86 *De Boer Buizen v Council and Commission* [1987] ECR 3677, paras 22–3; Joined Cases C-120 and 121/06P *FIAMM and Fedon* ECLI:EU:C:2008:476, paras 175–6.

⁴⁵Opinion 1/17 (CETA) ECLI:EU:C:2019:341, para 153.

⁴⁶Article 8.9.2 CETA (emphasis added).

adopt and apply their own laws and regulations that regulate economic activity in the public interest. The Court concludes from these provisions that ‘the discretionary powers of the CETA Tribunal and Appellate Tribunal do not extend to permitting them to call into question the level of protection of public interest determined by the Union following a democratic process’.⁴⁷

The Court finds affirmation of this conclusion by pointing out the definition of indirect expropriation contained in Annex 8-A (a definition modelled after the US model investment agreement) and the provisions of the ‘fair and equitable treatment’ standard in Article 8.10. The Court interprets Article 8.10.2 to contain an exhaustive list of situations covered by the standard as opposed to an open-ended list. The Court infers that those two provisions reflect that the Parties to CETA have concentrated on situations

where there is abusive treatment, manifest arbitrariness and targeted discrimination, which reveals, once again, that the required level of protection of a public interest, as established following a democratic process, is not subject to the jurisdiction conferred on the envisaged tribunals to determine whether treatment accorded by a Party to an investor or a covered investment is ‘fair and equitable’.⁴⁸

The Court then concludes its reasoning by stating that it is

apparent from all those provisions, contained in the CETA, that, by expressly restricting the scope of Sections C and D of Chapter Eight of that agreement, which are the only sections that can be relied upon in claims before the envisaged tribunals by means of Section F of that chapter, the Parties have taken care to ensure that those tribunals have no jurisdiction to call into question the choices democratically made within a Party relating to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights.⁴⁹

3.2. CETA’s investment provisions will in practice not be interpreted by the ECJ, but by ICS tribunals, government officials, lawyers and investors

The ECJ’s analysis of CETA focuses exclusively on those provisions the Commission has sought to introduce in CETA to accommodate concerns over regulatory chill. Thus the ECJ does not look at the actual substantive rights given to investors, but rather at some of the specific language introduced to constrain expansive interpretations of those rights. The ECJ looks at the general exception clause contained in CETA, provisions of the article on ‘investment and regulatory measures’ that was introduced after the initialling of CETA with the ICS reform package, the so-called Joint Interpretative Instrument introduced to alleviate concerns in German social-democratic circles in particular leading up to the signature of CETA, and parts of the definitions of indirect expropriation and fair and equitable treatment as they were already present in the initialled text of CETA in 2014.

In so doing, the ECJ introduces a caveat in its reasoning that upon closer examination does not significantly help reduce the risk of regulatory chill through CETA’s ICS. In paragraphs 152 to 160 the Court creates a dichotomy between two types of measures: on the one hand measures that are the result of ‘choices democratically made’ that relate to the ‘level of protection’ of an open list of public interests and, on the other, measures that constitute ‘abusive treatment, manifest arbitrariness and targeted discrimination’ or a means of ‘arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade between the Parties’. According to the Court, the CETA tribunals have no jurisdiction to call into question the former, but do have jurisdiction to declare incompatible the latter with CETA and on that basis award damages.

⁴⁷Opinion 1/17 (CETA) ECLI:EU:C:2019:341, para 156.

⁴⁸ibid, para 159.

⁴⁹ibid, para 160.

This dividing line is of course not unusual in international and European economic law and has been the subject of many disputes in the past decades.⁵⁰ Within the WTO, for instance, the legality under the GATT of many public interest measures hinges on whether or not they are compatible with the *chapeau* of Article XX.⁵¹ However, the Court's guidance as to when measures fall in one category and when in the other is limited and is based in large part by simply citing the actual text of the CETA provisions. The Court does not dwell on how exactly this demarcation line is to be drawn, nor question by whom this demarcation line is drawn and on what basis, but simply concludes that measures that are the result of choices democratically made that relate to the level of protection of an open list of public interests do not fall within this category.

However, drawing this demarcation line is far from self-evident. A body making such a determination can take a deferential stance on choices made by a Party to pursue public interests or a more intrusive stance. The former approach would consider even directly discriminatory measures permissible as long as they can be linked to the pursuit of a public interest, whereas the latter would not. That this demarcation line is not easily drawn between public interest measures a particular adjudication body needs to label as legitimate, and measures that breach a discrimination provision in an international agreement, is already evident from the ECJ's own internal market case-law.⁵² Take, for instance, the contrasting approaches in Advocate General Bot's Opinions in *Ålands Vindkraft* and *Essent* and the ECJ's judgments in those cases.⁵³ The case concerned the compatibility of Swedish and Belgian support schemes for domestic renewable electricity production with EU rules on the free movement of goods between Member States. Article 34 TFEU prohibits quantitative restrictions on imports and all measures having equivalent effect. However, Article 36 TFEU provides a limited list of public interest exceptions on which Member States can rely to justify any restrictions on the free movement of goods, provided that such measures shall not 'constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

The Swedish and Belgian support schemes were based on green electricity certificates that support domestic renewable energy production only. The schemes essentially require electricity suppliers to surrender each year to the authorities a quota of green electricity certificates. These certificates can be obtained by producing green electricity within that Member State or alternatively by purchasing them from domestic green electricity suppliers. Electricity suppliers that imported green electricity from other Member States, however, could either not obtain certificates in that country for this electricity or could not use certificates issued by another Member State.

For Advocate General Bot in *Essent*, EU free movement law 'preclude such rules, which hinder in a discriminatory way trade between Member States . . . without being justified by imperative requirements relating to environmental protection'. For the Advocate General, 'the national rules at issue, prohibiting as they do guarantees of origin from other countries from being taken into account, do not and cannot have environmental protection as their objective'.⁵⁴ The Advocate General came to a similar conclusion in *Ålands Vindkraft*. For the Advocate General a directly discriminatory measure may be justified on grounds of environmental protection 'provided, however, that it undergoes a particularly rigorous proportionality test, on [*sic*] which I have referred to as "reinforced"'.⁵⁵ The Advocate General applied this proportionality

⁵⁰Jochem-Jurrian Derk Wiers, *Trade and Environment in the EC and the WTO: A Legal Analysis* (Europa Law Publishing 2002); Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford University Press 2009).

⁵¹Ingo Venzke, 'Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012) 179; Robert Howse and Donald Regan, 'The Product/Process Distinction: an Illusory Basis for Disciplining Unilateralism in Trade Policy' (2000) 11 *European Journal of International Law* 2; Sanford Gaines, 'The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures' (2001) 22 *University of Pennsylvania Journal of International Economic Law* 739.

⁵²Catherine Barnard, 'Derogations, Justifications and the Four Freedoms: Is the State Interest Really Protected?' in Catherine Barnard and Oke Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009).

⁵³Joined Cases C-204/12 to C-208/12 *Essent Belgium* ECLI:EU:C:2014:2192; Joined Cases C-204/12 to C-208/12 *Essent Belgium* ECLI:EU:C:2013:294, Opinion of Advocate General Bot; Case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:2037; Case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:37, Opinion of Advocate General Bot.

⁵⁴Joined Cases C-204/12 to C-208/12 *Essent Belgium* ECLI:EU:C:2013:294, Opinion of Advocate General Bot, para 4.

⁵⁵Case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:37, Opinion of Advocate General Bot, para 79.

test of suitability and necessity because he could not see how imports of green electricity from other Member States could undermine environmental protection in the importing Member State. In other words, because the main objective invoked by the Member States was environmental protection and promoting the use of renewable energy sources, the measures at issue did not seem suitable to achieve the objective. This is so because the support schemes in question exclude from their application renewable electricity generated in another Member State. In reaching this conclusion, the Advocate General placed considerable emphasis on the importance of trade liberalisation and creating an internal market for green electricity in the EU, and through comparative advantage a ‘more rational location of production’.⁵⁶

The approach of the ECJ in both cases was less ideological and considerably more deferential towards Member States and the EU institutions as to the methods of achieving the goals of climate change mitigation and environmental protection. The Court found that promoting the use of renewable energy sources for the production of electricity was in principle capable of justifying barriers to the free movement of goods.⁵⁷ This was so because such promotion contributed to the protection of the environment as it contributes to the reduction of GHG emissions.⁵⁸ The increase in renewables protection was, according to the Court, ‘one of the important components of the package of measures needed to reduce greenhouse gas emissions’ and to comply with international agreements to which the EU was party.⁵⁹ The Court also noted that this increase in renewables production is ‘designed to protect the health and life of humans, animals and plants, which are among the public interests grounds listed in Article 36 TFEU’. The Court also pointed out that Article 194(1)(c) TFEU states that the development of renewables is one of the objectives that guides EU energy policy.⁶⁰

The Court then proceeded to a lengthy analysis of the support scheme’s compliance with the principle of proportionality. Much of the analysis of the Court emphasised the policy approach taken by the EU legislator, which required the EU to achieve its targets of renewables production for the overall energy mix (20% in 2020) through national production targets. In order for this approach to be successful, Member States needed a sufficient level of control over renewables production within their own territories.⁶¹ The Court noted that ‘a territorial limitation may in itself be regarded as necessary’ in order to promote the increased use of renewable energy in the production of electricity.⁶² The choice in particular to focus on renewable energy production, rather than on consumption, was logical for the Court because ‘the green nature of electricity relates only to its method of production and that, accordingly it is primarily at the production stage that the environmental objectives in terms of reduction of greenhouse gases can actually be pursued’.⁶³ By contrast, this objective becomes more difficult to pursue at the consumption stage, given that it is difficult to determine the specific origin of production. The Court found it is ‘essential, in order to ensure the proper functioning of the national support schemes, that Member States be able to “control the effect and costs of their national support schemes according to their different potentials”, while maintaining investor confidence’.⁶⁴

The Court’s deferential stance may be explained by the fact that the construction of the EU’s internal market is not an end in itself but a means to an end (an ever closer Union). The EU, after all, seeks to achieve a plurality of objectives, of which climate change mitigation is becoming more and more prominent. Indeed, the ECJ explicitly refers to this treaty objective in its reasoning. Nevertheless, the ECJ does not consider the objectives and the context of CETA relevant in assessing whether or not the tribunals interpreting CETA will be able to properly make the demarcation between legitimate and illegitimate measures. This is somewhat surprising given previous case-law of the ECJ where it appeared to be well

⁵⁶Joined Cases C-204/12 to C-208/12 *Essent Belgium* ECLI:EU:C:2013:294, Opinion of Advocate General Bot, para 110.

⁵⁷Case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:2037, para 82.

⁵⁸*ibid*, para 78.

⁵⁹*ibid*, para 79.

⁶⁰*ibid*, para 81.

⁶¹*ibid*, para 97.

⁶²*ibid*, para 93.

⁶³*ibid*, para 95.

⁶⁴*ibid*, para 99.

aware of the crucial difference context and objectives of international agreements can make in terms of interpreting fairly similarly worded text. In Opinion 1/91 the Court held:

The fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the law of treaties stipulates in this respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.⁶⁵

The Court then proceeded to compare the objectives of the EU Treaties with that of the European Economic Area (EEA) Agreement and came to the conclusion that both the context and the objectives were fundamentally different. Whereas the EEA agreement sought to simply remove trade barriers, the EU Treaties had the objective of making ‘concrete progress towards European unity’ and therefore the free movement provisions were ‘far from being an end in themselves, are only means for attaining those objectives’.⁶⁶

An analysis of the objectives and the context of CETA is, however, completely absent from the ECJ’s reasoning on regulatory autonomy in Opinion 1/17. CETA does not have as its objective mitigation of climate change or promoting peace, democracy, full employment, environmental protection, or any of the public interests mentioned by the ECJ in its analysis on regulatory autonomy in Opinion 1/17. CETA is simply a trade and investment agreement and has as its objective the liberalisation of trade between the EU and Canada and the protection of foreign investment. It contains no provisions that suggest that the objectives of the agreement go beyond economic liberalisation. At most, the sustainable development chapters simply seek to ensure that trade and investment liberalisation takes place in compliance with already existing environmental and social international obligations to which the Parties have committed themselves.⁶⁷ Public interests are only featured as exceptions to the overall objective of trade liberalisation and investment protection. In fact, climate change mitigation is not even mentioned as such an exception and is only explicitly mentioned in the sustainable development chapters as an area where the Parties should facilitate trade and investment liberalisation for goods and services that are of relevance for climate change mitigation and where the Parties should collaborate in trade-related aspects of the climate change regime.⁶⁸ The latter provision could even be read as a discouragement to take unilateral measures in the absence of international agreement.

Overall, the ECJ’s guidance is of rather limited value in preventing regulatory chill. The main problem is that the ECJ does little in actually interpreting the provisions themselves. It merely restates the text of CETA and concludes from these provisions that CETA’s investment tribunals will not call into question the level of protection of measures that relate to public interests. In particular, the Court does not elaborate to any significant extent on when measures should be considered to fall within the ‘arbitrary’ box or alternatively when they are legitimate public interest measures. Governments and investors will still be faced with the question whether an (envisaged) measure is pursuing a legitimate public interest or arbitrary. This may relate to a host of measures contributing to climate change mitigation: from measures promoting domestic renewables to sudden reversals in policies on coal mines, coal-fired power plants, or oil and gas infrastructure, as long as such measures can be framed as manifestly excessive, arbitrary, going against specific legitimate expectations, or discriminatory. In that sense, the ECJ’s ruling merely distils a high level of confidence in the ICS tribunals making the ‘right’ judgment calls rather than providing additional assurances against regulatory chill.

Nonetheless, there are two aspects of the Court’s expectations of how CETA should be interpreted that provide some interpretative guidance. First, the ECJ applies a relatively loose test for the causal relationship between the measure and the public interest itself by using the words ‘relate to’. For the Court

⁶⁵Opinion 1/91 ECLI:EU:C:1991:490, para 14.

⁶⁶ibid, para 19.

⁶⁷See, by analogy, Opinion 2/15 ECLI:EU:C:2017:376, para 152.

⁶⁸Articles 24.9 and 24.12(1)(e) CETA.

a ‘democratic choice’ made within a Party must only ‘relate to’ the level of protection of a particular public interest in order for that measure to fall outside the jurisdiction of the CETA tribunals, instead of being ‘necessary’ or ‘essential’ to achieve the desired level of protection. This appears to be a relatively generous interpretation from a public interest point of view, at least if one compares it to the text and interpretation of Article XX of the GATT. As such, if the line of the ECJ is followed before ICS tribunals, this particular point will make it easier to argue that a particular measure is not in violation of CETA and to prevent the three forms of regulatory chill identified above. Second, the ECJ makes clear that in its view the list of examples of breaches of the fair and equitable treatment standard is exhaustive, rather than open ended.

4. Investment disputes pertaining to the level of protection of a public interest after Opinion 1/17

Opinion 1/17 raises several legal questions regarding future investment disputes that pertain to the level of protection of a public interest. Of course, there is the question what happens if a CETA award appears to breach the limited parameters set by the ECJ. But beyond this question, one may also wonder what will happen to investment disputes brought under Member State investment agreements with third countries (extra-EU bilateral investment treaties – BITs). Are such agreements potentially incompatible with EU law if they do not contain the same formal ‘right to regulate’ provisions as CETA? A final question is what will happen to the EU’s efforts to negotiate a Multilateral Investment Court, now that the ECJ has linked the establishment of tribunals to the substantive provisions of the investment agreement. The Commission’s current mandate is purely procedural in nature.

4.1. Disputes before ICS tribunals

Given the limited interpretation of CETA itself by the ECJ, the risks of ICS tribunals interpreting CETA in a way that would contravene the ECJ’s understanding of CETA is rather low. ICS tribunals will not decide that they are calling into question the level of protection sought by the EU or a Member State implementing EU law, but simply classify measures as breaching the standards contained in CETA. While one therefore might argue that an ICS award de facto calls into question the level of protection sought by the EU, it would be quite easy to argue that an ICS tribunal simply confined itself to determining whether the treatment of the investor was vitiated by a defect mentioned in the CETA investment chapter.

On the other hand, an ICS tribunal may expressly contravene the ECJ’s actual interpretation of CETA – for instance by finding the examples of a breach of the fair and equitable treatment standard non-exhaustive or because of a higher public interest threshold. ICS tribunals are not bound under international law by the ECJ’s interpretation of CETA, and past practice of investment tribunals in intra-EU disputes show little deference towards the ECJ. Not a single investment tribunal set up under an intra-EU bilateral investment agreement has so far declined jurisdiction following the ECJ’s *Achmea* judgment.⁶⁹ Nonetheless, even if an ICS tribunal were to contravene the ECJ’s interpretation of CETA this would not necessarily mean that CETA would adversely affect the autonomy of the EU legal order. The ECJ may still find it necessary that the level of protection set by the EU for a particular public interest has been abandoned as a result of repeated damages claims. What is more, any such award must be issued against the EU or a Member State implementing EU law, and thus Opinion 1/17 cannot be relied upon to challenge an award issued against a third country. It may be possible, however, to either seek annulment or challenge any enforcement of an award against the EU before courts in the EU, as the ECJ could view such an award as resulting in the ICS overstepping its jurisdictional boundaries. The possibilities for such litigation are also rather remote, given the enforcement regime favourable to investors in CETA.⁷⁰

A different route in preventing regulatory chill may be issuing binding notes of interpretation of the CETA in relation to climate change or other public interest measures. Article 8.31(3) CETA provides that

⁶⁹Szilárd Gáspár-Szilágyi and Maxim Usynin, ‘The Uneasy Relationship between Intra-EU Investment Tribunals and the Court of Justice’s *Achmea* Judgment’ in Loukas Mistelis and Nikos Lavranos (eds), *European Investment Law and Arbitration Review Online* (Volume 4, Brill 2019) 29.

⁷⁰For instance, the investor has the option to bring proceedings under ICSID Convention rules, which ensures that awards are not reviewable by domestic courts and can be enforced in any country that is party to the ICSID Convention. See Article 8.23(2) and 8.41 CETA.

where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, ... recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.

Such a binding note could, for instance, state that measures relating to a non-exhaustive list of public interest measures shall not constitute a breach of Sections C and D of Chapter Eight of CETA. The Parties could also agree that all measures implementing Paris commitments shall not constitute such a breach. This would be a stronger assurance against jurisdictional overreach than simply having a court of one of the Parties giving a unilateral interpretation of the agreement. On the other hand, the difficulty with this approach is that it may face the same level of opposition and creative interpretation by the investment arbitration industry as under the North American Free Trade Agreement's (NAFTA) Free Trade Commission's Notes of Interpretation of Certain Chapter 11 Provisions.⁷¹ Strong wording may be considered de facto amendments of CETA and weaker wording opens the door for alternative interpretations.

In addition, the Parties to CETA could agree to complete the roster of tribunal members with individuals that are likely going to take a very deferential view to regulatory power and a strict interpretation of investor rights. This selection and appointment process for the ICS and the future Multilateral Investment Court is currently, and not entirely surprisingly, one of the main areas of interest of the investment arbitration community.⁷² There is, however, little evidence to suggest that the Parties to CETA are committed to such an outcome both in the CETA text and in terms of commitments by the European Commission and the Council in particular. Nor did the ECJ's analysis in Opinion 1/17 go beyond a formal vetting of independence requirements in CETA.⁷³

The CETA prescribes both the procedure for selection of these tribunal members as well as the qualifications tribunal members must have. In terms of procedure, the CETA Joint Committee is responsible for taking the appointment decision of 15 Members of the Tribunal. This decision is taken by 'mutual consent' by the CETA Joint Committee, which consists of representatives of the EU and Canada. The EU will in principle be represented by the Commissioner responsible for trade and will likely need a mandate from the Council to take a position within the Joint Committee.⁷⁴ If such a decision cannot be taken, it will fall upon the ICSID Secretary General to appoint tribunal members for a particular case. Thus in case of disagreement, a major investment arbitration institution will be responsible for the appointment. The nomination and selection process itself is not specified by CETA. The Council and the Commission, however, have indicated that 'candidate European judges [*sic*] will be nominated by the Member States, which will also participate in the assessment of candidates'.⁷⁵ Moreover, both institutions are committed to a process whereby the 'richness of European legal traditions' is reflected. This means that from the perspective of the EU five out of 15 tribunal members will be nominated by the EU Member States, but it is not clear how the other ten tribunal members will be nominated. In any event, it is clear that the government of the other Party, in the case of CETA Canada, will have to agree to any nominations from the EU side. This same process is likely to be repeated with other countries committed to having the ICS in an agreement with the EU, such as Vietnam.

In terms of substance, there is no requirement for ICS tribunal members to have experience of or a commitment to policy areas such as climate change. Instead, the substantive criteria are comparable to those of judges for the Court of Justice of the European Union (CJEU), with the notable addition that

⁷¹Patrick Dumberry, 'Moving the Goal Post! How Some NAFTA Tribunals have Challenged the FTC Note of Interpretation on the Fair and Equitable Treatment Standard under NAFTA Article 1105' (2014) 8 World Arbitration and Mediation Review.

⁷²See, for instance, the European Federation for Investment Law and Arbitration's (EFILA) submission to the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on ISDS Reforms 'Ensuring equitable access to all stakeholders: Critical suggestions for the MIC' (Brussels, 15 July 2019) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_efila.pdf> accessed 11 October 2019.

⁷³Opinion 1/17 (CETA) ECLI:EU:C:2019:341, paras 223–44.

⁷⁴Article 218(9) TFEU.

⁷⁵Statement 36 of the Statements to be entered in the Council minutes [2017] OJ L 11/9.

it is 'desirable' that tribunal members 'have expertise, in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements'. This prescription makes it likely that the tribunal members appointed will come from the very same legal community that has inspired public opposition to the system of investment arbitration. The Commission and the Council have in this sense merely emphasised that they seek tribunal members on the basis of 'the highest degree of competence' and 'impartiality' of prospective tribunal members.

Nonetheless, even within the world of investment arbitration there are differences in approaches between investment arbitrators. An interesting empirical study conducted by Van Harten found one individual as the leading contributor to restrictive interpretation of investment agreements and a small group of arbitrators as leading contributors to expansive interpretation of investment agreements in the period 1990 to May 2010.⁷⁶ Notably, Gabrielle Kaufmann-Kohler was among the arbitrators favouring an expansive interpretation of investment agreements, as were several arbitrators from EU Member States. While the study is not strictly concerned with regulatory chill as such it does provide some guidance and inspiration as to how to select and appoint arbitrators with a more favourable view on regulatory autonomy than other arbitrators within the investment law community.

4.2. *Extra-EU BITs*

Opinion 1/17 answers the legal question whether and under what conditions an investment agreement concluded between the EU and a third state is compatible with EU law. A year earlier, the ECJ also had the opportunity to clarify the compatibility of investment arbitration provisions in investment agreements between Member States. In *Achmea*, and in contrast to Opinion 1/17, the ECJ found such provisions incompatible with EU law.⁷⁷ However, it did not find that these provisions were incompatible with EU law because investment claims would undermine the capacity of EU institutions to operate autonomously. The ECJ's reasoning was based on a more straightforward reasoning that took issue with the ability of such investment tribunals to resolve disputes which may involve questions of EU law.

The outstanding question after Opinion 1/17 and *Achmea* is the extent to which investment agreements concluded between the Member States and third countries are compatible with EU law. This more general question will no doubt attract considerable scholarship but for the purposes of this article the more pertinent question is the relevance of the concept of regulatory autonomy specifically for the compatibility of such agreements with EU law. In other words, is it possible that the ECJ's reasoning in paragraphs 137 to 161 could result in the ECJ declaring both existing and future investment agreements by Member States incompatible with EU law? It is certainly not completely inconceivable that the ECJ may be faced with such a question. Such agreements have already been the subject of infringement cases brought by the Commission, and Article 9(1)(a) of the current Grandfathering Regulation 1219/2012 specifically requires the Commission to only authorise negotiations of a new investment agreement between a Member State and a third country if that agreement would not 'be in conflict with Union law'.⁷⁸ An alternative route to the ECJ may come in the form of a preliminary reference from a Member State court, either in the course of annulment or enforcement proceedings of awards against a Member State or in some other less orthodox manner.

The vast majority of these agreements do not contain the exact same language for their substantive provisions as CETA or contain the provisions the ECJ referred to in Opinion 1/17 that seek to curtail an expansive interpretation of CETA's investor rights. Without these formal guarantees, one could argue that the scope of investor rights in those agreements is not expressly restricted and therefore a Member State has not ensured that the tribunals in question have no jurisdiction to call into question the choices democratically made in relation to public interests.

It is important to keep in mind though that the focus of the Court in Opinion 1/17 is very much on the capacity of the Union and not the Member States to operate autonomously within its 'unique constitutional

⁷⁶Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29 *European Journal of International Law* 507.

⁷⁷Case C-284/16 *Achmea* ECLI:EU:C:2018:158.

⁷⁸Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351/40.

framework'. For the Court, the autonomy of the EU's legal order means that the *EU institutions* must be free to determine the level of protection of a public interest. Only where repeated awards by an investment tribunal would lead to an abandonment of that level of protection of a public interest by the EU institutions would there be an adverse effect on the EU legal order. Thus it is likely that the Court would deem it necessary to consider whether the Member State in question had been implementing EU law in some way and because of the award had to abandon the level of protection sought by the EU institutions.

Member States do play an essential role in achieving the levels of protection set by EU institutions, even if they are not responsible for setting the EU's levels of protection. Member States implement EU law and are responsible for ensuring its full effectiveness. It is not inconceivable that there are links between investment disputes brought against Member States and levels of protection set by the EU institutions. Consider, for instance, the claim Uniper is preparing against the Netherlands under the ECT in respect of the government's decision to restrict the use of coal. This restriction 'relates' to the level of protection against climate change set by the EU and its Member States under the Paris Agreement and in secondary EU climate change legislation. However, if the ECJ insists that the potential future award itself subsequently results in an abandonment of the level of protection by the Netherlands as set by the EU, there may be room to argue that the award or the agreement is still compatible with the Treaties. The ECJ's initial test in Opinion 1/17 therefore does not answer the question whether an award against a Member State or an extra-EU investment agreement itself can be successfully challenged, but merely raises the question.

4.3. *The Multilateral Investment Court*

On 20 March 2018 the Council authorised the Commission to negotiate a convention establishing a multilateral court for the settlement of investment disputes, commonly referred to as the Multilateral Investment Court (MIC).⁷⁹ The goal of this convention would be to replace the current ad hoc system of dispute settlement in international investment law with a permanent body to settle investment disputes. The convention's goal is therefore to replace existing investment arbitration mechanisms in international investment agreements as well as provide for a body to settle investment disputes for future agreements by both the EU and the Member States. The EU expects these negotiations to be carried out in the context of the UNCITRAL discussions on possible reforms of ISDS.

The mandate of the Commission is entirely procedural in nature. The EU aims to establish an institution that is permanent and that contains an appeal mechanism. Furthermore, the agreement should provide rules that would guarantee the independence of the judges of the MIC and include rules on transparency of proceedings. The EU also aims to make the MIC accessible and effective for businesses by including in the mandate provisions on supporting small and medium-sized enterprises (SMEs) and considering it 'vital' that the agreement contains an effective enforcement mechanism. The only rather limited aspect of the mandate addressing civil society concerns over regulatory chill is the inclusion of 'appropriate procedural safeguards, including provisions against frivolous claims'. The provision against frivolous claims in CETA Article 8.32 was not part of the Court's analysis of regulatory autonomy in Opinion 1/17.⁸⁰ This provision allows respondents to file a reasoned objection against a claim before a CETA Tribunal that it is manifestly without legal merit. The tribunal is then required to assess this objection before proceeding with the case itself. CETA does not provide a definition of what a claim manifestly without legal merit consists of, but an expansive interpretation of the provision could restrict the usefulness of CETA for investors and alleviate at least partially concerns over regulatory chill.

Opinion 1/17 does pose a challenge for the establishment of the MIC because of the link the ECJ has made between substance and procedure of investment agreements. The ECJ found that by expressly restricting the scope of the substantive provisions of CETA (e.g. the fair and equitable treatment, national treatment, and expropriation standards) 'the Parties have taken care to ensure that those tribunals have no

⁷⁹Council Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes of 20 March 2018 <<http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>> accessed 11 October 2019.

⁸⁰This provision that allows defending Parties to argue that a claim is manifestly without legal merit can be found in Section F of Chapter Eight of CETA, whereas the Court's analysis on regulatory autonomy is confined to Sections C and D of Chapter Eight.

jurisdiction to call into question the choices democratically made within a Party relating to, inter alia, the level of protection' of various public interests. Therefore, there was no adverse effect on the autonomy of the EU legal order. However, the Commission's mandate for the MIC does not contain any instructions to (re)negotiate the substantive provisions of investment agreements.

In principle, negotiating an agreement that does not contain any substantive provisions at all does not pose a challenge for the regulatory autonomy of the EU. After all, without substantive provisions no claims can be brought before the MIC and therefore there will be no awards that may lead the EU institutions to abandon their level of protection of a particular public interest. However, the mandate does require the MIC to be linked to existing agreements of the EU. Point 6 of the mandate states:

The Convention should allow the Union to bring agreements to which the Union is or will be a party to under the jurisdiction of the multilateral court. Consequently, the Union should be in a position to become a Party to the Convention and the provisions of the Convention should be drafted in a way which allows their effective use by the European Union.⁸¹

For the EU this means that in practice the ECT would need to be redrafted in terms of substance if the MIC were to have jurisdiction to hear disputes against the EU arising from the ECT. The ECT is currently the only agreement to which the EU is party that contains ISDS. The ECT's substantive provisions do not contain the provisions restricting the scope of investor rights the ECJ referred to in Opinion 1/17.⁸² The Commission's mandate to renegotiate the ECT suggests that the EU is seeking to accommodate this issue.⁸³

5. Conclusion

Opinion 1/17 is a vindication of the Commission's stance that CETA will have no effect on the ability of governments to regulate in the public interest. The ECJ refers to the clauses introduced in CETA to restrict the scope of investor rights in finding that CETA will have no adverse effect on the autonomy of the EU's institutional framework to set the level of protection of a non-exhaustive list of public interests.

Whether the ICS's and the EU's current approach to investment standards will actually preserve in practice the EU institutions' autonomy and that of third states is, however, not up to the ECJ. Government authorities and tribunal members will have to grapple with this question when faced with potential regulatory action that may constrain the freedom to conduct business of foreign investors. Especially where this impact may become severe, such as in the case of climate change, the EU's current approach will be put to the test.

If the Paris goals of holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels are to be achieved, significant and increasingly radical regulatory changes are needed as the annual amounts of GHG emissions increase rather than reduce. At the June 2019 G20 meeting UN Secretary-General Guterres called for 'a much stronger commitment' by G20 leaders in order to 'rescue the planet'.⁸⁴ A few months later at the UN Climate Action Summit, Guterres explicitly called for regulatory action against the fossil fuel industry.⁸⁵ At the same time, market forces indicate no significant changes to the current global energy system. Global investment in fossil fuels in 2018 increased, whereas investment in renewables dropped. In 2018, US\$304 billion was invested in renewables, whereas a total of

⁸¹Council of the European Union, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes of 20 March 2018 <<http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>> accessed 11 October 2019.

⁸²The definition of indirect expropriation and fair and equitable treatment is different from CETA, see ECSC, Euratom: Council and Commission Decision 98/181/EC of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects [1998] OJ L 69/1.

⁸³See Council of the European Union, Negotiating Directives for the Modernisation of the Energy Charter Treaty of 2 July 2019 <<https://data.consilium.europa.eu/doc/document/ST-10745-2019-ADD-1/en/pdf>> accessed 11 October 2019.

⁸⁴António Guterres, 'Opening remarks at press conference at the G20 Summit in Osaka, Japan' (28 June 2019) <<https://www.un.org/sg/en/content/sg/speeches/2019-06-28/remarks-press-conference-g20-summit-japan>> accessed 11 October 2019.

⁸⁵António Guterres, 'Remarks at 2019 Climate Action Summit' (23 September 2019) <<https://www.un.org/sg/en/content/sg/speeches/2019-09-23/remarks-2019-climate-action-summit>> accessed 11 October 2019.

US\$935 billion was invested in fossil fuels. The International Energy Agency states in its World Energy Investment 2019 report that

there are few signs in the data of a major reallocation of capital required to bring investment in line with the Paris Agreement and other sustainable development goals. Even as costs fall in some areas, investment activity in low-carbon supply and demand is stalling, in part due to insufficient policy focus to address persistent risks.⁸⁶

The European Commission's President Ursula van der Leyen has nonetheless promised Europe a 'Green Deal', which will include 'the first European Climate Law to enshrine the 2050 climate neutrality target into law' and 40% emissions reductions by 2030. Significant regulatory changes will be necessary to achieve such a transition and such changes will have distributional choices and consequences. Opinion 1/17 suggests that CETA will have no bearing on such choices. For the sake of future generations, hopefully the ECJ will be proven right.

Declarations and conflict of interests

The author has worked in a previous capacity for ClientEarth, a non-profit environmental law organisation dedicated to the protection of the environment. In this capacity, the author has advocated with Member States and the European Parliament a request for an Opinion on the compatibility of CETA's Investment Court System with the EU Treaties.

⁸⁶International Energy Agency, World Energy Investment (May 2019) 6.