ΕΛΛΗΝΙΚΗ ΔΗΜΟΚΡΑΤΙΑ
Εθνικόν και Καποδιστριακόν Πανεπιστήμιον Αθηνών
ΙΔΡΥΘΕΝ ΤΟ 1837

ΝΟΜΙΚΗ ΣΧΟΛΗ

Π.Μ.Σ.: ΔΙΕΘΝΕΙΣ ΚΑΙ ΕΥΡΩΠΑΙΚΕΣ ΣΠΟΥΔΕΣ
ΕΙΔΙΚΕΥΣΗ: ΔΙΚΑΙΟ ΤΗΣ ΕΥΡΩΠΑΙΚΗΣ ΕΝΩΣΗΣ
ΠΑΝΕΠΙΣΤΗΜΙΑΚΟ ΕΤΟΣ: 2018-2019

ΔΙΠΛΩΜΑΤΙΚΗ ΕΡΓΑΣΙΑ

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''Issues of compatibility of dispute resolution clauses, included in international agreements, with EU law''

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Αθήνα, 30 Σεπτεμβρίου 2019

Per aspera ad astra.

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AG	Advocate General
Art.	Article
ASEAN	Association of South-East Asian Nations
BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
DSM	Dispute Settlement Mechanism
EC	European Community
ECAA	European Common Aviation Area
ECJ	European Court of Justice
ECT	Energy Charter Treaty
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EPC	European Political Community
EU	European Union
EUSFTA	European Union-Singapore Free Trade Agreement

EUVFTA	European Union-Vietnam Free Trade Agreement
FTA	Foreign Trade Association
GATT	General Agreement on Tariffs and Trade
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
ISDS	Investor-State Dispute Settlement
MIC	Multilateral Investment Court
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UNCITRAL	United Nations Committee of International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
VLCT	Vienna Convention on the Law of the Treaties
WTO	World Trade Organization

Abstract

The case-law of the CJEU, which is presented in this thesis, has put into question to what extent the EU is capable to "integrate" in international settings by concluding international agreements that establish their own respective judicial bodies. In fact, the relationship between the CJEU and international courts and tribunals has been challenged since the early 1990's with Opinion 1/91 and the following case-law seemed to not give any hope for international "integration" of the EU. The principle of autonomy of the EU legal order and what it entails stand amongst the prominent stumbling blocks *en route* to the successful negotiation of EU agreements, which set up international courts or tribunals, or appear to establish cooperation with systems that already provide for their own judicial bodies. After many negative opinions by the CJEU, today with Opinion 1/17 for the CETA Agreement there is some considerable progress in the way towards the active role of the EU in the international world. The CJEU in this Opinion was not positive only in order to not be criticised for judicial activism or isolation of the EU, but because, as concluded in this thesis, the safeguards and innovations presented in the ICS in CETA are sufficient for the protection of the principle of autonomy and the special characteristics of the EU legal order.

Περίληψη

Η νομολογία του ΔΕΕ, η οποία παρουσιάζεται σε αυτήν την διπλωματική εργασία, έχει δημιουργήσει αμφιβολίες για τον βαθμό στον οποίο η ΕΕ είναι ικανή να ενσωματωθεί στην διεθνή έννομη τάξη, με την σύναψη διεθνών συμφωνιών, οι οποίες εγκαθιδρύουν τα δικά τους αντίστοιχα δικαστικά όργανα. Στην πραγματικότητα, η σχέση μεταξύ του ΔΕΕ και των διεθνών δικαστηρίων δέχεται προκλήσεις από την δεκαετία του 1990 με την γνωμοδότηση 1/91 και η νομολογία που ακολούθησε δεν φάνηκε να δίνει κάποια ελπίδα για την διεθνή ενσωμάτωση της ΕΕ. Η αρχή της αυτονομίας της ενωσιακής έννομης τάξης και ό,τι αυτή περιλαμβάνει αποτελούν από τα πιο έντονα εμπόδια στην πορεία προς την επιτυχή διαπραγμάτευση ευρωπαϊκών συμφωνιών, οι οποίες εγκαθιδρύουν δικαστήρια ή εμφανίζουν να εγκαθιδρύουν συνεργασία με συστήματα, τα οποία ήδη έχουν τα δικά τους δικαστικά όργανα. Μετά από πολλές αρνητικές γνωμοδοτήσεις του ΔΕΕ,

σήμερα, με την γνωμοδότηση 1/17 για την συνολική οικονομική συμφωνία ΕΕ και Καναδά (ΣΟΕΣ), υπάρχει σημαντική πρόοδος στην πορεία προς τον ενεργό ρόλο της ΕΕ στον διεθνή κόσμο. Το ΔΕΕ δεν εμφανίστηκε θετικό μόνο προκειμένου να μην κατακριθεί για δικαστικό ακτιβισμό ή για στάση απομονωτισμού της ΕΕ, αλλά επειδή οι δικλείδες ασφαλείας και οι πρωτοποριακές ρυθμίσεις του δικαστηρίου της ΣΟΕΣ είναι ικανές, όπως θα διαφανεί σε αυτήν την εργασία, να προστατεύσουν την αρχή της αυτονομίας και τα ιδιαίτερα χαρακτηριστικά της ενωσιακής έννομης τάξης.

General Introductory Remarks

I. The constitutional principle of the autonomy of the EU legal order

The main principle, which will guide and always lead the questions of compatibility analyzed in this thesis, is the principle of autonomy of the EU legal order. Jed Odermatt has given a notable definition on the term "autonomy": "*Autonomy means self-rule. An entity, which possesses autonomy, has the right to choose a path for itself, without the influence, direction and control of others"*[1]. What is implied with this principle, which is characterised as an *"umbrella"* principle, in the context of EU law, is mainly illustrated by the extensive case law of the CJEU, which calls for an analysis, especially since the concept is not expressly found in the EU Treaties. Already back in 1963 the CJEU held in its landmark case *Van Gend en Loos*[2] that the European Community (EC) created a new legal order of international law, and that the States by becoming members to the EC had limited their sovereign rights in favour of this new legal order. Shortly after this, it was held in the case of *Costa v ENEL*[3] *that* the Treaty establishing the European Economic Community (EEC Treaty) created its own legal system, which, according to the CJEU, distinguished the Community's legal system from other international treaties and gave it its specific characteristics. In this important landmark case, the autonomy of the EU legal order was emphasized by the CJEU and was used as an argument for the promotion of the primacy of EU law over national law. According to the CJEU, this rule could only be meaningfully established if one started from the premise that Community law arose out of *"an independent source of law"*, or, in the original French version, *"une source autonome"*. The new legal order that the European Community formed simply had to be primary to all national sources of law in order to be able to function the way it was

[1] Odermatt, J., (2016/17) *When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law*, EUI Working Papers, MWP, Page 1

[2] Judgement of the ECJ of 2nd February 1963 (C-26/62), *Van Gend en Loos*, ECLI:EU:C:1963:1 [3] Judgment of the ECJ of 15 July 1964 (C-6/64), *Costa v E.N.E.L.*, ECLI:EU:C:1964:66.

intended to. Furthermore, the CJEU meant that the binding force and primacy of EC (at the time) law was not subordinated to the national laws of the Member States, instead EC law derived from the EC Treaties and not from the laws of the Member States. Already in the early years of what has today become the European Union, the CJEU strongly emphasized the importance of the principles of autonomy and primacy of the EU legal order as something that should characterize the Union and give it its specific characteristics, not only internally in the context of supremacy towards its Member States, but also externally beyond the Union on the international level. In both instances the underlying rationale is the same: since the EU is a distinct and autonomous legal order, it cannot be undermined by the invocation of norms that originate outside that legal order, whether they derive from the Member States' legal systems or from international law[3]. This is why when it comes to dispute resolution mechanisms, included in international agreements, the concept of autonomy makes its appearance as a "crucial touchstone" or as a "stumbling block" for others[4]. Important is to also note the relevant *Kadi*[5] judgment of the ECJ, where the court applied the principle of autonomy stating that *"an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system."*[6] With this judgement, the Court went further than the need to preserve the jurisdictional role that it upholds in the EU legal order, highlighting the importance of the autonomy principle for the system of the Treaties. The *"fundamental characteristics"* of this special legal order entail the protection of fundamental rights, respect for the rule of law, and the judicial review of EU acts, all of which cannot be prejudiced by an international agreement. *Kadi* and other cases have been criticised for ending up isolating the legal order of the EU from the international one[7].

II. The dispute resolution clauses included in intra-EU and international agreements

The EU has been an active actor in the international legal order, especially after the Lisbon Treaty, which meant to be an expansion for its competences especially by creating a modified and more

[3] See De Witte, B., (2010) *'European Union Law: How Autonomous is its Legal Order?'* 65 Zeitschrift für öffentliches Recht, 141, 142.

[4] See Hindelang, S., (2015) *"Repellent forces: The CJEU and Investor-State dispute settlement"*, Archiv des Völkerrechts, Vol. 53 , pp. 68-89, available at: https://www.steffenhindelang.de/wpcontent/uploads/2018/09/Hindelang-AVR-2015.pdf, (last accessed: August 2019).

[5] Joined ECJ cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, (3 September 2008], ECLI:EU:C:2008:461.

[6] Ibid, para. 282.

[7] De Búrca, G., '*The European Court of Justice and the International Legal Order After Kadi'*, 51 Harvard International Law Journal 1 (2010) 1, 44.

unified framework for the whole of the EU's foreign relations. The exclusive competence of the EU in the field of trade and investment was the beginning for the plethora of investment bilateral treaties and international investment agreements concluded by the EU. Even though the subject of the competence allocation will not be analysed in this paper, it is important to highlight the pronouncements of the *Open Skies* case law, which presents the core principles of the CJEU's jurisprudence on competence allocation between the Community (then) and the Member States in the EU system of external relations.

With the conclusion of international agreements by the EU, according to Art. 216 TFEU and as was ruled in C-104/81, *Hauptzollamt Mainz v. Kupferberg & Cie*., the agreements form part of EU law and so they are placed above international law and the national law of the EU Member States, which means that they should be respected. Nonetheless, they are still under EU law in the hierarchy, which means that they should be in line with the constitutional rules of EU law and especially with Treaty law.

Apart from the conclusion of international agreements, the EU has a strong history of attempts for participation in international organizations. These organizations may include the establishment of another court like in the case of the agreement creating a European Economic Area (which was ruled on the grounds of its compatibility by the ECJ in Opinion 1/91) or the immediate jurisdiction of another court like in the case of the accession of the EU to the ECHR (Opinion 2/13). This means immediately that since the EU becomes a Member of those organizations, it is subject to the decisions of their courts or tribunals. It is important to be reminded that in order for the decision of an international court or tribunal to be binding for the EU, the international agreement establishing it must have a direct effect.

III. The relationship between the principle of autonomy and dispute resolution clauses

These "external" courts or tribunals have been proven to be very controversial, as they seem to intervene in the EU legal order by conflicting with the constitutional character and the exclusive jurisdiction of the CJEU, which is the apex court dealing with the interpretation and application of all issues of EU law. How does, will and should the Court of Justice deal with the decisions of these two judicial bodies?[8] What could be the reasons for the Court of Justice's concern about the autonomy of the EU legal order?

[8] Eckes, C., (2011) *"EU Autonomy and decisions of (quasi-)judicial bodies - How much differentness is needed?"*, Working Paper for Amsterdam Centre for European law and Governance, available at: https://pdfs.semanticscholar.org/208c/bf1d689c720870049e4baf4e295f7cb4bd12.pdf(last accessed: August 2019). [10] See Hindelang, S., (2019*) "The conceptualisation of the principle of autonomy of EU law - the CJEU's judgment in*

The principle of autonomy constitutes the central argument in all the relevant case law presented in this thesis and so the main touchstone that the CJEU recognises for the incompatibility of the dispute resolution clauses with EU law. In order to secure the uniform interpretation and equal application of EU law throughout its territories, the Union has attributed the CJEU with a monopoly of interpreting and applying EU law in a binding way for the institutions and the EU Member States[10]. The provision repeatedly used by the ECJ to claim its exclusive jurisdiction whenever the unity and integrity of the interpretation or application of EU law is at stake[11] is Art. 344 TFEU. This provision is just one of the aspects of the autonomy principle along with Art. 19 TEU, which refers to the obligation of the Member States to establish the suitable procedures and mechanisms for the effective application of EU law and the effective protection of the rights awarded to individuals and 267 TFEU, which establishes the preliminary ruling mechanism as the most valuable means of the CJEU in order to secure the uniform and consistent interpretation and application of EU law among all the Member States. Much more according to the ECJ, Art. 344 TFEU is an expression of the general loyalty obligation of the Member States towards the EU in accordance with Art. 4 para. 3 TEU[12].

This provision is intended, since the MOX Plant case, which will be further analysed following, to apply to the participation of the EU Member States in international dispute settlement mechanisms. Art. 344 wording and meaning causes for some[13] a number of worries and questions[14], such as: What is meant with the expression in the provision *"method of settlement"*? Does this apply only to judicial bodies or also to non-judicial dispute settlement procedures? When does a dispute concern the *"interpretation or application of the Treaties"*? Is this the case, for example, when the rival court or tribunal is called upon to interpret EU law only indirectly, such as provisions of an agreement that closely resemble EU law? Also, does it apply to interpretations of EU law that are merely incidental or procedural, such as in identifying the appropriate party in a case? Or, more radically, does it mean that the EU is prevented from joining a dispute settlement body simply because there is a possibility that Member States might bring claims against one another concerning EU law? Is it concerned only with inter-Member State disputes or is it an expression of a more general principle of exclusivity of jurisdiction? When answering these questions, the Court has had to strike a balance between allowing the EU to participate in international dispute settlement while also simultaneously preserving its judicial monopoly.

Achmea put in perspective", European Law Review, available at: https://www.steffenhindelang.de/wp-

content/uploads/2018/10/Hindelang_Conceptualisation_and_Application_of_the_Principle_of_Autonomy_of_EU_Law.pdf (last accessed: August 2019).

[11] Art.344 TFEU was touched upon in: *ECJ Opinion 1/91* ECLI:EU:C:1991:490 [35]; *ECJ Opinion 1/00* on the draft of a convention between the European Community and third countries about the establishment of a European Common Aviation Area (*hereinafter "ECJ Opinion 1/00*"), ECLI:EU:C:2002:231 [15-17]; *Reynolds Tobacco e.a. v Commission* (C-131/03 P) ECLI:EU:C:2006:541 [97-99]; *European Commission v Ireland Mox Plant* (C-459/03) ECLI:EU:C:2006:345 [80 et seqq]; *Czech Republic v European Commission* (T-465/08) ECLI:EU:T:2015:746 [101103]; *CJEU Opinion 2/13* ECLI:EU:C:2014:2454 [201 et seqq]; *Achmea* (C-284/16) ECLI:EU:C:2018:158. [12] *Mox Plant* (C-459/03), ECLI:EU:C:2006:345 [Guiding Principles, 4th point para.169, 171]; *Achmea* (C-284/16) ECLI:EU:C:2018:158 [34].

[13] See Odermatt, J., *When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law*, EUI Working Papers, MWP 2016/17, page 12.

[14] Many of which were addressed by the CJEU in the MOX Plant case.

In the occasion of doubt on the issue of compatibility, Art. 218 para. 11 TFEU gives the possibility to the Member States, the Council, the Parliament or the Commission to request an Opinion from the CJEU assessing the compatibility of the international agreement in question. This procedure was followed in the majority of the cases presented and analyzed in this paper. The first case where the rejecting attitude of the CJEU towards another Court was displayed is the EFTA Court case, by virtue of the international agreement between the EU Member States and the EFTA Member States. While it was acknowledged that the Member States are free to agree on an international agreement that includes the creation of an international court, the CJEU at the same time emphasized that there are certain limits to that due to the *sui generis* nature of the European legal order and the special position of the CJEU in preserving and protecting this nature[9]. Thus, establishing a Court like the EFTA would stand in conflict with Article 19 TEU and the *very foundations of the EU legal order*. Such a Court could not interpret and apply EU law, as the CJEU has the monopoly in doing this and so it was rejected by the Court with its Opinion 1/91. In short, Opinion 1/91, while not dealing with the position of investor-to-state arbitral tribunals, illustrates the narrow margins, which the CJEU leaves for allowing "foreign" international courts and tribunals to operate within the European legal order. Then, in Opinion 1/92 the ECJ ruled that the successor to the EFTA Court was compatible with the EU law. The main difference was that this Court would not bind with its decisions the EU Member States, but only the Member States also Members to EFTA (which were Norway, Iceland, Lichtenstein), which have acceded to its jurisdiction[10].

[9] ECJ, *Opinion 1/91, EEA Agreement*, [1991] ECR I-6079.

[10] Parish, M., (2012) "*International Courts and the European Legal Order"*, European Journal of International Law, Volume 23, Issue 1, (February), pp. 141–153, available at: https://academic.oup.com/ejil/article/23/1/141/525583 (last accessed: September 2019).

One of the most important rulings of the CJEU for the history of Human Rights protection and the European Union is the second attempted accession agreement of the EU to the ECHR[11], which was likewise with the first[12] rejected by the CJEU on the grounds of incompatibility with the EU law. One of the reasons was that the CJEU perceived it as a threat for the autonomy of EU law, because ECHR states' highest courts could make a preliminary reference to Strasbourg on the compatibility of EU law with ECHR rights, rather than to Luxembourg. This would be problematic as according to the principle enshrined in Article 344 TFEU, EU Member States may not submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for by the Treaties[13], so it was found that the possibility that the ECtHR settles disputes related to EU law would undermine it. This Opinion makes it undoubtedly difficult for the EU to proceed with the accession and also sets the idea of how the CJEU perceives its role and dynamics in the EU legal order.

Another important judgment to be noted is the *Achmea* case, where an arbitral award between the Netherlands and Slovakia (both EU Member States) was challenged in the course of a request for a preliminary ruling addressed of the Bundesgerichtshof (German Federal Supreme Court) to the CJEU. The CJEU concluded that *"Art. 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as art.8 of the [NCS BIT], under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept"*[14].

Today, just a few months after the long-awaited Opinion 1/17, the topic is more current than ever in the international world, where the ISDS is an essential ingredient for effective protection of the Parties, so that they enjoy the same degree of protection via effective and directly accessible dispute resolution rules. Is finally an ISDS at all possible to be considered compatible with the EU legal order? The Opinion on the compatibility of the CETA's ICS appeared to shine a green light across the investment Tribunals, as the Investor-State Dispute resolution system proposed in

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[11] The legal basis for the accession to the ECHR is laid down in Article 6(2) TEU*: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Such accession shall not affect Union's competences as defined in the Treaties."* This is considered to be the epitomy of the link between the regime of Strasbourg with the regime of Luxemburg.

[12] In Opinion 2/94 of March 28, 1996 (ECLI:EU:C:1996:140), where the Court held that the European Community, as the law stood then, had no competence to accede to ECHR.

[13] As also set forth in Article 3 of Protocol No. 8 Lisbon Treaty, which holds that an EU-ECHR accession agreement needs to preserve the *"specific characteristics of the EU and EU law"*.

[14] Judgment of the CJEU of 3 March 2018 in Case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para. 62.

CETA agreement was ruled to be compatible with EU law. Many academics were posing the same legal issues, that were "blocking" the previous Courts and Tribunals, when it came to the exclusive jurisdiction of the CJEU, but both the CJEU and the Advocate General Y. Bot ruled that the CETA does not confer on the envisaged tribunals any jurisdiction to interpret or apply EU law other than that relating to the provisions of that agreement. Consequently, this agreement does not adversely affect the autonomy of EU law. In the course of this thesis, it will be illustrated how the CETA's ICS is different than the Tribunals the CJEU has previously rejected and why it is also needed according to the principle of reciprocity. The characteristics, innovations and safeguards of the new generation Free Trade Agreements will be presented and the landmark Opinion 1/17 of the Court will be explained.

IV. Purpose and thesis question

The purpose of this thesis is to examine the different issues of compatibility of dispute resolution clauses, included in *intra-EU* and international agreements (*extra-EU*), with EU law. The main research question is why the CJEU has a different approach in Opinion 1/17 than the one in the previous opinions presented and the ultimate goal is to understand the general approach of the CJEU towards the presented case-law. The presentation will follow the main "methods" and criteria that the CJEU has been following in assessing in its Opinions the different dispute settlement clauses, establishing Tribunals in international agreements that the EU or its Member States are concluding. The intra-EU arbitral Tribunals will also be tested out. The analysis will be according to the rules and provisions of EU law and the case law of the CJEU and the focus will be on the arguments concerning the principle of autonomy and more particularly the exclusive jurisdiction of the CJEU over the definitive interpretation of EU law, as established in Art. 344 TFEU and complementarily in Art. 19 TEU and Art. 267 TFEU.

V. Separation of the parts - Disposition

In Part 1, the focus of the research will be on the earlier rulings of the Court up to the most recent one, which is the ruling in the Achmea case, regarding dispute resolution clauses, included in intra-EU and in international agreements that the EU and its Member States have concluded or were planning to conclude. On the one hand, rulings of intra-EU agreements, where the arbitration system is under the examination of the CJEU, will be analyzed. On the other hand, the opinions presented are in the line of the efforts of the EU to become part of international organizations or to create a new court system (European Patent Court). The main steps that are followed by the Court will be presented in order to clarify the reasons of the final ruling of incompatibility.

In Part 2, the focus will be on the new generation of international agreements, which are known as Free Trade Agreements (FTAs), even though not everyone agrees with the "term". These international agreements in the field of trade and investment have been discussed a lot lately. The reason why the whole second part will be focused on them is because of the last and very recent ruling of the CJEU, namely its Opinion 1/17, about the CETA Agreement and specifically the Investment Court System (ICS) it suggests. This ruling (together with the Advocate General Y. Bot's Opinion) marks the CJEU's jurisprudence in the field of external relations, as it appears that the CJEU for the first time is having no arguments against the dispute resolution clause included in CETA. Departing from the previous method, the analysis in the 2nd Part will insist on the different nature of international agreements that the EU concludes with third parties, which are governed by the important in international relations principle of reciprocity, the importance of the ISDS and in the end the safeguards, which are suggested in the CETA Agreement. These safeguards lead to the positive Opinion of the CJEU on the issue of the compatibility of the ICS with the principle of autonomy of the EU legal order.

VI. Delimitations

First and foremost, it is clear from the introduction and the separation of the Chapters that the question of the thesis is concentrated in the principle of autonomy of EU law and how the compatibility of the dispute resolution clauses is assessed in relation to the aspects of this principle. The other questions of EU law (for example: compatibility with the principle of equal treatment or effectiveness in Opinion 1/17) answered by the CJEU in its Opinions are not going to be assessed or touched upon in the course of this thesis.

The competence of the EU to conclude international agreements, which was examined in Opinion 2/94 and 2/15 is also out of the scope of this paper. What needs to be reminded upon this is that an international agreement, which was concluded by the EU without a competence to do so can be annulled by the CJEU. Moreover, an international agreement, which the EU concluded without the participation of the Member States and without having the exclusive competence to do so is politically dangerous for the role of the EU Member States in external relations and opposite to EU law. The issue was visited upon in Opinions 2/94 on the Accession of the EU to the ECHR and Opinion 2/15 on the competence of the EU to conclude the EU- Singapore Free Trade Agreement. In these opinions, issues of shared or exclusive competence can be found. It is important to note that after the Treaty of Lisbon entered into force in 2009, many things changed regarding to new competences for the EU and this marked also many changes and created many question marks in the field of its external relations. Political and legal difficulties were created in the negotiations on

trade agreements of the EU with third states. Specifically, the ISDS provisions came in the spotlight regarding the issue of whether the EU had an exclusive competence to negotiate treaties, which included ISDS provisions.

Finally, the WTO's dispute settlement system is mentioned in the course of this paper mainly in the form of comparisons made, but it will not be analysed. The relevance of the mentioning of the WTO in the context of the thesis has to do with the dispute settlement mechanism it entails, namely the WTO Appellate Body. The WTO Appellate Body is called a "body" rather than a court or tribunal and its decisions are called "reports" and need to be formally approved by the WTO's highest political organ, the Dispute Settlement Body (DSB). According to Article 17 para. 4 of the Dispute Settlement Understanding, the decisions of the WTO Appellate body are binding and *"shall be ... unconditionally accepted by the parties to the dispute"*. The WTO system, according to the case (f.e.) *Federal Republic of Germany vs Council of the European Union*, C-280/93, is different than the other international organizations and agreements, in which the European Union takes part. As a matter of fact while, earlier, the EU Member States were litigants in the WTO dispute settlement mechanism, nowadays the EU has replaced the Member States in its participation to the WTO. Today, the WTO regime can be for some parallelized with the ECHR regime, being both fully constitutionalised actors[15]. Despite that, EU accession to the ECHR is and will be different from EU accession to the WTO. Moreover, even though the decisions of the WTO dispute settlement mechanism can be enforced as trade sanctions, the CJEU insists on not giving them direct effect[16], which means that they cannot be used against acts of the EU institutions, using this as a political filter[17]. It was with the case of Van Parys[24], when the ECJ made clear that the nature of the dispute settlement body in question could not justify the existence of direct effect to its decisions[18]. The same was later emphasised in 2006 with its decision in the case of *FIAMM and Fedon*[19], when the ECJ dismissed the complaints or liability of the EU for unlawful conduct. The main reasons for this rejection of direct effect are the fact that the WTO regime is based on reciprocity and negotiations between the Parties, mainly illustrated by the temporary measures of

[15] Wessel, R. A., & Blockmans, S. (2013), "*Between autonomy and dependence: The EU legal order under the influence of international organisations*", The Hague: T.M.C. Asser Press, pp. 89 et seq.

[16] The ECJ admits direct effect of WTO obligations only in marginal cases concerning the review of EC measures implementing (Case 69/89, *Nakajima v. Council* [1991] ECR I–2069) or referring to (Case 70/87, *Fediol v. Commission* [1989] ECR 1781) international trade norms.

[17] See Dani, M. (2010) "*Remedying European Legal Pluralism : The FIAMM and Fedon Litigation and the Judicial Protection of International Trade Bystanders"*, The European Journal of International Law 21(2), pp. 303–340. [24] ECJ Case C-377/02 *Van Parys* [2005] ECR I-1465. See on the same issue and with the same outcome in more detail Advocate General Léger C-351/04 *IKEA Wholesale* [2007] ECR I-7727, paras 77 et seq.

[18] See Bronckers, M., (2008), '*From "direct effect" to "muted dialogue"'*, Journal of International Economic Law, 11(4), pp. 885–898.

[19] ECJ Cases C-120/06 P and C-121/06 P *FIAMM v Council and Commission* [2008] ECR I-6513.

compensation and the suspension of concessions and also that the WTO law itself does not have direct effect, which was also emphasized in the case of FIAMM. However, the CJEU has a jurisprudence[20] of interpreting secondary EU law according to WTO law[21].

Notably, the question of compatibility of the WTO dispute settlement mechanism was not asked by the Commission in Opinion 1/94[22].

PART 1

Dispute resolution clauses in intra and extra-EU agreements and their clash with the principle of autonomy of the EU legal order

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Introduction

The CJEU in the relevant case law mostly starts its reasoning with a focus on the idiosyncratic constitutional nature of the EU legal order by presenting the internal prerequisites that are important for the protection of its special constitutional character. Much of the emphasis is put on the fact that the provisions of the Treaties form fundamentally its legal foundations creating this *"new legal order"*. As the CJEU repeatedly states in the beginning of its judgments: subjecting the EU and the CJEU to an external judicial authority *"is not, in principle, incompatible with EU law*." This is nevertheless subject to *conditio sine qua non*. Such an international agreement that provides for the existence of another court will be acceptable, and may affect the CJEU's powers, *"only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU*

[20] See for example ECJ Case C-70/94 *Werner v Germany* [1995] ECR I-3189, para 23 and ECJ Case C-83/94 *Leifer and Others* [1995] ECR I-3231, para 24.

[21] EU secondary law, i.e. regulations, directives and decisions, as well as their application, can be influenced by the WTO in three different ways: (1) direct influence from the WTO treaty package, i.e. WTO primary law; (2) influence from WTO secondary law, i.e. decisions taken by Councils and Committees of the WTO, (3) influence from the reports of WTO panels and of the Appellate Body, i.e. from the WTO judiciary.

[22] Opinion of the Court of 15 November 1994, (*Opinion 1/94*), On the Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, ECLI:EU:C:1994:384

legal order"[23]. According to the critics of the Court's attitude "this caveat is turned into a lock"[24], as it seems almost impossible to successfully meet these requirements, which is illustrated also in the relevant case-law presented in Part 1 of this thesis.

The first part of this paper will present the landmark case-law, which illustrates the way the CJEU has managed up to now to safeguard its role and at the same time the constitutional principles, which are laid out specifically by Art. 344, 267 TFEU and Art. 19 TEU, which all construct the principle of autonomy of the EU legal order and the monopoly of the CJEU in the uniform interpretation and application of EU law. As the CJEU sees itself as the final arbiter of EU law, the international courts and tribunals that are proposed or established by international agreements are in conflict with its constitutional role. Specifically, in the first Part, I will present the three steps, which show the way of thinking of the judges of the CJEU before they reach their final conclusion on the compatibility or the incompatibility.

The occasions in which the CJEU has prohibited the EU to submit itself to the jurisdiction of another court are mostly with Opinions of the CJEU (under the procedure of Art. 218 para. 11 TFEU), which usually judge before the conclusion of the international agreement, for example before the participation of the EU to an international organisation (Opinion 1/91, Opinion 2/13). These Opinions are being presented in contrast to the cases, where the jurisdiction of another court or Tribunal is proposed in the course of an agreement between two EU Member States. This is where the thesis will begin from, namely the intra-EU BITs. The later relationship is ruled by different rules and principles and is mainly governed by the principle of mutual trust and sincere cooperation, which creates special obligations for the EU Member States. This principle is in contrast to the principle of reciprocity in the agreement between the EU (for example) and third states.

It is self-explanatory that the route that the jurisprudence of the CJEU has followed is affecting the role of the EU and its Member States in the relationship between them and of course the role of the EU international legal order, as it clearly sets the pace for its future internal and external relations.

[23] Opinion of the Court of 18 December 2014 (*Opinion 2/13*), ECLI:EU:C:2014:2454, para. 183

[24] See, for instance, Lazowski, A & Wessel, RA 2015, *'When caveats turn into locks: Opinion 2/13 on accession of the European Union to the ECHR'*, German law journal, vol. 16, no. 1, pp. 179-212.

Chapter 1

1. Arbitration clauses included in intra-EU Bilateral (Investment) Treaties

1.1. The conclusion of intra-EU BITs

After the Lisbon Treaty, the EU's exclusive competences were extended by including foreign direct investment in common commercial policy. Later more specifically, with Opinion *2/15*[25], which was published in May 2017, the CJEU held that matters related to foreign direct investment fall within the exclusive competence of the EU, apart from investment protection and investment arbitration, which fall within the shared competence of the EU and its Member States. Since then and after many conclusions of BITs, the legality of investor-state dispute settlement, included in EU trade agreements under EU law has become a thorny issue among academics and legal experts. The issue was lately heavily raised especially after the judgment of the CJEU in the case of *Achmea*[26], which will be the main case examined in this Chapter, being the landmark case in the relevant category of case-law.

[25] Opinion of the Court of 16 May 2017 (Opinion 2/15), *Free Trade Agreement between the European Union and the Republic of Singapore,* ECLI:EU:C:2017:376

[26] See Abula, M., *"Investor State Arbitration as Part of EU's Judicial System."* EU and Comparative Law Issues and Challenges Series, vol. 2, no. 2, 2018, pp. 687-699 (accessed in HeinOnline.).

To start from the beginning, Bilateral Investment Treaties (BITs) in the EU are mainly (*pre-accession*) agreements concluded between Central and Eastern European states, before they acceded the EU (non EU Member States at the time), and older members of the EU[27]. Being a very common practice, before the landmark decision of *Achmea*, they were and still are considered by many academics as a *"legal anomaly*" within the internal market of the EU. After the accession of the former to the EU in 2004, 2007, and 2013, the issue of compatibility of these agreements (today between EU Member States) with EU law was raised by many legal academics and professionals. The practical implications of this legal question were proved to be very important, since there was already a plethora of concluded intra-EU BITs. It is remarkable that EU investors brought 13 out of 14 ISDS cases against Hungary under intra-EU BITs or/and the Energy Charter Treaty (ECT). These *"legal anomalies"* were the reason why the EU Commission started terminating these agreements, even by resorting to bringing infringement proceedings against some Member States to make them terminate their intra-EU BITs[28]. It remains up to today a controversial issue giving birth to questions about the future of the conclusion of intra-EU BITs.

1.2. The principle of Mutual Trust and Sincere Cooperation between the EU Member States

When analysing intra-EU BITs and the relevant case law, it is necessary to clarify one of the basic principles, which governs the relationship between EU Member States. This principle also extends to their relationship when they conclude an intra-EU Bilateral Agreement. It was also mentioned in Opinion 2/13 (Draft Agreement on the accession of the EU to the ECHR) by the CJEU as being one of the fundamental characteristics of the EU legal order[29]. This is the principle of mutual trust and sincere cooperation between Member States, which is interpreted as follows[30]: the Member States share a set of common rules[38], which justifies the existence of mutual trust and they are also obliged by the principle of sincere cooperation under Article 4 para. 3 TEU to ensure the

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[27] See Abula, M., *"Investor State Arbitration as Part of EU's Judicial System."* EU and Comparative Law Issues and Challenges Series, vol. 2, no. 2, 2018, [Ibid] pp. 690 (accessed in HeinOnline.).

[28] See Gáspár Szilágyi, S. *(2018), "The CJEU Strikes Again in Achmea. Is this the end of investor-State arbitration under intra-EU BITs"*, World Trade Law Blog, available at: https://worldtradelaw.typepad.com/ielpblog/2018/03/guest-post-the-cjeu-strikes-again-in-achmea-is-this-the-end-ofinvestor-state-arbitration-under-intr.html and see also ibid, pp. 690.

[29] Opinion of the Court of 18 December 2014, (Opinion 2/13), ECLI:EU:C:2014:2454, para 168: "This legal structure is based on the fundamental premises that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected."

[30] See also the Judgment of the Court (Second Chamber) of 26 April 2018 in Case C-34/17, *Eamonn Donnellan v The Revenue Commissioners*, ECLI:EU:C:2018:282 [38] See Article 2 TEU.

application and respect of EU law. It is the reason why an area without internal borders is created and maintained properly working. What it requires is that each of the Member States, except in exceptional circumstances, considers all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by it[31]. It has to be highlighted that this principle does not and cannot apply in relations between the EU and third States[32].

Since the dispute settlement mechanisms included in intra-EU BITs, in the relevant case law were raising questions of incompatibility and thus could not ensure that potential disputes were solved in a manner that safeguarded the full effectiveness of EU law, these mechanisms would call into question not only the preservation of the specific characteristics of the EU legal system and its autonomy, but also the principle of mutual trust between the Member States.

It is important to note the way the judge in *Achmea* dealt with the specific principle, as it offers a good example in order to better understand it. To the surprise of many, he did not refer to the principle in detail and he did not analyse why Art. 8 of the BIT was violating it. Nevertheless, it has been supported that the principle is violated because the general conclusion of the BIT and the dispute settlement clause gives the impression that the national courts of the Member State of the investor will not provide the investor with the equal treatment and sufficient protection that they are obliged to provide him with[3334]. This raises doubts about the trust that should be awarded in the national administrative authorities and subsequently leads to a violation of the principle in question.

1.3. The issue of compatibility of arbitration clauses included in intra-EU BITs with EU law

Some could say that the CJEU has its own way of always using this provision in a diplomatic way, as it begins its reasoning by clarifying that: On the one hand, Article 344 of the TFEU does not prevent Member States from creating a court for settling disputes between private parties relating to the agreement. On the other hand, the envisaged agreement and its dispute settlement body cannot affect the *"constitutional framework and founding principles"* of the *sui generis* EU legal order and cannot have an *"adverse effect to the autonomy of EU law"*. The following analysis illustrates the steps that the CJEU has been following in its relevant jurisprudence in the field of

[31] See Mohay, A., (2015), *'Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR - Case note'*, Pécs Journal of International and European Law - 2015/I (14), pp. 28–36.

[32] See Judgment of the Court of 6 March 2018, (C-284/16), *Slowakische Republik v. Achmea BV*, ECLI:EU:C:2018:158, para. 129.

[33] Perakis, M., (2018), *"The luminosity of a case-law "white dwarf": an analysis of the CJEU Achmea judgment (C-*

[34] */16) in light of EU law,* Journal of Arbitration and Mediation, European Law, Issue 2, pp. 189

intra-EU Treaties. First the scope of the crucial Art. 344 has to be clarified in order to avoid any misunderstandings, which were a reoccurring theme in discussions around this topic.

1.3.1. The scope of Article 344 TFEU

Art. 344 TFEU was perceived for some time by many academics as only applying to disputes between Member States for which the infringement proceedings in accordance with Art. 259 TFEU are specified in the TFEU. This false perception surely stemmed from the fragmentary nature of the CJEU's case law and from the hasty treatment in the literature where the provision of the TFEU has so far been perceived as not a central issue[35]. Through previous case law and mainly through the Opinions 1/91[36], 1/09[37] and 2/13[38], the violation of Art. 344 was found whenever there was a danger that a Member State would be submitted to the decisions of another Court or Tribunal and whenever EU law was interpreted or applied by it, without the prior involvement of the CJEU.

When examining the provision in closer detail, it is seen that it should be interpreted in a broader way, as it does not specifically refer to disputes between Member States, stating *"a dispute"* rather than "the disputes *between them*"[39]. For some authors[40] the German language version appears to be even more revealing. Member States are obliged *"Streitigkeiten über die Auslegung oder Anwendung der Verträge nicht anders als hierin vorgesehen zu regeln"*. There, the broad term of "to regulate" *("zu regeln")* is being used: (translated :) *The Member States may not regulate dispute settlements differently than provided in the Treaties*. Thus, seeing the provision more broadly, any international agreement *regulating* certain dispute mechanisms between the Member States as well as between the Member States and private individuals would fall within the scope of application of Art. 344 TFEU. Of course, any such regulation must, in

[35] Hindelang, S., (2019), *"Conceptualisation and application of the principle of autonomy of EU law - The CJEU's judgment in Achmea put in perspective"*, European Law Review, available at: https://www.steffenhindelang.de/wpcontent/uploads/2018/10/Hindelang_Conceptualisation_and_Application_of_the_Principle_of_Autonomy_of_EU_Law.pdf (last accessed: August 2019).

[36] Opinion of the Court of 14 December 1991 (*Opinion 1/91)*, ECLI:EU:C:1991:490.

[37] Opinion of the Court of 8 March 2011, *(Opinion 1/09)*, ECLI:EU:C:2011:123

[38] Opinion of the Court of 18 December 2014, *(Opinion 2/13)*, ECLI:EU:C:2014:2454 [344 et seqq.].

[39] Perakis, M., *"The luminosity of a case-law "white dwarf": an analysis of the CJEU Achmea judgment (C-284/16) in light of EU law*, (2018), Journal of Arbitration and Mediation, issue 2, 2018, pages 176 seqq.

[40] Hindelang, S., (2019), *"Conceptualisation and application of the principle of autonomy of EU law - The CJEU's judgment in Achmea put in perspective"*, European Law Review, available at: https://www.steffenhindelang.de/wpcontent/uploads/2018/10/Hindelang_Conceptualisation_and_Application_of_the_Principle_of_Autonomy_of_EU_Law.pdf (last accessed: August 2019).

some way, be relevant to the interpretation or application of EU law, as this is the main point that needs to be secured by the principle of autonomy of the EU legal order.

Moreover, the fact that the section of the TFEU, in which this provision is found is under the title of "General and Final Provisions" suggests that Art. 344 must, likewise the rest of the Articles under this section of the Treaty, be understood as a general rule protecting the competence of the Court of Justice of the European Union as defined in Art. 19 para. 1 TEU, which covers the entire instruments granted for carrying out its functions.

The Court, finally, for the first time, gave this provision the broader meaning we referred to in the case of *Achmea*, without stating it expressively though, but by implying it by continuing with the interpretation of the relevant Art. 8 of the BIT in question based on Art. 344 TFEU.

1.3.2. First step: The check of the existing clause on the application and interpretation of EU law by the Court or Tribunal

The first question examined and answered by the CJEU in the case of *Achmea*, which would extend to any similar case, is whether the Tribunal in question may be possibly called on to interpret and/or apply EU law. What needs to be underlined is that even the possibility of such an interpretation or application suffices for the CJEU to consider the potential dangers of it for the autonomy[41][42].

The two threats to the CJEU's exclusive jurisdiction to interpret and apply EU law and hence to the uniformity of EU law, are summed up in the need to make sure that the latter does not issue binding interpretations of EU law and that it doesn't cause imbalances to the internal division of competences between the EU and the Member States.

The issue of whether an arbitration clause in a bilateral investment treaty (BIT) concluded between two EU Member States (intra-EU BIT) is compatible with EU law and, in particular, with the autonomy of the EU legal order is heavily discussed in the last years. At the same time and on the other hand, many scholar articles also discuss the necessity of the BITs by highlighting that the protection offered from bilateral investment treaties is broader and more effective than remedies available under EU law and national laws of the member states[43].

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[41] Opinion of the Court of 14 February 2017, (Opinion 3/15), Marrakesh Treaty, ECLI:EU:C:2017:114, paras. 106,

[42]

[43] Even though this is a difficult comparison to be made. *See* Sattorova, M., "*Investor Rights under EU Law and International Investment Law",* 17 Journal of World Investment & Trade, 2016, pp. 895-918

In a staff working paper[44], the Commission expressed the opinion that since the Lisbon Treaty in 2009, bilateral investment treaties concluded between EU member states are incompatible with EU law. This also means that provisions about Investor-state arbitration included in those treaties should be governed by the legal framework of the EU and that investor state arbitration tribunals have no jurisdiction over EU law. The Commission's raised concerns are summarized as follows:

"Such agreements clearly lead to discrimination between EU investors and are incompatible with EU law. In particular, most Intra-EU BITs provide for the possibility of investor-to-State arbitration procedures of a binding character, which is not subject to review by the CJEU on issues of interpretation of EU law. This form of international arbitration is incompatible with the exclusive competence of EU courts to rule on the rights and obligations of Member States under EU law. In contrast to national courts, arbitral tribunals are not bound to respect the primacy of EU law and, in case of doubt, are neither required nor in a position to refer questions to the CJEU for a preliminary ruling. In any case, such investor-to-State arbitration is very costly and thus not easily accessible to SMEs".

In fact, this question of whether arbitration clauses, included in intra-EU BITs are compatible with EU law has been haunting legal professionals and academics at least since 2007, when the Tribunal in *Eastern Sugar v Czech Republic*[45] appeared with its decision as refusing to accept the Respondent's argument, which was that the application of the BIT was limited because it had been superseded by EU law since the Czech Republic's accession to the European Union[46]. It has gained even more ground for discussion in recent years in the context of the CETA Agreement and the reoccurring debate on the establishment of the envisaged Multilateral Investment Court (MIC).

As already mentioned many times already, this issue was lately heavily raised in the case of *Achmea* in 2016 with the case being characterised by the commentators as the first ever ruling concerning the validity of an international agreement between EU Member States[47]. The case concerned a preliminary reference by a German court (the Federal Court of Justice, or

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[44] See Commission Staff Working Document on the free movement of capital in the EU, SWD (2013) 146 final, p. 11, available at: http://ec.europa.eu/internal_market/capital/docs/reports/130415___market-monitoring-workingdocument_en.pdf, (last accessed: August 2019)

[45] See *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004

[46] Bizikova, L., (2018), "The CJEU in Slovakia v. Achmea or is Justice best served cold?", Kluwer Arbitration Blog (March 2011), available at: http://arbitrationblog.kluwerarbitration.com/2018/03/11/cjeu-slovakia-v-achmea-justicebest-served-cold/ (last accessed: September 2019).

[47] Cimiota, E., (2018) *"The first ever interpretative preliminary ruling concerning the validity of an international agreement between EU Member States: the Achmea Case"* 3 (1) European Papers: A journal on Law and Integration, pp. 337-344

Bundesgerichtshof) regarding the validity of an award rendered by an ISDS tribunal under Art. 8 of the Dutch-Slovak Bilateral investment treaty (BIT). The investment tribunal had found that Slovakia had infringed the BIT and was ordered to pay the insurance company of Achmea BV damages for this infringement. The Slovak Republic firstly sought to set the arbitral award aside before the German High Court with the argument that the award was against public policy being in conflict with EU law and in particular with Art. 18[48], 344 and 267 TFEU.

In cases like the *Achmea*, it is apparent that since both of the Parties are at the time of the dispute EU Member States, the applicable law of the dispute that might occur between them is the EU law, as it is the domestic law of both of the Parties. Although the CJEU recognised that the jurisdiction of such a tribunal is limited to making findings on infringements of the Czechoslovakia-Netherlands BIT, the arbitral Tribunal of this BIT was, by virtue of Art. 8 para. 6 NCS BIT, directly obliged to apply EU law as *"the law in force of the Contracting Party concerned"* as well as *"other relevant agreements between the Contracting Parties"*. This means that the CJEU could not control the way this Tribunal with parallel jurisdiction to its jurisdiction, would interpret or apply EU law. Hence, there would be dangers for the uniform and consistent interpretation and application of EU law and a violation of Art. 344 TFEU and the principle of autonomy, because this Tribunal is not incorporated in the system of the Treaties of the EU legal order and is not bound by the rules and principles of this special legal order.

This was not the first time that the very permissibility of the existence of the intra-EU BITs was called into question by the ECJ. Following a similar pattern, already since the *MOX Plant* case[49] in 2001, but this time with a dispute between two EU Member States (Ireland and the UK) and not between a Member State and an individual[56], the Court found that it had exclusive jurisdiction in resolving a dispute between the two Member States, which was covered by EU law. In the view of the CJEU, the Law of the Sea issues raised in that arbitration came within the scope of Community competence and were thus part of a dispute concerning the interpretation or application of EU law[50] and so they had to be kept away from an arbitral Tribunal, which was set up under

[48] Art. 18 TFEU is establishing the principle of non-discrimination and citizenship of the Union. This Article will not be examined in the course of this thesis.

[49] See Judgement of 30 May 2006 in Case C-459/03, *Commission v Ireland*, ECLI:EU:C:2006:345, para. 123. [56] However, an arbitration arising from a BIT contains no differences that would justify the assumption of an approach different from that in *MOX Plant*.

[50] Reinisch, A., (2013) *"The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and Other Investment Agreements"* (March 20, 2013), available at SSRN: https://ssrn.com/abstract=2236192

UNCLOS[51]. In this case, the Court added that "*the act of submitting a dispute of this nature to a judicial forum as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to Community law."* The *MOX Plant* decision illustrates that in cases where controversy is born as to the application and interpretation of EU law, arbitral tribunals are not entitled to decide on the interpretation of certain provisions of EU law, even if in the specific environmental policy area in question, the Community (then) had only adopted minimum rules and standards.

Arbitral Tribunals have mostly refused to uphold the decisions of the CJEU. For example, the arbitral tribunal in *Micula v. Romania*[52] case refused to allow the prevailing application of EU law over the bilateral investment treaty, since the investment treaty was concluded prior to the time that Romania acceded to the EU (pre-accession agreement), which means that it was subject only to the intra- EU bilateral investment treaty. The Commission's submission that the ECJ has exclusive jurisdiction whenever an issue of EU law arises in a dispute has been rejected by other arbitral tribunals too[53]. Arbitral tribunals have repeatedly explained that an investment treaty tribunal is vested with jurisdiction by virtue of the bilateral investment treaty and the ICSID Convention. It is argued that international law is controlling tribunals and providing them with jurisdiction. The fact that investors may have more rights under the bilateral investment treaty than EU law does not lead to an incompatibility[54].

Since it is made clear that the court has ruled that the application and interpretation of EU law by an arbitral tribunal could potentially affect the autonomy of the EU legal order, it is therefore necessary for the CJEU to continue with the second step of the analysis, namely whether the CJEU can control such a Tribunal under the procedure of Art. 267 TFEU and the preliminary ruling procedure. In this step the role of the national courts of the EU Member States is particularly highlighted.

1.3.3. Second step: CJEU's control over the Tribunals' decisions under Art. 267 TFEU with the preliminary ruling procedure

[51] UNCLOS is an international agreement incorporated into the EU legal order, concluded under Art. 216 TFEU. It is thus evident that a dispute concerning its provisions' interpretation falls within the scope of Art. 344 TFEU. As stated in paras 122–127 of the *MOX Plant* Case.

[52] ICSID Case No. ARB/05/20, *Ioan Micula, Viorel Micula and others v. Romania.*

[53] See PCA Case No. 2008-13, *Eureko v Czech Republic* [2010], UNCITRAL case *Binder v Czech*, [2007], SCC Case No.088/2004 *Eastern Sugar B. V (Netherlands) v. The Czech Republic, [2007]*.

[54] See Abula, M., "*Investor State Arbitration as Part of EU's Judicial System."* EU and Comparative Law Issues and Challenges Series, vol. 2, no. 2, 2018, pp. 687-699. (HeinOnline).

This is certainly a crucial step for the compatibility test of the dispute resolution clauses with the principle of autonomy of the EU legal order. The preliminary ruling procedure, as the most important form of *"judicial dialogue"* between the CJEU and the Courts of the EU Member States, established by Art. 267 TFEU, is highlighted in the relevant case law together with Article 344 TFEU. Together they constitute the guarantees of the principle of autonomy, which constitutes, as repeatedly pointed out, one of the main constitutional principles of the EU judicial system and specifically with regard to the allocation of powers [55]. Articles 344 and 267 TFEU are interconnected, as in fact, the question of whether a dispute settlement clause falls under Article 267 TFEU, may be regarded as a determining factor in addressing potential compatibility with Article 344 TFEU.

If a tribunal is part of the EU judicial system and is regarded as a Court or Tribunal of a Member State within the meaning of Art. 267 TFEU, then this immediately means that it may submit a request to the CJEU for a preliminary ruling on the interpretation of EU law. In this way, the autonomy of the EU legal order is preserved, by making sure that there is uniformity in the interpretations of EU law by the national courts and that the Treaties are respected.

Regarding the previously mentioned principle of mutual trust and its relation to Art. 267 TFEU, the Member States' duty of cooperation to ensure the faithful and uniform implementation of EU law is exercised when in case of danger of divergent interpretations of EU law by the local national Courts, the local Courts submit a request to the CJEU for a preliminary ruling. When such courts or tribunals are of last instance, they are even obliged, according to the Treaties, to do so. When Art. 267 TFEU is not respected, then this indicates a clear breach of the principle of mutual trust between the Member States and will of course subsequently have a negative effect on the autonomy of the EU legal order[56].

In the most relevant case of *Achmea*, the question of what constitutes, according to EU law, a national Tribunal, with the power to request preliminary rulings from the CJEU, becomes crucial. According to settled case-law, for a judicial body to be a "court or tribunal" for the purposes of Article 267 TFEU, which means for it to have the right to refer issues for preliminary ruling to the CJEU, the basis of the referring court must be a Member State. Furthermore, besides its nationality, it must be a *"body established by law"* that is *"permanent*", is vested with *"compulsory*

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[55] Settled case-law: see for example: Opinion of the Court of 18 December 2014 (Opinion 2/13) *Accession of the EU to the ECHR*, ECLI:EU:C:2014:2454, para. 176.

[56] Jan Kuijper, (2018), *"The Netherlands draws consequences from the Achmea case. What consequence will the CJEU draw?"*, Amsterdam Centre of European Law and Governance, (May 7), available at: https://acelg.blogactiv.eu/2018/05/07/the-netherlands-draws-consequences-from-the-achmea-case-whatconsequence-will-the-cjeu-draw-by-pieter-jan-kuijper/ (last accessed: September 2019).

jurisdiction", is *"independent"*, applies *"rules of law*" and whose procedure is *"inter partes"*[57]. Clearly, a court not based in an EU Member State is under no obligation to refer to the CJEU a question for a preliminary ruling. As a result, in case an external court were to discuss an issue involving interpretation of EU law, the autonomy of the EU legal order would be in danger, as there is no guarantee at all that the external court would observe prior the whole of the CJEU's jurisprudence, which is dealing with the issue in question.

Regarding the relevant investment tribunal's own access to the procedure under Art. 267 TFEU, the Court was positive and even ruled that "joint Member State courts" such as the Benelux Court of Justice may also refer questions to the CJEU[58]. Nevertheless, while the Benelux Court of Justice formed an *integral part of the domestic court systems of the Benelux countries*, such integration in domestic procedure was not the case in regards to the investment arbitral tribunal[59] in Achmea. Subsequently, such a tribunal could not be also regarded as a (joint) Member States court allowed to refer questions for preliminary ruling to the CJEU[6061]. Nevertheless, the term "*integral part of the domestic court systems*" was not further explained, raising concerns. Already, the full court of the CJEU in Opinion 2/15[68] has underlined that the ISDS stands in conflict with domestic courts and is not part of the domestic judicial system, when it held that ISDS *"removes disputes from the jurisdiction of the courts of the Member States*" (para. 292). The fact that AG Wathelet did not take this statement into consideration and made no mention surprised many of the readers of his Opinion.

Important is to note for the first time the opposite Opinion of the AG Wathelet for the Achmea case, who had, among other arguments, relied on the case C-377/13 *Ascendi Beiras Litoral e Alta*, which the CJEU found not relevant there, because in that case, the Tribunal was part of a system of judicial resolution of a type of dispute for which the constitution of a Member State provided. Notably, AG Wathelet rejected this argument, by claiming that it is widely accepted in international and especially in international investment law that international agreements may directly confer rights to individuals so that the dispute cannot be attributed only to the treaty

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[57] See CJEU, Case C-394/11, *Valeri Hariev Belov v CHEZ Elektro Balgaria AD* [2013], ECLI:EU:C:2013:48, paras. 39 and ff. See also CJEU, Case C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SAV Autoridade Tributária e Aduaneira [*2014], ECLI:EU:C:2014:1754, para. 23.

[58] Similarly, in Case ECJ, *Parfums Christian Dior, [1997]*, ECLI:EU:C:1997:517

[59] Hindelang, S., (2018), *"The limited immediate effects of CJEU's Achmea Judgment*", Verfassungsblog, (March 9), Availablt at: https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/ (last accessed: September 2019).

[60] See Judgment of the Court of 6 March 2018 in the case of *Achmea* (C-284/16) ECLI:EU:C:2018:158 para. 48.

[61] See Opinion of the Court of 16 May 2017 (Opinion 2/15), *Conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore - Allocation of competences between the European Union and the Member States*, ECLI:EU:C:2017:376.

makers[62]. For him an ISDS Tribunal is part of the judicial system of the EU and there is no conflict of jurisdiction between the EU and it (the ISDS Tribunal)[63]. Thus, he considers the Tribunal to be according to the meaning of Art. 267 TFEU. His points were criticised and seem to neglect to closer examine important aspects of constitutional EU law, as he obviously failed to refer to the challenges that the ISDS is posing for the EU legal order.

Except for the fact that the Court was as seen above brief in judging that, it followed a different argumentation than the one of the three established in case law criteria to assess if a Court can refer a question to the CJEU. As mentioned above and as illustrated by the jurisprudence of the CJEU, the characterising criteria for the courts and tribunals within the meaning of Art. 267 TFEU include "*whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent*"[71].

It has to be highlighted that it was not surprising that the CJEU placed considerable emphasis on a dialogue with *"traditional permanent State courts"*, as this was done again in the past. In reality, the way this judicial dialogue was understood can seriously affect the ability of the EU to enter into third country agreements, which will contain dispute settlement clauses. In Opinion 1/09 on the European Patent Court, the CJEU held that Member States *"cannot confer the jurisdiction to resolve … disputes on a court created by an international agreement which would deprive…[national] courts of their task, as "ordinary" courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Art. 267 TFEU"*[64].

The EU has also concluded agreements providing that the court or tribunal established by that agreement must, if necessary, refer questions on the interpretation of EU law to the CJEU. This was the solution given in order to overcome the previously mentioned obstacle and to preserve the autonomy of the EU legal order. An example worth mentioning is Article 322 para. 2 of the Association Agreement between the European Union and its Member States, on the one part, and Ukraine, on the other part. The Art. 322 para. 2, which relates to State-to-State disputes concerning

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[62] Opinion of Advocate General Wathelet of 19 September 2017 in the Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, para. 155 – 156.

[63] Carta, A., and Ankersmit, L., (2018), "*AG Wathelet in C-284/16 Achmea and saving ISDS"*, (8 January), available at: https://europeanlawblog.eu/2018/01/08/ag-wathelet-in-c-28416-achmea-saving-isds/ (last accessed: August 2019).

[71] ECJ C- 54/96, *Dorsch Consult*, ECLI:EU:C:1997:413, para. 23, CJEU C-53/03, *Syfait etc*., ECLI:EU:C:2005:333, para. 29, CJEU C-246/05, *Haeupl*, ECLI:EU:C:2007:340, para. 16 *Paul Miles e.a. v Écoles européennes* (C-196/09) ECLI:EU:C:2011:388 para. 37, with further references.

[64] Opinion of the Court of 8 March 2011 (Opinion 1/09), Draft *agreement - Creation of a unified patent litigation system - European and Community Patents Court - Compatibility of the draft agreement with the Treaties*, ECLI:EU:C:2011:123, para. 80.

the interpretation and application of a provision of that agreement relating to regulatory approximation, provides:

"Where a dispute raises a question of interpretation of a provision of EU law referred to in paragraph 1, the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel."

The question of compatibility of such a clause with Article 267 TFEU has not yet been put before the CJEU. It is also not clear whether such a clause could be included in future agreements with third states, because third states (including the United Kingdom in its negotiations of a trade agreement with the European Union) may insist on reciprocity and demand that sufficient deference be given also to their own courts' interpretation of domestic law[65].

1.3.4. Third step: The judicial review/control of the awards before national courts in order to ensure compliance with EU law

For some academics, having no access to the preliminary reference procedure does not necessarily mean that a dispute settlement mechanism is automatically incompatible with the principle of autonomy of EU law. Such a mechanism is only incompatible, if there is no other way to restrain potential disruptive effects on the homogenous application of EU law flowing from an arbitral ruling. In the case of the Court in Achmea, it seems that there was no other way to involve the judgment of the CJEU, so that the potentially dangerous legal and factual effects flowing from the tribunal's ruling could in some way be controlled and avoided. Hence, the danger of misinterpretation still remained.

For instance, the court of a Member State could submit a request for a preliminary ruling, in the context of a review of an arbitral award in regards to the interpretation of EU law. Then, if the arbitration court did not comply with the answer of the CJEU, there would be the possibility for the CJEU to impose sanctions to it.

In the case of *Achmea*, for example, the *lex arbitri* (German law) provided only for limited review of the awards. According to commercial arbitration case-law[66], the limited review of arbitral

[65] Declève, Q. and Van Damme, I., (2018), *"Achmea: Potential Consequences for CETA, the Multilateral Investment Court, Brexit and other EU trade and investment agreements"*, International litigation blog, (13 March), available at: http://international-litigation-blog.com/achmea-consequences-ceta-mic-brexit/ (last accessed: August 2019).

[66] See Case C-126/97 *Eco Swiss* and Case C-168/05 *Mostaza Claro.*

awards before the courts of the Member States is justified, provided that such a review covers also fundamental provisions of EU law and that, if necessary, such questions of EU law can be referred to the CJEU[67].

1.4. Specifically, the dispute resolution system of the Energy Charter Treaty (ECT)

As an international agreement to which the EU and the Member States are also a party since its signing in 1994, the Energy Charter Treaty, by virtue of Article 216 TFEU[68], becomes an integral part of the EU legal order and enjoys primacy over secondary EU law. The ECT, which is considered to offer wider protection than the WTO system and NAFTA, contains an ISDS clause in Chapter V, Art. 26-28 of the Treaty. Article 26 specifically entails the rules for the disputes between investors and Member States and gives the investors the right to subject the dispute to arbitration when the prerequisites of *ratione personae, ratione materiae and ratione temporis* are satisfied[69].

Issues for the autonomy of EU law shall arise, specifically, when the arbitral Tribunal established by the Energy Charter Treaty deals with a dispute between an investor of one EU Member State and one of another EU Member State. This happens because the rules of the international agreement may differ with the respectively same rules of EU law. The European Commission and Member States[70] have repeatedly expressed their oppositions to the influence and interference of the ECT in the EU legal order.

The settled case law does not offer a clear answer on whether the dispute settlement mechanism of this agreement is compatible with EU law. Tensions were especially raised after the *Achmea* judgement, regarding the need for a concrete and systemic approach towards the dispute resolution

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[67] See Declève, Q. and Van Damme, I., (2018), *'Achmea: Potential Consequences for CETA, the Multilateral Investment Court, Brexit and other EU trade and investment agreements'*, International litigation blog, (13 March), available at: http://international-litigation-blog.com/achmea-consequences-ceta-mic-brexit/ (last accessed: August 2019).

[68] Firstly, the Union may conclude an agreement with one or more third countries or international organisations, where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. Secondly, agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

[69] See Metaxas, A., *(2019) "Investment protection under the provisions of the Energy Treaty Charter",* European Law, issue 2, pp. 166-174.

[70] See Charanne *B.V. and Construction S.A.R.L. v. the Kingdom of Spain*, SCC Case No. 062/2012 and *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.a.r.l. v. Kingdom of Spain*, ICSID
Case No. ARB/13/30 as both cited by Metaxas, A., *"Investment protection under the provisions of the Energy Treaty Charter",* European Law, issue 2, 2019, pp. 166-174.

clauses in the course of intra-EU BITs and their compatibility with EU law. These tensions specifically occur when a dispute occurs between an investor of one EU Member State and another EU Member State in the course of the ECT. The Commission has made clear, that Article 344 TFEU applies to all disputes that partially cover EU law and therefore may include disputes between private parties and EU Member States.

A test on the compatibility of the ISDS involved in this Treaty would not be different than the one we already know, applied in the relevant mentioned case law of this thesis. Thus, the examination of whether this Tribunal interprets or applies EU law is the first step. The situation where EU law is invoked or even when a breach of EU law is not directly the subject of the decision can as well arise under the ECT, because Tribunals hearing intra-EU disputes must, by definition, apply and interpret EU law when addressing the intra-EU application of the ECT[71]. As AG Wathelet also raised in his Opinion in the *Achmea* case, this application and interpretation of EU law falls within the scope of Art. 344 TFEU, in accordance also with the ECJ's interpretation in MOX Plant and Opinion 2/13 (which will be examined in the following Chapter of Part 1).

Even though the arguments are many and various depending on the circumstances of the case and the Investment Treaties in question, the main concept is simply that EU Law reigns as the supreme court of the EU in relations between Member States and overrides all international law commitments that individual Member States and the EU itself in the case of the Energy Charter Treaty may have entered into. The Commission's expressed concerns about the interpretation and application of the Energy Charter Treaty by arbitration tribunals are justified by the wider concerns of handing over competence to decide investment disputes to external tribunals. This is illustrated when comparing the different approaches of the following two cases of arbitration tribunals. In the first case of the *Electrabel SA v Hungary*, the Tribunal found that EU law *"would prevail over the Energy Charter Treaty where there was a case of any material inconsistency"* (para. 4.191). In contrast, in the second case, the Tribunal in *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Spain***,** ruled that *"Should it ever be determined that there existed an inconsistency between the Energy Charter Treaty and EU Law … the unqualified obligation in public international law of any arbitration tribunal constituted under the ECT would be to apply the former. EU law does not and cannot "trump" public international law[72]".*

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[71] See Cross, C. and Kube, V. (2018*) 'Is the arbitration clause of the Energy Charter Treaty compatible with EU law in its application between EU Member States?'*, (February), available at: https://www.bilaterals.org/IMG/pdf/180226_gutachten_english_b.pdf, (last accessed: August 2019).

[72] See Schepel, H., (2018), *"From conflict- rules to field preemption: Achmea and the relationship between EU law and International Investment law and arbitration"*, (March), available at:

The case of the ECT is a special one and raises important questions to be answered in the future in more detail. If the EU were to forbid intra-EU arbitration by overturning the arbitration clause of the ECT, then it would be like the EU, as a party to this Treaty, was using its own law to avoid fulfilling its international obligations that it is subject to because of the Treaty. This could lead to an infringement of Article 16 of the ECT, which provides that, *"as between the ECT and other treaties concerned the same subject matter, even entered into subsequently, the most favourable dispute resolution provision for the investor should prevail"*. This could undoubtedly create a danger of international liability of the EU[73].

1.5. The consequences of the incompatibility of intra EU BITs with EU law - After Achmea

The consequences of this case law and especially with the latest in Achmea were already noticed in the international law world and created many negative reactions. Following this judgment, several EU Member States have recently, on 15 January 2019[74], declared their commitments to terminate all bilateral investment treaties within the EU. Importantly, this declaration was signed by 22 EU Member States with the exception of Luxembourg, Malta, Finland, Hungary, Slovenia and Sweden. The obligation of the termination does not only flow from the indicated above case law, but also from Art. 351 TFEU. Specifically, Art. 351 TFEU obliges Member States to *"take all appropriate steps to eliminate"* the incompatibilities between their international agreements that come before their accession to the legal order of the EU. This obligation has been interpreted as obliging the Member States to denounce their prior international agreements either by amending or by even terminating the already existing BITs. Additionally, it is important to note that Member States have international law obligations under the Articles 59 and 30 of VCLT to terminate their intra-EU international agreements after their accession, which have incompatibilities with the EU treaties[83].

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https://europeanlawblog.eu/2018/03/23/from-conflicts-rules-to-field-preemption-achmea-and-the-relationshipbetween-eu-law-and-international-investment-law-and-arbitration/ (last accessed: August 2019).

[73] Pinsolle, P., and Michou, I., *"Arbitrage : l'arrêt Achmea, la fin des traités d'investissements intra-UE ?"*, Dalloz Actualités Blog, (March 7, 2018), available at: https://www.dalloz-actualite.fr/chronique/arbitrage-l-arret-achmea-findes-traites-d-investissements-intra-ue#.XXaRWNNR3IV (last accessed: September 2019).

[74] Declaration of the representatives of the governments of the Member States, of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union, available at: https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties (last visited in August 2019)

[83] Specifically: Article 59 VCLT provides that: a treaty entered into between parties shall terminate an existing treaty to the extent that it covers the same subject matter or is incompatible with earlier treaty. Further, Article 30 para. 3 provides that: in case of partial overlap between subject matter of the treaties, in cases where no reference to the earlier treaty is made, the earlier treaty will apply as long as it is compatible with the latter treaty.

For the national courts to comply with their international law obligations, they have to not consider questions posed before them in regards to international agreements, which are incompatible with EU law. Hence, the investors may face certain difficulties in enforcing arbitral awards in the EU in the future, when the arbitration seat is in a Member State, or the recognition and enforcement of the award is in a Member State. This means that under EU law Member States will not be allowed to enforce arbitral awards of tribunals constituted under intra-EU BITs. In case they do so, this will be considered as a breach of their obligations under the ICSID Convention and the New York Convention. Nevertheless, they might still be successful in third states as the courts outside the EU will be required to give legal effect to arbitral awards pursuant to international treaties such as the ICSID and New York Conventions[75].

It was crucial to also examine the possible implications to the Energy Charter Treaty and the dispute settlement mechanism contained in it, which would apply to disputes between an investor of an EU Member State and another Member State. As it appears the dangers for the autonomy of the EU legal order are the same and hence the Tribunal under the ECT (in disputes where EU Member States are involved) cannot be regarded as compatible with Art. 267 TFEU.

Specifically, after applying the test of the three established in case law criteria, mentioned above, it is concluded that the requirements of compulsory jurisdiction, permanence and impartiality appear not to be met[76].

Questions were at that time raised on whether the same line of thinking should be also applicable by the CJEU when it comes to international agreements between the EU and third States, especially when at that time the relatively recent Opinion 1/17 on the CETA Tribunal was awaited. The abstract way[77] in which the Grand Chamber's position in Achmea was presented made some falsely think that the CJEU would extend the ruling to agreements with third States. However, even then, in paragraphs 57 and 58 of its Achmea judgment, the CJEU itself made clear and highlighted the distinction between intra-EU BITs and international agreements between the European Union and third states, which provide for the establishment of a court or tribunal with jurisdiction to interpret

[75] See Dimopoulos A., (2018) "*The Principle of Autonomy of EU Law and its implications for intra and extra-EU BITs*", Blog of the European Journal of International Law, available at: https://www.ejiltalk.org/achmea-the-principleof-autonomy-and-its-implications-for-intra-and-extra-eu-bits/ (last accessed: August 2019).

[76] Cross, C. and Kube, V. (2018) *'Is the arbitration clause of the Energy Charter Treaty compatible with EU law in its application between EU Member States?'* (February), available at: https://www.bilaterals.org/IMG/pdf/180226_gutachten_english_b.pdf (last accessed: August 2019).

[77] As characterised by Thym, D., (2018), *"The CJEU ruling in Achmea: Death Sentence for Autonomous Investment Protection Tribunals"*, (March), available at: http://eulawanalysis.blogspot.com/2018/03/the-cjeu-ruling-in-achmeadeath.html (last accessed: August 2019).

and apply such agreements. This proved in fact more than correct in the end, after the Opinion 1/17 was published.

It remains to be seen exactly how the Achmea judgement will influence the Agreement between the EU and the UK after Brexit. As the Commission notes, it is "in principle" possible for the EU to conclude a future relationship agreement with the UK that establishes judicial bodies in a supervisory and enforcement function, but the nature of the EU legal system places some constraints on the specific powers such judicial bodies can have. Teresa May has stated, that an independent arbitration mechanism for trade disputes, which will replace the jurisdiction of the CJEU, is needed. Nevertheless, the EU is insisting that this mechanism has to respect the autonomy principle and the constitutional role of the CJEU[78].

Lastly, doubts still remain on what will eventually come out of the discussions on a Multilateral Investment Court[79], which started by the European Commission since 2015. The ultimate goal is to set up a permanent judicial body with the jurisdiction to decide investment disputes, which will bring the key features of the domestic and international courts to investment adjudication. More information about this court will be given in the second Part of the thesis.

Chapter 2

2. Dispute resolution clause included in international agreements concluded by the EU (*extra-EU)*

2.1. The conclusion of international agreements by the EU

The EU has a legal personality and is therefore in a position of concluding international agreements[80]. Article 218 TFEU establishes the procedure for the conclusion of such agreements and the Union's general competence can be found in Article 216(1) TFEU:

"The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to

[78] See UK House of Commons Briefing Paper, *"Brexit: New Guidelines on the Framework for future EU-UK relations"* (April 19, 2018), page 73, available at: https://commonslibrary.parliament.uk/wpcontent/upload/2018/04/Brexit-new-guidelines-on-the-framework-for-future-EU-UK-relations.pdf

[79] European Commission, *"The Multilateral Investment Court Project"*, available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 (last accessed: August 2019).

[80] See Art. 47 TEU.

in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."

From this provision the express and the implied powers of the EU to conclude international agreements are laid down. The express powers are the catalogue of competences that have been introduced by the Treaty of Lisbon in Art. 3 para.1, Art. 4 para. 2-4 and Art. 6 TFEU. On the other hand, the implied powers[81] have been more difficult to establish. The wording of Article 216(1) TFEU shows that the principle of parallelism, which means that where the European Union has the competence to legislate internally it also has implied external competence to conclude agreements with third parties, has been somewhat compromised by the principle of necessity, which was found in Opinion 1/76[82]. There are specific occasions in which the Union has implied powers in order for the effectiveness of EU law (*effet utile*) to be secured. It is not sufficient that the Union has internal competence. The conclusion of an international agreement must either be a necessary condition for the exercise of the internal competence or internal rules must have been adopted. In the absence of this, no implied power arises for the EU[83].

Following, the most important opinions of the CJEU in cases when the EU attempted to conclude an international agreement and/or become part of an international organization will be presented. As previously mentioned in the section of the delimitations of this thesis, the subject of it, is not the examination of the EU's competence to conclude international agreements, but rather the issues of compatibility of their dispute resolution chapters with the principle of autonomy of the EU legal order. These issues will be examined in the following pages by a separate analysis of the most important Opinions of the CJEU. Amongst the negative opinions of the CJEU, a positive one is found, namely Opinion 1/00. The reasons will be further explained.

2.2. The issue of compatibility of the dispute resolution clauses included in international agreements concluded by the EU (*extra-EU*)

2.2.1. The constitutional character of the EU in Opinion 1/91 (European Economic Area):

[81] See Judgment of the Court of 31 March 1971, (C-22/70), *AETR*, ECLI:EU:C:1971:32 for an explanation of the implied powers doctrine. It means that the member states are able to conclude agreements with third parties in areas for which the Union has a competence to legislate internally. In the Court's own words in Opinion 1/03, the purpose of the implied powers doctrine is *'to ensure that the agreement is not capable of undermining the uniform and consistent application of the [Union] rules and the proper functioning of the system which they establish'.*

[82] Opinion of the Court of 26 April 1977 (Opinion 1/76), Draft Agreement establishing a European laying-up fund for inland waterway vessels', ECLI:EU:C:1977:63.

[83] Lock, T., (2015) *The European Court of Justice and the International Courts*, International Courts and Tribunals Series, Oxford University Express, pp. 77 et seq. (doi: 10.4324/9781315070629-13).

This was the first case, where the creation of an alternative dispute resolution system in the context of an international agreement was considered by the ECJ and where the concept of autonomy reappeared after the case of *Costa ENEL*. Whereas, in the older *Opinion 1/76*[84], the ECJ only partly touched upon its potential relationship with the envisaged Tribunal, its prerogatives *vis-à-vis* the courts proposed under the draft agreements for the creation of the European Economic Area were the key issue of Opinions 1/91 and 1/92. It is also the first case, where the attempts of the EU to participate in an international organisation, which would submit it to the jurisdiction of another Court, are ruled.

In its original version, the European Economic Area Agreement included an EEA Court with the following main characteristics: The EEA Court was a two-instance body consisting of a Court of First Instance and an EEA Court envisaged with the power to settle disputes between the Contracting Parties arising out of the application of the EEA Agreement. The EEA Agreement created two parallel legal orders, linked to each other, as it stated that the provisions of the Agreement would be interpreted in conformity and uniformity with the EU law and specifically the rulings of the ECJ. Furthermore, there was an organic link between the EEA Court and the ECJ in accordance with Article 95 of the EEA Agreement. Both the EEA Court and the EEA Court of First Instance were supposed to include judges of the ECJ and the (at that time) Court of First Instance of the European Communities next to the EEA Court own judges *("double-hatting"[8586]).* These provisions were deemed necessary to secure uniformity between the EEA regime and the EU legal order, given that the former was essentially an extension of the rules of the latter to EFTA countries, and the provisions of the EEA Agreement were textually identical to the corresponding provisions of the EU Treaties. It was against this background that the ECJ was requested to assess *"whether the proposed system of courts may undermine the autonomy"* of the EU legal order[87].

Thus, in 1991, the ECJ was called upon to give its opinion under the procedure of Article 228 (1) of the Treaty on the compatibility of the agreement for the establishment of the European Economic Area (EEA) between the members of the European Free Trade Association (EFTA), EU and its Member States, to create equal conditions of competition in the EEA. The ECJ identified the following aspects of the proposed Court as not being compatible:

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[84] The Rhine Case and the Treaty-Making Powers of the Community: In its Opinion 1/76, the ECJ ruled on the distribution of competencies between the Communities and the Member States in the field of external relations.

[85] See Pantaleo, L. (2019) *The Participation of the EU in International Dispute Settlement*, The Hague, Springer, (doi:

[86] .1007/978-94-6265-270-5).

[87] See Pantaleo, L., Ibid.

First of all, the EEA Court established under the agreement would have jurisdiction over all disputes arising between the signatories to EEA agreement. What the ECJ did first was compare the respective objectives and contexts of the EEA and EU Treaties, as the similarity of the texts of certain EEA dispositions with those of the EU Treaties could not necessarily mean their identical interpretation. As the EEA was an international agreement, according to international law, it had to be interpreted, according to Article 31 of the Vienna Convention on the Law of Treaties. While analyzing the compatibility of the EEA agreement with EU law, the ECJ noted under paragraph 22 of its Opinion that the *"homogeneity of the rules of law throughout the EEA is not secured"*. Following the wordings of the ECJ, the reason attributed to such observation was that the obligation to interpret EEA agreement in light of ECJ's rulings was only restricted till the execution of the EEA Agreement and that it did not expressly recognize the primacy and direct effect of EU laws[88]. The conclusion regarding this part of the examination of the ECJ was that the EEA's envisaged characteristics are different than the essential elements of the Community and cannot guarantee the legal homogeneity, which was presented as a main object of the envisaged Agreement.

Additionally, with the EEA being a mixed agreement, the envisaged court would have the power to define, in a given case, who, between the Community and its Member States, was the competent party. Especially, the fact that this Court would have the jurisdiction to interpret the expression "Contracting Party" under the EEA Agreement (which could refer to the EU or its Member States) would mean that it could rule on the respective competences of the EU and the Member States[89]. This, according to the Court, was *"likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured by the Court of Justice"*, and therefore the exclusive jurisdiction of the ECJ[90]. The ECJ furthermore explained that the concept of autonomy was also implicated because concluding the EEA Agreement would have *"the effect of introducing in the Community legal order a body of legal rules which is juxtaposed with a corpus of identically-worded Community rules"*. As the EEA tribunal was in addition charged with the duty of guaranteeing the homogeneous application of these rules, this would, according to the ECJ, mean passing on the jurisdiction as regards the

[88] Opinion of the Court of 14 December 1991 (Opinion 1/91), ECLI:EU:C:1991:490, para. 44-45.

[89] Brandtner, B. (1993) *'The "Drama" of the EEA': Comments on Opinion 1/91 and 1/92*, (1992) European Journal of International Law, Vol.3 nº 2, pp. 300–328.

[90] Opinion of the Court of 14 December 1991 (Opinion 1/91), ECLI:EU:C:1991:490,, para 35.

interpretation of Community law, which, in turn, was contrary to Art. 344 TFEU and Art. 19 TEU[91] and subsequently the principle of autonomy of EU law.

After Opinion 1/91, the EEA agreement was amended and the new version of it was clearly separating the jurisdiction of the EFTA Court from the ECJ's. Therefore, the jurisdiction of the EFTA court was strictly, according to the rules of international law, limited to the interpretation of the EEA agreement and would not put the uniform interpretation of EU law in danger. The renegotiated version of the agreement was resubmitted to the CJEU in February 1992. The Court finally approved this second changed version of the Agreement with its Opinion 1/92[92]. The format of this new version can give us some hints for the issues presented in the second part of the thesis and for Opinion 1/17.

2.2.2. Opinion 1/00: The establishment of the European Common Aviation Area (ECAA) - ''Lesson learnt''

In 2002, the ECJ delivered Opinion 1/00[93], which dealt with the conclusion of an agreement between the European Community and non-Member States establishing a European Common Aviation Area (ECAA). The ECAA agreement's aim was to regulate access to air transport markets of the Contracting Parties subject to a single set of commonly established rules. The agreement included a dispute settlement mechanism, namely a Joint Committee.

This was the only case on the external dimension of autonomy, up to that point, that the ECJ ruled that the draft agreement was compatible with the EU Treaties without any modifications being necessary. The negotiator of this agreement seems to have been able to follow the lessons that the previous Opinion 1/91 taught on the autonomy principle. The ECAA, in reality, is the only agreement, amongst the ones assessed within the ECJ's Opinions, that does not propose the establishment of an international court or tribunal or the accession to one. It rather assigned the competence to solve disputes and ensure uniform interpretation of the agreement to the Joint Committee, a body composed of representatives of the Contracting Parties.

The ECJ summarised in this Opinion the autonomy case law by stating, that in order to be able to preserve the autonomy of the EU legal order, it is required that *''the <u>essential character</u> of the*

[91] See Van Rossem, Willem, J., *''The autonomy of EU law: More is Less''* in the book of Costa, O., and Jørgensen, K. E., (2013) *Between Autonomy and Dependence*, pp.15-17, (doi: 10.1007/978-90-6704-903-0).

[92] Opinion of the Court of 10 April 1992 (Opinion 1/92), ECLI:EU:C:1992:189

[93] Opinion of the Court of 18 April 2002 (Opinion 1/00) Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area, ECLI:EU:C:2002:231.

powers of the Community and its institutions as conceived in the Treaty remain unaltered[94]*"*. The ECJ further continued stating that the preservation of the autonomy of the EU legal order requires that *"the procedures for ensuring uniform interpretation of the rules of the ECAA Agreement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement*"[95].

Therefore, it can be concluded that there are two implications when it comes to the autonomy and international agreements establishing external courts. First, an international court, other than the Courts of the EU, can neither interpret the EU Treaties in a way that makes such interpretations binding for the EU nor influence the division of competences between the EU and its Member States. The EU Courts are the only courts that have the authority to interpret the provisions of the EU legal order and it is only those interpretations that are binding for the EU and for the EU Member States, according to the principle set in Article 344 TFEU. In this way, the CJEU establishes and protects its monopoly on the interpretation of European Union law. The binding character of the given interpretation plays also an important role, as there is a caveat to be pointed out. When the international court interprets EU law in a way that it is not binding for the institutions and does not change the distribution of competences, then this is not the same case and the autonomy of EU law is not in danger[96]. This was of course another hint for the Opinion 1/17.

The Court concluded in para. 21 of its Opinion, that *"although the proposed ECAA Agreement affects the powers of the Community institutions, it does not alter the essential character of those powers and, accordingly, does not undermine the autonomy of the Community legal order*". As regards the distribution of competences between the EU and the Member States, since the ECAA, in contrast to the EAA, was not a mixed agreement, the issue of affecting this competence distribution did not arise[97]. The essential character of the ECJ's power was safeguarded as the ECAA Joint Committee's decisions were to be in conformity with the ECJ case law, and in case of preliminary rulings requested from the ECJ by the Joint Committee or the national courts of the Contracting Parties, the ECJ's decisions would be binding. As for uniform interpretation, the provisions of the Treaty continue to be *"interpreted autonomously"* and therefore, potential

[94] Opinion of the Court of 18 April 2002 (Opinion 1/00), ECLI:EU:C:2002:231, para. 12.
[95] Ibid, para. 13.
[96] See Lock, T., (2015) *The European Court of Justice and the International Courts*, International Courts and Tribunals Series, Oxford University Express, pp. 77 et seq. (doi: 10.4324/9781315070629-13).
[97] Opinion of the Court of 18 April 2002 (Opinion 1/00), ECLI:EU:C:2002:231, paras. 15-17.

divergences in interpretation of the rules of the ECAA Agreement between the Community and the States Parties would not have any impact on the Community's legal order[98].

Finally, the conclusion of the ECJ in this Opinion was that since the jurisdiction of the Joint Committee established under the said agreement extended only with respect to disputes between EU and third countries (as Member States were not party to ECAA agreement, as it was not a mixed agreement), it would not affect the principle of autonomy set out in Article 344 of TFEU, as it would not "*affect the allocation of powers between the Community and the Members States"*[99].Therefore, it was regarded as compatible with EU primary law. Yet, the CJEU endorsed the principles laid down in Opinion 1/91 and equally stressed the need for an autonomous legal order and concretised the Court's understanding of the limits, in which this autonomy principle expands in, for the systems of international dispute settlement[100][101].

2.2.3. Opinion 1/09: The establishment of the European and Community Patent Court (ECPC)

The risk of the autonomy of the EU legal order being undermined in a case of an international agreement establishing an international jurisdiction, which could create tensions and have an adverse effect to the autonomy of the EU legal order, was revisited in 2011 by the CJEU with its *Opinion 1/09*[102] on the Draft Agreement on the European and Community Patent Court. The envisaged Contracting Parties of this Court were the Member States, the European Union and third countries, which are parties to the European Patent Convention. The proposed draft agreement would have had a drastic impact on the judicial system as far as Community Patents law was concerned. Allan Rosas has stated that Opinion 1/09 raised a new, up to that time, question, which was whether the EU and its Member States in this way *"delegate" or "outsource"* judicial functions to an international organization, which otherwise would have been dealt with by the national courts

[98] Contartese, C., *"The autonomy of the EU legal order in the ECJ's external relations case law: From the "essential" to the "specific characteristics" of the Union and back again*" in the book of Finch, E. H. (1965) 'Common Market Law Review', *American Journal of International Law*, 59(3), pp. 1627-1672, (doi: 10.1017/s0002930000077174).

[99] Opinion of the Court of 18 April 2002 (Opinion 1/00), ECLI:EU:C:2002:231, para. 15.

[100] Uwera, G. (2016) 'Investor-state dispute settlement (ISDS) in Future EU investment-related agreements: Is the autonomy of the EU legal order an Obstacle?' *Law and Practice of International Courts and Tribunals*, 15(1), pp.

[101] –151. doi: 10.1163/15718034-12341312.

[102] Opinion of the Court of 8 March 2011 (Opinion 1/09), EU:C:2011:123.

of the Member States, or possibly by a new Union court set up under the provisions of the Treaties[103].

As stated in paragraph 78 of the Opinion, "*the international court envisaged in this draft agreement is to be called upon to interpret and apply not only the provisions of that agreement but also the future regulation on the Community patent and other instruments of European Union law, in particular regulations and directives in conjunction with which that regulation would, when necessary, have to be read, namely provisions relating to other bodies of rules on intellectual property, and rules of the FEU Treaty concerning the internal market and competition law. Likewise, the PC may be called upon to determine a dispute pending before it in the light of the fundamental rights and general principles of European Union law, or even to examine the validity of an act of the European Union."* The envisaged court was, as described, aimed to replace domestic jurisdictions and, according to Art. 15 of the draft agreement, limit the role of the national courts only to actions, which did not come within its exclusive jurisdiction. This was clearly the end for another Draft Agreement, rejected by the CJEU on the grounds of posing a threat for the principle of autonomy of EU law.

In this Opinion, the broader concept of the autonomy principle can be seen. The concerns about the autonomy are ongoing and extend not only to the substantive interpretation of EU law, but also to the EU law functions of the courts of the Member States. In this Opinion, the CJEU's concern about the jurisdictional role of the national courts is also illustrated. Their role of operating as *"the guardians"* of the EU legal order and judicial system (para. 66 of Opinion 1/09) includes their jurisdiction to hear patent law cases and to refer questions to the CJEU under the procedure of Art. 267, which is one of the most important but yet controversial[104] articles of the Treaty. While it was recognised that the EU's external competence and its treaty-making powers necessarily extend to the capacity of submitting itself to the decisions of a jurisdiction created or designated by such agreements as regards the interpretation and application of its provisions, it was also found that the new Patent Court would have the jurisdiction to interpret and apply EU law taking the place of the national courts in doing this, which would put the autonomy of the EU legal order clearly at risk[105], as the main task of the CJEU is to ensure that national courts can reach "correct" conclusions in all cases involving EU law issues. The conclusion of the CJEU is that the envisaged agreement

[103] Rosas, A., (2012) *"The National judge as EU judge: Opinion 1/09",* in the book of Cardonnel, Rosas,Wahl (Eds.), *Constitutionalising the EU Judicial System. Essays in Honour of Pernilla Lindh* (Hart Publishing, 2012), pp. 105–121.

[104] Miron, S. (2014) *'The last bite of the BITs-supremacy of EU Law versus investment treaty arbitration',* European Law Journal, 20(3), pp. 332–345. doi: 10.1111/eulj.12039.

[105] Wessel, R. A., & Blockmans, S. (2013), "*Between autonomy and dependence: The EU legal order under the influence of international organisations ",* The Hague: T.M.C. Asser Press, pp. 38-39.

"would alter the essential character of the powers, which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law"[106].

The novelty of this ruling is exactly this emphasis it gives on the role of the national courts of the Member States. While previously the role of the courts of the Member States was highlighted as adding to the EU's special nature[107], with this Opinion the Court grants the national courts with the role of *"guardians of the Treaties"* alongside with the CJEU constructing the full concept of the principle of autonomy of the EU legal order. The CJEU then reminds the Member States that the judicial system of the EU is *"a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions*[108].

It is important here to mention the *Nordsee*[109] case, where the ECJ acknowledged that *"there are certain similarities between the activities of the arbitration tribunal [. . .] and those of an ordinary court or tribunal inasmuch as the arbitration is provided for in the framework of the law, the arbitrator must decide according to the law and his award has, as between the parties, the force of res judicata, and may be enforceable if leave to issue execution is obtained."* It was ruled that an arbitral Tribunal does not constitute a court or Tribunal with the meaning of Art. 267 TFEU giving two reasons about it. Firstly, as the arbitration agreement is purely private in nature, the parties were under no obligation, whether in law or *de facto*, to refer their disputes to arbitration. Secondly, in that particular case, there was no involvement of the state in the decision whether to refer the matter to arbitration or not, or in the arbitral proceedings as a whole. After this ruling, it was supported that by declining jurisdiction to answer questions referred for a preliminary ruling by arbitrators, the CJEU sought to prevent contracting parties from creating "courts and tribunals" of their own[110], which are external to the EU judicial order.

Similarly with the previous case mentioned, an arbitral Tribunal like the Patent Court is not considered eligible to request a reference under Art. 267[111], as it is *"outside the institutional and judicial framework of the EU"* and *"it is not part of the judicial system provided for in Art. 19 (1) TEU"*. The CJEU, also, remarked that the EPC has a *"distinct legal personality under international*

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[106] Opinion of the Court (Full Court) of 8 March 2011, (Opinion 1/09), ECLI:EU:C:2011:123, para. 85 and 89.

[107] Judgment of the Court of 9 March 1978 in Case C- 106/77, *Simmenthal*, ECLI:EU:C:1978:49.

[108] Opinion of the Court (Full Court) of 8 March 2011, (Opinion 1/09), ECLI:EU:C:2011:123, para. 70

[109] Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG and Co KG* [1982] ECR 1095. In the case of *Nordsee*, an arbitrator appointed by the Chamber of Commerce of Bremen in a commercial dispute concerning a contract between shipbuilders referred a question for a preliminary ruling to the Court. The question concerned the validity of a contract under EU law.

[110] Lenaerts, K., Arts, D. and Bray, R., (1999) "*Procedural Law of the European Union"* (Sweet and Maxwell, pp. 376.

[111] See Judgment of the Court of 23 March 1982 in case *Nordsee v Mond* (C-102/81) ECLI:EU:C:1982:107; confirmed inter alia in Judgment of the Court of 1 June 1999 in *Eco Swiss v Benetton* (C-126/97), ECLI:EU:C:1999:269

law"[112]. Important is the worry that the CJEU noted about the exclusive jurisdiction of the Patent Court for certain significant actions, which would pose dangers for the jurisdiction of the national courts of the Member States, changing thus the *"essential character of the CJEU as conceived in the EU and FEU Treaties"*[120]. It has however been suggested, that the prevention of arbitrators to make references to the Court under Article 267 TFEU raises the risk of endangering the uniform application of the Community law within the EU[121]. This will not be further examined in the course of this thesis.

2.2.4. From the *"essential"* to the *"specific characteristics"* and the autonomy of EU law in Opinion 2/13: EU Accession to the ECHR

The most characteristic example of the EU attempting to become a contracting party to an international convention, which would submit it to the jurisdiction of another court, is the Draft Agreement for its accession to the ECHR.

The attempts for the formal connection of the EU with the ECHR had already started since the 1950s[113] with the Treaty establishing the European Political Community (EPC), which provided that the ECHR would become an integral part of the basic law of the EPC and set up a mechanism by which the CJEU could give jurisdiction to the ECtHR on matters of principle concerning the ECHR. Since then, the two European supranational courts managed to create a judicial relationship through their case law, and the ECtHR even experimented with some forms of review of EU measures[114][115]. It was, however, after Opinion 2/94[116], which was the CJEU's first judicial pronouncement on the accession of the EU to the ECHR, delivered in 1996, that the relationship between the CJEU and the ECtHR became more intense. This Opinion was a negative one, but for reasons of competence, which will not be examined here. With the Lisbon Treaty entering into force on the 1st of December of 2009 and with *Article 6* of it, the Charter was granted legal value and the accession of the EU to the ECHR was officially mandated.

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[112] Opinion of the Court (Full Court) of 8 March 2011 (Opinion 1/09), Patent Court, ECLI:EU:C:2011:123 , para. 71.
[120] Opinion of the Court (Full Court) of 8 March 2011, (Opinion 1/09), Patent Court, ECLI:EU:C:2011:123, para. 75.
[121] Stylopoulos, E., (2009) "*Arbitrators: Judges or Not? An EC Approach . . . "*, Kluwer Arbitration Blog, (9 March 2009), available at: http://arbitrationblog.kluwerarbitration.com/2009/03/09/arbitrators-judges-or-not-an-ecapproach/ (last visited: September 2019).
[113] See De Burca, G., (2011), "*The Road Not Taken: The European Union as a Global Human Rights Actor",* 105, American Journal of International Law, 649.
[114] See Fabbrini, F. and Larik, J. (2016) *"The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights",* Yearbook of European Law, pp. 1–35. (doi:
[115] .1093/yel/yew002).
[116] Opinion of the Court of 28 March 1996, (*Opinion 2/94),* ECLI:EU:C:1996:140.

In order to proceed with the accession after the first "rejection", in May 2010, the Committee of Ministers of the Council of Europe was mandated to prepare, together with representatives of the European Commission, a draft agreement on the accession of the EU to the ECHR. In July 2013, the Draft Accession Agreement of the EU to the ECHR was referred by the Commission to the CJEU for an *ex ante* review of its compatibility with the EU treaties, pursuant to Article 218 para. 11 TFEU.

In the long-awaited Opinion 2/13, delivered on the 18th of December 2014, the CJEU ruled that the Draft Accession Agreement was incompatible with the Treaties reaffirming the basic principles of autonomy of EU law as set out in the various opinions detailed above, and also went a step further to state that "*the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation*".

Even though the accession of the EU to the Convention would constitute a major step in the development of the protection of fundamental rights in Europe and the Member States of the EU and the principle of that accession had also been already enshrined in the Treaty of Lisbon[117], the CJEU finally ruled again that the Agreement was not suitable to protect the specific characteristics of the EU legal order, given that it did not entail any guarantee that the EU Member States would not submit any dispute related to the interpretation and application of the Treaties to the Court of Strasbourg instead of the Court in Luxembourg.

To be a contracting party to the Convention meant for the EU that when a complaint was launched by an individual or a state party to the Convention, the European Court of Human Rights (ECtHR) would have the jurisdictional power to review the compatibility of any legal act of the Union with the human rights, as it was guaranteed in the Convention (Art. 34 ECHR)[118]. Even this mere possibility that the EU Member States would, according to Art. 33 ECHR, start proceedings against each other or against the EU, in the ECtHR and not the CJEU, makes the agreement incompatible with EU law, as it endangers the jurisdictional allocation of competences within the EU and is opposite to Art. 4 para. 3 of the TEU[119] and Art. 344 TFEU[120]. This jurisdictional tension could

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[117] ECHR, (2011), "Joint communication from Presidents Costa and Skouris", 35(14), pp. 1–3.

[118] Pernice, I., (2013) *"The autonomy of the EU legal order - Fifty years after Van Gend"*, in the book of the Court of Justice of the EU, *"50th Anniversary of the judgment in Van Gend en Loos"*, pp. 70-74, available at: https://curia.europa.eu/jcms/jcms/P_95693/

[119] Article 4 para. 3 states: "Pursuant to the *principle of sincere cooperation*, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties".

[120] This violation would render the Member State concerned liable to infringement proceedings under Art. 258 TFEU.

[129] Reitemeyer S. and Pirker, B., (2015*), "Opinion 2/13 of the CJEU on access of the EU to the ECHR - One step ahead and two steps back"*, European law Blog, (March 31), available at:

only be solved with an express exclusion of the competence of the ECtHR under Art. 33 ECHT for the disputes between EU Member States or between them and the EU, which concern the application of the ECHR within the scope *ratione materiae* of EU law (para. 213). At this point, the CJEU recalled its precedent in the *MOX Plant* case[129].

Very much discussed was the opposition of the AG Kokott to the CJEU's Opinion. Likewise, with the three major EU institutions, as well as the EU's 28 Member States, AG Kokott in her Opinion delivered on 13 June 2014, had also found the accession agreement compatible with EU law and with the EU treaties. She advocated that the Member States could make a binding declaration that they would not initiate proceedings against each other before the ECtHR, but according to the CJEU, this did not suffice as a protective shield for the CJEU's exclusive jurisdiction and the agreement could not enter into force unless it, or the EU treaties, is revised. Thus, the Accession was rejected for the second time, but this time on different grounds than the Draft Agreement for the accession of the EU to the ECHR of 1994[121].

The CJEU raised also concerns in regards to Art. 53 ECHR[122][123], which appeared to give the Contracting Parties the power to lay down higher standards of protection of fundamental rights than those given by the EU with Art. 53 of the Charter of Fundamental Rights[132] to the extent that the primacy, unity and effectiveness of EU law would be compromised (already established in *Melloni*[133]). For the purpose of compatibility with EU law, it would thus be needed to be regulated that raising the level of protection of fundamental rights under the ECHR must neither affect the primacy of EU law for the EU Member States nor the unity and effectiveness of EU law (para. 190 of Opinion 2/13).

Because of the great importance of the protection of human rights in the EU legal order, the future relations between the two courts constitute a concern of many academics of the fields. The good

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https://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-onestep-ahead-and-two-steps-back/ (last accessed: September 2019).

[121] Opinion of the Court of 28 March 1996, (*Opinion 2/94)* (ECHR accession), ECLI:EU:C:1996:140

[122] Reitemeyer, S., and Pirker, B., (2015), *"Opinion 2/13 of the Court of Justice on access of the EU to the ECHR - One step ahead and two steps back"*, (March), available at: https://europeanlawblog.eu/2015/03/31/opinion-213-ofthe-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/ (last accessed: August 2019) [132] Article 53 ECHR: 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.' While Article 53 Charter states: 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'

[123] Judgment of the Court (Grand Chamber), 26 February 2013 in Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

up to today relationship between them can be seen in the *Bosphorus*[124] case, in which the ECtHR found that if equivalent protection of human rights (to that under the ECHR) existed in the EU legal order, then it could be presumed that an EU member state had complied with the ECHR when it did no more than directly implement legal obligations flowing from its EU membership, in cases where it had no discretion in the form of implementation[125].

Additionally, the CJEU found that the preliminary ruling procedure would also be affected by the Accession Agreement and stated it as its third objection ground in Opinion 2/13. Specifically, the Advisory Opinion Procedure, which was proposed with Draft Protocol No 16[126], was seen as a means of strengthening the judicial dialogue between the domestic courts and Strasbourg and offering better protection standards to human rights in the EU.

The first reference to the national authorities can be found in Art. 1(1) of the Protocol which states that:

"[h]ighest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto."

Essentially, the domestic courts of the parties to the ECHR could request an opinion from the ECHR regarding human rights law issues arising in national cases, "copying" to a logical extent the preliminary ruling procedure under Art. 267 TFEU. These opinions would not be binding and according to the principle of subsidiarity, would only constitute optional "guidelines" for the domestic courts, in contrast to the "compulsory" preliminary rulings of the CJEU. The influence of the procedure of Art. 267 TFEU to the Advisory Opinion procedure is illustrated in the Wise Men Report of 2006[127] and in the ECtHR's Reflection Paper[138].

The CJEU expressed its concerns of this mechanism as a potential threat to the autonomy of EU law in para. 199 of its Opinion 2/13:

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[124] ECHR Case: *Bosphorus Hava Yollari Ve Ticaret Anonim Sirketi v Ireland* [2006] 42 EHRR 1.

[125] Douglas-Scott, S. (2014) *"Autonomy and Fundamental Rights : the ECJ' S Opinion 2 / 13 on Accession of the EU to the ECHR",* pp. 29–44.

[126] See Draft Protocol No. 16 to the Convention, DH, GDR (2012) R2 Addendum V, 31 October 2012.

[127] Report of the Group of Wise Persons to the Committee of Ministers, 979bis Meeting, CM(2006)203, 15 November 2006, available at: https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM (last accessed: September 2019). [138] Reflection Paper on the Proposal to Extend the Court's Advisory Jurisdiction, available at: https://www.echr.coe.int/Documents/2013_Courts_advisory_jurisdiction_ENG.pdf (last accessed: September 2019).

"By failing to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure."

The CJEU wants to protect the preliminary ruling procedure and to avoid the risks for the autonomy when the Member States' Courts would seek another way of involving the Court of Justice. It is essential that the procedure of Art. 267 TFEU is not disregarded in matters related to fundamental rights in the EU.

Finally, again in Opinion 2/13[128], the CJEU was worried about the fact that State to State disputes under Art. 33 ECHR could have as a result an absolute lack of control over good or bad interpretations of EU law and it was not even satisfied with the Advocate General's proposed solutions of having a deference mechanism (reminding to the one found in UNCLOS) or simply sanctioning one of the Member States who had brought the action (through infringement proceedings)[129].

2.2.4.1. Attempted safeguards in Opinion 2/13:

2.2.4.1.1. The co-respondent mechanism

It is crucial to note that the CJEU subsequently examined the co-respondent mechanism[130] mentioned in the paragraphs 224-225 of the Opinion 2/13. With this mechanism, the CJEU noted that the draft accession agreement, with a view to preventing gaps in the protection of human rights, foresaw that a contracting party to the ECHR *"is to become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that Contracting Party"*, which would again finally create tensions in the division of competences between the Union and the Member States. Specifically, the CJEU stated: *"However, the fact remains that, in carrying out that review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member states as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member states and on the EU. […] Such a review would be liable*

[128] Opinion of the Court of 18 December 2014, (Opinion 2/13), ECLI:EU:C:2014:2454, paras. 205-210.

[129] De Abreu Duarte, F. (2019*), "Autonomy and Opinion 1/17 - a matter of coherence?"*, (May), European law blog, available at: https://europeanlawblog.eu/2019/05/31/autonomy-and-opinion-1-17-a-matter-of-coherence/ (last accessed: August 2019).

[130] Opinion of the Court of 18 December 2014, (Opinion 2/13), ECLI:EU:C:2014:2454, paras. 215–235.

to interfere with the division of powers between the EU and its Member states"[131]. This allocation of competences was always of fundamental importance for the independence of the EU, as it maintains the balance that is needed in the EU and which is to remain intact whenever facing a problem related to its autonomy and so the co-respondent mechanism was considered also incompatible with EU law.

2.2.4.1.2. The prior involvement mechanism

Apart from the co-respondent mechanism, which ran afoul of EU treaty law, the prior involvement mechanism was also suggested as a safeguard, but was also ruled to be insufficiently protective of its role.

This mechanism was designed with regard for the autonomy of EU law, which required that the CJEU should have the chance to interpret and rule on an issue of EU law before it reaches the ECtHR, as a preliminary or incidental question. It would work as a way to satisfy *"the requirement that the competences of the EU and the powers of its institutions, notably the Court of Justice, be preserved"* and thus as a guarantee for the uniformity in the interpretation of this new Court. Nevertheless, in the CJEU's view the draft accession agreement still left to the ECtHR the competence to determine *"whether the [CJEU] has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR"*. Moreover, in the CJEU's view, the language in which the draft accession agreement was framed suggested that the prior involvement mechanism could be activated only for the purpose of reviewing the validity of an EU act and not also in order to empower the CJEU to rule on the interpretation of an EU act.

The problem was arising with the indirect actions brought to the national courts before the CJEU had the opportunity to get informed and give its prior ruling. Presidents Costa and Skouris in a Joint Communication tried offering a solution to this problem suggesting that, as part of the Accession agreement, an internal procedure for indirect actions should be introduced, so that the CJEU should have a chance to make a ruling in such cases. This innovative idea was finally adopted by the draft accession agreement (Art. 3 para. 6).

Nevertheless, in the end, the CJEU did not agree with the terms of the draft agreement, because, first, it did not reserve to the CJEU only (as it did not exclude the ECtHR) the power to rule on whether the CJEU had already dealt with an issue, and, second, it did not permit the CJEU to rule

[131] Opinion of the Court of 18 December 2014, (Opinion 2/13), ECLI:EU:C:2014:2454, para. 224-225.

on the interpretation, but only on the validity, of EU law[132]. Once again, however, the Advocate General Kokott determined that adequate safeguards could be put in place to avoid this problem[133].

2.3. The consequences of the incompatibility of the dispute resolution clauses included in international agreements concluded by the EU with third states

It can be derived from the Advisory Opinions of the CJEU that the autonomy of the EU legal order cannot be compromised with the situation where an external court or tribunal is given the power to interpret EU law with a binding effect for the EU and its institutions, including the CJEU or has the potential to intervene and influence the allocation of powers between the EU and its Member States. Firstly, the preservation of the autonomy of the EU legal order requires that the *"essential characteristics"* of the EU and its institutions as established in the Treaties remain unaltered. Second, it requires that the decisions of the external international court or tribunal will *"not have a binding effect"* for the EU and its institutions, in the exercise of their international powers, to a particular interpretation of the rules of EU law[134]. The CJEU is alerted for situations like these where its exclusive jurisdiction as established by Art. 344 is in danger in order for the autonomy of the EU legal order to stay preserved.

This has resulted up to now to an "isolated" EU when it comes to its position in the international world, as it has appeared as almost impossible for it to participate in international organisations when they establish or propose an external to the EU judicial body. Many have expressed their disappointment for this stance of the CJEU and have accused it for judicial activism. Especially the "veto" it presents in the case of the accession of the EU to the ECHR raises doubts for the system of protection of human rights in the EU and what could in the end change in order for these draft agreements to "pass the compatibility test" of the CJEU. Moreover, the rejection of the proposed safeguard mechanisms of prior involvement or the co-respondent mechanism makes things even more suspicious for some academics about the final motives of the CJEU in relation to this accession.

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[132] Opinion of the Court (Full Court) of 18 December 2014, *Opinion 2/13* (ECHR accession), ECLI:EU:C:2014:2454 paras. 242–247.

[133] Douglas-Scott, S., (2014) "*Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice"*, *VerfassungsBlog*, (24 December), available at: https://verfassungsblog.de/opinion-213-euaccession-echr-christmas-bombshell-european-court-justice-2/. (last accessed: September 2019).

[134] Opinion of the Court of 14 December 1991, (*Opinion 1/91*), ECLI:EU:C:1991:490, paras. 61-65, Opinion of the Court of 10 April 1992, (Opinion 1/92), ECLI:EU:C:1992:189, paras. 32 and 41, Opinion of the Court of 18 April 2002 (*Opinion 1/00*), ECLI:EU:C:2002:231, paras. 12-13, Opinion of the Court of 8 March 2011, (*Opinion 1/09*), ECLI:EU:C:2011:123, paras. 74-76.

For many years the attitude of the CJEU was creating questions marks to the drafters of the international agreements. It seems that on the basis of these Opinions, an external court or tribunal is only possible in a significantly modified, *"communitarized"* form, which means that it has to be fully "integrated" into the EU legal order and its special characteristics and mechanisms. In any case what needs to be guaranteed is that the CJEU remains in control of the interpretation and application of EU law.

In Part 2 of this thesis, it appears that finally the EU is ready to be "exposed" to the international legal order and specifically to an external judicial body. This Opinion comes as a surprise and is met with enthusiasm by some, but of course with criticism by others.

Conclusions of Part 1

As illustrated in the above presented case-law, the CJEU was defensive of its constitutional role by insisting that the dispute resolution clauses, included in the international or the BITs presented were incompatible with EU law and specifically with the principle of autonomy of the EU legal order. Even though it acknowledged that the conclusion of agreements between Member States or international agreements is something that the EU and its Member States are free to do, at the same time it limited this possibility due to the *sui generis* nature of the EU legal order. The special principle, which is in danger with the establishment of an external court or tribunal, which can issue binding rulings and interpretations of EU law is the autonomy principle. The preservation of this principle requires, first, that the essential character of the powers of the Union and its institutions as conceived in the Treaties remain unaltered. Second, it requires that the decisions of the external international court or tribunal will not have the effect of binding the EU and its institutions, in the exercise of their international powers, to a particular interpretation of the rules of EU law. All the mentioned opinions found the envisaged agreements not to be in line with EU law, especially since they were in violation of the exclusive jurisdiction of the CJEU, as is presented in Art. 344 TFEU.

From the field of intra- EU BIT's, the landmark case of the CJEU is the *Achmea* of 2017. It has to be emphasised that the *Achmea* analysis must be read as applying specifically to intra-EU agreements concluded between EU Member States, which are bound by the principle of mutual trust and sincere cooperation. This is a principle specific to EU and has no application in relations between the European Union, on one hand, and a third State, on the other. The CJEU's insistence on the intra-EU aspect and the principle of mutual trust could be read as signalling that it shares the position of the Commission that the *Achmea* analysis applies also to the Energy Charter Treaty with respect to cross-EU investments, given that that treaty still applies between EU Member States.

With the first clear manifestation of this defensive stance found in the ECJ's Advisory Opinion on the *European Economic Area (EEA) Agreement*, the ECJ considerably limited its position that the Community's treaty-making power in the field of an enlarged free trade agreement meant also the power to agree on binding dispute settlement by holding that such a dispute settlement institution would be prevented from ruling on issues concerning the allocation of competences between the EU and its Member States which fell under its own exclusive jurisdiction. The Court's Opinion on the establishment of a European Common Aviation Area (ECAA) reaffirmed this by again

highlighting the need for an autonomous EU legal order, which would prevent an international dispute settlement mechanism from giving binding interpretations of EU law.

More recently, in its Opinion on the *European and Community Patents Court* the Court of Justice revisited its defensive approach towards "foreign judges" who might rule on EU law. The CJEU worried about this court, which would have had exclusive jurisdiction to decide patent cases that such a system would deprive it of the possibility to make preliminary rulings on requests from Member State courts and would thus threaten the uniform interpretation and application of EU law guaranteed by the CJEU. This shows that the CJEU appears to give an important weight to its own role as the guardian of the interpretation of EU law whether in direct actions or indirectly through the national courts and the system of preliminary references.

The objections of the CJEU for the *Accession Agreement* were also focused in Opinion 2/13 on the CJEU's exclusive jurisdiction and the protection of the autonomy. Even though some EU institutions[135], and several academics[136], have re-affirmed their commitment towards completing the accession process, probably through the drafting of a new accession agreement, it seems plausible to claim that the doors for EU accession to the ECHR are closed, at least for the foreseeable future[137]. For some this relationship between the CJEU and the ECHR may have added value to the way fundamental rights are to be protected in Europe, even if the formal accession never succeeded, but this is another crucial issue not to be examined in this thesis.

The main questions, which are arising after this analysis are to be answered to an extent in the second Part, but can be summarised now as follows: should the principle of autonomy enable the Union's institutions to guard zealously their powers by restricting their interactions with other international bodies? Or should it be interpreted on the basis of the pragmatic understanding of the position of the EU legal order as a part of a dynamic, not isolated and constantly evolving international legal environment?[138]

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[135] See the Vice-President of the European Commission Frans Timmermans, Speech at the State of the Union Conference, European University Institute, 8 May 2015 (stating that even after Opinion 2/13 the Commission is committed to accession).

[136] See Krenn, C., (2015), *"Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13"* 16 German Law Journal, 147 as well as Besselink, L., (2014), *"Acceding to the ECHR Notwithstanding the Court of Justice Opinion 2/13"*, available at: http://www.verfassungsblog.de/en/acceding-echr-notwithstandingcourt-justice-opinion-213/#.Vk5NitrSRs (last accessed: August 2019).

[137] See Fabbrini, F. and Larik, J. (2016) *"The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights"*, pp. 1–35. (doi: 10.1093/yel/yew002).

[138] Koutrakos, P., (2018), *"What is the principle of autonomy really about"*, European law review, ISSN 03075400, Nº 1, pp. 1-2, available at: https://dialnet.unirioja.es/servlet/articulo?codigo=6352539 (last accessed: September 2019).

PART 2

The Investment Court System (ICS), included in international investment agreements and the successful compatibility test with EU law

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Introduction

In this Part (2), I will examine the relationship between dispute resolution clauses, included in the so-called "new generation" of investment protection international agreements, concluded between the EU and third States, ("*extra-EU*") with EU law. Specifically, the analysis will begin by highlighting the necessity of these agreements and their dispute resolution chapters according to the principle of reciprocity, which governs them. This principle characterises the relationships of the EU with third parties, in contrast to the principle of mutual trust, which is found to be governing the EU Member States relationships. It is important to start by clarifying the importance of the ICS Chapter and then continuing with the principle of autonomy and the analysis of the differentiated attitude of the CJEU. Because of both the different nature of this type of agreements, based on the principle of reciprocity and because of the specific safeguards included in these agreements, the CJEU started to move towards a more "open-minded" approach when it comes to the questions of compatibility of their dispute resolution clauses with EU law. This examination method is based to an extent to the method the AG Bot followed in his Opinion on the ICS Chapter. It has to be understood from the beginning that international agreements concluded by the EU form an integral part of the EU legal order[139]. In principle, an international agreement with its own DSM is not incompatible with EU law, but it is only ruled as such when it is found that there is an adverse effect to the autonomy of the EU legal order[140], as illustrated in the case-law of the first part of this thesis. There are, however, some safeguards that can be included, which can potentially "save" the agreement and its DSM from the strictly negative ruling of the CJEU in terms of compatibility with EU law.

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[139] See Gáspár-Szilágyi, S., (2019)*"AG Bot in Opinion 1/17. The autonomy of the EU legal order v. the reasons why the CETA ICS might be needed"*, (February 6) European Law Blog, available at: https://europeanlawblog.eu/2019/02/06/ag-bot-in-opinion-1-17-the-autonomy-of-the-eu-legal-order-v-the-reasonswhy-the-ceta-ics-might-be-needed/ (last accessed: September 2019)

[140] Opinion of the Court of 8 March 2011 (Opinion 1/09), ECLI:EU:C:2011:123, paras. 74-76.

Most of the recent free trade agreements ("*FTAs*")[141] concluded by the EU [including the one with Canada (CETA), Singapore (the EUSFTA) and Vietnam (the EUVFTA)], except for the provisions about lowering custom tariffs and other trade barriers between the EU and third countries, all provide for a similar Investment Court System ("ICS"), where investor disputes may be submitted to a permanent and institutionalised court. The members of these courts are subject to strict requirements of independence and impartiality and are appointed in advance by the Statesparties to the agreement. Moreover, their decisions in case of an appeal are subject to an appellate body[142]. The other several procedural innovations that the ICS model offers are significant. They are mostly based on the procedures governing the WTO dispute resolution system and they are significantly different from the former ISDS mechanism, which is used for resolving disputes under already existing investment agreements.

Again, like in the first part, the concerns about the relationship between this system and the rules of the EU legal order will be particularly focused on the potential adverse effects to the principle of autonomy, as it is illustrated by Art. 19 para. 1 TEU and Art. 344 TFEU according to which the interpretation and application of EU law falls under the exclusive jurisdiction of the CJEU. Of course, not to be forgotten is Art. 267 TFEU and the preliminary reference procedure, which is another important guarantee of the uniform interpretation and application of EU law and safeguards the role of the national courts. Moreover, another aspect of the same principle should be safeguarded and this is the division of competences between the EU and its Member States. As is clearly derived from these provisions, any FTA between the EU and third countries shall ensure that investor-State tribunals respect EU law, as interpreted and applied by the CJEU (and not by the tribunals on their own.)[143].

The main Opinion, which stands already for a landmark of when the Court differentiated his up to now approach to these questions is the very recent Opinion 1/17[144] on the compatibility of the

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[141] Since the transfer of foreign direct investment powers from the European Union member states to the European Union itself in the 2009 Treaty of Lisbon, the European Commission, the main external trade actor for the European Union, has started to negotiate international investment agreements as well as investment chapters in enlarged free trade agreements (FTAs). Other examples of Free Trade Agreements: EU-Singapore, EU-Mercosur, EU-Vietnam.

[142] See Croissant, G., (2019), *Opinion 1/17 – "The CJEU Confirms that CETA's Investment Court System is Compatible with EU Law"*, (April 30), Kluwer Arbitration Blog, available at: http://arbitrationblog.kluwerarbitration.com/2019/04/30/opinion-117-the-cjeu-confirms-that-cetas-investment-courtsystem-is-compatible-with-eu-law/ (last accessed: August 2019).

[143] See Dimopoulos, A., (2012), "*The Compatibility of Future EU Investment Agreements with EU Law"*, 39 Legal Issues of Economic Integration, 447, 470.

[144] Opinion of the Court of 30 April 2019 (*Opinion 1/17), Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA) — Investor-State Dispute Settlement (ISDS)*, ECLI:EU:C:2019:341

Investment Court System (ICS), envisaged in the CETA Agreement [145] with EU law and particularly with the autonomy of the EU legal order and fundamental rights (the other two aspects/rights that were examined by the CJEU were the equal treatment and the effectiveness principles of EU law). It was requested from the Belgian government, submitted on the basis of Art. 218 para. 11 TFEU, in regards to its specific Chapter 8, Section F titled: *"Resolution of investment disputes between investors and States"*. The CJEU, in reality, clarifies with this ruling if the EU can take part in extra-EU investment arbitrations and answers the question of whether the concerns about the principle of autonomy could possibly be compromised with the nature of the ISDS Tribunals.

To the surprise of many academics waiting for this Opinion to be a negative one[146] or those having an opposite opinion[147], the CJEU answered that its arguments, related to the breach of the autonomy principle, in the *Achmea* judgment cannot be transposed to this case, as the former is based on a different reasoning for a number of reasons that have to do with the different character of intra-EU BITs and the extra-EU ones. The point that will also be made is that the ICS of the CETA agreement differs from the Tribunals at issue in the relevant Opinions discussed above in Part 1. In order to recognise and understand these points, the CJEU's thinking has to be examined and analysed in further detail.

Opinion 1/17 is meant to be a very crucial and influential one for future negotiations of international agreements of the EU with third states, which include similar chapters (such as a future EU-UK trade and investment agreement), but also for the European Union's proposal for the establishment of a Multilateral Investment Court (MIC) [148], which builds on the ICS Model and is being negotiated already (since November 2017) in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.

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[145] The agreement is provisionally applied as far as its trade provisions are concerned, but this did not stand in the way of the CJEU's jurisdiction under Art. 218 TFEU.

[146] See for reference Eckes, C., (2018) *"Don't lead with your chin! If Member States continue with the ratification of CETA, they violate European Union Law"*, (March) European Law Blog, available at: http://europeanlawblog.eu/2018/03/13/dont-lead-with-your-chin-if-member-states-continue-with-the-ratification-ofceta-they-violate-european-union-law/ (last accessed: August 2019).

[147] Legal statement on investment protection and investor-state dispute settlement mechanisms in TTIP and CETA (October 2016), available at https://www.tni.org/files/article-downloads/13-10-16-legal-statementen.pdf (last accessed: August 2019).

[148] See Reinisch, A., (2016) *"The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court"*, Centre for International Governance Innovation, Paper No.(2), available at: https://www.cigionline.org/sites/default/files/isa_paper_series_no.2.pdf, (last accessed: August 2019).

Chapter 1

1. The principle of reciprocity and the necessity of the ICS model in international investment agreements

1.1. The principle of reciprocity in international agreements of the EU with third parties

First and foremost, the mere fact that CETA's ICS stands outside the EU judicial system does not, in itself, constitute a breach for the autonomy of the EU legal order. The principle of reciprocity, which governs the international agreements with third parties and the need to maintain the powers of the EU in international relations has led to the conclusion that an international tribunal may have jurisdiction to interpret those agreements without being subject to their interpretation by the domestic courts of the parties to the agreements. The principle of autonomy of EU law would only be breached if the CETA Tribunal could **1.** *interpret and apply EU rules other than the provisions of the CETA and/*or **2.** *issue awards having the effect of the EU institutions from operating in accordance with the EU constitutional framework*[149].

When examining if the CETA's ICS adversely affects the autonomy of the EU legal order, the requirement of reciprocity has to first be taken into consideration according to AG Bot's Opinion[150]. Unlike in the different case of the relationship between Member States, EU-third country relationships are not based on the principle of mutual trust and sincere cooperation, which is the main difference with the nature and the final findings of the *Achmea* case (intra-EU ISDS), which the CJEU really points out with Opinion 1/17. Especially in the field of investments and when economic criteria are of importance for an agreement, the intention that the parties reciprocally maintain a balance between economic pros and cons is vital[151] for the promotion and encouragement of EU investors as well as for the attraction of foreign investments (para 80 of the Opinion of AG Bot for CETA). Thus, the parties must ensure that a neutral international judicial forum with the suitable procedural rules exists to settle the disputes that occur between them,

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[149] See Croissant, G., (2019), *Opinion 1/17 – "The CJEU Confirms that CETA's Investment Court System is Compatible with EU Law"*, (April 30), Kluwer Arbitration Blog, available at: http://arbitrationblog.kluwerarbitration.com/2019/04/30/opinion-117-the-cjeu-confirms-that-cetas-investment-courtsystem-is-compatible-with-eu-law/ (last accessed: August 2019).

[150] Opinion of Advocate General Bot, delivered on 29th of January 2019, *On the compatibility of CETA's ICS with EU law*, ECLI:EU:C:2019:72

[151] Hallström, P. (2000), *"The European Union–From Reciprocity to Loyalty*", Scandinavian Studies in Law, *39*, pp. 79-88, available at: http://www.scandinavianlaw.se/pdf/39-5.pdf (last accessed: August 2019).

because it is not guaranteed that EU investors abroad will benefit from the same local remedies as foreign investors in the EU[152]. This is when the reciprocity argument comes into play.

However, it has to be highlighted that once more the CJEU and AG Bot were criticised. Reciprocity is not supposed to be an internal requirement of EU law that the agreement must meet in order to be ruled as compatible with EU law, but only an external feature of the Agreement and its dispute settlement mechanism. The central idea for AG Bot is finding a balance between, on one hand, the protection of the autonomy of the EU legal order, and, on the other hand, the importance of enabling the European Union to pursue an effective common commercial policy through the negotiation and conclusion of investment agreements that provide for both substantive and judicial protection of investors. On this basis, it is obvious that the intra-EU dimensions of the *Achmea* case are to be distinguished.

Since the basis of the previous opinions were the internal requirements of the EU legal order, it came as a surprise for many that the CJEU this time did not start with an expected analysis of them. This is not with no reason in my opinion. It illustrates the importance of the reciprocity principle, which was not mentioned before, but is the cornerstone of all international agreements that the EU is concluding with third countries. The ISDS is based on this principle for better protection of both of the parties to the agreement. The analysis will continue with the characteristics of the new ISDS system in contrast to the traditional one and will extend to the discussions, which are to be continued, for the Multilateral Investment Court (MIC).

1.2. The new ISDS form included in international investment agreements

The investor-state dispute settlement system is known since the middle of the twentieth century, when the first bilateral investment treaty (BIT) was concluded. This system appears as providing advantages for both the parties to the disputes, namely the investor and the host state. This is because it appears to be more independent and flexible than national courts, as both parties have the opportunity to choose arbitrators and the proceedings are considered to be based in confidentiality[153] and neutral treatment.

In reality, the rules of international investment were invented in Europe. Up to this day, EU Member States are parties to almost half of the total number of international investment agreements, which are currently in force worldwide (specifically to 1400 out of 3000). Almost all

[152] See Opinion of Advocate General Bot, delivered on 29th of January 2019, On the compatibility of CETA's ICS with EU law, ECLI:EU:C:2019:72

[153] Abula, M., *"Investor State Arbitration as Part of EU's Judicial System."*, EU and Comparative Law Issues and Challenges Series, vol. 2, no. 2, 2018, pp. 687-699, accessed via Hein Online.

of these agreements include both investment protection and investor-to-State dispute settlement ("ISDS") (which allows disputes between an investor and a State when the latter is alleged to have breached its commitments under an international investment agreement). They have indeed played an important role in encouraging and protecting the high volume of EU investment abroad and, reciprocally, the investments held by the rest of the third countries in the EU.

The Treaty of Lisbon, in 2009, gave the EU exclusive competence over foreign direct investment[154] as part of its common commercial (and trade) policy, alongside goods, services and trade-related aspects of intellectual property and thus, also the competence to negotiate investment agreements, which contain both substantive protection standards, as well as an enforcement mechanism in case of disputes arising[155]. Of course, this came with a new challenge for the EU, which was the need to ensure that the goal of protecting and encouraging investment does not affect the ability of the EU and its Member States to continue to pursue public policy objectives. A considerable part of this challenge was making sure that any system established for dispute settlement is fair and independent. The EU is already addressing these challenges, through interacting with EU stakeholders and through the process of negotiating for the first generation of EU trade agreements that included investment protection and ISDS[156].

The first two free trade agreements that included investment protection and ISDS, the one with Canada (CETA) and the other one with Singapore (EUSFTA), were noteworthy steps for the EU. In these agreements, many of the reforms that the European Commission has discussed with the European Parliament, Member States, and stakeholders are included. The CJEU published its Opinion 2/15 in May 2017 and held expressively that matters related to foreign direct investment fall within the exclusive competence of the EU, apart from investment protection and investment arbitration, which fall within a shared competence between the EU and its Member States[168]. Concerns have been expressed expectedly with regard to the compatibility of ISDS with the principle of autonomy of the EU legal order and the effects of this external judicial body on the exclusive jurisdiction of the CJEU. Article 344 has to be again reminded as covering these constitutional principles of the EU legal order. The risk of such incompatibility would exist especially if ISDS tribunals were to interpret EU law in a manner that would be binding on the EU institutions. Since ISDS tribunals only interpret and apply the agreement in question and other

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[154] Abula, M., "*Investor State Arbitration as Part of EU's Judicial System."*, EU and Comparative Law Issues and Challenges Series, vol. 2, no. 2, 2018, pp. 687-699, accessed via HeinOnline.

[155] De las Heras, B. P. (2018) *'The European Union in international investment governance: A hybrid approach to dispute settlement'*, Romanian Journal of European Affairs, 18(2), pp. 77–93.

[156] European Commission (2015) *"Concept Paper: Investment in TTIP and Beyond – the Path for Reform"*, pp. 1–12.

[168] Opinion of the Court of 16 May 2017, (Opinion 2/15), ECLI:EU:C:2017:376, para. 305.

rules and principles of international law applicable between the Parties to the agreement and would examine EU law only as a matter of fact and in a non-binding way, it seems that the concerns related to the autonomy of EU law are not well founded.

The European Commission proposed that *"the relevance of the domestic law of each Party of the agreement is clarified by making sure that:*

- *The application of domestic law does not fall under the competence of ISDS tribunals.*
- *Domestic law can be taken into account by ISDS tribunals only as factual matter and*
- *Any interpretations of domestic law made by ISDS tribunals are not binding for the domestic courts. The EU proposal should also clarify that, whenever a question of interpretation of domestic law of a Party arises, the Tribunal must base itself on the relevant case law of the domestic courts of that Party."*[157]

This means that the EU law basically is not something that the other's Party investors have to deal with and thus no interpretation given to it by any other Party or Court can affect the binding interpretations already given by the CJEU and its jurisprudence. The following Chapter will give a broad view on the safeguards for the principle of autonomy, which were incorporated in the ICS in the CETA Agreement.

1.3. From the traditional ISDS system to the new model of the ICS in CETA and other international agreements

Having the goal to achieve a balance between the protection of investments and the protection of the right to regulate[170], the ICS model, enshrined in CETA moves finally towards the perspective of a fairer and more independent system of dispute settlement. CETA is the first agreement, which incorporates the new rules concerning the creation of an investment court and an appellate tribunal mechanism to ensure the consistency and predictability of the ISDS system. The CETA dispute settlement system also includes other revolutionary rules in terms of substance and procedure. This new system approach was also materialised in the EU TTIP Draft[158] and the EU-Vietnam Free Trade Agreement[172]. The structure and main features of the ICS have been analysed in detail by

[157] European Commission (2015*) "Concept Paper: Investment in TTIP and Beyond – the Path for Reform"*, pp. 1–12.
[170] European Commission (2015) "Concept Paper: Investment in TTIP and Beyond – the Path for Reform", *supra* note 49, at 3, 7.
[158] The TTIP contains the first EU negotiating directives which explicitly mentioning an appellate mechanism. [172] European Commission Press Release IP/16/399, CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement (Feb. 29, 2016), http://europa.eu/rapid/press-releaseIP-16-399_en.htm, (last accessed: September 2019).

the Investment Treaty Working Group of the International Arbitration Committee, of the American Bar Association Section on International Law[159].

It appears and was stated that the vision of the European Union was to go beyond the creation of bilateral investment tribunals. Cecilia Malmström, the until very recently EU Commissioner for Trade, has emphasized that,*"[a] multilateral court would be a more efficient use of resources and have more legitimacy."*[160]. As previously mentioned, the final goal in sight is the creation of the Multilateral Investment Court, so that a modern, more efficient, impartial and transparent system is established.

This new generation of post-Lisbon agreements and the proposed ideas raised some questions and doubts, which also led to political debates[161] and clashes. The main reasons for these debates were the belief that the ISDS is an instrument for big corporations to make governments pay when they regulate, that it grants foreign investors greater rights than they are enshrined in national constitutions and that it is not judicially independent, but has a deliberate bias in favour of the investors.

The main question that we have to focus on, in the course of this thesis is the issue of compatibility of the ISDS with the EU Treaties. Apart from questions of competence of the EU to conclude such agreements, which were raised also in Opinion 2/15 about the EU-Singapore FTA, the questions of compatibility of the dispute settlement bodies with EU law seem to be in the spotlight since some time now already. The issue of the dangers for the autonomy of the legal order of the EU, the primacy and the exclusive competence of interpreting and applying EU law[162] has appeared to be a particularly thorny one.

Before we analyse the criteria and the arguments of the CJEU in its Opinion 1/17, it is important to clarify that the ICS in CETA has jurisdiction over potential investment disputes[163] between the EU and its Member States with investors coming from Canada and between Canada and investors that come from the EU Member States. The jurisdiction of the proposed court does not extend to

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[159] Investment Treaty Working Group of the International Arbitration Committee, (2016) *Task Force Report on the Investment Court System Proposal,* A.B.A., Section International Law. 1, 1-4, 15.

[160] Cecilia Malmström, (2015) Commissioner for Trade, Eur. Commission, "Discussion on Investment in TTIP at the Meeting of the International Trade Committee of the European Parliament" (March)

[161] See Reinisch, A., (2016), "*The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court"*, (CIGI, Investor-State Arbitration Series, Paper No. 2, 2016), https://www.cigionline.org/sites/default/files/isa-paper-series-no.2.pdf (explaining that investor-state arbitration has received broad opposition when in reference to TTIP).

[162] López-Rodríguez, A. M., (2017) *'Investor-State Dispute Settlement in the EU: Certainties and Uncertainties.*' Houston Journal of International Law, 40(1), pp. 139–189, available at: http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=128294040&lang=ja&site=ehost-live (last accessed: September 2019).

[163] For the definition of the term investment dispute see Art. 8.1 of the CETA Agreement.

disputes between investors of the Members States with other Member States[178]. As it will be analysed in the following, this means that the principle of mutual trust, which is of course highlighted in the case of *Achmea* does not apply here, simply because CETA does not deal with disputes between EU Member States[179].

1.4. The necessity of international investment agreements and the ICS Chapters

The arguments that the AG Bot presented in favour of the necessity of the ICS in CETA were criticised as being political and not "to the point", with the point being the question of compatibility of the DSM envisaged by CETA with EU law. Whether or not an international DSM is compatible with EU law is a different question than whether or not that DSM is needed[180]. However, in my opinion, it is important to firstly highlight why international investment agreements are needed and then specifically why an ISDS established by an international investment agreement is also needed. This will be done in order to justify to an extent the more "lenient" approach of the court.

After focusing in the field of investment law and its characteristics, it is easily concluded that the protection, which is guaranteed for foreign investors in the EU is not also simultaneously guaranteed for EU investors abroad. With reciprocity being one of the main principles governing the EU external relations, this means that sometimes this unequal treatment can be tackled as a problem. What is important to be highlighted once more is that mutual trust, which governs the relations between EU Member States does not characterise the relations between the EU and a third state and thus a neutral international forum must be included in order to settle the disputes in an equal and transparent way for both the parties[181].

Especially since the drafters of CETA did not give it direct effect, which means that the parties cannot invoke it before their domestic courts, the ISDS mechanism appears as a necessity. Of course the safeguards, amongst which is the exclusion of the direct effect, which will be

[178] See Opinion of AG Bot of 29 January 2019 on the CETA Agreement, paras. 108, 109.

[179] See Opinion of the Court of 30 April 2019, (Opinion 1/17) on the CETA Agreement, ECLI:EU:C:2019:341, para. 129.

[180] See Gáspár-Szilágyi, S., *"AG Bot in Opinion 1/17. The autonomy of the EU legal order v. the reasons why the CETA ICS might be needed"*, (February 6, 2019), European Law Blog, available at: https://europeanlawblog.eu/2019/02/06/ag-bot-in-opinion-1-17-the-autonomy-of-the-eu-legal-order-v-the-reasonswhy-the-ceta-ics-might-be-needed/ (last accessed: September 2019)

[181] See Gáspár-Szilágyi, S., *"AG Bot in Opinion 1/17. The autonomy of the EU legal order v. the reasons why the CETA ICS might be needed"*, (February 6, 2019), European Law Blog, available at: https://europeanlawblog.eu/2019/02/06/ag-bot-in-opinion-1-17-the-autonomy-of-the-eu-legal-order-v-the-reasonswhy-the-ceta-ics-might-be-needed/ (last accessed: September 2019)

included in the ISDS, are of high importance in order for the autonomy principle to be respected and so as not to have the same line of judgment of the CJEU in regards to the compatibility as the one presented in Part 1 of this paper. The main question that the analysis has to focus on is again, for reasons explained in the 1st part of this thesis, whether pursuant to the international agreement at issue, the tribunal may or must interpret EU law. Once more repeated, it is a considerable aspect of the principle of autonomy that the CJEU enjoys exclusive jurisdiction to interpret EU law and to decide on the validity of acts of the EU institutions. Articles 19 TEU and 267 TFEU are once more highlighted by the judge. These constitute the arguments and the reason why, the CJEU has previously ruled that the European Union may not become a party to, for example, the European Court of Human Rights (Opinion 2/13) or the European and Community Patents Court (Opinion 1/09), or that agreements between Member States may be contrary to EU law (for example, Case C-284/16 *Achmea*).

1.5. A look into the future of the ISDS - The establishment of the Multilateral Investment Court *(MIC)*

Since September 2015[164], during talks on the TTIP with the US, the European Commission has put forward a detailed proposal on creating a multilateral investment court system to handle future investment disputes. The proposed mechanism shares a lot of common elements with the arbitration procedure making it for many a *"hybrid settlement procedure"*[165]. Whilst the European Union is insisting on the inclusion of this ICS model in new investment protection agreements, which are being now negotiating, it also advocates the establishment of a Multilateral Investment Court (*MIC*), which builds on the ICS model, in the ongoing negotiations in UNCITRAL Working Group III. These negotiations have officially started since November 2017. The Council, gave, in March 2018, the mandate to the Commission to open negotiations on this court[166]. According to the website of the European Commission, many countries are currently engaged in internal reflections on their policies on investment protection and investment dispute settlement and the Commission is having an explorative look on these.

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[164] European Commission, Concept Paper of 5 May 2015 on "Investment in TTIP and beyond - the Path for Reform", available at: https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (last accessed: August 2019).

[165] See de las Heras, B. P. (2018) *'The European Union in international investment governance: A hybrid approach to dispute settlement',* Romanian Journal of European Affairs, 18(2), pp. 77–93.

[166] Press Release of the Council of the EU, *'Multilateral Investment Court: Council Gives Mandate to the Commission to Open Negotiations'* (March 20, 2018), available at: https://www.consilium.europa.eu/en/press/pressreleases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-opennegotiations/ (last accessed: August 2019).

Having finalised a work plan in early April 2019, specifically with the last meeting of UNCITRAL Working Group III having took place on the 1-5th of April 2019[167], the UNCITRAL Working Group III will now start discussing various models for reform, including the MIC. The envisaged design and way of operation of the MIC is seen in detail in a paper submitted by the EU to its Member States on the 18th of January 2019.

This proposal by the European Commission started off as a response to the, as previously mentioned, negative reactions and growing criticism against traditional ISDS [168] in bilateral investment treaties and investment chapters of free trade and economic agreements. Moreover, the CJEU's Opinion 1/17, while ruling on the compatibility of the envisaged ICS with EU law, it simultaneously gave signs of encouraging the EU to further pursue its agenda of reforming traditional ISDS by establishing a Multilateral Investment Court (MIC). The CJEU, even, expressly included the MIC in stating that *"EU law does not preclude the European Union from agreeing to the establishment of international courts and tribunals, which have no power to interpret or apply provisions of EU law or to make awards that might prevent the EU institutions from operating in accordance with the EU constitutional framework"*[187]. In addition, the CJEU appeared to hint at the possibility that traditional ISDS may not be able to satisfy the requirements, which the EU primary law imposes on the European Union in negotiating and concluding international agreements establishing courts and tribunals. Simultaneously, the CJEU's detailed assessment of specific provisions in CETA suggests that the absence of similar provisions in any agreement establishing a MIC or otherwise reforming ISDS might result in obstacles for the European Union to become a party to such an agreement. In other words, Opinion 1/17 appears to push to some extent the European Union into negotiating in that forum. Nevertheless, it has been supported that at the same time, Opinion 1/17 appears to tie to some extent the hands of the EU in negotiating in that forum, as it suggests that the absence of this type of provision in an international agreement, which establishes a MIC or reforming ISDS might be an obstacle for the EU to become a party to it.

Even though this envisaged forum shares several elements with the current ISDS system, it is supposed to offer a remedy to the perceived defects of the ISDS system and specifically to appear

[167] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019), available at: https://uncitral.un.org/sites/uncitral.un.org/files/acn9_970_as_sub_1.pdf (last accessed: August 2019).

[168] See also: European Commission, 'The Multilateral Investment Court Project' (10 October 2018), available at; http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 (last accessed: August 2019). [187] Opinion of the Court of 30 April 2019, (Opinion 1/17), ECLI:EU:C:2019:341, para. 118.

as more legitimate, transparent[169] , fair and coherent when addressing its limitations. The fears for inconsistent decisions would be mitigated with the creation of this permanent body with wider jurisdiction on investment disputes, especially when combined with the proposed appeal tribunal. The permanent nature of this court system, contrasting with the "ad hoc" appointment in the arbitral system, brings it closer in line with the functioning of judicial organs. However, the fact that these bodies will make "awards", which will be enforceable under the rules of the arbitration norms of United Nations Commission on International Trade Law (UNCITRAL) or any other rules agreed by the disputing parties indicates that the proposed system is characterised as being still essentially arbitral[170]. In the attached Appendix, the main differences between the traditional ISDS and the MIC are illustrated in further detail.

Finally, the mentioned Appeal Tribunal of the MIC is seen by some[171] to be inspired by the WTO Appellate Body. In practice, the multilateral investment court is intended to be for investment dispute settlement what the WTO is for trade dispute settlement, thus adding to a multilateral rules-based system.

[169] The criticism of the ISDS system is explained: See Bronckers, M., "*Is Investor–State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements",* 18 Journal of International Economic Law 655 (2015).

[170] See De las Heras, B. P. (2018) *'The European Union in international investment governance: A hybrid approach to dispute settlement',* Romanian Journal of European Affairs, 18(2), pp. 77–93.

[171] These represent opinions of the Counsels in ICSID cases: Anna De Luca and Giorgio Sacerdoti.

Chapter 2

2. The dangers for the autonomy principle and the proposed safeguards in CETA

2.1. The main characteristics of the ICS Chapter of the CETA Agreement - Article 8.31

On the 30th of April 2019, the judge in Opinion 1/17, following the same line as the AG Bot in his Opinion (29 January 2019), clearly deferred from his previous settled approach and the standard criteria he was using to check the compatibility of the dispute resolution clauses with EU law because of the special characteristics of this agreement. He was then accused by some as being incoherent and as departing from the long tradition he had established with the previously analysed Opinions seen in Part 1 of this study. On the other hand, there were given justifications about this different mind-set that the CJEU and the AG both "dared" to present.

The main constitutional characteristics of the EU legal order and mainly the principle of autonomy and the exclusive jurisdiction of the CJEU is for one more time in the spotlight, but more "discreetly" this time. This means that the respect of the jurisprudence of the CJEU in order to guarantee the uniform interpretation and application are again amongst the concerns of the CJEU when ruling on the compatibility of the dispute settlement mechanism suggested in CETA.

The main innovations of the CETA agreement, which is one of the reason that makes the CJEU's position differentiated are the following highlighted provisions of ***Article 8.31*** of the agreement:

> ***1.*** *When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.*
>
> ***2.*** *The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party* ***as a matter of fact.*** *In doing so, the Tribunal shall follow the prevailing*

interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.

3. *Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), 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 a Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.*

This Article contains four main autonomy safeguards:

In para. 1 of the Article, the applicable law of the agreement is stated to be the international law and not the EU law as the domestic law of one of the Parties. When checking the compatibility, it is important to check the clause of the respective agreement, which states the law to be applicable in case of a dispute arising between the parties. Thus, the CETA Tribunal is prohibited from judging the legality of a measure according to the domestic law of the Parties. Not all agreements include such clauses. In the case of CETA, the clause is not interfering with the autonomy of the EU legal order, like in the case of the *Achmea,* where it was stated that the arbitral Tribunal would consider the applicable law of the disputing Party without any safeguard for this principle. In regards to para. 2 of the article, it seems that by stating that domestic laws are to be treated according to the established international law principle as "matters of fact", Article 8.31 of CETA is interpreted by the CJEU as avoiding any clash with the autonomy of the EU legal order and thus as being compatible with EU law and at the same time respectful of the exclusive jurisdiction of the CJEU. Nevertheless, what is furthermore needed is the clarification of what is the difference when addressing law as matter of fact than when addressing it as a set of norms. Another important statement in this paragraph is that any given interpretation on domestic law will not be binding for the courts (CJEU and the national courts of the Member States in our case) and the authorities of that party.

Finally, in para. 3, another important safeguard for the autonomy of EU law is included. This safeguard was also appointed in the 2015 TTIP Proposal and the FTA between EU and Vietnam. It is the provision that the Parties to the Agreement through the Committees established therein may adopt decisions interpreting provisions on investment protection and dispute resolution when

serious concerns arise regarding the interpretation of these provisions. The decisions of the courts of the Parties will be binding for the investment tribunals, so that conflicts with the EU legal order are in this way significantly avoided.

2.2. Included guarantees in CETA's ICS - The arguments presented in CJEU's Opinion 1/17

The autonomy of the EU legal order and the exclusive jurisdiction of the CJEU to interpret and apply EU law and to safeguard the judicial dialogue between the national courts and the CJEU, appears to be sufficiently protected with the ICS in CETA[172]. The competence of the ICS will be limited to protecting the investor rights from possible violations under the Agreement with the exclusion of rulings on any violations of EU law.

According to the Advocate General Y. Bot, CETA offers "*sufficient guarantees to safeguard, first the role of the* [CJEU] *as the ultimate interpreter of EU law and, second, the cooperation mechanism between the national courts and tribunals and the* [CJEU], *which takes the form of the preliminary ruling procedure*" (para. 116 of the Opinion of AG Bot). At the same time according to the CJEU, the jurisdiction of the ICS to interpret and apply international agreements *"does not take precedence over either the jurisdiction of the courts and tribunals of the non-Member States with which those agreements were concluded or that of the international courts or tribunals that are established by such agreements"* (para. 116 of CJEU's Opinion 1/17).

Those guarantees are summarised and listed as follows[173] (paras. are taken from CJEU's Opinion 1/17):

- The ICS's jurisdiction is limited to disputes regarding a breach of non-discriminatory treatment obligations and investment protection obligations (para. 120).
- In resolving disputes, the ICS may *apply* CETA and other rules (VLCT) and principles of international law applicable between the European Union and Canada, but not EU law (paras 110, 121, 122), unlike the case in, for example Opinion 1/09 or C-284/16 in Achmea. (EU law is not the applicable law of CETA.)

[172] Also the November 2015 TTIP Proposal tries to avoid this challenge by including mechanisms to keep EU law and investment law separated.

[173] As summarised by the report on CETA of the law firm Van Bael and Bellis, *"Opinion 1/17 on CETA: Advocate General Bot finds that the investment court system in CETA is compatible with EU law"*, available at: https://www.vbb.com/insights/opinion-117-on-ceta-advocate-general-bot-finds-that-the-investment-court-system-inceta-is-compatible-with-EU-law (last accessed: September 2019).

- The ICS may only rule on whether acts of either party comply with CETA with a view to granting compensation to investors. It has no jurisdiction to decide on the legality of a measure adopted by a Member State or by the European Union, alleged to constitute a breach of the CETA Agreement or to annul such acts (paras 123-126). Nor can it rule on the reciprocal relations between the European Union and its Member States, between the Member States themselves or between an investor of one Member State and the other Member States (para 160).
- Before the ICS, EU law and the domestic law of the Member States (which includes again EU law as the domestic law of the EU) will be considered as a question of fact, notably in the context of assessing whether a particular measure is justified by legitimate objectives in the public interest. The ICS must take EU law as it already applied and follow any prevailing CJEU interpretations of it. Furthermore, CETA offers the necessary safeguards in order to ensure that the ICS will interpret EU law as less frequently as possible (paras 128-136, 148-152, 154).
- In the event that the ICS would need to interpret EU law in the absence of guidance from the CJEU in order to decide a particular dispute before it, that interpretation would, in any event, not be binding for the EU institutions (including the CJEU) (paras 137-143).
- The ICS does not prevent foreign investors from using judicial remedies available under domestic law. Although national courts of the Member States may not directly apply CETA, they remain an available alternative forum for judicial protection and their role in making requests for a preliminary ruling from the CJEU (Art. 267 TFEU) remains intact (paras 168-172).
- Finally, the lack of the institutional linkage between the Tribunals of CETA and the CJEU offers an independence much needed for the first. Specifically, there are no personal links between the judges of the CJEU and the judges of the CETA Tribunals [174]. This independence of the Members of the Tribunals of CETA is ensured by Article 8.30 (4) of CETA (and also 8.28(4)), which states that they will be only removed because of a breach of ethics within the meaning of paragraph 1 thereof[175].

In the following, the guarantees will be further analysed.

[174] For the selection of the Members of the Tribunal and the Appellate Tribunal, see Art. 8.27 and Art. 8.28 para. 3 and para. 4 CETA.

[175] Riffel, C. (2019) '*The CETA Opinion of the European Court of Justice and its Implications — Not that Selfish After All'*, 655, pp. 1–19. (doi: 10.1093/jiel/jgz021).

2.2.1. The applicable law of the CETA Agreement - *"EU law as a matter of fact"* (Article 8.31 of the CETA Agreement)

The answer to the question of the compatibility and of whether the ICS is bound to adversely affect the autonomy of the EU legal order can be once again transformed into the question of whether the Tribunal, pursuant to the international agreement in question, *may or must interpret and apply EU law*. It has to be reminded that in Part 1, this constituted the first step of the examination of the CJEU. The fears about potential misinterpretation and the concerns about the uniform application of EU law seem to disappear when reading the previously highlighted Article 8.31 of the CETA Agreement, where it is ensured that:

The ICS in CETA does not have jurisdiction over binding interpretation and application of EU law. As mentioned above, EU law will only be examined as a "matter of fact" and the applicable law of the Agreement is international law (VCLT). This constitutes for many academics the crucial basis of the argument against allegations of breaching the rules of EU law and the principle of autonomy of the EU legal order.

The conclusion that is quickly drawn from this is that the ICS will also not have jurisdiction to *decide on the legality of a measure, alleged to constitute a breach of the agreement under the domestic law of the Parties to this agreement***.** This is a substantial difference from agreements, that the CJEU had previously considered as incompatible with EU law. These other agreements were "dangerously" giving an international court the power to interpret EU law and thus the potential power to misinterpret it.

The CJEU in its Opinion (1/17), in para. 116, explicitly recognised that its jurisdiction to interpret and apply international agreements (which form part of EU law) *"does not take precedence over either the jurisdiction of the courts and tribunals of the non-Member States with which those agreements were concluded or that of the international courts or tribunals that are established by such agreements*". Moreover, what is the main new element about this agreement is that it is clearly stated that the ICS will never interpret EU law, as the CJEU states with its Opinion (1/17) in paragraph 131, that EU law will only be taken as *"a matter of fact"*.

This means that the power of interpretation of the Tribunals of CETA appears to be limited to the provisions of the international agreement. This argument leads the Court to its statement that the examination undertaken by the CETA Tribunal *"cannot be classified as equivalent to an interpretation"* (para. 131 of Opinion 1/17). Article 8.31 para. 1 of the CETA Agreement clarifies

what the applicable law of the Agreement is*: "the Tribunal [...] shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties."* In this way, art. 8.31 para. 2 obliges the ICS to follow the CJEU's prevailing interpretation (always as a matter of fact), thus respecting the *acquis* and not having in any case the power to interpret or apply EU law, unlike the case in, for example, *Opinion 1/09* or the Case C-284/16 of *Achmea*. As previously mentioned, the Patents Court (Opinion 1/09) proposed in this case was rejected by the CJEU because it would have been *"called upon to interpret and apply [...] the future regulation on the Community patent and other instruments of European Union law"*[176].

Moreover, regarding the envisaged CETA Appellate Tribunal, part of its mandate concerns *"manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law"*[177]. This refers, *inter alia*, to the previously mentioned third sentence of Article 8.31(2) CETA according to which *"the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party"*. Not doing so, constitutes a manifest error of the Tribunal in the appreciation of the facts. Pursuant to Article 8.28(2)(a) of CETA, the *"Appellate Tribunal may uphold, modify or reverse the Tribunal's award based on errors in the application or interpretation of applicable law"*. The CJEU drew as a conclusion from the reference to the applicable law that *"it was in no way the intention of the Parties to confer on the Appellate Tribunal jurisdiction to interpret domestic law."*[178]

Nevertheless, issues might arise, when no prevailing interpretation of the CJEU for an act of EU law exists. Article 267 TFEU then, can also become relevant. According to the example given by Christian Riffel[179] , when an EU Directive, implemented by the Member States, is challenged by a foreign investor as violating international investment protection standards, the CJEU will not have the opportunity to rule on the proper interpretation of it. If the investment court[180] could request a preliminary ruling[181] on the directive from the CJEU, then the interpretation of the CJEU would have been binding for the national courts[182].

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[176] See Opinion of the Court of 8 March 2011 (Opinion 1/09) (as listed above), ECLI:EU:C:2011:123, para 78.

[177] See Art. 8.28(2) (b) CETA.

[178] See Opinion of the Court of 30 April 2019 (Opinion 1/17), ECLI:EU:C:2019:341, para. 133.

[179] Riffel, C. (2019) *"The CETA Opinion of the European Court of Justice and its Implications — Not that Selfish After All"*, 655(2015), pp. 1–19. doi: 10.1093/jiel/jgz021.

[180] They do not form part of the judicial system of the CJEU since they are not considered "courts or Tribunals of a Member State" within the meaning of Art. 267 TFEU, so they are not eligible to request preliminary rulings before the ECJ.

[181] More on the arguments about the preliminary reference procedure not being needed will be found in the following relevant section.

[182] See Art. 4(3) of the TEU.

Thus, the three steps that were previously mentioned in Chapter 1 in the case of *Achmea* still constitute the concerns of the CJEU here in the case of the ICS in CETA, but the presented rules and guarantees make these concerns vanish for the CJEU. Nevertheless, there were academics that, before the Opinion came out, rushed to state that if this three-step test of *Achmea* was to be applied also for the ICS of CETA, then it would be concluded that the Tribunal is incompatible with EU law[183].

More specifically, in an agreement between the EU and a third State, EU law is not the applicable law, but it is the domestic law of one of the parties (the EU) to the agreement and to the dispute, which means that it is not binding on the third country in question and not directly applicable and interpretable by the ICS. As these agreements are covered by public international law, the principle of supremacy of EU law[184] does not apply here. The tribunal decided that international law had to be applied as a matter of law, while EU law as a "matter of fact", in assessing whether there was a breach of the investment protection, which was given to the parties. Although the CJEU drew extensively on paragraph 2 of Article 8.31 CETA the relationship between EU and international law in CETA, these provisions reflect common practice among international courts, as international courts often take municipal law *"as a matter of fact",* and in determining if a measure breaches international law, they *"follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party".* As the WTO Appellate Body in India – Patents (US) has observed[185]: *"Municipal law may serve as evidence of facts and may provide evidence of state practice. However, municipal law may also constitute evidence of compliance or non-compliance with international obligations."*

Even before that, the Permanent Court of International Justice held in *Certain German Interests in Polish Upper Silesia[186]*: "*From the standpoint of International Law . . ., municipal laws are merely facts . . . The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying*

[183] See Gatti, M., (2019) *"Articles Between International Law and European Union Law Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold ?",* 4(1), pp. 109–121.

[184] Principle of supremacy enables EU law to prevail over treaties concluded between EU member states and so it concerns only EU and EU member states in EU law matters.

[185] See WTO Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, para 65.

[186] Permanent Court of International Justice, *Certain German Interests in Polish Upper Silesia* (*Germany v Poland*) (Merits) (1926) Series A No. 7, at 19.

that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."[187]

On the other hand, in the case of *Achmea*, it was essential to the CJEU's reasoning that the law to be applied, in resolving disputes regarding the Czechoslovakia-Netherlands BIT, included the domestic laws of the Member States which were parties to that agreement as well as the international agreements to which those Member States were parties. As a result, the applicable law included EU law and hence a tribunal might need to interpret and/or apply EU law. For this reason the arbitral tribunal in *Achmea* failed even from the first step of the test. In assessing the compatibility of the international agreements to which the European Union is (or will become) a party with the principle of autonomy of EU law, it is always therefore relevant to first consider whether such agreements provide for a similar clause on the applicable law.

Following the doubts that this Opinion created, questions have been raised as to what exactly it means to apply law "as a matter of fact". The normal way in which courts adjudicate is by applying the law to underlying facts, so it is not totally logical to apply facts to facts. It has been supported that this rule does not make it clear that the Investment Tribunal's interpretation and application of domestic law, including EU law, as a matter of fact, would not influence the final decision, and if reiterated, could not develop into a sort of *de facto* overlapping precedent. In fact, it is not ensured that the Court would follow a different reasoning[188]. This argument will be examined following with the other remaining arguments against the compatibility of the ICS in CETA and against the Opinion 1/17 of the CJEU and the Opinion of the AG Bot.

2.2.2. The potential effect on the allocation of competences between the EU and the Member States

One of the main arguments used in previous cases by the CJEU (see for example Opinion 2/13 on the draft agreement for the accession of the EU to the ECHR[189]) was the danger that the Tribunal would affect the allocation of competences between the Union and its Member States. The context in which international courts and tribunals might be called upon to interpret EU law is connected

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[187] Riffel, C. (2019), *"The CETA Opinion of the European Court of Justice and its Implications — Not that Selfish After All"*, 655(2015), pp. 1–19.

[188] Hepburn, J., (2016) "*CETA's New Domestic Law Clause", EJIL*: TALK! (March), available at: http://www.ejiltalk.org/cetas-new-domestic-law-clause/ (last accessed: September 2019).

[189] See Van Bael and Bellis law firm report on CETA, (2019) 'CJEU rules that CETA ISDS mechanism is compatible with EU law', 32(May), pp. 1–11, available at: https://www.vbb.com/media/Insights_Articles/VBB_Client_Alert_CJEU_rules_that_CETA_ISDS_mechanism_is_compatible_with_EU_law_07.05.2019.pdf (last accessed: August 2019).

with the decision on who is to be the respondent between the EU and/or the Member States. This can especially happen when the agreement is concluded as mixed, both by the EU and its Member States. CETA is a mixed agreement according to the Foreign Affairs Council. This is clearly an EU law matter because the Treaties lay down the vertical allocation of competences. Regarding this, the CJEU has underlined that *Article 8.21* of CETA prevents tribunals from determining whether the European Union or a Member State should be the defendant in a dispute involving a claim made by a Canadian investor. The EU held this determination within its powers, including the CJEU, which enjoys exclusive power to decide on the division of competences between the EU and the Member States, according to *Regulation 912/2014* (para. 132 of Opinion 1/17 and para. 162 of Opinion of the AG Bot). The decision of the CJEU is binding for the ICS in CETA. This provision seems to be adequately protecting the right of the CJEU to determine the allocation of powers[190].

This disruptive effect in the allocation of powers cannot happen in the case of the ICS in the Agreement in question. The distinction between the international and national court systems is apparent more than ever in this case because of the lack of the prior involvement mechanism and of any power of the CETA tribunals to request a preliminary ruling from the CJEU. It is also consistent with the lack of any national court review of an investment body decision[191]. As for the influence of the ICS to the judicial dialogue between national courts and the CJEU, it is made clear that the ICS does not prevent the use of the preliminary reference procedure mechanism of Art. 267 TFEU or the rights of the EU courts to hear cases that concern substantive investor rights enshrined in EU law[192]. Instead, CETA leaves a choice for Canadian investors to use either the route of their domestic courts or the ICS route.

2.2.3. The lack of direct effect of the CETA Agreement

The exclusion of the direct effect in the new generation of international investment agreements that the EU is concluding constitutes for many a policy choice[193] of the Council and the

[190] See Karydis, G., "The CETA Investor-State Dispute Settlement in the light of the Opinion 1/17 of the Court of Justice of the European Union", European Law, Issue 3, 2019, pp. 246 et seqq.

[191] See Peers, S., (2019*), "We aren't the world': the CJEU reconciles EU law with international (investment) law",* EU law Analysis Blog, (May 2, 2019), available at: http://eulawanalysis.blogspot.com/2019/05/we-arent-world-cjeureconciles-eu-law.html (last accessed: August 2019).

[192] See Kübek, G., (2018) *"CETA's Investment Court System and the Autonomy of EU Law: Insights from the Hearing in Opinion 1/17", VerfassungsBlog,* available at: https://verfassungsblog.de/cetas-investment-court-system-and-theautonomy-of-eu-law-insights-from-the-hearing-in-opinion-1-17/, (last accessed: September 2019).

[193] Luca de, A., *"Direct effect of EU's Investment Agreements and the Energy Charter Treaty in the EU"*, (November 15, 2016), Eurojus.it

Commission, in order for them to cleverly avoid the interplay with the distinct legal order of the EU and with the principle of autonomy of it.

This "policy choice" was another argument used by AG Bot, who stated that the ICS under CETA is needed and is not dangerous for the EU legal order, because the contracting parties decided that CETA will not have direct effect (Article 30.6) and individual investors cannot invoke it before domestic courts in order to be compensated. In this way, with the exclusion of the direct effect, the decisions of international courts and tribunals cannot prevent the EU institutions from operating in accordance with the EU institutional framework[194]. The view of AG Bot was that given the lack of direct effect of CETA (para. 62 of his Opinion), the ICS offers judicial protection to investors through a legal system, which is separate, but at the same time, co-existing with the judicial remedies available before the CJEU and the courts and tribunals of the Member States (para. 63 of his Opinion).

2.2.4. The level of protection of a public interest in CETA

The Court definitely adds another layer to the definition of autonomy by ruling that the CETA Tribunal would have no jurisdiction to call into question the level of protection that the EU institutions choose to have about fundamental interests such as public security and public morals. The context within which the Opinion was rendered sheds some light on the emphasis on ensuring the choices of the EU institutions as to how to protect public interest[195].

This discussion starts from Art. 2 and Art. 5 TEU. The conformity with the EU's *"constitutional framework"* and the EU law principles of conferral, subsidiarity and of proportionality, is a must when we talk about dispute settlement mechanisms and systems. Otherwise, the capacity of the Union to operate autonomously within its unique constitutional framework is undermined according to para. 150 of Opinion 1/17. Moreover, the CJEU found that the CETA regime and standards of protection were in line with the protection of state sovereignty and the right of the Member States to regulate. This respect for State sovereignty is an element of all EU negotiated investment agreements. These agreements do not impose legislation or the withdrawal of their

[194] See Opinion of the Court of 30 April 2019, (Opinion 1/17), ECLI:EU:C:2019:341, para. 118.

[195] Koutrakos, P., (2019) *"More on autonomy - Opinion 1/17 (CETA)"*, European law review, Sweet and Maxwell, ISSN 0307-5400, Nº 3, pp. 293-294.

legislation to States, even though they may impose compensations to them. In this way, the States are left free and autonomous when operating[196].

Being a question of sovereignty, the level of protection of a public interest in an international agreement, or in other words the right to regulate economic activity in the public interest (para 155 of Opinion 1/17), is another aspect of the principle of the autonomy of EU law
(see paras 149-151 of Opinion 1/17). The standards *"determined by the Union following a democratic process"* (para. 156) will not be questioned and the CETA Tribunal will not constitute an obstacle for the operation of the EU institutions according to the EU's constitutional framework[197].

In the paragraphs 148, 160 of its Opinion 1/17, the CJEU made clear that the host state will be the one determining the level of protection of a public interest, except for areas of harmonisation with third countries. The right of the CJEU to regulate regarding a public welfare goal is safeguarded in Article 8.9 of CETA and in the Joint Interpretive Instrument (with regard to section D of the Investment Chapter, where it is stated that CETA *"will...not lower the [standards and regulations of each Party] related to food safety, product safety..."* etc.) as well as in the general exception clauses in Article 28.3 of CETA (with regard to section C of the Investment Chapter) [198]. This is highlighted also in Art. 8.10 of CETA, where the cases, which constitute a breach of the *"fair and equitable treatment"* of the covered investments are illustrated. In this regard, the contracting parties have focused mainly in cases of *"abusive treatment"*, *"fundamental breach"*, *"targeted discrimination"* and *"manifestly wrongful grounds"*, which means that the level of protection of the public interest is not to be ruled by the CETA Tribunals. This is an element, which satisfies the CJEU because *"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"*[199].

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[196] Bungenberg, M. and Titi, C., *"CETA Opinion - Setting Conditions for the Future of ISDS", (June 5, 2019), Blog of the European Journal of International Law*, available at: https://www.ejiltalk.org/ceta-opinion-setting-conditions-forthe-future-of-isds/ (last accessed: August 2019).

[197] See Favaretto, C., *"Beyond Selfishness: The Court of Justice in Opinion 1/17 on CETA"*, (June 10, 2019), Diritti Comparati Blog, available at: http://www.dirittocomparati.it/beyond-selfishness-court-justice-opinion-1-17-ceta/ (last accessed: August 2019).

[198] Riffel, C. (2019) '*The CETA Opinion of the European Court of Justice and its Implications — Not that Selfish After All'*, 655(2015), pp. 1–19. (doi: 10.1093/jiel/jgz021).

[199] See Peers, S., (2019*), "We aren't the world': the CJEU reconciles EU law with international (investment) law",* EU law Analysis Blog, (May 2, 2019), available at: http://eulawanalysis.blogspot.com/2019/05/we-arent-world-cjeureconciles-eu-law.html (last accessed: August 2019).

2.2.5. The need for a preliminary ruling procedure or a prior involvement mechanism

Even though, I have referred to the relationship of the ICS with the procedure of the preliminary ruling, I still believe that a separate section needs to be dedicated to the reasons why in the case of CETA, there was no need for a mechanism mimicking the procedure of the preliminary ruling (like the prior involvement mechanism suggested in the draft agreement for the accession of the EU to the ECHR). The main innovation, where we have already focused on, is the provision in CETA clarifying that EU law is to be taken *"as a matter of fact"*. Another safeguarding provision of the CETA agreement is that the ICS is obliged to follow the prevailing interpretation of EU law (once again as a matter of fact), when in need to take into consideration a domestic measure. This leads us safely to the conclusion that since the ICS will not interpret EU law, then there is no need for it to have the ability to ask for a prior interpretation by the CJEU in order for the uniform interpretation to be guaranteed.

A suggested guarantee[200] was again the prior involvement mechanism, which was also seen in Opinion 2/13. In this way the exclusive power of the CJEU to give definitive interpretations of EU law and therefore ensure the uniform interpretation of EU law across the EU (See ECHR Opinion 2/13, paras. 244-248) would be safeguarded and the case, in which the ICS would have to give interpretations of EU law, would be avoided. This time, it could not be an equivalent to the one envisaged in the Draft Accession Agreement to the ECHR. In this context, both primary and secondary law provisions would be subjected to the interpretational jurisdiction of the CJEU before the adoption of a decision by the investment Tribunal. Of course, this mechanism is seen with criticism by many academics. The CJEU accepted that there was no need for a provision in CETA regarding the prior involvement of the Court[201]. Specifically, it was ruled that it does not comply with the nature of the CETA Tribunals[202], because the agreement in question cannot be correlated to the ECHR or the EEA, where the proposal of such a mechanism was justified to an extent[203].

Finally, because of the character of the arbitration proceedings, which are supposed to be fast, it is a logical conclusion that there is no time for an interim consultation of the CJEU. Of course

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[200] Gallo, D. and Fernanda, N. G. (2016) 'The external Dimension of EU Investment Law, Jurisdictional clashes and Transformative Adjudication', *Fordham International Law Journal*, 39(5), pp. 1128. (doi: 10.3868/s050-004-0150003-8).

[201] See Opinion of the Court of 30 April 2019 (Opinion 1/17), ECLI:EU:C:2019:341, paras. 134, 135.

[202] See Opinion of the Court of 30 April 2019 (Opinion 1/17), ECLI:EU:C:2019:341, para. 134 and also Opinion of AG Bot of 29 January 2019 in CETA, para. 179.

[203] See Karydis, G., *"The CETA Investor-State Dispute Settlement in the light of the Opinion 1/17 of the Court of Justice of the European Union"*, European Law, Issue 3, 2019, pp. 246 et seqq.

there are criticisms about this argument, as there are still ICSID proceedings, which can take up to three years[204](!)

2.3. The remaining arguments against the compatibility of the ICS in CETA

Before the Opinion was published, but even after it, many sought to refer to the dangers that the CJEU did not take into consideration when ruling in favour of the CETA Agreement and its ICS Chapter. Some of the most commonly expressed worries and questions in regards to the general system of the ISDS in CETA are the following:

Are the guarantees included in CETA indeed sufficient to guarantee the uniform interpretation of EU law? Who will break up EU law *"as a matter of fact"* from EU law as a matter of law? What happens if there is no prevailing interpretation of the CJEU on a subject occurring in a potential dispute? Is it then possible that the trade/investment Tribunal will not affect EU law, especially when it cannot refer questions to the CJEU or have its decisions judicially reviewed by the courts of the Member States? Is the ruling of the CJEU in the *Achmea* case really completely irrelevant when it comes to the ICS in CETA?

2.3.1. The issue of the non-interpretation of EU law

When it comes to the question on the prevailing interpretation, which appears to be the most common one, the fact that the ICS cannot request, using the mechanism of the preliminary reference of Art. 267 TFEU, an interpretation by the CJEU, means that it is not always guaranteed that there will be a prevailing or any interpretation of EU law at all. This illustrates that although the consideration of the domestic legality of a measure as an incidental question of fact and not of law, may avoid the constitutional obstacle of need for a preliminary intervention of the CJEU. Nevertheless, according to Ana M. Lopez-Rodriguez[205], in practice, it does not eliminate the risk of overlapping interpretations of EU law. As already expressed by the *SPP v. Egypt* tribunal[206], the statement that *"[. . .] municipal law should be treated as a "fact" is not helpful. [When disputing]*

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[204] See de Abreu Duarte, F., (2019), *"Autonomy and Opinion 1/17 - a matter of coherence?"*, European Law Blog, (May 31), available at: http://europeanlawblog.eu/2019/05/31/autonomy-and-opinion-1-17-a-matter-of-coherence/ (last accessed: September 2019).

[205] See Lopez-Rodriguez, A. M., *"Investor-State Dispute Settlement in the Eu: Certainties and Uncertainties.*", (2017) *Houston Journal of International Law*, 40(1), pp. 139–189, available at: http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=128294040&lang=ja&site=ehost-live. (last accessed: September 2019).

[206] ICSID Judgment of 20th May 1992 in Case No. *ARB/84/3*, S. Pac. Props. (Middle East) Ltd. v. Arab Republic of Egypt.

parties are in fundamental disagreement as to what [a provision of domestic law] means [. . .] the Tribunal therefore must interpret [that provision] and determine its legal effect"[207][208].

In any case, regarding the issue of the interpretation by the ICS, it would be impossible that the ICS would not refer even indirectly to the EU law. This is interconnected with the nature of an international court or tribunal established by an international agreement. If this reference was not to be made, then the sole nature of the international dispute resolution mechanism, which has to do with the interpretation and application of the agreement would be canceled. This would also not correspond to the right interpretation of the principle of autonomy of the EU legal order in relation to international law. In contrast, this would mean the isolation of the EU from the international legal order and would not be compatible with the principles, which characterize the external relations of the EU, among them being the principle of reciprocity[209].

As the AG Bot highlighted with his Opinion (para. 137), it is possible that the ICS will in the end occasionally need to interpret EU law *"for example where it is required to define the scope of the conduct complained of"*. This is accepted by the CJEU and by the Member States, because it is possible that the national law will also be subject to the interpretation of the ICS. This potentially risky for the exclusive jurisdiction of the CJEU consequence was not taken into consideration by the Court. It seems that the Court relied in the letter of the law of the Agreement, where no jurisdiction for interpretation and/or application of EU law was given to the ICS (no clause, which stated that the applicable law for the dispute resolution would be EU law). At the hearing of the CJEU, which was held on 26 June 2018, concerning the ICS in CETA, Slovenia expressed these previously mentioned concerns. Specifically, Slovenia argued that Art.

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[207] See Hepburn, J., (2016) "*CETA's New Domestic Law Clause", EJIL*: TALK! (March), available at: www.ejiltalk.org/cetas-new-domestic-law-clause. As cited by: López-Rodríguez, A. M. (2017) 'Investor-State Dispute Settlement in the EU: Certainties and Uncertainties.' *Houston Journal of International Law*, 40(1), pp. 139–

[208] , available at: http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=128294040&lang=ja&site=ehost-live, (last accessed: September 2019).

[209] See Lenaerts, K., *"Les fondements consitutionels de l' Union européenne dans leur rapport avec le droit international*", La Cour de justice de l' Union européenne sous la présidence de Vassilios Skouris (2003-2015): Liber amicorum Vassilios Skouris, Bruylant, Brussels, 2015, pp. 367-385, as cited by Karydis, G., *"The CETA InvestorState Dispute Settlement in the light of the Opinion 1/17 of the Court of Justice of the European Union"*, European Law, Issue 3, 2019, pp. 246 et seqq.

8.31 of CETA provides sufficient safeguards with the phrase *"as a matter of law"*, leaving dangers where the ICS would have to interpret the substance of EU law[210][211].

2.3.2. The consequence of the exclusion of the direct effect

According to Semertzi[229] , the denial of direct effect in the text of the agreement is a more recent phenomenon in EU economic agreements. It is not absolute that this is a development, which will be in the end welcome. This argument, presented in the Opinion of AG Bot was already criticised, not only because direct effect is just a feature of the international agreement and not part of the internal EU requirements that an international DSM must meet, but also because the fact that the Court becomes a separate court, parallel and co-existing to the judicial system of the EU for the not convinced readers might translate as a judicial and political advantage for the foreign investors[212]. It is indeed a fact that the lack of direct effect constitutes an obstacle for an effective system of judicial protection of the rights of individuals[213].

Additionally, specifically the exclusion of the direct effect of the CETA Agreement prevents the domestic courts from the application of the FTAs' provisions in domestic proceedings and also the individuals from invoking them. This leads to the creation of a somewhat parallel jurisdiction to the CJEU's control and it is one of the arguments that the opponents of the ISDS's traditional proceedings in the EU and the United States propose, because it leads to the reinforcement of the external and special treatment that is given to the foreign investors. Slovenia again at the hearing

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[210] See Kübek, G., (2018) *"CETA's Investment Court System and the Autonomy of EU Law: Insights from the Hearing in Opinion 1/17"*, *VerfassungsBlog*, available at: https://verfassungsblog.de/cetas-investment-court-system-and-theautonomy-of-eu-law-insights-from-the-hearing-in-opinion-1-17/, (last accessed: September 2019).

[211] See Semertzi**,** A., (2014) "The preclusion of direct effect in the recently concluded EU free trade agreements" 51 *Common Market Law Review*, Issue 4, pp. 1125–1158.

[212] See López-Rodríguez, A. M. (2017) 'Investor-State Dispute Settlement in the Eu: Certainties and Uncertainties.' *Houston Journal of International Law*, 40(1), pp. 187, available at: http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=128294040&lang=ja&site=ehost-live, (last accessed: September 2019).

[213] See as cited by Gallo, D. and Fernanda, N. G. (2016) 'The external Dimension of EU Investment Law, Jurisdictional clashes and Transformative Adjudication', *Fordham International Law Journal*, 39(5), pp. 1081–1152; Cremona, M., Guest Editorial, *Negotiating the Transatlantic Trade and Investment Partnership (TTIP)*, 31 common Market Law
Review. 354-62 (2015); Bronckers, M., *"Is Investor State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements"*, 18 J. International Economic Law. 655, 662-64, 67476 (2015), Thym, D., *The Missing Link: Direct Effect, CETA/TTIP and Investor-State Dispute Settlement*, EU Law Analysis (Jan. 7, 2015) (observing that the denial of direct effect of a free trade and investment agreement constitutes a "stumbling block" for its long-term success), available at: http://eulawanalysis.blogspot.it/2015/01 /themissing-linkdirect-effect-cetattip.html (last accessed: September 2019).

of the CJEU argued that in this way the CETA Tribunal will be granted exclusive jurisdiction in certain areas.

2.3.3. The distortion of the EU policies regarding the internal market

Another argument against the CETA Agreement's ICS, which is not related to the autonomy principle, is that the duty to pay damages as a remedy for breach in investment claims may hinder the effectiveness of the Commission's enforcement powers and ultimately also lead to the distortion of the proper functioning of the internal market. In addition, the exclusive competence of the CJEU from Art. 268 to hear actions for damages brought under Art. 340 TFEU may be hindered by the obligation to pay damages for breach of the substantive rules on investor protection.

Even though the jurisdiction of the investment Tribunal is limited to the adjudication of a particular dispute that entails the interpretation and application of the specific free trade and investment agreement, there are expressed doubts[214] that this assessment may by its nature have a dangerous impact on EU policies, such as those related to the internal market, competition and trade related issues. Additionally, it appears as possible that the investment tribunals may give different definitions to the words *"investment*" and *"investor"*, than the ones given by EU law which will lead to inconsistencies and misunderstandings of the foreign companies and investors.

2.4. The example of the EUSFTA and its dispute settlement chapter - CJEU Opinion 2/15

The negotiations for the EU-Singapore Free Trade Agreement began in 2010 on the basis of the ASEAN negotiating directives of 2007. The final text of the agreement is not yet ratified, so it is not binding under international law and will only become so after completion by each Party of its internal legal procedures necessary for its entry into force[215]. It is another new generation FTA, which goes beyond tariff liberalisation and which has caused the criticism of the civil society, trade unions and academics.

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[214] See Gallo, D. and Fernanda, N. G. (2016) 'The external Dimension of EU Investment Law, Jurisdictional clashes and Transformative Adjudication', *Fordham International Law Journal*, 39(5), pp. 1081–1152. (doi: 10.3868/s050004-015-0003-8.)

[215] See News Archive on the EU-Singapore Free Trade Agreement in the website of the European Commission, last updated in July 2019: https://trade.ec.europa.eu/doclib/press/index.cfm?id=961 (last accessed: September 2019). [234] CJEU Opinion 2/15, *"Free Trade Agreement between the European Union and the Republic of Singapore"*, ECLI:EU:C:2017:376.

The EUSFTA, after its ratification would become an integral part of EU law according to Art. 216 para. 2 TFEU. It is to be reminded that this gives international agreements a lower hierarchic position than the Treaties but higher than secondary EU law. In this regard, decisions and interpretations of international courts and tribunals would affect secondary EU law to the same extent as the international agreement in question. Nevertheless, such interpretation could not affect the interpretation of primary EU law. For example, a decision by such an international judicial body, which enters the EU legal order at the same level as the agreement, would require a consistent interpretation of secondary EU law, but not of the Treaties.

The Opinion 2/15[234], which was requested for this agreement was focused on the topic of the competence for its conclusion. This long Opinion of 570 paragraphs contains a detailed discussion on the nature of the division of competences between the EU and its Member States and a detailed reasoning on specific aspects of the EUSFTA such as transport services, investment protection, procurement, sustainable development, and dispute settlement.

Leaving the competence issue out of the scope of this paper, the focus will be on Chapter 15 of the Agreement regarding the dispute settlement mechanism, which was not given as much attention by the CJEU[216], as the Commission did not ask the CJEU to resolve this question like it did in the case of the CETA Agreement. The Advocate General[236] even stated that:

"It is also important to bear in mind that the Commission's request does not concern the material compatibility of (any part of) the EUSFTA with the Treaties. Thus, the Court is not asked to consider, for example, the compatibility of an ISDS mechanism with the Treaties. That type of dispute resolution appears not only in the EUSFTA but also in other trade and investment agreements currently negotiated or in the course of negotiation by the European Union. In the present proceedings, the issue as regards the ISDS mechanism (and other forms of dispute resolution for which the EUSFTA provides) is only the question 'who may decide'. My analysis in this Opinion is therefore without prejudice to such issues (if any) as there may be concerning the material compatibility of the EUSFTA, including the provisions regarding the ISDS mechanism, with the Treaties."[217]

[216] See paras. 300-301 of Opinion 2/15, where it is stated that the dispute settlement procedure does not relate to the question whether the provisions of the envisaged agreement are compatible with EU law. [236] See AG Sharpston's Opinion for the Singapore FTA, para. 30 and paras. 290-293.

[217] Opinion of AG Sharpston of 21 December 2016, ECLI:EU:C:2016:992, para. 55.

The Commission's chief CETA negotiator Mauro Pettriccione, in his comments before the European Parliament[218], suggests that *"if the CJEU does not object to ISDS in Opinion 2/15, we can assume that the CJEU considers the mechanism compatible with the Treaties"* (at 12:30:30 of his speech).

The main reason is that the specific DSM of the international agreement is used to settle differences between the parties in regards to the interpretation and application of the agreement. The investment tribunal's core task is to substantively assess the compatibility of legal acts with the broad investment protection standards established under the investment agreement. Art. 9.19 of the EUSFTA provides that an arbitral tribunal, having jurisdiction to rule in investor-State arbitration cases, *"shall apply the Agreement interpreted in accordance with the VCLT and other rules and principles of international law applicable between the Parties".* A similar clause is found in Art. 15.18 of the agreement in question, regarding specifically the settlement of disputes between the EU and Singapore. Thus, investment tribunals do not seem, according to the letter of the agreement, to replace domestic or EU courts in the application of EU law, in contrast to the previously mentioned cases of the European Patent Court (EPC) and the *Achmea* case.

It has to be noted, nevertheless, that it has been supported that in para. 292 of CJEU's Opinion 2/15, we can spot again the problem that was expressed in *Achmea* regarding the "removal" of disputes from the jurisdiction of the courts of the Member States by submitting them to arbitration without the previous consent of the Member States[219]. It is left unknown though why not more attention was given to this statement of the CJEU.

Similarly with the CETA Agreement, the EU-Vietnam FTA includes a clause on the applicable law in Art. 3.42 stating and reassuring that the applicable law of the Tribunal and the Appeal Tribunal will be *"the provisions of Chapter 2 (Investment Protection) and other provisions of this Agreement, as applicable, as well as other rules or principles of international law applicable between the Parties, and take into consideration, as matter of fact, any relevant domestic law of the disputing Party".* Moreover, the safeguard of the exclusion of the direct effect can be also found in this agreement in Art. 17.15 of the Agreement, which is titled "No Direct Effect" and provides that *"…nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law."* This is

[218] Hearing of Mauro Pettriccione in the European Parliament, Commitee on International Trade Meeting, 11 November 2016, available at: https://www.europarl.europa.eu/ep-live/en/committees/video?event=20161110-0900COMMITTEE-INTA, (last accessed: September 2019).

[219] See Schepel, H., (2019) *"A parallel universe: Advocate General Bot in Opinion 1/17"*, European Law Blog, (February 7), available at: https://europeanlawblog.eu/2019/02/07/a-parallel-universe-advocate-general-bot-inopinion-1-17/ (last accessed: September 2019).

confirming the opinion of many of it being a policy choice of the drafters of the new investment treaties in order to "save" the agreements from the negative opinions of the CJEU.

Conclusions of Part 2

With the entry into force of the Lisbon Treaty, came the extension of EU trade powers to foreign direct investment. A direct consequence of this addition was that the EU now needed to be formally involved in the negotiation and conclusion of investment agreements covering foreign direct investment. This triggered the Commission's investment policy and resulted in the inclusion of investment protection chapters in international agreements such as CETA and the EU-Singapore Free Trade Agreement[220]. Moreover, in response to the criticisms on the investor-state dispute mechanisms, these agreements include a new ISDS form, which represents a permanent court system and incorporates many innovative features with all resulting to a better level of investment protection.

[220] See Anskersmit, L., (2017), *"The power to conclude the EU's new generation of FTA's: AG Sharpston in Opinion 2/15"*, European Law Blog, (January 10), available at: https://europeanlawblog.eu/2017/01/10/the-power-toconclude-the-eus-new-generation-of-ftas-ag-sharpston-in-opinion-215/ (last accessed: September 2019).

A point, which is first made by the AG Bot in his Opinion of the 29th of January 2019 on the compatibility of the ICS in CETA with the principle of autonomy, is how important the principle of reciprocity is in international relations and how dangerous it is for the European Union's external relations to be hampered if it cannot agree to be subject to the jurisdiction of an international court. In fact the analysis of AG Bot starts from the principle of reciprocity, which in my opinion, indicates the first reason why this analysis will not continue in the same line of arguments as the previously presented opinions of the CJEU. This situation, namely an international agreement of the EU with a third state, is different than both intra-EU BITs and the participation of the EU in an international organisation, exactly because of the principle of reciprocity. Of course, the safeguards presented in Part 2, Chapter 2 of this thesis play a significant role too. For a long time the CJEU was choosing to keep the EU autonomy and its exclusive jurisdiction behind the fences of international courts, but it is a logical step that the CJEU does not remain defensive or autarchic for some, when the characteristics of the new generation international agreements allow both the EU legal order and the external relations of the EU to
"thrive".

The ISDS in CETA was a very controversial issue, until Opinion 1/17 came out in the end of April 2019 as a surprise. The CJEU had ruled that the Investment Court System in CETA is compatible with the principle of autonomy (among other principles). This Opinion eliminates to a considerable extent doubts as to whether the European Union may finally become a party to international agreements subjecting it to the jurisdiction of an international court regarding the resolution of disputes on the interpretation and application of those agreements. The Opinion in question is accepting the ICS, conditionally, by presenting a number of innovative safeguards, which seem to be the ones that all the new generation free trade agreements will seek in order to gain the positive approach of the CJEU and to avoid the compatibility tests with EU law and specifically with the principle of autonomy of the EU legal order.

The safeguards have been summed up above, but the most important ones seem to be the following key points of the Agreement. First, the CJEU found that tribunals under CETA do not have any power to interpret or apply EU law other than, pursuant to Article 8.31 (1) of CETA, the power to interpret or apply the provisions of the international agreement having regard to the rules and principles of international law applicable between the Parties. EU law is to be interpreted according to the key phrase *"as a matter of fact"*. This appears to be one of the most challenging areas of ISDS mechanisms in these agreements. Since there is no interpretation or application of EU law involved, there is also no need for the preliminary ruling procedure. Furthermore, it is important that those tribunals, according to Article 8.31.2 of CETA, do not have jurisdiction to decide on the

legality of a measure, alleged to constitute a breach of CETA, under the domestic law of a Party to CETA. Both provisions guaranteed that, unlike the case in, for example, Opinion 1/09 (or Case C-284/16 *Achmea*), the (appellate) tribunals under CETA would not have any power to interpret and/or apply EU law (paras. 122 and 133).

Secondly, the CETA and other mentioned recent investment protection agreements negotiated by the European Union present a thoroughly detailed procedural framework with the rules for the operation of the ICS tribunals. Some of the examples of these rules include specific clauses, which refer to the applicable law, the standard of review in assessing domestic law as a fact or the recognition of the right to regulate and the level of protection of the public interest. The procedural framework in which other international courts and tribunals established by an agreement to which the European Union is a party, for example the WTO dispute settlement system, does not appear to be as detailed as the procedural framework of the CETA agreement. In contrast, the means of case-law are used in order to present their position as to, for example, the treatment of domestic law, the definition of the applicable law, the identification of a respondent or the standard of review in assessing the exercise of a party's right to regulate This is a factor, which must and is already taken into account when assessing their compatibility with the autonomy of the EU legal order[221].

Another important aspect, which is to be highlighted is the explicit exclusion of the direct effect of such agreements. With this "strategy", the drafters of the new generation free trade and investment agreements seem to escape the "rejection" of the CJEU. The EU institutions openly took the decision of "no direct effect" with reference to European agreements on trade even before the entry into force of the Lisbon Treaty. The Council's Decision on the signing, on behalf of the European Union, and the provisional application of the Free Trade Agreement between the European Union and its Member States, and the Republic of Korea of 16 September 2010 provided in Article 8 that *"the Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals."*. From my point of view, this feature of CETA is fundamental for the CJEU's Advisory Opinion.

Of course the ruling in Opinion 1/17 refers only exclusively to the ICS included in CETA, leaving doubts on whether the traditional ISDS mechanisms, other than it, are also compatible with the EU legal order. The example of the EU-Singapore Free Trade Agreement (EUSFTA) is a good one, which was left out of the examination of the CJEU on the basis of the compatibility of its ISDS mechanism. Specifically, the fact that the chief CETA negotiator Mauro Pettriccione in a hearing

[221] See Van Bael and Bellis law firm report on CETA, (May 7, 2019), *"CJEU rules that CETA ISDS mechanism is compatible with EU law"*, available at: https://www.vbb.com/media/Insights_Articles/VBB_Client_Alert_CJEU_rules_that_CETA_ISDS_mechanism_is_compatible_with_EU_law_07.05.2019.pdf (last accessed: August 2019).

before the European Parliament stated that since the CJEU did not examine the aspect of the ISDS of this Agreement, leads to the conclusion that the CJEU must be thinking that it is compatible with the EU Treaties. In other case, it would have stopped the proceeding, and have ruled in favour of the incompatibility of the EUSFTA with EU law.

What I also wanted to highlight in this Part of the thesis is that the principle of reciprocity and the need of the ISDS/ICS protection go hand in hand with the analysis on whether the safeguards, suggested in the CETA Agreement are sufficient for the compatibility test of the ICS with the principle of autonomy of EU law.

General Concluding Remarks and Findings

From the present research, I have reached the following conclusions:

The relationship between the CJEU and other courts and Tribunals, established through intra-EU or international agreements that the EU concludes or attempts to conclude has been challenged since the 1990s *(see Opinion of the Court of 14 December 1991, Opinion 1/91)*. Their common crucial characteristic is that they stand outside the EU's judicial system. The principle of autonomy of the EU legal order is the fundamental core principle, which appears as the "stumbling block" for these agreements and their dispute resolution clauses when it comes to their compatibility test. With a long jurisprudence on this principle, the argument could be supported that it is an always transforming principle. At first, it was used to justify internal integration, fostering a growing equilibrium between the EU and its Member States and today, it is used to protect the EU from the potential imbalances caused by the interferences of the international legal order. Therefore, it

seems understandable, why some would ask for more coherence in the jurisprudence of the CJEU and for the same standards applying for BITs and international agreements. But as outlined in this thesis, this constitutes an unfulfillable demand, since these are two different kind of relationships, respectively governed by different principles and rules. In my opinion, it is also impossible to ask for coherence when the EU legal order is always on the way towards new endeavours and challenges towards, on one hand, better integration and on the other hand a better participation in international relations.

In the past years, the CJEU appeared to consider itself, according to the words of many, as the supreme court of the EU. This is a justified characterisation when one thinks of its Opinions on the Patent Court, on the Draft Agreement for the EU accession to the ECHR or even the *Achmea* Judgement. With these rulings, the participation of the EU and its Member States in international dispute settlement, which was placed outside the control of the EU judicial system was seriously questioned. The worries of the CJEU were not vague. They were always concentrated specifically and categorically on the fact that EU law has to always be interpreted and applied in a uniform and coherent way. Thus, the CJEU maintained control on this interpretation and application via its exclusive jurisdiction, as illustrated in Art. 344 TFEU. Of course, the importance of the role of the national courts was never to be ignored. The preliminary ruling procedure and Art. 267 go hand in hand with the role of the CJEU and the reasons for this are made clear.

Many rushed to state that firstly the Achmea and then Opinion 1/17 were surprising rulings of the CJEU. Nevertheless, examining in closer detail the attitude of the Court throughout its jurisprudence, as done in this thesis, then it can be safely concluded that they were not all that surprising. On the one hand, *Achmea*, a case about an intra-EU agreement and its arbitration system shows the danger that this system entails for the exclusive jurisdiction of the CJEU and the principle of autonomy. This is because in an intra-EU agreement, the applicable law of the agreement, but also the law governing the disputes arising from it cannot be other than EU law, according to is applicable law clause. Having a dispute resolution system inside the EU legal system but outside of the jurisdiction of the CJEU and without the possibility to refer questions for interpretation according to the preliminary ruling procedure (Art. 267) is obviously dangerous for the uniform interpretation and application of EU law. It appears that the concept of intra-EU BITs is in any case violating EU law. The next and expected step after this was ruled in the, short in lines, case of *Achmea*, but also after Opinion 1/17, is what indeed happened, namely the campaign towards the termination of the existing intra-EU BITs with similar chapters on arbitration clauses. While the *Achmea* case was criticised because of the non-sufficient analysis of Art. 344, the conclusion was still clear. This can be summarized in one sentence: As long as intraEU BITs

contain applicable law clauses that include the domestic law of the parties, such clauses will need to be amended or else the agreements must be terminated. This is safely believed to be a positive step towards deeper European integration.

On the other hand, Opinion 1/17, was also not surprising. It is understandable that after following the steps of the CJEU in its previous opinions (Opinion 1/91, 1/09, 2/13), which were voicing an isolating, for the EU, attitude, some would necessarily exclude the possibility that the EU becomes a contracting party of an international agreement without this leading to an *''adverse effect to the autonomy of its legal order''*. It should not be ignored in this context that the CJEU has repeatedly stated that it is, in principle, not incompatible with EU law for the EU to conclude international agreements, which create a court responsible for the interpretation of their provisions. It is five years after De Witte described the stance taken by the Court on the autonomy of EU law as "selfish" and the first time after Opinion 1/00, that the Court remarkably changed its attitude. Specifically, in the case of CETA, the principle of reciprocity and the nature of investment protection call for the establishment of such a court system. Especially since this proposed Investment Court System (ICS) interferes as little as possible with the rules of EU law. Despite general existing public criticism towards ISDS, as it being a tool in favour of multinational corporations, the ICS in CETA is needed when taking in consideration the reciprocity principle and the autonomy principle is not violated. Nevertheless, this thesis does not expand on the political arguments for and against the ISDS, as the subject is the compatibility with the autonomy principle.

For some this stance of the CJEU represents a political choice, for others it is the end of its "judicial activism". For the CJEU and its compatibility test with EU law, it just has to do with the "sufficient safeguards". The exclusion of the direct effect, the application of EU law by the ICS *''as a matter of fact''*, the non-binding effect of its decisions for the CJEU and the other EU institutions, the preservation of the level of protection of the public interest are the main safeguards and innovative changes that the drafters of CETA included and that the CJEU and AG Bot highlight with their Opinions.

CETA's "successful" investment dispute settlement mechanism has already set the standards for future agreements to which the EU will be a contracting party. This is already evident in the EU-Singapore and EU-Vietnam Investment Protection Agreements, which are yet to be fully ratified. In the meantime, Opinion 2/15, released on 16 May 2017, clarified that the competence insisting on ISDS provision in EU international agreements was shared, but stated nothing on the compatibility of the ISDS provisions with the EU Treaties. Opinion 1/17 should also provide reassurance that in any potential future trade deal between the EU and the UK, it would be possible to include an ICS to encourage future investment in the UK. Especially since the UK appears to

be reluctant to accept the jurisdiction of the CJEU, this Opinion might give useful hints on how to include a new Treaty dispute resolution mechanism in a future (potential) UK-EU Trade agreement.

It is still too early and not safe to predict whether the reforms of the ISDS, as endorsed by the CJEU in its ruling, will also be met with satisfaction and approval amongst the critics of the system, so that the political opposition, which the ISDS has attracted in the past, will be reduced. It also still remains to be seen whether non-EU States and international organizations will submit to the standards of the CETA Opinion. Already after Opinion 1/17, the future of the CETA Agreement appears not to be an easy one, since the Italian government announced its intention not to ratify it. Nevertheless, significant encouragement has been given to the works of the UNCITRAL Working Group III, dealing with the establishment of the envisaged (European) Multilateral Investment Court (MIC). This EU's latest proposal suggests the future establishment of a multilateral judicial institution, which will replace any other dispute resolution mechanisms provided not only in EU agreements and its Member States' agreements with third countries, but also in trade and investment treaties concluded between any non-EU countries, after they have previously accepted its jurisdiction. The EU seems to aim at increasing its consistency and legitimacy, while at the same time, it seeks to lead the ongoing process of redefining international investment dispute settlement.

Lastly, these negotiations in UNCITRAL Working Group III, will likely need to address whether that same multilateral treaty or a similar one could be used to amend clauses on the applicable law and possibly other provisions in existing BITs.

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Appendix

The following table taken from a factsheet of the European Commission in 2017[222] illustrates the key features and differences between the traditional ISDS with the proposed MIC:

Investor to State Dispute Settlement (ISDS) Vs Multilateral investment court

At present – ISDS		**In the future – multilateral investment court**	
Ad hoc	Tribunals are only set up on a case by case basis	**Permanent**	The court would be a permanent international institution

[222] European Commission, (2017) Factsheet on future negotiations for a multilateral investment court, Recommendation for a Council Decision, (13 September), available at: https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-493-F1-EN-MAIN-PART-1.PDF (last accessed: August 2019).

Risks of Partiality	The disputing parties nominate arbitrators, who could have potential conflicts of interest	**Independent**	States who are members would appoint permanent, fully qualified judges, free of any conflicts of interest or interest in the outcome of cases
Unpredictable	Tribunals often interpret investment protection standards differently, since they are only appointed to hear a particular case	**Predictable**	By sitting permanently and deciding cases over time, judges would deliver consistent decisions
One-stop shop	Parties have very limited grounds on which to appeal against ISDS decisions - essentially if the tribunal has not followed its rules properly (violation of due process)	**Comprehensive**	The court would allow either party to appeal against a decision
Inefficient	ISDS (but also the EU's current approach of including ICS in bilateral EU trade agreements) duplicates the same framework for each deal. It is costly and doesn't cover the large number of treaties	**Cost-effective**	The court would allow for economies of scale, as it could cover disputes arising under the bilateral investment agreements which all members of the multilateral investment court have in place
Opaque	There is currently limited published information about: • the existence of investment disputes • the procedure of the dispute • the substantive aspects of the case • the results of the disputes	**Transparent**	The court would: • publish online details of all aspects of its work, including its decisions • open all hearings to the public • Allow third parties (NGOs, trade unions, consumer groups, business associations) to make submissions

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