The Constitutional Fundamentals of EU Investment Policy

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I. INTRODUCTION

This contribution explores the constitutional fundamentals lying behind European Union (EU) investment policy. It was only after 2009 and the entry into force of the Lisbon Treaty that the EU asserted a proactive role in this field. Its path has not been easy so far, as the EU stepped into a policy area that was dominated by Member States long-established practices and entered into a policy field that was, and still is, subject to fundamental challenges regarding its objectives and content. Yet, in the past couple of years, the EU has managed to assert itself as a powerful and influential global actor, shaping the future of international investment agreements.

The nature of the EU as a distinct constitutional polity from Member States has played a major role in shaping and forming its participation in international investment agreements. EU investment policy is being developed within the confines of EU law principles and values that dictate the shape and content of the EU's and its Member States' involvement in international investment treaties. On the one hand, similar to national constitutional traditions, the EU's constitutional framework on the protection of rights of economic actors and their balancing against other constitutional values has influenced the content of investment protection offered under EU investment agreements. Yet, EU constitutional law has shaped the scope and content of EU investment agreements also in a different and very distinct manner. The nature of the EU as a *sui generis* international organisation has also influenced substantially EU investment agreements.

In this context, this contribution aims to assess the limitations that the *sui generis* nature of EU law poses on EU investment policy. It focuses firstly on the question of EU competence, examining the legal framework concerning the assumption of powers in the field of foreign investment by the EU. A thorough look into EU competences provides an explanation as to what the EU can do in this field. Secondly, this contribution explores the constraints that the principle of autonomy of EU law poses for the conclusion of investment agreements by the EU. It engages into an examination of the effects that the autonomy of EU law has on investor-State dispute settlement (ISDS). Autonomy has different effects on ISDS,

depending on whether the latter is provided for under an international treaty concluded by the EU and its Member States together, as a mixed agreement, or the EU alone, and whether it concerns extra-EU or intra-EU investments. This contribution examines the implications of autonomy for ISDS for extra-EU investments under agreements, such as CETA that have been concluded as mixed agreements. This chapter argues that the principle of autonomy of EU law imposes significant constraints on the EU's ability to include ISDS in its international agreements, as investment tribunals should be precluded from affecting the right of the CJEU to offer authoritative interpretations of EU law and from applying and interpreting investment treaty standards in a manner that conflicts with EU human rights rules or undermines the policy choices made by EU institutions regarding the level of protection of public interests in the EU.

II. THE EVOLUTION OF EU INVESTMENT POLICY

The evolution of EU investment policy in the past eight years has been marked by a number of milestones that have set the framework for its future development. Although foreign investment was not a field entirely strange to the EU, it was only in 2009 when the Lisbon Treaty entered into force and endowed the EU with exclusive competence over foreign direct investment (FDI),[1] that the emergence of an autonomous and comprehensive EU investment policy became a policy priority. This was manifested early on, as EU institutions started debating their vision of the EU's role in foreign investment regulation. Already in 2010 the Commission made explicit its intention to create a comprehensive EU investment policy by gradually taking over this field from EU Member States.[2] As Member State bilateral investment treaties (BITs) account for more than 1,400, which is slightly less than half of all existing BITs worldwide, it becomes imminently apparent how the European Commission intended from very early on to influence and shape the future of international investment law as a whole. The Commission's vision of EU investment policy was not necessarily shared with other EU institutions or with Member States, which had differing opinions not only on the scope of EU investment policy, but also on its content and policy orientation.[3]

[1] Article 207 TFEU together with Article 3(1)(e) TFEU confer exclusive competence to the EU in the field of the Common Commercial Policy, which since 2009 covers also FDI.

[2] European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a Comprehensive European International Investment Policy' (Brussels, 7 July 2010) COM(2010)343 <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> accessed 18 January 2019.

[3] European Parliament, 'Resolution of 6 April 2011 on the Future European International Investment Policy' (2010/2203IINI) (6 April 2011); EU Council, 'Conclusions on a Comprehensive European International Investment Policy' Press Release (Luxembourg, 25 October 2010)

Considering that Member States had been the primary international actors in the field of foreign investment, one of the first steps taken was to ensure a smooth transition from Member State BITs to future EU investment agreements. The development of an appropriate legal framework was necessary in order to preserve European investors' interests and rights and to sooth the concerns of third countries. In that context, the EU adopted Regulation 1219/2012,[4] which sets out transitional arrangements for Member State BITs until their eventual replacement by EU investment agreements.

In the meantime, the European Commission succeeded in convincing the Council to provide it with a mandate to negotiate EU investment agreements. As the EU was already negotiating free trade agreements (FTAs) with a number of third countries in the early 2010s, the EU expanded the scope of its negotiations with key trading partners, such as Canada, India and Singapore, by including investment alongside trade matters.[5] Taking cautious steps, the Commission started negotiating only a handful of EU investment agreements, while considering in the meantime its policy objectives and priorities. As EU institutions and Member States had different visions on what investment treaties should include, it was initially unclear whether the EU would promote the insertion of more 'traditional' BIT-oriented provisions found in Member State BITs, which focus on high levels of investment protection and ISDS or whether the EU would approach foreign investment from a different perspective. The content of EU investment agreements and in particular their chapters on ISDS have become the subject matter of heated public debate. This has been illustrated for example by the fact that the EU opened public consultations regarding investment protection under its investment agreement negotiations with the United States,[6] which resulted in the highest ever number of responses received by an EU public consultation.

Indeed, one of the most controversial aspects of EU investment policy concerned the involvement of the EU in ISDS. ISDS presents an indispensable characteristic of BITs, which

<https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf> accessed 24 September 2019.

[4] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries [2012] OJ L351/40 (20 December 2012).

[5] EU Council, '3109th General Affairs Council Meeting' Press Release (Brussels, 12 September 2011) 13 <www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/genaff/124579.pdf> accessed 24 September 2019.

[6] European Commission, 'European Commission Launches Public Online Consultation on Investor Protection in TTIP' Press Release (Brussels, 27 March 2014) <http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179> accessed 24 September 2019. On the results of the consultation see Commission Staff Working Paper, 'Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (Brussels, 13 January 2015) <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf> accessed 24 September 2019.

has contributed to their success, but also resulted in its growing criticism.[7] Yet, the multifaceted nature of EU involvement in investment arbitration created uncertainties for foreign investors, who need to know when and what type of ISDS is available and who can act as the respondent party in ISDS. Aiming to clarify these questions, the EU has taken significant initiatives to establish a general framework regarding its involvement in ISDS. In August 2014 and after two years of negotiations, the Council and the Parliament adopted Regulation 912/2014, which presents a milestone towards demarcating the roles to be assigned to the EU and its Member States in ISDS under future EU investment agreements.[8] More specifically, this Regulation determines when and based on what criteria the EU or its Member States can act as respondents in dispute settlement under EU investment agreements and how financial responsibility is allocated among them.[9]

Following Regulation 912/2014 and the clarification it brought regarding the scope for EU and Member State responsibility under ISDS, the negotiations of the first EU investment agreements with Canada (CETA), Singapore and Vietnam were concluded in 2015. The texts of these agreements, which presented significant novelties in comparison to Member State BITs in respect of both substantive investment protection and ISDS, have since been the subject matter of increasing debate.[10] Yet, the content of EU investment agreements has not been the only matter affecting the shape and content of EU investment policy. Soon after these investment agreements were finalized, their conclusion became complicated due to internal EU political and legal hurdles regarding the role of Member States in their conclusion. On the one hand, the conclusion of CETA as a mixed agreement, that is signed and ratified both by the EU and its Member States, stumbled upon the refusal of a regional parliament to provide their assent and was only concluded in October 2016.[11] On the other hand, the Commission requested the Court of Justice of the EU (CJEU) to provide its opinion on whether the EU-Singapore FTA could be concluded only by the EU or require

[7] On criticism of ISDS see indicatively Nicolas Hachez and Jan Wouters, 'International Investment Dispute Settlement in the Twenty-First Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?' in Freya Baetens (ed), *Investment Law within International Law* (Cambridge University Press 2013) 417-49.

[8] Regulation No 912/2014 of the European Parliament and of the Council Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to Which the European Union Is Party [2014] OJ L257/121 (28 August 2014).

[9] See Angelos Dimopoulos, 'The Involvement of the EU in Investor State Dispute Settlement: A Question of Responsibilities' (2014) 51 Common Market Law Review 1671.

[10] See for example the contributions to the special issue of (2016) 1 Transnational Dispute Management, which is devoted to CETA; August Reinisch, 'The EU on the Investment Path – *Quo Vadis* Europe? The Future of EU BITs and other Investment Agreements' (2014) 12 Santa Clara Journal of International Law 111.

[11] On the political difficulties concerning the conclusion of CETA, due to its initial rejection by the Waloon regional parliament see EU and Canada to sign trade pact after Belgians strike key deal, available at <www.reuters.com/article/us-eu-canada-trade-idUSKCN12S1RR> accessed 18 January 2019.

Member State involvement. In its Opinion 2/15,[12] which came out in May 2017, the Court gave a landmark judgment, demarcating EU and Member States' powers over the different forms of foreign investment, holding that the EU-Singapore FTA should be concluded as a mixed agreement. Although the question of competence was decided, the compatibility of these new EU investment agreements with EU law is still a controversial question. In September 2017, Belgium asked the CJEU for an opinion in order to assess the compatibility of CETA, and in particular its dispute settlement provisions, with the principle of autonomy of EU law.[13] The Court delivered its ruling in April 2019,[14] following the Opinion of AG Bot,[15] which on the one hand confirmed that CETA is compatible with the principle of autonomy, yet poses significant limits to the ability of the EU and its Member States to be parties to international dispute settlement.

III. EU COMPETENCE ON FOREIGN INVESTMENT

The Lisbon Treaty established for the first time an express exclusive EU competence over FDI by including it in the scope of the Common Commercial Policy.[16] However, it has been controversial whether the inclusion of FDI as part of the Common Commercial Policy means that the EU can conclude international investment agreements on its own. EU action is founded upon the principle of conferral,[17] which explains that the EU can act only in accordance with the specific powers vested upon it in the EU Treaties. In that context, it has been necessary to delimitate EU from Member State competence on foreign investment as well as to clarify and identify the scope and nature of EU powers with regard to foreign investment. A definitive answer to this question has only very recently been given by the CJEU in its Opinion 2/15.[18]

A. FDI Competence

As the EU's competence under Article 207 TFEU is limited only to FDI, the first difficulty concerns the definition of FDI, thus excluding other forms of foreign investment that may be

[12] CJEU, Opinion 2/15 [2017] ECLI:EU:C:2017:376.
[13] Belgium is asking the CJEU to assess the compatibility of the ICS with: a) The exclusive competence of the CJEU to provide the definitive interpretation of European Union law, 2) The general principle of equality and the 'practical effect' requirement of European Union law, 3) The right of access to the courts, 4) The right to an independent and impartial judiciary. See <https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf> accessed 19 January 2019.
[14] CJEU, Opinion 1/17 [2019] ECLI:EU:C:2019:341.
[15] Opinion of AG Bot, Opinion Procedure 1-17 [2019] ECLI:EU:C:2019:72.
[16] Article 3(1)(e) TFEU.
[17] Article 5 TEU.
[18] Opinion 2/15 (n 12).

the subject of international investment agreements.[19] As there is no further clarification of the term in the TFEU, the concept of FDI has been interpreted by reference to the internal market definition of direct investment. In that context, the CJEU relied in Opinion 2/15 on established jurisprudence to identify that direct investment is used in Article 64(2) TFEU and it is associated with establishment or participation in new or existing undertakings via equity or security holdings which are characterised by the existence of a lasting link and managerial control of their activity.[20] The CJEU had avoided systematically in the past to link the interpretation of terms used in the context of the Common Commercial Policy with similar terms used in the internal market, preferring to link them to similar international law terms instead.[21] Yet, the lack of a clear and unambiguous definition of 'direct' investment under international law led the Court to look into internal market law for guidance.

The demarcation of the concept of FDI leads to the next question as to which aspects of FDI fall within the scope of EU exclusive competence. FDI regulation touches upon diverse regulatory interests, which focus on the admission of foreign investment, its treatment and its protection against expropriation and other political risks. However, it has been controversial whether Article 207 TFEU confers power on the Union to take action concerning all aspects of FDI regulation.

More specifically, it has been relatively uncontroversial that they fall within the scope of FDI competence.[22] Placing FDI competence within the Common Commercial Policy, which is based on principles of uniformity and liberalisation,[23] reveals that FDI competence is indeed related to market access, hence allowing the EU to take action with regard to the initial establishment of foreign investors. The negotiation and conclusion of trade agreements including provisions on investment liberalization by the EU since the 2000s verifies that admission of investment has always been part of EU investment policy.[24] Indeed, the CJEU confirmed that practice in Opinion 2/15.[25] Yet, as the Court has pointed out, Article 207(5) TFEU carves out an exception regarding transport services.[26] Investments in transport

[19] ibid para 83.
[20] ibid para 80.
[21] For example, in CJEU, Opinion 1/08, *Article 300(6) EC* [2019] ECLI:EU:C:2009:739, the Court avoided to interpret the term 'trade' in services by analogy to the freedom to provide services, but rather looked into the use of terms under the WTO agreement.
[22] Markus Krajewski, 'External Trade Law and the Constitutional Treaty: Towards a Federal and More Democratic Common Commercial Policy?' (2005) 42 Common Market Law Review 91.
[23] Marise Cremona, 'The External Dimension of the Internal Market' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market* (Hart 2002) 351, 377-78.
[24] See Angelos Dimopoulos, *EU Foreign Investment Law* (Oxford University Press 2011) 140-85.
[25] Opinion 2/15 (n 12) para 56.
[26] ibid paras 57-60.

services therefore fall outside the scope of the Common Commercial Policy. Consequently, the EU can include rules concerning investment in transport services in its agreements, only if it has competence based on the criteria of implied exclusivity in accordance with Articles 216 TFEU and 3(2) TFEU. According to longstanding jurisprudence of the CJEU, the EU has implied exclusive competence over a specific topic, if an international agreement 'is likely to affect common [EU] rules or alter their scope.'[27] Applying this rule, the CJEU in Opinion 2/15 entered a lengthy analysis of EU internal rules in the fields of maritime, rail, road and internal waterways transport, concluding that there are sufficient internal rules to create EU exclusive competence over investment in transport services.[28]

Although Article 207 TFEU could clearly serve as a legal basis for regulating admission of FDI, it has been controversial whether it covers treatment and protection of foreign investment. First of all, Member States argued that issues related to post-establishment treatment and protection of foreign investment lie outside the scope of the Common Commercial Policy. However, the CJEU dismissed these arguments by arguing that any matter related to FDI which exhibits a link to trade falls within the scope of the Common Commercial Policy.[29] The Court followed its earlier jurisprudence, whereby it used the 'link to international trade' as the relevant criterion for identifying the scope of the Common Commercial Policy.[30] Applying this criterion,[31] the Court explained that FDI related rules have 'direct and immediate effects' on trade between the EU and Singapore and secondly that their aim is to 'promote, facilitate and govern trade between the parties.'

Of course, the use of the term 'trade' by the Court, rather than trade and investment, which AG Sharpston suggested in her Opinion,[32] could be confusing, especially if trade is interpreted narrowly. This could be particularly problematic in future situations, for example, when the EU wishes to conclude an investment protection agreement outside the framework of an FTA, in which case a link to trade could be more difficult to prove. Although the Court did not provide a definition of international trade in Opinion 2/15, the suggestion of AG

[27] Case 22/70, Commission v Council (AETR), ECLI:EU:C:1971:32
[28] ibid paras 174-218.
[29] ibid paras 94-96.
[30] See CJEU, Opinion 3/15, *Marakkesh Agreement* [2017] ECLI:EU:C:2017:114; see also Angelos Dimopoulos, 'An Institutional Perspective II: the Role of the CJEU in the Unitary (EU) Patent System' in Justine Pila and Christopher Wadlow (eds), *The Unitary EU Patent System* (Hart 2015) 57, 72-75.
[31] See Opinion 2/15 (n 12) para 36 where the Court explains the criterion of the link to international trade as: 'the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, an EU act falls within that policy if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it.'
[32] Opinion of AG Sharpston, Opinion 2/15, paras 103-104, 328.

Sharpston who defines 'international trade' under the Common Commercial Policy by juxtaposition to the internal market,[33] can present a useful clarification of the criterion used to define the scope of the Common Commercial Policy. Such understanding of the term 'international trade' is further justified by Article 207(6) TFEU, which preserves Member States' external powers in those fields that are excluded entirely, within the internal market, from Union interference or from harmonisation by means of Union legislation. Thus, the scope of EU external FDI competence ultimately depends on whether the EU has the internal competence to provide standards for treatment and protection of investors, irrespective of whether and how such competence is exercised.[34]

A second argument raised by some Member States against a broad determination of FDI competence was the fact that investment treaties allow for exceptions and derogations to treatment envisaged under an investment agreement. As parties to an investment agreement can derogate from obligations on equal treatment for public security or other reasons, which fall within Member States powers, the argument was that competence to include such derogations lies with the Member States. The Court dismissed this argument, explaining clearly that such derogations are inherent to international trade and investment agreements and they do not encroach upon the discretion that Member States have to adopt such measures.[35]

A third argument raised by some Member States concerns the question whether Article 207 TFEU brings protection of foreign investors against expropriation and other political risks within EU competence. Significant reservations have been voiced concerning mainly the issue whether Article 345 TFEU, which preserves the property ownership system of the Member States, excludes investment protection from the scope of EU competence.[36] However, the Court found in Opinion 2/15 that Article 345 TFEU does not impact the scope of EU competence under Article 207 TFEU, as Article 345 TFEU provides only that Member States can choose rules regarding the system of property ownership in their territory and the right to decide if nationalisations and expropriations can occur, while investment agreements contain only rules that seek to ensure that when such nationalisation or expropriation

[33] ibid.
[34] For the precise scope of the limitation set out in Article 207(6) TFEU see Dimopoulos (n 24) 111-13.
[35] Opinion 2/15 (n 12) paras 101-104.
[36] See indicatively Christian Tietje, 'Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon' (2009) 93 Beiträge zum Transnationalen Wirtschaftsrecht 1, 15-16.

decisions of Member States are taken, foreign investors have a right to compensation if such decisions are not arbitrary and serve a public purpose.[37]

B. Competence Over Non-Direct Investments

As investment agreements cover also non-direct investment, the next question that arises is what forms other than foreign direct investment fall under EU competence. In that context, portfolio investment constitutes the most important category of non-direct foreign investment, which covers, in contrast with FDI, short-term investments that do not result in managerial control of an investment activity.[38] However, portfolio investment alongside other forms of foreign investment, such as real estate investments, that fall within the scope of international investment agreements,[39] can be classified as capital movements under EU law, as they concern the movement of capital and the participation of foreign investors in the capital market of the host state. To the extent that portfolio investments constitute capital movements, the power of the EU to conclude international agreements that cover non-direct foreign investment depends on the scope and nature of EU powers over capital movements. More specifically, the EU can include non-direct investment in its agreements if the capital movements provisions of the EU Treaties confer implied competence to the EU to conclude an international treaty on this subject matter.[40]

As the EU shares competence with the Member States in the field of capital movements, Member States are not precluded, as a matter of principle, from taking external action to regulate non-direct investment. Yet, one argument brought forward by the European Commission in Opinion 2/15 was that, similar to transport services, the EU had acquired implied exclusive competence, given that the TFEU rules on capital movements constitute EU common rules that can be affected by the conclusion of the EU-Singapore Agreement. Yet, the Court rightly concluded, that according to Article 3(2) TFEU implied exclusivity arises only when secondary rules of EU law that is legislative acts of the Union exist and can

[37] Opinion 2/15 (n 12) paras 107-108. See also Dimopoulos (n 24) 108-15; Wenhua Shan and Sheng Zhang, 'The Treaty of Lisbon: Half Way Toward a Common Investment Policy' (2010) 21 European Journal of International Law 1049, 1060-61.
[38] Opinion 2/15 (n 12) para 227.
[39] Opinion of AG Sharpston (n 32) para 367; Dimopoulos (n 24) 43-45.
[40] Opinion 2/15 (n 12) para 242 ('The competence conferred on the European Union by Article 216(1) TFEU in respect of the conclusion of an agreement which is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties is also shared since Article 4(1) TFEU provides that the European Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6, which is the case here.').

be affected.[41] As secondary EU rules concerning non-direct investment do not exist, EU competence is not exclusive. Following on from its conclusion that competence regarding non-direct investment is shared but not exclusive, the Court concluded that the part of the EU-Singapore Agreement relating to non-direct investments 'cannot be approved by the European Union alone.'[42]

The Court seemed to consider that if an international agreement falls in areas of shared competence, Member States always have to participate in its conclusion. This position is in direct contrast with the argument put forward by AG Sharpston in her Opinion, that the EU can conclude on its own an agreement that falls under shared competence, but that decision is political. As AG Sharpston clearly explained,

> it follows that an international agreement covering areas that fall within shared external competence that is eventually signed and concluded by the European Union alone is conceptually totally different from an international agreement that covers only areas falling within the European Union's exclusive external competence. In the former case, the Member States together (acting in their capacity as members of the Council) have the power to agree that the European Union shall act *or* to insist that they will continue to exercise individual external competence. In the latter case, they have no such choice, because exclusive external competence already belongs to the European Union.[43]

Yet, the Court has clarified in *OTIF* that Opinion 2/15 does not reject facultative mixity.[44] Considering that Member States in the Council were against the conclusion of the EU-Singapore Agreement by the EU alone, the Court explained that its statement was acknowledging the lack of political agreement in the Council, which would enable the conclusion of the EU-Singapore Agreement by the EU alone.

C. Competence over ISDS

Finally, that last question pertaining to the conclusion of investment agreements by the EU concerns the question as to whether primary EU law allows the inclusion of ISDS provisions in EU investment agreements and the conclusion of international agreements concerning

[41] ibid paras 234-35.
[42] ibid para 244.
[43] Opinion of AG Sharpston (n 32) para 75.
[44] CJEU, Case C-600/14, *Germany v Council* (OTIF) [2017] ECLI:EU:C:2017:935, paras 67-68.

investor-state dispute settlement, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[45]

As a general rule, EU competence to enter into an international agreement containing provisions for the settlement of disputes arising out of its application is a self-evident implication of its international legal personality. The existence of EU competence to subject itself to internationally agreed mechanisms of dispute settlement has been explicitly recognized by the Court in Opinion 1/91, which concerned the European Economic Area (EEA) Agreement; in it, the Court emphasized the link between dispute settlement and the binding nature of international agreements.[46] More specifically, the EU can conclude international agreements providing for compulsory dispute settlement systems that grant access to individuals to make claims and deliver binding decisions. As the Court clearly contemplated,

> where an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the [EU] institutions. […] An international agreement providing for such a system of courts is in principle compatible with [EU] law.[47]

Given that the EEA Agreement created access to an international court also for individuals, the EU is in principle competent to include in its international agreements provisions on ISDS. This primary conclusion is also supported by current practice, as the EU has concluded important international agreements with rigorous dispute settlement systems, such as the EEA Agreement, the World Trade Organization (WTO) Agreement and more importantly the Energy Charter Treaty (ECT), which provides specifically for investor-state arbitration.

Yet, in Opinion 2/15 the Court put forward a new reasoning, which departs from its earlier jurisprudence, arguing that ISDS falls outside the scope of EU exclusive competence. According to the Court, the fact that the EU-Singapore Agreement allows investors the choice to go either to national courts or ISDS, and that ISDS can be brought against a Member State without the latter being able to oppose this, results in 'a regime, which removes disputes from the jurisdiction of the courts of the Member States, … and cannot,

[45] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159. The question of EU competence to accede to the ICSID Convention is different from the question concerning the eligibility of the EU as a supranational organisation to accede to it as a matter of international law. As Article 67 of the ICSID Convention allows only states to accede to it, the Convention should be amended in order for the EU to become a contracting party.
[46] CJEU, Opinion 1/91, *EEA I* [1991] ECLI:EU:C:1991:490.
[47] ibid para 3.

therefore, be established without the Member States' consent.'[48] Hence, according to the CJEU, EU investment agreements that include provisions on ISDS have to be concluded both by the EU and the Member States.

Nevertheless, this reading of EU competence over ISDS is highly problematic. First of all, it departs from well-established jurisprudence that competence over procedural matters follows substantive matters. It is difficult to understand conceptually how the EU can have exclusive competence to set up substantive international rules, but not the power to sign agreements that relate to adjudicating cases applying and interpreting such rules. Such division between substance and procedure cannot be founded in the doctrine of conferral of powers. The EU treaties vest the EU with powers only in substantive areas of law, as there is no specific power conferring provision enabling the EU to set up or participate in dispute settlement systems.[49]

What is more, the argument brought forward by the Court to support Member States' competence over ISDS seems rather weak and ill-construed, contravening basic principles of EU law. The fact that Member States courts may apply the rules of an international agreement does not necessarily mean that Member States have competence to conclude that agreement. It is very well possible that Member States courts can decide cases relying on EU international agreements. More specifically, national courts in the EU can apply and interpret provisions of EU agreements, since international agreements signed by the EU are an integral part of the EU legal order.[50] Yet, the fact that national courts have jurisdiction over a substantive matter falling under EU competence dealt within an EU agreement does not mean that Member States have a right to conclude that international agreement.

As a result, the question of EU competence to conclude investment agreements has been and remains complicated and controversial. As Opinion 2/15 implicated the necessity to conclude investment agreements as mixed agreements, this places additional difficulties on the EU to exercise its powers to conclude investment agreements on its own in an efficient and effective manner, given that Member States retain a powerful role in the exercise of the EU's powers.

IV. THE PRINCIPLE OF AUTONOMY OF EU LAW AND ISDS

[48] Opinion 2/15 (n 12) para 242.
[49] For example the establishment of EU trademarks courts in Member States by Council Regulation 40/94 was based on the existence of substantive EU competence to establish a Community Trademark.
[50] Article 216(2) TFEU.

In addition to the principle of conferral, the principle of autonomy has an equally, if not more important effect on the scope and content of EU investment provisions, in particular on ISDS. ISDS presents the backbone of international investment law and an indispensable characteristic of international investment agreements, thus the degree to which the EU and/or its Member States can be involved in investment arbitration is a question of immense doctrinal and practical significance. This is particularly true since the most important novelty introduced by EU investment agreements relates to the complete transformation of ISDS with the introduction of the Investment Court System (ICS),[51] and the protagonistic role the EU has assumed in the context of the United Nations Commission on International Trade Law (UNCITRAL) aiming towards the establishment of a Multilateral Investment Court.[52]

The influence that the principle of autonomy can exert on the inclusion of ISDS in EU investment agreements has acquired an entirely new and important dimension in the aftermath of the CJEU's judgment in the *Achmea* case.[53] In *Achmea*, the CJEU opined that ISDS provisions under intra-EU BITs are incompatible with the principle of autonomy of EU law. In a rather brief judgment, the Court found the ISDS provision under the Netherlands-Slovakia BIT has an adverse effect on the autonomy of EU law, as the latter is enshrined in Articles 344 and 267 TFEU. While in this judgment, the Court gave a definitive answer to a long-awaited controversial issue as to whether international investment treaties between EU Member States are compatible with EU law, *Achmea* does not provide conclusive answers as to the interaction between EU law and international investment law, especially for extra-EU BITs.

Following upon its judgment in *Achmea*, Opinion 1/17 sheds further light on the limitations that the principle of autonomy of EU law poses to ISDS. Although the Court acknowledged that the ICS does not conflict with the principle of autonomy, its ruling was based on a detailed analysis of specific provisions and characteristics of ISDS under CETA, which allowed for such conclusion to be drawn. As the Court clearly indicated, ISDS does not conflict with the principle of autonomy only if an investment protection treaty 'does not confer on the envisaged tribunals any power to interpret or apply EU law other than the power to interpret and apply the provisions of that agreement having regard to the rules and

[51] European Commission, 'Investment in TTIP – The Path For Reform' Concept Paper (5 May 2015) <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 19 January 2019.
[52] EU Council, 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' 12981/17, ADD 1 DCL 1 (Brussels, 20 March 2018) <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> accessed 24 September 2019.
[53] CJEU, Case C-284/16, *Slovak Republic v Achmea BV* [2018] ECLI:EU:C:2018:158.

principles of international law applicable between the Parties;' and secondly 'does not structure the powers of those tribunals in such a way that, while not themselves engaging in the interpretation or application of rules of EU law other than those of that agreement, they may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.' [54]

In order to identify when and how the principle of autonomy affects the ability of the EU and its Member States to include ISDS provisions in EU investment agreements, it is necessary first to explain what the principle of autonomy means and the key objective it aims to safeguard. Considering the broad range of situations where the CJEU has found that autonomy is violated by the inclusion of dispute settlement provisions in EU international agreements in the past, this section looks into the different concerns that the inclusion of ISDS provisions raises in light of the principle of autonomy.

A. What Is the Principle of Autonomy?

The CJEU has relied extensively on the principle of autonomy of EU law in order to assess the legality of EU and Member State international treaties and in particular their dispute settlement provisions. Opinion 2/13[55] concerning the EU's accession to the European Convention on Fundamental and Human Rights (ECHR) presents the most pertinent example of the demands that the principle of autonomy poses on the EU and its Member States when they conclude international agreements. The principle of autonomy is a foundational principle of the EU legal order. Yet, the exact role of autonomy has been very difficult to identify, as the CJEU has used autonomy on numerous occasions to refer to different elements of the EU constitutional edifice. The CJEU has focused in particular on its own role as a key guarantor of the autonomy of EU law, and its exclusive jurisdiction to interpret EU law to the exclusion of other fora. In that respect, autonomy has been used by the CJEU as a tool for protecting and safeguarding its judicial monopoly across a vast spectrum of situations. From Opinion 1/00,[56] via Opinion 1/09[57] to the much discussed Opinion 2/13 on the EU's accession to the ECHR,[58] autonomy has emerged as a limit to EU and Member State international treaties that include dispute settlement provisions.

More specifically, the principle of autonomy of the EU legal order has been used by

[54] Opinion 1/17 (n 14) para 119.
[55] CJEU, Opinion 2/13, *Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] ECLI:EU:C:2014:245.
[56] CJEU, Opinion 1/00, *Common Aviation Area* [2002] ECLI:EU:C:2002:231.
[57] CJEU, Opinion 1/09, *Unified Patent Court* [2011] ECLI:EU:C:2011:123.
[58] Opinion 2/13 (n 55).

the Court as a tool for identifying the relationship between EU law, national law and international law. Autonomy has served as the foundation and the means for expressing the distinctiveness of the EU legal order and its priority over national constitutions and international law.[59] In that context, autonomy has been first used to explain the relationship between EU law and national law. This 'internal' aspect of autonomy has been used by the Court to express the distinctive nature of the EU legal order and the need for its preservation through the doctrines of primacy and direct effect.[60]

Secondly, autonomy has been used by the Court to explain the relationship between EU law and international law. This 'external' aspect of autonomy has been more complex, as the very creation of EU through instruments of international law, ie the EU treaties, has cast doubt on the distinctiveness of the EU legal order from other sources of international law.[61] Unlike 'internal' autonomy, it was only in its 2010 with the *Kadi* judgment[62] that the Court explicitly recognised that the 'external' autonomy of the EU legal order requires the protection of the integrity of the EU legal order also from international law.[63]

Therefore, the protection of the autonomy of the EU legal order equals the protection of the EU's institutional and constitutional integrity.[64] Unlike typical conflict of laws rules, the principle of autonomy does not simply aim to prioritise EU law obligations over national or international law obligations of the EU and its Member States. Rather it aims to retain intact the key features of the EU edifice and do away with any threats that are 'external' to the EU. As the CJEU has put it, autonomy requires that

> the essential character of the powers of the [EU] and its institutions remains unaltered by an international agreement [and in particular that] procedures for ensuring uniform interpretation of treaties, specifically procedures that involve an external judicial body, do not have the effect of binding the EU and its

[59] On the idea of autonomy embodying European constitutionalism see Bruno de Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union' in Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law, Constitutional Challenges* (Hart 2014) 33; Jan Willem van Rossem, 'The Autonomy of EU Law: More Is Less?' in Ramses Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence* (Asser 2013) 13, 14-22.
[60] René Barents, *The Autonomy of Community Law* (Kluwer 2004) 239-71.
[61] See indicatively Katja Ziegler, 'International Law and EU Law: Between Asymmetric Constitutionalisation and Fragmentation' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory of International Law* (Edward Elgar 2011) 268.
[62] CJEU, Joined Cases C-402/05 and C-415/05, *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461.
[63] See eg Gráinne De Bùrca, 'The European Court of Justice and the International Legal Order after Kadi' (2010) 51(1) Harvard Journal of International Law 1. For an in-depth analysis of the Kadi cases see Matej Avbelj, Filippo Fontanelli and Guiseppe Martinico (eds), *Kadi on Trial. A Multifaceted Analysis of the Kadi Trial* (Routledge 2014).
[64] Opinion 1/17 (n 14) paras 109-10

> institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law.[65]

As a result, the CJEU has linked the autonomy of the EU legal order with the institutional integrity of the EU. Although the Court has dealt with the undue influence of international agreements on other EU institutions, such as the Commission and the European Central Bank,[66] its main focus in its jurisprudence has been on its own role in preserving the autonomy of the EU legal order. Any international agreement creating dispute settlement mechanisms that undermine the constitutional role of the CJEU poses a threat to the autonomy of EU law. Judicial autonomy is in fact embedded in the EU Treaties. Article 19 TEU sets out clearly the exclusive jurisdiction of the Court to rule on the validity and interpret EU law, thus safeguarding the autonomy of the EU legal order.

B. The Exclusive Right to Provide Authoritative Interpretations of EU Law

First of all, the autonomy of the EU legal order prevents the EU from signing up to international agreements that allow non-EU adjudicatory mechanisms to offer authoritative and definitive interpretations of EU law. The CJEU clearly stated in Opinion 2/13 that

> any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law.[67]

Hence, a threat to the autonomy of the EU legal order arises only if ISDS can result in an authoritative interpretation of EU law. However, for the Court, the mere possibility of providing an authoritative interpretation of EU law suffices for autonomy to be breached. There is no need for an actual conflict of interpretations given to EU law by an investment tribunal and the CJEU. As autonomy guarantees the institutional integrity of the EU legal order, the CJEU considers that any international agreement that enables a binding interpretation of EU law by a non-EU forum contradicts the very purpose of the principle of autonomy.

In order to understand the scope of the exclusive jurisdiction of the CJEU over EU law and when it is threatened by the application and interpretation of EU law by non-EU tribunals, it is important to examine the evolution of the Court's jurisprudence on this matter.

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[65] Opinion 1/91 (n 46) paras 12-13.
[66] CJEU, Case C-370/12, *Pringle* [2012] ECLI:EU:C:2012:756.
[67] Opinion 2/13 (n 55) para 184.

1. The Interpretative Jurisdiction of the CJEU pre Opinion 2/13

The monopoly that the CJEU enjoys over offering authoritative interpretations of EU law was first explained by the Court in Opinions 1/91[68] and 1/92[69] concerning the conclusion of the EEA Agreement. In Opinion 1/91, the Court ruled that the autonomy of EU law was violated, because the proposed EEA Court could apply and interpret the EEA provisions without paying attention to future developments of the case-law of the CJEU. As the EEA Agreement intended to ensure homogeneity of EEA and EU law, this meant that an interpretation of the provisions of the EEA agreement by the proposed EEA court could be binding on the EU. Hence, the EEA Agreement would deprive the Court of its power to determine authoritatively questions of EU law, as it would be bound to follow future case law of the EEA Court.[70] Following the CJEU's opinion, the EEA agreement was amended. The amended EEA agreement was found compatible with EU law in Opinion 1/92. The amended EEA Agreement established a court to be used only by European Free Trade Agreement (EFTA) countries, and provided assurances that the CJEU would not be bound by interpretations of EU law, which would result indirectly from the interpretation of the EEA Agreement by the EFTA Court. This was done by allowing the CJEU to interpret the EEA within EU Member States and imposing a unilateral obligation on the EFTA Court to follow the CJEU's rulings.

A similar threat to the autonomy of the EU legal order was also discussed in Opinion 1/00, which concerned an international agreement that set up a common aviation area with non-EU Member States. That agreement essentially expanded the territorial scope of application of the EU *acquis* and required that provisions that are identical in EU law and in the international agreement had to be interpreted identically. The Court found that autonomy was preserved, as the interpretation of the agreement's provisions within the EU was assigned to the CJEU, while it contained assurances that its interpretation in non-EU States would follow the interpretation given by the CJEU. To facilitate such uniform interpretation, the agreement even allowed for non-EU courts to ask for preliminary references to the CJEU.[71]

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[68] Opinion 1/91 (n 46).
[69] CJEU, Opinion 1/92, *EEA II* [1992] ECLI:EU:C:1992:189.
[70] For an analysis of the EEA cases, see Henry Schermers, 'Opinion 1/91 of the Court of Justice, 14 December 1991; Opinion 1/92 of the Court of Justice, 10 April 1991' (1992) 29(5) Common Market Law Review 991; Tobias Lock, *The European Court of Justice and International Courts* (Oxford University Press 2015) 77-80.
[71] See Fernando Castillo de la Torre, '*Opinion 1/00*, Proposed Agreement on the Establishment of a European Common Aviation Area' (2002) 39(6) Common Market Law Review 1373.

Hence, a threat to the autonomy of EU law arises in particular if the international agreement requires that the scope and content of its rules are to be interpreted by reference to EU law (homogeneity). Nevertheless, this limitation of autonomy is less relevant for ISDS. Opinions 1/91, 1/92 and 1/00 illustrate that autonomy is breached only if an agreement extends in some form the EU *acquis* to third countries. Yet, homogeneity is not required under EU investment treaties. There is no provision in investment treaties that requires their interpretation to follow that of specific rules of EU law. Moreover, even if investment treaty provisions resemble, or are similar to rules found in, EU law there is no need for homogenous interpretation. As the Court clearly indicated in cases concerning the interpretation of EU association agreements with candidate countries, which export a large part of the *acquis*, provisions of EU international agreements that are identically or similarly worded to corresponding EU law provisions do not require homogeneity,[72] nor must necessarily be interpreted identically.[73] This lack of a need of homogenous interpretation between CETA and EU law provisions has been highlighted by AG Bot in his Opinion under Opinion 1/17, highlighting the above mentioned differences between CETA and the EEA and the Common Aviation Area Agreements.[74]

2. The Interpretative Jurisdiction of the CJEU in Opinions 2/13 and 1/17

Yet, Opinion 2/13 seems to offer a broader reach to the principle of autonomy. When the Court examined the compatibility of the prior involvement mechanism under the Draft Accession Agreement of the EU to the ECHR[75] with the principle of autonomy, it ruled that this mechanism was not sufficient for guaranteeing the binding interpretation of primary and secondary EU rules by the CJEU. The CJEU explained that when the European Court of Human Rights (ECtHR) assesses the compatibility of EU and national measures with the ECHR, the Strasbourg Court would in essence have jurisdiction to decide whether and how relevant EU rules have been interpreted by the CJEU.[76] Secondly, the CJEU found that the prior involvement mechanism, which required the CJEU to be asked to offer binding

[72] Adam Lazowski, 'With But Without You... The Europeanisation of Legal Orders of the Neighbouring Countries' in Andrea Ott and Ellen Vos (eds), *Fifty Years of European Integration: Foundations and Perspectives* (Cambridge University Press 2009) 247.
[73] CJEU, Case 270/80, *Polydor* [1982] ECLI:EU:C:1982:43; Case 104/81, *Hauptzollamt Mainz v Kupferberg* [1982] ECLI:EU:C:1982:362.
[74] See also the Opinion of AG Bot (n 15) paras 146, 157.
[75] On the scope and necessity of the prior involvement mechanism see Aida Torres Perez, 'Too many Voices? The Prior Involvement of the Court of Justice of the European Union' in Vicky Kosta, Nikos Skoutaris and Vassilis Tzevelekos (eds), *The EU Accession to the ECHR* (Hart 2014) 29; Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart 2013) 234-50.
[76] Opinion 2/13 (n 55) paras 237-40.

interpretations of EU law, where EU law was relevant for a dispute, was limited to questions of validity of secondary EU law, thus excluding the possibility of the CJEU being involved in situations where the interpretation of secondary EU law was required in order to assess the compatibility of an EU or national measure with the ECHR.[77] As a result, the Court found that it was necessary to have a definitive interpretation of EU law rules by the CJEU before the Strasbourg court ruled on their compatibility with the ECHR, and the prior involvement mechanism did not safeguard this.

In the aftermath of Opinion 2/13 it can be argued that autonomy requires that ISDS cannot assess the compatibility of EU or national measures taken in accordance with EU law with the provisions of an investment treaty, because it would deprive the CJEU of providing a definitive interpretation of relevant EU law rules. Considering that investment treaties lack a prior involvement mechanism, this could mean that in its current form ISDS under an EU investment agreement violates the principle of autonomy.

Yet, in Opinion 1/17 the Court gave a more nuanced approach as to when ISDS or any international court offers a definitive interpretation of EU law. In that context, the Court stressed the limitations of arbitral jurisdiction under CETA in order to establish what amounts to an incompatible application of EU law rules by international courts and tribunals. In that context, the Court stressed the fact that under CETA, EU law is explicitly excluded from the scope of applicable law under ISDS.[78] The Court explained that Article 8.31 CETA envisages EU law matters to be taken into consideration only as facts in any dispute. EU law is not part of the applicable law, which consists of the CETA provisions and relevant international law,[79] and therefore, CETA tribunals cannot rule on the legality of EU law nor offer any interpretation. Secondly, the Court ruled that Article 8.31.2 CETA, which provides for EU law to be treated as a fact, does not amount to an interpretation of EU law.[80] The Court explained that taking EU law into account

> cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law, but consists, on the contrary, of that domestic law being taken into account as a matter of fact, while that Tribunal is, in that regard, obliged to follow the prevailing interpretation given to that domestic law by the courts or authorities of that Party, and those courts and those authorities are

[77] ibid paras 246-47. See also Benedikt Pirker and Stefan Reitemeyer, 'Between Discursive and Exclusive Autonomy – Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law' (2015) 17 Cambridge Yearbook of European Legal Studies 168, 182-83.
[78] Opinion 1/17 (n 14) para 130.
[79] ibid paras 121-22.
[80] ibid para 130.

not, it may be added, bound by the meaning given to their domestic law by that Tribunal.[81]

The approach taken by the Court is problematic. First and foremost, the Court's conclusion that the qualification of EU law as a fact under CETA applicable law does not amount to an interpretation of EU law rules offers a very confusing approach as to what interpretation of EU law means. Any consideration of any legal rule requires in fact its interpretation. When does a consideration of a legal question amount to interpretation? This would be particularly true in situations where rules of EU law have not been the subject matter of interpretation by the CJEU. In fact, this was the very reason why the Draft Accession Treaty of the EU to the ECHR was explicitly found to be incompatible with EU law and why the mechanism of prior involvement was not considered a sufficient guarantee to ensure the autonomy of EU law.[82]

The Court missed a great opportunity to offer more clarity on the doctrine of autonomy of EU law and explain its links to its earlier case law and the EU's constitutional legal order. A broad limitation of ISDS on the basis of Opinions 2/13 and 1/17 contradicts the Court's earlier jurisprudence that autonomy is breached only if there is an authoritative interpretation of EU law. ISDS awards cannot result in binding, definitive interpretations of EU law rules, unlike decisions of the ECtHR.[83] The reason why prior involvement is necessary in the context of the ECHR is because the ECHR has a special link to the EU legal order.

As the Court clearly stressed in Opinion 2/13 and Opinion 2/94,[84] the ECHR has special significance for the EU legal order due to its linkages with the sources of EU law, be it through general principles of EU law or Article 52(3) of the Charter of Fundamental Rights (CFR).[85] There are, in other words, direct references to the ECHR in the primary law of the EU which in essence enable the ECtHR, through the interpretation of the ECHR, to shape the interpretation of relevant EU law rules. However, no investment agreement has a similar special link to the EU legal order. Unlike ECtHR rulings, which could tamper with the integrity of the EU legal order, any arbitral award declaring the compatibility of EU or

[81] ibid para 131. See also Opinion of AG Bot (n 15) paras 136-41.
[82] See references in supra n 77.
[83] See for example the analysis of Article 8.31 CETA which excludes the possibility of CETA tribunals binding EU or national courts on the interpretation of EU law rules that they consider. See in particular the analysis of AG Bot, Opinion 1/17 (n 15) paras 126-55.
[84] Opinion 2/13 (n 55) paras 37-38; CJEU, Opinion 2/94, *Accession by the Community to the European Convention on the Protection for Human Rights and Fundamental Freedoms* [1996] ECLI EU:C:1996:140, paras 34-35.
[85] The ECHR presents a source of inspiration for the protection of human rights as general principles of EU law and the minimum floor for interpretation of EU human rights according to Article 52(3) CFR.

Member State measures with the EU cannot result in a definitive interpretation of EU law rules.

This reading of autonomy under Opinions 2/13 and 1/17 is in line with the objectives that the principle of autonomy aims to serve. As judicial autonomy guarantees the integrity and unity of the EU legal order, it does so by precluding definitive interpretations of EU law. To the extent that EU law is considered by arbitral tribunals in a non-definitive manner, the unity of the EU legal order remains intact. More importantly, this reading of autonomy under Opinions 2/13 and 1/17, which focuses on the substantive links between the ECHR and EU law enables the EU to be party to ISDS, without the CJEU's prior involvement. Finally, any limitation on ISDS would contradict the EU's past practices, which allow for dispute settlement fora to decide on the compatibility of EU or national measures in a non-binding manner, without including the jurisdictional limitations that CETA contains. For example, measures taken by the EU and its Member States under relevant EU law rules have been the subject matter of international disputes in the context of the WTO on numerous occasions.[86] A broad reading of autonomy would restrict the ability of the WTO Appellate Body to even consider EU law questions in order to ascertain the compatibility of any EU or Member State measure with WTO law. The fact that WTO law does not explicitly state that EU law is to be treated as fact does not mean that WTO decisions are incompatible with EU law. Rather, WTO and ISDS rulings do not provide for a definitive interpretation of EU law which is binding on the CJEU, as the CJEU and Member State courts can dismiss any interpretation given to EU law by WTO/ISDS panels. What is important is that EU courts remain unbound to consider or completely disregard any analysis of EU law offered by WTO rulings. Therefore, it should also be irrelevant whether investment tribunals offer their views on relevant EU law, and if so whether it is considered as part of domestic or international law.[87]

3. The Interpretative Jurisdiction of the CJEU in Intra-EU BITS and *Achmea*

In the aftermath of the *Achmea* judgment, it has been argued that ISDS under extra-EU BITs is incompatible with EU law as well.[88] In finding an incompatibility between an intra-EU BIT with EU law, the Court focused exclusively on the ISDS mechanism and its effects on

[86] Tilman Krüger, 'Shaping the WTO's Institutional Evolution: The EU as a Strategic Litigant in the WTO' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge University Press 2014) 169.
[87] In the context of investment arbitration there has been a long debate on whether EU law is applicable law. See indicatively Panos Koutrakos, 'The Relevance of EU Law for Arbitral Tribunals: (Not) Managing the Lingering Tension' (2016) 17(6) Journal of World Investment and Trade 873.
[88] Such arguments were raised by Belgium in Opinion 1/17.

the autonomy of EU law. The argument used is easy follow: the principle of autonomy protects the full effectiveness and consistency of EU law, which entails the uniform interpretation of EU law. Article 19 TEU and Article 344 TFEU guarantee autonomy by providing exclusive jurisdiction to the CJEU to offer authoritative interpretations of EU law and enabling a judicial dialogue with national courts via Article 267 TFEU. Investment arbitration under intra-EU BITs can have an adverse effect on autonomy, as investment tribunals a) can decide matters of EU law and b) are not subject to the CJEU's control, thus any rulings can offer authoritative interpretations of EU law.

The first condition that has to be met for autonomy to be violated, is that investment tribunals can decide matters of EU law. The Court made a hasty finding that this condition is met. It opined that since EU law is part of the law of Member States and the provision of the specific BIT explicitly allows for such domestic law to be considered as applicable law, ISDS is bound to apply and interpret EU law. The very short analysis of the Court raises however two important questions. Is EU law applicable law under all intra-EU BITs, or only under those treaties such as the Netherlands-Slovakia BIT, that explicitly provide that the law in force at the host state, ie 'domestic law' is part of the applicable law? Secondly, is EU law applicable law only in ISDS under intra-EU BITs, or also under extra-EU IIAs, that is, under investment agreements between the EU and its Member States with third countries?

The answer to these questions depends of course to a large extent on the role of EU law as applicable law under extra-EU BITs. Irrespective of whether EU law is viewed as part of the applicable law or as a fact, as in the case of CETA,[89] arbitral tribunals under extra-EU BITs would have to engage in any case with rules of EU law and offer a specific interpretation in order to identify if there is a breach of the provisions of the EU investment agreement.[90]

Yet, there is a key difference between intra-EU and extra-EU BITs as regards the second condition, that is if any ruling offers an authoritative interpretation of EU law. As already discussed above, such threat arises in the context of agreements signed by the EU only when there is a substantive link between the EU *acquis* and the international agreement. On the contrary, in the context of an international agreement between EU Member States, such as intra-EU BITs, any ruling by a dispute settlement tribunal would violate autonomy, if it could not ask a question for a preliminary reference to the CJEU. As the Court emphasised what was problematic in *Achmea* was 'the possibility of submitting those disputes to a body

[89] Article. 8.31 CETA.
[90] See above.[please add cross-reference]

which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States.'[91]

This is because, in an *inter se* context, autonomy functions as a mechanism for establishing a kind of 'external' primacy of EU law, limiting the ability of Member States to cooperate internationally outside the EU legal order. Although primacy of EU law is usually understood as the principle that requires national law to be set aside if it conflicts with EU law, primacy does not directly refer to what happens if Member States assume international law obligations towards each other that conflict with EU law. In those instances, autonomy of EU law is used as a tool to preserve the primacy of EU law over any rule, of national or international nature set by Member States. Therefore, autonomy guarantees that Member States cannot use international law to circumvent their obligations under EU law, and any rule of international law that has such an effect violates the principle of autonomy. This function of autonomy has been manifested by the Court in Opinion 2/13 and reiterated in *Achmea*, when the Court opined that the principle of mutual trust requires that, when implementing EU law, Member States have an EU law obligation 'to presume that fundamental rights have been observed by the other Member States.'[92] The Court uses autonomy in order to limit the ability of Member States to enter into an *inter se* agreement that violates a fundamental principle of EU law. Without entering into the controversial debate concerning the scope and content of the principle of mutual trust and its relationship to human rights protection,[93] from an autonomy perspective the Court is clear that autonomy is breached when Member States assume obligations in *inter se* relations that may conflict with a fundamental principle of EU law, such as mutual trust.

In this context, *Achmea* can be interpreted in both a broad and a narrow manner. A broad reading of *Achmea* means that autonomy requires all *inter se* agreements to guarantee that no violation of EU law can occur. Inter se agreements can potentially overlap with and be incompatible with EU law. Yet, the existence of such incompatibility is a matter of EU law and could only be determined by the CJEU. Therefore, autonomy requires that Member States cannot conclude *inter se* agreements without guaranteeing that the latter are compatible with EU law, a question that only the CJEU can answer.[94] This is particularly true for intra-EU BITs. As AG Wathelet admitted,[95] substantive BIT provisions, such as FET and

[91] *Achmea* (n 53) para 58 (emphasis added); Opinion 1/17 (n 14) paras 126-28.
[92] Opinion 2/13 (n 55) para 192.
[93] Daniel Halberstam, 'Opinion 2/13 – It's the Autonomy, Stupid!' in (2015) 16(1) German Law Journal 105.
[94] Supportive of this argument seems to be AG Bot, Opinion 1/17 (n 15) para 112.
[95] Opinion of AG Wathelet, Case C-284/16, *Slovak Republic v Achmea BV* [2017] ECLI:EU:C:2017:699.

rules on expropriation, overlap with EU treaty standards, at least partially. Moreover, although, as the AG rightly notes, intra-EU BITs have a wider scope of application than the EU Treaties, they do cover situations falling within the scope of EU law.

A narrower reading of *Achmea* would mean that *inter se* agreements violate EU law only if a specific rule of EU law, such as the principle of mutual trust, is violated, rather than when the potential of a violation of EU law rules arises. As AG Bot explained in his Opinion 1/17, intra-EU BITs violate the principle of mutual trust between Member States, as embedded in Articles 19 TEU and 267 TFEU, which guarantee the role of national courts in the application of EU law.[96] More specifically, the successful exercise of the CJEU's jurisdiction to provide authoritative interpretations of EU law depends on its ability to assume jurisdiction over cases where issues of EU law arise. Thus, protecting the judicial autonomy of the EU legal order necessitates the protection of the underlying institutional framework, which relates primarily to the relationship between the CJEU and national courts of Member States under Article 267 TFEU.[97] In that sense, Article 19 TEU requires Member States to offer effective judicial protection via national courts. If one or more Member State explicitly remove EU law disputes from the jurisdiction of national courts, as intra-EU BIT do via allowing for ISDS on matters overlapping with EU law rules, this rule is effectively bypassed.

Unlike *Achmea* and intra-EU BITs, ISDS under EU investment agreements is not problematic, given that the EU rather than Member States are signatories, and interpretations of EU law are not binding on national courts or the CJEU. Consequently, ISDS under extra-EU BITS does not present a threat to the autonomy of the EU legal order as it does not offer binding, definitive interpretations of EU law. Investment treaty provisions are not an expansion of the EU single market *acquis*, nor is homogeneity required. Besides, investment treaties, unlike the ECHR, do not exhibit any special link to the sources of primary EU law, thus any interpretation offered by investment courts or tribunals is not definitive in the sense that it would result in a binding, authoritative interpretation of EU law.

[96] Opinion of AG Bot (n 15) para 92.

[97] Opinion 1/09 (n 62). The role of national courts was first highlighted in Opinion 1/09. The Court found that preserving the autonomy of EU law means not only protecting the exclusive jurisdiction of the CJEU, but also safeguarding the role of national courts as European courts. As the Unified Patent Court was going to be an international court, outside the national judicial system of Member States, the CJEU found that it affected the powers of national courts of Member States to interpret and apply EU law, including their power to request a preliminary ruling. For an analysis of Opinion 1/09, see Roberto Baratta, 'National Courts as "Guardians" and "Ordinary Courts" of EU Law: Opinion 1/09 of the ECJ' (2011) 38 Legal Issues of Economic Integration 297.

C. The Validity of Acts of EU Institutions

The second limitation that the principle of autonomy poses on ISDS according to the Court relates to the powers held by EU institutions to adopt measures under the EU constitutional framework. Preserving the integrity of the EU legal order entails the preservation of the power of EU institutions to adopt valid measures under EU law, the validity of which is only subject to the limits posed by the EU legal order. Yet, although in the past the Court seemed to acknowledge that autonomy only protected the formal validity of EU acts, Opinion 1/17 extended the scope of the autonomy principle to refer also to the substantive validity of EU acts.

1. The Validity of EU Acts Until Opinion 1/17

The CJEU set the foundations for protecting the validity of EU acts from interferences arising from national law already in 1980s. In the *Foto-Frost* judgment,[98] the Court determined that acts of EU institutions can only be declared invalid by the CJEU rather than by national courts, and only on grounds provided for in EU law. In the context of external relations, the Court followed a similar path, recognizing that international dispute settlement bodies cannot issue rulings that result in the invalidity of EU acts. Yet, the limitation was only limited to the formal validity of EU acts.

The CJEU ruled in Opinion 1/00 that if a dispute settlement body finds that a Union measure violates the provisions of an EU international agreement, the measure should not be automatically invalidated, but it should be up to the EU to take the appropriate measures so as to conform with the EU's international obligations.[99] As a result, international agreements concluded by the EU and/or its Member States should not offer, directly or indirectly, remedies, such as restitution, that can result in the invalidity of an EU measure without the CJEU's involvement.

More specifically, the Court, in Opinion 1/00, ruled that there is no need for an EU measure to be found invalid so as to contradict the principle of autonomy. Rather, it is sufficient to breach the autonomy of the EU legal order,[100] if a decision of an international court or tribunal results in the invalidity and inapplicability of an EU measure. As autonomy is aimed at preserving the integrity of the EU legal order and keeping it insular from non-EU

[98] CJEU, Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECLI:EU:C:1987:452.
[99] Opinion 1/00 (n 56) paras 18-21; Inge Govaere, 'Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited* (Hart 2010) 187, 195.
[100] ibid.

interferences, the Court considers that the possibility of a non-EU judgment affecting EU rules on the validity of EU acts is a violation of the principle of autonomy of EU law. This argument is further enhanced by the fact that the EU treaties do not even allow national courts of Member States to decide on the validity and applicability of EU norms, as the latter is only for the CJEU to decide.[101] Hence, autonomy requires the protection of the integrity of the EU legal order not only from national courts' interferences, but even more so from 'external' international rulings that have an effect on the validity or applicability of EU secondary law.[102]

As a result, in order to preserve the autonomy of EU law, it is necessary to have a closer look at the remedies available under ISDS. Given that monetary compensation is the most common remedy provided in ISDS,[103] the obligation to pay damages does not affect directly the formal validity of challenged EU measures. On the other hand, if an arbitral tribunal awards restitution, injunctive relief or specific performance,[104] ISDS may present a threat to the autonomy of EU law. Therefore, in order to preserve the autonomy of the EU legal order, EU investment agreements would have to preclude specific performance, injunctions and non-pecuniary compensation from the array of available remedies under ISDS. Alternatively, EU investment agreements can include specific performance as a remedy, as long as they enable the respondent to pay monetary damages instead, if they so prefer.[105]

The limitation of available remedies was further confirmed in Opinion 1/17. The Court referred to Article 8.39 CETA, which provides that CETA awards cannot result in the automatic inapplicability on invalidity of EU measures, but compensation is the preferred choice of remedy.[106] The Court accepted that the exclusion of remedies protecting the formal validity of EU acts is necessary, but not in itself sufficient to protect the autonomy of EU law.

Alternatively, this threat to the autonomy of EU law arises only if third-country investors can enforce such non-pecuniary awards in the EU, as they would only then

[101] *Foto Frost* (note 98).
[102] See also Opinion of AG Bot (n 15) paras 61 and 126.
[103] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment law* (Oxford University Press 2008) 271-72.
[104] Although specific performance is not directly provided for under the ICSID Convention, it is widely accepted that ICSID as well as ad hoc tribunals can require restitution or specific performance, which may take the form of reversing or invalidating secondary EU rules. On the use of specific remedies under investment arbitration see Christoph Schreuer, 'Non-Pecuniary Remedies in ICSID Arbitration' (2004) 20 Arbitration International 325, 325-32.
[105] Stephan Schill, 'Luxembourg Limits: Conditions for Investor-State Dispute Settlement Under Future EU Investment Agreements' in Marc Bungeberg, August Reinisch and Christian Tietje (eds), *EU and Investment Agreements* (Nomos 2012) 37, 50.
[106] Opinion 1/17 (n 14) para 144.

circumvent the exclusive jurisdiction of the CJEU to decide on the validity and applicability of EU measures. Consequently, the protection of the autonomy of the EU legal order requires a limitation of their enforcement in the EU. The autonomy of EU law could be safeguarded, if arbitral awards providing for non-pecuniary remedies do not have direct effect in the EU. Without entering into a detailed analysis of whether the provisions of EU investment agreements have direct effect in the EU,[107] it is noteworthy to point out that the CJEU has increasingly refused to grant direct effect to the EU's international agreements and international rulings based on them.[108] Following the case law on the direct effect of dispute settlement rulings under the WTO,[109] it is clear that the lack of direct effect of the substantive provisions of an EU agreement in essence precludes the direct effect of dispute settlement rulings. Moreover, even if an investment agreement has in principle direct effect, this does not mean that arbitral awards necessarily have direct effect. If dispute settlement under an international agreement leaves scope for manoeuvre regarding the implementation of a ruling, it can be argued that direct effect is excluded, since the granting of direct effect limits the flexibility enjoyed by EU institutions to comply with such international ruling.[110] In order to avoid such uncertainties regarding the compatibility of investment agreements with the autonomy of EU law, the new generation of EU investment agreements exclude direct effect, inter alia in order to preserve and protect the autonomy of the EU legal order.[111]

2. The Validity of EU Acts in Opinion 1/17

The CJEU in Opinion 1/17 extended the reach of the principle of autonomy of EU law, covering not only the formal validity of EU acts but also their substantive validity. The Court found that if the EU bears an international obligation to pay compensation, this can indirectly result in the withdrawal or amendment of EU measures that are found incompatible with the investment protection standards offered in CETA. The Court stated that the international obligation under CETA to pay compensation entails that

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[107] On debates concerning direct effect of EU agreements see Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (Oxford University Press 2013); Szilárd Gáspár-Szilágyi, 'The "Primacy" and "Direct Effect" of EU International Agreements' (2015) 21 European Public Law 343.

[108] See CJEU, Case C-308/06, *Intertanko v Secretary of State* [2008] ECLI:EU:C:2008:312; Case C-366/10, *Air Transport Association of America and Others* [2011] ECLI:EU:C:2011:864.

[109] CJEU, Case C-93/02, *Biret* [2003] ECLI:EU:C:2003:517; T-19/01, *Chiquita v Commission* [2005] ECLI:EU:T:2005:31; C-377/02, *Van Parys* [2005] ECLI:EU:C:2005:121.

[110] Mendez (n 107) 224-26.

[111] See for example the discussion by AG Bot on the lack of direct effect of CETA and how it protects the autonomy of EU law in Opinion 1/17 (n 15) paras 62-69 and 91-94. Francesca Martinez, 'Direct Effect of International Agreements of the European Union' (2014) 25 European Journal of International Law 129; see also Szilagyi (n 107).

> the jurisdiction of those tribunals would adversely affect the autonomy of the EU legal order if it were structured in such a way that those tribunals might, in the course of making findings on restrictions on the freedom to conduct business challenged within a claim, call into question the level of protection of a public interest that led to the introduction of such restrictions by the Union.[112]

The Court explained that in its Opinion

> this could create a situation where, in order to avoid being repeatedly compelled by the CETA Tribunal to pay damages to the claimant investor, the achievement of that level of protection needs to be abandoned by the Union… Hence it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework.[113]

Therefore, the Court implies that the principle of autonomy protects not only the formal validity of EU measures, but also the substantive validity of EU measures, to the extent that it relates to the level of protection of public interests set by EU institutions. The Court found that given that ISDS offer a remedy that is legally binding under international law and is not 'soft', like under WTO law, where the parties have leeway to adopt negotiated positions to respond to dispute settlement ruling,[114] compliance with international law can undermine the substantive validity of EU acts, by de facto resulting in EU institutions to withdraw or amend a measure. The Court finds that such a limitation is unacceptable from the perspective of the principle of autonomy of EU law, because it would challenge the ability of EU institutions to set the appropriate level of protection in accordance with EU law.

Following upon its analysis, the Court then engaged with a review of the substantive standards of investment protection offered under CETA. By looking in particular into the provisions that establish the right to regulate, FET, indirect expropriation and exceptions to protection, the Court opined that these provisions cannot call into question the level of protection of public interest adopted by EU institutions, and as a result CETA's substantive provisions are compatible with EU law.[115] The Court ruled that ISDS 'tribunals have no

[112] Opinion 1/17 (n 14) para 148.
[113] ibid paras 149-50.
[114] ibid paras 145-46.
[115] ibid paras 152-59.

jurisdiction to call into question the choices democratically made within a Party relating to, inter alia, the level of protection of [public interest].'[116]

In order to understand the scope of the new limitation set by the Court, it is important to explain the rationale behind the Court's judgment. As was already explained, the principle of autonomy guarantees that EU institutions can exercise their functions within the EU constitutional framework. As the Court rightly refers, Article 5 TEU determines the EU law limits to the powers of EU institutions, which require the adoption of acts only when EU acts fall within the scope of EU powers, and only if they comply with the principles of subsidiarity and proportionality.[117] Yet, Article 5 TEU relates primarily to the scope of EU powers, without explaining the objectives that EU actions should pursue. Unlike States, the EU is bound to pursue certain objectives when it exercises its powers. Articles 2 and 3 TEU identify the values and objectives of EU action, while a number of power-conferring provisions identify specific objectives that EU action in specific fields should aim to achieve. Yet, despite the fact that the EU Treaties determine specific objectives, they offer discretion to EU institutions to decide not only how such objectives should be achieved but also on the level of protection of public interest in the determination of such objectives.[118] In that regard, the Court in Opinion 1/17 dictates that autonomy protects the discretion enjoyed by EU institutions under EU law to set the level of protection of public interest as they deem fit to achieve EU objectives.

In that respect, the Court's ruling regarding the substantive validity of EU acts is highly problematic from a number of perspectives. First and foremost, the Court's understanding of the principle of autonomy does not seem to be in line with the normative foundations of the principle of autonomy, which aims to guarantee the constitutional and institutional integrity of the EU legal order. The Court uses autonomy to exclude any potential international law obligations of the EU from influencing EU institutions when they exercise their discretion to determine the level of protection of public interests. Yet, the Treaties do not require so. The Treaties impose only procedural obligations on EU institutions to consult, to be transparent and consistent in their policy making.[119] What is more, there is no reason to limit the level of discretion enjoyed by EU institutions when they decide upon the level of protection of public interests via the adoption of international

[116] ibid para 160.
[117] ibid para 151.
[118] On the binding nature of EU objectives guiding the scope and content of EU action, see Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016) 154-58.
[119] Article 2 of the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

agreements rather via internal law. If the integrity of the EU legal order aims to guarantee the absolute discretion of EU institutions to set the level of protection of public interest, then institutions should be free to do so whether explicitly in internal law, or indirectly by accepting international law rules that determine what the level of protection should be. In fact, compliance with international law rules, such as WTO law, has been deemed an acceptable and appropriate consideration for EU institutions when exercising their discretion.[120]

Secondly, the ruling of the Court raises significant concerns regarding the future of dispute settlement in EU agreements. The Court implicitly favours the participation of the EU in international treaties that offer, if at all, a weak system for enforcement and compliance with the obligations assumed thereunder. Such approach directly contravenes the key objective of 'strict observance and development of international law' that the EU treaties and political institutions aim to achieve.[121] The only alternative to accepting binding dispute settlement is by ensuring that international courts cannot rule that the level of protection set by EU measures is incompatible with international law.

Thirdly, it is the latter condition that creates significant questions for international law adjudication and ISDS in particular. As the CJEU pre-empts the jurisdiction of investment tribunals and declares that CETA provisions cannot be interpreted to question the level of protection of public interest adopted by EU institutions, the Court in essence asserts a global quasi-constitutional role. In essence, the Court warns arbitral tribunals that if they interpret the CETA provisions, which falls in their mandate in any manner different than that offered by the CJEU in CETA and in any way limit the discretion of EU institutions to set the level of protection of public interest, then their ruling will be annulled. Irrespective of whether the CJEU is right in its analysis of CETA's investment law provisions, and whether they guarantee the right of EU institutions to set the level of protection of public interest as they deem fit, by precluding investment tribunals from exercising their rightful jurisdiction, the CJEU assumes a hegemonic role[122] over international tribunals that is neither contributing to international law nor necessary to protect the autonomy of the EU legal order.

D. Determination of International Responsibility Under Mixed Agreements

[120] Tamara Perisin, 'EU Regulatory Policy: Should All EU Institutions Care What the World Thinks?' (2015) 11 European Constitutional Law Review 99.
[121] Article 3(5) TEU.
[122] On how autonomy is used by the CJEU to assert a hegemonic role over international courts, see de Witte (n 59).

The autonomy of the EU legal order can be further threatened because extra-EU investment treaties like CETA are concluded as mixed agreements, that is by the EU and its Member States together. The assumption of joint international obligations by Member States and the EU poses some additional threats to the autonomy of the EU legal order. A first manifestation relates to the issue of international responsibility under these agreements. The determination of the bearer of international responsibility under mixed agreements requires an allocation of obligations between the EU and its Member States, since states cannot be internationally responsible if they have not assumed international obligations. Consequently, a determination of the EU's external competences is necessary in order to ascertain whether the EU or its Member States have assumed specific international obligations under a mixed agreement. Any interference by an external mechanism, such as an investment tribunal, with the determination of EU external competences threatens the autonomy of the EU legal order, as it can undermine judicial autonomy and violate the exclusive right of the CJEU to rule on the application and interpretation of the competence allocation rules.[123]

More specifically, the CJEU has explicitly ruled that questions concerning the determination of competence between Member States and the EU cannot be decided by a non-EU dispute settlement body.[124] Such questions arise especially when international agreements are concluded together by the EU and its Member States as mixed agreements. This is particularly true when international agreements endorse a competence approach to determining international responsibility, that is they consider whether the specific rule that is the subject matter of a dispute falls under EU or Member State competence. For example, arbitral tribunals could engage with the question of whether the respondent party bears international responsibility in order to determine their jurisdiction and award damages,[125] and thus indirectly decide on the allocation of competences between the EU and its Member States. This is particularly true for cases where Member States are acting as respondents for violations of FDI-related provisions, which is an area of EU exclusive competence.[126]

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[123] As the Court explained in Opinion 2/13 (n 55) paras 223-24 with regard to the application of the co-respondent mechanism, 'if the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, … the ECtHR is to decide on that request in the light of the plausibility of those reasons. 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.'

[124] CJEU, Opinion 2/91, *ILO* [1991] ECLI:EU:C:1991:490; Case C-459/03 *Commission v Ireland* [2006] ECLI:EU:C:2006:345.

[125] Dimopoulos (n 9) 1685.

[126] Govaere (n 99) 192. Andrés Delgado, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016) 16-30. Cf Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' (2015) 38 Fordham International Law Journal 955, 980-85, who argues that the determination of international responsibility does not require a

In that context, the Court has set a high threshold for protecting the autonomy of EU law, explaining that even the possibility of a non-EU court or tribunal determining how competence is shared is sufficient to trigger an incompatibility with EU law. In Opinion 2/13, the Court dealt with a rule provided in the ECHR which enabled the Strasbourg Court to allocate responsibility in specific situations. The CJEU found that the mere possibility of the ECtHR deciding on the allocation of responsibility between the EU and its Member States violates the principle of autonomy because

> a decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law.[127]

The exclusion of investment tribunals from the determination of the allocation of international responsibility, and indirectly EU competences, lies at the very heart of the principle of autonomy. Autonomy safeguards the prerogative of the CJEU to provide an authoritative interpretation of EU law rules. The role of the Court in safeguarding autonomy becomes even more important, when the rules of EU law concerned relate to the very foundations of the EU legal system, such as the existence and scope of EU competences. Mixed agreements by their nature blur the distinction of competences, as they hardly ever provide which parts of an agreement fall under EU exclusive competence. Given that international law rules on the responsibility of international organisations are complex, and that their application to the EU and its Member States is a matter of debate,[128] it is imperative that mixed agreements explicitly allow for competence issues to be decided by the EU alone, whilst complying with international law rules on international responsibility. The lack of specific international law rules on responsibility of complex international organisations such as the EU would not only create legal uncertainty for investors and pose threats to the autonomy of EU law, but would ultimately result in entrusting arbitral tribunals with shaping how international responsibility rules apply to the EU and its Member States. Whether this task is suitable for arbitral tribunals and if the EU wishes to offer them this opportunity is, of

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determination of EU competences. Yet, attribution of conduct is not the only criterion for determining EU international responsibility, as apportionment of obligations is a prerequisite for determining international responsibility. This is the reason why declarations of competences have been widely used in EU mixed agreements, albeit not successfully, for determining EU and Member State international responsibility (for a detailed analysis see Delgado (above this fn) 110-59).

[127] Opinion 2/13 (n 55) para 230.

[128] On how international responsibility rules apply in the EU context see indicatively Delgado (n 126); Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union* (Hart 2013).

course incompatible with the principle of autonomy.

In that context, the EU has in practice used various mechanisms aiming to address these difficulties. In the ECHR context, such problems were aimed to be overcome via the creation of the co-respondent mechanism.[129] In the context of ISDS, autonomy concerns have been addressed differently. In order to guarantee the rights of foreign investors and promote legal certainty, EU investment agreements provide for the 'proceduralisation' of responsibility questions. EU investment agreements set up a new binding framework for determining the responsible party in investor-state dispute settlement. They introduce a specific provision in EU investment agreements which guarantees that, when an investor launches a case against the EU or a Member State, the respondent party bears international responsibility under international responsibility law, while the choice of that party rests with the EU.[130] More specifically, this is possible by enabling the EU to determine the respondent party, and rendering such determination binding for the tribunal and the parties to the dispute. In that way, both the autonomy of the EU legal order is protected, as the choice of respondent rests definitively with the EU, while the determination of the respondent is in accordance with international responsibility rules, on the basis of a *lex specialis* responsibility rule.[131] Indeed, the Court confirmed in Opinion 1/17 that CETA complies with the principle of autonomy as the respondent determination mechanism set thereunder excludes any 'outside' interference with the allocation of competences between the EU and its Member States. [132] It is an internal EU law question to decide how the respondent party is determined and whether the EU or a Member State bears responsibility for the violation of a provision of an EU investment agreement, Regulation 912/2014 establishes specific rules concerning the apportionment of financial responsibility between the EU and its Member States and explain how the EU and its Member States can be involved in ISDS.[133]

E. Compliance With EU Fundamental Rights

[129] The envisaged co-respondent mechanism under the draft EU accession to the ECHR requires that when a Member State is a respondent party before the ECtHR, the EU would also become co-respondent in order to protect the autonomy of EU law. On the correspondent mechanism see indicatively Gragl (n 75) ch 9.
[130] See for example Article 8.21 CETA.
[131] Gerard Kreijen, Andrea Varga and Freya Baetens, 'Multi-party Investment Arbitration: Determining Breach and Compensation Under the New Extra-EU Investment Agreements' (2014) 47 Vanderbilt Journal of Transnational Law 1203.
[132] Opinion 1/17 (n 14) para 132.
[133] Regulation No 912/2014 (n 8). See Dimopoulos (n 9). As regards the compatibility of CETA's provisions on determination of respondent with EU law and Regulation No 912/2014, see Opinion of AG Bot (n 15) paras 161-64.

ISDS finally poses a threat to the autonomy of EU law, if arbitral awards conflict with primary Union law rules on fundamental rights. In the aftermath of the *Kadi* judgment, it has become clear that international agreements concluded by the EU and/or its Member States should not conflict with EU fundamental rights. The Court emphasised the importance of fundamental rights in Opinion 2/13, where it indicated that the ECHR cannot override EU primary law rules on fundamental rights. As the Court clearly stressed

> the autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU.[134]

More specifically, the Court in Opinion 2/13 looked into the relationship between the scope and standard of protection afforded by the CFR and Article 53 ECHR, which enables Member States to provide a higher level of protection than that afforded under EU law. The CJEU found that there is a breach of the principle of autonomy insofar as the ECHR allows for different (higher) standards of fundamental rights protection than those prescribed in EU law.[135] Opinion 2/13 comes after *Melloni*, where the Court found that in areas where EU law is applicable Member States cannot provide higher standards of fundamental rights protection in comparison to the standard of protection afforded under EU law.[136] Hence, neither national law, nor international agreements can provide, nor even enable, the adoption of different standards of fundamental rights protection. In order to justify this position, the Court relied on the need to protect the primacy, unity and effectiveness of EU law,[137] which would be compromised if Member States or the EU were allowed to adopt national or international rules that are different from the standard of protection afforded under EU law. The role that autonomy plays as a guarantee of EU fundamental rights is in line with the role that autonomy serves. To the extent that the Court believes in the priority of EU fundamental rights over national and international law, and it considers that EU law rules pertaining to human rights protection exclude higher or lower standards, the EU should not be allowed to

[134] Opinion 2/13 (n 55) para 170.
[135] ibid para 189.
[136] CJEU, Case C-399/11, *Melloni* [2013] ECLI:EU:C:2013:107. On the role and impact of the Charter in the EU legal order, see indicatively Lucia Rossi, 'Same Legal Value as the Treaties? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights' (2017) 18(4) German Law Journal 771.
[137] Opinion 2/13 (n 55) para 188.

be party to international agreements that could compromise the scope of application and interpretation of EU human rights rules.[138]

Opinion 1/17 confirmed the role that EU fundamental rights play in limiting the ability of the EU and its Member States to include ISDS provisions in their investment agreements. More specifically, the Court emphasized the need for compliance with Article 20 CFR, which protects equal treatment of EU nationals, and with Article 47 CFR, which guarantees the right to a fair impartial trial.[139] Without entering into a substantive analysis of these provisions and how CETA complies with them,[140] suffice it to say that CETA is compatible with the right to equal treatment, as EU and Canadian investors are not in a comparable situation, while ISDS tribunals have the characteristics of accessibility and independence that are required under Article 47 CFR.

Yet, the reach of autonomy as interpreted by the Court, in particular in Opinion 2/13, can be even broader: there is no need for an outright conflict between the substantive rules found in an international agreement and EU human rights. It suffices that the international agreement has rules the interpretation of which *may* contravene EU human rights rules.[141] Following Opinion 2/13 and *Melloni*, there is no need for an extensive inquiry as to how investment treaty rules may conflict with EU fundamental rights protection. The most pertinent example concerns the protection against expropriation, which is protected both under investment treaties and in Article 17 of the CFR. Both provisions set the conditions that have to be satisfied in order for an interference with private property rights to be justified, including the payment of compensation in case of direct expropriation. Yet, to the extent that the measure challenged under an investment agreement falls within the scope of application of the Charter, the application and interpretation of the investment agreement rules on expropriation that differs from the level of protection afforded by the Charter violates the principle of autonomy of EU law.

Were such a broad interpretation of autonomy to be adopted, it can be argued that the autonomy of the EU legal order and the integrity of the CFR could be safeguarded via

[138] On the false assumptions upon which Opinion 2/13 rests, as Article 53 ECHR is not actually a power conferring provision, see Halberstam (n 93) 124-25; Eeckhout (n 126) 965-68.
[139] Opinion 1/17 (n 14) paras 162-244.
[140] AG Bot in his Opinion found that CETA does not violate the provisions of the Charter; see Opinion of AG Bot (n 15) paras 185-271. He argued that the principle of equal treatment was not violated because foreign and domestic investors are not in similar situations, thus the CFR does not require them to be treated in the same manner. On the other hand, as regards the right to a fair and impartial trial, the AG enters into a substantive analysis as to why CETA tribunals meet the demands of Article 47 CFR. Considering that CETA tribunals do not apply EU law, like national courts do, it is questionable whether Article 47 CFR is at applicable in this context.
[141] Pirker and Reitemeyer (n 77) 174.

limiting the enforcement on decisions of investment tribunals. As already discussed, autonomy can be preserved when non-conforming interpretations of international agreements are not binding within the EU legal order. Ensuring that broad international law obligations are not applied and interpreted in a way that conflicts with EU fundamental rights, the EU is required to deny enforcement within its territory of awards that run contrary to EU fundamental rights. As a result, in order to preserve autonomy, national courts and the CJEU should be able to assess whether investment awards offer a different level of protection than that afforded by the CFR, so as to eliminate the potential violation of the CFR.

Of course, this broad interpretation of the principle of autonomy is highly problematic. The Court seems to suggest that autonomy requires the existence of a mechanism that would ensure that the application and interpretation of any EU international agreement by a non-EU court would not result in a violation of EU fundamental rights rules.[142] This poses an insurmountable obstacle to EU and Member State participation in ISDS. In essence, it requires from investment tribunals or any other international courts in cases where a challenged measure falls with the scope of EU law to follow the CJEU's jurisprudence on EU fundamental rights rules, otherwise threatening their enforcement and execution in the EU. Such an interpretation of autonomy in essence eliminates the ability of investment agreements to set up higher standards for the protection of investors than those already prescribed in EU law. In addition, it jeopardises the effectiveness of ISDS, as investment awards can be at the stage of enforcement subject to scrutiny in front of EU courts where their compatibility with EU fundamental rights can always be challenged.

V. CONCLUDING REMARKS

Almost 10 years after the creation of EU exclusive powers in the field of FDI, it seems that it is still unclear what powers the EU holds in this field and what are the implications for international investment law. With regard to extra-EU BITs, Opinion 2/15 shed light and clarified the broad scope of EU powers, especially extending the reach of FDI competence under the Common Commercial Policy. However, the finding that ISDS falls under shared competence, and thus any future EU IIA has to be concluded as a mixed agreement, not only relies on a shaky understanding of when external EU competences arise, but also raises problems regarding the ability of the EU to play a meaningful role in the ongoing debates concerning the future of ISDS.

[142] Adam Lazowski and Ramses Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16(1) German Law Journal 179, 208-10.

With regard to autonomy, *Achmea* and Opinion 1/17 confirm the value that the CJEU attaches to the autonomy of EU law and its own role as the guardian of autonomy. Although it may have come as a shock to the investment law community, both rulings are consistent with the CJEU's earlier case law on autonomy and illustrate the effects that autonomy can have on EU and Member State participation in international dispute settlement. Rather than viewing *Achmea* and Opinion 1/17 as an 'attack' by the CJEU on ISDS, one should consider them within the broader context of the CJEU's recent jurisprudence on the relationship of EU law with other legal orders and the role of the CJEU in insulating and protecting EU law from 'threats' to the integrity of the EU legal order. In that context, their broad reading of the principle of autonomy remains highly controversial.

As a result, the principles of conferral and autonomy indicate how the *sui generis* nature of EU law as a distinct legal order situated between national and international law creates constitutional constraints on the ability of the EU to design its new generation of investment agreements. Unlike most states that enjoy greater flexibility in negotiating and concluding international agreements, the EU constitutional framework poses significant constraints, which if interpreted broadly can result in denying the very purpose of concluding investment agreements.