Sieps

Swedish Institute for European Policy Studies

2015:2

Investor-state arbitration under TTIP

Resolving investment disputes in an (autonomous) EU legal order

Hannes Lenk

THE EU'S EXTERNAL RELATIONS

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– SIEPS 2015:2 –

Report No. 2
June 2015

Published by the Swedish Institute for European Policy Studies

This publication is available at www.sieps.se
The opinions expressed in the publication are those of the author.

Cover design by LuxLucid
Printed by EO Grafiska AB

Stockholm, June 2015

ISSN 1651-8942
ISBN 978-91-86107-53-6

Preface

Controversies about the inclusion of the investment-state dispute settlement (ISDS) mechanism have been dominating the debate surrounding the ongoing negotiations of the Transatlantic Trade and Investment Partnership (TTIP) agreement in many EU countries. The level of social anxiety and the amount of heated political discussion about the instrument may seem somewhat surprising knowing that since the 1960s the EU Member States have concluded more than 1400 investment protection treaties, and by the 1990s ISDS had developed into a standard provision in such agreements.

Breaking away from the polarization of the ongoing debate about the ISDS, which limits the choice to either having or not having it included in the treaty, this report is attempting to address the issue from a legal rather than political perspective and show alternative solutions. The report investigates the systemic challenges of inclusion of ISDS provisions in the TTIP, and their compatibility with the principle of autonomy in the EU legal order. The author argues that the risk of incompatibility of the ISDS framework can be alleviated by innovative drafting of the relevant provisions and thereby address the many democratic concerns underlying public criticism of ISDS.

The time of publication of this report coincides with important developments at the EU level. On the 5th of May this year, EU Trade Commissioner Cecilia Malmström issued a concept paper on EU's approach to investment, and opened up a discussion of the possible reform of ISDS, which would respond to the critique voiced during the TTIP negotiations process. With the publication of this report, SIEPS wishes to contribute to a deeper understanding of this topical question.

Eva Sjögren
Director

About the author

Hannes Lenk is a doctoral student in International Law at the University of Gothenburg. He is currently working on his thesis project: *Foreign Direct Investment and the European Union - an International Perspective on the Union's External Competence and its Potential in a post-Lisbon Common Commercial Policy*.

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List of abbreviations

BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
EC	European Communities
ECAA	European Common Aviation Area
ECHR	European Convention for the Protection of Human Rights
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EP	European Parliament
EPCt	European Patents Court
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariff and Trade
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ISDS	Investor-state dispute settlement
LCIA	London Court of International Arbitration
MFN	Most Favoured Nation
NGO	Non-Governmental organization
SCC	Stockholm Chamber of Commerce
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership
TRIMs	WTO Agreement on Trade-Related Investment Measures
TRIPS	WTO Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States
USA	United States of America
WTO	World Trade Organization

Executive summary

The EU's participation in international fora and its far-reaching treaty-making activities have always portrayed the EU as an international actor. The Treaty of Lisbon strongly reflects the ambition of the EU to position itself as an important international player with a wide range of international commitments. As far as the EU's foreign trade policy is concerned, the Treaty of Lisbon extended the EU's exclusive competences in this area, including foreign direct investment. The EU is now competent to conclude international investment agreements and include comprehensive chapters on the regulation and protection of foreign investment into larger free trade agreements. The Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the USA are the pinnacle of this ambitious bilateral trade strategy.

To become an actor in international investment law, and with the intention of replacing bilateral investment agreements concluded between EU Member States and third countries, the EU's competences would ultimately have to allow for the conclusion of investment agreements of no lesser scope than those existing agreements. Since the 1990s, modern investment treaties have included provisions on investor-state dispute settlement (ISDS) as *quasi* standard clauses for investment protection. This mechanism allows investors to have direct access to international arbitration tribunals to enforce their rights under the agreement. The realisation of comprehensive EU investment policy on the basis of (bilateral) investment agreements presupposes that the EU is competent and willing to include ISDS provisions into their agreements. In the context of TTIP in particular, the inclusion of ISDS provisions has gone rather unquestioned by legislators on both sides.

ISDS provisions have been highly criticised in the recent past for their perceived adverse impact on the regulatory policy space of contracting states. Particularly in the case of the TTIP negotiations, this has completely polarised the public debate, with a strong demand for the categorical exclusion of ISDS provisions from the negotiations. Whilst this debate is highly political in nature, the present study is investigating potential challenges to the inclusion of ISDS into the TTIP under EU law. The precise focus is on the compatibility of ISDS provisions with the principle of autonomy in the EU legal order. The reasoning of the Court of Justice of the European Union (CJEU) in its past opinions on EU agreements establishing various international judicial bodies provides the relevant normative framework for this study. More importantly, it provides suggestions for the innovative drafting of ISDS provisions in TTIP to assure a positive assessment, if the CJEU were presented with this question.

In *Opinion 1/00*, the CJEU provided a precise definition of the principle of autonomy and the features determining its application to international courts and tribunals. Accordingly, the principle is two-fold. First, the international court or tribunal cannot bind the Union and its institutions internally to a specific interpretation of EU law that is referred to in the international agreement. Second, the international agreement cannot affect the essential characteristics of the powers conferred upon EU institutions under the Treaty. This includes, on the one hand, that the interpretation of respectively allocated competences remains exclusively a matter for the Court, and on the other hand, that the essential characteristics of powers allocated to institutions under the Treaty remain unaltered.

Although the opinions are characterised by very particular factual circumstances, a narrow reading of the Court's opinions cannot generally restrict the application of the principle of autonomy to international courts and tribunals. It is argued in this study that broad underlying concerns of the CJEU are reflected in its reasoning. Amongst those, there is the risk to the uniformity of the application and interpretation of EU law by divergences between the approaches taken in the CJEU and international tribunals, and the risk that international courts will trespass upon the judicial prerogatives of the CJEU, which were assigned to it under the Treaties. In light of the review of the Court's reasoning, three particular aspects are discussed in this study that present a challenge to the compatibility of ISDS provisions with the principle of autonomy.

First, the involvement of investor-state tribunals in the interpretation of EU law is more than merely incidental. In fact, it is a primary task of the investment tribunals in the assessment of EU legal acts and their compatibility with broadly defined investment standards under the investment agreement. To that extent, investment awards limit the Court in its interpretation of secondary EU law internally. The position of investment agreements in the EU legal order requires the CJEU to interpret secondary EU law in conformity with the investment agreement and the investment awards emanating from it. This effectively binds the CJEU to the investment tribunal's interpretation and assessment of secondary EU law. Additionally, the lack of permanence and precedents in investment arbitration exacerbates the risk of the development of divergences in the internal and external interpretation of EU law.

Second, the Court has recently reiterated in *Opinion 2/13* on the draft accession agreement of the EU to the ECHR that the determination of the respondent status in an individual dispute includes an assessment of the allocation of competences between the EU and its Member States under the Treaties. Investor-state tribunals will have to make this determination, expressly or impliedly, when deciding on their jurisdiction over a registered claim. The investment tribunal is thereby exercising a judicial function that is exclusively reserved to the CJEU.

Third, in accordance with Article 19 TEU, the CJEU enjoys exclusive jurisdiction to judicially review EU law, including an assessment of its compatibility with international agreements. This study argues that investor-state tribunals are charged with precisely the task of reviewing the compatibility of EU legal acts vis-à-vis the investment agreement. Both the CJEU and the domestic courts of the Member States are excluded from the arbitration process and have extremely limited means under the New York Convention to refuse the enforcement of investment awards within the territory of the EU. *Opinion 2/13* furthermore demonstrates that, in certain circumstances, where EU law is assessed in light of broad international standards, the international agreement must allow for the prior involvement of the CJEU. If the CJEU adopts this approach in the context of investment arbitration, it certainly would require EU investment agreements to implement preliminary reference procedures whereby the investor-state tribunal is bound by the Court's interpretation of EU law. On the other hand, *Opinion 1/09* of the European Patents Court emphasises that domestic courts of the EU Member States, in their role as ordinary courts of the EU legal order, have particular responsibilities under Article 267 TFEU in their relationship with the CJEU. Although investor-state arbitration is not usually an exclusive legal avenue under the Treaty, it does exclude domestic courts from questions concerning the interpretation and application of EU law once the investor has activated the ISDS provisions.

The EU law challenges faced by ISDS provisions in TTIP, in respect to their compatibility with the principle of autonomy, can be remedied in a number of ways. Amongst these are the total exclusion of ISDS from the scope of the TTIP and alternative interpretations of the principle. This study argues that an exclusion of ISDS from TTIP is not politically feasible. On the one hand, ISDS appears to be an important aspect of transatlantic relations on both sides. On the other hand, an exclusion of ISDS from TTIP might have larger implications for future negotiations by the EU and the USA, requiring stronger justifications for the inclusion of ISDS in agreements such as the TPP or an investment agreement with China. As far as alternative interpretations of the CJEU are concerned, it is difficult to conceive how the Court's reasoning could adapt in light of the characteristics of contemporary ISDS provisions. This study proposes that a more nuanced application of the principle of autonomy to investor-state tribunals must be accompanied by the innovative drafting of ISDS provisions that address the shortcomings identified in this study.

These can be addressed in a number of ways. This study discusses, in particular, the restriction of available remedies, an explicit limitation of the direct effect of investment awards, the inclusion of a preliminary reference mechanism, the exhaustion of domestic remedies, clauses defining the allocation of competences and the limitation of the practical effect of investment awards by recourse to public policy in the enforcement procedure.

In sum, the limitation of available remedies to pecuniary damages minimises – but does not eliminate – the risk that investment awards pose to the validity of EU legislation through restitution, injunctive relief or specific performance. An explicit limitation of the direct effect of investment awards effectively restricts the use of investment awards in parallel or subsequent proceedings, which eliminates their impact on the internal interpretation of EU law by the CJEU. A prior involvement of the CJEU on questions pertaining to the interpretation of EU law demonstrates judicial comity and would certainly go a long way in establishing a relationship between these two judicial mechanisms, whilst protecting both the judicial prerogatives of the CJEU and the integrity of EU law. Delimitation clauses are likely to fall short of providing a solution to the current problem of overlapping competences. However, a mechanism that allows the Commission to address the determination of the respondent status internally prevents investor-state tribunals from engaging in an assessment of the allocation of competences under the EU Treaties. The exhaustion of domestic remedies keeps domestic courts involved in the arbitration process and preserves their obligations under Article 267 TFEU. Lastly, a refusal to enforce investment awards on the grounds of public policy has potential as a measure of last resort for domestic courts or the CJEU to review investment awards in light of important principles of EU law.

However, the drafting of ISDS provisions is a double-edged sword that provides not only for solutions, but also introduces new problems into the system. The restriction of available remedies does not eliminate the risks posed by pecuniary awards. The explicit exclusion of direct effect for EU investment agreements has the potential to curtail some of the most fundamental rights of investors under modern investment treaty law. A preliminary reference procedure undermines the objective of depoliticising the arbitration process. A return to the exhaustion of domestic remedies reestablishes post-colonial preconceptions against judiciaries in developing countries and provides an unbalanced access to procedural rights under the investment agreements. An internalisation of the determination of the respondent status charges the Commission exclusively with the task of identifying international responsibility for EU legal acts, raising pertinent questions regarding the principles of international law. Lastly, refusing enforcement of awards on the grounds of public policy abuses the safeguards under the New York Convention to materially review investment awards.

Hence, none of the drafting choices individually provide for a comprehensive solution that addresses the incompatibility of ISDS provisions with the principle of autonomy in its entirety. The way forward is, thus, a balanced approach that focuses on positive features, whilst retaining safeguards against the potential negative effects. Additionally, it is argued in this study that the drafting choices have an important cumulative effect, because they address individual aspects of a broader and overarching problem. For it to show an effect, however, the willingness of the CJEU is required. Much will depend on the extent to which

the CJEU is committed to the strict reasoning it demonstrated in *Opinions 1/09 and 2/13*. Existing case law already provides the Court with sufficient leeway to reassess the impact of international judicial bodies on the essential characteristics of the powers of EU institutions, including its own jurisdictional prerogatives. Innovative drafting of ISDS provisions in TTIP can guide the CJEU towards a positive assessment of the agreement.

Operating on the international plane requires the consideration of other interests, such as fundamental principles of investment law, applicable international procedural frameworks for the enforcement of investment awards, or more generally, principles of public international law. The draft CETA text already reflects important progress in this regard, but retains some procedural drawbacks. For instance, although the Commission is now responsible for determining the respondent in investment disputes internally, the investor-state tribunal will still face such an assessment where the Commission fails to take the decision within 50 days.

In sum, if the CJUE were to assess the compatibility of the TTIP draft agreement with the Treaties prior to its conclusion under Article 218(11) TFEU, ISDS provisions face substantive challenges under the principle of autonomy. The expansion of the EU as a global actor demands the willingness of the CJEU to demonstrate more openness to international legal processes and international judicial bodies. For the Court's application of the principle of autonomy to international courts and tribunals, this requires alternative interpretations of the principle that are more receptive to international jurisdiction and focus on cooperation and communication. Currently, the use of the principle of autonomy as a means of excluding international law stays in harsh contrast with the inclusive approach adopted in the EU Treaties. However, the success of TTIP is not left to the goodwill of the CJEU. Regulators, and particularly, the negotiators of the TTIP agreement, have a responsibility to develop ISDS provisions in a way that facilitates the positive opinion of the Court. This study introduced a number of these drafting choices and critically discussed their inclusion in the TTIP negotiations.

1 Introduction

One of the major developments that were introduced with the Treaty of Lisbon is the further establishment of the EU as a global actor.[1] Accordingly, international commitments of the EU have been deeply embedded in the Treaties. This is exemplified by the extensive references to the United Nations and its Charter as a guiding principle for the development of EU external relations,[2] Articles 3(5) and 21 of the Treaty on European Union (TEU), which lay out the general principles underlying the EU's external action, and Article 6(2) TEU, which provides for the EU's accession to the European Convention for the Protection of Human Rights (ECHR). All of this is a clear indication of the EU's intention to play an active role in international relations. In a more traditional field for EU foreign policy, the Treaty of Lisbon furthermore provided for a great expansion in the EU's foreign trade competence under the common commercial policy (CCP). Whilst there remains a strong commitment to the multilateral trading system (i.e. the EU's role within the WTO), the Treaty of Lisbon facilitates the pursuit of the interests and objectives of EU trade by way of extending the EU's bilateral network, and positions the EU as an actor in international investment law. Article 207 TFEU now provides the EU with exclusive external competences in relation to foreign direct investment (FDI).

Yet, overshadowing the EU's Treaty commitments to the respect and development of international law, the Court of Justice of the European Union (the CJEU or the Court) has painfully reminded us that being a global actor requires more than words and goodwill. In its recent *Opinion 2/13*,[3] the CJEU reasoned that the current draft accession agreement of the EU to the ECHR violates the principle of the autonomy of the EU legal order and is therefore incompatible with the EU Treaties. The Court's restrictive interpretation and application of the principle of autonomy to international judicial bodies has already proved fatal to the EU's interaction with international law on several occasions in the past. It compromises the EU's ability to open up to the international legal order, and raises concerns about the Court's willingness to facilitate the necessary transition to the international establishment of the EU.

As an actor in international investment law, the EU must accommodate interaction with investment arbitration tribunals under investor-state dispute settlement (ISDS) provisions in EU investment agreements. Under ISDS

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1 Jan Wouters, Bart Van Vooren and Steven Blockmans (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press 2013).

2 Ramses A. Wessel, *Close Encounters of the Third Kind: The Interface between the EU and International Law after the Treaty of Lisbon* (SIEPS Report, 2013:8, 2013).

3 Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms,* 18 December 2014, nyr.

provisions, third-country investors in the EU may access private arbitration panels to enforce their rights under investment agreements directly, challenging regulatory acts of the EU or its Member States. It is the purpose of this study to examine the compatibility of ISDS provisions in EU investment agreements with the principle of autonomy, using the example of the Transatlantic Trade and Investment Partnership (TTIP) agreement between the EU and the USA.

The principal normative framework under which this study is conducted is presented by the Court's interpretation of the principle of autonomy. It is helpful to imagine that the underlying scenario is the assessment of an EU investment agreement by the CJEU in accordance with Article 218(11) TFEU. This, however, has certain implications for the scope of this study. First, the analysis of the content and elements of the principle of autonomy follows, rather pragmatically, the Court's reasoning. Although the examination of the Court's case law will be complemented at times by general and evaluative remarks, this study lacks a critical, free-standing, evaluation of the principle of autonomy. Second, the detailed discussion of solutions is focused on possible drafting choices for EU investment agreements that could help policy makers to circumvent a conflict with those elements of the principle that the CJEU has identified as controversial. Other options, such as an alternative method of interpretation, legislative intervention or Treaty amendments, are not addressed in detail in this study. Additionally, ISDS provisions represent procedural rights for investors under an investment agreement. The discussion in this study will therefore not entertain any discussion of material standards of protection (i.e. most favoured nation (MFN) treatment, national treatment, non-discrimination, fair and equitable treatment, no expropriation without proper compensation, etc.).

Before engaging in a substantive legal analysis, part two of this study constructs the necessary background for an understanding of ISDS provisions in EU trade agreements in general and in the TTIP agreement in particular; it will outline the general functioning of investor-state arbitration, and will address the ongoing public debate on the issue. Part three contains the substantive assessment of the compatibility of ISDS provisions with the principle of autonomy. Examining the relevant case law of the CJEU, the elements of the principle are identified and applied individually in the context of ISDS provisions. This part closes with a brief discussion of possible solutions to the potential shortcomings of traditional ISDS provisions through drafting choices in EU investment agreements. Lastly, part four examines the consolidated draft text of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada in an attempt to anticipate how far the problems that were set forth in the preceding analysis can be addressed in the framework of the TTIP negotiations.

The present study concludes that contemporary ISDS provisions pose a significant risk to the autonomy of the EU legal order, as that principle is currently interpreted and applied by the CJEU to international courts and

tribunals. This restrictive position of the Court hampers the EU's development as a global actor, and it is therefore crucial that incompatibilities are addressed swiftly and pragmatically. The best solution, it is argued in this study, can be achieved through innovative drafting of ISDS provisions in the text of future EU investment agreements.

2 Setting the scene

Before venturing into the legal analysis of the autonomy of the EU legal order, which is at the heart of this study, it is important to give a brief but comprehensive overview of the background to the EU's engagement in international investment law. This involves a summary of the development of the CCP, which now holds the EU competence for the negotiation of international investment agreements, as well as the procedural framework for investor-state arbitration. Setting the public debate on ISDS into the context of TTIP, this part aims to link the public, largely political, debate with the need for a legal assessment of ISDS provisions from an EU law perspective.

2.1 The 'new generation' of EU FTAs: the journey of the CCP

The liberalization of trade in goods was undeniably one of the cornerstones of the CCP from its very beginning. However, as trade relations progressed internationally, the limited focus on trade in goods no longer reflected commercial reality. Multilateral trade negotiations, with the start of the Uruguay Round, saw a shift of emphasis away from the traditional trade in goods model. Non-traditional aspects of trade such as intellectual property rights, services and investment received increasing attention and there was a recognition that they were inherently relevant to trade liberalization. These developments put EU trade policy under severe pressure to adapt, and this would have meant a legislative change for the CCP. However, in the absence of EU Treaty amendments in this respect, it was for the CJEU to display pragmatism and commitment to the multilateral trading system. The Court had already taken steps in that direction in its *Opinion 1/75*.[4] In a defining moment for EU foreign trade policy, the CJEU identified the CCP as a dynamic concept that develops over time in conjunction with the meaning of commercial policy in the national context of international trade action. Later, the Court reiterated this point in *Opinion 1/78*, forcefully declaring that the CCP would be rendered "nugatory" if it were to be interpreted restrictively.[5]

However, the CJEU was wary about substantively broadening the scope of the CCP and thereby encroaching on legislative competence. *Opinion 1/94* on the agreement establishing the World Trade Organization (WTO) sent a strong signal that ultimately triggered a progressive development of the alignment of the EU external trade competence with multilateral commitments through subsequent Treaty amendments.[6] Functioning as a catalyst for change, the CJEU demonstrated that, during a period in which the negotiation mandate for trade

[4] Opinion 1/75, *Understanding on a Local Cost Standard,* [1975] ECR 1355.
[5] Opinion 1/78, *International Agreement on Natural Rubber,* [1979] ECR 2871, para. 45.
[6] Opinion 1/94, *WTO Agreement* [1994] ECR I–5267.

liberalization was growing wider in the multilateral trading system, the EU's external competence was lagging behind.[7]

The reason for this gap was the missed opportunity for progressive change in the run-up to the Maastricht Treaty. In preparation for the drafting, the Commission proposed an ambitious plan to extend the competence under the CCP to include a wide range of sectors and non-traditional trade aspects.[8] But even the more nuanced proposal by the Luxembourg Presidency to update the CCP to cover "trade in goods and services directly related to such trade" was ignored at the intergovernmental conference.[9] At the time the Treaty was signed in 1992, therefore, it did not match the realities of the ongoing multilateral trade negotiations under the General Agreement on Tariff and Trade (GATT). The agenda of the Uruguay Round, which at that time was well underway, included trade in services, trade-related aspects of intellectual property rights and trade-related investment measures.[10] Hence, whilst international commitments increased, the CCP remained a fuzzy and broadly defined concept limited to the trade in goods. In 1994 the CJEU was asked to deliver its opinion on whether the multilateral agreement resulting from the Uruguay Round negotiations was covered by EU exclusive competence under the CCP. The CJEU reiterated its rhetoric on the dynamic character of the CCP and concluded that trade in services could not, as a matter of principle, be excluded from the scope of the CCP.[11] That being said, the Court denied exclusive EU competence to conclude the General Agreement on Trade in Services (GATS) because its broad definition of services, which included commercial presence and the presence of natural persons, could not be covered by the material scope of the CCP alone.[12] Additionally, with respect to intellectual property rights, the CJEU clarified that there is not a sufficient link between intellectual property rights and trade in goods.[13] Hence, it concluded that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) also fell outside the EU's exclusive competence under the CCP.[14]

To keep up with ambitious international commitments, Treaty amendments could no longer be stalled. In 2001, the Treaty of Nice introduced a reference to trade in services and the commercial aspects of intellectual property rights into

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7 For a comprehensive outline of the development of the CCP, see Piet Eeckhout, *EU External Relations Law* (Oxford University Press 2011).

8 Marc Maresceau, 'The concept "Common Commercial Policy" and the difficult road to Maastricht' in Marc Maresceau (ed), *The European Community's Commercial Policy after 1992: The Legal Dimension* (Martinus Nijhoff 1993), at p. 6.

9 *Ibid.,* at pp. 11-12.

10 GATT Ministerial Declaration on the Uruguay Round, 20 September 1986, available at <https://docs.wto.org/gattdocs/q/1986_90.HTM>.

11 Opinion 1/94, *WTO Agreement.,* at para. 41.

12 *Ibid.,* at para. 47.

13 *Ibid.,* at para. 57.

14 *Ibid.,* at para. 71.

the Treaty text on the CCP, subject to unanimity in the Council.[15] The Treaty of Lisbon has subsequently extended the list of competences even further, to include FDI, and removed the caveat left by the Treaty of Nice.[16] The CJEU has furthermore confirmed that GATS[17] and TRIPS[18] now fall entirely under the exclusive competence of the CCP.

In the beginning of the Uruguay Round, the focus was quite strongly on trade and investment. However, disagreement amongst GATT – and, later, WTO – members hampered real achievements in this area, and limited the outcome of the negotiations to the Agreement on Trade-Related Investment Measures (TRIMs). Trade and investment was subsequently brought over into the WTO Doha Round negotiations and was discussed in working groups. During the same period, the EU began the drafting of the Constitutional Treaty, which in its final version included FDI in the CCP. Presumably, this was essential in order to prepare the EU for the conclusion of an investment agreement as an outcome of multilateral negotiations, in other words to match EU competence with all aspects under negotiation in the Doha Round.[19] Then, only one month before the text of the Treaty was finalized, trade and investment was officially dropped from the Doha agenda.[20] Nonetheless, and despite the failure of the Constitutional Treaty, the inclusion of FDI in the CCP under the Lisbon Treaty remained uncontroversial.

Additionally, with stagnation in the Doha Round negotiations and the fading dream of achieving trade liberalization on the Singapore issues (i. e. transparency in government procurement, trade facilitation, trade and investment, and trade and competition), the EU refocused its trade policy in 2006,[21] ending a seven-year moratorium on bilateral trade negotiations.[22] The new orientation looked to the

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15 OJ C 80, 10.03.2001, Treaty of Nice, Article 2(8) amending Article 133(5).

16 OJ C 306, 17.12.2007, Treaty of Lisbon, Article 2(12) amending Article 2B, and Article 2(158) amending Article 188C; these are now Articles 3 and 207 TFEU, respectively.

17 Opinion 1/08, *GATS Schedules,* [2009] ECR I–11129, para. 119; this case was decided on the day before the Lisbon Treaty came into force. It can be presumed, however, that the outcome is generally applicable because the changes made by the Lisbon Treaty affected only the nature of the competence in trade in services and not its scope.

18 Case C-414/11, *Daiichi Sankyo Co. Ltd. v. DEMO* 18 July 2013, nyr.

19 OJ C 310, 16.12.2004, Treaty establishing a Constitution for Europe, Article III-315.

20 WT/L/579, 02.08.2004, WTO, Doha Work Programme, Decision Adopted by the General Council on 1 August 2004, at para. 1(g).

21 SEC(2006) 1230, Commission Staff Working Document, *Global Europe: Competing in the World: A Contribution to the EU's Growth and Jobs Strategy*; Boris Rigod, '"Global Europe": The EU's new trade policy in its legal context', 18 *Columbia Journal of European Law,* 2012 277, at p. 288.

22 SEC(2010) 1268/2, Commission Staff Working Document, *Report on Progress Achieved on the Global Europe Strategy, 2006-2010*, at p. 3.

EU's commercial interests[23] and a strategy based on the progressive achievement at a bilateral level on issues that could not be attained multilaterally.[24] Today, the EU has become one of the most frequent users of bilateral agreements, promoting the liberalization of trade through an extensive web of bilateral and regional trade agreements.[25]

Hence, whereas the early orientation of EU trade policy, in line with the development of the CCP, appears to have been driven by the objective of aligning the EU with its multilateral commitments, recent developments have turned this process into a progressive trade policy. The inclusion of FDI in the list of the EU's exclusive competences, and the explicit turn towards an extensive bilateral trade policy, demonstrate a willingness and commitment to address aspects beyond the reach of multilateral negotiations. The EU now has the competence to regulate issues such as regulatory standards, public procurement and FDI internationally with a 'new generation' of trade agreements.

2.2 Towards a comprehensive European foreign investment policy

Within six months of the coming into force of the Treaty of Lisbon, the European Commission presented a communication laying out its work towards a comprehensive EU investment policy.[26] At its core lies the establishment of a level playing field for investors, through the integration of investment liberalization and investment protection under bilateral agreements with third countries. The communication reflects the broad view being taken by the Commission on the scope and nature of its competence.

International investment can be regulated on three levels: domestic legislation on foreign investment, investment contracts between the government and particular investors, and international investment agreements, most commonly bilateral investment treaties (BITs). Currently, there are more than 3,500 BITs in place, almost half of which are agreements with EU Member States. The number of BITs, and consequently the importance of BITs as the predominant means of investment protection, grew gradually from the late 1950s and has increased exponentially from the 1990s onwards. A comprehensive European investment policy, therefore, presupposes that the EU at least has exclusive competence to conclude agreements with the scope and nature of BITs.

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[23] See Rigod (2012); the author divides existing EU agreements into two groups, those based on foreign policy considerations and those based on commercial considerations. It is the latter group that has been the focus for the EU when choosing its strategic partners for trade talks since 2006. Rigod (2012), at pp. 284-85.

[24] SEC(2006) 1230 *EU's Growth and Jobs Strategy*, at pp. 14-18; Rigod (2012), at pp. 279-80 and 287-88.

[25] Commission, EU Trade Relations World Wide – a Map, available at <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149622.jpg>.

[26] COM(2010)343, European Commission, 'Towards a comprehensive European international investment policy'.

The Commission's firm belief that it possesses the requisite competence is corroborated by the regulation on transitional arrangements for bilateral investment agreements between Member States and third countries, which envisages the gradual replacement of Member State BITs with EU agreements.[27] The Commission recently decided to bring the competence question before the CJEU and is currently preparing the request for an Advisory Opinion under Article 218(11) TFEU on the EU–Singapore agreement.[28] Amongst other things the Court is expected to provide clarity on the meaning and scope of the concept of FDI under the CCP. Be that as it may, the question of competence is not at the core of this study. Suffice it to say that investment protection, including the establishment of mechanisms for the resolution of investment disputes, is broadly within the EU's external competence under the CCP. This study is concerned with other EU law challenges to the inclusion of ISDS provisions in agreements such as the TTIP agreement, particularly with regards to the principle of the autonomy of the EU legal order.

Three ongoing sets of negotiations are of particular interest in regards to investment protection. Negotiations on the EU trade agreement with Singapore, even though this was initially finalized in 2013, were extended to allow the inclusion of a chapter on investment protection. Negotiations were finally concluded on 17 October 2014.[29] The EU–Canada summit in Ottawa on 26 September 2014 marked the end of negotiations on CETA.[30] A consolidated draft text is available on the Commission's website and includes a sophisticated chapter on investment protection. However, both draft texts are currently undergoing legal scrubbing and could be subject to amendments in the process. Indeed, the inclusion of ISDS provisions in CETA has met fierce opposition from Germany. Lastly, negotiations on the investment chapter in the TTIP agreement have been postponed as a result of public consultations initiated by the Commission earlier this year on the question of the inclusion of ISDS provisions.[31]

2.3 Investor-state arbitration in a nutshell

International investment law as a distinct field of international law has its roots in the protection of property abroad. It was only later that states started to

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

[28] Commission Press Release, 'Singapore: The Commission to request a Court of Justice Opinion on the trade deal', Brussels, 30 October 2014, available at <http://europa.eu/rapid/press-release_IP-14-1235_en.htm>.

[29] Commission Press Release, 'EU and Singapore conclude investment talks', Brussels, 17 October 2014, available at <http://europa.eu/rapid/press-release_IP-14-1172_en.htm>.

[30] Commission Press Release, 'Canada–EU Summit – A new era in Canada–EU relations: Declaration by the Prime Minister of Canada and the Presidents of the European Council and the European Commission', Ottawa, 29 September 2014, available at <http://europa.eu/rapid/press-release_STATEMENT-14-288_en.htm>.

[31] Commission Press Release, 'European Commission launches public online consultation on investor protection in TTIP', Brussels, 27 March 2014, available at <trade.ec.europa.eu/doclib/press/index.cfm?id=1052>.

conclude investment contracts with individual investors to guarantee favourable provisions and attract larger investment projects. These contracts covered only the particular project, and did not extent to any other assets of the investor. The investor thereby received a contractual right for the protection of its commercial property. In the case of a dispute, the investor was usually confronted with the challenge of bringing the case before the local courts of the host country. Additionally, and especially in cases where the local judiciary provided an inefficient or inadequate avenue for seeking legal redress, the investor could call upon diplomatic protection from its home state.[32] The resolution of disputes on the expropriation of commercial property was, thus, an inherently political matter.

The conclusion of the first BIT between Germany and Pakistan in 1959 marked an important shift in the regulation of international investment. Under BITs, investors are no longer dependent on the contractual relationship with the state but are protected as long as they fall within the scope of the agreement. However, under the early BITs investors remained dependent upon their home states to espouse their claims under state-state arbitration. By the 1990s ISDS had developed into a standard provision in modern investment agreements.[33] ISDS provided investors, for the first time, with the chance to enforce their rights under an investment agreement directly before an international arbitration tribunal. Notably, investment protection under a BIT is not limited in time or scope to a particular investment project. It constitutes, instead, a standing offer to any eligible investor to pursue its rights with regards to any investment that falls within the scope of the agreement. Consent of the state-party to arbitration is implied in the BIT, and all that the investor has to do is to accept the offer by initiating the claim.[34] In other words, once the state has decided to include ISDS into a BIT there is nothing that can prevent an eligible investor from initiating an investment claim under the agreement.

The procedural rules governing the arbitration procedure are identified in the ISDS provisions and vary between BITs. Most commonly, investment agreements include a reference to the International Centre for the Settlement of Investment Disputes (ICSID), which devised a set of rules particularly tailored for investment disputes. The EU is not a member of the ICSID

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[32] For a comprehensive outline of the methods of dispute resolution, see August Reinisch and Loretta Malintoppi, 'Methods of dispute resolution' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008), 691.

[33] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012), at pp. 6-7; Gus Van Harten and Martin Loughlin, 'Investment treaty arbitration as a species of global administrative law', 17 *European Journal of International Law,* 2006 121, at p. 123.

[34] Dolzer and Schreuer (2012), at p. 257.

Convention,[35] and this framework is thus not available in investment disputes against the EU as a respondent.[36] The ICSID Additional Facility rules, however, allow for claims to be brought under ICSID rules where either the investors home state or the respondent state is a signatory to the ICSID Convention. Although claims under the Additional Facility are administered by ICSID and benefit from its institutional structure, the investor cannot use the full range of mechanisms available under the ICSID Convention; for example, the automatic enforceability of investment awards is excluded.[37] Other procedural frameworks such as the rules of the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL), the Stockholm Chamber of Commerce (SCC) or the London Court of International Arbitration (LCIA) are traditional commercial arbitration rules that can, and have been, used for the settlement of investment disputes.

Commercial arbitration tribunals are inherently competent to decide on their own competence,[38] and Article 41(2) ICSID reflects a similar approach for ICSID investment tribunals.[39] This effectively means that after initiation of the claim, the tribunal will decide whether or not it has jurisdiction to hear the dispute and subsequently render the award. ICSID awards are final and automatically enforceable in the territory of all states that are signatories to the ICSID Convention.[40] Additionally, the ICSID Convention provides for the review and annulment of awards only in very limited circumstances,[41] and does not allow for an award to be appealed on substantive grounds. Domestic courts are, thus, entirely excluded from the process of dispute resolution.

In contrast, under the Additional Facility or commercial arbitration rules, it is for the domestic courts to enforce the award in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral

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[35] The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, as amended 10 April 2006.

[36] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2008), at p. 24.

[37] Reinisch and Malintoppi (2008), at p. 706.

[38] e.g. Article 23 UNCITRAL ; Article 16(1)(1) UNCITRAL Model Law; Article 6 ICC.

[39] Dolzer and Schreuer (2012), at p. 241; Chester Brown, 'Procedure in investment treaty arbitration and the relevance of comparative public law' in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010), 659, at pp. 666-68; Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005), at pp. 169-70; Marianne Roth, 'UNCITRAL Model Law' in Frank-Bernd Weigand (ed), *Practitioner's Handbook on International Commercial Arbitration* (2nd edn, Oxford University Press 2009), 953, at pp. 1021-22; Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell 2007), at pp. 384-86; for a recent arbitral decision on jurisdiction issued by the investment arbitration tribunal under the ECT, see *Electrabel S.A. v. Hungary*, 30 November 2012 (ICSID Case No. ARB/07/19), Part V.

[40] Article 53 ICSID Convention.

[41] Articles 51 and 52 ICSID Convention.

Awards (the New York Convention).[42] According to Article V of the New York Convention, domestic courts have limited grounds to refuse the recognition or enforcement of an award, and this may not amount to a *de facto* appeal of the award.

In summary, ISDS provisions constitute a legislative means to extend the benefit of directly enforceable rights under an international agreement to an objectively defined, broad and generally unknown group of claimants who have no prior relationship with the state regarding the investment.[43] Once the claim is initiated before a tribunal, there is practically no room for domestic courts to intervene in the process. Although this effectively depoliticizes the process for the settlement of investment disputes, it is fraught with problems from an EU law perspective to the extent that it encourages investors to circumvent the exclusive jurisdiction of the CJEU.

2.4 ISDS and a transatlantic trade deal

2.4.1 The ISDS and TTIP controversy

The inclusion of ISDS provisions in the TTIP agreement has sparked public outrage amongst non-governmental organizations (NGOs) and citizens' rights groups on both sides of the Atlantic. Under the mounting pressure of the public debate and in an attempt to deliver on its promise of transparency in the negotiations, the Commission initiated a public consultation in 2014.[44] Although similar voices were raised in other contexts (for example, there were German objections to the ISDS provisions in CETA), it appears that the public debate with regards to TTIP is particularly strong.

The criticism of the inclusion of ISDS provisions is, above all, based on the belief that they curb the scope of domestic regulatory policy. In brief, EU Member States will no longer be able to regulate freely in important areas of domestic policy such as healthcare, provision of social services, workers' rights and environmental protection, amongst others. This is because if such regulations have a restrictive effect on the business community then they may expose Member States to multi-billion dollar investment claims brought before investor-state tribunals. The number of investment claims has risen in recent years, with 2012 showing a record high of 58 new registered claims.[45] In June 2011, Philip Morris initiated arbitration proceedings against Australia under the Australia–Hong Kong BIT, claiming that Australia's plain packaging legislation violated investment standards under that agreement and had caused Philip Morris to

[42] Dolzer and Schreuer (2012), at p. 310.

[43] Van Harten (2008), at p. 63; Van Harten and Loughlin (2006), at p. 128.

[44] Commission Press Release, 'European Commission launches public online consultation on investor protection in TTIP'.

[45] UNCTAD, IIA Issue Note, 'Recent developments in investor-state dispute settlement (ISDS)', May 2013.

incur a one billion dollar loss.[46] Philip Morris has a similar claim pending against Uruguay under the Switzerland–Uruguay BIT.[47] Germany was recently hit by a claim from Vattenfall under the Energy Charter Treaty (ECT) against Germany's decision to phase out nuclear energy.[48] These and similar cases illustrate the privileged positions that investors are perceived to occupy in investor-state arbitration. This study will not engage in any substantive discussion about the perceived pro-investor bias in investor-state arbitration. Suffice it to say that although the system is indeed subject to legitimate and well-founded criticism, it also lends itself to a large number of common misconceptions and populist views, none of which will be entertained in this study.

It is notable, however, that the arguments brought against ISDS are systemic in nature in that they address the risk that ISDS provisions pose for democratic decision-making in general. The public debate has nonetheless found its main outlet in TTIP. One reason why this issue is so heavily discussed in the context of a transatlantic trade and investment deal is perhaps the fact that, once completed, the partnership will form the largest bilateral trade deal ever negotiated.[49] Together, the EU and the USA account for more than 25% of international trade, and TTIP effectively liberates trade between the world's two largest trading blocs.[50] Consequently, TTIP is set to have an impact on international trade far beyond the scope of the agreement itself, rendering the agreement of significant symbolic nature. Additionally, with a share of almost one third of all EU outward FDI and an even larger share of EU inward FDI, the USA is the most important trading partner for the EU in terms of FDI flows. As a natural corollary of the large number of US investors in the EU, the exposure to potential investment claims increases exponentially.[51] The sheer number of people and businesses affected by the scope of TTIP is not comparable to the number of those affected in any previous EU trade negotiations, and it is only natural that criticism of the agreement is growing accordingly.

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[46] *Philip Morris Asia Limited v. The Commonwealth of Australia*, 22 June 2011, UNCITRAL (PCA Case No. 2012-12).

[47] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, 19 February 2010 (ICSID Case No. ARB/10/7).

[48] *Vattenfall AB and others v. Federal Republic of Germany,* 31 May 2012 (ICSID Case No. ARB/12/12).

[49] In 2013 the trade volumes of goods imported from the US and of goods exported into the US were 196,000 and 288,000 million EUR, respectively. This makes the US the most important trading partner for the EU. These statistics are available at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/>; see also the Centre for Economic Policy Research, *Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment*, Final Report, March 2013, at pp. 8-9.

[50] WTO, 'International Trade Statistics 2014', at p. 27.

[51] Eurostat, Foreign Direct Investment Statistics, available at <http://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_direct_investment_statistics#Further_Eurostat_information>; see also Centre for Economic Policy Research, *Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment*, at pp. 10 ff.

It is becoming clear that the public debate on ISDS in TTIP is more political than legal in nature. To enable investors to enforce their rights against the state directly before an international investment tribunal is a policy choice that is weighed against the positive effect that this ability is expected to have on attracting foreign investment. From an EU law perspective the discussion must be more nuanced. First, it must investigate whether there are any EU law challenges to the legality of ISDS provisions in EU investment agreements, i.e. whether ISDS provisions are compatible with the principle of autonomy. Second, the complete polarization of the public debate appears to accept nothing less than a categorical exclusion of ISDS from the TTIP agreement as a solution to the problem. Consequently, this report will emphasize how addressing systemic defects of traditional ISDS provisions by virtue of innovative drafting would alleviate the risk of legal incompatibilities.

2.4.2 Will TTIP survive without ISDS provisions?

It has already been mentioned how investment protection and, in particular, the inclusion of ISDS provisions in the TTIP agreement have polarized public debate. Until recently, however, there was unreserved support for ISDS in the political ranks on both sides of the Atlantic. Late last year, former EU Trade Commissioner Karel De Gucht made a strong statement in the press, warning that without ISDS provisions TTIP could not be concluded; this was, perhaps, a reaction to pressure from the USA where investor-state arbitration is perceived as an essential element of the transatlantic trade deal. With a new Commission, however, this position has appeared to crumble. The new EU Trade Commissioner Cecilia Malmström is less fixated on the unqualified inclusion of ISDS in TTIP, and instead emphasizes the importance of a thorough assessment of these provisions in the light of the Commission's report on the public consultation.[52] On the American side congressional leaders sent a letter to the Obama administration requesting that ISDS provisions are excluded from TTIP in order to guarantee Congress the flexibility to act unrestrictedly in the event of another financial crisis.[53]

Indeed, traditional arguments supporting the incorporation of ISDS mechanisms are less convincing in the context of TTIP. The judiciary on both sides of the Atlantic is mature and the incorporation of investment arbitration as a procedural guarantee of judicial independence, accessibility or effectiveness is not needed. In fact, even in investment arbitration it can take several years before an award is rendered; with the measures in dispute becoming increasingly complex and the number of disputes relentlessly growing it is unlikely that the

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[52] Commission Press Release, 'Report presented today: Consultation on investment protection in EU–US trade talks', Strasbourg, 13 January 2015, available at <http://europa.eu/rapid/press-release_IP-15-3201_en.htm>.

[53] United States House of Representatives, Committee of Financial Services, Letter to the Obama administration of 1 December 2014, available at <democrats.financialservices.house.gov/uploadedfiles/2014.12.01_house_letter_to_administration_on_financial_services_in_ttip.pdf>.

length of proceedings will drop substantially in the future. The independence of arbitrators has also been in question given their links to industry and their economic interest in the arbitration system.[54] Domestic judiciaries are, it appears, more independent than arbitration panels. From a historical perspective this argument must also be dismissed. It has already been pointed out that the international investment system was traditionally characterized by a north-south dynamic that required the incorporation of investor-state arbitration to guarantee the protection of investors from corrupt or immature judiciaries in developing countries. TTIP, on the other hand, represents a north-north agreement of unprecedented reach between two of the world's strongest and most integrated economies with sophisticated, independent and mature judiciaries at both state and central level.

Another argument that is forcefully reiterated by the negotiating parties is that the scope and nature of TTIP are such that it sets a global precedent, which will have an impact on the international trade and investment system. The US is heavily invested in the negotiation of the Trans-Pacific Partnership (TPP), a regional agreement that the USA is negotiating with 11 countries in the Asia-Pacific region.[55] The EU, for its part, is negotiating a deep and comprehensive free trade agreement (FTA) with Japan, and has launched talks on a comprehensive investment agreement with China.[56] From that perspective it is understandable that neither party is keen on having its position on the inclusion of ISDS provisions affected in future investment agreements. Excluding ISDS from the scope of TTIP would certainly render it more difficult to substantiate its inclusion in the TPP or in an investment agreement with China. But ISDS provisions should not be treated as standard clauses of modern investment treaties in the first place; rather, their inclusion constitutes a conscious policy choice that should be assessed on a case-by-case basis and in the circumstances of the individual agreement.

Be that as it may, an outright exclusion of ISDS provisions from the scope of TTIP to appease public opinion is no strategy for a successful conclusion of TTIP. There are numerous other tensions on the boil in the transatlantic negotiations. The vociferous ISDS discussion is simply distracting attention from healthcare and public services, regulatory convergence as a 'race to the bottom', etc. Remove ISDS from the scope of TTIP, and civil rights groups and NGOs will undoubtedly devote more attention to these other, highly controversial,

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[54] Gus Van Harten, 'Arbitrator behaviour in asymmetrical adjudication: An empirical study of investment treaty arbitration', 50 *Osgoode Hall Law Journal,* 2012-2013 211; for a comprehensive account of the requirements for independence and impartiality under various international procedural rules and national laws, see Audley Sheppard, 'Arbitrator independence in ICSID arbitration' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009), 131.

[55] http://www.ustr.gov/tpp.

[56] European Commission, 'Overview of FTA and other Trade Negotiations', last updated 14 January 2015, available at <http://trade.ec.europa.eu/doclib/html/118238.htm>.

aspects. Additionally, government interference in private investments constitutes a phenomenon against which neither the EU nor the US government is immune in principle.

Additionally, domestic courts may be unable to guarantee rights under an international agreement without that agreement being implemented into domestic legislation. Without going into detail on this matter, it is enough to say that the CJEU has emphatically refused to grant that EU FTAs have direct effect,[57] and recent FTAs have been negotiated with an explicit limitation on their direct effect.[58] Direct effect, however, constitutes a necessary prerequisite for investors to enforce substantive rights under the investment agreement directly before the domestic courts of a Member State or the EU courts. The direct applicability of international agreements is equally uncertain in the USA,[59] although a recent Supreme Court decision appears to indicate that bilateral investment agreements have a self-executing nature.[60] In any case, an arbitration mechanism allows for the enforceability of the investor's rights under the agreement to an extent that exceeds the protection before the domestic courts. This is of particular importance if one considers that no other enforcement mechanism exists to guarantee full and adequate implementation of the investment agreement by the contracting states. Besides, judicial independence is not defined exclusively by the elimination of private interests in the dispute, but can equally stem from national affinity. Whether or not domestic judiciaries are *de facto* independent is thus irrelevant if it does not appear to the public that the judicial process is independent of national interests. The inclusion of ISDS in TTIP, therefore, carries an undeniably symbolic aspect as well.

In the light of the above, can TTIP survive without ISDS provisions? It certainly can! After all, the most significant aspect of the TTIP negotiations is the focus on regulatory convergence and the removal of non-tariff, 'behind-the-border' barriers to trade. But there are many reasons and political objectives behind the inclusion of ISDS in the scope of TTIP. A categorical exclusion of ISDS does not, therefore, represent a favourable solution. It must also be borne in mind that the US Congress is presented with a 'take it or leave it' vote on TTIP as a whole, with no possibility of further amendments or renegotiation. Despite signs of criticism of ISDS in TTIP in Congress, it is far from clear whether a majority would still endorse the deal without ISDS. Hence, although ISDS is not a guaranteed breaking point for TTIP, the political stakes are certainly high.

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[57] Eeckhout (2011), at p. 323; Angelos Dimopoulos, 'The Involvement of the EU in investor-state dispute settlement: A question of responsibilities', 51 *Common Market Law Review,* 2014 1671, at p. 1699.

[58] Aliki Semertzi, 'The preclusion of direct effect in the recently concluded EU free trade agreements', 51 *Common Market Law Review,* 2014 1125.

[59] Oona Hathaway, Sabrina McElroy and Sara Aronchick Solow, 'International law at home: Enforcing treaties in U.S. courts', 37 *Yale Journal of International Law,* 2012 51.

[60] *BG Group Plc v. Republic of Argentina*, No. 12–138, (U. S. 5 March 2014).

Thus, instead of the exclusion of ISDS from the scope of the TTIP agreement, a balanced approach might be considered, one that investigates and capitalizes on the benefits of such a mechanism in the context of strengthening transatlantic relations. The EU negotiation mandate emphasizes that the TTIP agreement "should provide for investors as wide a range of arbitration fora as is currently available under the Member States' bilateral investment agreements".[61] Nonetheless, it also highlights the need for transparency, the independence of arbitrators and the predictability of the agreement, and reflects the objective of establishing an "effective and state-of-the-art" ISDS mechanism.[62] Meanwhile, the US objectives for the TTIP negotiations are to provide a level of protection for EU investors in the USA that is no greater than that of US investors at home.[63] Instead of debating the question of ISDS in TTIP from an 'in-or-out' perspective, more energy should be spent on discussing material solutions. The first step in the right direction has already been taken. Since taking office in November 2014, EU Trade Commissioner Malmström has delivered on her promise to enhance transparency in the TTIP negotiations. Innovative drafting methods must also be applied to address EU law challenges to ISDS, such as the compatibility of investor-state arbitration with the principle of autonomy.

2.5 How the principle of autonomy affects the TTIP negotiations

2.5.1 The Court's advisory opinion under Article 218(11) TFEU

When it comes to international agreements, the CJEU is involved in questions of legality, validity and interpretation to the same extent as it is internally with regards to primary and secondary EU law. Additionally, the Treaty provides for the CJEU to have the opportunity to assess whether an international agreement is valid under the Treaties, prior to the agreement's conclusion.[64] In fact, much of the current law on the EU's external competence has been developed

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[61] 11103/13, Council of the European Union, 'Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America', Brussels, 17 June 2013, at para. 23.

[62] *Ibid.*

[63] Office of the United States Trade Representatives, U.S. Objectives, U.S. Benefits in the Transatlantic Trade and Investment Partnership: A Detailed View, accessible at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View>.

[64] In Opinion 1/75, *Understanding on a Local Cost Standard*, the CJEU describes the purpose and scope of opinions under what is now Article 218(11) TFEU, saying that they are given to avoid complications stemming from the legal validity of agreements under international law once such agreements are concluded. This measure has subsequently been used extensively, e.g. Opinion 1/78, *International Agreement on Natural Rubber*; Opinion 1/91, *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association,* [1991] ECR I-06079; Opinion 2/92, *Third Revised Decision of the OECD on national treatment,* [1995] ECR I-521; Opinion 1/94, *WTO Agreement*; Opinion 1/00, *European Common Aviation Area,* [2002] ECR I-3493; Opinion 1/09, *European Patents Court,* [2011] ECR I-1137; Opinion 2/13, *Accession to the ECHR*.

by means of these advisory opinions in accordance with what is now Article 218(11) TFEU.[65] Once an agreement is concluded, its validity can be contested either indirectly through the ordinary courts of a Member State according to the preliminary reference procedure under Article 267 TFEU[66] or directly by way of an annulment procedure[67] (Article 263 TFEU) or an enforcement action (Article 258 TFEU). For the sake of completeness it should also be mentioned that the Court might also be asked to review an international agreement with regards to the Union's non-contractual liability[68] (Articles 340 and 268 TFEU) for violation of an international obligation.

It is noteworthy that, unlike the activity of the CJEU when it is performing a judicial review in regard to internal EU legal acts, the assessment of the validity of international agreements can have far-reaching and peculiar consequences. Not only does an international agreement become an integral part of the EU legal order upon its conclusion, but it is also binding under international law in accordance with the Vienna Convention on the Law of Treaties.[69] The EU is prevented from subsequently relying on a lack of competence or other internal legal defects to justify non-performance of the agreement.[70] Thus, while an *ex post facto* declaration of incompatibility might prevent there being internal effects of the international agreement, it cannot prevent there being external effects. In other words, the EU's exposure to international treaty obligations exists independently of whether or not the international agreement is valid under EU law. It is therefore anything but irrelevant that a judicial review of an EU agreement is carried out prior to its conclusion. If there is an adverse opinion, Article 218(11) TFEU effectively acts as a 'preventive' judicial review in that it requires the EU to remedy incompatibilities with the EU Treaties, through the amendment of the agreement or a Treaty revision, before the agreement may be concluded.[71]

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[65] Eeckhout (2011), pp. 273-74.

[66] Most requests for preliminary references concern the interpretation of the international agreement. For a recent case of a request under Article 267(1)(b) TFEU contesting the legality of EU measures in the light of international commitments, and the admissibility of such a claim, see Case C-59/11 *Association Kokopelli v. Graines Baumaux SAS,* [2012] ECR I-0000.

[67] e.g. Case C-122/95 *Germany v. Council,* [1994] ECR I-4973. The case is notable insofar as it highlights the awkward position of a Member State when it has obligations under EU law and international law. Germany was unable to challenge the Council Regulation 404/93 on the common organization of the market in bananas in a direct action for annulment and, as a consequence, had to comply with the obligations under the Regulation. The WTO dispute settlement body subsequently declared Germany to be in breach of GATT. For two more recent agreements, see Case C-656/11 *United Kingdom v. Council,* [2014] ECR I-0000 on the EU–Switzerland agreement on the free movement of persons, and Case C-431/11 *United Kingdom v. Council,* [2013] ECR I-0000 on the coordination of social security systems within the framework of the EEA agreement.

[68] Cases C-120/06 P and C-121/06 P *FIAMM and Fedon v. Council,* [2008] ECR I-6513 for an illustration of the limited scope of this principle with regards to WTO agreements.

[69] Vienna Convention on the Law of Treaties 1969, Article 26.

[70] *Ibid*., Articles 27, 46.

[71] Eeckhout (2011), pp. 273-74.

It will be demonstrated in part three of this study that a judicial mechanism that is established under an EU agreement can, under certain circumstances, violate the principle of the autonomy of the EU legal order and hence be incompatible with the EU Treaties. Given its geographical and economic reach, it is of the utmost importance to clarify the compatibility of the ISDS provisions in the TTIP agreement before that agreement is concluded. Otherwise the EU and its Member States could end up in an awkward position in relation to EU law and international treaty obligations.

2.5.2 The enhanced role of the European Parliament in the negotiation of international agreements

According to Article 218(11) TFEU, four actors can request an advisory opinion: a Member State, the European Parliament (EP), the Council or the Commission. The current sentiment renders the Member States and the EP of particular importance in the context of the TTIP negotiations. Germany has already voiced dissatisfaction with the ISDS provisions in CETA and is currently, together with France, becoming more strongly opposed to the incorporation of a similar mechanism in TTIP. There is also growing concern inside the EP. ISDS in TTIP blatantly ignores the results of the public consultation, which reflected widespread opposition to such a mechanism in a transatlantic trade deal.[72] It might be in the interest of both actors to challenge, but also to clarify the position of investor-state tribunals in EU investment disputes with a request to the CJEU for an advisory opinion. The Court would then, in one way or another, probably address questions about the autonomy of the EU legal order. Additionally, the anticipated referral of the EU–Singapore FTA to the CJEU is convincing evidence that the Commission also has an interest in an advisory opinion, albeit with the aim of obtaining confirmation of its own legal position.

With respect to the Member States, it is clear that, as long as the Commission conducts the negotiations in line with the mandate, it is not required to act on individual Member States' concerns. The negotiation mandate for TTIP is particularly clear with regards to the inclusion of ISDS.[73] For this reason it is questionable whether German and French opposition to ISDS constitutes a call for change of the negotiation mandate, or simply a piece of political power play to appease constituents at home. After all, France and Germany both face general elections in 2017 and it can be expected that TTIP will still carry some weight then. Additionally, Germany and France endorsed the negotiation mandate in the Council. The request for an advisory opinion by an individual Member State with the purpose of achieving an exclusion of ISDS provisions from the scope of the TTIP negotiations raises questions about the Member State's duty of sincere cooperation under the EU Treaty. Arguably, the opinion procedure should be

[72] SWD(2015) 3 final, Commission Staff Working Document, *Report: Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement*.

[73] 11103/13, Council of the European Union, at para. 23.

initiated for the purpose of enhancing legal certainty, and on a politically loaded question, such as ISDS, Member States should aim to make a request under Article 218(11) TFEU collectively through the Council.

On the other hand, as the only democratically elected institution at the EU level, the EP carries a particular significance for democratic oversight in EU international action. Following the Treaty of Lisbon, international agreements covering fields in which the ordinary legislative procedure applies, such as the CCP, now require the consent of the EP.[74] Although it has already demonstrated the will to exercise this function wholeheartedly in the area of counterterrorism cooperation in the context of transatlantic security relations,[75] it is yet to be seen whether the EP is ready to withhold its consent to EU trade agreements. Although the process could be criticized on the grounds that the EP does not have a substantive impact on the negotiation but is simply left to approve or reject the consolidated draft text, it is undisputed that the EP can exert significant pressure if its concerns are not adequately addressed.

Past experience indicates, on the other hand, that the EP is likely to consent in the interest of good transatlantic relations, as long as the EP is fully informed at all stages of the negotiations and provided that the negotiations are conducted transparently.[76] It is therefore proposed here that the EP will not refuse consent as a matter of principle, provided that legal shortcomings are adequately addressed through the drafting of ISDS provisions in TTIP.

2.6 Interim conclusion

Much of the development in the CCP proved essential for matching EU competences in foreign trade policy with negotiations in the multilateral trading system. The necessary Treaty amendments, however, were slow and reactive. The events around the negotiation of the Maastricht Treaty are particular evidence for the absence of the political will that was required to shift more exclusive competence away from the domestic level of Member States and towards Brussels. With the Treaty of Lisbon, on the other hand, the EU has taken a leap forward in its own development as a progressive actor in international trade law, complementing the CCP with exclusive competence for FDI, an issue that was dropped from the agenda on the multilateral level. The Commission is clear that this competence is not restricted to trade-related aspects of investments but is ambitiously aimed at the replacement of the vast number of BITs that are currently in force between Member States and third countries. The EU is becoming an actor in international investment law.

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[74] Article 218(6)(a)(v) TFEU.

[75] Juan Santos Vara, 'Transatlantic counterterrorism cooperation agreements on the transfer of personal data – a test for democratic accountability in the EU' in Elaine Fahey and Deirdre Curtin (eds), *A Transatlantic Community of Law* (Cambridge University Press 2014), 256.

[76] *Ibid.* at pp. 271, 273.

One aspect that will, therefore, become an essential part of future EU agreements with comprehensive chapters on investment protection is that of ISDS provisions that enable individual investors to enforce their rights under the agreement directly before private arbitration tribunals. This might pose a serious risk to the autonomy of the EU legal order. Although this problem would have to be considered to be systemic to ISDS mechanisms generally, investor-state arbitration is particularly hotly debated with regards to the negotiation of TTIP, a partnership that, if successful, will liberalize trade and investment between the world's two largest trading blocs. The potential number of investment claims cannot be predicted but is sufficiently high to split public opinion and political interests on both sides of the Atlantic. Whilst the public debate appears to be focused on a categorical exclusion of ISDS from the scope of TTIP, it is argued in this study that the solution should be sought in innovative drafting techniques.

3 The autonomy of the EU legal order

3.1 Shaping the principle of autonomy

3.1.1 The early days

When the CJEU in 1963 handed down its infamous judgment in *Van Gend en Loos*, forever changing the character of EU law by declaring its supremacy over domestic legal orders, the Court took a clear stand as to the status of EU law *vis*-à-*vis* the domestic law of the Member States. The European Union, so the Court said, "constitutes a new legal order of international law".[77] The CJEU reiterated its conclusion with even stronger rhetoric only a year later, stating that "[b]y contrast with *ordinary* international Treaties, the EEC Treaty has created its own legal system […]".[78] Establishing its autonomy internally facilitated a firm claim of the EU legal order to integrity and independence from domestic legal processes. However, positioning itself intellectually in a pluralistic discussion, the CJEU differentiated the EU legal order from "ordinary" public international law merely in order to facilitate the establishment of the principles of direct effect and supremacy, which would otherwise not have been easily reconcilable with the principles of international treaty law. This, in turn, was necessary to guarantee the realization of the internal market and the effective implementation of the Treaties. With a growing involvement of the EU on the international plane, the CJEU could not escape the ramifications of this reasoning when confronted with the task of clarifying the relationship of the EU with international law. Having established that the EU legal order is separate from public international law, the Court reasoned that in its external dimension the principle of autonomy also protects the integrity of the EU legal order from the impact of international legal processes. By now this principle has been given a strong constitutional value and is perceived as one of the foundational principles of EU law.[79] Paradoxically, however, rather than facilitating the effective implementation of the Treaties, it will become clear during the course of this study that the Court's restrictive interpretation of the external dimension of this principle hampers the EU's development as an international actor, and restrains the EU's compliance with its international commitments that are firmly embedded in the Treaties.

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[77] Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration,* [1963] ECR 0001, at p. 12.

[78] Case 6/64, *Flaminio Costa v. E.N.E.L.,* [1964] ECR 0585, at p. 593.

[79] Jan W. van Rossem, 'The autonomy of EU Law: More is less?' in Ramses A. Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (T.M.C. Asser Press, Springer 2013), 13.

There are many aspects to the external dimension of the principle of autonomy. At one end of the spectrum the discussion focuses on the impact of international norm-creating processes on EU law. At the other end, which is most relevant for this study, is the impact of international courts and tribunals on the EU legal order. The CJEU has not ignored the fact that the creation of courts or tribunals under EU agreements with third countries is pivotal to the proper functioning of EU policies, such as the CCP.[80] Yet it has demonstrated with the utmost clarity that it will not tolerate any invasion into its own judicial prerogatives, which are guaranteed under the EU Treaties.

At the beginning of the 1990s the CJEU was asked to render an advisory opinion on the compatibility of the draft agreement establishing the European Economic Area (EEA) with the EC Treaty. The agreement extended the *acquis communautaire* to the member states of the European Free Trade Association (EFTA), with the purpose of enabling those states to participate in the EU's internal market without being subject to the full set of rights and obligations that EU membership entails. The drafters of the EEA agreement achieved this by replicating in large parts the Treaty provisions on the internal market.[81] The agreement also established a judicial body, the EEA court, with competence to hear disputes covering material aspects of the agreement. The EEA court was bound to follow that part of CJEU case law that was dated prior to the coming into force of the EEA agreement. Additionally, the draft agreement envisaged a type of preliminary reference procedure between the EEA court and the CJEU. In accordance with that procedure, the EEA court would refer to the CJEU questions on the interpretation of provisions in the EEA agreement that corresponded to Treaty provisions. The drafters clearly intended to guarantee the harmonious interpretation of these two instruments.

The CJEU, however, feared that under the EEA agreement it would bind itself to the interpretations of the EEA court on provisions that were identical to Treaty provisions. The incorporated reference procedure, being non-binding in nature,[82] was insufficient to generate the required safeguards. The Court also showed a more general level of scepticism about the possibility of achieving a harmonious interpretation with the Treaty and the Court's case law.

The CJEU concluded that the jurisdiction conferred upon the EEA court under the first EEA draft agreement:

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[80] Opinion 1/91, *EEA agreement,* at para. 40.

[81] For a comprehensive outline of the background concerning the EEA negotiations and Opinions 1/91 and 1/92 see Barbara Brandtner, 'The "Drama" of the EEA – Comments on Opinions 1/91 and 1/92', 3 *European Journal of International Law,* 1992 300; see also Henry G. Schermers, 'Opinion 1/91 of the Court of Justice, 14 December 1991; Opinion 1/92 of the Court of Justice, 10 April 1992', 29 *Common Market Law Review,* 1992 991.

[82] Opinion 1/91, *EEA agreement*, at paras. 45 and 61 to 64.

> […] is likely adversely to affect […] the *autonomy of the Community legal order*, respect for which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty. This exclusive jurisdiction of the Court of Justice is confirmed by Article 219 of the EEC Treaty.[83]

Although the CJEU adopted this strong reasoning against the EEA court, based on the principle of autonomy, it failed to provide further guidelines on the precise content and elements of that principle. It would be a mistake, however, to limit the application of this reasoning to the facts of the case and, thus, to instances where the international agreement in question is replicating Treaty provisions. Rather, it is evidence of the Court's refusal to accept that international courts or tribunals are capable of limiting its own judicial prerogative over the interpretation of EU law, and it elevates the importance of a harmonious interpretation of EU law in its internal and external application.[84]

The Court later declared the renegotiated EEA agreement compatible with the Treaties. Instead of an EEA court, the agreement now envisaged the creation of the EFTA court[85] with binding jurisdiction over the EFTA states only. A Joint Committee[86] was established and charged with the task of supervising the application of CJEU case law. Most importantly, however, the agreement retained the preliminary reference procedure that made the judicial reasoning of the CJEU in questions concerning the interpretation of EU law binding on the EEA court.[87] The Court's position emphasizes the focus on the interpretation of EU law, which is of exclusive concern to the external dimension of the principle of autonomy.[88]

The Court reiterated its position clearly in *Opinion 1/00* regarding the European Common Aviation Area (ECAA). The ECAA agreement, just like the EEA agreement, extended Community law to non-EU countries. Although it did not create a separate judicial body, it foresaw the establishment of a joint committee that was charged with the supervision of the interpretation and application of the agreement in the domestic institutions of the ECAA members.[89]

Concluding that the agreement did not undermine the autonomy of the EU legal order, the CJEU took the chance to set out a systematic development of the principle of autonomy. In accordance with this view, the principle falls

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[83] *Ibid.*, para. 35, emphasis added.

[84] Christina Eckes, 'The European Court of Justice and (quasi-)judicial bodies of international law' in Ramses A. Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (T.M.C. Asser Press; Springer 2013), 85, at p. 88.

[85] Opinion 1/92, *Amended Draft EEA Agreement,* [1992] ECR I-02821.

[86] *Ibid.,* paras. 21-25.

[87] *Ibid.,* paara. 34.

[88] Eckes (2013), at p. 88.

[89] Opinion 1/00, *European Common Aviation Area*, at paras. 3-4.

into two separate parts. First, the international court or tribunal cannot bind the Union and its institutions internally to a specific interpretation of EU law that is referred to in the international agreement.[90] Second, the international agreement cannot affect the essential characteristics of the powers conferred upon the EU institutions under the Treaty.[91] This latter aspect includes, on the one hand, that the allocation of competences between the EU and its Member States remains exclusively a matter for the Court, and, on the other hand, that the essential characteristics of powers allocated to institutions under the Treaty remain unaltered.

Whilst the interpretation of EU law is an essential aspect of the role of domestic courts in their capacity as ordinary courts of the EU legal order and, thus, becomes irrelevant in the application of the principle of autonomy internally, it forms a decisive feature of the principle's external dimension. This is largely due to the fact that most control mechanisms incorporated into the Treaties are unavailable to the Court in EU external relations.[92] A narrow reading of the above opinions reveals that the Court is eager to protect uniformity in the application of EU law in cases where provisions of EU law have been incorporated into the international agreement.[93] This is corroborated by the Court's emphasis on the provision in the EEA agreement that explicitly required that the EEA agreement had uniform interpretation in the light of the EU Treaties.[94] That position is unconvincing because harmonious interpretation poses identical problems to the body of EU law in a more general fashion. This study advances a broad reading, which requires that the determination of the binding effect of decisions of international courts and tribunals must take account of their effect on the uniformity of the internal and external application of EU law. Hence, an international judicial body that, in the exercise of its jurisdiction, creates divergences in the interpretation of EU law by that judicial body and the CJEU raises concerns about its compatibility with the principle of autonomy.

3.1.2 The European Patents Court

It was mentioned above that the interpretation of EU law by domestic courts of the EU Member States is unproblematic because the Treaties provide for numerous safeguards such as the preliminary reference procedure in Article 267 TFEU. The CJEU has proved to be equally lenient about international agreements that provide for the prior involvement of the CJEU under a mechanism akin to that of the preliminary reference procedure. In its opinion on the draft agreement establishing the European Patents Court (EPCt), the CJEU elaborated upon

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[90] *Ibid.*, paras. 11, 13.

[91] *Ibid.*, paras. 12, 16, 21.

[92] Eckes (2013), at p. 88.

[93] Dimopoulos (2014), at p. 1698.

[94] Opinion 1/91, *EEA agreement*, at paras. 3 and 43; Opinion 1/92, *on the draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, at paras. 2 and 21.

the role of domestic courts in upholding the autonomy of the EU in its external relations, and clarified the importance of a reference procedure in that respect.

The EPCt was meant to be a pan-European court for intellectual property rights, consolidating the power to adjudicate in the field of patent law into one judicial institution with exclusive jurisdiction.[95] It is noteworthy that the EU itself was not set to be party to the agreement establishing the EPCt. Instead, the EPCt was based on intergovernmental cooperation between 38 countries, including all the EU Member States. The decisive element for the CJEU when reviewing the agreement was the exclusive nature of the jurisdiction of the EPCt: the EPCt was effectively a substitute for domestic courts within the Member States in their task of interpreting and applying EU patent law.[96] This, so the CJEU said, "would deprive those courts of their task, as 'ordinary' courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU."[97] According to the Court, the preliminary reference procedure provides the domestic courts with the right, and in certain cases even with the obligation, to refer questions on the interpretation of EU law to the Court. This is particularly important with respect to the harmonious interpretation and application of EU law across the Union. Domestic courts constitute to that extent an essential part of the EU legal order. In more familiar terms, under the EU Treaties these courts are provided with a specific power, the essential characteristic of which may not be altered by an international agreement.[98] The fact that the EPCt itself had the power to refer questions to the CJEU was insufficient to safeguard the autonomy of EU law.[99]

The Court's reasoning in *Opinion 1/09* can be understood in a number of ways. First, the CJEU emphasizes the protection of individual rights. That allows one to conclude that an international agreement may not affect the power of domestic courts in a way that deprives them of their judicial means to protect the rights conferred upon individuals under the Treaties by 'outsourcing' this task to an international judicial body, such as the EPCt.[100]

Second, the responsibilities of domestic courts under Article 267 TFEU can be understood in the context of the overall system of judicial protection and the

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[95] Article 15(2) Draft Agreement establishing the EPCt; see Opinion 1/09, *European Patents Court*, at para. 10.

[96] Opinion 1/09, *European Patents Court*, at para. 73.

[97] *Ibid.*, at para. 80.

[98] *Ibid.*, at paras. 84, 89.

[99] The Court emphasized that the defect in the draft agreement was further aggravated by its provision that the EPCt was the only judicial body that could communicate with the CJEU in the field of patent litigation, see *ibid.*, at para. 81; Roberto Baratta, 'National courts as "guardians" and "ordinary courts" of EU law: Opinion 1/09 of the ECJ', 38 *Legal Issues of Economic Integration,* 2011 297.

[100] Opinion 1/09, *European Patents Court*, at paras. 84-85; Baratta (2011), at p. 307.

remedies provided under the Treaty.[101] This angle brings to the forefront of the discussion the Court's reference to non-contractual liability and infringement proceedings, which protect individual rights and guarantee the harmonious interpretation and application of EU law throughout the Member States.[102] This view contemplates the role of the domestic courts as a whole within the EU legal order.[103] Accordingly, the lack of involvement by the domestic courts in the interpretation and application of EU law allows these courts to escape liability for breaches of EU law.[104] Under the EU Treaties, the domestic judiciary is subject to various control mechanisms, from which the EPCt, as an external body, escapes. This, the CJEU reasoned, is unacceptable.

A third alternative focuses on the substantive responsibility of domestic courts under the preliminary reference procedure in Article 267 TFEU. By shifting the focus onto the judicial dialogue between the domestic courts and the CJEU, the Court manages to protect its own judicial prerogative as the ultimate interpreter of EU law, as a corollary to the domestic courts' obligation under the Treaty. It is notable that this approach invites the domestic courts into the inner circle of EU institutions[105] whose essential characteristics are protected by the principle of the autonomy of the EU legal order. Pursuant to this last perspective, not even a mechanism that would oblige international courts and tribunals to refer to the CJEU could therefore remedy the underlying defect of the EPCt. Instead, the reference would have to come from within the EU legal order in accordance with Article 267 TFEU.[106]

Opinion 1/09 clarifies the role of the preliminary reference procedure with respect to the external dimension of the principle of autonomy. The application of that principle of autonomy should not, therefore, be limited to international courts or tribunals that carry an express mandate to interpret or apply EU law. Its actual significance lies in the confirmation that a preliminary reference procedure will prove insufficient to guarantee harmonious interpretation if the international court or tribunal thereby effectively replaces domestic courts in the interpretation of EU law.

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[101] Steffen Hindelang, 'Circumventing primacy of EU law and the CJEU's judicial monopoly by resorting to dispute resolution mechanisms provided for in inter-se treaties? The case of intra-EU investment arbitration', 39 *Legal Issues of Economic Integration,* 2012 179, at p. 204.

[102] According to the CJEU, the responsibility of the domestic courts under Article 267 TFEU is "essential for the preservation of the [EU] character of the law established by the Treaties." Opinion 1/09, *European Patents Court*, at para. 82.

[103] Baratta (2011), at p. 308.

[104] Opinion 1/09, *European Patents Court*, at paras. 86-88.

[105] As a consequence, the meaning of EU institution for the purposes of the principle of the autonomy of the EU legal order is broader than the institutions identified in Article 13 TEU.

[106] Implicitly on this aspect, see Markus Burgstaller, 'Investor-state arbitration in EU international investment agreements with third states', 39 *Legal Issues of Economic Integration,* 2011 207, at p. 219; Angelos Dimopoulos, 'The validity and applicability of international investment agreements between EU Member States under EU and international law', 48 *Common Market Law Review,* 2011 63, at p. 91.

3.1.3 The European Court of Human Rights

The CJEU was first called upon to examine the EU accession to the ECHR in *Opinion 2/94*.[107] In its request for an opinion, the Council expressly questioned the compatibility of the system of courts set up under the ECHR with the autonomy of the EU legal order. However, the view on this was divided. All the Member States, the Commission and the EP submitted written observations to the CJEU, but only France, Portugal, Spain, Ireland and the United Kingdom shared the Council's concern. The opinion of the CJEU, meanwhile, lacks any reference to the principle of autonomy. In general terms the CJEU stated:

> Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. *It could be brought about only by way of Treaty amendment.*[108]

If it was the lack of an express competence in the Treaties that stood in the way of the EU accession to the ECHR, this was rectified with the Treaty of Lisbon. In addition to guaranteeing respect for fundamental rights and adherence to the Charter of Fundamental Rights of the European Union, Article 6 TFEU requires in unambiguous terms that the EU shall accede to the ECHR. However, an express competence to conclude the accession agreement did not alleviate the need for an assessment with respect to its compatibility with the autonomy of the EU legal order. Quite the contrary: in *Opinion 2/13* the CJEU pointed out that the respect for the "specific characteristics of the EU and EU law" are of particular relevance in line with Protocol No. 8 EU and the declarations made during the intergovernmental conference.[109]

The CJEU started by focusing on the effect of an external control mechanism on the relationship between Member States. In that respect, harmonious interpretation refers to the assessment of EU legal acts in the light of fundamental rights by the CJEU vis-à-vis the European Court of Human Rights (ECtHR).[110] More importantly for this study are the Court's remarks on the co-respondent mechanism and Article 267.

The CJEU examined the role of the ECtHR in the determination of the respondent to a dispute under the co-respondent mechanism. The attribution of responsibility for an act or omission requires an assessment of the EU law rules on the division of powers. The ECtHR is therefore involved in the determination of the allocation of competences under the EU Treaties, which is incompatible with

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[107] Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-01759.
[108] *Ibid.*, at para. 35, emphasis added.
[109] Opinion 2/13, *Accession to the ECHR,* paras. 161-64.
[110] *Ibid.*, para. 144 ff.

the principle of autonomy.[111] In addition, the possibility of joint responsibility is likely to have an adverse effect on the allocation of competences if the ECtHR is capable of apportioning responsibility between the EU and its Member States or of reviewing an agreement as to the apportionment of responsibility between the EU and its Member States.[112]

The preliminary ruling procedure under Article 267 TFEU is another central aspect in the Court's reasoning in *Opinion 2/13*. In this regard the judgment provides some clarification on *Opinion 1/09*, to the extent that it intimately links this procedure with the judicial protection of the rights of individuals,[113] although it fails to address the role of the domestic courts of the Member States. The Court also made important remarks on the structure of such a mechanism in the context of EU agreements. It stated that such a procedure cannot be limited to the assessment of primary EU law but must allow the CJEU to render binding interpretations of secondary EU law in the light of the rights guaranteed by the ECHR.[114] Otherwise, "there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law".[115] Most importantly, though, the Court stated that:

> the necessity for the prior involvement of the Court of Justice in a case […] in which EU law is at issue satisfies the requirement that the competences of the EU and the powers of its institutions, notably the Court of Justice, be preserved […].[116]

This is a remarkable statement because earlier case law did not suggest that the existence of such a mechanism in itself constitutes an element of the principle of autonomy. Rather it was to safeguard the essential characteristics of the Court's powers and its relationship with the domestic courts of the Member States under Article 267 TFEU, if the agreement included such a mechanism. Although *Opinion 2/13* finds additional support in Protocol No. 8 EU, which provides the framework for the EU's accession to the ECHR, its reasoning could have broader implications. As we have seen earlier, the indispensable condition that the essential character of the powers derived under the Treaty must not be adversely affected constitutes a general requirement of the principle of autonomy.

3.1.4 Interim conclusion

The above case law projects two general scenarios in which an assessment of the principle of autonomy might become relevant. The first is when international agreements incorporate EU law and thus require harmonious interpretation in

[111] *Ibid.*, paras. 221, 224, 225.
[112] *Ibid.*, paras. 230, 231, 234.
[113] *Ibid.,* paras. 175-76.
[114] *Ibid.*, paras. 245 and 247.
[115] *Ibid.*, para. 246.
[116] *Ibid.*, para. 237.

the light of the Treaty. The second is when international courts and tribunals are expressly charged with the task of interpreting and applying EU law in a particular field. The above discussion, however, demonstrates that the Court's reasoning transcends these two factual scenarios. In sum, concerns of incompatibility with the principle of autonomy arise generally when international courts are directly or indirectly concerned with the interpretation or application of EU law such that they may adversely affect its uniform interpretation, unless this is merely incidental to the interpretation and application of the international agreement. Additionally, a preliminary reference procedure allowing for the prior involvement of the CJEU might eradicate these concerns, provided it complies with the essential characteristics of the powers conferred under the EU Treaties and does not effectively replace the domestic courts.

3.2 Investor-state arbitration tribunals and the interpretation of EU law

3.2.1 The interpretation of EU law as a non-incidental activity

In the light of current events, the fact that investor-state tribunals are involved in the interpretation of primary and secondary EU law cannot be ignored.[117] Whether or not this poses a challenge to the autonomy of the EU legal order depends on the nature and extent of this involvement and the effect of investment awards on the jurisdiction of the CJEU. It should be made clear from the outset that EU investment agreements are unlikely to contain literal incorporations of Treaty provisions as was the case with the EEA and ECAA agreements. Accordingly, investor-state tribunals are not in a position to provide interpretations of investment agreements that pose a threat to the harmonious interpretation of EU law *per se*. Likewise, investor-state tribunals are not entrusted with an explicit mandate to interpret and apply EU law in a particular area of EU competence.[118]

The jurisdiction of an investment tribunal is limited to the adjudication of a particular dispute and the interpretation and application of the investment agreement under which the tribunal is established. With their overarching reach, however, investment standards have a potential impact on a variety of EU policies such as public health, environmental protection and labour standards,

[117] Angelos Dimopoulos, *EU Foreign Investment Law* (Oxford University Press 2011), at p. 333. The arbitrability of commercial disputes involving competition rules exemplifies this situation. Although there was a question as to whether such disputes can be referred to an arbitral tribunal given their public policy character, recent decisions illustrate a tendency towards accepting the arbitrability of these matters. At an EU level the CJEU in *Eco Swiss* (Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV,* [1999] ECR I-3055) did not contest the arbitrability *per se*. The Court appeared to accept that commercial disputes involving EU competition rules can be referred to arbitration. See, to that extent, Poudret and Besson (2007), at p. 298.

[118] Dimopoulos (2014), at p. 1698.

amongst others. With regards to the WTO Dispute Settlement Body, Advocate General Léger remarked that the broad standards, "would inevitably determine the Court's interpretation of the corresponding rules of Community law. Such an outcome would jeopardize the autonomy of the Community legal order in the pursuit of its own objectives."[119] Thus, if the binding nature of investment awards on the CJEU can be established, this will severely curtail its interpretive flexibility.[120] It is noteworthy, in that context, that investment tribunals will rule on questions of EU law if the parties present these questions as part of the dispute. These questions can and have already come before investment tribunals, when they concern, for instance, the applicability of BITs or the compatibility with EU law of BITs or the Member States' implementing measures.[121] Recent investment awards reveal, however, that investment tribunals are not in agreement on the question of whether EU law is to be considered as domestic or international law for the purpose of the adjudication of investment disputes.[122]

This is no insignificant detail. Many investment agreements incorporate international law as a legal source to be applied by the investment tribunal. If EU law is considered to be applicable international law, the investment tribunal expressly engages in an interpretation and application of EU law. On the other hand, if the investment tribunal considers EU law to be part of the applicable domestic law, it will apply EU law as a matter of fact rather than a matter of law.[123] The conclusion, however, that this would render the involvement of investment tribunals in the interpretation of EU law merely incidental is unconvincing. The core task of investment tribunals is the substantive assessment of legal acts against the investment standards set out in the underlying investment agreement. In the case of EU agreements, the investment tribunal is therefore implicitly charged with the task of assessing the legal acts of the EU or its Member States. This necessarily requires an interpretation of EU law that, it is argued here, extends beyond a merely incidental activity. Thus, although the investment tribunal does not apply EU law, it is nonetheless deeply invested in its interpretation, which constitutes an essential activity when the investment tribunal is fulfilling its principal role under the investment agreement.[124]

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[119] Opinion of Advocate General Léger in Case C-351/04 *Ikea Wholesale Ltd v Commissioners of Customs & Excise* [2007] ECR I-7723, at paras. 78, 79.

[120] On the assessment of the WTO Dispute Settlement Body in the light of the autonomy of the EU legal order, see Jan-Peter Hix, *Indirect Effect of International Agreements: Consistent Interpretation and other Forms of Judicial Accommodation of WTO Law by the EU Courts and the US Courts* (Jean Monnet Working Paper 03/13, 2013), at pp. 96, 97.

[121] Recent intra-EU investment awards reflect the very substantive involvement of investment tribunals in the interpretation of EU law. See *Eastern Sugar B.V. (Netherlands) v. The Czech Republic* (SCC Case No. 088/2004); *Electrabel* (ICSID Case No. ARB/07/19); *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, 11 December 2013 (ICSID Case No. ARB/05/20).

[122] Dimopoulos *EU Foreign Investment Law* (2011), p. 333.

[123] *Electrabel* (ICSID Case No. ARB/07/19) at para. 4.127.

[124] See *infra* at Section 3.4.1.

3.2.2 Investment awards and the hierarchy of EU norms

Additionally, the position of international agreements within the hierarchy of norms in the EU legal order supports the view that future investment awards can limit the CJEU in the exercise of its judicial prerogative. By virtue of Article 216(2) TFEU, international agreements are binding on the Member States and the EU institutions. This provision was only recently inserted into the EU Treaties and effectively consolidates the previous case law of the CJEU that referred to international agreements constituting an "integral part" of the EU legal order.[125] It was, furthermore, established that international agreements are subordinate to primary EU law but outrank secondary EU law. More precisely, secondary EU law needs to be interpreted, as far as possible, in accordance with international agreements that have entered the EU legal order[126] – that is, those agreements that have become legally effective. Although this requirement of consistent interpretation does not require a *contra legem* reading of EU legislation, it provides the Court with a workable solution to guarantee the conformity of EU legislation with the EU's international obligations.[127]

In *Opinion 1/91* the Court did not contest the legality of the binding jurisdiction of international courts or tribunals within the framework of an international agreement.[128] However, for decisions of international courts or tribunals to develop a binding effect they must first enter the EU legal order. In fact, the Court's fear of binding itself to a particular interpretation of EU law by the EEA court is in itself evidence that these decisions can and do penetrate the EU legal order.[129] Although it is no easy task to determine precisely the level within the hierarchy of norms in the EU legal order at which these decisions settle, a sensible argument can be advanced that they enter the sphere of EU law at the same level as the international agreement from which the court or tribunal

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[125] Case 181/73 *R & V Haegeman v. Belgian State,* [1974] ECR 449, para. 5; Case C-366/10 *Air Transport Association of America v. Secretary of State for Energy and Climate Change,* [2011] ECR I-0000, para. 50.

[126] Case C-61/94 *Commission v. Federal Republic of Germany,* [1996] ECR I-3989, para. 52; Case C-286/02 *Bellio F.lli Srl v. Prefettura di Treviso,* [2004] ECR I-3479, para. 33; Case C-344/04 *International Air Transport Association v. Department for Transport,* [2006] ECR I-443, para. 35; see also Allan Rosas, 'The status in EU law of international agreements concluded by EU Member States', 34 *Fordham International Law Journal,* 2011 1304, at pp. 1309-11.

[127] Because secondary EU law is assumed to conform to the EU's international obligations and because international agreements rank higher than EU legislation in the hierarchy of norms within the EU legal order, EU legislation is rendered subject to judicial review through either direct or indirect actions. Thus, the legality of EU legislation can under certain conditions be contested in the light of its conformity with international agreements to which the EU and / or the Member States are contracting partners. Eeckhout (2011), at pp. 292 ff.

[128] Opinion 1/91, *EEA agreement*, at para. 39.

[129] Nikolaos Lavranos, 'Designing an international investor-to-state arbitration system after Opinion 1/09' in Marc Bungenberg and Christoph Herrmann (eds), *Common Commercial Policy after Lisbon: Special Issue* (Springer Verlag 2013), 199, at pp. 207-8.

itself derives its jurisdiction.[130] If that understanding is correct, these decisions outrank secondary EU law and have the practical effect that EU legislation must be interpreted in conformity with them. An interpretation of primary EU law would not have the same effect.[131] Consequently, the CJEU is restricted in its interpretation of EU law by decisions of international courts only insofar as they affect the interpretation of secondary EU law.

Investment arbitration is not an exclusive legal avenue. On the contrary, investors are at liberty to initiate proceedings before the domestic courts instead, and under certain circumstances even in parallel to investment arbitration. Where an investment tribunal has already rendered an award, the judicial prerogative of the CJEU will be curtailed insofar as the CJEU is asked to assess the compatibility of the same EU legal act with the investment standards of the particular EU investment agreement. *A contrario* the CJEU is not bound to follow the investment award if the alleged incompatibility concerns EU Treaty provisions.

3.2.3 The lack of permanence and precedents in investment arbitration

Another point for consideration is the element of permanence in investment arbitration, or more precisely the lack thereof. Whilst the international courts and tribunals that have been under the scrutiny of the CJEU in the past all show a certain element of permanence and the development of a coherent body of case law, investment tribunals are usually set up *ad hoc* for the duration of the dispute only. Additionally, awards are binding on the parties to the dispute and do not generate precedential value. Tribunals are therefore not bound to follow the reasoning of earlier awards in similar cases. It might be argued, therefore, that investment tribunals are fundamentally different from traditional courts and tribunals for the purpose of their assessment under the principle of autonomy. That being said, nothing in the reasoning of the CJEU indicates that permanence of an international judicial body is a determining factor in the application of that principle.

In *Opinion 1/91* the CJEU strongly based its decision on the argument that the jurisdiction of the EEA court would undermine the harmonious interpretation

[130] The interpretation of the provisions of an international agreement by an adjudication body established under that agreement amounts to an act implementing that agreement. With regards to the decisions of committees established under international agreements, the Court has already confirmed this position. Thus, decisions of the 'Council of Association' under the Ankara Agreement were so closely linked to the implementation of that agreement that they constituted a legal act in the same way as the agreement itself: see Case C-192/68 *S. Z. Sevince v. Staatssecretaris van Justitie,* [1990] ECR I-3461, paras. 8-9.

[131] Kirsten Schmalenbach, 'Struggle for exclusiveness: The ECJ and competing international tribunals' in Isabelle Buffard and others (eds), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff 2008), at pp. 1048-49; Brandtner (1992), 1045, at pp. 309-10.

of EU Treaty provisions in a rather general way. It might even be argued that the major concern was not the binding force of the EEA court's decisions on the CJEU at all. On the contrary, the CJEU was concerned that the EEA court would provide diverging interpretations of EU law. The duality of the two lines of case law would erode harmonious interpretation and legal certainty.

The lack of permanence and a formal doctrine of precedence add to the concerns about harmonious interpretation. Investment arbitration remains private – commercial – rather than public in character, and proceedings are often held behind closed doors.[132] There is a notable shift towards more transparency in investment arbitration, resulting in more awards being published, and an almost inherent incentive for tribunals to consider – if not follow – earlier awards. In fact, arbitral awards undoubtedly have an authoritative character in the modern investment treaty arbitration system.[133] However, it is not uncommon that investment tribunals derive materially divergent conclusions on identical questions. In the course of interpreting EU law, an investment tribunal is bound neither by an earlier tribunal's interpretation of the same EU legal act nor by the interpretation of the CJEU on that provision of EU law. From this perspective it is true that the non-institutionalized, *ad hoc,* character of modern investment arbitration poses a significant risk for the erosion of the uniform interpretation of EU law.

This being said, it is arguable that the EU legal order already provides for a similar risk internally. Not only are domestic courts in different EU Member States and at different levels of judicial hierarchy likely to derive different interpretations, but these interpretations can, furthermore, conflict with the interpretation of the CJEU. Nonetheless, internally the Treaties provide safeguards, not least the preliminary reference mechanism under Article 267 TFEU, that ultimately preserve for the CJEU the role of ultimate arbiter. The obligations of domestic courts under Article 267 TFEU are, furthermore, subject to safeguards and monitoring by the European Commission and the CJEU.[134] Externally, there are currently no safeguards in place that allow the CJEU to render an authoritative judgment on the interpretation of EU law for the purpose of its assessment in

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[132] See *infra* at Section 3.4.1.

[133] For a general discussion on this issue, see Eric de Brabandere and Tarcisio Gazzini, 'Arbitral decisions as a source of international investment law' in Eric de Brabandere (ed), *International Investment Law – The Sources of Rights and Obligations* (Martinus Nijhoff 2012), 245; Irene M. Ten Cate, 'The cost of consistency: Precedent in investment treaty arbitration', 51 *Columbia Journal of Transnational Law,* 2012-2013 418, at 423; Benedict Kingsbury and Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* Working Paper No. 09-46 (NYU School of Law, 2009), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466980>; Justin D'Agostino, 'A discussion on the use of precedents in international investment arbitration and its consequences. Does the evolving practice of relying on previous investment arbitration awards represent the birth of a customary international law on investment?' (ECT Conference in Stockholm 9-10 June 2011).

[134] *Infra* at part 3.5.4.

investor-state arbitration. Lastly, unlike the engagement of the domestic courts of the EU Member States in the interpretation of EU law, it is precisely the interpretive activity of international courts and tribunals that is fraught with problems as far as the application of the principle of autonomy is concerned.[135]

3.2.4 Practical ramifications

Lastly, it should also be remembered that there are particular practical ramifications that cannot be ignored in this context. Investment awards are enforced in accordance with either the New York Convention or ICSID, which both allow for a limited range of measures for the review of an arbitral award.[136] It is, thus, essentially impossible for the EU to comply with its international legal obligations stemming from the enforcement of investment awards whilst simultaneously keeping the factual effect of such rulings outside the internal EU legal order. The conflict at the heart of the recent *Micula* arbitration serves as a helpful illustration in the context of intra-EU BITs, although it could equally arise under an extra-EU BIT.[137] Furthermore, an interpretation of EU law that is incompatible with an investment award can potentially lead to a number of claims and multi-million euro awards.[138] The Court is unlikely to ignore these practical effects if it is asked to assess ISDS provisions in EU agreements in the light of the principle of autonomy.

3.2.5 Interim conclusion

A narrow reading of the relevant case law might not allow for the conclusion that an investment tribunal in the exercise of its jurisdiction binds the CJEU to a particular interpretation of EU law. However, the general motivation underlying the Court's reasoning is the pursuit of uniformity in the interpretation of EU law. In that respect it must be acknowledged that investment awards do curtail the judicial prerogative of the CJEU. Investment tribunals are *de facto* invested with the right to interpret EU law. Additionally, the position of investment

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[135] Eckes (2013), at p. 88.

[136] Although the enforcement of non-ICSID awards can, in limited circumstances, be refused under Article V of the New York Convention of 1958, this does not affect the substance of the arbitral award and thus leaves the tribunal's potential expression on EU law unaffected. The possibility of reviewing arbitral awards depends, on the other hand, on the domestic arbitration law which, in most cases, includes limited grounds of grave misconduct that allow the annulment of the initial award. ICSID does not require *exequatur* proceedings – rendering ICSID awards directly enforceable – and foresees a system-internal review procedure that does not involve the domestic courts. See Dolzer and Schreuer (2012), at pp. 300-1, 310; see also *infra* note 221.

[137] The Commission initiated procedures in October 2014 under the EU state aid rules, pursuant to Article 108(2) TFEU, claiming that the enforcement of the investment award in the *Micula* case would violate EU state aid rules. See OJ C 393/27, 7.11.2014, Commission Notice 2014/C 393/03 to Romania, State aid SA.38517 (2014/C) (ex 2014/NN).

[138] Steffen Hindelang, 'The autonomy of the European legal order' in Marc Bungenberg and Christoph Herrmann (eds), *Common Commercial Policy after Lisbon: Special Issue* (Springer Verlag 2013), 187, at pp. 194-95; in 2003 a Stockholm arbitral tribunal under the UNCITRAL rules awarded USD 269 million and 10% interest (totalling USD 353 million) against the Czech Republic (*CME Czech Republic BV v. Czech Republic*, (14 March 2003), 15 *World Trade and Arbitration Materials* (2003), 83); see also Van Harten (2008), at pp. 6-8.

awards in the hierarchy of legal norms in the EU legal order requires the CJEU to interpret secondary EU law in conformity with an investment agreement and the investment awards emanating from it. This effectively binds the CJEU to the investment tribunal's interpretation and assessment of secondary EU law. Lastly, the lack of permanence and precedents in investment arbitration exacerbates the risks for the development of divergences in the internal and external interpretation of EU law.

3.3 Determining the respondent to investment disputes: an allocation of competences

The CJEU in *Opinion 1/91* stressed unambiguously that an international agreement cannot transfer to international courts or tribunals the power to interpret the allocation of competences within the EU (or between the EU and its Member States).[139] *Opinion 2/13* furthermore reiterated that such an assessment is inherent in the attribution of responsibility for the purpose of determining the respondent to a dispute before the ECtHR.[140] The determination of the respondent to an investment dispute is of similar relevance for investment tribunals. Investor-state arbitration refers to the resolution of an investment dispute between an individual investor and a contracting party to the investment agreement. Particularly in a multi-layered system such as the EU it is inevitable that an investment tribunal will engage in an assessment for the purpose of attributing international responsibility, determining the 'contracting party' – or in other words the respondent to the claim.[141] Determining the respondent to a dispute thus entails an assessment of the allocation of competences between the EU and its Member States under the EU Treaties. EU law then governs the internal question of whether or not that party is actually competent to act as respondent in the proceedings. Thus, the problem of identifying the respondent to an investment claim, in the case of the EU as a contracting party, is defined by an internal / external dichotomy.

3.3.1 The internal dimension

Whether or not a Member State is competent to act as the respondent in an investment dispute must be determined internally because the question refers intrinsically to the relationship between the EU and the Member States, and therefore to the allocation of competences under the EU Treaties. Furthermore, the Member States are under a duty of sincere cooperation,[142] which requires them to coordinate with the EU institutions before acting as a respondent in an investment dispute. The recent Council Regulation establishing a framework for managing financial responsibility linked to ISDS tribunals established by EU

[139] Opinion 1/91, *EEA agreement*, at paras. 34-36.
[140] Opinion 2/13, *Accession to the ECHR*, at paras. 221, 224 and 225.
[141] Hindelang (2013), p. 196.
[142] Article 4(3) TEU.

investment agreements refers explicitly to Article 4(3) TEU.[143] The Regulation applies a *prima facie* presumption that Member States will act as respondents in investment disputes, subject to a list of general exceptions. Amongst these are disputes that concern treatment by EU institutions, bodies, offices or agencies;[144] disputes where the Commission has taken a decision based on "full and balanced factual analysis and legal reasoning" that the Union is to act as a respondent; disputes where the same legal issues are subject to a dispute in the WTO; and disputes where the Member State does not intend to act as a respondent.[145] The Regulation affords significant leeway for the Commission to intervene in the determination of the respondent status. Before the WTO Dispute Settlement Body the EU is already acting as a single respondent on behalf of all the Member States, on the basis of Article 4(3) TEU,[146] and the Regulation might well be seen as an indication of a similar scenario developing within the framework of investor-state arbitration.

The Regulation stipulates that it shall not have an impact on the division of competences under the Treaty,[147] thereby following, first and foremost, the internal allocation of competences.[148] When the Member State or the Commission is notified about an investment claim, it is to be determined internally, in accordance with the allocation of competences under the EU Treaties and Article 4(3) TEU, to whom the disputed treatment (i.e. the legal act that forms the basis of the claim) can be attributed. In a second instance the Commission has the power to intervene in cases where the disputed treatment is attributable to the Member State but EU interests are at stake. The Regulation thereby reserves the power to allocate the respondent status in investor-state arbitration internally to the Commission.[149]

3.3.2 The external dimension

Before going any further it must be emphasized that, although there have already been numerous claims involving EU Member States with regards to investments in areas of EU competence, these need to be distinguished from future disputes under EU investment agreements. The EU has not yet entered the sphere of investment law in this respect: it has not previously been party to bilateral investment agreements; and it has not so far been an actor in any investment

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[143] OJ L 257/121, Regulation 912/2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.

[144] *Ibid.*, at Article 4.

[145] *Ibid.,* at Article 9.

[146] Stijn Billiet, 'The EC and WTO dispute settlement: The initiation of trade disputes by the EC', 10 *European Foreign Affairs Review,* 2005 197.

[147] Article 1, Regulation 912/2014.

[148] Jan Kleinheisterkamp, *Financial Responsibility in the European International Investment Policy* (LSE Law, Society and Economic Working Papers 15/2013, 2013) <http://ssrn.com/abstract=2222580>.

[149] *Ibid.*

arbitration.[150] It was therefore not previously required of investment tribunals to decide between the EU and an individual Member State as a respondent. BITs concluded by Member States raise another relevant aspect, namely that of retained competence to enter into and maintain intra- and extra-EU BITs. That question is largely governed by the Council Regulation establishing a transitional arrangement for those BITs,[151] and is not of importance for this study.

Following the initiation of investment arbitration, it is for the tribunal to determine whether it has jurisdiction over the dispute in accordance with the procedural framework from which it takes its power. There are a number of prerequisites that need to be fulfilled before the tribunal can assume jurisdiction over the dispute; the respondent is, for instance, required to be a contracting party to the investment agreement. In traditional bilateral or multilateral settings, where state-parties regularly act in their capacity as individual sovereign entities, this question is relatively straightforward.

EU investment agreements, on the other hand, provide for overlapping layers of competences. A third-country investor intending to bring an investment claim under an EU investment agreement is therefore confronted with the preliminary challenge of identifying whether an individual Member State or the EU is the competent party for the legal act that forms the basis of the dispute. Many EU Partnership and Co-operation Agreements have already recognized this by including a general clause that emphasizes the importance of the delimitation of competences for investment-related activities under the agreement.[152]

For the tribunal, this is primarily a matter to be determined with recourse to the investment agreement. If the agreement is silent on this point, the allocation of competences might be pre-determined by the form of future EU investment agreements.[153] The EU can only conclude an international agreement alone where the subject matter of the agreement is covered by exclusive EU competence. Mixed agreements, on the other hand, are a phenomenon of particular practical importance in the daily working of EU external relations, and they occur when the Union concludes an agreement with a scope that is at least partly covered

[150] The exception to this is the ECT, which provides for investor-state arbitration in Article 26 and to which the EU is a contracting party. The ECT was signed in 1991. With the shift in competences under the CCP, it is argued here, the determination of the respondent status under the ECT is subject to similar criticisms to those that apply under the more recent bilateral settings such as TTIP.

[151] Regulation 1219/2012.

[152] Dimopoulos *EU Foreign Investment Law* (2011), at pp. 254-55.

[153] Whilst this is not a matter of choice, the transparency of the EU institutions concerning their reasons for making decisions to conclude certain agreements as mixed agreements has been criticized in scholarly writing, especially with regards to bilateral agreements. See Marc Maresceau, 'A typology of mixed bilateral agreements' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010), 11, at p. 11.

by non-exclusive competence.[154] Article 3 TFEU reveals that the external competence for the CCP is exclusive, but there is still a lack of consensus on what this competence encompasses,[155] and to that extent whether or not future EU investment agreements can be concluded exclusively by the EU.[156] This study cannot engage in a comprehensive discussion of this matter. Suffice it to highlight a few precursory points. The vast majority of EU foreign investment regulation is likely to be incorporated into broader deep and comprehensive FTAs such as TTIP. The broad material scope of these agreements renders 'mixity' an inevitable reality. There are also factors that could have an impact on the nature of 'pure' EU investment agreements that lie beyond concerns of competence.

Be that as it may, it is not a far-fetched assumption that investment tribunals under EU agreements will derive their jurisdiction under mixed agreements. Hence, in determining the boundaries of its jurisdiction[157] an investment tribunal will inevitably be confronted with the question of whether, on the facts and nature of the dispute, the EU or the individual Member State is the respondent to the claim. In more general terms, the investment tribunal in adjudicating the dispute must express itself on whether or not the contested legal act is covered by EU or Member State competence. In the absence of a clear reference in the text of the investment agreement or a declaration on the

[154] There is significant scholarly writing that attempts to establish a typology of such 'mixity' situations. Leaving aside the extent to which such efforts are practical, it is important for this contribution to note that all types of mixed agreements have in common that they cover, at least in part, material aspects that are not part of the Union's exclusive competence under primary law (i.e. Article 3 TFEU). Whether or not these non-exclusive competences rest with the Member States alone or are shared with the EU is irrelevant for the external perspective described by this contribution. Eeckhout (2011), at pp. 213-14; Maresceau (2010); Allan Rosas, 'The European Union and mixed agreements' in Alan Dashwood and Christophe Hillion (eds), *The General Law of EC External Relations* (Sweet & Maxwell 2000), 200, at pp. 203-7.

[155] The Commission has recently decided to refer this question concerning the Singapore agreement to the CJEU (Commission Press Release, 'Singapore: The Commission to Request a Court of Justice Opinion on the trade deal'). For further discussion on this issue consider: Dimopoulos *EU Foreign Investment Law* (2011); Jan Ceyssens, 'Towards a common foreign investment policy? – Foreign investment in the European Constitution', 32 *Legal Issues of Economic Integration,* 2005 259; Wenhua Shan and Sheng Zhang, 'The Treaty of Lisbon: Half way towards a common investment policy?', 21 *European Journal of International Law,* 2010 1049; Marc Bungenberg, 'The division of competences between the EU and its Member States in the area of investment politics' in Marc Bungenberg, Joern Griebel and Steffen Hindelang (eds), *International Investment Law and EU Law* (Springer 2011), 29.

[156] It should be noted that besides the obvious competence question, there are other – facultative – aspects that could influence the nature of such agreements; for the impact of the duty of sincere cooperation, for example, see Christophe Hillion, 'Mixity and coherence in EU external relations: The significance of the "duty of cooperation"' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010), 87.

[157] It is an inherent competence of investment tribunals – or commercial arbitral tribunals in general – to rule on their own competence (Kompetenz-Kompetenz). This is not only formally recognized in many commercial arbitration rules (e.g. Rule 41(2) ICSID; Article 23 UNCITRAL; Article 16(1)(1) UNCITRAL Model Law; Article 6 ICC) but is practically upheld by domestic courts confronted with the competence question and virtually considered to constitute a general rule by investment arbitration tribunals in almost all cases. See *supra* note 39.

delimitation of competences,[158] the tribunal must resort to EU primary law. The CJEU in *Opinion 2/13* confirmed that the attribution of an act or omission that directly follows the application of EU law rules on the division of powers requires an assessment of the allocation of competence.[159] Consequently, under the assumption that international responsibility is directly dependent on the allocation of competence within the EU, the investment tribunal's assessment as to the respondent status inevitably leads to a determination of the allocation of competences under the EU Treaties.[160]

An investment tribunal that expressly discusses this aspect in an award on jurisdiction also expressly interprets the allocation of competences between the EU and its Member States. But even a simple acceptance of jurisdiction over an investment dispute contains an implied assessment of the allocation of competences because it reflects the acceptance that the matter of the disputes falls within the competence of either the EU or a Member State. The assessment of the allocation of competences within the EU thus becomes a task that is essential to the operation of investment tribunals under future EU investment agreements.

3.3.3 Interim conclusion

Internally, the Commission enjoys the prerogative of determining the respondent status of either the EU or a Member State in accordance with secondary EU law. Given that the internal dimension of this problem is essentially a question of competences, determination of the respondent status under the Regulation closely follows the allocation of competences under the EU Treaties. Likewise, the determination of the respondent status under the principles of public international law on the allocation of international responsibility essentially follows the allocation of competence under the EU Treaties. However, if it is the investment tribunal that carries out this assessment, this means that the investment tribunal is ultimately determining competences between the EU and the Member States. According to the case law of the CJEU, that sits uncomfortably with the principle of the autonomy of the EU legal order. This study discusses at a later point how this factor can be mitigated by reserving the power to determine the respondent status externally, under the EU investment agreement, to the Commission, in an attempt to match up the external and the internal dimension.

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[158] The use of declarations of competence is a common feature of international agreements that include international organizations amongst their signatories. This is discussed in more detail below, see *infra* at part 3.5.6.

[159] Opinion 2/13, *Accession to the ECHR*, paras. 221, 224, 225.

[160] Dimopoulos *EU Foreign Investment Law* (2011), pp. 254-55; see also the ILC draft articles on the responsibility of international organizations, Part I, Chapter II on the attribution of conduct to an international organization.

3.4 Safeguarding the essential characteristics of the EU institutions

The CJEU has persistently held that an international agreement that alters the essential characteristics of the powers conferred upon the EU institutions under the Treaties undermines the autonomy of the EU legal order. In its arguments the CJEU refers first and foremost to its own power.[161] This includes the Court's monopoly to review the legality of EU acts as well as the binding nature of the Court's interpretation of EU law.

3.4.1 Adjudicative review of EU legal acts

In both *Opinion 1/91* and *Opinion 1/09* the CJEU expressly recognized the importance for the exercise of its external competences, especially with regards to the CCP, of judicial bodies in EU agreements.[162] The Court furthermore stated that the jurisdiction of international courts and tribunals could, in certain circumstances, affect the powers of the EU institutions including the CJEU, particularly where an international agreement is provided for in the EU Treaties, without the agreement being incompatible with the Treaties.[163] It was established earlier in this study that the primary task of an international court or tribunal is the interpretation and application of the international agreement from which it derives its jurisdiction. A merely incidental assessment of EU legislation *vis*-à-*vis* the EU's international obligations under the agreement is therefore legitimate. To understand this, however, as a general shift of the power to review the legality of EU law, in the light of international agreements, from the CJEU to international courts and tribunals would be mistaken.

The CJEU clearly stated that international courts or tribunals can only affect the powers of EU institutions if the indispensable conditions for safeguarding the essential characteristics of those powers are satisfied.[164] There is nothing in Article 19 TEU that suggests that the judicial prerogative of the CJEU to rule on the legality of EU legal acts is limited to an internal assessment. An international court or tribunal whose sole purpose is to assess the legality of EU legislation according to the standards of an international agreement violates the Court's exclusive jurisdiction.

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[161] Opinion 1/00, *European Common Aviation Area*, at para. 12; Opinion 1/92, *Amended Draft EEA Agreement*, at paras. 32-36; Opinion 1/91, *EEA agreement*, at paras. 61-65; Hindelang points out how the system of autonomy of the EU legal order, which finds its roots in determining the relationship between the domestic legal orders of the Member States and the EU legal order, has gradually developed into a system of 'self-assertion', with the CJEU guarding EU law from the impact of public international law, see Hindelang (2013), at p. 189. It is furthermore noteworthy that the Court clearly acknowledged that the EU legal order could be affected by the jurisdiction of a judicial body under an international agreement without the characteristics of the Court's power being altered. Opinion 1/00, *European Common Aviation Area*, at paras. 20-21.

[162] Opinion 1/91, *EEA agreement*, at para. 40; Opinion 1/09, *European Patents Court*, at para. 74.

[163] Opinion 1/00, *European Common Aviation Area*, paras. 20 and 21; Opinion 2/13, *Accession to the ECHR*, para. 182.

[164] Opinion 1/00, *European Common Aviation Area*, para. 76; Opinion 2/13, *Accession to the ECHR*, para. 183.

It was shown earlier in this study that the investment tribunal's involvement in the interpretation of EU law is not merely incidental. Indeed, it was pointed out that investment awards have a binding effect on the Court's assessment of EU law as regards the international agreement. It was pointed out that, moreover, the sole purpose of the investment agreement is to provide international standards of judicial review for domestic regulatory acts. When the investment tribunal engages in the interpretation of EU law, it does so with the purpose of reviewing the compatibility of EU law with the investment agreement.

On the other hand, investment awards usually amount to monetary compensation, and investment tribunals might in many cases even lack the power to order specific performance. It is for the EU to decide whether to take appropriate measures to remedy the incompatibility (by amendment or revocation of the legal act, for example) or simply to ignore the material aspects of the award. Additionally, the arbitration model can be seen as having been heavily influenced by commercial arbitration, which as a method of private dispute resolution escapes compatibility problems as far as the principle of autonomy is concerned. That understanding is supported by the fact that the EU as an international organization cannot currently accede to the ICSID Convention, and investment treaty arbitration proceedings outside ICSID are largely based on traditional commercial arbitration rules.[165] The Court has expressed a reluctance to intervene in the establishment of such private dispute resolution mechanisms.[166]

That being said, modern investor-state arbitration mechanisms push the boundaries of commercial arbitration and put into question their material comparability.[167] Because of the idiosyncratic nature of the investor-state relationship that underlies the investment treaty arbitration, the tribunal *de facto* carries out an adjudicative review of domestic – or EU – legal acts.[168] The

[165] The most common forum for investment arbitration is ICSID, which is created particularly for the settlement of investment disputes. Nonetheless, the majority of investment agreements include more than one possible arbitral forum. Non-institutionalized *ad hoc* tribunals, in particular, are usually formed under commercial arbitration rules such as those of the ICC, SCC, UNCITRAL or LCIA. See Dolzer and Schreuer (2012), at pp. 241 ff.

[166] Opinion 1/09, *European Patents Court*, at para. 63. The Court indicated that where power is transferred to a judicial body under an international agreement whose jurisdiction extends only to private disputes, this does not conflict with the obligation under Article 344 TFEU.

[167] Highlighting the limits of comparing investment treaty arbitration with regular commercial arbitration, see Konstanze Von Papp, 'Clash of "autonomous legal orders": Can EU Member State courts bridge the jurisdictional divide between investment tribunals and the ECJ? A plea for direct referral from investment tribunals to the ECJ', 50 *Common Market Law Review,* 2013 1039, at pp. 1058-60. For an overview of the duality underlying investment treaty arbitration, see Kate Miles, 'Public–private dualities of international investment law and arbitration' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011), 97, at pp. 101-4.

[168] Stephan W. Schill, 'International investment law and comparative public law – An introduction' in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010), 3, at pp. 10-17; Van Harten (2008).

arbitration agreement forms an inherent part of the investment agreement, and contains the implied general consent of the contracting parties to submit to obligatory investment arbitration that is initiated by a third party. Unlike in traditional commercial arbitration, the consent emanates directly from the contracting states' sovereign power and is not substantially different from the consent expressed in national investment legislation.[169] This, it is argued here, lifts investor-state tribunals in investment treaty arbitration out of the private sphere.

Historically, investment disputes usually arose out of directly negotiated investment contracts between the state and the investor. In those circumstances, both parties acted in their private capacity. Material and procedural benefits under the investment contract are limited to the particular investment and the particular investor; and so are the effects of any arbitral award. It is not difficult to apprehend why commercial arbitration provides an adequate method for the settlement of disputes arising out of investment contracts.[170] The shift towards international investment agreements as the primary instrument for the regulation of foreign investment means that virtually all disputes before investor-state tribunals emanate from ISDS provisions. In those instances, consent is expressed, in a proactive way, for the benefit of an objectively defined, broad and generally unknown group of claimants who have no prior relationship with the state regarding the investment. It is only natural that awards rendered under ISDS provisions have a broad impact and a systemic effect on the regulatory policy space of the contracting state.[171] Within the framework of the investment agreement, the host state appears as a public actor, exercising sovereign power.

As part of a theory that approaches international investment law as an area of global administrative law, Van Harten argues that the specific characteristics of the investor-state arbitration proceedings render them more akin to international judicial review than commercial arbitration. These characteristics include the broad interpretation of the term investment, the lack of an obligation for the investor to exhaust available domestic remedies, the direct enforceability of the

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[169] Van Harten (2008), at p. 64; Christoph Schreuer, 'Consent to Arbitration' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008), 831, p. 835.

[170] Van Harten (2008), at pp. 62-63; Van Harten and Loughlin (2006); on the development of international investment law see Kate Miles, *The Origins of International Investment Law* (Cambridge University Press 2013).

[171] Van Harten (2008), at p. 63; Van Harten and Loughlin (2006), at p. 128. Applicable law and dispute resolution clauses in investment contracts depend very much on the bargaining power of the parties in the negotiation process, and the investor will generally try to protect its own interests as much as possible. This is not the case in investment treaties, where the investor has no actual influence on the content of the treaty text. If one also considers the fact that investment contracts may include renegotiation clauses, their contractual character – as opposed to the sovereign character of investment treaties – becomes even more obvious, see Dolzer and Schreuer (2012), at pp. 81, 85-86, respectively.

rights conferred under the agreement and the award of monetary compensation.[172] Investor-state arbitration establishes a directly enforceable right for the investor to challenge the regulatory acts of the host state before an international adjudicative body, excluding almost any involvement of domestic courts or institutions.[173] Under EU investment agreements, the investment tribunal will express itself on the compatibility of regulatory acts of the Member State or the Union with the investment standards established under the international agreement. In other words, investment tribunals perform an adjudicative review of the legality of EU legislation within the EU legal framework, which may result in the award of monetary compensation.[174] This appears to be a violation of the Court's judicial monopoly under Article 19(1) TEU.[175]

Investment awards that are pecuniary in nature leave it to the EU institutions to draw the correct conclusion from adverse decisions and to take appropriate measures to comply with the EU's international obligations.[176] Nevertheless, that argument ignores the far-reaching practical ramifications of adverse investment awards under generalized investor-state arbitration. The general consent underlying the arbitration agreement is not limited by temporal or historical factors, nor is it restricted to the individual relationship or the circumstances in which the particular investment occurs. Even though an investment tribunal generally lacks the power to invalidate national or EU legislation directly, the universal character of the award invites claims from other investors within the broad group of potential claimants for the benefit of whom the arbitration clause is operating and who are affected in a similar way by the regulatory act. Whereas neither the EU institutions nor the EU Member States are under any legal obligation to effect regulatory change in the light of an investment award, the significant number of potential claimants and the vast sums awarded in damages will most certainly have a *de facto* deterrent effect on the EU legislator in a broad range of policy fields.[177] Additionally, the CJEU and the domestic courts in their role as ordinary courts of the EU legal order cannot ignore investment awards in their interpretations of EU legislation.

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[172] Van Harten advances these four criteria as characteristics of investment treaty arbitration, and they form the basis of his approach to investment treaty arbitration as a model of global administrative law. See Van Harten (2008) and Van Harten and Loughlin (2006).

[173] Whereas investment awards are directly enforceable under ICSID, non-ICSID awards require an *exequatur* procedure, following the rules of the New York Convention of 1958. Despite the lack of a right of substantive appeal, arbitral awards are thus frequently challenged before domestic courts in the course of enforcement proceedings. The domestic court's power to refuse enforcement of particular awards is, however, limited and leaves the award substantively intact. See Dolzer and Schreuer (2012), at pp. 300 ff. This effectively insulates investment awards from any form of judicial review, see Van Harten and Loughlin (2006), at p. 137.

[174] To that extent, implicitly, see Hindelang (2012), at p. 202; and Semertzi (2014), at p. 1138.

[175] Opinion 1/00, *European Common Aviation Area*, at para. 24.

[176] Dimopoulos *EU Foreign Investment Law* (2011), p. 118.

[177] On the award of damages as a public law remedy, see Van Harten and Loughlin (2006), at p. 131.

Lastly, investment tribunals traditionally apply a broad definition of 'investor', which allows domestic companies to take advantage of an investment agreement through holding companies that fulfil the formal requirements of establishment within the territory of the other contracting state.[178] Despite efforts to counteract this sort of forum shopping, provisions in investment agreements have largely proved to be ineffective. This opens the possibility for EU companies to have EU legislation or the acts of EU institutions that have an unfavourable effect on their business operations reviewed before an investment tribunal against standards otherwise unavailable within the EU legal order, thereby effectively circumventing the jurisdiction of the CJEU. This poses a serious threat to the Court's monopoly power to review the legality of EU legislation, and to that extent alters the essential characteristics of the powers conferred upon the Court by virtue of Article 19(1) TEU.

3.4.2 The binding nature of the Court's case law

Notwithstanding the above, when referring to the character of the powers conferred upon the EU institutions under the Treaties, the CJEU has traditionally pointed first and foremost to the binding nature of its own interpretation of EU law.[179] Various of the agreements that the Court had a chance to review before their conclusion – among them the EEA agreement and the draft agreement establishing the EPCt – included procedures not unlike the preliminary reference procedure under Article 267 TFEU.[180] In essence, these agreements extended the Court's jurisdiction beyond the framework of the EU Treaties to cover questions on the interpretation of EU law that were referred to it by courts and tribunals established outside the domestic legal systems of the Member States. Although such an express extension of the Court's jurisdiction is not in itself problematic,[181] the Court has not hesitated to make it clear that such mechanisms will in fact undermine the autonomy of the EU legal order unless the Court's interpretation within the framework of the international agreement is legally binding on the international tribunal.[182] This conclusion is derived from a broad reading

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[178] *Ibid.*, at pp. 138-40; In *Tokios* a Ukrainian investor using a holding company in Lithuania brought a claim against a Ukrainian regulatory measure under the Lithuania–Ukraine BIT (*Tokios Tokelès v. Ukraine* (Jurisdiction), 29 April 2004 (ICSID Case No. ARB/02/18), paras. 37-40, 52). In *CME Czech Republic* Ronald Lauder, an American national owning a Czech TV station, claimed damages through a Dutch holding company before an UNCITRAL tribunal under the Netherlands–Czech Republic BIT and was awarded USD 353 million (*supra* note 138). It is noteworthy that Mr Lauder initiated parallel proceedings under the US–Czech Republic BIT but the tribunal rejected that claim (*Ronald S Lauder v. Czech Republic*, Final Award (3 September 2001)).

[179] Opinion 1/91, *EEA agreement*, at paras. 61-64; Opinion 1/92, *Amended Draft EEA Agreement*, at paras. 32, 37; Opinion 1/00, *European Common Aviation Area*, at para. 25; Opinion 1/09, *European Patents Court*, at para. 75.

[180] Opinion 1/91, *EEA agreement*, at paras. 11, 54-65; Opinion 1/92, *Amended Draft EEA Agreement*, at paras. 11, 37; Opinion 1/09, *European Patents Court*, at para. 12.

[181] Opinion 1/92, *Amended Draft EEA Agreement*, at para. 32; Opinion 1/09, *European Patents Court*, at para. 75.

[182] Opinion 1/00, *European Common Aviation Area*, at paras. 20-26; Opinion 1/09, *European Patents Court*, at para. 76.

of Article 267 TFEU, its purpose and objective, and the binding effect that preliminary references have on domestic courts in the Member States.[183] The CJEU thus evaluates the binding nature of its own interpretation of EU law to be an essential characteristic of the powers conferred upon the Court under the EU Treaties, which may not be altered by an international court or tribunal in the exercise of jurisdiction transferred under an EU agreement.

Investment tribunals are, above all, concerned by this insofar as ISDS provisions in future EU investment agreements provide for such a relationship with the CJEU. Established under an international agreement, investment tribunals are outside the framework of the Treaties and cannot, therefore, request a preliminary reference *ex officio*. However, an express expansion of the jurisdiction of the CJEU to cover requests from investment tribunals established under EU agreements effectively binds these tribunals to the Court's jurisprudence. This jeopardizes the perceived impartiality and depoliticization of investment dispute resolution, which constitute a fundamental characteristic of investor-state arbitration.[184] From an EU law perspective, however, a prior involvement of the CJEU has frequently been advanced as a solution to bridge the gap between the concurrent jurisdictions of the CJEU and investment tribunals.[185]

More importantly, in the light of the Court's reasoning in *Opinion 2/13* it might even be argued that the jurisdiction of investor-state tribunals demands a prior involvement of the CJEU, given that the tribunal is charged with the task of assessing EU legal acts against broad international standards of investment protection. Leaving aside the aspect of whether the power to refer questions should be facultative or compulsory for the investment tribunal, the mechanism as such might indeed resolve many of the problems advanced in this study.

3.4.3 Domestic courts – the ordinary courts of the EU legal order

The origins of the autonomy of the EU legal order can be situated historically in an external development of the Court's jurisprudence in *Van Gend en Loos* and *Costa v. E.N.E.L.,*[186] and legally-politically in the desire of the CJEU to protect its own judicial prerogative from external influence through international

[183] Opinion 1/91, *EEA agreement*, at para. 58.

[184] It is noteworthy in respect to arbitration clauses in intra-EU BITs that the lack of a preliminary reference by the investment tribunal raises additional concerns. It is arguable that by setting up such an arbitration mechanism the contracting – EU Member State – parties effectively circumvent the judicial control that the CJEU derives directly under the Treaties, and thereby violate Article 267 TFEU. See, to that extent, Hindelang (2012).

[185] A number of scholars even consider this to be a *conditio sine qua non* for investment arbitration clauses in future EU agreements. On the intra-EU aspect see Von Papp (2013), at pp. 1074-76; Hindelang (2012), pp. 201-5. For an opinion to the contrary see Dimopoulos *The validity and applicatbility of international investment agreements between EU Member States under EU and international law* (2011), at pp. 90-91. On the extra-EU aspect (including an assessment of extra-EU investment tribunals under Article 267 TFEU), see Burgstaller (2011), at p. 220.

[186] Case 26/62, *Van Gend en Loos*; Case 6/64, *Costa v. E.N.E.L.*

agreements.[187] Examining the line of opinions above, it becomes evident that the reasoning of the CJEU is gradually becoming more inclusive whilst also increasing the level of protectionism provided under the concept of autonomy. In both *Opinion 1/91* and *Opinion 1/92*, the Court explicitly focused on its own power derived under the Treaty, referring to the "nature of the function of the Court"[188] rather than the "essential characteristics of the powers conferred upon the EU institutions". It was not until *Opinion 1/00* that the Court adopted this latter expression.[189] Subsequently, from *Opinion 1/09* it has now become clear that the principle of autonomy applies even beyond the closed group of EU institutions defined in the Treaty,[190] inviting the domestic courts of the Member States into the inner circle of the EU legal order.[191]

A detailed examination of *Opinion 1/09* was provided earlier in this study and will not be repeated at this point.[192] It is important, however, to reiterate that the CJEU in its reasoning clearly demonstrates that the domestic courts of the Member States, as ordinary courts of the EU legal order, perform a particular role under Article 267 TFEU. International agreements depriving Member State courts of that role alter their specific power as granted under the Treaty. ISDS provisions do not deprive Member State courts of their role under the Treaty to the extent that the investor is free to pursue the investment dispute through the domestic courts of the host country. Investor-state arbitration is merely an additional safety mechanism that reserves to the investor the possibility of directly enforcing rights under the investment agreement before an international and independent judicial body.

ISDS provisions do not apply automatically but require that the investor activate this alternative dispute resolution mechanism by way of initiating the claim. Once the ISDS provision comes into effect, the domestic courts are excluded from the arbitration process. With regard to the interpretation of EU law, domestic courts are thus deprived of their role and specific power under Article 267 TFEU if the investor decides to opt for investor-state arbitration instead of the domestic legal avenue. This effectively circumvents the involvement of both the domestic courts of the Member States and the CJEU.

3.4.4 Interim conclusion

Whether or not ISDS provisions in EU investment agreements alter the essential characteristics of the powers conferred upon the EU institutions under the EU

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[187] van Rossem (2013), at pp. 15-16; Eckes (2013), at p. 88.
[188] Opinion 1/91, *EEA agreement*, at para. 61; Opinion 1/92, *Amended Draft EEA Agreement*, at para. 32.
[189] Opinion 1/00, *European Common Aviation Area*, at para. 11.
[190] Article 13(1) TEU.
[191] For an analysis of Opinion 1/09 and the negotiating history of the draft EPCt agreement, see Baratta (2011), at pp. 305-6.
[192] *Supra* part 3.1.2.

Treaties requires several considerations to be taken into account. First, it can be noted that, despite sharing procedural characteristics, the nature of investment arbitration is quite different from that of commercial arbitration. ISDS provisions provide a direct avenue for individual investors to review the legality of EU legislation before an international judicial body. This task, however, falls under the exclusive jurisdiction of the CJEU in accordance with Article 19(1) TEU, and constitutes an essential characteristic of its powers. Second, if EU investment agreements include a mechanism for references to the CJEU, it is essential that the investment tribunal considers itself bound by the Court's interpretation. Third, the domestic courts of the Member States, in their role as ordinary courts of the EU legal order, exercise an important function for the safeguarding of the principle of autonomy. The CJEU has demonstrated that depriving domestic courts of their specific power to guarantee harmonious interpretation of EU law by virtue of their obligations under Article 267 TFEU constitutes a fast track to the incompatibility of the judicial mechanism with the Treaty. Unlike the EPCt, investor-state tribunals do not replace Member State courts in a particular area of EU law, although recourse to ISDS provisions will lead to similar results.

3.5 Bridging the gap: how to integrate ISDS provisions into EU investment agreements

A new approach to drafting ISDS provisions is called for in order to mitigate or counter EU law challenges stemming from the principle of autonomy. This part will explore in more detail a number of available options that have the potential to mitigate or eliminate the shortcomings of traditional ISDS provisions. Bridging the gap between the CJEU and investment tribunals is a process. For the EU it becomes a matter of striking a balance between autonomy and the role of the EU as a truly international actor. The options discussed in this analysis are not intended to provide a single solution for the problem, but are meant to be an indication of the various interests at stake and the complexity of the issue. From the outset it should be mentioned that the exclusion of ISDS provisions from the scope of future EU investment agreements would, perhaps most effectively, solve the conflict of the compatibility of investor-state arbitration with the principle of autonomy. Despite the fact that ISDS provisions have developed into a procedural standard in modern investment treaty law, their inclusion in investment agreements is a conscious policy choice that should be evaluated on a case-by-case basis, having regard to the individual contracting parties and the scope and objective of the agreement that is envisaged. It was mentioned earlier in this study that, given the current political climate, ISDS provisions are vital for the successful conclusion of the TTIP agreement. The option of excluding these provisions from the scope of that agreement is therefore not further developed here.

3.5.1 Restriction of remedies

It has already been emphasized that the absence of restitution, injunctive relief

and specific performance as available remedies does not in itself exclude the use of investment arbitration as a means for the international adjudicative review of EU legal acts.[193] Recent awards have demonstrated that the mere payment of a pecuniary award can equate to a breach of EU law.[194] Additionally, the procedural frameworks do not generally restrict the investor-state tribunal in the award of non-pecuniary remedies, so it is therefore of paramount importance that their exclusion finds explicit reinforcement in the agreement. Otherwise these forms of legal remedies would potentially have the effect of directly invalidating EU legal acts.[195]

3.5.2 Direct effect of investment awards

Limiting the direct effect of EU investment agreements might be another alternative method for preventing investment awards from entering the EU legal order. In the determination of the direct effect of international agreements and judicial decisions, the CJEU applies roughly the same criteria. Investment awards that emanate from an EU investment agreement that itself provides for a general limitation of direct effect in the Member States are also likely to lack direct effect.[196] Whereas this would perhaps prevent remedies such as restitution, injunctive relief or specific performance from requiring direct EU action or direct regulatory change,[197] it is entirely inadequate for pecuniary investment awards. Moreover, it is argued here that an express limitation of direct effect in the EU investment agreement should not have any impact on the enforcement of the investment award in investor-state arbitration. Such a restriction is more suitable for the realms of state-to-state arbitration, and thus for the context of traditional public international law. Otherwise it curtails the rights of investors, who would be unable to enforce awards that have not only been made in their favour but are also directly addressed to them as a party to the proceedings. It is the objective of ISDS provisions to provide for a means of seeking direct relief. Such an effect would, however, be eliminated if the treaty language were to prevent enforceability from the outset.

The enforcement of investment awards is regulated under international frameworks, namely ICSID and the New York Convention, and a restriction on the direct effect of the investment agreement would have no impact on the application of these procedural frameworks. Although a restriction on direct effect could not impede the enforcement of an actual investment award, explicit

[193] *Supra* at Section 3.4.1.

[194] For a discussion of the *Micula* award (ICSID Case No. ARB/05/20) see *infra* part 3.5.5.

[195] Dimopoulos (2014), at p. 1699.

[196] *Ibid.*, at p. 1700. Semertzi (2014) confirms this in a comprehensive study on recently concluded EU FTAs. He emphasizes four different modes of restricting direct effect in the agreement or the concluding Council Decision. His argument is based primarily on a WTO integrationist perspective that emphasizes the similarities of FTA dispute resolution mechanisms that reflect characteristics of the WTO Dispute Settlement Understanding. These characteristics are not found, however, in investment arbitration.

[197] Semertzi (2014).

provisions in EU investment agreements would amount to a strong positive affirmation that awards did not have the value of legal precedents. As a result, third parties could not rely, in separate proceedings before domestic courts of the Member States or the CJEU, on investment awards ruling that EU legal acts were illegal. This would clarify the role and position of investment awards within the EU legal order and limit their factual effect.

More importantly, individuals could not invoke EU agreements that lack direct effect before the CJEU, or indeed before the domestic courts of the Member States. As a consequence the CJEU would escape from scenarios that require an examination of the compatibility of EU law with a particular EU investment agreement, and thus the risk that the CJEU and the investment tribunal would provide diverging interpretations of EU law would be eliminated. Nonetheless, it must be remembered that as a consequence investors would lose the domestic courts as a legal avenue to enforce their rights under the agreement. This would effectively entrust the investor-state tribunal with exclusive jurisdiction.

3.5.3 Preliminary references

The case law of the CJEU reveals that a reference procedure mitigates, under certain circumstances, the conflict between an international court or tribunal and the principle of autonomy. A mechanism that requires (or entitles) the investment tribunal to refer questions on the interpretation of EU law to the CJEU could therefore remedy some of the deficits of contemporary ISDS provisions that were addressed earlier in this study. Nevertheless, it would require investment tribunals to submit to the binding jurisdiction of the CJEU, because a mere non-binding opinion would amount to an alteration of the power of the CJEU conferred by the Treaty.

A further qualification to the integration of a reference mechanism into ISDS provisions in EU investment agreements is *Opinion 1/09* on the EPCt. It was demonstrated above how this opinion strengthens the role of the domestic courts of the Member States in the context of the autonomy of the EU legal order. Accordingly, a reference mechanism is insufficient where the judicial body established under the international agreement effectively replaces the jurisdiction of the domestic courts. Courts and tribunals that are recognized under Article 267 TFEU have, so the CJEU reasons, a particular responsibility that cannot be avoided by an international judicial mechanism.[198] Thus, simply channelling the request for a preliminary reference through an investment tribunal would not be sufficient to guarantee compatibility with the principle of autonomy. Irrespective of whether the investment tribunal is bound by the CJEU or required to submit a reference where the interpretation of EU law is in question, it would effectively deprive the domestic courts of the Member States of their responsibilities under the Treaties. This reading of *Opinion 1/09*

[198] Opinion 1/09, *European Patents Court*, at para. 80.

limits the available options to the recognition of an investment tribunal itself as a 'court or tribunal of a Member State' in accordance with Article 267 TFEU. With respect to intra-EU investment tribunals, scholarly opinion differs as to whether this option can be reconciled with the Treaties and the current case law of the CJEU.[199] Be that as it may, extra-EU investment tribunals can under no circumstances constitute a 'court or tribunal' for the purpose of Article 267 TFEU, without further Treaty amendments.[200] Following this approach, an integration of reference mechanisms into ISDS provisions in EU investment agreements has no impact on the compatibility of investment tribunals with the principle of the autonomy of the EU legal order.

Another problem with a reference procedure can be found in the very objective of modern investment treaty law, which is to enhance the independence of adjudication through depoliticizing the conflict, (i.e. through severing the investment dispute from the domestic judiciary).[201] Binding the investment tribunal unreservedly to the jurisdiction of the CJEU undermines one of the fundamental characteristics of investor-state arbitration. Additionally, although it falls within the sovereign right of every state[202] to balance the protection of its own interests against the political goal of establishing a more investor-friendly environment, it is unlikely that negotiating partners would be willing to include such a one-sided reservation without demanding an equal benefit during the course of negotiations.

The exclusion of judicial deference through mechanisms such as reference procedures is, however, extremely undesirable. In order to navigate around the multi-jurisdictional landscape of the contemporary pluralistic international legal order, international courts and tribunals need to start communicating. The incorporation of a reference mechanism would go a long way towards diminishing the practical ramifications of an increased use of EU law as the basis for future investment disputes. A partial solution might lie in a reference mechanism that is non-mandatory and binding only to the extent that the interpretation of EU law, which plays quite different roles in investment proceedings and before the CJEU, is concerned. Whether or not the CJEU is ready to accept such a development hinges first and foremost on its willingness to limit the effects of

[199] Arguing for the recognition of an intra-EU investment tribunal as a 'court or tribunal' for the purpose of Article 267 TFEU, see Von Papp (2013), at pp. 1074-76; Hindelang (2012), at pp. 201-5. For a contrary opinion see, *inter alia*, Dimopoulos *The validity and applicatbility of international investment agreements between EU Member States under EU and international law* (2011), at pp. 90-91. Although an arbitral tribunal can, under certain circumstances, fulfil the requirements of Article 267 TFEU (e.g. Case 109/88 *Handels-og Kontorfunktionaerenes Forbund I Danmark v. Dansk Arbejdsgiverforening,* [1989] ECR 3199), it appears unlikely that this reasoning would extend to investment tribunals: see C-196/09 *Paul Miles v. École européennes,* [2011] ECR I-5105; and Case 102/81 *Nordsee v. Reederei Mond and Reederei Friedrich Busse,* [1982] ECR 1095.

[200] For an opposing view see Burgstaller (2011), at p. 220.

[201] Dolzer and Schreuer (2012), at pp. 23 and 235-36.

[202] And as such, through the Council, of the EU.

its own reasoning in *Opinion 1/09*. In the meantime, it remains unlikely that ISDS provisions in EU agreements are going to include an integrated reference mechanism.

3.5.4 Exhausting domestic remedies

Another alternative for bridging the gap between investment tribunals and the CJEU is what Sattorova terms the "return to local remedies."[203] The attractiveness and success of investment treaty arbitration as a mechanism of dispute resolution must be ascribed, at least in part, to the investor's direct access to arbitration without the need to exhaust – or indeed attempt to obtain – domestic remedies.[204] The EP, however, expressed the desire to limit the scope of arbitration clauses in future EU agreements during the early stages of the consultation. Despite acknowledging the importance of investor-state arbitration in EU agreements, the EP proposed to reinstate the obligation to exhaust domestic remedies where "they are reliable enough to guarantee due process".[205] The Commission does not share this view[206] and it is unlikely that it will find its way into future EU agreements. However, from an EU law perspective it would address the concerns voiced by the CJEU in *Opinion 1/09*. In the course of domestic judicial proceedings the domestic court is bound by its responsibilities under Article 267 TFEU; this would render the role of investment tribunals not unlike that of the ECtHR.[207]

The problem then remaining is two-fold. First, if the domestic court omits to request a preliminary ruling, the involvement of the CJEU is excluded unless there is a residual mechanism for its involvement during the arbitration stage. Investment tribunals have interpreted the meaning of the exhaustion of local remedies broadly, requiring the investor merely to resort to reasonably available

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[203] Mavluda Sattorova, 'Return to the local remedies rule in European BITs? Power (inequalities), dispute settlement, and change in investment treaty law', 39 *Legal Issues of Economic Integration,* 2012 223.

[204] In fact, under customary international law redress must be sought through the domestic courts and in accordance with domestic law. It was not until the proliferation of international investment agreements in the 1990s that a general waiver of the requirement to exhaust local remedies started to constitute an integral part of the modern investment treaty system. See Dolzer and Schreuer (2012), at pp. 235-36, 264; Van Harten (2008); UNCTAD, *Dispute Settlement: Investor-State*, UNCTAD Series on issues in international investment agreements, UNCTAD/ITE/ITT/30, 2003, pp. 30-34.

[205] European Parliament, Committee on International Trade, Resolution on the Future European International Investment Policy (2010/2203(INI)), adopted 6 April 2011, paras. 31-32, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN> .

[206] European Commission, 'Towards a comprehensive European international investment policy' at pp. 9-10.

[207] Sattorova (2012), at p. 232. On the compatibility of the autonomy of the EU legal order and the ECHR, see Tobias Lock, 'Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order', 48 *Common Market Law Review,* 2011 1025; Eckes (2013); Baratta (2011), at pp. 310-14.

domestic remedies before the initiation of investment arbitration proceedings.[208] It is not, therefore, guaranteed that the case, even under normal circumstances, would reach the CJEU. Secondly, if the CJEU delivers a preliminary ruling it would be of vital importance that the investment tribunal follows that interpretation of EU law. Yet, without specific provisions to that effect, there is no legal obligation on the investment tribunal to do so. The exhaustion of domestic remedies does not, in itself, provide sufficient safeguards for the involvement of the CJEU or respect for its interpretation of EU law.

Albeit short of formal institutional legal safeguards, such an effect could be achieved through judicial comity and deference.[209] If the CJEU has expressed itself on the interpretation of a point of EU law that has become the basis of a particular investment dispute, there is nothing that should restrict the investment tribunal from following, expressly or impliedly, that interpretation in its own assessment under the investment agreement. Additionally, although under EU law the observance of the domestic court's duty to refer can be enforced only to a limited extent by means of the infringement procedure and state liability for its judiciary,[210] non-referral constitutes a risk that is already inherent in the EU judicial system.[211]

A return to an exhaustion of domestic remedies would not undermine the character of investor-state arbitration either. Rather, it would utilize an option available within the system of investment law itself,[212] albeit of rather insignificant practical relevance in modern investment treaty law.[213] Yet again, another problem lurks in the investment law perspective on this issue.

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[208] Sattorova (2012), at pp. 235-37; *Saipem v. Bangladesh (Award),* 20 Jun 2009, (ICSID Case ARB/05/7), paras. 182-83; *Loewen v. United States (Award)*, 26 Jun 2003, (ICSID Case ARB(AF)/98/3), paras. 168-69.

[209] Although the domestic court's conduct can itself be a subject of dispute, this is less likely to hinge on the specific interpretation of domestic legislation than general issues of access to justice. See Eckes (2013), at p. 105 on deference as a means to bridge the gap between the CJEU and the ECtHR without resorting to a complete jurisdictional privilege for either court, and also van Rossem (2013).

[210] Paul Craig and Gráinne de Búrca, *EU Law* (5th edn, Oxford University Press 2011), at pp. 428-29; Case C-224/01 *Köbler v. Austria,* [2003] ECR I-10239. Although the issue has not been addressed in judicial proceedings before the CJEU, the European Commission has sent a reasoned opinion to Sweden claiming infringement due to the failure of the highest Swedish Court to refer questions concerning the interpretation of EU law to the CJEU, Document No. C(2004)3899, 7 October 2003, relating to infringement proceedings 2003/2161.

[211] Von Papp (2013), at pp. 1062-65.

[212] Article 26 ICSID provides for the possibility of contracting states reinstating a local remedy requirement. See Dolzer and Schreuer (2012), at pp. 264-70; also, *Saipem* (ICSID Case ARB/05/7) at para. 175.

[213] Christoph Schreuer, 'Calvo's grandchildren: The return of local remedies in investment arbitration', 4 *Law and Practice of International Courts and Tribunals* 2005 1.

The EP's proposal requires an exhaustion of local remedies where domestic courts "are reliable enough to guarantee due process".[214] Arguably, this reduces the jurisdiction of the investment tribunals to cases of alleged denial of justice so that the reasonable attempt to resort to domestic remedies becomes a substantive rather than a procedural requirement.[215] As Sattorova shows, the return to an exhaustion of local remedies in EU investment agreements in these cases irrefutably means a return to the hegemonic roots of the international investment law system, reinforcing Western traditions and a Western European and American view on investment treaty law. Historically, investment agreements were concluded between predominantly capital exporting (developed) countries and capital importing (developing) countries. In that relationship judiciaries in developing countries were perceived to lack due process and thus ISDS provisions were perceived to be required to provide an alternative dispute resolution system for the investor from the developed country.[216]

There is evidence in recent awards that suggests that this presumption still underlies investment arbitration today. Whereas investors from major capital exporting countries can avail themselves of investor-state arbitration to protect their investments in developing countries where the judiciaries are perceived to be less reliable, investors from less developed countries are likely to be required to find redress in the domestic courts of the developed countries.[217] The reciprocity of investment agreements will be rendered nothing but a farce[218] in future investment disputes if this axiomatic polarity continues to be reflected.[219] Including this caveat in the TTIP agreement is likely to set a dangerous precedent for future EU investment agreements with less developed states. Furthermore, although the negotiation of north-north investment agreements between the EU and, *inter alia*, Canada and the US reflects a major shift in political and economic realities, access to justice is not a problem that is limited to north-south agreements. In the light of the above, although it addresses many of the concerns with regards to the compatibility of ISDS provisions with the principle of autonomy, it remains questionable whether a return to local remedies would ultimately result in a higher level of protection for EU investors abroad.

3.5.5 Public policy: enforcement and judicial review of arbitral awards

Strictly speaking, the enforcement of arbitral awards should be considered

[214] European Parliament, Committee on International Trade, Resolution on the Future European International Investment Policy (2010/2203(INI)), at para. 31.

[215] Schreuer (2005), at pp. 13-15.

[216] Sattorova (2012); for a historic analysis of the colonial and post-colonial roots of today's investment treaty arbitration system, see Van Harten (2008).

[217] For a discussion of the ICSID awards in *Loewen* (ICSID Case ARB(AF)/98/3) and *Saipem* (ICSID Case ARB/05/7), see Sattorova (2012), at pp. 236-37.

[218] For a view that not all investment treaties need to be reciprocal in nature, see Dolzer and Schreuer (2012), at pp. 20-21.

[219] Van Harten (2008), at pp. 40-41.

separately from investor-state arbitration so far as the compatibility of ISDS provisions with the principle of autonomy is concerned. However, whereas ICSID awards become automatically enforceable, non-ICSID awards are enforced in accordance with the New York Convention, which means that investment awards must be recognized and enforced before domestic courts. Indeed, following the actual investment arbitration, the domestic courts re-enter the legal process and play an indirect role in the post-arbitration process. Apart from the enforcement of investment awards, domestic courts might also be asked to perform judicial reviews of non-ICSID awards in questions of annulment.[220] Since this judicial intervention by the domestic courts and the CJEU derives directly from the procedural rules governing the arbitration, it is considered here as an alternative to restrict the practical effect of investment awards within the EU legal order.

Possible reasons for the annulment of or the refusal to enforce an investment award are scarce and are narrowly interpreted to guarantee full effectiveness of the arbitration procedure.[221] According to Article V.2.b of the New York Convention, a domestic court may refuse the enforcement of an arbitral award *ex officio* if it would otherwise undermine public policy of the state in which enforcement is sought.[222] The UNCITRAL Model Law provides an award to be annulled for a similar reason.[223] In *Eco Swiss*[224] the CJEU reasoned that Article 85 EC (now Article 101 TFEU) is an important and essential principle underlying the EU legal order that forms part of EU public policy.[225] Consequently, the relevant national authorities of Member States must refuse the enforcement of a commercial arbitration award if enforcement would lead to an infringement of EU competition law.[226]

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[220] The majority of the domestic arbitration laws in EU Member States are drafted on the basis of the UNCITRAL Model Law, which itself is based on the New York Convention and provides for the public policy ground in Articles 34(2)(b)(ii) and 36(2)(b)(ii). For a comparative analysis of the national arbitration laws see Poudret and Besson (2007).

[221] Alan Redfern, Martin Hunter and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004), at pp. 543-44; Jan Van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (T.M.C. Asser Institute 1981), at pp. 267-68; New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, Article V; UNCITRAL Model Law, Articles 34 and 36. ICSID awards cannot be reviewed by domestic courts since ICSID itself provides for its own self-contained review system without the involvement of domestic courts (see ICSID Convention, Articles 51 and 52). However, as an international organization the EU cannot become a signatory to the Convention and the Additional Facility is not subject to the ICSID review system. Hence it is not further discussed in this contribution.

[222] Van den Berg (1981), p. 264.

[223] UNCITRAL Model Law, Articles 34 and 36.

[224] *Eco Swiss* (Case C-126/97).

[225] *Ibid.*, at para. 37.

[226] Von Papp (2013), at pp. 1043-44. For a discussion of the case see Assimakis P. Komninos, 'Case C-126/97, Eco Swiss China Time Ltd. v. Benetton International NV, Judgment of 1 June 1999, Full Court', 37 *Common Market Law Review,* 2000 459; Robert B. Von Mehren, 'The Eco-Swiss case and international arbitration', 19 *Arbitration International,* 2003 465.

It is yet to be seen how far the CJEU and the domestic courts are willing to stretch the concept of public policy to refuse the enforcement of non-ICSID investment awards, and whether the same reasoning is applicable for the annulment of awards. However, it is already clear that the Commission, which intervenes on behalf of the EU in investment arbitration involving Member States and plays a central role in the enforcement of EU competition rules, is taking an aggressive stance. In the recent *Micula* arbitration,[227] the Commission has in an *amicus* brief made it clear that Romania would breach EU state aid law if it were to pay the investment award. Whilst the tribunal largely ignored that argument, the Commission is now threatening Romania with potential litigation for breaching EU state aid rules if it complies with the award.[228] What makes it worse is the fact that the *Micula* dispute was brought under the ICSID rules. The ICSID Additional Facility and commercial arbitration rules might, at least theoretically, have accommodated the Commission's position, but ICSID provides for an automatic enforcement procedure. This means that Romania is stuck between a rock and a hard place, with the option either to violate an EU law obligation or to violate an international law obligation. If Romania gives in to the pressure from the Commission and refuses to pay the ICSID award, this will set a precedent for future EU investment disputes and will shake the ICSID system to its foundations.

The domestic enforcement procedure under commercial arbitration rules and the ICSID Additional Facility just might grant the CJEU an indirect way of guaranteeing respect for the autonomy of the EU legal order. The domestic court reviewing the award guarantees the involvement of the CJEU in accordance with its responsibilities as an ordinary court of the EU legal order, which in turn are ensured by the remedies available under the Treaty.[229] This does not mean that the Court is free to interfere with arbitration proceedings by stretching the concept of public policy *ad absurdum*.[230] Rather, the refusal to enforce an arbitral award presents the CJEU with an opportunity to assess whether an individual investment award runs counter to the fundamental principles of EU law[231] or includes grave misinterpretations of EU legislation before it is enforced – and, thus, before it can have any effect within the EU legal order. It should be

[227] *Micula* (ICSID Case No. ARB/05/20).

[228] OJ C 393/27, 7.11.2014, Commission Notice 2014/C 393/03 to Romania, State aid SA.38517 (2014/C) (ex 2014/NN).

[229] There is no guarantee, however, that the award will be enforced before the domestic courts of the losing EU Member State, or any EU Member State for that matter. Rather, enforcement can be sought in any state where the losing party has substantial assets.

[230] Redfern and Hunter criticize the use of public policy as an inappropriate ground under which domestic courts can review arbitration awards on their merits. They advocate the development of a notion of international *ordre public*. See Redfern, Hunter and others (2004), at p. 498. See to that extent also Van den Berg (1981), pp. 265, 269-70 and 360-68. However, in the light of the *Eco Swiss* decision it is unlikely that the Court would embrace the more narrow understanding of *international* as opposed to *domestic* public policy.

[231] The CJEU in *Eco Swiss* refers to a "fundamental provision" (Case C-126/97, at para. 36).

mentioned that, unlike an annulment decision, which renders the award legally void, a refusal to enforce an investment award does not, strictly speaking, affect the legality or substance of the award. Thus, although a refusal to enforce an investment award does not resolve any systemic incompatibility of an investor-state tribunal with the principle of autonomy, it allows for the factual effects of that investment award to be kept outside the EU legal order.

Here again there remains the risk that domestic courts will omit to request opinions from the CJEU. This does not, however, present an external threat to EU autonomy because the domestic judicial proceedings render this an internal scenario. The risk does not exceed the risk of wrongful interpretation of EU law by domestic courts that already exists within the EU legal order, and cannot lead to a ruling of incompatibility with the principle of autonomy as it is applied to EU agreements. Quite the contrary: the fact that the domestic court can raise the public policy question *ex officio* during the enforcement procedure presents an additional advantage. From an EU law perspective, the CJEU retains judicial control over the interpretation of EU law and can protect the EU legal order from adverse external influence.

However, the use of the enforcement procedure in the way described above could be understood as an abuse of the New York Convention. The refusal to enforce an arbitral award is certainly not intended to allow an indirect judicial review of substantive aspects of the award. Additionally, if Member States really follow suit and refuse to enforce investment awards on the grounds of EU public policy, even for ICSID awards, this will shake the confidence of investors in the system of investment protection that EU investment agreements are intended to establish. Because the investment award remains intact, investors are at liberty, and indeed are encouraged, to seek enforcement of the investment award against assets outside EU or Member State territory. The Commission will inevitably create a host of new, politically charged, challenges for the application of EU investment agreements if it starts hijacking domestic enforcement proceedings to safeguard EU competition rules. Most certainly it will discourage foreign investors investing in the EU from establishing the seat of arbitration within the territory of an EU Member State. It is now for the CJEU to demonstrate a softer approach and to clarify the meaning of EU public policy in the context of the enforcement of investment awards under the New York Convention.

3.5.6 Declarations of competence

EU investment agreements must put in place safeguards to prevent investment tribunals from engaging in an assessment on the delimitation of competences between the EU and its Member States. As analysed above, investment tribunals engage in such an assessment when they attempt to establish international responsibility. One way of preventing this is a complete institutional separation of the two-tier judicial systems, which resolves the problem in the same fashion

as for the EEA crisis.[232] The structure and substance of the EEA agreement, however, differs significantly from investment agreements and renders this solution fairly nonsensical.[233]

Another option is an *ex ante* declaration of competences. The EU has opted for this in a number of multilateral agreements, such as the UN Convention on the Law of the Seas,[234] the Aarhus Convention[235] and the Rotterdam Convention,[236] amongst others. The EU as a Regional Economic Integration Organization usually submits this sort of declaration only where the participation clause of an international agreement demands it.[237] However, instead of increasing legal certainty for third parties as to the allocation of responsibility between the EU and its Member States in mixed agreements, declarations of competence import further uncertainty into the system. The externalization of the question of the allocation of competences fails to address the intricacies that are entailed in this extremely complex internal EU law question. Competences might not only change over time, but are furthermore dynamic, in the sense that they can vary depending on the legal act – the conclusion of the international agreement or its implementation, for example.[238]

One way of circumventing the unsuitable inflexibility of declarations of competence is the use of clauses in the international agreements that reserve for the EU the right to determine this question internally. The most striking example of such a mechanism is the declaration of transparency made under Article 26 of the ECT:

> The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings

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[232] Opinion 1/92, *Amended Draft EEA Agreement*, at paras. 13, 19; the Court later elaborated upon this in its *ECAA Opinion*, stating in general terms that an institutional separation of judicial bodies secures conformity with the autonomy of the EU legal order: Opinion 1/00, *European Common Aviation Area*, at para. 6.

[233] Such an approach would most certainly also have to meet reciprocal demands by the other contracting party during the negotiation of the agreement, rendering the entire mechanism practically obsolete. Hindelang (2013), at pp. 196-97.

[234] Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, OJ L 179, 23.06.1998, pp. 1-2.

[235] Annex, Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124, 17.05.2005, p. 3.

[236] Annex, Council Decision 2006/730/EC of 25 September 2006 on the conclusion, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade, OJ L 299, 28.10.2006, p. 25.

[237] Andres Delgado Casteleiro, 'EU declarations of competence to multilateral agreements: A useful reference base?', 17 *European Foreign Affairs Review,* 2012 491, at p. 494.

[238] *Ibid.* at p. 498.

> initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days. [239]

The recent Regulation[240] adopts this latter approach for the internal allocation of responsibility. Although the legal value of the Regulation could be anchored directly in the EU investment agreement,[241] this would be unsatisfactory because it would require the investment tribunal to interpret EU secondary law. Instead, it is likely that the Regulation provides an indication of what to expect from future EU investment agreements. It is conceivable that the text of EU agreements could stipulate that the EU is the *prima facie* respondent in investment disputes, unless there is a Commission decision to the contrary. Any questions of competence would be addressed internally, with the CJEU as the competent judicial body, and settled independently of the investment arbitration proceedings. Additionally, questions concerning the allocation of financial responsibility could also be settled internally by means of the instruments provided under the EU Treaties[242] and with reference to the Regulation.

This drafting of ISDS provisions refrains from externalizing the question of competence, and adequately addresses the internal/external dichotomy in the determination of the respondent status in investment disputes. By limiting the jurisdiction of the investment tribunal within the constituent instrument itself, it enhances clarity for foreign investors and structurally separates internal disputes between the Member States and the EU from external investor-state arbitrations. Declaring the Commission to be the exclusive actor for the allocation of responsibility under international law arguably opens up other controversial issues, and it remains to be seen whether an investment tribunal would ultimately feel bound by a Commission decision.

3.5.7 Interim conclusion

None of the above options is in itself sufficient to address the challenges that were laid out in the first half of this chapter. Whereas the restriction of the types of remedies available to investor-state tribunals ensures that investment awards pose no direct challenge to the validity of EU law through restitution, injunctive relief or specific performance, it does not eliminate the risks posed

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[239] Statement submitted by the European Communities to the Secretariat of the Energy Charter Treaty pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, OJ L 69, 09.03.1998, p. 115.

[240] Regulation 912/2014.

[241] Christian Tietje, Emily Sipiorski and Grit Töpfer, *Responsibility in Investor-State-Arbitration in the EU* (study requested by INTA, European Parliament, Directorate-General for External Policies, 2013) <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457126/EXPO-INTA_ET(2012)457126_EN.pdf>, at pp. 22-23.

[242] The judicial framework of the EU allows direct and indirect actions for the judicial review of acts of an institution of the EU (Article 163 TFEU and Article 167 TFEU respectively), and provides for actions for the non-contractual liability of the EU (Articles 268 and 340 TFEU), amongst others.

by pecuniary awards. The explicit exclusion of direct effect for EU investment agreements guarantees the participation of the domestic courts or the CJEU before the enforcement of an award. However, this option is liable to curtail the most fundamental rights of investors under contemporary investment law. A preliminary reference procedure that binds an investment tribunal to a CJEU decision is unlikely to be incorporated into EU investment agreements because it requires investment tribunals to be bound by the CJEU and thereby undermines the objective of depoliticizing the arbitration process.

On the other hand, the exhaustion of domestic remedies might provide a solution. This addresses not only the exclusion of domestic courts and the CJEU from investment disputes but also some of the criticisms from civil rights groups who claim that ISDS is unnecessary for parties with elaborate and transparent judicial systems such as the EU and the US. That being said, this is likely to buttress preconceptions against judiciaries in developing countries, and sends out a strong signal to other potential EU trade and investment partners. Refusing enforcement of awards on the grounds of public policy allows the CJEU to keep the practical effect of investment awards outside the EU legal order but requires it to abuse safeguards under the New York Convention by materially reviewing investment awards. Lastly, clauses that reserve to the Commission the right to determine the respondent to an investment dispute prevent investment tribunals from engaging in an assessment of the allocation of competences under the Treaty, whilst putting into question principles of international law.

Additionally, many of the drafting choices also require the CJEU to be willing to facilitate this process of finding a solution. Much will depend on how strictly the court interprets the broader effects of its own rulings in *Opinions 1/09* and *2/13*, with regards to preliminary reference mechanisms. On the other hand, the established cases might provide the CJEU with sufficient leeway to reassess the impact of international judicial bodies on the essential characteristics of the powers of EU institutions, including its own jurisdictional prerogatives. Operating on the international plane requires other interests, such as fundamental principles of investment law, applicable international procedural frameworks for the enforcement of investment awards or more generally the principles of public international law, to be considered. Rather than individually, these options have an important cumulative value. Although no single solution might be satisfactory, drafting ISDS provisions in future EU investment agreements with the above in mind might help to mitigate the problems and bridge the gap between the CJEU and investor-state tribunals.

3.6 Preliminary conclusion: cumulative effects and the role of innovative drafting

The quest to discover the outer limits of the principle of the autonomy of the EU legal order it is not an easy task to carry out. With its case law the CJEU has perhaps provided helpful guidance, but no coherent picture of the external

dimension of the EU legal order has emerged to allow a definite projection of how the Court will respond in future cases. It is in that context that any assessment of the conformity of ISDS provisions with this principle of EU law needs to be understood, and the present study is no exception.

A few points, however, seem to be certain. The CJEU has so far construed the principle of autonomy in a way that protects its own judicial prerogatives under the Treaty. The Court will not accept any international court or tribunal as the final arbiter on questions concerning the interpretation of EU law or as a forum for the judicial review of EU law. The allocation of competences under the Treaty essentially requires an interpretation of EU primary law, a task reserved to no judicial body other than the CJEU. An assessment of the principle of autonomy could, therefore, focus on the role and position of the CJEU within the investment arbitration process, and to a certain degree that is reflected in this study.

Three main arguments were made in Sections 3.2 to 3.4. First, the involvement of investment tribunals in the interpretation of EU law is not merely incidental but describes part of the tribunals' core task. The CJEU will be bound by a tribunal's interpretation at least to the extent that the CJEU is asked to assess the compatibility of EU law with the same EU investment agreement. Second, in determining the respondent to an investment dispute a tribunal must assess whether international responsibility lies with the EU or the Member State. In the course of that assessment the tribunal is required to express itself on the allocation of competences under the Treaty. Third, investment tribunals are charged with the task of judicially reviewing EU law in the light of international investment standards. Even though a tribunal is not competent to declare EU law invalid, it nonetheless performs a function that is reserved to the CJEU.

Whether or not the above assessment is reflected in the reasoning of the CJEU depends largely on how widely the Court interprets the concept of autonomy and the workings of investor-state tribunals. The argument was advanced, for instance, that a legality review of EU law against international agreements that have become an inherent part of the EU legal order could be considered to be an internal judicial review that is reserved to the CJEU alone. At the same time, the Court has emphasized the importance of judicial bodies for the interpretation and application of international agreements. In the light of that reasoning and the increasing international exposure of the EU legal order, the CJEU might be willing to interpret its existing case law restrictively.

Ultimately, it is all a matter of degree. It is insufficient to analyse each of the points that were made above individually. Rather, their cumulative nature needs to be acknowledged. Even if the risk of investment awards binding the CJEU is vanishingly low, the Court might still decide to rule against ISDS provisions in the light of the possibility of investment tribunals determining the allocation

of competences or performing judicial review. In that respect, part 3.5, which explored a number of options for bridging the gap between the CJEU and investment tribunals, was intended to demonstrate that even small changes in the drafting of ISDS provisions can cumulatively have a large effect on their compatibility with the principle of autonomy. Although the restriction of available remedies does not eliminate the impact of investment awards on EU law, it significantly lessens it, and although the exclusion of the direct effect of investment agreements might not have an impact on the actual award, it might limit the use of investment awards or investment agreements in disputes before the CJEU, reducing the number of situations of potential conflict.

There are substantial grounds on which ISDS provisions can be challenged in the light of the principle of autonomy. Given the ongoing negotiations with important trade and investment partners, this problem needs to be recognized and tackled through innovative drafting of ISDS provisions. In the following section this study will discuss the impact of this assertion on the particular example of the TTIP negotiations.

4 A "state-of-the-art" ISDS mechanism for TTIP

The negotiation mandate requires the Commission to establish a "state-of-the-art" ISDS mechanism that, as well as offering a forum comparable to ISDS in existing Member State BITs, respects the principles of transparency, the independence of arbitrators, and legal certainty. Whether the Commission can fulfil these requirements and, by virtue of innovative drafting, address the many democratic concerns underlying public criticism of ISDS, both in general and in the particular context of TTIP, is left for a future study. For the purpose of the present study it is more important to examine the extent to which drafting can address those challenges that ISDS provisions in the future TTIP agreement pose for the autonomy of the EU legal order, and that were set forth in part three. Having narrowed the list of aspects that can be addressed through drafting, this part will investigate whether and how they are addressed in the recently negotiated CETA agreement between the EU and Canada. Lastly, the discussion will focus again on the TTIP framework to illustrate what can be expected from the ongoing negotiations.

4.1 TTIP: EU demands and the need for compromise

Part three provided a detailed analysis of the aspects of an ISDS provision that could prove to be in conflict with the principle of autonomy.[243] Admittedly, that assessment must be taken with a pinch of salt. It cannot be determined conclusively how the CJEU will decide on the compatibility of ISDS provisions with this fundamental EU legal principle. It can, however, be said with a degree of certainty that some of the above arguments are likely to be more persuasive than others for the Court if it were to be given the task of rendering an opinion on ISDS in an EU investment agreement. Similarly, EU regulators cannot be expected to be successful in addressing all these concerns in the drafting of an investment agreement, particularly in a negotiation process with a trading partner as strong as the USA. Additionally, the internal challenges must ultimately be balanced against the functioning and effectiveness of an already institutionalized international legal system. Thus, anyone expecting the TTIP negotiations to result in a transcript of all EU requests for a transatlantic trade relationship will perhaps be disappointed by the compromise that will necessarily be reflected in this agreement.

It is important that the Commission chooses which battle it will fight, and that entails focusing on those aspects that are most likely to lead to a negative opinion from the Court. Most importantly, the internal / external dichotomy regarding

[243] *Supra* at parts 3.2 to 3.4.

the involvement of the Commission in the determination of the respondent status must be resolved.[244] A diverging internal / external regulatory framework is not only liable to instil uncertainty in investors in the EU, but first and foremost empowers arbitral tribunals to engage in a determination of EU competences under the Treaties. A "state-of-the-art" ISDS mechanism should, therefore, provide safeguards that allow for this question to be addressed in an internal EU legal assessment that is carried out by the Commission and is subject to judicial review by the CJEU. Arguably, from an international law perspective it is controversial to put the Commission in the position of determining its own international responsibility. The high level of institutional independence and judicial oversight that characterizes the EU as an international organization, however, allows for this degree of deference. This approach is further supported by the recognition of *lex specialis* in Article 64 of the International Law Commission (ILC) draft articles on the responsibility of international organizations. Special rules that govern the allocation of international responsibility may also "be contained in the rules of the organization applicable to the relations between an international organization and its members".[245] This approach has been endorsed through the statement on competence under the ECT.[246] TTIP, as a bilateral agreement, can explicitly provide the same assurances in the text of the agreement.

The statement on competence made pursuant to Article 26(3)(b)(ii) of the ECT furthermore allows for the EU and its Member States to respond jointly to investment disputes. So far, investors have never opted for this procedural possibility. This might, at least partly, be ascribed to the fact that until the Lisbon Treaty neither bilateral nor multilateral investment agreements represented overlapping layers of competence in the area of investment law. Incorporating joint responsibility into TTIP would provide much-needed clarity and certainty for investors. Joint responsibility effectively circumvents a precise determination of responsibility, and any related competence question, by virtue of leaving it to be determined in the internal EU–Member State relationship, and thus not affecting investors in the enforcement of their rights. That being said, the investor-state tribunal under those circumstances would not be entitled to assess the apportionment of responsibility between the EU and the individual Member States.[247]

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[244] *Supra* at parts 3.3 and 3.5.6.

[245] Frank Hoffmeister, 'Litigating against the European Union and its Member States – Who responds under the ILC's draft articles on international responsibility of international organizations?', 21 *European Journal of International Law,* 2010 723, at p. 744.

[246] Statement submitted by the European Communities to the Secretariat of the Energy Charter Treaty pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, OJ L 69, 09.03.1998, p. 115.

[247] Opinion 2/13, *Accession to the ECHR*, paras. 230, 231, 234.

Other aspects that can easily be addressed are the limitation of available remedies[248] and an exclusion of direct effect[249] for TTIP in the EU. An explicit exclusion of restitution, injunctive relief and specific performance would indeed constitute a statement as to the tribunal's lack of power to affect the validity of domestic legal acts. The exclusion of direct effect of the TTIP agreement yields similar results. However, although a limitation on direct effect has been employed in many EU agreements before,[250] it has so far only been linked to the resolution of trade disputes, and it remains unclear what effect it might have on future investment chapters and ISDS provisions. There might need to be positive reassurance that the enforcement of investment awards before domestic or EU courts remains unaffected, but it would certainly eliminate the risk of parallel challenges under TTIP in the domestic courts and before the CJEU, limit the risk of diverging interpretations of EU legal acts, and restrict the legal value of investment awards.

There are other ways of avoiding parallel proceedings, such as 'fork-in-the-road' clauses, waivers, umbrella clauses and the exhaustion of domestic remedies.[251] Unlike the restriction of direct effect, all these mechanisms would allow investors to pursue investment disputes under TTIP before the domestic and the EU courts. Although they do not avoid there being a clash of interpretations, these mechanisms might carry certain advantages. A clause requiring the exhaustion of domestic remedies, for instance, would allow for the involvement of the domestic courts and the CJEU, and indeed would facilitate judicial dialogue under Article 267 TFEU.

Lastly, in one way or another ISDS provisions in the TTIP agreement will address the role of the CJEU in investment arbitrations. If the text is silent on this relationship, it effectively excludes the Court's active involvement. If, on the other hand, it determines a relationship between the arbitration tribunal and the CJEU this could extend to the prior involvement of the CJEU in the form of a preliminary reference mechanism. The benefits and drawbacks of such a mechanism in the context of investment arbitration have been discussed at an earlier stage of this study.[252] It is sufficient to emphasize here that an exclusion of direct effect of TTIP provides investment tribunals with exclusive jurisdiction, precluding any judicial dialogue between the CJEU and the domestic courts of the Member States. In the light of *Opinions 1/09*[253] and *2/13*,[254] and the growing involvement of investment tribunals in the interpretation of EU law, some sort of reference mechanism might be called for.

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[248] *Supra* at part 3.5.1.

[249] *Supra* at part 3.5.2.

[250] Semertzi (2014).

[251] Katia Yannaca-Small, 'Parallel Proceedings' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008), 1008; see also Dolzer and Schreuer (2012), at pp. 264-68.

[252] *Supra* at part 3.5.3.

[253] Opinion 1/09, *European Patents Court*.

[254] Opinion 2/13, *Accession to the ECHR*.

4.2 Case study: ISDS provisions in CETA

Given the state of negotiations and the geographical contiguity of Canada as an EU trading partner, the CETA draft agreement currently provides the best yardstick for an assessment of ISDS provisions in a successful TTIP. Negotiations were completed in September 2014[255] and the agreement, despite fierce domestic political opposition from Germany to the inclusion of ISDS, awaits formal conclusion by way of a Council Decision. The ISDS provisions incorporated in the draft agreement are a significant advance on their traditional equivalents in existing BITs.

Most importantly, CETA addresses the question of the allocation of competences in the EU. According to the CETA provisions, an investor has to request a determination of the respondent from the Commission before the arbitration proceedings are initiated. The Commission has 50 days to render a decision, and the decision is binding on the investor-state tribunal.[256] Should the Commission fail to provide a decision within the requisite time period, it is for the investor to assess whether the measure in dispute falls under the exclusive competence of the EU or of a Member State, in order to identify the respondent. In that event, the EU and the Member State are barred from contesting the admissibility of the dispute, or otherwise objecting to the claim or the award on the grounds of an improper determination of the respondent status.[257] Although this approach closely resembles the mechanism under the ECT, it incorporates a residual procedural drawback. This drawback is that investment tribunals are required to establish international responsibility as part of their assessment of admissibility in cases in which the Commission has failed to respond in time. It was demonstrated above that a tribunal's task would then include an assessment of the allocation of competences within the EU. Considering that the Commission decision, as a legal act, must be open to judicial review before the CJEU, the chance of exceeding the 50-day time limit is more than merely hypothetical or remote.

The consolidated text of the CETA agreement furthermore defines 'respondent' as either the EU or a Member State, and leaves no room for concluding that the EU and a Member State are jointly responsible.[258] Additionally, it appears from the document that ICSID is available as a procedural framework for investment claims under CETA.[259] The EU is not a signatory to the ICSID Convention and cannot currently fulfil the requirements for accession. If a claim is brought against an EU Member State under the ICSID rules, the Commission will not

[255] Commission Press Release, 'Canada–EU Summit – A new era in Canada–EU relations: Declaration by the Prime Minister of Canada and the Presidents of the European Council and the European Commission'.
[256] Ch. 10, Article X.20, Consolidated CETA Text, published on 26 September 2014.
[257] *Ibid.* at Article X.20, paras. 5, 6.
[258] *Ibid.* at Article X.3 and X.20, para. 3.
[259] *Ibid.* at Article X.22.

be able to participate in the proceedings except in the role of *amicus curiae*.[260] It is, thus, procedurally impossible for the EU to become a respondent to that claim.

With regards to the limitation of direct effect, CETA does contain a relevant general clause. Article 14.16 reads:

> Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.
>
> No Party may provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.

Given its position in the agreement, the scope of this limitation is likely to be limited to the general mechanism for dispute resolution arising under the CETA agreement. As such, it confirms the exclusive nature of the settlement panel and restricts the initiation of a claim in respect of a trade dispute between the parties under the agreement to the traditional realm of public international law.[261] Semertzi emphasizes that the CJEU tends to apply similar criteria to the determination of direct effect in the case of judicial decisions as it does in the case of the substantive provisions of the agreement. A limitation of direct effect of the substantive provisions of the CETA agreement would therefore imply the limitation of the direct effect of the panel reports as well.[262] Additionally, the concluding Council Decision might still make reference to a limitation of direct effect of the agreement overall, as was the case in the conclusion of the EU–Korea FTA.[263]

This being said, the FTA with Korea does not include substantive provisions on investment protection, or ISDS provisions, and the Council Decision reflects that position in its recital, assuring the highest level of protection for investors under existing BITs between Member States and Korea. In the light of that, it cannot be the intention of the drafters of CETA to exclude direct effect for the investment chapter. To do so would deprive ISDS of its essential protective feature and, indeed, constitute an unlikely outcome of bilateral negotiations.

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[260] Article 37(2) ICSID.

[261] Semertzi (2014), at p. 1127.

[262] *Ibid.* at p. 1132.

[263] Council Decision 2011/265/EU of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Article 8, "The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals", OJ L 127/1, 14 May 2011, p. 3

Therefore neither Article 14.16 of CETA nor a concluding Council Decision with reference to a general limitation on the direct effect of the agreement is likely to affect the investment chapter. If it did, it would remain questionable whether investor-state tribunals, particularly under the ICSID framework, would accept this as a limiting factor on the initiation of claims or the enforcement of awards. This is furthermore supported by the inclusion of a waiver in Article X.21 of the investment chapter in the CETA draft text. In this article, investors initiating a dispute before an arbitration tribunal waive their right to bring parallel proceedings before any other tribunal or court, including domestic courts and the CJEU.

With regards to available remedies, CETA limits the tribunal to the award of monetary compensation and the restitution of property. With regard to the second of these, however, the state party has the opportunity to provide fair compensation *in lieu* of restitution, thus limiting the effect of the award on the validity of the EU legal act in dispute.[264]

4.3 What to expect from TTIP

All in all, it appears likely that the approach taken in the CETA draft agreement will also be reflected in the TTIP agreement. CETA already builds upon a North American model of investment treaties and thereby is close to the standard of the US model BIT. With regards to ISDS, CETA has no surprising revelations that, on first sight, conflict with US interests. The limitation of available remedies and the waiver are drafted in standard terms and no objection can be raised to their incorporation into TTIP.

In the light of past practice on the limitation of the direct effect of EU FTAs, it is likely that this aspect will also be addressed in order to clarify the legal status of the TTIP agreement in the respective domestic legal orders. Given the breadth of its scope, there must be incentive on both sides of the Atlantic to restrict TTIP to the realm of traditional public international law as far as trade relations are concerned, with a focus on substantive commitments between the signatories only. This, *inter alia*, also guarantees conformity in the interpretation, implementation and application of trade measures adopted under TTIP with its commitments on the multilateral trading system.[265] The strong negotiating position of the US *vis*-à-*vis* the EU would not allow, however, for the direct accessibility of ISDS or the enforceability of investment awards to be compromised by a general exclusion of private rights under the agreement as a whole. On the other hand, the Council might find it appropriate, by way of its concluding Decision, to clarify the applicability of TTIP in the EU Member States with an article restricting its direct effect. If that is the case it should not be construed as having any repercussions on the functioning of the ISDS provisions.

[264] Ch. 10, Article X.20, Consolidated CETA Text.
[265] Semertzi (2014).

As far as the determination of the respondent to an investment dispute is concerned, it can be expected that the Commission under TTIP will take a role similar to that assigned to it under CETA. It remains to be seen whether depriving investment tribunals of their power to identify and allocate international responsibility becomes a matter of controversy in the negotiations or for investment tribunals in the application of TTIP. Ultimately, however, it will be to the benefit of all, both signatories and investors on both sides of a transatlantic trade and investment deal, if this internal EU legal question is resolved by virtue of displaying deference to the Commission, subject to judicial review by the CJEU. In order to eliminate all shortcomings stemming from the investment tribunal's power to assess the allocation of competence between the EU and its Member States, however, the residual procedural drawback of CETA needs to be remedied. Otherwise the investment tribunal will inevitably endorse the investor's interpretation of the allocation of competence in the EU with a normative statement on its own jurisdiction and the admissibility of the claim whenever the Commission fails to determine the respondent within the requisite time period of 50 days. The remedy might be found by identifying the EU as the *prima facie* respondent unless the Commission determines otherwise during the 50-day period. Alternatively, the CJEU might accept that the requirement for cooperation, which directly emanates from the duty of sincere cooperation, provides sufficient safeguards for the upholding of EU objectives in investment arbitration against individual Member States.

4.4 Interim conclusion

Many controversial aspects of contemporary ISDS provisions can be addressed, if not easily resolved, through innovative drafting. The CETA draft text already reflects such an approach. It is, however, clear that the current drafting fails to eliminate the challenges that ISDS poses for the autonomy of the EU legal order. Although it must be recognized that the nature of bilateral negotiations does not allow for all aspects to be addressed, TTIP must strive for a balance that addresses the most important risk that investor-state tribunals pose to the fundamental principle of autonomy. Currently, CETA, which is likely to act as a blueprint for the negotiations of the investment chapter in TTIP, reserves to investment tribunals the power to decide on the allocation of competences between the EU and its Member States. Whilst the mechanism functions as a procedural safeguard for the US, because it guarantees that internal EU law questions cannot stall an international investment dispute involving US investors in the EU, it presents a concrete and real risk to EU autonomy. If the CJEU were asked to present an opinion on the matter, this mechanism might just convince it to issue a negative assessment of ISDS in TTIP.

5 Concluding remarks and future challenges

This study has demonstrated that the compatibility of EU investment agreements with the EU Treaties can be legally challenged on the basis that ISDS provisions infringe the principle of the autonomy of the EU legal order. The position of investment awards in the hierarchy of norms in the EU legal order suggests that, under certain circumstances, the CJEU is bound by a particular interpretation of EU law. Additionally, the determination of the respondent to a particular investment dispute invites investor-state tribunals to interpret the allocation of competences between the EU and its Member States under the EU Treaties. The study also illustrated that investor-state arbitration is unique in that it can be understood as a mechanism for international judicial review. Lastly, conceiving investor-state tribunals as quasi-exclusive legal avenues through which investors can enforce their rights under the agreement deprives domestic courts of their responsibilities under Article 267 TFEU. Although this analysis is open to criticism for being too abstract, in the light of the Court's pragmatic case law on the principle of autonomy, this study endeavours to draw attention to a few general concerns underlying the reasoning of the CJEU. These include an emphasis on harmonious interpretation, the importance of a preliminary reference procedure under Article 267 TFEU, the unrestricted exercise of the Court's judicial prerogative under the Treaty, and, in that respect, the role of the CJEU in the development of principles underlying the EU legal order.

The fact that investor-state tribunals, when applying the investment agreement, are involved in an assessment of EU law that exceeds mere incidental interpretation can no longer be ignored. The *Micula* arbitration, which is referred to throughout this study, as well as other recent investment awards, exemplify how and to what extent investment arbitration might conflict with important principles of EU law. Whilst *Micula,* itself an intra-EU dispute, marks the limits of when Commission will accept the impact of investment awards on core aspects of EU internal market law, it is not difficult to imagine the CJEU's conclusions in a similar dispute involving an extra-EU investment agreement, such as the TTIP agreement. A timely clarification of this issue, prior to the conclusion of TTIP, would provide assurances of legal certainty for US investors in the EU and Member States alike.

The shortcomings of traditional ISDS provisions can be addressed in a number of ways. One solution is a complete exclusion of ISDS from EU investment agreements. Although this would indeed remove any conflict with the principle of autonomy as far as investor-state tribunals are concerned, the political realities surrounding a transatlantic trade deal do not make such a drastic approach

feasible. Both the EU and the US appear to place significant importance on the inclusion of ISDS. A forum allowing for the direct enforceability of investors' rights under the agreement without any involvement of domestic or EU courts enhances, moreover, the perceived depoliticization of the resolution of investment disputes.

It is argued in this study that conflicts between ISDS provisions and the principle of autonomy should be addressed through the innovative drafting of ISDS provisions in future EU investment agreements. TTIP, because of its geographical scope and international significance, presents an opportunity for the EU to take a leading position in the re-emergence and alignment of a post-colonial system of investment dispute resolution that has been widely criticized as inadequate for the contemporary investment environment. In the course of this study, a number of drafting choices have been suggested that remedy potential incompatibilities with the principle of autonomy. However, it must be acknowledged that not all aspects can be addressed. Being part of the international legal order, the EU cannot merely impose its own standards, but must adjust for external legal processes. Instead, this study proposes that innovative drafting choices would have a cumulative effect. Whilst no single solution exists, if the ISDS provisions in TTIP are drafted in a manner that demonstrates that the concerns of the CJEU have been addressed in principle, this might receive a positive assessment, and thereby contribute to the development and broadening of the external dimension of the principle of autonomy.

An assessment of the proposed ISDS provisions in CETA shows that significant progress has been made in this respect. The direct effect of investment awards is likely to be precluded within the EU legal order. In addition, with one caveat, this limits the chance of parallel challenges and therefore the involvement of the CJEU in similar interpretive tasks. The determination of the respondent status is also internalized, allowing the Commission to make the relevant assessment and issue a decision that is binding on the investor-state tribunal. However, other aspects have not been addressed. One example is that the prior involvement of the CJEU or domestic courts is not clear. The system for the allocation of the respondent status incorporates a procedural drawback that allows the investor-state tribunal to decide on the respondent in cases in which the Commission exceeds the time frame stipulated for a Commission decision. This will prove to be controversial in cases where the Commission decision is subject to judicial review. A sharp distinction between internal and external effects in such an event results in the undesirable side effects of diverging applications of the agreement externally and the applicable EU regulation internally.

Lastly, although this study argues that the incompatibility of ISDS provisions with the autonomy of the EU legal order should be addressed by way of innovative drafting, it should be mentioned that such drafting is unlikely to yield results without the CJEU demonstrating a more open attitude. There are opportunities

for the CJEU to re-evaluate its position and demonstrate its openness to other international adjudicative processes. This could be achieved most effectively through an alternative, less restrictive interpretation and application of the principle of autonomy in respect of ISDS provisions. The Commission has recently created the necessary conditions for such a development by deciding to refer the EU–Singapore FTA to the CJEU under Article 218(11) TFEU; among the questions to the Court is a question about the nature and scope of the EU competence in FDI, including investment protection.[266] The answer could clarify much of the EU's future involvement in investment treaty law, and shed some light on important international agreements such as TTIP with the USA. Additionally, the Court can indirectly clarify the jurisdiction of investor-state tribunals when it assesses the compatibility of the payment of an ICSID award with EU rules on state aid, a circumstance provided for in the *Micula* arbitration.[267] The Court should craft its reasoning carefully and take the opportunity to define the extent to which investment awards penetrate the EU legal order.

[266] Commission Press Release, 'Singapore: The Commission to Request a Court of Justice Opinion on the trade deal'.
[267] Case T-646/14, *Micula v. Commission,* nyr.

Svensk sammanfattning

EU har genom sitt deltagande i internationella forum och ett långtgående fördragsarbete alltid framstått som en internationell aktör. Ambitionen att vara en viktig aktör med ett brett spektrum av internationella åtaganden återspeglas också tydligt i Lissabonfördraget. Fördraget utvidgade EU:s befogenheter på det utrikespolitiska området, också när det gäller utländska direktinvesteringar. EU har därmed befogenhet att sluta internationella investeringsavtal och att inkludera omfattande avsnitt om reglering och skydd för utländska investeringar i större frihandelsavtal. Förhandlingarna om ett framtida handels- och investeringsavtal mellan EU och USA (TTIP) utgör höjdpunkten på den målmedvetna bilaterala handelsstrategin.

För att bli en aktör inom internationell investeringsrätt – med målsättning att ersätta bilaterala investeringsavtal slutna mellan EU:s medlemsländer och tredje land – måste EU ha behörighet att sluta investeringsavtal som är minst lika omfattande som de redan befintliga. Moderna investeringsavtal har sedan 1990-talet innehållit bestämmelser om tvistlösning, vad som på engelska kallas Investor-State Dispute Settlement (ISDS). Den mekanismen ger investerare direkt tillgång till internationella skiljedomstolar för att hävda sina rättigheter i enlighet med ingångna avtal. En förutsättning för att EU ska kunna ha en heltäckande investeringspolitik – baserad på (bilaterala) investeringsavtal – är också att man har behörighet och är villig att inkludera ISDS-bestämmelser i avtalen. Det gäller inte minst i fallet TTIP, och lagstiftarna på båda sidor har inte i någon nämnvärd utsträckning ifrågasatt att man inkluderar ISDS-bestämmelser i avtalet.

ISDS-bestämmelser har på senare tid dock utsatts för hård kritik, eftersom de anses ha en negativ inverkan på de avtalsslutande staternas utrymme för regleringspolitik. Det gäller i synnerhet TTIP-förhandlingarna, där frågan har polariserat den offentliga debatten och lett till omfattande krav på att ISDS-bestämmelser helt ska uteslutas ur förhandlingarna. Men medan den debatten till sin natur är i hög grad politisk, är syftet med den här rapporten att granska de potentiella utmaningar ISDS-bestämmelser i TTIP utgör enligt EU-rätten. Mer precist ligger tonvikten på frågan om hur förenliga ISDS-bestämmelserna är med principen om oberoende i EU:s rättsordning. EU-domstolens motivering i tidigare yttranden över liknande avtal utgör den normativa ramen för granskningen. Än viktigare är att rapporten ger förslag på hur man på ett innovativt sätt kan utarbeta ISDS-bestämmelser i TTIP, bestämmelser som är förenliga med principen om oberoende och som kan garantera att EU-domstolen gör en positiv bedömning om man skulle få frågan.

I *Yttrande 1/00* gav EU-domstolen en exakt definition av principen om oberoende och vad som krävs för att den ska tillämpas i internationella domstolar och

tribunaler. Där framgår också att principen har en dubbel funktion. För det första att en internationell domstol inte kan binda EU och dess institutioner till den specifika tolkning av EU-rätten som ett internationellt avtal hänvisar till. För det andra att ett internationellt avtal inte på ett avgörande sätt kan påverka de befogenheter som EU-fördraget har tilldelat EU:s institutioner. Detta betyder å ena sidan att frågan om hur EU:s institutionella befogenheter ska tolkas endast kan avgöras av EU-domstolen. Å andra sidan innebär det också att innehållet i de befogenheter som har tilldelats institutionerna i enlighet med fördraget i allt väsentligt förblir oförändrat.

Även om yttrandena givetvis präglas av de faktiska omständigheter de avser, kan man inte tolka domstolens yttranden som att det går att begränsa tillämpningen av principen om oberoende till internationella domstolar och tribunaler. I den här granskningen hävdas tvärtom att EU-domstolens i vid mening underliggande farhågor återspeglas i dess motiveringar. Farhågorna gäller bland annat risken för att den enhetliga tillämpningen och tolkningen av EU-rätten hotas av att EU-domstolen och internationella domstolar inte resonerar på samma sätt i alla ärenden och risken för att internationella domstolar inkräktar på de rättsliga befogenheter som EU-domstolen har enligt fördragen. Baserat på granskningen av EU-domstolens sätt att argumentera, behandlar den här rapporten tre specifika aspekter av frågan huruvida ISDS-bestämmelser är förenliga med principen om oberoende.

Den första gäller att inblandningen av särskilda skiljenämnder i tolkningen av EU-rätten knappast är en tillfällighet. Det är i själva verket en huvuduppgift för skiljenämnderna när det gäller att bedöma EU:s rättsakter och dessas förenlighet med brett definierade investeringskriterier i internationella avtal, och i det avseendet utgör skiljedomar en begränsning för EU-domstolen i dess tolkning av sekundärrätten. Investeringsavtalens betydelse i EU:s rättsordning kräver att EU-domstolen tolkar sekundärrätten i enlighet med ett investeringsavtal och de skiljedomar som har sitt ursprung i avtalet. Det betyder att EU-domstolen i praktiken är bunden av skiljenämndens tolkning och bedömning av sekundärrätten. Dessutom bidrar bristen på beständighet och prejudikat i skiljenämndsförfaranden till ökad risk för en utveckling där interna och externa tolkningar av EU-rätten skiljer sig åt.

Den andra aspekten handlar om att EU-domstolen i *Yttrande 2/13* – som gäller utkastet till avtal om EU:s anslutning till Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna (EKMR) – nyligen har upprepat att fastställandet av svarandes status i en enskild tvist innefattar en bedömning av hur befogenheter enligt fördragen fördelas mellan EU och dess medlemsländer. En sådan bedömning kommer skiljenämnder att tvingas göra – uttryckligen eller underförstått – när man ska besluta huruvida man har behörighet att avgöra ett ärende. Därmed utövar skiljenämnden en rättslig funktion som annars är reserverad för EU-domstolen.

Den tredje aspekten avser att EU-domstolen – i enlighet med artikel 19 i EU-fördraget – har exklusiv behörighet att göra en rättslig granskning av EU-rätten, inklusive en bedömning av huruvida den är förenlig med internationella avtal. I den här rapporten hävdas att skiljenämnder just har i uppgift att granska om EU:s rättsakter är förenliga med investeringsavtal. Såväl EU-domstolen som de nationella domstolarna i medlemsländerna är utestängda från skiljedomsförfarandet och har dessutom ytterst begränsade möjligheter att enligt den så kallade New York-konventionen från 1958 förhindra att skiljedomar verkställs inom EU:s territorium. *Yttrande 2/13* visar dessutom att under vissa omständigheter – där man bedömer EU-rätten i ljuset av breda internationella kriterier – måste det internationella avtalet medge att EU-domstolens först får säga sitt. Om EU-domstolen intar den hållningen vid ett skiljedomsförfaranden, skulle det definitivt kräva att man i samband med investeringsavtal i EU tillämpar ett förfarande om förhandsavgörande och därmed skulle skiljenämnden vara bunden av EU-domstolens tolkning av EU-rätten. Å andra sidan understryker *Yttrande 1/09* – om Domstolen för europeiska patent och gemenskapspatent – att medlemsländernas nationella domstolar, i deras roll som vanliga domstolar i EU:s rättsordning, enligt artikel 267 FEUF (Fördraget om EU:s funktionssätt) har särskilda skyldigheter gentemot EU-domstolen. Även om skiljenämnd vanligtvis inte är den enligt fördraget enda rättsliga möjligheten, utestänger den de nationella domstolarna från frågor som handlar om hur EU-rätten ska tolkas och tillämpas när en investerare har använt sig av ISDS-bestämmelserna.

De utmaningar som ISDS-bestämmelserna i TTIP innebär för EU-rätten –och frågan om hur förenliga bestämmelserna är med principen om oberoende – kan hanteras på olika sätt. Exempelvis genom att man helt utesluter ISDS från TTIP eller gör alternativa tolkningar av oberoendeprincipen. I den här rapporten hävdas att det är politiskt omöjligt att utesluta ISDS ur TTIP. Å enda sidan förefaller ISDS vara en för båda parter viktig del av de transatlantiska relationerna, å andra sidan kan ett uteslutande av ISDS från TTIP få större återverkningar på framtida förhandlingar där EU och USA är inblandade. Det skulle exempelvis krävas starkare skäl för att införa ISDS i exempelvis ett frihandelsavtal med de asiatiska länderna (TPP) eller i ett investeringsavtal med Kina. Vad gäller alternativa tolkningar av EU-domstolen, så är det svårt att föreställa sig hur domstolens sätt att resonera skulle kunna anpassas till innehållet i befintliga ISDS-bestämmelser. I rapporten föreslås därför en mer nyanserad tillämpning av principen om oberoende när det gäller skiljenämnder, åtföljd av mer innovativt utarbetade ISDS-bestämmelser för att hantera de brister den här granskningen har identifierat.

Det kan göras på olika sätt, och i rapporten diskuteras framför allt frågan om att med olika medel begränsa de negativa effekterna. Det handlar om tydliga begränsningar när det gäller möjligheten till direkt effekt av skiljedomar, införande av en mekanism för förhandsavgöranden, att utnyttja alla tillgängliga inhemska rättsmedel samt klausuler som definierar fördelningen av befogenheter

och begränsar effekten av skiljedomar genom att i verkställighetsförfarandet förlita sig på den allmänna rättsordningen.

Sammanfattningsvis kan sägas att om man inskränker de tillgängliga rättsåtgärderna till att handla om ekonomiska påföljder, kan man visserligen minimera men knappast eliminera den risk skiljedomar utgör för EU:s lagstiftning och möjligheten att använda åtgärder som restitution, domstolsförelägganden eller särskilt fullgörande. En tydlig inskränkning av möjligheten till direkt effekt när det gäller skiljedomar skulle däremot effektivt begränsa användningen av skiljedomar vid parallella eller efterföljande förfaranden, och därmed eliminera deras påverkan på EU-domstolens interna tolkning av EU-rätten. En tidigare medverkan av EU-domstolen i frågor som rör tolkning av EU-rätten skulle vara ett tecken på vad man kan kalla rättslig respekt och skulle säkert vara till stor hjälp för att bygga upp en relation mellan två rättsliga mekanismer, samtidigt som man garanterar såväl EU-domstolens rättsliga privilegium som EU-rättens oberoende.

Avgränsningsklausuler kommer inte kunna erbjuda en lösning på det nuvarande problemet med överlappande befogenheter. Men en mekanism som tillåter EU-kommissionen att internt fastställa den svarandes status, skulle förhindra att skiljenämnderna blandar sig i frågan om hur befogenheter ska fördelas i enlighet med EU-fördragen. Det faktum att inhemska åtgärder är uttömda gör dock att nationella domstolar förblir inblandade i skiljedomsförfarandet och behåller sina skyldigheter enligt artikel 267 FEUF. Slutligen kan en vägran att genomdriva skiljedomar med hänvisning till allmän rättsuppfattning vara en möjlig sista utväg för nationella domstolar eller EU-domstolen att granska skiljedomar i ljuset av viktiga EU-rättsliga principer.

Utarbetande av ISDS-bestämmelser är dock ett tveeggat svärd som inte bara erbjuder lösningar utan även nya problem. Begränsningen vad gäller tillgängliga rättsliga åtgärder eliminerar inte den risk som ekonomiska påföljder innebär. En uttrycklig inskränkning av möjligheten till direkt effekt av skiljedomar kan dock potentiellt inkräkta på några av de mest grundläggande rättigheterna enligt modern investeringsrätt. Ett förfarande med förhandsavgörande undergräver målsättningen med att avpolitisera skiljedomsförfarandet. En återgång till att förlita sig på nationella rättsliga åtgärder skulle i sin tur återupprätta postkoloniala fördomar när det gäller utvecklingsländernas rättsväsende och bidra till en ojämlik tillgång till rättssäkerhetsgarantier i samband med investeringsavtal. Att låta EU-kommissionen få i uppgift att bestämma svarandes status, innebär att kommissionen ges exklusiv befogenhet att avgöra vem som har det internationella ansvaret för EU:s rättsakter, något som i sin tur leder till befogade frågor angående principerna för internationell rätt. Slutligen innebär en vägran att verkställa skiljedomar med hänvisning till den allmänna rättsuppfattningen ett missbruk av de garantier som New York-konventionen ger när det gäller rätten att granska skiljedomar.

Inget av dessa alternativ utgör således en heltäckande lösning som till fullo klargör oförenligheten mellan ISDS-bestämmelser och principen om EU-rättens oberoende. Den enda framkomliga vägen är därför en balanserad lösning som fokuserar på de positiva delarna, men samtidigt behåller skyddet mot tänkbara negativa effekter. I den här rapporten hävdas dessutom att de valmöjligheter som presenteras har en viktig samlande effekt, eftersom de belyser individuella aspekter av ett bredare och mer omfattande problem. För att det ska ge något resultat, krävs dock EU-domstolens medverkan. Mycket kommer att avgöras av hur starkt EU-domstolen vill hålla sig till den strikta motivering som återfinns i *Yttrandena 1/09 och 2/13*. Existerande rättspraxis ger redan EU-domstolen tillräckligt utrymme för att omvärdera frågan om hur internationella rättsinstanser påverkar avgörande delar i EU-institutionernas makt, inklusive deras exklusiva rättigheter. Innovativt utarbetade ISDS-bestämmelser i TTIP skulle dock kunna lotsa EU-domstolen i riktning mot en positiv syn på avtalet.
Att vara verksam på det internationella planet kräver att man beaktar ett stort antal intressen. Det handlar om sådant som grundläggande principer inom investeringsrätt, internationella ramverk för genomdrivande av skiljedomar eller – på ett mer allmänt plan – internationella rättsprinciper. Det nyligen ingångna handelsavtalet mellan EU och Kanada (CETA) visar att betydande framsteg redan har gjorts på området, även om det fortfarande återstår en del detaljer. Ett exempel är att även om EU-kommissionen nu är ansvarig för att internt fastställa svarandes status i samband med investeringstvister, kommer skiljenämnder alltjämt att utsättas för granskning om kommissionen inte lyckas fatta beslut inom 50 dagar.

Sammanfattningsvis kan sägas att om EU-domstolen skulle göra en bedömning vad gäller utkastet till TTIP-avtalets förenlighet med fördragen – innan ett avtal ingås enligt artikel 218(11) FEUF – kommer ISDS-bestämmelserna att utgöra betydande problem enligt principen om EU-rättens oberoende. Att EU alltmer utvecklas till en global aktör, kräver att EU-domstolen visar en större öppenhet gentemot internationella rättsliga förfaranden och internationella rättsväsenden. EU-domstolens tillämpning av principen om oberoende när det gäller internationella domstolar och tribunaler kräver alternativa tolkningar av principen som är mer lyhörda för internationell behörighet och betonar samarbete och kommunikation. För närvarande används principen om EU-rättens oberoende snarast som ett sätt att exkludera internationell rätt, vilket står i stark kontrast till den inkluderande inställning som återfinns i EU-fördragen. Men en framgång för TTIP beror inte bara på EU-domstolens goda vilja. Tillsynsmyndigheter – och inte minst de personer som är direkt engagerade i förhandlingarna om TTIP-avtalet – har ett ansvar att utveckla ISDS-bestämmelser på ett sätt som underlättar för EU-domstolen att inta en positiv hållning. Den här rapporten presenterar några av dessa val och diskuterar kritiskt huruvida de också bör ingå i TTIP-förhandlingarna.

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"Hence, none of the drafting choices individually provide for a comprehensive solution that addresses the incompatibility of ISDS provisions with the principle of autonomy in its entirety. The way forward is, thus, a balanced approach that focuses on positive features, whilst retaining safeguards against the potential negative effects."

Hannes Lenk

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