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Autonomy of EU Law as a Limit to Private Parties' Access to International Dispute Settlement Mechanisms

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LIST OF ABBREVIATIONS:

Aarhus Convention	Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Mattersof 25 June 1998, UNTS vol. 2161, p. 447
Aarhus Regulation	Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ EU L 264, 25.9.2006, p. 13–19
AT	Arbitral tribunal
BIT	Bilateral investment treaty
CFR	Charter of Fundamental Rights of the European Union, OJ EU C 326, 26.10.2012, p. 391–407
CJEU	Court of Justice of the European Union
DARIO	ILC Draft articles on the responsibility of international organizations with commentary (2011), A/66/10
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS No.005
ECtHR	European Court of Human Rights
ECT	Energy Charter Treaty of 17 December 1994, UNTS vol. 2080, p. 95
EPC	European Patent Convention, The new text of the European Patent Convention adopted by the Administrative Council of the European

	Patent Organisation by decision of 28 June 2001, OJ EPO 2001, Special edition No. 4, p. 55
EPO	European Patent Office
EPO BOA	European Patent Office Board of Appeals
ETS	European Treaty Series
EU	European Union
Extra-EU BIT	BIT between EU Member State and a third state
FET	Fair and equitable treatment
FTA	Free Trade Agreement
GATS	General Agreement on Trade and Services
GATT	General Agreement on Tariffs and Trades of 30 October 1947, UNTS vol. 55, p. 194
ICC 2017 Arbitration Rules	International Chamber of Commerce Arbitration Rules as revised in 2017
ICJ	International Court of Justice
ICSID	Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965, UNTS vol. 575, p. 159
ICTY	International Criminal Tribunal for the former Yugoslavia

IIA	International investment agreement
IIL	International investment law
ILC	International Law Commission
ILO	International Labour Organization
intra-EU BIT	BIT between the EU Member States
ISDS	Investor-state dispute settlement
ITLOS	International Tribunal for the Law of the Sea
Netherlands-Slovakia BIT	Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 29 April 1991 (terminated)
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, UNTS vol. 330, p. 38
OJ	Official Journal
OJ EU	Official Journal of the European Union
OJ EPO	Official Journal of the European Patent Organizations
Poland-BLEU BIT	Agreement between the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Republic of Poland on encouragement and reciprocal protection of investments signed on 19 May 1987 (terminated)

Poland-Netherlands BIT	Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments signed on 7 September 1992 (terminated)
REIO	Regional Economic Integration Organization
SCC 2010 Arbitration Rules	Stockholm Chamber of Commerce Arbitration Rules as revised in 2010,
TEU	Treaty on European Union, Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13–390.
TFEU	Treaty on Functioning of the European Union, Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCITRAL 2010 Arbitration Rules	United Nations Commission on International Trade Law UNCITRAL Arbitration Rules as revised in 2010
UNCITRAL Model Law	United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006
UNCLOS	United Nations Convention on the Law of the Sea of 10 December 1982, UNTS vol. 1833, p. 397
UNTS	United Nations Treaty Series
UPC	Unified Patent Court

UPC Agreement	Council Document no 7928/09 of 23 March 2009 Draft Agreement on the European and Community Patents Court and Draft Statute.
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969, UNTS, vol. 1155, p. 331
VCLT IO	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, A/CONF.129/15 (not entered into force)
WTO	World Trade Organisation
ZPO	German Law on Civil Procedure (*Zivilprozessordnung*) BGBl. I S. 3202; 2006 I S. 431; 2007 I S. 1781 as amended

PART I: PRELIMINARY MATTERS

Chapter 1: Introductory matters

1.1. Introduction: Research goals and the dissertation structure

The aim of this dissertation is to examine the limits set by the autonomy of European Union ("**EU**") law to the private parties' access to international dispute settlement mechanisms.[1]

As is well known, the Court of Justice of the European Union ("**CJEU**") made it clear on more than one occasion that certain dispute settlement mechanisms may be incompatible with EU law or, more precisely, with its autonomy. And the consequences thereof are all but insignificant. The CJEU's negative assessment either stalled the EU's accession to these mechanisms (or their very formation) as in the case of the Unified Patent Court or the European Convention of Human Rights ("**ECHR**") [2] or even prompted the Member States to revoke the existing instruments, as in the case of international investment agreements. Moreover, this was also no exception in that the CJEU has targeted mechanisms accessible to individuals on many occasions. Particularly in this context, the last case stands out due to affecting the legal positions of private parties under treaties concluded solely by the Member States outside of the EU framework.

And this could be particularly problematic, if to recollect that the autonomy principle itself is a creature of the CJEU's jurisprudence, and, as such, its contours are painfully blurred. As EU primary law does not contain any "autonomy paragraph",[3] the concept has been continuously developed by the CJEU, making general references to other provisions of EU law. And its application to international dispute-settlement mechanisms is a relatively recent phenomenon. In fact, it was only in Opinion 1/91 that the Luxembourg Court expressly recognized the

[1] This dissertation is part of a broader research endeavour spanning over the time of my PhD studies, that resulted in certain research works published, partially overlapping with certain issues discussed in this work. In this respect see in particular Bartosz Soloch, Makane Moïse Mbengue, *Conformity of International Dispute Settlement Mechanisms with EU Law : Does the EU's Participation Really Matter?*, in: Nicolas Levrat, Yuliya Kaspiarovich, Christine Kaddous and Ramses A Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements*, Hart Publishing, Oxford u.a. 2022, pp. 150-170; Bartosz Soloch, *International Investment Law: A Self-Proclaimed Ally in Commission's Rule of Law Endeavors* in: Julien Chaisse, Leïla Choukroune, Sufian Jusoh (eds), *Handbook of International Investment Law and Policy*, Springer, Singapore 2020 and Bartosz Soloch, *CJEU Judgment in Case C-284/16 Achmea: Single Decision and Its Multi-Faceted Fallout*, vol 18 2019, "The Law & Practice of International Courts and Tribunals", pp. 1-31.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS No.005.

[3] See e.g. Ramses A. Wessel, Christophe Hillion, *The European Union and International Dispute Settlement: Mapping Principles and Conditions*, available at: https://ris.utwente.nl/ws/portalfiles/portal/13757102/wessel118.pdf , accessed on 22 August 2022, p. 22.

autonomy principle in its external aspect. Since then, even if repeatedly relied on by the CJEU, the principle and its scope have consistently remained somewhat nebulous. Consequently, granted the seriousness of the topic on the one hand and the ambiguities surrounding the autonomy concept on the other, an in-depth examination of the interplay between the autonomy of EU law and the private parties' access to international dispute settlement mechanisms addresses a real issue.

Consequently, in my dissertation, I strive to illuminate whether the CJEU's existing jurisprudence would allow drawing more general consequences concerning the conditions set by the autonomy principle for the private parties' access to international dispute settlement mechanisms. Theoretically, in an ideal case, my research should lead to the formulation of an "autonomy test". Unfortunately, this is not the case and my dissertation instead reveals rather the pitfalls of the autonomy of EU law, as developed in the practice of the CJEU. As will be discussed in more detail below, the principle lacks clear contours and it does not allow to formulate any "checklist". Being a jurisprudential creation of, arguably, inconsistent application, it grants the CJEU considerable margin of discretion regarding the assessment of international dispute settlement mechanisms while, at the same time, leaving the other stakeholders at dark as to the compatibility of a given dispute settlement mechanism with EU law till the very decision of the Luxembourg court.

I am convinced that my work does have the element of novelty and contributes to a better understanding of the issues sketched above. Despite there being a plethora of studies thematizing various aspects of the interactions between the autonomy of EU law and international dispute settlement mechanisms (including also those accessible to individuals), there are no works comprehensively addressing specifically the same research questions based on a throughout analysis of the up to date CJEU's jurisprudence. This is particularly so, granted I intend to reach beyond the conflict of jurisdictions paradigm and to present the broader context in which all these subsystems of international law do operate. I believe that such an approach would allow me to examine better whether and to what extent the challenge posed by the individual access to international adjudication mechanisms for the autonomy and coherence of EU law is determined not by the overlapping jurisdictions taken alone but rather by the actual content of different international instruments. In this context, it would be of particular interest to shed some light on somewhat underestimated aspects of the functioning of the adjudicative bodies, such as enforcement mechanisms and their institutional context, with specific regard to their embedment in broader international and domestic legal frameworks.

Thematizing the above research problems requires a throughout analysis of the CJEU's jurisprudence, establishing the drivers behind the Luxembourg Court's decisions to accommodate or reject particular international dispute settlement mechanisms. To this end, I am going to find out whether and how the existing case law translates into more general principles governing the interrelationship between the principle of autonomy and the private parties' access to international dispute settlement bodies. Thus, in my research, I concentrate on the mechanisms involving the private parties thematized by the Luxembourg Court directly or indirectly. Luckily, this group encompasses a whole range of distinct dispute-settlement bodies. Thus, arguably, even though it does not cover all the mechanisms operating within the EU legal space (the European Patent Organization framework being the most prominent example), the CJEU's jurisprudence provides a sufficient basis for more general conclusions concerning all *kinds* of such instruments.

This being said, it must be stressed that the survey of the CJEU case law cannot and does not occur in a vacuum. Quite the contrary: it necessarily has to be accompanied by an analysis of the public international law perspective. This takes place in a twofold manner. Firstly, on a more general level, I try to reconstruct the basic features of dispute settlement mechanisms from the standpoint of public international law, as well as assess how the EU could be understood from this perspective. Secondly, against this background, I also try to shed light on the treatment of EU law by the dispute settlement bodies belonging to the frameworks examined by the CJEU to find out whether and to what extent the external bodies (quasi-)judicial practice was taken into account in the CJEU's appraisal.

As a result, I analyse the interrelation between the autonomy of EU law and the international dispute settlement bodies accessible to the individuals on five examples thematized in the CJEU's jurisprudence. Firstly, there is the ECHR, a human rights treaty with a robust adjudicative mechanism embodied by the European Court of Human Rights ("**ECtHR**"), examined by the CJEU foremostly in its seminal Opinion 2/13.[4] Secondly, there are investment arbitration tribunals operating on the basis of the Energy Charter Treaty ("**ECT**"),[5] a network of bilateral investment treaties ("**BITs**") and the EU's own free trade agreements, assessed foremostly in the *Achmea*[6] and *Komstroy*[7] judgments and the *CETA* opinion.[8] Thirdly, there is

[4] CJEU Opinion of 18 December 2014, *European Convention on Human Rights,* Opinion 2/13, ECLI:EU:C:2014:2454.
[5] Energy Charter Treaty of 17 December 1994, UNTS vol. 2080, p. 95.
[6] CJEU judgment of 6 March 2018, *Achmea*, case C-284/16, ECLI:EU:C:2018:158.
[7] CJEU judgment of 2 September 2021, *Komstroy*, case C-741/19, ECLI:EU:C:2021:655.
[8] CJEU Opinion of 30 April 2019 *CETA*, Opinion 1/17, ECLI:EU:C:2019:341.

the Unified Patent Court ("**UPC**"), an envisaged specialized international court for patent matters, declared incompatible with EU law in Opinion 1/09.[9] Fourth, there are European Schools[10] with their Complaints Board, i.e. sort of an international administrative tribunal tasked with deciding disputes concerning their teachers and students, analysed by the CJEU in its *Miles*[11] and *Oberto*[12] judgments. Lastly, there is an environmental compliance body, the Compliance Committee, set by the Aarhus Convention[13] and tasked with the examination of compliance issues, also upon the submission of the *members of the public*, whose activity has been the subject of both, numerous proceedings before the CJEU, and political and legislative activity of the EU.[14]

However, the enquiry in this dissertation may not be, and is not, limited to the jurisprudence above. In order to yield meaningful results, the analysis by necessity has to be grounded in more general considerations of the autonomy principle itself, as well as a broader look at the CJEU's treatment of the dispute settlement mechanisms available only for the state parties. Tackling both issues, in turn, requests reconstructing the EU's modes of reception of international law and attitudes towards it. A particular emphasis is to be placed on the challenges posed by its automatic incorporation into the EU legal order, the limits set by the CJEU's exclusive jurisdiction, and the role of the EU's control over the direct effect of international norms. In order to justify this choice, one should remember that it was only in relation to the inter-state dispute-settlement mechanisms that the CJEU first crystallized the external aspect of the autonomy principle. Last but not least, the analysis of this body of jurisprudence would allow the unveiling of the profound differences in the CJEU's treatment of inter-state dispute settlement mechanisms and the bodies accessible to the individual. As argued throughout the dissertation, the prior are treated in a much more relaxed manner, arguably due to the possibility of depriving their decisions of legal relevance within the EU legal space, be it in the way of threatening the Member States with infringement proceedings (as in the Mox Plant case) or by denying the individuals the very possibility of relying on them as in the case of WTO law.

[9] CJEU Opinion of 8 March 2011, *European Patent Court*, Opinion 1/09, ECLI:EU:C:2011:123.
[10] Convention defining the Statute of the European Schools, concluded in Luxembourg on 21 June 1994, OJ EU 1994 L 212, p. 3.
[11] CJEU judgment of 14 June 2011, *Paul Miles*, case C-196/09, ECLI:EU:C:2011:388.
[12] CJEU judgment of 11 March 2015, *Oberto and O'Leary v. Europäische Schule München* , case C-464/13, ECLI:EU:C:2015:163.
[13] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998, UNTS vol. 2161, p. 447.
[14] See Chapter 13 below.

In order to analyse the above topics I decided to divide my dissertation into three parts and 16 chapters.

The first part is dedicated to the preliminary matters, including the analysis of the research goals of this work, as well as the fundamentals of the EU's external relations law, autonomy principle included. In this part, I also examine the CJEU's jurisprudence dedicated to the interplay between the autonomy principle and the treaty interpreting bodies accessible to the states as creating the background for the benchmark against which the mechanisms accessible to private parties would be measured. Chapter 1: *Introductory matters* – is dedicated to presenting the research goals and explaining certain concepts and theoretical assumptions underlying this work. Chapter 2: *International identity of the European Union* contains an analysis of the EU's status and its relationship with the Member States from the standpoint of public international law. In Chapter 3: *External dispute settlement bodies as a threat to the autonomy of EU law*, I examine the basic structural features of the international dispute-settlement bodies, in particular, their embeddedness in their respective legal frameworks, to determine why may their operation be problematic from the point of view of the autonomy principle. In Chapter 4: *EU law and international law,* I analyse the modes of reception of public international law in the EU legal system, with particular emphasis on the lack of transformation requirements; the role played by the direct effect doctrine and the CJEU's exclusive jurisdiction. Based on the above, in Chapter 5, I try to reconstruct the principle of autonomy of EU law and the role it is to play in the EU's institutional system. In Chapter 6: *Autonomy and (un-)friendliness: EU law and treaty-interpreting bodies,* to prepare the ground for the proper enquiry, I am going to analyse how this principle was reflected in the CJEU's jurisprudence concerning inter-states dispute settlement mechanisms. To this end, I examine the CJEU's jurisprudence concerning the EFTA Court, the United Nations Convention of the Law of the Sea mechanism; the Benelux Court; the European Aviation Area Joint Committee and the WTO dispute-settlement system, along with the Member States' and the EU's treaty practice. This part ends with a brief set of preliminary conclusions.

The second part of the dissertation contains the analysis of the CJEU's jurisprudence related to the challenges to the autonomy principle posed by the dispute settlement mechanisms accessible to the private parties and, thus, constitutes the focal point of this research endeavour. In particular, in this part, I examine whether it is possible to extract more general principles from the CJEU's jurisprudence to formulate an "autonomy test", i.e. a checklist allowing to control the conformity with the autonomy principle. It begins with a brief introduction. Chapter 9:

ECHR: *Opinion 2/13 and beyond* is dedicated to analysing the challenges posed to the autonomy by the private parties' access to the ECHR mechanism. The enquiry encompasses both the ECHR understood as an EU agreement, and the Convention as it stands now, i.e. a Member States-only agreement. Chapter 10: *International Investment Law* pertains to the analysis of the challenges to autonomy posed by the investment treaties, be it BITs concluded by the Member States between themselves or with third parties, the ECT, and the EU's Free Trade Agreements. Chapter 11: *Unified Patent Court (Opinion 1/09)* concerns the challenges posed by the envisaged Unified Patent Court, while Chapter 12: *European Schools* contains an analysis of the potential issues brought by the European Schools Complaints Board. Chapter 13: *Aarhus Convention,* in turn, includes an analysis of the challenges to autonomy posed by the Aarhus Convention Compliance Committee's jurisdiction and their reflection in both the CJEU's jurisprudence and the Commission's actions. In Chapter 14: *Distilling focal points from the CJEU jurisprudence,* I conduct a comparative analysis of the aforesaid case law to establish whether it has attained a sufficient consistency level to draw more general conclusions. Unfortunately, this question will have to be answered negatively, with the consequences of such a state of affairs dissected in Chapter 15: *No autonomy test*.

The dissertation ends with Part III containing Chapter 16: *Conclusions.*

As mentioned above, Chapter 14, where the relevant practice is to be surveyed, plays an essential role. Based on the CJEU's jurisprudence, I decided to single out the following factors for consideration:

1. The EU being a party to an agreement;
2. Jurisdiction of a given body extending to matters falling within the scope of application of EU law;
3. Application or interpretation of EU law by a given body;
4. Review of the EU law enforcement by a relevant body, in particular, the possibility of reviewing individual acts of the EU authorities;
5. The binding character of a body's decision;
6. Intra-EU effect of a body's decisions and its enforcement;
7. Possibility of a body circumventing the dispute-settlement framework foreseen in the Treaties;
8. A body being created within an extra- or intra-EU framework;

9. Less tangible factors related to the intrinsic features of the frameworks underlying the dispute settlement bodies, as well as their attitude, namely:
    i) Concordance between their goals and the aims of the EU legal system;
    ii) Readiness of the dispute settlement bodies to enter into a meaningful judicial dialogue with the CJEU.

A careful examination of how these issues influenced the outcome of the CJEU's deliberations leads me to conclude that their treatment by the Luxembourg court was all but coherent. Save for the lack of binding legal force of the bodies' decision, no stable relationship between any of the above factors (or their groupings) and the CJEU's assessment of a given mechanism could be established. It follows that there is no "autonomy test", and the CJEU holds considerable discretionary powers concerning evaluating a given dispute settlement mechanism's conformity with EU law. And this is problematic for at least several reasons. Most importantly, all the stakeholders are left in the dark as to whether a negotiated text of an agreement would pass the autonomy scrutiny till the very CJEU's decision. Furthermore, one could argue that this heterogenous jurisprudence does not contribute to boosting the Luxembourg court's legitimacy due to failing to provide stable and predictable standards. And this is even more disconcerting if to recollect how un-pluralistic the CJEU's stance tends to be. Be that as it may, there are no signs of the CJEU's willing to abandon its position. Quite the contrary, in particular, relatively recent developments in investment law cases clearly demonstrate that this approach is all alive and well.

Regarding methodology, I rely mainly on dogmatic analysis. In the first line, my research rests on the relevant normative acts, jurisprudence, decisions, declarations, reports, etc. Among these, for the reasons set out above, the CJEU's decisions occupy a privileged place. Besides, I would also like to look at the materials analyzing the actual functioning of international frameworks and the enforcement mechanisms connected thereto. In particular, in relation to the Aarhus Convention framework, I also take into account the minutes of meetings, legislative proposals and other similar materials. Lastly, I would also like to rely on the empirical data, as well as interdisciplinary analyses describing the practice of functioning of different adjudicating bodies in their broader context, insofar as they could shed additional light on the tensions between the autonomy principle and the external frameworks.

1.2. Dispute-settlement mechanisms

Before going further into detail, it is necessary to clarify what should be understood as an *international dispute* and, consequently, what kind of organs would constitute a dispute-settlement body. This explanation may come in handy, particularly in relation to the Aarhus Convention Compliance Committee.

Despite there being no universally recognized definition, one may find some helpful guidance in international treaties and jurisprudence. The UN Charter[15] dedicates its whole Chapter VI to the *pacific settlement of disputes.* Rather than giving a complete definition, it limits itself to obliging its parties to peaceful settlement of disputes in Article 2.3 and presenting a non-exhaustive list of such methods in Article 33. Interestingly, the dispute settlement methods are not limited to judicial dispute settlement as they should encompass *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own* [i.e. parties'] *choice*. Similarly, Statue of the International Court of Justice simply lists matters that may be subject to *legal disputes* in Article 36.2. This list encompasses *the interpretation of a treaty*; *any question of international law*; *the existence of any fact which, if established, would constitute a breach of an international obligation*, and the *nature or extent of the reparation* to be made for the breach of an international obligation.[16] This being said, it lies at hand that the aforesaid documents do not offer a comprehensive definition of the concept.

Fortunately, international courts' jurisprudence managed to fill this gap. The classical definition of a *legal dispute* is contained in the PCIJ *Mavrommatis* case concerning a dispute between the British and Greek governments, where the Court decided that: *A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.*[17] As later explained by the court, the existence of a dispute is objective and cannot be eliminated solely by one party's denial of its existence.[18] Similarly, the presence of a dispute depends on the substance of the parties' underlying relationships (i.e. the existence of a disagreement) rather than the exact legal form of their actions.[19] This understanding has been repeatedly reaffirmed

[15] Charter of the United Nations signed on 26 June 1945 in San Francisco.
[16] Statue of the International Court of Justice.
[17] PCIJ judgment (Objection to the Jurisdiction of the Court) of 30 August 1924 in case *The Mavrommatis Palestine Concessions,* PCIJ Series A. No 2, p. 11.
[18] See ICJ Advisory opinion (first phase) of 30 March 1950 in case *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* p. 74
[19] ICJ Judgment of 11 April 2011 in case *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* para. 30.

and expanded by the ICJ.[20] Accordingly, one could define legal disputes as disputes regarding the interpretation of provisions of law conducted by a competent dispute-settlement body.[21]

Given such a definition, one can reasonably argue that there are no compelling arguments to tie the concepts of legal disputes solely to international courts *stricto sensu*. Even if the concept of an "adjudicative body" was to be understood so as to encompass only a body issuing binding decisions, such as courts or arbitral tribunals[22], one could not deny that there are also many "quasi-judicial" bodies, such as human rights committees or commissions, operating in a manner very similar to the proper adjudicating bodies, in particular by basing their decisions on the prior determination of the content of legal provisions constituting parties' obligations.[23] This conclusion is corroborated by the legal scholars underlining that one should treat human rights interpretation bodies (such as various committees) similarly to international courts, albeit with due regard being paid to the relevant differences, f.e. the lack of *res iudicata* effect.[24] Specifically, it cannot be denied that also such bodies may act as tools for individual enforcement of states' international commitments.[25] In any case, for the reasons set out in section 13.1 below, the Aarhus Convention Compliance Committee constitutes such a *quasi-judicial* body. Consequently, there are good arguments for considering the Aarhus compliance mechanism along with the international dispute-settlement mechanisms *stricto sensu*.

[20] See e.g. a detailed analysis of earlier jurisprudence in ICJ judgment of 30 June 1995 in case *East Timor (Portugal v. Australia)*, para 22; ICJ Judgment of 5 October 2016 in case *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom).*paras 37 ff. Władysław Czapliński, Anna Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia Systemowe,* 3rd ed. CH Beck Warszawa 2014, p. 785.

[21] ICJ Judgment of 20 December 1988 in case *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, para 52, where the court defined *legal dispute* as *dispute capable of being settled by the application of principles and rules of international law*, Władysław Czapliński, Anna Wyrozumska, *op. cit.*, p. 787. The authors speak specifically of „courts" yet such a narrowing should not be upheld, as shall be explained below; see also Marcin Kałduński, *Pojęcie sporu prawnego w prawie międzynarodowym. Uwagi na tle sprawy Wysp Marshalla przeciwko niektórym potęgom jądrowym,* „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" vol 15 2017, pp. 8, 15.

[22] ICJ Judgment of 27 June 2001 in case *LaGrand (Germany v. United States of America)*, para. 102; Chiara Giorgetti, *International Adjudicative Bodies*, in: Jacob Katz Cogan Ian Hurd Ian Johnstone (eds.), *The Oxford Handbook of International Organizations,* OUP Oxford et al. 2017, p. 882; Allain Pellet, *Judicial Settlement of International Disputes,* in: Max Planck Encyclopedia of Public International Law, entry of July 2013, accessed on 22 August 2022, para 36.

[23] See f.e. Human Rights Committee General Comment No. 33 of 25 June 2009 *Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, CCPR/C/GC/33, para 11; see also Edouard Fromageau, *Quasi-judicial Body,* in: Max Planck Encyclopedia of Public International Law, entry of March 2020, accessed on 22 August 2022, *passim*.

[24] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals,* OUP Oxford 2003, pp. 6-7, 16, 173, 255.

[25] Anne Peters, *Beyond Human Rights The Legal Status of the Individual in International Law*, CUP Cambridge 2016, p. 479. The author names specifically the Aarhus Convention Compliance Committee among such mechanisms.

1.3. Private parties as distinct litigants

1.3.1. Private parties before international dispute settlement bodies

Further, a few words should be dedicated to the understanding of private parties as potential litigants before the international dispute-settlement bodies, as well as the reasons for differentiating them from state actors. To begin with, even though private parties' access to international dispute settlement mechanisms did exist even in the post-Westphalian world of the early 20th Century[26], it cannot be denied that it was only in the 80s and 90s that a true boom in international dispute settlement mechanisms accessible to individuals occurred.[27] This may have to do with the fact that regardless of the controversies surrounding the concepts of "subjectivity" or "legal personality", it has become widely accepted that, particularly taking into account more recent developments in international law, non-state actors may be bearers of both rights and obligations.[28] This also includes individuals and other private entities.[29] Given that this study focuses on the analysis of positive international law, there is no need to explore further the exact nature of legal status enjoyed by such entities – it is more than sufficient to refer merely to rights and obligations granted to them in the analysed treaties.[30]

Furthermore, it merits attention that none of the instruments creating the dispute-settlement mechanisms to be discussed in more detail below employs the term *individual* while defining the rightsholders and the right of standing.[31] It follows that while speaking of substantive rights, ECHR resorts to broad terms such as *everyone*[32] or *no-one*[33] while granting direct access to the Strasbourg Court to *any person, nongovernmental organisation or group of individuals.*[34]

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[26] One could indicate here in particular mixed claims commissions or the Central American Court of Justice, see Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual*, OUP Oxford 2018, pp. 79-103; Barbara Mielnik, *Kształtowanie się pozapaństwowej podmiotowości w prawie międzynarodowym,* UWr University Press Wrocław 2008, pp. 148-150.

[27] Yuval Shany, *op. cit.*, p. 3.

[28] See e.g. analysis at Barbara Mielnik, *op. cit.*, pp.146-189.

[29] Olivier Dörr speaks even of *privatization* of international law, see Olivier Dörr, *"Privatisierung " des Völkerrechts,* "Juristenzeitung" vol. 60 19/2005, pp. 905-916.

[30] Anne Peters, *op. cit.*, p.40 ff.; see also Astrid Kjeldgaard-Pedersen, *op. cit.*, pp. 176, 190-193, 233-234, emphasising purely theoretical and *a posteriori* character of the concept and, consequently its irrelevance for the development of legal status of individual under international law. On the other hand, many scholars do not view the standing before international dispute settlement bodies as sufficient to establish legal subjectivity of an individual (see literature discussed in Karol Karski, *Osoba prawna prawa wewnętrznego jako podmiot prawa międzynarodowego*, WUW Warszawa 2009 on p. 142; the author himself does not seem to share this view, however).

[31] Anne Peters, *op. cit.*, p. 9 rightly observes that the concept of *individual* has only little if any basis in the language of existing treaties.

[32] See f.e. Articles 2.1; 55.1 or 6.1 ECHR.

[33] See f.e. Articles 5.1 or 7.1 ECHR. In contrast, Article 1.1 of the Protocol no. 1 to the Convention (right to property) speaks of *Every natural or legal person*.

[34] Article 34 ECHR.

International investment law typically speaks of the rights of an *investor*, a concept encompassing both natural and legal persons.[35] Last but not least, the Aarhus Convention[36] grants the right to request initiating a compliance review to the *members of the public*[37]. Needless to say, given the differences in both the treaty language and the broader logic of the above frameworks, it is apparent that the rules of standing provided by these mechanisms differ substantially, as shall be explained in more detail below.

This is even more so considering that individual human beings are not the only non-state actors recognized by international law. This in and of itself would not be a problem if the concept of *individual* was universally understood to encompass both natural and legal persons. This, however, is not the case. To begin with, general classifications of international law subjects elaborated in the international practice often juxtapose individuals and corporate entities labelled, e.g., as *NGOs* or *multinational enterprises.*[38] Furthermore, the term *individual* tends to be utilized specifically in the context of human rights, referring to a *person* endowed with human rights and, thus, carrying a particular moral weight[39]. Therefore, even if some authors seem to interpret the notion of *individual* broadly enough to encompass also legal persons,[40] it would still be advisable to avoid this term for the sake of clarity. In light of these discrepancies, it seems reasonable to refer collectively to the entities capable of initiating international proceedings as *private parties* rather than *individuals*.

Furthermore, one may view so-defined private parties as a category of litigants distinguishable from the state actors. To begin with, this differentiation takes place in the text of particular instruments. While some treaties provide only for state-to-state dispute settlement,[41] others,

[35] To give a few examples see Article 25.1 of the ICSID Convention foresees the Centre's jurisdiction in relation to *any legal dispute arising directly out of an investment, between a Contracting State (…) and a national of another Contracting State,* with the latter being defined as any *natural* or *juridicial* person (Article 25.2); Article 26.2 of the ECT foresees access to dispute settlement mechanisms for *investors* encompassing both natural and legal persons (Article 1.7 ECT). It may be said that the definitions in BITs concluded by the Member States granting access to dispute-settlement mechanisms concluded by the Member States follow this pattern..

[36] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998, UNTS vol. 2161, p. 447.

[37] Decision I/7 Review of Compliance adopted at the first meeting of the Parties held in Lucca, Italy, on 21-23 October 2002 ECE/MP.PP/2/Add, paras 15-18.

[38] See f.e. Christian Walter, *Subjects of international law,* in:Max Planck Encyclopedia of Public International Law, entry of May 2007, accessed on 22 August 2022; Barbara Mielnik, *op. cit.*, indicating international organizations; nation; insurgents; Maltese Order; natural persons; NGOs; multinational enterprises and the international community; Karol Karski, *op. cit.*, who, in addition to viewing multinational enterprises as a separate category of entities (p. 329 ff.), differentiates also between the status of natural and legal persons under national law (p. 54).

[39] See f.e. Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice,* OUP Oxford 2011, p. 47 (and *passim*); Anne Peters, *op. cit.*, pp. 9-10, 552, (and *passim*).

[40] See f.e. Astrid Kjeldgaard-Pedersen, *op. cit.*, p. 7.

[41] See e.g. UNCLOS or WTO discussed respectively in section 6.2.2. and 6.3. below.

including the mechanisms discussed in the preceding paragraphs, differentiate between provisions granting the right to initiate proceedings to the private parties and states.[42] More importantly, there are also more profound structural differences between them. In particular, it is commonly accepted that due to acting solely for their own advantage and not seeing themselves in a broader framework of mutual obligations, private litigants are much more ready to initiate international disputes also before competing fora.[43] In fact, certain authors even identify the relative success of the modern international dispute settlement mechanisms exactly with the empowerment of the individual.[44] In any case, it is to agree that by disentangling the litigation from the constraints of diplomatic relations, private parties' participation relatively strengthens the position of the dispute settlement bodies vis-à-vis the treaty parties and their rulemaking capacity.[45] To avoid doubt, it has to be stressed that these profound differences are not overcome by the mechanisms allowing the states to bring claims on behalf of individuals, in practice being subject to the same diplomatic relations concerns[46].

In fact, even a cursory analysis of the practice of the EU and its Member States would support this view. To begin with, the ICJ docket has become emptied of cases concerning the disputes between the EU Member States.[47] Similarly, inter-state arbitrations became an extreme rarity in the intra-EU context, with *Iron Rhine*[48] serving as most likely the only recent example of

[42] See e.g. Article 33 ECHR; Article 27 ECT.
[43] Anne Peters, *op. cit.*, p. 480; Yuval Shany, *op. cit.*, pp. 35-36, 74, 228, specifically in the EU context see Maria-Fogdestam Agius, *Interaction and Delimitation of International Legal Orders*, Brill/Nijhoff Boston/Leiden 2015, p. 215.
[44] Gary Born, *A New Generation of International Adjudication*, "Duke Law Journal" vol. 61 4/2012, pp. 864-868, 870, 873. The author contrasts, in particular, the newer dispute settlement mechanisms (encompassing also the WTO framework) with the relative inactivity of the ICJ and ITLOS, embodying traditional approach.
[45] Antônio Augusto Cançado Trindade, *op. cit.*, p. 29; see also Anne Peters, *op. cit.*, p. 549.
[46] Lucy Reed, *Observation on the Relationship between Diplomatic and Judicial Means of Dispute Settlement*, in: Laurence Boisson de Chazournes, Marcelo Kohen, Jorge E. Viñuales (eds.), *Diplomatic and Judicial Means of Dispute Settlement*, Brill Leiden 2012, p. 299.
[47] Jed Odermatt, *The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and Universality of International Law*, "iCourts Working Paper Series" 159/2019, pp. 6-7; Christina Binder, Jane A. Hofbauer, *The Perception of the EU Legal Order in International Law: An In- and Outside View*, "European Yearboook of International Economic Law" vol. 8 2017, p. 164. In fact, there have been only five such cases – ICJ judgment of 20 June 1959 in case *Sovereignty over Certain Frontier Land (Belgium v. Netherlands);* ICJ judgment of 20 February 1969 in case *North Sea Continental Shelf (Germany v Denmark)*; ICJ judgment of 3 February 2012 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* where Germany expressly informed the tribunal that the EU law had nothing to do with this case and ICJ order of 5 April 2011 in case *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland)*, where Belgium was eventually decided to discontinue the proceedings and the pending proceedings in the case *Questions of jurisdictional immunities of the State and measures of constraint against State-owned property (Germany v. Italy)*, all the materials available at https://www.icj-cij.org/en/case/183, accessed on 22 August 2022.
[48] PCA case 2003-02 *Iron Rhine Arbitration (Belgium/Netherlands)*, all documents available at: https://pca-cpa.org/en/cases/1/, accessed on 22 August 2022.

proceedings being decided on merits.[49] Likewise, except for the WTO system discussed in section 6.3 below, the EU is rarely a party to disputes with third states.[50] In any case, this effective substitution of other international mechanisms by the EU law had something to do with the real threat of "punishment" for initiating proceedings outside of the EU framework taking the form of infringement proceedings.[51] This deterrent is clearly absent in the case of individuals.

1.3.2. Practical relevance of the distinction between the mechanisms accessible to the states and the individuals: A tale of two cases

The profound difference between the legal effect of mechanisms accessible to private parties and solely the states may be best illustrated by comparing two distinct cases where the international tribunals asserted jurisdiction despite the EU's resistance. The first one concerned a UNCLOS arbitration between the UK and Ireland (*Mox Plant* case), i.e. an inter-state case. The latter concerns an investment dispute between a Swedish investor and Romania (*Micula case*), i.e. a dispute between a state and a private party. While the Commission's swift action resolved the imminent conflict in the first of them, the latter has run into a legal quagmire. Consequently, even a cursory review of both sets of proceedings should allow to illustrate the differences between the two kinds of dispute-settlement mechanisms.

The CJEU *Mox Plant* judgment resulted from a set of proceedings initiated by Ireland against the United Kingdom under the umbrellas of international instruments relating to protecting the marine environment, namely the United Nations Convention on the Law of the Sea (UNCLOS) and OSPAR.[52] In sum, Ireland brought cases against the UK before the International Tribunal for the Law of the Sea ("**ITLOS**"), as well as OSPAR and UNCLOS arbitral tribunals. Despite

[49] There is also a specific case of Slovenia-Croatia dispute initiated already before their accession and expressly recognized in their instruments of accession, see Final Award of 29 June 2017 in case *Arbitration Between the Republic of Croatia and the Republic of Slovenia,* PCA Case No. 2012-04; certain matters related to this dispute were later adjudicated upon by the CJEU, see section 4.4. below.

[50] E.g. the last proceedings against EU Member States (initiated in connection with implementation of an EU-regulation) within the framework of ICAO was initiated by the US in 2000 and, eventually, ended up in a settlement rather than a decision by the dispute settlement body, see Izabela Kraśnicka, *Rozstrzyganie sporów w międzynarodowym lotnictwie cywilnym: „ambitne marzenie" a rzeczywistość,* in*:* Ewelina Cała-Warcinkiewicz (ed.), *Prawo Międzynarodowe. Idee a rzeczywistość*, CH Beck Warszawa 2019, pp. 340-341. This pertains also to disputes involving the EU acting by the medium of its Member States, as exemplified by the ICJ Judgment of 4 December 1998 in *Fisheries Jurisdiction (Spain v. Canada),* where the World Court eventually denied jurisdiction due to Canada's reservations, see Esa Paasivirta, *The European Union and the United Nations Convention on the Law of the Sea*, "Fordham International Law Journal" vol 38 4/2015, p. 1055. See also Christina Binder, Jane A. Hofbauer, *op. cit.*, p. 165.

[51] Aneta Wilk, *Dialog TSUE z sądami międzynarodowymi o zakresie jego jurysdykcji w świetle art. 344 TFUE,* in: Anna Wyrozumska (ed.) *Granice swobody orzekania sądów międzynarodowych*, Łódź University Press Łódź 2014, p. 279.

[52] The case will be subject to a more detailed examination in section 6.2.2. below.

the UK raising EU-related jurisdictional objections in all of the aforesaid fora, none of them denounced jurisdiction – the ITLOS did exercise unrestricted temporary jurisdiction, OSPAR tribunal decided the case on merits. The UNCLOS tribunal decided to stay proceedings only upon being informed by both parties of a possible conflict with EU law, which would require the CJEU's intervention. But this suspension motion was all but accidental – it resulted from the Article 258 infringement proceedings against Ireland initiated in the aftermath of the UK's complaint to the Commission. And the UNCLOS tribunal, while eager to know the CJEU's position, asserted its *prima facie* jurisdiction and upheld provisional measures against the UK. The proceedings were not renewed before the CJEU rendered its judgment. In its landmark *Mox Plant* ruling, the CJEU decided that Ireland did violate the autonomy of EU law by resorting to the UNCLOS tribunal. In effect, both Ireland and the UK petitioned the UNCLOS tribunal to terminate the proceedings, which it eventually did. And this was it – the external tribunal's assertion of jurisdiction in contradiction to EU law was neatly remedied by forcing an unruly Member State to drop its case by instigating infringement proceedings under Art. 258 TFEU.

The story of *Micula* litigation could not have been more different.[53] The story began in the wake of Romania's accession to the EU when the state was forced to revoke specific incentives due to their incompatibility with the state aid rules. Micula brothers, i.e. the investors affected by the revocation of the stimuli, responded by initiating investment proceedings. While Romania has not addressed EU law issues in the jurisdictional stage[54], it has relied on the primacy of EU law, particularly state aid law, vis-à-vis investment treaties in the merits stage.[55] To this end, it was supported by the Commission.[56] The tribunal, however, did not consider EU law to be applicable, not to mention enjoying primacy over the provisions of the relevant BIT.[57] Eventually, the tribunal rendered an ICSID award granting the Romanian investors 376,433,229,00 RON with interest, mirroring the sum of incentives taken back in accordance with EU law. By their very nature, ICSID awards are enforceable before national courts in the same manner as final judgments of national courts. Romania, however, tried to annul the award based on article 54 ICSID Convention. ICSID annulment Committee eventually dismissed Romania's arguments. Interestingly, it was only in the annulment

[53] The peculiarities of international investment law and its liaisons with EU law are discussed in Chapter 10 below.
[54] Decision on Jurisdiction and Admissibility of 24 September 2008 in case *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20.
[55] Final Award of 13 December 2013 in case *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,* ICSID Case No. ARB/05/20, paras 313-315.
[56] *Ibid.*, paras 316-317.
[57] *Ibid.*, paras 318-329.

proceedings that the Commission raised the argument on the inapplicability of the BIT ISDS clause as contradicting the principle of autonomy of EU law. As the argument was allegedly raised belatedly by the Commission acting as a third-party intervener rather than Romania, the tribunal practically ignored it.[58] While Romania was initially ready to satisfy the investors, the Commission forbade it to do so due to the perceived single market distortions, which eventually resulted in a state aid decision designating the awarded sum as unlawful state aid.[59] This decision was later appealed to the CJEU by Miculas. While the Court quashed the decision for intertemporal reasons[60], it was immediately appealed to the Court of Justice, which decided to override the earlier decision, largely in concordance with AG Szpunar's opinion.[61]

In any case, even pending annulment proceedings before the CJEU did not prevent the investors from attempting to enforce the award. Faced with Romania's defiance, the investor tried enforcing the award in various EU and non-EU jurisdictions. Luxembourgish[62], Swedish[63] and Belgian[64] courts refused the enforcement of the award as conflicting with the EU state aid law. On the other hand, US courts brushed aside Romania's pleadings and the Commission's interventions, unanimously upholding Miculas' enforcement motions.[65] What is more, the example of the UK courts (at that time an EU Member State) demonstrates that even the EU courts could prioritize investment obligations before the EU law obligations. While the High Court stayed the enforcement to lift it completely[66], the Court of Appeals quashed its decision: It allowed only a temporary stay until the proceedings were finished before the CJEU.[67] UK Supreme Court went even further by stating that pending appeals proceedings before the CJEU cannot justify even a temporary stay and, consequently, granted leave to enforce the award

[58] Decision on Annulment of 26 February 2016 in case *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*, ICSID Case No. ARB/05/20, paras 328, 339.
[59] European Commission Decision of 30 March 2015 in case SA.38517 (2014/C) (ex 2014/NN) *on state aid implemented by Romania*.
[60] CJEU judgment of 19 July 2019, *European Food and Others v Commission*, case T-624/15, ECLI:EU:T:2019:423.
[61] CJEU judgement of 25 January 2022, *European Food and Others v Commission*, case C-638/19 P, ECLI:EU:C:2022:50, Opinion of AG Szpunar of 22 April 2021, *Micula*, case C-638/19 P, ECLI:EU:C:2021:529.
[62] Luxembourg Supreme Court Judgment of 21 March 2018 in case No. 71/18-VII-REF.
[63] Nacka District Court decision of 23 January 2019 in case Ä 2550-1.
[64] Brussels Court of Appeals judgment of 21 March 2019 in case 2016/AR/393. The court decided to make preliminary reference to the CJEU and suspend the proceedings until the final determination of the legality of the state aid decision by the CJEU.
[65] See in particular Memorandum Opinion of the United States District Court for the District of Colombia of 11 September 2019 in case No. 17-cv-02332 (APM) *Micula v. Government of Romania*, notably emphasising quashing the state-aid decision by the CJEU in paras 28 ff.
[66] Decision of the UK High Court of Justice on Romania's Request to Set Aside the Registration of the ICSID Award of 20 January 2017 in case [2017] EWHC 31 (Comm).
[67] UK Court of Appeals judgment of f 27 July 2018 in case *Micula and others v. Romania*, [2018] EWCA Civ 1801.

immediately.[68] In effect, despite being rendered by an intra-EU investment tribunal ("outlawed" by the *Achmea* judgment) and expressly violating the Commission's state-aid decision, the *Micula* award became enforceable in at least two important jurisdictions (the UK and the US). Furthermore, the existence of any measures capable of effectively preventing the Miculas from enforcing the award, let alone redressing it from them, is debatable, to say the least. Last but not least, the sheer multiplicity of the proceedings in various jurisdictions evidences the difficulties faced by any state wishing to preclude the investors from enforcing an award contradicting the EU law.

Thus, in light of the foregoing, it is clear that while being perfectly capable of preventing the negative consequences of interstate disputes, be it by targeting unruly Member States with infringement proceedings, as evidenced by the *Mox Plant* case, EU law lacks the same powers concerning disputes initiated by the individuals. It is possible to effectively demand without further ado from the Member State to refrain from initiating or to terminate pending proceedings, not to mention abandoning the enforcement of a decision violating EU law. The same is not the case with dispute settlement mechanisms available to individuals, particularly if they are flanked by robust enforcement frameworks. Consequently, it can be reasonably argued that these are the mechanisms accessible to the individuals that generate the most problems in view of the autonomy principle.

1.4.Autonomy: a complicated story

As was already stated in section 1.1 above and is discussed in more detail in the following chapters,[69] a meaningful analysis of the autonomy principle is possible only against the broader background of the EU foreign relations law. The role played by it in the EU legal architecture can be appreciated only after analysing, on the one hand, the challenges posed by the EU being viewed as an international organization from the standpoint of public international law and the modes of reception of the public international law in the EU legal order on the other. These issues shall be thematized in Chapters 2 and 4. At this place, it suffices to say that the main reason behind the autonomy principle is to allow for the control of the influx of international law into the EU legal space and, thus, to secure the preservation of the essential features of EU law. Furthermore, one could speak of both, the *substantive* aspect of this principle, finding expression in the primacy of EU primary law vis-à-vis international law, and the *procedural*

[68] UK Supreme Court Judgment of 19 February 2020 in case *Micula and others v. Romania*, [2020] UKSC 5.
[69] See particularly Chapter 5.

one, connected to the exclusive jurisdiction of the CJEU. And, in fact, one could argue that safeguarding the substantive primacy of EU law is conditional upon the CJEU acting as the court of the final word.

In such circumstances, one may reasonably maintain that international dispute settlement mechanisms accessible to individuals are *prima facie* capable of posing challenges to the autonomy principle. After all, as is discussed in more detail in Chapter 3 below, such dispute settlement bodies would not necessarily recognize all the peculiarities of the EU law, not to mention limiting the effectiveness of their constituent instruments for the sake of preservation of the autonomy of EU law. It follows that it could very well happen that a private party dissatisfied with the results yielded by the EU justice system would try to relitigate its case before the external bodies, and these bodies would decide the matter in a manner tackling with fundamental principles of EU law. Actually, as will be demonstrated in Part II, this is precisely what happened on more than one occasion. Therefore, it is all but surprising that the autonomy principle, by necessity, has to limit private parties' access to international dispute settlement mechanisms.

Granted the blurred contours of this principle, however, answering the question of what exact limitations this principle seeks to impose is no straightforward issue. After all, the autonomy principle not being expressly written into the treaties is the creation of the CJEU. In effect, determining what limitations it imposes on the private parties' access to international dispute-settlement mechanisms would require meticulous analysis of the relevant jurisprudence of the Luxembourg court. And this is precisely this issue that constitutes the very heart of this dissertation, and shall be thoroughly disputed in its Part II.

Chapter 2: International identity of the European Union

2.1.Introduction

Before going further into detail, it is necessary to reflect on the essential features of the relationship between the EU and international law. Understanding how decisions of international dispute settlement bodies may interact with the autonomy of EU law is impossible without a prior understanding of the logic underlying the EU's embeddedness in the international legal order. To this end, in section 2.2. I shall analyse the consequences of the EU's character as an international organisation, including having a distinct legal personality and being bound by customary international law. In section 2.3. I shall touch upon the consequences flowing from the fact that both the EU and its Member States act are distinct subjects of international law, particularly in the field of international responsibility. Particular attention will be dedicated to the problems surrounding the possible divergences between the assessment of competence division under EU and international law. This chapter shall end with preliminary conclusions

2.2.The EU as an international organisation

The legal nature of the EU belongs to routine matters of discussion for European lawyers. A number of scholars underline the particular character of many features of the EU legal system. Consequently, one may either speak of the "exceptional nature" of the EU's legal order;[70] or highlight the parallels between EU law and national constitutional laws.[71] All this, however, cannot cover the fact that the EU is constituted by international treaties, with the Member States retaining their position as their "masters".[72] Consequently, rather unsurprisingly, from the

[70] Notably, this idea was embraced on many occasions by the CJEU itself, see e.g. CJEU Opinion of 14 December 1991, *EEA*, Opinion 1/91, ECLI:EU:C:1991:490, para 21. See also Jed Odermatt, *International Law and the European Union*, CUP Cambridge 2021, p. 3.

[71] Most exemplary for the constitutionalist viewpoint would be an in-depth study Armin von Bogdandy, Jürgen Bast (eds.) *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüzge,* 2nd ed., Springer, Heidelberg [et. al] 2009; see also Andreas Bergmann, *Zur Souverenitätskonzepzion des Europäischen Gerichtshofs*, Mohr-Siebeck, Tübingen 2018, p. 233 ff. It has to be stressed in partiuclar, that many of the EU's pecularities, in particular relatively strong executive apparatus (though less elaborate than in EU) may be found also in other international organizations, see Eduardo Chiti, *EU and Global Administrative Organs*, in: Eduardo Chiti, Bernardo Matarella (eds.), *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison*, Springer Berlin Heidelberg 2011, pp. 13-40.

[72] Tadeusz Wasilkowski, *Stosunek wzajemny: porządek międzynarodowy, prawo międzynarodowe, europejskie prawo wspólnotowe, prawo krajowe*, Dom Organizatora Toruń 2009, pp. 204-208, 211; Juliane Kokott, *Artikel 47 EUV*, in: Rudolf Streinz, Walther Michl (eds.) *Vertrag über die Europäische Union Vertrag über die Arbeitsweise der Europäischen Union. Charta der Grundrechte der Europäischen Union*, CH Beck München 2018, para 10 (the author, though, is aware of the far-reachung constitutionalization processes). Jerzy Kranz, however, underscores that the existence of a multilevel ("wielopoziomowy") legal system within the EU does not suffice to make it into a federal state, not to say a sovereign entity (Jerzy Kranz, *Pojęcie suwerenności we współczesnym prawie międzynarodowym,* Elipsa Warszawa 2015, pp. 203-207, 216). Some authors further stress that this link to

international law perspective, the EU tends to be viewed as an international organisation rather than a federal state or a kind of a strange *sui generis* Frankenstein monster.[73] This conclusion finds its expression, among others, in the EU's participation in international agreements in the character of a "regional economic integrational organisation" ("**REIO**").[74] Indeed, one may explain many of the essential features of the EU, such as its regulatory powers or powerful institutions, etc., also in the categories of international law.[75] Conversely, acknowledging the character of EU law as a subspecies of public international law does not have to result in depriving it of any of its specific features.[76] Granted the above, one may assume that despite all its peculiarities, the EU cannot be classified as a state, and its autonomy could also be explained by the reference to its functionality as a tool for deepening European integration.[77]

Last but not least, what matters is how the EU is perceived by external actors, including (international) dispute settlement bodies. An overview of their practice would show that they view the EU as a kind of international organisation (even if somewhat specific) rather than

international law is renewed each time the Member States modify their treaties, see Michał Stępień, *Znaczenie prawa międzynarodowego dla funkcjonowania UE,* in: Cała- Warcinkiewicz Ewelina, Menkes Jerzy, Staszewski Wojciecj Szczepan (eds.), *W jakiej Unii Europejskiej Polska – jaka Polska w Unii Europejskiej. Instytucjonalizacja Współpracy Międzynarodowej,* CH Beck Warszawa 2020, pp. 13-24.

[73] See f.e. International Law Commission *Report of the study group on the fragmentation of international law*, ILC Report A/61/10, 2006, para 219; Władysław Czapliński, Anna Wyrozumska, *op. cit.*, p. 493. For other views see f.e. Delano Verwey emphasising the irreversible transfer of sovereignty as EU's defining difference, idem. o*p. cit.*, p. 16 and emphasising the intrinsic difference between the EU and other international organizations (p. 86 ff.); but see Maria M. Kenig-Witkowska., *Unia Europejska w świetle prawa międzynarodowego,* in: Elżbieta Mikos-Skuza, Katarzyna Myszona-Kostrzewa, Jerzy Poczobut (eds.), *Prawo międzynarodowe - teraźniejszość, perspektywy, dylematy. Księga Jubileuszowa Profesora Zdzisława Galickiego*, Wolters Kluwer Warszawa 2013, pp, 515-528, who emphasises the duality of perspectives (EU's own internal perspective, affirmative of the special nature of EU law and external perspective of public international law, treating the EU as an international organization). In any case, this acknowledgment does not preclude accepting that even as a REIO, the EU has certain specific features differentiating it from other international agreements, see Carolin Damm, *Die Europäische Union im universellen Völkergewohnheitsrecht,* Mohr Siebeck Tübingen 2016, p. 21.

[74] See e.g. Article 1.3 Energy Charter Treaty of 17 December 1994, UNTS vol. 2080, p. 95 ("**ECT**") tailored specifically for the EU and, therefore, reflecting certain peculiarities of its internal constitution, but see also less specific Article XXI.2 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973, UNTS vol. 243, p. 993 (joined by the EU on 9 July 2015), see also Delano Verwey, *op. cit.*, p. 181; Jed Odermatt, *International Law…*, pp. 18 ff.

[75] One could speak of international organization *sui generis*, distincted by the *degree of sovereign powers transfer* from the Member States; *density* of the legislative activity and the direct effect in national legal orders (Stephanie Schmal, *Die Internationalen und die Supranationale Organisationen,* in: Wolfgang Graf Vitzthum, Alexander Proelß, *Völkerrecht,* 8th ed., De Gruyter Berlin-Boston 2019, p. 455); similarly Herdegen, invoking the concept of the *supranational* organization, Matthias Herdegen, *Völkerrecht,* 18th ed., München Beck 2019, p. 107; or Friederike Kaiser, *Gemischte Abkommen im Lichte bundesstaatlicher Erfahrungen,* Mohr Siebeck Tübingen, 2009, p. 7; all these bases on relatively early jurisprudence of the German Federal Constitutional court, see German Federal Constitutional Court decision of 18 October 1967 in cases 1 BvR 248/63 und 216/67, "Entscheidungen des Bundesverfassungsgerichts", vol. 22 p. 296; From such a perspective, the EU's uniqueness would consists not in the particular features, but rather their degree, see e.g. see also Jed Odermatt, *International Law…*, p.11.

[76] See, in particular ,Rudolf Streinz, *Europarecht,* 11th ed., CF Müller Heidelberg 2019, pp 50-51. See also Chapter 5 below.

[77] Sophie Barends, *Streitbeilegung in Unionsabkommen und Europäisches Unionsrecht*, Mohr Siebeck Tübingen 2019, pp. 23, 28 ff.

anything else.[78] The EU's self-understanding on external fora confirms this conclusion, as the Commission often refers to the EU as an international organisation (even if endowed with particular features).[79] As shall be demonstrated below, by doing so, the Commission acted in concordance with the CJEU's jurisprudence treating the EU as an international organisation.[80]

Consequently, it follows that despite all its distinctive features, from the standpoint of public international law, the EU should be treated as an international organisation.

2.3.The EU and its Member States as subjects of international law

2.3.1. The EU's and the Member States as distinct subjects of international law

Having established that the EU should be viewed as an international organisation, one should think of consequences flowing therefrom. The most obvious would be the distinct legal personality of the EU and its Member States. Today it is commonly accepted that international organisations may count among subjects of international law, be it only due to their *derived* public international law personality.[81] International Court of Justice ("**ICJ**") *United Nations* opinion, where the ICJ connected United Nations ("**UN**") legal personality with mainly functional grounds, should serve as the prime example here.[82] Arguably, since the beginning of the European integration, particularly in light of the *van Gend & Loos* judgment,[83] the functional considerations driving the ICJ's opinion were fully applicable to the Communities

[78] Christina Binder, Jane A. Hofbauer, *op. cit.*, pp. 140-142. See also Maria M. Kenig-Witkowska fn. 73 above. A detailed analysis of external bodies' jurisprudence will be presented in the following chapters. But see opposing view, invoked in Cezary Mik, *Fenomenologia regionalnej integracji państw. Studium prawa międzynarodowego. T. II: Regionalne organizacje integracyjne z perspektywy analitycznej prawa międzynarodowego,* CH Beck Warszawa 2019, p. 714, see also Jed Odermatt, *International Law…*, pp. 7, 75.

[79] See e.g. EU's Memorial on Jurisdiction and Request for Bifurcation of 15 September 2020 in case *Nord Stream 2 AG v. European Union*, PCA Case No. 2020-07, https://www.italaw.com/sites/default/files/case-documents/italaw11843.pdf, accessed on 22 August 2022, paras 195 ff.; Final Brief for Amicus Curiae the European Commission in Support of Reversal of 23 March 2020 in case *Micula* (In The United States Court of Appeals For The District of Columbia Circuit) https://www.italaw.com/sites/default/files/case-documents/italaw11503.pdf, accessed on 2 April 2022, p. 7. For a more throughout analysis of earlier practice see Christina Binder, Jane A. Hofbauer, *op. cit.*, pp.149-151.

[80] See in particular CJEU Opinion of 18 December 2014, *European Convention on Human Rights,* Opinion 2/13, ECLI:EU:C:2014:2454,para 156; CJEU judgment of 5 April 2022, *Commission v Council*, ECLI:EU:C:2022:260, C-161/20, paras 54 ff.

[81] ICJ Advisory Opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, pp 178-179; ICJ Advisory Opinion of 8 July 1996 on *The legality of the Use by a State of Nuclear Weapons in Armed Conflict*; para 25; Marcel Kau, *Der Staat und der Einzelne als Völkerrechtssubjekte,* in: Wolfgang Graf Vitzthum, Alexander Proelß, *Völkerrecht,* 8th ed., De Gruyter Berlin-Boston 2019, p. 172. One may contrast full subjectivity of states with *partial* subjectivity of other actors, such as individuals and international organizations, Matthias Herdegen, *op. cit.*, p. 77.

[82] Stephanie Schmal, *op. cit*., p. 368; Władysław Czapliński, Anna Wyrozumska, *op. cit.*, pp. 429-434.

[83] CJEU judgment of 5 February 1963 in, case C-26/62 van Gend en Loos, case C-26/62, ECLI:EU:C:1963:1, p. 12.

(the EU initially had no legal personality).[84] Institutional independence and separateness of its organs from those of its Member States have been particularly prominent features of the EU.[85] Having said that, one should remember that due to international organisations being only secondary subjects of international law, their legal capacity, the scope of their responsibility etc., should be analysed in relation to the particular documents creating them, namely the Treaties.[86] This pertains also to the EU. At the same time, however, its legal position as a subject of public international law will be largely determined by the pre-existing norms of customary international law.[87] This is reflected by the CJEU's apparent recognition of both the Vienna Convention on the Law of Treaties ("**VCLT**")[88] and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ("**VCLT IO**")[89] as the embodiment of customary international law applicable to the actions of EU.[90] Actually, this recognition of the role of international law for the EU is corroborated by and contributing to the EU's friendliness towards international law (or, at least, should be).[91]

EU's capacity to act as a subject of international law is now stipulated in Article 47 of the Treaty on European Union ("**TEU**"),[92] but it was recognised by the CJEU already in its earlier jurisprudence, even in the absence of express treaty language.[93] More importantly, this legal personality (at that time of the EC) was relatively early recognised by the external actors (with

[84] See Juliane Kokott, *Artikel 47 EUV…*, para 2. But see also Stephanie Schmal, hinting that with the exception of UN, legal personality of other organizations for third parties is dependent on its recognition by the relevant states *op. cit.*, p. 369; in this context Matthias Herdegen speaks of *relative subjectivity* of international organizations, as opposed to *absolute* subjectivity of states; Matthias Herdegen, *op. cit.*, p. 77; see also Rudolf Streinz, *Europarecht,* 11th ed., CF Müller Heidelberg, 2019, p. 525.

[85] Werner Schroeder, *Die Europäische Union als Völkerrechtssubjekt,* „Europarecht" Beiheft 2/2012 *Die Europäische Union im Völkerrecht,* p. 12. The issue with EU was more problematic in the pre-Lisabon context; after the Treaty it has lost its relevance (*ibid.* pp 16-17), see also Delano Verwey, *op. cit.*, p. 6, 64 ff, 71.

[86] Stephanie Schmal, *op.cit.*, p. 370 ff.; Matthias Herdegen, *op. cit.*, pp. 101, 107 ff.

[87] Carolin Damm, *op. cit.*, pp. 57, 68; Delano Verwey, *op. cit.*, p. 157.

[88] Vienna Convention on the Law of Treaties of 23 May 1969, UNTS, vol. 1155, p. 331.

[89] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations signed at Vienna of 21 March 1986, A/CONF.129/15 (not entered into force). As to its character as codification of customary international law see Delano Verwey, *op. cit.*, p. 88.

[90] CJEU judgment of 10 January 2006, *IATA,* case C-344/04, ECLI:EU:C:2006:10, para 40; CJEU judgment of 22 January 1997, *Opel v Council of the European Union,* case T-115/94, ECLI:EU:T:1997:3, paras 76, 86; see also interviews with EU's official mentioned in Delano Verwey, *op. cit.*, fn. 13 on p. 88; Carolin Damm, *op. cit.*, pp. 88, 91.

[91] Carolin Damm, *op. cit.*, p. 253.

[92] Consolidated version of the Treaty on European Union, OJ EU C 326, 26.10.2012, p. 13–390. It has to be stressed that before merging the EU and the Communities, the latter's' international legal personality was expressly recognized as early as in the Rome Treaty, see Treaty establishing the European Economic Community of 25 March 1957, Article 210.

[93] Rudolf Mögele, *Artikel 216,* in: Rudolf Streinz, Walther Michl (eds.) *Vertrag über die Europäische Union Vertrag über die Arbeitsweise der Europäischen Union. Charta der Grundrechte der Europäischen Union,* CH Beck München 2018, para 3. Nonetheless, before Article 47 this was not uncontested, see Rudolf Streinz, *Europarecht,* 11th ed., CF Müller Heidelberg, 2019, p. 525.

the notable exception of the Soviet Union).[94] Furthermore, due to the broad interpretative powers of the CJEU, in practice, the derivative character of the EU's personality would be diminished, as the EU itself (more specifically, the CJEU) would define the exact scope of its derivative personality and obligations.[95]

Conversely, this has not deprived the EU Member States of their legal personality and status as subjects of international law. One could contemplate, at most, discussing whether their membership in the EU limited their international legal capacity. Nonetheless, even such a view would also be far-fetched, at best. After all, the Member States are still subjects of international law on their own, acting in their capacity, with the EU being merely a new entity.[96] Consequently, the existence of the EU exclusive competence as such would not affect the public international law binding effect of the Member States' international treaties.[97] In any case, even without denying that the outcome of this theoretical debates may have quite an impact on our assessment of the CJEU's jurisprudence related to international-law ,[98] it has to be stressed that the Member States are still capable of entering into international agreements, breaching their own international obligations and incurring their own responsibility. These issues shall be thematised in more detail in the following chapters dedicated to selected dispute-settlement mechanisms.

2.3.2. The EU and its Member States' international responsibility

As established above, the EU and its Member States are distinct subjects of international law. Consequently, each of them may incur liability on its own account. Furthermore, while perfectly valid under international law, their obligations may nonetheless conflict with each other. This "split" in legal personality somewhat mirrors the division of competences between the EU and its Member States on the internal level: As a matter of EU law, the EU cannot conclude agreements related to issues lying outside of its powers. Consequently, in many instances, the EU has to act jointly with its Member States. This, in turn, leads to further problems with apportioning the responsibility between the EU and its Member States which has been one of the main issues examined in the CJEU's autonomy related jurisprudence.

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[94] Rudolf Mögele, *Artikel 216…*, para 4. Werner Schroeder, speaks even of „*universal effects of EU's legal personality*, idem. *op. cit.*, p. 20, in similar vein Juliane Kokott, *Artikel 47 EUV…*, para 6.
[95] Werner Schroeder, *op. cit.*, p. 19.
[96] Tobias Lock, *The European Court of Justice and International Courts*, OUP Oxford 2015, pp. 154-155.
[97] Rudolf Streinz, *Europarecht*, 11th ed., CF Müller Heidelberg, 2019, p. 529.
[98] Matthias Kottmann, *Introvertierte Rechtsgemeinschaft*, Springer Heidelberg 2014, pp. 281-2.

I shall begin by analysing the relevant principles of international law. As already explained above, the EU is by its very nature bound by provisions of customary international law. It follows that in the effect of their separate legal personalities, as a matter of principle, member states are not bound by the agreements concluded by the international organisations and vice-versa.[99] As expressed in Article 36bis VCLT IO,[100] the member states may be bound by a treaty concluded solely by their organisation only if the treaty foresees so; the member states expressed consent to be bound by the treaties and the other parties to a given agreement were cognizant of this fact. Consequently, in case of joint participation of both, an organisation and its members it may become necessary to delimitate between the responsibilities of the organisation and its members. This process would be guided by the international law. In the lack of a comprehensive treaty framework, this issue is governed by the customary international law, largely reflected by the ILC Draft articles on the responsibility of international organisations ("**DARIO**").[101] Arguably, the International Law Commission ("**ILC**") seem to have opted for determining the international responsibility by indicating the responsible actor.[102] Thus, the basic rule of these Draft articles is that an organisation bears its own liability for its wrongdoings,[103] and its members may subsidiarily be held responsible only in limited circumstances.[104] However, to make the case more complicated, an international organisation may be held responsible also in cases where it *de facto* deprived the state committing the

[99] Anna Czaplińska, *Odpowiedzialność organizacji międzynarodowych jako element uniwersalnego systemu odpowiedzialności międzynarodowoprawnej*, UŁ University Press Łódź 2014, p. 250.

[100] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, A/CONF.129/15 (not entered into force).

[101] ILC Draft articles on the responsibility of international organizations with commentary (2011), A/66/10, Armin Steinbach, *EU Liability in International Economic Law*, Hart Oxford et al. 2017, p. 141; Carolin Damm, *op. cit.*, p. 89; Anna Czaplińska, *Odpowiedzialność organizacji międzynarodowych…*, p.119.

[102] See Chapter II DARIO on attribution, in particular Articles 6 (responsibility for conduct of the organization's organs) and 7 (responsibility for conduct effectively controlled by an organization). Numerous references to the European Convention on Human Rights and the Strasbourg Court jurisprudence (see e.g. commentaries 10 ff. to Article 7) suggest that the ILC relied heavily on the latter's jurisprudence, see Pieter Jan Kujiper, Eva Paasivirta, *EU international Responsibility and its Attribution: From the Inside Looking Out*, in: Malcolm Evans; Panos Koutrakos (eds.), *The International Responsibility of the European Union. European and International Perspectives*, Hart, Oxford et al. 2013, p. 66-67. Interestingly, the authors maintain that in doing so the ILC opted for solutions incapable of grasping the particular character of the EU, while ignoring more suitable ones (*ibid.*, pp. 49-66).

[103] ILC Draft articles on the responsibility of international organizations with commentary (2011), A/66/10, Article 3: *Every internationally wrongful act of an international organization entails the international responsibility of that organization*..

[104] ILC Draft articles on the responsibility of international organizations with commentary (2011), A/66/10, Article 62: *A State member of an international organization is responsible for an internationally wrongful act of that organization if: (a) it has accepted responsibility for that act towards the injured party; or (b) it has led the injured party to rely on its responsibility. 2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.*

wrongdoing of its freedom of action.[105] Arguably, by opting for an overly lax solution, the ILC failed to take into account the particular nature of the EU, being itself a REIO acting mainly through its Member States rather than its own organs,[106] thus leaving scarcely any guidance for cases involving EU law.[107] Nonetheless, one should be mindful that given the character of the above principles as customary international law, it is always possible to introduce solutions tailored to the needs of the treaty parties by more specific treaty instruments. In the absence of such special rules, however, any external adjudicating body would be largely left in the dark as to how to apportion the responsibility between the EU and its Member States, thus risking violating division of competences within the EU.

This vagueness should be least problematic in the context of EU only agreements, where the EU bears the exclusive responsibility for possible breaches of international law with no residual responsibility of its Member States.[108] Furthermore, the EU may assume responsibility for the actions of its Member States.[109] Interestingly, this may also happen within the framework of proceedings where the EU was not a party, but merely an intervener, as exemplified by the International Tribunal for the Law of the Sea ("**ITLOS**") *Fisheries* Advisory Opinion. In these proceedings the ITLOS decided to follow EU's observations and find it exclusively responsible for any wrongdoings along the lines of the division of internal competences.[110]

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[105] ILC Draft articles on the responsibility of international organizations with commentary (2011), A/66/10, Chapter IV. The fact, that the ILC invokes extensively the case law of ECtHR regarding responsibility of EU Member States for breaches of Convention during application of EU law as relevant for this chapter (Commentary 4 to Chapter IV) suggests, that at least in specific circumstances the provisions of the Chapter could be applied to states enforcing EU law.

[106] For general analysis of this *decentralized enforcement* see Marta Kisielewska, *Zasada legalności działania organów administracji publicznej w multicentrycznym systemie prawa,* IWEP Warszawa 2018, pp. 144 ff.. In any case, it has to be stressed that also in situations of the EU acting through its own organs, such as the competition proceedings, may demand involvement of Member States's courts or other authorities, see Gunnar Kallfaß, *Durchsetzung des Unionsrechts in den Mitgliedstaaten – am Beispiel des Kartellrechts*, "Europarecht" vol 53 2/2018, p. 180. See also Jed Odermatt, *International Law…*, pp. 209, 227.

[107] Pieter Jan Kujiper, Eva Paasivirta, *op. cit.*, pp. 38, 68. Similarly Andrés Delgado Casteleiro, Joris Larik, *The 'Odd Couple': The Responsibility of the EU at the WTO* in: Malcolm Evans; Panos Koutrakos (eds.), *The International Responsibility of the European Union. European and International Perspectives,* Hart, Oxford et al. 2013, p. 244; see also Bartłomiej Krzan, *The International Responsibility of the European Union in Light of Codification Efforts of the International Law Commission,* "Polish Review of International and European Law" vol 2 2/2013, p. 43.

[108] Juliane Kokott, *Artikel 47 EUV…*, paras 33-37; Sophie Barends, *op. cit.*, p. 264.

[109] Article 9 of ILC Draft articles on the responsibility of international organizations with commentary (2011), A/66/10, allowing international organizations to assume responsibility for acts of its member states, see also Rudolf Mögele, *Artikel 216…*, para 51.

[110] ITLOS Advisory Opinion of 2 April 2015 on the request submitted by the Sub-Regional Fisheries Commission (SRFC), paras 153-174. The proceedings concerned a request for advisory opinion submitted by SFRC, grouping several west-African states. For further references, see Cezary Mik, *o Fenomenologia regionalnej integracji państw …*, pp. 742-743; Luca Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements,* Springer Asser the Hague 2019, p.27. See also Esa Paasivirta, *op. cit.*, p. 1059.

On the other hand, the agreements involving the EU and its Member States seem to pose much more problems, which pertains in particular to the so-called mixed agreements. Mixed agreements are a specific kind of international instrument, allowing for the conclusion of international agreements by the EU and its Member States and third parties in situations where the issues to be regulated fall out of the scope of the EU's competences.[111] Consequently, if a subject matter of a given agreement does not belong to the EU's exclusive competences (or, possibly, an occupied field), such an agreement has to be concluded as a mixed one. Moreover, despite having been immensely popular, the mixed agreements pose unnumberable obstacles. To begin with, the distribution of competences between the EU and its Member States is not necessarily transparent to EU's external partners. In particular, the broad formulation of Article 216.1 Treaty on Functioning of the European Union ("**TFEU**")[112] stipulating the EU's competences grants much space for CJEU's extensive interpretation, especially regarding EU's implied powers.[113] Moreover, the delimitation of competences between the EU and its Member States is not written in stone: It may very well happen that matters once belonging to the jurisdiction of the Member States will eventually become covered by the EU's exclusive competences.[114] Perhaps this problem would still be manageable if the EU regularly updated its

[111] See e.g. Mirka Möldner, *European Community and Union, Mixed Agreements*, in:Max Planck Encyclopedia of Public International Law, entry of May 2011, accessed on 22 August 2022, para 1; R. Mögele [w:] *EUV/AEUV. Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union*, red. R. Streinz, München 2012, art. 216, para 39. At this place, one could only recall that mixed agreements may have both, bi- and multilateral character (Mirka Möldner, *op. cit.*, para 13). It has to be stressed that at least some scholars would count to this category also agreements concluded exclusively by the Member States on behalf of the EU because of the agreement not being open to international organizations (Rafael Leal-Arcas, *The European Community and Mixed Agreements*, „European Foreign Affairs Review" vol. 6 2001/4, p. 485).

[112] Consolidated version of the Treaty on the Functioning of the European Union, OJ EU C 326, 26.10.2012, p. 47–390.

[113] Marise Cremona, *Defining competence in EU external relations: lessons from the Treaty reform process*, in: Alan Dashwood, Marc Maresceau (eds.), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape*, CUP New York 2008, p. 61 f. See also the CJEU's jurisprudence CJEU judgment of 4 September 2014, *Commission v Council* case C-114/12, EU:C:2014:2151, para 92, where the CJEU, while defining the scope of EU's exclusive competences on the basis of the common EU rules concluded that it is the sheer possibility of expanding its application to common EU rules in the future that suffices to recognize the EU's exclusive competences; CJEU Opinion of 14 October 2014, Opinion 1/13, EU:C:2014:2303, paras 72-73, where the CJEU made it clear that in order to establish the danger of altering common EU rules by a given agreement providing reasons for EU's exclusive competences, it suffices that a large part of the agreement pertains to these common rules; CJEU Opinion of 14 February 2017, Opinion 3/15, EU:C:2017:114 that the exclusive competence to protect common EU rules may be recognized also with regard to issues excluded from the requirements of harmonization by the EU secondary law. In fact, this great degree of discretion left to the CJEU prompted some authors to speculate, whether this ambiguity regarding implied competences is not in fact a tool leveraging the CJEU's own power Andreas Bergmann, *op. cit.*, pp. 69, 71.

[114] A good example of such a situation is provided by the *Open Skies* agreement, see e.g. CJEU judgment of 24 April 2007, *European Commission v. Netherlands*, case C-523/04, ECLI:EU:C:2007:244, para 51. For further references, see Jakub Kociubiński, *Proliferencja umów modelu „Otwartego Nieba'' – uwarunkowania liberalizacji sektora transportu lotniczego w Unii Europejskiej*, „Przegląd Ustawodawstwa Gospodarczego" 2015/12, p. 2.

partners on the current state of division of competences,[115] yet this is not the case, even with regard to agreements containing declarations of competences or competence clauses (see infra).

There have been different ways of addressing the challenges posed by the mixed agreements. One of them consists in introducing competence clauses. On the theoretical level, they could provide a viable solution to this conundrum. If a given treaty contained such a clause, the responsibility would be apportioned between the EU and its Member States along the lines indicated therein.[116] There are, however, many practical problems regarding such a solution. Firstly, such clauses have to be inserted into the treaty text by the parties. It follows that, regardless of the issue of their incorporation in the text, their content may be connected rather to negotiating history and the contemporaneous wishes of the parties than real problems with the agreement.[117]

Similar problems pertain to declarations of competences. As for now, little if any established practice regarding operating agreements with declarations of competences exists.[118] Another problem is that in practice, the declarations of competence only rarely meet the specificity threshold allowing for an actual differentiation between EU and MS obligations.[119] Even the UNCLOS clause presented sometimes as an example of a well-tailored solution, while referring to EU legal acts covering the Convention's scope of application, does not provide for a clear division.[120] In any case, this competence clause did not prevent the ITLOS from being seized with jurisdiction and ordering provisional measures in an intra-EU dispute (see section 6.2.2. *infra*). In addition, such competence clauses are updated only rarely, if at all, making them obsolete in case of further development of the EU's competences.[121] Last but not least, it has to

[115] Actually, some authors maintain that the EU should inform its treaty partners on the recent developments regarding their competences even in the absence of a competence clause, on the basis of the sole good faith principle, see Pieter Jan Kujiper, Eva Paasivirta, *op. cit.*, p. 57.

[116] Raphael Oen, *Internationale Streitbeilegung im Kontext gemischter Verträge in der Europäischen Gemeinschaft und ihrer Mitgliedstaaten,* Duncker & Humblot Berlin 2004, p. 53. This seems to be backed by at least some international regulation such as Articles 4-7 Annex IX United Nations Convention on the Law of the Sea of 10 December 1982, UNTS vol. 1833, p. 397. Somewhat similar solution was adopted in the Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351, 20.12.2012, where the EU and the Member States decided to regulate as between them the issues related to the international responsibility of the EU incurred in connection with the extra-EU BITs, see section 10.6. See also Allan Rosas, *The EU and international dispute settlement,* "Europe and the World: A law review" vol 1 2017, p. 25.

[117] Raphael Oen, *op. cit.*, pp. 55-60.

[118] Joni Heliskoski, *EU Declarations of Competence and International Responsibility,* in: Malcolm Evans; Panos Koutrakos (eds.), *The International Responsibility of the European Union. European and International Perspectives,* Hart, Oxford et al. 2013, p. 191.

[119] Joni Heliskoski, *op. cit.*, p. 200, in a similar vein Jed Odermatt, *International Law…*, p. 78.

[120] Joni Heliskoski, *op. cit.*, p. 204

[121] *Ibid.*, p. 206; Esa Paasivirta, *op. cit.*, p. 50.

be stressed that the legal meaning of such competence clauses is limited not only from the standpoint of international law, but as a matter of EU law itself.[122]

Furthermore, legal scholars have made many proposals aiming at providing a complex solution to this issue. For example, it was proposed to treat the EU acting along with its Member States should as an *international law unity* (*völkerrechtliche Einheit*). This proposal was based on the recognition of the EU's capacity to be a party to international treaties along with states as REIO and the practice regarding EU's participation (common position, loyalty between the EU and its Member States etc.)[123]. Such a constellation would preclude an international agreement from producing legal effects as between the EU Member States. Another proposal in the context of mixed agreements concerned differentiation between the bilateral mixed agreements binding EU and its Member States as a unitary party and multilateral mixed agreements which, by definition, could also create some international obligations between the Member States and EU, as well as the Member States themselves[124]. Adopting the above solutions could address the issues connected to the application of mixed agreements as between the Member States. The problem is, however, that they lack any solid normative basis. And, in fact, if to look at the international jurisprudence concerning the mixed agreements, traces of their recognition are not that numerous. Quite the contrary: the binding effect of mixed agreements as between the Member States was recognised both, by the ITLOS in the *Mox Plant* dispute (see sections 6.2.2) and numerous Energy Charter tribunals (see sections 10.2 and 10.5). Even, however, if a precise delimitation between the competences of the EU and its Member States was possible, this would not be able to address the problems related to coupling the international responsibility with the imputability of the harmful action to either the EU or a Member State.

Thus, there is no wonder that various proposals were made in order to bridge this gap. Among EU law scholars, there was an observable tendency to expand the scope of application of the EU internal rules to the external treaty parties. The one that goes the furthest proposes to treat

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[122] CJEU judgment of 8 March 2011, *Lesoochranárske zoskupenie,* case C-240/09, ECLI:EU:C:2011:125, para 35, where the CJEU ignored the issue of declarations of competences while establishing the EU's competence. See also Matthias Müller, *Das Rechtsprechungsmonopol des EuGH im Kontext völkerrechtlicher Verträge. Untersucht anhand der Rechtsprechung des Gerichthofs der Europäischen Union, Nomos Baden-Baden 2012*, pp. 118, 189-191, underlinig the role of primacy of EU law and the clauses' lack of effect in the *Mox Plant* case and Andrés Delgado Casteleiro, *EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?*, „European Foreign Affairs Review" vol. 17 4/2012, pp. 491 – 509.

[123] Vera Rodenhoff, *Die EG und ihre Mitgliedstaaten als völkerrechtliche Einheit bei umweltvölkerrechtlichen Übereinkommen,* Nomos Baden-Baden 2008, pp. 218, 326-327. See also similar concept of „community group" (*Gemeinschaftsgruppe*), Raphael Oen, *op. cit.*, p. 15.

[124] Raphael Oen, *op. cit.*, p. 20, Chrisitian Pitschas, *Die Völkerrechtlliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten,* Duncker & Humblot Berlin 2001, p. 239; see also Jed Odermatt, *International Law…*, p. 67.

the EU as a *quasi*-federal state, with the EU assuming international representation and responsibility of its Member States.[125] This analogy based on the EU's practice in the WTO context, where the EU and its Member States regularly have acted jointly while being represented by the Commission.[126] Nonetheless, this proposal seems to be misguided for at least two fundamental reasons. Firstly, it ignores that, at least in external relations, the EU acts as an international organisation, i.e. subject of international law distinct from its member states. Secondly, as shall be discussed more in-depth in section. 6.3. it is based on a biased reading of the WTO dispute settlement body case law. In any case, it lacks meaningful backing in the existing case law or practice. According to a less radical solution, the very fact of accepting the EU as a contracting party to an agreement means a tacit acceptance for opting out from the general liability system in favour of distributing responsibility according to the EU's internal rules.[127] In a similar vein, others propose that the good faith principle (26 VCLT) demands the third states to consider the intra-EU division of competences in the context of international disputes.[128] Lastly, others have militaed for recognising the EU's specific legal nature as a matter of international law (as *lex specialis* between the parties) also by the external actors.[129] Attractive as they may seem, all these theories modifying international responsibility vis-à-vis third parties along the lines of competences-division within the EU seem to be fatally flawed, be it for one simple reason: they take it for granted that the EU's external partners simply have to adjust themselves to the organisation's complex internal realities, even in the absence of any basis in international law. And this expectations seem to run counter not to certain basic principles of treaty law, in particular the prohibition of invoking internal regulations in order to avoid fulfilment of international obligations.[130] In such circumstances, reliance on internal division of competences vis-à-vis the EU's external partners in the absence of explicit treaty

[125] Friederike Kaiser, *op. cit.*, p. 88.
[126] Friederike Kaiser, *op. cit.*, p. 194. For more on the EU's participation in WTO see section 6.3 below.
[127] Chrisitian Pitschas, *op. cit.*, pp. 24, 51. The author further endorsed the procedural solution, according to which EU's treaty partners could always clarify their doubts as to the competences division by asking the Council (regardless of the treaty text), p. 242-3.
[128] Raphael Oen, *op. cit.*, p. 130.
[129] Nikos Lavranos, *The MOX Plant and Ijzeren Rijn Disputes: Which Court Is the Supreme Arbiter?*, "Leiden Journal of International Law", vol. 19 2006, p. 233.
[130] This norm seems to be reflected, among others, by Article 27 VCLT (*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46*.) as well as Article 27.2 VCLT IO and Article 32.1 DARIO, see also, Katia Boustany, Maxime Didat, *Article 27 1986 Vienna Convention* in: Oliver Corten, Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol I, OUP Oxford et al. 2011, paras 3-4.

provisions (or other traces of the parties' intention) would seem to run against the *bona fide* principle.[131]

In any case, the negotiating history of the DARIO, in particular brushing off the Commission's proposals to base the responsibility regime on the division of competences between the organisation and its member states, militate against the blanket application of such a solution.[132] Similarly, the mere possibility of substituting DARIO with more specific instruments agreed on by the parties (Art 64 DARIO) does not seem to lend enough ground for demanding from external partners to implicitly accept a particular responsibility regime while dealing with the EU.[133]

In effect, it would be tempting to agree with the scholars proposing that in case of mixed agreements, the EU and its Member States are responsible jointly in the absence of competence clauses.[134] While there is some basis for this view in the CJEU's jurisprudence,[135] one has to be mindful of different case-law, matching the intra-EU binding effect of mixed agreement with the assumption of responsibilities vis-à-vis these agreements by the EU.[136] Nonetheless, these were internal views of the EU, which have not been reflected in the international jurisprudence of external bodies so far.

Consequently, in light of the aforesaid ambiguities surrounding the apportionment of responsibilities between the Member States and the EU, it has to be stressed that, absent specific treaty provisions, subjecting EU to an external adjudicative mechanism inevitably brings the risk of an external body assessing the intra-EU competence division contrary the provisions of

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[131] Vera Rodenhoff, *op. cit.*, p. 239. Importantly, this reality seems to be recognised also by the CJEU itself. In its recent judgement concerning the EU's representation in IMO, the Court made it clear that the intra-EU division of competences, even if backed by the EU's unilateral declarations, cannot lead to the EU being represented in a way not foreseen in the organisation's constituent instruments, see CJEU judgment of 5 April 2022, *Commission v Council*, ECLI:EU:C:2022:260, C-161/20, paras 63 ff.

[132] Dominik Brunner, *Der „DARIO" – Arikelentwurf über die Verantwortlichkeit Internationaler Organisationen. Eine Kritische Analyse*, Peter Lang Berlin 2018, pp. 234-237; Cezary Mik, *Fenomenologia regionalnej integracji państw...*, p. 733.

[133] Dominik Brunner, *op. cit.*, p. 243; Pieter Jan Kujiper, Eva Paasivirta, *op. cit.*, p. 37.

[134] Armin Steinbach, *op. cit.*, pp. 142, 149; Vera Rodenhoff, *op. cit.*, p. 236-7, 242-3. *Nota bene* the author uses also the term joint and several liability, while not being convinced about analytical usefulness of distinguishing between the two, *ibid* p. 241.

[135] CJEU judgment of 2 March 1994, *European Parliament v Council*, case C 316/91, ECLI:EU:C:1994:76, para 29.

[136] CJEU judgment of 30 September 1987, *Demirel* case C-12/86, ECLI:EU:C:1987:400, para 11; CJEU judgment of 30 May 2006, *Commission v Ireland*, case C-459/03, ECLI:EU:C:2006:345, para 85, see also Allan Rosas, *International Responsibility of EU and the European Court of Justice*, , in: Malcolm Evans; Panos Koutrakos (eds.), *The International Responsibility of the European Union. European and International Perspectives*, Hart, Oxford et al. 2013, p. 153. But see CJEU judgment of 10 January 2006 in case C-94/03 *Commission v Council*, ECLI:EU:C:2006:2, para 55, underlining that by indicating the right legal basis for the treaty, the EU informs its partners on the division of competences, thus implying the external relevance of the latter.

EU law, not rarely of fundamental character[137]. After all, the problems with determining the right party in proceedings before dispute settlement bodies, i.e. deciding on who is to blame for the wrongdoing, was the very central point of the EU's autonomy-related jurisprudence (Opinion 1/91[138] Opinion 2/13, analysed respectively in Chapters 6.2.1. and 9.3.).[139]

2.4. Preliminary Conclusions

In light of the foregoing, following may be said. To begin with, from the perspective of international law, the EU should be treated as an international organization. As such it possesses its own legal personality, distinct from the one of its Member States. As a consequence, it may incur its own obligations and liabilities under public international law. Furthermore, it is the public international law which stipulates the modalities of its functioning in the external relations. Importantly, in the lack of comprehensive treaty regulations, most of these norms are of customary nature and have not been necessarily tailored so as to encompass the EU's particular character. This pertains especially to the rules on the international responsibility. Consequently, there exist a real risk that the application of these provisions would lead to results incompatible with EU law. And, as will be discussed in more detail in the following chapter, the presence of an external treaty-interpreting bodies greatly exacerbates the risks connected to this situation.

[137] Dominik Brunner, *op. cit.*, p. 244.
[138] CJEU Opinion of 14 December 1991, *EEA*, Opinion 1/91, ECLI:EU:C:1991:490, paras 32-35.
[139] Raphael Oen, *op. cit.*, pp. 122-123.

Chapter 3: External dispute settlement bodies as a threat to the autonomy of EU law

3.1. General overview

This chapter serves the purpose of demonstrating that the CJEU's fears related to the threats posed to autonomy by international dispute settlement mechanisms external to the EU are by no means purely hypothetical. As shall be analysed in more detail below, in practice international courts and tribunals act in a somewhat solipsist manner, prioritizing principles specific to their native frameworks over considerations coming from different normative sources. In other words, a human rights court, for example, would be interested in giving full effect to the underlying human rights treaty, while effectively ignoring overlapping provisions of international economic law. In this state of affairs, the respect for the autonomy of EU law on the part of the international dispute-settlement bodies seems to be hardly warranted. Basically, sub-systems of international law form parts of the non-hierarchical structure of international law, thus contributing to its fragmentation, resulting in heterarchical character of the relationship between different international dispute settlement bodies. Consequently, the embeddedness of different bodies in their respective sub-systems results in the inherent threat of replacing the values characteristic of the EU legal system (and building up its autonomy) with the values distinct for these sub-systems.

And this seems to be particularly troublesome, granted the difficulties with the proper delimitation of competences between the EU and its Member States as a matter of international law. It is particularly so, granted that the autonomy principle is internal to the EU and does not necessarily have to be shared by the actors outside of the EU context. This is even more problematic if to take into account that the CJEU performs the double function of the EU's quasi-constitutional court and an international court.[140] Even if the CJEU does not always seem willing to admit its dual nature,[141] as reflected by the selective pattern of its references to

[140] Tobias Lock, *The European Court of Justice…*, p. 76.
[141] Jed Odermatt, *The International Court of Justice and the Court of Justice of the European Union…,* p.8. But see Tomasz Tadeusz Koncewicz, *Zasada jurysdykcji powierzonej Trybunału Sprawiedliwości Wspólnot Europejskich. O jurysdykcyjnych granicach i wyborach w dynamicznej „wspólnocie prawa"*, Wolters Kluwer Warszawa 2009, pp. 115-129.

international law,[142] for external players it is just a specific international court, created within a particular international law regime, interacting with its different counterparts.[143]

To begin with, I would adopt the pluralistic viewpoint according to which the international law is a conglomerate of separate sub-systems of international law rather than a unified, hierarchical system[144] as the starting point.. This general lack of hierarchy (except for *jus cogens*) is coupled with the fact that each of the regimes operates according to the intrinsic logic of its underlying rationale.[145] Consequently, it is to agree with the view that "regime collisions" should be understood as a conflict between their underlying rationales rather than merely a collision of isolated provisions.[146] It follows that providing a smooth interaction between different sub-systems of international law is rather an exercise in balancing their underlying values than a purely technical judicial operation. This led certain scholars to characterise the process of choosing the proper solution as political in nature (*principle of political decision*).[147] Not rarely, however, the space for making the right decision is further limited by the jurisdictional limitations of particular bodies.[148] Additionally, this is accompanied by the existence of epistemic communities centred around the cultivation of the values of their respective sub-systems and not necessarily willing to embrace external values.[149] This self-centred nature of legal regimes makes it rather unlikely that external norms would be used to justify non-compliance with the requirements of particular regimes[150]. In fact, the matters get even more

[142] Jed Odermatt, *The International Court of Justice and the Court of Justice of the European Union…*, *passim*.
[143] International Law Commission *Report of the study group on the fragmentation of international law*, ILC Report A/61/10, 2006, para 221. Christina Binder, Jane A. Hofbauer, *op. cit.*, p 143; Władysław Czapliński, Anna Wyrozumska, *op. cit.*, p. 501.
[144] International Law Commission *Report of the study group on the fragmentation of international law*, ILC Report A/61/10, 2006, *passim*. For an up to date overview of pluaralistic theories see Paul Schiff Berman, *The Evolution of Global Legal Pluralism*, in: Roger Cotterrell, Maksymilian Del Mar (eds.), *Authority in Transnational Legal TheoryTheorising Across Disciplines*, Edward Elgar Cheltencham 2019, pp. 151-181. The opposite view on the hierarchical nature of the international order, advocated first and foremost in Hans Kelsen, *Pure Theory of Law*, the Lawbook Exchange ltd. New Jersey 2005, p. 323 ff., despite its intellectual allure does not reflect the actual practice of international courts and tribunals.
[145] International Law Commission *Report of the study group on the fragmentation of international law*, ILC Report A/61/10, 2006, paras 324, 480; Andreas Fischer-Lescano, Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, "Michigan Journal of International Law" vol 25 4/2004, p. 1013 ff.
[146] See International Law Commission *Report of the study group on the fragmentation of international law*, ILC Report A/61/10, 2006 *passim*; Maria-Fogdestam Agius, *op. cit.*, pp. 32-34, 129, 499; Jan Klabbers, *Treaty Conflict and the European Union*, CUP Cambridge 2009, p. 12; Jed Odermatt, *International Law…*, p. 26 f. To the contrary see e.g. Laurence Boisson de Chazournes, *Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach*, "European Journal of International Law", vol. 28 1/2017, pp. 33 ff.
[147] Jan Klabbers, *Treaty Conflict …*, p. 90; see also Maria-Fogdestam Agius, *Op. cit.*, p. 8.
[148] Armin von Bogdandy, Ingo Ventzke, *In whose name? A public law theory of international adjudication*, OUP Oxford et al. 2010, p. 134 f.
[149] Jan Klabbers, *Treaty Conflict…*, p. 141 f., see also Jed Odermatt, *International Law…*, pp. 23-25.
[150] Maria-Fogdestam Agius, *op. cit.*, p.128.

complicated in case of sub-systems having their own law-interpreting bodies,[151] which typically act as paragons of their constituent systems, interpreting them expansively[152], to the degree of *de facto* exercising law-making function (even, if somewhat limited).[153]

This problem is amplified by the fact that there are no clear-cut rules in international law governing inter-regime interactions. In any case, fragmentary provisions of the Vienna Convention on the Law of Treaties (**VCLT**)[154] do not provide for comprehensive regulation of this issue[155]. This includes the principle of systemic integration identified with Article 31.3.c VCLT[156] which, apparently, does not suffice to address the problems of fragmentation, even if it provides some guidance in this respect.[157] In particular, general international law provides neither for clear-cut jurisdiction-regulating rules nor for an adjudicative instance; in addition most treaties do not provide for clear rules governing the relationship between them or rules on jurisdiction. This lack of universal rules, coupled with the adjudicative bodies' inherent tendency to maintain their jurisdiction,[158] does not provide incentives for elasticity in handling treaty interaction.[159] The problem was summarised in strong terms by the International Criminal Tribunal for the former Yugoslavia (**ICTY**) in its *Tadic* jurisdiction decision: [160]

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[151] On the role of treaty bodies as institutional expressions and drivers of the the fragmentation process see Ewelina Cała-Wacinkiewicz, *Fragmentacja prawa międzynarodowego,* CH Beck Warszawa 2018, pp. 331 ff., 416.

[152] See f.e. International Law Commission *Report of the study group on the fragmentation of international law*, ILC Report A/61/10, 2006, paras 35, 41, 158; Maria-Fogdestam Agius, *op. cit.*, p. 10, 45

[153] See Armin von Bogdandy, Ingo Ventzke, *op. cit.*, pp. 103-111 (the author underlines the role of distinction between judicial and political law-making). See also Anna Wyrozumska, *Prawotwórcza działalność sądów międzynarodowych i jej granice,* in: *idem*, (ed.), *Granice swobody orzekania sądów międzynarodowych*, UŁ University Press Łódź 2014, pp. 19, 71.

[154] Vienna Convention on the Law of Treaties of 23 May 1969, UNTS, vol. 1155, p. 331.

[155] See f.e. Anna Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka*, Prawo i Praktyka Gospodarcza Warszawa 2006, pp. 286-287, see also Jan Klabbers, *Beyond the Vienna Convention: Conflicting Treaty Provisions*, in: Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, OUP Oxford et al. 2011, pp. 192-195.

[156] ICJ Judgment of 6 November 2003 in case *Oil Platforms (Islamic Republic of Iran v. United States of America)*, para 41; Article 31.3.c. VCLT: *There shall be taken into account, together with the context: (...) any relevant rules of international law applicable in the relations between the* parties.

[157] Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, "The International and Comparative Law Quarterly" vol. 53 4/2005, pp. 318 ff., see also cautious optimism of the International Law Commission *Report of the study group on the fragmentation of international law*, ILC Report A/61/10, 2006, paras 479-480. Some authors advocate for naming human rights as the unifying principle according to Article 31.3.c., see e.g. Anne Peters, *op. cit.*, p. 477, but this conclusion seems to be rather far-fetched.

[158] See e.g. PCIJ judgment (Jurisdiction), of 26 July 1927 in case *Factory at Chorzów*, PCIJ Series A. No. 09, p. 30, see also Yuval Shany, *op. cit.*, p. 154; Maria-Fogdestam Agius, *op. cit.*, p. 491.

[159] Thomas Schultz, Niccolo Ridi, *Comity and International Courts and Tribunals*, "Cornell International Law Journal" vol 50 2017, pp. 587-588.

[160] ICTY Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 in case IT-94-1 *Tadić*, para 11. Even if the *formulation* of the dictum could have been found as somewhat extreme, it cannot be denied that it in essence, corresponded with the reality of international adjudication, see Anna Czaplińska *Określanie własnej kompetencji przez sądy międzynarodowe – granica czy przejaw swobody orzeczniczej?* Anna Wyrozumska (ed.) *Granice swobody orzekania sądów międzynarodowych*, Łódź University Press Łódź 2014, pp. 97-98.

International law, because it lacks a centralised structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralised or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).

While it cannot be denied that there exist certain more specific procedural instruments developed within the framework of different international dispute settlement mechanisms, they also do not provide satisfactory solutions. It was argued that essentially there were three main international law instruments designed to address the issue of competing proceedings, arguably also in the inter-systemic context: *res iudicata*; *lis alibi pendens* and *electa una via*.[161] Unfortunately, the nebulous contours of these principles and their narrow scope of application seriously limit their effectiveness in addressing such conflicts.[162] However, even if it were not the case, such narrow and technical jurisdictional provisions would still fall short of the CJEU's autonomy concerns. After all, the CJEU's far-reaching cautiousness in matters of interactions with foreign courts reaches far beyond the avoidance of "competing proceedings" (i.e. meeting the triple identity test) as opposed to merely "related" ones[163] and has much more to do with the doubts concerning possible admitting external judgments to the EU legal space.

Thus, in practice, "softer" principles seem to be the only way to go, at least for today.[164] Arguably, the autonomy of EU law could be safeguarded to an extent by the principle of *comity*, embedded in the international judges' common understanding of their mission and essential values.[165] Originating from the private law, it demands a certain degree of deference towards other sub-systems of international law even in the absence of an express normative basis mandating such behaviour.[166] The principle of comity could be beneficial, e.g. in providing an incentive to suspend the proceedings before an international body till the determination of the division of competences by the CJEU.[167] Cross-references to other courts' jurisprudence would constitute its another expression.[168] In and of themselves, mere references to "external" case

[161] Yuval Shany, *op. cit.*, pp. 22-23, 155, see also Thomas Schultz, Niccolo Ridi, *op. cit.*, pp. 593-595, emphasising the importance of the first two concepts.
[162] Yuval Shany, *op. cit.*, pp. 226 ff.
[163] For the distinction see Yuval Shany, *op. cit.*, p. 155 ff.
[164] Thomas Schultz, Niccolo Ridi, *op. cit.*, p. 591.As rightly admitted by the ILC, however, there is scarcely any information on the content of these principles, see International Law Commission *Report of the study group on the fragmentation of international law*, ILC Report A/61/10, 2006, para 423
[165] Laurence Boisson de Chazournes, *op. cit.*, pp. 38 ff., 66-67, 71.
[166] Yuval Shany, *op. cit.*, p. 260 ff.
[167] Raphael Oen, *op. cit.*, p. 174.
[168] Laurence Boisson de Chazournes, *op. cit.*, pp. 39 ff.

law do not necessarily have to contribute to providing a greater degree of coherence, however[169]. In any case, the problem is that the exact contours and the normative value of the principle of comity are vague, to say the least.[170] Furthermore, due to it being an exercise of tribunal's inherent powers, lacking solid normative foundations, the application of the comity is intrinsically linked to the exercise of a tribunal's discretion.[171] Consequently, it seems that this network of "soft" judicial tools does not create a comprehensive framework governing interactions between different legal regimes in a predictable fashion.[172] This appears to be mirrored by the fact that there have been no known cases of treaty bodies dismissing provisions of their constitutive instrument due to their incompatibility with "external" international law.[173] Thus, it is clear that also "soft" judicial tools do not suffice to safeguard the preponderance of EU law at fora external to the EU[174].

Lastly, there are also certain bolder proposals simply requiring external bodies to conform to EU law. The theory of Member States' lack of legitimate interest in involving judicial fora other than the CJEU resulting in these bodies' lack of jurisdiction may serve as an example here.[175] The proposals of such kind, however, seem to suffer from a degree of Eurocentrism and seem to lack sufficient legal basis. In any case, they do not seem to be supported by the existing case-law.

In any case, as shall be demonstrated in the following chapters, even if not using equally strong terms, international dispute settlement bodies deciding on issues related to EU law have acted along the lines set by the Tadić decision, readily doing away with any constraints to their jurisdiction or interpretative powers allegedly originating from EU law. This is particularly the case of the investment tribunals, but other dispute-settlement bodies were not free from such tendencies as well. In these cases, the principles discussed above did not prevent divergent

[169] Maria-Fogdestam Agius, *op. cit.*, p. 283.
[170] Yuval Shany, *op. cit.*, p. 262. As one commentator put it, *comity is not a source of international law, but may be, and has been, the basis and justification for the emergence of rules of international law,* see Thomas Schultz, Niccolo Ridi, *op. cit.*, pp. 581, 596.
[171] Thomas Schultz, Niccolo Ridi, *op. cit.*, p. 599. The view on judicial pragmatism as an insufficient tool of conflict solving is shared by other authors, see f.e. Rudolf Ostrihansky, *Przystąpienie Unii Europejskiej do Europejskiej Konwencji o Prawach Człowieka i Podstawowych Wolności: współistnienie organów sądowych* in: Elżbieta Mikos-Skuza, Katarzyna Myszona-Kostrzewa, Jerzy Poczobut (eds.), *Prawo międzynarodowe - teraźniejszość, perspektywy, dylematy. Księga Jubileuszowa Profesora Zdzisława Galickiego*, Wolters Kluwer Warszawa 2013, p. 536.
[172] Maria-Fogdestam Agius, *op. cit.*, p. 6; Nikos Lavranos, *The MOX Plant and Ijzeren Rijn Disputes…*, p. 242.
[173] Jan Klabbers, *Treaty Conflict…*, p. 61. In any case, the courts' tendency to do everything in their power to avoid admitting the existence of a conflict does not help in finding solutions to this conundrum, see *ibid.* p. 110.
[174] Christina Binder, Jane A. Hofbauer, *op. cit.*, p. 195.
[175] Tobias Lock, *The European Court of Justice…*, pp. 164-165.

interpretation of matters related to EU law.[176] In any case, such an attitude was not limited to dispute-settlement bodies operating within a more structured framework. As evidenced by the *Iron Rhine* arbitration,[177] even *ad hoc* bodies called upon to interpret obscure bilateral treaties, were equally eager to do so.

The case concerned a dispute between Belgium and the Netherlands concerning the division of costs related to renovating a railway. The parties were relying on a 19th-century treaty between them, yet its scope of application overlapped with norms implementing EU-environmental law. Eventually, the tribunal decided the case on merits while seeing its authority not being limitted by the EU law.

Initially, being faced with the task of interpreting EU law, the tribunal acknowledged that the Treaties could play a role in the dispute. Regarding now-Article 344 TFEU, however, the tribunal concluded that it did not preclude its jurisdiction since its position was similar to one of the national courts that could be obliged to make a preliminary reference.[178] Further, it denied the necessity of even interpreting EU law related to railway networks since the rights granted to the parties by EU law do not go beyond the railway convention at hand.[179] Similarly, while referring to the environmental issues, the tribunal saw the interpretation of EU environmental legislation redundant due to Dutch legislation containing the same norms.[180] Last but not least, the tribunal decided not to engage with the EU law obligation of loyal cooperation due to it not having been raised by the parties.[181] What merits attention is that, in fact, the parties have not raised EU-law jurisdictional objections at all.[182]

Such a treatment of EU law by the arbitral tribunal was all but satisfactory. To begin with, commentators pointed out that while explaining the alleged lack of conflict the tribunal conveniently misinterpreted the CJEU's jurisprudence.[183] Even at that time, the tribunal's self-understanding as a court of EU law was little short of spurious, like the exclusion of the

[176] For general information on the topic, see Maria-Fogdestam Agius, *op. cit.*, pp. 500 ff. Certain authors suggest even a general lack of receptiveness of the external dispute settlement bodies to the EU's exceptional claims, see e.g. Jed Odermatt, *International Law…*, p. 171, unfortunately without further references.
[177] PCA case 2003-02 *Iron Rhine Arbitration (Belgium/Netherlands)*, all documents available at: https://pca-cpa.org/en/cases/1/, accessed on 22 August 2022.
[178] Award of 24 May 2005 in case *Belgium v. Netherlands (Iron Rhine Arbitration)*, PCA Case no 2003-02, para 103.
[179] *Ibid.*, paras 117, 119, 120.
[180] *Ibid.*, para 137.
[181] *Ibid.*, para 141.
[182] *Ibid.*, paras 13-14.
[183] Nikos Lavranos, *The MOX Plant and Ijzeren Rijn Disputes…*, p. 238 ff.; Aneta Wilk, *op. cit.*, p. 269; Christina Binder, Jane A. Hofbauer, *op. cit.*, p. 163.

implemented EU law from the scope of application of EU law and, thus, the jurisdiction of the CJEU.[184] And all these happened despite the tribunal's mandate having been formulated carefully, with a view to not violating the EU law.[185]

3.2. Preliminary conclusions

The above amply demonstrates that the very access of the individuals to international fora may pose real challenges to the principle of autonomy of EU law. As a matter of international law as it stands, it is always possible for an external dispute-settlement body to "wrongly" decide upon an issue falling within the scope of application of EU law and, thus, violate the exclusive jurisdiction of the CJEU. This pertains particularly to the issue of delimitation of competences discussed in the preceding chapter, where it was clearly demonstrated that such a threat would not be removed even by the presence of declarations of competence.[186]

Thus, international dispute settlement bodies may, as a matter of principle, pose a threat to the autonomy of EU law already by their very existence. They represent sub-systems of international law external to the EU, whose agenda does not have to be identical to the EU's. Consequently, in case of divergent preferences, such courts are more than likely to follow the rationality of their native regimes rather than the EU's, which may very well result in decisions contradicting EU law. Furthermore, while pursuing the goals of their native sub-systems, such courts may also very well decide on matters falling within the scope of application of EU law, thus encroaching upon both, the EU's regulatory space and the CJEU's jurisdiction. In any case, international law as it stands today does not preclude such a scenario from happening. Especially, there is a lack of clear regulatory framework setting clear rules for interactions between different sub-systems of international law or the international courts and tribunals operating within them. *Soft* principles, such as the principle of comity or integrative interpretation, while capable of easing tensions between different regimes, are too nebulous to safeguard the EU legal order from external influences. After all, the exercise of these soft principles is entirely dependent on the approach of these bodies, being external to the EU. As evidenced by the *Iron Rhine* case, such external bodies are not only capable of deciding issues falling within the scope of application of EU law, but in doing so may very well grossly misinterpret EU law. In any case, in none of these cases did the international courts demonstrate

[184] Nikos Lavranos, *The MOX Plant and Ijzeren Rijn Disputes…*, p. 238.
[185] Award of 24 May 2005 in case *Belgium v. Netherlands (Iron Rhine Arbitration)*, PCA Case no 2003-02, paras 3-4; see also Christina Binder, Jane A. Hofbauer, *op. cit.*, p. 162.
[186] Raphael Oen, *op. cit.*, p. 162.

willingness to adopt the view on the CJEU's supremacy on EU matters, in particular, if it was to negatively affect their jurisdiction.[187]

[187] Christina Binder, Jane A. Hofbauer, *op. cit.*, p. 166.

Chapter 4: EU law and international law

4.1. Introduction

Having discussed in the preceding chapters the baseline conditions of the EU's participation in the international legal order, I would now reverse the perspective and move on to the issue of treatment of international law by EU law. After all, as will be discussed in more detail below, in practice, the principle of autonomy plays the role of an exception (limit) to the general receptiveness of the EU legal order toward international law. Consequently, Therefore it is reasonable to resort to its analysis only after reconstructing a more general framework for the accommodation of international law within the EU legal order. In the first line, in section 4.2, I shall analyse the primary mechanisms for the reception of international law and its legal effects within the EU, particularly its place in the legal hierarchy, conditions for its effectiveness etc. Secondly, I shall thematize the relevance of the provisions of international agreements concluded between the Member States for EU law (section 4.3.). Lastly, in section 4.4. I will try to elucidate how these considerations are reflected in the institutional design of the competences of the CJEU.

4.2.International law in the EU legal order

4.2.1. International obligations of the EU

As elegantly put by AG Pikmäe, the EU recognizes being bound by international law in three main constellations: *First, the European Union is bound by international agreements concluded by it pursuant to the provisions of the Treaties (…). Secondly, the European Union is bound by an international convention where it has assumed the powers previously exercised by the Member States (…). Thirdly, the European Union must respect customary international law in the exercise of its powers.* [188] Furthermore, the effect of these kinds of international law within the EU legal space may be determined either through clauses contained in treaties or the EU's internal legislation, or at the later stage, in particular in the way of interpretation by the CJEU.[189]

[188] Opinion of AG Pikmäe, 11 December 2019, *Croatia v Slovenia*, case C-457/18, ECLI:EU:C:2019:1067, para 104. Interestingly at times the CJEU seems to have suggested that this binding effect could extend to customary international law in general, see CJEU judgment of 27 February 2018, *Western Sahara Campaign UK*, case C-266/16, ECLI:EU:C:2018:118, para 47.

[189] CJEU judgment of 26 October 1982, *Kupferberg*, case 104/81, ECLI:EU:C:1982:362, para 17; CJEU judgment of 15 January 2015, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, case C-404/12 P, ECLI:EU:C:2015:5, para 45; CJEU judgment of 21 December 2011, *Air Transport Association of America*, case C-366/10, ECLI:EU:C:2011:864, para 49.

4.2.2. International law as a source of EU law

In practice, international agreements are the most crucial source of the EU's international obligations. Their binding character for the EU was recognised by the CJEU relatively early. As the Luxembourg Court elegantly put it in the *Haegeman* judgment, international agreements binding the EU form part of the EU law due to being entered into based on the community acts, thus binding Member States as part of EU law.[190] In effect, they participate in the primacy of EU law *vis-à-vis* national laws, enjoying overall primacy regardless of the arrangements concerning the reception of international law in the Member States' legal orders, so that one may speak of "unionised international law".[191] The fact that the conclusion of international agreements follows an internal act of EU law does not change the reality that the incorporation of international law norms into the EU legal order does not need any further transformative act.[192] Such an open stance could be viewed as giving place to the risk of the EU being faced with an uncontrolled influx of international law, particularly given the broad understanding of international agreements adopted by the Court.[193] These worries seem to be exaggerated for at least two reasons. Firstly, it is the EU that decides on concluding international agreements. Secondly, this general openness vis-à-*vis* international agreements is balanced by the CJEU's restrictive jurisprudence related to the direct effect of international agreements (see infra).[194]

This conclusion would stay even considering the possibility of the EU being bound by the agreements concluded solely by the Member States. This possibility was acknowledged by the CJEU as early as in its *International Fruit Company* judgment.[195] For this to happen, however, a complete transfer of competences covered by the agreement would have to occur, as in GATT's case. In the opposite case, an international treaty not embodying binding rules of customary international law would not be binding upon the EU.[196] Moreover, it would still be the case even if all the Member States became parties to a given instrument and there was an

[190] CJEU judgment of 30 April 1974, *Haegeman,* case 181/73, ECLI:EU:C:1974:41, paras 3-5, 13. Rudolf Mögele, *Artikel 216…*, para 51.
[191] Andreas Bergmann, *op. cit.*, p. 125 ff..
[192] CJEU judgment of 5 February 1976, *Bresciani,* case 87/75, ECLI:EU:C:1976:18, para 25, see Rudolf Mögele, *Artikel 216…*, para 49. But see to the contrary Matthias Müller, *op. cit.*, p. 93, basing his views on the EU's autonomy claim.
[193] Some even argue that the CJEU understands international agreements broader than the concept of treaty in the VCLT and VCLT IO, see Delano Verwey, *op. cit.*, p. 96, 99, invoking CJEU judgment of 9 August 1994, *France v Commission,* case C-327/91, ECLI:EU:C:1994:305, para 25 CJEU judgment of 16 June 1998, *Racke,* case C-162/96, ECLI:EU:C:1998:293, para 24. Nonetheless this broader understanding seems to correspond with the understanding of treaty in international law Matthias Müller, *op. cit.*, p. 73.
[194] Matthias Kottmann, *op. cit.*, p. 247.
[195] CJEU judgment of 12 December 1972, *United Fruits Company,* case 21-24/72, ECLI:EU:C:1972:115, para 18.
[196] CJEU judgment of 14 July 1994, *Peralta,* case C-379/92, ECLI:EU:C:1994:296, paras 16-17.

EU directive aiming to incorporate given standards from this agreement to EU legal order.[197] Equally, if EU law covered only a portion of a given treaty's subject matter, one cannot assume that the EU claimed the entirety of member States' rights in a given sector and thus became bound by the agreement.[198] Accordingly, the possibility of the EU being bound by unwanted international law in the way of succession is minimal and underlies strict supervision by the CJEU.

This being said, one should turn to the issue of customary international law, binding on the EU due to it being a subject of international law[199]. In fact, the CJEU has acknowledged such a possibility on at least several occasions. Firstly, the CJEU recognizes the EU as being bound by norms of international customary law enshrined in the VCLT[200] Furthermore, at least on the declaratory level, the CJEU feels obliged to interpret treaties in accordance with international law as stipulated in the VCLT and the VCLT IO.[201] Conversely, absent specific provisions[202] or indications of the object and purpose of a given treaty,[203] the CJEU should not interpret it identically to similarly worded provisions of EU law. In a similar vein, the CJEU is somewhat reluctant to apply customary international law to issues governed by EU law. The *Wightman* case concerning the Brexit process, where the CJEU had to decide whether the UK could have unilaterally withdrawn its notification of withdrawal from the EU, may serve as a good example. Whereby AG Sánchez-Bordona strongly advocated for applying customary norms encapsulated in VCLT, at least as gap fillers, due to the recognition of the public international

[197] CJEU judgment of 3 June 2008, *Intertanko*, case C-308/06, ECLI:EU:C:2008:312, paras 48-51.
[198] CJEU judgment of 21 December 2011, *Air Transport Association of America*, case C-366/10, ECLI:EU:C:2011:864, paras 69-71.
[199] Carolin Damm, *op. cit.*, pp. 179, 181; Astrid Epinay, *Die Bindung der EU an das allgemeine Völkerrecht, „Europarecht"* Beiheft 2/2012 *Die Europäische Union im Völkerrecht,* p. 26.
[200] Vienna Convention on the Law of Treaties of 23 May 1969, UNTS, vol. 1155, p. 331. See CJEU judgment of 16 June 1998, *Racke*, case C-162/96, ECLI:EU:C:1998:293, para 24; see also CJEU judgment of 21 December 2016, *Polisario*, case C-104/16 P, ECLI:EU:C:2016:973, para 88 ff. CJEU judgment of 27 February 2018, *Western Sahara Campaign UK*, case C-266/16, ECLI:EU:C:2018:118, para 58.
[201] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, A/CONF.129/15 (not entered into force). See CJEU judgment of 11 March 2015, *Oberto and O'Leary v. Europäische Schule München* , case C-464/13, ECLI:EU:C:2015:163, paras 32-38; CJEU judgment of 10 January 2006, *IATA*, case C-344/04, ECLI:EU:C:2006:10, para 40; CJEU judgment of 20 November 2001, *Jany*, case C-268/99, ECLI:EU:C:2001:616, para 35 and the jurisprudence invoked therein. Berenike Schriewer, *op. cit.* 2017, p. 157-159 says even that this differentiation between the interpretation methods characteristic of EU law and international law was not consistent enough to allow to speak about the CJEU's firm position. Actually, this fact could also be interpreted in favour of drawing a strict distinction between EU law and international law that should be interpreted according to different principles (autonomy), Christian Ohler, *Die Bindung der Europäischen Union an das WTO Recht, „Europarecht"* Beiheft 2/2012 *Die Europäische Union im Völkerrecht,* p. 144.
[202] CJEU judgment of 15 July 2010, *Hengartner and Gasser*, case C-70/09, ECLI:EU:C:2010:430, para 42.
[203] CJEU judgment of 22 January 1997, *Opel v Council of the European Union*, case T-115/94, ECLI:EU:T:1997:3, para 106.

law roots of the Treaties,[204] the CJEU decided to address the question solely within the context of the EU primary law.[205] Consequently, as this case clearly shows, the CJEU is free not to apply the customary international law where it thinks that the autonomy of EU law could be at stake.

Furthermore, it has to be stressed that besides being directly bound by the agreements, the EU may be obliged to act in conformity with international law norms also by virtue of it being referred to in EU law. Article 78.1 TFEU[206] may serve as a good example.[207] In such a case, again, the influence of international law on the EU's legal sphere underlines the control of the EU legislator retaining its power over making or undoing legal acts referring to external international law. For the avoidance of doubt, instances of applying international law to clear factual background of a case to make answering questions of EU law possible[208] should not count as a form of incorporating international law into theEU legal order.

It merits attention that the CJEU differentiates between intra-EU and external effects of incompatibility of international agreements with EU law. In at least one judgment, the CJEU expressly recognised that the EU could not rely on its "domestic" law while non-performing an agreement with a third party, so it had to apply a Council Decision violating EU law up until the agreement's denunciation.[209] Thus, it implicitly acknowledged being bound by the public international law rules related to the conclusion of treaties violating the constitutional law of a party as codified in Article 46 VCLT.[210]

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[204] Opinion of AG Sánchez-Bordona of 4 December 2018, *Andy Wightman and Others v Secretary of State for Exiting the European Union*, case C-621/18 ECLI:EU:C:2018:978, paras 77-85.

[205] CJEU judgment of 10 December 2018, *Andy Wightman and Others v Secretary of State for Exiting the European Union*, case C-621/18, ECLI:EU:C:2018:999, para 46. It is true that CJEU invoked also the VCLT, but this reference served solely a rhetorical purpose, as it was limited to a short confirmation of the result achieved by the analysis of the Article 50 TFEU. In any case, the manner of the CJEU's analysis does not indicate that the court treated the Treaties as specific provisions of international law excluding the application of the norms contained in the VCLT as *lex specialis.*

[206] Consolidated version of the Treaty on the Functioning of the European Union, OJ EU C 326, 26.10.2012, p. 47–390, Article 78.1 1. *The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.*

[207] CJEU judgment of 9 November 2010, *D.*, case C 101/09, ECLI:EU:C:2009:285, paras 77-78.

[208] CJEU judgment of 27 February 2018, *Western Sahara Campaign UK*, case C-266/16, ECLI:EU:C:2018:118, para 63.

[209] CJEU judgment of 30 May 2006, *European Parliament v. Council*, joint cases C-317/04 and C-318/04, ECLI:EU:C:2005:190, paras 72-74.

[210] Matthias Müller, *op. cit.*, p. 139.

Regarding the legal effects of decisions taken by bodies created by international treaties in the EU legal order, they share the fate of their constituent instruments.[211] Thus, one could say that, as in the case of international agreements, their legal status is ultimately derived from Article 216 TFUE.[212] This also pertains to the dispute settlement bodies, including international courts.[213] This attitude seems to create even a greater risk of an uncontrolled influx of external law to the EU legal space than in the case of international treaties: After all, as discussed in more detail in Chapter 3 above, the existence of decision making bodies substantially increases an organisation's potential for creating policy and values without the participation or control of the treaty parties. Thus, it should not come off as a surprise that, in some cases, the CJEU denied any legal significance to "non-binding" decisions of human rights bodies.[214]

Summing up earlier considerations, it may be said that the EU legal system is principally receptive to international law, regardless of its source. This, in turn, could result in an uncontrolled influx of external legal norms, which could lead to potential normative conflicts. Thus, the need for creating certain principles balancing this openness seems to be essential to maintaining the EU law's autonomy. As shall be demonstrated below, the widely defined jurisdiction of the CJEU acting as the "gatekeeper" is one of the main tools protecting the European legal system from unwanted external influence.

4.2.3. Place of the EU's international obligations in the EU legal order

The CJEU explained that international agreements would not only bind the EU but further *prevail* or have *primacy* over the acts of EU secondary law, which could even lead to the invalidity of the latter.[215] At the same time, however, international law does not enjoy primacy over primary law.[216] In fact, at least on several occasions, the Court has recognised its

[211] CJEU judgment of 14 November 1989, *Greece v. Commission*, case C-30/88, ECLI:EU:C:1989:422, para 13; CJEU judgment of 20 September 1990, *Sevince*, case C-192/89, ECLI:EU:C:1990:322, para 9.
[212] Rudolf Mögele, *Artikel 216…*, para 10.
[213] CJEU Opinion of 14 December 1991, *EEA*, Opinion 1/91, ECLI:EU:C:1991:490, para 39.
[214] CJEU judgment of 17 February 1998, *Grant*, case C-249/96, ECLI:EU:C:1998:63, paras 43,46-47. To the contrary, in the context of non-binding resolutions concerning customs CJEU recognized utmost importance of non-binding interpretation conducted by the treaty bodies CJEU judgment of 19 November 1975, *Tariefcommissie*, case 38/75, ECLI:EU:C:1975:154, paras 24-25.
[215] CJEU judgment of 10 September 1996, *Commission v. Germany*, case C-61/94, ECLI:EU:C:1996:313, para 52; CJEU judgment of 10 January 2006, *IATA*, case C-344/04, ECLI:EU:C:2006:10, para 35; more explicitly CJEU judgment of 21 December 2011, *Air Transport Association of America*, case C-366/10, ECLI:EU:C:2011:864, para 51. CJEU judgment of 3 June 2008, *Intertanko*, case C-308/06, ECLI:EU:C:2008:312, para 42.
[216] The *Kadi* case, being the zenith of this reasoning, shall be discussed in Chapter 5 below; but see also older jurisprudence, e.g. CJEU judgment of 7 March 1996, *Parliament v Council*, case C-360/93, ECLI:EU:C:1996:84, para 35, see also Juliane Kokott, *Artikel 47 EUV…*, paras 16-17; see also Anna Wyrozumska in: Jan Barcz, Maciej Górka, *ead*., *Instytucje i prawo Unii Europejskiej*, 6th ed., Wolters Kluwer Warszawa 2020, p. 265. This solution

competence to decide on the cases concerning the annulment of the EU's acts adopting international agreements, thus *de facto* assessing the compatibility of the international agreements with EU law.[217] This was reasoned with the necessity to provide the legal stakeholders with a possibility of judicial review also after concluding a treaty.[218] For example, in the *Banana* case, the Court annulled the decision underpinning conclusion of an agreement due to the latter's conflicting substantive provisions of EU law (principle of non-discrimination).[219] This hierarchical position of international law between the Treaties and the secondary law is reflected chiefly by Articles 216.2 and 218.11 TFEU.[220]

The higher hierarchical status of the international law in the EU legal order results in the necessity of interpretation of secondary legislation possibly consistent with the international agreements, at least so long as the provisions thereof allow such an interpretation.[221]

The EU law principle of loyalty and international law principle of good faith demand that this international law-friendly interpretation may also apply to international agreements lacking direct effect and, thus, not being capable of being relied on against EU secondary law.[222] This duty of consistent interpretation also covers the acts of secondary international law.[223] Furthermore, this preponderance of international law encompasses the obligation to refrain from any actions that could frustrate the attainment of the goal of a given agreement.[224] Interestingly, on certain occasions, the CJEU advocated also for the necessity of interpreting EU law in light of international agreements even without the EU being a party thereto, most

was criticised by certain scholars as going against the EU law friendlieness towards international law, see Carolin Damm, *op. cit.*, p. 193.

[217] CJEU judgment of 27 September 1988, *Commission v Council*, case 165/87, ECLI:EU:C:1988:458.

[218] CJEU opinion of 13 December 1995, *GATT-WTO*, Opinion 3/94, ECLI:EU:C:1995:436, para 22; CJEU judgment of 10 March 1998, *Germany v. Council*, case C-122/95, ECLI:EU:C:1998:94, paras 41-42. See also more detailed list of such cases in Matthias Kottmann, *op. cit.*, p. 88, fn. 45.

[219] CJEU judgment of 10 March 1998, *Germany v. Council*, case C-122/95, ECLI:EU:C:1998:94, para 72.

[220] Article 216.TFEU: 2 *Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*; Article 218.11 TFEU: *A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised*; see also Sophie Barends, *op. cit.*, p. 20.

[221] CJEU judgment of 10 September 1996, *Commission v. Germany*, case C-61/94, ECLI:EU:C:1996:313, para 52; CJEU judgment of 12 January 2006, *Algemene Scheeps Agentuur*, case C-311/04, ECLI:EU:C:2006:23, para 25; CJEU judgment of 18 March 2014, *Z.*, case C-363/12, ECLI:EU:C:2014:159, para 72.

[222] CJEU judgment of 3 June 2008, *Intertanko*, case C-308/06, ECLI:EU:C:2008:312, para 52; CJEU judgment of 15 March 2012, *SCF*, case C-135/10, ECLI:EU:C:2012:140, paras 46, 51.

[223] CJEU judgment of 30 July 1996, *Bosphorus*, case C-84/95, ECLI:EU:C:1996:312, paras 11, 13 ff., case concerned interpretation of EU regulation implementing UN Security Council sanctions.

[224] Rudolf Mögele, *Artikel 216…*, para 54.

likely due to them embodying provisions of customary international law,[225] even though the application of this general rule to EU's internal matters seems to be at times contested.[226]

Basically, similar rules apply to the internal effect of customary international law, despite the lack of clear basis in the Treaties.[227] Furthermore, such rules of customary international law, constructed, i.a., by analysis of the ICJ's jurisprudence,[228] could be a benchmark against which EU secondary law should be tested.[229] For example, the CJEU happened to define the content of legitimate expectations by referring to customary international law obligation not to frustrate the agreement that is to enter into force.[230] Nonetheless, while conducting such oversight, due to an alleged lack of precision of customary international law norms, the review typically would be limited compared to a review based on international treaties.[231] Furthermore, there are also some differences regarding the structure of the relevant test. Firstly, the CJEU has to reconstruct a particular principle of customary international law.[232] Secondly, it should check whether (a) the principles in question could affect the EU's competences or (b) whether they could affect individuals' rights or create obligations under EU law.[233] Of course, the CJEU's competence in this regard is exclusive.[234] Consequently, we may again see the CJEU trying to control the scope of the EU's openness to international law by recognising the intra-EU effect of customary international law on the one hand and setting a high threshold for granting legal effect to its provisions on the other. However, the effectiveness of these safeguards would be severely compromised if the decision in this respect was ceded to external actors.

4.2.4. Direct effect as the regulative tool

Given this far-reaching openness of EU law for the reception of international law, it is all but surprising that the CJEU had to devise instruments allowing it to control the scope of influence

[225] CJEU judgment of 24 November 1992, *Poulsen*, case C-286/90, ECLI:EU:C:1992:453, paras 9-10, reaffirmed i.a. in CJEU judgment of 16 June 1998, *Racke*, case C-162/96, ECLI:EU:C:1998:293, para 45.
[226] Juliane Kokott, *Artikel 47 EUV…*, para 23.
[227] Carolin Damm, *op. cit.*, p. 245.
[228] See f.e. CJEU judgment of 16 June 1998, *Racke*, case C-162/96, ECLI:EU:C:1998:293 or CJEU judgment of 21 December 2011, *Air Transport Association of America*, case C-366/10, ECLI:EU:C:2011:864.
[229] CJEU judgment of 16 June 1998, *Racke*, case C-162/96, ECLI:EU:C:1998:293, para 51.
[230] CJEU judgment of 22 January 1997, *Opel v Council of the European Union*, case T-115/94, ECLI:EU:T:1997:3, paras 90-91, 124-125.
[231] CJEU judgment of 16 June 1998, *Racke*, case C-162/96, ECLI:EU:C:1998:293, para 52; CJEU judgment of 21 December 2011, *Air Transport Association of America*, case C-366/10, ECLI:EU:C:2011:864, para 110.
[232] CJEU judgment of 21 December 2011, *Air Transport Association of America*, case C-366/10, ECLI:EU:C:2011:864, para 102.
[233] *Ibid.*, para 107.
[234] CJEU judgment of 14 June 2012, *CIVAD*, case C-533/10, ECLI:EU:C:2012:347, paras 39-40.

of the EU's internal rules by international law. In this context, the direct effect doctrine definitely plays the first fiddle.

Basically, to form the basis of the CJEU's control of EU's secondary law, an international treaty must be (i) binding on the EU; (ii) its *nature* and *broad logic* do allow to use it as a benchmark for EU law and (iii) its provisions are *unconditional* and *sufficiently precise*. Consequently, one could speak of a two-prong or double test.[235] Initially, the Court held that the non-fulfilment of these conditions would preclude not only individuals but equally the Member States from invoking provisions of such agreements.[236] In one of the later judgments, though, the CJEU seems to have relaxed its position by admitting that, as a matter of principle, also norms not granting specific rights to individuals may serve as a benchmark standard for the control of the EU's secondary legislation.[237] Given the discretionary character of the assessment of the direct effect, it is to welcome the more recent practice of the Council expressly addressing the issue of the binding effect of specific provisions of free trade agreements ("**FTAs**") in the treaty texts.[238]

Furthermore, the CJEU created special pathways allowing it to grant direct effect to international law in certain circumstances. For example, at least with regard to the specific TRIPS Agreement Provisions, the CJEU recognised their potential for creating the duty to conduct consistent interpretation of EU-secondary law.[239] Additionally, the Court introduced the *Fediol/Nakajima* exceptions. In the *Fediol* case, the Court admitted the possibility of relying on GATT provisions before EU organs, provided they were directly referred to in the relevant acts of EU law.[240] This exception was further expanded in the *Nakajima* judgment. The CJEU stipulated that despite the general lack of direct effect of the GATT, it may still be the measure for legality control of the EU acts explicitly adopted to comply with GATT.[241] The later practice would suggest that both exceptions were interpreted rather narrowly, however[242]. To avoid

[235] Rudolf Mögele, *Artikel 216…*, paras 62-63; Sophie Barends, *op. cit.*, p. 152; similarly Allan Rosas, *International Responsibility of EU…*, p. 143.
[236] CJEU judgment of 5 October 1994, *Germany v. Council (Bananas)*, case C-280/93, ECLI:EU:C:1994:367, para 109.
[237] CJEU judgment of 9 October 2001, *Netherlands v Parliament and Council*, case C-377/98, ECLI:EU:C:2001:523, paras 53-54.
[238] Rudolf Mögele, *Artikel 216…*, para 64. See also Sophie Barends, *op. cit.*, p. 105. See also section 10.4 infra.
[239] CJEU judgment of 15 March 2012, *SCF*, case C-135/10, ECLI:EU:C:2012:140, paras 51 ff.
[240] CJEU judgment of 22 June 1989, *Fediol v Commission*, case C-70/87, ECLI:EU:C:1989:254, para 22.
[241] CJEU judgment of 7 May 1991, *Nakajima* , case C-69/89, ECLI:EU:C:1991:186, paras 31-32.
[242] CJEU judgment of 1 March 2005, *Van Parys*, case C-377/02, ECLI:EU:C:2005:121, para 41, CJEU emphasised that introduction of internal measures did eliminate international negotiations as the main tool of conflict-solving. (paras 42 ff.); in relation to Aarhus Convention see see also judgment in CJEU judgment of 15 January 2015, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, case C-404/12 P, ECLI:EU:C:2015:5 discussed in Chapter 13 CJEU judgment of 27 September 2007, *Ikea Wholesale*, case C-

doubt, it has to be stressed that denying direct effect to particular provisions of international law cannot negatively affect the CJEU's (exclusive) jurisdiction.[243] In the *Van Parys* case, the Court clarified that its competence to decide on the binding effect (or lack thereof) also extends to international bodies' decisions.[244]

If one were to summarise the CJEU's jurisprudence, one could say that the CJEU acknowledged the direct effect of FTAs and Association Agreements and, in general, denied it to comprehensive law-making treaties, in particular the WTO agreements.[245] Nonetheless, it has to be stressed the WTO is not the only *bad guy* in town. Actually, the CJEU was more than eager to deny direct effect to other multilateral frameworks with regulatory potential,[246] such as UNCLOS,[247] the Kyoto Protocol,[248] or the Aarhus Convention,[249] particularly when their provisions were invoked against the EU itself rather than the Member States.[250] This should not be surprising as the CJEU seemed more willing to interpret the legal effect of international agreements in EU law substantially broader in the case of obligations of the Member States rather than the EU itself.[251] Consequently, it would be tempting to say that, especially in the

351/04, ECLI:EU:C:2007:547, paras 33-35, nonetheless in the later parts of its judgment the CJEU declared the disputed measures invalid due to a breach of EU law, similarly see CJEU judgment of 18 July 2007, *F.T.S. International*, case C-310/06, ECLI:EU:C:2007:456; see also Rudolf Mögele, *Artikel 216…*, para 67.

[243] CJEU judgment of 11 September 2007, *Merck Genéricos,* case C-431/05, ECLI:EU:C:2007:496, paras 31, 39 ff..

[244] CJEU judgment of 1 March 2005, *Van Parys*, case C-377/02, ECLI:EU:C:2005:121, para 42 ff.

[245] CJEU judgment of 12 December 1972, *United Fruits Company*, case 21-24/72, ECLI:EU:C:1972:115, para 28; CJEU judgment of 5 October 1994, *Germany v. Council (Bananas),* case C-280/93, ECLI:EU:C:1994:367, paras 108, 110 *;* CJEU judgment of 20 November 2001, *Jany*, case C-268/99, ECLI:EU:C:2001:616; Nadine Zipperle, *EU International Agreements. An Analysis of Direct Effect and Judicial Review Pre- and Post-Lisbon*, Springer 2017, pp. 10-61; Sophie Barends, *op. cit.*, p. 191. Actually, the dictum on lack of WTO law's effects in EU internal legal order was repeated on many occasions, also in the way of contrast, in cases regarding issues unrelated to WTO, see e.g. CJEU judgment of 9 October 2001, *Netherlands v Parliament and Council*, case C-377/98, ECLI:EU:C:2001:523, paras 52-53.

[246] Allan Rosas, *International Responsibility of EU…*, p. 143. Rather unsurprisingly, many of them foresee the existence of treaty interpreting bodies.

[247] CJEU judgment of 3 June 2008, *Intertanko*, case C-308/06, ECLI:EU:C:2008:312, para 64.

[248] CJEU judgment of 21 December 2011, *Air Transport Association of America*, case C-366/10, ECLI:EU:C:2011:864, para 74 ff.

[249] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998, UNTS vol. 2161, p. 447. See CJEU judgment of 15 January 2015, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe,* case C-404/12 P, ECLI:EU:C:2015:5, para 47, see Chapter 13 below.

[250] Mario Mendez, *The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, "European Journal of International Law", vol. 21 1/2010, pp. 83–104. But see to the contrary Court's more generous approach towards the Biodiversity Convention in CJEU judgment of 9 October 2001, *Netherlands v Parliament and Council*, case C-377/98, ECLI:EU:C:2001:523 or Convention for the protection of Mediterranean Sea against pollution CJEU judgment of 7 October 2004, *Commission v France (Étang de Berre)*, case C-239/03, ECLI:EU:C:2004:598, see Benedikt Pirker. *Access to Justice in Environmental Matters and the Aarhus Convention's Effects in the EU Legal Order: No Room for Nuanced Self-executing Effect*. "Review of European, Comparative & International Environmental Law", vol. 25 1/2016, pp. 84-85, 91.

[251] CJEU judgment of 10 September 1996, *Commission v. Germany,* case C-61/94, ECLI:EU:C:1996:313, para 58, Andreas Bergmann, *op. cit.*, pp. 131, 135, 140, 142. Matthias Kottmann, *op. cit.*, p. 250-255; Rudolf Streinz,

context of WTO, the CJEU decided to apply the *political question* doctrine,[252] excluding the direct effect of international agreements that provided for regulatory frameworks threatening to collide with EU law's values. In fact, provided the general commitment of the Court to provide for judicial review,[253] it would not be easy to conceive another reason for limiting the effectiveness of international agreements in EU law.

To sum up, while the EU legal order seems to be generally open and favourable towards international law, the direct effect doctrine is to play the role of the floodgate guarding the EU law against unwanted influences. By its very nature, the two-prong test gives the CJEU a considerable degree of discretion in deciding on the legal effects of international law within the EU. Furthermore, this allows the CJEU to differentiate the legal effect of the provisions not having a direct effect depending on the circumstances of a particular case. This relative freedom finds its expression particularly in expanding the scope of international obligations of Member States and reducing their scope as far as the EU is concerned. At this juncture, one could even be tempted to contemplate whether the CJEU was not unwilling to grant direct effect to norms produced within any robust sub-system of international law. This, in turn, shows the essential importance of the direct effect doctrine for maintaining the autonomy of EU law. And again, to ensure the effectiveness of this control, it cannot be bestowed upon an external body.

4.3.International obligations of the Member States

In addition to regulating the modalities of international agreements binding the EU, EU law governs the relationship between EU law and international agreements of its Member States falling within the scope of EU law. Basically, one could identify three main categories of such agreements: (i) international agreements between the Member States; (ii) international agreements between the Member States and third states concluded before the accession and (iii) international agreements between the Member States and third states concluded after the accession.

Europarecht, 11th ed., CF Müller Heidelberg, 2019, p. 198. See also Jan Klabbers, who speaks of *EU-radiating* treaties meant to export the EU law to the outside world as opposed to treaties meant to subjugate EU law to external legal frameworks, see *idem, The Reception of International Law in the EU Legal Order,* in: Robert Schütze, Takis Tridimas (eds.) *Oxford Principles of European Union Law,* OUP Oxford 2018, pp. 1209, 1233.

[252] Andreas Bergmann, *op. cit.*, p. 134. See section 6.3 below.

[253] Matthias Kottmann, *op. cit.*, p. 250-255. The author notices the stark contrast between the EU's attitude towards WTO and its general detest of the act of state doctrine (see particularly pp. 80 ff), see also Armin Steinbach, *op. cit.*, p. 19.

The matter with the first category will be most straightforward: EU law takes precedence before them, and acts of EU-secondary legislation may even replace their provisions.[254] In any case, they are not covered by the Article 351 TFEU exception (see *infra*)[255]. The CJEU's clarification in this should be welcome due to the ambiguities surrounding the application of general international law *lex posterior* principle embodied in Article 30.2 and Article 59 VCLT.[256] Arguably, some sort of a link between EU law primacy and the general treaty law is reflected by the CJEU's jurisprudence allowing for upholding such agreements in certain limited situations. For example, in the non-discrimination context, it could be possible to remove the incompatibility through extending privileges granted by treaties in question to all EU citizens.[257] Interestingly, in some of the double-taxation treaties cases, the CJEU actually allowed discrimination between different enterprises due to their revenues underlying different double taxation agreements, arguing that such discrimination belongs to the essence of double-tax agreements and should be considered in the perspective of such agreement with their peculiarities taken as a whole.[258]

The second category is governed by Article 351 TFEU, being an exception from the general rule of the primacy of EU law vis-à-vis Member States' agreements.[259] According to Article 351.1 TFEU[260], the accession to the EU is not to negatively influence the rights of third states. In this respect, Article 351 TFEU seems to anchor in EU law the international law principle of *pacta tertiis* codified in Article 34 VCLT[261], also recognised by the CJEU[262]. Naturally, the EU's acceptance of the further existence of a Member State's agreement concluded with the

[254] CJEU judgment of 9 November 1995, *Thévenon*, case C 475/93, ECLI:EU:C:1995:371, para 28.
[255] Article 351.1 TFEU: *The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties*. See CJEU judgment of 8 September 2009 in case C-478/07 *Budějovický Budvar*, ECLI:EU:C:2009:521, paras 98-99.
[256] Article 30.2 VCLT: *When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail*. Article 59.1 VCLT: *A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.* Berenike Schriewer, *op. cit.*, p. 210.
[257] CJEU judgment of 27 September 1988, *Matteucci*, case 235/87, ECLI:EU:C:1988:460, para 23.
[258] CJEU judgment of 12 December 2006, *Test Claimants*, case C-374/04, ECLI:EU:C:2006:773, paras 91-93.
[259] Allan Rosas, *The Status in EU Law of International Agreements Concluded by EU Member States*, "Fordham International Law Journal" vol 34 5/2011, pp. 1314-1315.
[260] Article 351.1 TFEU: *The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.*
[261] Article 34 VCLT: *A treaty does not create either obligations or rights for a third State without its consent*.
[262] CJEU judgment of 25 February 2010, case C-386/08, case *Brita*, ECLI:EU:C:2010:91, para 44 ff.; CJEU judgment of 14 January 1997, *Centro-Com*, ECLI:EU:C:1997:8, case C-124/95, ECLI:EU:C:1997:8, para 56.

third state does not mean it becoming bound by it.[263] It may be said that in relation to third states, article 351 TFEU has effectively precluded the application of EU law conflicting with the Member States' pre-accession obligations.[264] However, it merits attention that the scope of application of this article is not unlimited. To begin with, the existence of a prior agreement does not remove a given matter from the scope of application of EU law.[265] Consequently, it seems fitting to interpret Article 351 as balancing EU law and international law requirements rather than simply granting preference to international agreements.[266] This is particularly visible in the light of the provision's second paragraph[267] which shows that despite the further existence of such agreements with third parties, the EU Member States may be obliged to take all the steps necessary to change or terminate them.[268] One could even go as far as to indicate the termination as a sort of default option.[269] This is also reflected by the fact that Article 351.1 is interpreted as serving the purpose of defending the rights of third states[270] (and their citizens)[271] rather than these of the Member States. Consequently, it can justify the non-application of EU law only if given international instruments *obliged* a Member State but not only *allowed* them to adopt specific measures or *granted* them particular rights.[272] Furthermore, rather unsurprisingly, the CJEU has vehemently opposed extending Article 351.1 TFEU to the intra-EU application of multilateral agreements concluded with third states.[273] Similarly, the CJEU

[263] CJEU judgment of 21 December 2011, *Air Transport Association of America*, case C-366/10, ECLI:EU:C:2011:864, para 61.
[264] CJEU judgment of 3 February 1994, *Minne,* case C-13/93 ECLI:EU:C:1994:39, para 19 (ILO Convention).
[265] CJEU judgment of 28 March .1995, *Evans*, case C-324/93, ECLI:EU:C:1995:84, para 23.
[266] Maria-Fogdestam Agius, *op. cit.*, p. 202.
[267] Article 351.2 TFEU: *To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.*
[268] CJEU judgment of 14 September 1999, *Commission v. Belgium,* case C-170/98, ECLI:EU:C:1999:411, paras 42-43. In any case, such a termination should respect the requirements of international law, CJEU judgment of 4 July 2000 in case C-62/98 *Portugal v. Commission* ECLI:EU:C:2000:358, paras 34, 46,49. Conversely, should the termination of an agreement prove impossible as a matter of international law, it will be still protected by Article 351.1, see CJEU Judgement of 15 September 2011, *Atel*, case C-264/09, ECLI:EU:C:2011:580, paras 46, 51 concerning the effect of the Energy Charter Treaty.
[269] Jed Odermatt, *The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?*, in: Marise Cremona (ed.) *Structural Principles in EU External Relations Law,* Hart, Oxford Portland 2018, p. 307.
[270] Juliane Kokott, *Artikel 351,* in: Rudolf Streinz, Walther Michl (eds.) *Vertrag über die Europäische Union Vertrag über die Arbeitsweise der Europäischen Union. Charta der Grundrechte der Europäischen Union,* CH Beck München 2018, para 9.
[271] CJEU judgment of 14 October 1980, *Burgoa,* case C-812/79, ECLI:EU:C:1980:231, para 10.
[272] CJEU judgment of 14 January 1997, *Centro-Com*, ECLI:EU:C:1997:8, case C-124/95, ECLI:EU:C:1997:8, para 60; CJEU judgment of 28 March .1995, *Evans*, case C-324/93, ECLI:EU:C:1995:84, para 32. Berenike Schriewer, *op. cit.*, p. 203.
[273] See CJEU judgment of 27 February 1962, *Italy v. Commission*, case 10/61 ECLI:EU:C:1962:2.*;* CJEU judgment of 22 September 1988, *Deserbais,* case 286/86, ECLI:EU:C:1988:434, paras 17-18; CJEU judgment of 11 March 1986, *Conegate*, case 121/85, ECLI:EU:C:1986:114, paras 6 (question 4), 24-25. See also Juliane Kokott, *Artikel 351…*, paras 2, 10 (she, however, suggests that it could not be the case by the treaties pursuing an objective goal).

questioned the possibility of weakening the effect of EU law between the Member States even if EU regulations contained specific provisions giving primacy to international agreements concluded with third states.[274] In addition, the effect of Article 351.1 is further diminished by the obligation to interpret international agreements covered by it in conformity with EU law.[275] Lastly, the CJEU indicated in the context of the Open Skies Agreement that in case of renegotiation of a given treaty, the provisions repeating earlier commitments should be treated as subsequent regulations, not covered by the Article 351 exception.[276]

Regarding the situations of international agreements concluded between the Member States and third states after the accession, suffice is to say that according to the wording of Article 351.1 TFEU,[277] the Member States may not invoke it in order to allow further application of a provision of an agreement with third state subsequent to its accession to the EU, which however does not affect its validity under international law.[278]

All in all, it is evident that in the end, all Member States' international agreements have to conform to EU law. The situation is most straightforward with the agreements concluded between the Member States that are simply trumped by EU law. Similarly, there are no provisions safeguarding further application of the treaties concluded with third states after the accession to the EU. In the end, even the agreements with third states preceding the accession protected by Article 351.1 eventually must be brought to conformity with EU law as prescribed in Article 351.2 TFEU. However, even absent termination, their effectiveness is limited in the interest of EU law by the exclusion of their application as between the Member States or the obligation to interpret them in an EU-friendly fashion. Consequently, as will be discussed in more detail in the forthcoming chapters, even if not expressly prohibited by the EU law, dispute settlement mechanisms in international agreements concluded by the Member States have to conform to EU law.[279]

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[274] See CJEU judgment of 27 February 1962, *Italy v. Commission*, case 10/61 ECLI:EU:C:1962:2.
[275] CJEU judgment of 22 September 1988, *Deserbais*, case 286/86, ECLI:EU:C:1988:434, paras 17-18; CJEU judgment of 11 March 1986, *Conegate*, case 121/85, ECLI:EU:C:1986:114, paras 6 (question 4), 24-25. See also Juliane Kokott, *Artikel 351…*, paras 2, 10 (she, however, suggests that it could not be the case by the treaties pursuing an objective goal).
[276] See e.g. CJEU judgment of 24 April 2007, *European Commission v. Netherlands*, case C-523/04, ECLI:EU:C:2007:244, para 51.
[277] *The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.*
[278] Juliane Kokott, *Artikel 351…,* para 4; Allan Rosas, *The Status in EU Law of International Agreements…*, p. 1322. As will be discussed in more detail in sections 10.3 and 10.6 below, it did not preclude certain authors from arguing the opposite, at least in the context of the BITs.
[279] Juliane Kokott, *Artikel 351…*, para 8.

4.4.Jurisdiction of the Court of Justice of the European Union

Article 19 TEU[280] constituted the CJEU as the court responsible for interpreting EU law. Theoretically, its jurisdiction is limited by the Treaties, particularly the principle of conferral (Article 4.1[281] and 5.1– 2 TEU[282]), reflecting the EU's derived legal personality as a creation of the Member States.[283] It was in the *Haegeman* judgment that the CJEU recognized its jurisdiction to adjudicate international agreements concluded by the EU by virtue of them being part of EU law.[284] As shall be discussed in more detail below, since then, the CJEU's jurisdiction has expanded (too) widely[285] so that it could even bring conflicts with other international adjudicating bodies.[286] In theory, this should mean that the scope of the CJEU's jurisdiction concerning international agreements should mirror the scope of their application in EU law.[287] It means that it would be restricted to agreements concluded by the EU, binding it in the way of succession and pertaining to the binding customary international law.[288] However, even if to follow this relatively narrow understanding, it shall be clear that this jurisdiction should be conceived broadly. To begin with, the EU law conceives the concept of international agreements rather broadly so that the CJEU's jurisdiction covers the whole broad spectrum of such acts. To give an example, in its judgment in *NF v European Council* the CJEU made clear that the concept of an EU act may cover all forms of internationally relevant EU action, such as joint press statements.[289] Furthermore, the Court reminded that the formal classification of the act and the legal status of a body issuing it taken alone might not deprive the CJEU of its jurisdiction, provided that the measure as such belongs to EU law.[290] In addition, building upon

[280] Consolidated version of the Treaty on European Union, OJ EU C 326, 26.10.2012, p. 13–390.
[281] Article 4.1 TEU: *In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.*
[282] Article 5.1-2 TEU: *1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*
[283]See e.g. CJEU opinion of 28 March 1996, *ECHR,* Opinion 2/94, ECLI:EU:C:1996:140, paras 23, 25; see also Tomasz Tadeusz Koncewicz, *op. cit.*.pp. 81-92.
[284] CJEU judgment of 30 April 1974, *Haegeman,* case 181/73, ECLI:EU:C:1974:41, para 6.
[285] Francis G. Jacobs, *Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice,* in: Alan Dashwood, Marc Marescau (eds.), *Law and Practie of EU External Relations*. *Salient Features of a Changing Landscape,* CUP Cambridge 2008, p. 14; Matthias Müller, *op. cit.*, p. 216.
[286] Andreas Bergmann, *op. cit.*, p. 151.
[287] Matthias Müller, *op. cit.*, pp. 155, 160.
[288] Opinion of AG Pikmäe, 11 December 2019, *Croatia v Slovenia,* case C-457/18, ECLI:EU:C:2019:1067, para 104.
[289] CJEU (Court) judgment of 28 February 2017, *NF v European Council,* case T-192/16, ECLI:EU:T:2017:128, para 42.
[290] *Ibid.,* para 45. After a careful analysis, however, the Court find that the measure in dispute was not imputable to EU.

its earlier decision concerning its authority to interpret international agreements concluded by the EU, the CJEU further stated that this necessarily requires the CJEU to have the competence to interpret even the non-binding decisions of the respective treaty organs.[291]

At this juncture, one remark should be made regarding the nature of the CJEU's jurisdiction regarding the interpretation of international agreements. It seems that, contrary to the limits for the control of *validity* of international agreements, the Court's competence concerning their *interpretation* and the *scope of application* does require the CJEU to interpret the agreements themselves, not merely the EU's implementing acts.[292] The recent case law supports this view. In the *Western Sahara* case, the CJEU restated that the international agreements themselves, since their entry into force, are acts of EU institutions for the purpose of its jurisdiction (including preliminary reference proceedings).[293] It follows that the CJEU may assess the compatibility of such an agreement with the Treaties and international law binding the EU.[294] Such an assessment of a given agreement should take place in accordance with its current state of development.[295] This, of course, does not change earlier conclusions as to the limited legal effects of such an incompatibility as a matter of international law.

Establishing the CJEU's jurisdiction in relation to international agreements was all but surprising. After all, the performance of international agreements necessarily requires them to be interpreted by both EU organs and the Member States.[296] This entails, in particular, the Commission's competence to initiate cases against the Member States based on the former's interpretation of their obligations under international law.[297] Thus, it should not surprise that the CJEU stated that applying international agreements by national courts (also requiring their interpretation) does not adversely affect the competences of treaty-interpreting bodies created by the respective treaties.[298] Thus, it was apparent that international agreements being themselves acts of EU law, have to be interpreted uniformly across the EU by the CJEU. This

[291] See CJEU judgment of 20 September 1990, *Sevince*, case C-192/89, ECLI:EU:C:1990:322, paras 8-11 (judgment concerned an association agreement); CJEU judgment of 21 January 1993, *Shell*, case C-188/91, ECLI:EU:C:1993:24, paras 17-18; both invoked recently by CJEU in the context of harmonised standards, see CJEU judgment of 27 October 2016, *Elliot*, case C-613/14,: ECLI:EU:C:2016:821, paras 34-35.
[292] Matthias Müller, *op. cit.*, p. 156.
[293] CJEU judgment of 27 February 2018, *Western Sahara Campaign UK*, case C-266/16, ECLI:EU:C:2018:118, paras 45-46, 48, but see para 50.
[294] *Ibid.*, para 48.
[295] *Ibid.*, para 51.
[296] Delano Verwey, *op. cit.*, p. 213.
[297] CJEU judgment of 10 September 1996, *Commission v. Germany*, case C-61/94, ECLI:EU:C:1996:313, para 15, see also Delano Verwey, *op. cit.*, p. 214.
[298] CJEU judgment of 26 October 1982, *Kupferberg*, case 104/81, ECLI:EU:C:1982:362, para 20; CJEU judgment of 22 June 1989, *Fediol v Commission*, case C-70/87, ECLI:EU:C:1989:254, para 21.

pertained, among others, the competence to pronounce upon the direct effect of their provisions within the European legal order.[299]

As was already explained, the CJEU has repeatedly affirmed its commitment to interpreting international agreements in accordance with the principles enshrined in the VCLT. Nonetheless, these principles provide the CJEU with a wide margin of discretion. The CJEU's contradictory practice concerning interpreting provisions of international law in the same way[300] or differently[301] from similarly formulated provisions of EU law may be a good example. Consequently, interpretation of the CJEU, conducted in light of EU law and with the exclusion of other parties to a given agreement, may very well result in the CJEU departing from the meaning ascribed to this agreement by international law.[302] Article 9.3 of the Aarhus Convention, discussed in detail in Chapter 13 below, provides an excellent example of such a situation.

More importantly, however, defining the precise borders for the CJEU's jurisdiction is not always easy. Of course, there is a noticeable group of relatively straightforward cases. To begin with, there are EU-only agreements. Similarly, an extension of the CJEU's jurisdiction to treaties where the EU substituted the Member States;[303] agreements where the Member States acted on behalf of the EU or agreements with express jurisdictional clauses indicating the CJEU[304] does not seem to raise any serious doubts.[305]

However, the mixed agreements are much more problematic since there is a lack of clear-cut criteria for assessing the exact scope of the CJEU's (exclusive) jurisdiction.[306] The CJEU established its competence to interpret such agreements in its *Demirel* judgment. While departing from the *Haegeman* principles, the CJEU asserted its jurisdiction over the mixed

[299] CJEU judgment of 26 October 1982, *Kupferberg*, case 104/81, ECLI:EU:C:1982:362, paras 14, 17.
[300] CJEU judgment of 15 January 1998, *Henia Babahenini*, case C-113/97, ECLI:EU:C:1998:13, para 24; Francis G. Jacobs, *op. cit.*, p.24; Armin Steinbach, *op. cit.*, p. 18.
[301] CJEU Opinion of 14 December 1991, *EEA*, Opinion 1/91, ECLI:EU:C:1991:490, paras 14 ff.; CJEU judgment of 39 January 2014, *Diakite*, case C-285/12, ECLI:EU:C:2014:39, paras 20, 23-26.
[302] Delano Verwey, *op. cit.*, p. 210.
[303] CJEU judgment of 12 December 1972, *United Fruits Company*, case 21-24/72, ECLI:EU:C:1972:115; CJEU judgment of 16 March 1983. *SPI/SAMI*, joined cases 267/81, 268/81 and 269/81, ECLI:EU:C:1983:78, paras 14,17, 19.
[304] Article 107 of the EFTA Agreement (Agreement on the European Economic Area - Final Act - Joint Declarations - Declarations by the Governments of the Member States of the Community and the EFTA States - Arrangements - Agreed Minutes - Declarations by one or several of the Contracting Parties of the Agreement on the European Economic Area OJ EU L 1, 3.1.1994, p. 3–522); Article 25.2 of the Agreement establishing an Association between the European Economic Community and Turkey of 12 September 1963, OJ EU L 361 31.12.77.
[305] Tobias Lock, *The European Court of Justice…*, pp. 130-134.
[306] *Ibid.*, p.114.

agreements, or at least their parts covered by the EU's competences.[307] The CJEU subsequently interpreted its powers rather broadly, most likely by correlating its competences with the scope of the EU's international responsibility and the scope of application of the principle of loyalty.[308] It follows that in the case of mixed agreements, the Court has been continuously expanding its jurisdictional powers to matters beyond the strictly conceived EU's competences.[309] In particular, it was advanced that the CJEU's competence should be conceptualised in broad terms due to the inherent need to determine which parts of an agreement do fall within the remit of EUlaw as a prerequisite for further inquiry.[310] At least so long as the whole process is oriented on the competence division between the EU and the Member States, this solution should be accepted as the only possible.[311] Nonetheless, if not conducted with enough caution, it could lead to an expansion of the CJEU's competences beyond reasonable limits. Thus, it does not come off as a surprise that, according to some authors, the division of competences loses importance immediately after the conclusion of an international agreement due to the expansioninst approach of the CJEU.[312] The above problems would be particularly dire in case of international disputes between the Member States where the participants' opinions about the scope of application of EU law would differ, and the proceedings would also take place outside the EU framework.[313]

On the other hand, the CJEU does not have jurisdiction to adjudicate upon agreements not being a part of EU law.[314] The same also pertains to interpreting provisions of EU law repeating provisions of international agreements not binding the EU[315] or the agreements between the

[307] CJEU judgment of 30 September 1987, *Demirel* case C-12/86, ECLI:EU:C:1987:400, paras 7, 9.
[308] See CJEU judgment of 20 April 2010, *Commission v. Sweden*, case C-246/07, EU:C:2010:203, para 74 ff.; CJEU judgment of 27 March 2019, *Commission v Germany*, case C-620/16, ECLI:EU:C:2019:256, paras 90, 96, see also Opinion of AG Tesauro of 16 June 1998, *Hermès*, case C-53/96, ECLI:EU:C:1997:539, para 21; from the literature Matthias Müller, *op. cit.*, p .161, 170; Tobias Lock, *The European Court of Justice…*, p. 90.
[309] See e.g. CJEU judgment of 4 November 1997, *Parfums Christian Dior*, case C-337/95, ECLI:EU:C:1997:517; CJEU judgment of 7 October 2004, *Commission v France (Étang de Berre)*, case C-239/03, ECLI:EU:C:2004:598, and CJEU judgment of 19 March 2002, *Commission v. Ireland*, case C-13/00, EU:C:2002:184.
[310] CJEU judgment of 4 November 1997, *Parfums Christian Dior*, case C-337/95, ECLI:EU:C:1997:517, para 33; CJEU judgment of 11 September 2007, *Merck Genéricos*, case C-431/05, ECLI:EU:C:2007:496, para 33; CJEU judgment of 8 March 2011, *Lesoochranárske zoskupenie*, case C-240/09, ECLI:EU:C:2011:125, para 31, see also opinion of AG Sharpston of 15 July 2010, *Lesoochranárske zoskupenie*, case C-240/09, ECLI:EU:C:2010:436,para 60.
[311] Matthias Müller, *op. cit.*, p. 171-173.
[312] Andreas Bergmann, *op. cit.*, p. 157.
[313] Raphael Oen, *op. cit.*, p. 154. This problems were one oft the focal points of the case law discussed in Part II.
[314] See f.e. CJEU judgment of 15 January 1986, *Hurd*, case C-44/84, ECLI:EU:C:1986:2, para 39, also excluding the application of the principle of loyalty to treaties concerning issues not covered by EU law.
[315] CJEU judgment of 21 December 2011, *Air Transport Association of America*, case C-366/10, ECLI:EU:C:2011:864, para 63.

Member States not falling within the scope of application of EU law.[316] As recently explained by the Tribunal in a case of a border dispute between Slovakia and Croatia, CJEU also has no jurisdiction over disputes where the determination of a potential breach of EU law depends on a prior decision concerning the application and interpretation of another treaty conducted by a distinct international adjudicating body (*ad hoc* arbitral tribunal created by Croatia and Slovakia).[317] In particular, the CJEU stated that neutral references to the necessity of taking into account the outcome of these proceedings contained in the acts of EU law also do not suffice for establishing the CJEU's jurisdiction.[318] This conclusion was further strengthened by the reference that the provisions of public international law define Member States' territories.[319] Notably, the CJEU also rejected blanket incorporation of international law through the gateways of general principles of EU law, such as the rule of law or the principle of loyalty.[320] Despite being made in the context of Article 259 TFEU (inter-state proceedings), these conclusions also seem to cover also the proceedings initiated on the basis of other treaty provisions. Thus, they would not be controversial were it not for the fact that the arbitral tribunal decision and its treatment by the parties to the arbitral proceedings indeed had a substantive impact on the application and interpretation of EU law. On the other hand, however, the dispute before the arbitral tribunal was expressly referred to in EU law, including the accession agreement.

Last but not least, the CJEU's jurisdiction is also limited in temporal scope. To give a handful of examples, the CJEU expressly renounced its jurisdiction with relation to the application of international agreements concluded by the EU yet concerning the period from before the accession[321] or recognised the exclusive competence of external adjudication bodies, such as the EFTA court[322] for periods preceding the establishment of its jurisdiction.

It has to be remembered that besides its exclusive jurisdiction, the CJEU may also interpret agreements concluded by the Member States within the process of applying EU law, e.g. to

[316] CJEU judgment of 27 November 1973, *Vandeweghe,* case 130/73, ECLI:EU:C:1973:131, para 2, repeated i. a. in CJEU judgment of 4 May 2010, *TNT Netherlands,* case C-533/08, ECLI:EU:C:2010:243, para 61 and CJEU judgment of 5 May 2015, *Spain v European Parliament and Council*, case C-146/13, ECLI:EU:C:2015:298, para 101.
[317] CJEU judgment of 31 January 2020, *Croatia v Slovenia,* case C-457/18, ECLI:EU:C:2020:65, para 91.
[318] *Ibid*., para 103.
[319] *Ibid.*, para 105.
[320] Indirectly *Ibid.*, para 109; openly Opinion of AG Pikmäe of 11 December 2019, *Croatia v Slovenia,* case C-457/18, ECLI:EU:C:2019:1067, paras 134, 138.
[321] CJEU judgment of 15 May 2003, *Salzmann*, case C-300/01, ECLI:EU:C:2003:283, paras 69-70.
[322] CJEU judgment of 15 June 1999, *Andersson v Sweden*, case C-321/97, ECLI:EU:C:1999:307, para 31, or CJEU judgment of 15 June 1999 *Hofmeister v Austria*, case C-140/97, ECLI:EU:C:1999:306, para 38.

check whether a particular provision of international agreement conforms to EU law[323] or whether they allow a Member State to deviate from requirements of EU law as a matter of Article 351 TFEU.[324]

The CJEU may interpret international law within the framework of all the proceedings foreseen in the Treaties. The most apparent legal basis would be Article 218.11 TFEU[325], which allows the Member States, the European Parliament, the Council and the Commission to seek the CJEU's opinion on the conformity of an envisaged agreement with EU law. Regarding Article 218 opinions, it has to be stressed that their main goal is to avert situations of the EU entering into international obligations incompatible with EU law. Consequently, their function is mainly preventive. It follows that, as stated in clear terms by the CJEU in its WTO Opinion, a request for opinion does not preclude later challenges based on different TFEU provisions.[326] In any case, the filtering function is taken seriously by the CJEU: it suffices to say that, as will be discussed below, these were the CJEU's opinions that prevented the EU from joining EEA in its earlier form (Opinion 1/91); UPC Agreement (Opinion 1/09) and ECHR (Opinion 2/13).

Article 258 TFEU[327] provides another important procedural basis allowing the CJEU to decide cases involving international law issues by enabling the Commission to initiate infringement proceedings against the Member States. Here, one could conceive two basic scenarios: controlling the compatibility of Member States' international commitments with EU law[328] or supervising the execution of the EU international agreements by the Member States.[329] Another conceivable procedural venue would be offered by the invalidity claim under Article 263

[323] CJEU judgment of 6 March 2018, *Achmea*, case C-284/16, ECLI:EU:C:2018:158.
[324] CJEU Judgement of 15 September 2011, *Atel*, case C-264/09, ECLI:EU:C:2011:580.
[325] Article 218.11 TFEU: *A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.*
[326] CJEU opinion of 13 December 1995, *GATT-WTO*, Opinion 3/94, ECLI:EU:C:1995:436, para 22.
[327] Article 258 TFEU: *If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.*
[328] See e.g. CJEU judgment of 4 July 2000, *Portugal v. Commission*, case C-62/98, ECLI:EU:C:2000:358.
[329] See e.g. CJEU judgment of 10 September 1996, *Commission v. Germany*, case C-61/94, ECLI:EU:C:1996:313; CJEU judgment of 7 October 2004, *Commission v France (Étang de Berre)*, case C-239/03, ECLI:EU:C:2004:598.

TFEU[330] allowing to control the compatibility of international law with the primary law,[331] also with regard to the envisaged agreements.[332] Further, the CJEU could be seized with questions of EU law within the framework of preliminary reference proceedings (Article 267 TFEU).[333] Lastly, the CJEU may decide on questions involving international law pursuant to a jurisdictional clause (Article 273 TFEU) or an inter-state claim (Article 259 TFEU).[334] Apart from the cases foreseen in the Treaties, the CJEU *prima facie* also allowed creating treaty clauses granting it competences to issue preliminary rulings concerning parties from outside the EU (jurisdiction would be parallel to this of 267 TFEU). In any case, this solution has been utilised in many agreements, from Brussels Convention to new FTAs.[335] It was also recognised as conforming to EU law in Opinion 1/00.[336]

In addition, it has to be stressed that the very existence of the CJEU's jurisdiction has an exclusionary effect: According to Article 344 TFEU[337], the existence of the CJEU's jurisdiction excludes the very possibility of referring a dispute involving the Member States to an international tribunald.[338] In a way, Article 344 could be understood as an expression of the more general loyalty principle, which supports its broad interpretation.[339] Thus, the CJEU underlined that its exclusive jurisdiction should be conceived broadly to encompass not only primary law but the whole EU legal system,[340] even in the presence of competence clauses.[341] The exact contours of this exclusivity claim shall be discussed in more detail in the following

[330] Article 263.1 TFUE: *The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties*.

[331] CJEU judgment of 27 September 1988, *Commission v Council*, case 165/87, ECLI:EU:C:1988:458; CJEU judgment of 10 March 1998, *Germany v. Council (Bananas)*, case C-122/95, ECLI:EU:C:1998:94.

[332] CJEU judgment of 3 December 1996, *Portugal v Council*, case C-268/94, ECLI:EU:C:1996:461, para 1.

[333] To name just a few seminal cases, see e.g. CJEU judgment of 30 April 1974, *Haegeman*, case 181/73, ECLI:EU:C:1974:41; CJEU judgment of 30 September 1987, *Demirel*, case C-12/86, ECLI:EU:C:1987:400; CJEU judgment of 6 March 2018, *Achmea*, case C-284/16, ECLI:EU:C:2018:158.

[334] CJEU judgment of 31 January 2020, *Croatia v Slovenia*, case C-457/18, ECLI:EU:C:2020:65.

[335] This position was taken i.a. by the advocates general in their statement of position in the proceedings concerning Opinion 1/09, see Cristina Contartese, *The procedures of prior involvement and referral to the CJEU as means for judicial dialogue between the CJEU and international jurisdictions*, Geneva Jean Monnet Working Papers 27/2016, fn. 54 on p. 12; see also Matthias Müller, *op. cit.*, p. 227 f.

[336] CJEU opinion of 18 April 2002, *European Common Aviation Area*, Opinion 1/00, ECLI:EU:C:2002:231, paras 29-33.

[337] Article 344 TFEU: *Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein*.

[338] CJEU judgment of 30 May 2006, *Commission v Ireland*, case C-459/03, ECLI:EU:C:2006:345, paras 122-123,132.

[339] *Ibid.*, para 169 Matthias Müller, *op. cit.*, pp. 205,208; Tobias Lock, *The European Court of Justice…*, p. 83.

[340] Matthias Müller, *op. cit.*, pp. 180-181.

[341] *Ibid.*, p. 193.

sections dedicated to both the principle of autonomy and the relevant jurisprudence of the CJEU. In this place, it suffices to say that this dream of exclusivity seems to follow the same pattern as in other integrative organisations.[342] Consequently, it has to be stressed that the CJEU's jurisdiction is defined broadly enough to allow it to become an effective tool for controlling the legal effects of international law within the EU legal order and, thus, safeguarding the autonomy of EU law.

4.5. Preliminary conclusions

EU law's relationship with international law is somewhat complicated. To begin with, the EU itself is a creature of international law, whose status is largely defined by pre-existing international law. This is particularly visible in external relations, where the EU presents itself and is treated as an international organization. Furthermore, due to its legal personality, it may undertake obligations and incur international liability independently of its Member States, and it does so. This has serious consequences. To begin with, it creates complications in the EU's external relations, in particular in the case of the so-called mixed agreements involving both, the EU and its Member States. Given the lack of clear-cut regulations in this respect, there is always the risk of external bodies apportioning responsibility between the EU and its Member States in a manner violating the Treaties. Furthermore, it made it necessary to create rules for the reception of international law in the EU legal order. Arguably, the EU opted for a generous solution: international law binding the EU (including but not limited to treaties) not only produces legal effects within the EU but also enjoys primacy vis-à-vis secondary law. However, in order, to protect the EU legal space from an uncontrolled influx of foreign legal norms, the CJEU introduced the direct effect requirement, which foresees a two-prong test. Accordingly, one may rely on a provision of an international agreement only if the broad logic of the treaty and the formulation of a particular provision indicate that it was meant to grant an individual right. The effectiveness of this regulatory tool, however, is entirely dependent on the exclusive jurisdiction of the CJEU in this respect, as the external adjudicative organs could conduct the examinations to the results incompatible with EU law. Arguably, as shall be discussed in the following chapter, the necessity of maintaining this delicate balance is the main driving force behind the external aspect of the autonomy of EU law. Lastly, in light of the above, the scepticism of the CJEU vis-à-vis external dispute-settlement bodies seems to be well founded:

[342] Cezary Mik, *Fenomenologia regionalnej integracji państw…*, p. 525. To the contrary see Tobias Lock, *The European Court of Justice…*, p. 81, pointing at the exceptional character of the CJEU's claim to exclusive jurisdiction in the CJEU Opinion of 14 December 1991, *EEA*, Opinion 1/91, ECLI:EU:C:1991:490.

it is hard to deny, that allowing the individuals to bring individual claims concerning matters covered by the EU law could disturb this equilibrium.

Chapter 5: Principle of Autonomy of EU law

5.1. General overwiev

Having discussed the understanding of the EU and its relationship with the Member States from the standpoint of public international law in the preceding chapters, one may finally get down to the principle of autonomy itself[343]. Despite not being expressly written into the Treaties, the principle of autonomy of EU law has been part of the EU legal order nearly from its beginning. It is typically associated with the CJEU judgment *van Gend en Loos*, where the Court underlined that the *Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals*.[344] The phrase itself, however, was used by the Court only much later in Opinion1/91.[345] Nonetheless, as some authors advocate, the principle of autonomy may even be called *the feature* of EU law. As René Barents put it, *the special nature of the Community law (…) is constituted by its autonomy,* understood in the functional perspective as self-referentiality encompassing (i) the Treaties as the exclusive source of EU law; (ii) being the only source of guidance on EU law's implementation; (iii) the legal nature, scope and content of EU law capable of being modified solely in the ways allowed by EU law.[346] Thus one could say that the principle of autonomy protects the *integrity* of the EU legal order.[347] The concept has both external and internal

[343] At this juncture it may be only observed that the autonomy has been consistently expressly recognized as one of the principles of EU law by both, the CJEU's jurisprudence and the legal scholarship, see e.g. CJEU Opinion of 16 June 2022, *Energy Charter Treaty*, Opinion1/20, para 47; CJEU Opinion of 6 October 2021, *Istanbul Convention*, Opinion 1/19, para 172, see also Opinion of AG Szpunar of 3 March 2021, *Komstroy*, case C-741/19, ECLI:EU:C:2021:164, paras 80 ff.; Opinion of AG Kokott of 18 June 2014, *European Convention on Human Rights*, Opinion 2/13, ECLI:EU:C:2014:2475, paras 179, 184; Jan Willem van Rossem, *Pushing limits: The Principle of Autonomy in the External Relations Case Law of the European Court of Justice*, in: Mads Andenas et. al. (eds.), *EU External Action in International Economic Law*, Springer the Hague 2020, pp. 35-68; Jed Odermatt, *The Principle of Autonomy…;* Steffen Hindelang, *Conceptualisation and Application of the Principle of Autonomy of EU Law - The CJEU's Judgement in Achmea Put in Perspective*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3266123 accessed on 22 August 2022.

[344] CJEU judgment of 5 February 1963, *van Gend en Loos*, case C-26/62, ECLI:EU:C:1963:1, p. 12. Some authors are keen to indicate manifestations of this principle in even earlier case law, see René Barents, *The Autonomy of Community Law*, Kluwer, the Hague/London/New York 2004, p. 240 ff.

[345] CJEU Opinion of 14 December 1991, *EEA*, Opinion 1/91, ECLI:EU:C:1991:490, para 21.

[346] René Barents, *op. cit.*, p. 12, expanded on pp.239 ff.; expressly endorsed by Jan Willem van Rossem, *op. cit.*, pp. 35-37, 48; in a similar vein see f.e. Jed Odermatt, *The Principle of Autonomy…,* pp. 290, 293-294 calling it one of fundamental principles of EU law, Maria-Fogdestam Agius, *op. cit.*, p. 74. The later CJEU's jurisprudence seems to lend support to this definition, see e.g. CJEU judgment of 10 December 2018, *Andy Wightman and Others v Secretary of State for Exiting the European Union*, case C-621/18, ECLI:EU:C:2018:999, para 45, where autonomy is identified with the constitutional structure and principles of EU law, such as the Treaties as the exclusive source of law, primacy and direct applicability of EU law.

[347] Jan Willem van Rossem, *op. cit.*, p. 48.

dimensions, with the latter featuring particularly prominently in more recent case law.[348] Seemingly, autonomy finds its expression even without being expressly invoked whenever the CJEU curtails the effectiveness of international law within the EU legal space, f.e. by limiting the legal effects of international agreements within the EU.[349] Naturally, one may also find other *rationales* for the oversight over the implementation of international law, such as the necessity to provide for non-discrimination by uniform interpretation of EU law,[350] connected to the concept of legal community transplanted from the EU institutional law,[351] yet they seem to play a far less prominent role.

This protective role of the autonomy of EU law is well illustrated by the classical *Kadi* case concerning the redress of individuals targeted by the UN Security Council anti-terrorism sanctions enforced by EU regulations. More precisely, the case concerned an annulment action directed against the EU measures implementing the sanctions.

The case was firstly examined by the General Court, which adopted a stance fairly preferential towards international law. To begin with, the Court established the EU's obligation to follow the UN Charter based on the *United Fruits* dictum concluding that the EU had to obey earlier Member States' obligations stemming from their participation in the UN Charter.[352] Acting on this premise, the General Court excluded reviewing acts of EU secondary law which were the direct implementation of UN Security Council resolutions, as it would equal indirect control of the Security Council's acts from the point of view of EU primary law.[353] Consequently, the Court decided to limit the scope of its review to the provisions of international *jus cogens.*[354] Notably, it expressly denied the possibility of conducting a review based on the EU fundamental

[348] For express recognition of both dimensions see e.g. CJEU Opinion of 18 December 2014, *European Convention on Human Rights*, Opinion 2/13, ECLI:EU:C:2014:2454, paras 174-176; CJEU Opinion of 30 April 2019 *CETA*, Opinion 1/17, ECLI:EU:C:2019:341, paras 89, 109; CJEU judgment of 10 December 2018, *Andy Wightman and Others v Secretary of State for Exiting the European Union*, case C-621/18, paras 44-45, ECLI:EU:C:2018:999. Matthias Müller, *op. cit.*, pp. 30, 38; Panos Koutrakos, *The anatomy of autonomy: themes and perspectives on an elusive principle*, in: European Central Bank, *Building Bridges: central banking law in an interconnected world, ECB Legal Conference 2019*, European Central Bank 2019, pp. 91-92. Tobias Lock, *The European Court of Justice …,* p. 77-78. It has to be stressed that these two aspects of autonomy are discernible also in relation to other international organizations, see Luca Pantaleo, *op. cit.*, pp. 157-158; Jed Odermatt, *The Principle of Autonomy…*, pp. 295-296.
[349] Jed Odermatt, *The Principle of Autonomy…*, p. 305.
[350] Sophie Barends, *op. cit.*, p. 37; Tobias Lock, *The European Court of Justice…*, p. 111.
[351] Sophie Barends, *op. cit.*, pp. 34, 42; CJEU Opinion of 14 December 1991, *EEA*, Opinion 1/91, ECLI:EU:C:1991:490, para 21.
[352] CJEU judgment of 21 September 2005, *Kadi v Council and Commission*, case T-315/01, ECLI:EU:T:2005:332, para 195.
[353] *Ibid*, paras 215-216, 225.
[354] *Ibid.*, paras 226, 231.

rights.[355] Further, it did so even in the absence of judicial review on the UN level and lack of respective protective provisions in the Member States' respective legal systems. Thus, the General Court adopted a fairly internationalistic stance, seeing the EU legal order as a part of the general system of international law, subordinated to the law of the UN.[356]

This decision was, however, later overturned by the Court of Justice, taking a staunchly dualistic position.[357] It began by invoking the principle of autonomy of EU law, limiting the application of all international agreements within the EU legal order,[358] only to continue by explaining that this principle covers the protection of fundamental rights.[359] Consequently, no act violating this principle could have been given effect in the EU[360] due to the primacy of primary law *vis-à-vis* international agreements.[361] The CJEU stressed, in particular, that the existence of residual review mechanisms on the level of the UN could not have served as an argument to resign from an intra-EU review,[362] provided that EU law stipulates that *Community judicature must* provide for judicial review of the regulations.[363] Granted the far-reaching consequences of the CJEU's dictum, it should not surprise that the Luxembourg Court tried to water it down. Firstly, it limited the scope of review to the EU implementing legislation, trying to separate it from the Security Council decision.[364] Further, it argued that UN Charter provides the states with the freedom to review the implementing acts,[365] allowing the EU to forbid the abandonment of such a review.[366] This jurisprudence was upheld and fulfilled in *Kadi II* cases.[367]

Thus, it could be said that with its *Kadi* jurisprudence, the CJEU made it clear that general international law does not enjoy primacy vis-à-vis EU primary law and has to conform to it.[368]

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[355] *Ibid.*, paras 283-285.
[356] Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, "Harvard International Law Journal" vol 51 1/2010, p. 22.
[357] CJEU judgment of 3 September 2008, *Kadi v Council and Commission*, case C-402/05 P, ECLI:EU:C:2008:461, para 327.
[358] *Ibid.*, paras 282, 317.
[359] *Ibid.*, paras 283-284.
[360] *Ibid.*, para 285.
[361] *Ibid.*, 461 para 308.
[362] *Ibid.*, para 322.
[363] *Ibid.*, para 326.
[364] *Ibid.*, paras 286-288, 318.
[365] *Ibid.*, para 298-299.
[366] *Ibid.*, para 300.
[367] The General Court, being rather sceptical of the Court of Justice judgment, nonetheless accepted that in the light thereof it was forced to annul the Commission's decision, see CJEU judgment of 30 September 2010, *Kadi v Commission*, case T-85/09, ECLI:EU:T:2010:418, paras 114-121, which was later upheld by the Court of Justice CJEU judgment of 18 July 2013, *Kadi v Commission*, case C-584/10 P, ECLI:EU:C:2013:518.
[368] Juliane Kokott, *Artikel 47 EUV…*, paras 16-17; the author unconvincingly argues for EU not being bound by the UN Charter, see also Berenike Schriewer, *op. cit.*, p. 171; Gráinne de Búrca, *op. cit.*, pp. 23, 29 ff. In any case

Viewed in conjunction with the expansion of the CJEU's jurisdiction and its similarities to constitutional jurisprudence, these developments could be considered to be further asserting the EU's independent status vis-à-vis international law.[369] This is particularly visible if to contrast the CJEU's "constitutionalist" position with the General Court's argumentation, much more reliant on international law.[370] In fact, the dynamic that led to the *Kadi* decision may even show that the autonomy principle may push the self-understanding of the EU legal order into regions not very distant from the national law concept of sovereignty (constructing the EU's own identity and diffusing it to domestic orders of Member States while separating EU legal order from international law).[371] Some authors even contemplated whether the judgment did not lead to *de facto* mediatisation of the Member States vis-à-vis the UN.[372] In any case, the feeling of cutting off the EU law from international law is strengthened by the fact that in its judgment, the CJEU expressly denounced the view of the General Court, acknowledging the interdependence between EU law and international law. Consequently, one may say that the CJEU made it clear that the essential features of EU law cannot be altered by legal norms conceived outside of the framework foreseen in the treaties.

The above discussion concerned mainly the *substantive* aspect of the principle of autonomy. In addition, there is also its *procedural* corollary. It finds expression foremostly in the exclusive competence of the CJEU to interpret EU law.[373] In fact, both aspects of the principle of autonomy have developed in parallel, with the latter expanding, i.a., by an extensive

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this judgment should be viewed as a resume of the earlier jurisprudence rather than a U-turn, see Jan Klabbers, *The Reception of International Law…*, p. 1233.

[369] Andreas Bergmann, *op. cit.*, p. 181, 185-186; Christina Binder, Jane A. Hofbauer, *op. cit.*, pp. 145, 155; Klabbers Jan, *Treaty Conflict…*, p. 174, speaking of *strict, traditional dualism*. At this place, however, it cannot be omitted that eventually, the CJEU's position on the interplay between the fundamental rights and UN sanctions was adopted also by the ECtHR, ostensibly less idiosyncratic about its autonomy, see ECtHR judgment of 21 June 2016 in case 5809/08 *Al-Dulimi and Montana Management Inc. v. Switzerland*; Leszek Garlicki, *Ochrona praw jednostki w XXI w. (globalizacja-standardy lokalne-dialog między sądami),* in: E. Gdulewicz, W. Orłowski, S. Patyra (eds.), *25 lat transformacji ustrojowej w Polsce i w Europie Środkowo-Wchodniej*, UMCS University Press Lublin 2015, pp. 169 ff.

[370] Berenike Schriewer, *op. cit.*, 2017, p. 190; Matthias Kottmann, *op. cit.*, p. 245 comparing the CJEU's jurisprudence to US Supreme-Court judgments. Andreas Bergmann, *op. cit.*, pp. 192, 195, 247, the author suggests that all this would even allow to use the concept of sovereignty in relation to the EU. But see opposite view of Jerzy Kranz, *op. cit.*, pp. 203-207, 216,

[371] Andreas Bergmann, *op. cit.*, p. 253. The author notes in particular striking parallels between the historical function of sovereignty as a tool of emancipating monarchs from universalistic ambitions of the Church and the Empire, and the consequent refusal of CJEU to accept the primacy of international law, including UN Charter, pp. 279-285.

[372] Matthias Kottmann, *op. cit.*, p. 263.

[373] Arguably, as shall be discussed in more detail in further chapters, the CJEU expanded its interpretative monopoly enough to exclude not only deciding on the validity of EU law, but also any interpretation of the EU law by external bodies, see Jan Willem van Rossem, *op. cit.*, pp. 45-46, 52.

interpretation of EU law and the application of the duty of loyalty.[374] Some scholars went even so far as to suggest that the CJEU identified autonomy with its exclusive jurisdiction.[375] Even if to dismiss such a view as reaching too far, one still has to admit that protection of the autonomy of the EU legal system, and thus, the primacy of EU (primary) law, has belonged to the primary task of the CJEU.[376] In any case, the autonomy of EU law requires that the CJEU and other EU institutions may not become bound by an interpretation of EU law conducted outside of the institutional framework conceived in the Treaties.[377] This pertains to international law generally and is not limited to agreements containing particular provisions, e.g. replicating EU law.[378] Consequently, it may be said that the CJEU occupies the position of the ultimate "gatekeeper" of the EU legal order vis-à-vis international law.[379] Arguably, this gatekeeper function manifests itself particularly strongly in the Court's ultimate competence to pronounce itself on the direct effect of international agreements or lack thereof. It is not difficult to see that this unique power of the CJEU to interpret EU law while helping to maintain its autonomy and coherence, at the same time, could be viewed as detrimental to the coherence of specialised international law regimes the EU is a party to.[380]

For the avoidance of doubt, this distinct (autonomous) character of the EU vis-à-vis international law is not dependent on the decision as to the EU's legal nature, even if to admit the EU's (partial) emancipation from the constraints of general international law.[381] After all, also taking the international law conception as the point of departure would allow coming to similar conclusions, i.e. conceiving EU law as a separate regime.[382] This view seems to find

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[374] See CJEU Opinion of 30 April 2019 *CETA*, Opinion 1/17, ECLI:EU:C:2019:341, para 111; René Barents, *op. cit.*, pp. 262-263.Matthias Müller, *op. cit.*, pp.42-44; Tobias Lock, *The European Court of Justice …*, p. 91; Nikos Lavranos, *The MOX Plant and Ijzeren Rijn Disputes…*, pp. 234 f.

[375] Jan Willem van Rossem, *op. cit.*, pp. 55,64.

[376] Andreas Bergmann, *op. cit.*, pp. 123-4. One could go even further and call the CJEU's approach "court-centered", i.e. aimed at safeguarding the position of CJEU; see Panos Koutrakos, *op. cit.*, pp. 94-95; Jan Klabbers, *Treaty Conflict…* p. 15.

[377] CJEU judgment of 12 September 2006 in case C-131/03 *Reynolds Tobacco*, ECLI:EU:C:2006:541, para 98; Matthias Müller, *op. cit.*, p. 69.

[378] Jan Willem van Rossem, *op. cit.*, pp. 41-42.

[379] Matthias Kottmann, *op. cit.*,p .245.

[380] Matthias Müller, *op. cit.*, p. 199, Ramses A. Wessel, Christophe Hillion, *op. cit.*, pp. 19-20; Jed Odermatt, *International Law…*, p. 31.

[381] Maria-Fogdestam Agius, *op. cit.*, pp. 54-55, 230, 454. In addition to the earlier discussions concerning the CJEU's treatment of EU law as distinct from international law see for example, the exclusion of application of the principle of reciprocity as between the Member States CJEU judgment of 13 November 1964, *Commission v Belgium and Luxembourg*, joined cases 90/63 and 91/63, ECLI:EU:C:1964:80; CJEU judgment of 15 July 1964, *Costa v E.N.E.L.*, case C-6/64, ECLI:EU:C:1964:66.Matthias Müller, *op. cit.*, p. 39; in similar vein René Barents, *op. cit.*, p. 261.

[382] CJEU judgment of 10 December 2018, *Andy Wightman and Others v Secretary of State for Exiting the European Union*, case C-621/18, ECLI:EU:C:2018:999, para 45. See also Berenike Schriewer, *op. cit.*, 2017, p. 31; Sophie Barends, *op. cit.*, p 32. In fact, as Cezary Mik rightly notes, the international organizations with law-

support in both Barent's functional approach to the EU's autonomy concept and the international practice. In the end, an elaborate catalogue of remedies and legal procedures (preliminary reference in particular) available within the framework of an integrative organisation necessarily has to translate into its relative autonomy vis-à-vis general international law.[383]

Last but not least, it has to be stressed that the existence of the principle of autonomy should not be conceived as erecting a wall of separation between EU law and international law. Quite the contrary. All that the principle of autonomy is about, is that any international law may become relevant to the EU solely by virtue and in accordance with EU law itself[384]. One could even say that it is to be associated with the *self-openness* toward international law. Thus, arguably, the autonomy should be balanced against the EU's openness to international law that could be derived from various provisions of both TEU and TFEU[385]. And, as the relatively generous treatment offered to international law by the Treaties demonstrates (see Chapter 4 above), the outcome of this balancing exercise cannot be easily qualified as either open or sceptic vis-à-vis international law[386].

5.2. Preliminary conclusions

It is thus clear that the so-conceived principle of autonomy, by necessity, sets limits to the private parties' access to the international dispute settlement mechanisms. The CJEU's final say on matters related to the essential features of the EU legal order is a *conditio sine qua non* for safeguarding its integrity. And for the reasons set out in the preceding chapters, it is clear that unlimited access of individuals to international dispute settlement bodies would distort this equilibrium. This is particularly visible in the case of private litigants who, unlike their state counterparts, cannot be quickly disciplined by the EU institutions. Since autonomy does not equal autarky, however, this inherent scepticism vis-à-vis international dispute settlement

making powers seem to have an inherent tendency towards asserting their autonomy, idem , *Fenomenologia regionalnej integracji państw...*, p. 507, see also Jed Odermatt, *International Law…*, p.11, who stresses that it is not the features of the EU law as such, but rather they degree that make the EU law stand out from the different international law regimes.

[383] Cezary Mik, *Fenomenologia regionalnej integracji państw...*, pp. 531, 539.

[384] René Barents, *op. cit.*, pp. 260-261.

[385] It could be associated f.e. with principles contained in Articles 2, 3 6 and 21 TEU, as well as more specific provisions of TFEU such as Articles 165.3; 166.3; 167.3; 168.3; 180.b; 184.1; 184.4; 196.1 TFEU; see Berenike Schriewer, *op. cit.*, 2017, pp. 139, 146, 152, 154; see also Jed Odermatt, *The Principle of Autonomy…*, pp. 305-306.

[386] The concept of *international law-friendliness* shall describe the situations of going beyond the strict observance of international obligations in order to provide full effectiveness of international law. The concept of *international law-scepticism* describes its opposite, see Berenike Schriewer, *op. cit.*, pp. 103, 105, 110.

bodies resulted in their differentiated and somewhat casuistic treatment rather than a blanket exclusion, which will be the subject of the following topics.

Chapter 6: Autonomy and (un-)friendliness: EU law and treaty-interpreting bodies

6.1 Introduction

This Chapter shall thematise dispute settlement and treaty interpreting bodies which are not available for the private parties created by the agreements concluded by the EU and its Member States. As singling out each and every such an agreement would be impossible for practical reasons, I shall limit myself to instruments (or their categories) that were thematised either in the CJEU's jurisprudence or the EU's treaty practice, while only marginally referring to the other existing mechanisms. Even though not being the main topic of this work, their analysis shall provide the necessary context for assessing the mechanisms involving the private parties, providing a broader view of the attitude of the CJEU vis-à-vis external bodies capable of rendering (binding) decisions.[387] In particular, one must stress that the CJEU's jurisprudence discussed in this section largely precedes the decisions concerning the mechanisms accessible to individuals that will be addressed in the following chapters. Thus it may be assumed that it contributed to setting the benchmark against which the later mechanisms accessible to individuals have been measured. This is the case of the World Trade Organisation ("**WTO**") mechanism in particular, which demonstrated how challenges posed to the autonomy by a robust international dispute resolution mechanism could be offset by limiting the legal effect of its native legal system in the EU legal order.

One could think of several criteria for dividing such mechanisms. For example, Müller proposes a division along the lines of the nature of the agreements, dividing between (i) "loose" agreements without dispute settlement provisions; (ii) integration-oriented agreements and (iii) agreements with binding adjudicating mechanisms *stricto sensu*.[388] On the other hand, Pantaleo proposes a division along the line of EU's participation, differentiating between (i) mixed agreements without any specific arrangements, such as WTO; (ii) mixed agreements with clear competence division and (iii) other, more precise arrangements, involving procedural innovations such as the co-respondent mechanism.[389] Nonetheless, none of those above divisions is free of problems and particularly fit to address the questions driving this dissertation. Consequently, it would be more in line with the research goals of this dissertation to discriminate between international dispute settlement mechanisms which were: (i) directly

[387] Christina Eckes, *EU Autonomy and Decisions of (Quasi-)Judicial Bodies. How Much Differentness is Needed?* "Amsterdam Centre for European Law and Governance Working Paper Series" 10/2011, p. 8.
[388] Matthias Müller, *op. cit.*, p. 178-179.
[389] Luca Pantaleo, *op. cit.*, pp. 13-40.

examined by the CJEU (EEA and EFTA courts; United Nations Convention on the Law of the Sea ("**UNCLOS**")[390] dispute settlement provisions; Benelux Court and the draft of European Common Aviation Area Agreement)[391]; (ii) the WTO mechanism, as the only inter-state dispute settlement utilised by the EU on a regular basis yet only indirectly pronounced upon by the CJEU; (iii) mechanisms not addressed by the CJEU.

6.2. Treaty Interpreting bodies reviewed by the CJEU

6.2.1. EEA Court, Joint Committee and limits to interpretation of EU law (CJEU Opinions 1/91 and 1/92)

Undoubtedly, CJEU opinion 1/91 *EEA* was fundamental for the development of the external dimension of the autonomy principle vis-à-vis external adjudicating bodies.[392] The CJEU's opinion concerned an envisaged agreement creating European Economic Area ("**EEA**") to be concluded between the EU and its Member States on the one hand and European Free Trade Association ("**EFTA**") states on the other. The agreement did foresee, among others, the creation of an effective system of judicial supervision, which was precisely the subject matter of the CJEU's opinion.[393] Substantive provisions of the agreement were to mirror corresponding provisions of the Treaties, including, in particular, the fundamental freedoms.[394] The jurisdiction of the EEA Court was to cover disputes between the EEA parties and provide for recourse against the decisions of the EEA authorities.[395] In addition, EFTA states could have authorised their national courts to make preliminary references to the CJEU, whereby the agreement did not specify whether a referral would be obligatory and whether the CJEU's answer would be binding.[396] As is well known, these features led the CJEU to decide against the conformity of the envisaged EEA court with the principle of autonomy of EU law.

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[390] United Nations Convention on the Law of the Sea of 10 December 1982, UNTS vol. 1833, p. 397.
[391] The CJEU Opinion 2/13 on the EU's envisaged accession to the ECHR encompassed also the review of the Convention's provisions on inter-state dispute settlement. Nonetheless, due to the Opinion being focused on the individual-related aspects of the EU's accession, this issue will be discussed in Part II of this dissertation.
[392] Tobias Lock, *The European Court of Justice…*, p. 78, René Barents, *op. cit.*, p. 262; see also Marco Bronckers, *The Relationship of the EC Courts with other international tribunals: non-committal, respectful or submissive?*, "Common Market Law Review" vol 44 3/2007, p. 605 or Barbara Brandtner, *The 'Drama' of the EEA Comments on Opinions 1/91 and 1/92*, „European Journal of International Law" vol 3 1992, p. 315 stressing the importance of the CJEU having relied also on Treaties' provisions pertaining to the duty to ensure observance of application and interpretation of the Treaties.
[393] CJEU Opinion of 14 December 1991, EEA, Opinion 1/91, ECLI:EU:C:1991:490, para 1.
[394] *Ibid.*, para 4.
[395] *Ibid.*, para 6.
[396] *Ibid.*, para 11.

The first problem concerned the interpretation of similarly formulated provisions of EEA and EU law. The CJEU indicated that a similar formulation of the EEA provisions does not warranty their interpretation corresponding to EU law.[397] In particular, the Luxembourg court stressed that the mere requirement of following its interpretation of EU law *from before the accession* was insufficient to ensure the primacy of EU law as interpreted by the CJEU.[398] The aforementioned problems were only an introduction to more general considerations related to the *autonomy of the Community legal order* vis-à-vis the purported EEA Court.[399] Most importantly, the CJEU observed that since the parties to the EEA agreement encompass the EU and its Member States, the EEA Court would necessarily have to decide also on the division of competences between the two.[400] It continued by adding that this situation could give rise to the Member States initiating disputes between themselves outside of the EU framework.[401] This would be even more problematic, granted the EEA court's interpretation binding the EU and its organs (including the CJEU).[402] It would make the situation even more disconcerting provided that the EEA provisions were formulated nearly identically to their EU counterparts.[403] Thus, the EEA court would influence the interpretation of EU law by the CJEU.[404] In such circumstances, the limitation of the EEA Court's obligation to follow the prevailing interpretation of EU law solely to the pre-accession jurisprudence would not provide enough safeguards.[405] If it was not enough, the CJEU, relying on its earlier case law, stated that the envisaged agreement violated the autonomy principle by allowing the CJEU judges to sit also on the EEA Court bench (double hatting).[406]

Thus, one could speak of several problems. To begin with, the CJEU was worried about an external adjudicating organ meddling with the internal division of competences between the EU and its Member States.[407] As discussed in Section 2.3.2. above, at least in principle, this fear was not unfounded. Furthermore, it is clear that the CJEU was afraid of possible confusion caused by the existence of a parallel court without clearly defined competences. In the result, the Member States' courts could be tempted to follow the EEA Court's interpretation of

[397] *Ibid.*, paras 14 ff., para 22.
[398] *Ibid.*, paras 27-28.
[399] *Ibid.*, para 30.
[400] *Ibid.*, para 34.
[401] *Ibid.*, para 35.
[402] *Ibid.*, para 39.
[403] *Ibid.*, paras 41-43.
[404] Barbara Brandtner, *op. cit.*, p. 310.
[405] CJEU Opinion of 14 December 1991, *EEA*, Opinion 1/91, ECLI:EU:C:1991:490, para 44.
[406] *Ibid.*, para 47 ff., See also passages in Chapter 8 dedicated to the Opinion 1/76.
[407] See CJEU's own assessment in CJEU opinion of 18 April 2002, *European Common Aviation Area*, Opinion 1/00, ECLI:EU:C:2002:231, para 5. Matthias Müller, *op. cit.*, pp. 50, 191.

similarly worded treaty provisions rather than the CJEU's. In addition, the national courts could question the binding character of the CJEU's interpretation by following the EFTA courts' views.[408] In particular, the latter threat seems to be of specific significance for the CJEU's assessment.[409]

Most of the above problems were subsequently rectified in a later version of the agreement (EEA)[410] that passed the CJEU's scrutiny in Opinion 1/92.[411] According to the CJEU, the new agreement corrected the old wrongs in at least three ways. Firstly, it replaced the EEA court with an EFTA court having jurisdiction only in relation to EFTA states;[412] secondly, it introduced a clear distinction between interpretative and dispute settlement procedures[413] and removed the doubts as to the binding character of the CJEU's rulings issued in the EEA preliminary reference proceedings.[414] Seemingly, the first factor played the first fiddle – the new court could hear references solely from the EFTA parties, thus excluding the applicability of its jurisprudence to the intra-EU legal relationships.[415] Furthermore, the CJEU interpreted Article 105 of the Agreement as expressly denying the Joint Committee decisions binding effect vis-à-vis the CJEU.[416] In fact, this perceived insulation of the EU legal order from the Committee's decisions was viewed by the CJEU as the "essential safeguard" for the autonomy of EU law.[417] This "safeguard" was further strengthened by Article 111.4 expressly excluding EFTA provisions similar to provisions of EU law from the scope of the dispute settlement procedure before the Joint Committee.[418]

The correctness of the CJEU's assessment could be disputed. For example, the CJEU's understanding of the alleged exclusion of binding character of the Joint Committee Decisions was disputable, to say the least, in particular taking into account that the CJEU based its assessment rather on the *'procès-verbal agréé* than the actual wording of the Article 105.

[408] CJEU Opinion of 14 December 1991, *EEA*, Opinion 1/91, ECLI:EU:C:1991:490, paras 61-63; Sophie Barends, *op. cit.*, p. 78.
[409] Cristina Contartese, *The procedures of prior involvement…*, p. 18.
[410] Agreement on the European Economic Area - Final Act - Joint Declarations - Declarations by the Governments of the Member States of the Community and the EFTA States - Arrangements - Agreed Minutes - Declarations by one or several of the Contracting Parties of the Agreement on the European Economic Area, OJ EU L 1, 3.1.1994, p. 3–522.
[411] CJEU Opinion of 10 April 1992, *EEA*, Opinion 1/92, ECLI:EU:C:1992:189.
[412] *Ibid*., para 13.
[413] *Ibid*., para 14.
[414] *Ibid*., paras 15, 34.
[415] *Ibid.*, para 19.
[416] *Ibid.*, para 23.
[417] *Ibid.*, paras 22, 24. One could even discuss, whether the CJEU has not assessed the joint committee as a political rather than quasi-judicial body, see Marco Bronckers, *op. cit.*, p. 608.
[418] CJEU Opinion of 10 April 1992, *EEA*, Opinion 1/92, ECLI:EU:C:1992:189, para 36.

Similarly, one could legitimately ask whether the introduced safeguards were sufficient to mitigate the risks caused by parallel proceedings concerning substantially the same norms contained in both EU and EEA laws.[419] This, however, may not alter that at least on the normative level, the CJEU indicated that the revised EEA Agreement successfully mitigated the risks to the autonomy of EU law by carefully avoiding mixing EEA and EU legal regimes.[420] In any case, the CJEU considered the aforesaid safeguards sufficient to grant specific provisions of the EEA direct effect.[421]

6.2.2. UNCLOS dispute settlement bodies and the CJEU *MOX Plant* judgment

Another prominent example of challenges posed by international dispute settlement mechanisms to the principle of autonomy of EU law is provided by the **UNCLOS.**[422] UNCLOS is a UN treaty comprehensively regulating maritime activities. Essentially incorporating (and developing) the existing customary international law and counting 180 parties,[423] it may be called a genuinely universal instrument in the sea law. In addition to substantive provisions, UNCLOS also contains provisions on dispute settlement. Article 287.1 UNCLOS foresees four means of dispute settlement, namely submitting them to (i) the UNCLOS treaty body, the International Tribunal for the Law of the Sea ("**ITLOS**"); (ii) International Court of Justice; (iii) an arbitral tribunal constituted under UNCLOS Annex VII or (iv) an arbitral tribunal constituted under UNCLOS Annex VIII. In addition, it was open to signature also for international organisations (Article 305.1.f. UNCLOS, Annex IX to UNCLOS)[424]. The EU became a party to UNCLOS in 1998 along with its Member States.[425] Given the mixed character of UNCLOS, the EU filed a declaration of competences upon the accession,[426] which, however, has not been updated since.[427] In any case, as indicated by the declaration itself, there was considerable overlap between the UNCLOS and substantive provisions of EU law. Nonetheless,

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[419] Yuval Shany, *op. cit.*, p. 70.
[420] CJEU opinion of 18 April 2002, *European Common Aviation Area*, Opinion 1/00, ECLI:EU:C:2002:231, para 6.
[421] CJEU judgment of 13 July 2017, *Rosenich***,** case T-527/14, ECLI:EU:T:2017:487, para 65.
[422] United Nations Convention on the Law of the Sea of 10 December 1982, UNTS vol. 1833, p. 397. c.
[423] See information available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en, accessed on 22 August 2022.
[424] Article 305.1.f. UNCLOS: *1. This Convention shall be open for signature by: (…) f. international organizations, in accordance with Annex IX.*
[425] 98/392/EC: Council Decision 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, 23.6.1998, p. 1–2.
[426] Declaration available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en, accessed on 22 August 2022.
[427] Esa Paasivirta, *op. cit.*, p. 1050.

the UNCLOS does not provide for any mechanism of determining the proper respondent. Similarly, there is no *a priori* exclusion of Member States submitting disputes against each other. Consequently, it is apparent that the EU's mixed participation in the UNCLOS dispute settlement mechanism could pose real threats to the principle of autonomy.

This is even more so granted that disputes involving issues of EU law before the UNCLOS organs do happen. In fact, the EU acted as a respondent in two disputes initiated before the UNCLOS bodies: the *Swordfish* case and the *Faroe Islands* arbitrations. The *Swordfish* case involved Chile initiating a dispute against the EU in connection with the fishing quota (and the EU responded by initiating WTO proceedings against Chile; the dispute was eventually amicably settled.[428] A similar constellation concerned the *Faroe Islands* arbitration, but for a single exception: *Faroe Islands* were represented by Denmark, i.e. an EU Member State. Again, due to the amicable settlement of this dispute,[429] the case generated no further consequences. But the UNCLOS bodies' adjudicative activities concerning matters of EU law are not limited to contentious proceedings. In this context, particularly the *Fisheries* opinion springs to mind. The proceedings were initiated by the Sub-Regional Fisheries Commission, and the EU took part in them only as an intervener. One of the matters to be decided by the ITLOS concerned the responsibility of an international organization for illegal, unreported and unregulated fishing activities of its Member State's fishing vessels. Eventually, the tribunal recognized such a possibility, as pleaded by the Commission.[430] Regardless of the ultimate outcome of the proceedings, it should be stressed that this opinion should be viewed as highly problematic for at least one reason: it concerned the *sanctum sanctorum* of the autonomy of EU law, namely the distribution of liability along the lines of competences between the EU and its Member States.[431] Even if to share the ITLOS doubtful assessment of the opinion as lacking *binding force*,[432] the problem remains that an adjudicative body external to the EU was tasked with delimitating the responsibilities of the EU and its Member States in relation to a particular international treaty. Moreover, as demonstrated by the *MOX Plant* proceedings, the UNCLOS

[428] Yuval Shany, *op. cit.*, p. 149; Frank Hoffmeister, *The European Union and the Peaceful Settlement of International Disputes*, "Chinese Journal of International Law" 11/2012, p. 86; Esa Paasivirta, *op. cit.*, p. 1057.
[429] PCA press release of 24 August 2014 *Arbitrage relatif au hareng atlanto-scandien* https://pcacases.com/web/sendAttach/783, accessed on 22 August 2022.
[430] ITLOS Advisory Opinion of 2 April 2015 on the request submitted by the Sub-Regional Fisheries Commission (SRFC), available at https://www.itlos.org/index.php?id=252, accessed on 22 August 2022, paras 172-173.
[431] Esa Paasivirta, *op. cit.*, p. 1060.
[432] ITLOS Advisory Opinion of 2 April 2015 on the request submitted by the Sub-Regional Fisheries Commission (SRFC), available at https://www.itlos.org/index.php?id=252, accessed on 22 August 2022, para 76. The view of the Tribunal is debatable, to to say the least, see M. A. Becker., *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC). Case No. 21. At https://www.itlos.org International Tribunal for the Law of the Sea, April 2, 2015*, "The American Journal of International Law", vol 109 2015, pp. 856-858.

system allowed for the resolution of disputes concerning EU law as between the Member States outside of the CJEU's jurisdiction.

Interestingly, the CJEU had the opportunity to address the issue of overlapping jurisdictions. It directly thematised the relationships between the principle of autonomy and the UNCLOS dispute settlement mechanism in the *MOX Plant* case. The CJEU's judgment responded to a situation arising from a bundle of disputes between the United Kingdom and Ireland concerning a UK's facility for the discharge of radioactive waste. [433] Being denied access to the project documentation, Ireland decided to initiate a set of proceedings against the UK based on different international instruments. To begin with, it initiated proceedings based on Article 32 of the OSPAR Convention.[434] Further, being convinced of the negative impact of the proceedings on the environment, Ireland launched parallel proceedings under UNCLOS, applying for instating an arbitral tribunal under UNCLOS Annex VII in accordance with Article 287.5 UNCLOS and applying to the ITLOS for provisional measures under Article 290.5 UNCLOS. Acting as the respondent in these proceedings, the UK contested, among others, the jurisdiction of these bodies by relying on the principle of autonomy of EU law. Furthermore, alerted by the UK, the European Commission brought infringement proceedings against Ireland for initiating these disputes. This, however, had little if any influence on the bodies seized with the disputes. On its part, the OSPAR tribunal did not consider issues of EU law and, eventually, rendered a decision on merits (it found no breach; thus, a substantive conflict with EU law was avoided).[435] On the other hand, the ITLOS issued provisional measures acting on the assumption that the UNCLOS arbitral tribunals would have *prima facie* jurisdiction.[436] This finding was later confirmed by the arbitral tribunal itself in the decision to suspend proceedings until clarification of the CJEU's competence on the motion of the UK. Interestingly, despite suspending the proceedings till the clarification of the issues of EU law by the CJEU, the tribunal issued

[433] For further information on the dispute see Robin R Churchil, *Mox Plant Arbitration and Cases*, in: Max Planck Encyclopedia of Public International Law, entry of June 2018, accessed on 22 August 2022.
[434] Convention for the Protection of the Marine Environment of the North-East Atlantic of 22 September 1992, UNTS vol. 2354, p. 67. See proceedings in case PCA 2001-03, available at: https://pca-cpa.org/en/cases/34/ accessed on 22 August 2022. OSPAR Convention is a distinct instrument from UNCLOS and the EU is not a party to it. Nonetheless, the OSPAR proceedings were intrinsically connected to the UNCLOS litigation. Thus, analysis of the OSPAR proceedings while necessary, shall play solely an auxiliary role.
[435] Final Award of 2 July 2003 in case Ireland v. United Kingdom (OSPAR Arbitration), PCA Case No. 2001-03.
[436] ITLOS order of 3 December 2001 in case *MOX Plant (Ireland v. United Kingdom)*, *Provisional Measures*, paras 61-62, available at: https://www.itlos.org/en/main/cases/list-of-cases/case-no-10/ accessed on 22 August 2022.

provisional measures targeted at the UK.[437] Eventually, in the aftermath of the CJEU *Mox Plant* judgment, the tribunal terminated the proceedings on the motion of both participants.[438]

On its part, the Luxembourg Court limited itself to an assessment of Ireland's behaviour rather than conducting a structural analysis of the UNCLOS compatibility with EU law. The CJEU began by affirming its jurisdiction. In doing so, it recollected that UNCLOS constitutes an integral part of the EU legal order,[439] regardless of its mixed character.[440] Further, the CJEU concluded that EU law essentially covers the subject matter of the UNCLOS arbitration proceedings.[441] The CJEU supported its reasoning, among others, by referencing to the competence clause.[442] This allowed the CJEU to conclude that the dispute submitted by Ireland to UNCLOS bodies was covered by the now article 344 foreseeing exclusive jurisdiction of the CJEU over inter-state disputes pertaining to EU law[443] and being an expression of the more general principle of loyalty.[444] At this place, one should remind that the CJEU qualified the UNCLOS arbitration as a dispute-settlement method within the meaning of Article 344 TFEU due to the binding character of its decisions.[445] Consequently, the CJEU concluded that by submitting the dispute to the ITLOS, Ireland created a threat of infringing the EU's competence structure.[446] Notably, the CJEU expressly underlined that this threat could not be removed by a unilateral declaration excluding EU law from the scope of the dispute submitted by Ireland.[447] In effect, the CJEU concluded that where competences of the EU and its Member States are intertwined within the context of a particular treaty, it is the very act of submitting a dispute related to this instrument to a body from outside of the EU that threatens the principle of autonomy of EU law and, thus, violates the principle of loyalty.[448]

This jurisdictional stand-off provides for many valuable lessons. To begin with, it shows how far should the perimeter for safeguarding the principle of autonomy should be set up. In particular, the CJEU underlined that its exclusive jurisdiction in accordance with Article 344

[437] Order no. 3 of 24 June 2003 in case *MOX Plant (Ireland v. United Kingdom)*, PCA Case No. 2002-01, https://pca-cpa.org/en/cases/100/, accessed on 22 August 2022, paras 3-7 of the decision and para 21 of the reasons.
[438] Order no. 6 of 6 June 2008 in case *MOX Plant (Ireland v. United Kingdom)*, PCA Case No. 2002-01, https://pca-cpa.org/en/cases/100/, accessed on 22 August 2022.
[439] CJEU judgment of 30 May 2006, *Commission v Ireland*, case C-459/03, ECLI:EU:C:2006:345, para 84.
[440] *Ibid.*, para 82.
[441] *Ibid.*, paras 110, 121, 135.
[442] *Ibid.*, para 108.
[443] *Ibid.*, paras 122-123,132.
[444] *Ibid.*, para 169.
[445] *Ibid.*, para 129.
[446] *Ibid.*, para 154.
[447] *Ibid.*, para 155.
[448] *Ibid.*, para 176-179, 182.

TFEU should be conceived broadly so as to encompass not only primary law but the whole EU legal system,[449] even in the presence of competence clauses.[450] Moreover, the CJEU made it clear that the sheer possibility of submitting disputes to a body outside of the EU was a real problem.[451] Faced with these considerations, the CJEU avoided drawing the consequences by indicating that UNCLOS itself did foresee the primacy of interpretative competences of non-UNCLOS adjudicating bodies (i.e. the CJEU). The European Court's reasoning in this respect was rightly criticised as methodologically flawed due to not taking into account the position of the ITLOS itself.[452]

Arguably, the CJEU's rather idiosyncratic attitude was justified to a degree by the circumstances of the case, confirming only limited utility of the *comity* principle as a conflict-solving tool for interactions between different sub-systems of international law.[453] While both the CJEU and UNCLOS tribunal arguably showed a certain degree of deference vis-à-vis each other,[454] the OSPAR tribunal was much more reluctant to act in this way.[455] Ultimately, however, the CJEU came to a rather *non-comital* conclusion by asserting for itself the ultimate jurisdiction in questions of the existence of any conflict between provisions of EU law and other international frameworks.[456] Be that as it may, the enforcement of the CJEU's jurisdictional primacy, necessary to safeguard the principle of autonomy, was possible only due to the Commission effectively forcing Ireland to withdraw its claims by targeting it with infringement proceedings.

While the *MOX Plant* decision concerned mainly jurisdictional issues, one should not consider them in isolation from the issues of the legal effects of UNCLOS in the EU legal order where the CJEU decided to treat it in a manner similar to its WTO obligations by stripping UNCLOS

[449] Matthias Müller, *op. cit.*, pp. 180-181.
[450] *Ibid.*, p. 193.
[451] Sophie Barends, *op. cit.*, p. 51.; CJEU judgment of 30 May 2006, *Commission v Ireland*, case C-459/03, ECLI:EU:C:2006:345, paras 123, 132.
[452] CJEU judgment of 30 May 2006, *Commission v Ireland*, case C-459/03, ECLI:EU:C:2006:345, paras 124-125, 132, see Matthias Müller, *op. cit.*, pp. 209, 215; Klabbers Jan, *Treaty Conflict…*, p. 147, indicating its extremely conservative character. On the other hand, f.e. Shany praises CJEU's interpretation while criticising OSPAR's as overly broad, see Yuval Shany, *op. cit.*, pp. 237-238, see also Tobias Lock, *The European Court of Justice…*, p.119.
[453] International Law Commission *Report of the study group on the fragmentation of international law*, ILC Report A/61/10, 2006, para 10.
[454] Thomas Schultz, Niccolo Ridi, *op. cit.*, p. 602.
[455] Nikos Lavranos, *The MOX Plant and Ijzeren Rijn Disputes…*, pp. 227, 236; Aneta Wilk, *op. cit.*, p. 265.
[456] Dario Maestro, *Regulating Jurisdiction Collisions in International Law: The Case of the European Court of Justice's Exclusive Jurisdiction in Law of the Sea Disputes*, "Michigan Journal of International Law" vol. 41 3/2020, pp. 676-678. The author further observes that by issuing its *MOX Plant* judgment, the CJEU effectively precluded another international dispute-settlement body from deciding on its jurisdiction (p. 679).

provisions of legal effect in the EU legal space. In doing so, it made recourse to its main instruments, namely depriving them of direct effect and making it impossible to use them as a benchmark for the control of EU law.[457] It is even more so granted that the UNCLOS norms were invoked also by individuals trying to challenge provisions of EU law.[458] Thus, one could view the CJEU's decision as additionally safeguarding the CJEU's control over the UNCLOS provisions status in the EU legal order.

Consequently, the following may be said of the interrelation between the EU legal system and the UNCLOS dispute-settlement machinery. Firstly, as demonstrated by the existing case law discussed above, the very design of the UNCLOS dispute-settlement system makes it likely to come into conflict with the principle of autonomy of EU law. This conflict, however, is mitigated by the CJEU excluded the possibility of invoking UNCLOS provisions against the EU law. This, however, was possible only by asserting the gatekeeper function by the CJEU, which, in turn, required foremostly eliminating bringing disputes concerning the EU law to fora other than the CJEU. In the absence of corresponding treaty provisions, the only possible way of safeguarding compliance in this respect consisted in imposing an EU law ban, backed by the threat of initiating infringement proceedings, as neatly demonstrated by the *MOX Plant* proceedings. Nonetheless, the UNCLOS case may be considered unique in that the CJEU resigned from declaring a dispute settlement mechanism contrary to EU law despite finding an actual rather than hypothetical instance of its abuse at the expense of the autonomy principle. Arguably this unusual leniency was possible only due to offsetting the threat to autonomy by the possibility of bullying the litigant into dropping case by initiating parallel EU proceedings.

6.2.3. European Common Aviation Area Joint Committee (CJEU Opinion 1/00)

Opinion 1/00 of the CJEU concerned envisaged agreement establishing European Common Aviation Area subjecting the access to the air transport markets of the Contracting Parties to a single set of rules based on the relevant legislation in force in the Community and relating to free market access, freedom of establishment, equal conditions of competition, safety and the environment. In addition to substantive provisions, the agreement did also foresee the creation of a Joint Committee playing the function of a dispute-settlement body. Last but not least, unlike

[457] CJEU judgment of 3 June 2008, *Intertanko*, case C-308/06, ECLI:EU:C:2008:312, paras 59-65. Michelle Q. Zang, *Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement*, "The European Journal of International Law" vol. 28 1/2017, p. 276. Maria-Fogdestam Agius, *op. cit.*, p. 205ff.; who singles out specifically WTO, whose *regime*- nature is particularly visible, but her analysis of the UNCLOS-related case law on pp. 212ff , 220 ff. leads to the same conclusions. See also section 4.2.4. above.
[458] Maria-Fogdestam Agius, *op. cit.*, p. 215.

the agreements discussed above, the envisaged ECAA was an EU-only agreement.[459] Interestingly, despite the CJEU eventually giving the green light for the conclusion of the agreement, this draft text was eventually abandoned, and the ECAA was created by a different instrument, this time concluded by both the EU and its Member States.[460]

The CJEU took into account the legal status and competences of the joint committee, recognising it as the dispute settlement body of the organisation.[461] In assessing its conformity with EU law, the CJEU analysed several factors. To begin with, it stressed the importance of creating mechanisms safeguarding due respect for the CJEU's interpretation of EU law.[462] Most importantly, the Luxembourg court restated that insulating the EU institutions from the legal effects of external bodies' judicial decisions did lay at the very heart of the preservation of EU's autonomy.[463] The CJEU viewed this requirement to be satisfied by the envisaged agreement, as according to its Article 17.3, the CJEU would remain exclusively competent to rule on the questions of the legality of the actions performed by EU's institutions.[464] In any case, the binding character of the Luxembourg court's decisions would be upheld.[465] Further, the CJEU paid attention to the modalities of the Committee's decision-making. In this respect, it took a somewhat cynical position by underlining that the unanimity requirement, while not necessarily helpful to the effectiveness of the ECAA, would allow the EU to block any decision unfavourable to it.[466] Last but not least, the CJEU emphasised the importance of eliminating threats related to mixed participation. Actually, the Court was acutely aware that precisely these circumstances allowed it to avoid the risk of an external body deciding on the issues of competence division within the EU[467] or the Member States circumventing EU dispute

[459] CJEU opinion of 18 April 2002, *European Common Aviation Area*, Opinion 1/00, ECLI:EU:C:2002:231, para 1.
[460] Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area, OJ EU L 285, 16.10.2006, p. 3–46, Matthias Müller, *op. cit.*, p. 56.
[461] CJEU opinion of 18 April 2002, *European Common Aviation Area*, Opinion 1/00, ECLI:EU:C:2002:231, para 8.
[462] *Ibid.*, paras 35-36, 43.
[463] *Ibid.*, para 6, 13.
[464] *Ibid.*, para 24.
[465] *Ibid.*, para 25.
[466] *Ibid.*, para 40. At this juncture it may be only indicated that as evidenced by the practice regarding the Aarhus Convention, these considerations were by no means of only theoretical nature (see section 13.5). More general on the possibility of the EU Member States blocking the decisions unfavourable to the EU within international organisations see Jed Odermatt, *International Law…*, p. 157.
[467] CJEU opinion of 18 April 2002, *European Common Aviation Area*, Opinion 1/00, ECLI:EU:C:2002:231, para 16.

settlement mechanisms.[468] Seemingly, the above assessment was based on the assumption of the binding character of the Committee decisions, which was by no means self-evident.[469]

Arguably, Opinion 1/00 was a direct continuation of the principles elaborated upon in Opinions 1/91 and 1/92. The Court made it clear that the exclusion of creating legal effects by a given body's decisions within the EU was the main requirement set by the principle of autonomy.[470] Arguably, this effect was achieved in a twofold manner: on the one hand, the CJEU requested the preservation of the power architecture within the EU on the other, it denied any binding effect of this body's decisions on the EU organs.[471]

6.2.4. Benelux Court (C-337/95 *Parfums Dior*)

Another example of international courts examined by the CJEU is provided by the Benelux Court. It was established in 1965 by the Treaty concerning the establishment and statute of a Benelux Court of Justice.[472] Functionally it has always been connected to the Benelux Union, a regional international organisation established in 1958 encompassing Belgium, Netherlands and Luxembourg,[473] yet it was expressly recognized as one of its organs only after the 2008 treaty amendments.[474] It is granted *the task of promoting uniformity in the application of rules of law common to Belgium, Luxembourg and the Netherlands* in the way of preliminary references (Article 1.2; it has also further advisory and jurisdictional competences, which, however, are of lesser relevance for this work due to them not having been scrutinized by the CJEU). The Benelux Court's intrinsic connection to the Benelux Union, as well as its jurisdiction aiming at providing a uniform interpretation of certain provisions, prompted some scholars to view it as a tribunal of an international integration organisation.[475] Unlike the preceding mechanisms, the Benelux Court was chiefly tasked with providing the State-Parties

[468] *Ibid.*, para 17.
[469] Matthias Müller, *op. cit.*, p. 55.
[470] *Ibid.*, p. 56.
[471] Jed Odermatt, *The Principle of Autonomy…*, p. 302; Matthias Müller, *op. cit.*, p. 55.
[472] Traite relatif à l'institution et au statut d'une Cour de Justice Benelux of 31 March 1965 in Brussel as amended, available at https://www.courbeneluxhof.be/pdf/TraiteCour_consol.pdf, accessed on 22 August 2022 ("**Benelux Court Treaty**"). In fact, the Benelux Court is one of the oldest working international courts, see Yuval Shany, *op. cit.*, p. 5.
[473] For more information on the Benelux Union and its relationship with the Benelux court see Frauke Sauerwein, *Benelux (Economic) Union*, in: Max Planck Encyclopedia of Public International Law, entry of January 2013, accessed on 22 August 2022. Interestingly, Article 350 TFEU expressly recognizes its existence: *The provisions of the Treaties shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of the Treaties.*
[474] New Benelux Treaty of 17 June 2008, available at: https://www.benelux.int/fr/benelux-unie/nouveau-traite-benelux, accessed on 22 August 2022, Article 5.
[475] Cezary Mik, *Fenomenologia regionalnej integracji państw...*, p. 515.

with a uniform interpretation of the law, also in the form of preliminary references, rather than settling the inter-state disputes. It has to be stressed that the Benelux Court is not competent to issue decisions binding for the participants of the proceedings before national courts: it may only provide national courts deciding the case with a binding interpretation of legal provisions.[476] Thus, granted that it is not competent to hear individual complaints and render binding decisions settling individual cases, there are good arguments not to count this court among dispute settlement mechanisms. Nonetheless, one could still legitimately ask whether these features would not suffice to make it at least problematic from the point of view of EU law.

This being said, it has to be stressed that the CJEU did have to tackle the issues posed by the Benelux Court indirectly within the context of preliminary reference proceedings. Actually, the CJEU recognized the Benelux Court as a national court within the meaning of Article 267 TFEU in its *Dior* judgment concerning a preliminary referral from this body.[477] Somewhat surprisingly, rather than thematizing the issue of the relationship between the Benelux Court and the autonomy principle, the CJEU bypassed the issue by declaring the Benelux Court as a court common to Member States capable of making preliminary references,[478] that could be even obliged to do so due to the lack of appeal from its decisions.[479] It further reasoned its position by indicating that allowing for preliminary references would be in the interest of uniform application of EU law.[480] Basically, this rather superficial analysis was enough for the CJEU to establish the Benelux Court's status as a court common to the Member States.[481] Somewhat paradoxically, it was only in the later case law (concerning the European Schools Complaints Board, investment tribunals and Unified Patent Court, all discussed in Part II of this study) where the CJEU elaborated upon the legal nature of the liaisons between the Benelux

[476] Benelux Court Treaty .Article 6.2: *Lorsqu'il apparaît qu'une décision dans une affaire pendante devant une juridiction nationale implique la solution d'une difficulté d'interprétation d'une règle juridique visée à l'article 1er, cette juridiction peut, si elle estime qu'une décision sur ce point est nécessaire pour rendre son jugement, surseoir même d'office à toute décision définitive afin que la Cour se prononce sur la question d'interprétation*. Benelux Court Treaty Article 7.2: *Les juridictions nationales qui statuent ensuite dans la cause sont liées par l'interprétation résultant de la décision rendue par la Cour.*

[477] CJEU judgment of 4 November 1997, *Parfums Christian Dior*, case C-337/95, ECLI:EU:C:1997:517.

[478] *Ibid*., para 21.

[479] *Ibid.*, para 26.

[480] *Ibid.*, paras 22-23

[481] The Luxembourg Court subsequently backed its argumentation by deriving the acceptance for the Benelux Court also from the Article 350 TFEU recognizing the existence of regional union between the Belgium, Luxembourg and the Netherlands, see CJEU judgment of 14 July 2016, *Brite Strike*, case C-230/15, ECLI:EU:C:2016:560, para 63.

Court and national courts in order not to extend the notion of Member States' courts to further international dispute-settlement bodies.[482]

As will be discussed in more detail in section 15.2 below, even if to sympathise with the outcome of the CJEU's reasoning as reconciling both courts, from a methodological standpoint its handling of the case seems to be, at best, disputable. It is difficult to escape the impression that a mere tagging of the Benelux Court as a Member States' court allowed to effectively bypass the whole autonomy analysis. In any case, such relabelling may not obfuscate the reality of the Benelux Court being an international court responsible for rendering decisions on the basis of its constituent instruments. The arbitrariness of this operation becomes visible if to take into account that the criteria for such a qualification were elaborated only ex-post, and the status of a Member States' court has not been extended to any other international treaty interpreting body so far. Moreover, as will be discussed in section 9.3.3. the CJEU expressly denounced the existence of a parallel international preliminary reference mechanism as threatening the principle of autonomy of EU law in relation to the ECHR Protocol 16 (see also analysis of the Opinion 1/91 in section 6.2.1. above). Even, however, if to remain by the Benelux Court example, the blanket acceptance of this court jurisdiction issue may become more problematic, be it only due to the 2018 expansion of its competences so as to, among others, allow it tohear a range of intellectual property disputes in lieu of national courts, which may lead to an effective broadening of the scope of the overlap between the jurisdictions of both courts.[483]

Be that as it may, taking the CJEU's reasoning at face value, it lies at hand that such a classification was possible only upon the CJEU's assumption of the purely advisory character of the Benelux Court's preliminary rulings and the accessory character of the preliminary reference proceedings before this body.[484] Consequently, regardless of the assessment of the accuracy of the CJEU's analysis, on the normative level, there are no grounds to claim that in implicitly recognizing the Benelux Court, the CJEU detracted from its earlier case law discussed in the preceding sections.

[482] Cristina Contartese, *The procedures of prior involvement…*, fn. 19 on p.6.
[483] Interestingly, despite expanding docket, the Benelux Court has not made any preliminary references in these cases so far, see Thomas Jaeger, *Delayed Again? The Benelux Alternative to the UPC,* "GRUR International", 10.1093/grurint/ikab110, September 2021, pp. 1137, 1141.
[484] Matthias Amort, *Zur Vorlageberechtigung des Europäischen Patentgerichts: Rechtschutzlücke und ihre Schliessung,* „Europarecht" 2017, p. 71.

6.3. The case of WTO: conformity through externalisation and curbing the effectiveness

6.3.1. WTO law

This section shall be dedicated to the inter-state dispute settlement mechanism that has been most widely used by the EU, namely the WTO framework. Interestingly, despite its practical relevance, its conformity with EU law has not been a subject of direct examination by the CJEU. Nonetheless, as shall be demonstrated in this section, a throughout analysis of the CJEU's jurisprudence related thereto allows identifying the factors speaking for the CJEU's acceptance thereof. In order to get the proper understanding of the CJEU's jurisprudence, however, it is necessary to highlight essential features of the WTO mechanism.

Agreement Establishing the World Trade Organization with annexes ("**WTO Agreement**") was signed at Marrakesh on 15 April 1994.[485] With 164 Members,[486] WTO's claim to be the global international trade regime seems to be all but exaggerated. WTO Agreement supplemented the existing framework provided by the General Agreement on Tariffs and Trades ("**GATT**").[487] This continuity is reflected by Article XVI of the WTO Agreement, expressly affirming the continuous relevance of the GATT provisions and the treaty practice (including earlier panel reports) to the WTO.[488] Basically, beyond updating the GATT, the essential innovations consisted in adding new" pillars", namely trade in services (General Agreement on Trade and Services, "**GATS**") and IP rights (Agreement on Trade-Related Aspects of Intellectual Property Rights "**TRIPS**") on the one hand and introducing profound changes to the procedural provisions on the other.[489] Most importantly, the procedural limb included Understanding on the Rules and Procedures Governing the Settlement of Disputes ("**WTO DSU**").[490] However, before going to the dispute settlement body, some further aspects of the WTO architecture should be fleshed out.

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[485] Agreement Establishing the World Trade Organization with annexes of 15 April 1994, UNTS vol. 1867, p. 154.
[486] According to the data available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, accessed on 22 August 2022.
[487] General Agreement on Tariffs and Trades of 30 October 1947, 55 UNTS vol. 55, p. 194.
[488] See in particular Appellate Body Report of 1 November 1996 in case *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, p. 14; Götz Göttsche, *WTO als Rechtsordnung*, in: Meinhard Hilf, Stefan Oeter (eds.), *WTO Recht. Rechtsordnung des Welthandels*, Nomos Baden-Baden 2010, p. 108, see also Ilka Neugärtner, *GATT 1947*, in: Meinhard Hilf, Stefan Oeter (eds.), *WTO Recht. Rechtsordnung des Welthandels*, Nomos Baden-Baden 2010, p. 82.
[489] Götz Göttsche, *op. cit.*, p. 103.
[490] Annex 2 to the Agreement Establishing the World Trade Organization with annexes of 15 April 1994, UNTS vol. 1867, p. 154: Understanding on the Rules and Procedures Governing the Settlement of Disputes; Götz Göttsche, *op. cit.*, p. 103.

To begin with, WTO Agreement created a whole international organisation with its distinct organs, such as the Ministerial Conference (Article IV.1); General Council (Article IV.2), the Dispute Settlement Body (Article IV.3; "**DSB**") or the Trade Policy Review Body (Article IV.4). Furthermore, there are other specialised Councils and Committees eligible for creating further assisting bodies (see, e.g. Article IV.5-8). In performing their tasks, they are aided by the Secretariat (Article VI). Despite theoretically playing only an auxiliary role, in practice, having over 600 members and serving as the WTO's reservoir of institutional memory, it exercises a considerable influence on the organisation's functioning.[491] Furthermore, as an international organisation, the WTO may not only create secondary international law reaching beyond its internal administrative regulations (see e.g. Article IX.2-3) but also enter into legal relationships with other international organisations (Article V).[492] Most importantly, at least from the point of view of this study, the WTO provides one of the most robust international frameworks for dispute-settlement.[493]

As already explained, the WTO DSU lays down most rules concerning the functioning of the WTO dispute-settlement system. According to Article 1.1, WTO dispute-settlement system is accessible only to the states. This exclusion of individuals goes so far as to effectively preclude filing *amici curiae* by private parties.[494] This arrangement fully corresponded with the WTO states' intention of excluding the direct rights on the part of the individuals, instead opting for mediating them through the state.[495] On their part, at least some WTO Members, including the

[491] Meinhard, Hilf, *WTO: Organisationsstruktur und Verfahren*, in: Meinhard Hilf, Stefan Oeter (eds.), *WTO Recht. Rechtsordnung des Welthandels*, Nomos Baden-Baden 2010, p. 147.
[492] Götz Göttsche, *op. cit.*, p. 106.
[493] Peter van den Bossche, Denise Prévost, *Essentials of WTO law*, CUP Cambridge 2016, p. 259, 262; Meinhard Hilf, Tim Rene Salomon, *Das Streitbeinlegungssystem der WTO*, in: Meinhard Hilf, Stefan Oeter (eds.), *WTO Recht. Rechtsordnung des Welthandels*, Nomos Baden-Baden 2010, p. 166. Petr Polášek; Sylvia T. Tonova, *Enforcement against States: Investment Arbitration and WTO Litigation*, in: Romanetti Huerta-Goldman, Fuentes Stirnimann (eds.) *WTO Litigation, Investment Arbitration, and Commercial Arbitration,* Kluwer Aalphen an den Rijn 2013, p. 357. This, however may get changed with by the ongoing crisis caused by the USA blocking new appointements and, thus, effectively paralysing the WTO dispute-settlement, see e.g. G. Sacerdoti et al., *The WTO Dispute Settlement System in 2020: Facing the Appellate Body Paralysis*, Bocconi Legal Studies Research Paper Series No 3794327 February 2021, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3794327, accessed on 22 August 2022.
[494] While the Appellate body has reserved itself the possibility of admitting *amici* filed by the third parties (Appellate Body Report of 7 June 2000, in case *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdo*m, WT/DS138/AB/R, para 42; Appellate Body Report, adopted 5 April 2001 in case *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, paras 50-57), it has never agreed to do so, as in practice, the idea was met with the hostility of the WTO Members, see the footnote below.
[495] Saskia Hörman, *Rechtschutz Privater*, in: Meinhard Hilf, Stefan Oeter (eds.), *WTO Recht. Rechtsordnung des Welthandels*, Nomos Baden-Baden 2010, p. 205. This willingness to exclude the individuals is particularly visible in the many of WTO Members' hostile attitude vis-a-vis admitting *amicus curiae* submissions under the existing regulations, see with particularly developing nations such as China, India, Mexico, ANDEAN states, but also by

EU and the USA, try to accommodate the protection of individuals by instituting internal rules for initiating the WTO proceedings upon a complaint of a private party.[496] Anyhow, the existence of certain regulations cannot obfuscate the fact that the decision to initiate proceedings in a follow-up to a complaint remains a matter of discretion of a WTO Party. This is particularly visible in the case of the EU, where the examination of a complaint should be driven by the Commission's assessment of the EU's interest.[497] Rather unsurprisingly, the CJEU has underscored the discretionary character of the decision to initiate proceedings.[498] Consequently, it lies at hand that the WTO dispute resolution system is designed to protect the rights of the WTO Member States rather than their citizens.

WTO dispute settlement bodies' jurisdiction is defined rather broadly, i.e. it covers all the three pillars and certain optional plurilateral agreements (Article 1 WTO DSU). Furthermore, the legitimation of the WTO Member States to initiate disputes is conceived rather broadly, nearing *action popularis.*[499] As the formation of a panel may be hindered only by a consensus not to establish it (Article 6.1 WTO DSU, so-called *reverse consensus*), one may speak of the WTO Members enjoying *de facto* right to initiate proceedings before a selected panel.[500] Importantly, this widely conceived jurisdiction is paired with the exclusive competence of the WTO organs as stipulated in Article 23.2 DSU.[501]

WTO DSU creates a two-tier, quasi-judicial mechanism. It involves highly judicialized ad hoc dispute settlement panels in the first instance and a permanent appellate body in the second. More political Dispute Settlement Body ("**DSB**") is only of secondary importance.[502] Although

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European countries, such as Norway or Switzerland, see General Council, Minutes of the Meeting of 22 November 2000, WT/GC/M/60.

[496] See Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (codification) OJ EU L 272, 16.10.2015, p. 1–13*;* Trade Act of 1974, 19 U.S.C. §§ 2111-2462 (Suppl. 2 1976) Section 301, in particular §§ 242ff. ff. Saskia Hörman, *op. cit.*, p. 206.

[497] Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (codification) OJ EU L 272, 16.10.2015, p. 1–13, Article 9.1.

[498] See e.g. CJEU judgment of 14 December 2004, *FICF***,** case T-317/02, ECLI:EU:T:2004:360, para 94; Piotr Szwedo, *Rola jednostek we wszczynaniu sporów przez Wspólnotę w ramach WTO,* "Europejski Przegląd Sądowy" 07/2008, pp. 22-26.

[499] Peter van den Bossche, Denise Prévost, *op. cit.*, p. 268; Mitsuo Matsushita et al., *The World Trade Organization. Law Practice and Policy,* 3rd ed., OUP Oxford 2015, p. 91; see also Panel Report of 22 May 1997 in case *European Communities - Regime for the Importation, Sale and Distribution of Bananas Complaint by Ecuador* WT/DS27/R/ECU, para 7.32.

[500] John G. Merrils, *International Dispute Settlment,* 6th ed., CUP Cambridge 2017, p. 213.

[501] Meinhard Hilf, Tim Rene Salomon, *op. cit.*, p. 200.

[502] Peter van den Bossche, Denise Prévost, *op. cit.,* p. 270.

Panel Members may also be state officials, they all act in their individual capacity and should maintain independence. Furthermore, Panels, being themselves proposed to the Parties by the WTO Secretary, should be composed in a way safeguarding their representative character. (Article 8 WTO DSU). Basically, it is up to the parties to a given dispute to determine the scope of the complaint examined by the panel (Article 6.1 WTO DSU). The findings of a Panel shall take the form of a Report (Article 12.7 WTO DSU). The DSB shall adopt the Report unless one of the parties decides to file an appeal or there is a consensus not to adopt it (reverse consensus, Article 16.4 WTO DSU). As a matter of principle, a panel may conclude in its Report that a measure is inconsistent with a covered agreement and put forward certain recommendations for the state parties (Article 19.1 WTO DSU). Panel decisions may be appealed on the points of law to the standing WTO Appellate Body, which would also be eligible to submit Reports to the DSB, which would adopt them in the way of the reversed consensus (Article 17 WTO DSU). In practice, the Appellate Body acknowledges, quashes or alters the panel reports.[503] In any case, the Appellate Body fulfils a vital function, granted that around 50% of panel decisions are appealed.[504] The literature underscores the juridified character of this appellate review.[505]

It merits attention that the WTO framework grants the Member States not only tools to resolve their disputes but also provides a framework for their enforcement.[506] To begin with, the parties are obliged to follow the recommendations contained in the Reports.[507] In any case, compliance should be ensured possibly promptly (Article 21.1 WTO DSU) –losing party should present to the DSB plan of the enforcement of a Report within 30 days (Article 21.3 WTO DSU). Should it be impossible, a reasonable period for non-compliance shall be established. Under no circumstances should it exceed 15 months (Article 21.4 WTO DSU). The whole system is not entirely dependent only on voluntary compliance, however. Once a decision becomes binding, DSB monitors its enforcement and resolves the controversies between the parties related thereto (Articles 2.1; 21.6 and 22.8 WTO DSU). Should the compliance prove deficient, new proceedings may be initiated (Article 21.5 WTO DSU).[508] All in all, even if to accept that the

[503] Meinhard Hilf, Tim Rene Salomon, *op. cit.*, p. 181.
[504] John G. Merrils, *op. cit.*, p. 221.
[505] Meinhard Hilf, Tim Rene Salomon, *op. cit.*, p. 178, one could speak of shaping due process guarantees and other aspects of the proceedings in a fairly "*jurified"* manner, John G. Merrils, *op. cit.*, pp. 218-220.
[506] General on this topic see S. Charnovitz, *The Enforcement of WTO Judgments,* "Yale Journal of International Law", vol. 34 2/2009, p. 559 f.
[507] Meinhard Hilf, Tim Rene Salomon, *op. cit.*, p. 188.
[508] At this place it may be only indicated that the enforcement of WTO measures has resulted in a considerable body of case law, see e.g. Appellate Body Report of 26 October 2008 in case *United States - Continued Suspension of Obligations in the EC - Hormones Dispute*, WT/DS320/AB/R; Appellate Body Report of 2 June 2008 in case *United States - Subsidies on Upland Cotton - Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW.

effectiveness of the enforcement proceedings does not match the efficacy of the dispute settlement as such,[509] the fact is that the Reports are complied with in an overwhelming majority of cases.[510] Be as it may, this elaborate normative framework for the enforcement of panel and Appellate Body decisions enforcement could be viewed as another testimony of the juridisation of WTO.[511]

Regarding the remedies available, it has to be stressed that granted the aims of the WTO and its inter-state character, the remedies offered by the system are oriented rather on restoring unrestricted trade flows between the WTO parties than granting pecuniary compensation to harmed states, not to mention private parties.[512] Article 22 WTO DSU states unequivocally that *neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.*[513] It is only if no settlement as to the compensation is reached that the injured party may invoke its sanctions in accordance with Article 22.2 WTO DSU. Even in such circumstances, they still have to be proportionate (Article 22.4 WTO DSU)and possibly pertain to the same sector (Article 22.3 WTO DSU, it is allowed to use cross-retaliation onlyas *ultima ratio*).

Regardless of somewhat limited scope of available remedies, it may be safely assumed that the WTO system provides a robust framework for both dispute settlement and the enforcement of Reports rendered during those proceedings. Thus, it is all but surprising that the role of the panels for the development of WTO law could hardly be overstated. To begin with, due to the introduction of the reversed consensus, the decisions of the Appellate Body and Panels are quasi-binding.[514] Additionally, they fulfil the function of *de facto* legal precedence, serving as evidence of the treaty practice building *ratio decidendi* for the later decisions.[515] The provisions serving the purpose of mitigating the judicial activism of the WTO bodies, such as Articles

[509] Meinhard Hilf, Tim Rene Salomon, *op. cit.*, p. 188.
[510] Peter van den Bossche, Denise Prévost, *op. cit.*, p. 288.
[511] John G. Merrils, *op. cit.*, p. 225.
[512] Petr Polášek; Sylvia T. Tonova, *op. cit.*, p. 385.
[513] WTO Arbitrators Decision of 9 April 1999 in case *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Arbitration by the European Communities under Article 22.6,* WT/DS27/ARB, para 6.3; Meinhard Hilf, Tim Rene Salomon, *op. cit.*, p. 189.
[514] Peter van den Bossche, Denise Prévost, *op. cit.*, p. 281. Meinhard Hilf, Tim Rene Salomon, *op. cit.*, p. 170; Götz Göttsche, *op. cit.*, p. 109.
[515] John G. Merrils, *op. cit.*, p. 220; Mitsuo Matsushita et al., *op. cit.*, p. 89.

13.2[516] and 19.2[517] WTO DSU aimed at precluding treaty modification in the way of its interpretation, may not change the above conclusions. Consequently, the WTO law should be viewed as an autonomous subsystem of international law, if not a self-contained regime. It follows that its dispute-settlement organs have to grant WTO law priority over provisions of international law external to this subsystem.[518] Importantly, given the legal density of the WTO framework, its adjudicating organs are expected to follow the values familiar to the WTO Agreements rather than any external rules.[519]

This being said, one cannot pass over limits to the system's influence on the legal order of the WTO members. Despite its far-reaching *juridification,* just like its predecessor, GATT, the WTO system is designed not to bestow any direct rights on individuals.[520] These conclusions flow not only from the practice of some of the WTO's most prominent members, such as the EU or the USA[521] but are further supported by the WTO jurisprudence.[522] This may have to do with the fact that the WTO structure closely follows the "classical" international law model, where the state parties remain free in choosing the most effective way of implementing their international obligations.[523] In any case, this fundamental feature is also reflected by the available remedies aimed at removing barriers rather than providing monetary compensation for individuals. This rationale seems to carry even more weight considering that many of the WTO contracting parties are states with some rule of law and free-market deficits.[524] Thus one could assume that certain WTO members apply the WTO law *indirectly* as a source of

[516] Article 13.2 WTO DSU: *Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.*
[517] Article 19.2 WTO DSU: *In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.*
[518] See e.g. International Law Commission *Report of the study group on the fragmentation of international law*, ILC Report A/61/10, 2006, paras 165-171, 443 – 450; Bruno Simma, Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, "European Journal of International Law" vol 17, 3/2006, pp. 483–529, in particular pp. 519-523; see also Petr Polášek; Sylvia T. Tonova, *op. cit.*, p. 360.
[519] This seems to go unopposed even among the authors who distance themselves from the notion of WTO as a self-contained regime, see e.g. Mitsuo Matsushita et al., *op. cit.*, pp. 79-82.
[520] Saskia Hörman, *op. cit.*, pp. 212-214; Wolfgang Weiß, *WTO Law and Domestic Regulation*, Beck Hart Nomos 2020, pp. 71-72. See also opinion of AG Tesauro of 16 June 1998, *Hermès*, case C-53/96, ECLI:EU:C:1997:539, para 27.
[521] For the USA see Uruguay Round Agreements Act of 1994 U.S.C. §§ 103-465, Section 102, see also Mitsuo Matsushita et al., *op. cit.*, pp. 44-46. The EU's practice regarding WTO shall be analysed in the section 6.3.2. below.
[522] Panel Report of 22 December 1999 in case *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, paras 72, 78.
[523] Armin Steinbach, *op. cit.*, p.28.
[524] Christian Ohler, *op. cit.*, p. 148.

inspiration for national organs at best.[525] Therefore, it is all but surprising that certain authors criticise this solution as weakening the coherence of WTO law and depriving individuals of legal protection[526]. Be as it may, as shall be thematised in more detail below, these were the possibilities of mitigating the legal effect of WTO law within national legal orders that helped to reduce the tensions between the WTO system and the EU law.

6.3.2. WTO and EU law

Granted the features of the WTO law described above, the lack of the CJEU's jurisprudence addressing the conformity of the WTO dispute settlement mechanisms would seem somewhat surprising. As shall be demonstrated below, despite avoiding addressing the issue directly, the CJEU nonetheless has developed certain principles allowing it to effectively bypass any challenges to the autonomy principle.[527] Before commencing analysis in this respect, some basic facts concerning the EU's participation in the WTO should be reminded.

The WTO accession Agreement was concluded by both the EU and its Member States, so they both became bound by the Agreement.[528] Interestingly, the division of competences between them was clarified only in the CJEU's Opinion 1/94 rather than upon concluding the treaty.[529] This being said, the EU should not be viewed as a newcomer, as it was already a party to the GATT by virtue of stepping into the Member States' obligations.[530] Nonetheless, in particular, the strengthening of the dispute-settlement provisions brought about new challenges for the principle of autonomy. After all, as discussed above, introducing a dispute settlement mechanism in a mixed agreement means nothing short of asking for trouble. And it is particularly so if the treaty does not contain any provisions allowing for a predictable determination of the proper respondent. In any case, the WTO law contains no such provisions, and there is even no EU's unilateral act stipulating any rules in this respect. Furthermore, no declaration of competences eligible of informing the WTO dispute settlement organs on the division of competences between the EU and its Member States was filed. Last but not least,

[525] Saskia Hörman, *op. cit.*, p. 217.
[526] Saskia Hörman, *op. cit.*, p. 217. But see Allan Rosas, *International Responsibility of EU…*, p. 145, who argues that given the Member States' principal freedom to choose the best way to implement DSB ruling it was the only option.
[527] See e.g. Jed Odermatt, *International Law…*, p. 185.
[528] Frithjof Behrens, *Uruguay-Runde und die Gründung der WTO,* in: Meinhard Hilf, Stefan Oeter (eds.), *WTO Recht. Rechtsordnung des Welthandels,* Nomos Baden-Baden 2010, p. 99.
[529] 384/800/EC: Council Decision (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) OJ EU L 336, 23.12.1994, p. 1–2; CJEU opinion of 15 November 1994, *WTO,* Opinion 1/94, ECLI:EU:C:1994:384, Frithjof Behrens, *op. cit.*, p. 96.
[530] CJEU judgment of 12 December 1972, *United Fruits Company,* case 21-24/72, ECLI:EU:C:1972:115.

this agreement also lacked provisions excluding disputes between the EU Member States. Thus, it is clear that the WTO dispute settlement provisions were not tailored to account for the peculiarities of the EU legal order.

The practical significance of these institutional arrangements should not be understated. As for now, the WTO is the only international dispute settlement mechanism frequently utilised by the EU, acting both as the claimant and the respondent.[531] In fact, the tensions between EU and WTO laws were quickly indicated as the poster child for conflicts between regional and universal subsystems of international law.[532] One could contemplate whether these theoretical reservations would not be outweighed by the WTO practice, with the EU regularly acting on behalf of its Member States. Indeed, it cannot be denied that the EU has consistently stepped forward to act in lieu of its Member States. To begin with, the EU has utilised the possibility of exercising the voting rights of the EU Member States granted by Article IX.1 of the WTO Agreement.[533] The same pertains to the representation of the EU Member States in disputes before the WTO bodies, where the EU effectively assumes both the representation and responsibility for their actions. In practice, even though certain states tried to direct their claims against individual Member States rather than the EU, the Commission has always managed to assume the representation.[534] In a similar vein, there is not a single report on merits that would hold a Member State exclusively liable despite the EU's involvement.[535] Thus, it is only natural that some authors view this practice as trumping the practical importance of the EU's mixed participation.[536] Arguably, the WTO dispute-settlement bodies were indeed quite generous[537] in ascribing the responsibility for the Member States' organs' actions to the EU by excluding the liability of individual Member States for the enforcement of EU law[538] and accepting the

[531], Luca Pantaleo, *op. cit.*,p. 15; Allan Rosas, *The EU and international dispute settlement*, "Europe and the World: A law review" vol 1 2017, pp. 2-3.
[532] Yuval Shany, *op. cit.*, p. 59.
[533] Götz Göttsche, *op. cit.*, pp. 154, 156.
[534] Allan Rosas, *The EU and international dispute settlement…*, p. 23.
[535] Andrés Delgado Casteleiro, Joris Larik, *op. cit.*, p. 240; Ulrich Wölker, *Die Stellung der Europäischen Union in den Organen der Welthandelorganisation, „Europarecht"* Beiheft 2/2012 *Die Europäische Union im Völkerrecht,* p. 133.
[536] Christina Eckes, *op. cit.*, p. 11; Frank Hoffmeister, *op. cit.*, p. 90.
[537] Armin Steinbach, *op. cit.*, p. 145. The author argues, however, that relaxing the criteria foreseen in DARIO was right granted their modification by the EU Treaties as *lex specialis,* see *ibid.*, p. 147, see also Pieter Jan Kujiper, Eva Paasivirta, *op. cit.*, pp.62-63.
[538] Panel Report of 15 March 2005 in case *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R, paras 7.724 ff., arguably also Panel Report of 5 February 1998 in case *European Communities - Customs Classification of Certain Computer Equipment*, WT/DS62/R ; WT/DS67/R ; WT/DS68/R, paras 4.14, 8.18, 8.60.

EU stepping into their shoes.[539] Likewise, the EU is also treated as a unity for the purpose of enforcing WTO decisions or issuing retaliatory measures.[540] Finally, due to the EU being a party to WTO, its legal system tends to be treated similarly to domestic law rather than a parallel international framework.[541]

This, however, should not obfuscate serious structural problems marring the coexistence of the EU and WTO legal systems. To begin with, the acceptable practice of the WTO bodies does not suffice to remove the normative tension between WTO and EU legal frameworks. Actually, in all the cases invoked above, these were the WTO organs that determined the proper respondent and assigned responsibility on the case by case basis.[542] And there were instances of the WTO bodies underlining separate membership of the EU and its Member States (even though this has not led to ascribing responsibility to the individual Member States instead of the EU).[543] Furthermore, even if not likely, the possibility of intra-EU disputes was not excluded as a matter of international law.[544] The awkward situation giving rise to the *Faroe Islands* case, where the EU was sued by its Member State, Denmark, acting on behalf of the Faroe Islands, may serve as a good example.[545] Last but not least, WTO agreements by large cover the same subject matter as the provisions of EU law,[546] on the one hand making a collision between both regimes even more likely and, on the other, making its consequences more serious. Thus, it is all but surprising that the challenges posed by the WTO law to EU law were spotted not only in the literature but also in the AG's opinions.[547]

Consequently, if the analysis were to stop here, the compatibility of the WTO dispute-settlement mechanisms with the principle of autonomy would be highly questionable, at best. However, the thing is that the above challenges were largely mitigated by imposing severe

[539] Reports of the Panel of 29 September 2006 in case *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R; WT/DS292/R; WT/DS293/R, para 7.101.
[540] Andrés Delgado Casteleiro, Joris Larik, *op. cit.*, p. 253.
[541] Christina Binder, Jane A. Hofbauer, *op. cit.*, pp. 168-169.
[542] Christina Eckes, *op. cit.*, p. 13, indicating in particular the LAN case.
[543] Panel Report of 30 June 2010 in case *European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, para 7.174 ff. Eventually, the Panel found the EU liable together with certain other Member States (para 8.5).
[544] The opinion of authors indicating that the CJEU's monopoly on interpretation would effectively exclude the possibility of such problems, expressed e.g. in Michelle Q. Zang, *op. cit.*, pp.280-281, overlooks the CJEU case law concerning a purely theoretical possibility of initiating on intra-EU proceedings as a threat to autonomy of EU law, see in particular Chapter 9.3. dedicated to the CJEU Opinion 2/13.
[545] The case was, however, settled amicably, see Joint communication of EU and Denmark of 25 August 2014 on dispute settlment in case *European Union – measures on Atlanto-Scandian Herring* WT/DS469/3 G/L/1058/Add.1. See also Cezary Mik, *Fenomenologia regionalnej integracji państw...*, p. 717.
[546] Armin Steinbach, *op. cit.*, p. 49.
[547] Opinion of AG Léger of 6 April 2006, *Ikea*, case C-351/04, ECLI:EU:C:2006:236, para 79. See also Marco Bronckers, *op. cit.*, p. 610.

limitations on the effectiveness of the WTO law and the decisions of the Panels in the EU law. To this end, the CJEU has relied mainly on two techniques: denying direct effect to WTO law and outstretching the EU organs' discretionary space for the implementation of WTO decisions. What is particularly interesting is that, unlike in the case of the US, these constraints were the result of the CJEU's interpretation rather than the specific decisions of the EU lawmakers.

Regarding the denial of direct effect, it should be stressed that in doing so, the CJEU merely continued its earlier GATT jurisprudence.[548] Arguably, the Member States expressed their approval for this case law in the preamble to the Council decision approving the EU's accession to the WTO Agreement. Accordingly, *(…) by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts.*[549] Nonetheless, granted the limited legal relevance of a preamble to the Council decision, it should not be surprising that the matter had to be settled by the CJEU. And one did not have to wait long, as the CJEU pronounced itself on this already in the aforesaid. *Portugal v. Commission* judgment. To put the long story short, the Luxembourg Court decided to simply copy-paste its GATT jurisprudence, denying direct effect to EU norms. It backed this by emphasising the tip-for-tat character of the agreement and the role of inter-state negotiations in finding the best possible solution as the essential feature of WTO, resulting in the need for the preservation of the EU institutions' discretionary powers.[550] In its later jurisprudence, the CJEU reaffirmed this case law by stating that *The purpose of the WTO agreements is to govern relations between States or regional organisations for economic integration and not to protect individuals.*[551] Unsurprisingly, the CJEU expanded this lack of effectiveness to cover also the reports accepted by the DSB.[552]

This rather *unfriendly* attitude towards the WTO legal framework is even more striking if to take into account that it was adopted by the CJEU also in cases of individuals merely seeking damages for EU organs' breaches of WTO law rather than challenging the validity of EU

[548] CJEU judgment of 12 December 1972, *United Fruits Company*, case 21-24/72, ECLI:EU:C:1972:115, para 28; CJEU judgment of 5 October 1994, *Germany v. Council (Bananas),* case C-280/93, ECLI:EU:C:1994:367, paras 108, 110.
[549] 94/800/EC: Council Decision (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) OJ EU L 336, 23.12.1994, p. 1–2.
[550]CJEU judgment of 23 November 1999, *Portugal v. Council*, case C-149/96, ECLI:EU:C:1999:574, paras 36, 42-47. For the emphasis on the negotiations element see i.a. Rudolf Mögele, *Artikel 216…*, para 72.
[551] CJEU judgment of , 30 September 2003, *Biret v Council*, Case C-93/02, ECLI:EU:C:2003:517, para 62.
[552] CJEU judgment of 9 September 2008, *FIAMM*, joint cases C-120/06 P and C-121/06 P, ECLI:EU:C:2008:476, paras 129-132.

acts.[553] Interestingly, in this respect, the CJEU explicitly observed that granting an individual right to demand damages for the EU's breach of its international obligation could unduly restrict the EU institution's manoeuvre space.[554]

This denial of direct effects was accompanied by the case law extending the EU authorities' discretion regarding implementing WTO bodies' decisions beyond reasonable limits.[555] Its practical importance is demonstrated by the EU actors warmly embracing the idea of the WTO Reports' non-binding character to hamper their execution effectively.[556] *EC Hormones* case[557] would be particularly instructive in this respect. EU's guerrilla actions included, e.g. negotiating 15-month-term for implementation of the Report; initiating disputes concerning US countermeasures to prevent the US from introducing them or obtaining compensation for the EU's non-compliance. On top of it, the measures eventually introduced by the EU still failed to comply with WTO law.[558]

The recognition of the reciprocal character of the obligations existing between the WTO parties provided the necessary justification for this severe limitation of the intra-EU effect.[559] This rationale, however, fails to convince. Even without discussing its veracity,[560] one could still argue that in light of the transition from '*diplomatic'* GATT to a more '*judicialised'* WTO, the reciprocal character of the obligations would not suffice to sanction limitations to the effect of WTO law.[561] In fact, these doubts were shared not only by certain AGs[562] but also by legal scholars who pointed out that the non—implementation of WTO judgments violated Article

[553] CJEU judgment of 9 September 2008, *FIAMM,* joint cases C-120/06 P and C-121/06 P, ECLI:EU:C:2008:476, paras 1 and 107 ff.; Armin Steinbach, *op. cit.*, pp. 31-61.
[554] CJEU judgment of 9 September 2008, *FIAMM,* joint cases C-120/06 P and C-121/06 P, ECLI:EU:C:2008:476, paras 121-122; Marco Dani, *Remedying European Legal Pluralism, The* FIAMM *and* Fedon *Litigation and the Judicial Protection of International Trade Bystanders,* "The European Journal of International Law" vol 21 2/2010 pp. 304,-306 336 ff.
[555] CJEU judgment of 12 March 2002, *Omega,* case C-27/00, ECLI:EU:C:2002:161, para 90; see also Maria-Fogdestam Agius, *op. cit.*, p. 208; Marco Bronckers, *op. cit.*, pp. 612,616.
[556] Seemingly it was mostly the case of European Parliament, see Jacques Bourgeois, Orla Lynskey, *The extent to which the EC legislature takes account of WTO obligations: jousting lessons from the European Parliament*, in: Alan Dashwood, Marc Marescau (eds.), *Law and Practie of EU External Relations. Salient Features of a Changing Landscape*, CUP Cambridge2008, pp. 202-223.
[557] Appellate Body Report of 26 October 2008 in case *United States - Continued Suspension of Obligations in the EC - Hormones Dispute*, WT/DS320/AB/R.
[558] Similar problems happened in the *EC-Bananas* case, see Meinhard Hilf, Tim Rene Salomon, *op. cit.*, pp. 191-192; John G. Merrils, *op. cit.*, p. 224.
[559] See e.g. CJEU judgment of 12 March 2002, *Omega,* case C-27/00, ECLI:EU:C:2002:161, para 90.
[560] Götz Göttsche, *op. cit.*, p. 115.
[561] Maria-Fogdestam Agius, *op. cit.*, pp. 194-195. But some authors maintain that the CJEU took into account the juridization of GATT system by shifting the gist of its argumentation from the alleged legal nature of WTO to the need of accounting for the principle of reciprocity, see Matthias Kottmann, *op. cit.*, p. 251.
[562] Opinion of AG Tizzano of 18 November 2004 *Van Parys,* case C-377/02, ECLI:EU:C:2004:725, para 65 ff., see also Saskia Hörman, *op. cit.*, p. 215.

216 TFEU.[563] Be that as it may, this form of dialogue prevented CJEU from acting as WTO law enforcer and allowed it to retain strict control over the scope of influence of WTO on EU legal order.[564]

These conclusions would not be called into question by the examples from the CJEU's jurisprudence seemingly detracting from this case law. In this respect, the 2020 case[565] concerning Hungarian measures targeting the Central European University (CEU), an educational institution established in the US but providing services solely in the EU (Hungary), would come to mind. The case concerned infringement proceedings against Hungary resulting from the introduction of licencing requirements for foreign education providers leading eventually to the revocation of the CEU's permission. The Commission's charges concerned, among others, the breach of the GATS provisions by the Hungarian authorities. Interestingly, the Court decided that GATS provisions could form the basis of infringement claims, even though it was not compelled to do so (as Hungary also breached provisions of the Treaties). The Court began by underlining that GATS, an international agreement concluded by the EU, is a part of the EU law.[566] Building upon it, the CJEU continued by explaining that the EU's responsibility for the Member States' breaches of WTO law justified the Commission's competence to interpret the Member States' obligations to avoid possible liability, even in the absence of existingWTO jurisprudence.[567] Significantly, the Luxembourg Court differentiated between the case at hand and its earlier jurisprudence regarding WTO by indicating that unlike the case at hand concerning Member States' obligations, the latter concerned invoking WTO provisions against the EU itself.[568] Interestingly, as explained in more detail below, the CJEU, despite taking note of the WTO dispute settlement bodies' exclusive jurisdiction, did not see itself precluded from interpreting the WTO law nonetheless. In light of the above, one would

[563] Armin Steinbach, *op. cit.*, pp. 39, 44. Even if to treat such conclusions as far-fetched, there can be no doubt that this interpretation did not fit well with the principle of *friendliness* towards international law, see Berenike Schriewer, *op. cit.*, p. 182.
[564] Michelle Q Zang, *op. cit.*, p. 292. The author rightly observes that occasional following the WTO jurisprudence by the CJEU does not cast doubt on these conclusions , see pp. 284-287.
[565] CJEU judgment of 6 October 2020, *Commission v. Hungary*, case C-66/18 ECLI:EU:C:2020:792.
[566] *Ibid.*, paras 69, 71; more explicitly in Opinion of AG Kokott of 5 March 2020, *Commission v. Hungary*, case C-66/18, ECLI:EU:C:2020:172, para 60.
[567] CJEU judgment of 6 October 2020 in case C-66/18 *Commission v. Hungary*, ECLI:EU:C:2020:792, para 92. This link was explained in more detail by the Opinion of AG Kokott of 5 March 2020, *Commission v. Hungary*, case C-66/18, ECLI:EU:C:2020:172, paras 48, 52. Interestingly, the CJEU did not follow the AG's suggestion that granted the WTO DSB's jurisdiction it should limit its review to instances of manifest infringement only (para 91).
[568] CJEU judgment of 6 October 2020, *Commission v. Hungary*, case C-66/18 ECLI:EU:C:2020:792, para 78.

be tempted to see this case contrasting with the earlier case law, crippling the legal effects of the WTO law in the EU legal order.[569]

Such conclusions would be ill-founded, however. In contrast to earlier jurisprudence, in this case, the reliance on international law has not comprised the EU's manoeuvre space and, thus, could not have endangered the principle of autonomy. In fact, the opposite is the truth: Ensuring the broad applicability of EU international agreements vis-à-vis the Member States served the purpose of strengthening the EU's position pro foro interno solely. If it was not enough, by reaffirming the CJEU's complete authority over the legal effects of international law provisions in the EU legal order, one might view this judgment as a celebration of the CJEU's gatekeeper role.

6.3.3. Preliminary conclusions

It follows from the preceding section that even though not thematizing the conformity of the WTO dispute settlement mechanisms with EU law directly, the CJEU has indirectly analysed extensively many of its aspects. Rather unsurprisingly, it did not depart from the principles set in the earlier jurisprudence aimed at minimizing the possible influence of external international law and its interpretation by the designated dispute settlement bodies. In fact, the CJEU's janus-faced approach vis-à-vis the effectiveness of the WTO law, creating obligations solely for the Member States, but not the EU, may serve as the best example of this "autonomous" approach of the Luxembourg court.

The most valuable input provided by the CJEU WTO-related case law consists in thematizing the enforcement proceedings. Arguably, in its decisions denying the EU's responsibility for the failed implementation of the WTO Reports, the Luxembourg Court made it clear that the threat to the autonomy of EU law resulting from the binding character of external bodies' decisions may be offset by depriving them of legal significance in the intra-EU context, as well as granting an unreasonable scope of discretion for the implementing authorities.

[569] Filippo Fontanelli, *GATS the way / I like it: WTO Law, Review of EU Legality and Fundamental Rights*, "ESIL Reflections" vol. 10 2/2021, available at https://esil-sedi.eu/esil-reflection-gats-the-way-i-like-it-wto-law-review-of-eu-legality-and-fundamental-rights/, accessed on 22 August 2012. Sven L.E. Johannsen, *The role of the EU in supervising Member State compliance with WTO Law: Observations on the Opinion of Advocate General Kokott in Case C-66/18-Commission v Hungary*, TELC Policy Paper Policy Paper no 55 06/2020, https://telc.jura.uni-halle.de/sites/default/files/PolicyPaper/Policy%20Paper_No55_1.pdf, accessed on 22 August 2022.

6.4. Twilight zone: treaty practice of the EU and its Member States

Rather unsurprisingly, not all inter-state dispute-settlement bodies have appeared on the CJEU's radar. Actually, the EU and its Member States are parties to many international instruments granting them access to international dispute-settlement mechanisms, which are only rarely utilised. In fact, not even all the EU's mechanisms were scrutinised by the CJEU, or at least extensively discussed in the literature, despite being parts of Member States' and EU's international practice. Nonetheless, their continuous existence mandates their analysis, even if only cursory.

6.4.1. Mechanisms in EU Agreements

To begin with, the EU itself makes use of external dispute settlement mechanisms in external agreements. Recent EU Free Trade Agreements("**FTA**"), f.e. with Moldova, Ukraine or Georgia, may serve as an excellent example in this context.[570] They contain express and pretty detailed provisions on dispute settlement taking form of arbitration panels. Furthermore, these provisions seemingly took seriously the CJEU's jurisprudence discussed above by either explicitly excluding the possibility of dispute settlement bodies interpreting *acquis communitaire* or excluding the possibility of referring to arbitration disputes related to provisions formulated identically as in EU law.[571] Regardless of their jurisdiction limited to the respective agreements, these panels would also have right and obligation to make referrals to the CJEU regarding any pertinent provisions of EU law, with the CJEU's answers binding the tribunal.[572] Furthermore, the legal effect of these bodies' decisions within the EU legal space were severely limited: The FTAs expressly excluded the possibility of granting any rights to

[570] It is not that the earlier agreements had not foreseen any dispute-settlement mechanisms, nonetheless they were considerably less developed. See f.e. Article 25.1 of the Agreement establishing an Association between the European Economic Community and Turkey of 12 September 1963, OJ EU L 361 31.12.77: *The Contracting Parties may submit to the Council of Association any dispute relating to the application or interpretation of this Agreement which concerns the Community, a Member State of the Community, or Turkey*. In fact, this agreement is sometimes even presented as the starting point for EU's engagement with international dispute settlement, see Frank Hoffmeister, *op. cit.*, p.79.

[571] Cristina Contartese, *The procedures of prior involvement…*, p. 10; Allan Rosas, *The EU and international dispute settlement…*, p. 13 ff. The dispute settlement mechanism foreseen in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community OJ EU L 29, 31.1.2020, p. 7–187, with the possibility of initiating disputes only against the EU rather than the Member States (Article 170.1) and the obligation to formulate a preliminary reference to the CJEU to the exclusion of the arbitral panel's jurisdiction in EU law matters (Article 174.1) does not seem to be dissimilar from this pattern. The constraints of this dissertation do not allow to expand more on this issue, however.

[572] Cristina Contartese, *The procedures of prior involvement…*, pp. 9-10. See f.e. Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ EU L 161, 29.5.2014, p. 3–2137, Article 322.2.

individuals.[573] Interesting as they may be, these mechanisms' practical relevance seems to be limited due to the limited number of cases. So far, there has been only one such dispute, originating from the EU-Ukraine FTA, concluded in December 2020.[574] As the case was brought before the Arbitration Panel by the EU in connection with Ukrainian restrictions on wood export, no issues related to application or interpretation of the EU law (other than the agreement itself) did arise.

Furthermore, in some instances, the EU itself encourages provisions on inter-state arbitration also in instruments available to the Member States. Among these, the mechanisms designed to resolve controversies between different tax jurisdictions merit particular attention. The most important of them is the European Arbitration Convention of 1990.[575] Its Section 3 does foresee conciliation and arbitration proceedings to be launched by the interested national tax authorities upon an interested entrepreneur's request. Article 7.1 provides for creating an *advisory commission*, tasked with rendering an opinion (Article 11.1), which both states should follow, in case they fail to remove double taxation amicably (Article 12.1). This procedure is based on the OECD Model Convention,[576] whose Article 25.5 does foresee mandatory inter-state arbitration upon the request of the entrepreneur concerned. Rather unsurprisingly, the private parties' participation is severely limited, even though they enjoy certain procedural rights.[577] Consequently, the taxpayers are not parties to the proceedings and don not enjoy the rights that the parties would typically be entitled to.[578] In any case, possible interactions between this mechanism and EU law have been seen as problematic neither by the CJEU, nor by the legal scholarship. It was most likely the result of bilateral tax agreements not belonging to the EU's

[573] See f.e. Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ EU L 161, 29.5.2014, p. 3–2137, Article 321.1.
[574] Final Report of the Arbitration Panel 11 December 2020 in case *Restrictions applied by Ukraine on exports of certain wood products to the European Union*, available at https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159181.pdf, accessed on 22 August 2022.
[575] Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises of 20 August 1990 (90/463/EEC), OJ EU L 225, p. 10 as amended. The convention was recently supplemented (or, even, *de facto* replaced) by the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, OJ EU L 265, 14.10.2017, p. 1–14; see in particular motives 2-3 and 6-7 of the Preamble.
[576] OECD Model Tax Convention on Income and on Capital: Condensed Version 2017, available at: https://www.oecd.org/tax/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm, accessed on 22 August 2022.
[577] F.e. Article 10.1 of the European Arbitration Agreement does foresee the possibility of submitting additional evidence and opinions by the enterprises concerned.
[578] Evelyn Frink, *Verständingungs- und Schiedsverfahren im Internationalen Steuerrecht*, Peter Lang Frankfurt am Mein et al. 2015, pp. 38-39, p. 117.

competences and, thus, jurisdiction of the CJEU[579] on the one hand, and the relatively infrequent use of the tax arbitration mechanisms on the other.[580]

Consequently, the practical examples discussed above seem to confirm the EU's somewhat open attitude towards inter-state dispute settlement mechanisms. This support is not unconditional however, as the legal decisions of these bodies should not be capable of influencing intra-EU legal relationships.

6.4.2. Selected mechanisms in Member States' agreements

Arguably, it is the issue of agreements concluded by the Member States independently of the widely understood EU framework that seems to be more problematic. In fact, Member States are parties to many international agreements containing provisions on dispute settlment, concluded both as between them and with third parties. The European Convention for the Peaceful Settlement of Disputes of 1957,[581] containing general recognition of ICJ's jurisdiction, may serve as a good example, particularly granted that it gave rise to certain disputes involving issues of EU law. Most recently, on the basis thereof Belgium brought before the ICJ a dispute concerning interpretation of the Lugano Convention concluded as mixed agreement between EU and its Member States and, among others, Switzerland. The proceedings were discontinued solely due to Belgium eventually abandoning its claims under the Commission's pressure.[582]

Finally, even in the absence of relevant dispute settlement provisions, it is still possible for the parties to submit a dispute to an international dispute-settlement body based on a specific arbitration agreement. Actually, this constellation gave rise to one of the more problematic examples of interactions between EU law and international law, namely the *Iron Rhine* case.[583] Thus, the reasons for Commission's non-intervention could be political rather than strictly legal. Be it as it may, at least so far, the *Iron Rhine* case remains the only instance of international

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[579] *Ibid*., pp. 131-132. This, of course, changed with the adoption of the aforesaid Directive 2017/1852.

[580] For example, in 2017 there were only two pending arbitration proceedings between the Member States, see Commission document DOC: JTPF/007a/2018/EN *EU JOINT TRANSFER PRICING FORUM Overview of numbers submitted for Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention (AC) at the End of 2017 Meeting of 24 October 2018,* https://taxation-customs.ec.europa.eu/system/files/2018-10/statistics_on_pending_maps_under_the_arbitration_convention_2017_en.pdf, accessed on 22 August 2022, p. 5.

[581] European Convention for the Peaceful Settlement of Disputes opened to signature on 24 April 1957, ETS no. 023.

[582] *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland),* Order of 5 April 2011, I.C.J. Reports 2011, p. 5. See the Introduction for further considerations regarding the proceedings before the ICJ in section 1.3.1. above.

[583] PCA case 2003-02 *Iron Rhine Arbitration (Belgium/Netherlands)*, all documents available at: https://pca-cpa.org/en/cases/1/, accessed on 22 August 2022. See the analysis of the case in Chapter 3.

arbitration as between the Member States conducted outside of the broadly understood framework of EU law. Consequently, one should not understand the Commission's passive stance regarding this particularaward as general acceptance for inter-state arbitration based on agreements between the EU Member States. Actually, if this case were to show anything, it would be rather dangers of frivolous interpretation of EU law by external adjudicating bodies.

Be that as it may, the EU did have a considerable record of tacitly tolerating inter-state dispute settlement and treaty interpreting mechanisms. Even if, at times, this could have led to disputable results such as in the *Iron Rhine* case, it has not seriously endangered the autonomy of EU law, be it solely due to the possibility of the Commission forcing an overzealous Member State to abandon their claims.

6.5. Preliminary Conclusions

The brief analysis of the EU's, or rather the CJEU's practice related to dispute settlement bodies in the preceding paragraphs attests that their conformity with the autonomy principle has always been a delicate issue. Nonetheless, despite all the nuances, the analysis of the Luxembourg Court's decisions allows to draw certain inferences with regard to the essential requirements set to the international dispute-settlement mechanisms accessible to private parties. Due to the profound differences as between state to state and individual to state mechanisms, however, it would be better to speak at this place of more general principles rather than specific solutions.

On the most general level, the principle of autonomy requests to maintain the EU's ultimate control over legal effects of international law in the EU legal order. This entails, among others, retaining the power over deciding on the legal effect of international law norms in EU law, as well as safeguarding EU institutions' discretionary powers in enforcing the EU's legal obligations. And this is possible only if the decisions of external dispute-settlement bodies are clearly precluded from producing any legal effect *within* the EU legal order. Consequently, the CJEU banished the envisaged EEA Court for fear of its decisions being capable of determining on the distribution of competences between the EU and its Member States in a binding fashion, while tolerating the WTO mechanism bringing about pretty much the same challenges, seemingly due to limiting the binding effects of the WTO DSB Reports. The CJEU's consistency in rejecting the possibility of deriving any rights from the WTO Agreement or DSB Reports by the Member States or private parties may serve as an even better illustration here. Arguably, also the Benelux Court would not be qualified as a court common to the Member States were it not for the CJEU's opinion on the non-binding character of its decisions.

Furthermore, the *Mox Plant* case (and, indirectly, the practice of the WTO system and the abandoned inter-state claims under different regimes) strongly suggests that, when needed, the autonomy of EU law may very well be protected by forcing the Member States to drop their claims before extra-EU fora in the way of initiating infringement proceedings.

Arguably these features resulted in a relatively lenient attitude of the CJEU vis-à-vis such mechanisms. To begin with, the court detected autonomy-related problems in the case of only two mechanisms (EEA and UNCLOS). Even more importantly, it was only in the case of the EEA Court that the CJEU condemned the framework as such rather than solely the Member State's actions. On the other hand, in relation to the UNCLOS, the Luxembourg Court was much more relaxed: despite the Irish claim arguably demonstrating the systemic character of the threats to autonomy principle: The CJEU contended itself with forcing Ireland to withdraw its claims without any further systemic consequences, even limited to updating the competence clause or filing a new declaration. Needless to say, the CJEU's continuous (tacit) acceptance of the WTO mechanism (and the Benelux Court) could be perceived as an even stronger expression of this logic.

Last but not least, granted that the discussed decisions were rendered in all sorts of proceedings (Article 218.11 TFEU opinion request, Article 258 TFEU infringement proceedings; Article 263 TFEU annulment action and article 267 TFEU request for a preliminary reference), one may assume that the procedural aspects of the proceedings before the CJEU were not decisive for the ultimate assessment of the analysed mechanisms.

Chapter 7: Preliminary Conclusions

The enquiry conducted in the preceding chapters resulted in the reconstruction of the basic features of the principle of autonomy of EU law as well as the baseline demands set by it. To begin with, the concept of autonomy serves mainly the purpose of limiting the openness of the EU legal system to "foreign" international law. The need for these limitations seems to be well-founded. Regardless of its self-understanding as *a new legal order of international law,* from the standpoint of public international law, the EU is, to its international partners, just an international organization subject to international law. It follows that the external actors are not bound by the EU law, including the norms governing the distribution of competences between the EU and its Member States. This feature is particularly relevant in the case of the international dispute settlement bodies, by their very nature obliged to further the agenda of their native frameworks even at the expense of the integrity of the EU legal order. In practice, such risks are much higher in the case of mechanisms accessible to private parties, typically being much more aggressive and unpredictable litigants than the states, reluctant to resort to international dispute settlement mechanisms.

This may be particularly problematic, granted the EU's principal openness vis-à-vis international law – according to the CJEU's standing jurisprudence, international obligations of the EU produce legal effects within the EU legal order even in the absence of a transformative act. Consequently, the introduction of certain safety valves was necessary. In practice, this function is fulfilled mainly by the broadly conceived CJEU's jurisdiction and its power of granting or denying direct effect to the acts "external" to the EU. Any other essential elements of the EU legal order, such as protection of fundamental rights or distribution of responsibility between the EU and its Member States, could also be sheltered from unduly external interference under the umbrella of the autonomy principle. An analysis of the CJEU's practice regarding treaty-interpreting bodies not eligible to decide upon individual claims (the EEA Court, the Benelux Court, the WTO DSB and the European Aviation Area Joint Committee) seems to confirm the above findings. To begin with, it clearly evidences the CJEU's concern for the dispute settlement bodies' meddling with the issues falling within the remit of the autonomy principle. They may encompass, among others, determination of the competences division while assessing the respondent status; interpretation of the provisions of EU law or violating the CJEU's exclusive jurisdiction. In addition, it clearly shows that the CJEU's greatest fears are related to these bodies' decisions producing legal effects within the EU legal order. This concern is illustrated particularly well by the WTO-related jurisprudence, where the

CJEU has consistently tolerated a robust adjudicative framework, most likely due to depriving the decisions rendered within it of any potential to challenge the acts of EU institutions. The same tendency was, arguably, visible also in the CJEU's treatment of the Benelux Court or the European Aviation Area Joint Committee.

Thus, arguably, this survey allows us to spot the crucial difference between the adjudicative mechanisms accessible to states and individuals: It is only in the case of the bodies belonging to the former category that the potential risks to the principle of autonomy may be offset by the possibility of the Commission and the CJEU forcing an unruly Member States to abandon the proceedings threatening the autonomy of EU law, as in the UNCLOS case or forbidding it from attaching legal relevance to the decisions of such body as in case of the WTO. Both of these safety valves are clearly absent from the mechanisms available to the individuals. And this, arguably, should be viewed as the main reason for the visibly harsher treatment of the bodies accessible to the private parties that will be discussed in the second part of the dissertation.

PART II: TESTING AUTONOMY'S LIMITS: INTERNATIONAL DISPUTE SETTLEMENT AND COMPLIANCE MECHANISMS ACCESSIBLE TO THE PRIVATE PARTIES

Chapter 8: Introduction

The second part of this dissertation shall be dedicated specifically to the examination of the interactions between the international dispute-settlement mechanisms accessible to the individuals and the principle of autonomy of EU law. This category shall encompass following bodies: (i) the European Court of Human Rights ("**ECtHR**") functioning within the framework of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights, **ECHR)**; [584] (ii) investment arbitration tribunals mandated by the international investment agreements ("**IIAs**"); (iii) Unified Patent Court ("**UPC**"), a specialised intellectual property court envisaged by the UPC Agreement; (iv) European Schools Complaints Board, a dispute settlement bodies with jurisdiction over school-related disputes within the European Schools framework and (v) the Aarhus Convention[585] Compliance Committee tasked with monitoring parties' compliance. As explained in more detail in Chapter 1.1, the main criterion for the selection of these mechanisms was, on the one hand, that they were subject to the CJEU's judicial assessment (direct or indirect) and that they represent a wide range of different dispute-settlement bodies, on the other.

This selection merits certain explanations as, rather unsurprisingly, the EU's interactions with international dispute settlement mechanisms were not limited to these frameworks. Actually, it has to be remembered that the history of the EU's complicated relationships with the private parties' access to international justice is as old as the EU's interactions with international law themselves. Actually, the CJEU had to take a stance on the issue of external dispute settlement bodies accessible to individuals as early as in its 1/76 Opinion[586] concerning European Lying-up Fund for Inland Vessels, proposed in an agreement to be concluded by the EU and its Rhine Member States and the Swiss Republic.[587] The system's goal was to create a dedicated fund having a distinct legal personality (Articles 1.1; 1.3; and 1.4 Fund's Statue). One of the essential tasks of the Fund was to pay financial compensation to individuals for lying up inland vessels. This would take place in the form of the Fund Director's decisions (Article 35.1), which, after

[584] Convention for the Protection of Human Rights and Fundamental Freedoms opened to signature in Rome on 4 November 1950, ETS No.005.
[585] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998, UNTS vol. 2161, p. 447.
[586] CJEU Opinion of 26 April 1977, *Lying-up fund*, Opinion 1/76, ECLI:EU:C:1977:63.
[587] Proposal for a Council Regulation concluding the Agreement establishing a European laying-up fund for inland waterway vessels, and adopting the provisions for its implementation, OJ EU 76/C 208/02.

an unsuccessful opposition to the administrative council (Article 35.2), could be challenged by the "natural and legal persons" (Article 41.1) before the "Fund Tribunal", an international court composed of judges representing all the treaty parties including the EU (Articles 42.1 and 42.2). Furthermore, according to Article 44, the fund tribunal could have heard preliminary references in a manner similar to the CJEU – it had the sole competence to interpret the agreement, and it would have the competence to hear preliminary references from national courts regarding the agreement and the parties' last instance courts would be obliged to make preliminary references concerning the envisaged treaty. Lastly, Fund organs' final decisions would have immediate legal effects in all the state parties (Article 46). According to Article 4 of the Fund Agreement, its provisions would produce legal effects on the territories of all its parties.

This proposal, however, was eventually declared incompatible with EU law by the CJEU in its Opinion 1/76. Interestingly, however, the private parties' access to an international court played only a minor role. The Luxembourg Court concentrated instead on whether this agreement would carve out important matters falling within the EU's exclusive competence, thus altering the division of competences between the EU organs.[588] The Court made it explicit that the possibility of rendering decisions producing legal effects within the Member States was not problematic as such, as in the case at hand since they would pertain solely to granting the compensation and fixing its amount.[589] Similarly, in the context of the Fund Tribunal, the CJEU seemingly unwillingly accepted the possibility of referrals to an extra-EU court,[590] as well as providing legal remedies by a body from outside the EU in case of agreements with parties from outside the EU.[591] Nonetheless, it declared the Court incompatible with the Treaties for another reason: by serving in the fund's court, the CJEU judges would engage in wrongful double hatting.[592]

Whereby the Opinion arguably played a role in forging the concept of autonomy of EU law,[593] in the context of adjudicating bodies, its content was limited to the issue of the CJEU judges' double hatting.[594] Thus, it should not come off as a surprise that the opinion tended to be

[588] CJEU Opinion of 26 April 1977, *Lying-up fund*, Opinion 1/76, ECLI:EU:C:1977:63, para 11.
[589] *Ibid*., para 16.
[590] *Ibid.*, para 20.
[591] *Ibid.*, para 21.
[592] *Ibid.*, para 22.
[593] Luca Pantaleo, *op. cit.*, p. 46.
[594] Luca Pantaleo, *op. cit.*, p. 47, in a similar vein Matthias Müller, *op. cit.*, p. 47.

analysed in the context of the EU's implied powers rather than the interplay between the autonomy and international judicial bodies.[595]

Thus, it was not before the nineties that the CJEU did have to pronounce upon dispute settlement mechanisms accessible to the individuals in its opinion 2/94 concerning the EU's accession to the ECHR[596]. Of course, it is not that the problems started only then – in fact, throughout its history, the EU coexisted with many international law frameworks providing Europeans with access to dispute-settlement mechanisms. Most obviously, there was the ECHR. But it was not the only one: there have been many international dispute-settlement bodies accessible to individuals operating within the scope of application of EU law. To begin with, there are arbitral tribunals operating on the basis of international investment treaties (bilateral investment treaties, Energy Charter Treaty or EU's free trade agreements).[597] Further, there are different administrative tribunals established by various international organizations (such as European Schools Complaints Board,[598] ILO Administrative Tribunal),[599] accompanied by various human rights or environmental bodies and commissions (such as the Aarhus Convention Compliance Committee)[600] that may pronounce themselves on matters covered by the EU law. Last but not least, one should remember of specialised international tribunals having exclusive jurisdiction in narrowly defined matters, such as the European Patent Office ("**EPO**") Board of Appeals[601] or the Rhine Commission.[602] Most of them, however, have never appeared on the CJEU's radar and, for this reason, they will not be examined in this dissertation. Conversely, it has to be stressed that, as explained in section 1.1 above, the mechanisms examined in this dissertation

[595] See e.g. Robert Schütze, *Parallel external powers in the European Union From 'cubist' perspectives towards 'naturalist' constitutional principles?* in: *id., Foreign Affairs and the EU Constitution : Selected Essays*, CUP Cambridge et al. 2014, pp. 258 ff. To the contrary see Ramses A. Wessel, Christophe Hillion, *op. cit.*, p. 18 (the authors, however, differentiate between the „practical" approach adopted by the CJEU in this judgment, and more dogmatic attitude adopted in the later jurisprudence discussed throughout this dissertation).
[596] The opinion, however, did not thematise the autonomy-related issues.
[597] See Chapter 10 below.
[598] See Chapter 12 below.
[599] See e.g. ILO Administrative Tribunal judgment no 3034 of 6 July 2011 in case *Eurocontrol* (especially paras 19-20), see also Matthew Parish, *International Courts and the European Legal Order*, "European Journal of International Law", vol 23 1/2012, p. 149.
[600] See Chapter 13 below.
[601] See section 11.1. below.
[602] Revised Rhine Navigation Act of 17 October 1868 signed in Mannheim updated version available at: https://www.ccr-zkr.org/files/conventions/convrev_a.pdf, accessed on 22 August 2022: Among others, the convention foresees the existence of "*Rhine Courts"* having jurisdiction over criminal and civil matters related to navigating on the river (Article 34). Whereby in the first instance the rhine courts encompass simply Member States courts indicated by the Member States as such, appeals may be brought not only before them, but before the Rhine Commission, a treaty body overseeing the implementation of Mannheim Act (Article 37), which in practice acts through Chamber of Appeals (Article 45 c.), composed of state-parties' judges (article 45 ter). According to Article 40.1 the judgments of the rhine courts are enforceable in all the state parties.

arguably cover also the *categories* to which their more obscure counterparts belong, the conclusions of this work could be relevant for the assessment of their conformity with EU law.

Accordingly, this part will have the following structure: Chapters 9-13 will be dedicated to the analysis of the interplay between the autonomy of EU law and the aforesaid mechanisms, with Chapter 9 being dedicated to the ECHR, Chapter 10 – IIAs; Chapter 11 – UPC; Chapter 12 – European Schools and Chapter 13 – the Aarhus Convention. In Chapter 14, I will try to aggregate and review these findings in order to see whether the CJEU's jurisprudence allows drawing any more general conclusions. To this end, I shall examine whether the CJEU was consistent in assessing particular features of each framework, such as the EU being a party to a given agreement; the existence of jurisdictional overlaps; application of EU law by the dispute-settlement bodies; the binding character of their decisions etc. As I shall demonstrate, unfortunately, with regard to only one of these features (lack of binding effect of the decisions within the EU) is it possible to speak about a consistent treatment by the CJEU.

As I shall argue in Chapter 15 concluding this part, these discrepancies result in the lack of an "autonomy test", i.e. a set of clear-cut criteria allowing for the assessment of the given mechanisms' conformity with EU law. As will be discussed in more detail below, this state of affairs is all but satisfactory: Not only are the stakeholders deprived of reasonably clear guidelines as to the scope of their obligations under EU law, but also the CJEU's reasoning may look somewhat incoherent if not arbitrary. Last but not least, in this chapter, I am going to explain why the above setbacks stemming from the lack of autonomy test cannot be offset by relabelling international courts common to the several Member States as their national courts.

Chapter 9: ECHR: Opinion 2/13 and beyond

9.1. Introduction

In this section, the interplay between the autonomy of EU law and the individual's access to the ECHR will be explored. Firstly, the main features of the Convention system shall be highlighted. It will be followed by an analysis of the challenges posed to the autonomy of EU law by the EU's accession to the Convention in light of Opinion 2/13. The third part would try to map the consequences flowing from the fact that the CJEU has tolerated Member States' membership in the Convention even if it, as we will see, it has posed very similar challenges as in the case of EU's accession. This chapter will end with a brief set of preliminary conclusions.

9.2. Main features of the ECHR system

The ECHR[603] is an international treaty adopted in the framework of the Council of Europe, more or less parallelly to laying the foundations for what today did become the EU. While both, the ECHR and the EU founding Treaties were to contribute to the unification of Europe, the tasks entrusted to them by the states were somewhat divided, with the EU being responsible for economic integration and the ECHR framework for providing fundamental rights protection.[604]. For years after its creation, however, the Convention has not attracted too much attention from litigants or scholars,[605] with its importance growing rapidly only from the 1970s on.[606] From these later developments, accession of the post-Communist states and adopting Protocol 11 (entered into force in 1998) granting individuals direct access to the ECtHR and liquidating the Human Rights Commission should be indicated as the most important developments, granting the Convention its quasi-constitutional character.[607] In fact, as of today, the Convention provides individuals with a broad right of standing. According to Article 34 of the Convention,

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[603] Convention for the Protection of Human Rights and Fundamental Freedoms opened to signature in Rome on 4 November 1950, ETS No.005.

[604] Giuseppe Martinico, Oreste Pollicino, *The Interaction between Europe's Legal Systems. Judicial Dialogue and the Creation of Supranational Laws*, Edward Elgar Cheltenham et al. 2012, p. 138; Federico Fabbrini, Joris Larik, *The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights*, "Yearbook of European Law" vol. 35 1/2016, p. 157; Dean Spiellman, *The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights Or how to remain good neighbours after the Opinion 2/13*, FRAME, Brusseles on 27th March 2017, available at http://www.fp7-frame.eu/wp-content/uploads/2017/03/ECHRCJUEdialog.BRUSSELS.final .pdf, accessed on 22 August 2022, in particular pp. 11 ff.

[605] Ed Bates, *The Evolution of the European Convention on Human Rights — From its Inception till the Creation of a Permanent Court of Human Rights*, OUP Oxford 2010, p. 8.

[606] Ed Bates, *op. cit*., p. 19; Jochen A. Frowein, *European Integration through Fundamental Rights*, „University of Michigan Journal of Law Reform" vol. 18 1/1984, p. 8 used the famous metaphor of awakening of the sleeping beauty.

[607] Ed Bates, *op. cit*., p. 24.

The Court may receive applications from any person, nongovernmental organization or group of individuals whose ECHR rights were violated. This legitimation was understood broadly to encompass any natural person,[608] companies,[609] N.G.O.s[610] and, in specific situations, even legal persons of public law.[611]

The Convention contains a comprehensive catalogue of human rights, which by now have attained a considerable level of normative density, provided that since its inception (in particular since the introduction of Protocol 11) till 2020, the ECtHR examined over 921.200 applications and rendered over 23.000 judgments.[612] In fact, the human rights protection system provided by the ECHR tends to be recognized as the most effective human rights protection system in the world. Provided extremely high numbers of applications, it is evident that Convention's success or failure is contingent in the first place on achieving a high degree of its "embeddedness" in national legal systems.[613] The "Brighton Process", describing coordinated action of the convention parties aiming at enhancing the subsidiary character of the Convention, could be viewed as an embodiment of this doctrine. The Brighton Declaration[614] strongly emphasized the primary role of national remedies for the overall effectiveness of the Convention system. This process found its culmination in Protocol No. 15,[615] adding to the ECHR preamble explicit references to the principle of subsidiarity and highlighting the supervisory function of the Court and further heightening the admissibility requirements. Regardless of certain criticism of some aspects of the Brighton process coming particularly from academia and the "3rd sector",[616] in no case may it be inferred that the Brighton Process

[608] See e.g. ECtHR judgment of 2 March 2010 in case 61498/08 *Al-Saadoon and Mufdhi v. the United Kingdom*, concerning an application of Iraqui nationals claiming a breach of their rights by British military in Iraq (the controversy pertained rather to the territorial scope of application of the ECHR than the applicants' status).
[609] See f.e. ECtHR judgment of 16 April 2002 in case 37971/97 *Société Colas Est and Others v. France* where the applicant company's Article 8 rights were violated by office searches or ECtHR judgment of 31 July 2014 in case 14902/04 *OAO Neftyanaya Kompaniya Yukos v. Russia*, where the ECtHR declared Russian measures to violate property rights of Russian shareholders.
[610] Eg. ECtHR judgment of 17 July 2001 in case 39288/98 *Association Ekin v France*.
[611] See f.e. ECtHR judgment of 23 September 2003 in case 53984/00 *Radio France and others v. France*, concerning an application of the French public broadcaster.
[612] ECtHR, *Overview 1959-2020*, ECtHR 2021, pp. 4,7.
[613] Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, "European Journal of International Law" vol. 19 1/2008, pp. 125-159.
[614] Declaration of High-level Conference of Committee of Ministers in Brighton, United Kingdom, from 19 to 20 April 2012, available at: https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf, accessed on 22 August 2022, para 9. The declaration was followed by many further political commitments made over span of several years, their analysis, however, goes beyond the scope of this dissertation.
[615] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms signed at Strasbourg on 24 June 2013, CETS No.2.13, see in particular its Articles 1, 4, 5.
[616] Recently see especially the debate surrounding the Copenhagen Declaration and the deep concern related to its content expressed with regard to its first draft versions by, among others. several European NGOs (Joint NGO

fell out of the blue. It would be better to understand it rather as a mere amplification of tendencies that have always been there since the subsidiarity principle manifests itself in many ways, also in the context of deciding upon the admissibility criteria. Alas, according to Article 35 para 1 ECHR, the Court may examine the case only after the local remedies were exhausted. According to standing jurisprudence, this means that not only does the applicant have to avail himself of all the remedies available to him, but, equally, he is required to raise arguments at least corresponding in substance with the provisions of the ECHR so that the national court would have a real chance to remedy a Convention breach.[617] Apart from the principle of subsidiarity and the judge-made concept of margin of appreciation, providing national authorities, particularly courts, with a certain degree of deference plays an important role.[618] Some authors point out that the ECtHR's jurisprudence would even suggest a positive correlation between the scope of the ECtHR's deference and the national courts' sensitivity to the values contained in the convention.[619] This reliance on the national courts is even more evident if one was to consider that, as a matter of principle, the ECtHR relies on the fact-finding conducted by the national courts in its adjudicatory activities.[620] The European Court of Human

Response to the Draft Copenhagen Declaration of 13 February 2018 available at https://amnesty.dk/media/3931/joint-ngo-response-to-the-copenhagen-declaration-13-february-2018-with-signatures.pdf, accessed on 22 August 2022); academics (Andreas Follesdal, Geir, *The Draft Copenhagen Declaration: Whose Responsibility and Dialogue?,* 22 February 2018 https://www.ejiltalk.org/the-draft-copenhagen-declaration-whose-responsibility-and-dialogue/, accessed on 22 August 2022.; It seems however, that despite some doubts as to the final content of the declaration expressed in the CoE Parliamentary Assembly Recommendation 2129 adopted on 26 April 2018 ultimately both the final text and the spirit of the declaration do not seem to seriously threaten the ECHR's implementation, see Gerards Janneke, Sarah Lambrecht, *The final Copenhagen Declaration: fundamentally improved with a few remaining caveats*, 18 April 2018 https://strasbourgobservers.com/2018/04/18/the-final-copenhagen-declaration-fundamentally-improved-with-a-few-remaining-caveats/#more-4166, accessed on 22 August 2022. For a more comprehensive evaluation of Brighton Process see Ian Cram, *Protocol 15 and articles 10 and 11 ECHR—The partial triumph of political incumbency post-Brighton?*, "International and Comparative Law Quarterly" vol. 67 3/2018, pp. 477-503.

[617] See f. e. ECtHR judgment of 1 June 2010 in case 22978/05 *Gäfgen v. Germany*, paras 142, 144; ECtHR judgment of 25 March 2014 in case 17153/11 *Vučković and Others v. Serbia*, para 75.

[618] For general comments on this problem see Dean Spiellman, *Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, "Cambridge Yearbook of European Legal Studies" vol 14 2012 pp 381-414; for the connection between margin of appreciation and the subsidiarity principle see Angelika Nußberger, *Subsidiarity in the Control of Decisions Based on Proportionality: An Analysis of the Basis of the Implementation of ECtHR Judgements into German Law*, in: Anja Seibert-Fohr A., Mark E. Villiger (eds.) *Judgements of the European Court of Human Rights – Effects and Implementation*, Nomos Baden-Baden, p. 181.

[619] Catherine van der Heyning, *No place like home. Discretionary space for the domestic protection of fundamental rights*, in: Popelier Patricia, *ead*., van Nuffel Piet (eds.) *Human Rights Protection in the European Legal Order: the Interaction Between the European and the National Courts*, Intersentia Cambridge [et. et al] 2011, pp. 92-93. For an ECtHR judgment in this direction see ECtHR judgment of 7 February 2012 in joint cases 40660/08 and 60641/08 *von Hannover v. Germany (II)*, para 124.

[620] David Harris, Michael O'Boyle, Ed Bates (et. al.) *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights*, 3rd ed., OUP Oxford et al. 2014, pp. 143-147. The authors underline that even in cases in which the court is somewhat mistrustful of the national courts its capacity to conduct a full scale independent investigation is rather limited, be it only due to practical reasons.

Rights is conscious of its role as a quasi-constitutional court, as testified by the concept of the Convention as the *constitutional instrument of European public order*.[621] This opinion seems not to be unfounded. In practice, due to its subject matter, the Convention enjoys (quasi-)constitutional status in the EU Member States, arguably not that dissimilar from the one enjoyed by the EU law.[622]

According to Article 46 ECHR, the judgments of the Strasbourg Court are binding for their addressees (i.e. states) while basically leaving the respondent states with a choice as to the method of their execution, provided that it will not go against the spirit of the Convention and the ECtHR's ruling.[623] One could differentiate between different types of individual remedies, such as damages, revision of the proceedings, *restitutio in integrum*, or reopening of the proceedings and general remedies such as changing the laws; changing their application and interpretation etc.[624] Only in exceptional situations will the circumstances of a particular case and the ECtHR's ruling demand a specific action from the states.[625] Nonetheless, undertaking particular actions may also very well result from the nature of the breach and encompass e.g.the release of an unduly detained prisoner; returning of taken property etc.[626] Further, one has to remember the pilot judgment proceedings, explicitly designed to enable the Strasbourg Court to *identify […] remedial measures which the Contracting Party concerned is required to take at the domestic level* in case of systemic deficiencies.[627] Nonetheless, the ECtHR rulings are

[621] ECtHR judgment of 23 March 1995 in case 15318/89 *Loizdou v Turkey*, para 75. See also Steven Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects*, CUP, Cambridge 2006, pp. 169 ff.; Anne Peters, Tilmann Altwicker*, Europäische Menschenrechtskonvention,* 2nd ed., CH Beck München 2012, §2 para 9 f.

[622] Giuseppe Martinico, *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, "European Journal of International Law" vol. 23 2/2012, pp. 401-424, see also Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, "Global Constitutionallism" vol. 1 1/2012, pp. 53-90, in particular pp. 65-72 and Appendix I.

[623] ECtHR judgment of 1 December 2020 in case 26374/18 *Ástráðsson v. Iceland,* para 311 with further references.

[624] Adam Bodnar, *Wykonywanie Orzeczeń Europejskiego Trybunału Praw Człowieka w Polsce. Wymiar Instytucjonalny*, Wolters Kluwer Warszawa 2018, pp. 157-178.

[625] ECtHR judgment of 29 May 2019 in proceedings under Article 46 § 4 of the Convention in the case of *Ilgar Mammadov v. Azerbaijan* (15172/13), para 153 ff.; ECtHR judgment of 21 January 2011 in case 30696/09 *M.S.S. v. Belgium and Greece*, para 399.

[626] See detailed analysis of the relevant ECtHR jurisprudence conducted in Paweł Grzegorczyk, *The Effect of the Judgments of the European Court Of Human Rights in the Domestic Legal Order*, "Polish Yearbook of International Law" vol. 28 2008, p. 59 ff.

[627] Article 61.3 of the ECtHR Rules of Procedure as of 3 June 2022, available at https://www.echr.coe.int/documents/rules_court_eng.pdf, accessed on 22 August 2022. It has to be stressed, that this procedural rule served the purpose of legalizing earlier practice, rather than introducing completely new solutions. For an in-depth analysis of the topic see Maciej Lubiszewski, Jakub Czepek, *Procedura wyroku pilotażowego w praktyce Europejskiego Trybunału Praw Człowieka*, Wolters Kluwer Warszawa 2016. In any case, the application of the pilot judgment procedure cannot go so far as to distort the division of responsibilities foreseen in the Convention, granting the task of supervising the execution of judgments to the Committee of Ministers (see

still *essentially declaratory in nature*, as elegantly put by the ECtHR.[628] Consequently, an ECtHR's decision conflicting with EU law would have to be enforced by national actors, who would still have a considerable scope of manoeuvre in its implementation,[629] which would give yet another shot for ensuring compliance with EU law. In any case, the ECtHR judgments are not, strictly speaking, legally binding for the states other than their addressees, even if they contribute to the further development of the Convention.[630] This conclusion would not be altered even if to agree with the assessment that the ECtHR's jurisprudence enjoys *de facto* precedent status.[631]

It is particularly so due to the ECtHR judgments not creating any directly applicable rights for individuals and need implementation into the national legal system.[632] In the context of the envisaged EU's accession, this led some commentators so far as to suggest that ECtHR judgments would still have to be implemented in the EU legal order and would not necessarily have a direct effect in a manner similar to the WTO decisions.[633] Regardless of how tempting it may look, this position cannot be accepted. Contrary to the WTO system, the Convention bestows rights on individuals, not states, and it is precisely the individual who initiates proceedings before the ECtHR. Furthermore, the parties breach the convention vis-à-vis a concrete applicant by concrete decisions of their authorities. Consequently, while retaining a certain margin of appreciation regarding the modalities of implementing the ECtHR judgments, the EU would still be obliged to implement individual remedies cancelling the effects of the

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Lise R. Glas,, *The Theory Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System*, Intersentia Cambridge et. al. 2016, p. 574).

[628] ECtHR judgment of 29 May 2019 in proceedings under Article 46 § 4 of the Convention in the case of *Ilgar Mammadov v. Azerbaijan* (15172/13), paras 148-150 with further references; ECtHR judgment of 1 December 2020 in case 26374/18 *Ástráðsson v. Iceland,* para 312 with further references.

[629] Tacik, Przemysław, *Przystąpienie Unii Europejskiej do Europejskiej Konwencji Praw Człowieka,* IWEP Warszawa 2018, p. 424, 548..

[630] Christoph Grabenwarter underlined the pressure (*Veranderungsdruck*) on the Convention states, resulting in *de facto „*guiding effect" (*Orientierungswirkung*); Christoph Grabenwarter, *Europaisches und nationales Verfassungsrecht*, „Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer" vol. 60 2001, pp. 318, 321; U. Heckotter mentioned "authoritative effect" (*Autoritätswirkung*); Ulrike Heckötter, *Die Bedeutung der Europaischen Menschenrechtskonvention und der Rechtsprechung des EGMR fur die deutsche Gerichte*, Carl Heymanns Verlag Köln 2007, p. 82 f.

[631] Michał Balcerzak, *Zagadnienie precedensu w prawie międzynarodowym praw człowieka*, TNOiK Toruń 2008, pp. 146, 162 ff.; Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System. An Analysis of the European Court of Human Rights and the Court of Justice of the European Union*, Intersentia Cambridge 2011, p. 9.

[632] Kirsten Schmalenbach, *Die rechtliche Wirkung der Vertragsauslegung durch IGH, EuGH und EGMR*, „Zeitschrift fur offentliches Recht" vol 59 2004, p. 226; Jochen A. Frowein, in: idem, Wolfgang Peukert (eds.), *Europaische Menschenrechtskonvention. EMRK-Kommentar*, N.P. Engel Verlag Kehl am Rhein 2009, *Artikel 46*, para. 3.

[633] Robert Uerpmann-Wittzak, *Rechtsfragen und Rechtsfolgen des Beitritts der Europäischen Union zur EMRK, „Europarecht"* Beiheft 2/2012 *Die Europäische Union im Völkerrecht,* p. 177.

wrong committed to a successful applicant. The Convention mechanisms simply do not fit in the tip-for-tat paradigm applied by the CJEU to the enforcement of the WTO decisions.

Lastly, one should remember that throughout the long period of cohabitation, the ECtHR has shown its readiness to enter into a judicial dialogue with both national courts and the CJEU on many occasions. Since the aspect of the dialogue related to the jurisprudence will be discussed in more detail below, at this only the other aspects will be signalized. To begin with, one should look at the arrangements fostering conditions for institutional dialogue between the ECtHR and CJEU judges.[634] Both the CJEU and the ECtHR are embedded in largely the same regional context since the judges (and part of the auxiliary staff, legal clerks in particular) have to represent all member states and, in practice, they consist mainly of former governmental officials, judges and academics, with a substantive background in (European) public law,[635] and similarly to CJEU, refer in their judgments to different European legal systems and traditions.[636] Furthermore, one has many professional conferences taking place under the roof of European institutions, covering topics common to various national and international systems and bringing together judges from different courts.[637] Furthermore, the CJEU's and ECtHR's representatives have readily acknowledged on many occasions their commitment to a common enterprise which is the protection of fundamental rights in Europe.[638] There are also many international associations of judges, comprising both EU and CoE member states, providing fertile soil for

[634] Laurent Scheeck, *Diplomatic Intrusions, Dialogues, and Fragile Equilibria: The European Court as a Constitutional Actor of the European Union*, in: Jonas Christoffersen, Mikael Rask Madsen (eds.) *The European Court of Human Rights between Law and Politics*, OUP Oxford et al. 2011, p. 168 f.

[635] See the judges' biographies available at http://www.echr.coe.int/Pages/home.aspx?p=court/judges, accessed on 22 August 2022. A vast majority of them served a noticeable amount of time as public servants, experts, judges or clerks in either their home states or international organizations; most of the judges with academic background holds chairs in public law (particularly, but not only with some European connotations). Of the small group of judges with backgrounds as counsels, a substantial part either was interested rather with criminal than commercial law, or performed quasi-public functions as supreme-court advocates.

[636] See Bilyana Petkova, *Three levels of dialogue in precedent formation at the CJEU and ECtHR*, in Kanstantsin Dzehtsiarou, (ed.), *Human rights law in Europe : the influence, overlaps and contradictions of the EU and the ECHR*, Routledge New York, 2014, p. 80 and Paul Mahoney, *The Comparative Method in Judgements of the European Court of Human Rights: Reference Back to National Law* in: Guy Canivet, MadsAndenas, et. al.(eds.), *Comparative Law Before the Courts*, BIICL London 2004, p. 135 ff.

[637] As an example see f. e. the annual conference held in ECHR under the name *Dialogue of judges* https://www.echr.coe.int/Documents/Dialogue_2010_ENG.pdf, accessed on 22 August 2022, see also analytical projects with the participation of national judges aimed specifically at the issue of judicial dialogue in Europe, conducted under the umbrella of European Institutions (EC DG Justice) between 2013 and 2014 https://cjc.eui.eu/projects/european-judicial-cooperation-in-fr /, accessed on 22 August 2022.

[638] See f.e. a presentation held by Dean Spiellman, president of the ECHR in *The Judicial Dialogue…*, or the speech given by Court's president Koen Lenaerts for the opening of ECHR judicial year 2018 *The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection*, Solemn hearing for the opening of the Judicial Year 26 January 2018 https://www.echr.coe.int/Documents/Speech_20180126_Lenaerts_JY_ENG.pdf, accessed on 22 August 2022, on generally shared roots and goals of both courts see Giuseppe Martinico, Oreste Pollicino, *op. cit.*, p. 138.

the further development of European judicial dialogue and, thus, a kind of European legal space.[639] One should also remember various programs aimed at familiarizing national judges (being the principal operators of both ECHR and EU law) with the European courts' functioning, secondments to the ECHR being a prominent example.[640] The above is mirrored by the scholarly writings of Europe's top courts' judges, all demonstrating a deep conviction of the necessity of cooperation between their native courts.[641] However, these remarkable practical achievements cannot obfuscate that the judicial dialogue between Europe's most important international courts is based on the shaky normative basis of comity.[642]

Thus, it should not be surprising that all these achievements did not play a prominent role in the CJEU's assessment of the EU's envisaged accession in Opinion 2/13, emphasizing the formal aspect of the accession.

9.3. EU as a party to the ECHR? The CJEU Opinion 2/13

9.3.1. Introduction

Due to Opinion 2/13 having been commented on countless times,[643] the analysis in this part shall concentrate only on the issues most relevant to the autonomy question. With the progressive development of the EU's own fundamental rights framework since the 1970s, eventually, the desirability of unification and coordination between EU law and ECHR became

[639] See list of such organizations available on the webpage of European Network of Councils of Judiciary https://www.encj.eu/index.php?option=com_content&view=article&id=38&Itemid=94&lang=en, accessed on 22 August 2022. Generally on the topic of dialogue of judges see Monika de Claes, Maartje de Visser, *Are You Networked Yet? On Dialogues in European Judicial Networks*, "Utrecht Law Review" vol. 8, 2/2012, pp.100–114.

[640] A practice expressly encouraged at pt 20 b) of the 2012 *Brighton Declaration*, available at https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf, accessed on 22 August 2022..

[641] See f.e former president of ECHR and current judge in the EU General Court Dean Spiellman, *The Judicial Dialogue...*; Koen Lenaerts, *The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection* in: European Court of Human Rights/Council of Europe *Dialogue between judges*, European Court of Human Rights/Council of Europe Strasbourg 2018, pp. 57-65; Paul Kirchhof, deputy president of the German Federal Constitutional Court, *Grundrechtsschutz durch europäische und nationale Gerichte* "Neue Juristische Wochenschrift" 51/2011, pp. 3681-3686; Leszek Garlicki, former judge in Polish Constitutional Tribunal and ECHR, *Ochrona praw jednostki w XXI w. (globalizacja-standardy lokalne-dialog między sądami*), w: Ewa Gdulewicz, Wojciech Orłowski, Sławomir Patyra (eds.) *25 lat transformacji ustrojowej w Polsce i w Europie Środkowo-Wchodniej,* , Wyd. UMCS Lublin 2015, pp. 161-180.

[642] Lize R. Glas, Jasper Krommendijk, *From 'Opinion 2/13' to 'Avotiņš': Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts*, "Human Rights Law Review" vol 17 2017, p. 572.

[643] See f.e Federico Fabbrini, Joris Larik, *op. cit.*, pp. 145-179; Louise H. Storgaard, *EU Law Autonomy Versus European Fundamental Rights Protection: On Opinion 2/13 on EU Accession to the ECHR*, "Human Rights Law Review" vol. 15 3/2015, pp. 485-521; Tobias Lock, '*The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?*, "European Constitutional Law Review", vol 11 2015, pp. 239-273 or the Editorial Comment *The EU's Accession to ECHR – a "NO" from the ECJ*!, "Common Market Law Review" vol. 52 1/2015, pp. 1-16. Przemysław Tacik, *op. cit.*, pp. 329-367. Analysis of this opinion features prominently also in the literature dedicated to the issue of autonomy.

apparent.[644] It was particularly so, granted that all the EU Member States have been, at the same time, also ECHR parties, with the (temporary) exception of France.[645] The first attempt for the EU to accede to the ECHR took place in the early 1990s when the EU's attempts were blighted by the CJEU's Opinion 2/94 stating that the EU lacked competences for the accession.[646] The second attempt took place only in the 2010s. Both the EU Member States and EU Commission apparently learned their lesson: the Lisbon Treaty introduced provisions expressly empowering the EU to accede to the Convention.[647] Nonetheless, negotiations of the Accession Agreement protracted for several years.

Modalities of the EU's participation in ECHR were determined by the Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms,[648] agreed upon by the EU and CoE negotiators. The Draft Agreement covered a broad scope of issues, including the EU's voting rights and financial contribution to CoE. Thus, I shall refer only to the provisions of particular importance to the principle of autonomy at this place. To begin with, the preamble indicated the necessity to consider specific features of EU law as the primary rationale for introducing highly specific solutions. Article 1.4 did foresee ascribing responsibility for breaches of the Convention to the Member States if their authorities committed the violation. Article 3.1 introduced the co-respondent mechanism, according to which the EU or its Member States *could* become co-respondents upon the ECtHR's decision, issued either at their own request or the invitation of the ECtHR (Article 3.5). Furthermore, pursuant to Article 3.6, in case of allowing the co-respondent, the CJEU should be afforded sufficient time to pronounce upon the division of competences in cases of parties acting as co-respondents. Thus, as also evidenced by the

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[644] Nina Półtorak, *Przystąpienie Unii Europejskiej do Konwencji o Ochronie Praw Człowieka – projekt u mowy akcesyjnej a prawo UE*, „Europejski Przegląd Sądowy" 9/2012, p 4; see also Anna Wyrozumska, *Ochrona praw podstawowych w Unii Europejskiej – problemy pluralizmu porządków prawnych* w: Jerzy Kranz (ed.), *Suwerenność i ponadnarodowość a integracja europejska*, Wyd. Prawo i Praktyka Gospodarcza Warszawa 2006, pp. 170 ff.

[645] See the ECHR ratification charter available at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005, accessed on 22 August 2022. In this context one should take note of the exceptional situation of France which, despite being among the signatories of the ECHR, ratified it only 24 years later, in 1974.

[646] CJEU Opinion of 28 March 1998, case 2/94, ECLI:EU:C:1996:140.

[647] Treaty on European Union [2012] OJ EU C326/01, Article 6.2 (*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*). Somewhat paradoxically, certain authors were of the opinion that this particular role of the convention amplified the fears connected to the EU's accession, see CJEU opinion of 28 March 1996, *ECHR*, Opinion 2/94, ECLI:EU:C:1996:140; see also Sophie Barends, *op. cit.*, p. 69; Cristina Contartese, *The procedures of prior involvement…*, p. 20.

[648] Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. Appendix I to Final report to the CDDH prepared on 3-5 April 2013 at Strasbourg 47+1(2013)008rev2.

provisions on delimiting the scope of the engagement of the EU and its Member States, upon entry into force, despite the Accession Agreement being envisaged as an EU-only agreement, ECHR would effectively become a mixed agreement, be it only due to all the EU Member States being also parties to the Convention on their own right.[649]

Eventually, the Draft Accession Agreement was submitted to the CJEU for a legal opinion pursuant to Article 218.11 of TFEU.[650] As is well known, despite the existence of specific provisions addressing peculiarities of the EU's membership, the CJEU declared the agreement incompatible with the Treaties, much to the dismay of many legal scholars.[651]

9.3.2. EU's participation as a stumbling block

As highlighted above, unlike the earlier Opinion 2/94, opinion 2/13 concentrated on the actual conformity of the Accession Agreement with EU law instead of limiting itself to simple competence analysis. Somewhat surprisingly, however, the Court's reasoning revolved only around legal issues related to modalities of EU's participation in ECHR while omitting more general matters of both frameworks' coexistence.[652] Indeed, even a cursory analysis of opinion 2/13 reveals that the EU's participation in the agreement and its basic features were the decisive factors for the CJEU.

The CJEU commenced by stressing that the accession would make a great deal of difference to the Convention's position within the EU legal system. It began by highlighting that without the EU becoming a party to the Convention, the latter was not *formally incorporated into the legal order of EU*.[653] Thus, the ECHR would have become binding upon the EU,[654] with the EU's

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[649] Robert Uerpmann-Wittzak, *op. cit.*, p. 183.

[650] Treaty on Functioning of the European Union [2012] OJ EU C326/01, Article 218.11 (*A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised*.)

[651] See the literature invoked in fn. 643 above. Titles of contemporaneous expert blogposts would be even more telling: Sionaidh Douglas-Scott, *Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice*, 24 December 2014, https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/, accessed on 22 August 2022; Steve Peers, *The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection*, 18 December 2014 http://eulawanalysis.blogspot.com/2014/12/the-cjeu-and-eus-accession-to-echr.html, accessed on 22 August 2022.

[652] Allan Rosas, *The EU and international dispute settlement…*, pp. 10-12. Arguably, the issues related to Common Foreign and Security Policy (CFSP) were analysed by the Court from a different angle (the possibility of submitting matters falling outside of CJEU's jurisdiction to external adjudicating bodies), a further analysis of this issue would go beyond the scope of this chapter.

[653] CJEU Opinion of 18 December 2014, *European Convention on Human Rights*, Opinion 2/13, ECLI:EU:C:2014:2454, para 179.

[654] *Ibid.*, para 180.

institutions becoming subject to the control of the ECtHR,[655] also as a matter of international law[656] only after the EU's accession. Consequently, EU institutions would be bound by the ECHR and the ECtHR's decisions *in the exercise of their internal powers*[657] only with the EU's accession to the ECHR. The CJEU noted in this regard that as a result of the EU becoming a party to the Convention, the ECtHR could negatively assess the CJEU's interpretation of EU law, primarily the EU Charter on Fundamental Rights,[658] with legal effects also within the EU.[659] This could be problematic given that *Fundamental rights, as recognized in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the* [EU's] *constitutional framework (…)*,[660] i.e. with the preservation of the fundamental role of the CJEU.[661] The CJEU's expressed its worry about the possibility of creating divergent standards particularly in para 189 of the Opinion, where it indicated the possibility of *unity and effectiveness of EU law* being *compromised* by the ECtHR setting too high minimum standards for fundamental rights protection.[662] The CJEU supported its arguments by invoking mutual trust in paras 168, 191 and 194 of its Opinion. Yet, at least on the operative level, this argument was connected mainly to instruments of EU law within the area of security, freedom and justice, foreseeing automatic recognition of foreign judgements (paras 191, 194), rather than with fundamental principles of EU law, as in the later *CETA* opinion.[663]

It is difficult to escape the impression that by these declarations, the CJEU expressed its will to arrange its relationship with the ECtHR along the *Melloni* lines, i.e. retain its competence to

[655] *Ibid.*, para 181.
[656] *Ibid.*, para 185; see also Opinion of AG Kokott of 18 June 2014, *European Convention on Human Rights,* Opinion 2/13, ECLI:EU:C:2014:2475, para 1.
[657] CJEU Opinion of 18 December 2014, *European Convention on Human Rights,* Opinion 2/13, ECLI:EU:C:2014:2454, para 184, see also Christina Eckes, *op. cit.*, p. 17 while underscoring that only than would the CJEU be forced to assess the legal power of the ECHR's decisions; see also Przemysław Tacik, *op. cit.*, p. 610.
[658] CJEU Opinion of 18 December 2014, *European Convention on Human Rights,* Opinion 2/13, ECLI:EU:C:2014:2454, para 186.
[659] It is to be stressed that such a view, while being consistent with CJEU's earlier jurisprudence, is rather difficult to reconcile with the consensus on lack of the ECtHR judgments direct effect (*Durchgriffswirkung*).
[660] CJEU Opinion of 18 December 2014, *European Convention on Human Rights,* Opinion 2/13, ECLI:EU:C:2014:2454, para 177.
[661] *Ibid.*, paras 188-189.
[662] In this context one could also add that neither the ECHR, nor the CFR provided for clauses allowing to solve horizontal conflicts of rights, see Heiko Sauer, *Vorrang ohne Hierarchie. Zur Bewältigung von Kollisionen zwischen Rechtsordnungen durch Rangordnungsnormen, Bindungsnormen, Derogationsnormen und Kollisionsnormen*, "Rechtstheorie" vol. 44 4/2013, p. 534.
[663] Agnieszka Frąckowiak-Adamska, *Akcesja Unii Europejskiej do Europejskiej Konwencji Praw Człowieka: ryzyko naruszenia zasady wzajemnego zaufania między państwami członkowskimi*, „Europejski Przegląd Sądowy", 12/2015, p. 36. Nonetheless the references to mutual trust could be also viewed as a sort of rebuttal of the ECtHR's Dublin-related jurisprudence, clearly placing the ECHR fundamental rights above the EU law principle of mutual trust, *ibid.* p. 37, see also Dean Spiellman, president of the ECHR *The Judicial Dialogue…*, p. 13.

provide final and binding answers regarding the questions of balancing between different values of EU law.[664] This could be the very heart of the matter: even if invoking ECHR and the relevant ECtHR's jurisprudence, the CJEU has retained its position of the guardian of the gate to the EU legal order, having the ultimate power to decide what effect should be given to the external body's jurisprudence in the EU legal order, as in the case of many other international agreements (UNCLOS WTO etc.).[665] So long as the CJEU is the gatekeeper, any possible conflicts between the EU law and the Convention can be treated as intra-systemic disputes, decided by the CJEU, retaining its control over the interplay between the different EU values and principles. Submission of the EU to an external supervisory body would, seemingly, reconfigure the situation so that an external balancing act would bind the CJEU.

9.3.3. Article 33 ECHR and Protocol 16: violations of the CJEU's exclusive jurisdiction?

Having come to the above conclusions, the Court began analyzing the ECHR provision allowing the ECHR Parties to bring inter-state claims before the ECtHR.[666] Despite, theoretically, relating to mechanisms not covered in this part of the dissertation, arguably, the argumentation pertained in these sections is equally relevant to dispute-settlement bodies accessible to individuals. Coming back to the aforesaid provision, suffice is to say that the CJEU concluded that it violated the Luxembourg Court's exclusive jurisdiction with regard to inter-state claims between EU Member States relating to EU law. The EU's participation seemingly played the decisive role in declaring this mechanism incompatible with EU law, as the CJEU observed that with ECHR becoming part of EU law as an international agreement, the ECtHR would become exclusively responsible for adjudicating Convention disputes between the Member States and EU, and the Member States themselves.[667] Importantly what was problematic in this regard was not the application of EU law by the ECtHR, but rather *the application of the ECHR within the scope ratione materiae of EU law* [that] *would be*

[664] CJEU judgment of 26 February 2013, *Melloni*, case C-399/11, ECLI:EU:C:2013:107; see Maciej Taborowski, *Poziom ochrony praw podstawowych wynikający z Karty Praw Podstawowych UE jako przeszkoda dla przystąpienia Unii Europejskiej do Europejskiej Konwencji Praw Człowieka*, „Europejski Przegląd Sądowy" 12/2015, pp. 30-32, in similar vein Giacomo Di Federico, *Fundamental Rights in the EU: Legal Pluralism and Multi-Level Protection After the Lisbon Treaty*, in: idem (ed.) *The EU Charter of Fundamental Rights. From Declaration to Binding Instrument*, Springer the Hague 2011, p. 42.

[665] Giacomo Di Federico, *op. cit.*, p. 18. There were also certain arguments suggesting that, paradoxically, EU's accession to the Convention and its incorporation into the legal order could allow the CJEU to become the supreme arbiter in the matters of fundamental rights (see, Przemysław Tacik, *op. cit.*, p. 422). This view, however, seems to overlook the importance of the binding effect of international law on the EU institutions.

[666] Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.005, Article 33: *Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party*.

[667] CJEU Opinion of 18 December 2014, *European Convention on Human Rights,* Opinion 2/13, ECLI:EU:C:2014:2454, paras 204-205.

compatible with Article 344 TFEU.[668] In particular this statement, even if issued in relation to an inter-state dispute settlement mechanism, seems to be also of utmost importance also to the reasoning related to elements of the opinion related to private parties.

These general enunciations were followed by the critique of the mechanism envisaged in Protocol 16 of the ECHR allowing for preliminary references of national courts to the ECtHR.[669] This critique was somewhat spurious since the EU was not to be a party to Protocol 16 and that mechanism.[670] The issues around Protocol 16 should have consisted solely in allowing national courts to choose preliminary references in matters related to ECHR as a part of EU law to the ECtHR instead of the CJEU. However, the risk of such references being made outside of the EU law framework has existed since the Protocol's inception, and the EU's accession would not change much in this respect.[671]. This would mean that the Accession Agreement's failure consisted in not having contained specific provisions safeguarding the preponderance of EU's preliminary reference mechanism as contained in Article 267 TFEU.[672]

At first glance, it could be somewhat surprising that the CJEU, while analyzing the Accession Agreement's conformity with EU law, referred to an instrument to which the EU was not to become a party and would not have been bound. It was even more surprising if to contrast it with the earlier *Benelux Court* opinion, where the CJEU stated that a preliminary reference mechanism contained in a non-EU agreement by its very nature could not endanger the autonomy of EU law, be it only due to the Member States' courts being the ultimate decision-makers.[673] However, the CJEU's reasoning was supported by some authors who underscored that after the accession, matters of interpretation of the ECHR law in Protocol 16 procedure would become relevant to EU law, even without the EU being a party thereto.[674] This rationale

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[668] *Ibid.*, para 213.
[669] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.214. For the legal analysis of the Protocol, see Ada Paprocka, Michał Ziółkowski, *Advisory opinions under protocol no. 16 to the European Convention on Human Rights*, "European Constitutional Law Review", vol 11 2/2015, pp. 274-292.
[670] CJEU Opinion of 18 December 2014, *European Convention on Human Rights*, Opinion 2/13, ECLI:EU:C:2014:2454, para 197.
[671] *Ibid.*, para 198. It has to be stressed that as of August 2022 there are 9 EU Member States for whom the Protocol entered into force, see https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=214, accessed on 22 August 2022. Interestingly, all of these countries completed their ratification procedures after Opinion 2/13.
[672] CJEU Opinion of 18 December 2014, *European Convention on Human Rights*, Opinion 2/13, ECLI:EU:C:2014:2454, para 199.
[673] See section 6.2.4 above.
[674] Daniel Halberstam, *"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR and the Way Forward*, "University of Michigan Law School, Public Law and Legal Theory Research Paper Series" no. 439, 2015, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567591#, accessed on 22 August 2022, pp. 18, 38.

does not seem very convincing, though. After all, the EU found problematic the introduction of the *binding* character of the ECtHR's decisions, not the (already existing) interpretative effect of the ECtHR judgments. Furthermore, attention was drawn that a national court's possibility of non-filing a preliminary reference was an inherent element of the EU legal system ever since, and Protocol 16 would not change much in that regard.[675] Consequently, the only plausible explanation of the CJEU's overtly idiosyncratic treatment of the Protocol 16 mechanisms is connected to seeing it as an element of the broader shift of interpretative power to Strasbourg.

9.3.4. Co-respondent mechanism, prior involvement and jurisdiction in CFSP matters

Another problem with the EU's accession to the ECHR was intrinsically connected to selecting the proper respondent. The EU's accession to the ECHR would create a situation where the ECtHR could be faced with an individual application and forced to determine whether a claim should be directed against the EU or its Member States. As explained in previous chapters, this problem in practice relates mainly to mechanisms accessible to individuals, where their abuse cannot be excluded by the agreement between the Member States, as in the case of WTO, or the (threat of) infringement proceedings, as in the case of UNCLOS. Furthermore, granted the volume of cases decided yearly by the Strasbourg court, the ECtHR would have faced the problem of determining the proper respondent regularly. It was proposed that this problem should be solved by creating the possibility of the ECtHR deciding on allowing the EU or the Member States to join the proceedings. The CJEU, however, eventually found that leaving the ultimate decision in this respect in the hands of an external body would violate the autonomy of EU law.

It is apparent that by its very nature, this challenge was specific to the mixed participation of both the EU and the Member States in a given agreement and could not have arisen outside of this context.[676] The problems related to selecting the proper respondent were connected mainly to the issue of "wrong" attribution or apportionment of responsibility for decisions *interfering with the division of powers between the EU and its Member States.*[677] Furthermore, the CJEU was of the opinion that any such operation would necessarily require the external court to *apply* or *interpret* EU law – be it only in the form of *making an assessment of the rules of EU law.*[678]

[675] Robert Uerpmann-Wittzak, *op. cit.*, p. 178
[676] As AG Kokott observed, only in such a constellation the delimitation of competences would have been binding for the EU, see Opinion of AG Kokott of 18 June 2014, *European Convention on Human Rights,* Opinion 2/13, ECLI:EU:C:2014:2475, para 128.
[677] CJEU Opinion of 18 December 2014, *European Convention on Human Rights,* Opinion 2/13, ECLI:EU:C:2014:2454, paras 225 and 231.
[678] *Ibid.*, paras 224, 230.

This extensive understanding of the CJEU's interpretative monopoly, even though grounded in the earlier jurisprudence,[679] indeed pushed the limits for precluding interpretation of EU law by external bodies also in individual cases.[680]

The consequence of the opinion is that the EU ultimately has to have the right to determine the proper respondent,[681] whereby the CJEU's monopoly would be infringed already by an external body deciding whether there is a sufficiently definitive interpretation of EU law and choosing on its own from possible interpretations of EU law.[682] This could go so far as to suggest that the CJEU requests a referral be made every time that the possibility of application of EU law exists.[683] All this fuzz, however, seems to be much overblown. As will be explained in the following section (section 9.4), while deciding whether a Member State may be held liable for a measure implanting EU law, the ECtHR bases its decision on the scope of manoeuvre test rather than the division of competences, thus, strictly speaking, the Strasbourg court would not have to delimit between the competences of the EU and its Member States. All in all, however, the CJEU adopted an opposite stance.

Similarly, the CJEU's critique of the prior involvement mechanism[684] is necessarily linked to the EU's participation. This issue would not arise if the EU were not involved.[685] The problem lies simply in the Accession Agreement foreseeing a situation in which the ECtHR would analyze a provision without the CJEU having provided a definite interpretation thereof.[686] In fact, the CJEU's monopoly would be infringed already in case of the ECtHR deciding whether there is a sufficiently definitive interpretation of EU law conducted by the CJEU and choosing by itself from possible interpretations of EU law.[687] Rather obviously, in case of disputes brought by private entities rather than states, it would not be possible to avoid these threats by making some informal arrangements and exercising diplomatic pressure.

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[679] As explained in the Opinion of Opinion of AG Kokott of 18 June 2014, *European Convention on Human Rights*, Opinion 2/13, ECLI:EU:C:2014:2475, paras 48-50; the issue was not thematized by the CJEU.
[680] Jan Willem van Rossem, *op. cit.*, pp. 45-46.
[681] Armin Steinbach, *op. cit.*, p. 155.
[682] Cristina Contartese, *The procedures of prior involvement…*, pp. 14-15; see also Jan Willem van Rossem, *op. cit.*, p. 57.
[683] Cristina Contartese, *The procedures of prior involvement…*, pp. 14-18.
[684] CJEU Opinion of 18 December 2014, *European Convention on Human Rights*, Opinion 2/13, ECLI:EU:C:2014:2454, paras 236-248,
[685]Opinion of AG Kokott of 18 June 2014, *European Convention on Human Rights*, Opinion 2/13, ECLI:EU:C:2014:2475, para 127.
[686] CJEU Opinion of 18 December 2014, *European Convention on Human Rights*, Opinion 2/13, ECLI:EU:C:2014:2454, paras 238-239; para 246.
[687] Cristina Contartese, *The procedures of prior involvement…*, pp. 14-15.

The CJEU's reasoning in this respect was all but flawless. To begin with, the CJEU concentrated solely on the analysis of the relevant Accession Agreement provisions and did not consider whether the ECtHR's handling of the subsidiarity principle would not provide enough safeguards against by-passing the CJEU.[688] In any case, the connection between prior involvement and the subsidiarity principle, allowing to correctly determine the EU law-related issues before the Member States' courts lies at hand.[689] In addition, the institution of prior involvement itself is not entirely unproblematic: As some authors point out, it may even increase the potential for issuing conflicting decisions.[690]

Last but not least, with regard to the Common Foreign and Security Policy, the CJEU made it clear that the EU may not accept the jurisdiction of an external court over its actions concerning matters where the CJEU has no jurisdiction,[691] even if these actions would have been measured solely against the benchmark of ECHR and not EU law.[692] Laying aside the integrity of this assessment, it has to be stressed that it is logically flawed, as no jurisdiction conflict may arise when CJEU has no jurisdiction.[693]

9.3.5. Opinion 2/13 and the autonomy principle

As put by the former president of the ECtHR and current judge of the Court, Opinion 2/13 was an instance of a clear triumph of the autonomy principle over the protection of fundamental rights.[694] This is a visible difference between Opinion 2/13 and the *Kadi* case: Whereby the latter stipulated primacy of *fundamental rights* over EU's international obligations in a manner similar to other constitutional and international law courts, Opinion 2/13 stipulated the priority of the EU's internal considerations over human rights protection. Court's argumentation could be divided into two groups. The first one would consider procedural aspects regarding the EU's participation (prior involvement, co-respondent mechanism, etc.). The latter would be of much

[688] This problem was observed by the AG Kokott, who indicated that in case of EU acting as the respondent the problem would have been solved by the subsidiarity principle, Opinion of AG Kokott of 18 June 2014, *European Convention on Human Rights*, Opinion 2/13, ECLI:EU:C:2014:2475, para 128.
[689] Przemysław Tacik, *op. cit.*, p. 559.
[690] *Ibid.*, p. 557.
[691] CJEU Opinion of 18 December 2014, *European Convention on Human Rights*, Opinion 2/13, ECLI:EU:C:2014:2454, paras 252, 255-256 Critically of veracity of this opinion Allan Rosas, *The EU and international dispute settlement…*, p. 12. The critical view seems to be confirmed by the later CJEU's jurisprudence affirming the CJEU's willingness examine also claims in the contested area, see e.g. CJEU judgment of 28 March 2017, *PJSC Rosneft Oil Company*, case C-72/15, ECLI:EU:C:2017:236.
[692] CJEU Opinion of 18 December 2014, *European Convention on Human Rights*, Opinion 2/13, ECLI:EU:C:2014:2454, para 255.
[693] Sophie Barends, *op. cit.*, p. 82.
[694] Dean Spiellman, *The Judicial Dialogue…*, p. 12.

more fundamental character, as it would relate to the very essence of the EU's submission to external dispute settlement mechanisms.

Upon closer scrutiny, it is evident that the CJEU in its Opinion 2/13 applied standards devised in the earlier *EFTA* opinion (see section 6.2.1. above). Consequently, the Court tied the apportionment of responsibility by the external dispute settlement bodies to deciding on the distribution of competences between the EU and its Member States. In effect, the CJEU stated that the principle of autonomy demanded the determination of this competence division be left to the CJEU. Regardless of whether there were any good reasons for identifying the apportionment of international responsibility with the division of competences between the EU and its Member States, it has to be stressed that such deficits could have been removed by a proper formulation of the accession agreement. With its prior involvement and co-respondent clauses positively assessed by the CJEU, CETA provides the best example of such a situation.[695]

The CJEU's deliberations regarding the compatibility of international law with EU law had much more fundamental character, however. Arguably, in its opinion, the CJEU went further than in its earlier jurisprudence by doing nothing short of stating that *any* external dispute settlement system endowed with its own agenda could infringe the autonomy of EU law by imposing its own balancing between different values on the EU. Arguably, it applies also to international frameworks having largely common goals with the EU. After all, at no place did the CJEU state that the values of the ECHR were alien to the EU. Quite the contrary, it acknowledged that the human rights enshrined in ECHR were mirrored by the EU's own fundamental rights identified as general principles and codified in the Charter. Thus, the problem consisted solely in the possibility of an external body weighing fundamental rights against other principles of EU law and ascribing to them a different value than the CJEU, e.g. by curtailing the principle of mutual trust in the interest of maximizing fundamental rights protection. Furthermore, the CJEU presented a relatively broad understanding of the *application* or *interpretation* of EU law by external bodies by indicating that it should also encompass analyzing EU law as a background issue (e.g. for the purpose of identifying the proper respondent). Consequently, in light of Opinion 2/13, one could even go so far as to assume that the autonomy of EU law could be violated by any external dispute settlement mechanism that would cover issues lying within the scope of application of EU law. And these conclusions, even if going too far, are not unfounded. As explained in Chapter 3 above,

[695] See section 10.4.2. below.

international dispute settlement mechanisms have an inherent tendency to follow the policy goals native to their own regimes at the expense of other sub-systems of international law. From such a standpoint, the EU's accession to ECHR would be a problem even if to conceive the relationships between the ECtHR and CJEU as non-hierarchical[696] due to the ECtHR's inherent preference for values native to the Convention.

At this juncture, one should ask whether the long story of dialogue between the CJEU and the ECtHR[697] had any bearing on the CJEU's decision. The answer to this question should be a careful no. At the outset, the CJEU made no express statement regarding its assessment of the ECtHR's jurisprudence or the history of the relationship between the two courts. This, however, has not precluded many commentators from seeing Opinion 2/13 as a sort of harsh reply to the earlier ECtHR's jurisprudence undermining the application of mutual trust in asylum cases.[698] From this standpoint, Opinion 2/13 could be seen as a sort of Luxembourg court's revenge for the ECtHR's earlier intrusions in the *domain reserve* of the EU law.[699] This viewpoint would necessarily prerequisite a negative assessment of the ECtHR's treatment of issues of EU law. However, even if to assume that the ECtHR did not pay enough respect to EU law in its asylum cases, one should still be mindful of the broader context. After all, the two regimes, despite having largely overlapping scopes of application and being based chiefly on their enforcement by the national organs, have coexisted successfully for over 60 years. In particular, as shall be discussed in more detail below, the Strasbourg court has deployed elaborate judicial techniques allowing it to bypass the issue of assessing the EU law while supervising the actions of the Convention states' authorities. Thus, there is no evidence to support the view according to which the CJEU relied on the assessment of the judicial dialogue between the two courts.

Be as it may, as shall be discussed in more detail below, in Opinion 2/13 the CJEU seemingly related the aforesaid threats only due to the EU's membership in external dispute-settlement mechanisms, with the autonomy of EU law being unaffected by the Member States' participation in such mechanisms.

[696] Przemysław Tacik, *op. cit.*, pp. 547-548, in any case, this thesis was not undisputed, see *ibid.* p. 545.
[697] See section 9.2. above.
[698] See Chapter 9.4. below.
[699] The matter is not straightforward, however given that the CJEU itself has agreed to curtail the principle of mutual trust to the benefit of fundamental rights protection already in its earlier *NS* case, see Jan Willem van Rossem, *op. cit.*, p. 51.

9.4. Unspoken compromise: Member States' participation in the ECHR

9.4.1. Introduction: problems in the absence of the EU accession

The above analysis cannot obfuscate the question as to whether all the problems thematized by the CJEU were limited only to the situation of the EU's accession. After all, the concurrent jurisdiction of the CJEU and the ECtHR has long been indicated as *the* example of a potential conflict between REIO and regional human rights frameworks.[700] In particular, the problem of bypassing the EU's legal framework for settling disputes seems to exist independently of the EU's participation. Indeed, there are good arguments for the thesis of the ECtHR already seriously meddling with the autonomy of EU law even in the absence of the latter's accession. This conclusion would corroborate the argument on the decisive importance of the binding effect of external bodies' decisions and, thus, the EU's participation in international dispute settlement mechanisms with the principle of autonomy of EU law. One might even assume that by remaining silent on the issues related to Member States' participation in the Convention despite having many occasions to do so, the CJEU gave its tacit *imprimatur* for the Member States' participation in the ECHR. In any event, in light of the CJEU's later jurisprudence, in particular concerning the international investment agreements, it will become clear that this differentiation only added to the confusion.

To begin with, it is blatantly clear that as it currently stands, the Member States are perfectly capable of initiating Article 33 ECHR proceedings against each other in all matters covered by the Convention. As clearly demonstrated by the ECtHR's case law, the ECHR may very well intersect with matters covered by EU law. Besides, even in the absence of the EU's accession, the ECtHR would be *seized* with such a dispute, regardless of its relationship vis-à-vis EU law. Secondly, since the CJEU dismissed in its Opinion 2/13 the possibility of mitigating the risk of inter-state claims by a coordinated action between the EU Member States, one can safely assume that the fact that no inter-state claims between the EU Member States have made it to the merits stage so far,[701] would be irrelevant for the assessment of the ECHR's conformity with EU law.

[700] Yuval Shany, *op. cit.*, p. 68.

[701] See list of Article 33 ECHR cases as of 23 July 2021 prepared by the CoE secretariat, available at https://www.echr.coe.int/Pages/home.aspx?p=caselaw/interstate&c, accessed on 22 August 2022. Dispute between Croatia and Slovenia concerned pre-accession issues and the Latvian case against Denmark was dropped due to a settlement, see ECtHR Decision of 16 June 2020 in case 9717/20 *Latvia v. Danemark*..

Thirdly, the ECtHR assesses the competence division between the EU and its Member States on a regular basis while determining the responsibility of a Member State. Though not binding for the EU, this determination is binding, as a matter of international law, for its Member States. Furthermore, it seems that it was precisely the ECtHR's jurisprudence related to their responsibility or conduct in the exercise of EU law that seemingly influenced the International Law Commission (ILC) decisively while drafting the rules on the responsibility of international organizations.[702] Consequently, it could even be argued that the EU could have become *indirectly* bound by the ECHR jurisprudence on the competence division to the extent it became part of customary international law.[703] In any case, it has to be stressed that, similarly to the solution contained in Article 1.4 of the Accession Agreement – the correct respondent would be determined by checking whether the national authority retained any scope of manoeuvre. Needless to say, in the absence of the EU's membership, there has been no prior involvement procedure, and the EU could have influenced the ECtHR's decisions related to the application or interpretation of EU law through the medium of *amici curiae* at best.

Fourthly, regardless of the merits of the Protocol 16 argument, it has to be stressed that the possibility of referring cases pertaining to EU law to Strasbourg instead of Luxembourg on the basis of Protocol 16 is by no means hampered by the lack of EU accession to the Convention. In particular, already now, there is the risk of the Member States courts asking the Strasbourg Court to conduct an assessment of EU law from the viewpoint of the Convention in lieu of making an Article 267 TFEU preliminary reference, particularly taking into account that the Protocol entered into force for 9 of the EU Member States.

Last but not least**,** it has to be stressed that the ECHR has the particular potential to disrupt the uniform application of EU law due to *cross-cutting through virtually all (…) areas of competence and policy,* just like international investment or environmental treaties**.**[704] One has to remember that the ECHR is an international agreement binding on all EU Member States enjoying a quasi-constitutional status, in certain respects similar to EU law.[705] Thus, it is by no means a coincidence that many commentators awaiting the accession treated it as *enhancing*

[702] Pieter Jan Kujiper, Eva Paasivirta, *op. cit.,* Hart, Oxford et al. 2013, pp. 66-67.
[703] For the EU's international status being largely determined by the customary international law see Carolin Damm, *op. cit.*, pp. 57, 68; Delano Verwey, *op. cit.*, p. 157.
[704] Maciej Szpunar, *Is the Court of Justice Afraid of International Jurisdictions?* "Polish Yearbook of International Law" vol. 37 2017, p.141; Przemysław Tacik, *op. cit.*, p. 597.One could discuss whether this feature could not extend more generally also to other law-making treaties, see Jed Odermatt, *International Law…*, p. 68.
[705] Giuseppe Martinico, *op. cit.*, p. 401; See also Alec Stone Sweet, *op. cit.*, in particular pp. 65-72 and Appendix I.

rather than *revolutionizing* the system of human rights protection in the EU. Particularly the anticipated abandoning of the *Bosphorus* doctrine, foreseeing deferential treatment of EU-Member States' actions implementing EU law by the ECtHR, played the first fiddle.[706] Consequently, it does not come off as a surprise that the ECtHR had been competent to conduct *indirect* control of EU law through reviewing Member States' actions aimed at the implementation of EU law for many years. In any case, the ECtHR examined the implementation of EU law by the Member States on many occasions.[707] Additionally, it has to be stressed that even if it became a mixed agreement, the Convention would still enjoy a rank in the hierarchy of legal norms below the primary law, including the Charter.[708] This most likely would not elevate the Convention's rank beyond the special status as a source of principles of EU law already enjoyed on the basis of Article 6.3 TFEU.[709] On the other hand, the EU's accession could open new fields for the ECtHR's control, with limited access of individuals to invalidity actions taking an honourable place.[710] Even taking this into account, as already signalized, the main problem would concern ousting the CJEU from its position of ultimate arbiter rather than anything else.

This seems to be confirmed by Article 6.3 TFEU being by no means a dead letter. After a rather dormant initial period,[711] the CJEU started to invoke the Convention extensively to reconstruct

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[706] Daniel Halberstam, *op. cit.*, pp. 31 ff.; Robert Uerpmann-Wittzak, *op. cit.*, p. 181; Przemysław Tacik, *op. cit.*, pp. 593 f. For more on the *Bosphorus* presumption see section 9.4.3. – 9.4.4. below

[707] For a detailed analysis of ECtHR case law related to the enforcement of EU law see Daniel Engel, *Der Beitritt der Europäischen Union zur EMRK,* Mohr Siebeck Tübingen 2015, pp. 42-67; see also section 9.4.2. *infra*.

[708] See e.g. Louise H. Storgaard, *op. cit.*, p. 507.

[709] Kowalik-Bańczyk Krystyna, *Stosowanie Europejskiej Konwencji Praw Człowieka jako umowy UE*, „Europejski Przegląd Sądowy" 1/2014, p. 44; Tobias Lock, *The future of the European Union's accession to the European Convention on Human Rights…*, p. 257; Tacik, Przemysław, *op. cit.*, pp, 425, 526. This is, however not entirely clear. E.g. Rosas speaks of the ECHR as an agreement *that should be observed* as opposed to an agreement binding the EU, eventually, however conflating their legal effects, see Allan Rosas, *The Status in EU Law of International Agreements…*, pp. 1335 ff. see also Tacik, *op cit.* p. 604. But see also the CJEU president's, Koen Lenaerts' 2018 solemn hearing before the ECtHR judges where despite underlining *very special significance* of ECHR for the EU legal order, as well as acknowledging that the Convention provides *precious insights and guidance* to CJEU, the CJEU president carefully avoided any language even slightly suggesting binding effect of the ECHR for the CJEU, see Koen Lenaerts for the opening of ECHR judicial year 2018 *The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection*, Solemn hearing for the opening of the Judicial Year 26 January 2018 https://www.echr.coe.int/Documents/Speech_20180126_Lenaerts_JY_ENG.pdf, accessed on 22 August 2022, p. 4, see also Heiko Sauer, *Grundrechtskollisionen für das europäische Mehrebenensystem. Konkurrenzbestimmung – Kollisionsvermeidung – Kohärenzsicherung*, in: Nele Matz-Lück, Mathias Hong (eds.), *Grundrechte und Grundfreiheiten im Mehrebenensystem – Konkurrenzen und Interferenzen*, Springer Heidelberg 2012, pp. 47-49.

[710] See Sec 13.5 below on Aarhus Convention Compliance Committee finding Article 263.4 TFEU as interpreted by the CJEU non-compliant with the Convention. See also more specific considerations at Przemysław Tacik in *id., op. cit.*, pp. 585 ff.

[711] One had to wait nearly 20 years between the CJEU's first indirect reference to *international treaties for the protection of human rights* as a source of inspiration to fundamental principles of EU law CJEU judgment of 14 May 1974, *Nold*, case C-4/73, ECLI:EU:C:1974:51, para 13, see also CJEU judgment of 13 December 1979, *Hauer*, case 44/79, ECLI:EU:C:1979:290 and the first express reference to the ECtHR jurisprudence CJEU

the EU law standard of fundamental rights.[712] Somewhat dubiously, at least from the purely dogmatical point of view,[713] the CJEU at times even went so far as to invoke ECHR provisions as interpreted by the ECtHR, without providing the legal ground for their relevance in the EU legal order.[714] In fact, some authors, despite praising the CJEU, question the methodological correctness of treating Article 6 TEU as the portal allowing for the implementation of ECHR fundamental rights in the EU legal order.[715] Of course, there were also judgments where the CJEU went "by the book", correctly deriving the necessity of taking into account the ECtHR's jurisprudence from Article 52.3 CFR[716] or just referred to the necessity of interpreting CFR in concordance with ECHR.[717] In any case, on its part, the CJEU was seemingly respecting the borders between two systems by separating the Convention conformity from the issues of EU law conformity.[718] Thus, despite the seeming depletion in the references to the ECHR after adopting the Charter, one may still say that the ECHR, along with the ECtHR's jurisprudence, remains an important source of the EU fundamental rights.[719]

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judgment of 30 April 1996, *P.*, case C-13/94, ECLI:EU:C:1996:170; see also Laurent Scheeck, *op. cit.*, p. 173; see also Lize R. Glas, Jasper Krommendijk, *op. cit.*, pp. 568-570.

[712] In this regard see f.e. CJEU judgment of 14 October 2004, *Omega Spielhallen*, case C-36/02, ECLI:EU:C:2004:614, para 33, where the jurisprudence of ECtHR is invoked in order to reconstruct general principles of EU law, in effect justifying a derogation from the application of market freedoms or CJEU judgment of 26 February 2013, *Melloni*, case C-399/11, ECLI:EU:C:2013:107, where, while interpreting Article 47 of CFR, the CJEU reminded on the binding character of Article 6.1 TEU, ordering the CJEU to take into account ECHR jurisprudence (para 47), only to confirm that its understanding of Article 47 CFR is in concordance with the ECtHR's jurisprudence related to Article 6.1 ECHR concerning the due process (para 50).

[713] Władysław Jóźwicki, *Ochrona wyższego niż unijny konstytucyjnego standardu prawa jednostki i tożsamości konstytucyjnej RP. Trybunał Konstytucyjny a Trybunał Sprawiedliwości Unii Europejskiej: ku sekwencji a nie hierarchii orzekania*, UAM University Press Poznań 2019, p. 156.

[714] CJEU judgment of 5 June 2012 in case C-489/10 *Bonda*, ECLI:EU:C:2012:319, where the CJEU initially invokes the ECHR as a part of legal context (para 3), only to move to the analysis of "relevant" ECtHR case law in paras 36-37.

[715] Giacomo Di Federico, *op. cit.*, pp. 28-29.

[716] Charter of Fundamental Rights of the European Union, OJ EU C 326, 26.10.2012, p. 391–407, see CJEU judgment of 5 October 2010, *J. McB.*, case C-400/10 PPU, ECLI:EU:C:2010:582, paras 53-54, 56; repeated e.g. in CJEU judgment of 15 November 2011, *Murat Dereci*, case C-256/11, ECLI:EU:C:2011:734, para 70.

[717] CJEU judgment of 22 December 2010, *Sayn-Wittgenstein*, case C-208/09, ECLI:EU:C:2010:806, para 52; CJEU judgment of 5 April 2016 *Aranyosi and Căldăraru*, case C-404/15, ECLI:EU:C:2016:198, paras 86 ff., where, arguably, it was exactly the ECtHR case law that mandated the interpretation of CFR in a way undermining the strict character of mutual trust requirement.

[718] CJEU judgment of 26 February 2013, *Åkerberg Fransson*, case C-617/10, ECLI:EU:C:2013:105, paras 44, 49.

[719] See also President Lenaert's declarations on the CJEU's ongoing openness to ECtHR's jurisprudence Koen Lenaerts for the opening of ECHR judicial year 2018 *The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection*, Solemn hearing for the opening of the Judicial Year 26 January 2018 https://www.echr.coe.int/Documents/Speech_20180126_Lenaerts_JY_ENG.pdf, accessed on 22 August 2022, p. 9; see also Agnieszka Grzelak, Mirosław Wróblewski, *Ochrona praw podstawowych w ramach przestrzeni wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej*, in: Jan Barcz (ed.) *Współpraca sądowa w sprawach cywilnych, karnych i współpraca policyjna*. *System Prawa Unii Europejskiej*, T. 8, CH Beck Warszawa 2021, § 28 paras 46 ff.

Thus, it seems that the real changes brought about by the EU's accession would concern the establishment of the ECHR's jurisdiction. After all, this indirect way of invoking the ECHR provisions, particularly through the medium of the general principles, allowed to transform what could be a conflict between two different regimes into an act of intra-systemic balancing between different values.[720] Provided that, by definition, the ECtHR's assessment of fundamental rights could have differed from the assessment of the CJEU (and, in fact, occasionally did),[721] acknowledging its jurisdiction could adversely affect the unity and effectiveness of EU law. Consequently, as in the case of WTO or UNCLOS, this "unionization" of balancing exercise through the CJEU's exclusive jurisdiction allowed to protect the autonomy of EU law by limiting the scope and effects of international law in the EU legal order. Thus, this would seemingly validate the CJEU's assessment, according to which it was precisely the EU being bound by the Convention that caused the problem. As the analysis of the ECHR's judgments will show, however, the case is more complicated.

9.4.2. The ECtHR as the reviewer of EU law

In any event, it has to be stressed that the ECtHR had to review actions pertaining to EU law from early on. At this place, I shall only briefly sketch the relevant jurisprudence and concentrate on the cases defining the relationship between EU law and the Convention.[722] As early as in the 1970s, the European Commission of Human Rights decided on the inadmissibility of claims against the acts of the EU institutions due to the EU not being a party to the Convention.[723] However, it later precised that this does not imply that the Member States may escape their responsibilities under the Convention.[724] As was later explained by the ECtHR in more detail, the analysis should concentrate on whether the parts of the acts adopted by the Member States were fully regulated by EU law or whether the Member States retained a certain degree of discretion. Thus, e.g. in the *Cantoni* case, the ECtHR found itself competent to review national legislation implementing EU directives nearly word for word (it found no violation).[725] In later *Matthews* case, the Strasbourg Court made it clear that this exclusion of EU acts cannot

[720] Jan Klabbers, *Treaty Conflict…*, p. 165 f.
[721] Matthew Parish, *op. cit.*, p. 151. Even in the absence of the accession, it is clear that already now the supreme position in the field of human rights is necessarily shared between the CJEU, Member States' supreme (constitutional) courts and the ECtHR, Przemysław Tacik, *op. cit.*, pp. 602, 606.
[722] For a detailed analysis of ECtHR case law related to the enforcement of EU law see Daniel Engel, *op. cit.*, pp. 42-67;, Przemysław Tacik, *op. cit.*, pp. 111-153.
[723] European Commission of Human Rights decision of 10 July 1978 in case 8030/77 *Confederation Francaise Democratique du Travail c. Communautes Europeennes*, paras 3-7.
[724] European Commission of Human Rights decision of 9 February 1990 in case 13258/87 *M. & Co. v. Germany*.
[725] ECtHR judgment of 11 November 1996 in case 17862/91 *Cantoni v. France*, para 30.

be construed too widely, and, in any case, it would have jurisdiction to review the compatibility with ECHR of international agreements adopted within the EU framework, even if pertaining to issues so sensible as elections to the European Parliament.[726] In general, this way of treating the EU law was qualified as treating the EU as a "regular" international organization",[727] which was also reflected by its attribution of responsibility to the Member States along the lines of control over organs rather than the intra-EU division of competences.

This, however, does not mean that the ECtHR found itself competent to interpret EU law as the substantive law. Quite the contrary, the ECtHR has consistently maintained its position on not being responsible for applying and interpreting other international treaties, including EU law.[728] Nonetheless, upon closer examination, the situation is more complicated, as the ECtHR interpreted EU law at least to assess whether remedies provided in EU law were made available for the parties. This pertains in particular to the asylum cases.[729] In particular, in the decision of 2021 in the case against Denmark, the ECtHR *de facto* referred to EU legislation and the CJEU's jurisprudence as the normative benchmark against which the actions of authorities should be measured.[730] Specifically, in the asylum cases the ECtHR did not hesitate to identify contested acts of the Member States as falling outside of the scope of EU law and thus underlying the full review of the ECtHR.[731] What may be even more problematic, the ECtHR has not shied away from assessing the conformity of the application of EU law by the Member States' courts also in matters so intimate as making preliminary references.[732] Actually, in a 2021 case the ECtHR found Romanian courts to have breached the Convention by failing to provide reasons for their refusal to make a preliminary reference.[733] What is even more problematic, depending on the contextof a particular case, the ECHR may equally demand making a preliminary reference to the Luxembourg Court or, contrarily, abstaining from doing

[726] ECtHR judgment of 18 February 1999, in case 24833/94 *Matthews v. UK*, para 33.
[727] Christina Binder, Jane A. Hofbauer, *op. cit.*, pp. 173, 178.
[728] See f.e. ECtHR judgment of 18 December 2018 in cases 76550/13 and 45938/14 *Saber et Boughassal c. Espagne*, para 32.
[729] See f.e. ECtHR judgment of 13 February 2020 in case 8675/15 and 8697/15 *N.D. and N.T. v. Spain*, para 237.
[730] ECtHR judgment of 9 July 2021 in case 6697/18 *M.A. v. Denmark*, paras 151-163.Theoretically, the Directive was examined solely as a proof for the existence of European consensus, as the Danemark was not bound by this piece of the EU legislation.
[731] ECtHR judgment of 21 November 2019 in case 47287/15 *Ilias and Ahmed v. Hungary*, para 97; ECtHR judgment of 23 July 2020 in cases 40503/17, 42902/17 and 43643/17 *M.K. and Others v. Poland*, paras 180-182.
[732] See e.g. ECtHR judgment of 24 April 2018 in case 55385/14 *Baydar v. the Netherlands,* where the ECtHR, relying on its earlier case law, after recalling, that the Convention does not guarantee the right to preliminary reference, nonetheless stressed that Article 6.1 ECHR requires from the national courts to give reasons for declining to make a preliminary reference for the CJEU, if duly requested by the applicant.
[733] ECtHR judgment of 13 July 2021 in case 43639/17 *Bio Farmland Betriebs S.R.L. v Romania*, paras 52-57.

so.[734] It is difficult not to see that this jurisprudence is an instance of interference with the EU principle of autonomy by the ECtHR, in particular given that as a matter of principle, it could influence the CJEU's interpretation of Article 47 CFR.[735] The fact that the ECtHR has consistently done its best to pay due attention to EU law as interpreted by the CJEU[736] does not alter this conclusion. The matter seems to be even more problematic, as the ECtHR appears to adopt a concept of preliminary reference radically different from the understanding of EU law, by CJEU, by tying the preliminary reference to the individual right to due process.[737] In any case, as made clear in Opinion 2/13, the mere fact that these interactions are motivated by the desire of expanding human rights protection, cannot alter the conclusion on their encroachment upon the autonomy principle. Consequently, while some authors are keen to speak of the ECtHR as the CJEU's helper in EU law enforcement,[738] one should instead consider the potential problems to EU law's autonomy stemming from these practices.

9.4.3. The presumption of equivalent protection: *Bosphorus* and beyond

The above conclusion does not change that the ECtHR, nonetheless, has consistently tried to maintain a dialogical stance vis-à-vis the CJEU. The *Bosphorus* judgment could be viewed as the zenith of this way of thinking. The case concerned the application of a Turkish company pertaining to the execution of UN sanctions, which were implemented in an EU regulation enforced by the Irish authorities. The applicant was a Turkish national who leased a plane from Yugoslavian Airlines. Eventually, the aircraft was seized by Irish authorities implementing the EU regulation. The case was subject to proceedings before the Irish courts, which ultimately made a preliminary reference to the CJEU, which, in turn, confirmed the conformity of seizure with EU law.[739] The Irish courts followed the CJEU's decision. Thus, the issue of EU Member States' responsibility under ECHR for implementing EU law became essential for the case. On the outset, the ECtHR, after analyzing EU regulations and the relevant CJEU judgment, stated

[734] ECtHR judgment of 14 January 2020 in case 10926/09 *Rinau v. Lithuania*, para 219. It has to be stressed, however, that the ECtHR concerned the condemned preliminary reference to the CJEU as only one of the factors amounting to *procedural vagaries* resulting from Lithuanian authorities' continuous resistance to recognizing the German court judgment. It seems that while coming to these conclusions, the ECtHR tried to support its position by referring to the CJEU judgment allegedly criticising the referring Lithuanian court for unnecessarily prolonging the proceedings.
[735] Clelia Lacchi, *Multilevel judicial protection in the EU and preliminary references*, "Common Market Law Review", vol. 53 3/2016, p. 701.
[736] Lize R. Glas, Jasper Krommendijk, *op. cit.*, p. 579.
[737] Paul Gragl, *An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of 'Bosphorus' and Reaction to 'Opinion 2/13' in the 'Avotiņš'* Case, "European Constitutional Law Review" vol. 13 2017, p. 562; Lize R. Glas, Jasper Krommendijk, *op. cit.*, p. 583.
[738] Laurent Scheeck, *op. cit.*, p. 170.
[739] CJEU judgment of 30 July 1996, *Bosphorus*, case C-84/95, ECLI:EU:C:1996:312.

that the seizure was indeed mandated by EU law so that the Irish authorities had no discretion concerning it.[740] Further, the ECtHR decided to check the proportionality of the seizure. At the outset of the test, the Strasbourg court recollected that not only is it allowed for the Convention parties to become members of *supranational* organizations such as the EU,[741] but the weight of this interest is such that it can justify limiting the application of the ECHR rights.[742] However, this was immediately followed by reminding that this transfer of competences may not free the ECHR parties from their human rights obligations.[743] Thus, the actions of Member States could escape the ECtHR's scrutiny only if the international organization provided an *equivalent* degree of human rights protection. The court précised that *"equivalent"* […] *means "comparable"; any requirement that the organization's protection be "identical" could run counter to the interest of international cooperation.*[744] For the avoidance of doubt, the court added that it retained the right to review the level of the protection of human rights provided by the organization.[745] Lastly, the ECtHR analyzed whether the EU's judicial system conformed to these requirements. Eventually, despite seeing certain limitations of the system of legal remedies provided by EU law, particularly the limited standing of individuals in the annulment actions, the ECtHR nonetheless declared them to conform with the ECHR.[746] Even more importantly, the Strasbourg court subsequently has consistently applied the principle, successfully avoiding possible conflicts with EU law on more than one occasion.[747]

In the later *Michaud* case, the CJEU fine-tuned the *Bosphorus* test by adding the requirement to check whether the EU machinery was deployed to its full potential (i.e. whether a national court made a preliminary reference) in the circumstances of a particular case.[748] It has to be stressed that in the *Michaud* case, due to the national court failing to make a preliminary reference, the ECtHR found the *Bosphorus* presumption rebutted and conducted fully-fledged analysis under Article 8 ECHR.[749]

These principles were restated in the ECtHR *Avotiņš* judgment. It was observed with great interest as the ECtHR's first pronouncement on the application of the *Bosphorus* principle in

[740] ECtHR judgment of 30 June 2005 in case 45036/98 *Bosphorus v. Ireland*.
[741] *Ibid.*, para 152.
[742] *Ibid*., para 150, the ECtHR strengthened its argumentation by referring also to Article 31.3.c. VCLT (principle of systemic integration).
[743] *Ibid*., para 154.
[744] *Ibid.*, para 155.
[745] *Ibid.*, para 155.
[746] *Ibid.*, paras 163, 165.
[747] See e.g. Agnieszka Frąckowiak-Adamska, *op. cit.*, pp. 37-38.
[748] ECtHR judgment of 6 December 2012 in case 12323/11 *Michaud v. France*, paras 114-115
[749] *Ibid.*, para 115 (in the end it found no violation).

the aftermath of the CJEU opinion 2/13.[750] Another reason for the cases' importance was that it was the first instance of the ECtHR controlling the recognition of foreign judgments, i.e. matters falling within the scope of application of the strictly understood principle of mutual trust, explicitly invoked in Opinion 2/13.[751] The case concerned an application of a Latvian citizen faced with enforcement of a payment order issued by a Cypriot court. Mr Avotiņš complained about not being adequately informed about the proceedings before the Cypriot courts so that he could not have exercised his right to defend himself. Nonetheless, the Latvian courts decided to enforce the payment order without making a preliminary reference. Thus, Mr Avotiņš's challenges remained unsuccessful.

The ECtHR again began its analysis by stressing that its jurisdiction in a judgment recognition case is limited to the decision of the court recognizing a foreign judgment. Thus, it could have examined solely the Latvian courts' decisions.[752] It went further to stress that even though the *general* protection offered by the EU law met the equivalence test,[753] it would still have to examine whether this general presumption would not be rebutted in this particular case.[754] Consequently, it focused on whether the EU law system of legal remedies was indeed deployed to its full potential.[755] Despite the Latvian court not having made a preliminary reference, the ECtHR stated that this decision did not negatively affect the applicant's rights since he had not requested the reference.[756] As a result, the ECtHR found that Latvian authorities were bound by EU law and had no margin of discretion.[757] Despite the test having been satisfied, the ECtHR decided to go further and analyze the conformity of the mechanism of mutual recognition (and its application in the present case) with the Convention.[758] While deciding on the conformity with the Convention of the Brussels Regulation mechanism as such, the ECtHR emphasized that it may lead to ECHR violations in individual cases.[759] Nonetheless, despite finding the attitude of Latvian courts to be *regrettable*, the ECtHR concluded that it did not amount to an ECHR violation.

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[750] Paul Gragl, *op. cit.*, p. 561.
[751] ECtHR judgment of 23 May 2016 in case 17502/07 *Avotiņš v. Latvia*, para 99, see also Paul Gragl, *op. cit.*, pp. 556, 564.
[752] *Ibid.*, paras 97-100.
[753] *Ibid.*, para 102. This conclusion was strengthened by invoking the Charter of Fundamental Rights.
[754] *Ibid.*, para 104.
[755] *Ibid.*, paras 110-111.
[756] *Ibid.*, para 111.
[757] *Ibid.*, para 112. It has to be stressed that in doing so, the ECtHR relied on its in-depth analysis of EU law and CJEU's jurisprudence, see paras 57 ff., Arguably, this differentiated this case from the earlier MSS judgment, Paul Gragl, *op. cit*., p. 563.
[758] ECtHR judgment of 23 May 2016 in case 17502/07 *Avotiņš v. Latvia*, para 116.
[759] *Ibid.*, para 121.

Arguably, the *Avotiņš* judgment became an instant classic, often referred to in the ECtHR's jurisprudence in the context of automatic recognition. In most cases, this reference served to affirm the correctness of the national courts' decisions declining the automatic enforcement of judgments in family matters mandated by EU regulations.[760] On the other hand, there were also instances where the non-recognition of foreign judgment concerning parental custody and subsequent prolongation of the proceedings resulted in a Convention breach.[761] Arguably, however, the ECtHR drew the ultimate consequences from the *Avotiņš* judgment in the *Bivolaru* case concerning the execution of an European arrest warrant.[762] In this case, the CJEU stated that, granted the conditions in the Romanian prisons, surrendering one of the applicants to Romanian prisons, even though mandated by EU law as interpreted by the CJEU constituted a Convention breach. Interestingly, in doing so, the ECtHR did find the principle of equivalent protection applicable (national authorities did not fail to utilise the full potential of the EU fundamental rights protection system);[763] it was the outcome that led manifestly deficient protection of his fundamental rights, which resulted in the presumption of equivalent protection being rebutted in this particular case.[764] Thus, the disruptive potential of the *Avotiņš* principles lies at hand.

At this place, one may only add that the concept of the *constitutional instrument of European public order* played a particularly prominent role in the ECtHR's EU-related jurisprudence by setting the limits for openness to EU law.[765] Nonetheless, the stance taken by the ECtHR was relatively open, as evidenced by the critique that it supposedly resulted in an apparent de-absolutization of human rights due to allowing to weigh them against the interest in regional integration.[766] Arguably, many ECtHR judges voiced the same concerns in their separate opinions to the judgments described above.[767] Be as it may, this generosity did not influence

[760]ECtHR judgment of 6 March 2018 in case 9114/16 *Royer v. Hungary*, para 50; see also ECtHR judgment of 9 July 2019 in case 8351/17 *Romeo Castaño v. Belgium* , para 84, where the CJEU despite finding a violation, praised the Belgian court for not applying blindly the principle of mutual trust in the context of European Arrest Warrant.
[761] ECtHR judgment of 14 January 2020 in case 10926/09 *Rinau v. Lithuania*.
[762] ECtHR judgment of 21 March 2021 in cases 40324/16 and 12623/17 *Bivolaru and Moldovan v. France*.
[763] *Ibid.*, para 116.
[764] *Ibid.*, para 126.
[765] ECtHR judgment of 23 May 2016 in case 17502/07 *Avotiņš v. Latvia*, para 112; ECtHR judgment of 6 December 2012 in case 12323/11 *Michaud v. France*, para 103; ECtHR judgment of 30 June 2005 in case 45036/98 *Bosphorus v. Ireland*, para 156.
[766] Jan Klabbers, *Treaty Conflict…*, p. 172.
[767] See concurring opinion Mr Rozakis, Mrs Tulkens, Mr Traja, Mrs Botoucharova, Mr Zagrebelsky and Mr Garlicki; and concurring opinion of Mr Ress to the ECtHR judgment of 30 June 2005 in case 45036/98 *Bosphorus v. Ireland*, see also Dissenting opinion of judge Sajó to the ECtHR judgment of 23 May 2016 in case 17502/07 *Avotiņš v. Latvia*.

the CJEU's ultimate assessment. And, as shall be explained in more detail below, there were reasonable grounds for adopting such an attitude.

9.4.4. *Bosphorus* – a safeguard that failed?

Upon closer scrutiny, it becomes evident that despite this apparent openness, the ECtHR's jurisprudence has not only diverged from the CJEU's on many occasions but even, at times, contradicted it. In fact, in some instances, the ECtHR judgments eventually prompted the CJEU to abandon its earlier jurisprudence. To give the most prominent examples, it was precisely due to the influence of the ECtHR that the CJEU changed its jurisprudence regarding issues such as the defendant's right to abstain from submitting self-incriminating materials in cartel proceedings.[768] More importantly, even without the EU being a party to the Convention, the ECtHR's jurisprudence arguably led to a far-reaching transformation of the principle of mutual trust, so direly defended by the CJEU, which found its expression among others in resignation from the automatic application of mutual trust within the field of asylum-seeking[769] or European Arrest Warrant.[770] Even if certain limits were set to this transformative effect,[771] it cannot be denied that the ECtHR had a great deal of impact on the EU legal system, the scope of the principle of mutual trust in particular.

The ECtHR's jurisprudence regarding the principle of mutual trust provides the best example for the limits of the benevolent effects of the *Bosphorus* doctrine for the EU law. In fact, the ECtHR judgment that, arguably, had the most profound impact on the EU legal system by undermining the automaticity of the EU asylum regime and, more broadly, the scope and content the principle of mutual trust, seemingly did not detract from the *Bosphorus* standard. In its *M.S.S.* judgment, the ECtHR simply stated that the *Bosphorus* standard did not apply to the case at hand because Belgium, while sending the applicant to Greece, acted outside of the scope

[768] CJEU judgment of 22 October 2002 *Roquette Frères SA,* case 94/02, ECLI:EU:C:2002:603 adopting the ECtHR's viewpoint on the issue; see also Nina Półtorak, *op. cit.*, pp. 4, 7.
[769] CJEU judgment of 21 December 2011, *N.S.*, case C-411/10, ECLI:EU:C:2011:865, see also Koen Lenaerts, *La vie après l'avis: Exploring the principle of mutual (yet not blind) trust*, "Common Market Law Review", vol 54 3/2017, p. 834.
[770] CJEU judgment of 5 April 2016 *Aranyosi and Căldăraru,* case C-404/15, ECLI:EU:C:2016:198, which starkly contrasts with AG Bot's opinion, recommending upholding earlier jurisprudence, AG Bot Opinion of 3 March 2016 *Aranyosi and Căldăraru,* case C-404/15, ECLI:EU:C:2016:140 see also Tomasz Ostropolski, *Naruszenie praw podstawowych jako przesłanka odmowy wykonania ENA – uwagi do wyroku Trybunału Sprawiedliwości z 5.04.2016 r. w sprawach połączonych C-404/15 Aranyosi i C-659/15 PPU Căldăraru*, „Europejski Przegląd Sądowy" 11/2016, p. 20. Whereby it could be argued that this judgment addressed mainly concerns voiced by the German Federal Constitutional Court, the CJEU supported its reasoning leading to transforming its earlier jurisprudence by numerous references to the case law of ECtHR rather than the German Court, see also . Koen Lenaerts, *La vie après l'avis…*, p 828.
[771] See f.e. CJEU judgment of 20 April 1999, *Limburgse Vinyl,* case T-305/94, ECLI:EU:T:1999:80, para 420; Daniel Halberstam, *op. cit.*, p, 24 ff.

of its strict EU law obligations. Thus, the ECtHR based this conclusion on the Dublin regulation containing a norm allowing the Member States to accept asylum seekers' applications regardless of its other provisions.[772] By doing so, it avoided, among others, balancing the interest for effective international cooperation (encompassing the EU principle of mutual trust) with the Convention rights. Consequently, while seemingly referring to the relevant EU legislation and practice,[773] in reality, the Strasbourg Court undermined the effectiveness of the whole EU asylum system without even thematizing underlying issues.[774] Regardless of the above, it has to be stressed that the ECtHR did not undermine the *Bosphorus* presumption in the *M.S.S.* case, instead emphasizing alleged Belgium's manoeuvre space concerning the breaches committed.[775] The CJEU responded to this judgment with its *NS* decision, which should be viewed together with the *Aranyosi/Caldararu* as an affirmation and, later, expansion of this anti-automatic approach also to other branches of law being subject to mutual trust.[776]

Consequently, the ECtHR's jurisprudence has a tangible impact on the EU legal system, even in the absence of accession. The Convention is regularly applied to matters covered by EU law, and the ECtHR supervises the enforcement of EU law by the Member States' organs on a regular basis. This also pertains to matters belonging to the autonomy's core, such as the principle of mutual trust or the preliminary reference proceedings. Consequently, the fundamental problem concerning CJEU and ECtHR's coexistence relating to the risk of two independent courts producing different interpretations of similarly worded fundamental rights exists even without the EU's accession.[777] This may have serious consequences, in particular with regard to balancing different interests within both EU and ECHR regimes and, thus, setting the maximal and minimal standards of protection within each of them. It may very well happen that the minimal ECHR standard (*floor*) will be set higher than the EU maximal standard of protection (*ceiling*), set by other values essential for the functioning of the EU legal system, such as the

[772] ECtHR judgment of 21 January 2011 in case 30696/09 *M.S.S. v. Belgium and Greece*, paras 338-340.
[773] *Ibid.*, paras 56-87, 250 et al.
[774] *Ibid.*, para 359 *[...] it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice.* This jurisprudence was further developed and expanded so as to cover also situations of also individual and not only systemic threat to rights of individual asylum seekers, most notably in the ECtHR judgment of 10 September 2014 in case 29217/12 *Tarakhel v. Switzerland*, paras 116 ff.
[775] Władysław Jóźwicki, *op. cit*, p. 425.
[776] Władysław Jóźwicki, *op. cit.*, p. 426, 434., see also Lize R. Glas, Jasper Krommendijk, *op. cit.*, pp. 575-576.
[777] Anna Wyrozumska, *Ochrona praw podstawowych w Unii Europejskiej – problemy pluralizmu porządków prawnych* Jerzy Kranz (ed.), *Suwerenność i ponadnarodowość a integracja europejska*, Wyd. Prawo i Praktyka Gospodarcza Warszawa 2006, pp. 171-172, Rudolf Ostrihansky, *op. cit.*, p. 530.

principle of mutual trust or market freedoms.[778] All these are even more problematic, given the reliance of the EU on its Member States for the enforcement of EU law, *de facto* elevating national judges to the position of ultimate arbiters in deciding on the conflicts between Strasbourg and Luxembourg courts. Nonetheless, none of these has been thematized by the CJEU. Quite the contrary: As evidenced by the Luxembourg Court's judgment in the *NS* case, it was ready to abandon its entrenched interpretation in favour of the Strasbourg jurisprudence in matters as sensitive as the principle of mutual trust. Paradoxically, this case could be the best illustration of the stakes at play: Even if bending to the Strasbourg court, the CJEU still retained the ultimate control over balancing different rights and principles, so embracing ECtHR's reasoning could be viewed as an act of self-openness. This position would be perfectly reasonable in the light of Opinion 2/13, underscoring the importance of EU's accession and resulting in ECtHR judgments becoming binding for the EU. According to this logic, the ECtHR's jurisprudence, regardless of how annoying, would not threaten the autonomy of EU law due to the lack of a binding force vis-à-vis the EU. However, there is one problem: As shall be explained in more detail in the following chapter (section 10.3.2.), in its *Achmea* judgment, the CJEU took the opposing position by declaring the ISDS mechanism contained in a Member States only agreement violating the principle of autonomy of EU law.

9.5. Preliminary conclusions

As demonstrated above, the relationship between the autonomy principle and the ECHR is extremely complex. On the one hand, we have Opinion 2/13, *de facto* forbidding the EU's accession precisely due to autonomy-related concerns. While doubts related to the prior involvement or co-respondent mechanism could be viewed as technicalities somewhat based on the CJEU's jurisprudence, upon closer scrutiny, the CJEU's reasoning reveals a more general idiosyncratic attitude. In fact, the CJEU goes so far as to deny the conformity with EU law to any mechanism allowing for even accidental application or interpretation of EU law, be it only as a background issue. On the other hand, however, these strict requirements seem to relate solely to the EU's participation in the Convention. After all, the challenges to the autonomy of EU law observed by the CJEU in its 2/13 Opinion are largely present even in the absence of the EU's accession, particularly due to all the EU Member States being simultaneously parties to the ECHR. In particular, the ECtHR has repeatedly assessed the

[778] Anna Wyrozumska, *Ochrona praw podstawowych…*, pp. 171-172; Federico Fabbrini, *Fundamental Rights in Europe. Challenges and Transformations in Comparative Perspective*, OUP Oxford, 2014, elaborating on the analogy between *floors* and *ceilings* in human rights protection in pluralistic legal order.

conformity of the Member States' enforcement of EU law with the Convention, arguably, at least on several occasions, effectively altering the CJEU's jurisprudence. And in fact, Articles 6.3 TFEU and 53 CFR do provide a normative basis for such operations. Despite this, throughout over 60 years of the EU's and ECHR's coexistence, the CJEU has not even suggested that the Convention could pose any threat to the principle of autonomy of EU law unless acceded to by the EU. This, in turn, would suggest that by their very nature only the agreements to which the EU is a party may threaten the autonomy of EU law. As we shall see in the following chapter, however, in light of the ISDS-related jurisprudence, this conclusion is untenable.

Be that as it may, as for now, despite having derailed the EU's accession to the ECHR, the ECtHR has not questioned in any manner the Member States' participation in the Convention. Furthermore, it has to be stressed that even if delaying the issue of the EU's accession for over a decade and setting a very high threshold, Opinion 2/13 did not manage to kill the idea. In October 2019 the Commission filed a letter to CoE stating that the European Union was ready to resume the negotiations on its accession to the European Convention on Human Rights, and the negotiations were soon resumed within Steering Committee for Human Rights, with 14 negotiation meetings having taken place as of August 2022[779]. Thus, one may look forward to seeing new chapters of the saga being drafted be the Strasbourg and Luxembourg courts in the oncoming years.

[779] https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights, accessed on 22 August 2022.

Chapter 10: International investment law[780]

This chapter shall address the challenges posed to the principle of autonomy by the international investment law. The term „international investment law" ("**IIL**") shall refer to a decentralised subsystem of international law created by a network of over 2.800 international investment agreements ("**IIAs**"), encompassing both over 2.500 bilateral investment agreements ("**BITs**") and free trade agreements ("**FTAs**"), not rarely multilateral[781], accompanied by multilateral instruments, namely Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID**")[782] and Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New Your Convention, "**NYC**").[783]

Of course, only some of them will be relevant from the point of view of the autonomy principle. Consequently, from the angle of the research goals of this dissertation, investment agreements would be divided between the following categories. Firstly, there are BIT-s concluded between the EU Member States ("**intra-EU BITs**") that gave rise to the CJEU *Achmea* judgment. Despite the vast majority of them having been terminated either on a bilateral basis or by the multilateral termination agreement acceded to by most of the EU Member States,[784] this category still merits our attention as this termination was an immediate result of the CJEU *Achmea* judgment, and there are still certain pending cases initiated on the basis of such BITs. Thirdly, there is the issue of the investor-state dispute settlement ("**ISDS")** clause contained in the ECT[785], addressed in the CJEU *Komstroy* judgment. Further, there is the category of the EU's own FTAs, analysed by the CJEU in its *CETA* opinion. Lastly, I shall shortly thematise mechanisms where the CJEU has not taken a definite position, i.e. BITs concluded between the Member States and the third states (**"extra-EU BITs**"), as well as the extra-EU application of the ECT.

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[780] This chapter integrates my earlier research dedicated to this topic, see in particular Bartosz Soloch, Makane Moïse Mbengue, *Conformity of International Dispute Settlement Mechanisms…*, pp. 150-170; Bartosz Soloch, *International Investment Law: A Self-Proclaimed Ally…*; Id., *CJEU Judgment in Case C-284/16 Achmea: Single Decision…,* pp. 1-31.

[781] Andrew Newcombe, Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment,* Kluwer Aalphen an Rhijn 2009, pp. 57-58; Josefa Sicard-Mirabal, Yves Derains, *Introduction to Investor-State Arbitration*, KluwerAalphen an Rhijn 2018, p.1 ff.

[782] Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965, UNTS vol. 575, p. 159.

[783] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, UNTS vol. 330, p. 38

[784] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union signed at 5 May 2020 in Brussel, OJ EU L 169, 29.5.2020, data as to the implementation process available at: https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en , accessed on 22 August 2022.

[785] Energy Charter Treaty of 17 December 1994, UNTS vol. 2080, p. 95.

Granted that the ISDS mechanism in instruments belonging to all the above categories shows far-reaching similarities, I shall commence this chapter by outlining the essential features of the IIAs in general (10.1) and the treatment of the EU law by the investment tribunals (10.2). This section shall be followed by another dedicated to the intra-EU BITs and the CJEU *Achmea* judgment (10.3). Further, I shall analyse the CJEU's stance vis-à-vis the EU's FTAs, encapsulated in the *CETA* opinion (10.4), only move to the analysis of the ISDS clause contained in the ECT (10.5). Lastly, I shall analyse how the CJEU's jurisprudence in the above matters could be relevant to the extra-EU BITs (10.6). This chapter shall end with a set of preliminary conclusions (10.7).

10.1. Essential features of the international investment law

To begin with, one has to remember that in contrast to other dispute settlement mechanisms discussed in this dissertation, IIL does not provide for a standing court but instead relies on a network of *ad hoc* arbitral tribunals created for each individual dispute.[786] The jurisdiction of such tribunals rests on the consent of the parties to the arbitration. It is assumed that the ISDS clause in an IIA constitutes merely an offer to enter into an arbitration agreement.[787] The investor accepts this offer and, thus, concludes an arbitration agreement by initiating an investment dispute[788]. The resemblances to commercial arbitration are even more visible, granted that the procedure is usually governed by arbitral rules designed for commercial arbitration.[789] Additionally, many crucial aspects of the proceedings are subject to arrangement

[786] In fact substituting the network of arbitral tribunals with a single multilateral investment courts lies at the very heart of the ISDS-reform movement. For a recent commentary on the debate see Marc Bungenberg, August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court. Options Regarding the Institutionalization of Investor-State Dispute Settlement*, 2nd ed., Springer 2020.

[787] Decision on the Respondent's Jurisdictional Objections of 30 September 2020 in case *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (I)*, ICSID Case No. ARB/17/34, para. 149; Christoph Schreuer, *Consent to Arbitration*, in: Peter Muchlinski, Federico Ortino, Christoph Schreuer (eds.) *The Oxford Handbook of International Investment Law*, OUP Oxford 2008, p. 837. A more recent take on the subject, basing on "thicker" case law gives a better insight into the practical problems related to the application of the concept of consent to public-law relations, Horia Ciurtin, *Paradoxes of (Sovereign) Consent: On the Uses and Abuses of a Notion in International Investment Law*, in Jan Baltag (ed.) *ICSID Convention after 50 Years: Unsettled Issues*, Kluwer Aalpen an den Rijn 2016, pp. 25-73.

[788] Final Award of 26 March 2008 in case *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, para. 45-46; Decision on Jurisdiction (Churchill Mining Plc) of 24 February 2014 in case *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, para. 231; But this offer/acceptance paradigm is not entirely unproblematic, see Award of 8 March 2016 in case *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, para. 244.

[789] See e.g. Article 26.4.b.-c.ECT, indicating that the disputes, in addition to ICSID may be governed either by the United Nations Commission on International Trade Law UNCITRAL Arbitration Rules as revised in 2010, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf, accessed on 22 August 2022r, (**UNCITRAL 2010 Arbitration Rules**); or Stockholm Chamber of Commerce Arbitration Rules as revised in 2010, available at: http://www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf, accessed on 22 August 2022 (**SCC 2010 arbitration rules)**; see also Article 9.2 of the (terminated) Agreement between the Kingdom of

between the parties to a particular arbitration, which brings some scholars even to question the division between commercial and investment arbitration.[790]

Despite the decentralised structure, IIL shows a sufficient level of coherence to be regarded as a kind of distinct subsystem of international law.[791] These unifying tendencies are illustrated in particular by the patterns of legal interpretation, with cross-references to the jurisprudence of different tribunals, not rarely adjudicating based on the unrelated IIAs.[792] This distinct character of the investment law is also visible in the arbitrator selection patterns, showing a strong preference for individuals having rather a private than public law background, usually with a vast experience in investment arbitration.[793] This conclusion is not changed by the loose structure of the tribunals and open-ended standards not allowing the IIL to attain a satisfactory level ofcoherence and regulatory density.[794]

Before commencing the analysis of the scope of competence of the investment tribunals, one should stress the IIL's departure from the principle of subsidiarity. Unlike many other international law mechanisms, the "great promise" of ISDS is not to monitor and assess the functioning of the domestic legal framework but rather to create a "neutral forum"[795] devoid of any substantive link to the legal system of the state parties.[796] Consequently, these general considerations result in a predominant practice of rejecting the exhaustion of local remedies

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Belgium and the Grand Duchy of Luxembourg and the Republic of Poland on encouragement and reciprocal protection of investments signed on 19 May 1987 **("Poland-BLEU BIT")**.

[790] See f. e. Stephan Wilske, Martin Raible, Lars Markert, *International Investment Treaty Arbitration and International Commercial Arbitration - Conceptual Difference or Only a Status Thing*, "Contemporary Asia Arbitration Journal" vol 1 2/2008, pp. 213 ff.; Jose Alvarez, *Is Investor-State Arbitration 'Public'?*, "Journal of International Dispute Settlement" vol 7 3/2016, pp. 534-576. See also Robert Dolzer, Christoph Schreuer. *Principles of International Investment Law,* OUP Oxford et al. 2012, p. 254 stating expressly that the participation in investment treaties as such cannot establish the tribunals' jurisdiction and its real bases is the *consent* of the parties.

[791] Benedict Kingsbury, Stephan W. Schill, *Investor State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in: Jan van den Berg (ed.) *50 years of of the New York Convention: ICCA International Arbitration Conference*, Kluwer Aalphen an den Rijn 2009, p. 5 ff.; see also Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, "Harvard International Law Journal", vol. 51 2/ 2010, pp. 427-474 and Marcin Menkes, *Governance gospodarczy – stadium prawnomiędzynarodowe*, CH Beck Warszawa 2016, pp 197 ff.

[792] See f.e. Romesh J. Weeramantry, *Treaty Interpretation in Investment Arbitration,* OUP Oxford et al. 2012, esp. paras 5.30-5.31; Tarcisco Gazzini, *Interpretation of International Investment Treaties,* Hart Oxford, Portland 2016, pp. 291 ff.

[793] I have already discussed this issue in more detail in: Bartosz Soloch, *International Investment Law: A Self-Proclaimed Ally in Commission's Rule of Law Endeavors* in: Julien Chaisse, Leïla Choukroune, Sufian Jusoh (eds), *Handbook of International Investment Law and Policy*, Springer, Singapore 2020, pp. 27 ff.

[794] Marcin Menkes, *op. cit.*, p. 276; see also Giuseppe Bellantuono, *The misguided quest for regulatory stability in the renewable energy sector*, "Journal of World Energy Law and Business" vol. 10 4/2017, p. 284 ff.

[795] See award of 9 January 2003 in case *ADF Group Inc. v. United States of America,* ICSID Case No. ARB (AF)/00/1, para 25.

[796] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, Michael Waibel, *The Political Economy of the Investment Treaty Regime*, Oxfor University Press, Oxford et al. 2017, p. 86.

requirement in most IIAs.[797] Hence, as shall be explored in more detail below, IIAs at least potentially carve out a substantive part of disputes from the jurisdiction of national courts.

And the range of the disputes to be removed from the scope of jurisdiction of national courts is wide. Bearing in mind the differences between different IIAs, one may assume that, generally, they allow for initiating claims by *investors*, i.e. physical or legal persons that made an *investment* within the understanding of a given treaty.[798] It should be stressed that in practice, the circle of the actions and entities eligible for investment protection is relatively wide, granted that the investment tribunals bestowed the status of investors also on the entities that made only indirect investments (i.e. made them by means of other companies in the corporate chain).[799]

Another peculiarity of the IIL amplifies this difference: Contrary to most of the dispute settlement mechanisms discussed in this chapter, investment proceedings are definitely fact intense, as the tribunals conduct fully-fledged adversarial evidence gathering proceedings

[797] see Robert Dolzer, Christoph Schreuer. *op.cit*., pp. 264-267; Ursula Kriebaum, *Local Remedies and the Standards for the Protection of Foreign Investment,* in: Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer,* OUP Oxford 2009, p. 426, whereby it is worth noticing that while invoking the reasons for the existence of local remedies principle (p. 421) the authors do not thematize the justifications for the subsidiarity principle related to the possibility of dialogue between the domestic institutions and international courts. For the arguments for desirability of reintroduction of the exhaustion of local remedies requirement see Matthew C. Portfield, *Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?,* "The Yale Journal of International Law" vol 41 2015, pp. 1-12.

[798] Marek Jeżewski, *Międzynarodowe prawo inwestycyjne,* 2nd ed., CH Beck Warsaw 2019, p. 86 ff.; Jeswald W. Salacuse, *The Law of Investment Treaties,* 2nd ed., OUP Oxford et al. 2015, pp. 174-213. To give a few examples see Article 25.1 ICSID which foresees Center's jurisdiction in relation to *any legal dispute arising directly out of an investment, between a Contracting State (...) and a national of another Contracting State,* with the latter being defined as any *natural* or *juridicial* person (Article 25.2 ICSID). Similarly, Article 26.2 of the ECT foresees access to dispute settlement mechanisms for *investors* encompassing both natural and legal persons (Article 1.7 ECT). It may be said that the definitions in the BITs concluded by the Member States granting access to dispute-settlement mechanisms concluded by the Member States follow this pattern, see f.e. Article 1.b of the (terminated) Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments signed on 7 September 1992 ("**Poland-Netherlands BIT**"), that may be viewed as somewhat emblematic for intra-EU BITs. For wide understanding of the concept of *investment* see for example Jeswald W. Salacuse, *The Law of Investment Treaties,* 2nd ed. OUP Oxford 2015, p. 177 ff; see also Article 1.a of the Poland-Netherlands BIT, containing an open ended catalogue of property, encompassing i.a. (i) movable and immovable property; (ii) shares, bonds and other corporate rights; (iii) IP rights, goodwill etc.; (iv) money and other assets; (v) concessions and other rights etc. Look also at a similar provisions of Article 1.1 Poland-BLEU BIT.

[799] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment,* 2nd ed., CUP Cambridge et al. 2012, p. 326; see also Award, of 12 August 2016 in case *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, PCA Case No. 2014-11, paras. 305-306. See also examples of local investors suing their countries grace to changing their nationality (*Micula* case, where the claimants being originally Romanian nationals obtained Swedish nationality in the course of conducting their business activities in Romania) or using corporate vehicles registered in third states (see f.e. Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility of 8 April 2008 in case *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, paras 50-115, where Romania was sued by a Cypriot corporate vehicle owned by Romanian nationals).

involving extensive document production.[800] Thus, not rarely may the investment cases be described as essentially decided on facts.[801] Consequently, in conducting proceedings, the investment tribunals, unlike the CJEU or the ECtHR, are not dependent in any way whatsoever on the national courts.

In a similar vein, the enforcement of arbitral awards closely resembles the enforcement of commercial awards. Although theoretically, an arbitral tribunal may award both pecuniary and non-pecuniary remedies, in practice, the arbitral tribunals predominantly award the successful claimants with monetary compensation.[802] To be more precise, the arbitral awards constitute enforcement titles similar to payment orders issued in commercial arbitration, enforceable within one of the two regulatory frameworks, namely ICSID and the NYC regimes.

ICSID creates a "self-contained" regime for recognition and enforcement of arbitral awards,[803] which means that the awards are immediately enforceable and may not be challenged outside of the international ICSID framework (i.e. before the national courts). Within the ICSID regime, national courts should play the function of mere enforcers rather than reviewers of the award,[804] even if these restrictions on the judicial review may turn out somewhat less strict in practice. On the other hand, non-ICSID awards are enforced in the same manner as those rendered in commercial arbitration.[805] It follows that they may be subject to a limited review conducted by national courts in the places of arbitration and enforcement. This review is conducted by the national courts applying their national arbitration laws, commonly modelled on the NYC and UNCITRAL model law.[806] Thus, the limited grounds for the annulment of arbitral awards,

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[800] Mark W. Friedman, Guilherme Recena Costa, *Evidence in International Investment Arbitration*, in: Julien Chaisse, Leïla Choukroune, Sufian Jusoh (eds), *Handbook of International Investment Law and Policy*, Springer Singapore 2020.

[801] Award of 26 July 2007 in case *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, para. 31

[802] Berk Demirkol, *Remedies in Investment Treaty Arbitration*, "Journal of International Dispute Settlement" vol 6 2015, pp. 410-411; Eric de Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications*, CUP Cambridge et al. 2014, pp. 183-190.

[803] See Articles 53-54 ICSID. See in particular Article 53.1 *The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention* and Article 54.3: *Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.*

[804] Christoph H. Schreuer, *The ICSID Convention. A Commentary*, CUP Cambridge 2009, Article 54 Para 81 ff.

[805] For the topic of the applicability of the NYC to investment awards see Aliz Káposznyák, *The Expanding Role of the New York Convention in Enforcement of International Investment Arbitral Awards* in: Katia Fach Gomez Ana M. Lopez-Rodriguez (eds.), *60 Years of the New York Convention: Key Issues and Future Challenges*, Kluwer Aalphen an Rhijn 2019, pp. 425-440.

[806] United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf, accessed

encompassing lack of valid arbitration agreement, breach of public policy etc., closely resemble the provisions of the NYC and the UNCITRAL model law.[807] Furthermore, what both NYC[808] and ICSID[809] enforcement regimes have in common is a truly global reach. This leads some authors even to suggest that investment arbitration mechanisms offer the investors a tool far more effective than more "traditional" international dispute settlement mechanisms.[810]

The issue of the law to be applied by the tribunals is even more complicated. To begin with, IIAs offer to the entities eligible for investment protection a wide range of open-textured substantive guarantees. Despite being contained in a plethora of IIAs, these substantive standards show a considerable degree of uniformity. This allows speaking in a general manner about "substantive standards of treatment",[811] encompassing standards, such as national standard of treatment[812]; most favourite nation clause;[813] full protection and security;[814] fair and equitable treatment ("**FET**");[815] umbrella clause;[816] as well as protection against expropriation.[817] Due to their broad formulation and a general lack of stricter definitions in the respective treaties, all these concepts leave much interpretative space to the arbitral tribunals,

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on 22 August 2022; see Gary Born, *International Commercial Arbitration*, 3rd ed Kluwer Aalphen an Rhijn 2021, p. 3445 ff.

[807] Article V NYC; Article 34 UNCITRAL Model Law; Article 1492 French Code of Civil Procedure (arbitration act), English translation available at http://www.sccinstitute.com/media/37105/french_law_on_arbitration.pdf accessed on accessed on 22 August 2022; see also §§ 33 i 34 of Swedish Arbitration Law, English version available at http://www.sccinstitute.com/media/37089/the-swedish-arbitration-act.pdf, accessed on 22 August 2022. In particular the principle, common to court practice of many Member States, according to which all the jurisdictional issues have to be raised already in the arbitration proceedings in order to be relied on before the national court may be problematic in this regard, see G. B. Born , *International Commercial Arbitration*, Aalphen an den Rijn 2014, p. 3219 and ff.

[808] According to the UNCITRAL data, as of today there are 170 parties to the NYC, see https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2, accessed on 22 August 2022.

[809] According to data available at the ICSID website there are currently 165 parties and signatories to the ICSID convention, see https://icsid.worldbank.org/about/member-states/database-of-member-states, accessed on 22 August 2022.

[810] Gary Born, *A New Generation of International Adjudication…*, pp.775-879, see particularly p. 835 ff.

[811] Catalogues invoked in legal scholarship show a substantive degree of similarity in this regard (see lists of standards in Jeswald W. Salacuse, *op. cit.*, chaters 9, 11-12; Christopher F. Dugan, Don Wallace, Noah Rubins et al., *Investor-State Arbitration*, OUP Oxford et. al. 2008, chater XV-XVIII or Andrew Newcombe, Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Aalphen an den Rhijn, Kluwer, 2009. Of course, it does not alter the fact that the precise contours of the protection standards in various individually negotiated IIAs could be formulated in a slightly different manner, which would affect both, their application and interpretation.

[812] I.e. clause obliging a given state to treat investors not less favourable than its own nationals, see e.g. Article 10.3 ECT.

[813] I. e. clause extending any privileges given to citizens of third states to nationals of the home state of the investor, see f,e, Article 10.7 ECT; Article 3.2 Poland-Netherlands BIT and Art. 3.2 Poland-BLEU BIT.

[814] I.e. standard obliging the host state to afford to the investment full protection and security, see Article 10.1 ECT; Article 3.2 Poland-Netherlands BIT; Article 3.2 Poland-BLEU BIT.

[815] See f.e. Article 10.1 ECT; Articles 3.1 Poland-Netherlands BIT; Article 3.1 Poland-BLEU BIT.

[816] I.e. clause obliging the host state to honour contractual commitments vis-à-vis the investor or investment; see e.g. Article 10.1 ECT; Article 3.5 of Poland-Netherlands BIT

[817] See f. e. Article 13.1 ECT; Article 5 Poland-Netherlands BIT, Article 4.1 Poland-BLEU BIT.

which readily grasped the opportunity.[818] This is particularly the case of the FET standard. Its interpretation evolved beyond the traditional minimum treatment standard and, equally, to encompass many other guarantees such as legitimate expectations or the warranty to maintain general regulatory stability.[819]

Furthermore, the law applicable by the tribunals is partially determined also by the content of the individual arbitration agreements. Since technically speaking, the arbitral tribunals ("**ATs**") adjudicate on the basis of arbitration agreements concluded between the host state and the investor, the applicable law is partially determined by the parties to each dispute.[820] In practice, considering that an arbitration agreement comes into effect through an investor's acceptance of the standing offer to conclude an arbitration agreement contained in the respective ISDS clause, the choice of law is typically determined by the international treaty[821] or the applicable arbitration rules.[822] Notably, investment treaties themselves only rarely contain provisions expressly addressing this issue (ECT[823] or Netherlands-Slovakia BIT[824] being counter-examples). Some regulations concerning the applicable law are also stipulated in general organisational arrangements or rules governing the arbitration, such as ICSID Convention[825] or UNCITRAL rules.[826] Arbitration rules usually leave at least some degree of discretion to the parties, which is often (though not always) limited by the wording of IIAs, determining parties' choice of law. Nonetheless, provisions referring to domestic law as the law governing the

[818] Jeswald W. Salacuse, *op. cit.* p. 155 ff.
[819] UNCTAD, *FAIR AND EQUITABLE TREATMENT. UNCTAD Series on Issues in International Investment Agreements II*, New York and Geneva, 2012, available at https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf, accessed on 22 August 2022, pp. 11 ff; Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment*, CUP, Cambridge et al. 2015, p. 246 ff.
[820] See f.e. Article 35.1 UNCITRAL 2010 Arbitration Rules; Article 21.1 International Chamber of Commerce Arbitration Rules as revised in 2017, https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf, accessed on 22 August 2022 (**ICC 2017 Arbitration Rules**); Article 27.1 SCC 2010 Arbitration Rules. The view on the primacy of international law *vis-a-vis* parties's preferences finds some support also in legal scholarship, see Ole Spiermann, *Applicable Law*, in: Peter Muchlinski, Federico Ortino, Christoph Schreuer (eds.) *The Oxford Handbook of International Investment Law*, OUP Oxford 2008, pp. 99 f.
[821] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 29 April 1991 (terminated; „**Netherlands-Slovakia BIT**") Article 8; Article 26.6 ECT; Article 42.1 ICSID.
[822] See f. e. Article 35.1 UNCITRAL 2010 Arbitration Rules; Article 21.1 ICC 2017 Arbitration Rules; Article 27.1 SCC 2010 Arbitration Rules.
[823] Article 26.6 ECT.
[824] Netherlands-Slovakia BIT**.**
[825] Article 42.1 ICSID: *The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*
[826] Article 35.1 UNCITRAL 2010 Arbitration Rules: *The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.*

substantial issues are not too widespread. Furthermore, in practice, domestic law plays a rather subordinate role vis-à-vis international law, in particular the relevant IIAs.[827]

Nonetheless, regardless of the parties' agreement on the governing law, certain issues by their very nature have to be decided based on the national law of the parties to an IIA. This pertains to the problems of the existence of investments and investor status in particular.[828] Last but not least, the domestic law of the parties comes into play as an element of the case's factual background. This implies that in such a case, ATs could be forced to de facto interpret national law to determine the factual background correctly.[829]

At this place, it should be underlined that investment tribunals were more than reluctant to take into account values external to their underlying treaties, including human rights.[830] This is particularly problematic, granted the one-sidedness of the text of the BITs, devoid of any provisions aimed at balancing the interest of investors with that of the general public, be it only in the form of carve-outs. Intra-EU BITs seem to be particularly illustrative in this respect.[831] This one-sidedness contrasts sharply with the CJEU's acknowledgement of the necessity of preserving regulatory autonomy of the legislative.[832] This lack of openness is further deteriorated by the resignation from the subsidiary character of the arbitral tribunals' review resulting in the national courts, usually responsible for much of the balancing work, being removed from the equation. In such circumstances lack of any legal doctrine even roughly resembling the ECtHR's equivalent protection standard is all but surprising.[833]

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[827] See f.e. Decision on the Application for Annulment of 16 May 1986 in case *Amco Asia Corporation and others v. Republic of Indonesia* ICSID Case No. ARB/81/1 1 ICSID Rep. 509 (1993), para 20; *Asian Agricultural Products Limited v. Republic of Sri Lanka (ICSID Case No. ARB/87/3)*, Award of 27 June 1990, 4 ICSID Rep. 250, 256-257 (1997), paras 23-24.

[828] See detailed analysis conducted by Zachary Douglas, *The International Law of Investment Claims*, CUP Cambridge et al. 2011, pp. 52-72 (Rule 4), whereby the author tries to associate it with the ICJ *Barcelona Traction* jurisprudence strain.

[829] For general remarks in this respect see Peter Tomka, Jessica Howley, Vincent-Joël Proulx, *International and Municipal Law before the World Court: One or Two Legal Orders?,* "Polish Yearbook of International Law" vol. 35 2015, pp. 36 f..

[830] See f. e. Ł. Kułaga, *Ochrona praw człowieka w międzynarodowym arbitrażu inwestycyjnym*, „Forum Prawnicze", 1/2014, pp. 41-59. See also Lone W. Mouyal, *International Investment Law and the Right to Regulate. A human rights perspective,* Routlege Oxon New York 2016, p. 145 ff.

[831] See e.g. Lone W. Mouyal, *op. cit.,* p. 56; Tomáš Fecák, *International Investment Agreements and EU Law*, Kluwer Alphen aan den Rijn 2016, p. 380 ff. ; Prabhash Ranjan, *Using the public law concept of proportionality to balance investment protection with regulation in international investment law: a critical appraisal,* "Cambridge Journal of International and Comparative Law" vol. 3 3/2014, p. 867 ff.

[832] See for example a legal study of Client Earth, L. Ankersmit, K. Hill, *Legality of investor-state dispute settlement (ISDS) under EU law*, available at https://www.euractiv.com/wp-content/uploads/2015/10/clientearth_legal_study_-_legality_of_investor_state_dispute_settlement_.pdf, accessed on 22 August 2022, p. 16 and the invoked jurisprudence.

[833] For more on the topic of deference in investment arbitration (or rather lack thereof) see Caroline Henckels, *The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration,* in: Łukasz

Additional problems are related to the *amicus curiae* being the only procedural venue available to the Commission to present its position. In this context, however, one has to note that the applicable versions of most arbitration rules (UNICITRAL, ICSID) do not expressly foresee a possibility of *amici curiae*. Whereby the ICSID Rules do contain a provision expressly referring to the possibility of admitting a third party,[834] the UNICITRAL Rules do not even regulate this matter. They are contained only in additional UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. These rules, however, according to their Article 1 para 2, apply to investment treaties concluded before 1 April 2014 (so, basically a minority of investment treaties) only if the parties to the dispute agree so or the parties to an IIA have concluded a specific multilateral agreement.[835] The multilateral treaty concerning the application of UNICITRAL Rules on Transparency, namely the Mauritius Convention[836] entered into force on 18 October 2017, yet it has not been ratified by any EU Member State so far.[837] This ambiguous normative basis results in a lack of a consistent practice concerning procedural rights connected to the Commission's *amici curiae*[838] and, ultimately, a negative assessment of the outcomes of this form of dialogue.[839]

In light of the above, it is clear that the IIAs provide fertile soil for frictions with EU law.[840] It is undeniable that on the level of their respective instruments, both IIL and EU law protect by large similar values.[841] However, upon closer scrutiny, it becomes evident that the different

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Gruszczyński, Werner Wouter (eds.) *Deference in International Courts and Tribunals*, OUP Oxford 2014, pp. 113– 134.

[834] See Rule 37.2 ICSID Rules of Procedeeings of 2006, available at http://icsidfiles.worldbank.org/icsid/icsid/StaticFiles/basicdoc/partF-chap04.htm#r37, accessed on 22 August 2022.

[835] See UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf, accessed on 22 August 2022.

[836] See Article 2 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration of 10 December 2014, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf, accessed on 22 August 2022.

[837] See information available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&clang=_en, accessed on 22 August 2022.

[838] See particularily F. D. Simoes, *A Guardian and a Friend? The European Commission's participation in investment arbitration*, "Michigan State International Law Review" vol. 25 2/2017, p. 289 ff. In any case, it has to be stressed that the Commission's views may be (and have been) submitted also indirectly, as elements of parties' submissions in the main proceedings as well, See Partial Award, of 27 March 2007 in case *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004.

[839] See Fidelma Mackenn, *Investor-State Arbitration – The European Union as Amicus Curiae?* in: Arthur W. Rovine (ed.) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2015*, Brill Leiden 2017, pp. 163-178.

[840] Jan Kleinheisterkamp, *European Policy Space in international Investment Law*, "ICSID Review" vol. 27 2012, p. 420 ff.

[841] This may refer e.g. to the principle of equal treatment; and non-discrimination; property rights; due process etc Philip Stirk, *Shaping the Single European Market in the Field of Foreign Direct Investment*, Hart, Oxford et al.

systemic contexts of IIL and EU law render the similarly worded standards hardly comparable.[842] Consequently, even if one were to conclude that the IIAs and EU law contain similarly worded substantive guarantees, one would still be forced to admit that they emphasise different interests. This is illustrated by the intra-EU BITs, concentrating solely on the investors' rights and lacking any provisions allowing to curtail them for the sake of public interest.[843] This pertains particularly to the concept of legitimate expectations, interpreted much stricter within the EU legal system. The state aid issues may serve as another good example here due to the strictness of the EU law on the one hand and the relative probability of conflicting situations of this kind on the other.[844] This difference finds its expression, among others, in setting considerably higher prongs for the responsibility of the public authorities in EU law so that they encompass only "sufficiently serious breaches".[845] Thus, one would be tempted to apply the floor/ceiling analogy again, with the *floor* set by rights bestowed on the investors by the IIL breaching the *ceiling* set by the EU's regulations.[846] Furthermore, unlike in the case of f.e. ECHR, this conflict potential was further aggravated by the resignation from the subsidiarity principle, entailing crossing out the national courts acting as a sort of *middleman*, necessarily reconciling competing values coming from different systems. Needless to say, in the absence of the exhaustion of local remedies requirement, no doctrine of equivalent protection emerged. Consequently, it lies at hand that the principal problem lies not in the formulation of the material standards in the IIAs, but rather in their balancing with different values.

10.2. Treatment of EU law by the arbitral tribunals

As shall be explained in more detail below, intra-EU application of IIAs did become an issue only in the aftermath of the 2004 Eastern enlargement. Arguably, since then, one had to wait 14 years for the CJEU to take a position on the relationship between the principle of autonomy

2014; Mavluda Sattorova, *Investor Rights under EU Law and International Investment Law*, „The Journal of World Investment & Trade" vol. 17 6/2016, pp. 895 - 918; in any case, the basic guarantees are covered also by the ECHR, see Maria Fanou Vassilis P Tzevelekos, *The Shared Territory of the ECHR and International Investment Law*, in: Yannick Radi (ed.), *Research Handbook on Human Rights and Investment*, Edward Elgar Cheltenham 2018, pp. 93-136.

[842] Martins Paparinskis, *Investors remedies under EU law and International Investment Law,* "The Journal of World Investment & Trade" vol. 17 6/2016, pp. 919-942.

[843] See for example a legal study of Client Earth, L. Ankersmit, K. Hill, *op. cit.*, p. 16 and the invoked jurisprudence.

[844] See especially C. Saavedra Pinto *The narrow Meaning of the Legitimate Expectation Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations, "*European State Aid Law Quarterly" 2/2016, pp. 270-285, with further references.

[845] Armin Steinbach, *op. cit.*, p. 140.

[846] See Opinion of AG Kokott of 22 April 2021, *PL Holdings*, case C-109/20, ECLI:EU:C:2021:321, esp. paras 39, 55-56,where she observes that too rigorous application of the IIL protective standards could eventually result in misapplication of the EU's public law (banking) regulations.

of EU law and the ISDS clauses. Nonetheless, it has to be stressed that the tension between the two subsystems was observable already in this period, and two distinct approaches emerged. On the one hand, the Commission and the certain Respondent Member States pleaded for the inapplicability of the ISDS clauses as between the EU-Member States. On the other, the investment tribunals largely ignored the EU-related issues.

The main problem lay in there being no instrument of international law addressing the relationship between the two subsytems. Nonetheless, even in their absence, one could still find at least some general directions as to the mutual relationship between the two. To begin with, it has to be stressed that even though the investment agreements do not refer directly to EU law, open-textured IIAs and arbitration rules in principle allow for its application. Given its dual nature, EU law could be a part of the law governing the dispute either as a part of the international or domestic law. In practice, however, the nature of EU law was often cast into doubt by many ATs[847] qualifying it as municipal law, which not rarely resulted in limiting its importance to the status of "factual matrix" of the case,[848] or underscoring its solely secondary

[847] For a recent summary of different lines of jurisprudence concerning the character of EU law as international law see Decision on Jurisdiction and Liability of 17 March 2021 in case *Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/4, para. 231. Regardless of the aforesaid controversies, EU law has not been explicitly recognized as part of international law governing the dispute in any publicly known award so far, whereby some of the ATs limited its role to part of the "factual matrix" of the case(Award of 11 December 2013 in case *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,* ICSID Case No. ARB/05/20, 2 para 328), some other tribunals, however, recognized its nature as international law; this pertains particularly to ECT tribunals (see award of 27 December 2016 in case *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic,* ICSID Case No. ARB/14/3 para 278; or Award of 21 January 2016 in case award of 21 January 2016 *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, para 438), contrarily Award of 23 September 2010 in case *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary,* ICSID Case No. ARB/07/22, para 7.6.6.

[848] See Award of 11 December 2013 in case *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,* ICSID Case No. ARB/05/20, para 328; Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010 *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I)*, PCA Case No. 2008-13; Decision on Jurisdiction of 30 April 2010 in case *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, para 74. It has to be stressed that in all these cases EU could have come into play as a part of municipal law, given the wording of either the relevant procedural rules (Article 42 ICSID in case *Micula*) or even the BIT itself (cases *Achmea* and *Oostergetel*).

role *vis-à-vis* international law, primarily IIAs.[849] Thus, it may be agreed with the authors suggesting that the EU law has not been recognised as governing law by the arbitral tribunals.[850]

The same lax attitude was observable concerning the tribunals' jurisdiction. Even if the tribunals do not necessarily have to be directly bound by EU law, treaty law must influence the validity and scope of the states' consent expressed in the respective IIAs.[851] Consequently, recognising the character of EU law as international law, one would be bound to accept that the consequences of the incompatibility between EU law and intra-EU IIAs would be determined to a large degree by the law of treaties. To be more precise, the rules codified in Articles 30 and 59 VCLT[852] concerning inapplicability or termination of an earlier treaty incompatible with the later one would be particularly relevant. Thus, it is hardly surprising that the argumentation related to both articles has been raised manifold in arbitral proceedings by both Member States and Commission. In practice, however, the tribunals have consistently rejected the relevance of EU law for their jurisdiction.[853]

The jurisdictional arguments relying on the incompatibility between ISDS clauses and EU law could be summarised as follows: (i) EU law superseded the BIT-s upon the accession of the respondent states to the EU in accordance with Article 59 VCLT, so that they eventually ended up terminated or(ii) The BIT-s were rendered inapplicable in accordance with the Article 30 VCLT due to their overlapping with the EU-law.[854] Given that the inapplicability argument attracted the most attention and being mindful that in practice, the prong for application of Article 59 VCLT is set higher than for the Article 30 VCLT, it suffices to limit the analysis to the issues of application of Article 30. According to Article 30.1 and 30.3 VCLT, if earlier and

[849] Award of 23 September 2010 in case *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, para 7.6.6. At this place it should be only signalized that even recognition of the international character of EU law has guaranteed neither its applicability, nor primacy *vis-à-vis* investment agreements. It seems, however, that these course of action chosen by the ATs was nothing unique, since the ATs in general in case of a conflict seem to be keen to ensure the primacy to the international rather than domestic law, regardless of the exact wording of the applicable law clause (for further references see Christopher. Thomas, Harpreet K. Dhillon, *Applicable Law Under International Investment Treaties*, "Singapore Academy of Law Journal" vol 26 2014 , pp. 975-998.

[850] Kai Hober *Application of EU Law in Investment Treaty Arbitration*, in: Arthur W. Rovine (ed.) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2015,* Brill Leiden 2017, particularly p. 199 f.; see also Eirik Bjorge, *EU Law Constraints on Intra-EU Investment Arbitration?*, "The Law and Practice of International Courts and Tribunals" vol 16 2017, p. 85.

[851] Christoph Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, "McGill Journal of Dispute Resolutions" vol. 1 2014, p. 16 f.

[852] Vienna Convention on the Law of Treaties of 23 May 1969, UNTS, vol. 1155, p. 331.

[853] Ahmed Ghouri, *Interaction and conflict of treaties in investment arbitration*, Kluwer Alphen aan den Rijn 2015, pp. 149-176; T. Fecák, *op. cit.*, pp. 380 ff.

[854] See especially Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010 *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I)*, PCA Case No. 2008-13.

later treaties both cover the same subject matter and the provisions of the former are incomparable with the latter, the later treaty prevails (*lex posterior*). Thus, the argumentation was related mainly to the issues of sameness of the subject matter and the possible conflict of their provisions. ATs have been consistent in rejecting the existence of both. In essence, their reasoning boiled down to the following conclusions: (i) an IIA has a different subject matter than EU's regulations pertaining to the Single Market and (ii) no provisions thereof conflict with EU law, with IIAs amounting at most to an improvement to EU's remedies.[855]

It is difficult not to see that the understanding of the treaty conflict presented above is relatively narrow, at least in comparison with the position adopted by the ILC.[856] In fact, the broad concept of a conflict, covering the situations of excessive difficulty in fulfilling several norms simultaneously, seems to be better grounded in the legal theory and appears to correspond much better with reality. After all, general rules on treaty conflict have residual character, i.e. are designed for situations where the parties failed to make specific arrangements.[857] Further, arguably this model seems to address better the kind of possible tensions that may arise between EU law and international investment law, i.e. tensions between norms of a different kind, containing different outlooks on the proper balancing between different values. Thirdly, it is pretty clear that the narrow and formalistic understanding of the treaty conflict stays at odds with the broader, functional understanding adopted in the CJEU's jurisprudence related to the application of international agreements in the EU legal order. Lastly, this model completely ignored the reality that conflicts between EU law and investment law could also have their sources in different balancing between competing interests in EU and investment law, rather than different formulations of the provisions constituting both subsystems. In any case, it became clear that a solution allowing for mutual dialogue, e.g. in the form of preliminary

[855] *Ibid.;* Partial Award, of 27 March 2007 in case *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004; Decision on Jurisdiction of 30 April 2010 in case *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Award on Jurisdiction of 22 October 2012 in case *European American Investment Bank AG (EURAM) v. Slovak Republic*, UNCITRAL, paras 179-180. In similar vein, an ECT arbitral tribunal in the *Electrabel* case denied the existence of any conflict between the ECT and EU law, in particular regarding the ISDS clause, see Decision on Jurisdiction, Applicable Law and Liability, of 30 November 2012 in case *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, paras 4.111-4.199; 5.31-5.60.

[856] ILC *Fragmentation of international law: difficulties arising from the diversification and expansion of international law* (2006) A/CN.4/L.682, paras 21-26, in particular para 25.

[857] Statement of Dissent of Professor Marcelo G. Kohen of 3 February 2020 in case *Theodoros Adamakopoulos and others* v. *Republic of Cyprus*, ICSID Case No. ARB/15/49, para 41; ILC *Fragmentation of international law: difficulties arising from the diversification and expansion of international law* (2006), A/CN.4/L.682, para 21.

references, could not ease these tensions, as the tribunals were quick to renounce even the slightest possibility of entering into an institutional dialogue with the EU institutions.[858]

In any case, the actual practice evidenced that this conflict potential was by no means purely hypothetical. To begin with, as in the case of ECHR, the open-textured general standards of protection provide a fertile ground for inter-systemic tensions by their very nature.[859] Secondly, it has to be stressed that investment disputes regularly involve issues regulated by EU law, such as environmental law;[860] incentives in the renewable energy sector;[861] the issues of power purchase agreements;[862] or, last but not least, state aid issues.[863]. Finally, one cannot ignore a growing body of investment tribunals' decisions whose *substance* violates EU law. Most obviously, there is the state aid issue. As for now, many awards simply fly in the face of the EU's state aid rules. This mainly pertains to the infamous *Micula* award and *ECT* awards concerning Czech and Spanish repealed incentive schemes for renewable energy sources, rendered despite earlier Commission decisions declaring the aforesaid incentive schemes to constitute unlawful state aid.[864]. Of course, state aid is not the only field. Another noticeable

[858] See, e.g., Partial Award of 27 March 2007 in the case *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, , paras. 134–135; similarly, the Decision on Jurisdiction of 30 April 2010 in the case *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, para. 68; where ATs disposed of the respondent States' requests for a preliminary reference by simply denying their compulsory jurisdiction. See also Nikos Lavranos, *The poison pill for maintaining intra-EU BITs arbitration*, 28 September 2017, http://arbitrationblog.practicallaw.com/the-poison-pill-for-maintaining-intra-eu-bits-arbitration/, accessed on 22 August 2022.

[859] Maciej Szpunar, *op. cit.*, p. 141.

[860] *Case Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, available at https://www.italaw.com/cases/1148 , accessed on 22 August 2022, ended with a settlement of The further developments in this case are described in a blog post of L. Ankersmit, *Case C 142/16 Commission v. Germany: the Habitats Directive Meets ISDS?*, 6 September 2017, available at https://europeanlawblog.eu/2017/09/06/case-c-14216-commission-v-germany-the-habitats-directive-meets-isds/, accessed on 22 August 2022.

[861] See award of 27 December 2016 in case *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3*; Final award of 4 May 2017 in case *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36*; Final Award of 11 October 2017 in case *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03; CJEU judgment of 20 September 2017, *Elecdey*, case C-215/16 ECLI:EU:C:2017:705.

[862] Award of 23 September 2010 in case *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22,; Decision on Jurisdiction, Applicable Law and Liability, of 30 November 2012 in case *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19; CJEU Judgement of 15 September 2011, *Atel*, case C-264/09, ECLI:EU:C:2011:580. Generally for overlapping scopes of application of the ECT and EU law see E. Bonafe,Gokce Mete, *Escalated interactions between EU energy law and the Energy Charter Treaty*, "Jounal of World Energy and Law" vol. 9 3/2016, pp. 174-188.

[863] The infamous *Micula* case discussed in section 1.3.2. seems to be most emblematic here.

[864] See Commission decisions *de facto* prohibiting Spain and Czechia fulfilling the awards rendered by the investment tribunals in intra-EU cases, see European Commission's decision of 28 November 2016 in case SA.40171 (2015/NN) *Czech Republic Promotion of electricity production from renewable energy sources* and European Commission Decision of 10 November 2017 in case State aid SA.40348 (2015/NN) *Kingdom of Spain, Support for electricity generation from renewable energy sources, cogeneration and waste*, paras 159-166, esp. para 165. According to a press release, the Commission launched its first investigation in this regard, see EC press release of 19 July 2021 *State aid: Commission opens in-depth investigation into arbitration award in favour of*

clash was caused by an arbitral tribunal ordering Romania to withdraw a European Arrest Warrant as a provisional measure.[865] Romanian national concerned tried to rely on this measure to prevent his extradition from the UK. However, a British court decided that provisional measures issued by an investment tribunal cannot be relied on to limit the effectiveness of the EAW decision.[866]

Thus, to put the long story short, it may be concluded that despite an overlap between the EU law and the investment law, the investment tribunals have not developed jurisprudence allowing them to take into account the EU law properly.

10.3. Intra-EU BITs

10.3.1. Intra-EU BITs

The term intra-EU BITs denotes bilateral investment treaties binding between the Member States. Consequently, it will also extend to the agreements entered into by the parties that were not EU Member States at the time of the BIT's conclusion. As explained above, the term *intra*-EU BITs encompasses a wide variety of distinct international treaties, nonetheless displaying many common features. In particular, like most other IIAs, they typically do not contain procedural regulations. In practice, the category of intra-EU BITs consists solely of agreements concluded between the EU Member States and third countries that eventually became the EU Member States. Thus, the topic of intra-EU BITs did become relevant only in the aftermath of the 2004 enlargement.[867] Before the accession to the EU, the Commission did not comment on the BITs' conformity with EU law, they were also not expressly thematised in the accession treaties. Immediately after 2004, however, the Commission took a position on the inapplicability (termination) of intra-EU BITs upon accession. And it tried to enforce it upon the other actors. To begin with, the Commission acted actively in the arbitral proceedings, *inter alia*, by submitting its position utilising *amici curiae* or through the respondent Member States.[868] Further, it should be recalled that the Commission did initiate infringement proceedings against certain member states (Austria, the Netherlands, Romania, Slovakia, and

Antin to be paid by Spain, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3783, accessed on 22 August 2022.

[865] Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures, 29 March 2017 in case *Nova Group Investments, B.V. v. Romania,* ICSID Case No. ARB/16/19, para. 365.

[866] Judgment of the High Court of Justice of England and Wales of 6 March 2019 *Nova Group Investments, B.V. v. Romania, ICSID Case No. ARB/16/19*, para. 31.

[867] Prior to the 2004 enlargement there were only two IIAs between the EU Member States concluded with Greece and Portugal, none of them, however, contained an ISDS clause, see Tomáš Fecák, *op. cit.*, pp. 370 ff.

[868] See section on the *amici curiae* above, see also Tomáš Fecák, *op. cit.*, pp. 374 f.

Sweden) due to their unwillingness to denounce the intra-EU BIT-s because to their incompatibility with EU law.[869] Nonetheless, up until the *Achmea* judgment, there was no definite position of the CJEU regarding the relationship between EU law and IIL.

10.3.2. CJEU *Achmea* judgment

The preliminary reference that gave rise to the CJEU *Achmea* judgment[870] was made in the context of post-arbitration proceedings pending before the German courts, related to an arbitral award rendered on the basis of the Slovakia-Netherlands BIT, in proceedings initiated by a Dutch firm *Achmea* (former *Eureko*).[871] The proceedings were conducted under UNCITRAL arbitration rules, and Frankfurt am Mein was selected as the seat of arbitration. During the proceedings, Slovakia raised the so-called EU jurisdictional objection, which the tribunal eventually rejected in a separate jurisdictional award affirming the tribunal's jurisdiction over the case.[872]

Slovakia initiated set-aside proceedings, firstly against the jurisdictional,[873] then against the final award.[874] It based its case on the supposed lack of a valid arbitration agreement[875] and a public policy violation[876] that were to have originated from the award's incompatibility with Articles 267, 344 and 18 TFEU[877]. It was only in the proceedings against the final award before the German Federal Court (*Bundesgerichthof* – BGH) that a preliminary reference to CJEU

[869]See the press release of the Commission of 18 June 2015 *Commission asks Member States to terminate their intra-EU bilateral investment treaties*, available at: http://europa.eu/rapid/press-release_IP-15-5198_en.htm, accessed on 22 August 2022.
[870] CJEU judgment of 6 March 2018, *Achmea*, case C-284/16, ECLI:EU:C:2018:158.
[871] *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008–13, all related documents are available at https://www.italaw.com/cases/417, accessed on 22 August 2022.
[872] Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010 *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I)*, PCA Case No. 2008-13. Legal argumentation in this case was already analysed in depth in the broader context of other awards concerning the relationship between the EU and investment law, see Ahmed Ghouri *op. cit.*, 149–176; Tomáš Fecák, *op. cit.*, p. 380 et seq.
[873] § 1140 para. 3 of German Law on Civil Procedure – *Zivilprozessordnung* BGBl. I S. 3202; 2006 I S. 431; 2007 I S. 1781 as amended **(ZPO**). https://www.gesetze-im-internet.de/zpo/__1040.html accessed on 22 August 2022– allows challenging jurisdictional awards. See OLG Frankfurt Decision of 10 May 2012 in case 26 SchH 11/10, available at https://www.italaw.com/sites/default/files/case-documents/ita0931.pdf, accessed on 22 August 2022 rejecting the application as unsubstantiated and BGH decision of 19 September 2013 in case III ZB 37/12, available at: https://www.italaw.com/sites/default/files/case-documents/italaw1606.pdf, accessed on 22 August 2022 rejecting the application due to the Arbitral tribunal having rendered the final award.
[874] OLG decision Frankfurt of 18 December 2014 in case 26 Sch 3/13, available at: https://www.italaw.com/sites/default/files/case-documents/italaw7079.pdf, accessed on 22 August 2022; BGH decision of 3 March 2016 in case I ZB 2/15 available at: https://www.italaw.com/sites/default/files/case-documents/italaw10114.pdf, accessed on 22 August 2022.
[875] Grounds for challenge are stipulated in § 1059 para. 2 pt. (1) let. a) ZPO.
[876] Grounds for challenge are stipulated in § 1059 para. 2 pt. (2) let. b) ZPO.
[877] Consolidated version of the Treaty on the Functioning of the European Union, OJ EU C 326, 26.10.2012, p. 47–390.

concerning the alleged nonconformity of the "arbitration clause" with Articles 18, 267 and 344 TFEU was made.[878]

BGH asked the CJEU the following questions:

> *(1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?*
>
> *(2) Does Article 267 TFEU preclude the application of such a provision?*
>
> *(3) Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?*

The CJEU addressed in its judgment jointly the 1st and 2nd questions asked by the BGH, remaining silent with regard to the discrimination issue. According to the Luxembourg Court:

> *Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*

The formulation of the above-mentioned questions merits some attention. Firstly, regardless of the specificity of the procedural issue to be decided by BGH, their formulation would indicate them being conceived in a fairly general manner to encompass the issue of compatibility of ISDS clauses contained within intra-EU BITs with EU law as such. The questions do not

[878] BGH decision of 3 March 2016 in case I ZB 2/15, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&nr=74612&linked=bes&Blank=1&file=dokument.pdff, accessed on 22 August 2022.

seem to depend on the content of particular proceedings or the exact wording of the arbitration clause contained in Article 8 of Slovakia-Netherlands BIT. Furthermore, the issues raised by the BGH were general in scope by their very nature: the alleged incompatibility was deemed to stem from the existence of the ISDS mechanism as such, not from a conflict between substantive provisions of EU law and BITs in the case at hand. Consequently, one may assume that BGH perceived the problem of compatibility between ISDS and EU law in separation from the content of material standards invoked in the case. However, the broad formulation of questions did not prevent the BGH from suggesting in pretty strong terms that the CJEU should answer them negatively.[879]

Even leaving aside the BGH's questions, it is clear that the CJEU decided to formulate its answer in broad terms. Thus, the Luxembourg Court speaks of the lack of conformity of the ISDS mechanism as contained in intra-EU BITS with EU law, whereby the clause in Netherlands-Slovakia BIT plays only an exemplary role, as evidenced mainly by the formulation "such as".[880] Such broad understanding seems to have been adopted by the EC,[881] Member States,[882] and most of the judgment's immediate commentators.[883] Moreover, it cannot be lost out of sight that the decision was formulated in a fairly strong manner. In particular, the conflict between the ISDS clause and the EU law was caused by the sheer existence of the arbitration clauses, not the content of the substantial BIT guarantees, not to mention the subject matter of a particular dispute. Finally, the operative part of the judgment contains neither limitations *ratione temporis* nor *ratione materiae*, which indicates that the judgment produces legal effects *ex tunc*.[884]

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[879] See esp. paras 29, 33-39 in relation to the first question; paras 47-52, 57-67 in relation to the second and 77-8 to the third.
[880] See also German (*wie*) and French (*telle que*) language versions of the judgement.
[881] Commission Communication of 19 July 2018 COM(2018) 547/2 *Communication from the Commission to the European Parliament and The Council. Protection of intra-EU investment*, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0547, accessed on 22 August 2022.
[882] Declarations of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection available at https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en, accessed on 22 August 2022 .
[883] See Nikos Lavranos, *Black Tuesday: the end of intra-EU BITs*, 7 March 2018, http://arbitrationblog.practicallaw.com/black-tuesday-the-end-of-intra-eu-bits/, accessed on 22 August 2022; Steffen Hindelang, *The Limited Immediate Effects of CJEU's Achmea Judgement*, 9 March 2018, https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/, accessed on 22 August 2022 or Daniel Thym, *The CJEU ruling in Achmea: Death Sentence for Autonomous Investment Protection Tribunals*, 9 March 2018, http://eulawanalysis.blogspot.com/2018/03/the-cjeu-ruling-in-achmea-death.html, accessed on 22 August 2022.
[884] CJEU judgement of 27 March 1980, *Amministrazione delle Finanze dello Stato v. Denkavit Italiana S.R.L.*, case C-61/79, ECLI:EU:C:1980:100, para 16.

Such conclusions seem to be backed up by the judgment's reasoning, even though it could be perceived as somewhat cursory. To begin with, at no place does the CJEU express any willingness to limit the effects of the judgment to only selected BITs. Furthermore, nowhere is the link between the content of substantial standards contained in the BITs (or AT's awards) and their incompatibility with EU law established. Such an ISDS-unfriendly reading appears to be further amplified by the fact that CJEU has completely disregarded arguments in favour of the ISDS presented in the AG Wathelet's Opinion[885] and the BGH's referral.[886]

Considering the above, it would be worthwhile to highlight some focal points of the *Achmea* case. Issues of (i) the autonomy of EU law; (ii) the application of EU law by ATs; (iii) the ATs' qualification as EU courts; (iv) the importance of the judgment for ISDS mechanisms contained in IIAs other than BITs and for commercial arbitration seem to be of particular relevance. Nonetheless, granted the research aims of this dissertation, I shall concentrate only on the autonomy-related aspects.

To begin with, the CJEU was pretty straightforward in indicating that the dispute at hand pertains to the issue of autonomy of EU law. While analysing the compatibility of ISDS clauses in intra-EU BITs with EU law, the CJEU decided to expressly invoke the concept of autonomy rather than the primacy of EU law, typically serving as the primary conflict-solving rule in the intra-EU context, also with respect to the intra-EU application of international agreements.

Furthermore, the CJEU dedicated a substantial amount of space to the possibility of application or interpretation of EU law by the ATs. In paras 39-42 of its judgment, the Luxembourg court concluded that EU law, being both domestic law of the Member States and international law between them (para 41), could be interpreted and applied by the ATs. This brought the CJEU

[885] There seemed to be little if any disagreement between the commentators as to whether the AG's opinion was favourable to the ISDS, whereby some of them assessed this fact as positive (see f.e. Nikos Lavranos, *Black Tuesday…*) some other somewhat negative (see f. e. Andrea Carta, Laurens Ankersmitt, *AG Wathelet in C-284/16 Achmea: Saving ISDS?*, 8 January 2018, available at https://europeanlawblog.eu/2018/01/08/ag-wathelet-in-c-28416-achmea-saving-isds/, accessed on 22 August 2022; Burkhard Hess, *A European Law Reading of Achmea,* 8 March 2018, available at http://conflictoflaws.net/2018/a-european-law-reading-of-achmea/#_ftnref4, accessed on 22 August 2022, who even suggested that the AG has proposed nothing short of practical primacy of investment law vis-à-vis EU law) see also Magdalena Słok-Wódkowska, Michał Wiącek, *Zgodność dwustronnych umów inwestycyjnych pomiędzy państwami członkowskimi z prawem Unii Europejskiej – glosa do wyroku Trybunału Sprawiedliwości z 6.03.2018 r., C-284/16, Slowakische Republik przeciwko Achmea BV,* "Europejski Przegląd Sądowy" 11/2018, p. 34.

[886] Burkhard Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, "Max Planck Institute Luxembourg for Procedural Law Research Paper Series 2018", available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3152972 accessed on 22 August 2022, pp. 7-8.

to conclude that the mechanism could have bypassed the judicial architecture foreseen in the Treaties (para 56).

It seems that the above has the following consequences. Firstly, CJEU appears to reject the view according to which ATs adjudicate solely based on the IIAs' provisions. Secondly, CJEU emphasised the role of EU law as international law that should be "taken into account" (Germ. "*berücksichtigt"*) during the interpretation of BITs. Even if one was willing to assume that the ATs are not necessarily obliged to *apply* EU law as substantive law, he would still have to accept that they at least *interpret* it, even if only as an element of the "factual matrix" of the case. And this conclusion remains valid, even if slightly unsatisfactorily, the CJEU referred solely to the application of TFEU provisions related to market freedoms while omitting any direct references to problems of disregarding provisions of EU law limiting investor's rights, such as environmental or competition norms (the *floor/ceiling* figure).[887]

The broad understanding proposed above appears even more plausible given the context of the case. The tribunal adjudicating in the *Achmea* case neither recognised EU law as applicable law nor did it apply (interpret) substantive provisions of EU law. Notably, neither misapplication nor omission of EU law were advocated by Slovakia in post-arbitration proceedings. Consequently, it sufficed for the CJEU that ATs simply adjudicated upon issues falling within the scope of application of EU law to pronounce their incompatibility with EU law.

Furthermore, the CJEU analysed whether this circumvention of EU law could not be offset either by qualifying the ATs as courts or tribunals of the Member States, or by the residual control of the arbitral awards. Eventually, however, it decided to answer both questions in the negative (paras 50, 53 55), thus maintaining its position on the violation of EU law by the provisions of the BIT.

The CJEU judgment eventually resulted in the BGH setting aside the arbitral award.[888]

Regardless of its seminal importance for the mutual relationship between the EU law and IIL,[889] it has to be stressed that this judgment's contribution to the development of the principle of autonomy of the EU law was not less significant.

[887] See a brief remark in Laurens Ankersmit, *The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System*, "Journal of European Environmental & Planning Law" vol 13 2016, p. 52.
[888] BGH decision of 31 October 2018 in case I ZB 2/15 *Achmea*, available at https://www.italaw.com/sites/default/files/case-documents/italaw10114.pdf, accessed on 22 August 2022.
[889] Bartosz Soloch, *CJEU Judgment in Case C-284/16 Achmea: Single Decision…*, p. 3.

To begin with, the *Achmea* decision was the first instance of the CJEU admitting that the autonomy principle can also be violated by dispute settlement bodies created by instruments to which the EU is not a party.[890] This is particularly visible if to contrast the CJEU judgment with the preceding AG Wathelet's opinion.[891] It contained a lengthy argument on the irrelevance of *inter se* Member State agreements with dispute-settlement clauses in respect of EU law. In part D of the opinion, much space was dedicated to to explaining why, even if not considered Member States' courts, investment arbitration tribunals would not infringe the autonomy of EU law in any way whatsoever. Firstly, it was observed that disputes between the Member States and individuals did not come within the remit of Article 344 TFEU.[892] More importantly, in the latter part of his opinion, AG Wathelet underscored that in the case of both the *Mox Plant* judgment and the *ECHR Opinion,* the CJEU was concerned with the accidental application of EU law by ITLOS and the ECtHR solely because of the EU being party to these agreements,[893] which was to have rendered the principles contained therein inapplicable to intra-EU BITs to which EU is not the party.[894] Lastly, AG Wathelet denied arbitral tribunals interpreting EU law by underlining that EU law was not applied in the arbitration proceedings.[895] Despite admitting certain investment protection rules partially overlap with the TFEU, yet without contradicting the Treaties,[896] he underscored that they were dissimilar enough to allow minor differences between the application of the TFEU and BITs.[897] Lastly, he explained that investment arbitration should be accepted from the point of view of the autonomy principle in a way analogous to commercial arbitration.[898] Thus, it appears that AG Wathelet's opinion relied heavily on the strict distinction between agreements concluded with or without the EU's participation and only the former being of relevance to the autonomy of EU law. Thus, by rejecting it, the CJEU made it clear that also the dispute settlement mechanisms to which the EU is not a party may very well result in a violation of the autonomy principle.

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[890] Interestingly, in its judgment of 5 May 2015 in case C-146/13 *Spain v. European Parliament and Commission,* ECLI:EU:C:2015:298, the CJEU declared lack of jurisdiction to hear Spain's Article 263 TFEU annulment action targeting an international agreement between the Member States aimed at creating the United Patent Court by indicating that, *in an action brought under Article 263 TFEU, the Court does not have jurisdiction to rule on the lawfulness of an international agreement concluded by Member States* (para 101).
[891] Opinion of AG Wathelet of 19 September 2017, *Achmea,* case C-284/16, ECLI:EU:C:2017:699.
[892] *Ibid*., paras 138-159, particularly para 150 f. differentiating the case at hand from CJEU Opinion of 14 December 1991, *EEA*, Opinion 1/91, ECLI:EU:C:1991:490 and CJEU Opinion of 8 March 2011, *European Patent Court*, Opinion 1/09, ECLI:EU:C:2011:123.
[893] Opinion of AG Wathelet of 19 September 2017, *Achmea,* case C-284/16, ECLI:EU:C:2017:699, para 163-164.
[894] Ibid., para 167.
[895] Ibid., paras 173-178.
[896] Ibid., para 210 ff.
[897] Ibid., para 228.
[898] Ibid., para 229-272.

Furthermore, in this decision, the CJEU upheld the broad understanding of *interpretation* or *application* of EU law, also encompassing the treatment of EU law as a fact or law, sketched in its earlier Opinion 2/13.[899] In fact, in light of the aforesaid opinion identifying the risk for autonomy with a mere possibility of interpretation of EU law by an external body rather than an actual breach of EU law was the only option.[900] In practice, this meant that a mere jurisdictional overlap would suffice to render a whole mechanism incompatible with EU law.

One could question whether the CJEU's radical judgment was not based on a mischaracterisation of the IIL. In light of the latter's characteristics conducted in sections 10.1 and 10.2 above, however, it is clear that this is not the case. As already discussed, the IIL provided for a self-contained regime allowing for effective enforcement of monetary awards against the Member States; due to the open-textured nature of the protective standards at least accidentally overlapping with EU law. Thus, it seems pretty natural that the possibility of negative consequences of the CJEU's autonomy-jurisprudence for intra EU BITs was observed already well before the *Achmea* judgment.[901] In any case, as will be explained in the following section, the subsequent reaction of the arbitral tribunals confirmed these fears.

10.3.3. Post-Achmea Developments

On the part of all the EU institutions, as well as the majority of Member States, it was clear that the judgment requires nothing short of termination of all the intra-EU BITs and depriving them of any legal effect. This way of handling the problem was indicated as the only suitable solution as early as in the Commission's July Communication on intra-EU investments,[902] urging termination of the treaties and confirming the inapplicability of the intra-EU BITs (along with the ECT dispute-settlement provision). The Communication's wide understanding of the incompatibility between the intra-EU BITs and the autonomy principle was subsequently

[899] Andrej Lang, *Die Autonomie des Unionsrechts und die Zukunft der Investor-Staat-Streitbeilegung in Europa nach „Achmea". Zugleich ein Beitrag zur Dogmatik des Art. 351 AEUV*, „Beiträge zum Transnationalen Wirtschaftsrecht" vol. 156 2018, pp. 17-18, 43; Joanna Lam, Paweł Marcisz, *Dopuszczalność arbitrażu inwestycyjnego: między Achmeą a Cetą – glosa do orzeczenia Międzynarodowego Centrum Rozstrzygania Sporów Inwestycyjnych ARB/12/12, Vattenfall (w kwestii Achmei)*, Europejski Przegląd Sądowy 11/2019, p. 38; Sophie Barends, *op. cit.*, p. 207; see also Jed Odermatt, *op. cit.*, p. 302 who rightly indicates that bypassing the autonomy problem by qualifying EU law as a simple fact was excluded already in the Opinion 2/13.

[900] See Steffen Hindelang, *Conceptualisation and Application of the Principle of Autonomy …*, p. 9.

[901] Stephan Schill, *Opinion 2/13 – the End for Dispute Settlement?, "*The Journal of World Investment & Trade" vol. 16 3/2015, p. 382 f.

[902] Commission Communication of 19 July 2018 COM(2018) 547/2 *Communication from the Commission to the European Parliament and The Council. Protection of intra-EU investment*, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0547, accessed on 22 August 2022.

reaffirmed by Member States' Declarations.[903] These documents were followed by a wave of treaty terminations on the basis of both bilateral and multilateral instruments.[904] All these documents stipulated that, in accordance with EU law, the EU and its Member States acknowledged the existence of a prior conflict between the EU law and international investment law.[905] Similarly, the EU courts have consistently recognised the CJEU *Achmea* judgment as precluding investment arbitration on the basis of intra-EU BITs.[906] In any case, the later CJEU's decisions and opinions of Advocates Generals confirm this broad understanding.[907] The CJEU made its opinion particularly clear in the *Micula* judgment, where it stated nothing less than that the Romania's consent to conduct arbitration proceedings on the basis of Romania Sweden BIT *lacked any force* from the day of its accession to the EU.[908]

[903] Declaration of the Representatives of the Governments of the Members States on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, dated 15 January 2019, available at: https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en, accessed on 22 August 2022; similarly worded declarations were signed also by all the other Member States.

[904] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union signed at 5 May 2020 in Brussel, OJ EU L 169, 29.5.2020.

[905] Łukasz Kułaga, *Implementing 'Achmea': The Quest for Fundamental Change in International Investment Law,* 'Polish Yearbook of International Law' vol 39 2019, p. 247; Sonsoles Centeno Huerta, Nicolaj Kuplewatzky, *On Achmea, the Autonomy of Union Law, Mutual Trust and What Lies Ahead*, "European Papers - A Journal on Law and Integration", vol. 4 1/2019, p. 74; See also Statement of Dissent of Professor Marcelo G. Kohen of 3 February 2020 in case *Theodoros Adamakopoulos and others* v. *Republic of Cyprus*, ICSID Case No. ARB/15/49.

[906] In addition to BGH decision setting aside the *Achmea* award see also Frankfurt Court of Appeals decision of 11 February 2021 in case 26 SchH 2/20 available at https://www.rv.hessenrecht.hessen.de/bshe/document/LARE210000373, accessed on 22 August 2022 setting aside jurisdictional award asserting jurisdiction on the basis of Austria-Croatia BIT (under appeal); Judgment of the Svea Court of Appeal, of 22 February 2019 in Case No. T 8538-17, T 120333-17 *PL Holdings*, available at https://www.italaw.com/sites/default/files/case-documents/italaw10447.pdf, accessed on 22 August 2022, p 40 ff. (the Swedish court eventually upheld jurisdiction due to the alleged subsequent conclusion of a commercial arbitration agreement, the case is currently pending before the Swedish Supreme Court and the CJEU). In light of the CJEU PL Holdings judgment it is clear that such a course of action is the only one paying sufficient tribute to the principle of effectiveness of EU law, thus one may expect the Supreme court to overturn the judgment, see CJEU judgment of 26 October 2021, in *PL Holdings*, case C-109/20, ECLI:EU:C:2021:875, paras 47-56. In any case, the jurisprudence supporting this understanding seems to be growing, as evidenced e.g. by the judgments of the Paris Court of Appeals of 19 April 2022 in cases n 48/2022 RG 20/13085 *Strabag* and n 49/2022 RG 20/13085 *SLOT*, setting aside jurisdictional awards ignoring the intra-EU objections, or Lithuanian Supreme Court judgment of 18 January 2022 in case Nr. e3K-3-121-916/2022 *Veolia* stating that an arbitration agreement concluded on the basis of an intra-EU investment treaty cannot block initiating proceedings before a national court due to the arbitration clause's invalidity as a matter of EU law.

[907] See CJEU judgments of 25 January 2022, *European Food and Others v Commission*, case C-638/19 P, ECLI:EU:C:2022:50; of 26 October 2021, in *PL Holdings*, case C-109/20, ECLI:EU:C:2021:875, paras 44-46; CJEU Opinion of 30 April 2019 *CETA*, Opinion 1/17, ECLI:EU:C:2019:341 discussed in more detail infra, see also Opinion of AG Kokott of 22 April 2021, *PL Holdings*, case C-109/20, ECLI:EU:C:2021:321, paras 24, 30; Opinion of AG Szpunar of 3 March 2021, *Komstroy*, case C-741/19, ECLI:EU:C:2021:164, para 67; Opinion of AG Szpunar of 22 April 2021, *Micula*, case C-638/19 P, ECLI:EU:C:2021:529, para 83; Opinion of AG Øe of 29 October 2020, *Anie*, case C-798/18, ECLI:EU:C:2020:876, fn. 55 to para 93; see also CJEU judgment of 2 September 2021, *Komstroy*, case C-741/19, ECLI:EU:C:2021:655, discussed in section 10.5. below.

[908] CJEU judgement of 25 January 2022, *European Food and Others v Commission*, case C-638/19 P, ECLI:EU:C:2022:50, para 145.

On the other hand, the arbitral tribunals have invariably kept brushing aside the intra-EU objection,[909] despite there being solid arguments to treat the *Achmea* judgment and subsequent actions of the Commission and the Member States as proof of the existence of a treaty conflict, rendering the respective ISDS clauses inapplicable.[910] More precisely, there are only one known ECT award[911] and two dissenting opinions affirming the *Achmea's* relevance for the tribunals' jurisdiction.[912] Somewhat ironically, certain ATs' decisions to move their seats outside of the EU motivated by their willingness to escape possible problems with the post arbitral proceedings[913] could also be seen as an implicit recognition of the existence of the conflict. All these evidence the ATs' nearly uniform rejection of the claims to any relevance of EU law. Deplorable as it may be, this attitude is all but surprising. As was discussed in Chapter 3 above, granted the fragmentation of international law, international courts and tribunals in practice act as paragons of their respective subsystems rather than agents of unity of international law. Thus, one could hardly expect the arbitral tribunals to renounce their jurisdiction altogether. Be as it may, the post-*Achmea* behaviour of the arbitral tribunals only confirms the CJEU's assessment of the IIL as a threat to the autonomy and unity of EU law.

10.4. EU Free Trade Agreements

10.4.1. EU FTAs

Under the term "Free Trade Agreements", one should understand "*trade agreement*[s] *including — in addition to the classical elements in such agreements, such as the reduction of tariff and non-tariff barriers to trade in goods and services — other aspects that are relevant, or even*

[909] Maria Fanou, *Intra-EU Claims as an Objection to Jurisdiction*, JusMundi Wikinote available at https://jusmundi.com/en/document/wiki/en-intra-eu-claims-as-an-objection-to-jurisdiction, accessed on 22 August 2022, fn 11 to para 6 listing 29 cases; see also Łukasz Kułaga, *Implementing 'Achmea'…*, p. 242.

[910] See the documents and jurisprudence discussed above, in particular Statement of Dissent of Professor Marcelo G. Kohen of 3 February 2020 in case *Theodoros Adamakopoulos and others* v. *Republic of Cyprus*, ICSID Case No. ARB/15/49; in particular para 48; see also Konstantina Georgaki, Thomas-Nektarios Papanastasiou, *The Impact of Achmea on Investor-State Arbitration under Intra-EU BITs: A Treaty Law Perspective*, "Polish Yearbook of International Law" vol 39 2019, pp. 217 ff. See also Julien Scheu, Petyo Nikolov, *Jurisdiction of Tribunals to Settle Intra-EU Investment Treaty Disputes*, "ICSID Review" vol. 36 1/2021, p. 12, correctly indicating that in non-ICSID arbitrations with their seat in the EU *Achmea* judgment is binding for the arbitral tribunals simply as a part of *lex fori*.

[911] Award of 16 June 2022 in case *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, discussed in more detail in section 10.5 below.

[912] Statement of Dissent of Professor Marcelo G. Kohen of 3 February 2020 in case *Theodoros Adamakopoulos and others* v. *Republic of Cyprus*, ICSID Case No. ARB/15/49, and separate opinion of Mr Lazar Tomov in Decision on the Respondent's Jurisdictional Objections of 30 September 2020 *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (I)*, ICSID Case No. ARB/17/34, paras. 255-258.

[913] See f.e. Award of 2 May 2018 in the case *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01 para 38; See also award of 19 May 2019 in the case *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, paras 23-26. Both cases concern ECT tribunals but may be found representative also for the cases on the basis of intra-EU BITs.

essential, to such trade",[914] including investment.[915] For the purpose of this study, however, the examination shall be limited to the dispute-settlement provisions. Before going further into detail, it should be reminded that despite the Lisbon Treaty providing a new impulse for the EU's external commercial policy by expressly bestowing the Union with exclusive competences in the sector of trade (Article 207 TFEU), the EU still lacks exclusive competence for the conclusion of the parts of agreements related i.a. to the dispute-settlement provisions and indirect investment.[916] Consequently, FTAs have to be concluded either as mixed agreements or split into two agreements: the trade agreement concluded solely by the EU and the investment protection agreement, concluded as a mixed agreement. As for now, the latter seems to be the default option.[917] At this moment, there are several FTAs in the ratification process, such as EU-Vietnam FTA[918] and EU-Singapore FTA.[919]

Nonetheless, it will be CETA that shall serve as the case study for further analysis of the interrelations between dispute settlement mechanisms in FTAs and EU law. To begin with, as of today, it is the only applicable FTA (even if only provisionally).[920] Furthermore, it is this agreement, the dispute settlement provisions of which were the subject of the CJEU Opinion;[921] treated by the Commission as a model FTA ("*golden standard*")[922] and which attracted (along with TTIP) most of the scholarly attention in the context of EU's FTAs.[923] Lastly, the provisions

[914] CJEU Opinion of 16 May 2017 in case 2/15 *EUSFTA*, ECLI:EU:C:2017:376, para 140.
[915] CJEU Opinion of 16 May 2017 in case 2/15 *EUSFTA*, ECLI:EU:C:2017:376, para 17.
[916] CJEU Opinion of 16 May 2017 in case 2/15 *EUSFTA*, ECLI:EU:C:2017:376.
[917] Draft Council conclusions on the negotiation and conclusion of EU trade agreements 8622/18 of 8 May 2018.
[918] Details available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement_en , accessed on 22 August 2022.
[919] Details available at: https://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/, accessed on 22 August 2022.
[920] Details available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement_en , accessed on 22 August 2022.
[921] CJEU Opinion of 30 April 2019 *CETA*, Opinion 1/17, ECLI:EU:C:2019:341. The earlier EUSFTA opinion concerned solely the distribution of competences with regard to the dispute-settlement provision.
[922] Joint statement Canada-EU Comprehensive Economic and Trade Agreement (CETA) of 29 February 2016, available at: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154330.pdf, accessed on 22 August 2022.
[923] To give just a few examples see f.e. Makane Moïse Mbengue, Stefanie Schacherer (eds.) *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)*, Springer 2019; more importantly it was CETA, not EU-Vietnam or EU- Singapore FTA that were used as the vehicles for analysing more general issues related to EU FTAs, see f.e. Kevin Ackhurst, Stephen Nattrass, Erin Brown, *CETA, the Investment Canada Act and SOEs: A Brave New World for Free Trade, "*ICSID Review - Foreign Investment Law Journal" vol 31 1/2016, pp. 58-76; Ernst-Ulrich Petersmann, *Democratic Legitimacy of the CETA and TTIP Agreements?*, in: Thilo Rensmann (ed.), *Mega-Regional Trade Agreements*, Springer 2017, pp. 37-59; Catherine Titi, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, "European Journal of International Law" vol 26 2015/3, pp. 639–661; Luca Pantaleo, *op. cit.*; Łukasz Kułaga, *Unia Europejska a zmiana paradygmatu w międzynarodowym prawie inwestycyjnym,* „Europejski Przegląd Sądowy" 4/2017, pp. 4-8.

of other FTAs in the ratification process do not differ that much from those contained in CETA; thus, it may serve as a representative example.[924]

From the point of view of this study, the most interesting provisions of CETA are contained in Chapter 8 (*Investment*), in particular Section F thereof (*Resolution of investment disputes between investor and states*) and, to a lesser extent, Sections C and D, as well as the Joint Interpretative Instrument. For the sake of brevity, instead of providing a detailed description of particular treaty provisions, I shall instead try to show in what way do they converge with and diverge from the solutions traditionally utilised in the IIAs discussed above.

This being said, it has to be stressed that despite containing many innovations,[925] this agreement preserves many of the essential features of the ISDS mechanism.[926] The notions of "investment" and "investor" are still conceived in broad terms.[927] The protection standards offered to investors include national treatment;[928] most favourite nation clause;[929] FET and full protection and security clauses;[930] prohibition of expropriation.[931] Furthermore, the CETA tribunal would have jurisdiction over claims related to the breach of these standards.[932] Concerning procedural issues, the investor may choose among ICSID, ICSID Additional Facility and UNCITRAL Arbitration Rules (or any other, if agreed between the parties).[933] Regarding the enforcement, the parties decided to treat CETA awards identically to the traditional arbitral awards.[934] Notably, the drafters did not choose to introduce the requirement of exhaustion of legal remedies. Thus, CETA retains the central feature of the ISDS, namely providing for a neutral forum devoid of any links to national legal systems.

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[924] See in particular Steffen Hindelang, Teoman M. Hagemeyer, *In Pursuit of an International Investment Court: Recently negotiated investment chapters in EU Comprehensive FTA in comparative perspective,* European Parliament 2017.
[925] Catherine Titi, *op. cit.*, pp. 639–661. Rather unsurprisingly, among authors seeing CETA as introducing major changes to the ISDS, its assessment is dependant mainly on their overall assessment vis-à-vis ISDS, see Piero Bernardini, *The European Union's Investment Court System,* "ASA Bulletin" vol 35 4/2017, pp. 812-836 and Lisa Diependaele, Ferdi De Ville, Sigrid Sterckx *Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System*, "New Political Economy" vol. 24 1/2019, pp. 37-61.
[926] Christian Tietje, Kevin Crow *The Reform of Investment Protection Rules in CETA, TTIP, and Other Recent EU FTAs: Convincing?*, in: Stefan Griller, Walter Obwexer, and Erich Vranes (eds.) *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations*, OUP Oxford et al. 2017, pp. 96-97.
[927] CETA Article 8.1. Though the former incorporates the investment requirements formulated in the *Salini*-test , such as commitment of the resources; duration; undertaking of risks etc.
[928] CETA Article 8.6.
[929] CETA Article 8.7.
[930] CETA Article 8.10.
[931] CETA Article 8.12.
[932] CETA Article 8.18.
[933] CETA Article 8.23.2.
[934] CETA Article 8.41.5 and 6.

The most prominent innovations apply to four aspects of this agreement,[935] namely: (i) naming *expressis verbis* the states' right to regulate in the public interest;[936] (ii) narrowing the protection standards;[937] (iii) creating mechanisms for rendering binding interpretations by the parties[938] and (iv) replacing ISDS with CETA-Tribunal. Of course, the list does not end here, as there are also other provisions addressing some criticism directed at the investment arbitration, such as fork-in-the-road clause (i.e. clause requiring the investor to choose between the litigation of its claims before national courts and arbitral tribunals)[939] or ATs' obligation to stay proceedings if an interconnected claim is pursued before another tribunal,[940] yet they all seem to relate to issues of lesser importance, at least from the standpoint of autonomy of EU law.

Of these changes, the establishment of the CETA- Tribunal seems to be one of the most significant.[941] Instead of being heard by parties-appointed arbitrators, the cases shall be adjudicated by randomly selected *divisions*[942] consisting of three Members,[943] chosen from among the pool of adjudicators nominated by the CETA Joint Committee, composed in equal proportions of nationals of EU, Canada and third states.[944] Members of the divisions having qualifications for appointment for top judicial posts or enjoying *recognised competences*[945] would be selected for a five-year term of office.[946] Members of the CETA Tribunal should be remunerated on an hourly basis unless decided otherwise by the CETA Joint Committee.[947] Besides, they should be paid a constant *retainer fee*.[948] The Agreement, however, does foresee the possibility of replacing it with a fixed salary.[949] They would also be subject to specific ethical standards.[950] Additionally, CETA envisages introducing the Appellate Tribunal, functioning similarly to the CETA-Tribunal[951] and endowed with broad review powers, allowing it, i.a., to overturn awards because of errors in law and manifest errors in the

[935] Łukasz Kułaga, *Unia Europejska a zmiana paradygmatu w międzynarodowym prawie inwestycyjnym,* „Europejski Przegląd Sądowy" 2017/4, pp. 6-7.
[936] CETA Article 8.9.
[937] See particularly narrowing of the FET-clause in CETA Article 8.10 (2).
[938] CETA Article 8.31.3.
[939] CETA Article 8.22.f and g.
[940] CETA Article 8.24.
[941] Luca Pantaleo, *op. cit.*, p 70 ff.
[942] CETA Article 8.27.7.
[943] CETA Article 8.27.6.
[944] CETA Article 8.27.2.
[945] CETA Article 8.27.4.
[946] CETA Article 8.27.5.
[947] CETA Article 8.27.14.
[948] CETA Article 8.27.12.
[949] CETA Article 8.27.15.
[950] CETA Article 8.30.
[951] CETA Article 8.28.3 ff.

appreciation of facts, including interpretation of domestic law.[952] These arrangements, however, should be viewed as provisory since the parties did undertake to do their best to bring about the establishment of the *Multilateral Investment Court.*[953] Interesting as they may be, these innovations obviously could not alter the fact that the CETA tribunal remains a body external to the EU, allowing for effective bypassing of the judicial system just as its more traditional counterparts foreseen in the Treaties.

More importantly, CETA contains also some provisions reflecting specifically its nature as an agreement between the EU and its Member States acting jointly and an external partner. *Firstly*, it introduced a tailored mechanism for determining the proper respondent. In accordance therewith, only the EU has the power to indicate who should be sued by the investor for the measures indicated in the notice of arbitration.[954] The investor has the right to determine the respondent based on the actions complained of only if the EU failed to provide an answer within 50 days of filing the notice.[955] An AT would be bound by such a determination.[956] Further, CETA expressly mandates that an interpretation of the domestic law of a party conducted by the tribunal (examined as a part of the factual background) has to follow established interpretation on the one hand and should not be binding upon any authorities of each party on the other.[957] The legal effect of CETA-Tribunal's awards was further limited by the express exclusion of non-pecuniary remedies[958] and narrowing the legal relevance of the awards to the parties and subject matter of particular disputes.[959] And these were, arguably, the changes that eventually allowed to win the CJEU's acceptance for CETA in its Opinion 1/17.

10.4.2. CJEU CETA Opinion and its assessment

The CJEU scrutinised the conformity of the CETA dispute settlement mechanism with the principle of autonomy of EU law in its opinion 1/17. This opinion was issued as a result of Article 218 proceedings initiated by Belgium at the request of the Wallon region. Before commencing the analysis of Opinion 1/17, a clarification should be made. The study of the CJEU *CETA* opinion shall thematise only the court's treatment of the intersection of the dispute settlement mechanism's itself and the principle of autonomy, rather than the parts of the opinion

[952] CETA Article 8.28.2.
[953] CETA Article 8.29.
[954] CETA Article 8.21.3.
[955] CETA Article 8.21.4.
[956] CETA Article 8.21.7.
[957] CETA Article 8.31.2.
[958] CETA Article 8.31.1.
[959] CETA Article 8.41.1.

referring to the agreement's conformity with the Charter of Fundamental Rights or the principle of non-discrimination.[960]

This being said, it is possible to commence the analysis of the CJEU's opinion. On the outset, the CJEU assessed the provisions introduced to address the issue of the determination of the right respondent. The CJEU observed that, contrary to the solutions contained in the draft agreement that was the subject of Opinion 2/13, the CETA Tribunal would not be competent to decide on the proper respondent, which sufficed to insulate the EU legal order from unwanted external influence in this regard.[961] Thus, one could assume that the CETA model for the prior involvement, involving compulsory jurisdiction of the CJEU and the binding character of its decisions, would be sufficient to address the doubts expressed in Opinion 2/13. This conclusion seems to be further confirmed by the succinctness of the CJEU's analysis.

Turning to the analysis of the dispute settlement mechanism, the Luxembourg Court began by setting in unequivocal terms that an external dispute settlement body lacking powers to interpret EU law and being devoid of any impact on the internal competences of EU institutions is a precondition to submitting the EU to any international dispute settlement mechanism whatsoever.[962] Building upon these statements, the CJEU observed that Article 8.31.1 CETA limited the law to be applied by the CETA Tribunal to CETA and international law applicable between the Parties, i.e. EU with its Member States on the one hand and Canada on the other. This was further strengthened by Article 8.31.2 expressly excluding the determination of the legality of measures taken by each of the Parties under their domestic law, thus confining the CETA Tribunal's jurisdiction solely to the CETA Agreement.[963] In fact, Article 8.31.2, excluding the *de iure* interpretation of EU law, was indicated as the primary point distinguishing CETA from intra-EU BITs.[964] Nonetheless, ignoring the problem of *de facto* interpretation of EU law required the adoption of a formalistic perspective,[965] hardly reconcilable with the earlier

[960] For the reasonableness of this approach see Maria Fanou, *The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future,* "Cambridge Yearbook of European Legal Studies" vol 22 2020, p.119.
[961] CJEU Opinion of 30 April 2019 *CETA*, Opinion 1/17, ECLI:EU:C:2019:341, para 132. On the lack of tribunals' powers to determine the proper respondent, see Luca Pantaleo, *op. cit.*, pp. 108-109.
[962] CJEU Opinion of 30 April 2019 *CETA*, Opinion 1/17, ECLI:EU:C:2019:341, para 118.
[963] *Ibid*., paras 121-122.
[964] François Biltgen, *The concept of autonomy of EU law: from Opinion 2/13 (accession to the ECHR) to Achmea and Opinion 1/17,* in: European Central Bank, *Building Bridges: central banking law in an interconnected world, ECB Legal Conference 2019,* European Central Bank 2019, p. 87; see also Panos Koutrakos, *op. cit.*, p. 97, with the latter author recognizing that the CJEU made a "leap of faith" while taking the position that CETA tribunal will not interpret EU law. See also Nikos Lavranos, *CJEU "Opinion 1/17": Keeping International Investment Law and EU Law Strictly Apart,* "European Investment Law and Arbitration Review" vol 4 1/2019, p. 243.
[965] Cristina Contartese, *Achmea and Opinion 1/17: Why do intra and extra-EU bilateral investment treaties impact differently on the EU legal order?* in: European Central Bank, *The new challenges raised by investment arbitration*

Achmea and *ECHR* decisions. In any case, despite CETA being an EU agreement, the tribunal's power to interpret it was not at all seen as problematic.[966]

It was this formal exclusion of jurisdiction over EU law matters that served as the CJEU's main argument to differentiate between the case at hand and Opinion 1/09[967] and, more importantly, the *Achmea* judgment. In doing so, the CJEU relied on two arguments: firstly, it merely stated that, unlike the CETA Tribunal, BIT Tribunals could have given rulings in disputes that might have concerned the interpretation or application of EU law.[968] This should be understood in the context of the further parts of this section of the opinion where the CJEU emphasised the lack of the binding character of CETA Tribunals' interpretation vis-à-vis the Parties[969] and the fact that the domestic law of the Parties (including EU law) understood in accordance with the prevailing interpretation of the parties' domestic organs, would be taken into account only as a matter of fact.[970] This would also apply to the CETA Appellate Tribunal, whereby the CJEU stated *expressis verbis* that examining manifest errors in appreciation of domestic law would not count as an *interpretation* of EU law.[971] Secondly, the CJEU indicated that the *Achmea* judgment was based upon the principle of mutual trust, applicable within the EU but not in the external relations, as in the case of CETA, where the principle of reciprocity replaces it.[972] This, in turn, should be read in a broader context of the Court emphasising the "reciprocal character" of the agreement,[973] with these features justifying the lack of mechanisms for interaction between the CJEU and CETA Tribunal.[974] Given the above, one could be tempted to understand the CJEU's action as a sort of return to its earlier doctrine of imprimatur for "externalised" adjudication mechanisms discussed in Chapter 7 above.

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for the EU legal order, ECB Legal Working Paper Series 19/2019, p. 12. In contrast, Luca Pantaleo, *op. cit.*, p. 152 who, while observing despite admitting the existence of potentially serious consequences of the *de facto* interpretation, eventually concludes that such a view would have excluded the EU's participation in any dispute settlement mechanism.

[966] CJEU Opinion of 30 April 2019 *CETA*, Opinion 1/17, ECLI:EU:C:2019:341, para 136. This laxity seems to be in sharp contrast with the later CJEU judgment of 2 September 2021, *Komstroy*, case C-741/19, ECLI:EU:C:2021:655, discussed in section 10.5.2 below.

[967] CJEU Opinion of 30 April 2019 *CETA*, Opinion 1/17, ECLI:EU:C:2019:341, paras 123-124.

[968] *Ibid*., para 126.

[969] *Ibid*., para 130.

[970] *Ibid*., para 131. Some commentators went so far as to declare that the obligation to follow the prevailing interpretation effectively eliminated the need to interpret EU law, see François Biltgen, *The concept of autonomy of EU law: from Opinion 2/13 (accession to the ECHR) to Achmea and Opinion 1/17,* Building Bridges: central banking law in an interconnected world, ECB Legal Conference 2019, European Central Bank 2019, p. 87.

[971] CJEU Opinion of 30 April 2019 *CETA*, Opinion 1/17, ECLI:EU:C:2019:341, para 133

[972] *Ibid*., paras 127-128. Interestingly the Court expanded the principle so as to encompass certain basic features of the EU judicial system, such as right to effective remedy.

[973] *Ibid*., paras 109, 117.

[974] Panos Koutrakos, *op. cit.*, p. 96.

Despite this seemingly dogmatic attitude vis-à-vis CETA, the CJEU also addressed the potential *indirect* influence of an external body's decisions on the EU legal order. To be more precise, the CJEU analysed the possibility of challenging EU policies through excessive compensations awarded by the arbitral tribunal.[975] Fortunately for CETA, the CJEU stated that the agreement's substantive provisions safeguarding the Parties' competence to follow regulatory measures pursuing public interest[976] or underlining their right to regulate[977] resulted in the tribunals not having jurisdiction to adjudicate upon these matters.[978] This removed the danger of imposing undue limitations on the EU's regulatory freedom. Nonetheless, it can be reasonably held that by analysing this aspect for the first time, the CJEU considerably broadened its scope of analysis to encompass also the factual impact of a dispute-settlement mechanism on the EU legal system.

Many aspects of the CJEU's analysis of the CETA opinion analysed above, particularly when compared to the *Achmea* judgment, seem doubtful, to say the least. As one of the commentators remarked, distinguishing between both cases required "considerable legal gymnastics".[979]

To begin with, the distinction between the matters of law and matters of fact definitely playing a prominent role in the *CETA* opinion is not convincing. As rightly observed by Lang, it played little if any role in the CJEU's assessment in *Achmea* and was highly formalistic.[980] This is even more so as it cannot be excluded that the CETA tribunal, while interpreting international law, would refer to principles common to both EU and international law, thus *applying* EU law also according to these narrow, formalistic criteria.[981] In a similar vein, provisions mandating the arbitral tribunals to follow the prevalent interpretation of EU law do not suffice to address the problems of bypassing the EU law. On the one hand, CETA organs would be empowered to choose by themselves the interpretation of EU law they see fit and, on the other hand, would not make up for the lack of the CETA Tribunal's preliminary reference powers.[982] This problem

[975] CJEU Opinion of 30 April 2019 *CETA*, Opinion 1/17, ECLI:EU:C:2019:341, paras 148-150
[976] *Ibid*., paras 152-153.
[977] *Ibid*., paras 154-155.
[978] *Ibid*., paras 159-160.
[979] Nikos Lavranos, *CJEU "Opinion 1/17...*, pp. 240, 241.
[980] Andrej Lang, *op. cit.*, pp. 17-18, 43; Joanna Lam, Paweł Marcisz, *op.cit.*, p. 38 see also J. Odermatt, *The Principle of Autonomy…*, p. 302 who rightly indicates that bypassing the autonomy problem by qualifying EU law as a simple fact was excluded already in the Opinion 2/13, as discussed above. But see Maria Fanou, *The CETA ICS and the Autonomy of the EU Legal Order…*, pp.118-119, 123-124.
[981] Nikos Lavranos, *CJEU "Opinion 1/17...*, p. 245. To the contrary see Magdalena Słok-Wódkowska, Michał Wiącek, *op. cit.*, pp. 38-39.
[982] Leszek Bosek, Grzegorz Żmij, *W sprawie zgodności CETA z prawem Unii Europejskiej i Konstytucją RP w świetle opinii 1/17 Trybunału Sprawiedliwości z 30.04.2019 r.*, „Europejski Przegląd Sądowy" 7/2020, pp. 11-12. It has to be stressed that this competence to choose from among possible interpretations of EU law was deemed to encroach upon EU law's autonomy in its *ECHR* Opinion, see CJEU Opinion of 18 December 2014, *European Convention on Human Rights*, Opinion 2/13, ECLI:EU:C:2014:2454, paras 224, 230.

would be even more visible in the context of the CETA Appeals Tribunal, a body competent to assess the correctness of the interpretation of EU law conducted by the arbitral tribunals (even if as a matter of *fact*)[983] without the obligation to follow the prevailing interpretation of the EU bodies.[984] In any case, the CJEU's analysis did not seriously address the issue of the CETA dispute settlement mechanism allowing the removal of certain disputes from the jurisdiction of EU courts.[985]

Further, while stating that the substantive provisions sufficiently insulated the legislator's freedom from the scrutiny of the tribunals, the CJEU overlooked the fact that not only is it disputable whether these provisions, in reality, constituted an improvement in relation to existing standards,[986] but, equally, these tribunals would be the ones to decide on the contours of these carve-outs.[987] Trying to present the CETA Tribunal's rulings as non-binding seems to be equally misguided. After all, the payment orders will also bind EU institutions and the Member States by being New York Convention awards (Art. 8.41(5) CETA).[988] They will be enforceable against them before municipal courts in various jurisdictions.[989] Consequently, apparent analogies to the WTO system coming under the umbrella of "reciprocity" seem to overlook fundamental features of the ISDS mechanism, i.e. its accessibility to individuals and the binding and enforceable character of judicial decisions.[990] Lastly, even adopting *ad*

[983] Laurens Ankersmit, *Judging International Dispute Settlement: From the Investment Court System to the Aarhus Convention's Compliance Committee,* Amsterdam Centre for European Law and Governance Research Paper No. 2017-05, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080988, accessed on 22 August 2022, p. 23; Nikos Lavranos, *CJEU "Opinion 1/17...*, p.241.
[984] Nikos Lavranos, *CJEU "Opinion 1/17...*, p. 247.
[985] Opinion CJEU Opinion of 16 May 2017 in case 2/15 *EUSFTA,* ECLI:EU:C:2017:376, Para 292; see also Similarly Maria Fanou, *The CETA ICS and the Autonomy of the EU Legal Order...*, pp.119, 125-126; Cristina Contartese, Mads Andenas, *EU autonomy and investor-state dispute settlement under inter se agreements between EU Member States: Achmea*, "Common Market Law Review" vol. 56 1/2019, pp. 159, 187.
[986] Christian Tietje, Kevin Crow *op. cit.*, pp. 96-97.
[987] Nikos Lavranos, *CJEU "Opinion 1/17...*, pp. 250-251.
[988] At this point it may be noted that it cannot be excluded that certain external courts would not necessarily treat these awards as arbitral awards within the meaning of the NYC, see Luca Pantaleo, *op. cit.*, p. 134.
[989] Laurens Ankersmit, *Judging International Dispute Settlement…*, p. 23. One could contemplate in how far this may be reconciled with the CJEU's long-standing jurisprudence according to which the decisions of adjudicating bodies are applicable within the EU legal order only insofar as their agreements, see Luca Pantaleo, *op. cit.*, p. 136.
[990] Steffen Hindelang, *Conceptualisation and Application of the Principle of Autonomy…*, p. 12; see also also Christina Eckes, *op. cit.*; Laurens Ankersmit, *Judging International Dispute Settlement…*, p. 23, explaining why the ECHR demand different treatment than the WTO, but see Cristina Contartese, Mads Andenas, *op. cit.*, pp. 159, 185. Interestingly, despite its reliance on the *reciprocity* concept, utilized earlier in the WTO jurisprudence, the CJEU made it clear that it is mindful of the differences between the enforcement of WTO and CETA awards, see CJEU Opinion of 30 April 2019 *CETA*, Opinion 1/17, ECLI:EU:C:2019:341, para 146.

arguendo the CJEU's view on the CETA tribunals' inability to interpret EU law and *de facto* influence EU legal order, these tribunals would still allow bypassing EU courts.[991]

10.4.3. Preliminary conclusions

Regardless of the above doubts as to the correctness of the CJEU's reasoning, one is compelled to accept that in its *CETA* opinion, the CJEU further developed its autonomy-related jurisprudence. To begin with, it made clear that a prior involvement mechanism granting the EU full control over the determination of Respondent would suffice to address the problems related to the apportionment of the responsibility. Additionaly, it went even further than in its earlier *Achmea* and *ECHR* decisions by indicating that a dispute settlement mechanism could *indirectly* endanger the autonomy of EU law solely by practically restricting the field of manoeuvre of the EU bodies. On the other hand, the CJEU took a seemingly relaxed its stance vis-à-vis the application of EU law by external bodies, satisfying itself with a merely formal exclusion of the applicability of EU law. This apparent surge in the CJEU's openness was not unconditional, however: In order not to contradict the EU law, an external mechanism should not be capable of producing any legal effects within the EU. In a similar vein, the Court found itself satisfied by the procedural tools allowing it to bypass the issue of selecting the right respondent.

10.5. The Energy Charter Treaty

10.5.1. The Energy Charter Treaty

ECT is a multilateral treaty containing provisions on both, trade and investment protection in the energy sector signed at Lisbon on 17 December 1994.[992] Its main goal was to provide legal security for the Western investors willing to commit resources to the exploitation of natural resources of the countries of the former Eastern Block. The European Commission is often regarded as the driving force behind this treaty.[993] As discussed in section 10.1 above, the ECT contains protection standards largely similar to the ones contained in the BITs and, unlike

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[991] Cristina Contartese, *Achmea and Opinion 1/17…,* p. 18; Laurens Ankersmit, *Judging International Dispute Settlement…*, p. 17; Steffen Hindelang, *Conceptualisation and Application of the Principle of Autonomy…*, pp. 15-16.

[992] Energy Charter Treaty of 17 December 1994, UNTS vol. 2080, p. 95.

[993] For an analysis of the context of the conclusion of the ECT see e.g. Andrew Seck, *Investing in the Former Soviet Union's Oil Industry: The Energy Charter Treaty and its Implications for Mitigating Polotical Risk*, in: Thomas Wälde (ed.) *The Energy Charter Treaty: An East-West Gateway for Investment and Trade*, Kluwer Aalphen an den Rijn 1996, pp. 110-133. The Commission itself has consistently presented the treaty in its submissions before the arbitral tribunals as its *brainchild*, see e.g. Decision on Jurisdiction and Liability of 30 Novemeber 2012 in case *Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19, para 4.60.

CETA, does not contain any meaningful provisions allowing for balancing of the investment protection with the public interest.

Thus, the main difference between ECT and the intra-EU BITs consists in it being a multilateral agreement concluded between the EU and its Member States and third parties.[994] Arguably, these circumstances already make the conformity of ECT with EU law even less likely than in case of intra-EU BITs. This pertains particularly to the mixed character of the agreement. As discussed particularly in *CETA* and *ECHR* opinions, the autonomy of EU law mandates the introduction of provisions allowing the EU to determine the proper respondent. And ECT does not contain such a mechanism. The competence of the EU to determine the right respondent was stipulated only in a unitary declaration of the EU submitted to the Secretariat of the Energy Charter.[995] Needless to say, such a regulation is not binding for any external parties, including arbitral tribunals and the suing investors, and should be viewed solely as a mutual commitment between the EU Member States[996]. In any case, concluding a mixed agreement cannot be viewed as the EU's *implicit* blessing for the utilization of its dispute settlement mechanism in intra-EU relations[997]. At this juncture, it may only be highlighted that there are even reasonable doubts as to whether the ECT should have been concluded as a mixed agreement or, at least, whether the EU's competences have not expanded so as to completely cover the subject matter thereof.[998] In light of the above the insistence of some authors to view the EU's participation as its acceptance of the Charter's intra-EU application[999] has more to do with wishful thinking than anything else. In any case, it has to be stressed that these controversies are all but fictional granted that in addition to its Member States, the EU also acted as a respondent in the ECT proceedings.[1000] Thus, it is all but surprising that the potential for the incompatibility between the ECT and the EU law was observed well before the *Achmea* judgment, as evidenced, among

[994] According to information available at the ECT Secretary webpage there are currently 53 signatories and contracting parties to the ECT, see https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties/, accessed on 22 August 2022.
[995] Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26.3.b.ii of the Energy Charter Treaty, OJ EU L69/115.
[996] Raphael Oen, *op. cit.*, p. 98.
[997] See in particular discussion of the *Mox Plant* case, WTO Law and Article 33 of the ECtHR; Opinions 1/92 and 1/91 conducted above.
[998] Raphael Oen, *op. cit.*, p. 26. See also Richard Happ, Jan A. Bischoff, *Role and Responsibility of the European Union under the Energy Charter Treaty*, in: Graham Coop, *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, JURIS New York 2011, p. 166.
[999] According to a more subtle version of this argument by concluding a mixed agreement and failing to provide a disconnection clause the EU expressed its willingness to apply the ECT also as between the Member States see e.g. in Richard Happ, Jan A. Bischoff, *op. cit.*, p. 178.
[1000] See case *Nord Stream 2 AG v. European Union*, PCA Case No. 2020-07, files available at https://www.italaw.com/cases/8187, accessed on 22 August 2022.

others, by the unsuccessful interventions of the Commission in the pre-*Achmea* proceedings, most notably the *Electrabel* and *AES Summit* cases. Rather unsurprisingly, this conflict potential did not escape the attention of legal scholarship.[1001]

10.5.2. CJEU *Komstroy* judgment

The applicability of the *Achmea* judgment to ECT was a matter of contention. On the one hand, one had the EU institutions and the vast majority of the Member States, backed by the EU law scholars, recognising the importance of the *Achmea* judgment for the ECT arbitration.[1002] On the other hand, one had the arbitral tribunals backed by their respective expert community, questioning the applicability of the aforesaid *dictum* to the ECT.[1003] While one could deliberate whether they were right in doing so from the point of view of public international law,[1004] what

[1001] See e.g. Angelos Dimopoulos, *EU Foreign Investment Law*, OUP Oxford 2011.p. 332, see also Tomáš Fecák, who sees that the intra-EU application of the ECT puts forward essentially the same problems as intra-EU BITs, yet doubts the likelihood of questioning the applicability of the ECT for the political reasons, Tomáš Fecák, *op. cit.*, p. 522.

[1002] See Cristina Contartese, Mads Andenas, *op. cit.*, pp. 159, 183; see also Julien Scheu, Petyo Nikolov, *The incompatibility of intra-EU investment treaty arbitration with European Union Law – assessing the scope of the ECJ's Achmea judgment*, "German Yearbook of International Law" vol. 62 2019, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3545811, accessed on 22 August 2022, pp 13-22; Joanna Lam, Paweł Marcisz, *op. cit.*, p. 39. See also the position of the Member States' courts, suspending proceedings concerning ECT awards in the anticipation of the CJEU's decision (e.g. Damien Charlotin, *Spain Secures Stay of Enforcement in Energy Charter Treaty Award in Swedish Court*, 18 May 2018, https://www.iareporter.com/articles/spain-secures-stay-of-enforcement-of-energy-charter-treaty-award-in-swedish-court/, accessed on 22 August 2022; see also the preliminary reference made by the Stockholm Court of Appeals in case C-155/21 (the reference was eventually withdrawn by the Swedish court in the aftermath of the *Komstroy* judgment, see infra); CJEU order of 8 December 2021, *Athena*, case C-155/21, ECLI:EU:C:2021:1032.

[1003] See supra for the general rejection of the *Achmea* judgment by the arbitral tribunals. The reasoning behind could have taken many forms. Some tribunals insisted that the multilateral character of the ECT, as opposed to the bilateral nature of BITs, rendered it impossible to apply findings from *Achmea* to the ECT see Award of 16 May 2018 in case *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, paras 678-683. *Vattenfall* tribunal added that the ECT should prevail over EU law as *lex specialis* see Decision of 31 August 2018 on the *Achmea* issue in the case *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, para 217, while *Eskosol* tribunal underlined that given the text of the ECT grants the tribunals with jurisdiction to hear intra-EU cases, their competence may not be comprised by later agreements as to its interpretation as between some parties to the Treaty, Decision of 7 May 2019 on the intra EU jurisdiction objection in the case *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, paras 223 ff.

[1004] Of the arguments raised by various arbitral tribunals the one pertaining to limitations to state's capacity to modify multilateral treaties only as between certain parties seems to carry the most weight, in particular granted that Article 16 ECT may be read as precluding an inter-se modification of the treaty: *Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty, (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,where any such provision is more favourable to the Investor or Investment*. This reading seems to find support see e.g. by Eirik Bjorge, *op. cit.*, p. 78, see also.Matthew Happold, Michael De Boeck, *The European Union and the Energy Charter Treaty: What Next after Achmea?*, in: Mads Andenas, Matthew Happold, Luca Pantaleo (eds.) *The European Union as an actor in International Economic Law*, Springer/TMC Asser Press 2019, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3261590, accessed on 22 August 2022, p. 16. But see contrary conclusions in Decision on Jurisdiction and Liability of 30 Novemeber 2012 in case *Electrabel S.A. v.*

matters for the purpose of this dissertation is that they clearly ignored EU law and the CJEU's decisions. Eventually, the CJEU *Komstroy* judgment confirmed the correctness of the first position.

The CJEU rendered its *Komstroy* judgment on 2 September 2021.[1005] The proceedings before the CJEU concerned a preliminary reference from the Paris Court of Appeals. The reference was made in the context of post-arbitration proceedings pertaining to an arbitral award rendered by a Paris-seated tribunal in an investment dispute between a Ukrainian investor and the Republic of Moldova. Thus, it is clear that the underlying investment dispute neither concerned matters covered by substantive EU law nor pertained to the EU nationals or EU Member States. Nonetheless, the French court asked questions related to the interpretation of the concept of *investment*, fundamental for determining the ECT's scope of protection (see section 10.1 above). It was only the CJEU, acting following to the observations made by *several Member States* that decided to rule on the compatibility of the ECT-ISDS clause with EU law as a preliminary matter.[1006]

Granted the peculiarities of this case, it is all but surprising that the CJEU decided to provide reasons for asserting its jurisdiction. It began by recollecting its earlier case law stressing the existence of the CJEU's jurisdiction with regard to the EU's international agreements, including parties other than the EU (paras 23-24). Furthermore, by recollecting earlier *Hermes/Dior* jurisprudence, the CJEU reaffirmed its competence to opine on provisions that could apply in both intra- and extra-EU contexts (para 29).[1007] As already mentioned above, it explained its enquiry about the ECT ISDS clause with a necessity to decide it as a preliminary issue (para 40). Interestingly, unlike AG Szpunar, the CJEU did not see it necessary to provide reasons for opting to interpret a treaty foreseeing its own dispute-settlement bodies external to the EU.[1008]

Republic of Hungary, ICSID Case No. ARB/07/19, para 4.191, *nota bene* relied on in the Award of 16 June 2022 in case *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain,* SCC Case No. V2016/135, para 467 declining jurisdiction due to the conflict with EU law. If to agree that Article 16 ECT precluded the application of the principle of the primacy of EU law, it would fly in the face of the principle of autonomy of EU law, thus rendering the whole ECT incompatible with EU law, see Joanna Lam, Paweł Marcisz, *op.cit.*, p. 39. Regardless thereof, if to agree that the ECT ISDS clause could be treated merely as a bundle of bilateral obligations the aforesaid provisions would not preclude their inter-se modifications by the interested parties, see Julien Scheu, Petyo Nikolov, *Jurisdiction of Tribunals…*, p. 8.

[1005] CJEU judgment of 2 September 2021, *Komstroy,* case C-741/19, ECLI:EU:C:2021:655.

[1006] *Ibid.*, para 40.

[1007] Similar reasoning may be found in Opinion of AG Szpunar of 3 March 2021, *Komstroy,* case C-741/19, ECLI:EU:C:2021:164, paras 28-38.

[1008] *Ibid.*, para 40.

Having done so, the CJEU resorted to the analysis of ECT ISDS clause. In paras 42 to 46, it reaffirmed its *Achmea* dictum, basically by identifying the autonomy with preservation of the EU law's specific features and highlighting the role of its procedural collorary, namely the CJEU's exclusive jurisdiction warranting the procedural dialogue with the Member States' courts. The CJEU began measuring the ECT against this standard by observing that the ATs apply and interpret EU law already by applying ECT, being itself part of EU law (paras 48-50). Furthermore, the CJEU stressed that exactly as in the *Achmea* case, the ECT tribunals are not a part of the EU judiciary (paras 51-53), and the final and binding arbitral awards are subject only to a very limited review before the Member States' courts (paras 55-57).[1009] Consequently, the jurisdiction of such arbitral tribunals would lead to a circumvention of the EU courts and, thus, violate the autonomy principle (paras 59-60). In order to limit the scope of this judgment, the CJEU underlined that while the interpretation of the EU law by the external bodies would be, as a matter of principle, acceptable (para 61), the provisions of ECT replacing EU courts with the investment tribunals in the relationships between themselves unduly tampered with the distribution of competences foreseen in the Treaties (paras 62-64).[1010] Consequently, the CJEU stated that the principle of autonomy precludes the application of the ECT ISDS clause between the Member States. (para 65). Having dedicated the bulk of its reasoning to this *preliminary* issue, the CJEU in paras 66 to 85 interpreted the concept of *investment* in a rather narrow fashion, thus contradicting the earlier tribunal's findings. Importantly, however, the answer given to the French court was limited to the definition of the investment concept.

Bearing in mind the specific features of the IIL, one would have to wait for the reaction of other actors in order to fully appreciate all the effects of the CJEU *Komstroy* judgment. This pertains particularly to the reaction of arbitral tribunals, EU institutions, Member States and their courts regarding the judgment. As there are little chances of the CJEU elaborating further on its understanding of the *Komstroy* judgment in the near future[1011], there would be good reasons to expect that the situation would largely remind the one in the *Achmea* case, with the EU and

[1009] See also *Ibid.*, paras 73 ff.

[1010] The concept of the ECT as a bundle of bilateral obligations was relied on also Opinion of AG Szpunar of 3 March 2021, *Komstroy*, case C-741/19, ECLI:EU:C:2021:164, paras 40-41. Unfortunately, unlike AG Szpunar, the CJEU resigned from conducting an in-depth comparison with the earlier CETA opinion (conducted in Opinion of AG Szpunar of 3 March 2021, *Komstroy*, case C-741/19, ECLI:EU:C:2021:164, paras 84 ff.).

[1011] See in particular the CJEU refusing to give a response on merits in Article 218 TFUE opinion due to the procedural reasons. The opinion related proceedings originating from the request of the Belgian government directly thematising the conformity of ECT with principle of autonomy of EU law, see CJEU Opinion of 16 June 2022, *Energy Charter Treaty*, Opinion 1/20 (with a strong reaffirmation of the *Komstroy* findings in para 47); see also preliminary reference made by the Stockholm Court of Appeals in case C-155/21 Athena, withdrawn in the immediate aftermath of the Komstroy judgment due to matter being sufficiently clarified, see CJEU order of 8 December 2021, *Athena*, case C-155/21, ECLI:EU:C:2021:1032.

Member States' institutions denying the legal effects of the awards[1012] and arbitral tribunals trying to continue doing business as usual. Nonetheless, there are certain indicia for the changing of the tide, be it only due to many arbitrations having their seat in Stockholm, i.e. within the EU which results in Swedish (i.e. EU Member State's) courts having jurisdiction to hear applications directed agains such awards.[1013] Nonetheless, due to the practice in this respectbeing still in flux, at this place, I shall limit myself only to highlighting the most important takeaways from the *Komstroy* judgment itself.

To begin with, as foreseeable, the CJEU adopted a wide reading of *Achmea*, also covering the ECT ISDS clause. In fact, the CJEU concentrated on exactly the same features of the mechanism as in the earlier judgment. This is even more visible, granted that earlier CJEU judgment, invoked 14 times, was definitely *the* authority relied on by the Luxembourg court. Secondly, the CJEU limited its findings only to the intra-EU application of ECT, leaving open the conformity with the autonomy principle of its application in relation to third states. In doing so, it followed its earlier jurisprudence, namely the *CETA* opinion, recognizing the ISDS clause in an agreement with Canada and the *Atel* judgment, recognizing ECT obligations vis-à-vis a Swiss company as a ground for non-compliance with EU law in accordance with Article 351 TFEU.[1014] It stays true even if to find the CJEU's rationale for reaching such a decision somewhat murky and less convincing than in the case of AG Szpunar's opinion. Consequently, the best we can root for is that this issue would be decided by the CJEU in the proceedings concerning Opinion 1/20.

Thus, att this place, it may only be remarked that there are serious arguments militating against the conformity of the ECT as applied externally with the EU law. Firstly, as shall be discussed in more detail in the section concerning extra-EU BITs below, the application of the ECT in relations with the third states brings about largely the same challenges to the autonomy of EU

[1012] See in particular the Swedish court's decision to withdraw the preliminary reference in light of the *Komstroy* judgment discussed in the footnote above.
[1013] See Award of 16 June 2022 in case *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, where the tribunal decided to decline jurisdiction by taking into account the jurisdictional developments before the CJEU, including the *Komstroy* judgment. In doing so, in addition to developing new arguments under public international law, the tribunal has also underscored the importance of the applicability of EU primacy rules *qua* Swedish law being the *lex fori* (see e.g. paras 163-169, 475. But see ICSID awards to the contrary, e.g. Decision on Jurisdiction, Liability and Principles of Quantum of 11 February 2022 in case *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27 or Decision on the Kingdom of Spain's Request for Reconsideration of 10 January 2022.in case *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/24, where the ICSID panel declined to reconsider its decision on the EU objection in light of the *Komstroy* judgment due to having already rejected the reasoning contained therein.
[1014] CJEU Judgement of 15 September 2011, *Atel*, case C-264/09, ECLI:EU:C:2011:580 discussed in the section 10.6. below.

law as the intra-EU application of the ECT. A recent award where an arbitral tribunal thoroughly analysed issues of EU law as intimate as state aid may serve as a perfect example here[1015]. Secondly, the lack of a foreseeable mechanism for determining the proper Respondent (such as prior involvement or co-respondent mechanism) should raise the red flags. After all, this issue was the proverbial stumbling block in opinion 2/13 and was meticulously scrutinized by the CJEU in the *CETA* opinion (see section 9.3. and 10.4.2. above). In any case, it has to be underlined that the mere fact of a mechanism being covered by Article 351.1 TFUE exception says nothing of it being in conformity with EU law[1016].

Thirdly, the fact that the judgment was rendered in a case where the underlying arbitral proceedings did not involve any issue of EU law whatsoever made it even more explicit that the non-conformity of the ISDS clauses with EU law is completely independent of the circumstances of a given case.

Fourthly, the CJEU decided that the interpretation of the ECT as such by the investment tribunals would suffice to establish them interpreting or applying EU law and, thus, endangering the principle of autonomy of EU law. This conclusion, while logically correct (after all, ECT is also an EU agreement), not only detracts from the CJEU's earlier case law but also seems to have serious negative consequences. In earlier case law, the dangers of interpreting EU law by external adjudicating bodies were related either to situations concerning explicit jurisdiction to interpret EU law (Opinion 1/09)[1017] or to issues of the possibility of accidental application of provisions of EU law (Opinion 2/13; *Achmea* judgment).[1018] Arguably, in the *CETA* case the CJEU went even further by stating explicitly that an external tribunal's power to interpret CETA (an EU agreement) as such was not problematic at all.[1019] In fact, if applied consequently, the *Komstroy* dictum would mean nothing less than accepting that each and every international agreement concluded by the EU and containing a treaty-interpreting body should be viewed as posing a danger to the autonomy of EU law by its very existence, unless demonstrated that it does not have any potential to affect the balance of powers within the EU. It remains to be seen how rigorously the CJEU will stick to this concept.

[1015] See e.g. recent Decision on Jurisdiction and Liability of 17 March 2021 in case *Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/4, where the tribunal conducted an in-depth analysis of the interplay between the EU state-aid regulations and claimant's legitimate expectations under the ECT in paras 405-433 of the award.
[1016] This topic will be discussed in more detail in section 10.6 below dedicated to extra-EU BITs.
[1017] See section 11.3. below.
[1018] See respectively sections 9.3. and 10.3 above.
[1019] See sec 10.4. above.

Regardless of the further developments of the CJEU's jurisprudence, it has to be stressed that even though the ECT modernization process is pending with the Commission's active participation, the *Komstroy* decision was followed by a wave of the Member States' declarations on withdrawal from the treaty.[1020] It is thus clearly visible that the Luxembourg Court's judgment, in addition to excluding the intra-EU applicability of the ECT, most likely would result also in many Member States simply dropping the instrument.

10.6. *Extra*- EU BITs and Article 351 TFUE

10.6.1. *Extra*-EU BITs

The term extra-EU BITs shall denote BITs concluded between the EU Member States and third states. Bearing in mind each BIT being an individual agreement, one may assume that on a general level, the content of most of them roughly corresponds with the provisions of intra-EU BITs, be it only due to temporal reasons. It has to be stressed that, unlike in the case of the mechanisms discussed in prior chapters, the conformity of the ISDS clause in extra-EU BITs with the principle of autonomy of EU law has not been a subject of the CJEU's scrutiny. Nonetheless, granted their relative similarity to intra-EU BITs and the ECT, the existing jurisprudence allows us to formulate certain opinions on this topic. Further, before commencing the proper analysis, it has to be underlined that the issue of conformity of these extra-EU BITs with the division of external competences between the EU and the Member States after extending the EU's external competences with regard to foreign investments and trade in the Treaty of Lisbon (Article 207 TFEU) would go beyond the scope of this study. In relation to this issue, it suffices to say that the utilized solution, i.e. adopting an EU regulation "legalizing" *extra*- EU BITs for the transitory period in the way of grandfathering clauses, has been largely understood as a sufficient one[1021]. It follows that the *extra*-EU BITs shall be analysed here solely from the angle of the compatibility of the ISDS mechanisms contained therein with the principle of autonomy EU law. Asa result, this section will be dedicated to the issue of whether this difference in their status suffices to treat them in a manner different to the intra-EU IIAs.

[1020] For an up-to-date overview of the process see Johannes Tropper, *Withdrawing from the Energy Charter Treaty: The End is (not) Near*, 4 November 2022, http://arbitrationblog.kluwerarbitration.com/2022/11/04/withdrawing-from-the-energy-charter-treaty-the-end-is-not-near/, accessed on 5 November 2022. Accordingly, Poland is currently proceeding the bill allowing the ECT withdrawal, while Spain and the Netherlands, along with Germany, France, Belgium and Slovenia announced their intention to follow the suit.

[1021] For more details on the content of the regulation see Cezary Mik, *Unia Europejska wobec międzynarodowego prawa inwestycyjnego*, in: Anna Tarwacka (ed.) *Iura et negotia. Księga Jubileuszowa z okazji 15-lecia Wydziału Prawa i Administracji Uniwersytetu Kardynała Stefana Wyszyńskiego w Warszawie*, Wolters Kluwer Warszawa, pp. 183-214; Angelos Dimopoulos, *op. cit.*, p. 321-322.

Before going further, one additional issue should be discussed: Granted that the extra-EU BITs were concluded with non-EU states, their application may be shielded from the primacy of EU law on the Article 351 TFEU. As a consequence, EU law does not trump over the agreements between the Member States and third states, provided that they were concluded before their accession to the EU. The situation would be less straightforward in the case of BITs concluded *after* the Member State's accession to the EU,[1022] nonetheless, it seems that in the light of more general considerations presented in section 4.3 above, it could mean the necessity of a (partial) renouncement of the *extra*- EU BITs at best[1023]. These findings seem to be reflected by the CJEU's jurisprudence regarding these IIAs.

In fact, the CJEU was confronted with the legal consequences of the interplay between EU law and pre-accession *extra*-EU BITs at least twice. *Firstly*, in a series of cases brought by the Commission against Austria, Finland and Sweden,[1024] the CJEU declared the provisions of their pre-accession extra-EU BIT-s as violating EU law due to allowing for the free transfer of capital to contradict the EU law by hypothetically preventing the effectiveness of the possible Council's measures implementing the UN Security-Council's resolutions on freezing the assets. As a result of the treaties being covered by Article 351 TFEU, the clauses were not superseded by EU law but instead merely had to be denounced in accordance with the public international law. Remarkably, in doing so, the CJEU did not preclude the possibility of there being further incompatibilities. *Secondly*, (and more importantly) in another case brought by the Commission against Slovakia,[1025] the CJEU had to decide whether an imminent threat of a claim brought by an investor from outside the EU on the basis Swiss-Slovakian BIT and the ECT could excuse

[1022] In any case, such BITs not only do exist, but, equally, have been a basis for claims against EU Member States, see e.g. Award of 30 April 2015 in case *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, (concerning several versions of BLEU-China BITs; eventually the AT denied its jurisdiction). See also Spanish-Mexican BIT that gave rise to an investment dispute related to the European Resolution Authority (see infra). On the impossibility af analogous application of Article 351 to post-accession extra-EU BITs see Angelos Dimopoulos, *op. cit.*, p. 306; Tomáš Fecák, *International Investment Agreements and EU law*, Kluwer Aalphen an den Rijn 2016, pp. 355. For the opposing view see Konstanze von Papp, *Solving Conflicts with International Investment Treaty Law from an EU Law Perspective: Article 351 TFEU Revisited*, "Legal Issues of Economic Integration" vol 42 4/2015, pp. 325 – 356. In any case, however, according to both authors the only possible consequence of discovering such a conflict would consist in the obligation to modify or denunciate such agreements.

[1023] See Tomáš Fecák, *International Investment Agreements and EU law*, Kluwer Aalphen an den Rijn 2016, p. 315 ff.; Pekka Niemelä, *The Relationship of EU Law and Bilateral Investment Treaties of EU Member States*, 2017 (dissertation), available at: https://helda.helsinki.fi/handle/10138/225135, accessed on 22 August 2022, pp. 28-30. One could speculate, whether the difference could not play a more important role in the intra-EU context, at least with regard to the national courts' obligations to ensure the primacy of EU law vis-à-vis international agreements within the EU.

[1024] See CJEU judgements of 3 March 2009 in case C-249/06 *Commission v Sweden*, ECLI:EU:C:2009:119 and C-205/06 *Commission v. Austria* ECLI:EU:C:2009:118 and of 19 November 2009 C-118/07 in case *Commission v Finland*, ECLI:EU:C:2009:715.

[1025] CJEU Judgement of 15 September 2011 in case C-264/09 *Atel*, ECLI:EU:C:2011:580.

Slovakia's non-compliance with EU secondary law in the energy sector. The CJEU, after analysing the legal requirements of the BIT, concluded that the enforcement of EU law would most likely have led to non-compliance with this IIA. Somewhat surprisingly, the Court decided to exempt Slovakia from its EU law obligations on the basis of now art. 351 TFEU. In doing so, however, the CJEU abstained from making any references regarding the conformity of the ISDS mechanism with EU law and has not thematised the possibility of Slovakia being obliged to denounce the BIT as a matter of EU law[1026]. Thus, this jurisprudence gives little if any guidance regarding the conformity of the dispute-settlement mechanisms contained in these instruments with EU law, in particular granted that the *Atel* judgment discussed above preceeds the seminal *Achmea* judgment by several years.

Consequently, granted the above jurisprudence, it may be safely assumed that, on the one hand, the extra-EU BITs are applicable by virtue of Article 351 TFEU. At this place, it may be only added that these conclusions of the Luxembourg court were mirrored by the arbitral tribunals operating under public international law.[1027] On the other hand, as evidenced by the proceedings concerning the money transfer provisions, it does not preclude the CJEU from checking the conformity of their ISDS clauses with EU law. It follows that granted their similarity to the incriminated provisions of intra-EU BITs, the ISDS clause in extra-EU BITs could violate the principle of autonomy of EU law at least on a *prima facie* basis.

10.6.2. Extra-EU BITs' legal status

As already said, even though the EU law may not render *extra*-EU BITs inapplicable, the dispute settlement provision of such a BIT may very well still conflict with EU law. What is more, provided that the provisions of *extra*-EU BITs are by and large similar to those of *intra*-EU BITs, one could legitimately ask whether, in the aftermath of the *Achmea*, *CETA* and *Komstroy* decisions, the sheer fact of the BITs being concluded with third states is sufficient to declare them to be in conformity with EU law. And there are good arguments against such a possibility.

[1026] See Tomáš Fecák, *International Investment Agreements and EU law*, Kluwer Aalphen an den Rijn 2016, p. 350 ff. The author, however, warns from drawing too far-reaching consequences from this silence and indicates that too lenient attitude could result in Member States avoiding their obligations vis-à-vis EU by simply invoking IIAs.

[1027] Award of 24 October 2019 in case *CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa, and CMC Africa Austral, LDA v. Republic of Mozambique*, ICSID Case No. ARB/17/23, paras 316-339, esp. para 336.

To begin with, as explained in Chap 4.3. and 10.6.1. above, the CJEU, on at least several occasions, did declare provisions of agreements between the Member States and third states incompatible with the Treaties and ordered the Member States to denounce the questioned international instruments or at least amend their provisions conflicting with EU law.

Furthermore, the interplay between EU law and ISDS may take forms very similar to those in the case of *intra*-EU BITs. In particular, the risks for the autonomy of EU law resulting from unduly privileging certain EU enterprises being at the same time third states nationals' subsidiaries or ATs "applying or interpreting" EU law outside of the judicial framework foreseen in the Treaties are pretty much the same as in the case of Slovakia-Netherlands BIT or ECT referred to in *Achmea* and *Komstroy* cases.[1028] The CJEU's insistence on the necessity of examining the dispute settlement system's potential for infringing the EU's regulatory freedom expressed in the *CETA* opinion would also speak against the conformity of the extra-EU BITs ISDS clauses with the principle of autonomy of EU law. In any case, the disputes brought before such tribunals may and, indeed, have also covered very sensitive topics and pertained to the matters being regulated directly by the EU. The case *Antonio del Valle Ruiz and others v. The Kingdom of Spain*,[1029] where the Claimants apparently direct their claims against Spain's actions undertaken in the enforcement of an act of the EU concerning the resolution of Banco Popular Español S.A.[1030], may serve as a useful example here.

This being said, one should be also wary of certain arguments speaking in favour of *extra*- EU BITs' conformity with EU law. *Firstly*, there are no CJEU judgments that would pertain directly to the conformity of their ISDS clauses with EU law. There are, however, certain judicial decisions that could give some food for thought regarding the possibility of the EU's general acceptance of the ISDS mechanism in IIAs. To begin with, one could remind of the *Atel* judgment analysed above, where the CJEU refrained from the assessment of the dispute settlement mechanism's conformity with EU law. Additionally, one could also consider, whether the CJEU's jurisprudence related to EU's FTAs analysed in section 10.4. above could be considered as providing guidance to the EU law's attitude towards extra-EU BITs. After all,

[1028] Quentin Declève, *Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements*, "European Papers", Vol. 4, 2019/1, pp. 99-108.
[1029] *Antonio del Valle Ruiz and others v. The Kingdom of Spain* 2019-17, available at https://pca-cpa.org/en/cases/211/, access on 22 August 2022 .
[1030] Notice of Arbitration of 23 Aug 2018 in case *Antonio del Valle Ruiz et al v. Kingdom of Spain*, PCA Case No. 2019-17. See also Dimitrios Andriopoulos, Ioannis G. Asimakopoulos, *Does Investment Arbitration Threaten the Effectiveness and Integrity of EU Bank Resolution?*, 29 October 2019, available at: http://arbitrationblog.kluwerarbitration.com/2019/10/29/does-investment-arbitration-threaten-the-effectiveness-and-integrity-of-eu-bank-resolution/, access on 22 August 2022.

CJEU did accept ISDS in CETA, seemingly mandating a differentiated treatment between the intra-EU and extra-EU investors. Against this, however, one could argue that the CJEU's approval of CETA was closely connected to this FTA's particular features, which are not present in BITs, such as explicit reassertion of right to regulate; replacement of traditional ISDS with CETA Tribunal more similar to an international court and – last but not least – the fact that it is an agreement between EU and a third party. The fact that all these elements are lacking in the case of *extra*- EU BITs puts a great question mark on the usefulness of *CETA* decision for assessing the compatibility of *extra*-EU BITs with EU law.

Secondly, at least on several occasions, the Member States and the EU institutions expressed their general acceptance of the existence of *extra*-EU BITs. Most importantly, after the introduction of Article 207 TFEU stipulating the EU's exclusive competence in the field of trade, rather than extinguishing the existing BITs, the Commission and the Member States opted for introducing the so-called "Grandfathering Regulation"[1031], limiting the possibilities of Member States to enter into new extra-EU BITs and requiring Commission's "licence" for the further existence of the BITs. According to the stipulated goal of the Regulation, it has only temporal character, and its aim is to safeguard a safe passage from the investment protection based on the Member States' individual agreements to the protection based on the FTAs concluded by the EU[1032]. Regardless of the Regulation's exact contours, it could be inferred that its adoption was a sign of the Commission's and Member States' approval for the *content* of these agreements. In a similar fashion, upon the accession of CEE states, the EU candidate states and the Commission signed a special Memorandum of Understanding relating to the application of these states' BITs with the US, implicitly acknowledging their compatibility with EU law.[1033] The relevance of these circumstances, however, may be challenged on at least several grounds. Most importantly, these acts of secondary are not and cannot be decisive for the compatibility of a given agreement with the primary law (encompassing the autonomy principle). Furthermore, one could also reasonably argue that these instruments, being concerned mostly with the division of competences, could not be understood as the

[1031] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351, 20.12.2012, p. 40–46.
[1032] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351, 20.12.2012, p. 40–46, motifs (5)-(8) of the Preamble.
[1033] See Commission's press release of 23 September 2003 *European Commission, eight acceding countries and US sign Bilateral Investment Understanding*, available at http://europa.eu/rapid/press-release_IP-03-1284_en.pdf, access on. 22 August 2022.

stakeholders' positive assessment of the ISDS' conformity with EU law[1034]. It is particularly so, granted that they by far precede the *Achmea* judgment, where the CJEU formulated its *dictum* regarding the incompatibility of the ISDS with the autonomy of EU law.

10.6.3. Extra-EU BITs conformity with EU law?

Consequently, EU law, as it stands today, does not provide any clear-cut answer as to the conformity of extra-EU BITs therewith. Nonetheless, in light of the *Achmea* and *CETA* jurisprudence, there are serious arguments for their lack of conformity with the principle of autonomy of EU law, as the extra-EU BITs share the problematic features of their intra-EU counterparts without offering safty valves comparable to the ones contained in CETA. Be that as it may, however, this problem seems to be only of secondary importance for at least two reasons. Firstly, the only possible consequence of the extra-EU BITs' conflict with EU law would consist in imposing the obligation to terminate them, as the agreements themselves would be covered by Article 351 TFEU. *Secondly*, maintaining *extra*-EU BITs in force, as already explained above, should be treated as a provisorium on the way to replacing these agreements with the EU's own FTAs. Lastly, the unanimous consensus of all the EU's stakeholders (Member States and the Commission) for their upholding reflected by the Grandfathering Regulation makes any judicial challenges against these BITs less than likely.

10.7. Preliminary conclusions

As demonstrated by this chapter, the interrelations between the ISDS clauses and the autonomy principle are problematic, to say the least. On the one hand, as amply demonstrated by the *Achmea* and *Komstroy* judgments, the ISDS mechanism promising the investors parallel fora, by its very nature, is destined to cause frictions with the autonomy principle. Apparently, the recognized threats were deemed to be serious enough for the *Achmea* judgment being the very first instance of the CJEU declaring an autonomy violation with respect to an international agreement to which the EU had not been (and was not to become) a party. Arguably, the Luxembourg Court had solid grounds to do so. After all, the ISDS promised precisely bypassing the EU judicial system also in cases clearly involving matters covered by the EU law, such as state aid or implementing EU regulations. Furthermore, the IIAs' institutional design warranted that the arbitral tribunals' decisions could hardly be controlled in the enforcement stage. Be that as it may, this strain of jurisprudence could be seen as further expanding the reach of the autonomy principle. On the other hand, however, the CJEU has demonstrated far-reaching

[1034] Tomáš Fecák, *International Investment Agreements and EU law*, Kluwer Aalphen an den Rijn 2016, p. 363.

leniency towards a largely similar dispute settlement mechanism contained in CETA. Furthermore, it did so despite the EU being a party to the agreement along the Member States. One could speculate whether, somewhat paradoxically, it was not for the EU's membership that the proper safeguards for the principle of autonomy could have been introduced.

Anyhow, if measured against the background of other mechanisms, the CJEU's treatment of the ISDS seems to be even less coherent. This is particularly visible in relation to the ECHR. In light of *Achmea* judgment and *CETA* opinion, the differentiated treatment of the challenges posed to the autonomy of EU law by the ECtHR based on the Convention's characteristic as an EU or the Member States-only agreement is no longer justified. At the same time, however, as will be discussed in Chapter 12 below, in relation to the European Schools Complaints Board, the CJEU not only was ready to tolerate a parallel dispute settlement system, but also thwarted any attempts at balancing this bypassing of EU law by introducing a residual control of national courts over the Board's decision. Consequently, the ISDS-related jurisprudence deepened the state of confusion surrounding the interplay between the autonomy principle and international dispute settlement mechanisms accessible to individuals.

Chapter 11: Unified Patent Court (Opinion 1/09)

11.1. Introduction – patent governance in the EU Member States

Another instance of the CJEU expressly denying the conformity of specific dispute settlement arrangements with EU law concerned the Unified Patent Court ("**UPC**"), a dispute settlement body envisaged as a part of efforts to harmonise patent law within the EU. The court should have operated based on an international agreement, to which the EU should have been a party, and have its jurisdiction strictly limited to the EU's patent legislation. However, this institution has never come into being as the CJEU declared the projected court to violate the principle of autonomy of EU law, among others, due to creating a forum parallel to the EU's judicial system. Nonetheless, since the CJEU's opinion and its implications may be adequately assessed only in their proper context, before commencing the analysis of the opinion itself, I shall sketch the background of the patent governance in the EU and highlight the essential aspects of the envisaged UPC agreement.

As of today, the European patent law is a conglomerate of national, international and EU regulations, which allows to qualify it as an example of multilevel governance.[1035] Consequently, matters of patent law are regulated on the international level by both universal[1036] and regional instruments (with the most prominent role being played by the European Patent Convention("**EPC**"),[1037] as well as by national laws of the Member States. This plurality of legal sources of patent law is reflected by the plurality of judicial or quasi-judicial bodies interpreting patent law.[1038] In fact, EU regulation in this field and CJEU's patent-related jurisprudence are relatively scarce: As a matter of principle, patent law issues are part of the EU's shared competences governed by Article 118 TFEU.[1039] It has to be stressed, however,

[1035] Federica Baldan, Esther van Zimmeren, *The future role of the Unified Patent Court in Safeguarding coherence in the European Patent system*, "Common Market Law Review" vol 52 6/2015, pp. 1529-1578, in particular 1534 ff.; Leon Dijkman, Cato van Paddenburgh, *The Unified Patent Court as Part of a New European Patent Landscape: Wholesale Harmonization or Experiment in Legal Pluralism?*, "European Review of Private Law" 1/2018, p. 112-113.

[1036] Paris Convention for the Protection of Industrial Property of 20 March 1883 (as amended on September 28, 1979), TRT/PARIS/001; Agreement on Trade-Related Aspects of Intellectual Property Rights, of 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, UNTS vol. 1869, p. 299, 33 I.L.M. 1197 (1994).

[1037] The new text of the European Patent Convention adopted by the Administrative Council of the European Patent Organisation by decision of 28 June 2001, OJ EPO 2001 p. 55. Of other treaties that do not encompass all the EU Member States see in particular Strasbourg Convention on the Unification of Certain Points of Substantive Law on Patents for Inventions of 27 November 1963, ETS no. 047.

[1038] Federica Baldan, Esther van Zimmeren, *op. cit.*, p. 1532; Leon Dijkman, Cato van Paddenburgh, *op. cit.*, p. 113 ff.

[1039] Article 118 TFEU: *In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual*

that, at least as far as substantive regulations are concerned, the EU has not made too much use of these powers,[1040] as its legislative *acquis* encompasses only regulations pertaining to supplementary protection certificates for plant protection,[1041] medicinal products[1042] and the directive setting substantive rules for biotechnological inventions.[1043]

Furthermore, it has to be stressed that there are already international mechanisms for litigating patent rights provided within the EPC framework. While most of the disputes are to be settled before national courts (Article 64.3 EPC), certain matters are to be settled before international quasi-judicial bodies operating on the EPC level. Consequently, European Patent Office ("**EPO**") Opposition Division has jurisdiction to hear oppositions brought against European Patents (Art. 19 EPC), which are reviewed solely within the EPO framework, by the EPO Board of Appeals (Art. 21 EPC, "**EPO BOA"**). At this place, suffice is to say that EPO BOA was already faced with the issue of interactions between EU law and patent legislation. To be more precise, while acting in enlarged composition, it expressly denied being bound by EU law, including the obligation to make a preliminary reference.[1044] Being conscious of the potential problems stemming from the EPO bodies' jurisdiction,[1045] however, I shall adhere to this dissertation's research goals and limit myself to the issues having been examined by the CJEU, i.e. the issue of the unified patent court.

This being said, it has to be stressed that the efforts to create the UPC should be viewed in the broader framework of actions aimed at creating a single patent valid across the EU, corresponding with extending the Single Market to the sphere of patent rights.[1046] From this

property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

[1040] Federica Baldan, Esther van Zimmeren, *op. cit.*, p. 1547.

[1041] Regulation (EC) No 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products OJ EU L 198, 8.8.1996, p. 30–35.

[1042] Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (Codified version) (Text with EEA relevance) OJ EU L 152, 16.6.2009, p. 1–10.

[1043] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions OJ EU L 213, 30.7.1998, p. 13–21.

[1044] EPO Board of Appeals (enlarged) Decision of 25 November 2008 in case G 0002/06 *(Use of embryos/WARF),* available at https://www.epo.org/law-practice/case-law-appeals/recent/g060002ex1.html, accessed on 22 August 2022, paras 1-11, but see later jurisprudence recognizing the need to take into account CJEU's interpretation of directives, EPO Board of Appeals Decision of 4 February 2014 in case T 2221/10 *(Culturing stem cells/TECHNION),* available at https://www.epo.org/law-practice/case-law-appeals/recent/t102221eu1.html, accessed on 22 August 2022, paras 43-44.

[1045] Federica Baldan, Esther van Zimmeren, *op. cit.*, p. 1554; Thomas Jaeger, *op. cit.*, p. 7. Interestingly, the constitutionality of the EPO Board of Appeals is currently a being reviewed by the German Federal Constitutional Court in the proceedings 2 BvR 2480/10.

[1046] Sebastian Fuchs, *Das Europäische Patent im Wandel. Ein Rechtsvergleich des EP-Systems und des EU-Patentrechts,* Duncker & Humblot Berlin, 2016, pp.29-30. A detailed analysis of the history of the European Patent system may be found at Kevin P. Mahne, *A Unitary Patent and Unified Patent Court for the European Union: An*

point of view, even though the legislative works took off only in the 2000s, one may say that the unified patent court pursued an idea formulated as early as the seventies.[1047] According to the legislative proposals, the European patent system should necessarily encompass EU regulations concerning patents and international regulations describing the patent court, jointly creating the unitary patent package.[1048] Thus, substantive aspects of patent law are governed by Regulation 1257/2012,[1049] accompanied by Regulation 1260/2012 covering the linguistic aspects of the system.[1050] Both instruments were created in the way of enhanced cooperation due to Spain's and Italy's resistance, motivated mainly by language issues.[1051] The functional link between the two was further underlined by the fact that entry into force of the Regulation was conditioned by ratification of the Patent Agreement by enough states (Regulation 1257/2012, Article 18.2). The patent reform's very essence consisted in replacing a "bundle of national patents" as foreseen in the EPC[1052] with a single European patent (Regulation 1257/2012, motive 5 of the Preamble). This should be achieved i.a. by creating the patent with unitary effect (Regulation 1257/2012, Article 3.1 in connection with Article 2.b). The unitary effect should express itself, in the first line, in providing unitary protection in all the participating Member States (Regulation 1257/2012 Article 3.1, motive 7 of the Preamble) and have uniform legal consequences across different Member States (Regulation 1257/2012, Article 5.2). Notably, the Regulation was not envisaged to cover all the issues of substantive

Analysis of Europe's Long Standing Attempt to Create a Supranational Patent System, "Journal of the Patent and Trademark Office Society", vol. 94, 2/2012, pp. 162-191; the author places particular emphasis on economic rationale behind the unification of the patent frameworks. In any case, it has to be stressed that many of the earlier codification efforts, undertaken both in the context of EU legislative projects or international agreements, failed.

[1047] Sebastian Fuchs, *op. cit.*, pp. 34-38, 162,

[1048] *Ibid.* p. 167, see also Ewa Gromnicka, *Systemowe aspekty jednolitej ochrony patentowej w UE,* "Europejski Przegląd Sądowy" 4/2013, p. 25.

[1049] Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ EU L 361, 31.12.2012, p. 1–8.

[1050] Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ EU L 361, 31.12.2012, p. 89–92

[1051] 2011/167/EU: Council Decision of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, OJ EU L 76, 22.3.2011, p. 53–55; the decision was unsuccessfully litigated against by Italy and Spain in proceedings C-295/11 and C-274/11; further analysis of these issues would go beyond the scope of this work, however.

[1052] The new text of the 1973 European Patent Convention adopted by the Administrative Council of the European Patent Organisation by decision of 28 June 2001, OJ EPO 2001, Special edition No. 4, p. 55; the „bundle" concept seems to be accepted unanimously, see f.e., Kevin P. Mahne, *op. cit.*, p .167; Federica Baldan, Esther van Zimmeren, *op. cit.*, p. 1543. As one author observed, *centralized application procedurę* is *the only „European" aspect* of the European patent, see Leon Dijkman, Cato van Paddenburgh, *op. cit.*, p. 101. Unsurprisingly, this concept was embraced also by the CJEU, see CJEU Opinion of 8 March 2011, European Patent Court, Opinion 1/09, ECLI:EU:C:2011:123, para 3.

patent law. Interestingly, some of them were to be contained in the international agreement, most likely to escape the CJEU's jurisdiction.[1053]

The envisaged international agreement foreseeing the creation of the UPC was the procedural corollary to the substantive regulations discussed above. For this reason, from the functional perspective, the agreement was to be a part of the EU legal system, with the sources of such regulatory choice being related mainly to historical and political circumstances: The UPC was conceived as a court open also for non-EU states.[1054] In any case, much of the patent-related issues would still be governed by the Member States' regulations which pertain primarily to various aspects of the patent property.[1055]

In fact, given the limited scope of the EU's regulation on patent matters, one could legitimately ask what would be the actual scope of overlap between the CJEU's jurisdiction and the purported patent court. As for now, patent law is regulated chiefly by domestic laws of the Member States and international treaties. Furthermore, the patent proceedings' specificity and highly technical character, not rarely resulting in only limited scope of judicial review of patent authorities' decisions, further decreases the potential for the judicial dialogue between national courts and CJEU in patent matters.[1056] Seemingly, the scarcity of preliminary reference to the CJEU in patent matters, coupled with the scepticism of the patent professionals vis-à-vis CJEU's capacities, would validate this thesis.[1057] Nonetheless, this viewpoint seems to ignore the problems related to "extra-systemic" interactions between the patent law and other branches of law regulated on the EU level, such as competition law, market freedoms or fundamental rights.[1058] In fact, CJEU did render decisions in all of these spheres.[1059] Furthermore, one could

[1053] Leon Dijkman, Cato van Paddenburgh, *op. cit.*, p. 103.
[1054] Sebastian Fuchs, *op. cit.*, p. 172. See also assessment of the German Federal Constitutional Court in its decision of 13 February 2020 in case 2 BvR 739/17, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/02/rs20200213_2bvr073917.html, accessed on 22 August 2022, paras 144 ff. The judgment concerned the new draft of the UPC Agreement, but the provisions concerning the court's competences were formulated in a largely similar fashion, see analysis in the section 11.4. below.
[1055] Ewa Gromnicka, *op. cit.*, p. 27; Leon Dijkman, Cato van Paddenburgh, *op. cit.*, p. 112.
[1056] Piotr Zawadzki, *Urząd Patentowy jako sąd uprawniony do zadawania pytań prejudycjalnych*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej" is. 122 4/2013, pp. 94-116; Seemingly, the CJEU went also against the wishes of most patent law practicioners while strenthening national patent courts, see Jens Gaster, *Das Gutachten des EuGH zum Entwurf eines Übereinkommens zur Schaffung eines Europäischen Patentgerichts Ein weiterer Stolperstein auf dem Wege zu einem einheitlichen Patentsystem in Europa?* „Europaische zeitschrift für Wirtschatsrecht" vol 10 22/2011, p. 396.
[1057] Federica Baldan, Esther van Zimmeren, *op. cit.*, p. 1551.
[1058] Federica Baldan, Esther van Zimmeren, *op. cit.*, pp. 1539, 1552, 1567-1568, 1576; Leon Dijkman, Cato van Paddenburgh, *op. cit.*, pp. 109-111.
[1059] For interactions between patent law and fundamental rights, see CJEU judgment of 18 October 2011, *Brüstle,* case C-34/10, ECLI:EU:C:2011:669, concerning the patentability of human embryos; for interactions between

also contemplate whether further conflicts could not stem from the CJEU's broad competence in relation to interpreting mixed agreements, including TRIPS.[1060] Last but not least, issues of EU law could find a way to the cases decided by the UPC due to it having to resort to provisions of national contract laws, which also are influenced by EU law (f.e. Rome I and II regulations).[1061] Be as it may, the relatively narrow scope of interactions between the patent law and EU law did not influence the CJEU's assessment.

11.2. Unified Patent Court Agreement

In Opinion 1/09, the CJEU analysed the compatibility of the Draft Agreement on the European and Community Patents Court („**UPC Agreement**")[1062] with EU law. Before commencing the analysis of the opinion itself, it would be sensible to highlight the crucial aspects of the UPC Agreement.

As already explained, the Agreement envisaged the creation of „*[a] jurisdictional system for the settlement of litigation related to Community patents and European patents*" (Article 1 UPC Agreement). According to Article 58.1 of the UPC Agreement, it should have been opened to accession for all the European Patent Convention parties, including non-Member States.

The two-tier Patent Court (Article 4.1 UPC Agreement) was foreseen to have its separate legal personality (Article 3a.1 UPC Agreement). The Court should be populated by both legal and technical judges (Article 10 UPC Agreement), enjoying considerable guarantees of independence and impartiality (Article 12 UPC Agreement).

Most importantly, the EPC Agreement expressly empowered the Patent Court to interpret and apply EU law (Article 14a), particularly Regulation 1257/12 (Article 14a.1.b. of the UPC Agreement). Conscious of this fact, the parties provided for a possibility of making preliminary references in Article 48 of the UPC Agreement, which by large mimicked Article 267 TFEU. Consequently, the first-tier UPC sections could and the Court of Appeals was obliged to make preliminary references to CJEU if faced with the interpretation of the Treaties or the acts of EU

patent law and competition law see CJEU judgment of 16 July 2015, *Huawei Technologies*, case C-170/13, ECLI:EU:C:2015:477, concerning granting FRAND licences.

[1060] See CJEU judgment of 18 July 2013, *Daiichi Sankyo*, case C-414/11 ECLI:EU:C:2013:520, where the CJEU declared itself competent to interpret Article 27 TRIPS concerning patentability, see also CJEU judgment of 4 November 1997, *Parfums Christian Dior*, case C-337/95, ECLI:EU:C:1997:517.

[1061] Leon Dijkman, Cato van Paddenburgh, *op. cit.*, p. 112.

[1062] Council Document no 7928/09 of 23 March 2009 *Draft Agreement on the European and Community Patents Court and Draft Statute*.

organs, with the CJEU judgment being binding for them. This made the UPC Agreement the first treaty expressly foreseeing the possibility of referral from an international court to the CJEU.[1063]

According to Article 15.1 of the UPC Agreement, the UPC would have the exclusive jurisdiction in essential patent-related matters such as actions for non-infringement; actions or counterclaims for revocation of patents; actions for damages or compensation derived from the provisional protection conferred by a published patent application. This exclusive jurisdiction was even more critical if to take into account the legal effects of the UPC judgments. The decisions of the UPC were to take effect within the whole territory of the EU with regard to the Community patent and in all selected jurisdictions in relation to the European patent (Article 16 UPC Agreement). Further, according to Article 56.1 of the UPC Agreement, all the UPC's decisions should have been immediately enforceable in all the contracting states without any recourse to national courts.

Procedural provisions contained only the most basic information, with a strong indication that all the details should be adopted in UPC's Statue (Article 21a.1. of the UPC Agreement) and the Rules of Procedure (Article 22.1 of the UPC Agreement). Already the UPC Agreement did foresee substantive powers for the Court, however: it allowed it to decide on provisional measures affecting the legal position of the parties, such as assets freezing (Article 35b UPC Agreement). Remedies foreseen by the Agreement included determining the validity of patents (Article 38a UPC Agreement) and awarding monetary damages (Article 41b UPC Agreement).

Consequently, the UPC agreement did foresee creating an independent court capable of rendering enforceable decisions in individual cases without any involvement of the national judicial organs. Thus, it is clear that the UPC framework allowed for the practical exclusion of the Member States' courts from many aspects of patent litigation. In fact, the scope of competences transferred to the UPC would be broad enough for the German Federal Constitutional Court to qualify the UPC Agreement as transferring the sovereign powers to an international court.[1064] And it was not something the CJEU was not ready to agree to.

[1063] Cristina Contartese, *The procedures of prior involvement…*, p 5.

[1064] See German Federal Constitutional Court decision of 13 February 2020 in case 2 BvR 739/17, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/02/rs20200213_2bvr073917.html, accessed on 22 August 2022, stipulating that the modified UPC Agreement should be ratified in the legislative procedure foreseen for transferring sovereign competences to supranational bodies. The judgment concerned the new draft of the UPC Agreement, but the provisions concerning the court's competences were formulated in a largely similar fashion, see analysis in the section 11.4. below.

11.3. Opinion 1/09: the CJEU's judgment over the Unified Patent Court

As is well known, in its Opinion 1/09, the CJEU declared the UPC Agreement to violate the principle of autonomy of EU law. And it did so despite the broad support for the UPC from among the Member States and the Commission.[1065]

In its examination, the CJEU referred to solely the provisions related to: (i) UPC's jurisdiction, both *rationae materiae* (Article 15) and in the territorial scope (Article 15a.1); (ii) applicable law (Article 14a) and (iii) referral obligation (Article 48).[1066] The CJEU's critique centred on Articles 14a, 1b, 2a and 48 UPC Agreement that, on the one hand, did foresee the sole responsibility of UPC for interpretation of EU law and, on the other, did not provide satisfactory safeguards for the obligation of preliminary reference.[1067] Thus, the CJEU's criticism would boil down to three main points. Firstly, the UPC would apply and interpret EU law. Secondly, it would be independent in deciding whether to make a referral. Thirdly, this independence would be correlated with the lack of possibility of executing from the individual Member States the responsibility for the UPC failing to make a referral.[1068] Despite the radical tone of the above conclusions, it merits attention that the CJEU began its reasoning in a rather UPC-friendly fashion. It commenced by stating that the possibility of granting CJEU additional responsibilities in the field of patent law on the basis of Article 262 TFEU does not preclude the Member States from creating another mechanism.[1069] It further underlined that Article 344 could not prohibit creating another international court for individuals due to its applicability solely in inter-state disputes.[1070]

The problems started with the CJEU recollecting the fundamentals of its autonomy concept, explicitly linked with the role of national and European courts in safeguarding the EU legal order as a matter of Article 19 TFEU.[1071] From the above and the principle of sincere cooperation, the Court derived the obligation of the Member States to ensure the full effectiveness of the national courts' cooperation with CJEU in safeguarding the effectiveness of EU law and its complete system of legal remedies.[1072] This, in turn, would be threatened if an external organ interfered with the judicial communication between the CJEU and the

[1065] Seemingly, the CJEU went also against the wishes of most patent law practitioners while strengthening national patent courts, see Jens Gaster, *op.cit.*, p. 395.
[1066] CJEU Opinion of 8 March 2011, *European Patent Court, Opinion* 1/09, ECLI:EU:C:2011:123, paras 9-12.
[1067] Sebastian Fuchs, *op. cit.*, p. 191.
[1068] Sebastian Fuchs, *op. cit.*, p. 192.
[1069] CJEU Opinion of 8 March 2011, *European Patent Court, Opinion* 1/09, ECLI:EU:C:2011:123, para 62.
[1070] *Ibid.*, para 63.
[1071] *Ibid.*, paras 65-67.
[1072] *Ibid.*, paras 67-69.

national courts along the lines of Article 267 TFEU, having a pivotal role in providing for the coherence of EU legal order.[1073]

Having said this, the CJEU made it clear that the Patent Court was not a Member States Court. To be more precise, it was *an organisation with a distinct legal personality under international law*.[1074] Consequently, granting it jurisdiction at the expense of Member States courts would *divest* the latter of their jurisdiction in matters of EU law.[1075] Thus, while declining the applicability of Article 344 TFEU taken alone, the CJEU expressly connected the autonomy of EU law with the EU judicial system as constructed by national courts bound by their preliminary reference obligations.[1076] Regardless of the narrow scope of EU patent law, this constellation was indeed problematic given that the Court was to be tasked with the application and interpretation of EU law, which would have concerned not only rules pertaining to patents, but, equally, fundamental rights and general principles of EU law connected with the dispute.[1077] In fact, CJEU made it clear that this was precisely the feature differentiating the envisaged agreement from the adjudicative mechanisms in other agreements found to be acceptable by the CJEU precisely because of the limitation of their competences to their respective treaties.[1078]

Further, the CJEU expressly denied qualifying the UPC as a Member States' Court by excluding any similarity to the Benelux Court.[1079] While differentiating between the Benelux Court and national courts, the CJEU emphasised the role of the apportionment of responsibility for failing to make a preliminary reference. In the CJEU's view, transferring powers to UPC would make it impossible to initiate infringement proceedings for failing to make a preliminary reference, as no Member State would bear responsibility for UPC's actions.[1080] In this respect, the decision

[1073] *Ibid.*, para 80, 83-85.
[1074] *Ibid.*, para 71.
[1075] *Ibid.*, para 72.
[1076] Tobias Lock, *The European Court of Justice…*, p. 86. Thus, contrary to some suggestions (Aneta Wilk, *op. cit.*, p. 276) it cannot be held that by excluding the application of Article 344 to individual dispute settlement mechanisms the CJEU gave green light to such mechanisms.
[1077] CJEU Opinion of 8 March 2011, *European Patent Court, Opinion* 1/09, ECLI:EU:C:2011:123, paras 73, 78. At this pace it should be noted, however, that in doing so the CJEU was all but consistent. As shall be analysed in section 12.3. below, the European Schools Complaints Board invokes general principles of EU law on regular basis, which, however, did not entertain the CJEU's attention.
[1078] CJEU Opinion of 8 March 2011, *European Patent Court, Opinion* 1/09, ECLI:EU:C:2011:123, para 77.
[1079] *Ibid.*, para 82. In light of the later *Miles* judgment this was all but surprising, see Joachim Gruber, *Das Einheitliche Patentgericht: vorlagebefugt kraft eines völkerrechtlichen Vertrags?*, „GRUR International" 2015, p. 325, for analysis of the Benelux Court see section 6.2.4 above.
[1080] CJEU Opinion of 8 March 2011, *European Patent Court, Opinion* 1/09, ECLI:EU:C:2011:123, paras 86-88.

was consistent with the earlier CJEU's *Miles* judgment.[1081] Be as it may, CJEU's opinion would strongly suggest that providing for a preliminary reference mechanism in international agreements would contribute to the dispute settlement mechanism's conformity with EU law only if correlated with the possibility of initiating infringement proceedings.[1082]

11.4. Preliminary Conclusions

The analysis of the CJEU's opinion conducted above leads to following conclusions. *Firstly*, the crux of the opinion relates to the circumvention of national courts acting in their capacity of EU courts applying the EU law.[1083] In this respect, one could even go so far as to say that the opinion expressed the impossibility of reconciliation between EU law and a mechanism allowing for the application of a significant body of EU law by an external organ and, thus, interventions of this body in EU's affairs.[1084]

Secondly, the provisions on binding effect and enforcement of the court's decisions despite not being called by their name also played a pivotal role. To put the matter in the simplest way possible, bypassing the EU court system was possible only if the UPC's judgments were directly enforceable by the individuals. Was it not the case, there would still be a need for involvement of the national courts so that the role of the patent court would be more similar to this of the Benelux Court, merely providing national courts with an interpretation of provisions of law.

Thirdly, the application of the EU law (both the dedicated regulation and the principles of EU law interacting with the patent law) seems to be the main argument for the CJEU's *circumvention* thesis. This reading would be corroborated by the long-lasting tacit acceptance of the external international jurisdiction within the EPO framework, which could be explained by the EU not being a party to the UPC (see section 11.1 above). It is, however, not easy to judge precisely in what respect this application was problematic. If the problems concerned solely the UPC interpreting a specific part of EU legislation (patent package), the problem would be containable and could be addressed by removing EU law from such court's jurisdiction. If the issue also concerned the accidental application of certain provisions and

[1081] CJEU judgment of 14 June 2011, *Paul Miles*, case C-196/09, ECLI:EU:C:2011:388 concerning European Schools Complaints Board, analysed in section 12.4 below, see Matthias Müller, *op. cit.*, p.231; CJEU Opinion of 8 March 2011, *European Patent Court, Opinion* 1/09, ECLI:EU:C:2011:123, para 89.
[1082] Matthias Müller, *op. cit.*, p. 248.
[1083] Allan Rosas, *The EU and international dispute settlement…,* p. 10.
[1084] Luca Pantaleo, *op. cit.*, pp. 51-52. Some suggested that, if applied coherently the *deprivation test* developed by the CJEU in the opinion would make effectively illegal any dispute-settlement mechanism available to an individual, see Matthew Parish, *op. cit.*, p. 143.

principles of EU law, the matter would be much more severe. Upon careful examination,however, the latter seems to be the case. Firstly, one may draw such a conclusion from the very text of the opinion. As the CJEU underlined in para 78, UPC could *be called upon to determine a dispute pending before it* ***in the light of*** *the fundamental rights and general principles of European Union law* [emphasis added]. This poses the question of whether this formulation means that any interpretation of international law conducted in light of the principles of EU law should be deemed to circumvent the CJEU's exclusive jurisdiction. If this was the proper reading, then any dispute settlement body deciding disputes involving the EU Member States could circumvent the EU legal order. After all, even if such courts did not treat EU law as the applicable law, they could still interpret it as a part of the case's factual background. As discussed in other chapters, the CJEU's later jurisprudence in this respect was ambivalent.

Lastly, provided that the review was conducted before creating the adjudicative body itself, there is no practice one could refer to while assessing in how far would be a peaceful coexistence of the Patent Court and CJEU viable. Nonetheless, the design of the system, providing reliance on judges coming from EU countries, as well as the experiences with the functioning of the multilevel European patent system up until today, provide solid indices for the existence of fertile soil for judicial dialogue. Consequently, it is to assume that Opinion 1/09 strongly suggests that even the presence of relatively favourable conditions for judicial dialogue would not suffice to tip the balance in favour of a given mechanism's conformity with EU law.

Interestingly, the CJEU most likely would have the chance to revisit the topic of the patent court with the modified Agreement on a Unified Patent Court ("**Revised UPC Agreement**").[1085] One could say that, on balance, while largely reproducing the provisions of the initial project, the agreement strived to adapt it to the requirements set by the opinion 1/09.[1086] To begin with, the membership would be restricted to the EU Member States (Article 84.4). Secondly, the court was expressly labelled as a *court common to the Contracting Member States* (Article 1.2, Preamble), with the contracting Member States *jointly and severally* liable for its actions

[1085] Agreement on a Unified Patent Court signed on 19 February 2013, OJ EU C 175, 20.6.2013, p. 1–40, not entered into force (the agreement is provisionally applied from 19 January 2022 on the basis of the Protocol to the Agreement on a Unified Patent Court on provisional application; according to the information available at the UPC's webpage the entry into force of the UPC Agreement is currently planned for 1 April 2023, https://www.unified-patent-court.org/news/latest-state-play-view-launch-unified-patent-court, accessed on 7 October 2022).

[1086] Sebastian Fuchs, *op. cit.*, p. 173 ff. This pertains, in particular, to the binding character and direct effect of the UPC decisions (Article 82.1), as well as the exclusionary effect of the Court's jurisdiction in patent matters (Article 32).

(Article 22.1). While it remains to be seen whether these measures would suffice to placate the Luxembourg Court, it is difficult not to escape the impression that the drafters have been trying to bypass the autonomy conundrum by a simple re-labelling exercise. And, as will be discussed in more detail in section 15.2 *infra*, such an operation results not in solving autonomy-related problems but rather their mere side-stepping that is not likely to be accepted by the CJEU. In any case, it does not address the inherent challenges connected to the existence of a jurisdiction parallel to the CJEU. Be that as it may, at least for now, one has no choice but to wait for the mechanism's hypothetical entry into force and the CJEU's pronouncement upon the conformity of the mechanism with EU law. And this will be less likely than in the case of the first UPC Agreement, be it only due to the exclusion of the procedural venue offered by the Article 218.11 TFEU due to the EU not being a party to the discussed treaty.

Chapter 12: European Schools

12.1. Introduction

European Schools are one of the many "international legal persons governed by public law" in Europe,[1087] whose mission is to provide education to the children of EU officials. They were originally created in 1957 by the Statue of European Schools,[1088] accompanied by the later 1962 Protocol.[1089] The European Union was party to neither of the instruments and, thus, as acknowledged by the CJEU in the *Hurd* case (see *infra*), initially, the Schools did not form part of EU law *stricto sensu*. This changed only in 1994 when those instruments were replaced by the Convention defining the Statute of the European Schools, concluded in Luxembourg on 21 June 1994 (OJ EU 1994 L 212, p. 3; hereinafter "**the Statue**") which entered into force on 1 October 2002, this time with EU as a party, acting on the basis of an earlier Council decision.[1090] In effect, the European Schools Convention became a mixed agreement. Since the provisions regarding the organization of the European Schools contained in the Statue, in essence, followed earlier arrangements,[1091] there is no need to analyse the earlier provisions in this place. More importantly, the Convention elevated the Schools' status to the international organization and a part of the EU legal system. Doing so, however, fueled the potential of conflicting jurisdictions, particularly given the Statue's specific status, differing from typical mixed agreements, usually involving a third, non-EU party.[1092]

According to Article 1.2 of the Statue, the purpose of the Schools is to educate together children of the staff of the European Communities (and other international organizations, based on separate agreements). To this end, according to Article 7 of the Statue, certain organs are common to all the European Schools, among them the Complaints Board. Each School shall be administered by the Administrative Board and managed by the Headteacher. Furthermore, according to Article 6, each European School should have a separate legal personality as a

[1087] Joachim Gruber, *European Schools: A subject of International Law Integrated into the European Union*, „International Organizations Law Review" vol 8 2011, p. 176.
[1088] Statute of the European School of 12 April 1957, UNTS, Vol. 443, p. 129.
[1089] Protocol on the setting-up of European Schools with reference to the Statute of the European School of 13 April 1962, UNTS vol. 752, p. 267.
[1090] Council Decision 94/557/EC, Euratom of 17 June 1994 authorising the European Community and the European Atomic Energy Community to sign and conclude the Convention defining the Statute of the European Schools, OJ EU 1994 L 212, p. 1-2.
[1091] Joachim Gruber, *European Schools…*, pp. 177-181.
[1092] Joachim Gruber, *European Schools…,* p. 176, highlighting close institutional ties between the two organizations, see *ibid.* p. 194; Kirsten Schmalenbach, *Challenging Decisions of the European Schools Before National Courts,* in: August Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts,* OUP Oxford 2010, p. 196.

matter of Member States' law and its own budget. The latter elements led to extensive litigation before German Courts related to the alleged nature of the European Schools as organs of the German state (the courts eventually denied this status and decided to treat the schools as an international organization).[1093] This conclusion seems fair, given that it is difficult to conceive how the Schools' actions could be attributed to the individual Member States.[1094]

12.2. The European Schools Complaints Board

Most importantly, the European Schools have their own quasi-judicial organ: the Complaints Board, described in Article 27.2 of the Statue. Its exclusive jurisdiction was defined in rather broad terms (emphasis added):

> *The Complaints Board shall have **sole jurisdiction** in the first and final instance, once all administrative channels have been exhausted, in **any dispute concerning the application of this Convention** to all persons covered by it with the exception of administrative and ancillary staff, and regarding the legality of any act based on the Convention or rules made under it, adversely affecting such persons on the part of the board of Governors of the Administrative Board of a school in the exercise of their powers as specified by this Convention. When such disputes are **of a financial character**, the Complaints Board shall have **unlimited jurisdiction**.*

Importantly, the Board's judgments would have direct effect in the state-parties legal orders (Article 27.6; emphasis added):

> *The judgments of the complaints Board shall be **binding on the parties** and, should the latter fail to implement them, **rendered enforceable** by the relevant authorities of the Member States in accordance with their **respective national laws**.*

Consequently, the Complaints Board was conceived as a judicial organ exercising exclusive jurisdiction and capable of issuing binding and enforceable judgments for individuals. Indeed, as evidenced by the practice, the Board's jurisdiction in the matters falling within the ambient of Article 27.2 effectively precluded the national courts from deciding matters listed therein. In

[1093] Joachim Gruber, *European Schools…*, p. 186-187.
[1094] Kirsten Schmalenbach, *Challenging Decisions of the European Schools…*, p.186.

particular, the German Federal Constitutional Court decision of 2018[1095] may serve as a good example. Despite the Complaints Board finding itself lacking the competence to hear a claim related to boarding fees, the German Constitutional Court rejected a complaint concerning German courts' unwillingness to instigate proceedings against the Schools, thus leaving the applicants without any recourse against the Schools' decision. This assessment is further strengthened by the fact that the German court expressly recognized the European Schools as an international organization to which Germany transferred its sovereign powers.[1096] This means recognising the Board's exclusive jurisdiction over cases concerning more than 27.000 pupils and 2300 teachers[1097] in matters related to employment, school fees or pupils' promotion,[1098] all potentially intersecting with EU law.

The Board shall comprise persons *whose independence is beyond doubt and who are recognized as being competent in law*, introduced on a list composed by the CJEU (Article 27.3 of the Statue); of whom the members would be selected by the Board of Governors acting unanimously (Article 27.4). As for now, it is composed of active or retired Member States and EU high officials, judges and scholars.[1099] The Complaints Board was competent, upon the Board of Governors' approval, to create its own Rules of Procedure (Article 27.5). These warranties sufficiently safeguarded the Board's independence and, thus, contributed to the recognition of its court quality.[1100]

12.3. Application of EU law by the Complaints Board: a self-assessment

Theoretically, the Complaints Board's jurisdiction is limited to disputes concerning the application of the Convention. Nonetheless, somewhat unsurprisingly, the Board has repeatedly invoked EU law in an auxiliary manner. It may be safely said that in doing so, the Complaints Board adopted a relatively open stance vis-à-vis EU law. Despite having recognized the separate personality and *sui generis* nature of the European Schools, it has repeatedly admitted

[1095] German Federal Constitutional Court decision of 24 July 2018, case 2 BvR 1961/09, http://www.bverfg.de/e/rs20180724_2bvr196109.html, accessed accessed on 22 August 2022. An in-depth analysis of earlier jurisprudence may be found in Joachim Gruber, *European Schools…*, pp. 186-187, 192

[1096] Within the meaning of Article 24.1 of the Basic Law for the Federal Republic of Germany BGBl. I S. 2048 as amended English version available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html, accessed on 22 August 2022 *The Federation may, by a law, transfer sovereign powers to international organisations*. It has to be underlined that this article served as the normative basis for Germany's participation in the EU prior to the introduction of the so-called *Europaartikel* (Article 23).

[1097] See European Schools Report 2019-10-D-32-en-2 *Facts and figures on the beginning of the 2019- 2020 school year in the European Schools* https://www.eursc.eu/Documents/2019-10-D-32-en-2.pdf, accessed on accessed on 22 August 2022, pp. 2, 20.

[1098] Kirsten Schmalenbach, *Challenging Decisions of the European Schools…*, pp. 186 ff.

[1099] http://www.schola-europaea.eu/cree/chambre.php, accessed on 22 August 2022.

[1100] Joachim Gruber, *European Schools…*, p. 193, see also analysis of cases *Miles* and *Oberto* below.

that it is advisable to apply common legal principles of the EU and the Member States, even without being strictly speaking bound by them.[1101]

EU law was invoked mainly in relation to general principles of law. This is all but surprising, provided that the European Schools regulatory framework provides hardly any guidance on this topic. At this place, it suffices to name only some examples of such references. In the first place, EU law was used as an aid for defining proper standards governing the organization of exams.[1102] Furthermore, as a part of the legal orders of the EU and its Member States, it was used to provide grounds for the obligation to provide reasoning for decisions.[1103] Similarly, EU law was indicated as the source of the principle of protection of legitimate expectations[1104] or the proportionality principle.[1105] In at least one decision, the Complaints Board went so far as to expressly invoke the EU's fundamental rights: The Board stated that the way the school administration proceeds may not adversely affect the essence of the rights guaranteed by the Charter of the Fundamental Rights ("**CFR**").[1106]

It has to be stressed that the Complaints Board did not shy away from the procedural dialogue with the EU institutions through the preliminary reference procedure. Even before the preliminary reference in the *Miles* case, the Complaints board has not excluded such a

[1101] In the case at hand it allowed private applicants to invoke CFR fundamental rights, see Complaints Board Decision of 30 July 2007 in case 07/14, available at: http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=07/14, accessed on 22 August 2022, paras 18-19. See also Complaints Board Decision of 15 June 2020 in case 20/05, http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=20/05, accessed on 22 August 2022 para 18; Complaints Board Decision of 5 August 2008, Case 8/06, http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=08/06, accessed on 22 August 2022, paras 12-13.

[1102] Complaints Board Decision of 10 October 2015 in case 15/40, available at http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=15/40, accessed on 22 August 2022, para 17.

[1103] Complaints Board Decision of 30 July 2007 in case 07/14, available at: http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=07/14, accessed on 22 August 2022, para 24; Complaints Board Decision of 24 August 2015 in case 15/35, available at http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=15/35, accessed on 22 August 2022, para 6.

[1104] Complaints Boar Decision of 5 February 2015 in case 14/28, available at http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=14/28, accessed on 22 August 2022, para 38.

[1105] Complaints Board Decision of 15 June 2020, in case 20/05, http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=20/05, accessed on 22 August 2022, para 18; Complaints Board Decision of 5 August 2008, Case 8/06, http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=08/06, accessed on 22 August 2022, para 13.

[1106] Charter of Fundamental Rights of the European Union, OJ EU C 326, 26.10.2012, p. 391–407, see Complaints Board Decision of 5 October 2020 in case 20/56 available at http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=20/56, accessed on 22 August 2022, para 15; Complaints Board Decision of 14 October 2020 in case 20/40, available at http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=20/56, accessed on 22 August 2022, para 19.

possibility, even if it did not allow for such a reference in a particular case.[1107] As will be discussed in more detail below, however, the CJEU did not respond positively to these attempts.

12.4. The CJEU's Assessment: *Miles* and *Oberto* judgments

The CJEU's engagement with the European Schools started relatively early. However, the first cases concerned the general nature of the European Schools Agreement solely and had nothing to do with the dispute settlement mechanism. Nonetheless, recollecting them is worthwhile since they contributed to defining the relationship between EU law and the European Schools system. The Luxembourg Court was consequent in denying its jurisdiction regarding the 1957 European Schools Statue to which the EU was not a party. Thus, the CJEU did not follow the Commission's infringement proceedings based on the alleged breaches of the aforesaid agreement by the Member States.[1108] The only aspect of the violations of the 1957 European Schools Statue that interested the CJEU was their possible influence on the EU's budgetary expenses, a strictly intra-EU affair.[1109] Thus, the first proceedings where the CJEU had to pronounce itself on the mutual relationship between itself and the Complaints Board came only much later with the *Miles* case.[1110]

Interestingly, they originated in a preliminary reference attempt by the Complaints Board in the case 08/51[1111] concerning a dispute between the Schools and their teacher**.** Establishing by reference to its earlier case law stipulating that despite the *sui generis* character of European Schools, certain general principles derived from EU law and the law of Member States could be applicable[1112] was the starting point of the Board's analysis. It continued by adding that also the application of the EU primary law provisions on the non-discrimination and free movement of workers could come into play.[1113] Having made the above conclusions as to the applicable law, the Board analysed its eligibility to make a preliminary reference. In this respect, it concluded that, at least potentially, it could be treated as a Member States' Court, obliged to

[1107] Decision of 30 July 2007 in case 07/14, available at: http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=07/14, accessed on 22 August 2022, para 44.
[1108] CJEU judgment of 30 September 2010 in case C-132/09 *Commission v Belgium*, ECLI:EU:C:2010:562, paras 43-44, 51.
[1109] CJEU judgment of of 15 January 1986 in case C-44/84 *Hurd*, ECLI:EU:C:1986:2; CJEU judgment of 5 April 1990 *Commission v. Belgium*, case C-6/89, ECLI:EU:C:1990:166.
[1110] CJEU judgment of 14 June 2011, *Paul Miles*, case C-196/09, ECLI:EU:C:2011:388.
[1111] Complaints Board Decision of 25 May 2009 in case 08/51, available at: http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=08/51, accessed on 22 August 2022.
[1112] *Ibid.*, para 18.
[1113] *Ibid.*, para 20.

make preliminary references to the CJEU, in a manner similar to the Benelux Court.[1114] Thus, a preliminary reference was made.

The CJEU judgment was preceded by an opinion of AG Sharpstone. While analysing the reference, AG Sharpston began by stating that despite the European School's acts not being a part of EU law, the CJEU would still have jurisdiction to "give guidance" on how EU law influences their interpretation and application.[1115] Further, AG thematized whether the schools could be considered a court common to the several Member States. While she was clearly in favour of establishing the Board's quality of a court,[1116] she recognized the problems with qualifying it as belonging to Member States' legal system. Nonetheless, she tried to analogize the Board with Member States' administrative tribunals or the Benelux Court, recognized as a Member State's court in the *Dior* case.[1117] Starting from this point, she observed that due to the final and binding nature of its rulings recognized in all the Member States, the Board should be regarded as *a jurisdiction that is 'common to a number of Member States*.[1118] AG Sharpston bolstered her argument by indicating the weak spots of adopting the opposite conclusions: Given that the Board does apply EU law,[1119] precluding it from making preliminary references would be harmful to the coherence of the EU law interpretation.[1120]

The CJEU decided not to follow AG Sharpston's opinion. While agreeing with the AG as to the recognized Complaints Board's authority to give binding judgments,[1121] it chose to limit its analysis to the Complaints Board's eligibility to make preliminary references. Whereby the Luxembourg Court affirmed that the Complaints Board undoubtedly meets the criteria of a "court",[1122] it denied it being common to the Member States. In doing so, it relied on two arguments. Firstly, it observed that, unlike the Benelux Court, the Complaints Board rendered its own final and binding decisions rather than merely provided uniform interpretation of legal rules within the context of proceedings before domestic courts.[1123] Secondly, it indicated that the Complaints Board operates within a judicial framework distinct from EU law.[1124] Systemic

[1114] *Ibid.*, paras 22-25.
[1115] Opinion of AG Sharpstone of 16 December 2010, *Paul Miles and Others v European Schools,* case 196/09, ECLI:EU:C:2010:777, para 47.
[1116] *Ibid.*, paras 50-53.
[1117] *Ibid.*, paras 58 ff. See section 6.2.4 above.
[1118] *Ibid.*, paras 64-65.
[1119] *Ibid.*, para 48.
[1120] *Ibid.*, para 73
[1121] CJEU judgment of 14 June 2011, *Paul Miles,* case C-196/09, ECLI:EU:C:2011:388, para 6.
[1122] *Ibid.*, para 37.
[1123] *Ibid.*, para 41.
[1124] *Ibid.*, para 42.

considerations, so crucial to AG Sharpston, were done away with a short remark that it is up to the Member States to reform their legal systems so as to ensure the full effectiveness of EU law.[1125] Thus, the CJEU denied having jurisdiction to entertain preliminary references made by the Complaints Board.

Interestingly, the CJEU's denial to accept the status of the Complaints Board as a Member States' court did not result in a backlash: In its final decision 08/51bis,[1126] the Board decided in favour of the applicants by relying on EU law. In particular, the Board indicated that the CJEU's *Miles* judgment meant solely a lack of the CJEU's competence to hear the case at hand and in no way negatively affected the applicability of EU law by the Board.[1127] Further, the Board decided to rely expressly on AG Sharpston's interpretation of the EU law provisions on non-discrimination[1128] to conclude that the remuneration system adopted by the European Schools did violate the non-discrimination principles contained in EU law.[1129]

It is not easy to understand why the CJEU simply ignored systemic concerns voiced by AG Sharpston. It is even more so, granted that the Board's decision to make a referral was not self-evident and, arguably, signalized its readiness to take an EU-friendly turn.[1130] Be as it may, in its later *Oberto* judgment,[1131] the CJEU opted to reaffirm the approach taken in the *Miles* decision. The case concerned a referral made by the German Federal Labour Court (*Bundesarbeitsgericht*), consisting of four questions. In essence, the national court wanted to know whether acts of the Schools' Headteacher adversely affecting the legal situation of part-time teachers should still fall within the exclusive jurisdiction of the Complaints Board on the basis of Article 27 of the Convention.[1132]

Again, the AG's opinion revolved around the systemic context of the overlapping jurisdiction of EU courts and the Compliance board.[1133] AG Mengozzi began by affirming the CJEU's

[1125] *Ibid.*, para 45.
[1126] Complaints Board Decision of 20 December 2011 in case 08/51bis, available at: http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=08/51bis, accessed on 22 August 2022.
[1127] *Ibid.*, para 19.
[1128] *Ibid.*, para 26.
[1129] *Ibid.*, para 35.
[1130] Matthias Müller, *op. cit.*, p. 237. See Board Decision of 30 July 2007 in case 07/14, available at: http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=07/14, accessed on 22 August 2022, para 44, where the Board did not see any need to make a preliminary reference in the circumstances of a given case.
[1131] CJEU judgment of 11 March 2015, *Oberto and O'Leary v. Europäische Schule München* , case C-464/13, ECLI:EU:C:2015:163.
[1132] *Ibid.*, para 27.
[1133] AG Mengozzi opinion of 4 September 2014, *Oberto and O'Leary v. Europäische Schule München*, case C-464/13, ECLI:EU:C:2014:2169, para 69.

jurisdiction to answer the question due to the EU being a party to the Convention since 1994.[1134] Further, he observed that, due to the ambiguous language of the Statue, the applicability of the Compliance Board's jurisdiction to part-time teachers was disputable, at best.[1135] Furthermore, AG denied the possibility of the European schools exempting themselves from judicial scrutiny simply by invoking their international organization's immunity.[1136] This was quite important, as the AG was of the opinion that the Headteacher's decision could have interfered with the applicants' rights under EU law. To be more precise, he believed the part-time teachers to be workers within the meaning of Article 45 TFEU capable of invoking the protection of the Directive 1999/70/EC concerning limitations on fixed-term contracts.[1137] He further stressed that, as an EU measure, the 1994 Convention has to be interpreted in conformity with principles of EU law.[1138] In this context, he rightly observed that the application of these principles by the Board does not warranty the full effectiveness of EU law: Due to the *sui generis* nature of the European Schools, they are not bound to apply EU law, so its application lies entirely at the Board's discretion.[1139] This, in turn, is particularly problematic given the final and binding character of the Board's decision.[1140] In such a situation, a lack of national courts' residual review would mean removing from the competence of national courts disputes concerning the application of EU law in a similar manner to the failed European Patent Court.[1141] The above considerations led AG to the conclusion that the national courts should have jurisdiction to review the decisions of the Complaints Board involving issues of EU law in order to remedy the above deficits.[1142]

The CJEU, however, took the opposite view. While accepting its jurisdiction to interpret the agreement due to the EU's participation in the 1994 Convention,[1143] it denied national courts' jurisdiction over the matter. The Luxembourg Court began its analysis by recollecting that the European Schools are generally distinct from the EU.[1144] Interestingly, the Court followed AG in admitting that acts of the European Schools organs may adversely affect an individual's legal

[1134] *Ibid.*, para 12.
[1135] *Ibid.*, para 25 ff.
[1136] *Ibid.*, para 41.
[1137] *Ibid.*, paras 45-53, 55.
[1138] *Ibid.*, para 56.
[1139] *Ibid.*, paras 58-60.
[1140] *Ibid.*, para 61.
[1141] *Ibid.*, para 65.
[1142] *Ibid.*, para 70.
[1143] *Ibid.*, paras 29-31.
[1144] *Ibid.*, para 33.

situation.[1145] Nonetheless, it decided to consider the Statue's legal protection system as sufficient. While conceiving the jurisdiction based on Article 27.2 Convention widely, it held that such interpretation corresponded with the European Schools' practice, tacitly agreed on by the treaty parties and, thus, relevant for the Statue's interpretation.[1146] Regarding the issue of providing adequate judicial protection, the CJEU began by recollecting its *Miles* conclusions that the Complaints Board constitutes a *court* within the meaning of Article 267 TFEU,[1147] only to explain that the lack of two-tier judicial review does not violate EU due process guarantees.[1148] Lastly, the CJEU brushed aside any systemic considerations by repeating that it is up to the Member States to reform the judicial system of the European Schools.[1149] The decision was even more interesting, given that the practice of the Member States was not uniform and some national courts had engaged in substantive review of the Board's decisions.[1150] In any case, in its *Oberto* decision, the CJEU definitively closed the door for *indirect* control over the Complaints Board's decisions in the way of referrals made by the national courts.[1151]

12.5. Preliminary conclusion

Assessing the relationship between the European Schools and EU law is not an easy task, granted that the CJEU limited itself to analysing whether they would qualify as a court of the Member States rather than assessing the totality of their legal situation. Nonetheless, this jurisprudence offers certain more general takeaways. Firstly, the CJEU recognized that the European Schools do apply EU law, including primary law, outside of the framework of the Treaties. Secondly, contrary to the AGs opinions, it decided to slur over that issue. Thirdly, as a consequence, the CJEU saw no need to either qualify the Complaints Board as a Member States' court or to introduce a residual review of its decisions by the national courts acting in their EU capacity. And it did all these despite being aware that the Statue was a part of EU law. Consequently, one may infer from the above that the CJEU implicitly assumed the conformity of the Complaints Board's jurisdiction with the principle of autonomy of EU law. Even without going into further detail, it suffices to say that this assessment stays at odds with most of the

[1145] CJEU judgment of 11 March 2015, *Oberto and O'Leary v. Europäische Schule München* , case C-464/13, ECLI:EU:C:2015:163, para 56.
[1146] *Ibid*., paras 61,66.
[1147] *Ibid*., para 72.
[1148] *Ibid*., para 73.
[1149] *Ibid*., para 74.
[1150] Kirsten Schmalenbach, *Challenging Decisions of the European Schools…*, p. 205.
[1151] Joachim Gruber, *Das Einheitliche Patentgericht...*, p. 326.

CJEU's jurisprudence related to international dispute settlement bodies, be it the *ECHR* or *Patent Court* opinions or the *Achmea* and *Komstroy* judgments.

Chapter 13: Aarhus Convention

13.1. Introduction

This Chapter shall be devoted to analysing the interplay between the autonomy principle and the Aarhus Convention.[1152] In the opening sections, I will review the basic features of the Convention and its Compliance Committee. In section 13.4, I am going to thematize the modalities of the EU's participation in the mechanism. Section 13.5 will contain the analysis of the Communication ACCC/C/2008/32 saga spanning over 14 years between the first communication and the Meeting of Parties recognizing the EU's efforts to meet the demands set in the Committee Findings and Recommendations. Rather unsurprisingly, this chapter will end with a set of preliminary conclusions.

Before going further into detail, however, one should provide some explanation for analysing the Aarhus Convention together with dispute settlement mechanisms *stricto sensu*. After all, it cannot be denied that *verba legum*, the Aarhus Convention provides solely for a *compliance* regime, allegedly of *non-confrontative* character.[1153] Nonetheless, it has to be stressed that it shows many similarities to proper dispute settlement mechanisms in practice. To begin with, the proceedings are structured along the lines of typical court procedure: they are triggered by a communication, followed by preliminary admissibility control, subsequent to which the Committee invites the party concerned to respond to the communication and, eventually, organizes the hearing involving both parties.[1154]There are some more specific features. E.g., the proceedings have a fairly adversarial character (with the exchange of submissions commenting on each other;[1155] confrontational hearing;[1156] parties pleadings concerning issues of preclusion or admissibility;[1157] institution of *amici curiae*[1158] etc.). Thus, they bear all the marks of a *legal*

[1152] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998, UNTS vol. 2161, p. 447.
[1153] Tulio Treves, *Introduction*, in: Tulio Treves, Laura Pineschi, Attila Tanzi et al. (eds.) *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, Asser Press the Hague 2009, p. 2; point argued also by Laurens Ankersmit, *Judging International Dispute Settlement...*, juxtaposing the Committee with CETA tribunal.
[1154] UNECE Guide to the Aarhus Convention Compliance Committee, 2nd ed. 2019, paras 75-82.
[1155] Decision I/7 Review of Compliance adopted at the first meeting of the Parties held in Lucca, Italy, on 21-23 October 2002 ECE/MP.PP/2/Add.8, para 23; Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union adopted on 14 April 2011; Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union adopted on 17 March 2017.
[1156] UNECE Guide to the Aarhus Convention Compliance Committee, 2nd ed. 2019, paras 134, 185-188; 191-193.
[1157] UNECE Guide to the Aarhus Convention Compliance Committee, 2nd ed. 2019, paras 102, 114, 126; Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union adopted on 17 March 2017, para 84.
[1158] Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union adopted on 14 April 2011, paras 6-9.

dispute (see section 1.2 above). In addition, the procedure, despite its rather loose formulation and lack of express provisions, is commonly seen as encompassing many due process safeguards, such as the right to participation; the right of being regularly informed on the developments in the proceedings and the right to be heard.[1159] Moreover, the terms generally associated with dispute-settlement bodies, such as "case law" or "jurisprudence", are used with regard to the Compliance Committee not only in semi-official publications available at the UNECE websites[1160] but also in the scientific discourse,[1161] not rarely by the members of the compliance committee themselves.[1162] Furthermore, the Convention tends to be analysed as an example of international environmental law mechanisms together with dispute settlement mechanisms *stricto sensu.*[1163] Also, it seems that the mechanism is assessed as at least "court-like" also by the system operators from both public and private sectors.[1164] Interestingly, this similarity to dispute settlement mechanisms was also recognized by the external actors, not necessarily content with the developments: Despite not being a party to the Aarhus Convention, the US saw it necessary to express its objections to the compliance committee due to its too far-reaching similarity to judicial proceedings.[1165]

[1159] Cesare Pittea, *Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters,* in: Tulio Treves, Laura Pineschi, Attila Tanzi et al. (eds.) *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements,* Asser Press the Hague 2009, pp. 234-5.

[1160] Andriy Andrusevych, Summer Kern (eds), *Case Law of the Aarhus Convention Compliance Committee (2004-2014),* 3rd Edition (RACSE, Lviv 2016) https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Publication/ACCC_Case_Law_3rd_edition_eng.pdf, accessed on 22 August 2022.

[1161] See f.e. Astrid Epiney, Stefan Diezig, Benedikt Priker, Stefan Reitemeyer, *Aarhus-Konvention. Handkommentar,* Nomos-Manz-Helbing Lichtenhahn, Baden Baden, Basel Wien 2018, *Einführung* para 13.

[1162] See f.e. Jerzy Jendrośka, *Recent Case-Law of the Aarhus Convention Compliance Committee*, "Journal for European Environmental & Planning Law" vol 8 4/2011, pp. 375-391. On the other hand, see careful distinguishing of the terms by Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements,* "Colorado Journal of International Environmental Law and Policy", vol. 18 1/2007, p. 5.

[1163] See e.g. Laurens Ankersmit, *Judging International Dispute Settlement...*

[1164] See in particular Duncan Weaver, *The Aarhus Convention: towards a cosmopolitan international environmental politics,* (PhD 2015), available at: http://eprints.keele.ac.uk/2310/1/Weaverphd2015.pdf, accessed on 22 August 2022, pp 147, 153 ff.

[1165] See Statement by the Delegation of the United States with Respect to the Establishment of the Compliance Mechanism, Annex I to Report of the First Meeting of The Parties of 6 May 2003, ECE/MP.PP/2KIEV.CONF/2003/INF/6, p. 19 *First, we question whether certain of these measures are consistent with the enabling provision in the Aarhus Convention, which calls for "arrangements of a non-confrontational, non-judicial and consultative nature." It is difficult to see how measures such as the issuance of "declarations of non-compliance," the issuance of "cautions," and the suspension of a Party's rights and privileges could be considered "non-confrontational, non-judicial and consultative."* Indeed, the procedure involves first an exchange of parties' submissions, than followed by hearings or "discussions" i.e. further exchange of views between parties to the proceedings, and then the Committee takes decision on a closed session, see Cesare Pittea, *op. cit.* pp. 232-3. Therefore, f.e. Alessandro Fodella speaks of *quasi-judicial* character to the likeliness of the UN bodies, drawing it particularly from the fact that the body may analyse individual claims and assess the states' actions in quasi-judicial manner Alessandro Fodella, *Structural and Institutional Aspects of Non-Compliance Mechanisms,* in:

What is even more critical, this system bestows the right to initiate proceedings before international bodies against states on the *members of the public*. These proceedings can eventually result in decisions that may become quasi-binding after their *endorsement* by the Meeting of the Parties, i.e. political organ of the Convention. However, provided that all the findings of the Committee (with the exception of the ones concerning the EU that shall be discussed in more detail below) have been unanimously endorsed by all the parties to the Aarhus Convention, in practice, the Committee's decision could be considered quasi-binding for the Aarhus Convention states. Consequently, there are solid arguments for analysing the Aarhus Convention together with the proper dispute settlement mechanisms accessible to individuals.

13.2. Focus of the Aarhus Convention

In essence, the Aarhus Convention aims to contribute to sustainable development by providing access to information, participation in decision-making, and access to judicial review in environmental matters for all the relevant stakeholders.[1166] Arguably, measured against the contemporary standards, the Convention was a significant step forward due to its binding character; focus on internal remedies; relatively precise formulation, enabling its easy transposition; broad definition of the environmental information and, most importantly, empowering private parties to initiate compliance proceedings.[1167] Thus, this is not surprising that it inspired many later instruments.[1168]

The concept of *environmental information* is defined in Article 2.3 of the Convention rather broadly to encompass any information in written, visual, aural, electronic, or any other material form concerning widely conceived environmental rights. Article 5 of the Convention stipulates in detailed fashion steps to be taken to ensure access to environmental information, while Articles 6 to 8 regulate modalities of public participation in environmental matters. Most

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Tulio Treves, Laura Pineschi, Attila Tanzi et al. (eds.) *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements,* Asser Press the Hague 2009, p. 361, one may also speak of "seeds of juridization", such as Enrico Milano, *The Outcomes of the Procedure and their Legal Effects,* in: Tulio Treves, Laura Pineschi, Attila Tanzi et al. (eds.) *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements,* Asser Press the Hague 2009, p. 413.

[1166] Preamble Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters concluded in Aarhus, Denmark, 25 June 1998 United Nations Treaty Series , vol. 2161, p. 447; see also Rui Lanceiro, *The Review of Compliance with the Aarhus Convntion of the European Union,* in Eduardo Chiti, Bernardo Giorgio Matarella (eds.) *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparisons,* Springer, Berlin Heidelberg, 2011, p. 360.

[1167] Vera Rodenhoff, *op. cit.*, pp. 152-153; Astrid Epiney, Stefan Diezig, Benedikt Priker, Stefan Reitemeyer, *op. cit.*, *Einführung* para 13.

[1168] See Astrid Epiney, Stefan Diezig, Benedikt Priker, Stefan Reitemeyer, *op. cit.*, *Einführung,* paras 7-12; 14-25.

importantly, however, Article 9 of the Convention obliges its parties to provide adequate remedies. In particular, according to Article 9.2, *Each Party shall, within the framework of its national legislation, ensure that members of the public concerned […] have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission […]*. Article 9.3 defines these obligations even broader by stating that *members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.* Nonetheless, it merits attention that the aforementioned rights and guarantees primarily reflected then-existing EU environmental regulations so that, at least as to their substance, they did not impose new obligations on the EU.[1169]

13.3. Aarhus Convention Compliance Committee

Furthermore, in order to provide for the observance of these rules, the Aarhus Convention foresees the creation of a specialized supervisory body accessible to the members of the public (Article 15 of the Convention), which should *have non-confrontational, non-judicial and consultative nature*. This provision was implemented by the Decision I/7 of 2002, creating the Aarhus Convention Compliance Committee.[1170]

The Committee may submit reports and draft recommendations[1171] and provide and facilitate assistance to individual Parties or make recommendations to them upon Party's agreement.[1172] As such, they are not binding, even in case of their endorsement by the Treaty parties acting on the Parties' meeting,[1173] which differs the Aarhus Convention Compliance Committee from "classical" dispute settlement bodies.[1174] Nonetheless, the Committee findings are important for the functioning of the Convention, as they provide guidance as to its interpretation which may even amount to *subsequent practice* amounting to an agreement within the meaning of Article 31.3.b. VCLT.[1175] ILC, however, took a more restrained approach in its report on

[1169] Vera Rodenhoff, *op. cit.*, p. 160.
[1170] Decision I/7 Review of Compliance adopted at the first meeting of the Parties held in Lucca, Italy, on 21-23 October 2002 ECE/MP.PP/2/Add.8.
[1171] *Ibid.*, para 14.
[1172] *Ibid.*, paras 36.a; 36.b.
[1173] *Ibid.*, para 35, see also Laurens Ankersmit, *Judging International Dispute Settlement…*, p. 9.
[1174] Astrid Epiney, Stefan Diezig, Benedikt Priker, Stefan Reitemeyer, *op. cit.*, *Einführung,* para 34. Other authors are more cautious and speak solely about doubts as to the legal effect, see Elena Fasoli, Alistair McGlone, *The Non-Compliance Mechanism Under the Aarhus Convention as "soft" Enforcement of International Environmental Law: Not So Soft After All!,* "Netherlands International Law Review" vol 65 2018, p. 29 f.
[1175] Vienna Convention on the Law of Treaties of 23 May 1969, UNTS, vol. 1155, p. 331, Article 31.3.b. *There shall be taken into account, together with the context: (…) b. Any subsequent practice in the application of the*

subsequent treaty practice: While admitting that, in principle, resolutions of expert treaty bodies such as the Aarhus Convention Compliance Committee *may* evidence such subsequent practice, such a claim should be restated by a resolution of the parties.[1176] Thus, it is to assume that the treaty parties acting as Meeting of Parties and delivering authentic interpretation may always override an interpretation of the Compliance Committee.[1177] Nonetheless, absent endorsement or objection of the Meeting of Parties, this expert body's (i.e. the Committee's) pronouncements could still be understood at least as subsequent practice in the meaning of Article 32 VCLT.[1178] In any case, it merits attention that, with the exception of the EU case discussed in this chapter, all the Committee findings have been routinely endorsed by the Meeting,[1179] which practically would allow treating this requirement as a mere formality.

The Compliance Committee consists of 9 members being nationals of the Convention parties serving in their personal capacity,[1180] obliged to remain impartial and conscientious.[1181] The latter obligation is further strengthened by their duty to disclose any conflicts of interests[1182]

treaty which establishes the agreement of the parties regarding its interpretation. One could find here analogies to the treatment of UN Human Rights Committee's commentaries in the ICJ judgment of 30 November 2010 in case *Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, paras 66-67, see also Astrid Epiney, Stefan Diezig, Benedikt Priker, Stefan Reitemeyer, *op. cit.*, *Einführung,* paras 26, 35, 36 (invoking also Opinion of AG Kokott of 18 October 2012, *Edwards*, case C-260/11, ECLI:EU:C:2012:645, para 8). On the other hand, as claimed by one of the Committee's members, Jerzy Jendośka, Committee's interpretations as such constitute *authoritative interpretation* of the Convention, Jerzy Jendrośka, *Aarhus Convention Compliance Committee: Origins, Status and Activities*, "Journal for European Environmental & Planning Law", vol. 8 4/2011, p. 302.

[1176] ILC draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentary (2018), A/73/10, commentaries 12 ff to Draft Conclusion 13. This understanding would be implicitly embraced by the Commission which went great lengths to filibuster endorsement of the unfavourable Committee's findings on the Meeting of Parties in Budva (see infra), Elena Fasoli, Alistair McGlone, *op. cit.*, fn. 9 on p. 30, see also remarks on p. 39 regarding understanding Meeting of parties' resolutions endorsing Committee's findings as subsequent practice within the meaning of Article 31.3.b VCLT.

[1177] Astrid Epiney, Stefan Diezig, Benedikt Priker, Stefan Reitemeyer, *op. cit.*, *Einführung,* para 37, see also Laurens Ankersmit, *Judging International Dispute Settlement…,* pp. 9-10.

[1178] Article 32 VCLT *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 : (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.* See also ILC draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentary (2018), A/73/10, commentary 16 to Draft Conclusion 13; Tullio Treves, *The Settlement of Disputes and Non-Compliance Procedures*, in: Tulio Treves, Laura Pineschi, Attila Tanzi et al. (eds.) *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, Asser Press the Hague 2009, pp. 508-9.

[1179] Jerzy Jendrośka, *Aarhus Convention Compliance Committee…*, p. 304, see section 13.5. infra.

[1180] UNECE Guide to the Aarhus Convention Compliance Committee, 2nd ed. 2019, para 56; Decision I/7 Review of Compliance adopted at the first meeting of the Parties held in Lucca, Italy, on 21-23 October 2002 ECE/MP.PP/2/Add.8, para 1. As for now, 6 of 9 members come from EU countries, see https://unece.org/env/pp/cc/committee-members, accessed on 22 August 2022.

[1181] Decision I/7 Review of Compliance adopted at the first meeting of the Parties held in Lucca, Italy, on 21-23 October 2002 ECE/MP.PP/2/Add.8, para 11.

[1182] *Ibid.*, para 68.

and the introduction of specific impartiality principles,[1183] such as their duty to make a declaration of impartiality and the practice of excluding civil servants.[1184] The decisions are taken by a substantial majority of its Members (never by less than five votes).[1185]

The Meeting of Parties oversees the Committee and has the last word on compliance issues. After submitting recommendations to a given party, the Committee follows their implementation in the way of progress reports.[1186] In case of non-compliance, the Committee may ask the Meeting of Parties to issue a decision on non-compliance.[1187] Arguably, it is only the adoption of the findings by the Meeting that elevates them to the level of authoritative interpretation, *quasi-binding* for both the parties and the convention organs.[1188] Due to the Committee being an independent body, however, the Meeting should refrain from influencing its decisions.[1189]

As already mentioned, the crucial feature of the Committee is its competence to consider submissions concerning the lack of compliance with the Aarhus Convention made not only by the parties but also by the *members of the public*.[1190] The term is to be understood widely so as to encompass *one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups* (Article 2.4 of the Convention). In any case, the finality of the Convention precludes a narrow understanding of the concept.[1191] Thus, it is all but surprising that this provision was viewed as relatively far-reaching by contemporaneous standards.[1192] The practical importance of opening the avenue to the Committee to Members of the public lies at hand. This is particularly visible if to consider the ratio of cases brought by the private parties to the cases brought by other actors (states, secretariat). Rather unsurprisingly, the vast majority of complaints came from private

[1183] *Ibid*., para 69.
[1184] Astrid Epiney, Stefan Diezig, Benedikt Priker, Stefan Reitemeyer, *op. cit.*, *Artikel 15*, para 2; Rui Lanceiro, *op. cit.*, p. 361. Notably, as of 2011, 7 of 9 Members were serving from Committee's creation in 2002. Cesare Pittea, *op. cit*., p. 225.
[1185] UNECE Guide to the Aarhus Convention Compliance Committee, 2nd ed. 2019, para 50.
[1186] *Ibid*., para 205.
[1187] *Ibid*., para 210.
[1188] Astrid Epiney, Stefan Diezig, Benedikt Priker, Stefan Reitemeyer, *op. cit.*, *Artikel 15*, para 7; see also Laurens Ankersmit, *Judging International Dispute Settlement…,* p. 26.
[1189] Cesare Pitea, *op. cit.*, p. 226.
[1190] Rui Lanceiro, *The Review of Compliance with the Aarhus Convention of the European Union,* in Eduardo Chiti, Bernardo Giorgio Matarella (eds.) *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparisons*, Springer, Berlin Heidelberg, 2011, p. 362.
[1191] UNECE, *The Aarhus Convention: An Implementation Guide*, 2nd ed., 2014, p. 55.
[1192] Cesare Pitea, *op. cit.*, p. 224.

parties.[1193] Needless to say, also the case that had such a powerful impact on the EU legal system was initiated by communication of an NGO (*Client Earth*). The effect of the individual access to the Committee is further amplified by the flexible treatment of the subsidiarity requirement[1194] expressing itself particularly in treating this demand as also met if the local remedies were unsuccessfully tested by another applicant.[1195] Nonetheless, it has to be stressed that in the light of the limited powers of the Committee, as well as the subsidiary character of its competences, it is clear that it cannot be viewed as a forum parallel to the EU courts.[1196]

At this juncture, it should also be mentioned that the Committee seems to be fully open to applying a high degree of comity vis-à-vis the treaty parties, manifesting itself in particular in suspending proceedings in anticipation of the ultimate outcome of the proceedings before the Convention Parties' organs.[1197] In any case, as shall be discussed in more detail below, the Committee represented such an attitude in the proceedings concerning the EU.

13.4. The EU as a Party to the Aarhus Convention

The EU became a party to the Aarhus Convention following Council Decision 2005/370/EC.[1198] Upon conclusion of the Convention, the EU issued a declaration stipulating, among others, that the implementation of the Convention will be mainly the Member States' task, and the EU *reiterates its declaration made upon signing the Convention that the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the*

[1193] UNECE Guide to the Aarhus Convention Compliance Committee, 2nd ed. 2019, para 84. As of 2011 there were 49 communications from members of public in comparison to only 1 submitted by a state, Rui Lanceiro, *op. cit.*, p. 363; as of 2017 the number of individual complaints rose to nearly 150, see Elena Fasoli, Alistair McGlone, *op. cit.*, fn. 9 on p. 29.
[1194] Decision I/7 Review of Compliance adopted at the first meeting of the Parties held in Lucca, Italy, on 21-23 October 2002 ECE/MP.PP/2/Add.8, para 21.
[1195] UNECE Guide to the Aarhus Convention Compliance Committee, 2nd ed. 2019, para 118; Cesare Pitea, *op. cit.*, p. 229. Arguably, there are certain tendencies aiming at limiting the access to the Convetnion, see Elena Fasoli, Alistair McGlone, *op. cit.*, p. 48.
[1196] Laurens Ankersmit, *Judging International Dispute Settlement…*, p. 17.
[1197] AG Sharpston Opinion of 16 December 2010, *Bund für Umwelt und Naturschutz Deutschland*, case C-115/09, ECLI:EU:C:2010:773, para 28; See also Letter to the Party concerned informing on decision to suspend the review of the communication until two months after the release of the opinion of the ECJ of 18 May 2009 in case ACCCC/C/2008/31 *Germany*, or Letter to the parties seeking views on possible deferment of 18 November 2016 in case ACCC/C/2014/113 *Ireland*. The Compliance Committee's handling of the case was generous. For the comparison in situation of parallel proceedings concerning application of identical EU regulations (though in respect to different applicants) in cases *M.S.S.* and *N.S.*, ECtHR did not even consider staying proceedings despite being aware of the preliminary reference filed to the CJEU, see the ECtHR judgment of 21 January 2011 in case 30696/09 *M.S.S. v. Belgium and Greece*, para 82.
[1198] 2005/370/EC: Council Decision 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 EU L 124, 17.5.2005, p. 1–3.

Convention.[1199] Being concluded as a mixed agreement by the EU and its Member States, it binds both the EU and its Member States. The structure of the Convention was unusually complicated given that it created obligations not only for both the EU and its Member States but also for their respective organs.[1200] One could even claim that the Convention is the first instrument recognizing the EU's nature as an organization granting direct rights to individuals.[1201] In such a perspective, the CJEU would play the role of a "national" court, even if being a sort of supreme court for 28 of 47 Aarhus Convention states.[1202] In any case, despite the CJEU not enjoying the status of a treaty organ, it still may issue interpretations binding for over 50% majority of the Convention parties, which gives its jurisprudence particular weight.[1203]

Additionally to the above, it merits attention that despite the mixed character of the EU's participation, there seems to be little cause of concern regarding the wrong distribution of competences. Firstly, since the mission of the Compliance Committee consists rather in enhancing compliance with the Convention than punishing wrongdoers, the Committee is not strictly bound by rules on international responsibility (though it should take them into account).[1204] Furthermore, the non-binding character of the Committee's decisions makes them unable to negatively influence the distribution of powers within the EU.[1205]

Given the mixed character of the Convention, it was implemented in EU law by several legal acts, regulating obligations of, respectively, EU and its Member States.[1206] Despite this apparent concordance, it has to be borne in mind that the Aarhus Convention due to being an environmental treaty concerning access to justice, formulated in broad terms, has considerable

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[1199] Declaration is available at the Convention's webpage in UN treaty depository https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&clang=_en, accessed on 22 August 2022, and was reproduced in the above decision.

[1200] Vera Rodenhoff, *op. cit.*, pp. 161-162 the author speaks of *„geteilt gemischtes"* and *paralllel-gemischtes" Abkommen,* for the parallelism see *ibid*. pp. 180-181.

[1201] Vera Rodenhoff, *op. cit.*, p. 159.

[1202] Astrid Epiney, Stefan Diezig, Benedikt Priker, Stefan Reitemeyer, *op. cit.*, *Einführung,* paras 26, 42-43.

[1203] *Ibid.*, paras 42-43.

[1204] Cesare Pittea, *op. cit.*, p. 245.

[1205] *Ibid.*, p. 246.

[1206] See e.g. Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ EU L 41, 14.2.2003, p. 26–32; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC - Statement by the Commission, OJ EU L 156, 25.6.2003, p. 17–25; for more exhaustive list of legal acts see Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters Final report September 2019, 07.0203/2018/786407/SER/ENV.E.4, p. 18.

potential to spill over different branches of law.[1207] And this is reflected by the practice. According to one study, as of 2019, there were at least 491 legal provisions of EU law potentially giving rise to Aarhus Regulation proceedings which were the basis for 1715 legal acts issued by the EU institutions and 105 Aarhus Regulation challenges concerning activities of various Commission's Directorates.[1208]

These challenges were resolved within a framework designed specifically for the EU institutions as opposed to the Member States, namely Regulation 1367/2006 ("**Aarhus Regulation**").[1209] As the analysis shall revolve around the case-law concerning the EU's own participation in the Convention, there is no need to analyse the regulations concerning the Member States. The Aarhus Regulation, in turn, will be discussed in section 13.5.4. below. At this place, however, it should be mentioned that this twin-track approach resulted in setting different legal standards for the Member States and the EU. Whereby the former not rarely are described as friendly towards EU law due to the extensive CJEU's jurisprudence,[1210] the same may be hardly said of the latter.[1211] The CJEU's readiness to ensure the effectiveness of the Convention vis-à-vis Member States while practically ignoring peculiarities of national administrative law frameworks and nearing the rights guaranteed thereby to *actio popularis* was even criticized by the Member States as going too far and departing from the lower requirements of the Aarhus Convention.[1212] Thus even if some authors speak about the CJEU interpreting EU law mainly in concordance with the Convention,[1213] this claim should be relativized to the

[1207] Maciej Szpunar, *op. cit.*, p. 141.
[1208] Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters Final report September 2019, 07.0203/2018/786407/SER/ENV.E.4, p. 10, 36.
[1209] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ EU L 264, 25.9.2006, p. 13–19. See also 2008/50/EC: Commission Decision of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts OJ EU L 13, 16.1.2008, p. 24–26, stipulating procedural rules.
[1210] Berenike Schriewer, *op. cit.*, p. 180.
[1211], Katja Rath, *The EU Aarhus Regulation and EU Administrative Acts Based on the Aarhus Regulation: the Withdrawal of the CJEU from the Aarhus Convention*, in: Christina Voigt (ed.*), International Judicial Practice on the Environment. Questions of Legitimacy*, CUP Cambridge et al. 2019, p. 53; Justyna Bazylińska-Nagler, *Implementacja Konwencji z Aarhus w prawie UE : środowisko nie ma głosu?* in*:* Ewelina Cała-Wacinkiewicz (ed.) *Prawo międzynarodowe : idee a rzeczywistość*, C.H. Beck Warszawa 2018, p. 673; Ludwig Krämer, *Access to Environmental Justice: the Double Standards of the ECJ*, "Journal for European Environmental & Planning Law", vol. 14 2017, p. 182.
[1212] Rui Lanceiro, *op. cit.*, pp. 367-8.
[1213] See e.g. CJEU judgment of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland*, case C-115/09, ECLI:EU:C:2011:289, see also Astrid Epiney, Stefan Diezig, Benedikt Priker, Stefan Reitemeyer, *op. cit.*, *Einführung,* para 42. Critically on the CJEU's *muted dialogue* resulting in largely discretionary interpretation of the Aarhus Convention see Ioanna Hadjiyianni, *The CJEU as the Gatekeeper of International Law: the cases of*

jurisprudence concerning Member States' obligations, as shall be discussed in more detail below.

Apparently, the EU institutions being expressly subjected to an external review could *prima facie* result in problematic situations. In particular, the Aarhus Convention's potential for reviewing even the conformity of EU primary law, including criteria set in CJEU's jurisprudence, was immediately recognized, even before 1st report of the Committee.[1214] Markedly, it was evident already at the moment of the Aarhus Convention conclusion that in the context of the private parties' access to justice, the overtly demanding criteria for individuals willing to file an annulment action to the CJEU, defined in the *Plaumann* Formula discussed in the following section, were ill-suited to implement the general access to court in environmental matters required by the Aarhus Convention.[1215]

13.5. Communication ACCC/C/2008/32 and the story of the dialogue that failed

Indeed, one did not have to wait long for the above risks to materialize. The communication initiating the procedure that allowed to define the mutual relationship between EU law and the Aarhus Convention that still has not found a definite conclusion today was initiated as soon as 2008. What is more, the Communication ACCC/C/2008/32 *European Union*[1216] mentioned above, along with the decisions issued in relation thereto, is the leading case for the tensions between EU law and the Aarhus Convention.[1217]

13.5.1. The Compliance Committee's first findings

The case was instigated upon the communication of an environmental NGO, Client Earth, supported by other organizations and individuals and concerned the failure of the EU system of legal remedies to accommodate the rights guaranteed in the Convention, namely Article 9.2-9.5 concerning access to justice in environmental matters. The communicant indicated that the access to judicial review was limited by the CJEU's standing jurisprudence related to the

WTO Law and the Aarhus Convention, "International & Comparative Law Quarterly" vol. 70 1/2021, pp. 919-927.

[1214] Rui Lanceiro, *op. cit.*, p. 381.

[1215] See CJEU's contemporaneous jurisprudence related to individuals' access to the CJEU in environmental matters, such as CJEU judgment of 2 June 2008, *WWF-UK Ltd*, case T-91/07, ECLI:EU:T:2008:170; CJEU judgment of 2 April 1998, *Stichting Greenpeace Council* , case C-321/95 P, ECLI:EU:C:1998:153, Rui Lanceiro, *op. cit.*, p. 369.

[1216] All the documents related to the case are available at UNECE's website: https://unece.org/env/pp/cc/accc.c.2008.32_european-union, accessed on 22 August 2022.

[1217] Laurens Ankersmit, *Judging International Dispute Settlement…*, p. 11.

requirement of *individual concern* according to Article 263.4 TFEU[1218] on the one hand, and the deficiencies in the Aarhus Regulation implementing the Convention on the other.[1219] As expected, the Commission vehemently opposed these allegations. At the outset, the Committee decided to limit itself to the CJEU's practice regarding the *individual concern* requirement, as the proceedings relating to the first annulment action against an Aarhus Regulation decision were still pending.[1220]

To this end, the Committee conducted an in-depth analysis of the CJEU's jurisprudence in this respect.[1221] This scrutiny resulted in adopting the position that the strict interpretation of Article 263.4 TFEU was an effect of the Court's preferences rather than the TFEU wording.[1222] Further, by referring to the *Greenpeace* case concerning granting financial assistance, the Committee stated that contrary to the CJEU's understanding, the actions of EU bodies cannot be generally excluded from the scope of application of Article 9 of the Aarhus Convention as legislative acts.[1223] Consequently, the Committee saw the necessity to examine the system of remedies granted by EU law. It continued by recollecting that while the Convention gives the parties a considerable degree of flexibility in shaping the modalities of access to court, it nonetheless demands that the "domestic" law of the parties does not block individuals' access to environmental justice.[1224] While analysing the impact of the *Plaumann* doctrine on the CJEU's jurisprudence, the Committee concluded that the requirement of the *individual concern* was too strict to meet the Convention threshold, as evidenced by virtually no environmental applicant being granted standing before the CJEU.[1225] In any case, the above deficiencies could not have been made up for by the access to the preliminary reference mechanism.[1226] Thus, the Committee concluded that should this jurisprudence continue without being offset by the introduction of a robust administrative review mechanism, the EU would fail to comply with the Convention.[1227] It follows that the Committee decided to wait and see whether new EU-internal developments will meet the Convention threshold, despite having observed that the

[1218] Treaty on Functioning of the European Union, Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.
[1219] Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union adopted on 14 April 2011, paras 2-3.
[1220] *Ibid.*, para 10.
[1221] *Ibid.*, paras 72, 81, 87, 92, 94.
[1222] *Ibid.*, para 91.
[1223] *Ibid.*, para 73.
[1224] *Ibid.*, paras 77-80.
[1225] *Ibid.*, paras 83-87.
[1226] *Ibid.*, paras 89-90.
[1227] *Ibid.*, paras 88, 92.

CJEU's jurisprudence was not necessarily taking into account the EU's accession to the Convention.[1228]

Assessment of the Committee findings is not an easy task. On the one hand, they seem to be highly intrusive. After all, it lies at hand that the Committee did not shy away from pronouncing itself about matters belonging to essential features of EU law. It examined (i) application of the Treaties (ii) by an EU organ (iii) vested with the exclusive jurisdiction over interpretation of the Treaties, (iv) only to find them in non-compliance with the Aarhus Convention, thus indicating the possibility of their modification. In any case, this unprecedented step[1229] could be viewed as an infringement of the *sanctum sanctorum* of the judicial architecture of the EU, i.e. the CJEU's power to interpret provisions of EU law on access to a court. The *Plaumann* doctrine[1230] mandating narrow reading of Article 263.4 TFEU, allowing the individuals to challenge acts of EU law before the CJEU has been consistently applied by the CJEU from its conception up until now.[1231] Notably, also later Treaty reforms adding new ground for the annulment action, namely challenging a regulatory act that should be "only" of direct concern to individuals, did not broaden the access to the CJEU's judicial review.[1232] Thus, the Committee made a very strong suggestion that the CJEU should redefine its 50 years old jurisprudence regarding the interpretation of the admissibility criteria foreseen in the treaties, a matter clearly belonging to the essential features of the EU's judicial architecture and, thus, its autonomy. This conclusion can be changed neither by the endorsement of these findings by many scholars strongly critical of the application of the *Plaumann* formula in environmental cases[1233] nor by the fact that the change of admissibility criteria would require a change of interpretation of EU law rather than a change of the Treaties themselves.[1234]

On the other hand, however, one could argue that the Committee showed considerable deference in different aspects. Most importantly, the above findings were *double conditional*, in the sense that finding non-compliance could have been avoided either by changing the

[1228] *Ibid*., paras 87, 95.
[1229] Ludwig Krämer, *op. cit.*, p. 161.
[1230] CJEU judgment of 15 July 1963, *Plaumann v. Commision,* case C-25/62, ECLI:EU:C:1963:17, according to which *Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.*
[1231] See also Anna Wyrozumska in: Jan Barcz, Maciej Górka, *ead*., *op. cit.*, p. 432.
[1232] CJEU judgment of 6 November 2018, *Montessori v. Commission*, case C-622/16 P to C-624/16 P, ECLI:EU:C:2018:873, para 22 ff.
[1233]Katja Rath, *op. cit.*, p. 56.
[1234] Ludwig Krämer, *Access to Environmental Justice: the Double Standards of the ECJ*, "Journal for European Environmental & Planning Law", vol. 14, 2017, p. 176.

CJEU's jurisprudence or by compensating for the lack of judicial review by introducing an effective administrative mechanism.[1235] Consequently, the Committee left the EU an honourable way out: Rather than changing the established interpretation of its constituent documents, the EU could simply create an effective mechanism on the level of secondary law. In addition, the Committee expressed its willingness to wait for further developments in EU law before pushing forward with its report. Lastly, it has to be stressed that checking the Aarhus Convention parties' jurisprudence's conformity with the Convention was nothing unusual, and the EU was not targeted by the Committee for some extraordinary sanctions.[1236]

13.5.2. Slovakian Bears and ensuring effectiveness

At first, the developments on the level of EU law could have been seen as promising. In the *Slovakian Bears* case,[1237] the CJEU laid the ground for broad application of the Aarhus Convention in the EU legal order. To begin with, by recollecting its earlier *Dior* jurisprudence, the Court found itself competent to interpret provisions of international agreements common to the EU's and Member States' respective parts.[1238] Further, however, the CJEU stated that Article 9.3 of the Aarhus Convention, containing merely an obligation to create a system of remedies, lacked direct effect.[1239] The CJEU, however, quickly went to watering down these stark conclusions. Tt underlined that EU law should respect the goal of these provisions, namely providing for effective environmental protection.[1240] In effect, the CJEU stated that Article 9.3 of the Aarhus Convention has to be interpreted so as to provide adequate access to the EU judicial system.[1241] As the CJEU put it, *[…] it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law.*[1242]

[1235] Jerzy Jendrośka, *Recent Case-Law…*, p. 391.
[1236] See earlier and Recommendations with regard to communication ACCC/C/2005/11 concerning compliance by Belgium adopted by the Compliance Committee on 16 June 2006, paras 22 f.; Rui Lanceiro, *op. cit.*, p. 380.
[1237] CJEU judgment of 8 March 2011, *Lesoochranárske zoskupenie*, case C-240/09, ECLI:EU:C:2011:125. It has to be underlined that the judgment was rendered before the Committee's decision.
[1238] *Ibid.*, paras 31, 42.
[1239] *Ibid.*, para 45. It has to be stressed that in doing so it followed the advocate general, see Opinion of AG Sharpston of 15 July 2010, *Lesoochranárske zoskupenie*, case C-240/09, ECLI:EU:C:2010:436, paras 83-93.
[1240] Opinion of AG Sharpston of 15 July 2010, *Lesoochranárske zoskupenie*, case C-240/09, ECLI:EU:C:2010:436, para 46.
[1241] CJEU judgment of 8 March 2011, *Lesoochranárske zoskupenie*, case C-240/09, ECLI:EU:C:2011:125, para 49.
[1242] *Ibid.*, Sentence, para 51.

Consequently, even if to dispute the decision to deprive Article 9.3 of the Aarhus Convention of its direct effect,[1243] the judgment should be viewed as rather strengthening the Convention's position in the EU legal system.[1244] In any case, the formulation utilised by the CJEU precluded neither the control of EU secondary legislation from the viewpoint of the Convention (direct effect is not *conditio sine qua non* for such review)[1245] nor widening the access to the CJEU in the way of changing the interpretation of Article 263.4 TFEU. However, there was one problem: The case concerned the compliance with EU law of the Member States' actions rather than the provisions concerning the access to justice mechanisms in EU law itself. Nonetheless, arguably, it provided a good starting point for the further development of the CJEU's jurisprudence addressing the issues indicated by the Committee. In any case, it still did not preclude reconciliation between EU law with the requirements of the Aarhus Convention.

13.5.3. Stichting Milieu and the EU's closure

The CJEU did not have to wait long to pronounce upon the impact of the Convention on the legal remedies concerning the EU itself. On 4 June 2012, it concluded the pending proceedings mentioned by the Aarhus Convention Compliance Committee by rendering the judgment in the *Stichting Milieu* case.[1246] The proceedings concerned a direct action of an environmental NGO against the Commission concerning the latter's refusal to conduct an internal review of Regulations relating to pesticides. The request was based on Article 10 of the Aarhus Regulation. The applicants pleaded, among others, that the formulation of Article 10 of the Aarhus Regulation violated Article 9.3 of the Aarhus Convention by replacing the word "acts" with "administrative acts" defined as a "measure of individual scope" (Article 2.1.g), thus unduly limiting its scope. Testing the validity of the aforesaid provision of the Aarhus Regulation, however, required defining the legal effects of Article 9.3 in the EU legal order. The General Court began its assessment by recollecting that, as a matter of principle, the validity of the Aarhus Regulation could be affected by its incompatibility with the Aarhus Convention.[1247] Interestingly, the General Court tried to bypass the issue of direct effect by

[1243] Rui Lanceiro, *op. cit.*, p. 372.
[1244] This is particularly so, provided that similar formulation with regard to effectiveness of the Aarhus Convention were repeated also in other contemporary CJEU judgments, see f.e. CJEU judgment of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland*, case C-115/09, ECLI:EU:C:2011:289, para 41; see also CJEU judgment of 18 July 2013, *Deutsche Umwelthilfe eV*, case C-515/11, ECLI:EU:C:2013:523, paras 28, 32-33; CJEU judgment of 18 October 2011 *Boxus*, case C-128/09, ECLI:EU:C:2011:667, para 53 ff. See also authors concentrating rather on the effectiveness requirements than the limitations on the scope of direct effect, Katja Rath, *op. cit.*, p. 62.
[1245] See section 4.2.3.
[1246] CJEU judgment of 14 June 2012, *Stichting Natuur en Milieu and Pesticide Action Network Europe*, case T-338/08, ECLI:EU:T:2012:300.
[1247] *Ibid.*, para 52.

arguing that the fact that the Aarhus Regulation contained specific references to the Aarhus Convention (*renvoi*), it was possible to check its conformity with the treaty on the basis of *Fediol/Nakajima* doctrine.[1248] The General Court went further to interpret whether Article 9.3 of the Aarhus Convention, in reality, understands *acts* as a category broader than *individual acts* indicated in the Regulation, eventually concluding that the understanding adopted in EU law was too narrow.[1249] Notably, in doing so, it relied also on the Aarhus Convention *soft law* acts, namely the Aarhus Convention Implementation Guide.[1250] In effect, the Commission's decision was annulled.

The General Court was praised for its endorsement of the Committee findings. The happiness with the conclusion led some authors to honour the Court for its reasoning, particularly the correct interpretation of *Fediol* and *Nakajima* exceptions.[1251] Even if to remain sceptical of the methodological soundness of the GeneralCourt's handling of these exceptions, the fact is that it did propose a prudent and well-balanced solution. After all, the General Court was faced with conflicting demands of the principles of autonomy and friendliness towards international law. The first required maintaining the CJEU's jurisprudence on lack of direct effect of Article 9.3 of the Aarhus Convention, while the second mandated following even non-binding finding of the Committee regarding the EU's non-compliance with the aforesaid article. Thus, reliance on *Fediol/Nakajima* doctrine did allow to satisfy both opposing imperatives and give its due to the *Brown Bears*' requirement to give full effectiveness to Article 9.3 of the Aarhus Convention. Last but not least, due to the discretionary character of *Fediol/Nakajima* exceptions, the CJEU would be able to preclude their spillover on other branches of law. Desirable as it could be, the General Court's judgment was eventually quashed by the Court of Justice judgment of 13 January 2015.[1252]

The appeal was filed by both the Council and the Commission. Interestingly, AG Jääskinen, in his opinion of 8 May 2014, proposed a solution seemingly allowing to avoid a direct clash with the Compliance Committee. Being mindful of the Compliance Committee's negative findings, he tried to bypass the problem by moving the debate from the scope of the Aarhus Convention's

[1248] *Ibid*., paras 54,58. In order to strengthen its argumentation the Court invoked also the *Brown Bears* dictum, according to which the EU courts were to give fullest possible effect to the Article 9 of the Aarhus Convention. For *Fediol/Nakajima* exception see section 4.2.4 above.
[1249] CJEU judgment of 14 June 2012, *Stichting Natuur en Milieu and Pesticide Action Network Europe*, case T-338/08, ECLI:EU:T:2012:300, paras 59-79; 83-84..
[1250] *Ibid*., paras 68-69.
[1251] Katja Rath, *op. cit.*, p. 66.
[1252] CJEU judgment of 15 January 2015, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe,* case C-404/12 P, ECLI:EU:C:2015:5.

legal effect in the EU legal order to the problem of qualifying the Commission's Regulation as a legislative act within the meaning of the Convention, thus sidestepping the underlying problematic issues.[1253] The CJEU, however, was far less subtle and decided to face the challenge head-on. It began by recollecting the lack of Article 9.3 Aarhus Convention's direct effect.[1254] It explained further that the *Fediol/Nakajima* exceptions did not apply to the case at hand due to the different particularities of the WTO agreement and the Aarhus Convention.[1255] With regard to the *Fediol* exception, the CJEU underlined that contrary to the Aarhus Regulation, the act examined in the former case explicitly aimed at providing individuals with a right to invoke GATT provisions[1256] While referring to the *Nakajima* exception, the CJEU indicated the wide margin of discretion left to the parties by the Article 9.3. as the differentiating factor.[1257] Consequently, the CJEU decided that it was not possible to invoke Article 9.3. of the Aarhus Convention to measure EU regulations' legality.

It follows that the CJEU judgment dealt a powerful blow to the Aarhus Convention's effectiveness vis-à-vis EU institutions. It is even more so, provided that this judgment was only the first step in developing a jurisprudence extremely protective of the EU's autonomy, at times with somewhat perplexing results.[1258] Some critics go so far as to state that the CJEU's decision de facto went so far as to deprive Article 9.3 of the Aarhus Convention of any substantive legal meaning by freeing the EU from any obligations thereunder.[1259] In fact, the Luxembourg Court's radical stance is even more striking when compared with the jurisprudence regarding the Member States. In these cases, the CJEU not only upheld the open *Slovakian Bears* approach but also emphasised that the effectiveness of Article 9.3 of the Aarhus Convention may translate into specific requirements vis-à-vis Member States court procedure.[1260]

[1253] Opinion of AG Jääskinen of 8 May 2014,*Stichting Natuur en Milieu and Pesticide Action Network Europe v. Commission*, joint cases C-404/12 P and C-405/12 P, ECLI:EU:C:2014:309, para 23.
[1254] CJEU judgment of 15 January 2015, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, case C-404/12 P, ECLI:EU:C:2015:5, para 47.
[1255] *Ibid*., paras 49, 52.
[1256] *Ibid*., para 50.
[1257] *Ibid*., para 51.
[1258] CJEU judgment of 16 July 2015, *Greenpeace*, case C-612/13 P, ECLI:EU:C:2015:486. In addition to repeating its dictum on non-applicability of the *Fedioll/Nakajima* doctrine (para 38) the CJEU made some even bolder statement, namely stated that the provisions of the Aarhus Convention may not be invoked against the EU institutions, because of not taking into account to a sufficient degree the special features of the EU legal architecture (paras 40, 42) and due to the content of the declaration filed by the EU upon acceding to the Convention (para 41, see sec 13.4. above), which, in any case seems to be based on misunderstanding of international law, see fn. 1289 below elaborating in more detail on the impossibility of reliance of internal legal order to non-perform international obligations.
[1259], Benedikt Pirker. *op. cit.*, p. 89.
[1260] See e.g. CJEU judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation*, case C-664/15, ECLI:EU:C:2017:987, paras 44 ff.

Nonetheless, regardless of how deplorable this lack of friendliness towards international law is,[1261] the CJEU acted within the boundaries of formalistically understood compliance with international law. One has to remember that the first Committee findings were not a final document and, more importantly, by their very nature, even after adoption by the Committee, they would not be, strictly speaking, binding. Nonetheless, as shall be demonstrated below, taking the collision course contributed to escalating the tensions between the autonomy principle and the Aarhus Convention.

13.5.4. The Compliance Committee final findings and the aftermath

In such context, it is all but surprising that Part II of the Committee findings[1262] was negative for the EU: The Committee found the EU in non-compliance with the Convention and recommended taking appropriate steps to remedy the breach.

The Committee commenced its analysis by reaffirming its competence to review the decisions of the CJEU due to it being an institution of the Convention's party.[1263] In doing so, the Committee chose the *Stichting Milieu* judgment as the point of reference for the state of development of CJEU case law.[1264] The Committee commenced by praising the reasoning of the General Court,[1265] only to juxtapose it with the CJEU appeal judgment, making it impossible to mitigate the tensions between EU law and the Aarhus Convention.[1266] Further, the analysis of more recent developments of the case law concerning Article 263.4 TFEU led the Committee to the conclusion that the concepts of *regulatory act* and *direct concern* relied on by the CJEU unacceptably narrowed the access of private parties to judicial review.[1267] The latter findings were particularly important, granted that the deficiencies in the EU framework could not have been compensated by the review conducted by the national courts.[1268] In fact, the Committee expressly criticised the EU's double standards (high for the Member States and much lower for the Commission and EU institutions).[1269] The Committee concluded this part by dismissing

[1261] Katja Rath, *op. cit.*, p. 69. For the explanation of the concept of friendliness towards international law see fn. 386 above.
[1262] Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union adopted on 17 March 2017.
[1263] *Ibid.*, para 40.
[1264] *Ibid.*, para 48.
[1265] *Ibid.*, paras 49-52.
[1266] *Ibid.*, para 54.
[1267] *Ibid.*, paras 58-78.
[1268] *Ibid.*, para 57.
[1269] *Ibid.*, para 81.

Commission's argument on the gradual character of jurisprudential developments as a justification for the EU's non-compliance.[1270]

Having reviewed the CJEU's jurisprudence, the Committee turned to the analysis of the Aarhus Regulation. It began by coming to a rather obvious and foreseeable conclusion that narrowing the conventional concept of the *members of public* to NGOs in Article 10.1of the Regulation was unduly restrictive.[1271] Next, it observed that narrowing the concept of acts to those of *individual scope* (Article 2.1.g. of the Aarhus Regulation) equally illegitimately reduced the purview of the control.[1272] Similarly, restricting the application of the Regulation to acts adopted *under environmental law* (Article 2.1.g.) also was too restrictive in comparison with the Convention's wording pertaining to acts *contravening law relating to the environment* (Article 9.3).[1273] In addition, the Committee also found the requirement of the act producing *legally binding and external effects* introduced in Article 2.1.g of the Regulation as an unsubstantiated restraint on the Convention.[1274] Lastly, the Committee condemned the exclusion from the scope of the Regulation of the acts of the administrative review bodies.[1275] Only with regard to the communications regarding the limited scope of the remedy provided by Article 10 of the Regulation (internal review by the institution), the Committee indicated that the possibility of external review of the decisions by the CJEU according to Article 12 of the Regulation, in the absence of negative jurisprudence, should be deemed as constituting an adequate remedy.[1276]

In effect, the Committee recommended all EU institutions to take the necessary steps to bring EU law into compliance with the Convention. The Committee proposed two possible courses of action. The first set of measures concerned EU legislation. With regard thereto, it proposed: (i) indicating in the Regulation that it serves the purpose of implementing the Aarhus Convention; (ii) *verbatim* implementation of the Convention provisions. The second set of measures concerned the CJEU's jurisprudence/case law. Here, the Committee proposed to change its jurisprudence to assess the implementing measures in the light of the Convention and interpret EU law (Article 263.4 TFEU) *to the fullest extent possible* in consistence with

[1270] *Ibid.*, para 44.
[1271] *Ibid.*, para 93.
[1272] *Ibid.*, para 94.
[1273] *Ibid.*, para 100.
[1274] *Ibid.*, paras 101-104.
[1275] *Ibid.*, para 111.
[1276] *Ibid.*, para 119.

Article 9.3-4 of the Aarhus Convention. Consequently, the Aarhus Regulation was found in non-compliance with Articles 9.3-9.4 of the Convention.

It may be safely said that in Part II of the findings, the Committee delivered on its threats made six years earlier in its preliminary findings and recommendations, thus allowing the challenges to the autonomy of EU law to materialize. It is hard to escape the impression that the Committee findings encroached upon the very core of the autonomy principle, namely the CJEU's monopoly to interpret the Treaties and determine the legal effects of international law in the EU's legal order. In fact, no other external body has ever made such demands vis-à-vis the Luxembourg Court. Thus, one could legitimately ask whether the Committee did not go too far in doing so. Yet, at least from the normative point of view, it would be difficult to blame the Committee. After all, its mission consists in ensuring the full effectiveness to the Aarhus Convention, and it is not obliged to safeguard the autonomy of EU law. In fact, any such considerations would have an extra-systemic character for the Committee (see Chapter 3 above). Furthermore, from the standpoint of the Convention, the EU is just a treaty party that has to bring its legal system into compliance with the Convention. Consequently, from the Committee's point of view, there are no compelling reasons to treat the CJEU as a sacred cow. Furthermore, from the standpoint of the Aarhus Convention, there were solid arguments for declaring the EU to be in non-compliance with the Convention. The actual practice of the Aarhus Regulations seems to support the Committee's conclusions: Of 43 internal review procedures initiated up to 2019, every single one resulted in a dismissal (28 due to their inadmissibility, 15 were unsuccessful on merits).[1277] Furthermore, of Article 263.4 proceedings initiated by individuals or NGOs outside of the scope of application of the Aarhus Regulation between 2007 and 2019, all were dismissed on procedural grounds.[1278] This is even more striking provided that, at the same time, the CJEU was seemingly more lax in discovering direct concern and, thus, granting standing to the economic operators.[1279] In any case, one must remember that the Committee also left open the possibility of changing solely the Aarhus Regulation (i.e. secondary law) without changing the CJEU's jurisprudence regarding individual cases. Lastly, one should bear in mind that throughout the whole proceedings, the Committee showed a degree of deference towards the EU, finding expression mainly in

[1277] Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters Final report September 2019, 07.0203/2018/786407/SER/ENV.E.4, p. 44.
[1278] Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters Final report September 2019, 07.0203/2018/786407/SER/ENV.E.4, p. 69.
[1279] See the aforesaid statistics and comparative analysis of the CJEU's jurisprudence concerning in particular competition, anti-dumping cases in Ludwig Krämer, *op. cit.*, p. 167 ff.

suspending its own assessment in the absence of a prior CJEU's decision. Regardless of how to assess the Committee findings, however, it was not the end of the story.

13.5.5. Meeting of the Parties and the EU's counterstrike

As already explained above, to become legally effective, the Committee findings have to be adopted by the Meeting of the Parties, gathering the representatives of the Convention parties. At least theoretically, this grants a Party dissatisfied with the outcome of the proceedings before the Committee a second bite at the cherry. And the Commission decided to avail itself of this opportunity in a hard way, namely by *rejecting* the Committee Findings and Recommendations. This proposal, however, was not agreed on by the EU Member States. After a backlash from environmental NGOs and controversies in the Council,[1280] the EU was still not to *adopt* the Committee findings, but the Commission's wording was eventually watered down, with *reject* being replaced by *take note.*[1281] It has to be stressed that even in the more lenient form, the proposal meant nothing short of the breach of the long-standing practice of unanimously *endorsing* the Committee findings and recommendations during earlier Meetings of Parties.[1282] Therefore, it is all but surprising that the EU's proposal was met with stiff resistance by some non-EU Aarhus Convention Member States at the 2017 Meeting of Parties in Budva.[1283] Ultimately, under EU's pressure, the parties agreed to defer deciding on the Compliance Committee findings till the next meeting, which took place only in the late 2021 (see *infra*). From the contemporaneous perspective, however, the straightforward actions of the Commission were rightly seen as yet another instance of the EU's double standards vis-à-vis its Member States and own institutions.[1284]

This conclusion is corroborated by the Commission's actions aimed at addressing the Committee findings. Subsequent to the somewhat embarrassing Meeting of Parties, the Commission presented the Communication regarding improving access to justice in

[1280] A description on the controversies surrounding the Commission's position may be found at Nathalie Berny, *Failing to preach by example? The EU and the Aarhus Convention*, "Environmental Politics", vol 27 4/2018, pp. 757-762.
[1281] Report of the sixth session of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Budva, Montenegro, 11–13 September 2017, ECE/MP.PP/2017/2, para 55.
[1282] Nathalie Berny, *op. cit.*, pp. 759-760; Report of the sixth session of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Budva, Montenegro, 11–13 September 2017, ECE/MP.PP/2017/2, para 61; see section 13.3. above.
[1283] Report of the sixth session of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Budva, Montenegro, 11–13 September 2017, ECE/MP.PP/2017/2, paras 57-58. In fact, none of the Member States stood up to defend the Commission's proposal (paras 56, 62, 64-65).
[1284] Nathalie Berny, *op. cit.*, p. 761.

environmental matters.[1285] In a predictable fashion, it concentrates on the implementation of the Convention by the Member States while diminishing any responsibility on the part of the EU's institutions. With regard to the latter, the Commission, acting very much in the spirit of the *Greenpeace* judgment, underlined that the Committee should have taken into account special features of EU law (para 14) and should have been satisfied with the EU's declaration of the unwillingness to open the litigation system to individuals (para 17, see). It is difficult to escape the impression that by doing so, the Commission decided to continue playing the same game of rejecting the Committee findings. If anyone could have any doubts, they would be dispelled by the Commission's proposal of amendments to the Aarhus Regulation.[1286] Amended Article 10.1 would maintain the limitation of the applicants to the NGOs, while amended Article 2.1.g. would still limit the scope of the Regulation's application to acts having *legally binding and external effects* that should be *adopted* by the EU bodies. Furthermore, the Amended Article 2.1.g would introduce a new exception by expressly excluding provisions of an EU act that *explicitly require implementing measures at Union or national level*. Thus, it does not come off as a surprise that when being asked by the EU about the legal opinion on the proposed amendments, the Compliance Committee pointed out the above deficiencies of the Regulation Proposal.[1287] Additionally, the Committee once more emphasised that the shortcomings of the EU's own review mechanism cannot be set off against imposing additional burdens on the EU Member States.[1288]

The Commission's uncompromising stance appears to be even less comprehensible, granted how flimsy the legal arguments relied on by the EU were. In the first line, the principle according to which internal arrangements of a party cannot justify its non-compliance with

[1285] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Improving access to justice in environmental matters in the EU and its Member States of 14 October 2020 COM/2020/643 final.
[1286] COM (2020) 642: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies of 14 October 2020.
[1287] Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3 (European Union) of 12 February 2021, paras 42, 46, 55, 68. On the other hand, the Committee stated that expanding the concept of *administrative act* would resolve the issue of limiting review to acts of individual scope (para 43) and replacing the phrase *adopted under environmental law* with acts that *contravene environmental law* would address the problems with the too narrow definition of the acts that can be reviewed (para 44).
[1288] Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3 (European Union) of 12 February 2021, paras 32-35.

international law is recognized as the bedrock of international law.[1289] Similarly, the EU's reliance on its unilateral declaration to exclude the EU from the Convention's supervisory mechanisms had little if any basis in international law.[1290]

The most likely explanation for this behaviour is the Commission's willingness to defend the CJEU's position. This should not be surprising, granted that the CJEU indicated the possibility of vetoing the adoption of uncomfortable resolutions as one of the primary safeguards of the autonomy of EU law in its Opinion 1/00.[1291] In fact, the Aarhus Convention Compliance Committee findings, in addition to being not complied with by the EU organs, were not even discussed by the CJEU itself. The only exception was the *Mellifera* case. However, even in this single proceedings, the Court eventually decided to side-step the issue by indicating that the Committee findings cannot serve as a benchmark for assessing the Commission's decisions rendered before their adoption.[1292] The CJEU's silence is even more telling if recollecting that the Committee was referred to by the AGs more than once. At the outset, before the relationship between EU law and the Aarhus Convention became a hot topic, AG Kokott indicated Compliance Committee findings as a part of relevant international law (invoking its recommendations several times throughout her opinion).[1293] The CJEU, interestingly, while not referring to them, nonetheless decided to give considerable weight to the non-binding document, i.e. the Convention Implementation Guide.[1294] At some other instances, the AGs invoked the Committee finding to corroborate their earlier argumentation without, however,

[1289] Article 27 VCLT; Article 27.2 VCLT IO; Article 32.1 DARIO; Katia Boustany, Maxime Didat, *Article 27 1986 Vienna Convention* in: Oliver Corten, Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol I, OUP Oxford et al. 2011, paras 3-4. See also Ioanna Hadjiyianni, *op. cit.*, p. 902.

[1290] See e.g. ILC Guide to Practice on Reservations to Treaties (2011) A/66/10.Guideline 4.7.1.1. clarifying that an unilateral declaration cannot change obligations of a party to an international treaty. Interestingly, this simple truth seems to have been acknowledged also in one of the CJEU's recent judgments where, the Court made it clear that the intra-EU division of competences, even if backed by the EU's unilateral declarations, cannot lead to the EU being represented in a way not foreseen in the organisation's constituent instruments, see CJEU judgment of 5 April 2022, *Commission v Council*, ECLI:EU:C:2022:260, C-161/20, paras 63 ff.

[1291] See section 6.2.3. above.

[1292] CJEU judgment of 27 September 2018, *Mellifera eV***,** case T-12/17, ECLI:EU:T:2018:616**,** Para 86. Conclusion upheld by the Court of Justice in CJEU judgment of 3 September 2020, *Mellifera eV***,** case C-784/18 P, ECLI:EU:C:2020:630; see also CJEU decision of 28 February 2019, *Région de Bruxelles-Capitale*, case T-178/18, ECLI:EU:T:2019:130, where the CJEU being faced with pleadings related to conformity of the EU law with Aarhus Convention decided not to address this issue by indicating that the applicant did not have standing as a matter of Aarhus Convention itself (paras 31-37).

[1293] Opinion of AG Kokott of 18 October 2012, *Edwards*, case C-260/11, ECLI:EU:C:2012:645 Opinion of AG Kokott of 18 October 2012, *Edwards,* case C-260/11, ECLI:EU:C:2012:645, para 8, reaffirmed in Opinion of AG Kokott of 30 June 2016, *Lesoochranárske zoskupenie VLK*, case C-243/15, ECLI:EU:C:2016:491, para 66.

[1294] CJEU judgment of 11 April 2013, *Edwards*, case C-260/11 ECLI:EU:C:2013:221, para 34.

analysing the interplay between EU law and the Aarhus Convention.[1295] Some others went deeper into details. E.g. AG Cruz Villalón invoked Compliance Committee findings as interpretative aid while strongly emphasising their non-binding character.[1296] This being said, it has to be underlined once more that the above AG opinions did not translate into the CJEU's jurisprudence.[1297]

13.5.6. Most recent developments – 2021 Meeting of Parties and compliance *a la carte*?

Two weeks in advance of the 2021 Meeting of Parties, the European Parliament and Council adopted the modified text of the Aarhus Regulation proposal.[1298] The legislative proposal adopted by the Parliament addressed many of the imperfections connected to the previous document. To begin with, it broadened the concept of the administrative act (Article 2.1 g) so as to cover any acts producing legal effects and not only non-legislative acts. Furthermore, it expanded *ius standi* to members of the public other than NGOs (Article 10.1), provided that certain other criteria related to the possible effects of contested measures would be fulfilled (Article 11.1a). Most importantly, the Proposal expressly entrusts judicial review of the Commission's decisions to the CJEU (Article 12.2). Thus, it may be assumed that the modified Regulation corresponded with the Compliance Committee recommendations. And indeed, the Meeting of Parties confirmed this assessment. In addition to finally *endorsing* the findings on the EU's violation after over ten years, the Committee welcomed the new legislative developments as bringing the EU law in full concordance with the Aarhus Convention.[1299] The Regulation entered into force on 28 October 2021.[1300] Could this be interpreted as a happy ending, even if delayed? Unfortunately, it could be labelled bittersweet, at best.

[1295] Opinion of AG Wathelet of 21 May 2015, *Commission v Germany*, case C-137/14, ECLI:EU:C:2015:344, para 81; Opinion of AG Jääskinen of 8 May 2014,*Stichting Natuur en Milieu and Pesticide Action Network Europe v. Commission*, joint cases C-404/12 P and C-405/12 P, ECLI:EU:C:2014:309, fn. 23 to para 34.

[1296] Opinion of AG Cruz Villalón of 20 June 2013, *Gemeinde Altrip*, Case C-72/12, ECLI:EU:C:2013:422, para 101.

[1297] Even authors claiming that one should consider the situation at issue not as ignorance, but rather an instance of *muted dialogue*, where participants take into account their mutual positions even in the absence of direct references admit that in effect, the CJEU largely ignores the Committee's position, see Ioanna Hadjiyianni, *op. cit.*, especially pp. 919-926.

[1298] Position of the European Parliament adopted at first reading on 5 October 2021 with a view to the adoption of Regulation (EU) 2021/… of the European Parliament and of the Council amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, P9_TC1-COD(2020)0289.

[1299] Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Seventh session Geneva, 18–20 October 2021, Item 7 (b) of the provisional agenda, ECE/MP.PP/2021/CRP.6/Rev.1, paras 3-5.

[1300] Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to

The reason for it is pretty simple. In March 2021 the Aarhus Convention Compliance Committee found another breach on the part of the EU, this time consisting in failing to grant the concerned parties adequate means of challenging state aid decisions capable of negatively affecting the environment.[1301] And these breaches were not even addressed in the envisaged amendments to the Aarhus Regulations (or any other EU document), as frankly admitted by the Commission.[1302] Nonetheless, any remarks on *endorsing* or even *taking note* of the Committee findings by the Meeting of Parties were crossed out from the Meeting's resolutions. Instead, the parties attached an Annex mandating an *exceptional* postponement of the *decision-making* concerning the findings adverse to the EU.[1303] To put things more bluntly, the Meeting of Parties mandated the EU's non-compliance with the Aarhus Convention at least until the next Meeting (i.e. around four years), this time without that much ado. Such a turn of events, in turn, strongly suggests not only maintaining by the conditional character of its readiness to implement the Convention but also other parties' emerging acceptance thereto. In any case, it is clear that, in the end, the autonomy of EU law was successfully defended by the concerted efforts of the Commission and the CJEU.

13.6. Preliminary Conclusions

The above saga, dragging on for over 13 years, and, after all this time, with the EU not even trying to hide its unwillingness to comply, shows clearly that the EU may very well ignore the Convention and the Compliance Committee if it only wishes so. Paradoxically, however, the EU's filibustering tactic could be looked at as a specific act of observance of international law: In the end, all these actions were aimed at precluding the Committee findings from producing quasi-binding legal effects.[1304] Consequently, even if one could speak of breaching the principle of friendliness toward international law or ignoring the EU's own primary law commitments to

Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ EU L 356, 8.10.2021, p. 1–7.

[1301] Findings and recommendations adopted by the Compliance Committee on 17 March 2021 with regard to communication ACCC/C/2015/128 concerning compliance by the European Union, ECE/MP.PP/C.1/2021/21.

[1302] See the Commission statement annexed to the proposal of the European Parliament adopted at first reading on 5 October 2021 with a view to the adoption of Regulation (EU) 2021/… of the European Parliament and of the Council amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, P9_TC1-COD(2020)0289.

[1303] Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Seventh session Geneva, 18–20 October 2021 Item 7 (b) of the provisional agenda, ECE/MP.PP/2021/CRP.6/Rev.1, Annex.

[1304] Elena Fasoli, Alistair McGlone, *op. cit.*, fn. 9 on p. 45.

maximizing environmental protection,[1305] one still cannot talk of an outright violation of its international obligations.

What is most interesting from the point of view of this study, despite the escalating tensions, at no point did the CJEU even allude to the possibility of the Aarhus Convention or the Committee's jurisdiction posing any threat to the autonomy of EU law and the integrity of EU legal order. At first glance, it could look a bit surprising, granted that the degree of the Committee's engagement with issues belonging to the hard core of the principle of autonomy of EU law, in particular in comparison to the CJEU's over-sensitiveness to even potential threats posed by external mechanisms discussed in previous chapters. One could contemplate various reasons for such a relaxed attitude. As this issue will be discussed in more detail in the following section, at this place suffice is to say that the most appealing explanation would boil down to the lack of binding character of the Committee's decisions, coupled with the lack of their legal effect within the EU legal order, allowing to ignore its inconvenient findings and recommendations.

[1305] Ludwig Krämer, *op. cit.*, p. 182.

Chapter 14: Distilling focal points from the CJEU jurisprudence

14.1. Introduction

The aim of this chapter is to draw some more general conclusions regarding the requirements set by the autonomy principle for the international dispute settlement mechanisms accessible to the private parties. This throughout survey should provide the necessary basis for answering the question as to the existence (and, possibly, the content) of the autonomy test in relation to such mechanisms in Chapter 15 below. Due to the profound differences between the frameworks available solely to states and those accessible to private litigants, it seems reasonable to treat both kinds of mechanisms separately. As discussed in more detail in other chapters, the CJEU treats the inter-state mechanisms more leniently, most likely due to retaining the possibility of discouraging the state litigants (under the threat of infringement proceedings or in the way of an international undertaking or agreement) and effectively depriving the decisions taken by such bodies of any legal effect within the EU, as in the case of the WTO system, to mention the most prominent features.[1306] Furthermore, by their very nature, inter-state mechanisms can hardly replace the courts of Member States (which are not competent to hear inter-state disputes), these courts can hardly threaten the autonomy of EU law in the way of bypassing the judicial framework foreseen by the treaties. Consequently, in this chapter, I am going to concentrate on the CJEU's jurisprudence referred to in Chapters 9-13, with references to the jurisprudence discussed in Chapter 6 above playing only an auxiliary role.

This being said, I am convinced that the above analysis of the CJEU's jurisprudence allows distinguishing the following factors that were (or could have been) taken into account by the CJEU while analysing competing frameworks:

1. Whether the EU is a party to a given mechanism;
2. Whether a given body's jurisdiction would cover matters of EU law;
3. Whether a given body applies or interprets EU law;
4. Whether a given body may control the enforcement of EU law by EU organs;
5. Whether a given body is capable of rendering binding decisions;
6. Whether body's decisions produce legal effects within the EU and how are they enforceable;
7. Whether dispute-settlement bodies may circumvent the judicial framework foreseen in the Treaties;

[1306] See in particular Chapters 1.3, 7, 16.

8. Whether a body was created in an extra- or intra-EU context;
9. Whether other relevant features, such as general openness to dialogue or substantive conformity of the mechanism with EU law, played any role in the CJEU's analysis.

All of the above factors were either addressed implicitly or explicitly by the CJEU; or, at least, influenced its decision. Further, they may provide a useful angle for extracting some more general principles from the CJEU's jurisprudence. In any case, their analysis can yield results indispensable for assessing the limitations set by the autonomy principle on the international dispute-settlement mechanisms accessible to individuals. Discussion of these points will be summarised in the Table 1 at the end of this chapter.

14.2. The EU as a party to an agreement

To begin with, rather unsurprisingly, the analysis of the aforesaid case law demonstrates that the EU's participation in international dispute settlement mechanisms could be of importance at least in two respects. Firstly, it is only upon the EU's accession that a given agreement would become binding on the EU and its institutions. Secondly, only the EU's accession to an agreement could trigger problems with the attribution of responsibility. As shall be demonstrated, the value ascribed to both factors would be highly context-dependant. In general, it may be said that the first issue is not decisive, and the second one, while of crucial importance for compatibility of mixed agreements with the principle of autonomy, is more of a technicality that may be dealt with by a careful treaty drafting.

Regarding the second issue, it may be recollected that, as was already discussed in section 2.3.2 above, the problems with the division of competences would arise only in the case of agreements where both the EU and its Member States would participate as distinct subjects of international law. Conversely, the problem would not concern EU-only or Member States-only agreements.[1307] Essentially, the issue boils down to the threat of an external body apportioning the responsibility in contradiction to the division of competences according to the EU law. In this respect, one could recollect three main causes of such a wrongful determination. Firstly, the customary rules on international responsibility of international organizations as expressed in DARIO[1308] and applied by most international dispute settlement bodies do not reflect the principles of EU law considering the division of competences. Secondly, even if it was not the

[1307] Matthias Müller, *op. cit.*, p. 59; Matthew Parish, *op. cit.*, p. 146.
[1308] ILC Draft articles on the responsibility of international organizations with commentary (2011), A/66/10, Armin Steinbach, *op. cit.*, p. 141; Carolin Damm, *op. cit.*, p. 89; Anna Czaplińska, *Odpowiedzialność organizacji międzynarodowych…*, p.119.

case, the division of competences between the EU and its Member States is a highly complex issue even for the intra-EU actors, not to mention the external decision-makers. Thus, a non-EU actor could commit such a mistake even if acting in good faith. Lastly, the matter is further complicated by the composite nature of the EU law enforcement, involving the national actors acting on behalf of the EU.

In general, one could identify three principal ways of dealing with this issue: sending a clear signal on the division of responsibilities to external partners, e.g. by the medium of declarations of competences;[1309] treating the challenge *per silentium*, or by allowing the EU institutions to determine the proper respondent in each case by introducing the co-respondent mechanism. Given the notorious ineffectiveness of the competence clauses and the inherent problems connected with their interpretation by external bodies, only the third solution may be viewed as contributing to solving the CJEU's dilemma. As *CETA* opinion demonstrated,[1310] a carefully drafted prior involvement mechanism should allow to sufficiently address the autonomy concerns in this regard. An analysis of the *CETA* and *ECHR* opinions[1311] further shows that three conditions must be fulfilled by a given international agreement to satisfy the principle of autonomy: Such a mechanism has to be obligatory, unconditional and the determination made by the CJEU has to be binding for the external actors. As demonstrated by the *ECHR* opinion, a mechanism would most likely violate the principle of autonomy if any of the above elements are lacking. Granted that this requirement seems to stem directly from the exclusive competence of the CJEU to decide on the division of competences between the EU and its Member States,[1312] there would seemingly be no compelling arguments to resign from it. Arguably, a lack of prior involvement in state-to-state dispute settlement mechanisms (such as the WTO agreement or UNCLOS) could be justified by their external character and the greater degree of controllability over the states than private parties, factors clearly lacking in the case of mechanisms available to individuals.[1313] Thus, the conclusion would remain unchanged.

[1309] In addition to declarations of competences one could thing of other means to similar effect, such as indicating proper addressees in the agreement's text or introducing relevant clauses to the agreement; making proper reservations or conducting a throughout division of rights and obligations between the EU and the Member States, see Monika Niedźwiedź, *Umowy międzynarodowe mieszane w świetle prawa Wspólnoty Europejskiej*, Wydawnictwo Prawo i Praktyka Gospodarcza Warszawa 2004, p. 117.
[1310] CJEU Opinion of 30 April 2019 *CETA*, Opinion 1/17, ECLI:EU:C:2019:341, see section 10.4 above.
[1311] CJEU Opinion of 18 December 2014, *European Convention on Human Rights*, Opinion 2/13, ECLI:EU:C:2014:2454, see sections 9.3 and 10.4 above.
[1312] Matthias Müller, *op. cit.*, p. 224.
[1313] See Chapters 1.3, 6.5 and 7 above.

The answer to the first question is more tricky, as the CJEU's decisions are contradictory. On the one side of the spectrum, one would have the jurisprudence unambiguously connecting the autonomy violation with the EU's accession. *ECHR* opinion provides a perfect example. As was analysed in section 9.3 above, most of the problems identified as stumbling blocks on the way to the EU's accession to the ECHR,[1314] have been faced by the EU legal system even in the absence of the accession. The divergent interpretations of fundamental rights and assessment of EU law implementation by national courts conducted by the ECtHR provide valuable examples here. Nonetheless, the CJEU viewed as problematic solely the EU's accession to the Convention. For the avoidance of doubt, this schizophrenic attitude cannot be blamed on the procedural constraints, as preliminary references from different Member States' courts have provided the CJEU with plenty of opportunities to pronounce itself on the possible challenges posed by the Convention to the principle of autonomy of EU law. Also, in the case of Opinion 1/09 concerning the Unified Patent Court ("**UPC**")[1315], the CJEU put much emphasis on the EU's submission to the court's jurisdiction. The CJEU, though, did not make any references as to the possible outcome of the examination if the UPC was created as the Member States only agreement. Court's focus on the threat of by-passing judicial framework foreseen in the treaties, coupled with complete silence on the issue of EU's Membership, could be viewed, however, as an indication that the participation of the EU in the agreement (or lack thereof) taken in itself was not the decisive factor.

The middle ground would be occupied by the mechanisms implicitly tolerated by the CJEU, such as the Aarhus Convention Compliance Committee and European Schools Complaints Board. In particular, in the latter case, the CJEU, in its *Oberto* judgment,[1316] while recognizing the separate existence of the Schools' Complaints Board, not only did not see it as problematic but also decided to curtail the indirect control of the Member States' courts over the Board's decision. Furthermore, it did so contrary to the recommendations of AG Mengozzi. Turning to the embarrassing Aarhus Convention saga, one should be conscious that it could have taken place only due to the EU's accession to the Convention. In no other constellation would it be possible for an external body to conduct a straightforward analysis of the compliance of the EU's judicial framework with an external review mechanism. Despite the above, the CJEU did

[1314] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS No.005.
[1315] CJEU Opinion of 8 March 2011, *European Patent Court*, Opinion 1/09, ECLI:EU:C:2011:123.
[1316] CJEU judgment of 11 March 2015, *Oberto and O'Leary v. Europäische Schule München* , case C-464/13, ECLI:EU:C:2015:163. See section 12.4.

not see any need to analyse the compatibility of the Compliance Committee's jurisdiction with EU law.

The other side of the spectrum would be occupied by the jurisprudence related to ISDS, which clearly demonstrated that, on the one hand, the autonomy of EU law could be violated by a mechanism entirely external to the EU and, on the other, the EU's participation may foster the introduction of the proper safeguards, thus, somewhat paradoxically, mitigating the autonomy challenges. As evidenced by the *Achmea* judgment,[1317] it would be sufficient for a violation of the autonomy of EU law to materialize that the dispute settlement bodies created by certain agreements *could* interpret or apply EU law outside of the Treaties framework. Notably, in doing so, the CJEU brushed aside AG Wathelet's arguments,[1318] expressly referring to the earlier jurisprudence affirmative of the existence of parallel treaty frameworks insofar the EU was not to be bound by the decisions taken within them. In fact, this impression is further deepened by the *CETA* opinion, where the CJEU considered the autonomy of EU law to be sufficiently safeguarded because of the introduction of specific provisions that were, arguably, a result of the EU's accession. After all, as explained in section 10.4.2. above, the EU's participation in the agreement allowed to implement mechanisms necessary for "externalizing" the legal effects of CETA. Thus, one could even claim that somewhat paradoxically, in the case of the ISDS mechanism, the EU's membership made it possible to bring the mechanism into conformity with the principle of autonomy of EU law.

Therefore the EU's participation in international agreements is not the decisive factor regarding their compatibility with the principle of autonomy.

14.3. Jurisdiction of a given body extending to matters falling within the scope of application of EU law

Furthermore, one may examine the importance of jurisdictional overlap between an external dispute settlement body and the CJEU. Before answering this question, however, one should make some more general considerations related to the scope of this overlap. Theoretically, one could conceive a situation where a dispute settlement body would not adjudicate upon matters falling within the scope of application of EU law. However, such a scenario is hardly possible in practice due to the overly broad understanding of the concept of application of EU law conceived by the CJEU. This pertains particularly to open-ended standards, such as general

[1317] CJEU judgment of 6 March 2018, *Achmea*, case C-284/16, ECLI:EU:C:2018:158. See section 10.3.2. above.
[1318] Opinion of AG Wathelet of 19 September 2017, *Achmea*, case C-284/16, ECLI:EU:C:2017:699.

principles, fundamental rights or market freedoms, that may be accidentally applicable even to matters not generally regulated by EU law. In any case, such an overlap would necessarily exist in case of agreements to which the EU is a party absent an express exclusion of all the EU law matters from such bodies' jurisdiction.[1319] This is neatly confirmed by the caselaw analysed above.

Essentially, all of the examined dispute-settlement bodies acted within the scope of application of EU law and, thus, the CJEU's jurisdiction. The matter was most straightforward with the European Patent Court, explicitly tasked with applying an EU Regulation.[1320] Other apparent cases would include instruments that were (or would have been) acceded to by the EU, such as the Aarhus Convention,[1321] European Schools Statue[1322] or the ECHR,[1323] where the CJEU expressly recognized its jurisdiction. Arguably, even without the EU's membership, the jurisdictions of the CJEU and these dispute settlement bodies would (or does) overlap. It is most visible in the case of ECHR and the Aarhus Convention, both containing open-textured standards, largely corresponding with provisions of EU law (environmental protection and fundamental rights) and having a great potential for spill-over on different branches of EU law.[1324] The case of the European Schools would be more complicated, yet one could follow the AGs' positions that, at least in certain constellations, the Complaints Board would have to decide cases covered by the TFEU provisions on the free movement of workers.[1325] The example of the ISDS would be analogous to the one of ECHR and the Aarhus Convention – due to the broad formulation of the investment treaties arbitral tribunals may and, in reality, have resolved disputes concerning issues of EU law.[1326]

Consequently, granted that there are hardly any dispute settlement mechanisms whose jurisdiction could not at least occasionally overlap with the one of CJEU, it could be tempting to focus on the *degree* of this jurisdictional instead of the issue of its *existence*. As shall be demonstrated below, however, this proposal also seems to be a dead-end.

[1319] To this end see in particular CJEU judgment of 2 September 2021, *Komstroy*, case C-741/19, ECLI:EU:C:2021:655, para 49.
[1320] See section 11.2. above.
[1321] See Chapter 13 above.
[1322] See Chapter 12 above.
[1323] See section 9.3 above.
[1324] See section 13.4 above on wide application and open-textured character of the Aarhus Convention provisions; see also sec 9.4.1 on the applicability of the ECHR to matters governed by EU law.
[1325] See section 12.3 above.
[1326] See section 10.2 above.

In this respect, the differentiation between the bodies with a high or low spill-over potential[1327] would seem to have some merit. At least theoretically, limited potential for such an effect in more specialized regimes could help to contain the threat posed by their dispute-settlement bodies to the autonomy of EU law, as by their very nature, such bodies could not compete with CJEU in defining essential features of the EU legal system. It follows that specialized regimes would be principally far less prone to this kind of threat than regimes providing for general standards in areas pervading all spheres of activity, such as human rights or protection of the environment and investment. However, upon closer scrutiny, it becomes clear that this distinction played little if any role in the CJEU's jurisprudence.

Of the five frameworks examined, only the proposed UPC and the European Schools Complaints Board would qualify as "closed" regimes, tasked with adjudicating narrowly defined, strictly separable matters (respectively, educational disputes and certain aspects of patent law). While one could contemplate (despite the CJEU's silence on this topic) whether the CJEU's deference towards European Schools Complaints Board was not partially motivated by the Luxembourg Court's recognition of the low spillover potential of its jurisprudence,[1328] the UPC was found to unduly circumvent EU law, regardless of the limited scope of its competences. All that sufficed for the CJEU was that the patent court could decide on matters belonging to EU law in lieu of its EU counterparts and, in doing so, could accidentantly apply certain protective standards. The narrow dimension of its activities played no role.

These findings would be confirmed by the CJEU's inconsistent treatment of the mechanisms providing for a broad scope of application. On the one hand, it declared ECHR (as an EU agreement)[1329] and intra-EU application of IIAs[1330] to violate the autonomy of EU law. On the other, at no point did it contest the legitimacy of the Aarhus Convention Compliance Committee[1331] or the ECHR (as Member-States only agreement),[1332] despite them both overlapping with EU law to a degree not any less substantial than in the case of the aforesaid incriminated agreements. Even more importantly, in its *CETA* opinion, the CJEU expressly considered the CETA to comply with the principle of autonomy of EU law despite the scope of

[1327] Maciej Szpunar, *op. cit.*, p. 141.
[1328] See section 12.4 above.
[1329] See section 9.3. above.
[1330] See sections 10.3. and 10.5. above.
[1331] See sections 13.4-13.5 above.
[1332] See section 9.4 above.

the jurisdictional overlap being comparable, if not identical, with the banished bilateral investment treaties as between the EU Member States ("**intra-EU BITs**").[1333]

Consequently, it may be assumed that neither the existence of the jurisdictional overlap nor its degree have a substantive influence on assessing a given mechanism's conformity with the principle of autonomy.

14.4. Application or interpretation of EU law by the relevant body

Another issue, similar yet distinct from overlapping jurisdictions, concerns the application or interpretation of EU law by an external body. Before going further into detail, one should define what should be understood under the terms application or interpretation of EU law. At this place, it would be helpful to recollect that, given the fragmentation of international law, as a matter of principle mandate of international courts is shaped primarily by their respective founding instruments.[1334] Thus, at least as a matter of principle, in the absence of specific provisions to the contrary, there are no good reasons for external dispute settlement bodies to treat EU law as the applicable law *stricto sensu*, at least in the absence of express treaty provisions. The analysis of the case law confirms this. ECtHR[1335] and the investment tribunals[1336] have consistently denied applying EU law in the sense of relying on it as the legal basis of their decisions. Similarly, there are no traces of the Aarhus Convention Compliance Committee treating EU law as the legal basis for its analysis.[1337] Against this background, the European Schools Complaints Board's practice, encompassing invoking principles derived from EU law,[1338] seems somewhat more ambivalent. The UPC designed by the EU and its Member States specifically to apply and interpret EU law[1339] may serve as the sole clear-cut counter-example here. Thus, it could be safely assumed that if to adopt the criteria of these dispute-settlement bodies external to the EU, there would be no international dispute settlement bodies to apply or interpret EU law safe for those created by the EU itself. This result, however, not only may raise reasonable doubts but also clearly contradicts the CJEU's own assessment.

It was in Opinion 2/13 that the CJEU adopted an extremely broad concept of EU law application and interpretation, encompassing also accidental references thereto made within the context of

[1333] See section 10.4.2. above.
[1334] See Chapter 3 above.
[1335] See section 9.4.2 above.
[1336] See section 10.2. above.
[1337] See section 13.4. above.
[1338] See section 12.3. above.
[1339] See section 11.2. above.

the case's factual background.[1340] Arguably, this understanding was maintained by the CJEU in its later *Achmea*[1341] and *CETA*[1342] decisions, even if its application in the latter case was questionable. Since, in the *Oberto* case, the CJEU concluded that the European Schools Complaints Board did apply and interpret EU law,[1343] there are no reasons to say that the case of European schools was any different. For the avoidance of doubt, in its *Komstroy* judgment, the CJEU went even further so as to equate the interpretation of an EU agreement being, at the same time, the treaty forming the jurisdictional basis for an external dispute-settlement body, with the interpretation of EU law.[1344] As was observed above, the problem with this understanding of the CJEU is that practically any international dispute settlement body deciding issues regarding the Member States could be viewed as applying or interpreting EU law unless relevant treaty provisions expressly exclude such a possibility as in the case of the CETA.

Be as it may, granted the aforesaid discrepancies in the understanding of the concept of application and interpretation of EU law, one has to decide what criteria to adopt. Since this study refers to the principle of autonomy of EU law, it seems prudent to stick to the CJEU's perspective.

Having resolved these preliminary issues, one may ask whether the application or interpretation of EU law by the relevant bodies had any bearing on the CJEU's assessment of their conformity with EU law. Unfortunately, as shall be demonstrated below, it is again impossible to establish any firm rules in this regard. On the one hand, the CJEU declared incompatible with EU law not only dispute settlement mechanisms expressly tasked with the interpretation of EU law (Unified Patent Court)[1345] but also the ones responsible for the incidental application or interpretation thereof (ECHR as an EU agreement)[1346] or creating a mere possibility of interpreting parallel provisions of EU law (intra-EU BITs; Energy Charter Treaty, "**ECT**").[1347] On the other hand, however, the CJEU was ready to tolerate (ECHR as a Member States' agreement,[1348] the Aarhus Convention)[1349] or even affirm (European Schools)[1350] dispute settlement mechanisms allowing for at least incidental application of EU law. The *CETA*

[1340] See section 9.3. above.
[1341] See section 10.3.2 above.
[1342] See section 10.4.2 above.
[1343] See section 12.4 above.
[1344] CJEU judgment of 2 September 2021, *Komstroy*, case C-741/19, ECLI:EU:C:2021:655, para 49.
[1345] See section 11.2. above.
[1346] See section 9.3. above.
[1347] Energy Charter Treaty of 17 December 1994, UNTS vol. 2080, p. 95, see sections 10.3 and 10.5 above.
[1348] See section 9.4 above.
[1349] See section 13.4 above.
[1350] See section 12.4. above.

example would be somewhat more ambivalent in this respect. As was discussed above, there were arguably no good reasons to adopt an unusually narrow definition of application of EU law, based solely on the CETA's wording and ignoring the practicalities of the operation of the agreement.[1351] This, however, cannot obfuscate the fact that while declaring CETA's conformity with the principle of autonomy, the CJEU acted upon the assumption that the CETA tribunal will neither apply nor interpret EU law.[1352] Therefore, one may say that an express exclusion of application or interpretation of EU law in a given instrument may contribute to the mechanism's conformity with EU law.

Consequently, with regard to the application and interpretation of the EU law criterion, one may say that an express exclusion of interpretation or application of EU law should, in principle, contribute to a mechanism's conformity with the autonomy principle. Contrarily, the fact that such a body may accidentally interpret or apply EU law is not determinative for its compliance with EU law. Explicit empowerment to interpret or apply EU law, however, should be treated as a strong indicator of a threat to the autonomy of EU law.

14.5. Review of the EU law enforcement by the relevant body, in particular, the possibility of reviewing individual acts of EU-authorities

Furthermore, one could contemplate whether external bodies could have reviewed the enforcement of EU law by the organs of the EU and its Member States. Arguably, such a review could pose a particular danger to the autonomy of EU law, as it could undermine the effects of acts of EU law and interfere directly with the balance of powers within the EU. This pertains particularly to the instances of undermining the definitive interpretation of EU law rendered by the CJEU. In any case, the dangers posed to the autonomy of EU law by enabling the ECtHR to review enforcement of EU law were one of the *leitmotifs* of Opinion 2/13.[1353]

Moving to the aforesaid opinion, it is clear that the danger of elevating the ECtHR to the ultimate reviewer of actions aimed at implementing EU law belonged to the very core of the problems with the accession. This alone, however, does not allow us to say that the fact of exercising such control was decisive for the CJEU's assessment. After all, in reality, the ECtHR has conducted *indirect* control of EU law for many years, even without the EU's accession.[1354] In the first line, this entailed checking the conformity of the measures taken by the EU Member

[1351] See section 10.4.2 above.
[1352] See section 10.4.2 above.
[1353] See section 9.3 above.
[1354] See section 9.4 above.

States to enforce EU law with the Convention. If it was not enough, on several occasions, the Strasbourg Court found that these measures were in breach of the Convention. And despite all this, at no point did the CJEU suggest that, absent the accession, the ECtHR may threaten EU law's autonomy.

Such an indirect control of the European authorities was possible and, indeed, did happen in the case of international investment agreements. At this juncture it suffices to recollect that many of the proceedings initiated on the basis of intra-EU BITs and ECT concerned Member States' measures taken with a view to enforcing EU law.[1355] More importantly, IIAs to which the EU is a party (FTAs, and the ECT) expressly foresee the possibility of reviewing the actions of the very EU organs.[1356] And here, again, the CJEU acted somewhat counterintuitively: It embraced a mechanism expressly allowing for the review of the actions of the EU organs in its *CETA* opinion while simultaneously condemning a mechanism eligible, at best, of only indirect control of the EU organs' actions in the *Achmea* judgment.

The lack of direct connection between reviewing the enforcement of EU law and being recognized as a threat to the autonomy of the EU law is even more visible on the example of the Aarhus Convention. The Aarhus Convention Compliance Committee is expressly empowered to review the EU acts insofar as they pertain to environmental matters. Actually, the communication that gave rise to the embarrassing saga analysed above related to the Commission's decision not to grant the applicants access to environmental information. But the problems, in fact, are more profound: the Committee pronounced itself on issues belonging to the very core of the principle of EU law's autonomy: private entities' standing before the CJEU and the direct effect of international law within the EU legal order.[1357] Regarding the first issue, the Committee conducted an in-depth analysis of the system of legal remedies provided by the EU law. In doing so, it was daring enough to make it in unambiguous terms that the settled interpretation of the Treaties regarding individual's access of the individual to justice (*Plaumann* Formula) contradicted the Convention. Thus, the Committee reviewed the conformity of the CJEU's interpretation of primary law with the Aarhus Convention, eventually concluding that the CJEU should abandon its entrenched interpretation of the primary law. Similarly, by stating that Article 9 of the Aarhus Regulation is capable of producing direct effects within the EU legal order, the Committee did nothing short of finding the CJEU's

[1355] See in particular sections 10.2, 10.3.1; 10.5.1 and 10.6.3.
[1356] In this context see in particular proceedings against the EU initiated in the basis of the ECT in the *Nord Stream 2* case, see sections 10.4.1 and 10.5.1 above.
[1357] See section 13.5. above.

decision on this matter to be in non-compliance with the Convention thus trying to deprive the CJEU of its *gatekeeper* function. Consequently, it may be said that the Compliance Committee not only directly controlled the enforcement of EU law by the EU organs but did it precisely in relation to their function of the autonomy's guardians. Nonetheless, at no point did the CJEU even suggest that the Aarhus Convention could threaten the autonomy of EU law. Most likely,this was directly linked to the non-binding character of the Committee findings and recommendations thematised in the following section.

On the other hand, the UPC, despite having no competence to review the enforcement of EU law by the Member States' organs, still violated the principle of autonomy of EU law. In any case, despite being regulated by EU law, the matters related to the Unitary patent were designed to be resolved mostly within the EPO framework, so not before the Member States' authorities or courts.[1358] Furthermore, even without the UPC, most patent-related issues have been decided outside of the EU's system of legal remedies. Lastly, the CJEU's opinion indirectly confirms these findings, granted that the CJEU was concerned with bypassing EU courts or accidental application of the general principles of EU law rather than the possibility of actions of EU organs being supervised by an external body.

Other than the UPC, European Schools Complaints Board did not provoke an aggressive reaction on the part of the CJEU. In this case, it is difficult to conceive a likely constellation in which the Complaints Board would have to pronounce upon matters of enforcement of EU law, as its jurisdiction is strictly limited to the assessment of legal relationships as existing between the European Schools; their teachers and pupils, as well as their parents. Actually, it is difficult to conceive proceedings other than addressing acts of the Schools' organs. Thus, at least in this case, the lack of oversight over the actions of EU organs corresponded neatly with the mechanism's conformity with EU law.

Nonetheless, granted the incoherencies discussed above, in and of itself, the issue of a dispute settlement body supervising EU organs does not determine the compatibility of such body's jurisdiction with the principle of autonomy of EU law.

[1358] See section 11.2. above.

14.6. Binding character of the body's decision

Other than the factor discussed above, the narrowly understood binding character of dispute settlement bodies' decisions apparently played a vital role in the CJEU's assessment of the conformity of the reviewed mechanisms with the principle of autonomy of EU law. Directly thematized in Opinion 2/13,[1359] it arguably played a critical role also in other discussed case law. As shall be illustrated by the Aarhus Convention example, it is by no means surprising: Ultimately, regardless of how negative such bodies' assessment of EU law would turn out, the EU always maintains the possibility of simply ignoring them without committing an outright violation of the international law.

The most straightforward cases would be the UPC and the European Schools Complaints Board, both designed so as to render binding decisions to the exclusion of the EU courts.[1360] The same goes for the investment tribunals, whose decisions constitute enforcement titles under the New York Convention or ICSID.[1361] The ECHR also is not an exception since even if requiring implementation in national legal orders, the ECtHR judgments are legally binding following to Article 46.1 ECHR.[1362]

The Aarhus Convention, with its Compliance Committee, plays the role of the proverbial black sheep. As discussed above, there are many arguments for recognizing the legal relevance of the Committee findings and recommendations, even absent the endorsement of the Meeting of Parties, in particular as a sort of relevant interpretation of the Convention that could even amount to its parties' subsequent practice. Arguably, after the endorsement, their status could be raised even to the level of authentic interpretation; furthermore, the Meeting could monitor their implementation by the non-compliant party. Yet, even then, one cannot deny that, strictly speaking, they are not binding due to the character of the mechanism.[1363] For the avoidance of doubts, it has to be stressed that, as in the case of ECHR, the general normative effect of the Aarhus Convention's interpretation should not be mixed with the binding character of individual decisions vis-à-vis the interested parties. Consequently, even if the Committee findings *prima facie* impinge on matters essential to the EU's autonomy, such as the direct effect or the admissibility criteria to the CJEU, they do not pose a threat to the autonomy of EU law, as they can be simply ignored. Nevertheless, it cannot be denied that ignoring such

[1359] See section 9.3.2 above.
[1360] See respectively sections 11.2 and 12.2 above.
[1361] See section 10.1 above.
[1362] See section 9.2 above.
[1363] See section 13.3 above.

inconvenient findings hampers the effectiveness of the Aarhus Convention and, thus, definitely goes against the principle of friendliness towards international law. Deplorable as it is, it cannot be equated with breaking international law. In any case, the story of the EU's non-compliance with the Aarhus Convention makes it clear that in case of conflict with the principle of autonomy of EU law, the principle of friendliness has to give ground.

To sum up, the binding effect or lack thereof may play an essential role in the assessment of the conformity of a given dispute settlement mechanism with EU law. While no clear-cut conclusions may be drawn from such decisions' binding character, the CJEU raised no doubts with regard to the mechanism that was to render only non-binding decisions. Thus, it seems that the lack of the dispute settlement body's decisions' binding effect speaks strongly in favour of its conformity with the principle of autonomy.

14.7. Intra-EU effect of the bodies' decision and their enforcement

One cannot conflate the issue of the binding character of external bodies' decisions with their intra-EU effect and the modalities of their enforcement. After all, one could perfectly imagine a mechanism capable of rendering binding decisions, leaving the parties much freedom as to their implementation. For this reason, at least theoretically, a soft enforcement regime could offset the challenges to the principle of autonomy flowing from the mechanism's other features. One could say that it was this assumption that the CJEU relied on in its WTO-related jurisprudence: While not questioning the dispute-settlement framework itself, the CJEU effectively deprived the WTO bodies' decisions of legal significance within the European legal space.[1364] Regarding the mechanisms accessible to individuals, the CJEU explicitly analysed this issue only in the *CETA* case, though it arguably played an unspoken yet important role also in other cases. Consequently, there are reasonable grounds to consider also this factor.

To begin with, there are bodies rendering decisions that directly influence the situation of the individuals. This group would encompass the UPC, European Schools Complaints Board and investment tribunals. UPC judgments were not only to create or curtail individuals' rights and obligations but also were to be directly enforceable within the Member States.[1365] In fact, it is difficult to imagine a constellation in which execution of such a judgment could entail substantial involvement of the Member States' courts, as they were to lack jurisdiction in the matters ascribed to the UPC. This was to pertain in the first line to the matters of the existence

[1364] See sections 6.3 and 7 above.
[1365] See section 11.2 above.

of individuals' rights. Thus, it would be difficult to conceive adequate supervision of the UPC's activities by the national courts, be it only indirect. Similarly to the UPC's judgments, European Schools Complaints Board decisions are not only binding upon the parties to a given dispute but are also to be directly enforceable in the Member States.[1366] In any case, it has to be reminded that there is no redress from the Board decisions due to its exclusive jurisdiction. In this context, it has to be stressed that in the *Oberto* case,[1367] the CJEU was rather unequivocal in denying expanding the review of the Board decisions by national courts. Consequently, it may be safely assumed that, given the reluctance of national courts to check the Board's decisions, they are directly enforceable. Lastly, the arbitral awards rendered by the arbitral tribunals constitute enforcement titles within the understanding of the New York Convention or ICSID, so they are directly enforceable in the EU Member States.[1368] Arguably, it was also the case with CETA. Even granted the problems surrounding the alleged non-applicability of CETA tribunals awards within the EU, the CJEU nonetheless seemingly recognized their enforceability.[1369] Be that as it may, the CJEU acted upon the assumption of the CETA awards not producing legal effects within the EU. Thus, pursuant to the CJEU's logic, it is possible to formulate a treaty so that a judgment enforceable in all the EU jurisdictions does not produce any legal effect within the EU legal space.

The case is more complicated with adjudicating bodies providing for external review rather than replacing national courts. Arguably, since they do not replace Member States' courts, their decisions do not have to produce legal effects within the EU. Aarhus Convention Compliance Committee, with its non-binding decisions, could serve as a good example here. It has to be particularly stressed that its findings and recommendations do not bestow any rights on individuals. It has to do with the fact that issuing specific recommendations of legal significance is the thing of the Meeting of the Parties, i.e. the political organ gathering the parties' representatives. Even after their endorsement by the Meeting of Parties, however, they still are not binding. Furthermore, this body has only limited powers of exercising pressure on participants not willing to comply.[1370] Lastly, the EU's preponderance in the Meeting allows it to derail the whole enforcement process, a possibility of which the EU was more than happy to make use of. At this place, it should be only recalled that the Commission tried to further

[1366] See section 12.2 above.
[1367] See section 12.4 above.
[1368] See section 10.1 above.
[1369] See section 10.4.2 above.
[1370] See section 13.3 above.

capitalize on its misdeeds at the Meeting of the Parties by pleading before the CJEU that absent endorsement by the Meeting of the Parties, the Committee findings have no legal force. And the CJEU apparently accepted this argumentation.[1371] Consequently, it may be safely assumed that the Compliance Committee findings do not produce legal effects within the EU legal order even after their endorsement by the Meeting of Parties.

The enforcement of the ECHR judgments also is far from being a straightforward enterprise, as despite being binding, they still do need implementation in domestic legal orders of the Convention parties. As was discussed above, this particular feature of the Convention even led some scholars to draw parallels between the ECHR and the WTO system based on reciprocity and diplomatic negotiations.[1372] This proposal, however, is not convincing due to ignoring the profound difference between the WTO system regulating relations between the states and ECHR safeguarding individual rights. After all, the ECtHR rules on claims brought by private parties and concerning alleged violations of their individual rights, determining both, the scope of their rights and their possible violations. Consequently, the state parties' scope of manoeuvre may be severely limited, as the individuals' rights cannot be subject to a diplomatic bargain, nor can they be waived by the states. Depending on the context of a particular case, an ECtHR judgment, even if not producing immediate legal effects in the respective national orders, may still require from the Convention states–parties to undertake specific actions vis-à-vis successful applicants (such as releasing them from unlawful detention, reinstating court proceedings etc.). The ECtHR's rulings concerning asylum cases may serve as a good example here. In effect, despite the ECtHR judgments requiring further implementation in domestic orders, it may be assumed that they substantively influence the legal situation of private entities, thus producing legal effects within the EU legal order. This being said, it cannot be denied that their execution still provides for a considerable manoeuvre. Nonetheless, it has to be stressed that this discretionary space attracted little if any attention of the CJEU's reasoning in Opinion 2/13. Quite the contrary, the CJEU's insistence on the possibility of bypassing the EU judicial framework and the binding character of the ECtHR's decisions would strongly suggest that the CJEU acted upon the assumption that the ECtHR judgments would produce legal effects within the EU legal system.[1373]

[1371] See section 13.5.5. above.
[1372] See section 6.3 above.
[1373] See section 9.3.5 above.

It follows from the above analysis that producing legal effects within the EU may serve as a reliable proxy for mechanisms posing a threat to the autonomy of EU law. It is so, even if to admit that the CJEU has not been sufficiently clear regarding the criteria for qualifying an agreement as producing legal effects within the EU. Conversely, mechanisms not producing such effects should be viewed as relatively unproblematic, as evidenced by the *CETA* opinion and the CJEU's lenient treatment of the Aarhus Convention Compliance Committee. On the other hand, producing such legal effects in no way predetermines a mechanism's compatibility with EU law, as evidenced, e.g. by the differentiated treatment of the ECtHR (depending on the EU being a party to the Convention); European Schools Complaints Board; UPC and investment tribunals. To make things even more complicated, however, it has to be stressed that the debatable quality of the CJEU's reasoning in its *CETA* opinion indicates ambiguities connected to deciding on the lack of effects of a given body's decisions within the EU legal order.

14.8. Possibility of circumventing the dispute-settlement framework foreseen in the Treaties

Another issue of great importance to the principle of autonomy concerns the possibility of an external body's jurisdiction leading to circumvention of the judicial framework foreseen in the Treaties. The CJEU placed great importance on this criterium in its Opinion 1/09 concerning the UPC. At least on the basic level, this concern is understandable. After all, systematic taking cases away from the EU Member States courts could eventually lead to hollowing out the jurisdictional architecture foreseen in the Treaties, thus effectively limiting the scope of application of EU law. More importantly, it would deprive EU courts of their power to rule on issues of EU law. In addition, the consequences of such a transfer of judicial functions could reach even further, granted the inherent tendency of international courts to prioritize the values of their native subsystems.[1374]

Regarding the issue of the possible circumvention of EU law by international dispute-settlement bodies, one could basically indicate two groups of dispute settlement bodies . The first one would consist of "classic" bodies, tasked with reviewing the actions of state organs and, thus, highly dependent on the principle of subsidiarity. It would encompass the Aarhus Convention

[1374] See Chapter 3 above.

Compliance Committee[1375] and the ECtHR.[1376] The second group would relate to dispute-settlement bodies created to settle disputes in lieu of national courts and tribunals. This group would encompass the European Schools Complaints Board,[1377] investment tribunals,[1378] and the envisaged UPC.[1379] Seemingly, by their very nature, only the entities belonging to the latter group could be viewed as enabling to go around the EU law, as the subsidiary mechanisms cannot replace the national courts. Arguably, this conclusion would be confirmed by the CJEU's jurisprudence.

Getting around the system of judicial remedies foreseen in the Treaties was, in fact, the very purpose of the UPC, which was designed precisely to supplement a plethora of national courts with a single international court.[1380] As already explained above, the UPC would be able to render enforceable decisions without any participation or control of the EU courts. There are, however, certain issues distorting this image. As already explained, the competence of the UPC was to be somewhat limited and encompass matters of patent law solely, with little if any potential of spillover to other branches of law. Furthermore, it has to be reminded once more that the potential of patent issues making their way to the Luxembourg court is rather slim even without the UPC, in particular given that the national courts are not the primary actors in the patent governance framework. Additionally, the alleged "circumvention" of the EU law is not as unambiguous as the CJEU would like to present: the Parties inserted into the UPC Agreement a preliminary reference mechanism mimicking Article 267 TFEU and expressed their will for the UPC to apply EU law. This was coupled with selection criteria warranting the inclusion of judges sensitive to issues of EU law.[1381] In fact, it seems that the decisive argument for the CJEU to declare the UPC to be outside of the EU's framework was the impossibility of attributing international responsibility for the UPC's actions to the individual Member States. Be as it may, the UPC was found to unduly circumvent EU law by providing a competing avenue for settling individual disputes.

Similarly, it is clear that the European Schools Statue effectively removes certain disputes from the judicial framework foreseen in the Treaties. The Complaints Board has exclusive jurisdiction in cases involving mutual obligations of the schools and third parties, based on

[1375] See sections 13.2 and 13.3 above.
[1376] See section 9.2 above.
[1377] See section 12.2 above.
[1378] See section 10.1 above.
[1379] See section11.2 above.
[1380] See sections 11.1 and 11.2 above.
[1381] See section 11.2 above.

Article 27.6 of the Convention,[1382] to the exclusion of the national courts. Importantly, this fact was expressly recognized by the CJEU in its *Oberto* judgment.[1383] Furthermore, as explained by the CJEU in its *Miles* decision, the Complaints Board cannot be regarded as a part of the EU judicial system due to not being a Member State's court. Nonetheless, unlike in the case of UPC, the CJEU did not recognize these instances of bypassing the EU courts as problematic from the standpoint of the autonomy of EU law.

Lastly, the circumvention threat seems to be apparent in the case of the ISDS mechanism. As was discussed above, the very purpose of the investment arbitration is to provide the investors with an allegedly *neutral* forum, completely separate from the allegedly *biased* state courts. In any case, by their institutional design, arbitral tribunals are well equipped to do this task, with their vast fact-finding powers and competence to render enforceable money judgments playing a prominent role.[1384] Thus, it should not come off as a surprise that the CJEU decided in *Achmea* and *Komstroy* cases that intra-EU application of ISDS does circumvent EU judicial architecture, thus violating the principle of autonomy of EU law.[1385] Having said this, one may only contemplate the reasons behind the CJEU's decision to differentiate this situation from the CETA tribunal, offering a slightly modified ISDS mechanism. As this issue was not explored by the Luxembourg court, however, one may only assume that the CJEU excluded the possibility of circumventing EU legal framework by the mechanisms uncapable of rendering judgments producing legal effects within the EU.

In contrast, the Aarhus Compliance Committee does not seem to pose such threats. To begin with, it does not provide any self-standing remedies to the applicants; its findings and recommendations are not even binding.[1386] At best, the Committee findings could be used to influence proceedings before the EU courts. Furthermore, the Committee's insistence on the subsidiary character of its review and its practice of comity towards other adjudicating bodies make it highly unlikely that it would decide any case without prior involvement of the EU courts. Consequently, one cannot reasonably hold the Committee as allowing to circumvent the EU's judicial architecture.

[1382] See section 12.2 above.
[1383] See section 12.4 above.
[1384] See section 10.1 above.
[1385] See respectively section 10.3.2 and 10.5.2 above.
[1386] See section 13.3 above.

Similarly, with the subsidiarity principle written into its DNA, the ECtHR cannot replace the national courts acting in their EU law capacity.[1387] Thus, not only does it strictly observe the principle of exhaustion of local remedies, but similarly, it relies heavily in its judicial practice on the materials presented by the Convention parties and does not even conduct its own fact-finding. Furthermore, as was already explained, its judgments do not have an immediate effect on respective national legal orders but require further implementation.[1388] Arguably, this feature was also recognized by the CJEU in its Opinion 2/13. Even if it would be tempting to connect the CJEU's critique of Protocol 16 as unduly creating a preliminary reference procedure parallel to the one foreseen in the Treaties to the circumvention concept, it has to be stressed that despite frequent references to Opinion 1/09, the Luxembourg Court abstained from relying on this opinion's *dictum*, i.e. the circumvention thesis. Nonetheless, the ECHR accession agreement was still found to violate the principle of autonomy of EU law.

Consequently, it may be said that the possibility of bypassing EU legal order precludes a given mechanism's conformity with EU law only if expressly named so by the CJEU (Opinion 1/09; *Achmea* and *Komstroy* judgments), as specific mechanisms allowing for it are at least tolerated by the Luxembourg court (European Schools, CETA Tribunal). On the other hand, not posing a threat of getting around the judicial framework foreseen in the Treaties does not guarantee a mechanism's conformity with EU law, as illustrated by the ECHR example. In effect, taken on its own, the possibility of circumventing the dispute settlement framework foreseen in the Treaties is not decisive for the agreements' conformity with the principle of autonomy.

14.9. The body created within an extra- or intra-EU framework

There comes another issue – whether a particular adjudicative body was created in connection to the EU legal framework in pursuance of the EU's goals. At least theoretically, the fact that the EU decided to join (or even create) a particular instrument could indicate the apparent concordance of objectives. Arguably, this would be particularly the case with the international agreements created by the EU itself. As the jurisprudence analysed in the previous chapters shows, however, this element is hardly relevant to CJEU's assessment.

To begin with, there are dispute settlement bodies within frameworks explicitly conceived by the EU, to which the EU was (to be) a party. Representatives of this group encompass the

[1387] See section 9.2 above.
[1388] See section 9.2. above.

UPC,[1389] CETA and ECT tribunals,[1390] and Aarhus Convention Compliance Committee.[1391] The CJEU's practice regarding them was as diverse as possible, as the CJEU explicitly affirmed CETA; tolerated the Aarhus Convention Compliance Committee, and rejected the UPC and ECT tribunals (the latter in the intra-EU context). Furthermore, there are external frameworks created outside the EU, yet which were to be acceded to by the EU to fulfil its goals. They would encompass European Schools Complaints Board[1392] and the ECHR, as envisaged in the accession agreement.[1393] Yet, here again, the practice was not consistent, as the CJEU rejected the EU's accession to the ECHR and was favourable of the Complaints Board's jurisdiction. Lastly, one would have frameworks existing parallelly to EU law, to which the EU is not a party, such as intra-EU BITs[1394] and ECHR (as the Member States only agreement), where the CJEU was equally ambiguaous: While banishing ISDS in intra-EU BITs, the Court has continuously tacitly accepted the jurisdiction of the ECtHR.

In effect, whether a given framework was created or, at least, developed by the EU in the pursuance of the EU goals has little if any meaning to its conformity with the principle of autonomy of EU law.

14.10. The "X-factor": intrinsic features of particular dispute settlement systems

In addition to the above "hard" criteria, more or less addressed by the CJEU in its jurisprudence, one could also consider "softer" factors, at least theoretically allowing for the mitigation of potential clashes between EU law and the external frameworks. Adopting the pluralistic framework as the point of departure, as explained in Chapter 3 above, one could think of two principal ways of mitigating tensions between different treaty regimes. Firstly, provided that inter-regime collisions are deemed to reflect more profound differences between the regimes underlying rationales, a conflict potential should be significantly reduced by the concordance of the goals behind different frameworks. Secondly, given the mitigating role ascribed to soft-law "dialogical" principles, one could think of an institutional environment facilitating judicial dialogue, creating incentives for applying the comity principle and encouraging dispute settlement bodies to effectively sideline any menacing conflicts. It follows that one could legitimately expect that international frameworks showing either of these traces should be

[1389] See section11.2 above.
[1390] See sections 10.4 and 10.5 above.
[1391] See section 13.4 above.
[1392] See section 12.1 above.
[1393] See section 9.3 above.
[1394] See section 10.3 above

treated as less challenging to the principle of autonomy of EU law and, thus, be treated more leniently by the CJEU. However, as the CJEU case law discussed below clearly indicates, such external factors not only are not directly thematised by the CJEU, but also play little if any role in the ultimate outcome of its assessment.

14.10.1. Underlying frameworks' aims conformity with EU law

Before going further into details, it has to be stressed that in literary none of the cases analysed above did the CJEU refer to any divergences between the substantive rules underlying their application and the EU law. This should not come off as a surprise, given that virtually all the scrutinized frameworks pursued goals also recognized by EU law. On several occasions, the CJEU even expressly underlined the concordance of the substantive standards with EU law. The case of the UPC that was to interpret the very provisions of EU law[1395] would provide the most extreme example. Similarly, Opinion 2/13 CJEU left no doubt that both the ECHR and the EU law shared common goals and values to the extent the EU primary law mandating its interpretation in conformity with the Convention even absent the EU's accession.[1396] In effect, as will be examined below the problem was not whether the external frameworks pursued goals similar to the ones of the EU, but rather whether these goals were to be weighed against the same values as in the EU law and whether the outcome of this balancing would be the same. It follows that a mere concordance of a given mechanism's goals with the ones followed by the EU law does not suffice to assure its concordance with EU law.

The UPC example seems to be most telling in this respect. The UPC's underlying international agreement was to contain mainly procedural provisions, with the bulk of the substantive regulations to be included in the Patent Regulation 1257/12, i.e. an act of EU law. In any case, certain substantive rules contained in the Agreement[1397] neither doubled nor contradicted existing EU legislation. Furthermore, the envisaged Agreement was being drafted with the full participation of the EU Commission, and the EU was to become the party to the agreement so that no one could reasonably argue that its conclusion somehow impaired the exercise of the EU's shared competences in the field of patent law. Consequently, the only thing that bothered the CJEU was the threat of different balancing between conflicting values of EU law by the

[1395] See section 11.2 above.
[1396] See section 9.3 above.
[1397] See section 11.2 above.

UPC judges. The fact that this potential threat would be confined to a narrow and clearly separable field of patent law played little if any role in the CJEU's ultimate assessment.

The ECHR case is pretty similar. The legal norms contained in the provisions of the Convention have become a part of EU law either as general principles of EU law as expressed in Article 6.3 TEU or as a part of the Charter of the Fundamental Rights.[1398] Particularly the latter instrument, additionally to replicating the provisions of the ECHR, contains a clause mandating the interpretation of the Charter provisions in conformity with the ECHR.[1399] Given the strong formulation of the EU law provisions, one could hardly argue that the Convention values would contradict EU law. Thus, as in the case of the UPC, the potential for the conflict would again lie in the threat of different balancing between divergent values rather than in an outright irreconcilability on the level of substantive provisions.

Regarding the Aarhus Convention, it has to be reminded that, generally speaking, its regulations were practically mimicking the contemporaneous EU's provisions on environmental protection.[1400] Thus, as a matter of principle, there has been no discord between the goals pursued by the Aarhus Convention and the EU law, as the axiological underpinnings of both systems and their goals largely coalesce. In any case, also the Convention practice has not revealed any noteworthy conflicts in this respect. Therefore, if the similarity of the normative content between different instruments was to reduce the threats to EU law's autonomy, the Aarhus Convention should have served as the poster child. Yet, it did not.

Even the open-textured standards contained in investment treaties, in and of themselves, not only do not contradict EU law but frequently correspond with the provisions contained therein, at least on the textual level.[1401] Arguably, this was also reflected in the CJEU case law, as the Luxembourg court concentrated on the issue of incidental application of EU law or limiting the scope of manoeuvre of the EU organs rather than on identifying substantive divergences of the particular provisions of investment treaties with EU law.[1402] Arguably, here again the real problem concerned the potential outcome of the balancing exercise rather than an outright conflict between the provisions of the IIAs and EU law.

[1398] Charter of Fundamental Rights of the European Union, OJ EU C 326, 26.10.2012, p. 391–407.
[1399] See section 9.4 above.
[1400] See section 13.4 above.
[1401] See section 10.2 above.
[1402] See sections 10.3.2; 10.4.2. and 10.5.2 above.

The case of the European Schools Complaints Board was slightly more complicated. As already explained, the Board's underlying instrument contained hardly any provisions granting substantive rights to the individuals. Furthermore, even if it was not the case, one should bear in mind that these rights could be invoked merely against the Schools' own administration. This being said, it has to be stressed that, as discussed in section 12.3 above, the Complaints Board was more than eager to embrace standards and principles common to the EU and its Member States. In any event, at least as a matter of principle, there are no reasons to declare mainly internal regulations of an international organization concerning the mode of its functioning contradictory to EU law, in particular given the lack of potential for their spillover effect. This, in addition to the CJEU's silence on the matter, allows assuming that the substantive provisions of the Convention do not conflict with EU law.

It follows that the imperatives driving underlying regulatory frameworks of the analysed dispute settlement bodies are by and large shared with EU law. Nonetheless, many of them were declared to contradict EU law. This should not come off as a surprise: After all, as early as in Opinion 1/91, the CJEU made it clear that the autonomy of EU law could be endangered by treaty provisions mimicking EU law. The CJEU, however, has not referred to this opinion in the judgments referred to above. What drew its attention instead, was the possibility of divergent balancing between competing values which could eventually lead to different outcomes. In fact, the Luxembourg Court was relatively straightforward about it in its opinions 1/09[1403] and 2/13.[1404] However, accepting that balancing is all that matters would mean that the principle of autonomy would be endangered by the very existence of any external dispute-settlement body, regardless of the substantive content of the underlying instrument. This view, even if somewhat disturbing, arguably finds confirmation in the CJEU's jurisprudence. The Aarhus Convention Compliance Committee may serve as a particularly striking example: Despite the lack of divergences between the underlying substantive standards, the Committee made findings impinging on the very core of the EU's autonomy (primary law regulations regarding access to the CJEU).[1405] In light thereof, regardless of the assessment of the CJEU's jurisprudence, it is clear that concordance between substantive standards, not to mention more general normative underpinnings, of external frameworks and EU law is hardly relevant for the

[1403] See section 11.3 above.
[1404] See section 9.3.5 above.
[1405] See section 13.5 above.

conformity of the dispute settlement mechanisms contained therein with the principle of autonomy of EU law.

14.10.2. Dialogue and openness: does it make any difference?

By and large, similar considerations pertain to the role of the potential of the judicial dialogue, even though one would be willing to expect that a situation favourable to judicial dialogue could translate into a decreased threat level to the principle of autonomy. Conversely, the hypothesis on extra-EU judges sitting in external bodies deciding on EU matters having a possibly detrimental influence on the EU legal order playing the role of an essential factor in legality assessment is nothing new.[1406] As the survey of the CJEU's jurisprudence demonstrates, however, the CJEU has not expressly addressed this factor so far. This translates into the lack of correlation between the existence of systemic incentives for judicial dialogue and a mechanism's conformity with EU law.

On the one hand, we would have dispute settlement bodies whose design and operational history would *prima facie* suggest fertile soil for judicial dialogue. Even though not having become an EU agreement, the ECHR seems to provide the best example here.[1407] To begin with, the majority of ECHR parties are the EU Member States. Thus, at least the ECtHR judges coming from these states, being themselves mostly former national judges, officials, or academics, are at least familiar with EU law. Furthermore, there are institutional programs aimed at familiarizing not only CJEU and ECtHR judges but also their national colleagues with the basics of their respective legal systems, accompanied by extensive academic writing regarding the interaction between EU law and the Convention. All this is reflected by both European top courts' jurisprudence showing a high degree of mutual awareness and respect. And, at least in the case of the CJEU, this jurisprudence has a solid normative basis in the provisions mandating the interpretation of EU law in conformity with the Convention. If it was not enough, one should also remember that before making it to Strasbourg or Luxembourg court, a case necessarily has to be assessed by a national court, which, being obliged to apply both EU law and the Convention, would typically try to strike a balance between the two. Despite all these, the CJEU did not dedicate a single line of its opinion 2/13 even to the very possibility of offsetting the observed challenges to autonomy by the conditions favourable to the judicial dialogue.

[1406] Matthew Parish, *op. cit.*, p. 146. Notably, the author emphasised that investment tribunals were especially susceptible to such problems, see p.148.
[1407] See sections 9.2 and 9.4 above.

Arguably, the UPC and the European Schools Complaints Board would also fit neatly into this pattern. As already explained, the parties to the European Schools Statue encompass the EU and its Member States, along with the European Patent Organization. They directly influence the appointment of the organization's organs, as well as its budget, etc. In addition, the members of the Complaints Board would be selected from a list prepared by the CJEU (Article 27.3 European Schools Statue); as for now, they are mainly members of EU courts or senior civil servants in the institutions of the or the Member States. In any case, the Board's jurisprudence also does not offer fertile ground for accusations of its hostility towards EU law, as it has repeatedly applied EU law and even attempted to make a preliminary reference.[1408] In a similar vein, despite the envisaged UPC not having come into being, the perspectives for its openness to judicial dialogue were non less satisfactory.[1409] The court was to be manned by EU judges, sitting together with technical experts. The UPC was to be explicitly empowered and, at times, obliged to make preliminary references. Further, there should have been many networking mechanisms available to the judges, including networks, courses, etc. In any case, granted the limited enthusiasm of the existing patent organs for making preliminary references to the CJEU, there was nothing to suggest that creating the UPC would result in a deterioration of the quality of the judicial dialogue. Yet, the CJEU again has not even brought this factor into consideration while declaring this framework incompatible with EU law.

Actually, these are the investment tribunals that seem to stick out.[1410] Deprived of any organizational ties with the Member States; chaired by arbitrators operating within an international context, utterly independent from the EU, and fixated on the neutrality concept, the investment tribunals consistently emphasised their independence from the EU and diminished the importance of EU law for their decisions. All in all, this does not seem to create a framework conducive to the judicial dialogue. In any case, despite specific provisions to the opposite effect, the CETA tribunal is not free from these difficulties, as its members should be recruited from people coming from the ranks of arbitration practitioners, and only 1/3 of them would be elected by the Member States. Thus, one could expect that this composition, seemingly unfavourable to the very possibility of fruitful judicial dialogue, would have to be at least mentioned in the CJEU *CETA* opinion, particularly granted earlier refutation of the ISDS in intra-EU BITs in the *Achmea* judgment. Yet, it was not the case: The CJEU not only

[1408] See section 12.3. above.
[1409] See sections 11.1-11.2 above, see also Federica Baldan, Esther van Zimmeren, *op. cit.*, pp. 1549-1551, 1555.
[1410] See section 10.2. above.

embraced the dispute-settlement mechanism foreseen by CETA but also failed to make any reference to the dialogue issue.

The above clearly shows that it is simply impossible to establish any link between the external bodies' openness to dialogue and the challenges posed by them to the principle of autonomy of EU law. On the one hand, we have mechanisms with established (ECHR) or, at least, promising (UPC) arrangements for judicial dialogue, which were found to breach the autonomy of EU law. On the other, as demonstrated by the positive assessment of the CETA tribunal, the CJEU's is willing to accept mechanisms perpetuating dialogue-unfriendly patterns of interactions between dispute-settlement bodies. Consequently, one may safely assume that the potential openness of particular bodies to judicial dialogue plays little if any role for the CJEU. This conclusion is even more evident, if to recollect that the CJEU has not even taken this factor into account in its reasoning of the aforementioned jurisprudence.

The reason for this omission may be pretty simple: Structural openness to dialogue may be insufficient to prevent collisions endangering the autonomy of EU law, as amply demonstrated by the interactions between the EU legal system and the Aarhus Convention.[1411] The Aarhus Convention Compliance Committee not only functions within a framework literally dominated by the EU Member States and is manned mostly by (former) academics with background knowledge of EU (environmental) law selected by the Member States, but also it has shown a considerable degree of awareness and deference towards the EU and its institutions throughout the proceedings regarding the case ACCC/c/2008/32, be it only through adjourning its decision up until the crystallization of the CJEU's own jurisprudence. And all this has not precluded it from coming to a conclusion impinging upon the *sanctum sanctorum* of the autonomy principle, namely the interpretation on the TFEU provisions on the standing of the individuals before the CJEU.

[1411] See section 10.3 above.

Table 1: distillation of the focal points from the CJEU's jurisprudence

	ECHR (EU)	**ECHR* (Member States only)**	**European Patent Court**	**European Schools**	**Aarhus Convention**	**Intra-EU BITs**	**ECT (intra-EU only)**	**CETA**
EU as a party	Y	**N**	Y	Y	Y	**N**	Y	Y
Jurisdiction on matters covered by EU law	Y	Y	Y	Y	Y	Y	Y	Y
Application/interpretation of EU law	Y	Y	Y	Y	Y	Y	Y	N
Review of EU law enforcement	Y	Y	N	N	Y	Y	Y	Y
Binding character of legal decisions	Y	Y	Y	Y	N	Y	Y	Y
Binding effect within EU	Y	Y	Y	Y	N	Y	Y	N
Circumvention of EU law	N	**N**	Y	Y	N	Y	Y	Y
External to EU*	N	**N**	N	N	N	Y	N	N
Lack of Additional features favouring compatibility with EU law*	**N**	**N**	N	N	N	Y	Y	Y
Mechanism conform with EU law	**N**	**Y**	N	Y	Y	N	N	Y

Chapter 15: No autonomy test

15.1. No autonomy test

The discussion of the interplay between different factors affecting the CJEU's ultimate assessment of the challenges posed to the principle of autonomy by the international dispute settlement mechanisms available to the individuals conducted in the preceding chapter leads to the inevitable conclusion: The CJEU's jurisprudence is highly casuistic and, consequently, there is no "autonomy test", i.e. comprehensive list of requirements for external dispute-settlement mechanisms. The incoherencies marring the CJEU's jurisprudence in this respect will be summarised in Table 2 at the end of this section.

In fact, the only dependable factor providing 100% sureness as to the conformity of a given mechanism with EU law is the non-binding character of the dispute settlement body's decisions. In fact, at no point did the CJEU condemn a mechanism where the decisions would be non-binding. This is by no means surprising: As evidenced by the infamous Aarhus Convention saga, if not feeling bound *stricto sensu*, the EU is simply going to ignore the unwanted decisions of international both, *pro foro externo* (by sabotaging endorsement of the unfavourable findings by the Meeting of Parties) and *pro foro interno* (by ignoring the Compliance Committee findings). Importantly, as the case shows, such a non-compliance is an option not only in the case of reciprocal treaties such as the WTO agreement but also in the case of *objective* treaties concluded in general interest and, in fact, in order to pursue the policy goals of the EU. Accordingly, it may be said that the mechanisms with whose decisions the EU may simply refuse to comply by their very nature cannot threaten the autonomy of EU law.

The issue of the bodies' decisions producing legal effects within the EU is slightly more complicated. As a general principle, however, one could argue that the lack of legal effects of a body's decision within the EU would also ensure the compatibility of a given dispute settlement mechanism with EU law. The basis for such an understanding was created already in the Luxembourg Court's WTO jurisprudence, where the Court ensured that both the WTO provisions and the DSB rulings would produce only as much legal effect within the EU as the EU organs would see fit. Thus, by insulating the EU legal order from possible external influences and posing itself as the gatekeeper, the CJEU eliminated the issue of further surveying the WTO regime's conformity with EU law. In fact, it would be hard to imagine an agreement not producing any legal effects within the EU that could lead to circumvention of the EU legal system. Arguably, it was this alleged lack of the decisions' legal effect that allowed

the CJEU to justify different treatment of the CETA. On the other hand, however, if both EU and its Member States were parties to such an agreement, it could still result in problems with the division of responsibility between them. This, however, cannot alter the conclusion that, , such a lack of legal effects within the EU legal order could also be considered a factor speaking in favour of a given mechanism's conformity with EU law.

Conversely, all the dispute settlement mechanisms that threatened the autonomy of EU law had three traits in common: They (1) allowed external organs to interpret EU law; (2) their scope of application overlapped with the scope of application of EU law and (3) dispute settlement bodies rendered binding decisions. The problem is, however, that these three characteristics are also shared by the mechanisms at least tolerated by the CJEU, namely the European Schools and the ECHR (in the Member States only version) and, arguably, also CETA (were it not for the somewhat arbitrary assumption that the CETA tribunal would not interpret EU law, see section 10.4.2). Consequently, also with relation to this combination of the different characteristics what we get at best, is a very rough approximation.

Interestingly this survey also shows the irrelevance of parameters that could be associated with the judicial dialogue or, more broadly, mutual comity. The questions of a given framework offering good conditions or even existing practice of judicial dialogue or its embeddedness in a scheme advancing the EU's interest not only have not been raised by the CJEU, but also had no effect on its ultimate decisions. On the one hand, the Luxembourg court has denounced UPC, whose design seems to have been favourable to a possible dialogue, and the ECHR (as an EU agreement) with an actual positive track record in this respect. At the same time, however, it embraced CETA Tribunal, whose design could hardly give raise to any hopes of a fruitful dialogue (section 14.10.2). Similarly, a framework's pursuance of the EU's goals in practice could have been more of a liability than an asset, as evidenced by the *UPC* and the *ECHR* opinions underlying the dispute settlement bodies' potential for bypassing the judicial system foreseen in the Treaties. Nonetheless, rather unsurprisingly, as evidenced by the *CETA* opinion, also an opposite situation is possible, where the interconnectedness between a given framework and EU goals speaks in favour of their conformity with EU law (section 14.10.1).

Be that as it may, this inevitably leaves us with the conclusion that there is no such thing as the autonomy test. While certain authors expressly accepted this somewhat unattractive constatation,[1412] there have also been many dissenters believing that creating an autonomy

[1412] In any case, this conclusion is not new, see e.g. Jed Odermatt, *International Law…*, pp. 180-181.

checklist, be it only in an abbreviated form, is possible. For example, Pantaleo's four points list encompasses (i) the existence of an organic link between the dispute settlement body and the CJEU ("double-hatting"); (ii) the external body's power to rule on the internal division of competence between the EU and its Member States; (iii) the existence of powers to issue a binding interpretation of EU law; (iv) having jurisdiction over intra-EU disputes where EU law issues are at stake and (v) having no jurisdiction over EU acts not subject to the CJEU's review.[1413] On his part, Lock distilled only two main points, namely (i) prohibition of rendering binding interpretations of EU law and (ii) prohibition of changing the Treaties through the backdoor.[1414] Another take was made by Wessel and Hilion, who proposed the following checklist, according to which international dispute settlement (i) does not entail an adverse effect on the autonomy of the EU legal order, (ii) does not affect the allocation of powers between the EU and its Member States; (iii) cannot interpret EU law; (iv) does not limit the jurisdiction of the Court in relation to the application and interpretation of EU law and (v) CJEU judges cannot sit in international tribunals.[1415] As demonstrated by the preceding chapters, however, these efforts are doomed to fail. To begin with, in addition to operating with rather blurred criteria, the above lists do not examine all the relevant factors. More importantly, they do not sufficiently take into account the actual jurisprudence of the CJEU and, thus, have little if any predictive value. In fact, as demonstrated in the preceding chapters, upon careful analysis of the CJEU case law they all show serious deficiencies. Regarding the Pantaleo's list, suffice is to say that every of the examined dispute-settlement bodies had jurisdiction over matters where EU law issues are at stake, and, unlike it happened in reality, the ISDS mechanism in intra-EU BITs would pass all the other elements of the test. In a similar fashion, it is pretty clear that the ISDS mechanism under scrutiny in the *Achmea* judgment *prima facie* would score positively on the Lock's chart. Also the last checklist would be hardly helpful, be it only for choosing the autonomy of EU law as one of the relevant criteria, while failing to provide any comprehensive definition thereof.[1416] It is thus clear that the existing heuristic frameworks are not very helpful in this respect

Thus, the overall picture is rather bleak. As demonstrated by this survey, the CJEU's jurisprudence does not allow to draw any more general conclusions with regard to the

[1413] Luca Pantaleo, *op. cit.*, pp. 65-66.
[1414] Tobias Lock, *The European Court of Justice…*, p. 80.
[1415] Ramses A. Wessel, Christophe Hillion, *op. cit.*.
[1416] At this place it has to be underlined that the authors are fully aware of the ambiguities and incongruities connected to CJEU's autonomy jurisprudence, see Ramses A. Wessel, Christophe Hillion, *op. cit.*, pp. 29-30.

requirements set by the autonomy principle to the dispute settlement mechanisms accessible to private parties. Even if individual CJEU judgments would seem to contain elements of such a test, a comprehensive analysis of the CJEU's aggregated jurisprudence shows that in practice, they contradict the reasoning of other decisions. Consequently, it is not possible to draw any "autonomy checklist" that could serve as guidance for both the CJEU and other actors within and without the EU.[1417] And without it, the EU, its Member States and their external partners are left in the dark as to the more exact contours of "do's" and "dont's" related to the international dispute settlement mechanisms accessible to the private parties.[1418] It follows that as a matter of principle, *any* such mechanism is suspicious from the standpoint of autonomy of EU law. One could even go so far as to say that in this respect, the CJEU is largely guided by the *guilty until proven innocent* principle. This has several consequences. To begin with, in practice, the assessment of the dispute settlement mechanisms by the CJEU is entirely dependent on the CJEU. What is more worrisome, the Luxembourg Court, not guided by clear-cut principles, has *de facto* discretionary powers in this respect. In fact, at times it may be difficult to escape the impression on the arbitrary character of its actions, as was particularly the case of the 2/13 Opinion (see section 9.3.1). In my opinion, one could legitimately question whether this situation is desirable from the point of view of the legal stability, as well as the balance of powers within the EU and the CJEU's legitimacy.

But even leaving aside the EU's internal problems, it is clear that this lack of sensible guidelines poses a threat to the EU's international credibility. In the absence of foreseeable and understandable criteria guiding the autonomy analysis, parties negotiating a treaty may not be sure whether it would not end up being rendered ineffective by the CJEU judgment nearly till its conclusion. And this threat is by no means purely hypothetical. To give an example, after over a decade, the EU again began negotiations concerning accession to the ECHR, involving all the 46 Convention parties. Granted the broad character of the Opinion 2/13 criticism and lack of the autonomy test, the negotiating parties not only do not know, whether the negotiated text would be conform to EU law, but will be left in dark with regard thereto well until the CJEU's hypothetical future opinion (or decision rendered within the framework of different proceedings). In particular, even introducing co-respondent and prior involvement mechanisms reproducing the solutions approved by the CJEU in *CETA* case would still not allow

[1417] Jed Odermatt, *International Law…*, pp. 180-181 (the author, however tries to somewhat balance it against the inherent vagueness of principles that should be applied individually to a particular case. Similar scepticism may be found also at Ramses A. Wessel, Christophe Hillion, *op. cit.*, pp. 29-30.
[1418] Jed Odermatt, *International Law…*, p. 181.

determining beforehand that the envisaged mechanism does not infringe the autonomy principle for other reasons. In effect, it may very well turn out that after months, or rather years, of negotiations conducted upon the request of the EU, the organization would inform its partners that it cannot adopt the negotiated texts due to internal policy reasons right after its adoption. For the second time. Would the EU be given a third shot after that? One could have reasonable doubts with regard thereto.

Table 2: Dispute settlement mechanisms available to individuals grouped according to their conformity with autonomy principle

	MECHANISMS ACCEPTED/TOLERATED BY THE CJEU				**MECHANISMS REJECTED BY THE CJEU**			
	ECHR* (Member States only)	**CETA**	**European Schools**	**Aarhus Convention**	**Intra-EU BITs**	**European Patent Court**	**ECT (intra-EU only)**	**ECHR (EU)**
EU as a party	**N**	Y	Y	Y	**N**	Y	Y	Y
Jurisdiction on matters covered by EU law	Y	Y	Y	Y	Y	Y	Y	Y
Application/interpretation of EU law	Y	N	Y	Y	Y	Y	Y	Y
Review of EU law enforcement	Y	Y	N	Y	Y	N	Y	Y
Binding character of legal decisions	Y	Y	Y	N	Y	Y	Y	Y
Binding effect within EU	Y	N	Y	N	Y	Y	Y	Y
Circumvention of EU law	**N**	Y	Y	N	Y	Y	Y	N
External to EU*	**N**	N	N	N	Y	N	N	N
Lack of Additional features favouring compatibility with EU law*	**N**	Y	N	N	Y	N	Y	**N**
Mechanism conform with EU law	**Y**	**Y**	**Y**	**Y**	**N**	**N**	**N**	**N**

15.2. Relabelling international courts as courts common to the Member States as a way out?

The practical nonexistence of the autonomy test is a tough reality. Thus, it is all but surprising, that the EU actors, the CJEU included, have been searching for a silver bullet that would allow to escape the autonomy conundrum. Seemingly, substituting the autonomy test with relabelling international dispute settlement bodies as courts and tribunals common to the Member States constitutes the only serious attempt at this direction. After all, as the *Dior* case demonstrates, at least theoretically, qualifying an entity as such a court should suffice to trump any doubts related to the principle of autonomy of EU law. In my opinion, however, resorting by the CJEU to this concept would be not only methodologically flawed but, equally, counterproductive and, as such, should be viewed rather as an act of desperation than anything else.

The whole story started with the Benelux Court and the *Dior* judgment, where the CJEU simply qualified the Benelux Court as a court common to several Member States[1419] . Despite the concepts' innovative character at the time, the judgment's reasoning contained hardly any criteria for the CJEU's decision. Thus, it is all but surprising that this decision resulted in a bunch of ill-fated attempts at disguising other dispute settlement bodies (investment tribunals,[1420] European Schools Complaints Board[1421] and the Unified Patent Court[1422]) as Member States' courts. Nonetheless, the CJEU has consistently rejected expanding the *Dior* exception to any other instruments so far, with the litigation resulting, up until now, solely in the elaboration of the criteria foreseen in the *Dior* test.[1423] Nonetheless, as evidenced, among others, by the revised UPC agreement (see section 11.4 above), the concept seems to still attract the attention of the stakeholders as a sort of a joker, enabling a given body to bypass the demanding autonomy test.

While one cannot predict the CJEU's future jurisprudence, it has to be stressed that there are sound arguments against relying on the *Dior* reasoning. The most important rationale lies at

[1419] CJEU judgment of 4 November 1997, *Parfums Christian Dior*, case C-337/95, ECLI:EU:C:1997:517, see section 6.2.4 above.
[1420] See in particular the analysis of AG Wathelet's opinion in *Achmea* case in section 10.3.2, see also Jürgen Basedow, *EU Law in the International Arbitration*, "Journal of International Arbitration" vol. 32 4/2015, p. 378 ff.; Paschalis Paschalidis, *Case C-567/14 Genetech: EU law confronted with international arbitration*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2990246, accessed on 22 August 2022, p. 4.
[1421] See in particular Opinion of AG Sharpstone of 16 December 2010, *Paul Miles and Others v European Schools*, case 196/09, ECLI:EU:C:2010:777 and its discussion in section 12.4.
[1422] See CJEU Opinion of 8 March 2011, *European Patent Court*, Opinion 1/09, ECLI:EU:C:2011:123 and its discussion in section 11.3.
[1423] This happened particularly in the *Miles* case, see section 12.4.

hand: Qualifying an international dispute settlement body as a court common to the Member States is nothing more than a unilateral relabelling exercise on the part of the EU and, as such, by its very nature it cannot influence the character of an international body. What is more, the concept of the court common to the Member States belongs exclusively to the realm of EU law and does not correspond with any specific category of international law. In particular, this relabelling exercise does not mitigate in any way whatsoever the challenges posed by the dispute settlement bodies' embedment in their native frameworks rather than EU law, as discussed extensively in Chapter 3 above and demonstrated by various examples discussed in Part II of this dissertation. In any case, it lies at hand that even the possibility of ascribing to the Member States' the liability for such court's decisions would not mitigate the threats to the autonomy of EU law discussed above, be it only for two reasons. On the one hand, it would not influence in any meaningful way the status of the international courts as paragons of their respective subsystems. On the other, punishing the Member States for decisions of such international courts would neither affect the existence of these decisions nor automatically influence the jurisprudence of the issuing bodies, be it only due to their separate legal personality. Thus, it is clear that tagging an international dispute settlement body as a court common to the Member States cannot and does not remove any of the challenges posed by such bodies to the autonomy principle.

In fact, it would be interesting to see whether the expansion of the Benelux Court's jurisdiction in the years following the Dior judgment would not lead to a revaluation of the position adopted in the *Dior* judgment, in particular in light of the recent expansion of the Benelux Court competences discussed in section 6.2.4 above. It would be particularly interesting to learn, whether, in light of the condemnation of the preliminary reference mechanism contained in the Protocol 16 to ECHR in Opinion 2/13 (see section 9.3.3) the CJEU would still consider that the Benelux Court's jurisdiction does not affect the functioning of the EU judicial system.

This being said, one cannot exclude the concept's resurgence in the CJEU's future case law. After all, it possesses an undisputable practical advantage: It allows the CJEU to bypass the uncharted territory of the autonomy test so as to effectively slur over an unwanted conflict between a given mechanism and the EU law. In fact, it seems to have little if any rivals in this master key role. The attempts at revamping the UPC as a court common to member states without addressing any of its main problematic features (see section 11.4.) seem to serve as a perfect illustration in this respect. As for now, however, we have no choice but to wait for the CJEU's further rulings.

15.3. Preliminary conclusions

A detailed analysis of the CJEU's jurisprudence concerning the private parties' access to international dispute-settlement mechanisms conducted in Chapter 14 clearly demonstrates that it has not been sufficiently coherent to produce anything that would even slightly resemble an *autonomy test*. There is little if any correlation between the particular features of a given mechanism (or their groupings) and the CJEU's ultimate assessment, but for a single exception: the lack of the body's decisions' binding effect. Consequently, it turns out that the particular mechanisms' assessment is conducted on a case by case basis, with the CJEU exercising a considerable degree of discretion. This creates a rather uncomfortable situation, where the stakeholders from both, within and without the EU are left in dark with regard to the permissible limits for the EU's submission to external dispute-settlement mechanisms till the very decision of the Luxembourg Court.

In light of the above, the attempts to bypass the autonomy challenge altogether should be all but surprising. The most serious of them relates to the concept of relabelling international dispute settlement bodies as courts common to several Member States, as happened in the case of the Benelux Court. This concept, however, seems to be ill-founded: Mere name-changing exercise, by its very nature cannot lead to removing the structural challenges posed by external international adjudicative mechanisms to the EU legal systems. And the CJEU's jurisprudence consistently rejecting to expand this concept to other mechanisms seems to confirm the above findings. Yet, as demonstrated by the revised Unified Patent Court Agreement, this concept is still relied on by the stakeholders. Be it as it may, at least as for now, it may be said that the lack of autonomy test is not offset by the existence of an alternative, more reliable adjudicatory tool.

PART III: CONCLUSIONS

Chapter 16: Conclusions

Parts I and II of this piece of research inevitably lead to the conclusion that the principle of autonomy of EU law does limit the private parties' access to the international dispute-settlement mechanisms. In fact, the CJEU relied precisely on this principle in all the cases where incompatibilities with EU law were found: Opinion 2/13[1424] concerning the ECHR;[1425] Opinion 1/09[1426] related to the Unified Patent Court Agreement, and judgments related to the EU' and Member States' IIAs.[1427] What is more worrisome, in its up to now decisions, the CJEU has continuously failed to create predictable and reliable standards in this respect. In fact, the ambiguities marring the analysed jurisprudence have resulted in the CJEU effectively being granted an overly broad margin of discretion. Arguably, this margin would go so far as to put under suspicion the comparability with the principle of autonomy of any agreement providing private parties with access to international dispute-settlement mechanisms. Consequently, one could assume that, as a matter of principle, all such international agreements do pose a challenge to the autonomy of EU law. And this may have far-reaching consequences.

To begin with, the principle of autonomy may result in curtailing the private parties' access to such internal mechanisms. In fact, such limitations have taken many forms so far. To begin with, the CJEU simply prevented such agreements from coming into force (Opinions 2/13[1428] and 1/09[1429]). Furthermore, it tried to deprive the private parties of the benefits offered by such agreements by trying to deprive the decisions rendered by them of any legal significance within the EU legal order (*Achmea*, *Komstroy* and *PL Holdings* judgments related to the investment treaties,[1430] as well as the treatment of the Aarhus Convention Compliance Committee recommendations[1431]). Lastly, the Luxembourg Court effectively forced the Member States to renounce their own agreements contradicting the EU law, as happened with the intra-EU BITs in the aftermath of the *Achmea* judgment.[1432] Thus, it is hardly disputable that the autonomy of

[1424] CJEU Opinion of 18 December 2014, *European Convention on Human Rights,* Opinion 2/13, ECLI:EU:C:2014:2454.
[1425] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS No.005.
[1426] CJEU Opinion of 8 March 2011, *European Patent Court*, Opinion 1/09, ECLI:EU:C:2011:123.
[1427] Foremostly CJEU judgment of 6 March 2018, *Achmea*, case C-284/16, ECLI:EU:C:2018:158 and CJEU judgment of 2 September 2021, *Komstroy*, case C-741/19, ECLI:EU:C:2021:655.
[1428] See section 9.3.
[1429] See section 11.3.
[1430] CJEU judgment of 26 October 2021, in *PL Holdings*, case C-109/20, ECLI:EU:C:2021:875, see Chapter 10.
[1431] See section 13.5.
[1432] See section 10.3.3.

EU law may place severe limitations upon the effectiveness of the individual's access to international dispute settlement mechanisms. Arguably, these consequences may go much further than in the case of any other known international frameworks.

Are there any good reasons for such a far-reaching interference? In my opinion, yes. As was discussed extensively in Part I, the interactions of the EU with the public international law, despite having been intense, are nonetheless riddled with many structural problems. Most importantly, the EU took a rather open stance vis-à-vis international law. To be more precise, not only did it opt for direct reception of international law binding the EU, without the need for any transformative acts, but it also offered it a place in the hierarchy between the primary and secondary law. This rather generous approach, however, bore the risk of an uncontrolled influx of international norms to the EU legal space. And this risk is particularly tangible in the case of international instruments containing dispute-settlement mechanisms. As discussed in more detail in Chapter 3, the existence of such mechanisms typically leads to further development of their native frameworks beyond the effective control of the treaty parties. Furthermore, such bodies are typically oriented rather on maximizing the effect of the values underlying their native legal systems than taking into account the interests protected by EU law. Consequently, the very possibility of diluting the CJEU's gatekeeper function by such adjudicative bodies could pose a challenge to the integrity of the EU legal order. If it was not enough, all the above considerations are far more relevant in the context of mechanisms available to the private parties than their inter-state counterparts. As discussed in particular in Chapters. 1.3; 6.5 and 7, as a matter of principle, not only are individuals much more active litigants than the state actors, but also the structural deterrents existing in the case of the latter, such as the reluctance to initiate inter-state proceedings for diplomatic reasons or the threat of infringement proceedings being initiated by the Commission, are absent. Consequently, the challenges posed by these dispute-settlement bodies to the principle of autonomy of EU law are far more serious than by their inter-state counterparts.

Does it mean that the CJEU's position is convincing? Not necessarily. To begin with, the obvious has to be said: In its protection of autonomy, the CJEU goes further than not only other international courts but also the constitutional courts of the Member States. It has to be stressed that the CJEU's practice of excluding *a limine* other dispute settlement frameworks is unknown to other international dispute settlement bodies, merely ignoring, disapplying or criticising competing mechanisms or the decisions rendered within them. Moreover, structural challenges posed by the private parties' access to the international dispute settlement mechanisms to the

EU law do not differ much from the ones posed to national legal systems. And no one expects national courts to mimic the CJEU's assertive behaviour. In fact, one could hardly imagine a national court ordering the straightforward denouncement of the ECHR for an abstract fear of the national fundamental laws being misinterpreted by the Strasbourg Court. At most, the national courts "merely" requested limiting legal effects of particular decisions, allegedly conflicting with their native constitutional orders. These rather general considerations seem to be confirmed by the actual European courts' practice providing not a single example of questioning the jurisdiction of international courts *a limine* even in most controversial cases.[1433] Thus, due to the CJEU taking a far stricter position than the EU constitutional courts, analogizing the CJEU to the constitutional court[1434] would not suffice to explain its assertive attitude vis-à-vis international law. Also, the EU's claims to its particular legal nature advocated in particular in the proceedings before the Aarhus Convention Compliance Committee and

[1433] In particular, when contesting the Germany's accession to the UPC convention, German Federal Constitutional Court concentrated solely on the observance of the formal requirements of the lawmaking process, without putting into question the very possibility of creating the UPC, see German Federal Constitutional Court decision of 13 February 2020 in case 2 BvR 739/17, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/02/rs20200213_2bvr073917.html, accessed on 22 August 2022. Even the most contested instances of stand-offs between the Member States' top-courts and their international counterparts in the recent years have concerned merely certain aspects of the extent of the international courts' jurisdiction (or the manner of their exercise), rather than the general extent of its competence (see e.g. German Federal Constitutional Court judgment of of 5 May 2020 in case 2 BvR 859/15, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html, accessed on 22 August 2022 concerning the German court's negative assessment of the CJEU's treatment of the ECB financial crisis measures that resulted in an *ultra vires* decision or Polish Constitutional Tribunal judgment of 7 October 2021 in case K 3/21, available at: https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej, accessed on 22 August 2022, concerning the unconstitionality of the provisions of EU law allowing the EU institutions to assess functioning of Polish justice system and Polish Constitutional Tribunal judgment of _24 November 2021_ in case K 6/21, available at: https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%206/21, accessed on 22 August 2022, doing the same in relation to the ECHR). Notably, even very critical commentators of these decisions do not claim that they directly challenged the very possibility of accepting the jurisdiction of external bodies (see respectively e.g. Franz C. Mayer, *The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020*, "European Constitutional Law Review" vol. 16 4/2020, pp. 733-769; Anna Wyrozumska, *Wyroki Trybunału Konstytucyjnego w sprawach K 3/21 oraz K 6/21 w świetle prawa międzynarodowego*, "Europejski Przegląd Sądowy" 12/2021, pp. 27-38). Even the (in-)famous rulings of the Russian Constitutional Court allowing the national courts to avoid compliance with the Strasbourg Court judgments (see, in particular, Judgment of 14 July 2015 No. in case no 21-P/2015, English translation available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2016)019-e, accessed on 22 August 2022 introducing such a possibility; Judgment of 19 April 2016 in case no. 12-П/2016, English translation available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)033-e, accessed on 22 August 2022 putting the aforesaid principles into practice with regard to the prisoners' vote) did not require denouncing the Convention or question Russia submitting itself under the very jurisdiction of the ECtHR, but "merely" introduced the procedure allowing to ignore specific ECHR judgments whose outcome was deemed to contradict basic values of the Russian legal order. One could contemplate whether German Federal Constitutional Court proceedings 2 BvR 2480/10 concerning the compatibility of the envisaged UPC with the German Basic Law would not change this picture.

[1434] See in particular analysis of the *Kadi* case in Chapter 5.

Opinion 2/13 do not seem to justify this far-reaching rigidity, as the EU's claims for the special treatment seem to find support neither in the provisions of the particular instruments examined by the CJEU nor in the customary international law pertaining to international organizations. It is particularly so if to recollect, as discussed throughout in this dissertation, the EU is and has been a party to many dispute-settlement mechanisms, only rarely having provisions adequately reflecting the EU's internal arrangements. Thus, the arguments connected to the EU's legal nature fail to account for the CJEU's radical treatment of international dispute-settlement mechanisms accessible to the private parties.

More importantly, as the analysis conducted in part II clearly demonstrates, the CJEU failed to produce any comprehensive standards for the assessment of the conformity of international dispute settlement mechanisms accessible for the private parties with EU law. Sadly, its jurisprudence in this respect seems to be casuistic and fragmentary. As was discussed ich Chapter 15, the only feature guaranteeing the mechanism's conformity with EU law is the mechanism's lack of legal effects within the EU legal space, allowing to treat it with the same leniency as their inter-state counterparts. The utility of this concept, however, is fairly limited, in particular in the context of the mechanisms accessible to private parties, ultimately designed precisely so as to shape legal situation of the individuals. Furthermore, by their very nature, the contours of such a concept are themselves blurred and open to discretionary interpretations. In practice, the CJEU was happy to exercise this discretion, not to say arbitrariness, as evidenced by denying legal relevance to the Aarhus Convention Compliance Committee findings and recommendations or declaring the lack of legal effects of the awards within the EU in case of CETA awards. In any case, these arbitrariness considerations are even more relevant for the CJEU's silver bullet, namely relabelling international dispute settlement bodies as the Member States' courts, in particular given the lack of objective criteria for such operations. At this place, however, one should consider whether these discrepancies are not inevitable consequences of applying individual case justice by the Luxembourg Court. My answer to this question would be negative, as this toxic cocktail of far-reaching autonomy control and discretionary standards seems to be peculiar to the CJEU. One could perfectly imagine an examination of dispute settlement mechanisms being conducted on a case-by-case basis not leading to so wildly differentiated results as in the CJEU's autonomy-related case law.

This being said, one could add that the assessment of this state of affairs is not an easy task, yet one could strive to draw at least some conclusions in relation thereto. To begin with, the above clearly demonstrates that the CJEU's treatment of the dispute settlement mechanisms accessible

to the private parties does not conform to the pluralistic framework. Rather than striving to achieve "contrapunctual" harmony between parallel legal orders, whose operators try to achieve concordance between them while showing a certain degree of mutual respect and openness without hierarchical subordination,[1435] the CJEU is bent on the forestalling the very possibility of polyphonic harmony, by simply eliminating the competing voices. To put things differently, as a matter of principle, the CJEU is generally willing to tolerate other international mechanisms only as long as it maintains full control over the legal effects of the decisions rendered within these frameworks in the EU legal space. Thus, it is clear that the popular theories of European legal pluralism conceptualizing the European legal order as a "multi-layered"[1436] or "multi-centred"[1437] enterprise driven by the heterarchically organised courts engaged in open-ended, never-ending dialogue[1438] fail do adequately address the relationship between the CJEU and other international dispute settlement mechanisms accessible to the private parties. As elegantly summarized by Justin Lindeboom, rather than being a *Dworkinian Court* committed to producing globally coherent case law, the CJEU is much more of a *Razian* adjudicative body, heavy reliant on its self-referentiality and strict monopoly on determining the legal effect of "foreign" law within the EU legal order.[1439] This reality is further reflected by the lack of relevance of the dialogue potential of particular frameworks for the ultimate outcome of the CJEU's assessment of the mechanism's conformity with the primary law. In and of itself, however, the above does not have to necessarily result in a negative assessment of the CJEU's stance. It should be viewed rather as a demonstration of deficits of the pluralistic heuristic frameworks, at least in relation to international dispute-settlement mechanisms.[1440]

[1435] The concept was initially used to describe the relationship between the constitutional courts and the CJEU, nonetheless it could apply equally well to the international courts. See classical article by Miguel Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in: Neil Walker (ed.), *Sovereignty in Transition*, Hart Oxford 2003, pp. 523 ff.

[1436] Nele Matz-Lück, Mathias Hong, (eds.), *Grundrechte und Grundfreiheiten im Mehrebenensystem – Konkurrenzen und Interferenzen*, Springer Heidelberg 2012, *passim.*

[1437] Ewa Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, „Państwo i Prawo" 4/2005, pp. 3-11.

[1438] See e.g. Aleksandra Kustra, *Koncepcje pluralizmu prawnego a problem ustalenia ostatecznego strażnika legalności prawa w Unii Europejskiej*, „Ruch Prawniczy Ekonomiczny i Socjologiczny" 1/2008, pp. 57-72; Agnieszka Sołtys, *Pluralistyczna koncepcja relacji prawa UE i prawa krajowego wobec współczesnych wyzwań dla europejskiego porządku konstytucyjnego*, „Państwo i Prawo" 4/2021, pp. 11-14. Interestingly, the author sees the sole rationale for limiting the judicial dialogue in the protection of the *liberal-democratic governance*, constituting the bedrock for the effective operation of the pluralist principles, see pp. 14 ff. See also Władysław Jóźwicki, arguing for replacing the hierarchical perspective with a sequential one, Władysław Jóźwicki, *op. cit*, pp. 467 ff.

[1439] Justin Lindeboom, *Why EU Law Claims Supremacy*, "Oxford Journal of Legal Studies", vol. 38 2/2018, pp. 328-356.

[1440] Rather unsurprisingly, this observation is all but new, see e.g. Marco Dani, *op. cit.*, pp. 336 ff.

Nonetheless, one could argue that by doing so, the CJEU effectively reduced the possibility of relying on pluralistic justifications for its position.

And this could be viewed even more negatively as contributing to the CJEU's more general failure to lay consistent standards for the international law's conformity with EU law, decreasing the consistency and predictability of the Luxembourg court's decisions, which could further negatively affect its legitimacy: After all, foreseeability and predictability of an international court's decisions, as well as their quality, lies at the very heart of the normative legitimacy theories.[1441] In any case, as discussed in Chapter 15 above, this lack of clarity and predictability is a serious setback for the EU's external action due to keeping parties negotiating an agreement in the dark till the very last moment as to its conformity with EU law.

This being said, I am of the opinion that in and of itself, the CJEU's restrictive position vis-à-vis international law should still be considered very carefully for at least several reasons. To begin with, it has to be stressed that maximizing private parties' access to international dispute settlement mechanisms should not necessarily always be assessed positively. After all, at least some of these frameworks are controversial as they overemphasise particular interests at the expense of the more general ones. This problem is best illustrated by the investment treaties, as discussed in Section 10.1, among others curtailing the states' power to introduce regulations in the general interest. Arguably, albeit to a lesser degree, a similar tension could also be observed in the case of the Unified Patent Court, where the CJEU was afraid, among others, of the patent court misinterpreting EU values that could find themselves on the collision course with the requirements of patent law, as elaborated in Chapter 11. Consequently, without going too much into detail, it may only be signalled that at least in certain areas of law, the CJEU's position could be viewed as beneficial not only from the autonomy angle. The truth is, however, that one could present convincing arguments also for the opposing view, not to mention the above rationale miserably failing to substantiate the CJEU's position vis-à-vis the Strasbourg court. In any case, the above logic was neither incorporated into the CJEU's reasoning nor highlighted by the commentators. More importantly, also the practical merits of such an approach should be highlighted: From the standpoint of legal system operators banning a conflicting international legal framework altogether provides much more clarity than allowing for the continuous existence of bodies issuing (potentially) conflicting decisions. And this factor

[1441] Mark A. Pollack, *The Legitimacy of the Court of Justice of the European Union*, in Harlan Cohen and Nienke Grossman (eds.), Legitimacy and International Courts, CUP Cambridge et al. 2018, pp. 151-158.

should not be understated, as navigating throughout the pluralistic legal labyrinth at times proves to be nigh impossible also for well-versed specialists.

Somewhat paradoxically, one could say that these uncertainties are further deepened by the instances of the CJEU showing its more benevolent face and declaring international dispute settlement mechanisms compatible with the autonomy principle, thus encouraging the decision-makers to try to implement such mechanisms also in another negotiated agreements, without knowing whether the CJEU would eventually approve these solutions. Consequently, it could be tempting to consider replacing the current casuistic solution with more clear-cut rules, consisting either in a blanket rejection of the mechanisms accessible to the individuals or abandoning the autonomy test altogether, at least with regard to the agreements with the EU's own participation. Such an approach could result in providing the actors both within and without the EU with the so much needed clarity as to the mechanisms' assessment from the standpoint of EU law. Tempting as it may seem, however, such a transition would be hardly possible. Rather obviously, granted the status of the autonomy principle in the EU legal system, such modifications would be most likely found to contradict EU law. Furthermore, the CJEU's jurisprudence as it stands today militates against such blanket approach: Despite vehemently defending the autonomy principle, the CJEU, at the same time, has consistently held, even if somewhat half-heartedly, that EU law, in principle, allows submitting the EU under the jurisdiction of external dispute-settlement bodies.

Be as it may, as of today, the autonomy-related strain of jurisprudence remains alive and surprisingly well, and there are no signs of the CJEU being willing to abandon it. Furthermore, it remains so even in the absence of a tangible *autonomy test.* In effect, there are no grounds for the CJEU not to treat international dispute settlement mechanisms accessible to individuals as posing serious challenges to the autonomy of EU law.

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5.2. International Jurisprudence

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8. ICJ judgment of 30 June 1995 in case *East Timor (Portugal v. Australia).*
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16. ICJ judgment of 3 February 2012 in case *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening).*
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5.2.2. European Court of Human Rights

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2. European Commission of Human Rights decision of 9 February 1990 in case 13258/87 *M. & Co. v. Germany*.
3. ECtHR judgment of 23 March 1995 in case 15318/89 *Loizdou v Turkey.*
4. ECtHR judgment of 18 February 1999, in case 24833/94 *Matthews v. UK.*
5. ECtHR judgment of 17 July 2001 in case 39288/98 *Association Ekin v France*.
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7. ECtHR judgment of 23 September 2003 in case 53984/00 *Radio France and others v. France.*
8. ECtHR judgment of 30 June 2005 in case 45036/98 *Bosphorus v. Ireland*.
9. ECtHR judgment of 2 March 2010 in case 61498/08 *Al-Saadoon and Mufdhi v. the United Kingdom.*
10. ECtHR judgment of 1 June 2010 in case 22978/05 *Gäfgen v. Germany*.
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12. ECtHR judgment of 7 February 2012 in joint cases 40660/08 and 60641/08 *von Hannover v. Germany (II).*
13. ECtHR judgment of 6 December 2012 in case 12323/11 *Michaud v. France*.
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28. ECtHR judgment of 1 December 2020 in case 26374/18 *Ástráðsson v. Iceland.*
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5.2.3. World Trade Organization

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10. Appellate Body Report of 2 June 2008 in case *United States - Subsidies on Upland Cotton - Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW.
11. Appellate Body Report of 26 October 2008 in case *United States - Continued Suspension of Obligations in the EC - Hormones Dispute*, WT/DS320/AB/R.
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5.2.4. Investment Tribunals

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3. Award of 9 January 2003 in case *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1.

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6. Award of 26 July 2007 in case *Tokios Tokelés v. Ukraine,* ICSID Case No. ARB/02/18.
7. Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility of 8 April 2008 in case *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3.
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10. Award of 23 September 2010 in case *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22.
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12. Decision on Jurisdiction and Liability of 30 November 2012 in case *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19.
13. Award on Jurisdiction of 22 October 2012 in case *European American Investment Bank AG (EURAM) v. Slovak Republic,* UNCITRAL
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20. Award, of 12 August 2016 in case *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, PCA Case No. 2014-11.
21. Award of 27 December 2016 in case *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic,* ICSID Case No. ARB/14/3.
22. Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures, 29 March 2017 in case *Nova Group Investments, B.V. v. Romania,* ICSID Case No. ARB/16/19.
23. Final award of 4 May 2017, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain,* ICSID Case No. ARB/13/36.
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25. Award of 2 May 2018 in the case *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01.
26. Award of 16 May 2018 in case *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1.
27. Notice of Arbitration of 23 Aug 2018 in case *Antonio del Valle Ruiz et al v. Kingdom of Spain*, PCA Case No. 2019-17.
28. Decision of 31 August 2018 on the *Achmea* issue in the case *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12.
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31. Award of 24 October 2019 in case *CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa, and CMC Africa Austral, LDA v. Republic of Mozambique*, ICSID Case No. ARB/17/23.
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35. Decision on the Kingdom of Spain's Request for Reconsideration of 10 January 2022.in case *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/24.
36. Decision on Jurisdiction, Liability and Principles of Quantum of 11 February 2022 in case *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27.
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3. Complaints Board Decision of 25 May 2009 in case 08/51, available at: http://www.schola-europaea.eu/bdcree/complete.php?nr_dec=08/51, accessed on 22 August 2022.
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2. Letter to the Party concerned informing on decision to suspend the review of the communication until two months after the release of the opinion of the ECJ, of 18 May 2009 in case ACCCC/C/2008/31 *Germany*.
3. Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union adopted on 14 April 2011.
4. Letter to the parties seeking views on possible deferment of 18 November 2016 in case ACCC/C/2014/113 Ireland.
5. Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union adopted on 17 March 2017.
6. Findings and recommendations adopted by the Compliance Committee on 17 March 2021 with regard to communication ACCC/C/2015/128 concerning compliance by the European Union, ECE/MP.PP/C.1/2021/21.

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5.2.9. European Patent Office

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5.2.11. International Labour Organization

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2. Order no. 3 of 24 June 2003 in case *MOX Plant (Ireland v. United Kingdom)*, PCA Case No. 2002-01, https://pca-cpa.org/en/cases/100/, accessed on 22 August 2022.
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5.3.2. France

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5.3.3. Germany

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2. Frankfurt Court of Appeals Decision of 10 May 2012 in case 26 SchH 11/10, available athttps://www.italaw.com/sites/default/files/case-documents/ita0931.pdf, accessed on 22 August 2022.
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5.3.5. Luxembourg

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5.3.9. United States

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