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**Summary of the PhD dissertation:**

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

# *[Autonomia prawa Unii Europejskiej jako ograniczenie w dostępie podmiotów prywatnych do międzynarodowych mechanizmów rozstrzygania sporów]*

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1. 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.

2. 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**) 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.

3. 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", 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 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.

4. 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.

5. Furthermore, 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.

6. 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.

7. 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.

8. 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. Secondly, there are investment arbitration tribunals operating on the basis of the Energy Charter Treaty (**ECT**) and a network of bilateral investment treaties (**BITs**), EU Free Trade Agreements assessed foremostly in the *Achmea* and *Komstroy* judgments and the *CETA* Opinion. Thirdly, there is the Unified Patent Court (**UPC**), an envisaged specialized international court for patent matters, declared incompatible with EU law in Opinion 1/09. Fourth, there are European Schools with their Complaints Board, i.e. sort of an international administrative tribunal tasked with deciding disputes concerning their teachers and students, analyzed by the CJEU in its *Miles* and *Oberto* judgments. Lastly, there is an environmental compliance body, the Compliance Committee, set by the Aarhus Convention 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.

9. 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.

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

11. 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.

12. 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*.

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

14. 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:
    - The EU being a party to an agreement;
    - Jurisdiction of a given body extending to matters falling within the scope of application of EU law;
    - Application or interpretation of EU law by a given body;
    - Review of the EU law enforcement by a relevant body, in particular, the possibility of reviewing individual acts of the EU authorities;
    - The binding character of a body's decision;
    - Intra-EU effect of a body's decisions and its enforcement;
    - Possibility of a body circumventing the dispute-settlement framework foreseen in the Treaties;
    - A body being created within an extra- or intra-EU framework;
    - Less tangible factors related to the intrinsic features of the frameworks underlying the dispute settlement bodies, as well as their attitude, namely:
        - Concordance between their goals and the aims of the EU legal system;
        - Readiness of the dispute settlement bodies to enter into a meaningful judicial dialogue with the CJEU.

15. 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 the hitherto approach is all alive and well.

16. 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.