

# Repellent Forces: The CJEU and Investor-State Dispute Settlement

On how the CJEU's Concept of Autonomy of EU Law Could Fundamentally Alter Investor-State Arbitration's Current DNA, or what the ECtHR, the European Patent Court, and Investment Tribunals in the EU-Canada Comprehensive Economic Trade Agreement (CETA) Might Have in Common.

Prof. Dr. iur. STEFFEN HINDELANG, Berlin\*

## I. Introduction

It is fair to say that the Court of Justice of the European Union (CJEU or the Court) is possessive, even jealous when it comes to determining the content and meaning of European Union (EU) law.<sup>1</sup> Everything which could only remotely compromise its mandatory, binding, and final jurisdiction over the interpretation and application of EU law throughout the Union<sup>2</sup> is met with suspicion. Just recently the Court furnished impressive proof of its readiness to protect its jurisdictional monopoly. In its Opinion<sup>3</sup>

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\* Associate Professor, Freie Universität Berlin, Germany. The author can be contacted at mail@steffenhindelang.de. He would like to thank Professor Stephen Clarkson of the University of Toronto and the participants of the "Monday Lunch" Faculty Seminar Series at the University of Toronto, School of Law, for their helpful comments on earlier drafts, and Daniel Ncube and Sonja Hilgert, both student assistants at Freie Universität Berlin, for their editorial support.

<sup>1</sup> This paper partly draws from and builds on *Stephen Clarkson/Steffen Hindelang*, How Parallel Lines Intersect: Investor-State Dispute Settlement and Regional Social Policies, in *Andrea C. Bianculli/Andrea Ribeiro Hoffmann* (eds.), *Regional Organizations and Social Policy in Europe and Latin America: A Space for Social Citizenship?* (Palgrave, forthcoming); *Steffen Hindelang*, The Autonomy of the European Legal Order – EU Constitutional Limits to Investor-State Arbitration on the Basis of Future EU Investment-related Agreements, in: *Mark Bungenberg/Christoph Herrmann* (eds.) *Common Commercial Policy after Lisbon*, Special Issue to the European Yearbook of International Economic Law, 2013, pp. 187 et seqq., as well as on *Steffen Hindelang*, Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU Abkommen, in *Marc Bungenberg/Christoph Herrmann* (eds.), *Die Gemeinsame Handelspolitik der Europäischen Union nach Lissabon*, 2011, pp. 157 et seqq.

<sup>2</sup> Cf. Art. 19(1), subsection (1), 2nd sentence TEU, Art. 251 et seqq. TFEU.

<sup>3</sup> CJEU, Opinion 2/13, ECHR, n.y.p.

on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) the CJEU concluded that – at least for the time being – above the Court there will be nobody else, apart from the blue sky. For four years the parties to the ECHR and the European Union intensively negotiated the latter's accession. Considerable effort was devoted to securing the CJEU's future position – a privileged one indeed, when compared to the courts of any party to the ECHR<sup>4</sup> – in the network of European supreme courts. However, all the efforts to adequately address the specific nature of the EU law regime and the CJEU's role therein were in vain. An accession of the EU to the ECHR any time soon has turned into an increasingly unattainable dream.

However, this could not be the only dream which could disappear, never to return. Following the entry into force of the Treaty of Lisbon in 2009, the European Commission included investment protection in its international negotiating agenda.<sup>5</sup> The Comprehensive Economic and Trade Agreement (CETA),<sup>6</sup> the Transatlantic Trade and Investment Partnership (TTIP),<sup>7</sup> and other comprehensive free trade agreements<sup>8</sup> – if and once entered into force – will break new ground. For the very first time, the EU's comprehensive trade agreements include an investment chapter, providing for market access and protection of foreign investment, the latter enforceable through an investor-State dispute settlement (ISDS) mechanism. Moreover, by including such investment protection in treaties with Canada and the United States of America, the EU also deviates from a formerly shared understanding that such clauses are generally only included in treaties with partners which face serious challenges in terms of their domestic rule of law.<sup>9</sup>

<sup>4</sup> Cf. Art. 3(6) of the Draft Accession Treaty which provides among others that “[in] proceedings to which the [EU] is a co-respondent, if the [Court] has not yet assessed the compatibility with the rights at issue defined in the [European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)] or in the protocols to which the [EU] has acceded of the provision of [EU] law as under paragraph 2 of this article, sufficient time shall be afforded for the [Court] to make such an assessment, and thereafter for the parties to make observations to the [European Court of Human Rights (ECtHR)]”.

<sup>5</sup> *European Commission*, Towards a comprehensive European international investment policy, COM(2010)343 final, 07.07.2010, [http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc\\_147884.pdf](http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf) (last visited 17.01.2015).

<sup>6</sup> This paper uses the CETA text, dated 26.9.2014, as point of reference. Cf. *European Commission*, *DG Trade*, [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) (last visited 15.01.2015).

<sup>7</sup> For the TTIP negotiation texts see *European Commission*, *DG Trade*, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230> (last visited 15.01.2015).

<sup>8</sup> Cf. especially Draft EU-Singapore Free Trade Agreement, Chapter 9-Investment, [http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc\\_152844.pdf](http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf) (last visited 15.01.2015). See also *European Commission*, Overview of FTA and other Trade Negotiations, updated 14.01.2015, [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_118238.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf) (last visited 17.01.2015).

<sup>9</sup> Notable, albeit limited, exceptions are the North American Free Trade Agreement

In defining its policy priorities, the EU Commission's Directorate General for Trade (DG Trade) has been kept busy aligning different visions on investment protection found in the European institutions,<sup>10</sup> among the Member State governments, in corporate lobby organisations, and civil society. In particular, it has had to address an increasingly critical discourse concerning the impact of ISDS on a country's right to regulate in the general interest.<sup>11</sup>

The political stir revolving around ISDS and its reform<sup>12</sup> has, nonetheless, somewhat distracted attention from another issue, i.e. the conditions and limits stipulated by the EU's "basic constitutional charter"<sup>13</sup> – the Treaties upon which the European Union is founded – for subjecting the EU to a dispute settlement mechanism such as the one included in the CETA text; a text which will possibly serve as a template for all other EU investment-related agreements in the future.

When it comes to the establishment of dispute resolution bodies in international agreements to which the EU is a party, the concept of autonomy

and the Energy Charter Treaty. There might be good reasons to introduce rules on foreign investment also in treaties among developed countries with functioning domestic courts. However, out of several reasons, in such circumstances they should serve as a fall-back option only instead of an alternative to functioning domestic courts. Cf. *Steffen Hindelang*, Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law", in *European Parliament* (ed.), *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements. Volume 2-Studies*, 2014, <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-Europaeisches-Parlament/Volume-2-Studies.pdf?1411545557> (last visited 05.01.2015) ('EP Study'), pp. 76–78, 88–93. See also *Steffen Hindelang*, Stellungnahme, Öffentliche Anhörung des Ausschusses für Wirtschaft und Energie des Deutschen Bundestages am 15.12.2014, zum Comprehensive Economic and Trade Agreement ('CETA') zwischen der EU und Kanada, Themenblock 'Investitionsschutzbestimmungen', Ausschussdrucksache 18(9)285, <http://www.bundestag.de/blob/345496/2f9d17704429c70693d11e18755bbc3b/steffen-hindelang--fu-berlin-data.pdf> (last visited 15.01.2015); *Peter-Tobias Stoll/Till Holterhus*, The Generalization of International Investment Law in Constitutional Perspective, in *Steffen Hindelang/Markus Krajewski* (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (provisional title) (OUP, forthcoming 2015).

<sup>10</sup> See, for a social science analysis of views held in the EU institutions, *Stephen Clarkson/Steffen Hindelang* (supra footnote 1); See also the studies produced for the European Parliament by *Pieter Jan Kuijper*, *Ingolf Pernice*, and *Steffen Hindelang*, in *European Parliament* (ed.), *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements. Volume 2-Studies*, 2014, <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-Europaeisches-Parlament/Volume-2-Studies.pdf?1411545557> (last visited 15.01.2015) ('EP Study').

<sup>11</sup> Cf. *European Commission*, Report on the online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), SWD(2015) 3 final, 13.01.2015, [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf) (last visited 15.01.2015).

<sup>12</sup> See on reform *Steffen Hindelang/Markus Krajewski* (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (provisional title) (OUP, forthcoming 2015).

<sup>13</sup> CJEU, Opinion 2/13, ECHR, n.y.p., para. 163.

of EU law has proven to be one of the crucial touchstones.<sup>14</sup> This was just re-confirmed by the CJEU's December 2014 Opinion on the accession of the EU to the ECHR.<sup>15</sup> It is this very concept which could turn out to be not only a touchstone but ultimately a stumbling block for ISDS in CETA and its sister agreements, if the text of the EU agreements is not carefully drafted.

This paper, first, briefly explains the concept of autonomy of EU law, mainly developed in a series of opinions of the Court rendered in accordance with Art. 218(11) TFEU.<sup>16</sup> Second, its role in limiting the Union's leeway in subjecting itself to the current model of investor-State arbitration is explored. Thereupon, the question of what would probably be required to render an ISDS model conforming to the concept of autonomy of EU law as understood in this paper is addressed. By way of conclusion and considering future prospects, some remarks are made on an additional possible constitutional stumbling block which could attract more public attention once the EU finds itself at the receiving end of investment arbitration.

## II. The Autonomy of the European Legal Order

Legal equality is not just a fundamental part of the rule of law; it constitutes the foundations of the European Union. The EU is built on law and it has hardly more than law<sup>17</sup> to make true one of its grand promises given to its citizens, i.e. a Europe-wide level playing field for their economic and increasing social activities.

Guaranteeing legal equality is the mandate and obligation of all EU institutions, but the foremost responsibility for defending this equality is al-

<sup>14</sup> A different, equally contentious question relates to the issue of whether the EU enjoys comprehensive competence to negotiate, conclude, and ratify modern investment agreements on its own or only jointly with the Member States. In October 2014, the Directorate General for Trade decided to request an opinion by the CJEU on its competence to sign and ratify a trade agreement with Singapore which contains an investment chapter similar to the one found in CETA and envisaged for TTIP. European Commission Press Release, Singapore: The Commission to Request a Court of Justice Opinion on the trade deal, IP/14/1235, 30.10.2014, [http://europa.eu/rapid/press-release\\_IP-14-1235\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1235_en.htm) (last visited 16.01.2015). However, no opinion has been requested as of 12.05.2015.

<sup>15</sup> CJEU, Opinion 2/13, ECHR, n.y.p., para. 170.

<sup>16</sup> Cf. ECJ, Opinion 1/91, European Economic Area I, [1991] ECR, I-6079, para. 35; ECJ, Opinion 1/00, European Common Aviation Area, [2002] ECR, I-3493, para. 11–12; CJEU, Opinion 1/09, European and Community Patent Court, [2011] ECR, I-1137, para. 77 et seq.; Opinion 2/13, ECHR, n.y.p.

<sup>17</sup> "Die Majestät des Rechts soll schaffen, was Blut und Eisen in Jahrhunderten nicht vermochten. Denn nur die selbstgewollte Einheit hat Aussicht auf Bestand, und Rechtsgleichheit und -einheit sind untrennbar miteinander verbunden." (Walter Hallstein, Die Europäische Gemeinschaft, 5th ed., 1979, p. 53).

located to the Court.<sup>18</sup> In order to secure the uniform interpretation and equal application of EU law throughout its territories, the Union has vested the CJEU with a monopoly in authoritatively determining the content and meaning of EU law and controlling its lawful application.

In order to protect this jurisdictional monopoly, the CJEU has developed the concept of autonomy of EU law. In a nutshell, while Member States' national courts do apply and interpret EU law, they lack the final say on its content. It is not the last judicial instance in each Member State that conclusively determines the scope of application of EU law and the rights and duties flowing therefrom in its territory; rather, it is the CJEU which has the mandatory, binding, and final jurisdiction over the interpretation and application of EU law.<sup>19</sup> Among other things, it is this centralized judicial power which distinguishes EU law from (ordinary) public international law.<sup>20</sup>

Initially, the concept of autonomy of EU Law was advanced to describe the relationship between the Member States' national law and EU law depicted as an autonomous source of law distinct from the Member States' legal orders. It has been used to justify two fundamental characteristics of EU law, i.e. its primacy and its direct effect.<sup>21</sup> Over time the concept has developed into a comprehensive concept of EU self-assertion to also limit the effects on EU law flowing from public international law.<sup>22</sup> Hence, when it comes to the question of dispute-resolution mechanisms in in-

<sup>18</sup> Cf. Art. 19(1), subsection (1), 2nd sentence TEU.

<sup>19</sup> See for a somewhat qualifying view with reference to Art. 4(2) TEU *Armin von Bogdandy/Stephan Schill*, *Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag*, ZaöRV 70, pp. 701 et seqq. (2010); but *Ingolf Pernice*, *Der Schutz nationaler Identität in der Europäischen Union*, AöR 136, pp. 185 et seqq. (2011).

<sup>20</sup> *Steffen Hindelang*, *Contracting out – Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? – The Case of Intra-EU Investment Arbitration*, *Legal Issues of Economic Integration* 39, pp. 191 et seqq. (2012). See also CJEU, Opinion 2/13, ECHR, para. 174, which reads: "In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law." This view is, however, not fully embraced by all constitutional courts of the EU Member States. In particular, the Bundesverfassungsgericht (BVerfG), the German constitutional court, faces some problems to render the final say on the construction of the European integration programme to the CJEU. Cf., just recently, BVerfG, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, Decision of 14.01.2014 on the preliminary reference to the CJEU in respect of the so-called Outright Monetary Transactions announced by the European Central Bank. For a reply of the CJEU to that challenge see CJEU, Case C-62/14, not yet decided.

<sup>21</sup> Cf. European Court of Justice (ECJ); now Court of Justice of the European Union), Case 26/62, *van Gend en Loos*, [1963] ECR Special Edition, 3; ECJ, Case 106/77, *Simmenthal*, [1978] ECR, I-629; recently CJEU, Opinion 1/09, *European and Community Patent Court*, [2011] ECR, I-1137, para. 65; Opinion 2/13, ECHR, n.y.p., para. 157, p. 166.

<sup>22</sup> *Thomas von Danwitz*, *Verwaltungsrechtliches System und europäische Integration*, 1996, p. 101. The autonomy in respect of international law was again explicitly confirmed in CJEU, Opinion 2/13, ECHR, n.y.p., para. 170.

ternational agreements concluded by the EU,<sup>23</sup> the concept of autonomy could prove to be a crucial touchstone and possible hindrance to an attempt to incorporate today's model of investor-State arbitration in the EU's investment-related agreements. If the CJEU further cultivates the scepticism towards international dispute resolution bodies displayed in recent legal opinions, this could herald a major shift in the way investment disputes will be settled in the future.

Although the concept of autonomy is still very much in flux, as the two most-recent CJEU opinions<sup>24</sup> have just proved, its core elements can nevertheless be identified. When the Union attempted to confer jurisdiction on external courts and tribunals through international agreements, in particular the following treaty arrangements were deemed irreconcilable with the concept: (1) Dispute settlement bodies may not encroach on the Court's autonomous interpretation of the EU legal order. (2) They may not interfere with the allocation of competences between the Union and its Member States. (3) Nor may they affect the separation of powers between the EU's different institutions.<sup>25</sup>

Essentially, the CJEU finds no problem in conferring jurisdiction on a court or tribunal which interprets in a binding fashion an international agreement and only this agreement.<sup>26</sup> What the Court perceives as critical, however, is the situation in which decisions of such courts or tribunals produce spillover effects on the construction of EU law and so encroach on the CJEU's monopoly in its ultimately conclusive interpretation.

### III. Investor-State Arbitration and the Concept of Autonomy of EU Law

At first glance, one might see no apparent conflict with the concept of autonomy of EU law when it comes to investor-State arbitration on the basis of agreements to which the EU will be a party. Because investment arbitration tribunals have no legal mandate to rule on questions of EU law, their juris-

<sup>23</sup> From a public international law perspective, it is beyond debate that the European Union can be a disputing party in an international dispute resolution procedure. Cf. ECJ, Opinion 1/91, European Economic Area I, [1991] ECR, I-6079, para. 40. In accordance with general public international law, the Union has on principle free choice of means in respect of settling its disputes. Cf. *Christian Tomuschat*, Art. 281 Vertrag zur Gründung der Europäischen Gemeinschaft (EGV) in *Hans von der Groeben/Jürgen Schwarze* (eds.), Vertrag über die Europäische Union (EUV)/EGV, 2004, para. 18.

<sup>24</sup> Opinion 1/09, European and Community Patent Court, [2011] ECR, I-1137; See also CJEU, Opinion 2/13, ECHR, n.y.p.

<sup>25</sup> Cf., in detail, *Steffen Hindelang*, Der primärrechtliche Rahmen (supra footnote 1), pp. 168–173.

<sup>26</sup> ECJ, Opinion 1/91, European Economic Area I, [1991] ECR, I-6079, para. 39. Confirmed in CJEU, Opinion 2/13, ECHR, para. 182.

diction is usually limited to decide a case on the basis of the given investment agreement and such rules of public international law which may be applicable.<sup>27</sup> Certain material standards of treatment of foreign investment commonly contained in investment chapters – such as non-discrimination and fair and equitable treatment – can in substance also be found in EU law.<sup>28</sup> Investment tribunals might strike a balance different from the CJEU between the protection of foreign investment and the common good with respect to regulatory measures interfering with the operation of a foreign investment. The CJEU would – de jure – not be obliged to adapt its interpretation of EU law to the view held by an investment tribunal in respect of this agreement. The two perceptions could simply co-exist.<sup>29</sup> Seen from this perspective, one might be inclined to conclude that the autonomous interpretation of EU law is not threatened by including ISDS clauses in future EU investment-related agreements.

### *1. Spillover Effects: Factual Pressure on the Court's Interpretative Monopoly*

However, this formal reading does not deal with the actual pressure on the EU legal order and the CJEU to conform to an investor-State arbitral ruling concerning an EU measure affecting an EU investment-protection agreement. While the CJEU is not bound by law to have its interpretation conform to a foreign tribunal's ruling, there might be situations in which there is hardly any choice de facto. In the context of a particular investment protection agreement, for example, arbitrators could order the EU to pay damages to a foreign investor because they consider a previous EU ruling – confirmed by the CJEU – that the foreign investor repay aid previously granted by an EU Member State to have been in violation of the investment agreement.<sup>30</sup> By way of the damages award, the investor would end up in

<sup>27</sup> Cf. Art. X-27(1) CETA Text (any reference to Draft of 26.9.2014).

<sup>28</sup> See on this Steffen Hindelang, Member State BITs – There's Still (Some) Life in the Old Dog Yet – Incompatibility of Existing Member State BITs with EU Law and Possible Remedies, in Karl Sawant (ed.), Yearbook on International Investment Law & Policy 2010–2011, 2013, 21; Steffen Hindelang (supra footnote 20), pp. 179–206.

<sup>29</sup> Steffen Hindelang, The Autonomy of the European Legal Order (supra footnote 1), pp. 193–194. See also Angelos Dimopoulos, The involvement of the EU in investor-state dispute settlement: A question of responsibilities, 51 CMLR 1671, pp. 1698 et seqq. (2014).

<sup>30</sup> The CJEU might, for example, strike a different balance between legality and legitimate expectations of an investor than an investment tribunal. Cf., e.g. ECJ, C-24/95, Alcan, [1997] ECR, I-1591, especially guiding principle 2: "In that connection, although the Community legal order cannot preclude national legislation which provides that the principles of the protection of legitimate expectations and legal certainty are to be observed with regard to recovery, nevertheless, in view of the mandatory nature of the supervision of State aid by the Commission under Art. 93 of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent business-

the same position it would have been in had it kept the original State aid. Domestic investors in a similar factual situation of having received State aid subsequently held unlawful by EU standards would not have access to investor-State arbitration. They would have no choice but to repay the unlawful State aid. The end effect of this process would be to distort the parameters of competition inside the EU's internal market by favouring the foreign over the domestic corporation.

While there is no legal mechanism compelling the CJEU to accept an investment tribunal's ruling, de facto the CJEU might have no choice other than to align the interpretation of EU law to that of the investment tribunal if it does not want to risk several more investment arbitrations and a patchwork quilt of de facto exceptions of EU State aid law.<sup>31</sup>

Even if the EU chose not to comply with the tribunal's ruling, the investor could enforce the award outside the EU<sup>32</sup> and, again, would be placed in the position held before the reclaiming of the State aid. Hence, the EU cannot keep the distortive effects of the tribunal's ruling outside the Internal Market and would risk – when not adapting its law to this ruling – a de facto unequal “application” of its law. In contrast, the EU can maintain a measure which was held contrary to WTO law and accept the imposition of countermeasures<sup>33</sup> such as import duties, thereby shielding itself from the spillover effects of a WTO dispute settlement ruling into the domestic legal order.<sup>34</sup> In a further contrast with the WTO's State-driven

man should normally be able to determine whether that procedure has been followed, even if the State in question was responsible for the illegality of the decision to grant aid to such a degree that its revocation appears to be a breach of good faith”.

<sup>31</sup> Steffen Hindelang, *The Autonomy of the European Legal Order* (supra footnote 1), p. 194 et seq.; see also Ingolf Pernice (supra footnote 10), p. 146 et seq.

<sup>32</sup> Awards rendered pursuant to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘ICSID-Convention’) are enforceable in accordance with its Art. 53 which states in section (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.” Currently, however, the EU cannot become a party to the Convention as it is open to States only. Hence, awards against the EU will have to be enforced in accordance with the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

<sup>33</sup> Cf. Art. 22.2 1994 Understanding on Rules and Procedures governing the Settlement of Disputes (‘WTO Dispute Settlement Understanding’ or ‘DSU’): “...to suspend the application to the Member concerned of concessions or other obligations...”; see generally on retaliation in WTO law Chad P. Bown/Joost Pauwelyn (eds.), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, 2014.

<sup>34</sup> For example, the imposition of import duties by the complaining WTO Member in response to non-compliance with WTO commitments would not lead to a “factual non-application” or, perhaps more to the point, “monetary compensation” of the foreigner for the continuing application of a WTO non-conforming measure with the effect that the competitive level-playing field within the EU Internal Market would be distorted and the equal application of the law de facto be questioned. Rather, under WTO law, the competitive po-

dispute-settlement system, the number of potential claimants is limited to the Organization's own members, whereas, in investor-State arbitration, the EU could face a multitude of claims by different corporations against a single regulatory measure with potential damage awards of billions of Euros. Also in contrast to the WTO,<sup>35</sup> the possibilities for resolving disputes through diplomatic negotiations are minimal.<sup>36</sup>

Viewed against the background of those significant potential spillover effects from the EU's investment protection agreement, it cannot be ruled out that the CJEU might be inclined to (further) broaden its concept of autonomy of EU law in the sense that allowing for dispute resolution mechanisms in EU agreements which can lead to considerable de facto effects impinging on the EU legal order would also violate the EU's legal autonomy.

2. "This number is currently unavailable":  
*Interrupting the Judicial Dialogue within the European Union*

Expansionary tendencies in the Court's jurisprudence on the concept of autonomy of EU law can be witnessed for some time. The CJEU's Opinion 1/09 on the proposed European and Community Patent Court, handed down in 2011, provided insight into its perception of EU law's autonomy which touches on the allocation of competences between the Union and the Member State in the area of justice. The EU judicial system is characterised by the national and European courts cooperating to deliver a uniform application of that law within the Union. Although national courts have to apply both EU and national law when deciding a case, in situations in which the EU law is ambiguous or national courts question the validity of an EU measure, they have to refer the question of interpretation or validity to the CJEU before rendering a final judgement to which an appeal is inadmissible. The so-called reference for a preliminary ruling enshrined in Art. 267 TFEU is a fundamental mechanism aimed at enabling Member States' tribunals to obtain an interpretation of EU law from the CJEU.

In Opinion 1/09 the CJEU stressed the importance of this judicial dialogue for the "protection of the Community character of the law created

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sition of some EU exporters – probably not even those benefiting from the continued maintenance of the WTO non-conforming measure – would be affected on the market of the complaining WTO Member.

<sup>35</sup> Art. 3.7, 21.3, 22.2 DSU.

<sup>36</sup> Cf. Art. 27(1) ICSID-Convention; see also *Colvis J. Trevino*, State-to-State Investment Treaty Arbitration and the Interplay with Investor-State Arbitration under the same Treaty, 5 J. Int. Disp. Settlement, pp. 199 et seqq. (2014). Less sceptical *Christoph Herrmann*, The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy, 15 J. World Investment & Trade, pp. 570, 582 (2014).

by the Treaties”.<sup>37</sup> It held that Member States “cannot confer the jurisdiction to resolve ... disputes on a court created by an international agreement which would deprive ... [national] courts of their task, as ‘ordinary’ courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Art. 267 TFEU.”<sup>38</sup>

While there are differences between the proposed Patent Court and an investment tribunal in terms of applicable law and institutional settings,<sup>39</sup> in one respect they might be comparable: certain EU law issues would probably no longer be resolved in the Member States’ national courts and, hence, not be referred to the CJEU by means of Art. 267 TFEU.

<sup>37</sup> CJEU, Opinion 1/09, European and Community Patent Court, [2011] ECR, I-1137, para. 83.

<sup>38</sup> CJEU, Opinion 1/09, European and Community Patent Court, [2011] ECR, I-1137, para. 80.

<sup>39</sup> Cf. CJEU, Opinion 1/09, European and Community Patent Court, [2011] ECR, I-1137, para. 86–88; stated in such absolute terms, one could wonder whether CJEU wanted to exclude any possibility to confer jurisdiction on other courts or tribunals outside the world of Member State courts and itself which might come in touch with questions linking to EU law only very remotely.

Such very strict reading as well as the transferability of the reasoning one-on-one on investment tribunals established on the basis of future EU investment-related agreements is debatable: while the proposed European and Community Patent Court was entitled and obliged by agreement to apply EU law in its exclusive sphere of jurisdiction, investment tribunals established on the basis of future EU investment-related agreements enjoy an alternative jurisdiction and will – absent any explicit stipulation to the contrary – take EU law into account as facts only. A certain EU action impacting an investment is measured against the substantive standards.

The CJEU’s statements should, furthermore, be viewed in conjunction with two other principles discussed by the Court in its Opinion which are (also) put in place to preserve the very nature or autonomy of EU law: i.e., first, that “a member-state is obliged to make good damages caused to individuals as a result of breaches of EU law by its judicial bodies” [CJEU, Opinion 1/09, European and Community Patent Court, [2011] ECR, I-1137, para. 86] and, second, that the violation of EU law by a national court can result in infringement proceedings on the basis of Art. 258 et seqq. TFEU. In the case before the Court, however, both mechanisms were “deactivated”. The proposed European and Community Patent Court was supposed to form a body of an international organisation, i.e. an entity formally distinct from the Member States and the EU. Infringements of EU law by the proposed European and Community Patent Court hence could neither result in a claim for damages nor in infringement proceedings against Member States as not the Member States or a court of the Member States but an international organisation would violate EU law. Such situation was perceived by the CJEU as impermissible; cf. CJEU, Opinion 1/09, European and Community Patent Court, [2011] ECR, I-1137, para. 86–88. Turning to the issue of investment tribunals – for the sake of the argument considered regardless of the fact that such tribunals will presumably not apply EU law as law and dependent of whether the Member States will be parties to future EU investment-related agreements – the situation discussed in Opinion 1/09 could be different from the one investment tribunals might be placed in. Investment-related agreements will not establish an international organisation distinct from the parties to the investment-related agreement and investment tribunals are not organs of such an organisation. Hence, attribution of the conduct of an investment tribunal to the parties of the investment-related agreement remains on principle possible. However, whether these differences would suffice for the CJEU to accept the current model of ISDS enshrined, for example, in the CETA text, appears to be a totally different question.

The proposed European Patent Court was intended to exercise exclusive jurisdiction over a certain subject area which previously was part of the domain of the CJEU and the courts of the Member States. With the entry into force of CETA, domestic administrative and constitutional courts will be relegated to an alternative to investor-State arbitration tribunals for all disputes and remedies covered by the Agreement. It will be up to the investor to decide over the course of law. If it opts for arbitration, domestic courts and the CJEU will potentially be deprived of part of the jurisdiction over the control of the interpretation and lawful application of EU law: In the context of arbitration based on the CETA text, on principle, only compensation and damages – i.e. secondary legal protection – may be claimed. Primary legal protection – i.e. the revocation or amendment of an administrative act or the annulment of a law – may not be sought by an investor.<sup>40</sup> Should an investor opt for the commencement of arbitral proceedings, in accordance with Chapter 10, Art. X.21 CETA, it is barred from taking recourse to domestic courts to assert claims to compensation or damages. Seeking primary legal protection in State courts parallel to arbitral proceedings seems to remain possible, however. To what extent parallel procedures before a national court (primary legal protection) and an arbitral tribunal (secondary protection) are feasible at all depends on the specific case and the financial resources of the investor. In spite of all uncertainty connected with such prediction, if the investor has no interest in the revocation of the primary act itself,<sup>41</sup> the investor will possibly opt for the faster remedy, which is arguably an arbitral tribunal. Domestic proceedings for damages would in most cases take up considerably more time.<sup>42</sup> Considering by the way of example the German legal system in respect of legal protection against administrative measures, the investor would have to take action against the administrative act itself, which might involve three instances in admini-

<sup>40</sup> A partial exception is made for the return of property in cases of expropriation; see Art. X.36 para. 1 CETA Text.

<sup>41</sup> Even if the investor is interested in revocation of the primary act, it might nevertheless opt for investment arbitration as this could place the investor into a better negotiation position vis-à-vis the host state than initiating domestic litigation. Cf. *Lange Poulsen*, Submission to House of Lords EU Sub Committee on External Affairs: The Transatlantic Trade and Partnership Agreement, 5 March 2014; *Tariana Turia*, Government moves forward with plain packaging of tobacco products, [Beehive.govt.nz: The Official Website of the New Zealand Government](http://www.beehive.govt.nz/), 19 February 2013, <http://www.beehive.govt.nz/-release/government-moves-forward-plain-packaging-tobacco-products> (last visited 4 May 2014): “To manage this [the legal risk], Cabinet has decided that the Government will wait and see what happens with Australia’s legal [investment arbitration] cases, making it a possibility that if necessary, enactment of New Zealand legislation and/or regulations could be delayed pending those outcomes.”

<sup>42</sup> The average length of ICSID arbitration is above three years. *Anthony Sinclair/Louise Fisher/Sarah Macrory*, ICSID arbitration: how long does it take? 4 *Global Arbitration Review*, pp. 14 et seq. (2009).

strative courts first (due to the primacy of primary legal protection<sup>43</sup>) before being able to sue for damages in civil courts, a process which allows for various stages of appeal.<sup>44</sup>

In all those cases in which the investor opts for investment arbitration only, questions of interpretation and lawful application of EU law would not reach the CJEU by way of the preliminary reference procedure in accordance with Art. 267 TFEU. The judicial dialogue between the Member State courts and the CJEU would be deactivated.

One might object, though, that the arbitral tribunal would not apply EU law and, hence, no dialogue on EU law would exist which could be deactivated. The issue might, however, be more complex than that. The EU agreement opens up the possibility that, by choice of the investor, the responsibilities of the CJEU and the Member States' courts in the areas covered by the EU agreement's material scope are handed over to arbitral tribunals. In this respect, for the CJEU's appreciation of such a dispute settlement mechanism in the light of the concept of autonomy of EU law, it might not make a difference that an arbitral tribunal does not apply EU law as law *stricto sensu* but treats it merely as facts in its analysis. An engagement with EU law as a preliminary question might, for example, occur when an arbitral tribunal considers – e.g. within the context of indirect expropriation or the fair and equitable treatment standard – the factual question whether a certain EU measure under review was in compliance with superior EU law.<sup>45</sup> In such a situation the CJEU might ignore the fact that the arbitral tribunal is not applying EU law *stricto sensu*, but it might focus on the aspect that in such cases a tribunal's damages award, enforceable by an individual inside and outside the EU, might *de facto* impact interpretations and review for legality of EU measures in the light of superior EU law by the CJEU. Despite the fact that the tribunal's decision would not legally bind the CJEU in respect of the interpretation of EU law and its own legality review, the Court would have to think twice in the future before it declared an EU measure as being compatible with superior EU law in view of an arbitral tribunal previously having awarded damages on the ground that the EU violated, for example, the fair and equitable treatment standard

<sup>43</sup> See § 839(3) *Bürgerliches Gesetzbuch* (German Civil Code).

<sup>44</sup> Another situation in which investment arbitration might turn out to be the more favorable legal option for an investor is such in which preconditions to be met for claims for damages are more challenging domestically than in international investment law, in particular in respect of the liability for legislative acts.

<sup>45</sup> Note also that, even if the arbitral tribunal and CJEU were to share the same view in respect of the incompatibility of an EU measure with superior EU Law, if the investor approaches the arbitral tribunal, the illegal act would continue to exist within the EU. The CJEU's task to review EU measures for their legality would be restricted and the principle of primacy of judicial review of the EU measure with the view to declare it void in case of a violation of superior EU law, would be replaced by the principle of endure and cash in. See *Ingolf Pernice* (supra footnote 10), p. 147.

by enforcing an EU measure which the arbitral tribunal perceived as not being in compliance with superior EU law. It would risk multiple claims for damages by other foreign investors, enforceable by individuals virtually worldwide. In contrast, as explained above, in a WTO-context where a violation of the WTO agreements was established, there is room for diplomatic negotiation, and in relation to the European Convention of Human Rights, judgments cannot be enforced by the individual but implementation is policed by the Council of Europe on inter-State level.

Similar de facto spillover effects might also occur in other situations. For example, the EU legislator and the CJEU have, over the years, established a balance between the EU's fundamental freedoms – such as the freedom of establishment<sup>46</sup> or movement of capital<sup>47</sup> which provide, inter alia, for national treatment of foreign investors – and the mandatory requirements of public interests which would allow for restrictions on their freedoms. If a tribunal were to rule that a certain different treatment of nationals and foreigners would amount to an unjust discrimination of a foreign investor in application of the national treatment clause in an EU investment agreement and the CJEU, on the basis of the same facts, previously accepted such different treatment as being justified by some mandatory requirement, this would again pose the question of what pressure the CJEU would perceive as tolerable on the autonomous construction of EU law.

### 3. *The Trouble with Mixed Agreements: Distorting the Allocation of Competences between the Union and its Member States in Determining the Respondent in ISDS*

Another situation in which a conflict with the EU's legal autonomy can arise deals with arbitral rulings which would distort the allocation of competences between the Union and its Member States. The allocation of competences between the Union and its Member States can be affected in agreements concluded between the EU and the Member States with one or several third countries. Such a mixed agreement deals with situations where neither the EU (with, for example, jurisdiction on trade in services) nor the Member States (with, e.g., jurisdiction on public health or certain modes of transport) alone have the necessary competences for all the subject areas covered by an agreement.<sup>48</sup>

<sup>46</sup> Art. 49 TFEU. Cf. *Friedl Weiss/Clemens Kaupa*, European Union Internal Market Law, 2014, pp. 196 et seqq.

<sup>47</sup> Art. 63(1) TFEU. Cf. *Steffen Hindelang*, The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law, 2009.

<sup>48</sup> See for a view on whether CETA qualifies as a mixed agreement *Franz C. Mayer*, Stellt das geplante Freihandelsabkommen der EU mit Kanada (Comprehensive Economic and Trade Agreement, CETA) ein gemischtes Abkommen dar?, Rechtsgutachten für das Bundesministerium für Wirtschaft und Energie, <http://www.bmwi.de/BMWi/Redaktion/>

If a tribunal (established on the basis of such an agreement) pronounces, for example, on the question of the appropriate respondent on the side of the EU and the Member States, by choosing one of them, the CJEU has perceived this as indirectly ruling on the allocation of competences between Member States and the Union and, hence, as an interference with its judicial monopoly.<sup>49</sup>

With regard to CETA and other (draft) EU agreements with an investment chapter,<sup>50</sup> the European Commission obviously wanted to avoid this pitfall by providing a specific procedure to determine the proper respondent for disputes with the European Union or its Member States.<sup>51</sup> Whether it has been successful will ultimately be for the Court to decide; an element of caution or even doubt appears to be justified.

The CETA text provides that, upon a compulsory request by the investor, the “European Union shall, after having made a determination, inform the investor as to whether the European Union or a Member State of the European Union shall be the respondent.”<sup>52</sup> This determination will be binding on the tribunal and should, therefore, satisfy the CJEU’s

PDF/C-D/ceta-gutachten-einstufung-als-gemischtes-abkommen,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf (last visited 16.02.2015). See specifically for the issue of EU competences in the area of foreign investment protection *Steffen Hindelang/Niklas Maydell*, The EU’s Common Investment Policy – Connecting the Dots – Origins, Trends, and Perspectives, in *Marc Bungenberg/Jörn Griebel/Steffen Hindelang* (eds.), *International Investment Law and EU Law*, Special Issue to the European Yearbook of International Economic Law, 2011, pp. 1 et seqq.

<sup>49</sup> Cf. ECJ, Ruling 1/78, Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports, [1978] ECR, I-2151, para. 35. ECJ, Opinion 1/91, European Economic Area I, [1991] ECR, I-6079, para. 31–36; ECJ, C-459/03, Mox Plant, [2006] ECR, I-4635, para. 135. Just recently confirmed in CJEU, Opinion 2/13, ECHR, h.y.p., para. 223–5: “As Art. 3(5) of the draft agreement provides, if the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, they must give reasons from which it can be established that the conditions for their participation in the procedure are met, and the ECtHR is to decide on that request in the light of the plausibility of those reasons. Admittedly, in carrying out such a review, the ECtHR is to ascertain whether, in the light of those reasons, it is plausible that the conditions set out in paragraphs 2 and 3 of Art. 3 are met, and that review does not relate to the merits of those reasons. However, the fact remains that, in carrying out that review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU. Such a review would be liable to interfere with the division of powers between the EU and its Member States.”

<sup>50</sup> Cf., e.g., Art. 9.18(2)-(5) Singapore Text.

<sup>51</sup> The Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-State dispute settlement tribunals established by international agreements to which the European Union is a party, OJ L 257 of 28.8.2014, 121, can only have EU internal effects. On that regulation cf. *Jan Kleinheisterkamp*, Financial Responsibility in the European International Investment Policy, 63 *International and Comparative Law Quarterly*, pp. 449 et seqq. (2014).

<sup>52</sup> Art. X.20(3) CETA Text.

claim to an autonomous interpretation of the allocation of competences between the EU and its Member States. However, the mechanism in place geared to the situation that the investor has not been informed of the determination within a certain period of time appears problematic. For this case the CETA text wants to establish some sort of an automatism for determining the respondent: “where the measures identified in the notice [of the investor to the EU requesting a determination of the respondent] are exclusively measures of a Member State of the European Union, the Member State shall be respondent. [W]here the measures identified in the notice include measures of the European Union, the European Union shall be respondent.” No further indication is provided in the CETA text on what constitutes “measures of a Member State”<sup>53</sup> or such “of the European Union”. This, however, might arguably provide some leeway to an investor to qualify a certain measure as being either attributable to the EU or to a Member State as the investor “may submit a claim to arbitration [...] on the basis of the application”<sup>54</sup> of the aforementioned rules on the determination of the proper respondent. One may wonder how an investor can avoid addressing difficult questions of allocation of competences and attribution of a measure in accordance with EU law. For example, an investor may wonder whether a Member State’s order to an investor to repay State aid granted in violation of EU law which, in turn, is based on an EU decision with similar content directed at the respective Member State, would qualify as an EU or Member State measure. Similarly, the implementation of an EU Directive into domestic law of a Member State might pose difficult delineation questions.

In its recent Opinion 2/13 on the accession of the EU to the ECHR – referring to the functions attributed to the European Court of Human Rights (ECtHR) in respect of the operation of the so-called co-respondent mechanism<sup>55</sup> – the CJEU held: “Admittedly, in carrying out such a review [of a request of the EU or Member States to intervene as co-respondents in a case before the ECtHR], the ECtHR is to ascertain whether, in the light of those reasons [provided by the EU or Member States], it is plausible that the conditions set out in paragraphs 2 and 3 of Art. 3 are met, and that review does not relate to the merits of those reasons. However, the fact remains that, in carrying out that review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the

<sup>53</sup> The term “measure” itself is defined as including “a law, regulation, rule, procedure, decision, administrative action, requirement, practice or any other form of measure by a Party.”, Cf. Art. X.3 CETA Text.

<sup>54</sup> Emphasis added.

<sup>55</sup> The joint participation of the EU and a Member State shall avoid gaps in participation, accountability, and enforceability in the ECHR system, which might emerge due to the special nature of the EU. Cf. CJEU, Opinion 2/13, ECHR, n.y.p., para. 215 et seqq.

EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU. Such a review would be liable to interfere with the division of powers between the EU and its Member States.<sup>56</sup>

Turning to CETA, while the determination of the proper respondent would ultimately also be binding on the EU and the Member States,<sup>57</sup> the only significant factual difference is that such determination is done by the investor which (arguably) binds the tribunal.<sup>58</sup> The Court has not conclusively decided whether enabling a disputing party to interfere with the distribution of competences and attribution within the EU legal system is to be considered normatively different from such interference upon the behest of a court or tribunal established on the basis of an EU agreement.<sup>59</sup> However – if the CJEU, due to political considerations, does not somewhat retreat from its strict stance – doubts are warranted that the CJEU would accept current CETA treaty language as sufficiently safeguarding the autonomy of EU law.

#### IV. Neo-Calvoism and a Revival of a Local Remedies Rule? Possible Modifications to EU Agreements to Conform with the Requirements Stipulated by the Concept of Autonomy

Above, three possible obstacles flowing from the concept of autonomy of EU law for including ISDS in EU agreements were identified. The first one relates to a de facto impact of awards rendered by arbitral tribunals on the CJEU's monopoly in autonomously interpreting EU law. The second possible issue refers to the CJEU's firm position on the preservation of the judicial dialogue between Member States courts and itself, enshrined in Art. 267 TFEU, and a possible circumvention of that mechanism by opening up alternative avenues of legal redress through arbitral tribunals estab-

<sup>56</sup> CJEU, Opinion 2/13, ECHR, n.y.p., para. 224.

<sup>57</sup> According to Art. X.21(6) CETA Text the determination cannot be challenged by the EU or the Member States and an arbitral tribunal's award made on the basis if this determination would be binding on the EU or a Member State in accordance with Art. X.39(1) CETA Text.

<sup>58</sup> Art. X.21(7) CETA Text: "The tribunal shall be bound by the determination made pursuant to paragraph 3 and, if no such determination has been communicated, the application of paragraph 4." Pernice suggests that the tribunal may control the application of the respective CETA provision by the investor. Cf. *Ingolf Pernice* (supra footnote 10), p. 148. This would, however, make no difference for the purpose of the analysis in this paper.

<sup>59</sup> Ultimately, it will be the tribunal established on the basis of an EU agreement which will render a decision with binding effect on the EU or a Member State.

lished on the basis of EU agreements. Lastly, doubts exist on whether the European Commission succeeded in CETA negotiations<sup>60</sup> to shield the EU legal order from interferences with the internal division of powers between the EU and its Member States by arbitral tribunals' decisions.

If indeed the CJEU should come to conclude that the treaty language currently used in the CETA text and similar draft agreements is insufficient to protect the autonomy of EU law and the Court's role in preserving this special nature, overcoming this stumbling block might involve not just minor adjustments to the current model of investor-State arbitration widely used but nothing less than a small revolution.

### 1. *A Prior Involvement Mechanism*

Preventing any spillover effect on the interpretation or lawful application of EU law by a pronouncement of arbitral tribunals established on the basis of EU agreements would require a mandatory prior involvement of the CJEU with a binding effect of its rulings on an arbitral tribunal if questions of EU law are at issue.<sup>61</sup> The CJEU held that "an international agreement concluded by the Community [now the European Union] may confer new powers on the Court, provided that in doing so it does not change the nature of the functioning of the court as conceived in the EEC Treaty [now TEU and TFEU]."<sup>62</sup> An interesting side effect of such a prior in-

<sup>60</sup> The same applies on principle also to the Draft EU Free Trade Agreement with Singapore.

<sup>61</sup> Steffen Hindelang, *Der primärrechtliche Rahmen* (supra footnote 1), p. 183. See also Ingolf Pernice (supra footnote 10), pp. 156 et seqq., Stephan Schill, *Luxembourg Limits: Conditions For Investor-State Dispute Settlement Under Future EU Investment Agreements*, *Transnational Dispute Management* 2, pp. 51 et seqq. (2013). It would not suffice to establish such mechanism only for arbitrations on the basis of the ICSID-Convention which are delocalized as well as for such arbitrations governed by other arbitration rules with an arbitration seat outside the EU. If an arbitral tribunal is seated within the EU and governed by arbitration rules other than the ICSID-Convention, it is doubtful that the supervisory functions exercised by Member States' courts over arbitral tribunals and these Courts' possibility to refer questions of interpretation and application of EU law to the CJEU in accordance with Art. 267 TFEU are sufficient to preserve the autonomy of EU law. While it is true that the CJEU held in *Eco Swiss* [ECJ, Case C-126/97, [1999], I-3055, para. 32] that in the context of commercial arbitration this supervisory function is sufficient to secure a uniform interpretation and application of EU law, in respect of investment arbitration it might not be. In commercial arbitration there is a smaller risk that an EU Member State faces problems fulfilling its EU law obligations due to an award rendered not in conformity with EU law as it does not bind it; except in rare cases in which Member States are party to the arbitration. In investment arbitration, however, they are regularly party to the dispute and directly bound by an award. Of a different view *Stephan Schill, Luxembourg Limits*, p. 52.

<sup>62</sup> Cf. ECJ, *Opinion 1/91, European Economic Area I*, [1991] ECR I-6079, para. 59–65; *Opinion 1/92, European Economic Area II*, [1992] ECR I-2821, para. 32 et seqq.; see also CJEU, *European and Community Patent Court*, [2011] ECR, I-1137, para. 75. Not possible would be a reference to the CJEU by an arbitral tribunal in accordance with Art. 267 TFEU as this procedure requires a court or a joint court of (a) Member State(s) [cf. CJEU, *Opin-*

involvement procedure in an investment arbitration would be that EU measures affecting an investor could ultimately be annulled by involving the CJEU. Investment arbitration would turn into something more than just providing a remedy for compensation and damages<sup>63</sup> as envisaged, e.g., in the CETA text.<sup>64</sup>

However, on the downside, prior mandatory involvement and decisions of a court of a disputing party binding an arbitral tribunal will not easily be negotiated in future EU agreements as it somewhat contradicts investment arbitration's underlying basic idea of providing a neutral forum for dispute resolution. Perhaps even more problematic in policy terms, establishing a compulsory prior involvement mechanism would dispose an arbitral tribunal of any active engagement with EU law which does not evoke just distant memories of Calvo but might turn into a kind of Neo-Calvoism if other countries or regional integration organizations might demand similar privileges for their courts.<sup>65</sup>

When it comes to the threat of distorting the allocation of competences between the EU and the Member States by determining the respondent on the side of the EU and the Member States in investment arbitration by choosing one of them, the element of discretion granted to the investor in the CETA text would probably have to be eliminated in order to conform with the principle of the autonomy of EU law. The determination must be left entirely to the EU which will probably not tremendously thrill the other State party to the EU agreement. The latter might be concerned that the EU could frustrate arbitration by simply not determining any respondent. In order to respond to this issue, an EU agreement could provide for a compulsory involvement of the CJEU if the other EU institutions fail to determine an appropriate respondent. In lieu thereof, or if the CJEU itself should fail to name a respondent within reasonable time, the failure to name a respondent could be classified in an EU agreement as a measure amounting to a violation of a treatment standard easily attributed to the

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ion 1/09, European and Community Patent Court, [2011] ECR, I-1137, para. 82.]. An arbitral tribunal established on the basis of an EU Agreement with a non-Member State would hardly qualify as a joint court of Member States. Cf. *Steffen Hindelang*, Der primärrechtliche Rahmen (supra footnote 1), p. 183; also sceptical *Ingolf Pernice* (supra footnote 10), p. 156 et seq.

<sup>63</sup> *Ingolf Pernice* (supra footnote 10), p. 158.

<sup>64</sup> Art. X.36(1) CETA Text.

<sup>65</sup> *Steffen Hindelang*, Der primärrechtliche Rahmen (supra footnote 1), p. 183. See also *Nikos Lavranos*, Designing an International Investor-to-State Arbitration System After Opinion 1/09, in *Mark Bungenberg/Christoph Herrmann* (eds.), Common Commercial Policy after Lisbon, Special Issue to the European Yearbook of International Economic Law 2013, pp. 199 et seqq. Also pointing towards the "loss" of a neutral forum *Claus Dieter Classen*, Der EuGH und die Schiedsgerichtsbarkeit in Investitionsschutzabkommen, *Europarecht* 611, p. 622 (2012).

EU which itself could open up the possibility of a damages claim by an investor against the EU.

## 2. Local Remedies Rule and State-State Arbitration?

The centrality of the judicial dialogue between the CJEU and the Member State courts in the concept of autonomy of EU law could lead to a sceptical appreciation by the Court of EU agreements which allow for investor-State arbitration as an alternative to domestic courts and the CJEU. In all those cases in which the investor elects investment arbitration only, questions of interpretation and lawful application of EU law could not be judged by the CJEU anymore by way of the preliminary reference procedure as prescribed for in Art. 267 TFEU. The CJEU's function in controlling the exercise of European public authority would be diminished.

If a prior involvement mechanism cannot be negotiated with the EU's treaty partners or appears politically not feasible, one may think of including some kind of a "local remedies rule" in order to allow for a judicial dialogue between Member State courts and the CJEU.<sup>66</sup> While the findings of a domestic court or the CJEU prior to the commencement of arbitration might influence the tribunal's reasoning on questions of EU law later on, it is difficult to think of how to prevent the tribunal from second-guessing questions of interpretation and lawful application of EU law. Such second-guessing – irrespective of whether EU law is applied as law or constitutes just a preliminary question – might, again, be perceived by the CJEU as encroaching on the autonomy of EU law since the arbitral award would be binding on the EU or a Member State.<sup>67</sup> Making any determination on questions of EU law by domestic courts and the CJEU binding upon the tribunal might solve this problem; it could however face similar resistance as a prior involvement mechanism by negotiating partners.

In a similar vein, the EU could consider abandoning investor-State arbitration altogether and switching to an enhanced model of State-State arbitration. This option appears unappealing to investors as, in essence, they would face all the disadvantages associated with diplomatic protection,<sup>68</sup> if no provision is made in domestic law for some procedure which would give the investor a stronger legal position vis-à-vis its home State to initiate State-State arbitration on its own behalf and to have a claim against the home State to damages possibly obtained from the host State. If shaped in

<sup>66</sup> Steffen Hindelang, EP Study (supra footnote 9), pp. 88–93.

<sup>67</sup> Ingolf Pernice, EP Study (supra footnote 10), p. 156.

<sup>68</sup> Steffen Hindelang, EP Study (supra footnote 9), p. 81. On recent developments in respect of the concept of diplomatic protection cf. Jörg Gundel, Vom diplomatischen Schutz zum Recht der Investitionsschutzabkommen: Offene Fragen und alternative Wege beim Auslandsschutz privater Vermögensinteressen, 51 AVR, pp. 108 et seqq. (2013).

a WTO-style, i.e. excluding (also) de facto effects of arbitral awards on the EU internal legal order by disallowing for enforcement by individuals and providing for political negotiations upon the implementation of an award, EU constitutional issues as to the conformity with the concept of autonomy of EU law might be overcome.

## V. Concluding Remarks and Prospects: Even more Stumbling Blocks Ahead? The Principles of Due Process and the Rule of Law in the European Legal Order

Much debate in public but also in expert circles in Europe has revolved lately around the question of whether comprehensive free trade agreements should include an investment chapter and how such chapters should be tailored in order to strike a balance between the protection of property and other interests involved in the activity of investing abroad.<sup>69</sup> However, this debate, which is largely a policy one, has somewhat distracted from Europe's internal constitutional stumbling blocks with regard to the concept of the autonomy of EU law which the EU has to overcome when including investment chapters in EU agreements such as the one found in the CETA text. This paper suggests that it is not only a theoretical chance that the CJEU might take issue with the clauses on ISDS currently contained in the CETA text and similar draft treaties. The means available to sufficiently address the conditions stipulated by EU law might not just bring some modification to the current model of investor State-arbitration, but could alter its basic DNA. Essentially, the CJEU demands the final say on questions of the interpretation or lawful application of EU law which may arise in legal proceedings initiated on the basis of an EU agreement to the extent that those could potentially have an effect on the EU internal legal order.

Depending on the precise wording of any future EU investment-related agreement and also the procedural context in which the case is brought to the CJEU, it is also conceivable that the Court might take issue with investment arbitration's procedural inadequacies.<sup>70</sup> By allowing for investment arbitration, the EU transfers some power to control the exercise of public authority to an international dispute settlement body. If EU and Member State courts are partially deprived of their controlling functions, the gen-

<sup>69</sup> Cf., e.g. *Steffen Hindelang*, Statement in the Joint Public Hearing of the European Parliament Committees on Legal Affairs and on International Trade on ISDS and Arbitration in TTIP of 27.01.2015, <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/TTIP-Hearing-European-Parliament/index.html> (last visited 16.02.2015).

<sup>70</sup> In respect of these inadequacies cf. *Steffen Hindelang*, EP Study (supra footnote 9), pp. 96–113.

eral question then arises whether arbitral tribunals guarantee a sufficiently impartial, independent, and high-quality control of the exercise of public authority. More specifically, the CJEU could take issue with the design of those arbitral tribunals, deeming them to be inconsistent with the EU principle of the rule of law.<sup>71</sup> Whether these might be the inadequate protection against arbitrators' conflicts of interests or the extremely limited grounds for appeal,<sup>72</sup> the CJEU could, for example, force Member State courts to deny ISDS arbitral awards having effect within the EU if it perceives the procedural features of these tribunals as insufficient for the rule of law. It is true that the CJEU has not yet taken offence at any dispute settlement mechanism to which the EU effectively subjected itself in international treaties in terms of due process and the rule of law. However, the CJEU stands ready to defend fundamental values enshrined in EU law against potential infringement by measures taken in public international law; including those taken by the UN Security Council.<sup>73</sup>

Since the EU has never been a defendant in investor-State arbitration it is unlikely that a broader critical reflection on the differences between the WTO's public international law dispute settlement and investor-State arbitration will start before the EU finds itself at the receiving end of these cases and challenges of these awards find their way to the CJEU. With the necessary political will in the EU institutions or a Member State government, clarification could be accelerated by requesting a legal opinion from the Court on the basis of Art. 218(11) TFEU.<sup>74</sup> In any event, although these problems are necessarily hypothetical, the CJEU has always been good for a surprise.

### Summary

The European Union (EU) aspires to conclude and ratify comprehensive trade agreements with Canada, Singapore, the USA and other States containing investment chapters which

<sup>71</sup> Cf. Art. 2, 1. sentence TEU "The Union is founded on the values of [...] the rule of law". See also *European Commission*, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2, [http://ec.europa.eu/justice/effective-justice/files/com\\_2014\\_158\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf) (last visited 17.01.2015).

<sup>72</sup> Cf. *Steffen Hindelang*, EP Study (supra footnote 9), p. 56 et seqq.

<sup>73</sup> Cf. ECJ, Joint Cases C-402/05 P und C-415/05 P, *Kadi* (targeted sanctions), [2008] ECR, I-6351.

<sup>74</sup> Currently, the European Commission is negotiating several comprehensive economic agreements with similar-worded investment chapters [cf. *European Commission*, Overview of FTA and other Trade Negotiations, updated 14.01.2015, [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_118238.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf) (last visited 17.01.2015)]. Once ratified and entered into force, they may create a weighty factum – the famous elephant in the room. Furthermore, as of today, neither a European institution nor the Member States have considered addressing the Court with questions discussed in this paper by the way of requesting a legal opinion on the basis of Art. 218(11) TFEU. Only the competence issue might be referred to the Court. Cf. above n. 14.

also provide for investor-State dispute settlement (ISDS). Surprisingly, the conditions and limits stipulated by the Treaties upon which the European Union is founded, i.e. the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), have received only selective attention. When it comes to the establishment of dispute resolution bodies in international agreements concluded by the EU the concept of autonomy of EU law has proven to be the crucial touchstone. The role of this concept, mainly developed in a series of opinions of the Court of Justice of the European Union (CJEU), in limiting the Union's leeway to subject itself to the current model of investor-State arbitration has so far not sufficiently been explored. This paper suggests that, in the light of recent decisions, it is not a purely theoretical possibility that the CJEU might take issue with the scope of ISDS currently contained in the CETA Text and similar draft treaties. The means available to sufficiently address the conditions stipulated by EU law might not just bring some modification to the current model of investor-State arbitration, but could completely alter its DNA.

### *Zusammenfassung*

Die Europäische Union (EU) strebt den Abschluss und die Ratifizierung umfassender Handelsabkommen mit Kanada, Singapur, den USA und anderen Staaten an. Diese enthalten auch Investitionsschutzkapitel mit Investor-Staat Streitbeilegungsmechanismen (ISDS). Überraschenderweise ist den Bedingungen und Grenzen, die in den Verfassungsdokumenten der EU festgelegt sind, nur punktuelle Aufmerksamkeit zuteil geworden. Wenn es zur Einrichtung von Streitbeilegungsmechanismen in von der EU geschlossenen internationalen Abkommen kommt, hat sich das Konzept der Autonomie des Unionsrechts als entscheidender Prüfstein erwiesen. Die möglicherweise limitierende Wirkung dieses Konzepts, entwickelt in einer Reihe von Gutachten des Gerichtshofes der Europäischen Union (EuGH), bei dem Vorhaben der Union, sich dem aktuell vorherrschenden Modell der Investor-Staat-Schiedsgerichtsbarkeit zu unterwerfen, ist bisher nicht ausreichend untersucht worden. Angesichts seiner jüngsten Entscheidungen erscheint es nicht mehr nur eine rein theoretische Möglichkeit, dass der EuGH an der konkreten Ausgestaltung des ISDS im CETA Text und ähnlichen Vertragsentwürfen Anstoß nehmen könnte. Die zur Verfügung stehenden Mittel, um die im EU-Recht enthaltenen Anforderungen ausreichend zu adressieren, könnten verlangen, das gegenwärtige Modell der Investor-Staat Schiedsgerichtsbarkeit nicht nur zu modifizieren, sondern dessen Struktur völlig zu verändern.