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Simas Grigonis

DOCTORAL DISSERTATION

JURISDICTIONAL INTERACTION BETWEEN THE CJEU AND INTERNATIONAL DISPUTE SETTLEMENT BODIES: EU LAW PERSPECTIVE

SOCIAL SCIENCES,
LAW (S 001)
VILNIUS, 2020

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MYKOLO ROMERIO UNIVERSITETAS

Simas Grigonis

ESTT IR TARPTAUTINIŲ GINČŲ SPRENDIMO INSTITUCIJŲ JURISDIKCIJŲ SĄVEIKA: ES TEISĖS PERSPEKTYVA

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LIST OF DIAGRAMS

ABBREVIATIONS

AG – Advocate General of the Court of Justice of the European Union

CCP – Common Commercial Policy

CETA – Comprehensive Economic and Trade Agreement between Canada, on the one part, and European Union and its Member States, on the other part

Charter – Charter of Fundamental Rights of the European Union

CJEU or **the Court** – Court of Justice of the European Union

EC – European Communities

ECT – Energy Charter Treaty

ECHR – Convention for the Protection of Human Rights and Fundamental Freedoms

EU – European Union

FDI – foreign direct investment

GC – General Court

ICJ – International Court of Justice

ICS – Investment Court System

ICS tribunals – CETA's Tribunal of first instance and the Appellate Tribunal referred together

ICSID – International Centre for Settlement of Investment Disputes

ISDS – Investor-state dispute settlement

ITLOS – International Tribunal for the Law of the Sea

MIC – Multilateral Investment Court

PCA – Permanent Court of Arbitration

PCIJ – Permanent Court of International Justice

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

Treaties – TEU and TFEU together

UN – United Nations

UNCITRAL – United Nations Commission on International Trade Law

VCLT – Vienna Convention on Law of Treaties

KEY NOTIONS USED IN THE THESIS

Accession Agreement – Draft international agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Essential characteristics – or, as the CJEU refers to it – the 'essential characteristics of EU and EU law' – is a common term used in this thesis to mark the constitutional principles, doctrines and qualities of the EU and EU law, described in detail in Section 1.2.2.

International tribunal – a term used in this thesis to define 'international adjudicative bodies', as they are defined in the *The Oxford Handbook of International Organizations*.[1] The concept encompasses a variety of international courts, tribunals, arbitral tribunals, as well as *ad hoc* bodies.

Legal order – the concept of 'legal order' is used in this thesis synonymously to the notion of 'legal system'. The notion is based on the H.L.A. Hart's theory of legal system, claiming that it is a normative system comprised of primary and secondary rules.[2]

International legal regime – is used in this thesis to distinguish specialised international legal regimes created by states, which lays down a system of specialised rules and regulations as well as the procedural arrangements for their implementation, including rules for reacting to breaches.[3]

Member States – member states of the European Union together.

ISDS clause – defines a variety of clauses that are included in most of the contemporary international investment agreements, providing investor-state dispute settlement mechanisms pursuant to which an individual investor may resort to international arbitration (on the basis of different arbitration rules such as the ICSID or the UNCITRAL arbitration rules) and seek to enforce substantive obligations included in the investment agreements against the host states of their investment. Typically *ad hoc* tribunals of three arbitrators are appointed by the parties to adjudicate disputes, which are disbanded after issuing an award, normally, without any possibility for review of an award.[4]

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1 Chiara Giorgetti, "International Adjudicative Bodies," in *The Oxford Handbook of International Organizations*, ed. Jacob Katz Cogan, Ian Hurd, and Ian Johnstone, 1st ed. (Oxford: Oxford University Press, 2016), 881–902.

2 H.L.A. Hart, *The Concept of Law*, 2nd edition (Oxford: Clarendon Press, 1997), 100-123.

3 Bryan A. Garner, ed., *Black's Law Dictionary*, 9th ed. (West, 2009), 1395; Martti Koskenniemi, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law." *Report of the Study Group of the International Law Commission*, (2006), 65-99, http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

4 Joachim Pohl, Kekeletso Mashigo, and Alexis Nohen, "OECD Working Papers on International Dispute Settlement Provisions in International Investment Agreements," (2012), 7-8; Commission Staff Working Document 'Impact Assessment' on Multilateral Reform of Investment Dispute Resolution, SWD(2017) 302 Final, Brussels, 13 September 2017, 7-19.

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INTRODUCTION

Scientific problems of the research

Regimes of international law constantly interact by advancing claims of relevance onto each other.[5] While the number of international tribunals is constantly increasing,[6] international law does not provide for common rules that would coordinate this interaction, as separate legal regimes normally are not organised in a hierarchical relationship. This phenomenon has come to be associated with the concepts of fragmentation of international law,[7] legal pluralism,[8] 'global disorder,'[9] and most recently – 'inter-legality.'[10] In this regulatory vacuum tribunals experiencing jurisdictional competition are the institutions setting the rules of such interaction, first of all, by handling the question of jurisdiction in a particular case.[11]

Since the very beginning of the European Community, the CJEU has set the rules of its relationship with international law and international dispute settlement mechanisms. The CJEU consistently claimed that as a matter of principle the EU has a competence to conclude international agreements establishing dispute settlement bodies entitled to interpret provisions of such agreements and adopt decisions binding the EU.[12] However, the CJEU has made the EU's accession to such international agreements dependent on the preservation of the autonomy of the EU legal order. According to the Court, autonomy requires that the essential character of the powers of the EU and its institutions as provided by the Treaties remain unaltered.[13] Autonomy also requires that participation in international dispute settlement mechanism would not have binding effect on the EU and its institutions to a particular interpretation of EU law when they exercise their internal powers under the Treaties.[14] Behind these requirements of autonomy protection is the aspiration

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5 Filippo Fontanelli, "Let's Disagree to Disagree: Relevance as the Rule of Inter-Order Recognition," *Italian Law Journal* 4, 2 (2018): 319–20.

6 Gleider I. Hernández, "The Judicialization of International Law: Reflections on the Empirical Turn," *European Journal of International Law* 25, 3 (2014): 919–34; Benedict Kingsbury, "Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem," *New York University Journal of International Law and Politics* 31, 4 (1999): 679–96.

7 Koskenniemi, *supra* note 3; William Thomas Worster, "Competition and Comity in the Fragmentation of International Law," *Brooklyn Journal of International Law* 34, 1 (2008): 119–50; Eva Kassoti, "Fragmentation and Inter-Judicial Dialogue: The CJEU and the ICJ at the Interface," *European Journal of Legal Studies* 8, 2 (2014): 21–49.

8 Nicholas W. Barber, "Legal Pluralism and the European Union," *European Law Journal* 12, 3 (2006): 306–29; Paul Schiff Berman, "Global Legal Pluralism," *Southern California Law Review* 80, 6 (2007): 1155–1238.

9 Neil Walker, "Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders," *International Journal of Constitutional Law* 6, 3–4 (July 1, 2008): 373–96.

10 Jan Klabbers and Gianluigi Palombella, eds., *The Challenge of Inter-Legality* (Cambridge: Cambridge University Press, 2019).

11 Yuval Shany, "International Courts as Inter-Legality Hubs," in Klabbers and Palombella, *op. cit.*, 319–21.

12 Opinion 1/91 *on Compatibility of Draft Agreement concerning the Creation of the European Economic Area with the Treaties* [1991] EU:C:1991:490, paras. 39-40.

13 Opinion 1/00 *on Draft Agreement concerning the Establishment of a Common European Aviation Area* [2002] EU:C:2002:231, para. 12.

14 Ibid., para. 13.

to ensure uniform interpretation of EU law. The Court considers uniformity of EU law to be an essential precondition for the achievement of the single market and overall European integration.[15] For the sake of uniform interpretation, the CJEU has consistently claimed an exclusive right to provide definitive interpretation of EU law.[16]

The necessity to ensure uniform interpretation of EU law determined the development of various instruments, which were closely related to securing the uniformity of laws within the EU in one way or another. These instruments have come to be known as the essential characteristics of EU law. The scope of the principle of autonomy was therefore extended by the CJEU over the years to cover these characteristics as well, which rendered autonomy more and more complex and dynamic.

The CJEU has assessed the compatibility of a number of international agreements providing for dispute settlement mechanisms that were not foreseen in the Treaties.[17] With each case the scope of the characteristics protected by autonomy seems to have broadened. In the *Opinion 1/76*, the CJEU directly questioned whether the jurisdiction of the Fund Tribunal was compatible with the CJEU's power to give preliminary rulings under the Treaties and concluded that it was not due to the possibility of divergent interpretation of EU law the Fund Tribunal created.[18] The CJEU's exclusive right to provide definitive interpretation of EU law was thus already protected in this early case.

In the *Opinion 1/91* the CJEU introduced the concept of autonomy of the EU legal order when assessing whether the proposed EEA Court would not undermine it.[19] This time the CJEU ruled that jurisdiction of the EEA Court was incompatible with the autonomy, since it was likely to adversely affect the allocation of responsibilities of institutions as provided under the Treaties.[20] Thus, the CJEU introduced the requirement that the EU's and its institutions' powers must be preserved. At this instance, the CJEU still mostly had its own powers in mind, since it underlined the necessity that its exclusive right to observe the law is ensured.[21]

In the *Opinion 1/09*[22] the CJEU developed the characteristic of the EU judicial system. The CJEU considers the EU judicial system to be composed of the CJEU and the national courts, which altogether comprise a complete system, designed to effectively ensure the full application of EU law in all the Member States as well as to ensure protection of

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15 Opinion 1/91, *supra* note 12, paras 30-45.

16 Opinion 1/00, *op. cit.*, para. 13; Opinion 2/13 *on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms Agreement with the Treaties* [2014] EU:C:2014:2454, paras. 246-7.

17 Opinion 1/76 *on draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] EU:C:1977:63; Opinion 1/91, *op. cit.*; Opinion 1/92 *on the draft EEA agreement* [1992] EU:C:1992:189; Opinion 1/00, *op. cit.*; Case C-459/03, *Commission of the European Communities v Ireland (Mox Plant)* [2006] EU:C:2006:345; Opinion 1/09 *on Compatibility of Draft Agreement concerning the Creation of the Unified Patent Litigation System with the Treaties* [2011] EU:C:2011:123; Opinion 2/13, *op. cit.*.

18 Opinion 1/76, *op. cit.*, paras. 18-22.

19 Opinion 1/91, *op. cit.*, para. 30.

20 Ibid., para. 35.

21 Opinion 1/91, *supra* note 12, para. 35.

22 Opinion 1/09, *supra* note 17, paras. 82-89.

individuals' rights stemming from EU law.[23] The EU judicial system is one of the essential characteristics of EU law that the CJEU rigidly protects by invoking the principle of autonomy. As a consequence, the normal functioning of the internal judicial system of the EU may not be affected by external dispute settlement mechanisms created by international agreements.[24]

Moreover, the attempts to accede to the ECHR were stopped by the CJEU.[25] The first time, the Court stopped the accession since EU law, as it stood back then, provided no competence under the Treaties for the EU to accede to the ECHR.[26] The second time, accession was blocked by the CJEU, despite the clear Treaties' obligation to accede,[27] since the Accession Agreement was found incompatible with autonomy and essential characteristics of EU law.[28] The Court ruled in the *Opinion 2/13* that the Accession Agreement was liable to adversely affect the characteristics of the EU judicial system,[29] division of powers between the EU and the Member States,[30] fundamental rights,[31] mutual trust,[32] sincere cooperation[33] and consequently – the autonomy of the EU legal order.[34] As these cases indicate, the concept of autonomy has gradually evolved into a complex network of principles comprising the foundations of the entire legal system of the EU. These characteristics may not be affected by the international agreements providing for 'external' dispute settlement mechanisms, which are not foreseen in the Treaties.

The recent rulings of the CJEU in *Achmea* and the *Opinion 1/17* marks the newest phase in the evolution of the doctrine of autonomy of the EU legal order. In these rulings the CJEU has adopted two completely different positions on compatibility of two similar investment dispute settlement mechanisms – the ISDS under the intra-EU BITs and the ICS under CETA. While the Court found the ISDS clauses of intra-EU BITs incompatible with autonomy, the new ICS mechanism was ruled to be in line with it. These new rulings, providing two contrasting positions require answering why these cases were treated differently and how they have impacted the understanding of the autonomy of the EU legal order.

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23 Opinion 1/09, *supra* note 17, paras. 66-68.

24 Ibid., para 89.

25 See, *for example*: Opinion 2/94 *on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] I-01759; Opinion 2/13, *supra* note 16.

26 Opinion 2/94, *op. cit.*, para. 36.

27 "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. <…>" – Article 6(2) TEU.

28 Opinion 2/13, *op. cit.*, para. 258.

29 Ibid., para. 198.

30 Ibid., paras. 221-31.

31 Ibid., paras. 169-70.

32 Ibid., paras. 191-94.

33 Ibid., para. 173.

34 Ibid., para. 258.

Since the Treaty of Lisbon the FDI is part of the exclusive competence of the EU.[35] With the exclusive competence in the field of the FDI the EU inherited from the Member States various BITs containing ISDS clauses providing a possibility for investors to resort to international arbitration against state in order to enforce their rights under specific BIT.[36] Some of the BITs were concluded between the Member States (intra-EU BITs) and some of them were concluded by Member States and third countries (extra-EU BITs). It soon became clear that different kinds of BITs would be treated differently in the EU. While the agreements of the Member States with third countries were essentially integrated into the EU's investment policy,[37] the intra-EU BITs were declared incompatible with EU law by the Commission.[38] At the time of the Lisbon Treaty, there were 191 intra-EU BITs within the EU.[39]

In *Achmea* the CJEU has for the first time assessed the compatibility with EU law of ISDS clauses contained in the intra-EU BITs.[40] The CJEU's assessment largely reflected its previous case law concerning the autonomy discussed above. The Court ruled that clauses of international agreements concluded between the Member States, which provided an opportunity for an investor of one of the Member States to bring proceedings against another Member State before an arbitral tribunal were precluded by Articles 267 and 344 TFEU.[41] The *Achmea* ruling resulted in friction between EU law and international investment protection regime. While the Commission and the Member States recognised *Achmea* as repealing jurisdiction of ISDS tribunals in all on-going and future intra-EU investment disputes (including the ones arising from the ECT),[42] investors and a number of ISDS tri-

35 However, as was recently clarified by the CJEU in Opinion 2/15, investor-state dispute settlement does not fall under the exclusive competence of the EU and is shared with the Member States. – Opinion 2/15 *on Free Trade Agreement between the European Union and the Republic of Singapore* [2017] EU:C:2017:376, para. 305; Article 207(1) TFEU.

36 European Commission, *Communication: Towards a Comprehensive European International Investment Policy*, Brussels, 7.7.2010, COM(2010)343 Final Communication," 9.

37 Regulation (EU) No 1219/2019 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).

38 European Commission, *Communication: Towards a Comprehensive European International Investment Policy*, *op. cit.*, 11.

39 Wenhua Shan and Sheng Zhang, "The Treaty of Lisbon: Half Way toward a Common Investment Policy," *European Journal of International Law* 21, no. 4 (2010): 1065.

40 Case C-284/16, *Slovak Republic v Achmea BV* [2018] EU:C:2018:158.

41 Ibid., para. 62.

42 Communication from the Commission to the European Parliament and the Council *on Protection of intra-EU investment*, Brussels, 19.7.2018, COM(2018) 547 final; Declaration of the Representatives of the Governments of the Member States of 15 January 2019 *on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the EU*.

bunals refused to apply *Achmea* for determination of their jurisdictions.[43] Thus, the *Achmea* saga provided an exceptional opportunity to observe how international investment tribunals, which were not related to the EU, dealt with claims of relevance of the CJEU's *Achmea* ruling.

In turn, once the competence in the FDI was conferred on the EU, the Commission recognised the ISDS to be such an established feature of the international investment regime that it had to find the way for the EU to participate in its relationship with third states.[44] The Commission's rationale was that if the EU did not participate in the ISDS, investors could be discouraged from investing in the EU.[45] Thus, it was decided to temporarily leave the extra-EU BITs of the Member States in force by setting strict rules for their management until the mechanism suitable for the EU is created and replaces the extra-EU BITs.[46] For this reason, the Commission aimed to develop an innovative ISDS mechanism suitable for the EU.[47] As a result, a new kind of investment dispute settlement mechanism – the ICS – was developed. As expected, the proposal of the ICS raised numerous discussions on its compatibility with autonomy of EU law. In September 2017 Belgium requested the CJEU to assess whether the ICS mechanism of the CETA is, *inter alia*, compatible with the exclusive competence of the CJEU to provide definitive interpretation of EU law.[48]

To the surprise of numerous critics of the new mechanism,[49] the CJEU concluded in the *Opinion 1/17* that the exclusive jurisdiction of the Court over the definitive interpretation of EU law was not adversely affected by the ICS.[50] While the CJEU had previously found

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43 *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 ("Masdar"); *Vattenfall AB and others v. Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018 ("Vattenfall"); *UP and C.D Holding Internationale v Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018 ("UP and C.D Holding"); *Foresight Luxembourg Solar 1 Sàrl, et al v Kingdom of Spain*, SCC Case No 2015/150, Final Award, 14 November 2018 ("Foresight"); *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sà r.l v Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018 ("RREEF"); *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v The Italian Republic*, SCC Case No. V 2015/095, Final Award, 23 December 2018 ("Greentech"); *Marfin Investment Group v The Republic of Cyprus*, ICSID Case No ARB/13/27, Award, 26 July 2018 ("Marfin").

44 European Commission, *Communication: Towards a Comprehensive European International Investment Policy*, *supra* note 36, 9-10.

45 Ibid., 10.

46 Regulation (EU) No 1219/2019, *supra* note 37.

47 European Commission, *Communication: Towards a Comprehensive European International Investment Policy*, *op. cit.*, 9-10.

48 Belgian Request For an Opinion from the European Court of Justice Regarding the Compatibility of CETA, (2017), accessed 7 May 2018, https://diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta.

49 Szilárd Gáspár-Szilágyi, "A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union," *The Journal of World Investment & Trade* 17, no. 5 (2016): 701–42; Daniele Gallo and Fernanda G. Nicola, "The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication," *Fordham International Law Journal* 39, no. 5 (2016): 1132; Szilárd Gáspár-Szilágyi, "AG Bot in Opinion 1/17. The Autonomy of the EU Legal Order v. the Reasons Why the CETA ICS Might Be Needed," (2019), *European Law Blog*, accessed 12 March 2020, https://europeanlawblog.eu/2019/02/06/ag-bot-in-opinion-1-17-the-autonomy-of-the-eu-legal-order-v-the-reasons-why-the-ceta-ics-might-be-needed/; Christina Eckes, "Some Reflections on Achmea's Broader Consequences for Investment Arbitration," *European Papers* 4, no. 1 (2019): 79–97.

50 Opinion 1/17 *on Compatibility of Investment Court Sysytem with EU Law* [2019] EU:C:2019:341, para. 136.

the possibilities for external tribunals to engage in the interpretation of EU law incompatible with autonomy (as discussed above), this time it reached the opposite conclusion: both the CJEU and the AG Bot recognized the fact that the ICS tribunals would essentially have to interpret EU law as compatible with EU law.[51] Such a shift in the Court's attitude in the *Opinion 1/17* towards the interpretations of EU law provided by international dispute settlement body may be a signal that the doctrine of the autonomy of the EU legal order has taken another step in its evolution.

Taking into account the context described above, the following main **scientific problems** require to be addressed:

1. What the principle of autonomy of the EU legal order, given its complexity and dynamic nature, entails in relation to the EU's and the Member States' participation in dispute settlement mechanisms falling outside the mechanisms provided under the Treaties? Does the *Opinion 1/17* reflect any substantial changes in the concept of autonomy of the EU legal order?
2. Given the CJEU's ruling in *Achmea* and the ISDS tribunals' reactions to the parties' attempts to rely on *Achmea*, how to implement dispute settlement in the emerging European foreign investment policy while safeguarding the principle of autonomy of the EU legal order and, at the same time, respecting the requirements of international law?
3. Although the CJEU concluded in *Opinion 1/17* that the ICS would not have adverse effect on the CJEU's right to provide definitive interpretation of EU law, the CJEU did not address several issues that could have adverse effects on uniform interpretation of EU law. In case the ICSs have adverse effects on uniform interpretation and application of EU law, would and to what extent such effects be incompatible with EU primary law?

Relevance of the problem

Each of the problems identified in this thesis are particularly relevant for the development of the doctrine and practice of EU and international law as well as the relationship between the EU legal order and international law. First, the question whether the content of the principle of autonomy of the EU legal order has changed is of fundamental importance for the legal doctrine. The recent recognition of the ICS to be compatible with the autonomy of EU law is only one of a few instances where the CJEU ruled in favour of the international dispute settlement mechanism in which the EU participates.[52] The *Opinion 1/17* contrasts with the previous opinions of the CJEU, since the Court recognized that the fact that the ICS tribunals will have to undertake the examination of the effect of EU law measures does not make the ICS mechanism incompatible with EU law. Such a conclusion

51 Opinion 1/17, *supra* note 50, para. 131; Opinion 1/17 *on the Compatibility of Investment Court Sysytem with EU Law*, Opinion of Advocate General Bot [2019] EU:C:2019:72, para. 137.

52 Other mechanisms recognized to be compatible with EU law were EFTA Court and the system of legal supervision proposed by the Agreement on the establishment of the European Common Aviation Area. – Opinion 1/92, *supra* note 17, para. 42; Opinion 1/00, *supra* note 13, para. 46.

was unexpected in the light of the previous case law of the CJEU. Therefore, an analysis inquiring whether the Court's reasoning in the *Opinion 1/17* brought new developments into the doctrine of the autonomy of the EU legal order is very relevant and could be significant for the assessments of future international agreements of the EU.

The CJEU's ruling in *Opinion 1/17* is also relevant due to the scale of its possible effects. The ICS is arguably the most complex and largest scale mechanism to have ever been approved by the CJEU. By concluding that ICS mechanism is compatible with EU law, the CJEU endorsed the large-scale international investment dispute settlement reorganization promoted by the Commission. The Commission's investment dispute settlement reform is intended to be implemented in two stages.[53] First, the Commission aims to include the ICS clauses in each future EU-level investment agreement. The CETA's ICS was one of the first mechanisms out of many ICSs under negotiation.[54] Then, all the ICSs should eventually be replaced with the standing MIC for the settlement of the EU's and Member States' investment disputes.[55] The parallel negotiations on the ISDS reform under the framework of UNCITRAL have also started already.[56] Once the reform is finished, dozens of the ICS and ISDS tribunals under investment protection treaties with third countries will be replaced with a single MIC entitled to handle all the investment disputes arising out of the EU investment agreements. However, since the CJEU did not address all the concerns regarding the effects of the ICS on the CJEU's exclusive right to provide definitive interpretation of EU law, it is important to analyse whether the ICSs could have adverse effects on the uniformity of EU law and, if yes, whether those effects would be compatible with the Treaties. It must be realised that we are currently in the transitional period in the investment dispute settlement reform. The first ICS mechanisms are currently in the process of being actually set up and we will have to wait until the first cases emerge. Only then it will be possible to assess the the true effects of the operation of the ICS mechanisms. Should the effects discussed in this thesis manifest in the ICS tribunal's work, they could still be corrected when establishing the MIC. Therefore, the problems and solutions discussed in this thesis will remain relevant in the nearest future.

Lastly, due to the CJEU's *Achmea* ruling the respondent Member States were given an opportunity to challenge the jurisdictions of the respective ISDS tribunals established under the ECT and intra-EU BITs. It was ruled in *Achmea* that ISDS clauses under intra-EU BITs were unlawful rendering hundreds of the international investment protection agreements concluded between the Member States contrary to EU law.[57] That way, *Achmea* has

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53 European Commission, *Concept Paper: Investment in TTIP and Beyond – the Path for Reform*, 2015, 1–12, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

54 The Commission estimates that approximately 20 of ICSs should be created by EU investment agreements with third states in the near future. – European Commission, "Negotiations and Agreements," accessed 16 August 2019, https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/.

55 Commission Recommendation *for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes*, COM(2017) 493 final, 13 September 2017, Brussels.

56 Possible Reform of Investor-State Dispute Settlement (ISDS) (Draft) (Note by the Secretariat, A/CN.9/WG.III/WP.149, United Nations Commission on International Trade Law), 2018.

57 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 62.

become a legal argument in the hands of the defendant Member States to challenge the jurisdiction of various ISDS tribunals established under intra-EU BITs and the ECT. Yet, on the other side stand the investors, which rely on their ability to defend their rights under respective intra-EU BITs or the ECT. The *Masdar*, *Vattenfall*, *UP and C.D Holding* and other tribunals' decisions on the issue of *Achmea* presented a unique material for the analysis of the legal solutions applied by the respective tribunals to solve the questions of the relevance of EU law for their proceedings and balance the interests of different sides.[58] It must be stressed that these are the most recent and almost entirely non-analysed cases of international tribunals, which allows looking into the interaction between the CJEU and international tribunals from different angles, as is the intention of this thesis. It must be underlined that, given the decisions of the analysed arbitral tribunals, the intra-EU ISDS is not going away soon, despite the *Achmea* ruling. Therefore, the analysed problems and proposed solutions, which are discussed in this thesis, will remain relevant in the years to come.

Review of the relevant literature and other sources

The starting point of the analysis in this thesis is the historical case law of the CJEU where the doctrine of autonomy was developed. These cases are mostly used in the thesis as analytical instruments of settled knowledge to investigate the *Opinion 1/17* and *Achmea* – the most recent judgments of the CJEU assessing the international investment dispute settlement mechanisms. The principle of autonomy of the EU legal order has been the topic of an extensive research. The number of publications concerning autonomy increased with each of the CJEU's judgments assessing the compatibility of dispute settlement mechanisms with autonomy and the essential characteristics of EU law.[59]

The research outputs concerning the principle of autonomy are grouped into several categories. The first distinguishable group of scholars has analysed autonomy systematically by scrutinising different aspects and seeking to identify the essence of the principle. Among these highly analytical and specialised studies, works of Contartese, Lindeboom and Odermatt stand out.[60] Moreover, several important collective studies exploring the in-

58 *Masdar*, *supra* note 43; *Vattenfall*, *supra* note 43; *UP and C.D Holding*, *supra* note 43.

59 Opinion 1/91, *supra* note 12; Opinion 1/92, *supra* note 17; Opinion 1/00, *supra* note 13; Case C-459/03, *supra* note 17; Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] EU:C:2008:461; Opinion 1/09, *supra* note 17; Opinion 2/13, *supra* note 16.

60 See, *for example*: Cristina Contartese, "The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the Essential to the Specific Characteristics of the Union and Back Again," *Common Market Law Review* 54, 6 (2017): 1627–1672; Jed Odermatt, "The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?," in *Structural Principles in EU External Relations*, ed. Marise Cremona, 1st ed. (Oxford and Portland: Hart Publishing, 2018), 291–316; Justin Lindeboom, "Why EU Law Claims Supremacy," *Oxford Journal of Legal Studies* 38, 2 (2018): 328–56; Rachel O'Sullivan, "Burning Bridges: The Court of Justice and the Autonomy of the EU Legal Order," *Hibernian Law Journal* 17 (2018): 1–24; René Barents, *The Autonomy of Community Law* (The Hague: Kluwer Law International, 2004).

teraction between the EU and international legal order in general are notable.[61] The *Structural Principles in EU External Relations Law* edited by Cremona,[62] *The European Court of Justice and International Courts* by Lock[63] and *The Challenge of Inter-Legality* by Klabbers and Palombella[64] are the most relevant studies.

The second category consists of the sources focusing on the effects of a particular ruling of the CJEU. Recently, *Opinion 2/13* resulted in a series of specialised articles analysing different aspects of the Court's reasoning substantiating the incompatibility of the Accession Agreement and relationship between the CJEU and ECtHR.[65] The special issue of the *German Law Journal* is noticeable in the context of the *Opinion 2/13*.[66] The authors of this special issue attempted to cover all the relevant aspects concerning the Accession Agreement's incompatibility with EU law. The research conducted included an extensive analysis of the co-respondent mechanism,[67] prior involvement of the CJEU in the ECtHR proceedings,[68] compatibility with Article 344 TFEU,[69] compatibility of the human rights protection standards contained in Article 53 ECHR and Article 53 of the Charter,[70] and the significance of the preservation of the mutual trust between the Member States after accession to ECHR.[71] Considering that every aspect of the *Opinion 2/13* has been extensively

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61 See, *for example*: Marise Cremona, ed., *Structural Principles in EU External Relations Law*, 1st ed. (Portland; Oxford: Hart Publishing, 2018); Ramses A. Wessel and Steven Blockmans, eds., *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organizations* (The Hague, The Netherlands: T. M. C. Asser Press, 2013); Enzo Cannizzaro, Paolo Palchetti, and Ramses A. Wessel, eds., *Studies in EU External Relations, Volume: 5: International Law as Law of the European Union* (Leiden and Boston: Brill | Nijhoff, 2011); Tobias Lock, *The European Court of Justice and International Courts*, 1st ed. (Oxford: Oxford University Press, 2015).

62 Cremona, *op. cit*.

63 Lock, *op cit*.

64 Klabbers and Palombella, *supra* note 10.

65 See, *for example*: Christoph Krenn, "Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13," *German Law Journal* 16, 1 (2015): 147–68; Daniel Halberstam, "It's the Autonomy, Stupid: A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward," *German Law Journal* 16, 1 (2015): 105–46; Stian Oby Johansen, "The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences," *German Law Journal* 16, 1 (2015): 169–78; Adam Lazowski and Ramses A. Wessel, "When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR," *German Law Journal* 16, 1 (2015): 179–212; Steve Peers, "Opinion 2/13 The EU's Accession to the ECHR: The Dream Becomes a Nightmare," *German Law Journal* 16, 1 (2015): 213–22; Piet Eeckhout, "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky," *Fordham International Law Journal* 38, 4 (2015): 955–92; Eleanor Spaventa, "A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13," *Maastricht Journal of European and Comparative Law* 22, 1 (2015): 35–56; Graham Butler, "A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights," *Utrecht Journal of International and European Law* 31, 81 (2015): 104–11; Benedikt H. Pirker and Stefan Reitemeyer, "Between Discursive and Exclusive Autonomy - Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law," *Cambridge Yearbook of European Legal Studies* 17 (2015): 168–88.

66 GLJ Volume 16 Issue 1 Cover and Front Matter," *German Law Journal* 16, 1 (March 1, 2015): f1–3, https://doi.org/10.1017/S2071832200019490.

67 Halberstam, *op. cit.,* 115-7.

68 Krenn, *op. cit.,* 149-54.

69 Johansen, *op. cit.,* 169-78.

70 Lazowski and Wessel, *op. cit.,* 190-93.

71 Peers, *op. cit.,* 219-22.

analysed and there is nothing significant to be added to the debate, the *Opinion 2/13* is not the primary object of the analysis of this thesis.

Yet, the *Opinion 2/13* is a valuable reference on the essential characteristics and the autonomy of EU law. Therefore, the *Opinion 2/13* in this thesis is the key to reveal the content of the principle of autonomy and to assess the compatibility of the respective features of the ISDS and ICS mechanism proposed under CETA. The Court's earlier rulings and the scholarly analysis, for instance, in the *Opinion 1/09*[72], *Kadi*[73] and *MOX plant*[74] are used for the same purpose. Since principle of autonomy is still considered an ambiguous and vague concept (despite intensity of its research),[75] this thesis provides a systematic account of the scope and content of the principle of autonomy as well as the features of EU legal order it is used to protect.

Literature concerning the investment dispute settlement reform proposed by the Commission, which is analysed in the 2nd and 3rd Parts, is also abundant. *Achmea* has generated a separate line of specialised literature in respect of the ISDS under intra-EU BITs.[76] The 2rd Part of the thesis discusses the most recent awards of the ISDS tribunals, addressing challenges to their jurisdiction in view of the CJEU's *Achmea* decision.[77] Two large studies

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72 See, *for example*: Roberto Baratta, "National Courts as Guardians and Ordinary Courts of EU Law: Opinion 1/09 of the ECJ" 38, 4 (2011): 297–320; Allan Rosas, "The National Judge as EU Judge; Some Constitutional Observations," *SMU Law Review* 67, 4 (2014): 717–28; Herman van Harten, "(Re)Search and Discover: Shared Judicial Authority in the European Union Legal Order," *Review of European Administrative Law* 7, 1 (2014): 5–32.

73 See, *for example*: Grainne de Burca, "The European Court of Justice and the International Legal Order after Kadi," *Harvard International Law Journal* 51, 1 (2010): 1–50; Jan Willem van Rossem, "Patrolling the Borders of the EU Legal Order: Constitutional Repercussions of the Kadi Judgment," *Croatian Yearbook of European Law & Policy* 5 (2009): 93–120; Bruno de Witte, "European Union Law: How Autonomous Is Its Legal Order?," *Zeitschrift Für Öffentliches Recht* 65, 1 (March 17, 2010): 141–55; Kushtrim Istrefi and Zane Ratniece, "Think Globally, Act Locally: Al-Jedda's Oscillation between the Coherence of International Law and Autonomy of the European Legal Order," *Hague Yearbook of International Law* 24 (2011): 231–64.

74 Jasper Finke, "Competing Jurisdiction of International Courts and Tribunals in Light of the MOX Plant Dispute," *German Yearbook of International Law* 49 (2006): 307–26; Nikolaos Lavranos, "The MOX Plant and IJzeren Rijn Disputes: Which Court Is the Supreme Arbiter?," *Leiden Journal of International Law* 19, 01 (2006): 223.

75 Panos Koutrakos, "The Autonomy of EU Law and International Investment Arbitration," *Nordic Journal of International Law* 88, 1 (2019): 41–64; Steffen Hindelang, "Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU's Judgement in Achmea Put in Perspective," *European Law Review* 44, no. 3 (2019): 386; Cristina Contartese, "Achmea and Opinion 1/17: Why Do Intra and Extra-EU Bilateral Investment Treaties Impact Differently on the EU Legal Order?," *ECB Legal Working Paper Series* 19 (2019): 7–8.

76 Simon Burger, "Arbitration Clauses in Investment Protection Agreements after the ECJ's Achmea Ruling: A Preliminary Evaluation," *Yearbook on International Arbitration* 6, 1 (2019): 121–48; Xavier Taton and Guillaume Croisant, "Judicial Protection of Investors in the European Union: The Remedies Offered by Investment Arbitration, the European Convention on Human Rights and EU Law," *Indian Journal of Arbitration Law* 7, 2 (2019): 61–145; Csongor István Nagy, "Intra-EU Bilateral Investment Treaties and EU Law After Achmea: 'Know Well What Leads You Forward and What Holds You Back,'" *German Law Journal* 19, 4 (2018): 981–1016; Eckes, *supra* note 49; Hindelang, *supra* note 75. Venetia Argyropoulou, "Vattenfall in the Aftermath of Achmea: Between a Rock and a Hard Place?," *European Investment Law and Arbitration Review* 4 (2019): 203–26; Szilárd Gáspár Szilágyi and Maxim Usynin, "The Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment," *SSRN Electronic Journal*, no. Issue 4/2019 The (2019): 1–38; Ivana Damjanovic and Nicolas de Sadeleer, "I Would Rather Be a Respondent State Before a Domestic Court in the EU than Before an International Investment Tribunal," *European Papers* 4, no. 1 (2019): 19–60.

77 *Masdar*, *supra* note 43; *Vattenfall*, *supra* note 43; *UP and C.D Holding*, *supra* note 43; *Foresight*, *supra* note 43; *RREEF*, *supra* note 43; *Greentech*, *supra* note 43; *Marfin*, *supra* note 43.

on on-going ICS reform were conducted by the Directorate-General for External Policies.[78] As these studies clearly suggested that the ICS mechanism was compatible with the Treaties, they provoked a number of critical comments.[79] Yet, *Achmea* and AG Bot's position in *Opinion 1/17* brought the discussion on the compatibility of the ICS mechanism to a new level. While *Achmea* suggested that the ICS mechanism was also incompatible with the principle of autonomy,[80] this was contested by AG Bot[81] whose opinion finally found the CJEU's support in *Opinion 1/17*. Therefore, the assessment of the ICS mechanism now calls for re-evaluation as several distinct positions on the ICS compatibility with the principle of autonomy were expressed along the way.

Novelty of the research

This thesis is one of the first, if not the only, study concerning the principle of autonomy of the EU legal order in the Republic of Lithuania. The principle of autonomy is unexplored in Lithuania. Therefore, in general, the academic community is not familiar with the scope, complexity and significance of the principle of autonomy. This thesis fills this gap. Moreover, to the knowledge of the author, the *Achmea* ruling as well as the *Opinion 1/17* were not analysed by the Lithuanian scholars yet, with the exception of some mentions in the press. As a result, the thesis is original in the context of the Lithuanian scholarly literature.

This thesis is one of the first systematic studies concerning the normative effect of the principle of autonomy of the EU legal order on the emerging European investment dispute settlement mechanism. To be more precise, this is one of the first studies exploring how the CJEU's jurisdiction is delimited from jurisdictions of international investment dispute settlement bodies. Although the FDI fell under the exclusive competence of the EU almost a decade ago, the first significant judgments of the CJEU in the field, like *Opinion 2/15*,

78 Pieter Jan Kuijper et al., Directorate-General for External Policies, *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements*, 2014, http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU(2014)534979_EN.pdf; Steffen Hindelang and Teoman Hagemeyer, Directorate-General for External Policies, *In Pursuit of an International Investment Court Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective*, 2017, http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603844/EXPO_STU(2017)603844_EN.pdf.

79 See, *for example*: Gallo and Nicola, *supra* note 49: 1081–1152; Szilárd Gáspár-Szilágyi, *supra* note 49: 701–42; August Reinisch, "The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court," *Centre for International Governance Innovation* (2016), accessed 28 June 2018, https://www.cigionline.org/sites/default/files/isa_paper_series_no.2.pdf; Szilárd Gáspár-Szilágyi, "Quo Vadis EU Investment Law and Policy ? The Shaky Path Towards the International Promotion of EU Rules," *European Foreign Affairs Review* 23, 2 (2018): 167–86; Inge Govaere, "TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order," in *Speeches and Presentations from the XXVII FIDE Congress, Congress Prroceedings Vol 4*, ed. Gy. Bandi, P. Darak, and K. Debisso (Budapest: Wolters Kluwer, 2016), 123–44.

80 Christina Eckes, "Dont't Lead With Your Chin! If Member States Continue With the Ratification of CETA, They Violate European Union Law," (2018), *European Law Blog*, accessed 20 January 2019, http://europeanlawblog.eu/tag/achmea/.

81 Opinion 1/17, AG Bot, *supra* note 51, paras. 95-114.

Achmea and *Opinion 1/17* were adopted only recently.[82] While each of these cases had been analysed separately, to the knowledge of the author, there has not been a complex analysis of the EU's investment dispute settlement regime, which encompasses the assessment of the CJEU's case law on ISDS under intra-EU BITs and the ICS mechanism into a single research.

In turn, the principle of autonomy of the EU legal order has mostly been analysed from the internal perspective of EU law. Therefore, there is an entire dimension of international law that is not addressed that often, i.e. the proceedings of international tribunals where the questions of EU law interpretation and application arise. For instance, the arguments presented in the *Masdar*, *Vattenfall, UP and C.D Holding* and other tribunals' decisions concerning the applicability of *Achmea* or other rules of EU law to contest jurisdiction of these tribunals are largely unexplored. This gap is addressed in this thesis.

Lastly, the thesis proposes that the content of the principle of autonomy was complemented by the CJEU in the *Opinion 1/17*, which would mark the new step in the evolution of the doctrine of autonomy. The list of the safeguards of the autonomy provided under the ICS mechanism could, and probably will, become part of the autonomy doctrine. Moreover, to the knowledge of the author, the *Opinion 1/17* has not been explored from the angle of sufficiency of the safeguards of the autonomy protection provided under the ICS mechanism. This thesis provides the needed critical look into the effects the operation of the ICS tribunals may have on the European legal system and its autonomy. In addition, the *Opinion 1/17* clarified one the essential characteristics of the EU legal order, which are protected by the autonomy, namely, the normal operation of the EU institutions under the democratic process. These particular points have not been analysed in the scholarly literature from the angle of the development of the doctrine of the autonomy yet. Therefore, despite the fact that, as demonstrated above, the principle of autonomy has been extensively analysed, there is a new dimension of the principle that must be explored.

The purpose and the objectives of the research

The **purpose** of this thesis is to systematically analyse the extent of the normative influence of the principle of autonomy of the EU legal order on delimitation of the CJEU's jurisdiction from jurisdictions of selected international dispute settlement bodies, which fall outside the scope of dispute settlement mechanisms provided under the Treaties.

For this purpose, the **objectives of the thesis are**:

1. To reveal the content of the principle of autonomy of the EU legal order established in the CJEU's cases related to jurisdictional delimitation and how the principle evolved over the course of European integration;

82 Opinion 2/15 where the CJEU ruled on the division of competences between the EU and the Member States under the 'New Generation' Free Trade Agreements concluded under Article 207(1) TFEU was only adopted in 2017. – Opinion 2/15, *supra* note 35.

2. To analyse how the principle of autonomy is applied in respect of investment dispute settlement bodies established under intra-EU BITs and to scrutinise if their responses to the CJEU's case law reflect risks for autonomy of EU law;
3. To assess if the ICS mechanism could have adverse effects on the autonomy of the EU legal order, given the reasons, which determined the ICS mechanism's compatibility with the principle of autonomy of the EU legal order in the *Opinion 1/17*.

Defended statements of the research

1. The safeguards of autonomy protection under the ICS mechanism are insufficient since the mechanism will, in the long term, adversely affect the autonomy of the EU legal order.
2. Possibility to refer for a preliminary ruling for selected investment dispute settlement bodies on questions of EU law interpretation would allow ensuring uniform interpretation of EU law in intra-EU disputes heard by these bodies.

Methodology

In general, the research conducted in the thesis is based on the *grounded theory approach* as outlined in *Constructing Grounded Theory* by Kathy Charmaz.[83] The grounded theory approach consists of systematic, but flexible, guidelines for collection and analysis of qualitative data.[84] It is characterised as an inductive analysis invoking iterative strategies of going back and forth between the data and the analysis, using comparative method and keeping the researcher interacting and involved with the data and emerging analysis.[85] The primary method for scientific data collection for this thesis is document analysis method.[86] In addition, specific research methods are used in the separate parts of the thesis, as described further.

The *principle of autonomy* of the EU legal order is analysed in the following way. The so-called 'hard cases' were chosen to be analysed in the thesis. The concept 'hard cases' is attributable to Dworkin who considered 'hard cases' to be the cases "<…> in which the result is not clearly dictated by statute or precedent."[87] Importantly, all of the cases where the CJEU applied the principle of autonomy of the EU legal order could be considered hard cases at the time of their examination. *Textual analysis* is used to study the selected cases and relevant literature and to *categorise* the essential characteristics of EU law reflected in

83 Kathy Charmaz, *Constructing Grounded Theory*, 2nd ed. (London: SAGE Publications, Inc., 2014); Kathy Charmaz and Antony Bryant, "Grounded Theory," in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa Given (Thousand Oaks, California, United States: SAGE Publications, Inc., 2008), 375–77.

84 Charmaz, *op. cit*., 1.

85 Charmaz, *supra* note 83.

86 Lindsay F. Prior, "Document Analysis," in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa Given (Thousand Oaks California, United States: SAGE Publications, Inc., 2008), 231–32. Charmaz, *supra* note 83, 45.

87 Ronald Dworkin, "Hard Cases," *Harvard Law Review* 88, 6 (1975): 1057.

the cases. *Narrative analysis* is used to examine the selected cases. In general, the method focuses on the analysis of the specific texts having the aim to establish what a text is about, what message is communicated through it and what particular points are made to an audience.[88] For the purposes of this thesis, the selected cases are analysed systematically as comprising a single narrative developed by the Court. In the adaptation of the method for the purposes of the thesis, the following questions are aimed to be answered: what message is communicated by the CJEU through its case law regarding the protection of the autonomy of the EU legal order? What is the purpose the CJEU seeks through the application of the autonomy? What methodology the Court uses for the sake of implementation this purpose?

The *rulings of the ISDS tribunals on Achmea issue* are analysed by conducting the *case analysis*[89] and *comparative research*. A *descriptive method* is also used in the 2nd Part of the thesis, since it was necessary to describe the factual background of different cases analysed so that a comparison could be made. The analysis of the *compatibility of the ICS* with EU law is mainly conducted by using *comparative method.* In general terms, comparative research refers to the evaluation of the similarities, differences, and association between phenomena.[90] It is applied in this thesis by comparing the respective features of the dispute settlement mechanisms already assessed by the CJEU and the matching features of the ICS mechanism. In addition, the *critical analysis* method is employed to make an overall assessment of the ICS mechanism's effect on the uniform interpretation of EU law in the long term.

Structure of the thesis

The thesis comprises three constitutive Parts. The principle of autonomy is analysed in the 1st Part of the thesis. It aims to reveal the content of the principle of autonomy of the EU legal order as established in the CJEU's cases on jurisdictional delimitation. Also it is aimed to demonstrate how the principle evolved over the course of European integration. Thorough analysis of the historical case law where the principle of autonomy of the EU legal order was established and developed is conducted, since it is essential for the assessment of the new developments introduced by the CJEU in *Achmea* and the *Opinion 1/17*. Understanding the origins, content and the function of the principle of autonomy in the EU legal order is essential for perceiving the reasons why ISDS clauses of intra-EU BITs were ruled incompatible with EU law in *Achmea*. It is also equally important for the analysis of the ICS effects on uniformity of EU law performed in the 3rd Part.

The 2nd Part takes a look at the investment dispute settlement under the intra-EU BITs.

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88 Catherine Kohler Riessman, "Narrative Analysis," in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa Given (Thousand Oaks, California, United States: SAGE Publications, Inc., 2008); Robert M. Cover, "The Supreme Court, 1982 Term - Foreword: Nomos and Narrative," *Harvard Law Review* 97, 1 (1983): 1.

89 Leslie K. Goodyear, "Unique-Case Analysis," in *Encyclopedia of Evaluation*, ed. Sandra Mathison (Thousand Oaks, California, United States of America: Sage Publications, Inc., 2005), 427.

90 Melinda C. Mills, "Comparative Research," in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa Given (Thousand Oaks, California, United States: SAGE Publications, Inc., 2008), 101-3.

It is aimed to analyse how the principle of autonomy is applied in respect of ISDS tribunals established under intra-EU BITs and to analyse if their responses to *Achmea* reflect any risks for the autonomy of EU law. First, the arguments why the ISDS clauses of intra-EU BITs were ruled incompatible with the principle of autonomy of the EU legal order are analysed. Secondly, the decisions of the ISDS tribunals, which responded to challenges against their jurisdictions on the ground of *Achmea* ruling, are scrutinised. Thus, a conflicting international law perspective to the CJEU's rulings and their effect in the respective arbitration proceedings is presented.

In the 3rd Part the compatibility of the ICS mechanism with the principle of autonomy is assessed. More precisely, it is aimed to identify the reasons why the ICS mechanism was ruled compatible with the principle of autonomy of the EU legal order and to assess if the ICS mechanism could have adverse effects on autonomy, which were missed or not analysed by the CJEU. The CJEU's argumentation in the *Opinion 1/17* is assessed in the light of the historical case law of the CJEU, focusing on the ICS mechanism's effect of the exclusive jurisdiction of the CJEU to interpret EU law and ensure uniform interpretation. Such comparative scrutiny is essential for identification of alterations in the application of the principle of autonomy of the EU legal order (if any).

Diagrams are added to the thesis for the purposes of illustration and visualisation of the arguments presented. They should be read systematically along the text referring to them. A separate section of the "Key notions used in the thesis" is added in the beginning of the thesis in order to define and describe the central concepts that are used most often. Thus, it is aimed to make the thesis easier to read.

1. AUTONOMY OF THE EU LEGAL ORDER: DECISIVE PRINCIPLE OF JURISDICTIONAL DELIMITATION

The principle of autonomy of the EU legal order is a wide and obscure concept. Despite being extensively analysed in legal scholarship, its contents and extent still cause confusion. The foundations of the autonomy doctrine were laid down in the early case law of the CJEU as the principle itself originates exclusively from the case law of the CJEU. In *Costa/ENEL* the Court declared that EU law stems from the Treaties, which are an independent source of law.[91] The subsequent domestic legal provisions could not override EU law, since it would deprive that law of its *community* character and call into question the legal basis of the EU itself.[92] Thus, by establishing primacy of EU law over the national laws of the Member States the CJEU laid down the most fundamental feature of the principle of autonomy of the EU legal order: the idea that EU operates pursuant to the rules established in the Treaties, independently from national laws of the Member States, and later – independently from influences stemming from international law, if they are incompatible with EU Treaties.[93] Thereby the internal (autonomy from domestic law) and external element (autonomy from international law) of the principle of autonomy were distinguished. The external element of the principle of autonomy is the focus of this thesis.

Having established the general principle that EU operates solely on the basis of the Treaties, the CJEU extended the scope of the principle by elaborating which features entrenched in the Treaties could not be affected by international agreements concluded by the EU. These features have become to be known as the essential characteristics of EU law. They were developed by the CJEU in a number of cases while assessing the compatibility of international agreements with the Treaties (see below). With each case the scope of the characteristics protected by autonomy were extended by the Court. In the *Opinion 1/76*, the CJEU emphasized its exclusive right to provide definitive interpretation of EU law so that divergent interpretations of EU law can be avoided.[94] In the *Opinion 1/91*, when assessing if the EEA Court was compatible with the Treaties, the CJEU introduced the concept of autonomy of the EU legal order.[95] This time, the Court underlined that the allocation of responsibilities of the EU's institutions under the Treaties should not be adversely affected.[96] In the *Opinion 1/00*, the CJEU stated that the Common Aviation Area Agreement must not undermine the Treaties' objective that EU law is uniformly interpreted and that the CJEU's function to review the legality of EU's acts is not affected.[97] In the *Opinion 1/09*, the CJEU developed the notion of the EU judicial system by referring to the national courts

91 Case 6/64, *Flaminio Costa v. ENEL* [1964] EU:C:1964:66, p. 594.

92 Ibid.

93 Opinion 1/91, *supra* note 12, paras. 40-1.

94 Opinion 1/76, *supra* note 17, paras. 18-22.

95 Opinion 1/91, *op. cit.*, para. 30.

96 Ibid., para. 35.

97 Opinion 1/00, *supra* note 13, para. 11.

as to the "guardians of the EU legal system",[98] the powers and position of which cannot be affected by the EU's international agreements. In the *Opinion 2/13*, the Court ruled that the Accession Agreement was liable to adversely affect the characteristics of the EU judicial system,[99] division of competences,[100] fundamental rights,[101] mutual trust,[102] sincere cooperation[103] and consequently – the autonomy of the EU legal order.[104] As is evident from these cases, autonomy has gradually evolved into a complex network of principles comprising the foundations of the entire legal system of the EU.

Yet, many questions remain unclear. More precisely, why was the principle established and still exists in the first place? What determined that the CJEU decided to extend the list of the protected characteristics? What is the autonomy's connection with the process of European integration? Was the Court, when extending the scope of the autonomy, acting within the limits of its competence under the Treaties?

The 1st Part of this thesis aims to answer these questions and elaborate on the principle of autonomy of the EU legal order. The analysis is performed in several steps. First, the autonomy's relationship with the process of European integration is scrutinised aiming to identify the reason why autonomy was necessary and what purpose it serves (see Chapter 1.1). Secondly, by systemising different elements established in the case law of the CJEU in delimiting its jurisdiction from other dispute settlement bodies – the extent of the autonomy's content is determined (see Chapter 1.2). Thirdly, by scrutinising the CJEU's methodological approach in cases concerning jurisdictional delimitation it is aimed to answer if the CJEU's decisions establishing the autonomy doctrine were within the limits of EU's competence provided by the Treaties (see Chapter 1.3).

1.1. The CJEU as the driving force of European integration

In modern history, the European continent suffered two world-scale and many regional wars and conflicts. The idea of economic integration was first of all offered as a solution to avoid conflict through an economic union of the potential rivals allowing them to overcome international conflicts and peacefully co-exist and prosper.[105] Once the states are interconnected economically – it is not beneficial for them to have a military conflict with one another, as they would lose more than they could possibly win. The idea of European integration, inspired by Jean Monnet and Robert Schuman, gave rise to the European Coal and Steel Community and subsequently extended to the European Communities. Since

98 Opinion 1/09, *supra* note 17, para. 66.

99 Opinion 2/13, *supra* note 16, para. 198.

100 Ibid., paras. 221-31.

101 Ibid., para. 169-70.

102 Ibid., para. 191-94.

103 Ibid., para. 173.

104 Ibid., para. 258.

105 Anu Bradford and Eric A. Posner, "Universal Exceptionalism in International Law," *Harvard International Law Journal* 52 (2011): 24.

their establishment, military resolution of conflicts within the integrated areas has disappeared. That is strong evidence that economic integration can prevent conflict.

As will be further demonstrated, the existence and evolution of autonomy are inextricably related to the evolution of European integration. The CJEU has been promoting the idea of integration since the very beginning of European Communities and was one of the most significant integrative factors.[106] Motives of European integration have been firmly influencing the CJEU's reasoning (see Chapter 1.3). It may be asked in this context why does integration bear such significance in the CJEU's case law? More importantly, what is its place in the system of the legal norms of the EU? Could European integration be described as a value? Or is it a purpose of the EU? Are there any other meanings behind the concept?

1.1.1. Origins of the concept of the European integration

Is integration entrenched in the primary law? The first paragraph of the preamble of the Treaties[107] positions the integration as the primary reason for the establishment of the European Communities. Notably, the process of creating an ever-closer union among the peoples of Europe is also an expression marking the process of integration.[108] Also, there is an aspiration of the Member States to promote 'economic integration' and a vague invitation to take further steps to advance European integration. While the Treaties list the values of the EU,[109] integration is not on the list allowing to believe that integration should not be considered as one of the values of the EU.

The case law of the CJEU is much more useful in determining the meaning of integration in the EU. The Court operates two different concepts in its case law: integration of laws and economic integration. Further, a short description of each of the concepts is provided.

First, an integration of laws laid down the foundation for the development of the doctrine of primacy of EU law. Starting with the *Costa/ENEL* the Court underlined that the integration of EU laws into domestic laws of the Member States made it impossible for the Member States to unilaterally accord precedence to the subsequent national measure over measures of EU law.[110] Thus, the integration of laws became the basis for the development of the primacy doctrine. Similarly, in the *Opinion 1/00* the CJEU pointed to integration as a reason for the necessity of uniform interpretation and application of EU law.[111] The two examples refer to the integration of laws of the Community as a way to unify the respective rules throughout the Member States.

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106 Alejandro Pizarroso Ceruti, "The European Court of Justice: Legal Interpretation and the Dynamics of European Integration," *Columbia Journal of European Law* 25, no. 2 (2019): 254.

107 It states that parties "[resolved] to mark a new stage in the process of European integration <…>" and being "[determined] <…> to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields" and "[in] view of further steps to be taken in order to advance European integration" have decided to establish the EU. – TEU, Preamble.

108 See Article 1 TEU.

109 Article 2 TEU provides that: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."

110 Case 6/64, *Flaminio Costa v. ENEL*, *supra* note 91, p. 593-4.

111 Opinion 1/00, *supra* note 13, para. 2.

In turn, in the *Opinion 1/91* the Court referred to the economic integration as to the ultimate goal of the Treaties. It stated that "[i]t follows <…> from <…> the EEC Treaty that that treaty aims to achieve economic integration leading to the establishment of an internal market and economic and monetary union."[112] The Court's position in the *Opinion 1/91* refers to integration as to the goal of the EU. In the recent *Opinion 2/13* the CJEU recognised the pivotal role of integration stating that the EU's objectives set forth in Article 3 TEU entrusted to series of fundamental provisions that "<…> are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the *raison d'être* of the EU itself."[113] Significantly, the *Opinion 2/13* revealed a fresh meaning to the concept by defining integration as a process. Also, not only did the Court recognise that integration is the reason for the EU's existence, but that all the other EU's objectives are subordinated to the achievement of integration.

Clearly, the concept of European integration is given multiple meanings in the CJEU's case law. The Court uses the concepts of *integration of laws* and *economic integration*. The Court defines the concept as the purpose (or goal) rather than a value, and it recognises the continuous character of integration by referring to it as a process. Also, it appears that the CJEU views the EU's integrative objectives as legally binding on the EU's institutions, meaning that the EU's institutions have a legal obligation to implement them. If the goal of integration is viewed as legally binding, EU's institutions, including the CJEU, must act to achieve it.

Considering multiple meanings given to integration by the CJEU, confusion concerning the meaning of the concept among the scholars is understandable. Partly, it is so because the meaning of integration is considered to be self-evident. Therefore, many scholars use it intuitively. Others prefer to rely on a certain specific meaning. Most commonly, integration is viewed as a process.[114] Yet, it may also be creatively referred to as a principle or value.[115] Others, like Hartley, endow European integration an all-encompassing meaning stating that the policies of the CJEU basically aim to strengthen the EU, increase the scope and effectiveness of EU law and enlarge the powers of the EU institutions – that altogether may be summarised into one phrase: "the promotion of European integration."[116]

Can distinctive meanings of European integration be systemised in an orderly and logical manner? And how is it related to the principle of autonomy of the EU legal order?

The author believes that multiple meanings of integration originate from the confusion of the types and forms of European integration (see Diagram 1 below). The Court uses two concepts in its case law – integration of laws and economic integration. Yet, they do

112 Opinion 1/91, *supra* note 12, para. 17.

113 Opinion 2/13, *supra* note 16, para. 172.

114 Jo Shaw, "European Union Legal Studies in Crisis - Towards a New Dynamic," *Oxford Journal of Legal Studies* 16, 2 (1996): 232; Joxerramon Bengoetxea, "Principles in the European Constitutionalising Process," *King's College Law Journal* 12, 1 (2001): 110.

115 Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012), 76.

116 Trevor Clayton Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community*, 8th ed. (Oxford: Oxford University Press, 2014), 73-4.

not mark the same phenomenon. While the concept of economic integration represents one out of many possible types (or material areas) of integration, the integration of laws is merely a form (or output) that integration takes. While the possible types are entrenched in Articles 3, 4 and 5 TFEU, the form will always be a legal act containing specific norms – regulation, directive, decision and etc.[117] Thus, European integration is both a continuous process and, at the same time, the outcome of that process – the European legislation.

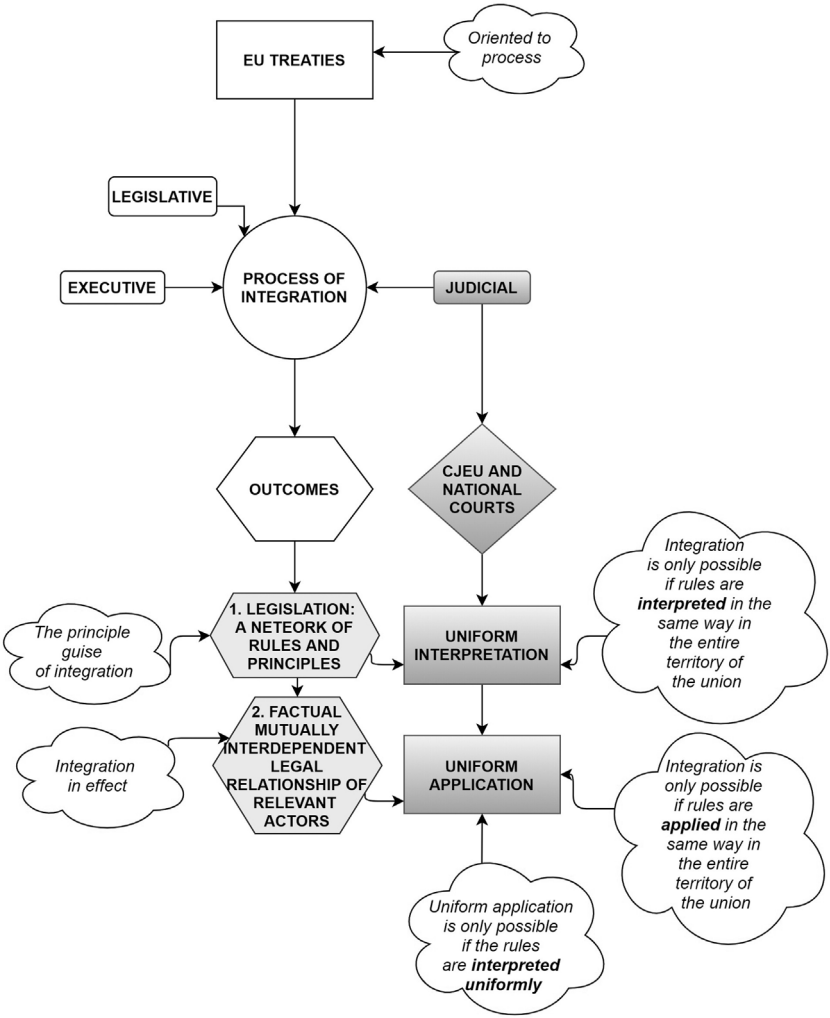

Diagram 1: *European integration – process and outcomes*[118]

117 See Article 288 TFEU.

118 Composed by the author.

1.1.2. The role of the CJEU in the process of European integration

What is the CJEU's function in the process of integration? The Court does not operate in the legislative procedures and is thus not in a position to determine the contents of the laws. Yet, it performs the legality review by ensuring that legislation complies with the primary law and that the legislative institutions operate within the limits of their competence as provided by the Treaties. Secondly, it ensures the uniformity of laws adopted by the legislative institutions. By executing both of these functions the Court contributes to the overall success of integration. Yet, the Court pays particular attention to ensuring that EU laws are interpreted uniformly throughout the EU.

The Treaties entitle the Court to "<…> ensure that in the interpretation and application of the Treaties the law is observed."[119] For the Court, the task to observe the law means observation of two elements. First, it is the *process* of integration for the attainment of which the treaties have set the "<…> sophisticated institutional structure and a full set of legal rules <…>."[120] The EU's institutions while exercising their functions under the Treaties implement this process. An effective implementation of the Treaties requires that the institutions are able to operate as the Member States intended them to operate. If the institutions were prevented from performing their functions, the process of integration would be impeded.

Secondly, it is the observation of laws adopted by the EU's institutions while exercising their functions in the process of integration. The EU laws adopted represent the most evident outcome of the process of integration. Once the respective institutions adopt a law, it becomes the concern of the Court to ensure that it is uniformly interpreted and applied in the entire territory of the EU so that it has the integrative effect.[121] In the words of the Court, this integrative effect created by EU law manifests as "<…> a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged <…> in a 'process of creating an ever closer union among the peoples of Europe'"[122] If follows that European integration is at the core of the CJEU's primary function – to observe the law.

1.1.3. Significance of uniform interpretation of EU law

Why is ensuring uniform interpretation of EU law so important? The level of integration would be impeded if the law is understood differently in separate territories of the EU, or if different addressees apply the same legal norm in a different manner. Different interpretations of the same norm would most likely determine differing results and create

119 See Article 19(1) TEU.

120 Opinion 2/13, *supra* note 16, para. 158.

121 Ibid., para. 176.

122 Ibid., para. 167.

obstacles for an overall objective of the single market and European integration.[123] Thereby, EU law would become ineffective, i.e. would not reflect in real-life behaviour of the addressees – the Member States as well as the private persons.

This is where the CJEU's firm aspiration for uniform interpretation and exclusive right to provide definitive interpretation of EU law originates from. The purpose of integration requires the rules to be understood in the same way. Therefore, it should not be surprising that some authors align the integration with the unification of laws.[124] Uniform understanding of legal norms in different parts of the EU is the essential first step towards the successful integration in any sphere of competence foreseen in the Treaties.

Thus, by ensuring uniform interpretation of EU law the CJEU is safeguarding the overall objective of European integration. As it will be demonstrated in the following Chapter, the CJEU gradually developed the principle of autonomy and the essential characteristics of EU law to ensure, as discussed above, that the law is observed in the interpretation and application of the Treaties: first, by ensuring uniform interpretation of EU law, secondly, by securing the normal operation of the EU's institutions so that they are able to implement their duties under the Treaties. Behind these actions of the CJEU the aspiration of furthering European integration lies.

1.2. Principle of autonomy and the 'essential characteristics' – instruments to ensure European integration

This Chapter aims to reveal the rationale of the principle of autonomy of the EU legal order. The fundamental proposition of this Chapter is that integration is ensured by the CJEU through securing uniform interpretation and application of laws. European integration can only be implemented if the uniformity and indivisibility of EU laws is ensured. In the EU, it is done by applying the principle of autonomy of EU law. Making a body of law uniform and indivisible requires rendering it independent from the internal and external influences that could alter its contents in different territories.[125] This Chapter demonstrates how the principle of autonomy of the EU legal order and essential characteristics of EU law were used by the CJEU to ensure uniform interpretation of EU law. Structurally, the origins and content of the principle of autonomy are firstly revealed by exploring the features of the internal and external dimensions of the principle. The analysis pays particular attention to the cases where the external element of autonomy was formed by the CJEU in assessing the

123 For an illustration, in *Baltic Master* decision the ECtHR, while interpreting Article 6(1) of the ECHR, indicated that Lithuanian Supreme Administrative Court's refusal to refer for a preliminary ruling had to be sufficiently reasoned. Thus, the ECtHR not only interpreted the preliminary ruling procedure as a part of the right to a fair trial, but also interpreted CILFIC criteria, setting the rules when a national court is exempt from referring to the CJEU. From the perspective of the protection of the autonomy of EU law, decisions such as *Baltic Master* could determine conflicting interpretations concerning the meaning of EU law and confusion as to what criteria should be applied. – Case No 55092/16 *Baltic Master LTD. v. Lithuania*, 16 April 2019.

124 Giuseppe Martinico, "Reading the Others: American Legal Scholars and the Unfolding European Integration," *European Journal of Law Reform* 11, 1 (2009): 45.

125 Barents, *supra* note 60, 239.

compatibility of dispute settlement bodies provided under international agreements with EU law. As autonomy is always applied by the CJEU in combination with one or several of the essential characteristics, the instrumental role of the essential characteristics for the success of European integration is scrutinised and explained. Thus, the concepts analysed further should be taken into account systematically and not in isolation from each other. For analytical purposes, Diagram 2 and Diagram 3 should be viewed alongside the analysis of the following Sections.

1.2.1. Principle of autonomy of the EU legal order

1.2.1.1. Two dimensions of the EU autonomy

An international organisation is 'autonomous' in its relations with other actors or legal orders. In case of the EU legal order, autonomy is first and foremost the 'design' of the CJEU. It is the result of dynamic and goal-oriented interpretive methodology employed by the Court to make integration successful (see Chapter 1.3). In general, autonomy represents the EU's constant aspiration to be projected as distinct from the Member States and assertion that EU legal system is separate from international law.[126] Two dimensions of autonomy are distinguished in the academic literature.

The EU's autonomy from the Member States and their national laws is regarded to comprise the internal dimension of autonomy. In the fields of competence delegated for the EU to exercise, the EU is regarded to do so independently from the Member States.[127] In exercising its powers the EU is independent from the national laws and institutions of the Member States. This independence from the Member States has been criticised as leading to the creation of the 'Frankenstein's monster' – an organisation having too much powers and acting without necessary level of control by the founding states.[128] However, the necessity for the independence of organisation from its founding states can be reasonably defended, as was done by Barents. As he stated, referring to the body of law as a law of *community* not only indicates its origins but also a character – i.e. its indivisible nature – "Community law is the same in all circumstances in all Member States."[129]

Indivisibility of a legal order necessitates three significant consequences. First, as it constitutes an intrinsic unity, the entire body of EU law, as law of *community*, can only find its legal basis in the single source – the Treaties.[130] Secondly, as far as its' scope of application is concerned – whether it is material, personal, geographical or temporal – as well as its legal effects (validity, application and interpretation) must be governed only by what the Treaties

126 J. W. van Rossem, "The EU at Crossroads: A Constitutional Inquiry into the Way International Law Is Received within the EU Legal Order" in Cannizzaro et al., *supra* note 61, 63.

127 Odermatt, *supra* note 60: 295-6.

128 Andrew Guzman, "International Organizations and the Frankenstein Problem," *European Journal of International Law* 24, 4 (2013): 999–1025.

129 Barents, *supra* note 60, 239.

130 Ibid.

provide and imply.[131] Thirdly, the position of EU law in relation to the other systems must exclusively be determined under the rules of EU law.[132] It follows that EU law validity and application in the territory of the Member States cannot, in any way, be dependent on national legal orders. Only autonomy from the national legal orders can ensure the proper functioning of EU law since any attempts to explain EU law from the perspective of national law would shatter indivisible body of law into many different pieces.[133] Evidently, uniform interpretation stands at the core of autonomy – homogenous perception of the EU rules by all the addressees in different parts of the EU is essential to make single market and European integration work. If the rules of integration are understood differently in distinct parts of the EU, integration of those parts is not possible.

For the integration to be a success not only the internal relationship of the EU with the Member States is significant, but the EU's relationship with an outside world as well. The EU's participation in international treaties, organisations or dispute settlement mechanisms can also have divisive effects on EU law. Thus, autonomy has gradually become one of the general principles of EU law[134] and the driving principle of the EU external relations law.[135] The external dimension of autonomy is the EU legal order's independence from international law and its actors. What particular rule lies behind the external autonomy?

The external autonomy is now the main reference point for settling the jurisdictional boundaries between the CJEU and international tribunals. As van Rossem summarised – autonomy requires addressing two concerns: first, an international treaty must not alter the essential character of the EU and its' institutions powers; secondly, procedures for ensuring uniform interpretation of international treaties, involving an external judicial body, must not have an effect of binding the EU and its institutions to a particular interpretation of EU rules when they exercise their internal powers.[136] Both of these concerns are closely related to the preservation of the CJEU's judicial powers, which are essential for ensuring uniform interpretation of EU law. External autonomy requires the functioning of the EU legal system to be not affected by international influences unless it is done so under EU rules itself.[137] Rigid self-protection of the CJEU's interpretive powers is thus not a purpose in itself, but the consequence of the implementation of the fundamental purpose of the EU – European integration.

External autonomy has its consequences – it predetermines the conflict with international law. As a consequence of that conflict, while it is often declared that EU legal order is in monist relationship with international law, the CJEU's case law on autonomy

131 Barents, *supra* note 60, 239

132 Ibid.

133 Ibid.

134 Gallo and Nicola, *supra* note 49: 1117.

135 Koen Lenaerts and Jose A. Gutierrez-Fons, "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice," *Columbia Journal of European Law* 20, 3 (2014): 7-8.

136 van Rossem, *supra* note 126: 61-62.

137 Barents, *op. cit.,* 239.

contradicts such statements. Pursuant to Article 3(5) TEU the EU is obliged to the strict observance and the development of international law. Yet, since *Costa/ENEL* judgment the CJEU consistently maintained that EU legal order derives from an independent source of law – the Treaties,[138] thereby underlining the EU legal order's separateness from international law.

The principle of autonomy is there to ensure the authority of the Treaties while setting the rules of reception of international law that is in line with the Treaties. On the one hand, the principle of autonomy allows the EU to creatively pursue the purpose of integration by implementing the Treaties' objectives. On the other hand, autonomy predetermines the separateness of the EU legal order from international law, which indicates that the two legal systems belong in different compartments. As Klabbers summarised it, the Court "<…> aspire[s] to build a fence around EU law, thus running the risk of placing the EU outside international law."[139] Odermatt observed that such an austere assertion of the EU's external autonomy by the CJEU undermines the EU's ability to participate effectively at the international level and to realise successfully the EU's external action through participation in international agreements.[140] To give most popular example – following the *Opinion 2/13* the EU's accession to the ECHR is delayed indefinitely due to the stringent application of autonomy.

Considering the above, a frequent assertion that EU legal order is in monist relationship with international law appears to be inaccurate. As Lenaerts states, for international agreement or for a principle of customary international law to be 'the law of the land,' there is no need for the EU institutions to pass secondary law 'translating' such an agreement or principle into EU law.[141] Yet, it is rather a theoretical proposition than a fact. Since the CJEU restricts the effects of the international law within the EU legal order, other scholars have contradicted Lenaerts position by describing the relationship as firmly dualist.[142] The Court has provided a sufficient amount of strictly autonomous case law allowing for these authors to substantiate their views.

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138 Case 6/64, *Flaminio Costa v. ENEL*, *supra* note 91, p. 593-4.

139 Jan Klabbers, *Treaty Conflict and the European Union* (Cambridge: Cambridge University Press, 2009), 148. *Author's note*: Interestingly, the argument that EU law is not a part of international law because the CJEU claims autonomy was used by the claimants in *Masdar* and *Vattenfall* cases. See the Sub-Section 2.2.2.1 of this thesis for detailed analysis. – see *Vattenfall*, *supra* note 43, para. 143.

140 Odermatt, *supra* note 60: 316.

141 Koen Lenaerts, "The Kadi Saga and the Rule of Law within the EU," *SMU Law Review* 67, 1 (2014): 707.

142 Jed Odermatt, "The Court of Justice of the European Union: International or Domestic Court?," *Cambridge Journal of International and Comparative Law* 3, 3 (2014): 699; de Burca, *supra* note 73: 2.

1.2.1.2. CJEU's exclusive right to provide definitive interpretation of EU law – the essence of autonomy

The CJEU has regularly blocked the EU's international agreements due to the incompatibility of their dispute settlement mechanisms with the autonomy of EU law.[143] In each of those cases the CJEU repeated that an international tribunal could only exist alongside the EU system if it had no adverse effect on the autonomy of the EU legal order. However, the CJEU left a theoretical possibility for the establishment of such an international dispute settlement mechanism stating that "<…> international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law."[144]

Whereas jurisdictions of international tribunals could collide with the jurisdiction of the CJEU, the CJEU's assessment in those cases was much related to the question whether the international tribunal's powers interfered with the exclusive competence of the CJEU – its right to provide binding and definitive interpretation of EU law[145] and to rule on division of competences within the EU[146]. The protection of both of these competences is directed to the preservation of the uniform interpretation of EU law necessary for the achievement of European integration.[147] Where does the CJEU derive these powers from?

There are three Treaty provisions that form the legal basis for the CJEU's exclusive jurisdiction to provide a definitive interpretation of EU law. First, Article 19(1) TEU entrusts the CJEU with the task to ensure that in the interpretation and application of the Treaties the law is observed. Secondly, Article 344 TFEU entrenches the Member States' obligation not to submit any dispute concerning the interpretation or application of the Treaties to other methods of settlement than those provided in the Treaties. As was explained by the Court, its power to interpret EU law forms part of the essential characteristics of EU law that must be preserved:[148] the balance of the Court's competences derives directly from the EU's constitutional structure the way it was designed by the Member States on the basis of the principle of conferral.[149] The Court elaborated that "<…> 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."[150]

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143 Opinion 1/76, *supra* note 17, para. 22; Opinion 1/91, *supra* note 12, para 30-35; Case C-459/03, *Mox Plant*, *supra* note 17, para 123; Opinion 1/09, *supra* note 17, paras. 67, 76; Opinion 2/13, *supra* note 16, paras. 170-183; Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para 62.

144 Opinion 2/13, *op. cit.*, para. 182. Opinion 1/91, *supra* note 12, paras 40, 70.

145 Opinion 2/13, *op. cit.*, para. 246-7.

146 Ibid., paras. 221-225; Opinion 1/91, *op. cit*., paras. 35-46.

147 *Author's note*: both of these competences are relevant for the evaluation of the CETA's ICS as well that is performed in the 3rd Part of this thesis.

148 Opinion 2/13, *op. cit.*, para. 237.

149 Ibid., para. 165.

150 Ibid., para. 174. See *also*: Opinion 1/17, *supra* note 50, para. 111.

Thirdly, the Court deems Article 267 TFEU to be the keystone of the EU judicial system ensuring that the CJEU is given the possibility to interpret any question of EU law that seems unclear for a national court.[151] The preliminary ruling procedure unites the CJEU and national courts into a single system of the EU courts the proper functioning of which is to be protected.[152] It follows that the primary purpose of the entire judicial system of the EU, including the CJEU and national courts, is to ensure uniformity of EU law and, consequently, European integration. In other words, based on autonomy, the CJEU protects its own powers, with the aspiration to ensure that EU law is only understood in the same way in the entire territory of the EU.

As is explained in the Chapter 1.1., the Court is concerned with both the process of integration and the outputs achieved in the process of integration, which are expressed in respective legislation. The two aspects are inseparable: EU law can only effectively determine the formation of integrative legal relationship among relevant actors if the procedures ensuring the uniform interpretation and application of EU law, adopted by the institutions, functions properly (see Diagram 1 above).

By protecting its right to provide definitive interpretation of EU law the CJEU is thus securing the successful implementation of the integrative goals prescribed by the Treaties in the entire territory of the EU. Thus, ensuring uniformity of EU law comprises the essence of the doctrine of the autonomy of EU law. Yet, autonomy is always applied in combination with one or several of the essential characteristics of EU law, which are analysed further.

1.2.2. Essential characteristics of the EU and EU law: general observations

The principle of autonomy secures the characteristics of EU law that are considered by the CJEU to be fundamental features of the EU legal order.[153] The essential characteristics contain the constitutional doctrines of the EU entrenched in the Treaties, or developed by the CJEU, for the sake of ensuring successful integration. The Court considers them to arise from the 'very foundations'[154] or the 'very nature'[155] of the EU legal order.

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151 *Author's note*: Article 19(1) TEU second paragraph stating that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" is clearly addressed to the national courts and the effective functioning of the judicial system of the EU.

152 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 37; Opinion 1/09, *supra* note 17, para. 70.

153 Opinion 2/13, *supra* note 16, para. 164-7.

154 Opinion 1/91, *supra* note 12, para. 71; Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi*, *supra* note 59, para. 304.

155 Opinion 1/09, *supra* note 17, para. 85; Opinion 2/13, *op. cit.,* para. 212; Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 33.

The logic behind the essential characteristics is uncomplicated: if the achievement of integration as defined in the Treaties depends on the application of certain legal doctrine this doctrine must be preserved and defended from possible alterations at the national or international level. Otherwise, the success of the integration may be impeded. Thus, the autonomy of the EU legal order, having the purpose to protect the EU legal system and its essential characteristics from external interferences is a significant instrument allowing to pursue European integration. Should the national or international measure come into conflict with one of the essential characteristics, it will be protected by the autonomy.

The *Opinion 2/13* brought confusion as to which concept should be used – the 'essential characteristics',[156] as was used by the Court before, or the 'specific characteristics'[157] – introduced with the *Opinion 2/13*. Contartese observes that the two concepts are not synonymous: not everything that is specific will be essential, meaning that the 'specific characteristics' is a broader concept than the 'essential characteristics'.[158] According to her, the notion of 'specific characteristics' may apply to the *Opinion 2/13* only, as the Court picked up such a concept from the Protocol No. 8[159] that was relevant for that particular case only.[160]

Indeed, the Court suggested in the *Opinion 2/13* that some characteristics derive from others (see Diagram 2 below). The Court distinguishes between two groups of 'essential characteristics'. The first group, relating to the constitutional structure of the EU includes the principle of conferral and the EU's institutional framework.[161] The second group derives from the very nature of EU law and includes direct effect, primacy and the fact that EU legal order originates from the independent source of law.[162] According to the court, three other characteristics can be derived from the mentioned ones, i.e. mutual trust, fundamental rights and sincere cooperation.[163] Together, they comprise a network of principles, rules and mutually interdependent legal relations linking the EU and the Member States into a process of creating an ever-closer Union among the peoples of Europe.[164]

156 Opinion 1/91, *supra* note 12, para. 21; Opinion 1/00, *supra* note 13, para. 29.

157 Opinion 2/13, *supra* note 16, para. 178.

158 Contartese, *supra* note 60: 1670.

159 Protocol (No 8) Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, 2012 O.J. C 326/1, http://data.europa.eu/eli/treaty/tfeu_2012/pro_8/oj.

160 Contartese, *op. cit.*: 1670.

161 Opinion 2/13, *op. cit.*, para. 165.

162 Ibid., para. 166.

163 Ibid., paras. 168-173.

164 Ibid., para. 167.

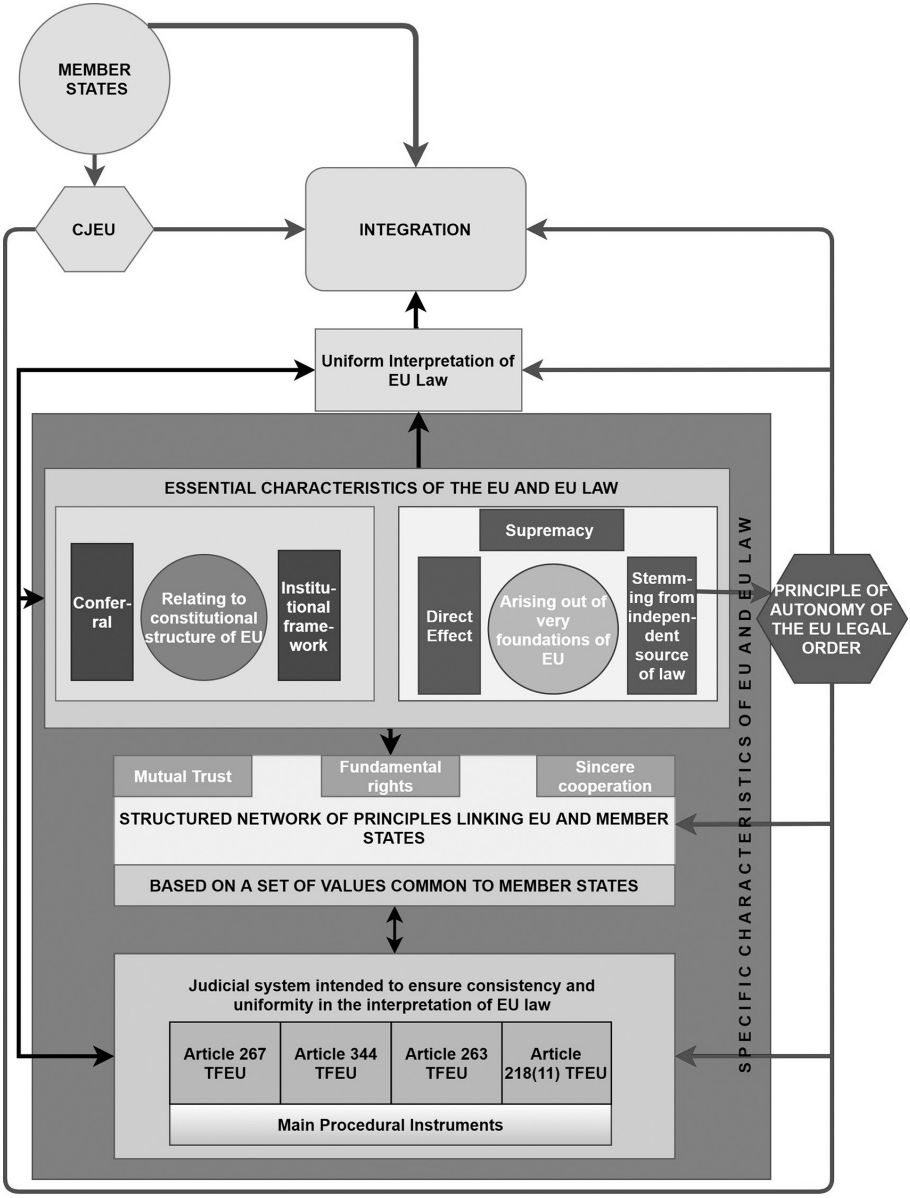

Diagram 2: *'Essential characteristics' and 'specific characteristics' of EU and EU law after the Opinion 2/13*[165]

165 Composed by the author.

Does the fact that some characteristics are derived from others mean that some characteristics are more important than others? The recent ruling in *Achmea* where mutual trust and sincere cooperation were invoked suggests that these principles have acquired constitutional importance. In turn, sincere cooperation is entrenched in the Treaties, which automatically makes it a constitutional principle. The significance of fundamental rights in the EU legal order is self-evident. Not only it is a general principle of EU law,[166] but the Charter is also a part of the primary law compliance with which is a condition of legality of any act of the EU.[167] It renders the fundamental rights significant for the entire regime. Thus, the broad meaning of the term 'essential characteristics' is used in the thesis considering the 'specific characteristics' invoked in the *Opinion 2/13* (mutual trust, sincere cooperation and fundamental rights) to be of equal importance as are the characteristics developed previously (see Diagram 3 below). Especially since the Court seems to use the two concepts synonymously alongside one another in *Opinion 1/17*,[168] there is no reason to consider some characteristics to be more important than others. Each of the 'essential characteristics' is further shortly discussed aiming to answer why they are important for the process of European integration and what specific purposes they serve.

166 Case 29/69, *Erich Stauder v City of Ulm* [1969] EU:C:1963:17.

167 Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi*, *supra* note 59, para. 285.

168 Opinion 1/17, *supra* note 50, paras. 109-111.

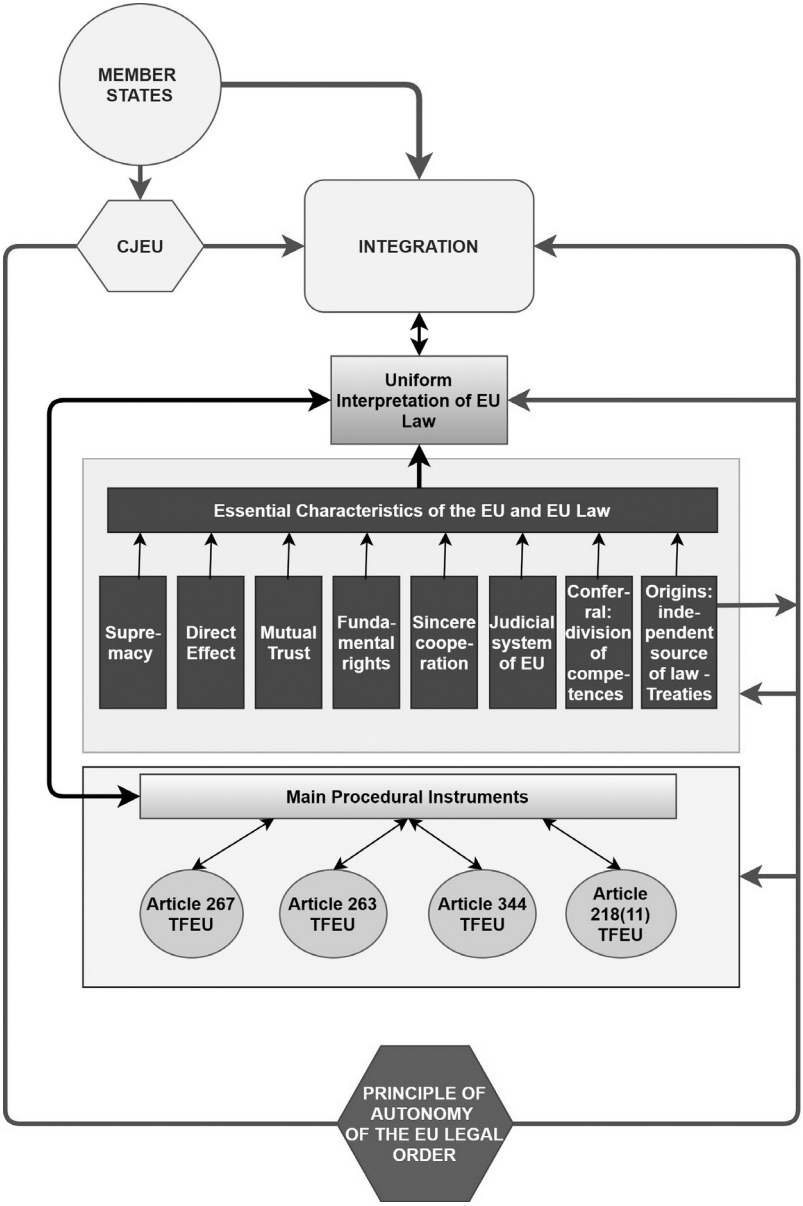

Diagram 3: *Scope of the 'essential characteristics' of EU law*[169]

169 Composed by the author.

1.2.3. Essential characteristics of the EU and EU law: specific features

1.2.3.1. Direct effect and primacy of EU law

The principles of direct effect and primacy of EU law are the measures allowing to ensure uniform application and effectiveness of EU law in all of the Member States of the EU. The CJEU had discovered these doctrines at the very early stage of European integration. First, in *Van Gen den Loos* the CJEU ruled that Community legal order constitutes a new legal order of international law subjects of which comprise not only the Member States but also their nationals, meaning that EU law not only imposes on individuals obligations but confer upon them rights which become part of their legal heritage that the national courts must protect.[170] Very shortly after, with *Costa/ENEL* the Court added that the law stemming from the Treaties, which was an independent source of law due to its special and original nature, could not be overridden by domestic legal provisions without being deprived of its character as *community* law and without the legal basis of the Community itself being called into question.[171] The Court elaborated the principle and extended it to the constitutional laws of the Member States in its further rulings in *Internationale Handelsgesellschaft* and *Simmenthal* where it relied on the arguments of effectiveness and uniformity of EU law.[172] Recent ruling in *Taricco II* of the CJEU had placed some limitations on the application of primacy in criminal cases.[173] However, those limitations were based on the fundamental rights protection – another essential characteristic of EU law.[174] Thus, it is now evident that application of primacy may be restricted if, by applying EU law and setting aside the applicable national law, the fundamental rights of individuals could be infringed.

Consequences of these cases were systemic. Due to the development of direct effect of EU law, it has become an effective instrument in the hands of individuals allowing them to pursue their rights stemming from the Treaties. Most importantly, in doing so, individuals also pursue the overall implementation of the purpose of integration at the micro-level legal relationship. Thus, obstacles to integration are publicised and eliminated before national courts in the process of application of EU law provisions in the specific cases between private parties.

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170 "<...> 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. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community." – Case 26/62, *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] EU:C:1963:1, p. 12.

171 Case 6/64, *Flaminio Costa v. ENEL*, *supra* note 91, p. 564.

172 Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] EU:C:1970:114, para. 3; Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] EU:C:1978:49, para. 20.

173 Case C-42/17, *Criminal proceedings against M.A.S. and M.B. (Taricco II)* [2017] EU:C:2017:936.

174 Ibid., paras. 46-48.

How can the CJEU's claim for primacy be explained? As observed by Lindeboom, aspiration for supremacy is intrinsic for the concept of law 'as we know it' in the existing legal systems – supremacy exists in every national legal order, and it applies to the EU as well.[175] The more functional and goal-driven the legal system is, the more important it is for the legal order to claim supremacy to be efficient.[176] It is especially true in case of the EU, the Treaties of which are the collection of integrative goals. Building on Raz,[177] Lindeboom asserts that EU claims *comprehensive* supremacy in that it aims to regulate any type of behaviour that is relevant for the system.[178] Development of primacy of EU law in respect of national law was essential to ensure uniform interpretation and application of EU law throughout the territory of the EU. If the Member States could evade an application of EU law or modify it by adopting subsequent internal measures, there would be as many versions of respective instrument of the EU as there are Member States. Consequently, primacy is the principle ensuring the indivisibility of EU law throughout the Member States, which is essential for European integration. Such indivisibility of law allows it to be effective in achieving integrative goals set by the Treaties.

1.2.3.2. Functioning of the judicial system of the EU

As was mentioned in Section 1.2.1, the Court considers that the Treaties have established the judicial system intended to ensure consistency and uniformity in the interpretation of EU law precisely for the purpose that the essential characteristics and autonomy of the EU legal order are preserved.[179] Structurally, there are several aspects protected by the CJEU that falls under the concept of the judicial system of the EU. First, the Court protects its own position as the sole institution entitled to provide definitive binding interpretation of EU law.[180] Secondly, it protects the position of national courts in the EU legal order as 'ordinary courts' of the EU and CJEU's collaborative relationship with these courts.[181] Thirdly, there is an obligation on the Member States to refer disputes concerning interpretation and application of EU law solely to the judicial system of the EU and not to external dispute settlement institutions.[182] Each of these elements is directed to ensuring uniform interpretation and ultimately – the effectiveness of EU law.[183]

The first aspect became evident in the evaluation of the EU's international agreements

175 Lindeboom, *supra* note 60: 337.

176 Ibid.

177 "According to Raz, legal systems are social, normative systems which (i) are comprehensive, (ii) claim supremacy and (iii) are open systems." – Ibid., 336.

178 Ibid.

179 Opinion 1/17, *supra* note 50, para. 111; Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 35; Opinion 2/13, *supra* note 16, para. 174; Opinion 1/09, *supra* note 17.

180 Opinion 1/00, *supra* note 13, para. 13.

181 Opinion 1/09, *op. cit.*, para. 80.

182 Case C-459/03, *Mox Plant*, *supra* note 17, para. 123.

183 Opinion 2/13, *op. cit.*, para. 188-9; Case C-459/03, *Mox Plant*, *op. cit.*, para. 160; Opinion 1/09, *supra* note 17, para. 82.

that anticipated the establishment of dispute settlement mechanisms to resolve disputes arising out of those agreements. Since the *Opinion 1/91 on compatibility of EEA Agreement* with the Treaties, it has been the CJEU's official position that an international agreement providing for a system of courts is in principle compatible with EU law.[184] The EU's competence in international relations and "<…> its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions."[185] Where an international agreement provides for its own court entitled to settle disputes between contracting parties and to interpret agreement's provisions, the decisions of such court would be binding on the EU institutions, including the CJEU.[186]

Nevertheless, the Court has also underlined that an international agreement "may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order."[187] According to the CJEU, such situation would occur if the external tribunal's decisions have the effect of binding the EU and its institutions in the exercise of their internal powers to a particular interpretation of EU rules provided by that tribunal.[188] Furthermore, among the prerogatives falling exclusively under the CJEU's jurisdiction is the legality review of the EU's secondary law.[189] As the Court ruled in *Foto-Frost*, the "<…> requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of EU legal acts would be liable to place in jeopardy the very unity of the EU legal order and detract from the fundamental requirement of legal certainty."[190] Consequently, the CJEU's exclusive power to interpret EU law is only preserved if international tribunal established by the EU's international agreement cannot provide interpretations of EU law binding the EU and its institutions, or assess the legality of EU secondary law.

The judicial system of the EU is composed of the CJEU and the national courts of the Member States serving as 'ordinary courts' of the EU. As the CJEU described it in *Opinion 1/09 on compatibility of Unified Patent Litigation System with the Treaties*, national courts, in collaboration with the CJEU, fulfil the duty entrusted to them to ensure that in the interpretation and application of the Treaties the law is observed.[191] In turn, the judicial system of the EU is a complete system of legal remedies and procedures designed to ensure the review of the legality of acts of the institutions.[192] Therefore, according to the Court, not only the exclusive right of the CJEU to interpret EU law must be protected, but also the position and

184 Opinion 1/91, *supra* note 12, para. 40.

185 Ibid. See *also*: Opinion 1/17, *supra* note 50, para. 106; Opinion 2/13, *supra* note 16, para. 182.

186 Opinion 1/91, *op. cit.*, para. 39.

187 Opinion 2/13, *op. cit.*, para. 96.

188 Ibid., para. 184.

189 Case C-314/85, *Foto-Frost v. Hauptzollamt Lubeck-Ost* [1987] EU:C:1987:452, para. 15.

190 Ibid., para. 15.

191 Opinion 1/09, *supra* note 17, para. 69.

192 Ibid., para. 70.

prerogatives of the national courts in the EU system must be preserved. Consequently, in the *Opinion 1/09* the Court ruled that a dispute settlement mechanism created by an international agreement may not deprive national courts of their tasks, as the 'ordinary courts' of the EU legal order.[193] In particular, their power (or, as the case may be, the obligation) under Article 267 TFEU to refer questions for a preliminary ruling must not be affected.[194] Ensuring the use of the preliminary ruling procedure stands at the core of the cooperation between the CJEU and the national courts, which was repeatedly stressed by the CJEU.[195] Safeguarding the role of the national courts as well as the functioning of the preliminary ruling procedure are clearly oriented towards ensuring that the CJEU is given the opportunity to determine the interpretation of EU law in all the cases where it is deemed necessary and, consequently, to ensure uniform interpretation of EU law in different Member States.

In addition, the Treaties oblige the Member States "<…> not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."[196] Thus, the parties must not evade the EU judicial system by referring disputes concerning the questions of EU law to external tribunals. In *MOX Plant* the Court ruled that by instituting dispute-settlement proceedings against the United Kingdom under the UNCLOS concerning the MOX plant located at Sellafield (United Kingdom), Ireland had failed to fulfil its obligations under Article 344 TFEU.[197] It was established that Ireland had submitted instruments of EU law to the UNCLOS tribunal seeking their interpretation and application in the proceedings to prove that the United Kingdom has breached the provisions of these instruments of EU law.[198] The CJEU found it to be a breach of Article 344 TFEU.[199] Recently, in *Achmea* the CJEU invoked Article 344 TFEU, along with the Article 267 TFEU, to rule the ISDS clauses contained in intra-EU BITs invalid (see the 2nd Part of the thesis).[200] Clearly, an obligation of the Member States not to settle their disputes arising out of EU law outside the EU judicial system is aimed to ensure that the CJEU and national courts are not circumvented by the Member States and uniform interpretation of EU law is ensured by the CJEU.

1.2.3.3. Institutional framework of the EU

The basis of the EU's competences is the principle of conferral pursuant to which the EU can only act within the limits of the competences conferred upon it by the Member States in order to attain the objectives set out in the Treaties.[201] Competences not conferred

193 Opinion 1/09, *supra* note 17, para. 80.

194 Ibid.

195 Ibid., para. 77; Opinion 2/13, *supra* note 16, para. 176; Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 37.

196 See Article 344 TFEU.

197 *Author's note*: Article 292 EC at the time.

198 Case C-459/03, *Mox Plant*, *supra* note 17, paras. 151-153.

199 Ibid., para. 182.

200 Case C-284/16, *Slovak Republic v Achmea BV*, *op. cit.*, para 62.

201 See Article 5(2) TEU.

on the EU in the Treaties remain with the Member States.[202] Importantly, the Treaties regulate in detail the power balance of the EU institutions as well. The Court appears to take the division of powers between the EU and the Member States, as well as between institutions themselves, seriously and thus claims an exclusive jurisdiction to determine the boundaries of EU law.

Therefore, any international agreement of the EU must ensure "<…> that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered."[203] If the agreement deprives EU's institutions of their functions entrenched in the Treaties, such an agreement is likely to be ruled incompatible with the principle of autonomy of EU law, particularly, if the powers of the CJEU to provide definitive interpretation of EU law are affected. As was explained in *Opinion 1/91*, if an international agreement is likely to adversely affect the allocation of responsibilities defined in the Treaties – it will be considered incompatible with the principle of autonomy.[204] As it happened in that instance, a large body of legal rules of the EEA agreement were identically worded with EU rules, which meant that interpretation of EEA Agreement would have resulted in interpretation of EU law.[205] It came in conflict with the CJEU's responsibility to interpret EU law under the Treaties.[206] Similarly, the question of power division came up in the assessment of the co-respondent mechanism foreseen in the Accession Agreement.[207] According to the Court, determination of who, the EU or the Member State, is responsible for the action infringing international agreement necessarily entails an analysis of the competence division between the EU and the Member States.[208] Therefore, if an external tribunal is entitled to decide who a respondent of the proceedings should be, it would have to engage in the delimitation of powers between the EU and the Member States. Since such delimitation of powers requires interpretation of the Treaties – it is an exclusive competence of the CJEU. Consequently, determination of the proper respondent is a matter that must be decided by the EU and the Member States internally.

It appears that in case of investment dispute settlement this issue was resolved successfully. Having regard to the CJEU's position in *Opinion 2/13*, the Commission initiated the adoption of the regulation establishing the framework for managing financial responsibility linked to the investor-state dispute settlement tribunals established by international agreements to which the EU is a party.[209] The regulation set the rules how the proper respondent should be appointed. In turn, pursuant to Article 8.21 of the CETA, if a Canadian investor intends to submit a claim, it is required to deliver to the EU a notice requesting

202 See Article 5(2) TEU.

203 Opinion 1/00, *supra* note 13, para. 12.

204 Opinion 1/91, *supra* note 12, para. 35.

205 Ibid., para. 42.

206 Ibid., para. 43-6.

207 Opinion 2/13, *supra* note 16, paras. 215-35.

208 Ibid., para. 224.

209 Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 *Establishing a Framework for Managing Financial Responsibility Linked to Investor-to-State Dispute Settlement Tribunals Established by International Agreements to Which the European Union is a Party*, (OJ 2014 L 257, p. 121).

a determination of the respondent. Then, having discussed and decided the question internally with the respective Member States, the EU informs the investor on who is to be a respondent in the proceedings. Analogous mechanism should be developed in case the negotiations regarding the EU's accession to the ECHR are renewed. It should replace a failed co-respondent mechanism that was foreseen in the Accession Agreement.

Consequently, the CJEU considers that the powers of the EU institutions conferred on them by the Treaties, may not be altered by an international agreements of the EU. It means that international dispute settlement mechanisms established under such agreements cannot be entitled to determine the extent of the EU's or its institutions powers.

1.2.3.4. Fundamental rights

Fundamental rights have been first officially recognised by the CJEU in *Stauder*, where it held that fundamental rights are enshrined in the general principles of Community law and are protected by the Court.[210] It was afterwards repeated in various cases underlining that fundamental rights form an integral part of the general principles of law and originates from the constitutional traditions common to the Member States and the guidelines supplied by international treaties for the protection of fundamental rights.[211] As was made clear in *Kadi*, respect for fundamental rights is a condition of the lawfulness of EU acts and that measures incompatible with respect for fundamental rights are not acceptable in the Community.[212]

It was *Kadi*[213] and *Opinion 2/13* that have caused the most controversy in recent years in the field of the fundamental rights protection in the EU. The problem lies not in the content of fundamental rights in the EU, but rather in the jurisdictional question of which institution is entitled to interpret them. Significantly, the Court has given the notion of fundamental rights a very specific meaning in its case law by referring to "<…> fundamental rights recognised by the Charter (which, under Article 6(1) TEU, has the same legal value as the Treaties)."[214] Since the Charter is endowed with the same legal power as the Treaties and is thus part of primary law – only the CJEU is entitled to provide its binding interpretation. For this reason, fundamental rights come under the protection of the principle of autonomy, which requires that the CJEU's exclusive jurisdiction to interpret EU law is ensured and uniformity of the Charter's interpretation in the entire territory of the EU is ensured. For that purpose, the Court ruled that the application of the national standards of fundamental rights protection must not compromise the level of protection provided by

210 Case 29/69, *Stauder*, *supra* note 166, para. 7.

211 Case C-4/73, *Nold v the Commission* [1974] EU:C:1974:51, para. 13; Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others (ERT)* [1991] EU:C:1991:254, para. 41; Case C-299/95, *Friedrich Kremzow v Austrian state* [1997] EU:C:1997:254, para. 14.

212 Joined cases C-402/05 P and C-415/05 P*, Yassin Abdullah Kadi*, *supra* note 59, para. 284.

213 Ibid.

214 Opinion 2/13, *supra* note 16, para. 169.

the Charter.[215] In other words, the Member States are not allowed to set higher standards of fundamental rights protection than the Charter provides.

It is thus not surprising that the CJEU found it problematic that the interpretations of the ECHR provided by the ECtHR would under international law be binding on the EU, but the interpretations by the CJEU of the Charter would not be considered binding on the ECtHR.[216] Particularly, the Court stressed that "<…> it should not be possible for the ECtHR to call into question the Court's findings in relation to the scope *ratione materiae* of EU law <…>."[217] If that was the case, a risk of non-uniform interpretation of EU law would occur. Thus, the binding character of the interpretations of the Charter (as a matter of interpretation of primary law) provided by the CJEU cannot be challenged.

In turn, it also means that an autonomous meaning of certain fundamental rights may exist within the EU legal order that does not necessarily correspond to the meanings of comparable rights under international law. While the CJEU has been consistently seeking inspiration from the ECtHR it is unlikely that considerable differences of the interpretations in comparable situations would emerge. However, since the catalogue of rights in the Charter and the ECHR is not identical and the Charter is broader in scope, the CJEU could depart from the interpretations of the ECtHR. Therefore, the CJEU's case law in the field of fundamental rights protection has provided the EU's regime of fundamental rights protection an autonomous character.

1.2.3.5. Mutual trust

Mutual trust is the principle regulating the relationship between the Member States only.[218] It requires (particularly in the area of freedom, security, and justice) each of the Member States to presume that all other Member States comply with the requirements of EU law.[219] The principle aim of mutual trust is to enable the creation of an area without internal borders.[220] The Member States' claims against each other in the areas regulated by EU law could result in undermining the effectiveness EU law and lead to impediments to integration. In case of fundamental rights, when implementing EU law the Member States may be required to presume that fundamental rights have been observed by the other Member States.[221] It means that a Member State may not demand national standards from another

215 Case C-399/11, *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107, para. 60*;* Opinion 2/13, *supra* note 16, para. 188.

216 Ibid., para. 185-186.

217 Ibid., para. 186.

218 As the Court explained in *Achmea*: "EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected." – Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 34.

219 Opinion 2/13, *op. cit.*, para. 191.

220 Ibid.

221 Ibid., para. 192.

Member State, which are higher than the level provided by EU law.[222] Therefore, the principle obliges the Member States to presume the compliance of the other Member States so that the disruptive effects on integration are avoided.

Mutual trust was invoked by the Court in *Opinion 2/13* to rule the Accession Agreement incompatible with EU law. The Court considered that to the extent that the ECHR would require the EU and the Member States to be considered Contracting Parties not only in their relations with other non-EU contracting parties, but also in their relationship with each other (including where such relationship is governed by EU law) mutual trust may be breached.[223] If a Member State were required to check whether another Member State has observed fundamental rights, despite EU law obligation of mutual trust between those Member States, accession would be liable to disrupt the underlying balance of the EU and undermine the autonomy of EU law.[224] Since there was no provision preventing that, Accession Agreement was found incompatible with EU law in that regard. As the EU law is aimed to integrate the Member States, protection of the obligation of mutual trust by the autonomy appears to be in line with the CJEU's integration protection narrative.

Mutual trust was invoked by the CJEU in *Achmea* (analysed in the 2nd Part), where *inter alia* it found ISDS under intra-EU BITs to be contrary to this principle.[225] By contrast, the CJEU found mutual trust irrelevant in the *Opinion 1/17* and thus underlined the distinction between the ICS tribunals from the ISDS tribunals established under intra-EU BITs assessed in *Achmea*.[226] The Court ruled that mutual trust is not applicable in relations between the EU and non-Member States, even if the Member States are also parties to that same agreement.[227]

1.2.3.6. Sincere cooperation

Principle of sincere cooperation is entrenched in Article 4(3) TEU and thus forms part of the primary law. It obliges both the EU institutions and the Member States to assist each other in carrying out tasks stemming from the Treaties.[228] Pursuant to the principle, the Member States must take any appropriate measures to ensure the fulfilment of the Treaties' obligations or the acts of the EU institutions.[229]

The aim of the sincere cooperation, which is often applied together with mutual trust, is to consolidate the Member States in order to ensure unified and coherent external action,

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222 Opinion 2/13, *supra* note 16, para. 192.

223 Ibid., para. 194.

224 Ibid.

225 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 58.

226 Opinion 1/17, *supra* note 50, para. 127.

227 Ibid., para. 129.

228 See, *for example*: Sergio Carrera, "The Price of EU Citizenship: The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters," *Maastricht Journal of European and Comparative Law* 21, 3 (2014): 406–27; Eva Nanopoulos, "Judicial Review of Measures Implementing Security Council Resolutions: The Relevance of the EU Principle of Loyal Cooperation," *Cambridge Yearbook of European Legal Studies* 15 (2013): 669–98.

229 Opinion 1/09, *supra* note 17, para. 68.

given the parallel presence of the EU and the Member States on the international stage.[230] Indeed, under international law a Member State may be entitled to represent its individual position, but being the Member State of the EU it may be required to abstain from unilateral declarations and support a common position of the EU: otherwise, it could jeopardise the attainment of the EU's objectives.[231] However, the same applies to the Member States' cooperation internally in seeking to implement the goals of the Treaties. In the end, sincere cooperation requires unity and solidarity of the Member States' internal and external action, so that integrative goals are efficiently achieved.

To sum up, the principle of autonomy of the EU legal order was developed by the CJEU to ensure that European integration is successful. By applying the principle the Court protects several fundamental features of the EU legal order called the essential characteristics. The list of the essential characteristics was gradually extended by the CJEU over the years consequently expanding the scope of the autonomy as well. The principle of autonomy and the essential characteristics are all directed to the efficient process of integration and the effectiveness of EU law, which altogether leads to the integration. The process is only efficient if the institutions are able to perform their duties foreseen under the Treaties. Thus, through the protection of institutional framework, the CJEU has strictly protected the roles and powers of EU's institutions, including the powers of itself.

The law is only effective if it is interpreted and applied uniformly throughout the EU. Therefore, the fundamental principles of direct effect and primacy of EU law were developed, rendering EU law effective in national legal orders. Also, the roles of the CJEU and national courts under the Treaties were given a particular attention by the CJEU, to ensure uniform interpretation pursuant to the preliminary ruling procedure. Finally, the actions of the Member States in respect of each other were regulated through the application of the mutual trust and sincere cooperation, encouraging them to coordinate and solidify.

It must be underlined that autonomy and essential characteristics are universal principles. Thus, all the future international agreements will have to comply with these principles. Most importantly, dispute settlement bodies established under such agreements may not adversely affect neither of the essential characteristics, as it will result in the breach of the principle of autonomy of the EU legal order. Precisely pursuant to the criteria outlined in this Part, the assessments of compatibility with EU law of dispute settlement mechanisms analysed in the 2nd and 3rd Parts are conducted. The following Chapter aims to scrutinise the CJEU's methodological approach in cases, in which the doctrine of autonomy was developed. It is aimed to answer whether the CJEU's decisions establishing the autonomy doctrine and extending the list of the essential characteristics were within the limits of the EU's competence provided by the Treaties.

230 Joris Larik, "Pars Pro Toto: The Member States' Obligations of Sincere Cooperation, Solidarity and Unity," in Cremona, *supra* note 61: 180.

231 Ibid., 187.

1.3. CJEU's interpretive methodology – designed to ensure integration

Having discussed the contents and importance of the principle of autonomy and each of the characteristics for the uniformity of EU law and the attainment of European integration, the focus now shifts to the question *how the CJEU does it*? What are the foundations of the CJEU's interpretive powers? What interpretive techniques does the Court use? Is the criticism addressed to the CJEU alleging that the Court is practicing law making by engaging in extra-textual interpretation substantiated? Indeed, the CJEU has been constantly criticised for being pro-active in developing doctrines like autonomy and essential characteristics without having them expressly included in the Treaties. It is thus essential to analyse the theoretical foundations of the CJEU's interpretive strategy and methodology, and to assess whether the criticism addressed to the Court is valid. It will be essential for the analysis of the 2nd and 3rd Parts in seeking to answer if the Court's approach represents the same methodology as was practiced in its historical case law, or if there is something unique about it.

1.3.1. The EU as an interpretive community

Are courts allowed to depart from purely textual interpretation? If yes, where does the meaning of law come from if not the text? It is proposed in this Section that the CJEU's engagement in extra-textual interpretation is not only justifiable, but also inevitable if European integration is to be successful.

The theoretical ground for this proposition lies in the critical studies of the legal interpretation. It was Stanley Fish who was one of the first scholars to contest the assumption that a text is self-sufficient for interpretation as it has an intrinsic meaning embedded or encoded within it that can be taken and perceived at a single glance.[232] Instead, he proposed the idea of 'interpretive community' – the community that is made up of those who share interpretive strategies not for reading, but for writing texts as well as constituting their properties as assigning their intentions.[233] Fish claimed that those interpretive strategies existed prior to the act of reading the interpreted text and thus determined the shape of what is read and understood. Fish's proposition basically claims that the meaning of the interpreted text rather originates from the interpretive community than the text itself.[234] According to Bianchi, "<…> at the origin of meaning there is always a social community."[235] It is only within a certain community where communication becomes possible and acts come to acquire particular shared meaning.[236]

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232 Stanley E. Fish, "Interpreting the 'Variorum,'" *Critical Inquiry* 2, 3 (1976): 465–85.

233 Ibid., 483.

234 Ibid.

235 Andrea Bianchi, "Textual Interpretation and (International) Law Reading: The Myth of (in)Determinacy and the Genealogy of Meaning," *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts*, (2010): 51.

236 Bianchi, *supra* note 235: 51.

The rationale of Fish and Bianchi is complementary with the prominent theory of 'nomos and narrative' by Cover.[237] According to Cover, "[w]e inhabit nomos – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void."[238] The principal idea that the scholar proposes is that law is endowed with the meaning by the context and narrative originating from the respective community.[239] Legal provision cannot escape its origins, explanation and purpose.[240] Communities are central in the formation of law and its interpretation. Communities construct their own myths, lay down their own precepts, and presume their own hierarchy of norms.[241] According to Cover, different interpretive communities almost certainly exist and would generate distinctive responses to any normative problem.[242] It can be explained by the observation that different narratives are important or dominant in different communities. Depending on the dominant narrative, the interpretive strategy is adjusted by a respective interpretive community.

It must be noted that the EU fits surprisingly well within the rationale of these theories. The EU consists of many smaller communities: communities of states, citizens' groups, institutions, NGOs, etc. They tend to share common values, abide common rules, and have common purposes and goals at the heart of which is the common good of the EU. These communities share a common vocabulary and perceive matters occurring in the EU in a particular way. In this wider context, while the entirety of EU law could be vividly called the *nomos* – a normative universe – the Member States, EU institutions and the EU citizens comprise the interpretive community. The purpose of integration is the fundamental narrative behind EU law – it can explain the origins of the provisions, their purpose and the results expected to be achieved.

Thus, for the CJEU, interpretation, which promotes integration, is naturally the dominant interpretive strategy. As Bredimas summarised, the only consistent and overriding principle of interpretation of the CJEU "<…> which can be traced throughout the case law, is interpretation promoting European integration."[243] Its essence is to shape the interpretive process in such a way that allows European integration to be the most effective. Whether the CJEU does it intentionally, or if it is a contingency, is not entirely clear. Yet, as demonstrated in the following Section, the extra-textual interpretive techniques used by the CJEU present the evidence demonstrating that the CJEU conforms to this theoretical interpretive model.

What is more, not only the promotion of integration determined the choice of certain interpretive techniques, but also was the reason that the principle of autonomy of the EU legal order and the essential characteristics of EU law were developed. As will be further

237 Cover, *supra* note 88: 4-68.

238 Ibid., 4.

239 Ibid., 4-5.

240 Ibid., 5.

241 Ibid., 33.

242 Ibid., 42.

243 Anna Bredimas, *Methods of Interpretation and Community Law* (Oxford: North-Holland 1978), 179, cited from Conway, *supra* note, 115.

demonstrated, the goal of integration is the decisive criterion in accordance with which the CJEU's interpretive techniques are determined in the cases of constitutional importance.

The choice of the interpretive strategy to reason the judicial decision can determine the meaning of the specific norm and the outcome of the decision.[244] Article 31 of the VCLT provides a general rule of the interpretation of international treaties. Firstly, international treaties must "<…> be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[245] Secondly, the context of a treaty for the purposes of interpretation must be taken into account.[246] Thirdly, along with the context, any subsequent agreement between the parties regarding the interpretation or application of the treaty, any subsequent practice in the application of the treaty or any relevant rules of international law applicable in the relations between the parties may be taken into account.[247]

While some authors consider that Article 31 VCLT comprises a single rule of interpretation different methods of which are equally important,[248] it is the prevailing view that in international law textual interpretation is the dominant method.[249] It is settled opinion that "[l]inguistic arguments give way to or are complemented by systemic or purposive arguments only if they are inconclusive and/or in the face of strong countervailing reasons."[250] As Bianchi puts it, the mainstream scholarship of international law remains filled with traditional rule-based approaches to legal interpretation and falls behind other disciplines where interpretive issues are analysed comprehensively and from more diverse perspectives.[251] Indeed, the CJEU is an example of an international court constantly engaging in extra-textual approaches of interpretation giving due regard to the context of the situation and the purpose the respective measures aim to attain. The CJEU's choices reflect the particular understanding of law of the interpretive community the Court represents and is a part of.

Thus, there is a particular logic and purpose behind the CJEU's choice of the methods of interpretation. The further Section aims to reveal the CJEU's interpretive approach. Then, it is analysed whether the CJEU's activities derive from the powers conferred on the CJEU by the Treaties.

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244 Bianchi, *supra* note 235: 36.

245 See Article 31(1) VCLT.

246 See Article 31(2) VCLT.

247 See Article 31(3) VCLT.

248 Richard Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), 141-42.

249 Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points," *British Year Book of International Law* 33 (1957): 212; David Jonas and Thomas Saunders, "The Object and Purpose of a Treaty: Three Interpretive Methods," *Vanderbilt Journal of Transnational Law* 43, 3 (2010): 578; Bianchi, *supra* note 235: 35.

250 Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU*, 1st ed. (Oxford: Hart Publishing, 2013), 279, cited from Ceruti, *supra* note 106: 271.

251 Bianchi, *op. cit.*: 35.

1.3.2. Interpretive techniques used by the CJEU

The doctrine of the autonomy of the EU legal order as well as the essential characteristics were developed by the CJEU as a result of the interpretive techniques applied by the Court. What interpretive techniques does the CJEU employ in its work? Is the Court's interpretive approach comparable to other international courts?

As Lenaerts and Guttierez-Fons underlined in their comprehensive article, the CJEU follows all the classical methods of interpretation.[252] According to these scholars, the methods of interpretation used by the CJEU operate in a mutually reinforcing manner.[253] Notably, it is true for most courts, since for determining the meaning of legal norms, courts, whether national or international, use various methods systematically. Yet, it is of decisive importance which technique is given priority in the process of interpretation. While most of the international courts and tribunals favour textual interpretation,[254] the CJEU gives priority to the techniques that best serve for the implementation of European integration. The CJEU does not grant textual interpretation the same level of primacy as other high courts do.[255] It may sometimes be possible to rely on the textual interpretation and achieve the goal provided by the Treaties, but an abstract wording of the Treaties' provisions requires the Court to often engage in teleological (or, purposive) and contextual interpretation. The CJEU's approach was named 'cumulative approach', since it integrates different methods of interpretation altogether without clearly expressed hierarchy between them.[256]

Why is the context significant? Proponents of an extra-textual interpretation propose that 'clear' or 'plain' meaning of term is not some kind of an intrinsic or linguistic quality of that term. The clarity of a term originates from the context in which a specific interpretive community uses it in a particular situation.[257] For an interpreter which belongs to that community, context is not only some kind of external circumstance developing around him, but also an internal context, marking his past experience, knowledge, domain that the text interpreted belongs to as well as his subjective assumptions.[258] The internal context allows disposing the ambiguities surrounding the text.[259] It happens not because of the in-

252 They distinguished textual, contextual, teleological and consistent interpretation techniques. – Lenaerts and Gutierrez-Fons, *supra* note 135: 6.

253 Ibid., 61.

254 To this end, an illustrative concept of constitutional or legal 'fetishism' was developed by some authors to describe the practice of courts to rely excessively on the text of constitutional documents. – Neil Walker, "The Idea of Constitutional Pluralism," *Modern Law Review* 65, 3 (2003): 319; Ingo Venzke, "The Role of International Courts as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation," *Loyola of Los Angeles International and Comparative Law Review* 34, 1 (2011): 104.

255 Ceruti, *supra* note 106: 272.

256 Ibid., 271-2.

257 Bianchi, *supra* note 235: 40.

258 Ibid., 41.

259 Ibid.

trinsic clarity of a text, but because of the interpreter's internal baggage that he brings from his surroundings, including the community he originates from. As was demonstrated in previous Section, the EU, as a community, fits well under the concept of such interpretive community. In turn, the CJEU's judges stand in the position of the interpreters of EU law. To perform its duty, the Court relies on the context, as it allows the Court to identify the precise meaning of the legal norms interpreted.

The CJEU had summarized its approach in *CILFIT* stating that "<…> every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."[260] Several remarks are important here. First, the CJEU's position in *CILFIT* allegedly gives teleology and contextualism an equal importance as to the textual interpretation. The Court does not imply the necessity to refer to the ordinary linguistic meaning of the text. It suggests that a meaning of a provision may rest elsewhere in the legal system and a context. Secondly, the CJEU's use of teleological method is the CJEU-specific and different from teleological interpretation as it is understood under the VCLT. Bengoetxea draws a distinction between three different modes of teleological interpretation applied by the CJEU.[261] The first mode aims to secure the effectiveness of the specific provision in question and is thus referred to as 'functional interpretation.'[262] The second mode is applied if the provision in question is vague and ambiguous and therefore requires to be interpreted 'stricto sensu' in the light of objectives it pursues.[263] The third mode focuses on the consequences to be caused by the interpretive choice and is called the 'consequentialist interpretation.'[264] When the CJEU says 'objective or purpose' the Court does not refer to the 'objective or purpose' of a specific provision, but rather the systemic goals of the EU.[265] Thus, its approach differs from the normal application of the teleological method of interpretation under the VCLT that aims to identify the goal of the specific provision. Thirdly, the CJEU clearly states that EU law is evolutive. It means that the content of the specific norm is susceptible to change depending on circumstances and the content of other norms of EU law. Consequently, not only the literal meaning of the norm in question is important in the determination of the content of this provision, but also the meaning of other norms and principles.

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260 Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] EU:C:1982:335, para. 20.

261 Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford: Oxford University Press, 1993), cited from Lenaerts and Gutierrez-Fons, *supra* note 135: 32.

262 Ibid.

263 Ibid.

264 Ibid.

265 Conway, *supra* note 115, 82-3; Miguel Poiares Maduro, "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism," *European Journal of Legal Studies* 1, no. 2 (2008): 146.

The CJEU's interpretive technique presented in *CILFIT* led to several consequences. First, while it could be easy to identify the goal and purpose of a specific provision, determining the systemic goals and how a specific provision interacts with them is considerably more difficult. Secondly, if primacy is not given to textual interpretation, prediction of the most likely outcomes becomes more difficult since the text of the provision is not the decisive interpretive factor for the CJEU. Thirdly, it complicates the task of interpretation of EU law, since understanding the text of the respective provisions is not sufficient to understand the law. Thus, precisely the application of such a mixed interpretive methodology, combining teleology, contextualism and textualism provide the CJEU with the means to evolve its case law in response to the contemporary challenges to successful integration. Development of the principle of autonomy and the essential characteristics of EU law is the result of this cumulative interpretive approach applied by the CJEU as a solution. Since the CJEU "<…> favours integration over other plausible objectives,"[266] each of the principles covered by the autonomy doctrine were developed to achieve the most integration-friendly outcome as was possible in the particular case.

Consequently, the Court's constitutional authority in the EU legal order is closely related and determined by the methodology it applies to explain EU law. While almost anyone could indicate a subjective literal meaning of a legal provision from the text, it takes a comprehensive knowledge of the system and its operation to place the provision in the systemic context and assess whether it satisfies the ultimate goal of integration. Thus, at least partially, the CJEU's claim for exclusive right to provide a definitive interpretation of EU law is reasonable, as it would be highly difficult for any other judicial body to imitate the judicial reasoning process that the CJEU employs.

Yet, due to the use of the purposive and contextual interpretation the CJEU has been accused of activist and innovative interpretation that results in law making,[267] which would mean that it is operating in excess of the powers conferred on it by the Member States. The application of the doctrine of autonomy as well as primacy has become the main target of such criticism. The following Section engages with the question whether the CJEU's interpretive approach was within the limits of the EU's competence provided by the Treaties.

266 Ceruti, *supra* note 106: 272.

267 Hjalte Rasmussen, "Between Self-Restraint and Activism: A Judicial Policy for the European Court," *European Law Review* 13 (1988): 28; Hjalte Rasmussen, "Towards a Normative Theory of Interpretation of Community Law," *University of Chicago Legal Forum* 1992, no. 1 (1992): 165; Conway, *supra* note 115, 50.

1.3.3. CJEU's interpretive practices: in line with the powers conferred by the Member States?

The CJEU's interpretive methodology, often departing from the text of the Treaties, was criticized to result in law making.[268] According to critics, by departing from textual interpretation the CJEU aims to increase the competence of the EU and consequently – its own powers.[269] Thus, it trespasses the boundaries of the powers conferred on the EU and threatens the sovereignty of the Member States.[270] Was the CJEU authorised under the Treaties to develop the principle of autonomy and essential characteristics of EU law? In order to address these issues the concept of judicial law making is first discussed. Then, the rationale of the CJEU's methodology is scrutinized.

Judicial law making is the phenomenon that is first of all associated with the countries of the common law tradition and the principle of *stare decisis*, which translated from the Latin means 'to stand by things decided.' [271] *Stare decisis* is often used as a synonym to a precedent.[272] It says that courts are bound by the reasoning of the already rendered judgments *that create the law*, which must be respected.[273] In the common law tradition, which operates in accordance with *stare decisis*, the law making powers of judges are manifest. Judges are expected to follow earlier decisions whereas the goal of the law is to render uniform and predictable justice.[274] It is only fair that if one individual is judged in a certain way, then another individual behaving in an identical manner under equivalent conditions should be judged in the same manner.[275] The *stare decisis* principle is not as rigid as it may seem: the courts of highest instances may overrule what was previously decided by also changing the law. However, it seldom happens.[276]

For comparison, countries in civil law tradition do not officially recognise courts' right to law making and does not adhere to the principle of *stare decisis*. As observed by Guillaume, courts of Roman-German countries seek inspiration in each case from solutions offered by previous instances that they refer to as 'jurisprudence'.[277] The concept of jurisprudence is considered much more flexible than the rule of *stare decisis*.[278] However, in

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268 Conway, *supra* note 115, 26; Laurence R Heifer and Karen J Alter, "Legitimacy and Lawmaking: A Tale of Three International Courts" 1 (2013): 487; Alec Stone Sweet, "The Juridical Coup d'Etat and the Problem of Authority," *German Law Journal* 8, 10 (2007): 915-6.

269 Lenaerts and Gutierrez-Fons, *supra* note 135: 34-5.

270 Ibid.

271 Timothy Oyen, "Stare Decisis | Wex Legal Dictionary / Encyclopedia | LII / Legal Information Institute," accessed 25 March 2019, https://www.law.cornell.edu/wex/stare_decisis.

272 Ibid.

273 Gilbert Guillaume, "The Use of Precedent by International Judges and Arbitrators," *Journal of International Dispute Settlement* 2, 1 (2011): 5.

274 James L. Gibson, Delmar Karlen, and Brian P. Smentkowski, "Court | Law | Britannica.Com," accessed 25 March 2019, https://www.britannica.com/topic/court-law#ref191256.

275 Ibid.

276 Oyen, *op. cit*.

277 'Jurisprudence constante' in French. – Guillaume, *supra* note 273: 6.

278 Ibid.

order for the court to be able to refer to jurisprudence it needs a sufficient degree of clarity, continuity and permanence that makes it similar to *stare decisis*.[279] Civil law countries are considered to rely more upon statutes and ordinances than precedent.[280] Yet, it is notable that the aspiration for a minimum degree of legal certainty and foreseeability of the dispute settlement is inherent to both the common law and the civil law systems.[281] Are these theories relevant for the operation of international courts, such as the CJEU?

According to Conway, the CJEU's interpretive approach is comparable to law making that would place the CJEU under the terms of the common law tradition. He claims that the CJEU's cases gave rise to the doctrines and rules of general application analogous to the legal provisions of a legislative character, that transcended their immediate facts of a particular case and that violated relative distinctiveness of judicial and legislative functions.[282] What the critics find problematic is that in the absence of a textual basis the Court created the doctrines currently forming the essential characteristics of EU law.[283] According to Weiler, the foundations of the current legal system were laid by the CJEU in a series of decisions between 1963 and 1970s[284] when the doctrines of direct effect, primacy, implied powers and fundamental rights were established[285] by fixing the rules of relationship between the Community and the Member States.[286] These developments were claimed to result in law making, since the essential characteristics were of general character, the Treaties did not expressly provide neither of them at the time of their establishment and the Member States did not participate in their development.[287]

Is the criticism addressed to the CJEU justified? The following arguments suggest that it is not. To begin with, it must be stressed that only comparable phenomena can be compared. The common and civil law traditions both concern the operation of national courts. Thus, national courts representing different legal traditions can be compared in respect of each other, but courts of neither tradition are comparable to international courts. While the application of the concept of law making is perfectly suited to define activities of national courts, it is inappropriate to use it in respect of international courts. An assessment of an international court, like the CJEU, in the light of national legal traditions is methodologically inappropriate – only comparable institutions that belong to a comparable class can be compared. Therefore, the CJEU, as an international court, should first of all be analysed in the context of the other international courts and not in the light of the national

279 'Jurisprudence constante' in French. – Guillaume, *supra* note 273: 6.

280 Oyen, *supra* note 270.

281 Guillaume, *op. cit.*: 6.

282 Conway, *supra* note 115, 26.

283 J. H. H. Weiler, "The Transformation of Europe," *Yale Law Journal* 100, 8 (1991): 2413.

284 Ibid.

285 Ibid., 2413-2419.

286 Ibid., 2413.

287 See, *for example*: Conway, *supra* note 115; Anthony Arnull, "The European court and judicial objectivity: a reply to Professor Hartley," *Law Quarterly Review* 112, 1 (1996): 411–23; Tridimas, *supra* note 59: 199–210; Trevor Clayton Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union," *Law Quarterly Review* 112, 1 (1996): 95-109.

legal concepts, since the legal grounds, context and procedures under which these distinct groups of courts operate are very different.

As a general rule, international courts do not recognise the value of their judgments as *stare decisis*, i.e. as binding in following cases. For instance, in *Fisheries* case, the ICJ ruled that "<…> the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down."[288] The ICJ, however, tends to rely on its 'settled jurisprudence' and refers to its previous judgments for the sake of consistency of its jurisprudence.[289] Consequently, although the ICJ does not recognise binding nature of its judgments as precedents, it takes previous decisions into consideration that usually result in their confirmation.[290] The ECtHR has declared that it is not bound by its previous judgments, which is in line with the rules of the court.[291] Similarly to the CJEU, the ECtHR aims to be ready "<…> to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions."[292] Moreover, the ECtHR considered that if it failed to maintain a dynamic and evolutive interpretive approach it would risk rendering it a bar to reform and improvement that might make the rights of the ECHR not practical and ineffective.[293] To ensure that the interpretations of the ECHR are effective, the ECtHR adopted the so-called 'living tree' approach, meaning that the Convention must be interpreted in the light of the present day conditions.[294] Apparently, the CJEU is not the only international court that engages in teleological and evolutive interpretation.

If other international courts engage in similar techniques, why are the activities of the CJEU found so problematic? The answer lies in one significant feature of the CJEU that differs from other international courts. While the ICJ and the ECtHR refused to recognise a wider binding effect of their rulings, except among the parties in a particular case, the CJEU's interpretations of EU law are considered to have the *erga omnes* effect. Thus, the CJEU is different from other international courts in that the CJEU combines purposive and contextual interpretive techniques with far-reaching binding effects. Such a combination can indeed have a transformative power on the entire legal order of the EU, which could be confused with law making.

Since neither the ICJ nor the ECtHR are accused of law making, it appears that it is acceptable for the international community to have purposive and evolutive interpretation if such interpretation is accorded with binding powers limited to particular parties in a specific case. Yet in case of the CJEU, the far-reaching binding effects have made the CJEU's

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288 International Court of Justice, *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland).* Judgement of 25 July 1974, I.C.J. Reports 1974, p. 23-24, para. 53.

289 International Court of Justice, *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain).* Judgment of 5 February 1970, I.C.J. Reports 1970, p. 33, para. 34-35; International Court of Justice, *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran).* Judgment of 24 May 1980, I.C.J. Reports 1980, p. 18, para. 33.

290 Guillaume, *supra* note 273: 12.

291 Case No 10843/84 *Cossey v United Kingdom* [1990], para. 35.

292 Ibid.

293 Case No 46295/99 *Stafford v United Kingdom* [2002], para. 68.

294 Case No 5856/72 *Tyrer v United Kingdom* [1978], para. 31.

actions a target for criticism. However, if the successful integration is to be ensured, is there any other choice for the CJEU? Could uniformity and indivisibility of the EU legal order be ensured any other way?

Recently, Lenaerts and Guttierez-Fons provided a comprehensive defence for the Court's interpretive choices, which resulted in the constitutionalisation of the EU legal order. As they described it, "<…> the CJEU decided to fill the lacunae left by the authors of the Treaties by having recourse to principles capable of ensuring ideological continuity between EU law and national constitutions" so that the Member States would be reassured that the Community legal order embraced a particular public morality reflecting the basic values of European liberal democracies.[295] According to the scholars, as the CJEU filled those lacunae in the light of the constitutional traditions common to the Member States, "<…> the objectives pursued by the EU are aligned with those set out in national constitutions, thereby creating a 'common constitutional space' that does not threaten national sovereignty."[296] The autonomy and the essential characteristics of EU law were at the core of that 'common constitutional space' developed by the CJEU.

According to Walker and Conway, what can be seen in the EU is a progressive adaptation of the problem of incompleteness where each judicial act both offers a way forward and also exposes new gaps, the need for closure of which justifies yet further steps.[297] Each of the essential characteristics developed by the CJEU marked a new step in the EU's integration and the state of evolution of EU law. Being entrenched at the constitutional level, these principles have the influence for further judicial decisions of the CJEU. Thus, once the CJEU started the process of the gap-filling the attainment of which integration required, it started a never-ending process of constitutional self-reinforcement and self-justification where previously developed principles are placed as a basis for further rulings.[298] In this sense, the EU legal order is also a 'living tree' that is overseen by the Court. Application of the teleological and contextual interpretation allowed the CJEU to cope with changing times and react to the new circumstances.[299]

As the case law of the ICJ and the ECtHR suggest, such observance of the changing circumstances is compatible with international law. According to the ICJ, since international organizations do not possess general competence, they are governed by the 'principle of speciality.'[300] It means that founding states create international organisations and grant them with powers, "the limits of which are a function of the common interests whose promotion those [s]tates entrust to them".[301] The ICJ ruled that the powers conferred on

295 Lenaerts and Gutierrez-Fons, *supra* note 135: 36.

296 Ibid.

297 Conway, *supra* note 115, 105; Neil Walker, "Juridical Transformation as Process: A Comment of Stone Sweet," *German Law Journal* 8, 10 (2007): 932.

298 Ibid.

299 Lenaerts and Gutierrez-Fons, *supra* note 135: 34.

300 International Court of Justice. *Legality of the Threat or Use of Nuclear Weapons.* Advisory Opinion. Judgment of 8 July 1996, I.C.J. Reports 1996, p. 226, para. 25.

301 Ibid.

international organisations are normally expressly stated in their constituent documents.[302] Yet, the necessities of international life "<…> may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as 'implied' powers."[303] Several implications come from this. First, an express statement in the constituent treaties of the international organisation may not be the only source of the powers of the institutions of the organisation. Certain powers may be derived from the objectives of the organisation. Secondly, for the court entitled to interpret the law of an organisation, looking at the objectives of the organisation may be not a choice, but a necessity if the organisation's law is to be applied in a correct way that serves the purpose delegated by the founding states.

In case of the EU, the Member States had purposefully delegated to the CJEU under international law the task to observe the law and recognised the binding character of its case law. The CJEU has used its interpretive powers to ensure that European integration is a success, as the goals entrenched in the Treaties are part of the law that the Court is obliged to observe. Thus, in observing EU law, the CJEU applies a mixed interpretive methodology where the purpose and context may sometimes be of greater significance than purely textual interpretation. There may be other reasons compelling the CJEU to depart from text in search of the meaning. The Treaties are drafted in broad terms, contain general notions and only a few concrete rules.[304] Despite such generality of the interpreted materials, the CJEU must exercise its judicial authority in respect of it, as it is the only institution entitled to interpret the Treaties.[305] Yet, in any attempt to interpret vague provisions, the Court will have to rely on the purpose and context of the interpreted provision, as purely textual approach of open-textured provisions is not sufficient to achieve complete and consistent interpretation.[306] It may also be necessary to reduce the scope of application of EU law, if the textual reading is incompatible with the purpose of the provision.[307] Finally, extra-textual interpretation allows a debate about alternative normative preferences in interpretation of a specific rule, which may not be possible if the rule was interpreted solely on the basis of text.[308]

Thus, achievement of European integration requires the Court to react to changing circumstances, which reflects in the dynamic interpretation of the Court.[309] It must be stressed that the CJEU is not exceptional in its methodological choices, if it is compared to international courts, as was demonstrated above. It is the far-reaching binding effects of its rulings in the EU and Member States' legal orders that make the CJEU exceptional. However, the widely binding effect of CJEU's interpretations should not be equated with the law making in the

302 Legality of the Threat or Use of Nuclear Weapons, *supra* note 300, para. 25.

303 Ibid.

304 Lenaerts and Gutierrez-Fons, *supra* note 135: 31-2.

305 Ibid.

306 Ibid., 35.

307 Ibid.

308 Miguel Poiares Maduro, *supra* note 265: 144.

309 Lenaerts and Gutierrez-Fons, *op. cit.*: 51.

sense of the common law tradition, since it is the Member States that granted the Court with such powers. Interpretation which is not purely textual is still interpretation – other methods of international treaties' interpretation are not only foreseen in the VCLT, but are also actively used by international courts. The Court selects the methods depending on how well they serve the overall purpose of integration in the particular case. And that is entirely justified – the Treaty objectives are not merely declarative or hypothetical, but obligatory in the sense that the institutions are endowed with their powers precisely to achieve these objectives. The Treaty objectives are binding the institutions. However, should any limits be overstepped by the CJEU, the Member States retain the ultimate control of the Treaties and have the possibility to overrule any of the CJEU's interpretations. In turn, the Court has an obligation to pursue the implementation of the objectives when exercising its prerogatives foreseen under the Treaties, as it falls under the scope of its duty to observe the law.

In the light of these considerations the Court's interpretive techniques, propagating goal-oriented and dynamic interpretation should be considered to be within the limits of the powers conferred on the CJEU by the Treaties. The interpretive techniques used by the CJEU are in no way exceptional in the context of international courts: not only courts of international organisations have to interpret their founding treaties, but they also have to do so while giving due regard to the overall objectives of the organisation. Integration being the ultimate purpose of the EU, the CJEU must give it a due regard while interpreting EU law.

1.4. Summary

The doctrine of autonomy was developed gradually. It started with a simple idea that EU legal order derives from an independent source of law. It evolved into a complex network of constitutional principles – named essential characteristics of EU law – forming the foundation of the entire EU. They are the instruments used by the CJEU to ensure that integration is successful. It was revealed that the list of essential characteristics is not static and may be expanded by the CJEU if such need arises. To ensure the implementation of the systemic goals of the EU, the CJEU may go beyond the textual interpretive techniques giving the decisive importance to the context and purposes aimed to be achieved by the EU. These characteristics are also the criteria pursuant to which the compatibility of international dispute settlement mechanisms with EU law is analysed. Thus, the analysis conducted in the 1st Part will be particularly relevant for the remaining parts of this thesis.

The analysis revealed that the origins of the autonomy of the EU legal order stems from the fundamental purpose of European integration aspired by the EU. Purpose of integration had influenced the CJEU's interpretive choices in the course of the EU's evolution that resulted in the development of the autonomy and essential characteristics of EU law. Integration is perceived by the Court as both a never-ending process and the outcomes of that process, embodied in the EU's legislation. Both of these features are protected by the CJEU by applying autonomy.

The success of the process of integration requires ensuring that the EU institutions are able to carry out the functions and obligations, which the Treaties bind them to implement. Therefore, the CJEU protected the institutional framework of the EU, so that the powers

of the EU institutions are safeguarded from adverse effects of international agreements. In turn, once the legislation is adopted, integration requires ensuring its effectiveness. In order to be effective, law must be indivisible. Law will only have integrative effects if it is understood in the same way in different territories and will have the same level of binding power everywhere in the EU.

The only way in which uniformity can be ensured is by preventing any tribunals other than the CJEU from providing interpretations of EU law binding the EU, its institutions and the Member States. The fundamental importance of uniform interpretation of EU law has made the CJEU's exclusive right to provide definitive interpretation of EU law the central requirement of the principle of autonomy. This is where the CJEU's aspiration for the exclusive right to provide definitive interpretation of EU law derives from. To this end, the roles of the national courts in the EU legal system have come to be protected by the autonomy as well. For the sake of uniform interpretation and application of EU law, the essential characteristics of direct effect and primacy were also developed. Together with the principles of mutual trust, sincere cooperation and fundamental rights, designed to coordinate the Member States in achieving the EU's goals, these characteristics comprise a network of principles, rules and mutually interdependent legal relations linking the EU and the Member States into a process of creating an ever-closer Union among the peoples of Europe.

The analysis has shown that the CJEU's interpretive practices in developing the doctrine of autonomy were within the limits of the powers conferred on it by the Treaties. Integration, being a legally binding goal of the EU, determines the CJEU's interpretive techniques. As an institution of the EU, the CJEU is obliged by the Treaties to ensure that in the interpretation and application of the Treaties the law is observed. Observing the law means that the procedures foreseen under the Treaties are functioning properly and that integrative objectives are achieved following those procedures. In addition, it also means that the law is effective i.e. uniformly implemented throughout the EU. To this end, the CJEU adopted a dynamic methodology of judicial reasoning, involving textual, teleological and contextual methods of interpretation, which allowed it to react to the evolution of the EU and changing circumstances. Yet, departure from purely textual interpretation gave rise to the trend of criticism towards the Court as engaging in law making. The analysis has demonstrated that the CJEU's activities in interpreting EU law using dynamic methodology should not be regarded as law making. Dynamic interpretive approach of the Court is not unusual in the context of the interpretive techniques used by international courts. As an international court, the CJEU is not comparable to the national courts of the countries of the common law tradition, which are entitled to law making. Moreover, as an institution of an international organisation the Court is obliged by the Treaties to pursue the implementation of the Treaty objectives within the limits of the functions delegated to it under the Treaties – that is, through interpretations it provides. Giving due regard to the objectives set by the Treaties is not a choice, but an obligation. If the achievement of the Treaty objectives requires application of the extra-textual interpretation giving due regard to context and systemic purposes of the organisation – it is justified and within the limits of the Treaties.

2. CONSEQUENCES OF ACHMEA: FRICTION BETWEEN EU LAW AND INTERNATIONAL INVESTMENT PROTECTION LEGAL REGIME

While the 1st Part of the thesis was designated to analyse how the principle of autonomy of the EU legal order was previously applied by the CJEU to delimit the CJEU's jurisdiction from international dispute settlement bodies, the 2nd Part addresses *Achmea*[310] – one of the most recent rulings of the CJEU concerning autonomy. In *Achmea*, the CJEU ruled ISDS clauses entrenched in the intra-EU BITs incompatible with the principle of autonomy of the EU legal order. In short, *Achmea* has caused a conflict between the EU legal order and international investment protection regime.

While the Commission and the Member States consider *Achmea* to create an obligation to terminate all the intra-EU BITs and to cease exercising the ISDS clauses entrenched therein, ISDS tribunals do not recognise the EU's position and continue exercising their jurisdiction in intra-EU investment disputes. Thus, this situation requires a solution that would allow reconciling the autonomy of the EU legal order with the international investment protection regime.

The analysis is structured as follows. First, the factual background and significant points on autonomy raised by the CJEU in *Achmea* are discussed. Secondly, *Achmea* ruling provides a unique opportunity to observe how international tribunals in their cases analyse the question of applicability of EU law. The decisions on *Achmea* applicability issue in *Masdar v. Kingdom of Spain*[311] *(Masdar)*, *Vattenfall AB v. Germany*[312] (*Vattenfall*), *UP and C.D Holding Internationale v Hungary (UP and C.D Holding)*,[313] and other cases[314] are analysed. The main substantive points, which were addressed by the analysed tribunals when conducting *Achmea's* applicability analysis are scrutinised. It is examined whether their responses to *Achmea* reflect any risks for autonomy of EU law, as discussed in the 1st Part. Finally, the possible solutions for settling the friction between the two regimes are discussed.

2.1. Achmea ruling and its significance: EU perspective

2.1.1. Achmea dispute: background

The Slovak Republic acceded the EU in 2004. As a result of the accession, Slovakia liberalized its health care insurance market by setting up a system of regulated competition requiring the health insurance companies to be set up as joint stock companies that were allowed to make and distribute profits to their shareholders, while the clients were allowed

310 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40.

311 *Masdar*, *supra* note 43.

312 *Vattenfall*, *supra* note 43.

313 *UP and C.D Holding*, *supra* note 43.

314 *Foresight*, *supra* note 43; *RREEF*, *supra* note 43; *Greentech*, *supra* note 43; *Marfin*, *supra* note 43;

to switch between the insurance companies.[315] An independent Slovak Health Surveillance Authority was set up to issue operation licenses and to supervise the insurers' compliance with applicable regulations.[316]

In 2006 Achmea, still known as Eureko at that time, applied for and obtained a license that was followed by incorporation of *Union zdravotna poist'ovna a.s.* all shares of which were owned by Achmea. In total Achmea invested 72 million euro in the form of cash capital contributions.[317] In 2006 the Slovak Government changed[318] leading to the reform of health insurance companies. First, a *ban on profits* was introduced requiring to use the profits gained from health insurance for healthcare purposes and not at the discretion of the shareholders or the company. Secondly, a *ban of transfers* was imposed that prohibited a transfer of a portfolio of insurance contracts.[319] On 1 October 2008 Achmea (still known as Eureko) challenged these measures in arbitration proceedings against Slovakia on the basis of Netherlands-Czechoslovakia BIT (hereinafter – Dutch-Slovak BIT).[320]

Since the very beginning of the proceedings Slovakia, supported by the Commission, challenged the tribunal's jurisdiction to hear the case. Slovakia argued that the subject matter of the Treaties related to the same aspects of investment protection as the BIT in question,[321] that the Treaties were intended to replace the preceding intra-EU BITs[322] and that the provisions of the Treaties are so incompatible with those of the BIT that the two treaties are not capable of being applied at the same time.[323]

The Commission added that it had no issues with arbitration mechanisms set out in BITs entered into with non-EU countries.[324] It continued by stating that there is at least a partial overlap of the intra-EU BITs and the EU's internal market provisions.[325] Thus, the Member States resorting to an arbitration mechanism foreseen under an intra-EU BIT for matters partially covered by EU law, are in breach of Article 344 TFEU.[326] Intra-EU investors must rely on the EU judicial system by addressing national courts or calling on the Commission to initiate infringement proceedings.[327] According to the Commission, there was a serious potential for discrimination between EU investors from different Member

315 *Achmea B.V. v. the Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, para. 35.

316 Ibid.

317 Ibid., para. 36.

318 *Author's note*: Mr. Robert Fico of the *SMER-socialna demokracia* party assumed office as Prime Minister on 4 of July of that year. – Ibid., para. 39.

319 Ibid.

320 *Eureko BV v. the Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010.

321 Ibid., para. 77.

322 Ibid., para. 86-87.

323 Ibid., para. 109.

324 Ibid., para. 176.

325 Ibid., para. 178.

326 Ibid.

327 Ibid., para. 179.

States to be created due to the availability of a choice of dispute resolution procedures giving some investors an advantage over investors from other Member States.[328] The Commission also recalled the settled principle established in *Francovich* that a victim has a right to compensation for damage caused as a result of breaches of EU law thus contesting Eureko's assertion that an award of damages would not be available to it under the EU legal system.[329] The Commission considered that certain provisions of the BIT were incompatible with the Treaties, within the meaning of Article 30(3) of the VCLT, and that the BIT should not be applied.[330]

Having regard to all of the concerns, the Commission requested the tribunal to act in accordance with mutual respect and comity and suspend the proceedings by allowing the CJEU to resolve the matters in the infringement proceedings that were at that time already initiated by the Commission against Slovakia.[331] None of the persuasions convinced the tribunal to suspend the proceedings. The tribunal dismissed the intra-EU objection and claimed that it had jurisdiction in the case by also rejecting the request to suspend the proceedings until the CJEU has a say.[332] Following the proceedings the tribunal concluded that Slovakia had breached Article 3 and Article 4 of the Dutch-Slovak BIT by banning the use of profits and transfers of contracts and ordered to pay to Achmea 22.1 million euros with interest in damages.[333]

In 2013, Slovakia turned to the German courts[334] seeking to set aside the final arbitral award claiming that the recognition and the enforcement of the award would be contrary to the public policy.[335] Since the attempt before the Court of first instance was unsuccessful, Slovakia filed an appeal on a point of law to the *Bundesgerichtshof* (Federal Court of Justice).[336] The Federal Court of Justice did not share the concerns of Slovakia regarding the compatibility of Article 8 of the Dutch-Slovak BIT with Articles 18, 267 and 344 TFEU.[337] Yet, since the CJEU had not yet given a ruling on the compatibility of BITs with EU law and since the Federal Court of Justice found it impossible to infer the answer with sufficient certainty from the existing case law, it decided to refer to the CJEU for a preliminary ruling.[338] Specifically, the CJEU was asked whether, first, Article 344 TFEU precluded the application of an ISDS provision in an intra-EU BIT, when the BIT was concluded before one of the contracting parties acceded to the EU, but the proceedings were brought after its accession; secondly, if the question was answered in negative, whether Article 267 TFEU

328 *Eureko BV v. the Slovak Republic, supra* note 320, para. 183.

329 Ibid., para. 186.

330 Ibid., paras. 188-93.

331 Ibid., para. 196.

332 Ibid., para. 293.

333 *Achmea (formerly Eureko) BV v. the Slovak Republic*, PCA Case No. 2008-13, Final Award, 7 December 2012, para. 352.

334 *Author's note*: The seat of arbitration was Frankfurt am Main, and thus, the law applicable to the proceedings was German national law.

335 Case C-284/16, *Achmea BV v. Slovak Republic*, *Opinion of Advocate General Wathelet* [2017] EU:C:2017:699, para. 26.

336 Oberlandesgericht Frankfurt am Main – Higher Regional Court, Frankfurt am Main, Germany. – Ibid., para. 25.

337 Ibid., para. 29.

338 Ibid., para. 29-30.

precluded the application of such ISDS provision; thirdly, in case both previous questions were answered in negative, whether Article 18 TFEU, providing a general duty of non-discrimination, precluded the application of such ISDS provision.[339]

2.1.2. CJEU's ruling in Achmea: ISDS under intra-EU BITs – incompatible with autonomy

The CJEU responded to the preliminary questions by asserting that the Treaties preclude ISDS clauses entrenched in intra-EU BITs.[340] The Court's assessment in *Achmea* followed the line of logic of its previous case law concerning the autonomy of the EU legal order, as discussed in the 1st Part of this thesis. According to the Court, clauses of international agreements concluded between EU Member States, which provide an opportunity for an investor of one of the Member States to bring proceedings against another Member State before an arbitral tribunal are precluded by Articles 267 and 344 TFEU.[341] The CJEU remained silent on intra-EU ISDS compatibility with Article 18 TFEU. The CJEU based its position on the intra-EU ISDS effects on the essential characteristic of the EU judicial system.

As was explained in the 1st Part, the protection of the EU judicial system comprises of three aspects. First, the CJEU protects its own position as the sole institution entitled to provide definitive binding interpretation of EU law.[342] Secondly, it protects the position of national courts in the EU legal order as 'ordinary courts' of the EU and CJEU's collaborative relationship with these courts.[343] Thirdly, there is an obligation on the Member States to refer disputes concerning interpretation and application of EU law solely to the judicial system of the EU and not to external dispute settlement institutions.[344] As it will be demonstrated further, the Court concluded in *Achmea* that ISDS under intra-EU BITs are liable to affect all of these aspects.

First, the Court indicated that in order to rule on possible infringements of the BIT, the tribunal would have to take account of the law in force in the defendant Member State and other relevant agreements concluded by the Member States, which are parties to the BIT.[345] According to the CJEU, EU law must be considered as forming part of the law in force in the respective Member States.[346] EU law also derives from an international agreement concluded between the Member States parties to the BIT.[347] Consequently, the Court concluded that the tribunal established under ISDS clause might be called on to interpret

339 Case C-284/16, *Achmea BV v. Slovak Republic, AG Wathelet, supra* note 335, para. 30.

340 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 62.

341 Ibid.

342 Opinion 1/00, *supra* note 13, para. 13.

343 Opinion 1/09, *supra* note 17, para. 80.

344 Case C-459/03, *Mox Plant*, *supra* note 17, para. 123.

345 Case C-284/16, *Slovak Republic v Achmea BV*, *op. cit.*, para. 40.

346 Ibid., para. 41.

347 Ibid.

and apply EU law.[348] Thus, the tribunal's powers would interfere with the CJEU's exclusive right to provide definitive interpretation of EU law.

Secondly, the CJEU examined whether, given the fact that the tribunal could interpret and apply EU law, the tribunal was situated in the judicial system of the EU. The Court was in particular concerned with answering if the tribunal could be regarded as the 'court or tribunal of the Member State' and refer for a preliminary ruling under Article 267 TFEU.[349] Should the tribunal fall within the judicial system of the EU, its decisions would be subject to the mechanisms capable to ensure "the full effectiveness of EU law."[350] The CJEU then concluded that the tribunal in question could not in any event be classified as a court or tribunal of the Member State in terms of Article 267 TFEU, since the exceptional nature of the tribunal's jurisdiction (eliminating investment disputes from national courts) was precisely the reason why the assessed ISDS clause existed.[351] Thus, the ISDS tribunal did not fall within the EU judicial system and could not refer for a preliminary ruling, which would have made it compatible with EU law.

Thirdly, the Court assessed if a court of a Member State could review the award made by the tribunal, so that the questions of EU law the tribunal may have to address could be submitted to the CJEU for a preliminary ruling.[352] The Court found it problematic that judicial review of an award could only be exercised to the extent that respective national law of the seat of arbitration permits.[353] The Court reminded that in case of commercial arbitration it has previously justified a limited review of arbitral awards on the ground of efficient arbitral proceedings, if it could be ensured that fundamental provisions of EU law would be examined in the course of the review and a reference for a preliminary ruling could be made, if necessary.[354]

Yet, the Court ruled that investment dispute settlement as defined in intra-EU BITs is nothing like commercial arbitration proceedings.[355] The reason why the CJEU distinguished between commercial and investment arbitration was the origins of each arbitration. Commercial arbitration originates from the free will of the parties.[356] Thus, intra-EU commercial arbitration remains lawful, even if commercial arbitral tribunals engage in interpretation and application of EU law. Parties may still freely agree on commercial arbitration concerning EU law, as long as it is possible to subsequently review the fundamental questions of EU law and if those parties are not the Member States eliminating respective questions from the purview of the EU judicial system. In turn, the Court pointed out that investment arbitration originates from a treaty of the Member States removing jurisdiction

348 Case C-284/16, *Slovak Republic v Achmea BV, supra* note 40, para. 42.

349 Ibid., para. 43.

350 Ibid., para. 43.

351 Ibid., paras. 45-46.

352 Ibid., para. 50.

353 Ibid., para. 53.

354 Ibid., para. 54; Case C-126/97, *Eco Swiss ChinaTime Ltd. v. Benetton International NV* [1999] EU:C:1999:269, paras. 35-40; Case C-168/05, *Mostaza Claro v. Centro Móvil Milenium SL* [2006] EU:C:2006:675, paras. 34-39.

355 Case C-284/16, *Slovak Republic v Achmea BV*, *op. cit*., para. 55.

356 Ibid.

in the fields covered by EU law from the EU judicial system.[357] Consequently, the CJEU considered that by establishing ISDS mechanism in cases that might concern interpretation and application of EU law, the Member States prevent those disputes from being resolved in a manner that could ensure full effectiveness of EU law.[358] Thus, by concluding intra-EU BITs the Member States eliminated disputes concerning interpretation of EU law from the competence of the national courts, as 'ordinary courts' of the EU, and thereby prevented them from referring for a preliminary ruling to the CJEU.

The Court concluded that the possibility to submit disputes concerning interpretation of EU law to arbitral tribunal which is outside the EU judicial system provided in the Member States' treaty was liable to call into question the principles of mutual trust, sincere cooperation and preservation of the particular nature of the law established by the Treaties, which is ensured by the preliminary ruling procedure.[359]

2.1.3. Critical reception of Achmea: clash with international investment protection regime

2.1.3.1. Low probability that ISDS tribunals will need to interpret EU law

The CJEU held in *Achmea* that the tribunal "may be called on to interpret or indeed to apply EU law."[360] As was demonstrated in the 1st Part, autonomy indicates that such a situation is contrary to the CJEU's exclusive right to provide definitive interpretation of EU law. The CJEU's position has received a lot of criticism, whereas the proponents of the intra-EU ISDS considered the CJEU's conclusion on the necessity for the tribunal to interpret or apply EU law unfounded.

The Court was criticised for choosing such a conflicting stance towards the intra-EU ISDS,[361] while ignoring an alternative ISDS-friendly approach proposed by the AG Wathelet, which integrates intra-EU ISDS into EU law.[362] AG Wathelet observed that ISDS tribunals are highly unlikely to interpret EU law.[363] According to AG Wathelet, statistics proves that "the systemic risk which, according to the Commission, intra-EU BITs represent to the uniformity and effectiveness of EU law is greatly exaggerated."[364] The AG submitted that out of 62 closed intra-EU cases over decades, investors were only successful in 10 cases,

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357 Case C-284/16, *Slovak Republic v Achmea BV, supra* note 40, para. 55.

358 Ibid., para. 56.

359 Ibid., para. 58.

360 Ibid., para. 42.

361 Panos Koutrakos, "Managing Inter-Legality: Conceptualizing the European Union's Interactions with International Investment Law," in Klabbers and Palombella, *supra* note 10: 208.

362 Case C-284/16, *Achmea BV v. Slovak Republic*, *AG Wathelet*, *supra* note 335, para. 85; Nikos Lavranos, "Black Tuesday: The End of Intra-EU BITs," (2018) *Practical Law Arbitration Blog*, accessed 19 February 2020, http://Arbitrationblog.Practicallaw.Com/Black-Tuesday-the-End-of-Intra-Eu-Bits/.

363 Case C-284/16, *Achmea BV v. Slovak Republic*, *AG Wathelet*, *op. cit.*, paras. 44-5.

364 Ibid., para. 44-5.

representing only 16,1 percent success rate.[365] Moreover, out of those 10 cases, in none of them were the tribunals required to review the validity of EU laws, or compatibility of acts of the Member States with EU law.[366] In other words, tribunals in question were not required to interpret EU law. The only case, which resulted in an arbitral award allegedly incompatible with EU law that was named by the Member States and the Commission was *Micula*[367] award.[368] Considering these facts, the AG considered that the risk that ISDS tribunals established under intra-EU BITs could adversely affect uniform interpretation and effectiveness of EU law was not serious.

In addition, according to the AG Wathelet, disputes between investors and Member States do not fall at all under the scope of Article 344 TFEU, since it only encompasses disputes between Member States and disputes between Member States and the EU.[369] The AG considered whether the dispute arising out of the Dutch-Slovak BIT concerned the interpretation and application of the Treaties in terms of Article 344 TFEU, and concluded that it did not.[370] Such conclusion was based on the fact that the EU is not a party to the BIT making it not an integral part of EU law, unlike the situation in MOX Plant where the EU was a party to UNCLOS and the Accession Agreement assessed in *Opinion 2/13* that would have made the EU party to the ECHR.[371] Therefore, the AG was of the opinion that interpretation and application of EU law was not concerned in enforcement of intra-EU BITs. Rather, the AG Wathelet considered intra-EU investment protection as a sphere distinct from EU law.[372]

Similarly, as Koutrakos observed, jurisdictions of arbitral tribunals are limited to interpretation and application of the BITs on the basis of which a dispute has been brought before them.[373] It is not the function of ISDS tribunals to review the validity of EU laws or to interpret the meaning of EU law provisions. Moreover, Koutrakos asserted that the question whether EU law interpretation or application was concerned in the case was too broad.[374] It should have rather concentrated on whether tribunal could bind the respective Member State to that particular interpretation of EU law.[375] De Sadeleer underlined that the Dutch-Slovak BIT which was analysed by the CJEU in *Achmea* had a clause on applicable

365 Case C-284/16, *Achmea BV v. Slovak Republic, AG Wathelet, supra* note 335, para. 44.

366 Ibid.

367 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).

368 Case C-284/16, *Achmea BV v. Slovak Republic*, *AG Wathelet*, *op. cit.,* para. 45.

369 Ibid., para. 152-4.

370 Ibid.

371 Ibid., para. 167.

372 Koutrakos, *supra* note 361: 221.

373 Ibid., 213.

374 Panos Koutrakos, "But Seriously, What Is the Principle of Autonomy Really About?," *European Law Review* 43, no. 3 (2018): 293–94.

375 Ibid.; Koutrakos, *op. cit.*: 213.

law, which was worded in an unusual way.[376] Under the BIT the tribunal had to take account of the *law in force of the contracting party concerned*, meaning that the tribunal was entitled to interpret and apply domestic law of the parties.[377] Since EU law forms an integral part of the law of the Member States, the tribunal could have engaged in its interpretation and application under the BITs provision. However, as De Sadeleer observes, there are few such clauses in the BITs around the world which would expressly include the domestic law of the parties among the law applicable to disputes.[378] Thus, such a situation as in *Achmea* is highly unlikely to happen again.

Despite that it was unlikely that ISDS tribunals would engage in interpretations of EU law in the future, the CJEU in *Achmea* found the mere theoretical possibility that a tribunal might interpret EU law to be incompatible with the autonomy of EU law. The CJEU adopted an approach which is in line with its previous case law concerning the protection of autonomy. What can be witnessed in *Achmea* is the CJEU applying the purposive and contextual interpretation to assess the ISDS tribunal's jurisdiction (see Chapter 1.3). While purely textual approach could have led to the conclusion that the risk of tribunal interpreting or applying EU law is low, the contextual approach giving due regard to the systemic risks to European integration posed by the operation of intra-EU ISDS tribunals leads to a different conclusion.[379] As Hindelang suggested, the Court's approach is not a formalistic one: the Court "does not limit its reasoning to situations in which an investment tribunal technically '*applies*' EU law; it seems sufficient that it '*interprets*' it."[380] The Court seems to pre-empt a situation where the Member States would be subjected to conflicting obligations under EU law and the BITs, even if *potentially* only.[381] It would ultimately result in the impairment of the effectiveness of EU law.[382] If that happened, negative effect on European integration could occur. Considering these arguments, the CJEU in *Achmea* once again appears to have followed pro-integration reasoning.

2.1.3.2. Preliminary ruling procedure – does not preclude ISDS mechanism

The Court found in *Achmea* that the tribunal is not a part of the judicial system of the Netherlands or Slovakia[383] and "cannot in any event be classified as a court or tribunal 'of a Member State' within the meaning of Article 267 TFEU."[384] The conclusion of the Court was completely different from the AG Wathelet's position and was thus criticised.

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376 Nicolas De Sadeleer, "The End of the Game: The Autonomy of the EU Legal Order Opposes Arbitral Tribunals under Bilateral Investment Treaties Concluded between Two Member States," *European Journal of Risk Regulation* 9, no. 2 (2018): 363-4.

377 Ibid.

378 Ibid.

379 *Author's note*: For a more detailed analysis of the CJEU's interpretive choices see Chapter 1.3 of this thesis.

380 Hindelang, *supra* note 75: 392.

381 Ibid.

382 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 56.

383 Ibid., para. 45.

384 Ibid., para. 46.

According to the AG Wathelet, ISDS tribunals could be made a part of the EU judicial system, which would eliminate any conflict of the intra-EU BITS with Article 267 TFEU. Even if the questions of EU law interpretation could arise in the proceedings, it may be solved by allowing the ISDS tribunals to refer for a preliminary ruling.[385] AG Wathelet found that Article 267 TFEU did not preclude an ISDS mechanism such as the one provided under the Dutch-Slovak BIT, since the AG considered the tribunal to conform the criteria of a 'court or tribunal of the Member State' within the meaning of Article 267 TFEU.[386]

The AG analysed whether the body is established by law, is permanent, its jurisdiction is compulsory, its procedure is *inter-partes*, it applies rules of law and whether it is independent and concluded that the tribunal conformed to all of the criteria.[387] Yet, the AG did not consider whether the tribunal in question was sufficiently closely linked with the judicial system of either of the signatories to the BIT. The question was almost ignored in his opinion by merely stating that, in the eyes of the AG, tribunals established under intra-EU BITs are 'courts or tribunals' within the meaning of Article 267 TEFU.[388] An example of Benelux Court was provided by the AG to substantiate his position, since it was recognised by the CJEU to fall under the concept of 'court or tribunal of the Member State', despite being an international court created by the Member States by an international treaty.[389] The AG cited the CJEU's position that "<…> there is no good reason why such a court, common to a number of Member States, should not be able to submit questions to this Court <…>."[390] The AG considered the arbitral tribunal established under intra-EU BIT to be in an analogous position, since it was established by two Member States as a dispute settlement mechanism common to them.

Yet, a couple of drawbacks of such comparison are evident. The Benelux Court actually forms a part of national judicial systems of the three countries in question, despite being established by an international treaty, while the arbitral tribunals established under ISDS clauses do not belong to the national judicial systems.[391] Moreover, while the Benelux Court is permanent, arbitral tribunals established under intra-EU BITs for a particular dispute are not, as they are disbanded once the award is issued. Yet, to this end, the AG read the CJEU's rulings in *Merck*[392] and *Ascendi Beiras Litoral e Alta*[393] as meaning that 'permanence' criterion relates to the institutionalisation of arbitration as a dispute settlement

385 Case C-284/16, *Achmea BV v. Slovak Republic*, *AG Wathelet*, *supra* note 335, para. 85.

386 Ibid., para. 85, 131.

387 Ibid.

388 Ibid., paras. 126-7.

389 Ibid., para. 128.

390 Ibid., para. 128.

391 "In this regard, particular account must be taken of the fact that the Benelux Court has the task of ensuring that the legal rules common to the three Benelux States are applied uniformly and of the fact that the procedure before it is a step in the proceedings before the national courts leading to definitive interpretations of common Benelux legal rules." – Case C-337/95, *Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV* [1997] EU:C:1997:517, para. 22.

392 Case C-555/13, *Merck Canada Inc. v Accord Healthcare Ltd and others* [2014] EU:C:2014:92, para. 24.

393 Case C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira* [2014] EU:C:2014:1754, paras. 25-6.

mechanism and not to the composition of the specific arbitral tribunal.[394] According to the AG, it is not by reference to the specific arbitral tribunal (the composition of which is ephemeral), but by reference to the arbitral institution administering the proceedings (which are permanent), that the 'permanence' must be assessed.[395] Overall, the AG made a compelling argument in respect of the application of preliminary ruling to render intra-EU ISDS compatible with EU law.[396]

However, the Court was not eager to place ISDS tribunals within the EU judicial system. The Court expressly rejected the proposal of the AG Wathelet by stating that ISDS tribunals were of different nature than national courts of the Member States[397] and because of that particular nature these tribunals exist in the first place. Before ISDS tribunals are allowed to refer for a preliminary ruling, several other problematic issues should be resolved. For instance, what should be done in case the tribunals did not refer to the CJEU with preliminary questions, despite an obligation to do so? Given the *Masdar*, *Vattenfall* and other tribunals' responses to *Achmea* analysed further, it appears more likely that these tribunals would not refer for a preliminary ruling even if they had a chance. As Hindelang put it, the investment tribunals did not demonstrate any willingness for some kind of 'pragmatic co-existence' as well.[398] Considering the history of ISDS tribunals' rulings, could the CJEU expect that these tribunals would actually respect the preliminary ruling procedure?

2.1.3.3. Overlap between EU law and BITs provisions – merely partial

Doubts were expressed whether the alleged overlap between the Dutch-Slovak BIT and EU law exists, since the BIT addresses subjects that EU law does not.[399] *Achmea* was a unique and very rare case in that the claimants invoked the BIT's provisions on the free movement of capital and freedom of establishment. As it happens, these freedoms are also protected under EU law, which allowed the CJEU to conclude that the tribunal "may be called on to interpret or indeed to apply EU law, *particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital.*"[400] Indeed, the Court did not comment extensively on the overlap of the provisions of the BIT and rules of the single market as well as the extent of it.

Even if there is an overlap of the provisions on freedom of establishment and freedom of capital, the likelihood of a dispute arising out of these freedoms is low. As was stressed by Nagy, the BITs provisions on the free movement of capital and freedom of establishment

394 Case C-284/16, *Achmea BV v. Slovak Republic*, *AG Wathelet*, *supra* note 335, para. 101.

395 Ibid., para. 101-2.

396 Hindelang, *supra* note 75: 397.

397 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 45.

398 Hindelang, *supra* note 75: 397.

399 Nagy, *supra* note 76: 981.

400 Case C-284/16, *Slovak Republic v Achmea BV*, *op. cit.*, para. 42. – Emphasis added by the author.

are very rarely arbitrated.[401] On the contrary, the majority of arbitral cases concerning investment protection arise out of rules on prohibition of expropriation and fair and equitable treatment – the rules that "<…> have not counterpart – not even an imperfect one, – in EU law."[402] Therefore, the overlap between the subject matter of intra-EU BITs and EU law is merely partial.[403]

As was underlined by the AG Wathelet, any overlap between EU rules and the rules of BIT, which provide material protection of investment, like security, fair and equitable treatment and the prohibition of expropriation, is only partial and does not render the rules of the BIT incompatible with EU law.[404] On the contrary, being a factor encouraging the movement of capital between the Member States they should be considered compatible with the single market.[405] Consequently, scholars agree that BITs indeed address matters not covered by EU law.[406]

Yet, the Court did not state in *Achmea* that overlap between the Dutch-Slovak BIT and EU law was of full extent, nor was it CJEU's intention. What the Court is stating is that even partial overlap of the intra-EU BIT with EU rules, combined with the possibility that the tribunal will interpret those EU rules, is a sufficiently serious threat to the effectiveness of EU law and consequently – European integration. As was analysed in Chapter 1.3, the Court is the only institution able to assess EU measures, while giving due regard to the internal context of the EU, its systemic goals as well as how the specific measure interacts with other measures. Assessed in the light of these factors, even a partial overlap of EU rules with intra-EU BIT could have adverse effects on the effectiveness of EU law.

2.1.3.4. Termination of intra-EU BITs would infringe intra-EU investors' rights and stop investment flows

Some scholars oppose the CJEU's *Achmea* ruling by stating that intra-EU investors' rights would be infringed if intra-EU ISDS is abolished. There are several aspects, which are presented to support this position.

Firstly, according to Lavranos, Wierzbowski and Szostak, *Achmea* will result in a significantly reduced level of investment protection in the EU, since investors will have no other choice but to turn to malfunctioning, corrupted and politically influenced domestic courts.[407] Moreover, having intra-EU ISDS terminated means that intra-EU investors

401 Nagy, *supra* note 76: 992.

402 Ibid., 932-3.

403 Ibid., 996.

404 Case C-284/16, *Achmea BV v. Slovak Republic*, *AG Wathelet*, *supra* note 335, para. 210.

405 Ibid.

406 Nagy, *op. cit.*: 997-1000; Ciaran Cross and Dr Vivian Kube, "Is the Arbitration Clause of the Energy Charter Treaty Compatible with EU Law in Its Application between EU Member States?" (Munich, 2018), 4; Marta Abula, "Investor State Arbitration as Part of EU's Judicial System," *EU and Comparative Law Issues and Challenges Series* 2, no. 2 (2018): 690.

407 Lavranos, *supra* note 362; Krzysztof Wierzbowski and Aleksander Szostak, "The Downfall of Investment Treaty Arbitration and Possible Future Developments," *Dispute Resolution International* 13, no. 1 (2019): 68.

can only enforce their rights by reference to national courts. Thereby, another guarantee is taken away from investors – state-independent resolution of investment disputes, which was previously provided by the BITs.[408] Thus, it was submitted that *Achmea's* effect should be limited to cases related to analogous factual circumstances – where intra-EU BIT's rules on free movement of capital and freedom of establishment are invoked.[409] If *Achmea* is applied broadly to all intra-EU disputes, depriving EU investors of the possibility of ISDS, it may seriously impair intra-EU investment.[410]

Secondly, it is often claimed that abolishing ISDS will have a chilling effect on investment.[411] While the BITs are concluded between states, they provide benefits to private investors. The BITs provide foreign investors substantive and procedural guarantees from interference in their business by host states.[412] Many of such investors invest because of the protective rules of the BITs exist and naturally form legitimate expectations to be protected under BITs' provisions.[413] Investors' legitimate expectations would be impeded if the EU revoked the BITs' protection without replacing them with comparable protection under EU law.[414] Hence, the 'survival clauses' are included. Considering that only part of the subject matter of BITs overlaps with EU law, after termination of the BITs investors may be unable to effectively contest expropriation and demand fair and equitable treatment. Therefore, as a result of the loss of the ISDS option, future investors may not invest in the EU at all,[415] while investors currently invested in the EU's Member States may not defend their rights effectively.[416] As a result, some scholars expect abolishment of ISDS to cause adverse effect to the European economy.[417]

However, it was recently observed in UNCITRAL working group on ISDS reform that these risks may not be as serious as are often presented.[418] As it was outlined in the discussions, the evidence that structural reform of ISDS would meaningfully influence investment patterns or investment flows are inconclusive.[419] Moreover, some data indicates that BITs are hardly the decisive factor when investors are deciding whether to invest.[420] BITs and ISDS may have some impact on certain sectors of investors, but should not be absolutized. It was also observed that these threats of stopping investment flows are generally

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408 Nagy, *supra* note 76: 998.

409 Ibid., 1015.

410 Ibid.

411 Damjanovic and Sadeleer, *supra* note 76: 59;

412 Wierzbowski and Szostak, *supra* note 407: 61.

413 Nagy, *op. cit:* 997.

414 Ibid.

415 Wierzbowski and Szostak, *op. cit.*: 64-5.

416 Damjanovic and Sadeleer, *op. cit.*: 59.

417 Wierzbowski and Szostak, *op. cit.*: 64-5.

418 Anthea Roberts, "UNCITRAL and ISDS Reform: Plausible Folk Theories," (2020), *Blog of the European Journal of International Law*, accessed 22 February 2020, https://www.Ejiltalk.Org/Uncitral-and-Isds-Reform-Plausible-Folk-Theories/.

419 Ibid.

420 Ibid.

raised by the ISDS lawyers, who have a strong interest in maintaining the current ISDS system since "they are the ones most directly affected by the reforms."[421]

In the light of these arguments, claims that intra-EU BITs and ISDS are essential for intra-EU investment should not be taken as self-evident. While positive effects of BITs on international investment are usually presented as fact, there is little scientific evidence to substantiate such claims. If the CJEU had to weigh between the effective functioning of EU law and questionable benefits of intra-EU BITs for investment flows, it is reasonable that the former prevailed.

As was demonstrated in this Section, the opponents of the CJEU's position in *Achmea* managed to find compelling arguments to retain intra-EU ISDS. However, as was shown, the CJEU's position is easily defended if the broader context is taken into consideration.

2.1.4. Consequences of Achmea: setting ground rules of European investment policy

The CJEU's ruling in *Achmea* can only be understood in the broader context of the EU's foreign investment policy reform. Both the *Achmea* ruling and the *Opinion 1/17* are the reflections of the emerging European foreign investment policy. After the Lisbon Treaty, which placed the FDI under the CCP and made it the sphere of the exclusive competence of the EU, the Commission realised that creation and implementation of European foreign investment policy would be a lengthy and challenging process. The Commission suggested that development of comprehensive policy would be a 'gradual and targeted' process that will have to take a number of factors into account.[422] Among those fundamental factors was the question how to implement the European foreign investment policy while safeguarding the principle of autonomy of the EU legal order and, at the same time, respecting the EU's and the Member States' obligations under international investment law?

The Commission recognised that ISDS is such an established feature of the international investment regime that it will have to find a way to participate, if it does not want to discourage investors from investing in the EU.[423] As will be discussed in the 3nd Part, the ICS mechanism was created as the solution for the EU's participation in ISDS. The Commission also noted that with the exclusive competence in the field of the FDI the EU inherited from the Member States various BITs containing ISDS clauses.[424] It soon became clear that different kinds of the BITs would be treated differently in the EU. As demonstrated in the Diagram 4 below, while the agreements of the Member States with third countries were essentially integrated into the EU's investment policy, the intra-EU BITs and the application of the ECT's ISDS clause in intra-EU relations of the Member States, were declared incompatible with EU law. Each category of the agreements is discussed further.

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421 Roberts, *supra* note 418.

422 *European Commission, Communication: Towards a Comprehensive European International Investment Policy*, *supra* note 36, 11.

423 Ibid., 10.

424 Ibid., 9.

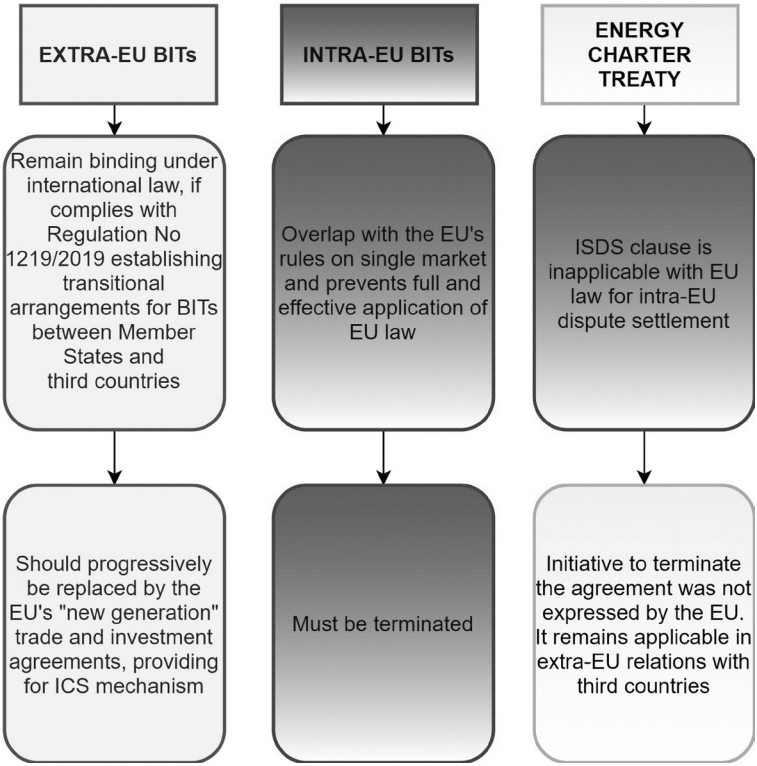

Diagram 4: *Compatibility of international investment treaties with EU law*[425]

2.1.4.1. Position of extra-EU BITs of the Member States in the EU

At the time the Lisbon Treaty entered into force, the Member States maintained a number of BITs with third countries. Since those agreements came under the competence of the EU and there were no explicit transitional provisions for such agreements in the Treaties, the Commission had to decide how to deal with them.[426]

According to the plan, the BITs remained binding on the Member States under public international law so that the interests of the EU's investors in the third states would be guaranteed by the respective agreements.[427] These extra-EU BITs had to be progressively replaced by the EU's agreements with the same countries, providing for high standards

425 Composed by the author.

426 Regulation (EU) No 1219/2019, *supra* note 37.

427 Ibid., preamble paras. 5-6.

of investment protection.[428] Yet, due to the continuing existence of the extra-EU BITs, the Commission set the conditions for the proper management of these agreements to eliminate any of their incompatibilities with EU law.[429] Thus, the Regulation 1219/2012 establishing transitional arrangements for Member Sates' BITs with third countries (the so-called 'Grandfathering Regulation') was adopted.[430] The Grandfathering Regulation set the procedural framework at the centre of which stands the Commission that has to be notified and consulted with regard to maintenance in force of the existing extra-EU BITs, their amendment, conclusion of new agreements and opening of their negotiations.

The existing extra-EU BITs were recently started to be replaced by the EU's agreements, containing the ICS mechanism, discussed in the 3rd Part. The first agreements were concluded with Singapore, Canada and Vietnam, while many more are under negotiation.[431]

2.1.4.2. Position of intra-EU BITs of the Member States in the EU

Unlike in the case of extra-EU BITs, the Commission has always viewed the substantive rules of the intra-EU BITs applied between the Member States to be a parallel system, which overlaps with the rules of the single market and, thereby, prevents the full application of the EU rules.[432] According to the Commission, intra-EU BITs are in conflict with the principle of non-discrimination among EU investors within the single market, since they confer rights only in respect of investors from the two Member States,[433] while investors from other Member States are not entitled to the same privileges. Moreover, by setting up an alternative dispute settlement mechanism intra-EU BITs take away from national courts litigation involving national measures and EU law.[434] In the absence of a dialogue with the CJEU, private arbitrators "cannot properly apply EU law."[435] Consequently, the ISDS under intra-EU BITs was regarded incompatible with EU law by the Commission. This position was expressed by the Commission in a number of arbitral proceedings where the Commission acted as *amicus curiae*.[436] The Commission considered that intra-EU ISDS is not essential for the protection of the rights and interests of investors, as they are in multiple ways protected under EU law.[437] Although investors will not be able to initiate ISDS proceedings

428 Regulation (EU) No 1219/2019, *supra* note 37, preamble para. 5.

429 Ibid., preamble paras. 5, 11.

430 Ibid., preamble para. 4.

431 For instance, New Zealand, Australia, Mexico, Japan, Argentina, Brazil, Paraguay and Uruguay. – European Commission, "Negotiations and Agreements", *supra* note 54.

432 Communication from the Commission to the European Parliament and the Council *on Protection of Intra-EU Investment*, *supra* note 42, 2.

433 Ibid.

434 Ibid.

435 Ibid.

436 See, *for example*: *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.19; *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, paras. 334-340.

437 Communication from the Commission to the European Parliament and the Council *on Protection of Intra-EU Investment*, *op. cit.,* 5-17.

on the basis of intra-EU BIT's, there is a system of various remedies in place within the EU that would help to protect the investments and enforce their rights as effectively as ISDS.

Having regard to these views, the Commission has consistently held intra-EU BITs incompatible with EU law and took action to eliminate such agreements. With *Achmea*, the CJEU has supported the long-standing position of the Commission in respect of the intra-EU BITs, by asserting that ISDS under intra-EU BITs is incompatible with the autonomy of the EU legal order.[438] Again, it provided the needed legal obligation on the Member States to terminate their intra-EU BITs and to cease exercising the ISDS clauses contained in such agreements. While the Commission's position in respect of the intra-EU BITs was based on the political arguments, the CJEU provided the Member States with a legally binding reason to consider intra-EU BITs incompatible with EU law.

After *Achmea*, the Commission again intensified the dialogue encouraging the termination of the remaining intra-EU BITs.[439] The Commission requested 21 Member States to provide information on their intra-EU BITs.[440] Two Member States – Ireland and Italy – ended all of their intra-EU BITs in 2012 and 2013 respectively.[441] In January 2019, 22 Member States have supported the Commission and signed a declaration on the legal consequences of *Achmea*.[442] The Member States declared that they consider tribunals established under ISDS clauses to lack "<…> jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty."[443] This declaration materialised into an international agreement, whereby 23 Member States have terminated their intra-EU BITs concluded among each other.[444] The agreement provides a Member States' confirmation that ISDS clauses of intra-EU BITs are incompatible with EU law and cannot serve as a legal basis for arbitration proceedings.[445] In addition to this general obligation, rules for concluded and pending proceedings are set. While the former will not be affected by the agreement,[446] the latter are subject to various measures, such as informing the tribunals of the Member States' lack of consent to arbitrate, requesting competent courts to set the arbitral award aside, annul it, or refrain from recognizing and enforcing it.[447] Notably, the agreement is subject to ratification procedures which means

438 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 59.

439 Communication from the Commission to the European Parliament and the Council *on Protection of Intra*-EU Investment, *supra* note 42, 2-3.

440 Ibid.

441 Ibid.

442 Declaration of the Representatives of the Governments of the Member States of 15 January 2019 *on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the EU*, *supra* note 42.

443 Ibid.

444 Agreement of 5 May 2020 for the Termination of Bilateral Investment Treaties between the Member States of the European Union, A/T/BIT/Annex A/En 1, Https://Ec.Europa.Eu/Info/Files/200505-Bilateral-Investment-Treaties-Agreement_en.

445 Ibid., Articles 2 and 5.

446 Ibid., Article 6.

447 Ibid., Articles 7 to 9.

that it may take some time for it to come into force.[448] Thus, Member States provided several measures to be undertaken to manage the intra-EU investment arbitration (see the following Sub-Section).

2.1.4.3. Position of the ECT in the EU

The CJEU remained silent on the compatibility of the ECT's ISDS clause with EU law in *Achmea*. Due to the abstract wording of the ruling, the CJEU has left confusion concerning the scope of *Achmea's* application. The wording used by the CJEU, namely, its statement that ISDS provisions 'such as' the one in the Dutch-Slovak BIT, are precluded under EU law, immediately raised a discussion whether *Achmea* rule could also be applied to the multilateral treaties concluded not only between the Member States, but also by the third parties and the EU itself. In general, there is only a single such treaty in the existence – the ECT (see Diagram 5 below).[449]

Yet, the Commission and the Member States have interpreted *Achmea* as applicable to the intra-EU arbitration under the ECT as well. The Commission considers that the ECT's Article 26, as far as intra-EU relations are concerned, does not provide for an ISDS arbitration clause applicable between investors from a Member State and other Member States of the EU.[450]

Right after the *Achmea* ruling the Commission issued a communication on protection of intra-EU investment, where it ruled that the reasoning of the CJEU in *Achmea* applies equally to the intra-EU application of Article 26 ECT providing an ISDS clause.[451] According to the Commission, such clause is incompatible just like the clauses of intra-EU BITs, since "<...> it opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU."[452] The Commission did not consider the fact that the EU is also a party to the ECT as affecting this conclusion, since the participation of the EU only created rights and obligations between the EU and third parties that did not affect the internal relationship between the EU Member States.[453] Thus, the Commission has been systematically challenging the jurisdiction of the tribunals established under the ECT to handle intra-EU cases.[454]

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448 Agreement of 5 May 2020 for the Termination of Bilateral Investment Treaties between the Member States of the European Union, *supra* note 444, Article 15.

449 The question whether *Achmea* is applicable to the ECT is a significant one – over half of the registered ISDS cases under the ECT were brought by investors from one Member State of the EU against another Member State as the respondent state. It means that if the ECT was not applicable to disputes between the EU Member States, the tribunals would lose half of its workload. – De Sadeleer, *supra* note 376: 357.

450 Communication from the Commission to the European Parliament and the Council *on Protection of Intra-EU Investment*, *supra* note 42, 3-4.

451 Ibid., 4.

452 Ibid.

453 Ibid.

454 *Masdar*, *supra* note 43, para. 304; *Eureko BV v. the Slovak Republic*, *supra* note 320, paras. 175-96; *Vattenfall*, *supra* note 43, para. 54.

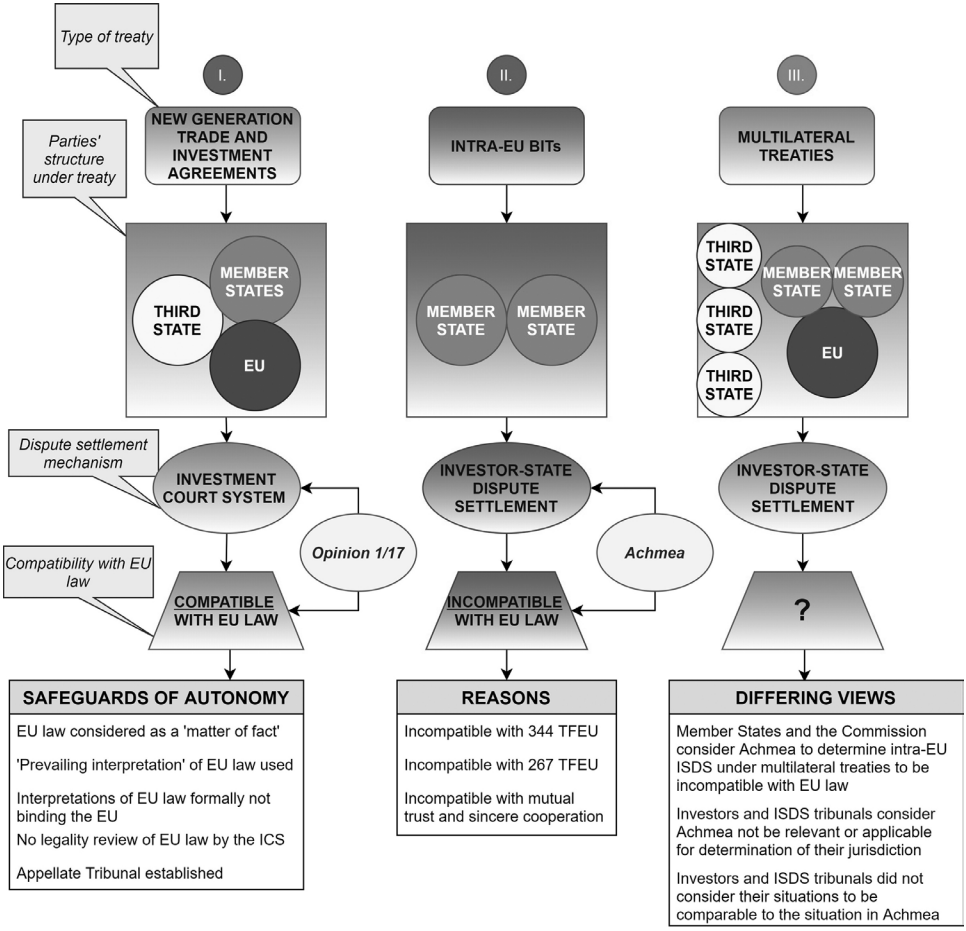

Diagram 5: *the CJEU's case law in respect of European foreign investment policy*[455]

The majority of the Member States supports the Commission as well. In a joint declaration they have expressed their views that the ECT, being an integral part of EU law, must be compatible with the Treaties.[456] Therefore, the ECT's ISDS clause, which is applicable between the Member States, is incompatible with the Treaties and should consequently be disapplied.[457] Moreover, the Member States declared the measures that should be undertaken without undue delay in respect of intra-EU investment arbitration arising from the

455 Composed by the author.

456 Declaration of the Representatives of the Governments of the Member States of 15 January 2019 *on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the EU*, *supra* note 42, 2.

457 Ibid.

intra-EU BITs and the ECT.[458] Among other things, the Member States informed the investors' community that no new intra-EU investment arbitration proceedings should be initiated; the Member States will request courts (including in third countries) that are deciding in proceedings related to recognition (or enforcement) of intra-EU investment arbitration awards, to set those awards aside or not to enforce them due to a lack of valid consent to arbitrate; they will undertake steps so that Member State-controlled companies withdraw pending cases; they will terminate all the remaining intra-EU BITs either by plurilateral treaty, or by bilateral means.[459] While the Commission's communication and the Member States' declaration on *Achmea's* consequences are more of political nature, and not legally binding documents, they reflect a strong position of the EU on how the intra-EU dispute resolution will be handled from the EU's and the Member States' side.

Considering the above, from the perspective of the Commission and the Member States, *Achmea* is applicable to the entire field of intra-EU investment arbitration arising out of both the intra-EU BITs as well as the ECT (see Diagram 5). Yet, the Commission did not express the view that the ECT should be terminated, as is the case with intra-EU BITs. So far, the ECT's ISDS clause should merely be disapplied.[460] As the Member States indicated in their declaration: "<…> Member States together with the Commission will discuss without undue delay whether any additional steps are necessary to draw all the consequences from the *Achmea* judgment in relation to the intra-EU application of the Energy Charter Treaty."[461] Thus, at least for now, there are no intentions to terminate the ECT from the EU's side, but there is a strong determination to disapply ECT's arbitration clause.

But it is one thing to persuade the Member States that ECT's arbitration clause is inapplicable due to incompatibility with EU law and another thing to convince arbitral tribunals that they do not have jurisdiction anymore due to the CJEU's ruling. The CJEU's *Achmea* ruling makes sense from the internal perspective of EU law, having regard to the well-established case law of the CJEU on the autonomy of EU legal order. The CJEU applied the rules developed previously to protect the functioning of the EU judicial system from adverse effects of external dispute settlement mechanisms entered into by the Member States (see the 1st Part). Yet, from the perspective of international law, the EU's internal considerations based on the principle of autonomy and protection of uniform interpretation of EU law, may seem to be irrelevant and not applicable for determination of jurisdiction of the ISDS tribunals operating under valid intra-EU BITs and the ECT.

It is now evident that CJEU's position in respect of the intra-EU investment dispute settlement has created friction between EU and international investment dispute settlement law.

Immediately after its release, *Achmea* raised a principal problem for ongoing arbitral

458 Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment *of the Court of Justice in Achmea and on Investment Protection in the EU, supra* note 42, 3.

459 Ibid., 3-4.

460 Communication from the Commission to the European Parliament and the Council *on Protection of Intra-EU Investment*, *supra* note 42, 26.

461 Declaration of the Representatives of the Governments of the Member States of 15 January 2019 *on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the EU*, *op. cit.*, 4.

proceedings. Should the ISDS tribunals hearing intra-EU disputes apply *Achmea* in ongoing proceedings by renouncing their jurisdictions in the respective cases? The first reactions to *Achmea* of the investment tribunals emerged recently.

Consequently, while this Chapter has presented *Achmea* and its place in the emerging EU's foreign investment policy, the following Chapter addresses *Achmea* from the ISDS tribunals' perspective, aiming to scrutinise how they analyse *Achmea* issue and to answer if their reactions represent any threats to the autonomy of the EU legal order.

2.2. Responses of investment tribunals: forming a common approach

To the knowledge of the author in December 2019 there were 98 intra-EU ISDS cases that were pending when *Achmea* was delivered or which were initiated afterwards.[462] Out of those cases, in seven cases the *Achmea* ruling was addressed by the respective tribunals.[463] Notably, in three other cases the respective tribunals refused to admit *Achmea* as a legal argument in their proceedings due to various procedural barriers.[464] Majority of these cases were initiated under the ECT,[465] while three cases were brought under intra-EU BITs.[466] *Antaris* was initiated pursuant to both the ECT and a BIT (see Table 1 below).

Table 1: *Background of post-Achmea ISDS cases*[467]

Case	Treaty	Arbitration rules	Achmea issue analysed in:
Gavrilovic	Austria-Croatia BIT	ICSID Convention - Arbitration Rules	Decision on the Respondent's Request of 4 April 2018
Masdar	ECT	ICSID Convention - Arbitration Rules	Award
Antaris	Energy Charter Treaty (ECT), Czech Republic - Germany BIT (1990)	UNCITRAL (1976)	Award
Antin	ECT	ICSID Convention - Arbitration Rules	Award
Vattenfall	ECT	ICSID Convention - Arbitration Rules	Decision on the *Achmea* Issue

462 Szilágyi and Usynin, *supra* note 76: 5; 32-38.

463 *Masdar*, *supra* note 43; *Vattenfall*, *supra* note 43; *UP and C.D Holding*, *supra* note 43; *Foresight*, *supra* note 43; *RREEF*, *supra* note 43; *Greentech*, *supra* note 43; *Marfin*, *supra* note 43; Gáspár Szilágyi and Usynin, *op cit.*, 5.

464 *Georg Gavrilovic and Gavrilovic d.o.o v Republic of Croatia*, ICSID Case No ARB/12/39, Decision on the Respondent's Request of 4 April 2018, 30 April 2018; *Antaris Solar GmbH and Dr Michael Göde v Czech Republic*, PCA Case No 2014-01, Award, 2 May 2018; *Antin Infrastructure Services Luxembourg Sà.r.l and Antin Energia Termosolar BV v Kingdom of Spain*, ICSID Case No ARB/13/31, Award, 15 June 2018.

465 These are *Masdar*, *Antin*, *Vattenfall*, *Foresight*, *RREEF* and *Greentech*.

466 These are *Gavrilovic*, *UP and C.D Holding* and *Marfin*.

467 Composed by the author.

Case	Treaty	Arbitration rules	Achmea issue analysed in:
UP and CD Holding	France - Hungary BIT (1986)	ICSID Convention - Arbitration Rules	Award
Foresight	ECT	SCC Arbitration Rules (2010)	Award
RREEF	ECT	ICSID Convention - Arbitration Rules	Decision on Responsibility and on the Principles of Quantum
Greentech	ECT	SCC Arbitration Rules (2010)	Award
Marfin	Cyprus-Greece BIT	ICSID Convention - Arbitration Rules	Award

Achmea has set off the re-examination of the analysed tribunals' jurisdiction in the respective proceedings, since the question of jurisdiction was already settled in all of the proceedings when *Achmea* came out. Each of these cases produced similar results – claims that tribunals have no jurisdiction in respective cases because of the *Achmea* ruling were rejected. Despite that the outcome of this re-examination was the same in all of the cases, the substantive points of analysis re-emerging in their proceedings require scrutiny. The purpose of this Chapter is to analyse how the question of applicability of *Achmea* ruling was analysed by the tribunals and how the conclusion that *Achmea* does not affect their jurisdictions in the respective cases was reached. The most important material points of the *Achmea's* legal relevance analysis, which were raised by the analysed tribunals, are scrutinised. Namely, the scope of *Achmea's* applicability is first addressed aiming to answer whether it applies to the intra-EU ISDS arising out of the ECT. Secondly, the question whether EU law forms part of the applicable law in the investment arbitration proceedings is tackled. Thirdly, the tribunals questioned whether international rules of conflict of laws can be applied to resolve the challenges to their jurisdictions. Each of the questions is discussed in the following Sections. Notably, since *Gavrilovic*, *Antaris* and *Antin* tribunals entirely refused to accept *Achmea* as a jurisdictional objection on the procedural grounds, these cases are not discussed further.

2.2.1. Scope of the application of Achmea does not extend to the ECT

As was already explained in Sub-Section 2.1.4.3, the Commission and the Member States contend that *Achmea* renders the ECT's ISDS clause inapplicable for the resolution of intra-EU disputes. Following *Achmea* it has become evident that typical ISDS is not considered to be a legit option for the resolution of intra-EU investment disputes. Yet, the analysed tribunals disagreed that the effect of interpretations provided in *Achmea* extends to the ISDS clause of the ECT as well. One argument recurred in the positions of several tribunals: *Achmea* ruling allegedly does not apply to the kind of treaties the respective tribunals originate their jurisdictions from – the multilateral treaties that are not BITs discussed in *Achmea*. Thus, the tribunals reached the conclusion that *Achmea* did not affect their jurisdiction in any way.

The *Masdar* tribunal's position was largely based on *Achmea's* limited application argument. First, it stated that *Achmea* concerned a specific agreement only – the Dutch-Slovak BIT.[468] Secondly, it stated that in a more general perspective *Achmea* applied to any "provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection" between the Netherlands and Czech and Slovak Federative Republic.[469] The tribunal then simply concluded that the ECT was not that kind of treaty and therefore *Achmea* "<…> does not take into consideration, and thus it cannot be applied to, multilateral treaties, such as ECT, to which the EU itself is a party."[470] Yet, the tribunal did not limit itself with that conclusion. It then oddly relied on the AG Wathelet's opinion where it was expressly stated that he considered the ECT compatible with EU law.[471] The *Masdar* tribunal considered it sufficient to conclude that *Achmea* did not have any consequences for intra-EU dispute settlement under the ECT.[472] *Masdar* tribunal's reasoning was subsequently endorsed by the *Vattenfall*, *Foresight* and *Greentech* tribunals, which cited *Masdar's* arguments and applied them to their respective cases to reject relevance of *Achmea*.[473]

The *RREEF* tribunal observed that *Achmea* ruling was inapposite for the tribunal's proceedings.[474] *Achmea* concerned an intra-EU instrument concluded exclusively by two Member States.[475] According to *RREEF* tribunal, it was not the case with the ECT, which binds the EU and the Member States on the one side and non-EU states on the other.[476]

The *Vattenfall* tribunal declined the respondent's assertion that Articles 267 and 344 TFEU prohibited intra-EU ECT arbitrations.[477] The tribunal had a serious difficulty to identify the precise rule of international law from these provisions of EU Treaties, or arising from *Achmea*, in accordance with which 'as relevant rules of international law' the ECT should be interpreted.[478] As the CJEU's reasoning did not specifically address the ISDS under the ECT and the wording of Article 26 ECT was regarded different from Article 8 of the Dutch-Slovak BIT, the tribunal endorsed *Masdar* tribunal's view that *Achmea* was silent on the compatibility of intra-EU ISDS under the ECT and also pointed to the opinion of the AG Wathelet.[479] *Vattenfall* tribunal noted that "it is not for this Tribunal to extrapolate from the ECJ Judgment and declare a new rule of international law which is not clearly stated therein, or to decide which other scenarios would pose the same EU law concerns

468 *Masdar*, *supra* note 43, para. 679.

469 Ibid.

470 Ibid.

471 Ibid., paras. 680-82; Case C-284/16, *Achmea BV v. Slovak Republic*, *AG Wathelet*, *supra* note 335, para. 43.

472 *Masdar*, *op. cit.*, para. 683.

473 *Vattenfall*, *supra* note 43, para. 163; *Foresight*, *supra* note 43, para. 220-21; *Greentech*, *supra* note 43, para. 399.

474 *RREEF*, *supra* note 43, para. 211.

475 Ibid.

476 Ibid.

477 *Vattenfall*, *op. cit.*, para. 161.

478 Ibid., para. 159-161.

479 Ibid., para. 161-163.

as those that the ECJ found in relation to the Netherlands-Czechoslovakia BIT."[480] Due to these considerations, the tribunal reached the same conclusion as the *Masdar* tribunal, i.e. that EU law and *Achmea* could not be taken into account for the purposes of a so-called 'harmonious' interpretation of Article 26 ECT that would exclude intra-EU investor-state arbitrations.[481] Thus, *Vattenfall* tribunal did not consider *Achmea* to extend to the ECT.

The *UP and C.D Holding* and *Marfin* tribunals were more original with their approach. They ignored the fact that their proceedings were initiated on the ground of intra-EU BITs and tied their jurisdiction to the ICSID Convention exclusively.[482] As the *UP and C.D Holding* tribunal put it, since the *Achmea* ruling contained no reference to the ICSID Convention or arbitration under it, it could not be understood as determining that Hungary was no longer bound by the ICSID Convention due to its accession to the EU.[483] It added that irrespective of what could be argued from *Achmea* in respect of the BITs, "<…> as regard jurisdiction under the ICSID Convention it is undisputed that Hungary did not expressly terminate its participation in and submission to arbitration pursuant to ICSID Convention when it joined the EU in 2004."[484] The *Marfin* tribunal defended its jurisdiction by analysing whether consent to arbitrate was still valid. According to the tribunal, consent to arbitrate under ICSID Convention was given by Greece by including offer to arbitrate in the BIT.[485] Under Article 25(1) of the ICSID Convention, once this consent was accepted by an investor through the initiation of arbitral proceedings, this consent may not be withdrawn unilaterally by respondent state.[486] Moreover, the *Marfin* tribunal underlined, that the issues of jurisdiction do not relate to the issues of the enforceability of the awards.[487] The tribunal may legitimately claim jurisdiction, even if later its award is not considered enforceable in some states.[488] Consequently, the tribunal considered that the principle of legal certainty entitled investors to rely on state's written consent to arbitrate as long as that consent is withdrawn by terminating the treaty.[489] Since *Achmea* did not result in such termination, it was not considered as affecting both of these tribunals' jurisdictions under the ICSID Convention.

As was demonstrated above, the analysed tribunals all responded to *Achmea* with one principal argument: since *Achmea* only mentioned intra-EU BITs, it applies to such BITs only. The ECT, or the ICSID Convention, being multilateral treaties are different. Therefore, for intra-EU disputes arising from the ECT, or conducted under the ICSID Convention,

480 *Vattenfall, supra* note 43, para. 164.

481 Ibid., para. 167.

482 In case of *UP and C.D Holding* tribunal it was the France-Hungary BIT while in Marfin the Cyprus-Greece BIT was concerned. – *UP and C.D Holding*, *supra* note 43, para. 253; *Marfin*, *supra* note 43, para. 1.

483 *UP and C.D Holding*, *op. cit.*, para. 258.

484 Ibid., para. 259.

485 *Marfin*, *op. cit.*, para. 593.

486 Ibid.

487 Ibid., para. 596.

488 Szilágyi and Usynin, *supra* note 76: 21-2.

489 Ibid.

Achmea is irrelevant. Are the situations really so different from *Achmea*, as the analysed tribunals suggest?

It must be underlined that there are many similarities between the factual situations of the analysed arbitral proceedings with the situation of *Achmea* arbitration (see Table 2 below). First, they are all clearly of intra-EU character, i.e. the claimants are established within the EU while the respondent states are the Member States of the EU, just as it was in case of *Achmea* (see Row 1 of the Table 2). All the respective treaties that are concerned in the proceedings provide that the disputes are to be settled in applying those treaties and other applicable rules and principles of international law (see Row 3 of the Table 2). Those same circumstances existed in case of *Achmea* arbitration as well.

Considering the above, it is essential to scrutinise the differences between the situations and to assess whether they are of such significance that could render *Achmea* ruling inapplicable for determination of jurisdiction of the tribunals in those cases. The first evident difference is that the *Masdar*, *Vattenfall*, *Foresight*, *RREEF* and *Greentech* cases arise out of the alleged breach of the ECT. The *UP and C.D Holding* and *Marfin* originate from intra-EU BITs (just as in *Achmea* situation the Dutch-Slovak BIT was infringed) (see Row 2 of the Table 2). Thus, the situations in the *UP and C.D Holding* and *Marfin* are clearly similar to the *Achmea* arbitration since these cases originated from the intra-EU BITs containing comparable ISDS clauses which were ruled incompatible with EU law by the CJEU. In turn, the *Masdar*, *Vattenfall*, *Foresight*, *RREEF* and *Greentech* cases are different in that they arose out of the multilateral treaty – the ECT.

Aside the claims that *Achmea* does not apply to the ECT as a multilateral treaty concluded by the EU itself, the principal argument invoked by the tribunals to deny the relevance of *Achmea* concerns the rules of arbitration applicable to the proceedings (see Row 4 of the Table 2). The tribunals have formally delimited the rules applicable to their proceedings. Notably, UNCITRAL Arbitration Rules were applied for the *Achmea* arbitration. In turn, all the analysed tribunals, except *Foresight* and *Greentech*, applied ICSID Convention and ICSID Rules of Procedure for Arbitration Proceedings. The *Foresight* and *Greentech* tribunals applied the Stockholm Chamber of Commerce Arbitration Rules. Some of the tribunals used the fact that arbitration rules in their cases are different from *Achmea* as the main argument to reject the applicability of *Achmea* for determining their jurisdiction. For instance, the *UP and C.D Holding* tribunal distanced its jurisdiction from the France-Hungary BIT claiming that its jurisdiction originated from the ICSID Convention only (see Rows 5 and 6 of the Table 2).[490] The tribunal asserted that *Achmea* did not have the effect of terminating Hungary's participation in ICSID Convetion.[491] In turn, *Masdar* and *Vattenfall* used the same argument in respect of the ECT claiming that nothing in EU law could be regarded as precluding ISDS under the ECT or the ICSID Convention,[492] as the two orders are not in conflict and can be applied together.[493] Evidently, the positions of

490 *UP and C.D Holding*, *supra* note 43, para. 253.

491 Ibid., para. 259.

492 *Masdar*, *supra* note 43, para. 340; *Vattenfall*, *supra* note 43, paras. 166-7.

493 *Masdar*, *op. cit.*, para. 340.

the arbitral tribunals on the scope of application of *Achmea* have differred from the EU's position.

Apparently, the tribunals have considered the applicable arbitration rules as a separate ground, out of which their jurisdictions originate (particularly, the *UP and C.D Holding* tribunal). Yet, from the perspective of EU law, the question of the rules of arbitration should be regarded as an integral part of the question of legality of an ISDS clause (contained in intra-EU BITs or the ECT), which foresee the possibility to choose the rules of arbitration. The *Achmea* ruling stated that ISDS clauses contained in intra-EU BITs are precluded by the primary law of the EU. Thus, as was proven above, as a matter of EU law the ISDS clauses were rendered inapplicable to the intra-EU dispute settlement, despite the fact that respective BITs and the ECT are not formally terminated yet. The inapplicability of the ISDS clauses for intra-EU dispute settlement contained in the intra-EU BITs and the ECT should be considered as encompassing their internal references to the alternative arbitration forums and rules available under the respective clause. Thus, if the original ISDS clause of the BIT or the ECT is considered unlawful due to the lack of consent under EU law in that particular dispute, it should no longer matter whether UNCITRAL Arbitration Rules, or the ICSID Convention and rules, are applied to the dispute. They should be regarded inapplicable as a result of the inapplicability of the original ISDS clause, which provides the possibility to choose these rules for the proceedings. But can this EU law perspective be coordinated with international law of treaties?

It turns out, that arbitral tribunals applied a very similar model for dealing with challenges based on EU law. The tribunals agreed to formally reconsider the question of their jurisdiction because of the emergence of *Achmea*.[494] From the perspective of international law, the position of the tribunals is not surprising, since the situation in *Achmea* was similar, but not identical, to the situations that arose in the analysed cases. Thus, absent a specific rule entrenched either in *Achmea* or in the Treaties and considering the factual differences between the situations in their cases and *Achmea* (absent an express mention of the ECT or ICSID Convention), the tribunals did not regard *Achmea* to be legally relevant and applicable for determining of their jurisdiction. The situations being not identical, application of *Achmea* by the respective tribunals would thus have resulted in an extension of *Achmea's* scope of application, which was *expressis verbis* determined by the CJEU. As such interpretation would be binding the EU Member State and an EU investor, it could affect uniformity of EU law, which is a situation that is incompatible with EU law. In turn, it could also disrupt an international investment protection regime, since investor's interests under a valid treaty could suffer due to the alleged internal regulatory changes of the respondent Member States. From the investor's perspective, referring to the alternative dispute settlement bodies, like the national courts, could be an unappealing option (see Sub-Section 2.1.3.4 above).

Refusal to apply *Achmea* by extending its scope of application is substantiated from the persepctive of international law and may be considered as tribunals' deference to the CJEU and EU legal order. Indeed, while it may be implied that *Achmea* is applicable to the

494 With the exception of *Gavrilovic*, *Antaris* and *Antin* cases.

ECT, irrespective of which arbitration rules are chosen by the parties to a dispute, such implicit arguments may seem insufficient to render a formally valid treaty innapplicable under international law. Thus, for the arbitral investment tribunals to recognise *Achmea* as relevant in respect of proceedings under these multilateral treaties, clarifications indicating the inapplicability of these treaties in intra-EU disputes will have to be made. Filling this gap is clearly the CJEU's prerogative.

Table 2: *Comparison of the factual situations of the arbitral tribunals' proceedings*[495]

Row		Achmea	Masdar	Vattenfall	UP and C.D Holding	Foresight	RREEF	Greentech	Marfin
1	*Claimant*	Claimant: Achmea B.V., a Dutch private company with limited liability, having its statutory seat in Amsterdam and its head offices in Zeist, the Netherlands.	Claimant: Masdar Solar & Wind Cooperatief U.A., a private limited liability company incorporated under the laws of The Netherlands	Claimant: Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwerk Krümmel GmbH & Co. oHG, and Kernkraftwerk Brunsbüttel GmbH & Co. oHG	Claimant: UP, a cooperative company incorporated under the laws of France, and C.D Holding Internationale, wholly owned by UP and organized under the laws of France.	Claimant: Foresight Luxembourg Solar 1 S.à.r.l. and Foresight Luxembourg Solar 2 S.à.r.l., a private limited liability companies incorporated under the laws of Luxembourg, and others	Claimant: RREEF Infrastructure (G.P.) Limited, a private limited liability company incorporated under the laws of Jersey and RREEF Pan-European Infrastructure Two Lux S.à r.l., a private limited liability company incorporated under the laws of Luxembourg	Claimant: Greentech Energy Systems A/S, a company incorporated under the laws of the Kingdom of Denmark, and others	Claimant: Marfin Investment Group Holdings Société Anonyme, a limited company holding and managing investments, incorporated under the laws of Greece
	Respondent	The Slovak Republic	The Kingdom of Spain	Federal Republic of Germany	Hungary	The Kingdom of Spain	The Kingdom of Spain	The Italian Republic	The Republic of Cyprus
2	*Treaty breached and applicable*	Netherlands-Czechoslovakia BIT[496]	ECT[497]	ECT[498]	France-Hungary BIT[499]	ECT[500]	ECT[501]	ECT[502]	Cyprus-Greece BIT[503]

495 Composed by the author.

496 *Achmea (formerly Eureko) BV v. the Slovak Republic*, *supra* note 332, para. 7.

497 *Masdar*, *supra* note 43, para. 1.

498 *Vattenfall*, *supra* note 43, para. 8.

499 *UP and C.D Holding*, *supra* note 43, para. 1.

500 *Foresight*, *supra* note 43, para. 1.

501 *RREEF*, *supra* note 43, para. 1.

502 *Greentech*, *supra* note 43, para. 12.

503 *Marfin*, *supra* note 43, para. 1.

Row		Achmea	Masdar	Vattenfall	UP and C.D Holding	Foresight	RREEF	Greentech	Marfin
3	*Applicable law*	Article 8(5) of the Netherlands-Czechoslovakia BIT: the law in force of the Contracting Party concerned; the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law[504]	Article 26(6) of the ECT:[505] "A tribunal <…> shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."	Article 26(6) of the ECT:[506] "A tribunal <…> shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law." and Article 42(1) ICSID Convention[507]	Article 9(3) of the France-Hungary BIT: "The arbitral tribunal shall rule in accordance with the provisions of this Agreement and the rules and principles of international law."[508]	Article 26(6) of the ECT: "The Tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of International Law." [509]	Article 42(1) of the ICSID Convention and Article 26(6) of the ECT.[510]	Article 26(6) of the ECT: "[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."[511]	Article 42(1) of the ICSID Convention and Cyprus-Greece BIT[512]

504 *Eureko BV v. the Slovak Republic*, *supra* note 320, para. 11.

505 *Masdar*, *supra* note 43, para. 138.

506 *Vattenfall*, *supra* note 43, para. 114.

507 "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." – Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (Washington: 575 UNTS 159, 1965).

508 *UP and C.D Holding*, *supra* note 43, para. 280.

509 *Foresight*, *supra* note 43, para. 264.

510 Article 42(1) states: "(1) 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." – *RREEF*, *op. cit.*, para. 194.

511 *Greentech*, *supra* note 43, para. 183.

512 *Marfin*, *supra* note 43, paras. 514-23.

Row		Achmea	Masdar	Vattenfall	UP and C.D Holding	Foresight	RREEF	Greentech	Marfin
4	*Arbitration rules*	UNCITRAL Arbitration Rules[513]	ICSID Rules of Procedure for Arbitration Proceedings[514]	ICSID Rules of Procedure for Arbitration Proceedings[515]	ICSID Rules of Procedure for Arbitration Proceedings[516]	Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (in force since 1 January 2010)[517]	ICSID Rules of Procedure for Arbitration Proceedings [518]	Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (in force since 1 January 2010)[519]	ICSID Rules of Procedure for Arbitration Proceedings [520]
5	*Article endowing a tribunal with jurisdiction*	Article 8 of the Netherlands-Czechoslovakia BIT[521]	Article 26 of the ECT[522]	Article 26 of the ECT[523]	Article 9(2) France-Hungary BIT foreseeing option for ICSID arbitration[524]	Article 26 of the ECT[525]	Article 26 of the ECT[526]	Article 26 of the ECT[527]	*Author's note: in public versions of the award, tribunal's motives on jurisdiction are mostly classified*
6	*Treaty endowing a tribunal with jurisdiction according to a tribunal itself*	Article 8 of the Netherlands-Czechoslovakia BIT[528]	Article 26 ECT[529] and Article 25 of the ICSID Convention[530]	Article 26 of the ECT[531]	ICSID Convention[532]	Article 26 of the ECT[533]	Article 26 of the ECT[534]	Article 26 of the ECT[535]	*Author's note: in public editions of the award, tribunal's motives on jurisdiction are mostly classified*

513 *Eureko BV v. the Slovak Republic, supra* note 320, para. 16.

514 *Masdar*, *supra* note 43, para. 10.

515 *Vattenfall*, *supra* note 43, para. 12.

516 *UP and C.D Holding*, *supra* note 43, para. 98-9.

517 *Foresight*, *supra* note 43, para. 264.

518 *RREEF*, *supra* note 43, para. 21.

519 *Greentech*, *supra* note 43, para. 14.

520 *Marfin*, *supra* note 43, paras. 511-23.

521 *Eureko BV v. the Slovak Republic*, *op. cit.,* para. 11.

522 *Masdar*, *op. cit.,* para. 679.

523 *Vattenfall*, *op. cit.,* para. 128.

524 *UP and C.D Holding*, *op. cit.,* para 265.

525 *Foresight*, *op. cit.*, para. 221.

526 *RREEF*, *op. cit.,* para. 15.

527 *Greentech*, *op. cit.*, para. 18.

528 *Eureko BV v. the Slovak Republic*, *op. cit.*, para. 221.

529 *Masdar*, *op. cit.*, para. 313.

530 Ibid., para. 177.

531 *Vattenfall*, *op. cit.*, para. 128.

532 *UP and C.D Holding*, *op. cit.*, para. 253.

533 *Foresight*, *op. cit.*, para. 212.

534 *RREEF*, *op. cit.*, para. 213.

535 *Greentech*, *op. cit.*, para. 396.

2.2.2. EU law is not applicable in the arbitral proceedings

Another material point of analysis, which emerged in the analysed cases, was the question if EU law could be considered the law applicable in the proceedings. The analysis was conducted pursuant to the rules of VCLT and was related to the general question of what place EU law occupies in the international legal system and in what manner it could be applied in ISDS proceedings. The *Vattenfall*, *UP and C.D Holding*, *Foresight* and *Greentech* tribunals first engaged in answering whether EU law was at all part of international law. Then, if yes, whether it could be applied in their cases.

2.2.2.1. EU law is (not) part of international law

In its award, the *Greentech* tribunal presented a rather extreme position to the question of whether EU law formed part of international law. In commenting the ECT's Article 26(6) providing that the tribunal "shall decide the issues in dispute in accordance with this Treaty [ECT] and applicable rules and principles of international law," the tribunal ruled that reference to 'international law' "cannot be stretched to include EU law" without doing violence to the text of the ECT.[536] According to the tribunal, to include EU law within the concept of the international law under the meaning of Article 26(6) ECT would be impermissible under VCLT.[537] As a consequence, the *Greentech* tribunal did not consider EU law to be international law at all.

The *Vattenfall* tribunal conducted a more thorough and moderate analysis in answering whether EU law was at all international law in the light of *Achmea*. The claimant Vattenfall submitted that "<…> EU law does not form part of international law, and is consequently not part of the applicable law for the Tribunal's jurisdiction."[538] Vattenfall challenged the classification of EU law as international law by pointing to the fact that EU law has been accepted as an autonomous legal order in respect of both the domestic laws of the Member States and international law.[539] Thus, Vattenfall claimed that EU law, as an autonomous legal order, cannot fall within the scope of Article 38 of the Statute of the ICJ as it forms neither customary international law nor general principles of international law.[540] Does the claim for the autonomy of the legal order eliminate it from the scope of the rules of international law?[541]

Indeed, as was in detail analysed in the 1st Part, the CJEU is continuously claiming EU legal order to be separate from both national and international legal orders. Vattenfall presented a reverse perspective into the question of the autonomy of the EU legal order

536 *Greentech*, *supra* note 43, para. 397.

537 Ibid.

538 *Vattenfall*, *supra* note 43, para. 63.

539 Ibid., para. 143.

540 Ibid.

541 *Author's note*: this particular question was raised by the claimant in *Vattenfall*. Therefore, the Sub-Section concentrates on *Vattenfall* award on jurisdiction.

by trying to use it to its own advantage. Claimant pointed to *Achmea* stating that since the CJEU itself recognised that tribunals constituted under intra-EU BITs are not courts or tribunals of a Member State, such tribunals also cannot be bound by the CJEU's judgments.[542] In such case, the tribunal would not have to take *Achmea* into account. Vattenfall asserted that autonomy works both ways: if the EU claims to be autonomous, separate and distinctive from international legal order then it can be questioned whether EU law still forms part of international legal order. The question itself is not illogical. If the EU does not admit certain dispute settlement bodies within its system, why should EU law be applicable in these international dispute settlement proceedings that are outside the scope of EU law? If an arbitral tribunal is not considered to comply with the concept of 'a court or tribunal of the Member State', it cannot be imposed on this non-EU tribunal that it has to apply EU law in order to deny its jurisdiction to decide the case. Yet, the tribunal did not accept the line of reasoning chosen by the Vattenfall.

The *Vattenfall* tribunal did not agree with the claimant's position placing EU law outside international law. The tribunal observed that "the corpus of EU law derives from treaties that are themselves a part of, and governed by, international law, and contains other rules that are applicable on the plane of international law, while also containing rules that operate only within the internal legal order of the EU and, at least arguably, are not a part of international law <…>."[543] Thus, according to the tribunal, to the extent that EU law is rooted in the Treaties, it constitutes international law.[544] In addition, the tribunal observed that the parties did not dispute that the EU Treaties are international treaties of the Member States.[545] The tribunal considered the autonomous character of EU law to be premised on the constitutional nature of the Treaties in the sense that they form the basis of the EU's organisational structure.[546] Yet, the tribunal concluded that the autonomous or constitutional nature of the Treaties did not exclude them from the purview of international law whereas Article 38(1)(a) of the Statute of the ICJ indicates that any kind of international convention – whether general or particular – constitutes international law.[547] The tribunal then recalled the findings of *Electrabel v. Hungary*[548] where it was ruled that "EU law is international law because it is rooted in international treaties."[549] In turn, since the CJEU is empowered to give preliminary rulings on the interpretation of EU law, including the Treaties, the tribunal regarded the CJEU's interpretations of the Treaties to form a part of the relevant international law as well.[550]

It follows that *Vattenfall tribunal* was not convinced that EU secondary law forms part

542 *Vattenfall*, *supra* note 43, para. 63-64.

543 Ibid., para. 146.

544 Ibid., para. 147.

545 Ibid., para. 142.

546 Ibid., para. 144.

547 Ibid., para. 145.

548 *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015.

549 Ibid., para. 4.120; *Vattenfall*, *op. cit.*, para. 146.

550 Ibid., para. 148.

of international law. Yet, EU secondary law, despite the fact that it falls outside the categorisation of Article 38 of the ICJ Statute, is also of an international nature. It may be substantiated by a couple of arguments.

First, international agreements concluded by the EU are considered to stand between the primary and secondary law of the EU.[551] International agreements may not contradict the primary law, but they prevail over the acts of the EU institutions.[552] However, formally, international agreements are brought within the EU legal order by the act of the Council, which makes them part of secondary law as well.[553] The fact that international agreements concluded by the EU are placed hierarchically among the sources of the secondary law does not render it non-international law. Thus, a legal act can simultaneously be a part of the secondary law of the EU and international law as well.

Secondly, despite the attempts to describe EU secondary law as a type of domestic law in international arbitration proceedings, such a description is not entirely accurate.[554] Indeed, secondary law is only applicable within the internal legal order of the EU. But that does not make it a domestic law. The territorial scope of its application is also international, since it normally applies to several or all of the Member States. The EU is still an international organisation, and not a federation. Thus, EU secondary law is rather comparable to the acts (for instance, resolutions) of other international organisations and not to the national legislation of sovereign states. They are sources of international law, but it is the parties to the particular agreement that decide what effects such acts would have in their legal regimes.

Considering the above, there is no doubt that the Treaties form part of international law. In case of secondary law, it was categorised into two groups by the tribunal. It distinguished the sources of secondary law that are applicable on the international plane, and the ones that operate only internally within the EU legal order (that allegedly do not belong to international law). Yet, the question whether EU law forms part of international law and whether it is applicable to resolve question of tribunals' jurisdictions are separate matters. If EU law was not part of international law, any possibility of its legal relevance for the tribunals' jurisdiction could be denied. After concluding that EU rules form part of international law, it is further analysed whether it can be invoked in a specific case as a matter of law applicable to decide the tribunals' jurisdiction. The question is addressed in the following Sub-Section.

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551 Allan Rosas, "The Status in EU Law of International Agreements Concluded by EU Member States," *Fordham International Law Journal* 34, 5 (2015): 1310.

552 Case C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] EU:C:2011:864, para. 50.

553 See Article 218(6) TFEU.

554 *Author's note*: secondary law does not fit under the definition of domestic law similarly as under the definition of international law.

2.2.2.2. EU law as 'relevant rules of international law' applicable between the parties

The question of the applicability of *Achmea* was raised in *Vattenfall*, *UP and C.D Holding* and *Greentech* proceedings. The *Vattenfall* tribunal considered that the only legal basis that would allow bringing EU law into the analysis of the tribunal's jurisdiction in the case was Article 31(3)(c) VCLT[555] pursuant to which EU law could be regarded as the "relevant rules of international law applicable in relations between the parties."[556] It was the Commission's view in *Vattenfall*, that to the extent that EU law or the *Achmea* ruling falls under Article 31(3)(c) VCLT, they could be taken into account to interpret Article 26 ECT that is the legal basis of the tribunal's jurisdiction.[557] It was Hungary's position in *UP and C.D Holding*, that Art. 9(3) of the BIT and Art. 25(1) of the ICSID Convention, endowing the tribunal with jurisdiction, should be interpreted in the light of *Achmea*.[558]

However, the tribunals considered that it is not possible to apply Article 31(3)(c) VCLT to justify application of *Achmea* to deny its jurisdiction in the case.[559] First, the *Vattenfall* tribunal considered that interpretation of international treaties, like the ECT, has to be conducted in a particular order. It considered that interpretation of the international treaty in accordance with the relevant rules of international law applicable in relations between the parties is preceded by the general rule requiring the tribunal to interpret the treaty in accordance with the "ordinary meaning to be given to the terms in their context and in the light of its object and purpose."[560] In other words, the tribunal considered that if an ordinary meaning can be attached to the interpreted provision, there is no need to engage in the analysis of other relevant rules of international law. According to the tribunal, "[i]t is not the proper role of Article 31(3)(c) VCLT to rewrite the treaty being interpreted, or to substitute a plain reading of a treaty provision with other rules of international law, external to the treaty being interpreted, which would contradict the ordinary meaning of its terms."[561] Similar was the *Greentech* tribunal's position. Since it concluded that EU law was not part of international law (as discussed in previous Sub-Section), it found that the ECT contains a clear requirement that the tribunal must reach decision in accordance with public international law, and not EU law.[562] The *Greentech* tribunal closed its argument by claiming that it "has not been called upon to apply EU law, since Claimants asserted breaches of the ECT and international law, but not of EU law."[563] The *Vattenfall* and *Greentech* tribunals found

555 "There shall be taken into account, together with the context: <…> (c) Any relevant rules of international law applicable in the relations between the parties." – Vienna Convention on the Law of Treaties. U.N. Treaty Series, Vol. 1155, p. 331, Article 31(3)(c).

556 *Vattenfall*, *supra* note 43, para 134.

557 Ibid., para. 151.

558 *UP and C.D Holding*, *supra* note 43, para. 238.

559 *Vattenfall*, *op. cit.*, para. 152.

560 Ibid., para. 153.

561 Ibid., para. 154.

562 *Greentech*, *supra* note 43, para. 397.

563 Ibid.

the Commission's approach suggesting to invoke *Achmea* in respect of the ECT unacceptable since it could potentially allow different interpretations of the same provisions of the ECT in different cases.[564]

The *Vattenfall* tribunal added that since states establish international legal obligations under multilateral treaty, principles of *pacta sunt servanda* and good faith demands the terms of the treaty to have one single and consistent meaning.[565] Member states of the multilateral treaty have a right to assume that the treaty means what it says as well as that all states are obliged by the same rules.[566] The same words of the same treaty may not have different meaning depending on the independent legal obligations entered into by some states or made subject to the question what are the parties to a particular dispute.[567] Similarly, the *RREEF* tribunal observed that it would be highly improper to impose a sweeping modification of the ECT on non-EU states based on the pretext that the EU's Member States eventually consider the ECT as being incompatible with EU law.[568] Bearing these arguments in mind the *Vattenfall* tribunal concluded that the "<…> need for coherence, and for a single unified interpretation of each treaty provision, is reflected in the priority given to the text of the treaty itself over other contextual elements under Article 31 VCLT."[569] Consequently, the tribunal found that application of Article 31(3)(c) VCLT to interpret the ECT in the light of the EU law would not ensure 'systemic coherence', but rather its exact opposite by creating one set of obligations applicable in some intra-EU disputes and another set of different obligations applicable to other not intra-EU disputes.[570]

The issue of the applicability of Article 31(3)(c) was also raised by the respondent before the *UP and C.D Holding* tribunal. Despite that the tribunal did not take the respondent's arguments into consideration, Hungary's line of reasoning is noteworthy. First, it underlined the difference between the law applicable to the questions of jurisdiction and law applicable to the merits.[571] Questions of jurisdiction are governed by reference to the instruments wherein the parties' consent is contained.[572] It is noteworthy that the 22 Member States have agreed to consider *Achmea* as creating the consequence of withdrawal of their consent to arbitrate.[573] According to Hungary, EU law forms part of international law and thus must be considered in determining the extent of the consent given by Hungary in the ECT and BIT cases.[574] Hungary asserted that relevant rules set out under EU law, as well

564 *Vattenfall*, *supra* note 43, para. 155; *Greentech*, *op. cit.*, para. 336.

565 *Vattenfall*, *op. cit.,* para. 156.

566 Ibid.

567 Ibid.

568 *RREEF*, *supra* note 43, para. 211.

569 *Vattenfall*, *op. cit.*, para. 156.

570 Ibid., para. 158.

571 *UP and C.D Holding*, *supra* note 43, para. 238.

572 In *UP and C.D Holding* law applicable to jurisdictional matters was Article 9(3) of the France-Hungary BIT and Article 25(1) of the ICSID Convention. – Ibid.

573 Declaration of the Representatives of the Governments of the Member States of 15 January 2019 *on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the EU*, *supra* note 42, 1.

574 *UP and C.D Holding*, *op. cit.*, para. 238.

as the CJEU's rulings, for the purpose of Article 31(3)(c) VCLT should be treated like any other international rules.[575] Since the CJEU's findings in *Achmea* form part of the *acquis communautaire*, it would have to be applied by the tribunal as part of law applicable to its jurisdiction.[576] Hungary then suggested that "<…> in order to comply with the provisions of Art. 31(3)(c) of the VCLT, the Tribunal would need to apply the *Achmea* Decision when interpreting the TFEU."[577] In doing so, it would find that EU law applied directly to its jurisdiction and rendered the ISDS clause of the French-Hungarian BIT invalid at the time when the proceedings were instituted.[578]

Unlike the *Vattenfall* and *Greentech* tribunals, the *UP and C.D Holding* tribunal did not assign a single sentence to assess the soundness of the respondent's reasoning. Yet, the disregard for the most of the Hungary's arguments was rather based on the tribunal's conviction that the situation in the case is not similar to the one that arose in *Achmea*, than an evident incorrectness of those arguments.[579] Again, *Achmea* could possibly have been considered as relevant pursuant to Article 31(3)(c) VCLT by *UP and C.D Holding* tribunal if the CJEU's wording in *Achmea* was more accurate and expressly mentioned multilateral treaties. Since the CJEU has left this gap, the *UP and C.D Holding* tribunal was able to circumvent the fact that the dispute originated from intra-EU BIT, by pointing to arbitration rules as to the main ground of its jurisdiction.

Certain common features in the tribunals' approach should be underlined. In general, the tribunals recognise EU law as part of international law (with the exception of the *Greentech* tribunal's extreme interpretation of EU law's place in international law). Yet, they refuse to apply EU rules as the relevant rules of international law applicable between the parties of dispute, by contesting its relevance for their proceedings. Such refusal is essetially based on the textual interpretation of the relevant instruments, whether it is the ECT, or *Achmea* ruling. Tribunals tend to apply a valid treaty, in majority of analysed cases – the ECT, in accordance with the ordinary meaning of the interpreted provisions. Textual interpretation of Article 26(1) performed by the tribunals presents an unambiguous conclusion that tribunals indeed have jurisdiction. As was underlined by the *Foresight* tribunal, following the textual interpretation under Article 31 VCLT, "the Tribunal <…> conclude that it has jurisdiction over Parties' dispute under the plain language of Article 26(1) ECT."[580] The tribunal considered that there was no need to resort to any supplementary means of interpretation, since there is nothing obscure in Article 26(1) ECT.[581] As a result, the tribunal considered that its conclusion from the text that it has jurisdiction is not a "manifestly absurd or unreasonable result."[582] Consequently, if the text of a treaty is clear enough, it is

575 *UP and C.D Holding, supra* note 43, para. 238.

576 Ibid.

577 Ibid.

578 Ibid.

579 Ibid., para. 252.

580 *Foresight*, *supra* note 43, para. 212.

581 Ibid., para. 213.

582 Ibid.

unlikely that tribunals will find the opposing arguments stemming from the EU legal order to be more important than the ordinary meaning of a treaty provision.

2.2.3. Possibility of application of the principles of conflict of laws

In addition to the interpretive techniques aimed to invoke *Achmea* as the relevant rules of international law applicable between the parties, the respondents in the analysed cases proposed to apply the rules of the conflict of laws. Two major conflict of laws techniques emerged in the analysed proceedings claiming that their application would render EU law applicable in the proceedings and decline the tribunals' jurisdictions in the cases. Namely, the doctrines of *lex posterior* and *lex specialis* were invoked. Each one of them are analysed in further Sub-Sections in the context of the respective proceedings.

2.2.3.1. EU law as 'lex posterior'

The legal basis of the *lex posterior* doctrine is entrenched in Article 30(3) VCLT stating that when the same parties to the earlier treaty are also parties to the later treaty, but the earlier treaty is not terminated or suspended, the earlier treaty applies only to the extent that its provisions are compatible with the provisions of the later treaty.[583] The idea on the application of *lex posterior* doctrine in respect of *Achmea* consists of two elements. First, the wide effects of the preliminary rulings in the EU legal order. Secondly, the idea that EU Treaties must be regarded the later treaty rendering inapplicable the incompatible provisions of the earlier treaty – the intra-EU BITs and the ECT.

The effects of the preliminary rulings within the EU legal order are of central importance here. As Hungary summarised in *UP and C.D Holding*, building on the CJEU's rulings in *Brasserie*, *Costa/ENEL* and *Denkavit*,[584] preliminary rulings are considered part of the *acquis*, are binding in the same way as statutory law, have *erga omnes* effect meaning that the consequences are extended to all the Member States and private entities, and most importantly – have retroactive effect.[585] The retroactive effect means that preliminary ruling "<…> clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force."[586] Pursuant to this reading, *Achmea* judgment means that Articles 267 and 344 TFEU had to be understood as precluding ISDS provisions contained in the intra-EU agreements since the very beginning of the existence of these articles. In case of the Member States – from the moment that they have acceded to the EU.

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583 Article 30(4)(a) VCLT provides a clarification that "When the parties to the later treaty do not include all the parties to the earlier one: As between States parties to both treaties the same rule applies as in paragraph 3." – Vienna Convention on the Law of Treaties, *supra* note 555, Article 30(4)(a).

584 Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur v. Factortame* [1996] EU:C:1996:79, para. 57; Case 6/64, *Flaminio Costa v. ENEL*, *supra* note 91; Case 61/79, *Amministrazione delle finanze dello Stato v Denkavit italiana Srl.* [1980] EU:C:1980:100, para. 16.

585 *UP and C.D Holding*, *supra* note 43, para. 232.

586 Case 61/79, *Amministrazione delle finanze dello Stato v Denkavit italiana Srl., op. cit.*, para. 16.

Germany, as a respondent in *Vattenfall*, claimed that EU law should prevail over the ECT as *lex posterior*. The tribunal again found it difficult to apply the *lex posterior* doctrine to the situation in the case. First, it considered that Article 30 VCLT contains a subsidiary rule for dealing with treaties' relationship with other treaties. In case there is a more specific provision, like Article 16 ECT, it should prevail[587] (see the following Sub-Section). Secondly, the tribunal found it unclear that the Treaties are 'later treaty' in the terms of Article 30 VCLT.[588]

Hungary, as a respondent in *UP and C.D Holding*, claimed that the innapplicability of Article 9(2) of the BIT providing an ISDS clause flowed from the VCLT foreseeing that provisions of an earlier treaty are only applicable in so far as they are compatible with the later treaty.[589] It also added that the possibility of the neutralisation of the ISDS clause was already contemplated by the *Achmea* tribunal itself.[590] The *Achmea* tribunal considered that the only way how Article 30 VCLT could deprive it of jurisdiction based upon the parties' consent derived from Article 8 of the Dutch-Slovak BIT was if Article 8 of the BIT providing for investor-state arbitration was by itself incompatible with EU law.[591] It concluded that "[i]f that were so, that would, at least arguably, deprive the Tribunal of jurisdiction."[592] Hungary then pointed out that incompatibility of Article 9(2) of the BIT with EU Treaties emerged on 1 May 2004, since on that date Hungary entered into a later international treaty with France – the EU Treaties. Article 9(2) of the BIT was not compatible with that later Treaty.[593] According to Hungary, this incompatibility crystallised when the TFEU came into effect.[594] Hungary's argument only makes sense if the retroactive effect of the preliminary rulings is recognised – in such a case ISDS clauses of intra-EU BITs have always been precluded by Articles 267 and 344 TFEU. Prohibition of such clauses became applicable to Hungary since its accession to the EU, while the prohibition itself was clarified with the *Achmea* ruling.

Hungary made a compelling line of reasoning in *UP and C.D Holding*, that was again dismissed by the tribunal by redirecting the question of the applicability of the ISDS clause towards the applicability of the ICSID Convention. The tribunal concluded that its jurisdiction is based on ICSID Convention.[595] It then asserted that despite of what consequences may *Achmea* have on the intra-EU BITs, ICSID Convention was not terminated by Hungary in 2004 when it joined the EU, nor can it be stated that Hungary's accession to the EU was an implied withdrawal from the Convention.[596] Finally, it relied of the 'survival clause'

587 *Vattenfall*, *supra* note 43, para. 217.

588 Ibid., para. 218.

589 *UP and C.D Holding*, *supra* note 43, para. 241.

590 Ibid.

591 *Eureko BV v. the Slovak Republic*, *supra* note 320, para. 172-3.

592 Ibid., para. 173.

593 *UP and C.D Holding*, *op. cit*., para. 241.

594 Ibid.

595 Ibid., para. 253.

596 Ibid., para. 259-60.

contained in the France-Hungary BIT having the effect that if the BIT was considered retroactively terminated as of 1 May 2004, the BIT as well as its ISDS clause foreseeing the ICSID arbitration, should still remain in force for the period of 20 years after.[597] In such case the *UP and C.D Holding* tribunal would still have jurisdiction. Was the analysed tribunal's approach towards *lex posterior* substantiated?

Article 30 VCLT provides a subsidiary rule how conflicts between earlier and successive treaties should be resolved.[598] If treaties in question contain special clauses regulating their relations to other treaties, Article 30 VCLT does not apply.[599] If the need to apply Article 30 arise, there ares everal criteria which must be observed in order to apply Article 30 VCLT. First, the *lex posterior* doctrine under Article 30 VCLT Article 30 VCLT deals with the issue of conflict between prior and subsequent treaties.[600] Article 30(3) VCLT effectivelly codifes the *lex posterior* rule by stating that "when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."[601] Thus, an earlier and later treaty must exist.[602]

Secondly, the two treaties must relate to the same subject matter.[603] If this limitation is interpreted strictly, Article 30(3) excludes from its scope conflicts between treaties of different areas.[604] For instance, between environmental and trade treaties or human rights and humanitarian law treaties.[605] In such case, states could deviate from their obligations simply by "qualifying a novel treaty in terms of a novel 'subject.'"[606] Thus, it was suggested by some scholars that answering whether two treaties deal with the same subject matter should be resolved by assessing if the fufilment of the obligation under one treaty affects the fulfilment of the obligation of another treaty.[607] The need to apply Article 30 VCLT will arise if the two treaties are incompatible, i.e. if states parties to both treaties cannot cannot be comply with one treaty without breaching another.[608]

Thirdly, account must be taken whether the parties to the earlier and later treaties are identical.[609] Article 30(3) VCLT lays down the rules to be followed in case parties are identical, while Article 30(4) set the rules if the parties are not completely identical. Both of the provisions are based on the *lex posterior* principle, according to which the later treaty

597 *UP and C.D Holding, supra* note 43, para. 265.

598 Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Heidelberg: Springer, 2012), 512, http://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=598959&site=ehost-live.

599 Ibid.

600 Koskenniemi, *supra* note 3, 129.

601 Vienna Convention on the Law of Treaties, *supra* note 555, Article 30(3).

602 Dörr and Schmalenbach, *op. cit.*, 509.

603 Ibid.

604 Ibid.

605 Ibid.

606 Koskenniemi, *op. cit.*, 130.

607 Ibid., 132; Dörr and Schmalenbach, *op. cit.*, 511.

608 Ibid.

609 Ibid., 514.

prevails over the earlier one.[610] Most problematic are the situations where not all the parties to the prior treaty are parties to the later treaty, or where there are states which are parties to the later but not to the prior treaty.[611] Hypothetically, if states X, Y, and Z have concluded an earlier treaty and, subsequently, X, Y, and G concluded later treaty, which treaty will apply? Relationship between X and Y will be goverened under the later treaty pursuant to Article 30(4)(a) as well as their relationship with G. However, X and Y's individual relationship with Z will still be governed by earlier treaty, since Z is only party to it.[612] As this example demonstrates, *lex posterior* is only relevant in resolving conflicts between identical parties to two treaties. Thus, Article 30 VCLT is considered an unsatisfactory provision, since *lex posterior* does not solve all the questions that arise in case of a conflict between treaties.[613]

Lastly, it is a settled opinion that the conflict of the successive treaties does not entail the invalidity of the earlier treaty.[614] *Lex posterior* rule is about the applicability of the prevailing treaty, which means that to the extent the earlier treaty is compatible with the subsequent treaty, earier treaty applies as well.[615] Notably, if both of the treaties are valid but incompatible with each other, once priority is given to the later treaty, its application will inevitably result in violation of the earlier treaty.[616] Therefore, application of *lex posterior* does not eliminate the responsibility of state under the violated treaty – state may sometimes have to decide which treaty it intends to infringe.

Considering the described elements of the *lex posterior* doctrine, tribunals' refusal to take EU law into account as *lex posterior* may be justified since some uncertainties could preclude the application of *lex posterior*. First, the very fact that the Treaties is the 'later treaty' in the sense of Article 30 VCLT is not evident. As the *Vattenfall* tribunal observed, Articles 267 and 344 TFEU on the basis of which the CJEU bases *Achmea* ruling, "have existed in substantively similar form since a time prior to the conclusion of the ECT, and have only been renumbered in the successive versions of the EU Treaties."[617] The same could be stated in respect of the most of the intra-EU BIT's, as they are more recent phenomena than the first versions of the Treaties. Secondly, there are considerable doubts on whether the subject matter of the Treaties and intra-EU BIT's, or the ECT, is the same. It was expressly underlined by four tribunals that subject matter of the respective investment treaty was not the same with the Treaties.[618] In *Achmea*, the CJEU itself referred to only partial overlap of the intra-EU BIT with the Treaties.[619] Thus, the *UP and C.D Holding* tribunal pointed to the *potential* character of this alleged overlap expressed in the CJEU's conclusion that

610 Dörr and Schmalenbach, *supra* note 598, 514.

611 Koskenniemi, *op. cit.*, 132.

612 Ibid., 515.

613 Ibid., 517.

614 Ibid., 518.

615 Ibid.

616 Ibid., 516.

617 *Vattenfall*, *supra* note 43, para. 218.

618 Ibid., para. 214; *UP and C.D Holding*, *supra* note 43, para. 218; *Greentech*, *supra* note 43, para. 346; *Marfin*, *supra* note 43, para. 587.

619 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 42.

the "tribunal <…> *may* be called on to interpret or indeed to apply EU law."[620] In turn, the *Greentech* tribunal found no inconsistencies between the ECT and EU law whatsoever and considered them compatible.[621] The *Marfin* tribunal elaborated that two treaties may simultaneously apply to the same set of facts without them having the same subject matter and found the situation in question to be precisely suchlike.[622] Thirdly, it is evident that the parties to the earlier and later treaties are not identical in neither of the analysed cases. EU Treaties have the remaining Member States as parties. The ECT is also a multilateral treaty having non-EU states as parties, which was used by the analysed tribunals to emphasize the difference between *Achmea* situation and the ECT, or ICSID.[623] Lastly, as was indicated above, *lex posterior* is about the applicability of the prevailing treaty and not about the invalidity of the ealier treaty. Bearing that in mind, the tribunals have also dismissed the arguments of implicit termination or modification of an earlier treaty by a subsequent one pursuant to Articles 59(1)(b) or 41(1)(b)(ii) VCLT.[624]

Consequently, it appears that the tribunals quite have reasonably refused to apply the *lex posterior* doctrine to render *Achmea* applicable in their cases, if this question is analysed from the perspective of international law.

2.2.3.2. EU law as 'lex specialis'

Lex specialis is a principle of conflict of laws designed to resolve situations where two norms contradict each other. *Lex specialis* rule indicates which rule should be applied in case of such conflict – a special rule should have priority over the general rule.[625] The reasons of the priority of the more specific rule are practical – compared to a vague general rule a specific rule should be closer to the point, regulate more effectively, take into account concrete circumstances and have a greater degree of clarity and certainty.[626] Yet, telling which rules are general and specific is not easy, since a rule *per se* can be general or specific only if compared to, and in respect of, another norm of similar subject matter.[627] It was precisely the question, which rules to consider *lex specialis* that the tribunals struggled with in the analysed cases.

In *Vattenfall* the question of competition between Article 351 TFEU and Article 16 ECT was analysed.[628] Article 351 TFEU provides the rules on how to deal with the international treaties concluded by the Member States with third states before they acceded to the EU. Agreements concluded before the accession shall not be affected by the provisions of

620 Case C_284/16, *Slovak Republic v Achmea BV, supra* note 40, para. 42. *UP and C.D Holding*, *supra* note 43, para. 218.

621 *Greentech*, *supra* note 43, para. 350.

622 *Marfin*, *op. cit.*, para. 587.

623 *Masdar*, *supra* note 43, para. 679.

624 *UP and C.D Holding*, *op. cit.,* para. 218; *Greentech*, *op. cit.,* para. 354-55.

625 Koskenniemi, *supra* note 3, 81.

626 Ibid.

627 Koskenniemi, *op. cit.*, 62.

628 *Vattenfall*, *supra* note 43, para. 222.

the Treaties.[629] However, if such agreements are not compatible with the Treaties, the Member States must undertake appropriate measures to eliminate those incompatibilities.[630] In relationship with third parties, it is required that the Member States adopt a common attitude and assist each other in the elimination of existing incompatibilities. In turn, under Article 16 ECT it must not be derogated from a more favourable to investor provision or dispute resolution mechanism under another agreement, and *vice versa*.[631] In *UP and C.D Holding* the respondent raised a question of the conflict between Article 351 TFEU and Article 9(2) of the BIT. The *UP and C.D Holding* tribunal did not analyse this question as well.

The *Vattenfall* tribunal engaged in an analysis aimed to answer which of the rules should be given priority. Not surprisingly at all, the tribunal chose to apply Article 16 ECT as the more specific and clear rule.[632] The tribunal reached such a conclusion by engaging in the interpretation of the scope of application of Article 351 TFEU. It stated that Article 351 TFEU only concerns the agreements between the Member States and third non-EU states.[633] It found unreasonable the Commission's and respondent's request to apply Article 351(1) *a contrario* and conclude that the rights and obligations airising from an agreement concluded between the Member States prior to the accession are displaced by the Treaties.[634] The tribunal concluded that such conflict rule as alleged was not contained in Article 351 TFEU.[635] From the perspective of public international law the tribunal considered that it could not set aside a clear rule for the benefit of a coutertextual one[636] and finalised by stating that Article 16 ECT was *lex specialis* in the case.[637] The same issue was also raised by the parties in *Greentech.*[638] However, the Greentech tribunal did not engage in detailed analysis on which of the twoo articles is more specific and merely stated that "TFEU Article 351 is inapplicable here."[639]

The assessment of which of the conflicting rules is more specific necessarily requires detailed interpretation of both of the provisions. Such interpretation may not always be compatible with the rules and principles of the 'external' legal regime, just as was the case

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629 See Article 351(1) TFEU.

630 See Article 351(2) TFEU.

631 "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." – The International Energy Charter Consolidated Energy Charter Treaty with Related Documents, Last Updated: 15 January 2016 (2016), Article 16 ECT.

632 *Vattenfall*, *supra* note 43, para. 227.

633 Ibid., para. 225.

634 Ibid.

635 Ibid., para. 226.

636 Ibid., para. 227.

637 Ibid., para. 229. See *also*: *RREEF*, *supra* note 43, para. 208.

638 *Greentech*, *supra* note 43, paras. 268-315.

639 Ibid., para. 355.

in *Vattenfall*. While the tribunal made a relatively accurate conclusion that Article 351(1) is applicable to the treaties concluded by the Member States with third states, tribunal's assessment of the Member States's *inter se* agreements was innacurate: the Member States are obliged to terminate international agreements concluded with other Member States if those agreements are contrary to EU law.[640] From the point of EU law, the *Vattenfall* tribunal's statement that rights and obligations arising out of the agreements concluded between the Member States prior to the accession to the EU are not displaced by the Treaties is imprecise. If the subject-matter of an incompatible agreement comes under the competence of the EU, such agreement concluded between the Member States must be terminated. However, the analysed tribunals do not base their decisions on the EU law perspective. They operate from the point of view of a particular regime of international law. As *RREEF* tribunal pointed out, "if there must be a 'hierarchy' between the norms to be applied by the Tribunal, it must be determined from the perspective of public international law, not of EU law."[641] Similarly, the *Marfin* tribunal stated that "the jurisdiction of this Tribunal is not determined by the various national rules governing the enforceability of arbitral awards, but by this Treaty and international law."[642] Two aspects are important here. The *Marfin* tribunal underlined that its jurisdiction arises from the Cyprus-Greece BIT and is not influenced by domestic regimes. The *Marfin* tribunal has also drawn attention that question of jurisdiction and question of enforceability are two separate matters. A tribunal may have jurisdiction and issue an award, even if later it might be considered unenforceable (or contrary to public policy) in some states.[643] The fact that such treaties must be terminated from the perspective of EU law does not affect the jurisdiction of the tribunal since the tribunal substantiates its decision on jurisdiction on the entirely different legal regime.

Therefore, until the investment treaty is terminated by the parties to it, it is to be considered valid and must be implemented under international law. The tribunal is not in a position to refuse jurisdiction if the treaty endowing it with jurisdiction has not yet been terminated by the parties in question. Considering the above, Article 16 ECT is clearly the more specific rule, as it addresses the question of priority in case of the conflict of two provisions, while Article 351 TFEU addresses the compatibility of international treaties with primary law EU and question of their termination. While the former relates to the conflict of specific rules, the latter concerns conflict between entire treaties. Having regard to the fact that the objectives of the two provisions are fundamentally different, they are hardly comparable.

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640 Angelos Dimopoulos, "Validity and Applicability of International Investment Agreements between EU Member States under EU and International Law," *Common Market Law Review* 48, 1 (2011): 92.

641 *RREEF*, *supra* note 43, para. 208.

642 *Marfin*, *supra* note 43, para. 596.

643 Szilágyi and Usynin, *supra* note 76: 21-2.

2.3. Two competing regimes: is there a solution?

2.3.1. Clash of the EU and international investment protection regime

Two competing views were so far presented in this Part in respect of the intra-EU investment dispute settlement. Both of them are legitimate from the perspective of different legal regimes. Is there a way in which these two views could be reconciled? Is there an effective solution?

EU law perspective, represented in the CJEU's *Achmea* ruling was formulated from the angle of the protection of autonomy of the EU legal order (see the 1st Part). The *Achmea* ruling is another example of contextual and purposive interpretation practiced by the CJEU, giving the decisive meaning to the systemic objectives of the EU rather than the text of the interpreted provisions (see Chapter 1.3.2). In *Achmea*, the CJEU remained consistent with autonomy protection doctrine formulated in its previous case law. Intra-EU ISDS under BITs was found by the CJEU to be liable to affect several features of the EU judicial system – one of the central essential characteristics protected by the autonomy of the EU legal order (see Sections 1.2.3.2 and 2.1.2). Including, the CJEU's exclusive right to provide definitive interpretation of EU law, the position of the national courts as 'ordinary courts' of the EU and thus the proper functioning of the preliminary ruling procedure, which could altogether have adverse impact on uniform interpretation of EU law and European integration. It was also found to be incompatible with Article 344 TFEU in that the Member States have assigned the resolution of disputes falling under the exclusive competence of the EU for an external dispute settlement mechanism. Given the contents of the principle of autonomy and the essential characteristics of the EU legal order, there was a very little chance that the CJEU would consider ISDS under intra-EU BITs compatible with EU law. Thus, from the perspective of EU law, the CJEU's position is understandable and expected.

The analysis performed in this Part has revealed that the analysed tribunals adopted a common approach to respond to challenges to their jurisdiction based on *Achmea*. What are the features of that common approach? First, the tribunals do not hesitate in quoting each other's decisions in respect of *Achmea*. For instance, *Masdar* tribunal's arguments are used by several later tribunals.[644] As Gáspár-Szilágyi and Usynin observed, the tribunals' responses have a "snowball effect": once a tribunal makes a conclusion that *Achmea* does not preclude disputes under the ECT or ICSID Convention, other tribunals tend to follow the same line of arguments.[645] These references to previous decisions of other tribunals are presented by later tribunals as evidence that *Achmea* does not apply. Secondly, the tribunals have given the preference to a purely textual interpretation of the legal provisions related to their cases by referring to the 'ordinary' (or 'plain') meaning of the ISDS provisions as

644 *Vattenfall*, *supra* note 43, para. 163; *Foresight*, *supra* note 43, para. 220; *RREEF*, *supra* note 43, para. 197; *Greentech*, *supra* note 43, para. 399.

645 Szilágyi and Usynin, *supra* note 76: 11.

well as the *Achmea* ruling itself.[646] If strictly textual approach is applied to interpret *Achmea* ruling and the respective investment treaties, it is rather easy to limit the scope of *Achmea* application (see 2.2.1). Consequently, all of the analysed tribunals have reached a conclusion that *Achmea* ruling, which expressly only mentioned Dutch-Slovak BIT, did not apply to them since their jurisdiction originated from different types of treaties.

Indeed, *Achmea* did not contain a clear rule entrenched in the text of the ruling or the Treaties, which could allow to interpret the provisions of the ECT or the ICSID Convention, endowing tribunals with jurisdiction, in a different light. The situation in *Achmea* was very similar to the situations in the analysed cases, but it was not identical. It is not for the investment tribunals to extend the applicability of the rule formulated in *Achmea* to other treaties (like the ECT and the ICSID Convention). Therefore, in the words of *Foresight* tribunal, it is not manifestly absurd or unreasonable to conclude that tribunal has jurisdiction on the basis of textual interpretation of the ECT.[647] The tribunals can in fact be criticised for being very formalistic, but their approach is not by itself incorrect.[648]

One may even conclude that by not extending the scope of application of *Achmea*, the tribunals have demonstrated respect to the autonomy of the EU legal order as well as to the CJEU's jurisdiction to interpret EU law. Should they have applied *Achmea* in the analysed cases, it could be alleged that the tribunals have exceeded their mandate. In this regard, the tribunals have strictly followed the requirements of the VCLT, which renders their interpretive approach justifiable from the perspective of international law.

Moreover, it may be asked what would have happened, if the tribunals refused their jurisdictions in the cases? Since the CJEU has no competence to hear investor-state disputes, the tribunals could not refuse their jurisdiction in favor of the CJEU. Thus, their refusal would be for the benefit of the national courts of the Member States. In this case, the entire idea of the international investor-state dispute settlement regime would be denied, since from the investors' perspective national legal systems are considered biased, politcised and do not provide judicial guaratees as the state-independent ISDS mechanism does (see Sub-Section 2.1.3.4).

The CJEU's and ISDS tribunals' views both make sense and seem justifiable. How can it be explained? It is evident that tribunals on both sides are looking at the same issue from the internal perspective of the respective regime they represent. According to Romano, the 'receiving' legal regimes decide themselves which elements of 'external' legal regimes are legally relevant, which should be regarded as facts and which should not be considered at all.[649] One legal regime may become relevant to another only if the 'receiving' regime

646 *Vattenfall*, *supra* note 43, para. 192; *Greentech*, *supra* note 43, para. 397; *Foresight*, *supra* note 43, para. 212.

647 Ibid., para. 213.

648 Szilágyi and Usynin, *op. cit.*: 11.

649 This fundamental proposition is based largely on Santi Romano's theory that was recently revived by Filippo Fontanelli and others. – Santi Romano, *The Legal Order*, 1st ed. (London: Routledge, 2017); Fontanelli, *supra* note 5: 315; Mauro Barberis, "Santi Romano, Neoinstitutionalism and Legal Pluralism," *Digest: National Italian American Bar Association Law Journal* 21 (2013): 27–36; Mariano Croce and Andrea Salvatore, "Ethical Substance and the Coexistence of Normative Orders - Carl Schmitt, Santi Romano, and Critical Institutionalism," *Journal of Legal Pluralism and Unofficial Law* 56 (2007): 1–32.

recognises that relevance in allowing the legal content to be shaped in accordance with the latter regime.[650] From the perspective of international investment protection regimes and following the rules of the VCLT, *Achmea* ruling, as was formulated by the CJEU, could hardly be considered as law applicable for the determination of the tribunals' jurisdiction.

Looking from the angle of autonomy of the EU legal order, as was in detail examined in the 1st Part, the CJEU would only approve the conclusion of international treaties that are, in its eyes, compatible with the autonomy and the essential characteristics of the EU legal order. It follows from the principle of primacy of EU law that the Member States are only allowed to conclude with each other international agreements, which are compatible with their obligations under EU law.[651] Thus, ISDS under intra-EU BITs could only remain in the existence if it had no adverse effect on the autonomy and the essential characteristics of EU law. As *Achmea* demonstrated, this was not the case. Thus, as long as the ISDS tribunals will continue to operate under the intra-EU BITs, a risk to the principle of autonomy of the EU legal order will be present.

How can this incompatibility of EU law and the investment protection regime be resolved? As the analysis of the ISDS tribunals' reactions has shown, it appears that ISDS tribunals are likely to continue exercising their jurisdictions in intra-EU disputes despite the existence of *Achmea*. As is evident from the position of the Commission and the Member States on the consequences of *Achmea*, they intend to eliminate the incompatibilities by termination of the intra-EU agreements containing the ISDS clauses.[652] It might seem obvious that the most straightforward way to deny ISDS tribunals' jurisdiction is the termination of the intra-EU BITs and the ECT under international law. Yet, due to the 'sunset clauses', a number of intra-EU BITs would remain in force for a period of up to 30 years.[653] If the ISDS tribunals continue to exercise their jurisdictions in intra-EU disputes (which is very likely considering the positions of *Masdar*, *Vattenfall*, *UP and C.D Holding* and other analysed tribunals) all the negative effects on the EU judicial system expressed in *Achmea* would continue to manifest. Thus, even after formal termination of all the intra-EU BITs, the problem of the intra-EU ISDS may not disappear for a foreseeable future.

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650 Fontanelli, *supra* note 5: 321.

651 Case 235/87, *Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium* [1988] EU:C:1988:460, paras. 22-3; Case 10/61, *Commission v Italian Republic* [1962] EU:C:1962:2, p. 10; Dimopoulos, *supra* note 640: 70.

652 Communication from the Commission to the European Parliament and the Council *on Protection of Intra-EU Investment*, *supra* note 42, 2; Declaration of the Representatives of the Governments of the Member States of 15 January 2019 *on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the EU*, *supra* note 42, 4.

653 Agnieszka Zarowna and Hogan Lovells, "Termination of BITs and Sunset Clauses – What Can Investors in Poland Expect?" (2019), *Kluwer Arbitration Blog*, accessed 12 March 2020, http://arbitrationblog.kluwerarbitration.com/2017/02/28/booked-22-february-polish-bits/.

As an alternative, the CJEU could be given a chance to extend the scope of application of *Achmea* to the multilateral treaties as well. If the clear rule addressing multilateral treaties, like the ECT, were formulated, it would be more likely that investment tribunals would consider *Achmea* to be applicable to their situations. Yet, even in case the CJEU clarifies the scope of *Achmea*, arbitral tribunals could still ignore it. Thus, neither of these options is sufficient to eliminate the risks to the principle of autonomy of the EU legal order posed by the intra-EU investment dispute settlement under BITs.

Consequently, alternative solutions to reconcile the CJEU with international investment tribunals must be reconsidered. Importantly, such solution would have to be able to resolve the risks arising from the perspective of both of the regimes – if it is to be successful. From EU law perspective, all the threats to the autonomy and the essential characteristics provided in *Achmea* by the CJEU would have to be addressed. Thus, the proper functioning of the EU judicial system would have to be ensured, by securing the exclusive right of the CJEU provide definitive interpretation of EU law, the operation of the preliminary ruling procedure and ensuring uniform interpretation and application (and thus, effectiveness) of EU law. From the perspective of the international investment protection regime, investment dispute settlement independent from national courts would have to be ensured as well as the protection of the interests of investors under BITs that are not covered under EU law (like protection from expropriation and guarantees of fair and equitable treatment). The following Sub-Section inquires what techniques could be used for this purpose.

2.3.2. Judicial comity – an alternative approach to Achmea issue?

After analysing how the investment tribunals have so far reasoned their decisions in respect of *Achmea*, it may be asked whether there is any alternative approach to coordinate EU law with international investment dispute settlement regime. Could *Achmea* be justifiably applied in the analysed cases, given the lack of specific rules entitling tribunals to do so?

As is now evident, in order to implement *Achmea* the Member States will have to end their intra-EU BITs formally expressing the withdrawal of their consent to arbitrate under international law. Until that happens, many intra-EU cases will be initiated under those treaties (as well as the ECT). Even after the termination of the treaties, due to the 'sunset clauses' contained in some treaties, intra-EU disputes could still arise. Therefore, a solution is necessary for the EU on how to deal with the intra-EU cases which will be initiated in this transition period.

In the context of this so-called global disorder of courts and tribunals, a phenomenon of judicial comity has emerged. It is regarded as courts' activity in governing the relationship between different legal systems when existing rules fail to manage that relationship or

are absent at all.[654] Given the lack of coordination between continuously emerging international legal regimes, judicial comity techniques may have become the principle solution allowing to endow legal relevance to 'external' legal regimes. Judicial comity can also offer a solution on how to coordinate the CJEU's relationship with intra-EU ISDS tribunals.

According to D'Alterio "<…> judicial comity may be interpreted as a form of reaction on the part of the courts to the lack of hierarchies among the diverse systems at the global level."[655] This global disorder of international regimes develops a demand for techniques making it possible to coordinate the contrasting systems. Judicial comity expresses various flexible techniques applied by tribunals to regulate the interaction between legal systems.[656] Through the application of the techniques of judicial comity external legal regimes may acquire legal relevance and be applied at the 'receiving' legal regime.[657] Theoretically, comity techniques could have been employed to render *Achmea* applicable in the analysed tribunals' proceedings.

The essential condition for that to happen is that a tribunal of a 'receiving' legal regime must decide to recognise that relevance. As Romano described it, the determination of the 'receiving' legal regime plays a decisive role: "if there were no norm (to impose such relevance across orders), even if the state order had the legal possibility of completely abstracting from the order of the other states, this does not exclude points that, for whatever reason, even as a matter of convenience, the state order could decide to take them into account."[658] Decision to accept, or not accept another legal regime as legally relevant ultimately depends on internal perspective and even willingness of the 'receiving' regime.[659]

Judicial comity techniques are characterised by several features. First, they are of discretionary character: since there is a lack of rules regulating what the tribunal must do, in applying comity techniques tribunals do so by exercising their discretion.[660] Secondly, these practices are different from the official rules of the conflict-of-laws, since the need of their application arises out of the insufficiency of the official rules to resolve the conflict of the two legal regimes.[661] Thirdly, judicial comity is applied in situations of competition between judicial systems that are not in any hierarchical relationship.[662] Fourthly, the judicial comity is always directed towards another legal regime and its assessment. Thus, a term of 'judges judging judges' formed in the literature.[663] Finally, judicial comity would not be possible

654 Elisa D'Alterio, "From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?," *International Journal of Constitutional Law* 9, 2 (2011): 396.

655 Ibid., 410.

656 Ibid.

657 *Author's note*: for the description of judicial comity techniques see – Ibid.

658 Santi Romano, *The Legal Order*, 1st ed. (London: Routledge, 2017), 83, cited from Fontanelli, *supra* note 5: 320.

659 As Palombella summarized the situation with an example of national courts: "<…> apply international law or implement international decisions, they do so because domestic law requires it, not because they are organs of the international community." – Fontanelli, *op. cit.*: 333.

660 D'Alterio, *supra* note 654: 405.

661 Ibid., 406.

662 Ibid.

663 Anne-Marie Slaughter, "A Global Community of Courts," *Harvard International Law Journal* 44, 1 (2003): 210.

without the willingness of the 'receiving' tribunal that projects a recognition of and respect for another tribunal and legal regime.[664] What specific techniques of judicial comity could be potentially applicable to resolve the situation?

Interaction of international tribunals was previously coordinated using several noteworthy techniques. A first well-known example is the principle of *forum non conveniens*, which originates from private international law. The doctrine was started to be applied in the common law countries mostly: it empowers a court to refuse to exercise its jurisdiction based on its conviction that the interests of justice would be best served if the case was heard by another court.[665]

Secondly, a test of equivalence is noteworthy. It is best-known in connection with the ECtHR's approach towards the EU legal order named *Bosphorus* doctrine. The ECtHR stated back then that where the EU Member State's actions are taken in compliance with legal obligations stemming from EU law, those actions of a Member State are only considered to be justified as long as the EU is considered to provide an equivalent (or comparable) level of protection to the level of protection provided under the ECHR.[666] Yet, this presumption may be rebutted in separate cases if there are reasons to believe that the protection of the ECHR's rights was manifestly deficient in the EU.[667]

The third one is the conclusiveness technique, which states that if two international legal systems collide, a court that may issue final and binding decisions should decide a dispute.[668] Here an example of *MOX Plant* arbitration fits as an illustration. The PCA suspended its jurisdiction "<…> bearing in mind considerations of mutual respect and comity <…>" since a parallel EU proceedings were emerging and many questions in the proceedings before it concerned questions of EU law.[669] Since both of the proceedings, the PCA and the CJEU, would have resulted in final and binding decisions, the PCA considered that "<…> conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties"[670] and has consequently terminated its proceedings.[671]

Fourthly, the technique of respect for due process of law requires applying the system, which ensures a better compliance with the principles of rule-of-law, and taking the level of guarantees provided under the other legal regime.[672] Respect for the due process of law has been invoked by the CJEU in *Kadi* to claim jurisdiction to annul regulation implementing

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664 D'Alterio, *supra* note 654: 407.

665 Jungmoo Lee, "Harmonizing Forum Non Conveniens and Foreign Money Judgment Recognition through International Arbitration," *Emory International Law Review* 29, 2 (2014): 453.

666 Case No 45036/98 *Bosphorus Hava Yollari Turizm v. Ireland* [2005], para. 155-6.

667 Ibid.

668 D'Alterio, *op. cit.,* 404.

669 *The Mox Plant Case. Ireland v. United Kingdom*, PCA Case No. 2002-01, Procedural Order No 3 on Suspension of Proceedings on Jurisdiction and Merits and Request For Further Provisional Measures, 24 June 2003, para. 26-8.

670 Ibid., para. 28.

671 *The Mox Plant Case. Ireland v. United Kingdom*, PCA Case No. 2002-01, Procedural Order No 6 on Termination of Proceedings, 6 June 2008, p. 3.

672 D'Alterio, *op. cit.*: 403.

UN resolution imposing sanctions.[673] Overall, these techniques were used by international tribunals to resolve the jurisdictional conflicts with other legal regimes.

As is evident by now, judicial comity techniques allow international tribunals to recognise legal materials of other regimes as legally relevant within their regimes and consequently to decide on how to resolve a conflict when there are no explicit rules indicating how to do so. Judicial comity techniques may thus be considered as a kind of international *rules of recognition* in terms of H.L.A. Hart, as some authors observed.[674] As Fontanelli has put it, "<…> relevance is the rule of recognition between orders, through which interlegality prospers or fails."[675] Could the CJEU's and ISDS tribunals' jurisdictions be rendered compatible?

It may be asked why should tribunals practice comity favouring the CJEU, while the CJEU itself does not do the same in respect of them? The CJEU's position in *Achmea* is clear: intra-EU ISDS is incompatible with EU law. The consequence of the CJEU's position is that ISDS tribunals cannot hear disputes arising out of the agreements concluded between the EU Member States and/or concerning questions of EU law (even if hypothetically only). Thus, the *Achmea* ruling is basically an attempt to push ISDS tribunals out of exsitence. Considering that, why should the tribunals demonstrate comity in respect of the CJEU? Is there a technique that could be applied to reconcile the CJEU with international investment tribunals in intra-EU disputes?

It must be stressed that the most obvious solution was already suggested by AG Wathelet in his opinion in *Achmea*.[676] As will be demonstrated in the following Section, it is the solution that is easiest to implement and capable of resolving the majority of the issues arising from the conflict between the CJEU and ISDS tribunals.

2.3.3. Preliminary ruling procedure – solution for the CJEU's and ISDS tribunals' conflict

As was explained in the 1st Part, the CJEU's judicial reasoning and decisions in particular cases are made by assessing their effect to the European integration. It is done by relying on the doctrine of autonomy and evaluating if the essential characteristics would not be adversely affected. In case of the jurisdictional conflict between the CJEU and international tribunal, the fundamental question which renders such a tribunal conpatible (or incompatible) with EU law is whether the operation of such tribunal could adversely affect uniform interpretation and application of EU law. The CJEU is exceptional in this regard, as the Member States obliged it to secure that EU law is interpreted and applied uniformly

673 Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi*, *supra* note 59, paras. 352-3.

674 Gianluigi Palombella, "The Rule of Law beyond the State: Failures, Promises, and Theory," *International Journal of Constitutional Law* 7, 3 (2009): 464–7; Fontanelli, *supra* note 5: 335; D'alterio, *supra* note 654, 421.

675 Fontanelli, *op. cit.*, 321.

676 Case C-284/16, *Achmea BV v. Slovak Republic*, *AG Wathelet*, *supra* note 335.

throughout the EU. Thus, the CJEU is endowed by the Member States with the exclusive right to provide binding interpretations of EU law which is ensured though the preliminary ruling procedure. It is time to reconsider whether the preliminary ruling procedure could be used as a solution to the CJEU's and intra-EU ISDS tribunals' conflict.

While the national courts of the Member States are entitled or required at times to request preliminary rulings from the CJEU such referrals have traditionally been held inadmissible where made by arbitration panels, including ISDS.[677] Yet, the involvement of the CJEU in the work of the ISDS tribunals established under intra-EU BITs through the preliminary ruling procedure would be the simplest way to coordinate the relationship of the CJEU with these tribunals. Notably, the procedure already exists and there is nothing new to be invented. Moreover, extending preliminary ruling procedure to include ISDS tribunals in intra-EU disputes would allow ensuring uniform interpretation of EU law, since the CJEU would be given a chance to interpret it. If the CJEU decided that intra-EU ISDS tribunals are 'courts or tribunals' within the meaning of Article 267 TFEU, it would be a sort of demonstration of comity on part of the CJEU.

Implementation of preliminary ruling in intra-EU ISDS, of course, would require two modifications. First, for the CJEU to reconsider its previous case law and amend the concept of the 'court or tribunal of the Member State.' Secondly, as was mentioned above, judicial comity is only possible if the tribunals involved are willing to cooperate and recognise another tribunal and regime. Thus, it would be necessary for the ISDS tribunals to accept the preliminary ruling procedure and be *willing* to refer to the CJEU where question of EU law interpretation arise.

As for the first step, the concept of a 'court or tribunal of the Member State' would have to be broadened. The Court indicated in *Dorsch Consult* that a number of factors must be considered to recognise the referring institution as a court or tribunal, i.e. whether the body is established by law, permanent, its jurisdiction is compulsory, its procedure is *inter-partes*, it applies rules of law and it is independent.[678] The *Nordsee* judgement elaborated that certain similarities between the activities of arbitration and ordinary court (like that proceedings are provided for within the framework of law, the arbitrator must decide according to law and his award is final and may be enforceable) were not sufficient to give the arbitral tribunal the status of a 'court or tribunal of a Member State.'[679] As the parties were under no obligation, whether in law or in fact, to refer their disputes to arbitration and German public authorities were not involved in the decision to opt for arbitration or called upon to intervene automatically in the proceedings before the arbitrator, the link between the arbitration and the organization of legal remedies of the Member State in question was not sufficiently close.[680] In other words, *Nordsee* judgement underlined that not only the

677 Jurgen Basedow, "EU Law in International Arbitration: Referrals to the European Court of Justice," *Journal of International Arbitration* 32, 4 (2015): 367.

678 Case C-54/96, *Dorsch Consult v Bundesbaugesellschaft Berlin mbH* [1997] EU:C:1997:413, para. 23.

679 Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern and Reederei Friedrich Busse Hochseefischerei Nordstern* [1982] EU:C:1982:107, para. 10.

680 Ibid., paras. 12-3.

arbitral tribunal must have court-alike characteristics, but has to possess the link with a judicial system of a specific country as well.

An ISDS tribunal complies with most of the CJEU's conditions. It is indeed purposefully established by international law as an independent institution endowed with exclusive compulsory jurisdiction to hear investment disputes *inter-partes* while applying international law – the BIT, or ECT. However, it does not meet the traditional concept of the link with the judicial system of a particular Member State, as was also examined by the CJEU in *Christian Dior*[681] and *Achmea*[682]. To make referral of the ISDS tribunals possible, the CJEU would have to reconsider if this link with particular Member State is still essential.

The AG Wathelet's opinion in *Achmea* is noteworthy in this context. The AG Wathelet claimed that an arbitral tribunal constituted under the Dutch-Slovak BIT was a court or tribunal within the meaning of Article 267 TFEU.[683] The AG provided the Benelux Court as an example to substantiate its position, since it was recognised by the CJEU to fall under the concept of 'court or tribunal of the Member State', although it is an international court created by the Member States by an international treaty.[684] The AG cited the CJEU's position that "<…> there is no good reason why such a court, common to a number of Member States, should not be able to submit questions to this Court <…>."[685] The AG considered the arbitral tribunal established under intra-EU BIT to be in an analogous position, since two Member States established it as a dispute settlement mechanism common to them.

Yet, such comparison has a couple of drawbacks. The Benelux Court actually forms a part of national judicial systems of the three countries in question, despite being established by an international treaty, while the arbitral tribunals established under ISDS clauses do not belong to the national judicial systems.[686] Moreover, while the Benelux Court is permanent, arbitral tribunals established under intra-EU BITs, or the ECT, for a particular dispute are not since they are disbanded once the award is rendered. Yet, to this end, the AG read the CJEU's rulings in *Merck*[687] and *Ascendi Beiras Litoral e Alta*[688] as indicating that 'permanence' criterion relates to the institutionalisation of arbitration as a dispute settlement mechanism and not to the composition of the specific arbitral tribunal.[689] According to the AG, it is not by reference to the specific arbitral tribunal, composition of which is

681 Case C-337/95, *Parfums Christian Dior*, *supra* note 391, paras. 21-6.

682 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, paras. 47-49.

683 Case C-284/16, *Achmea BV v. Slovak Republic*, *AG Wathelet*, *supra* note 335, para 131.

684 Ibid., para. 128.

685 Ibid.

686 "In this regard, particular account must be taken of the fact that the Benelux Court has the task of ensuring that the legal rules common to the three Benelux States are applied uniformly and of the fact that the procedure before it is a step in the proceedings before the national courts leading to definitive interpretations of common Benelux legal rules." – Case C-337/95, *Parfums Christian Dior*, *supra* note 391, para. 22.

687 Case C-555/13, *Merck Canada Inc. v Accord Healthcare Ltd and others*, *supra* note 392, para. 24.

688 Case C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira*, *supra* note 393, paras. 25-6.

689 Case C-284/16, *Achmea BV v. Slovak Republic*, *AG Wathelet*, *op. cit.*, para. 101.

ephemeral, but by reference to the permanent arbitral institution administering the proceedings, that the 'permanence' must be assessed.[690]

The CJEU did not accept the AG Wathelet's position in *Achmea.* The Court pointed to the fact that the tribunal in question was not part of the judicial system of neither of the signatories and to the exceptional nature of the tribunal's jurisdiction compared to that of the courts of the Member States.[691] Notably, it would take the CJEU one ruling to alter its position in favour of the intra-EU ISDS giving the investment tribunals the possibility to request for a preliminary ruling.

The question should be reconsidered, as it is the solution that may resolve the majority of the problems that arise out of the intra-EU ISDS. First, allowing the ISDS tribunals to refer for a preliminary ruling would secure the exclusive right of the CJEU provide definitive interpretation of EU law in those cases where questions of EU law interpretation arise. Since only a few cases, as indicated by the AG Wathelet,[692] requires EU law interpretation, allowing to refer for preliminary rulings in those cases would settle all the disputes over EU law and move on to the final decision. As the preliminary ruling procedure would be invoked, uniform interpretation, application and effectiveness of EU law would also be ensured. Yet, it is important that ISDS tribunals would recognise the binding character of the CJEU's rulings issued. From the perspective of the international investment protection regime, investment dispute settlement independent from national courts would also be ensured in such case, since ISDS with state-independent arbitration would remain in the existence. From the perspective of investors, it is perhaps more desirable option to have intra-EU ISDS with the possibility of preliminary ruling than no ISDS at all (which is soon to become reality). Moreover, the protection of investors' interests under BITs that are not addressed by EU law (protection from expropriation and guarantees on fair and equitable treatment)[693] would be protected. Thus, the interests of investors would remain to be protected.

As for the second step, the investment tribunals should be *willing* to refer to the CJEU for a preliminary ruling, when they face a question of interpretation of EU law. A tribunal surely cannot be forced to refer to the CJEU, but should do it as an act of a good will and practice of comity. Assuring that the award is enforced successfully and not annulled within the EU could be a major stimulus for the ISDS tribunals to consider such a reference. As the CJEU elaborated in *Eco Swiss*, when the misinterpretation or misapplication of EU law performed by an arbitral tribunal concerned *fundamental provisions* of EU law, enforcement of such an award might be refused or it may be annulled by a national court as being contrary to the public policy of the EU.[694] Indeed, the interpretation of EU law by the

690 Case C-284/16, *Achmea BV v. Slovak Republic, AG Wathelet, supra* note 335, para. 101-2.

691 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 45-6.

692 Case C-284/16, *Achmea BV v. Slovak Republic*, *AG Wathelet*, *op. cit.*, para. 44.

693 Nagy, *supra* note 76: 992-3.

694 Case C-126/97, *Eco Swiss ChinaTime Ltd. v. Benetton International NV*, *supra* note 354, paras. 36-9; Basedow, *supra* note 677: 373.

arbitral tribunal should not raise doubts to a national court requested to enforce the award if the preliminary ruling is issued in the case.

It is the author's opinion that introduction of preliminary ruling procedure in the work of the intra-EU ISDS tribunals has the potential of resolving the threats posed by intra-EU ISDS to the autonomy and the essential characteristics of EU law. It would also allow ensuring the continuance of the intra-EU ISDS as well as the protection of investor's interests not covered by EU law. Preliminary ruling is the option that is easiest to implement, as nothing substantially new would have to be devised. Yet, to make it work it would take the willingness to cooperate from both the CJEU and the ISDS arbitrators.

2.4. Summary

The *Achmea* ruling is the landmark ruling of the CJEU, which determined that ISDS clauses entrenched in intra-EU BITs were incompatible with the principle of autonomy of the EU legal order, and particularly, with the normal operation of the EU judicial system. The way the CJEU sees it, intra-EU ISDS is harmful to its exclusive right to provide definitive interpretation of EU law, to the position of national courts of the Member States as the 'ordinary courts' of the EU, and the functioning of the preliminary ruling procedure. These threats altogether could adversely affect uniform interpretation, application, and effectiveness of EU law, which lead the Court to rule intra-EU ISDS clauses incompatible with the autonomy of the EU legal order. The CJEU's argumentation was closely in line with the doctrine of autonomy discussed in detail in the 1st Part.

By providing such interpretation the CJEU appears to have endorsed the long-standing position of the Commission, which continuously assserted that intra-EU BITs are incompatible with EU law. The Member States and the Commission welcomed *Achmea* as a legal obligation to terminate all the intra-EU BITs and to cease exercising ISDS clauses entrenched therein due to their lack of consent to arbitrate. The Commission and the Member States also consider *Achmea* as applicable to the ECT as well, which is a multilateral treaty containing an ISDS clause and which is concluded by the EU itself.

However, the Commission's and the Member States' understanding of the consequences of *Achmea* has come into conflict with the rules of international investment protection regime. It became evident from the first post-*Achmea* arbitral tribunals' decisions, that *Achmea* effects will be limited. The *Masdar*, *Vattenfall*, *UP and C.D Holding*, and other analysed tribunals have all applied a common model of analysis of *Achmea's* applicability for re-examination of their jurisdiction.

The analysis has revealed that the tribunals have scrutinised the question of *Achmea* effects from the internal perspectives of their respective regimes. The tribunals tend to rely on the formalistic textual interpretive approach. Seeking to identify the 'ordinary' meaning of the interpreted instruments, the tribunals limited the *Achmea's* scope of application to Dutch-Slovak BIT only, mentioned expressly in the *Achmea* ruling. The tribunals have found it difficult to identify the precise rule in *Achmea*, which could extend its effects over the respective clauses of the ECT (or ICSID Convention) and render them incompatible with EU law. Therefore, the tribunals did not consider *Achmea* to affect their jurisdiciton.

Having found no specific rule precluding their jurisdiction and considering the factual differences in the situations, they have refused to extend the scope of application of *Achmea* by themselves. As the first post-*Achmea* cases suggest, the tribunals tend to quote each other's decisions using them as evidence that *Achmea* ruling does not apply for determining their jurisdiction. Such reliance on previous decisions creates a "snowball effect", as was vividly described by some scholars.

It was found in this Part that, from the perspective of international law, the tribunals' approach in respect of *Achmea* is justifiable. The investment tribunals do not base their decisions on arguments of EU law. They operate from the point of view of a particular regime of international investment law. In case there is a conflict between the norms to be applied by the tribunals, they will determine the conflict from the perspective of public international law, not EU law. The fact that intra-EU BITs, or the ECT, must be terminated from the perspective of EU law, does not affect the jurisdiction of the tribunal, which substantiates its decision on jurisdiction on the entirely different legal regime. Therefore, until the respective intra-EU BITs and the ECT are in force, the respective tribunals can claim jurisdiction.

Moreover, the application of *Achmea* to the ECT (or other multilateral treaties) by the tribunals would have resulted in the extension of its scope of application. In other words, the tribunals would have interpreted EU law. By refusing to apply *Achmea* in respect of the ECT, the tribunals have shown deference to the CJEU's exclusive right to interpret EU law. It is the CJEU's prerogative to extend the application of interpretation provided in *Achmea* towards the ISDS clauses of the multilateral treaties. In turn, absent specific rules denying their jurisdiction and their investment treaties being not terminated, the tribunals had no valid reason to refuse exercising their jurisdiction, as it would have negatively affected the interests of investors as well as the overall stability of their investment protection regimes.

The analysis has shown that there was hardly an alternative approach for the tribunals. The refusal of the tribunals' jurisdiction in favor of the national courts would have denied the very nature of the international investment protection regime and the interests of investors, as they consider national courts to be biased and politicised. Therefore, as long as the respective investment treaties containing ISDS clauses incompatible with EU law are not terminated (or as long as the CJEU does not clearly extend the scope of application of *Achmea*), investment tribunals will maintain their jurisdiction under such clauses. Even after the official termination of all the intra-EU BITs, due to the 'susnset clauses' included in the majority of BITs, tribunals would retain their jurisdictions for decades. Thus, termination of intra-EU BITs will not eliminate the threats to the autonomy of the EU legal order posed by intra-EU investment dispute settlement under ISDS clauses.

The author believes that a less conflicting position in respect of intra-EU ISDS, allowing tribunals to refer to the CJEU for a preliminary ruling, would ensure the autonomy of the EU legal order and resolve the conflict with international investment protection regime. Endowing ISDS tribunals with the right to refer for a preliminary ruling would secure the exclusive right of the CJEU provide definitive interpretation of EU law in the cases where questions of EU law interpretation arise. The preliminary ruling procedure would ensure uniform interpretation and application of EU law and result in safeguarding the overall effectiveness of EU law.

Importantly, from the perspective of the international investment protection regime, investment dispute settlement independent from national courts would also be ensured in such case, since ISDS with state-independent arbitration would remain in the existence. For the investors, it is most likely a more desirable option to have intra-EU ISDS with the possibility of preliminary ruling than no ISDS at all. Investors' interests under BITs that are not addressed by EU law (like protection from expropriation and guarantees on fair and equitable treatment) would remain secured. Considering these reasons, allowing ISDS tribunals to resolve intra-EU disputes with the possibility to refer for a preliminary ruling could resolve the existing conflict between the EU legal order and the international investment protection regime.

3. ASSESSMENT OF THE INVESTMENT COURT SYSTEM'S EFFECT ON THE EU PROCEDURES ENSURING UNIFORM INTERPRETATION OF EU LAW

3.1. General observations

Since the Lisbon Treaty, foreign direct investment is a part of the common commercial policy which is an exclusive competence of the EU.[695] Thus, investment dispute settlement has become a matter of concern for the EU. Most of the contemporary international investment disputes are resolved under the specific investor-state dispute settlement (ISDS) mechanism entitling private persons to launch their claims against states before international tribunals.[696] Yet, the Commission considers the existing ISDS system to be unsuitable for the EU.[697]

The Commission indicated two groups of arguments for the unsuitability of the current ISDS system. First, the EU cannot formally accede to the existing ISDS rules, as they do not foresee the possibility for international organisations to accede.[698] Secondly, ISDS is claimed to have drawbacks, including the lack of legitimacy and safeguards for independence of the arbitrators, lack of consistency and predictability of the case law, absence of the possibility of review, high costs diminishing its accessibility to small and medium enterprises and lack of transparency.[699] Serious concerns were expressed by the opponents against the negative effects of ISDS on the states' right to regulate – caused by private arbitrators called upon to decide multi-million claims against sovereign states[700] in response

695 However, as was recently clarified by the CJEU in Opinion 2/15, investor-state dispute settlement does not fall under the exclusive competence of the EU and is shared with the Member States. – Opinion 2/15, *supra* note 35, para. 305; Article 207(1) TFEU.

696 ISDS is a mechanism entitling an investor to bring a claim directly against the host country before an international tribunal for the breach of international investment agreement. Most of ISDS cases are heard under 1965 Washington Convention, establishing the International Centre for Settlement of Investment Disputes (ICSID). However, other rules are also used for adjudication, such as, arbitration rules of United Nations Commission for International Trade Law (UNCITRAL), the Permanent Court of Arbitration or the International Arbitration Court of the International Chamber of Commerce. – European Commission, "Fact Sheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements", 26 November 2013, 4, accessed 23 October 2017, http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf; Commission Staff Working Document 'Impact Assessment', *supra* note 4, 7.

697 Ibid., 10; Vera Korzun, "The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs," (2017) 414 *Vanderbilt Journal of Transnational Law* 355: 358.

698 European Commission, *Communication: Towards a Comprehensive European International Investment Policy*, *supra* note 36, 10.

699 European Commission, *Concept Paper: Investment in TTIP and Beyond – the Path for Reform*, *supra* note 53, 1-4.

700 Korzun, *op. cit.*, 358.

to their laws aiming common good for the society.[701] To address these concerns, in 2010 the Commission launched the initiative to develop an innovative ISDS mechanism suitable for the EU.[702] A two-step approach was proposed.[703] First, to include the Investment Court System (ICS) clauses in each future EU-level investment agreement. The CETA's ICS is the first mechanism out of many ICSs under negotiation.[704] Secondly, to eventually replace all the ICSs with the standing MIC for the settlement of the investment disputes.[705] Should the reform succeed, all the investment disputes arising out of the EU investment agreements would be handled by the single MIC instead of dozens of the ICS and ISDS tribunals.

Immediately, the first step of the reform raised numerous discussions on the CETA's ICS compatibility with EU law. In September 2017 Belgium requested the CJEU to assess whether, *inter alia*, the CETA's ICS mechanism is compatible with the exclusive competence of the CJEU to provide definitive interpretation of EU law.[706]

There was not much optimism among the scholars prior to the adoption of the *Opinion 1/17* – the prevailing opinion was that the ICS would not pass the test of autonomy.[707] The CJEU had strengthened already pessimistic views with *Achmea* stating that Articles 267 and 344[708] TFEU had to be interpreted as precluding ISDS clauses in intra-EU investment

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701 One of the most prominent ISDS case is the *Phillip Morris Asia Ltd v Australia*. The dispute concerned the enactment and enforcement of the so called Tobacco Plain Packaging Measures imposed by Australia in implementation of preventive health programs and strategies. Plain packaging of tobacco was intended as a measure to improve public health and to achieve related public health objectives. Phillip Morris Asia Ltd claimed that that "[t]he plain packaging legislation bars the use of intellectual property on tobacco products and packaging, transforming [the Claimant's subsidiary in Australia] from a manufacturer of branded products to a manufacturer of commoditized products with the consequential effect of substantially diminishing the value of [the Claimant's] investments in Australia." – *Philip Morris Asia Ltd. v. Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, paras. 5-10.

702 European Commission, *Communication: Towards a Comprehensive European International Investment Policy*, *supra* note 36: 9-10.

703 European Commission, *Concept Paper: Investment in TTIP and Beyond – the Path for Reform*, *supra* note 53.

704 The Commission estimates that approximately 20 of ICSs should be created by EU investment agreements with third states in the near future. – European Commission, "Negotiations and Agreements", *supra* note 54.

705 Commission Recommendation *for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes*, *supra* note 55, 2.

706 Belgian Request For an Opinion from the European Court of Justice Regarding the Compatibility of CETA, *supra* note 48.

707 S. Gáspár-Szilágyi, "The CJEU Strikes Again in Achmea. Is This the End of Investor-State Arbitration under Intra-EU BITs?" (2018), *International Economic Law and Policy Blog*, accessed 7 May 2018, http://worldtradelaw.typepad.com/ielpblog/2018/03/guest-post-the-cjeu-strikes-again-in-achmea-is-this-the-end-of-investor-state-arbitration-under-intr.html; V. Thym, "The CJEU Ruling in Achmea: Death Sentence for Autonomous Investment Protection Tribunals," (2018), *EU Law Analysis*, accessed 7 May 2018, http://eulawanalysis.blogspot.lt/2018/03/the-cjeu-ruling-in-achmea-death.html; Eckes, *supra* note 80.

708 *Author's note*: Article 267 TFEU provides for the preliminary ruling procedure while under Article 344 TFEU the Member States undertake not to submit disputes concerning interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties.

agreements concluded between the Member States.[709] Yet, surprisingly – the *Opinion 1/17* ruled that the CETA's ICS does not adversely affect the autonomy of the EU legal order.[710]

In the context of the doctrine of autonomy analysed in the 1st Part, the *Opinion 1/17* was atypical decision of the CJEU. While many expected the CJEU to rule the ICS mechanism incompatible with the autonomy, the CJEU decided otherwise despite of all the potential of the mechanism to adversely affect the principle of autonomy of the EU legal order, as is demonstrated in this Part. Naturally, *Opinion 1/17* raises a question whether the CJEU has taken into account all the significant features of the ICS? Or does this ruling mark the new stage in the evolution of the principle of autonomy adjusting the contents of the principle to the contemporary reality of the international legal order. If yes, what features reflect these adjustments and determine the ICS mechanism's compatibility with the autonomy and essential characteristics?

In order to address these questions, the 3rd Part aims to assess whether the ICS mechanism could have adverse effects on the uniform interpretation and application of EU law, as the *Opinion 1/17* did not dispel all the doubts surrounding the effects of the ICS mechanism on the EU judicial system. It is asserted in this Part that despite the favourable assessment of the CJEU, the CETA's ICS does not entirely comply with the criteria of the protection of the autonomy of the EU legal order, which were discussed in the 1st Part. The *Opinion 1/17* is systematically analysed in each of the Chapters of the 3rd Part seeking to identify the risks related to the CETA's ICS and whether any changes were made by the CJEU in the content of the principle of autonomy of the EU legal order and its application practice.

3.2. Assessment of the compatibility of the CETA's ICS with the essential characteristics and autonomy of EU law

The CJEU's assessment of the CETA's ICS compatibility with the autonomy of EU law basically concerned the analysis of the ICSs compliance with two essential characteristics. First, it analysed whether the ICS tribunals would have jurisdiction to interpret and apply EU rules. This assessment was aimed to answer whether the judicial system intended to ensure consistency and uniformity of the interpretation of EU law was not adversely affected. Secondly, the Court investigated the effect of the ICS mechanism on the operation of the EU institutions in accordance with the EU constitutional framework. Here the Court aimed to answer whether the normal functioning of the EU institutions in implementing the tasks conferred on them by the Treaties would not be disrupted. In analysing both of the features, the Court decided that the characteristics were not adversely affected.[711]

The Commission is well-aware of the requirements of autonomy. To ensure the CJEU's exclusive right of interpretation it has accommodated guarantees, discussed in detail below, to prevent conflicts between the prerogatives of the ICS tribunals and the CJEU. First, interpretation and application of EU law will not fall under the competence of the ICS

709 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para 60.

710 Opinion 1/17, *supra* note 50, para. 161.

711 Ibid., paras. 136, 161.

tribunals. Secondly, EU law will only be taken as a *matter of fact* by the ICS tribunals. In case EU law interpretations are necessary, the ICS will use the prevailing interpretation[712] of the respective norms. Thirdly, interpretations of EU law made by the ICS tribunals will not be binding on the domestic courts nor will the tribunal have a right to assess the legality of EU measures.[713] Yet, the sufficiency of these measures is doubtful, as several aspects discussed below that could adversely affect the uniform interpretation of EU law remain.

3.2.1. Exclusion of EU law as an applicable law from investment disputes

Under CETA, the domestic law of the parties, including EU law, will not be part of the law applicable by the ICS tribunals and will be considered as a *matter of fact.*[714] The ICS tribunals should only apply the provisions of CETA and other provisions of international law applicable between the parties in accordance with the VCLT.[715] It may be implied that the Commission believed that these measures would adequately protect the exclusive right of the CJEU to provide definitive interpretations of EU law.

The Court undertook a rather formal approach to answer whether the ICS tribunals will not engage in interpretation and application of EU law. In fact, the Court did not engage in the analysis of the question at all. The CJEU considered that the safeguards[716] foreseen under CETA are sufficient to ensure that the ICS tribunals will not have jurisdiction to interpret the rules of EU law.[717] Yet, there is a sharp contradiction in the CJEU's reasoning. The Court admitted that when the ICS tribunals are called upon to examine the compliance with CETA of the measure challenged by an investor, the ICS tribunals "<…> will inevitably have to undertake, on the basis of the information and arguments presented to it by that investor and by that State or by the Union, of *the effect of that measure*."[718] Determination of the effect of the measure is an evident indication to the interpretation of a measure.[719] Yet, according to the Court, the examination of the effect of the measure, including EU law, by the ICS tribunals cannot be classified as equivalent to interpretation. It is so, because the ICS tribunals would have to take domestic law into account as a *matter of fact*, follow the *prevailing interpretation* given to domestic law by the courts or authorities of a party and because the courts and authorities would not be bound by the meaning given to their domestic law by the ICS tribunals.[720] The analysis below will demonstrate that it is doubtful that the ICS tribunals could in practice refrain from interpretation of EU law despite the listed safeguards.

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712 *Author's note*: The concept of *prevailing interpretation* is discussed in detail in Section 3.2.3.

713 CETA, Article 8.31(2).

714 CETA, Article 8.31(2).

715 CETA, Article 8.31(1).

716 Opinion 1/17, *supra* note 50, para. 130.

717 Ibid., para. 131.

718 Emphasis added by the author. – Ibid., para. 130.

719 AG Bot was not so subtle with his wording stating that the ICS tribunals "<…> must interpret the Parties' domestic law *as little as possible*." (emphasis added by the author) – Opinion 1/17, AG Bot, *supra* note 51, para. 150.

720 Opinion 1/17, *op. cit.,* para. 131.

Notion of law as a *matter of fact* was originally applied within the Common law countries and had to be proven by parties via documentary materials and expert witnesses.[721] It is also a typical notion used in international law. In *Certain German Interests in Polish Upper Silesia*, the PCIJ already considered municipal laws as merely facts expressing the will and constituting the activities of states, in the same manner as legal decisions or administrative measures.[722] The PCIJ found nothing to prevent it from giving judgment on whether or not, in applying that law, Poland was acting in conformity with its international obligations towards Germany.[723] Likewise, law is considered as a fact by ISDS tribunals. In *AES v. Hungary* the tribunal concluded that in an international arbitration *national laws are to be considered as facts*. Since both of the parties of the case pled that the Community's competition law regime should be considered as a fact, the tribunal followed this logic by also reminding that a state may not invoke its domestic laws to excuse alleged breaches of its international obligations.[724]

It follows that the connotation that the notion of law as a *matter of fact* carries is twofold. The first one is purely procedural: law, as any other evidentiary materials, must be proven. Secondly, law is considered as a fact so that the defendant state may not invoke its domestic laws as an excuse for the breaches of its international obligations. As Rovine elaborated "<…> the body of law applied in ICSID arbitrations is international law, not national law <…>. National law is generally not a defense to international law duties."[725] An analogous rule is also entrenched in Article 32 of the Draft Articles on the Responsibility of States providing that a state in breach of the duty to provide reparation for an internationally wrongful act may not rely on its internal law to justify its failure to comply with obligations of international law.[726]

However, the notion of law as a *matter of fact* has become so common in international dispute settlement, that nobody questions its reasonableness. In the author's view, the use of the notion of law as a *matter of fact* in the framework of EU law causes serious conceptual and logical inconsistencies. Law is always abstract to a certain degree as it exists in the intellectual form only, and thus, it requires interpretation. International lawyers tend to rely on such concepts like 'plain meaning' or 'ordinary meaning' that should "<…> reflect the determinacy of the text and the objective character of the language."[727] Yet, as Bianchi

721 C. Croft, C. Kee, and J. Waincymer, *A Guide to the UNCITRAL Arbitration Rules*, 1st edn. (New York: Cambridge University Press, 2013), p. 402; Jeff Waincymer, "International Arbitration and the Duty to Know the Law" (2011) 28 Journal of International Arbitration 201: 205.

722 Permanent Court of International Justice. *Case Concerning Certain German Interests in Polish Upper Silesia*. The Merits. Judgement of 25 May 1926, PCIJ Series A no 7, 19.

723 Ibid.

724 *AES v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 7.6.6.

725 A. W. Rovine, Contemporary Issues in International Arbitration and Mediation. Leiden: Brill | Nijhoff, (2013). eBook Academic Collection (EBSCOhost), accessed 27 June 2018.

726 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), Chp.IV.E.1, http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

727 Bianchi, *supra* note 235: 36.

put it, language as such conveys no clear and objective meaning.[728] Bianchi cites an illustrative example, originally presented by Lord McNair, explaining why plain meaning should not be trusted blindly. It concerned the will of a man who wrote 'All for mother.' Yet, the entire inheritance was intended by that man to his widow, who was referred to by everyone in the family as 'mother' (including her husband).[729] Only by resorting to extra-linguistic elements, like context, may meaning of text be considered clear.[730] Fact, on the other hand, is a notion that is normally opposed to law. It can always be stated in respect of the fact whether it occurred, or not.[731] Application of law is performed in respect of and as a reaction to the facts of reality. Law cannot be applied without facts. Irrespective of its form, law will require effort to be perceived by the recipient. Yet, there is always a possibility that another recipient could understand the same norm differently.[732] The same applies to courts.[733]

As was discussed in Chapter 1.3, the meaning of law largely depends on the interpretive community the interpreter comes from. According to Cover, the same norm could have opposite meanings in different communities, depending on the narrative used to endow law with content.[734] Therefore, law is susceptible to interpretation that may determine many different meanings. The higher the legal act is in the hierarchy of acts, the more likely it is that it will require interpretation and clarification. The idea is supported by the so-called *incomplete contract* theory used in commercial law studies to describe the dynamics of interpretation and application of the treaties. As Fontanelli describes it, a treaty can be compared to the contract concluded between two or more parties. Due to political and practical reasons, parties may intentionally leave certain provisions of an agreement incomplete, vague or ambiguous. In case of an *incomplete contract*, clarification of the terms of the agreement is assigned to the subject entrusted with its interpretation in case of a dispute – a judge.[735] What a judge can do in case of an incomplete provision is to rely on extra-textual interpretive strategies that would allow him to ascertain the meaning of a provision despite an unclear text (as was explained in the Chapter 1.3).

Thus, regarding law as a *matter of fact* does not change the nature of law – to identify its meaning, even as a *matter fact*, it must be interpreted. Determining the meaning of EU law is even more complicated. Since the Member States have to agree on important issues in various fields covered by the Treaties, reaching a consensus is a difficult task requiring

728 Bianchi, *supra* note 235, 36.

729 Ibid., 40.

730 Ibid., 36.

731 "Incident, act, event, or circumstance. A fact is something that has already been done or an action in process. It is an event that has definitely and actually taken place, and is distinguishable from a suspicion, innuendo, or supposition. A fact is a truth as opposed to fiction or mistake." – "West's Encyclopedia of American Law, Edition 2" - 'fact', https://legal-dictionary.thefreedictionary.com/fact, accessed 6 March 2018.

732 *Author's note*: In fact, the same is true in case of perception of facts relevant to the proceedings. Hence, the experts are necessary.

733 Cover, *supra* note 88, 40.

734 Ibid., 11-25.

735 Filippo Fontanelli, "The Court Goes All In," *European Journal of Law Reform* 11, 4 (2009): 474.

compromises. Making compromises in EU legislative negotiations can (and it often does) result in vagueness and purposeful incompleteness of legislation. According to Fontanelli, in the EU there is an "<…> objective difficulty in adopting new <…> legislation, amending the existing one and finding an agreement on detailed provisions."[736]

It is upon the CJEU to find a correct and coherent interpretation of the legal order and of its single provisions.[737] Unlike most of the international courts, the CJEU has established a specific system of jurisprudence, aimed to ensure that EU law is understood in the same way in each of the Member States. A couple of features characterise this system. First, the case law of the CJEU has an *erga omnes* effect and is thus mandatory not only in a particular case, but to the rest of the national courts as well.[738] National courts may decide not to refer to the CJEU for a preliminary ruling and invoke previous interpretations of the CJEU in deciding a case. However, the jurisprudence is not rigid. On the one hand, courts are free to refer to the CJEU for a preliminary ruling despite the existence of relevant case law. On the other hand, the CJEU is free to alter its case law if it considers it necessary. The dynamics of the CJEU's case law are covered by the *acte éclairé* doctrine.[739] Secondly, breaches of the case law of the CJEU performed by the national courts are considered to be breaches of the EU law.[740] In turn, rulings of international tribunals only bind the parties of a particular case[741] while the judicial decisions are considered as a subsidiary source of law.[742]

As was discussed in the Sub-Section 1.2.3.2, the functioning of the EU judicial system, composed of the CJEU and national courts, is one of the essential characteristics of the EU legal order, which are protected by the principle of autonomy. At the core of this judicial system stands the preliminary ruling procedure ensuring uniform interpretation and effectiveness of EU law in all the Member States. The autonomy of the EU legal order requires that the CJEU's cooperation with national courts through the preliminary ruling procedure is not adversely affected by EU's international treaties. As already analysed in Section 2.1.2, ISDS clauses entrenched in intra-EU BITs were found by the CJEU incompatible with autonomy precisely because they had adverse effect on the functioning of the preliminary ruling procedure, and therefore, the EU judicial system. One of the main reasons that led the CJEU to such conclusion was that intra-EU ISDS tribunals could engage in interpretation, or application, of EU law.[743]

Gallo and Nicola accurately observe that the analysis of EU law is an essential function

736 Fontanelli, *supra* note 735, 474.

737 Ibid.

738 Ilija Vukcevic, "CILFIT Criteria for the Acte Clair/Acte Eclaire Doctrine in Direct Tax Cases of the CJEU," *Intertax* 40, 12 (2012): 656.

739 Joined cases 28 to 30-62, *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration* [1963] EU:C:1963:6, p. 37-8; Case 283/81, *CILFIT*, *supra* note 260, para. 14.

740 Case C-224/01, *Gerhard Köbler v Republik Österreich* [2003] EU:C:2003:513, para. 56.

741 For instance, a decision of International Court of Justice "<…> has no binding force except between the parties and in respect of that particular case." – United Nations, Statute of the International Court of Justice, 18 April 1946, Article 59; ICSID Convention stipulates that "The award shall be binding on the parties <…>." – Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), Article 53.

742 Statute of the International Court of Justice, Article 38(1)(d).

743 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 42.

that the ICS tribunals will have to perform to be able to assess whether EU's act infringed CETA.[744] In order to establish an infringement of CETA's provisions, the tribunal would have to establish the precise requirements of EU law, their actual effects to the respective investors, and to determine if it results in what is defined in CETA as discrimination, expropriation or an unfair and inequitable treatment.[745] Therefore, considering law as a *matter of fact* without interpreting it is impossible in practice. The AG Bot had also acknowledged that "<…> in order to conduct its review, the Tribunal may be called upon to undertake some interpretation of EU law."[746] It follows that considering EU law as a *matter of fact* may not prevent the ICS tribunals from its interpretation. Therefore, the Court's conclusion in the *Opinion 1/17* that the examination of the effect of EU measures would not be equivalent to interpretation[747] because EU law would be regarded as a *matter of fact* is unrealistic.

On the contrary, the ICS tribunals would have no other choice but to determine EU law contents, which may not itself be a problem if the tribunal does not err in law. The problem of interpretation occurs not in cases where everything is clear and precise, but where the contents of EU norms are uncertain, ambiguous and vague. An error in law is likely irrespective of whether it is interpreted by a legal professional (like a judge), or by an ordinary citizen – only the probability of error differs. The meaning of the applicable EU law is constantly determined by various actors within the EU (including the national courts, institutions and citizens). There is no way to directly apply and implement EU law, for instance regulations, other than by establishing the meaning of the specific norms. The fact that national judges face the questions of EU law on a daily basis does not make the possibility of error less likely. The preliminary ruling procedure is in place with the aim to rectify the errors of interpretation if such occurred and to indicate the correct meaning of EU law to be followed henceforth by the other actors. Thus, the heart of the problem lies not only in the fact that the contents of EU law would have to be determined by the ICS tribunals, but in the possibility that these tribunals would make an error in such determination.

The risk of error in determining the meaning of EU law is even higher if, as Lavranos and Lock observe, a person does not come from within the EU system that is often the case with the judges of international tribunals.[748] Since the ICS tribunals do not belong to the EU's interpretive community and thus are influenced by different narratives and interpretive strategies, they could come up with entirely different assessments of EU law than then ones originating from the EU judicial system.

The *Iron Rhine* illustrates such a situation. It concerned the dispute between Belgium and the Netherlands over the Iron Rhine railway linking Antwerp and Rhine basin in Germany via the Netherlands. As part of the route went through the natural reserves of the

744 Gallo and Nicola, *supra* note 49: 1126.

745 Opinion 2/13, *supra* note 16, para. 221.

746 Opinion 1/17, *supra* note 50, para. 137.

747 Ibid., para. 131.

748 Lavranos, *supra* note 74: 239; Tobias Lock, "The European Court of Justice: What Are the Limits of Its Exclusive Jurisdiction," *Maastricht Journal of European and Comparative Law* 16, 3 (2009): 303.

Netherlands, the Netherlands claimed that Belgium had to comply with its environmental laws and bear the extra costs involved.[749] The parties disagreed on the allocation of costs necessary for the reactivation and long-term use of the railway.[750]

Although 1839 Treaty of Separation and later treaties had to be applied to solve the dispute, a question of application of the EU Habitats and Birds directives and decision on trans-European transport network arose in the proceedings.[751] To answer whether it should interpret and apply EU law, the PCA turned to the case law of the CJEU. The criteria that the PCA chose to apply was the relevance test: if the PCA reached the conclusion that it could not decide the case without engaging in the interpretation of EU law the relevant questions of EU law would have to be submitted to the CJEU.[752] The PCA considered itself to be in an analogous position as the national courts of the Member States to refer for a preliminary ruling.[753] The PCA concluded that EU law application was not necessary to reach a verdict in the case, as it would arrive to the same conclusions irrespective of whether relevant EU law was interpreted in the case, or not.[754]

In other words, the PCA applied one of the *CILFIT* criteria to substantiate its decision to ignore EU law in deciding the case since the PCA considered that it would not make a difference.[755] According to Lavranos and Lock, the PCA clearly misunderstood the significance of *CILFIT* criteria, pursuant to which a domestic court is released from obligation to refer to the CJEU, but not from actually applying EU law in the case – even if the international tribunal presides over domestic disputes, it stands outside the EU legal system and thus is not in an analogous position to that of a domestic court.[756] Surprisingly, other scholars considered the PCA's decision to resort to *CILFIT* criteria as instructive and a good example of judicial comity allowing other tribunals to avoid frictions with the CJEU.[757] However, the latter view is hardly substantiated, as the PCA was not in the position to apply the *CILFIT* rules in the first place and ultimately applied it in an incorrect way. Such a practice itself could very well be the ground for friction between courts.

The *Iron Rhine* demonstrates that considering EU law as a *matter of fact* may not prevent international tribunals from engaging in significant interpretations of EU law and from asserting jurisdiction over the questions clearly falling under the jurisdiction of the CJEU. Therefore, such a safeguard is not sufficient to ensure that uniformity of EU law is not adversely affected.

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749 *Iron Rhine Arbitration. Belgium v. Netherlands*, PCA Case No. 2003-02, Award of 24 May 2005.

750 Ibid., paras. 22-27.

751 Ibid., paras. 121-123.

752 Ibid., para.103.

753 Ibid.

754 Ibid., para. 137.

755 Ibid.

756 Lavranos, *op. cit.*: 238-239; Lock, *supra* note 748: 302-303.

757 Yasuhiro Shigeta, "The ECJ's 'hard' Control over Compliance with International Environmental Law: Its Procedural and Substantive Aspects," *International Community Law Review* 11, 3 (2009): 296; Ineke van Bladel, "The Iron Rhine Arbitration Case: On the Right Legal Track ? Analysis of the Award and of Its Relation to the Law of the European Community," *Hague Justice Journal* 1, 1 (2006): 23-4.

Ultimately, the fact that the CJEU found the ICS mechanism to be compatible with the autonomy and essential characteristics may be a signal of the softening criteria for the protection of the uniform interpretation of EU law. While the CJEU did not find the fact that the ICS tribunals would have to determine the effect of EU measures problematic, its position in *Opinion 2/13* did the opposite. Back then, the Court found unsatisfactory that the interpretation of the ECHR provided by the ECtHR would be binding on the EU and its institutions while the interpretations of the Charter by the CJEU of an analogous rights would not be binding on the ECtHR.[758] In case of the situation analysed in the *Opinion 2/13*, the ECtHR was also not entitled to interpret EU law – only the ECHR – the international agreement in question. Yet, it was sufficient for the Court that the ECtHR was entitled to interpret fundamental rights that fell under the scope of the *rationae materiae* covered by the Charter, even if it is done while interpreting the ECHR and not the Charter directly. In contrast, in case of the ICS mechanism, the Court found the fact that the ICS tribunals will have to engage in direct interpretations of EU law, by determining the effect of EU measures, not problematic, as long as they are not binding the EU and its institutions.

The following Section looks into the safeguard of non-binding character of the interpretations of EU law given by the ICS tribunals and assesses its credibility.

3.2.2. Ensuring that tribunal's interpretations are not binding on the EU

CETA anticipates that "any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party."[759] It evidently aims to eliminate any concerns that respective awards will bind the EU to a particular interpretation of the EU rules, as the CJEU's interpretations do.[760] It is clear that the Court considered the measure sufficient and self-evident as it did not give a matter much of attention.

According to the CJEU, examination of the effect of EU law cannot be regarded as equivalent to interpretation since the courts and authorities of the EU block will not be bound by the meaning given to EU law by the ICS tribunals.[761] As reported by AG Bot, the fact that the ICS tribunals would have to engage in the interpretation of EU law does not affect the CJEU's functions or its position in the EU legal order, since the Court, the EU and its institutions as well as the Member States will not be bound by the tribunal's interpretations.[762] However, if this proposal is read systematically together with other provisions of CETA, its suitability seems doubtful due to the following reasons.

The CJEU has consistently repeated that if an international agreement concluded by the EU provides for a system of courts, empowered to settle disputes between the parties to the agreement and to interpret its provisions, the decisions of that court could be binding

758 Opinion 2/13, *supra* note 16, para. 185.

759 CETA, Article 8.31(2).

760 Opinion 1/00, *supra* note 13, para. 13.

761 Opinion 1/17, *supra* note 50, para. 131.

762 Opinion 1/17, AG Bot, *supra* note 51, para. 138.

on the EU's institutions.[763] An agreement providing for a system of courts should be, as a matter of principle, compatible with EU law, if international agreement does not adversely affect the autonomy of the EU legal order.[764] Yet, the ICS tribunals are not in fact prevented from interpretation of EU law, as was demonstrated in the previous Section. The reasoning provided by the ICS tribunals could include important features of EU law interpretation leading to compensation award to a claimant. Moreover, as ICS tribunals' awards will be binding the parties to the agreement, the interpretations of EU law, as an integral part of the award given by the tribunal, would possess the same binding character. Since the EU as the respondent will be bound by the ICS awards, such awards would thus have to be respected by all the institutions of the EU.[765] CETA foresees that: "[a]n award <…> shall be binding between the disputing parties and in respect of that particular case."[766] Moreover, "<…> a disputing party shall recognise and comply with an award without delay."[767] Therefore, CETA does not seem to ensure in practice that the EU is not bound by the interpretations of EU law provided by the ICS tribunals. According to Pernice, ISDS clauses give these tribunals a final and binding say on the relevant interpretation of EU law at stake, even if considered as *facts* only.[768] Although this competence to interpret EU law is not exclusive, the tribunal would *de facto* be the forum where questions of EU law are adjudicated with binding effect upon the EU institutions (even if in a particular case only).[769] Importantly, this is exactly the situation that the CJEU has consistently been trying to prevent.

Normally, in arbitration an award would only be binding on the parties to the case. For instance, under the UNCITRAL arbitration rules "[a]ll awards <…> shall be final and binding on the parties."[770] The ICSID Convention provides similar provision under Article 53. However, one of the drawbacks of the ISDS tribunals, that the Commission aims to resolve with the ICS, is that "[p]redictability and consistency of case-law are not achieved since arbitrators are not bound by previous decisions and there is no systemic requirement to take account of them."[771] Predictability and consistency of the case law is what CETA's ICS is intended to achieve, albeit within the limits of the specific agreement only.[772] As the ICS's Appellate Tribunal would promote the consistency of the case law,[773] a sort of precedent system would be created under CETA. The essence of the problem lies in the question of what should be done if an error of EU law interpretation, even if taken as a *matter of*

763 Opinion 1/91, *supra* note 12, para. 39-40; Opinion 2/13, *supra* note 16, para. 182.

764 Ibid., para. 183.

765 Gallo and Nicola, *supra* note 49: 1127.

766 CETA, Article 8.41(1).

767 CETA, Article 8.41(2).

768 Ingolf Pernice, "Part III: Study on International Investment Protection Agreements and EU Law," in Kuijper et al., *supra* note 78, 150.

769 Ibid.

770 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration: With Amendments as Adopted in 2010*, Article 34(2), 2010.

771 Commission Staff Working Document "Impact Assessment," *supra* note 4: 34-35.

772 Ibid., 34-39.

773 Ibid., 39.

fact, is made by the ICS tribunals? According to AG Bot, the Appellate Tribunal provides an additional guarantee that EU law will not be misinterpreted, since the Appellate Tribunal may modify or reverse an award of the ICS tribunal of first instance by correcting it as part of the review if a manifest error is made.[774] Yet, the existence of Appellate Tribunal does not eliminate the risk of misinterpretation as AG Bot suggests.

The EU could challenge the award of the ICS tribunal of first instance before the Appellate Tribunal on the ground of "manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law."[775] However, only manifest errors could be the ground to successfully challenge the award, while minor misinterpretations of the ICS tribunal of first instance would not count. If the Appellate Tribunal affirms the misinterpretation of EU law all the procedural measures would be exhausted leaving the EU with no choice but to comply with the award. Importantly, an award of the Appellate Tribunal may form a precedent for the future cases of the ICS where EU law could be misinterpreted again in cases initiated by other investors. Notably, investment tribunals tend to increasingly rely on previous decisions to buttress their legal reasoning and thereby create standards and expectations for the application of often vague provisions.[776] The manner in which the applicable law is applied in a case is always tied up to the specific facts of the situation. Even if EU law was appreciated as a *matter of fact* in the ICS case, a certain model of CETA's application in respect of specific legislation of the EU would be formed. Should another case be brought before the ICS concerning the same legislation of the EU, it is reasonable to expect that the ICS tribunals would apply CETA in respect of the same facts in an analogous manner. Thus, not only the Appellate Tribunal does not prevent the possibility of misinterpretation of EU law, but also is itself a precondition for the development of precedents containing such misinterpretations. Such unofficial assessments of EU law may mislead the Member States with regard to the true meaning of EU law.

Considering the scale of the ICS reform, the existence of tens of parallel dispute settlement regimes is a major threat to the uniform interpretation of EU law. Hundreds of cases could eventually be solved by the ICS tribunals established under different investment and trade agreements each forming its separate body of 'predictable and consistent' case law. Importantly, the CJEU recognised in *Opinion 1/17* that the ICS tribunals will be entitled to external autonomy meaning that they will exercise their functions "<…> without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions."[777] It follows that each of the ICS mechanisms will be independent from one another and will not have to adhere to interpretations and assessments provided by other ICS tribunals. Thus, it is very likely that many different assessments of

774 Opinion 1/17, AG Bot, *supra* note 51, para. 148.

775 CETA, Article 8.28(2b).

776 Catharine Titi, "The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration," *Journal of World Investment & Trade* 14, 5 (2013): 831.

777 Opinion 1/17, *supra* note 50, para. 202.

EU law under analogous circumstances could come into existence. What the CJEU stated in the *Opinion 1/17* is that such a situation does not affect the autonomy of the EU legal order as long as those interpretations are formally not binding the EU. What it means in practice is that many different interpretations of EU measures, each equally legitimate, could come into being and thus become bases to find the EU and the Member States liable in different cases under separate regimes. The fact that EU laws effects would be assessed in such scale in an attempt to form consistent case law clearly has a potential to adversely affect the uniform interpretation of EU law.

The following Section looks into the use of prevailing interpretation by the ICS tribunals as the safeguard of autonomy and the CJEU's right to provide definitive interpretation of EU law.

3.2.3. Use of 'prevailing interpretation' by the ICS tribunals

One can imply the Commission's assumption that the ICS tribunals could avoid interpreting EU law, if already existing interpretations were available for its use. Under CETA, if the tribunal is required to ascertain the meaning of a provision of domestic law of one of the parties as a *matter of fact*, it shall follow the *prevailing interpretation* of that provision made by the courts or authorities of that party.[778] Just as in case of other safeguards, the CJEU did not engage in the analysis of the concept of *prevailing interpretation*.

There are a couple of problems concerning the use of prevailing interpretation in the ICS proceedings. First, the very existence of the *prevailing interpretation* of EU law is doubtful. Secondly, the process of its proof may place the parties to an unequal position.

The very existence of *prevailing interpretation* is complicated and raises practical questions. First, it is unclear what interpretations should be considered prevailing. Would it be the ones provided by the Court of Justice only, or would the rulings of the General Court count as well? Secondly, the question of the institution authorised to declare interpretations prevalent is also relevant. Since it is the CJEU that is only entitled to interpret unclear and imprecise provisions of EU law, it can be asked whether indication of prevalent interpretation does not fall under the powers of the CJEU. If it is the Commission that is entitled to point to certain case law and declare it prevalent, it can be questioned if it possesses such a power under the Treaties. Moreover, according to what criteria would case law be recognised as *prevailing interpretation* by the Commission? This might be a challenging task, since the CJEU is known for dynamic pro-integrationist interpretation of law (see Chapter 1.3).[779] One may ask, what should be done in case no interpretation at all was provided by the CJEU yet, or if two or more conflicting interpretations exist?

According to AG Bot, the review of manifest errors by the Appellate Tribunal should only be conducted in situations when there is nothing in the EU legal order to clarify the

778 CETA, Article 8.31(2).

779 "<…> every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied." – Case 283/81, *CILFIT*, *supra* note 260, para. 20.

meaning to be given to a provision of EU law.[780] Indeed, it is not clear from the AG's opinion what would be the function of the Appellate Tribunal in such a case. Since the Appellate Tribunal would not be authorised to refer to the CJEU for a preliminary ruling, it could do nothing that the ICS tribunal of first instance couldn't do. Both of the ICS tribunals have no right to determine the interpretation of EU law. If there is nothing in the EU legal order to clarify a certain provision of EU law, both of the tribunals would find themselves in a dead-end requiring them to determine the content of EU law provision in question by themselves. Thus, the review by the Appellate Tribunal would not resolve the main problem – that authoritative interpretation of EU provision relevant to the case does not exist.

The other problem concerns the process of proof of the *prevailing interpretation*. Even if the Commission was not entitled to indicate *prevailing interpretation*, the parties of the case would be placed in an unequal position. It is evident that the institution representing the EU in the ICS proceedings (most likely, the Commission) would be in a better position to indicate the relevant law of the EU. Due to Commission's role as the guardian of the Treaties,[781] its submissions may be regarded as more authoritative than the Canadian investor's. Or at least, while the Canadian investors would have to put significant resources to prove that certain case law comprise *prevailing interpretation*, the Commission, initiating most of the legislation and constantly representing the EU in various judicial proceedings, would be in a better starting position to do so.

Furthermore, even if the tribunal is presented with the relevant case law, it may not take it into account or misunderstand it. Prevailing, or not, the CJEU's interpretations also requires interpretation and effort. As was analysed in detail in Section 1.3.1, even an evident and clear provision of law still requires interpretation and may acquire different meanings in distinct interpretive communities. Also, the tribunal may not even be presented with all the relevant case law by the parties, but with the ones that proves the parties' arguments best. As the PCA observed in MOX Plant arbitration, despite of what the parties of a case may agree on the scope and effects of the EU law applicable in the dispute, in the end the question is not for the parties to decide, but the CJEU.[782] The same argument applies to the parties of the ICS proceedings. Thus, clarification of the precise procedures on how the *prevailing interpretation* would be indicated is necessary.

Some guidelines were already provided by the CJEU. As was indicated in the *Opinion 2/13*, to manage the CJEU's relationship with international tribunal it has to be ensured that the competent institution of the EU is able to assess whether the CJEU has already given a ruling on the question of EU law at issue in that case. If the Court did not have such an opportunity yet, prior involvement procedure has to be initiated so that the CJEU could provide such a ruling.[783] However, under current model of the ICS, neither of these conditions is fulfilled and the CJEU cannot intervene or participate in the tribunal's proceedings in any

780 Opinion 1/17, AG Bot, *supra* note 51, para. 152.

781 European Commission, "Applying EU Law," accessed 3 July 2018, https://ec.europa.eu/info/law/law-making-process/applying-eu-law_en.

782 *The Mox Plant Case. Ireland v. United Kingdom*, *supra* note 669, para. 26.

783 Opinion 2/13, *supra* note 16, para. 241.

capacity. What is surprising is that the CJEU provided an entirely different position in the *Opinion 1/17* which may signal the change of its attitude regarding the necessity of its involvement in the work of international dispute settlement mechanisms. The Court stated that it is consistent that the CETA makes no provision for the prior involvement of the CJEU that would allow or oblige the ICS tribunals to make a reference for a preliminary ruling to the CJEU.[784] Moreover, it considered that justifiable the ICS tribunals' power to provide definitive rulings on disputes between investors and the EU without the establishment of any re-examination procedure of the award by domestic courts of the parties to the agreement.[785]

These conclusions were built by the Court on its conviction that the ICS tribunals will not be called upon to interpret or apply the rules of the EU,[786] as it stands outside the EU judicial system.[787] Bearing that in mind, the CJEU's conclusion in *Opinion 1/17* contrasts with the *Opinion 2/13*, despite that the circumstances in both cases were very similar. After all, the ECtHR was not intended under the Accession Agreement to interpret or apply EU law as well as the ICS tribunals. The ECtHR was clearly not intended to become a part of the EU judicial system also. Yet, the CJEU did not underline the separateness of the regime of the ECtHR from the EU judicial system, as it did in case of the ICS mechanism. One may question whether the result of the assessment in the *Opinion 2/13* would have been different if the CJEU had separated the two regimes in a similar manner as in case of the ICS mechanism.

Be that as it may, the separateness of the ICS mechanism from the EU judicial system will have its consequences. If there is a dispute between the parties over the *prevailing interpretation* it automatically indicates that the question of EU law interpretation is present in the case and requires clarification. Since any possibilities to refer to the CJEU for clarification of EU law are excluded, the ICS tribunals will have to make those clarifications themselves, if need arises. These assessments of EU law could have adverse effects on the uniformity of EU law.

3.2.4. Ensuring that EU law legality review is not performed

CETA anticipates that the ICS tribunals shall not have jurisdiction to determine the legality of EU law measure alleged to constitute a breach of CETA. The CJEU has long ago reserved an exclusive right to declare EU institutions' acts invalid.[788] As a result, national courts cannot rule EU law measures invalid, but are entitled to apply EU law by confirming its validity.[789] By analogy, CETA provides that ICS tribunals would not be entitled to assess the legality of EU law measures.[790] The CJEU, without engaging in a detailed analysis, has

784 Opinion 1/17, *supra* note 50, para. 134.

785 Ibid., para. 135.

786 Ibid., para. 133.

787 Ibid., para. 114.

788 Case C-314/85, *Foto-Frost v. Hauptzollamt Lubeck-Ost*, *supra* note 189, paras. 19-20.

789 Ibid., para. 14.

790 CETA, Article 8.31(2).

recognised this circumstance as another safeguard of the autonomy and essential characteristics, rendering the ICS mechanism compatible with EU law.[791]

However, in its assessment whether the ICS mechanism would not have the effect on the operation of the EU institutions in accordance with the EU constitutional framework, the Court introduced a new feature into its autonomy doctrine. It stated that if the EU was to enter into an international agreement leading to the consequence that the EU "<…> has to amend or withdraw legislation because of an assessment made by a tribunal standing outside the EU judicial system <…>, it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework."[792] In other words, if the EU institutions are forced to revoke their acts as a result of the ICS tribunals' awards, it should be considered an adverse effect on the EU legal order. Thus, although the ICS tribunals will never directly declare an act of the EU unlawful, the CJEU considered that the ICS could still have adverse effects on the legality of these acts within the EU if the ICS lead the EU to withdraw those acts. Therefore, it may be asked whether it was possible to use the ICS award favouring investor's position to challenge the legality of respective EU measures under preliminary ruling procedure or action for annulment.

The question is significant in two aspects. First, if the ICS tribunals conclude that EU law infringed CETA, it may serve as an argument that EU measure in question is actually unlawful. The CJEU itself has consistently declared that international agreements concluded by the EU are binding upon its institutions and prevail over the acts of the EU.[793] Therefore, even one award in favour of the investor could spark questions regarding EU law legality. Secondly, if the respective rules of the EU were not annulled after the first ICS award in favour of the investor it would make sense for other investors that are in a comparable situation to initiate ICS proceedings and pursue compensation as well. Not to mention that the ICS proceedings under the frameworks of one trade and investment agreement (like CETA) could encourage investors covered under other agreement (like EU agreements with Singapore or Vietnam) to initiate proceedings in the same grounds.[794] Thus, although the award would only be binding on the parties of the dispute, it could be a strong impetus for numerous further proceedings against the EU as it is likely that the ICS tribunals would follow the previous case law.[795] Having numerous ICS proceedings and awards declaring respective rules of the EU to infringe CETA could factually impair the effectiveness of those rules.

Thus, from the first sight, there is no reason to believe that EU secondary law could not be challenged as a consequence of the ICS awards. However, the award itself could not

791 Opinion 1/17, *supra* note 50, para 121.

792 Ibid., para. 150.

793 Case C-366/10, *Air Transport Association of America*, *supra* note 552, para. 50.

794 *Author's note*: It must be noted that the new generation trade and investment agreements tend to be very similar in respect of their contents.

795 *Author's note*: As was mentioned in Section 3.2.2., it is one of the goals of the ICS to make the investment cases more predictable and consistent. It should be eventually achieved through an application of the precedents formulated by the ICS tribunals.

be used as a ground for annulment. It would have to be CETA. CETA, being an international agreement concluded by the EU, also forms an integral part of the EU law.[796] As the CJEU recognised, the validity of an act of secondary law may be affected by the fact that it is incompatible with the rules of international law, provided that they comply with three conditions.[797] First, the EU must be bound by those rules; secondly, nature and the broad logic of an international agreement must not preclude the examination of the validity of an act of EU law in the light of that agreement; thirdly, the provisions of an agreement which are relied upon for the purpose of examining the validity of EU's act appear, as regards their content, to be unconditional and sufficiently precise.[798] The Court interpreted CETA's Article 30(1),[799] as meaning that Canadian investors are entitled to a specific legal remedy against the EU measures, unlike the enterprises and natural persons of the Member States which are not foreign investors in the EU and will not have access to that specific legal remedy and will not be able to invoke directly the CETA's provisions before the courts of the Member States or the EU.[800] Thus, the Court ruled out that CETA could be used to challenge EU secondary laws.

The CJEU also ruled out the possibility that the EU institutions could be forced to withdraw legislation because of the assessments made by the ICS tribunals. It concluded that the ICS will have no effect on the operation of the EU institutions in accordance with the EU constitutional framework,[801] since the ICS tribunals have "<…> no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures <…>."[802] Yet, despite these assurances of CETA, it is clear that any successful claim by an investor before the ICS tribunals will inevitably invite other investors under various agreements to consider analogous actions against the EU. Therefore, the EU institutions may have to weigh what is more reasonable – to pay the multiple investors,[803] or to better revoke the legislation and avoid at least some of the payments.

Thus, the CJEU has clearly stated that the nature and the broad logic of CETA preclude it from being invoked within the EU judicial system. In doing so, the Court has potentially undermined the principle of equal treatment between purely-EU enterprises and foreign investors. The following Section analyses whether foreign investors and purely-EU investors are in a comparable situation, since the answer may have severe implications for the uniform interpretation and application of EU law.

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796 Case 181/73, *Haegeman* [1974] EU:C:1974:41, para. 5.

797 Case C-366/10, *Air Transport Association of America*, *supra* note 552, para. 51.

798 Ibid., paras. 52-54.

799 "Nothing in this Agreement shall be construed as <…> permitting this Agreement to be directly invoked in the domestic legal systems of the Parties." – CETA, Article 30(1).

800 Opinion 1/17, *supra* note 50, para. 181.

801 "<…> Article 28.3.2 of that agreement states that the provisions of Section C cannot be interpreted in such a way as to prevent a Party from adopting and applying measures necessary to protect public security or public morals or to maintain public order or to protect human, animal or plant life or health, subject only to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade between the Parties." – Ibid., para. 152.

802 Ibid., para. 153.

803 "<…> the Union will have to make payment of that sum when it is ordered to do so <…>" – Ibid., para. 145.

3.2.5. The compliance of the ICS mechanism with the principle of equal treatment

As Belgium stated in the CJEU's proceedings on CETA's compatibility with EU law, the CETA's ICS mechanism results in the preferential judicial process for Canadian investors in that Canadian undertakings investing in the EU would be able to bring disputes before the internal courts of the EU as well as before the ICS tribunals while the intra-EU investors would not have the possibility of the ICS proceedings.[804] It has thus requested the CJEU to assess whether such a situation is compatible with Article 20 of the Charter stating that "[e]veryone is equal before the law" and Article 21 of the Charter saying that "[w]ithin the scope of application of the Treaty establishing the European Community <...> any discrimination on grounds of nationality shall be prohibited."[805] Both of the provisions correlate with Article 18 TFEU providing the general prohibition of discrimination on the grounds of nationality.[806] The Court contested Belgium's arguments by relying on the non-comparability of the positions of the investors originating from the parties to CETA, and enterprises investing intra-EU.

Belgium alleged that the principle of equal treatment might be infringed in two situations.[807] The first concern of Belgium was related to the effects of the ICS tribunals' awards on the free competition within the internal market. Namely, if the case concerned an anti-trust fine imposed by the EU on the investor and the ICS tribunal awarded a compensation of similar size, fine would be neutralized.[808] The consequence of such neutralization would be that Canadian investors would evade the financial consequences of the anticompetitive behaviour infringing EU law while European investors unable to do the same would face a less favourable treatment.[809] In turn, the effectiveness and uniform application of the EU competition rules would be undermined in that the same rules would be applied in a different manner to different addressees. Since the uniform interpretation and application of EU law, as well as its effectiveness, is precisely what the EU law autonomy is designed to protect, it was Belgium's view that it should be another reason to consider the ICS mechanism incompatible with the Treaties. Without an extensive analysis of the question the Court ruled out the possibility of such a risk by merely stating that such a situation "<…> is unimaginable where the competition rules have been correctly applied by the Commission or by a competition authority of a Member State <…>."[810] In turn, the EU investors would have available to them the legal remedies under EU law enabling them to seek annulment of any unfair fine.[811]

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804 Opinion 1/17, AG Bot, *supra* note 51, para 185.

805 *Charter of Fundamental Rights of the European Union* (7 June 2016, O.J. C 202/393), Articles 20 and 21(2).

806 Opinion 1/17, AG Bot, *op. cit.*, para. 197.

807 J. R. Mata Dona, "Opinion 1/17 on CETA: Hearing Report," (2018), *International Litigation Blog*, accessed 9 July 2018, http://International-Litigation-Blog.Com/Opinion-1-17-Ceta-Hearing-Report/.

808 Opinion 1/17, AG Bot, *op. cit.*, para. 191.

809 Ibid., para. 190.

810 Opinion 1/17, *supra* note 50, para. 185.

811 Ibid., para. 186.

Secondly, Belgium was concerned that under Article 8.39.2(a) of CETA if a Canadian investor brings an action on behalf of its locally established enterprise (that the investor owns or controls directly or indirectly) any damages will have to be awarded to that locally established enterprise.[812] Thus, intra-EU investors operating in the same market could be placed at the competitive disadvantage if on the basis of the ICS award compensations were paid to entities located at the EU, but represented by their Canadian parent company. As purely-EU entities would not have a possibility to refer to the ICS, they would find themselves in a worse situation than Canadian competitors.[813] In turn, a locally established enterprise of the Canadian investor would gain a competitive advantage over other entities operating in the same market.

The Court, as well as AG Bot, did not find either of the Belgium's concerns on the ICS mechanism to be at odds with the principle of equal treatment. First, the Court found Article 18 TFEU and Article 21(2) of the Charter irrelevant for the analysis. It stated that the first paragraph of Article 18 TFEU is not intended to apply to cases where there is a possible difference in treatment between nationals of the Member States and nationals of non-Member States.[814] Thus, it considered Article 21(2) of the Charter irrelevant to examination whether the ICS mechanism could lead to discrimination in the treatment of the EU investors compared to Canadian investors.[815] Yet, the Court recognised that Article 20 of the Charter, providing that 'everyone is equal before the law' is applicable to all situations governed by EU law, including the ones that fall within the scope of international agreements concluded by the EU.[816] The Court declared that investments made within the EU by Canadian investors and investments made within the EU by the entities of the Member States both fall within the scope of the equality before law guaranteed by Article 20 of the Charter, and thus proceeded with the assessment of the situation of CETA in this regard.[817]

Pursuant to the CJEU's case law, Article 20 of the Charter enshrines the principle of equal treatment, requiring that "<…> comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified."[818] In the assessment of comparability of the situations the Court must assess the subject matter and purpose of the act that makes the distinction between two groups, while the principles and objectives of the field relating to the act in question must also be considered.[819]

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812 Opinion 1/17, AG Bot, *supra* note 51 para. 187.

813 Mata Dona, *supra* note 735.

814 Opinion 1/17, *supra* note 50, para. 169; Joined cases C-22/08 and C-23/08, *Vatsouras and Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg* [2009] EU:C:2009:344, para. 52.

815 Opinion 1/17, *op. cit.*, para. 170.

816 Ibid., para. 171.

817 Ibid., para. 172.

818 Ibid., para. 176; Case C-540/16, *UAB 'Spika' and Others v Žuvininkystės tarnyba prie Lietuvos Respublikos žemės ūkio ministerijos* [2018] EU:C:2018:565, para. 35.

819 Opinion 1/17, *op. cit.,* para. 177; Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi* [2019] EU:C:2019:43, para. 42.

The Court found that the Canadian enterprises and purely-EU enterprises are not in a comparable situation that consequently determines that principle of equal treatment was not breached.[820] The Court's reasoning in stating so is however very formal and thus questionable. According to the Court, the reason why the Canadian investors can rely on CETA before the ICS tribunals is that, as foreign investors, they are to have a specific remedy against EU measures, while purely-EU entities investing in the EU are not foreign investors and will not be able to make use of this remedy.[821] Also, the CJEU did not find problematic that the award would have to be paid to the locally established enterprise controlled by the investor, since such an enterprise is an investment itself.[822] These circumstances, as suggested by the Court, render the situations of the Canadian enterprises investing in the EU and enterprises of the Member States investing in the EU not comparable.

The author disagrees with the position of the Court whereas several important points were overlooked by the Court (see Diagram 6 below). First, the CJEU did not take into account that the enterprises established by the Canadian investors in the EU and other purely-EU undertakings compete in the same market under the same regulation. The author believes that in case the undertakings are concerned, the decisive criteria in deciding whether persons are in a comparable situation should be the fact of having a permanent establishment of the undertaking in a specific Member State and its operation in a specific relevant market. Therefore, if undertakings are permanently established in the same Member State and compete in the same market, they should be regarded as being in a comparable situation.

As is demonstrated in Diagram 6 below, the intra-EU and Canadian investors are in an almost identical position. They have to follow the same laws and thus would suffer similar negative consequences, in case legislation affecting their businesses is adopted. It is precisely the additional option available to the Canadian investor to invoke CETA before the ICS tribunals that makes the situation of the intra-EU and Canadian investors different. It must be noted that their position is not different in any meaningful way until the loss of investment occurs. At that point, the foreign investor will find itself in a better position. The Commission itself recognised in the *Achmea* arbitral proceedings, when referring to intra-EU BITs, that there is serious potential for discrimination between the EU investors from different Member States, since some investors were covered by a BIT and granted the opportunity to resort to investor-state arbitration while others were not.[823] According to the Commission, the mere "<…> availability of a *choice* of dispute resolution procedures gives some investors an advantage over investors from other Member States, and thus constitutes forbidden discrimination against those other EU nationals."[824]

Considering the above, it appears that the ICS may place intra-EU investors under less favourable conditions that may reduce their ability to compete with foreign investors

820 Opinion 1/17, *supra* note 50, para. 180; Opinion 1/17, AG Bot, *supra* note 51, para. 203.

821 Opinion 1/17, *op cit.*, para. 181.

822 Ibid., para. 182-3.

823 *Eureko BV v. the Slovak Republic*, *supra* note 320, para. 183.

824 Ibid..

and undermine uniform interpretation and application of EU law. It appears that the two groups will fall under different scope of application of EU law (particularly, competition law). EU investors will experience it to the full effect, while the foreign investors will be able to mitigate its consequences by receiving compensation. That could clearly disrupt free competition in the internal market. What is significant to underline is that this disruption of the internal market would be a result of an infringement of the principle of equal treatment that the Court so formally refused to recognise in the *Opinion 1/17*.

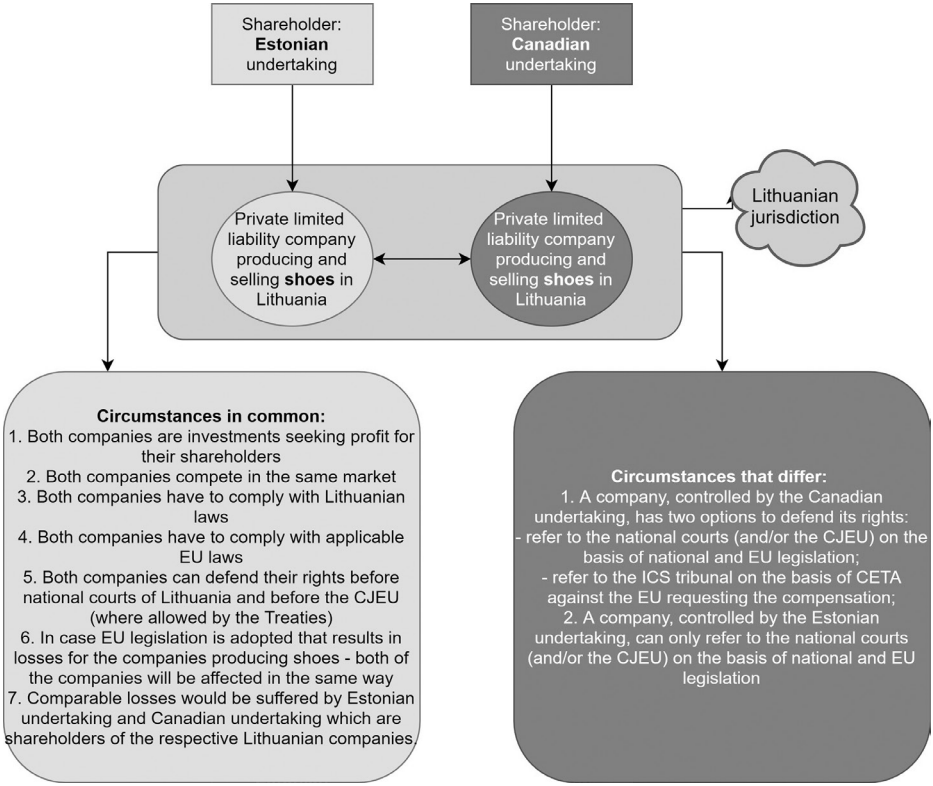

Diagram 6: *Comparison of the Canadian and EU investors*[825]

825 Composed by the author.

3.2.6. Right to decide on the liability of the EU

Power to rule on the liability[826] of the EU for the damage caused by its wrongful acts is the other category of the CJEU's powers, along the right to interpret EU law, which may be affected by CETA. [827] The essential question is whether the ICS establishment will not eliminate the CJEU's competence endowed under the Treaties to rule on the liability of the EU.

It has become a trend that the CJEU protects judicial procedures anticipated under the Treaties. In *Opinion 2/13* the CJEU found that EU's Accession Agreement to ECHR created "<…> a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented"[828] and thus was capable "<…> adversely to affect the autonomy and effectiveness of the latter procedure."[829] In *Achmea*, the preliminary ruling procedure was considered to preserve the particular nature of the law established by the Treaties[830] that precluded ISDS clause in BITs concluded between the Member States. The mechanism of adjudication of non-contractual liability of the EU anticipated in Article 340(2) TFEU could be regarded in a similar manner. As well as preliminary ruling procedure, claims under 340(2) TFEU form a unique part of the CJEU's powers stemming directly from the Treaties. From the perspective of the application of the principle of autonomy, the CJEU's power to rule on the liability of the EU and the respective procedure foreseen by the Treaties falls within the scope of the essential characteristics preserved by the autonomy of the EU legal order.

Handling the question of non-contractual liability of the EU will now be the function of both, ICS tribunals under CETA, and the CJEU as anticipated in the Treaties. The principal function of the ICS tribunals will be to adjudge damages incurred by investors due to the acts of the EU allegedly breaching the investor's rights guaranteed by CETA. If the claim is substantiated, investor could be entitled to a monetary compensation. Comparable opportunities are provided in the Treaties as well. Under Articles 340(2) and 268 TFEU, the CJEU is endowed with an exclusive jurisdiction to adjudicate cases regarding the EU's non-contractual liability.[831] Therefore, the primary function of the ICS will duplicate one of the competences of the CJEU. Once the ICS begins its work, the CJEU may in practice be

826 *Author's note*: The notion of *liability* is used in this thesis with the reference to the same concept used in the Treaties (Article 268 and Article 340 TFEU).

827 Govaere, *supra* note 79: 128.

828 Opinion 2/13, *supra* note 16, para 198.

829 Ibid., para. 199.

830 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, para. 58.

831 As outlined in CJEU's case law, the illegality of the act, the existence of actual damage and a causal relationship between the illegality of the act and the damage caused to the applicant would have to be proven. – Case 4/69, *Alfons Lütticke GmbH v Commission of the European Communities* [1971] EU:C:1971:40, para. 10; Case 26/81, *SA Oleifici Mediterranei v European Economic Community* [1982] EU:C:1982:318, para. 16; Albertina Albors-Llorens, "Remedies Against the EU Institutions After Lisbon: An Era of Opportunity?," *The Cambridge Law Journal* 71, no. 03 (2012): 532.

deprived of its function to decide on the EU's liability in one of the fields of the exclusive competence of the EU – FDI,[832] which could affect the essential character of the powers of the CJEU as it is entrenched in the Treaties. The ICS may affect the CJEU's powers in a couple of ways.

First, the question of EU's liability, generally speaking, is closely related to the question of the internal power division between the EU and the Member States, which is one of the essential characteristics of the EU legal order preserved by the autonomy. As was mentioned in the Sub-Section 1.2.1.2, it is only the CJEU that can legitimately define where the boundaries of the EU's competences are, i.e. what EU law is and where it ends. Thus, questions of the EU liability and internal power division are inseparable, as the EU can only be found liable in the fields where it possesses the competence to act.

The same applies for the instances where the EU or a Member State incurs liability for the infringement of an international agreement of the EU. Since international agreements concluded by the EU are considered to be an integral part of EU law, the CJEU is entitled to interpret and apply EU's international agreements.[833] Moreover, in case of mixed agreements, like CETA, the CJEU claims interpretive jurisdiction over the entire agreement, as it is the only way how it can indicate which provisions fall under the exclusive jurisdiction of the EU and which under the jurisdiction of the Member States.[834] While finding EU liable under CETA, the ICS tribunals may engage in the questions of the EU's competence division that are exclusively reserved for the CJEU.

However, it appears that CETA did address the problem of the EU's power division by laying down an automatic procedures allowing for the EU to internally determine the respondent in the proceedings[835] while taking into account the rules of the Regulation establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements.[836] Considering that detailed rules were laid down internally in the EU to deal with the questions of proper respondent, the ICS should not have to resolve this question and thus the autonomy should be protected.[837] Consequently, it appears that the CJEU considered these measures to be

832 *Author's note*: Notably, this applies for the Canadian investors and damages resulting from a breach of CETA only.

833 Case 181/73, *Haegeman*, *supra* note 796, para. 5-6.

834 Case C-12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] EU:C:1987:400, paras. 7-12.

835 See Article 8.21 of CETA.

836 Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 *Establishing a Framework for Managing Financial Responsibility Linked to Investor-to-State Dispute Settlement Tribunals Established by International Agreements to Which the European Union is a Party*, *supra* note 209.

837 *Author's note*: And yet, pursuant to Article 8.21.4 of CETA, if the EU does not indicate the respondent within fifty days, the respondent would be determined automatically depending on whether the measures indicated by the investor in its notice are exclusively of the Member States, or of the EU. Should such circumstances arise that Article 8.21.4 of CETA has to be applied, an identification of the correct respondent would depend exclusively on the measures indicated by the investor. In such case, there is a risk that an investor would not indicate all the acts relevant and thus an improper respondent could be determined.

sufficient as it concluded in the *Opinion 1/17* that the exclusive jurisdiction of the Court to give rulings on the power division between the EU and the Member States is preserved.[838]

Secondly, the ICS tribunals may apply substantially lower standard to find the EU liable than the CJEU does. Strict conditions have settled down in the CJEU's case law to find the EU liable for damage caused by actions of its institutions[839] Different results may thus be achieved before the CJEU and the ICS – while the CJEU would apply its consistent case law regarding the EU's liability, the ICS could settle with less stringent criteria allowing to find EU liable more easily. Once the ICS begins to work, the case law of the CJEU and the mechanism on non-contractual liability of the EU provided under the Treaties may lose its relevance for the investment disputes.

Given the above, it appears that the CJEU did not find the ICS tribunals' jurisdiction to affect its powers under Article 340(2) TFEU, as it was not even mentioned in the *Opinion 1/17*. It thus can be concluded that the Court considers compatible with the autonomy of EU law that the ICS tribunals will decide on the EU's liability for the damages incurred by investors.

3.3. Impact of the Opinion 1/17 on the content of the autonomy of the EU legal order

Does *Opinion 1/17* mark the new stage in the evolution of the doctrine of autonomy, discussed in the 1st Part? What features reflect the adjustments made to the content of the doctrine and determine the ICS mechanism's compatibility with the autonomy? Could and should the potential adverse effects of the ICS mechanism on the procedures ensuring uniform interpretation of EU law be addressed? This Chapter addresses these questions.

3.3.1. Clarification of the essential characteristics: normal operation of the EU institutions under the EU's constitutional framework

As discussed in the Sub-Section 1.2.3.2, most of the previous opinions of the CJEU concerning the autonomy of the EU legal order concerned an in-depth analysis on whether the respective dispute settlement bodies could adversely affect the operation of the EU judicial system. This time, alongside the Court's powers an emphasis was also placed on the normal operation of the EU's institutions in accordance with the constitutional framework of the EU.

In that regard it appears that the Court emphasised the legislative branch of EU institutions and its ability to perform the functions, which the Treaties oblige it to implement (see Diagram 1). In that regard, the CJEU stressed that EU legislation is adopted by the EU legislature following democratic process as defined in the Treaties.[840] The Court originated

838 Opinion 1/17, *supra* note 50, para. 136.

839 "<…> non-contractual liability of the Community and the exercise of the right to compensation for damage suffered depend on the satisfaction of a number of conditions, relating to the unlawfulness of the conduct of which the institutions are accused, the fact of damage and the existence of a causal link between that conduct and the damage complained of." – Joined cases C-120/06 P and C-121/06 P, *FIAMM* [2008] EU:C:2008:476, para. 106.

840 Opinion 1/17, *op. cit.,* para. 151.

this democratic process from the principles of conferral, subsidiarity and proportionality that altogether makes EU legislation appropriate and necessary to achieve the EU's objectives.[841] It found that it was the Court's task to ensure that the level of protection of public interests established by such legislation complies with EU's primary law.[842] Thus, the Court emphasised the fundamental importance of the procedures foreseen in the Treaties to adopt legislation as well as the significance of the legislation already adopted, which implements the Treaties' objectives and serves for the purpose of the European integration.

The Court introduced a new feature by clarifying what the normal functioning of the legislative branch of the EU institutions encompasses. It stated that, if the ICS tribunals were to have jurisdiction to issue awards finding such legislation incompatible with CETA "<…> because of the level of protection of a public interest established by the EU institutions, this could create a situation where, in order to avoid being repeatedly compelled by the CETA Tribunal to pay damages to the claimant investor, the achievement of that level of protection needs to be abandoned by the Union."[843] Thus, the CJEU concluded that, if the EU entered into such an agreement that would determine the necessity for the EU to amend or withdraw legislation just because of the assessments made by the ICS tribunals, the level of protection of public interest established by the EU institutions and EU's capacity to operate autonomously would be undermined.[844] Therefore, the CJEU clarified that normal operation of the EU institutional system under the constitutional framework means that operation of an international dispute settlement mechanism in which the EU participates cannot have an effect of forcing the EU to amend or withdraw legislation adopted within the constitutional framework of the EU.

The CJEU did not consider that ICS tribunals would have such adverse effects on the EU's institutions. According to the Court, EU's institutions could not be forced to withdraw legislation because of the assessments made by the ICS tribunals under CETA. It concluded that the ICS will have no effect on the operation of the EU institutions in accordance with the EU constitutional framework,[845] since the ICS tribunals have "<…> no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures <…>."[846] Despite these assurances of CETA, it is clear that any successful claim by an investor before the ICS tribunals will inevitably invite other investors under various agreements to consider analogous actions against the EU.

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841 Opinion 1/17, *supra* note 50, para. 151.

842 Ibid.

843 Ibid., para. 149.

844 Ibid., para. 150.

845 "<…>Article 28.3.2 of that agreement states that the provisions of Section C cannot be interpreted in such a way as to prevent a Party from adopting and applying measures necessary to protect public security or public morals or to maintain public order or to protect human, animal or plant life or health, subject only to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade between the Parties." – Ibid., para. 152.

846 Ibid., para. 153.

Therefore, when the ICSs start their work, weighing whether to pay to the multiple investors,[847] or to revoke certain legislation and avoid at least some of the payments might become a common for the EU's institutions. While the Court is formally right in that there will be no legal obligation to revoke the legislation, keeping it in force could eventually become very expensive for the EU.

3.3.2. List of safeguards of the autonomy: most important clarification

Opinion 1/17 is particularly important due to the fact that the CJEU has confirmed therein a finite list of safeguards of the autonomy and essential characteristics. The Court validated this list of measures as sufficient to preserve the most important characteristics of EU and EU law. Despite all of the potential of the ICS mechanism to have adverse effects on uniform interpretation of EU law (as discussed above), the safeguards contained in the ICS mechanism will probably become the model solution to ensure the autonomy of the EU legal order when drafting future international agreements of the EU. It is so because the Court has recognised that they are sufficient to eliminate all the threats to the autonomy and essential characteristics, as discussed in detail in Chapter 1.2. Consequently, from now on, the safeguards of the autonomy confirmed in the *Opinion 1/17* might become a part of the autonomy doctrine that has been missing in the past. However, considering all the risks, discussed in the Chapter 3.2, posed by the ICS mechanism on the procedures ensuring uniform interpretation of EU law, are these safeguards really sufficient?

In the *Opinion 1/17*, highly formal interpretive approach was applied by the CJEU to assess the contents and meaning of the main CETA's safeguards intended to ensure that EU judicial system is not adversely affected. A textual interpretive technique dominated the Court's analysis, leaving the contextual factors aside, which is rather unusual if compared to interpretive techniques used in other rulings concerning the autonomy of the EU legal order, as discussed in Chapter 1.3. The concepts of law as a *matter of fact*, *prevailing interpretation* of domestic law as well as the ICS tribunals' powers to assess the effect of EU measures were mainly assessed by the Court based on the text of the provisions of CETA pointing to them as to a proof that there is no risk for the adverse effects on the autonomy. The Court did it as if these concepts and their successful operation were self-evident. Yet, negative effects of the legal measure can only be identified through the analysis of its practical effects. The Court's compatibility review was rather formal and superficial, as the Court did not analyse the practical effects of the proposed safeguards. As was discussed in detail in Section 1.3.2, the CJEU's interpretive approach in its previous case law concerning autonomy was characterized by its reliance on context, systemic purposes of the EU as well as the evolution of the EU legal order.

The *Opinion 1/17* poses a question whether the systemic risks for uniform interpretation of EU law of multiple ICS mechanisms were assessed by the CJEU. While in case of *Opinion 2/13* the Court found incompatible the situation that the interpretation of the

847 "<…> the Union will have to make payment of that sum when it is ordered to do so <…>" – Opinion 1/17, *supra* note 50, para. 145.

ECHR provided by the ECtHR would be binding on the EU and its institutions while the interpretations of the Charter by the CJEU of an analogous rights would not be binding on the ECtHR,[848] in case of the ICS the Court did not have any concerns whether its case law would have any binding effect at all. What is more, the Court did not engage in the analysis of the effects of the ICS interpretations within the EU legal order, even in case they are not binding. By choosing to follow formal textual approach of the ICS mechanism, the CJEU issued a favourable ruling. However, there are several contextual matters that are particularly relevant for the ICS compatibility with EU law and that may still have adverse impact on the EU legal order in the long term.

Although at the first glance it may seem that due to its position in the *Opinion 1/17* the CJEU has exercised judicial comity and adherence to the ICS mechanism, the true impact of the Court's opinion is exactly the opposite and serves to distance the EU judicial system from the international investment protection regime as rigidly as possible. The Court was unambiguous in drawing the line between the EU legal order and the CETA's regime. First, it stated that the ICS tribunals stand outside the EU judicial system making it acceptable that no provision for the prior involvement of the Court in the ICS proceedings is foreseen in CETA that would enable the ICS tribunals to refer for a preliminary ruling to the CJEU.[849] Secondly, it found it consistent with EU law that the ICS tribunals will provide definitive rulings without establishing any procedure for the re-examination of the award by courts or tribunals of the defendant states or without the investor being permitted to bring the same dispute, during or after the ICS proceedings, before a court of that state or the CJEU.[850]

By claiming this distinction between the two dispute settlement regimes the CJEU has indicated that it will have no relationship with the ICS tribunals whatsoever. Importantly, this autonomy goes both ways, since the ICS tribunals will be protected from any interference from the CJEU as well. They will not have the right or obligation to refer to the CJEU, nor will they be bound by the CJEU's rulings. This is the kind of relationship the CJEU has with all the other international ISDS and commercial arbitration tribunals.

Yet, what the CJEU did not analyse in this case is the fact that the EU itself will be the participant in the proceedings before the ICS tribunals. As it concluded that the ICS tribunals would have no jurisdiction to interpret EU law, there is no point for the CJEU to participate in the ICS proceedings. However, as demonstrated in Chapter 3.2, due to indirect negative effects on the procedures ensuring uniform interpretation of EU law, operation of ICS could result in formation of parallel quasi-precedent systems of EU law interpretations applicable as guidance in future cases. Based on those interpretations, originating from various CETA-alike treaties, binding awards would be enforced in various Member States, which could bring many different understandings of EU law into the EU legal sphere.

Indeed, the Court has also ignored the fact that its assessment in *Opinion 1/17* will legalise the ICS mechanisms in the other new generation trade and investment agreements

848 Opinion 2/13, *supra* note 16, para. 185.

849 Opinion 1/17, *supra* note 50, para. 134.

850 Ibid., para. 135.

opening way to other autonomous ICS regimes.[851] Each of them would be free to form their own consistent case law. Consequently, by imposing its autonomy in respect of the ICS the Court admitted that it is comfortable with the possibility that there may soon exist on the international plane several or more different interpretations of EU law under different ICSs that will be formed in cases against the EU itself. Evidently, the safeguards of autonomy validated by the Court in the *Opinion 1/17* will not prevent that.

Does that bring anything new to the meaning of the principle of autonomy of the EU legal order? It seems that the CJEU does not consider the fact that different interpretations of EU law may exist outside the EU legal order to adversely affect the uniform interpretation and application, and consequently, the autonomy of the EU legal order. As long as those interpretations formally do not bind the EU and its institutions they are compatible with the autonomy, even if those interpretations are within awards binding the EU itself. Thus, it appears that a distinction is made between the binding award and interpretations given by the ICS tribunals of EU law within those awards (that will not be binding the EU). Clearly, making distinction between the two would become confusing. Considering these drawbacks, solutions to ensure uniform interpretation of EU law in the process of investment dispute settlement pursuant to the EU's investment agreements should be reconsidered. It is done in Chapter 3.4.

3.4. Involvement of the CJEU in the MIC: solution for the compatibility issue

As was demonstrated above, there are some major concerns regarding the protection of the autonomy of the EU legal order (and particularly, uniform interpretation of EU law) in the course of operation of the ICS mechanisms. Inasmuch as the ICS tribunals would be entitled to assess EU law measures in the light of CETA, they may be required to assess the content and effect of the EU norms applicable. Neither of the guarantees foreseen to ensure that the ICS tribunals do not engage in the interpretation of EU law solves the problem. Since the assessment whether EU law infringed CETA requires EU law interpretation, the ICS tribunals will in fact have to engage in questions of the contents of EU law. As was discussed above, in the long run, the operation of the ICS mechanisms could have adverse effects on uniform interpretation of EU law, and consequently, the autonomy of the EU legal order.

Yet, the CJEU declined that there is any need for it to participate in the ICS mechanism. It stated that the ICS tribunals stand outside the EU judicial system making the prior involvement of the Court in the ICS proceedings unnecessary.[852] Also, the Court found it consistent with EU law that the ICS tribunals will provide definitive rulings in the cases without establishing any procedure for the re-examination of the award by courts or

851 *Author's note*: The Court also indicated that the assessment of the *Opinion 1/17* applies also to the planned Multilateral Investment Court. – Opinion 1/17, *supra* note 50, para. 118.

852 Ibid., para. 134.

tribunals of the defendant states or without the investor being permitted to bring the same dispute, during or after the ICS proceedings, before a court of that state or the CJEU.[853] This separateness of the ICS mechanisms under many new generation trade and investment agreements could cause many practical problems concerning the uniformity of EU law. Since the CJEU has already spoken in respect of the compatibility of the ICSs, their reconsideration is very unlikely. What is left now, is to observe the effects of the ICS mechanism on the uniform interpretation of EU law and European integration. However, as the adverse effects of the ICS will almost certainly become visible, there is still another opportunity to resolve all the issues concerning uniform interpretation of EU law and the protection of the autonomy of the EU legal order. The author believes that inclusion of the CJEU in the investment dispute settlement should be reconsidered when establishing the MIC that is the next step in the EU's investment dispute settlement agenda.

The author believes that inclusion of the CJEU in the ICS mechanism to provide EU law interpretations could have eliminated most of the concerns identified. So it would in case of the MIC. If the CJEU was involved, it would be given a chance to provide legitimate interpretation of EU law, to resolve any doubts concerning the legality of secondary law and to eliminate the need for the MIC tribunal to engage in the same questions itself. The CJEU's participation would reduce the probability of error in interpretation of EU law to a minimum, particularly, in cases where no CJEU's interpretations exist yet or where hard and contentious questions of EU law arise.

Yet, inclusion of the CJEU in the MIC would also mean that the MIC could lose features that made the ISDS attractive for the investors in the first place. As AG Bot described it, the rationale of the ICS is that neither of the parties of CETA trusts each other's judicial system and thus agreed to establish a neutral dispute settlement mechanism.[854] As the CJEU's participation would lengthen the proceedings and deprive the tribunal from a degree of independence from the domestic legal systems, the MIC would become less attractive compared to original ISDS tribunals. Traditionally, ISDS was known for depoliticization of investment disputes, making them independent from national interference, providing final and enforceable decisions in a flexible process where disputing parties have considerable control.[855] Inclusion of the CJEU would again raise concerns on politicization of the proceedings by rendering it at least partially dependent on the CJEU, i.e. the institution of the respondent. It may cause a chilling effect on the investment in the EU, as the investors would not trust the independence of the proceedings and question the probability of success before the MIC. On the other hand, the CJEU would be given only a part of the legal issue to solve. If the CJEU interprets EU law in a way that makes it compliant with CETA, the investor would get satisfaction. If not, the MIC could still find EU law incompatible with the respective agreement.

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853 Opinion 1/17, *supra* note 50, para. 135.

854 Opinion 1/17, AG Bot, *supra* note 51, para. 84.

855 Himaloya Sahat, "A Critical Analysis of the Commonly Recommended Reforms of Investor-State Dispute Settlement (ISDS)," *Legal Issues Journal* 4 (2016): 41.

Setting aside these concerns, there are two ways to include the CJEU within the MIC: first, through the preliminary ruling procedure; secondly, through a specific mechanism of prior involvement of the CJEU. Each of these possibilities is presented in detail in the following Sections.

3.4.1. The CJEU's involvement under the preliminary ruling procedure

The preliminary ruling procedure was presented as the principal solution to resolve the conflict between the CJEU and ISDS tribunals (see Section 2.2.3). It is equally the solution that would allow ensuring the uniform interpretation of EU law and eliminating threats to the autonomy of the EU legal order caused by the operation of the MIC, as most of the arguments presented in the Section 2.2.3 also apply in respect of the MIC as well.

Again, the same conditions already discussed in the Section 2.2.3 would have to be satisfied. The CJEU would have to reconsider its previous case law and amend the concept of the 'court or tribunal of the Member State,' while the MIC would have to accept the preliminary ruling procedure and be *willing* to refer to the CJEU where questions of EU law interpretation arise.

Including the CJEU in the work of the MIC would resolve all the risks that the MIC causes to the autonomy of the EU legal order. Most importantly, the CJEU's exclusive right to provide definitive interpretation of EU law in the cases requiring to interpret EU law would be secured. No adverse effects to the operation of the EU judicial system or the operation of the preliminary ruling procedure would occur, whereas the MIC would become a part of this system. Yet again, it is important that the MIC would recognise the binding character of the CJEU's rulings issued in respect to the questions of EU law. Preliminary ruling is once again the option that is easiest to implement, as it only takes the willingness to cooperate from the CJEU and the future arbitrators of the MIC.

However, the CJEU has expressed reluctance to include investment tribunals within the EU judicial system by recognising them as courts or tribunals of the Member States.[856] Should the Court refuse not to include the MIC into the EU judicial system, cooperation could be conducted under the special prior involvement mechanism, creating similar cooperation between the CJEU and MIC as the preliminary ruling procedure would.

3.4.2. Prior involvement of the CJEU under special mechanism

Creation of the special mechanism for the prior involvement of the CJEU in the MIC proceedings could be another way to include the CJEU. The basis for such a mechanism would have to be included in the respective international agreement establishing the MIC. It would have to foresee the MIC's obligation to refer to the CJEU if it not yet had an opportunity to provide a ruling on EU law relevant to the case. Specific mechanism under CETA could help to circumvent the concept of 'court or tribunal of the Member State': the MIC would refer to the CJEU on the basis on CETA, and not in accordance with Article

856 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 40, paras. 45-6.

267 TFEU. Prior involvement under CETA would thus be a special mechanism similar to preliminary ruling by its purpose, but different as far as its legal basis is concerned.

Importantly, there was already an attempt to create a special mechanism of prior involvement. EU's Accession Agreement to ECHR[857] provided a version of prior involvement procedure. According to the Court, the mechanism was necessary to ensure the proper functioning of the EU judicial system and to safeguard that the competences of the EU and the powers of its institutions are preserved.[858] The CJEU drew the essential conditions for such an involvement. First, all the relevant information has to be provided to the EU with regard to the course of the case and EU law provisions connected to the case. Secondly, the EU institutions must be given a chance to assess whether there has already been a CJEU's judgment providing an interpretation of the relevant provisions of EU law. Thirdly, in case it is found that no previous case law is relevant, prior involvement procedure must be arranged so that interpretation of the case-related provisions is provided to the tribunal by the Court of Justice.[859] Lastly, the prior involvement of the CJEU would have to be implemented in such a way, as to ensure that the CJEU's interpretations of EU law provided to the MIC are binding in that case. In case the CJEU's decision is not binding on the MIC, the CJEU could find the involvement mechanism incompatible with the principle of autonomy, as was the case in *Opinion 2/13*.[860]

However, the CJEU rejected the mechanism since it had limited the CJEU's interpretive jurisdiction with primary law only, by excluding the interpretation of secondary law. The Court was thus deprived of the possibility to provide definitive interpretation of secondary law.[861] Evidently, that was a condition that the Court, possessing an exclusive competence to interpret the entire subject-matter of EU law, could not put up with. Although the mechanism envisaged in the Accession Agreement was struck down, the CJEU in principle assented to the idea and provided some valuable guidelines on rendering the mechanism compatible with the Treaties.

Moreover, the CJEU verified a prior involvement procedure as a legitimate solution that could serve to manage overlapping jurisdictions of the CJEU and international tribunals. Notably, the CJEU's prior involvement in the investment dispute settlement is not a new idea within the institutional framework of the EU: recommendations on prior involvement were provided in the study on ISDS provisions in the international investment agreements carried out by the Directorate-General for External Policies of the EU.[862] It is clear that implementing prior involvement of the CJEU in the MIC would require setting up one of its institutions to continuously provide support to the MIC, so that information is provided

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857 Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, European Council, Doc. 10 June 2013, 47+1(2013)008rev2, Appendix I.

858 Opinion 2/13, *supra* note 16, paras. 236-7.

859 Ibid., paras. 241-3.

860 Ibid., para. 185.

861 Ibid., paras. 245-7.

862 "*In cases where local remedies have not been exhausted – and the ECJ has not been given an opportunity to rule on relevant questions of EU law– it would be of great help <…> to provide for a prior involvement of the ECJ as a part of the ISDS.*" – Pernice, *supra* note 768: 162.

to the tribunals on the relevant case law of the CJEU. In case no relevant or applicable case law existed, the MIC should refer to the CJEU to receive its position.

Considering the above, prior involvement procedure seems to be a legitimate solution since it was recognised as such by the CJEU itself in the *Opinion 2/13*. It would also allow to ensure the uniform interpretation of EU law in the MIC's proceedings and to protect the autonomy of the EU legal order.

3.5. Summary

The *Opinion 1/17* was perhaps the first time that the CJEU recognized the fact that international tribunals (under ICS mechanism) would have to engage in interpretation of EU law to be compatible with the Treaties. Partly, such a conclusion was driven by a largely formal and textual interpretive approach adopted by the CJEU to conduct the compatibility analysis. But the main reason of the CJEU's conclusion on the ICS's compatibility was based on the CJEU's conviction that the safeguards of the autonomy of the EU legal order provided in CETA are sufficient to ensure that autonomy and the essential characteristics will not be adversely affected by the ICS tribunals. However, the analysis has shown that, at least in the long term, the operation of ICS tribunals could have adverse effects on uniform interpretation of EU law and consequently on the autonomy of the EU legal order.

The CJEU's positive assessment of the ICS mechanism was largely based on the CJEU's conviction that the list of safeguards intended to secure the autonomy of the EU legal order was sufficient. Yet, the analysis has shown that CETA's ICS mechanism does not secure the exclusive jurisdiction of the CJEU to interpret EU law. Since the ICS tribunals are not in practice prevented from interpreting EU law, the probability of mistakes in the interpretations of EU law provided by ICS tribunals is high. As an integral part of the binding award, EU law interpretations issued by the ICS tribunals could form a precedent how particular law should be assessed and may be an incentive for future proceedings. If the ICS tribunal errs in understanding EU law once, it could lead to similar errors in the upcoming cases. Theoretical distinction of the law as a *matter of fact* from the law as an *applicable law* is artificial, for even if law is considered as a *matter of fact* it still requires interpretation. In turn, use of *prevailing interpretation*, foreseen in CETA as a measure for the ICS tribunals to avoid engagement in questions of EU law, does not resolve this issue. On the contrary, if *prevailing interpretation* was given for the Parties to prove there would be no guarantee that the most relevant case law is presented to the ICS tribunals. Also, relevant interpretation may not be provided by the CJEU yet. Even if provided, the CJEU's interpretations often require clarifications. All these factors together create a risk that the ICS tribunals would misinterpret EU law.

Moreover, the CJEU has underlined the separateness of the ICS tribunals from the EU judicial system. Thus, the Court rendered the ICS tribunals with autonomy from the CJEU's jurisdiction creating conditions for the ICS tribunals to form their own separate regimes of EU law interpretations. Consequently, the ICS tribunals may create parallel quasi-precedent systems of EU law assessments applicable as guidance in further cases of the ICS. The CJEU did not consider the fact that different interpretations of EU law may come

to exist outside the EU legal order as adversely affecting uniform interpretation, application, and consequently, the autonomy of the EU legal order. It seems that, as long as those interpretations formally do not bind the EU and its institutions they are compatible with the autonomy, even if those interpretations are within the awards binding the EU itself. Thus, the Court made an artificial distinction between the binding awards of ICS tribunals and interpretations of EU law given by the ICS tribunals within those same awards. Yet, the Court did not assess the possible impact of the precedent systems that would be formed by different ICS tribunals under different treaties.

Although the CJEU ruled out the possibility of its involvement in the ICS mechanism, the question of CJEU's involvement might become relevant again when creating the MIC, or once the ICS mechanism becomes a real threat to the uniformity of EU law having adverse effects on European integration. The author considers the CJEU's involvement in the MIC proceedings as a solution to ensure uniform interpretation of EU law and the autonomy of EU legal order in the EU's investment dispute settlement. Most importantly, inclusion of the CJEU would allow for the MIC to seek assistance from the CJEU once it faces contentious questions of EU law, or if no interpretations of relevant rules of the EU exist yet. The CJEU's participation would reduce the chances of misinterpretation to a minimum in cases related to complex questions of EU law. From the procedural point of view, application of the preliminary ruling procedure should first be considered, as it would not require to create a new mechanism. In case the CJEU was not willing to recognise the MIC as a court or tribunal of the Member State, the creation of a special prior involvement mechanism providing for a similar mechanism should be considered. It would require to include respective provisions in the relevant international agreement that would elaborate the CJEU's role in the MIC's proceedings.

CONCLUSIONS

The analysis conducted allows concluding that the purpose of the thesis was attained, the objectives were accomplished meaning that the defended statements of the thesis were defended.

1. The first statement that the *safeguards of autonomy protection under the ICS mechanism are insufficient since the mechanism will, in the long term, adversely affect the autonomy of the EU legal order* is confirmed by the following conclusions:
   1.1. The safeguards of the principle of autonomy of the EU legal order provided under the ICS mechanism in CETA are insufficient since, in the long run, the ICS tribunals' operation is likely to adversely affect uniform interpretation of EU law. The following supporting findings must be underlined:
      1.1.1. The existence of the 'prevailing interpretation' of EU law, which ought to be used by the ICS tribunals to avoid interpreting EU law by themselves, is debatable. As the *Achmea* saga demonstrated, the same ruling may be interpreted in a completely different way by various actors. *Achmea* assessments made by the parties and arbitral tribunals have proven that the CJEU's interpretations may require further clarification. Since the ICS tribunals will not have the right to refer to the CJEU for a preliminary ruling, the conditions for misinterpretations of EU law will be created. If misinterpretations of EU law occur in some of the ICS tribunals' proceedings, they may form guidelines for the future cases of the ICS tribunals and impede the uniform interpretation and effectiveness of the EU rules in question.
      1.1.2. An exclusion of EU law from the scope of the law applicable to investment disputes is based on the fictional division of law as a *matter of law* and law as a *matter of fact*. As was proven, even if considered as a *matter of fact*, law must be interpreted. For this reason, the ICS tribunals will have to engage in interpretations of EU law and will create parallel quasi-precedent systems of EU law assessments applicable as guidance in further cases heard by the ICS tribunals. The awards of the ICS tribunals, based on such quasi-precedents and binding on parties in the particular case (including the EU), could eventually interfere with the CJEU's exclusive right to provide definitive interpretation of EU law.
      1.1.3. While the CJEU considered that the ICS mechanism would not adversely affect the normal operation of the EU institutions, it is clear that any successful claim by an investor before the ICS tribunals might invite other investors under various agreements to consider similar actions against the EU. Therefore, considering whether to pay to multiple investors or to revoke the legislation and avoid litigation and payments might become relevant for the EU institutions. While the CJEU is right in stating that there will be no legal obligation stemming from the ICS mechanism to revoke the legislation, keeping it in force could eventu-

ally become very expensive for the EU and lead to the withdrawal of the legislation. Thus, although indirectly, but the EU's participation in multiple treaties providing ICS mechanisms would become an impediment to the normal operation of the EU's institutions pursuant to the constitutional framework provided under the Treaties.

1.2. All of these risks caused by the operation of multiple ICS mechanisms to the autonomy of the EU legal order could be resolved by involving the CJEU in the proceedings of the MIC, which is to be created in the future. The possibility for the MIC to refer to the CJEU would ensure the CJEU's exclusive right to provide a binding interpretation of EU law and minimise the possibility that EU law would be misinterpreted by the MIC. In case the MIC faces contentious questions of EU law, or if no interpretations of EU law exist yet, the CJEU could authoritatively fill in these gaps. The CJEU's participation would also bring additional validity to the MIC's awards since it would render the awards in line with EU law and thus eliminate most jurisdictional, enforceability and other objections based on EU law. The CJEU could be involved by way of the preliminary ruling procedure, or through a special prior involvement mechanism provided under an international agreement establishing the MIC.

2. The second statement that *possibility to refer for a preliminary ruling for selected investment dispute settlement bodies on questions of EU law interpretation would allow ensuring uniform interpretation of EU law in intra-EU disputes heard by these bodies* is confirmed by the following conclusions:

2.1. The CJEU's *Achmea* ruling has caused friction between the autonomy of EU law and international investment protection regime. From the internal perspective of EU law, the operation of ISDS tribunals in intra-EU disputes was liable to adversely affect the CJEU's exclusive jurisdiction to provide the definitive interpretation of EU law, the position of the national courts as 'ordinary courts' of the EU and the proper functioning of the preliminary ruling procedure. Thus, the operation of such tribunals is incompatible with the principle of autonomy of the EU legal order and the normal functioning of the EU judicial system, as formulated in the CJEU's case law.

2.2. To enforce *Achmea* and protect the autonomy of the EU legal order the Commission and the Member States are determined to terminate all the intra-EU BITs and to cease exercising ISDS clauses in intra-EU disputes. However, these measures will not be sufficient. Even after the Member States terminate all the intra-EU BITs, due to the 'sunset clauses' included in the majority of BITs, the ISDS tribunals could still exercise their jurisdiction for decades thus rendering awards contrary to EU law. In turn, the possibility of termination of the ECT, which is the basis for the majority of investment arbitration cases is not yet even considered by the EU. Consequently, termination of the intra-EU BITs will not eliminate the threats to the autonomy of the EU legal order posed by the intra-EU investment dispute settlement under ISDS clauses. Intra-EU ISDS proceedings are very likely to be initiated in the future, particularly under the

ECT, hence creating a threat to the uniform interpretation and autonomy of EU law.

2.3. The ISDS tribunals have formed a common approach to deal with challenges to their jurisdiction based on *Achmea*. The analysed tribunals do not recognise *Achmea* as applicable for determining of their jurisdiction, meaning that the tribunals are likely to continue exercising their jurisdiction despite the *Achmea* ruling. In spite of the evident similarities, the tribunals consider their factual and legal situations to be different from the situation in *Achmea*. Moreover, the tribunals follow a strictly textual interpretive approach, limiting *Achmea's* effects to the intra-EU BITs (or the Dutch-Slovak BIT mentioned in the ruling) only. The tribunals motivate the limited effects of *Achmea* by underlining that they operate under international law and that EU law, despite being part of international law, does not apply for determination of their jurisdiction under none of the rules of the VCLT. The first post-*Achmea* cases indicate that tribunals tend to rely on and follow each other's decisions in respect of *Achmea*. Therefore, it can be reasonably expected that tribunals in currently pending (or future) intra-EU proceedings will also maintain their jurisdiction regardless of the *Achmea* ruling. As a result, the threats to uniformity and autonomy of EU law posed by intra-EU ISDS would also remain.

2.4. It follows from the analysis that a solution is necessary to ensure the autonomy of the EU legal order while the intra-EU ISDS tribunals continue to exist. The EU and international investment protection regimes could be reconciled if the CJEU was involved in the ISDS tribunals' proceedings through the preliminary ruling procedure, rendering intra-EU ISDS tribunals a part of the EU judicial system. Since the procedure exists already, no novel mechanisms would have to be invented. It would only require the CJEU to adjust the concept of the 'court or tribunal of the Member State,' to include the intra-EU ISDS tribunals. It would allow ensuring the exclusive right of the CJEU to provide definitive interpretation of EU law if questions of EU law interpretation arise in a case. Thus, the uniform interpretation, application, and effectiveness of EU law would be preserved. By allowing the ISDS tribunals to refer for a preliminary ruling, the CJEU would demonstrate judicial comity from the side of the EU, which may encourage arbitral tribunals to cooperate with the CJEU. From the perspective of the international investment protection regime, a possibility of investment dispute settlement independent from national courts would remain in the existence. It would be a more appealing option for investors to have ISDS with the possibility of the preliminary ruling, than no ISDS at all.

RECOMMENDATIONS

The following *recommendations* are made in connection to the conclusions outlined above:

1. It is recommended to the CJEU to allow investment tribunals to refer for a preliminary ruling to the CJEU under Article 267 TFEU, by changing the concept of the 'court or tribunal of the Member State' as including the intra-EU ISDS tribunals instituted under intra-EU BITs, the ECT, and the MIC, which will be established in the future.
2. In case the MIC is not recognized as the 'court or tribunal of the Member State', it is recommended for the Commission to initiate the creation of a special prior involvement mechanism under international agreement establishing the MIC, pursuant to which the MIC could refer to the CJEU on questions of EU law interpretation, if need arises.

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MYKOLAS ROMERIS UNIVERSITY

Simas Grigonis

JURISDICTIONAL INTERACTION BETWEEN THE CJEU AND INTERNATIONAL DISPUTE SETTLEMENT BODIES: EU LAW PERSPECTIVE

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Simas Grigonis

JURISDICTIONAL INTERACTION BETWEEN THE CJEU AND INTERNATIONAL DISPUTE SETTLEMENT BODIES: EU LAW PERSPECTIVE

SUMMARY

Scientific problems of the research

Regimes of international law constantly interact by advancing claims of relevance onto each other.[863] While the number of international tribunals is constantly increasing,[864] international law does not provide for common rules that would coordinate this interaction, as separate legal regimes normally are not organised in a hierarchical relationship. This phenomenon has come to be associated with the concepts of fragmentation of international law,[865] legal pluralism,[866] 'global disorder,'[867] and most recently – 'inter-legality.'[868] In this regulatory vacuum tribunals experiencing jurisdictional competition are the institutions setting the rules of such interaction, first of all, by handling the question of jurisdiction in a particular case.[869]

Since the very beginning of the European Community, the CJEU has set the rules of its relationship with international law and international dispute settlement mechanisms. The CJEU consistently claimed that as a matter of principle the EU has a competence to conclude international agreements establishing dispute settlement bodies entitled to interpret provisions of such agreements and adopt decisions binding the EU.[870] However, the CJEU has made the EU's accession to such international agreements dependent on the

863 Filippo Fontanelli, "Let's Disagree to Disagree: Relevance as the Rule of Inter-Order Recognition," *Italian Law Journal* 4, 2 (2018): 319–20.

864 Gleider I. Hernández, "The Judicialization of International Law: Reflections on the Empirical Turn," *European Journal of International Law* 25, 3 (2014): 919–34; Benedict Kingsbury, "Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem," *New York University Journal of International Law and Politics* 31, 4 (1999): 679–96.

865 Martti Koskenniemi, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law." *Report of the Study Group of the International Law Commission*, (2006), 65-99, http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.; William Thomas Worster, "Competition and Comity in the Fragmentation of International Law," *Brooklyn Journal of International Law* 34, 1 (2008): 119–50; Eva Kassoti, "Fragmentation and Inter-Judicial Dialogue: The CJEU and the ICJ at the Interface," *European Journal of Legal Studies* 8, 2 (2014): 21–49.

866 Nicholas W. Barber, "Legal Pluralism and the European Union," *European Law Journal* 12, 3 (2006): 306–29; Paul Schiff Berman, "Global Legal Pluralism," *Southern California Law Review* 80, 6 (2007): 1155–1238.

867 Neil Walker, "Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders," *International Journal of Constitutional Law* 6, 3–4 (July 1, 2008): 373–96.

868 Jan Klabbers and Gianluigi Palombella, eds., *The Challenge of Inter-Legality* (Cambridge: Cambridge University Press, 2019).

869 Yuval Shany, "International Courts as Inter-Legality Hubs," in Klabbers and Palombella, *op. cit.*, 319–21.

870 Opinion 1/91 *on Compatibility of Draft Agreement concerning the Creation of the European Economic Area with the Treaties* [1991] EU:C:1991:490, paras. 39-40.

preservation of the autonomy of the EU legal order. According to the Court, autonomy requires that the essential character of the powers of the EU and its institutions as provided by the Treaties remain unaltered.[871] Autonomy also requires that participation in international dispute settlement mechanism would not have binding effect on the EU and its institutions to a particular interpretation of EU law when they exercise their internal powers under the Treaties.[872] Behind these requirements of autonomy protection is the aspiration to ensure uniform interpretation of EU law. The Court considers uniformity of EU law to be an essential precondition for the achievement of the single market and overall European integration.[873] For the sake of uniform interpretation, the CJEU has consistently claimed an exclusive right to provide definitive interpretation of EU law.[874]

The necessity to ensure uniform interpretation of EU law determined the development of various instruments, which were closely related to securing the uniformity of laws within the EU in one way or another. These instruments have come to be known as the essential characteristics of EU law. The scope of the principle of autonomy was therefore extended by the CJEU over the years to cover these characteristics as well, which rendered autonomy more and more complex and dynamic.

The CJEU has assessed the compatibility of a number of international agreements providing for dispute settlement mechanisms that were not foreseen in the Treaties.[875] With each case the scope of the characteristics protected by autonomy seems to have broadened. In the *Opinion 1/76*, the CJEU directly questioned whether the jurisdiction of the Fund Tribunal was compatible with the CJEU's power to give preliminary rulings under the Treaties and concluded that it was not due to the possibility of divergent interpretation of EU law the Fund Tribunal created.[876] The CJEU's exclusive right to provide definitive interpretation of EU law was thus already protected in this early case.

In the *Opinion 1/91* the CJEU introduced the concept of autonomy of the EU legal order when assessing whether the proposed EEA Court would not undermine it.[877] This time the CJEU ruled that jurisdiction of the EEA Court was incompatible with the autonomy, since it was likely to adversely affect the allocation of responsibilities of institutions as provided under the Treaties.[878] Thus, the CJEU introduced the requirement that the EU's and

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871 Opinion 1/00 *on Draft Agreement concerning the Establishment of a Common European Aviation Area* [2002] EU:C:2002:231, para. 12.

872 Ibid., para. 13.

873 Opinion 1/91, *op. cit.*, paras 30-45.

874 Opinion 1/00, *op. cit.*, para. 13; Opinion 2/13 *on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms Agreement with the Treaties* [2014] EU:C:2014:2454, paras. 246-7.

875 Opinion 1/76 *on draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] EU:C:1977:63; Opinion 1/91, *op. cit.*; Opinion 1/92 *on the draft EEA agreement* [1992] EU:C:1992:189; Opinion 1/00, *op. cit.*; Case C-459/03, *Commission of the European Communities v Ireland (Mox Plant)* [2006] EU:C:2006:345; Opinion 1/09 *on Compatibility of Draft Agreement concerning the Creation of the Unified Patent Litigation System with the Treaties* [2011] EU:C:2011:123; Opinion 2/13, *op. cit.*.

876 Opinion 1/76, *op. cit.*, paras. 18-22.

877 Opinion 1/91, *op. cit.*, para. 30.

878 Ibid., para. 35.

its institutions' powers must be preserved. At this instance, the CJEU still mostly had its own powers in mind, since it underlined the necessity that its exclusive right to observe the law is ensured.[879]

In the *Opinion 1/09*[880] the CJEU developed the characteristic of the EU judicial system. The CJEU considers the EU judicial system to be composed of the CJEU and the national courts, which altogether comprise a complete system, designed to effectively ensure the full application of EU law in all the Member States as well as to ensure protection of individuals' rights stemming from EU law.[881] The EU judicial system is one of the essential characteristics of EU law that the CJEU rigidly protects by invoking the principle of autonomy. As a consequence, the normal functioning of the internal judicial system of the EU may not be affected by external dispute settlement mechanisms created by international agreements.[882]

Moreover, the attempts to accede to the ECHR were stopped by the CJEU.[883] The first time, the Court stopped the accession since EU law, as it stood back then, provided no competence under the Treaties for the EU to accede to the ECHR.[884] The second time, accession was blocked by the CJEU, despite the clear Treaties' obligation to accede,[885] since the Accession Agreement was found incompatible with autonomy and essential characteristics of EU law.[886] The Court ruled in the *Opinion 2/13* that the Accession Agreement was liable to adversely affect the characteristics of the EU judicial system,[887] division of powers between the EU and the Member States,[888] fundamental rights,[889] mutual trust,[890] sincere cooperation[891] and consequently – the autonomy of the EU legal order.[892] As these cases indicate, the concept of autonomy has gradually evolved into a complex network of principles comprising the foundations of the entire legal system of the EU. These characteristics may not be affected by the international agreements providing for 'external' dispute settlement mechanisms, which are not foreseen in the Treaties.

The recent rulings of the CJEU in *Achmea* and the *Opinion 1/17* marks the newest phase in the evolution of the doctrine of autonomy of the EU legal order. In these rulings the CJEU has adopted two completely different positions on compatibility of two similar

879 Opinion 1/91, *supra* note 870, para. 35.

880 Opinion 1/09, *supra* note 875, paras. 82-89.

881 Ibid., paras. 66-68.

882 Ibid., para 89.

883 See, *for example*: Opinion 2/94 *on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] I-01759; Opinion 2/13, *supra* note 874.

884 Opinion 2/94, *op. cit.*, para. 36.

885 "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. <…>" – Article 6(2) TEU.

886 Opinion 2/13, *op. cit.*, para. 258.

887 Ibid., para. 198.

888 Ibid., paras. 221-31.

889 Ibid., paras. 169-70.

890 Ibid., paras. 191-94.

891 Ibid., para. 173.

892 Ibid., para. 258.

investment dispute settlement mechanisms – the ISDS under the intra-EU BITs and the ICS under CETA. While the Court found the ISDS clauses of intra-EU BITs incompatible with autonomy, the new ICS mechanism was ruled to be in line with it. These new rulings, providing two contrasting positions require answering why these cases were treated differently and how they have impacted the understanding of the autonomy of the EU legal order.

Since the Treaty of Lisbon the FDI is part of the exclusive competence of the EU.[893] With the exclusive competence in the field of the FDI the EU inherited from the Member States various BITs containing ISDS clauses providing a possibility for investors to resort to international arbitration against state in order to enforce their rights under specific BIT.[894] Some of the BITs were concluded between the Member States (intra-EU BITs) and some of them were concluded by Member States and third countries (extra-EU BITs). It soon became clear that different kinds of BITs would be treated differently in the EU. While the agreements of the Member States with third countries were essentially integrated into the EU's investment policy,[895] the intra-EU BITs were declared incompatible with EU law by the Commission.[896] At the time of the Lisbon Treaty, there were 191 intra-EU BITs within the EU.[897]

In *Achmea* the CJEU has for the first time assessed the compatibility with EU law of ISDS clauses contained in the intra-EU BITs.[898] The CJEU's assessment largely reflected its previous case law concerning the autonomy discussed above. The Court ruled that clauses of international agreements concluded between the Member States, which provided an opportunity for an investor of one of the Member States to bring proceedings against another Member State before an arbitral tribunal were precluded by Articles 267 and 344 TFEU.[899] The *Achmea* ruling resulted in friction between EU law and international investment protection regime. While the Commission and the Member States recognised *Achmea* as repealing jurisdiction of ISDS tribunals in all on-going and future intra-EU investment disputes (including the ones arising from the ECT),[900] investors and a number of ISDS

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893 However, as was recently clarified by the CJEU in Opinion 2/15, investor-state dispute settlement does not fall under the exclusive competence of the EU and is shared with the Member States. – Opinion 2/15 *on Free Trade Agreement between the European Union and the Republic of Singapore* [2017] EU:C:2017:376, para. 305; Article 207(1) TFEU.

894 European Commission, *Communication: Towards a Comprehensive European International Investment Policy*, Brussels, 7.7.2010, COM(2010)343 Final Communication, 9.

895 Regulation (EU) No 1219/2019 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).

896 European Commission, *Communication: Towards a Comprehensive European International Investment Policy*, *op. cit.*, 11.

897 Wenhua Shan and Sheng Zhang, "The Treaty of Lisbon: Half Way toward a Common Investment Policy," *European Journal of International Law* 21, no. 4 (2010): 1065.

898 Case C-284/16, *Slovak Republic v Achmea BV* [2018] EU:C:2018:158.

899 Ibid., para. 62.

900 Communication from the Commission to the European Parliament and the Council *on Protection of intra-EU investment*, Brussels, 19.7.2018, COM(2018) 547 final; Declaration of the Representatives of the Governments of the Member States of 15 January 2019 *on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the EU*.

tribunals refused to apply *Achmea* for determination of their jurisdictions.[901] Thus, the *Achmea* saga provided an exceptional opportunity to observe how international investment tribunals, which were not related to the EU, dealt with claims of relevance of the CJEU's *Achmea* ruling.

In turn, once the competence in the FDI was conferred on the EU, the Commission recognised the ISDS to be such an established feature of the international investment regime that it had to find the way for the EU to participate in its relationship with third states.[902] The Commission's rationale was that if the EU did not participate in the ISDS, investors could be discouraged from investing in the EU.[903] Thus, it was decided to temporarily leave the extra-EU BITs of the Member States in force by setting strict rules for their management until the mechanism suitable for the EU is created and replaces the extra-EU BITs.[904] For this reason, the Commission aimed to develop an innovative ISDS mechanism suitable for the EU.[905] As a result, a new kind of investment dispute settlement mechanism – the ICS – was developed. As expected, the proposal of the ICS raised numerous discussions on its compatibility with autonomy of EU law. In September 2017 Belgium requested the CJEU to assess whether the ICS mechanism of the CETA is, *inter alia*, compatible with the exclusive competence of the CJEU to provide definitive interpretation of EU law.[906]

To the surprise of numerous critics of the new mechanism,[907] the CJEU concluded in the *Opinion 1/17* that the exclusive jurisdiction of the Court over the definitive interpretation

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901 *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 ("Masdar"); *Vattenfall AB and others v. Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018 ("Vattenfall"); *UP and C.D Holding Internationale v Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018 ("UP and C.D Holding"); *Foresight Luxembourg Solar 1 Sàrl, et al v Kingdom of Spain*, SCC Case No 2015/150, Final Award, 14 November 2018 ("Foresight"); *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sà r.l v Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018 ("RREEF"); *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v The Italian Republic*, SCC Case No. V 2015/095, Final Award, 23 December 2018 ("Greentech"); *Marfin Investment Group v The Republic of Cyprus*, ICSID Case No ARB/13/27, Award, 26 July 2018 ("Marfin").

902 European Commission, *Communication: Towards a Comprehensive European International Investment Policy*, *supra* note 894, 9-10.

903 Ibid., 10.

904 Regulation (EU) No 1219/2019, *supra* note 895.

905 European Commission, *Communication: Towards a Comprehensive European International Investment Policy*, *op. cit.*, 9-10.

906 Belgian Request For an Opinion from the European Court of Justice Regarding the Compatibility of CETA, (2017), accessed 7 May 2018, https://diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta.

907 Szilárd Gáspár-Szilágyi, "A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union," *The Journal of World Investment & Trade* 17, no. 5 (2016): 701–42; Daniele Gallo and Fernanda G. Nicola, "The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication," *Fordham International Law Journal* 39, no. 5 (2016): 1132; Szilárd Gáspár-Szilágyi, "AG Bot in Opinion 1/17. The Autonomy of the EU Legal Order v. the Reasons Why the CETA ICS Might Be Needed," (2019), *European Law Blog*, accessed 12 March 2020, https://europeanlawblog.eu/2019/02/06/ag-bot-in-opinion-1-17-the-autonomy-of-the-eu-legal-order-v-the-reasons-why-the-ceta-ics-might-be-needed/; Christina Eckes, "Some Reflections on Achmea's Broader Consequences for Investment Arbitration," *European Papers* 4, no. 1 (2019): 79–97.

of EU law was not adversely affected by the ICS.[908] While the CJEU had previously found the possibilities for external tribunals to engage in the interpretation of EU law incompatible with autonomy (as discussed above), this time it reached the opposite conclusion: both the CJEU and the AG Bot recognized the fact that the ICS tribunals would essentially have to interpret EU law as compatible with EU law.[909] Such a shift in the Court's attitude in the *Opinion 1/17* towards the interpretations of EU law provided by international dispute settlement body may be a signal that the doctrine of the autonomy of the EU legal order has taken another step in its evolution.

Taking into account the context described above, the following main **scientific problems** require to be addressed:

1. What the pri!nciple of autonomy of the EU legal order, given its complexity and dynamic nature, entails in relation to the EU's and the Member States' participation in dispute settlement mechanisms falling outside the mechanisms provided under the Treaties? Does the *Opinion 1/17* reflect any substantial changes in the concept of autonomy of the EU legal order?
2. Given the CJEU's ruling in *Achmea* and the ISDS tribunals' reactions to the parties' attempts to rely on *Achmea*, how to implement dispute settlement in the emerging European foreign investment policy while safeguarding the principle of autonomy of the EU legal order and, at the same time, respecting the requirements of international law?
3. Although the CJEU concluded in *Opinion 1/17* that the ICS would not have adverse effect on the CJEU's right to provide definitive interpretation of EU law, the CJEU did not address several issues that could have adverse effects on uniform interpretation of EU law. In case the ICSs have adverse effects on uniform interpretation and application of EU law, would and to what extent such effects be incompatible with EU primary law?

Relevance of the problem

Each of the problems identified in this thesis are particularly relevant for the development of the doctrine and practice of EU and international law as well as the relationship between the EU legal order and international law. First, the question whether the content of the principle of autonomy of the EU legal order has changed is of fundamental importance for the legal doctrine. The recent recognition of the ICS to be compatible with the autonomy of EU law is only one of a few instances where the CJEU ruled in favour of the international dispute settlement mechanism in which the EU participates.[910] The *Opinion*

908 Opinion 1/17 *on Compatibility of Investment Court Sysytem with EU Law* [2019] EU:C:2019:341, para. 136.

909 Ibid., para. 131; Opinion 1/17 *on the Compatibility of Investment Court Sysytem with EU Law*, Opinion of Advocate General Bot [2019] EU:C:2019:72, para. 137.

910 Other mechanisms recognized to be compatible with EU law were EFTA Court and the system of legal supervision proposed by the Agreement on the establishment of the European Common Aviation Area. – Opinion 1/92, *supra* note 875, para. 42; Opinion 1/00, *supra* note 871, para. 46.

1/17 contrasts with the previous opinions of the CJEU, since the Court recognized that the fact that the ICS tribunals will have to undertake the examination of the effect of EU law measures does not make the ICS mechanism incompatible with EU law. Such a conclusion was unexpected in the light of the previous case law of the CJEU. Therefore, an analysis inquiring whether the Court's reasoning in the *Opinion 1/17* brought new developments into the doctrine of the autonomy of the EU legal order is very relevant and could be significant for the assessments of future international agreements of the EU.

The CJEU's ruling in *Opinion 1/17* is also relevant due to the scale of its possible effects. The ICS is arguably the most complex and largest scale mechanism to have ever been approved by the CJEU. By concluding that ICS mechanism is compatible with EU law, the CJEU endorsed the large-scale international investment dispute settlement reorganization promoted by the Commission. The Commission's investment dispute settlement reform is intended to be implemented in two stages.[911] First, the Commission aims to include the ICS clauses in each future EU-level investment agreement. The CETA's ICS was one of the first mechanisms out of many ICSs under negotiation.[912] Then, all the ICSs should eventually be replaced with the standing MIC for the settlement of the EU's and Member States' investment disputes.[913] The parallel negotiations on the ISDS reform under the framework of UNCITRAL have also started already.[914] Once the reform is finished, dozens of the ICS and ISDS tribunals under investment protection treaties with third countries will be replaced with a single MIC entitled to handle all the investment disputes arising out of the EU investment agreements. However, since the CJEU did not address all the concerns regarding the effects of the ICS on the CJEU's exclusive right to provide definitive interpretation of EU law, it is important to analyse whether the ICSs could have adverse effects on the uniformity of EU law and, if yes, whether those effects would be compatible with the Treaties. It must be realised that we are currently in the transitional period in the investment dispute settlement reform. The first ICS mechanisms are currently in the process of being actually set up and we will have to wait until the first cases emerge. Only then it will be possible to assess the the true effects of the operation of the ICS mechanisms. Should the effects discussed in this thesis manifest in the ICS tribunal's work, they could still be corrected when establishing the MIC. Therefore, the problems and solutions discussed in this thesis will remain relevant in the nearest future.

Lastly, due to the CJEU's *Achmea* ruling the respondent Member States were given an opportunity to challenge the jurisdictions of the respective ISDS tribunals established under the ECT and intra-EU BITs. It was ruled in *Achmea* that ISDS clauses under intra-EU BITs

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911 European Commission, *Concept Paper: Investment in TTIP and Beyond – the Path for Reform*, 2015, 1–12, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

912 The Commission estimates that approximately 20 of ICSs should be created by EU investment agreements with third states in the near future. – European Commission, "Negotiations and Agreements," accessed 16 August 2019, https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/.

913 Commission Recommendation *for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes*, COM(2017) 493 final, 13 September 2017, Brussels.

914 Possible Reform of Investor-State Dispute Settlement (ISDS) (Draft) (Note by the Secretariat, A/CN.9/WG.III/WP.149, United Nations Commission on International Trade Law), 2018.

were unlawful rendering hundreds of the international investment protection agreements concluded between the Member States contrary to EU law.[915] That way, *Achmea* has become a legal argument in the hands of the defendant Member States to challenge the jurisdiction of various ISDS tribunals established under intra-EU BITs and the ECT. Yet, on the other side stand the investors, which rely on their ability to defend their rights under respective intra-EU BITs or the ECT. The *Masdar*, *Vattenfall*, *UP and C.D Holding* and other tribunals' decisions on the issue of *Achmea* presented a unique material for the analysis of the legal solutions applied by the respective tribunals to solve the questions of the relevance of EU law for their proceedings and balance the interests of different sides.[916] It must be stressed that these are the most recent and almost entirely non-analysed cases of international tribunals, which allows looking into the interaction between the CJEU and international tribunals from different angles, as is the intention of this thesis. It must be underlined that, given the decisions of the analysed arbitral tribunals, the intra-EU ISDS is not going away soon, despite the *Achmea* ruling. Therefore, the analysed problems and proposed solutions, which are discussed in this thesis, will remain relevant in the years to come.

Review of the relevant literature and other sources

The starting point of the analysis in this thesis is the historical case law of the CJEU where the doctrine of autonomy was developed. These cases are mostly used in the thesis as analytical instruments of settled knowledge to investigate the *Opinion 1/17* and *Achmea* – the most recent judgments of the CJEU assessing the international investment dispute settlement mechanisms. The principle of autonomy of the EU legal order has been the topic of an extensive research. The number of publications concerning autonomy increased with each of the CJEU's judgments assessing the compatibility of dispute settlement mechanisms with autonomy and the essential characteristics of EU law.[917]

The research outputs concerning the principle of autonomy are grouped into several categories. The first distinguishable group of scholars has analysed autonomy systematically by scrutinising different aspects and seeking to identify the essence of the principle. Among these highly analytical and specialised studies, works of Contartese, Lindeboom and Odermatt stand out.[918] Moreover, several important collective studies exploring the in-

915 Case C-284/16, *Slovak Republic v Achmea BV*, *supra* note 898, para. 62.

916 *Masdar*, *supra* note 901; *Vattenfall*, *supra* note 901; *UP and C.D Holding*, *supra* note 901.

917 Opinion 1/91, *supra* note 870; Opinion 1/92, *supra* note 875; Opinion 1/00, *supra* note 871; Case C-459/03, *supra* note 875; Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] EU:C:2008:461; Opinion 1/09, *supra* note 875; Opinion 2/13, *supra* note 874.

918 See, *for example*: Cristina Contartese, "The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the Essential to the Specific Characteristics of the Union and Back Again," *Common Market Law Review* 54, 6 (2017): 1627–1672; Jed Odermatt, "The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?," in *Structural Principles in EU External Relations*, ed. Marise Cremona, 1st ed. (Oxford and Portland: Hart Publishing, 2018), 291–316; Justin Lindeboom, "Why EU Law Claims Supremacy," *Oxford Journal of Legal Studies* 38, 2 (2018): 328–56; Rachel O'Sullivan, "Burning Bridges: The Court of Justice and the Autonomy of the EU Legal Order," *Hibernian Law Journal* 17 (2018): 1–24; René Barents, *The Autonomy of Community Law* (The Hague: Kluwer Law International, 2004).

teraction between the EU and international legal order in general are notable.[919] The *Structural Principles in EU External Relations Law* edited by Cremona,[920] *The European Court of Justice and International Courts* by Lock[921] and *The Challenge of Inter-Legality* by Klabbers and Palombella[922] are the most relevant studies.

The second category consists of the sources focusing on the effects of a particular ruling of the CJEU. Recently, *Opinion 2/13* resulted in a series of specialised articles analysing different aspects of the Court's reasoning substantiating the incompatibility of the Accession Agreement and relationship between the CJEU and ECtHR.[923] The special issue of the *German Law Journal* is noticeable in the context of the *Opinion 2/13*.[924] The authors of this special issue attempted to cover all the relevant aspects concerning the Accession Agreement's incompatibility with EU law. The research conducted included an extensive analysis of the co-respondent mechanism,[925] prior involvement of the CJEU in the ECtHR proceedings,[926] compatibility with Article 344 TFEU,[927] compatibility of the human rights protection standards contained in Article 53 ECHR and Article 53 of the Charter,[928] and the significance of the preservation of the mutual trust between the Member States after accession to ECHR.[929] Considering that every aspect of the *Opinion 2/13* has been extensively

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919 See, *for example*: Marise Cremona, ed., *Structural Principles in EU External Relations Law*, 1st ed. (Portland; Oxford: Hart Publishing, 2018); Ramses A. Wessel and Steven Blockmans, eds., *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organizations* (The Hague, The Netherlands: T. M. C. Asser Press, 2013); Enzo Cannizzaro, Paolo Palchetti, and Ramses A. Wessel, eds., *Studies in EU External Relations, Volume: 5: International Law as Law of the European Union* (Leiden and Boston: Brill | Nijhoff, 2011); Tobias Lock, *The European Court of Justice and International Courts*, 1st ed. (Oxford: Oxford University Press, 2015).

920 Cremona, *op. cit*.

921 Lock, *op cit*.

922 Jan Klabbers and Gianluigi Palombella, eds., *The Challenge of Inter-Legality* (Cambridge: Cambridge University Press, 2019).

923 See, *for example*: Christoph Krenn, "Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13," *German Law Journal* 16, 1 (2015): 147–68; Daniel Halberstam, "It's the Autonomy, Stupid: A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward," *German Law Journal* 16, 1 (2015): 105–46; Stian Oby Johansen, "The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences," *German Law Journal* 16, 1 (2015): 169–78; Adam Lazowski and Ramses A. Wessel, "When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR," *German Law Journal* 16, 1 (2015): 179–212; Steve Peers, "Opinion 2/13 The EU's Accession to the ECHR: The Dream Becomes a Nightmare," *German Law Journal* 16, 1 (2015): 213–22; Piet Eeckhout, "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky," *Fordham International Law Journal* 38, 4 (2015): 955–92; Eleanor Spaventa, "A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13," *Maastricht Journal of European and Comparative Law* 22, 1 (2015): 35–56; Graham Butler, "A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights," *Utrecht Journal of International and European Law* 31, 81 (2015): 104–11; Benedikt H. Pirker and Stefan Reitemeyer, "Between Discursive and Exclusive Autonomy - Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law," *Cambridge Yearbook of European Legal Studies* 17 (2015): 168–88.

924 GLJ Volume 16 Issue 1 Cover and Front Matter," *German Law Journal* 16, 1 (March 1, 2015): f1–3, https://doi.org/10.1017/S2071832200019490.

925 Halberstam, *supra* note 923: 115-7.

926 Krenn, *supra* note 923: 149-54.

927 Johansen, *supra* note 923: 169-78.

928 Lazowski and Wessel, *supra* note 923: 190-93.

929 Peers, *supra* note 923: 219-22.

analysed and there is nothing significant to be added to the debate, the *Opinion 2/13* is not the primary object of the analysis of this thesis.

Yet, the *Opinion 2/13* is a valuable reference on the essential characteristics and the autonomy of EU law. Therefore, the *Opinion 2/13* in this thesis is the key to reveal the content of the principle of autonomy and to assess the compatibility of the respective features of the ISDS and ICS mechanism proposed under CETA. The Court's earlier rulings and the scholarly analysis, for instance, in the *Opinion 1/09*[930], *Kadi*[931] and *MOX plant*[932] are used for the same purpose. Since principle of autonomy is still considered an ambiguous and vague concept (despite intensity of its research),[933] this thesis provides a systematic account of the scope and content of the principle of autonomy as well as the features of EU legal order it is used to protect.

Literature concerning the investment dispute settlement reform proposed by the Commission, which is analysed in the 2nd and 3rd Parts, is also abundant. *Achmea* has generated a separate line of specialised literature in respect of the ISDS under intra-EU BITs.[934] The 2rd Part of the thesis discusses the most recent awards of the ISDS tribunals, addressing challenges to their jurisdiction in view of the CJEU's *Achmea* decision.[935] Two large studies on on-going ICS reform were conducted by the Directorate-General for External

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930 See, *for example*: Roberto Baratta, "National Courts as Guardians and Ordinary Courts of EU Law: Opinion 1/09 of the ECJ" 38, 4 (2011): 297–320; Allan Rosas, "The National Judge as EU Judge; Some Constitutional Observations," *SMU Law Review* 67, 4 (2014): 717–28; Herman van Harten, "(Re)Search and Discover: Shared Judicial Authority in the European Union Legal Order," *Review of European Administrative Law* 7, 1 (2014): 5–32.

931 See, *for example*: Grainne de Burca, "The European Court of Justice and the International Legal Order after Kadi," *Harvard International Law Journal* 51, 1 (2010): 1–50; Jan Willem van Rossem, "Patrolling the Borders of the EU Legal Order: Constitutional Repercussions of the Kadi Judgment," *Croatian Yearbook of European Law & Policy* 5 (2009): 93–120; Bruno de Witte, "European Union Law: How Autonomous Is Its Legal Order?," *Zeitschrift Für Öffentliches Recht* 65, 1 (March 17, 2010): 141–55; Kushtrim Istrefi and Zane Ratniece, "Think Globally, Act Locally: Al-Jedda's Oscillation between the Coherence of International Law and Autonomy of the European Legal Order," *Hague Yearbook of International Law* 24 (2011): 231–64.

932 Jasper Finke, "Competing Jurisdiction of International Courts and Tribunals in Light of the MOX Plant Dispute," *German Yearbook of International Law* 49 (2006): 307–26; Nikolaos Lavranos, "The MOX Plant and IJzeren Rijn Disputes: Which Court Is the Supreme Arbiter?," *Leiden Journal of International Law* 19, 01 (2006): 223.

933 Panos Koutrakos, "The Autonomy of EU Law and International Investment Arbitration," *Nordic Journal of International Law* 88, 1 (2019): 41–64; Steffen Hindelang, "Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU's Judgement in Achmea Put in Perspective," *European Law Review* 44, no. 3 (2019): 386; Cristina Contartese, "Achmea and Opinion 1/17: Why Do Intra and Extra-EU Bilateral Investment Treaties Impact Differently on the EU Legal Order?," *ECB Legal Working Paper Series* 19 (2019): 7–8.

934 Simon Burger, "Arbitration Clauses in Investment Protection Agreements after the ECJ's Achmea Ruling: A Preliminary Evaluation," *Yearbook on International Arbitration* 6, 1 (2019): 121–48; Xavier Taton and Guillaume Croisant, "Judicial Protection of Investors in the European Union: The Remedies Offered by Investment Arbitration, the European Convention on Human Rights and EU Law," *Indian Journal of Arbitration Law* 7, 2 (2019): 61–145; Csongor István Nagy, "Intra-EU Bilateral Investment Treaties and EU Law After Achmea: 'Know Well What Leads You Forward and What Holds You Back,'" *German Law Journal* 19, 4 (2018): 981–1016; Eckes, *supra* note 907; Hindelang, *op. cit.*; Venetia Argyropoulou, "Vattenfall in the Aftermath of Achmea: Between a Rock and a Hard Place?," *European Investment Law and Arbitration Review* 4 (2019): 203–26; Szilárd Gáspár Szilágyi and Maxim Usynin, "The Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment," *SSRN Electronic Journal*, no. Issue 4/2019 The (2019): 1–38; Ivana Damjanovic and Nicolas de Sadeleer, "I Would Rather Be a Respondent State Before a Domestic Court in the EU than Before an International Investment Tribunal," *European Papers* 4, no. 1 (2019): 19–60.

935 *Masdar*, *supra* note 901; *Vattenfall*, *supra* note 901; *UP and C.D Holding*, *supra* note 901; *Foresight*, *supra* note 901; *RREEF*, *supra* note 901; *Greentech*, *supra* note 901; *Marfin*, *supra* note 901.

Policies.[936] As these studies clearly suggested that the ICS mechanism was compatible with the Treaties, they provoked a number of critical comments.[937] Yet, *Achmea* and AG Bot's position in *Opinion 1/17* brought the discussion on the compatibility of the ICS mechanism to a new level. While *Achmea* suggested that the ICS mechanism was also incompatible with the principle of autonomy,[938] this was contested by AG Bot[939] whose opinion finally found the CJEU's support in *Opinion 1/17*. Therefore, the assessment of the ICS mechanism now calls for re-evaluation as several distinct positions on the ICS compatibility with the principle of autonomy were expressed along the way.

Novelty of the research

This thesis is one of the first, if not the only, study concerning the principle of autonomy of the EU legal order in the Republic of Lithuania. The principle of autonomy is unexplored in Lithuania. Therefore, in general, the academic community is not familiar with the scope, complexity and significance of the principle of autonomy. This thesis fills this gap. Moreover, to the knowledge of the author, the *Achmea* ruling as well as the *Opinion 1/17* were not analysed by the Lithuanian scholars yet, with the exception of some mentions in the press. As a result, the thesis is original in the context of the Lithuanian scholarly literature.

This thesis is one of the first systematic studies concerning the normative effect of the principle of autonomy of the EU legal order on the emerging European investment dispute settlement mechanism. To be more precise, this is one of the first studies exploring how the CJEU's jurisdiction is delimited from jurisdictions of international investment dispute settlement bodies. Although the FDI fell under the exclusive competence of the EU almost a decade ago, the first significant judgments of the CJEU in the field, like *Opinion 2/15*, *Achmea* and *Opinion 1/17* were adopted only recently.[940] While each of these cases had been

936 Pieter Jan Kuijper et al., Directorate-General for External Policies, *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements*, 2014, http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU(2014)534979_EN.pdf; Steffen Hindelang and Teoman Hagemeyer, Directorate-General for External Policies, *In Pursuit of an International Investment Court Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective*, 2017, http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603844/EXPO_STU(2017)603844_EN.pdf.

937 See, *for example*: Gallo and Nicola, *supra* note 49: 1081–1152; Szilárd Gáspár-Szilágyi, *supra* note 49: 701–42; August Reinisch, "The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court," *Centre for International Governance Innovation* (2016), accessed 28 June 2018, https://www.cigionline.org/sites/default/files/isa_paper_series_no.2.pdf; Szilárd Gáspár-Szilágyi, "Quo Vadis EU Investment Law and Policy ? The Shaky Path Towards the International Promotion of EU Rules," *European Foreign Affairs Review* 23, 2 (2018): 167–86; Inge Govaere, "TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order," in *Speeches and Presentations from the XXVII FIDE Congress, Congress Prroceedings Vol 4*, ed. Gy. Bandi, P. Darak, and K. Debisso (Budapest: Wolters Kluwer, 2016), 123–44.

938 Christina Eckes, "Dont't Lead With Your Chin! If Member States Continue With the Ratification of CETA, They Violate European Union Law," (2018), *European Law Blog*, accessed 20 January 2019, http://europeanlawblog.eu/tag/achmea/.

939 Opinion 1/17, AG Bot, *supra* note 909, paras. 95-114.

940 Opinion 2/15 where the CJEU ruled on the division of competences between the EU and the Member States under the 'New Generation' Free Trade Agreements concluded under Article 207(1) TFEU was only adopted in 2017. – Opinion 2/15, *supra* note 893.

analysed separately, to the knowledge of the author, there has not been a complex analysis of the EU's investment dispute settlement regime, which encompasses the assessment of the CJEU's case law on ISDS under intra-EU BITs and the ICS mechanism into a single research.

In turn, the principle of autonomy of the EU legal order has mostly been analysed from the internal perspective of EU law. Therefore, there is an entire dimension of international law that is not addressed that often, i.e. the proceedings of international tribunals where the questions of EU law interpretation and application arise. For instance, the arguments presented in the *Masdar*, *Vattenfall, UP and C.D Holding* and other tribunals' decisions concerning the applicability of *Achmea* or other rules of EU law to contest jurisdiction of these tribunals are largely unexplored. This gap is addressed in this thesis.

Lastly, the thesis proposes that the content of the principle of autonomy was complemented by the CJEU in the *Opinion 1/17*, which would mark the new step in the evolution of the doctrine of autonomy. The list of the safeguards of the autonomy provided under the ICS mechanism could, and probably will, become part of the autonomy doctrine. Moreover, to the knowledge of the author, the *Opinion 1/17* has not been explored from the angle of sufficiency of the safeguards of the autonomy protection provided under the ICS mechanism. This thesis provides the needed critical look into the effects the operation of the ICS tribunals may have on the European legal system and its autonomy. In addition, the *Opinion 1/17* clarified one the essential characteristics of the EU legal order, which are protected by the autonomy, namely, the normal operation of the EU institutions under the democratic process. These particular points have not been analysed in the scholarly literature from the angle of the development of the doctrine of the autonomy yet. Therefore, despite the fact that, as demonstrated above, the principle of autonomy has been extensively analysed, there is a new dimension of the principle that must be explored.

The purpose and the objectives of the research

The **purpose** of this thesis is to systematically analyse the extent of the normative influence of the principle of autonomy of the EU legal order on delimitation of the CJEU's jurisdiction from jurisdictions of selected international dispute settlement bodies, which fall outside the scope of dispute settlement mechanisms provided under the Treaties.

For this purpose, the **objectives of the thesis are**:

1. To reveal the content of the principle of autonomy of the EU legal order established in the CJEU's cases related to jurisdictional delimitation and how the principle evolved over the course of European integration;
2. To analyse how the principle of autonomy is applied in respect of investment dispute settlement bodies established under intra-EU BITs and to scrutinise if their responses to the CJEU's case law reflect risks for autonomy of EU law;
3. To assess if the ICS mechanism could have adverse effects on the autonomy of the EU legal order, given the reasons, which determined the ICS mechanism's compatibility with the principle of autonomy of the EU legal order in the *Opinion 1/17*.

Defended statements of the research

1. The safeguards of autonomy protection under the ICS mechanism are insufficient since the mechanism will, in the long term, adversely affect the autonomy of the EU legal order.
2. Possibility to refer for a preliminary ruling for selected investment dispute settlement bodies on questions of EU law interpretation would allow ensuring uniform interpretation of EU law in intra-EU disputes heard by these bodies.

Methodology

In general, the research conducted in the thesis is based on the *grounded theory approach* as outlined in *Constructing Grounded Theory* by Kathy Charmaz.[941] The grounded theory approach consists of systematic, but flexible, guidelines for collection and analysis of qualitative data.[942] It is characterised as an inductive analysis invoking iterative strategies of going back and forth between the data and the analysis, using comparative method and keeping the researcher interacting and involved with the data and emerging analysis.[943] The primary method for scientific data collection for this thesis is document analysis method.[944] In addition, specific research methods are used in the separate parts of the thesis, as described further.

The *principle of autonomy* of the EU legal order is analysed in the following way. The so-called 'hard cases' were chosen to be analysed in the thesis. The concept 'hard cases' is attributable to Dworkin who considered 'hard cases' to be the cases "<…> in which the result is not clearly dictated by statute or precedent."[945] Importantly, all of the cases where the CJEU applied the principle of autonomy of the EU legal order could be considered hard cases at the time of their examination. *Textual analysis* is used to study the selected cases and relevant literature and to *categorise* the essential characteristics of EU law reflected in the cases. *Narrative analysis* is used to examine the selected cases. In general, the method focuses on the analysis of the specific texts having the aim to establish what a text is about, what message is communicated through it and what particular points are made to an audience.[946] For the purposes of this thesis, the selected cases are analysed systematically as comprising a single narrative developed by the Court. In the adaptation of the method for the purposes of the thesis, the following questions are aimed to be answered: what message is communicated

941 Kathy Charmaz, *Constructing Grounded Theory*, 2nd ed. (London: SAGE Publications, Inc., 2014); Kathy Charmaz and Antony Bryant, "Grounded Theory," in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa Given (Thousand Oaks, California, United States: SAGE Publications, Inc., 2008), 375–77.

942 Charmaz, *op. cit*., 1.

943 Ibid.

944 Lindsay F. Prior, "Document Analysis," in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa Given (Thousand Oaks California, United States: SAGE Publications, Inc., 2008), 231–32. Charmaz, *op. cit.*, 45.

945 Ronald Dworkin, "Hard Cases," *Harvard Law Review* 88, 6 (1975): 1057.

946 Catherine Kohler Riessman, "Narrative Analysis," in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa Given (Thousand Oaks, California, United States: SAGE Publications, Inc., 2008); Robert M. Cover, "The Supreme Court, 1982 Term - Foreword: Nomos and Narrative," *Harvard Law Review* 97, 1 (1983): 1.

by the CJEU through its case law regarding the protection of the autonomy of the EU legal order? What is the purpose the CJEU seeks through the application of the autonomy? What methodology the Court uses for the sake of implementation this purpose?

The *rulings of the ISDS tribunals on Achmea issue* are analysed by conducting the *case analysis*[947] and *comparative research*. A *descriptive method* is also used in the 2nd Part of the thesis, since it was necessary to describe the factual background of different cases analysed so that a comparison could be made. The analysis of the *compatibility of the ICS* with EU law is mainly conducted by using *comparative method.* In general terms, comparative research refers to the evaluation of the similarities, differences, and association between phenomena.[948] It is applied in this thesis by comparing the respective features of the dispute settlement mechanisms already assessed by the CJEU and the matching features of the ICS mechanism. In addition, the *critical analysis* method is employed to make an overall assessment of the ICS mechanism's effect on the uniform interpretation of EU law in the long term.

Main conclusions of the research

The analysis conducted allows concluding that the purpose of the thesis was attained, the objectives were accomplished meaning that the defended statements of the thesis were defended.

1. The first statement that the *safeguards of autonomy protection under the ICS mechanism are insufficient since the mechanism will, in the long term, adversely affect the autonomy of the EU legal order* is confirmed by the following conclusions:
   1.1. The safeguards of the principle of autonomy of the EU legal order provided under the ICS mechanism in CETA are insufficient since, in the long run, the ICS tribunals' operation is likely to adversely affect uniform interpretation of EU law. The following supporting findings must be underlined:
      1.1.1. The existence of the 'prevailing interpretation' of EU law, which ought to be used by the ICS tribunals to avoid interpreting EU law by themselves, is debatable. As the *Achmea* saga demonstrated, the same ruling may be interpreted in a completely different way by various actors. *Achmea* assessments made by the parties and arbitral tribunals have proven that the CJEU's interpretations may require further clarification. Since the ICS tribunals will not have the right to refer to the CJEU for a preliminary ruling, the conditions for misinterpretations of EU law will be created. If misinterpretations of EU law occur in some of the ICS tribunals' proceedings, they may form guidelines for the future cases of the ICS tribunals and impede the uniform interpretation and effectiveness of the EU rules in question.

947 Leslie K. Goodyear, "Unique-Case Analysis," in *Encyclopedia of Evaluation*, ed. Sandra Mathison (Thousand Oaks, California, United States of America: Sage Publications, Inc., 2005), 427.

948 Melinda C. Mills, "Comparative Research," in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa Given (Thousand Oaks, California, United States: SAGE Publications, Inc., 2008), 101-3.

1.1.2. An exclusion of EU law from the scope of the law applicable to investment disputes is based on the fictional division of law as a *matter of law* and law as a *matter of fact*. As was proven, even if considered as a *matter of fact*, law must be interpreted. For this reason, the ICS tribunals will have to engage in interpretations of EU law and will create parallel quasi-precedent systems of EU law assessments applicable as guidance in further cases heard by the ICS tribunals. The awards of the ICS tribunals, based on such quasi-precedents and binding on parties in the particular case (including the EU), could eventually interfere with the CJEU's exclusive right to provide definitive interpretation of EU law.

1.1.3. While the CJEU considered that the ICS mechanism would not adversely affect the normal operation of the EU institutions, it is clear that any successful claim by an investor before the ICS tribunals might invite other investors under various agreements to consider similar actions against the EU. Therefore, considering whether to pay to multiple investors or to revoke the legislation and avoid litigation and payments might become relevant for the EU institutions. While the CJEU is right in stating that there will be no legal obligation stemming from the ICS mechanism to revoke the legislation, keeping it in force could eventually become very expensive for the EU and lead to the withdrawal of the legislation. Thus, although indirectly, but the EU's participation in multiple treaties providing ICS mechanisms would become an impediment to the normal operation of the EU's institutions pursuant to the constitutional framework provided under the Treaties.

1.2. All of these risks caused by the operation of multiple ICS mechanisms to the autonomy of the EU legal order could be resolved by involving the CJEU in the proceedings of the MIC, which is to be created in the future. The possibility for the MIC to refer to the CJEU would ensure the CJEU's exclusive right to provide a binding interpretation of EU law and minimise the possibility that EU law would be misinterpreted by the MIC. In case the MIC faces contentious questions of EU law, or if no interpretations of EU law exist yet, the CJEU could authoritatively fill in these gaps. The CJEU's participation would also bring additional validity to the MIC's awards since it would render the awards in line with EU law and thus eliminate most jurisdictional, enforceability and other objections based on EU law. The CJEU could be involved by way of the preliminary ruling procedure, or through a special prior involvement mechanism provided under an international agreement establishing the MIC.

2. The second statement that *possibility to refer for a preliminary ruling for selected investment dispute settlement bodies on questions of EU law interpretation would allow ensuring uniform interpretation of EU law in intra-EU disputes heard by these bodies* is confirmed by the following conclusions:

2.1. The CJEU's *Achmea* ruling has caused friction between the autonomy of EU law and international investment protection regime. From the internal pers-

pective of EU law, the operation of ISDS tribunals in intra-EU disputes was liable to adversely affect the CJEU's exclusive jurisdiction to provide the definitive interpretation of EU law, the position of the national courts as 'ordinary courts' of the EU and the proper functioning of the preliminary ruling procedure. Thus, the operation of such tribunals is incompatible with the principle of autonomy of the EU legal order and the normal functioning of the EU judicial system, as formulated in the CJEU's case law.

2.2. To enforce *Achmea* and protect the autonomy of the EU legal order the Commission and the Member States are determined to terminate all the intra-EU BITs and to cease exercising ISDS clauses in intra-EU disputes. However, these measures will not be sufficient. Even after the Member States terminate all the intra-EU BITs, due to the 'sunset clauses' included in the majority of BITs, the ISDS tribunals could still exercise their jurisdiction for decades thus rendering awards contrary to EU law. In turn, the possibility of termination of the ECT, which is the basis for the majority of investment arbitration cases is not yet even considered by the EU. Consequently, termination of the intra-EU BITs will not eliminate the threats to the autonomy of the EU legal order posed by the intra-EU investment dispute settlement under ISDS clauses. Intra-EU ISDS proceedings are very likely to be initiated in the future, particularly under the ECT, hence creating a threat to the uniform interpretation and autonomy of EU law.

2.3. The ISDS tribunals have formed a common approach to deal with challenges to their jurisdiction based on *Achmea.* The analysed tribunals do not recognise *Achmea* as applicable for determining of their jurisdiction, meaning that the tribunals are likely to continue exercising their jurisdiction despite the *Achmea* ruling. In spite of the evident similarities, the tribunals consider their factual and legal situations to be different from the situation in *Achmea*. Moreover, the tribunals follow a strictly textual interpretive approach, limiting *Achmea's* effects to the intra-EU BITs (or the Dutch-Slovak BIT mentioned in the ruling) only. The tribunals motivate the limited effects of *Achmea* by underlining that they operate under international law and that EU law, despite being part of international law, does not apply for determination of their jurisdiction under none of the rules of the VCLT. The first post-*Achmea* cases indicate that tribunals tend to rely on and follow each other's decisions in respect of *Achmea*. Therefore, it can be reasonably expected that tribunals in currently pending (or future) intra-EU proceedings will also maintain their jurisdiction regardless of the *Achmea* ruling. As a result, the threats to uniformity and autonomy of EU law posed by intra-EU ISDS would also remain.

2.4. It follows from the analysis that a solution is necessary to ensure the autonomy of the EU legal order while the intra-EU ISDS tribunals continue to exist. The EU and international investment protection regimes could be reconciled if the CJEU was involved in the ISDS tribunals' proceedings through the preliminary ruling procedure, rendering intra-EU ISDS tribunals a part of the

EU judicial system. Since the procedure exists already, no novel mechanisms would have to be invented. It would only require the CJEU to adjust the concept of the 'court or tribunal of the Member State,' to include the intra-EU ISDS tribunals. It would allow ensuring the exclusive right of the CJEU to provide definitive interpretation of EU law if questions of EU law interpretation arise in a case. Thus, the uniform interpretation, application, and effectiveness of EU law would be preserved. By allowing the ISDS tribunals to refer for a preliminary ruling, the CJEU would demonstrate judicial comity from the side of the EU, which may encourage arbitral tribunals to cooperate with the CJEU. From the perspective of the international investment protection regime, a possibility of investment dispute settlement independent from national courts would remain in the existence. It would be a more appealing option for investors to have ISDS with the possibility of the preliminary ruling, than no ISDS at all.

Author's publications on the topic of dissertation

1. Grigonis, Simas. Investment court system of CETA: adverse effects on the autonomy of EU law and possible solutions // International comparative jurisprudence. Vilnius: Mykolas Romeris University. eISSN 2351-6674. 2019, vol. 5, iss. 2, p. 127-141. DOI: 10.13165/j.icj.2019.12.003. [DOAJ; Hein Online] [M.kr.: S 001];
2. Daukšienė, Inga; Grigonis, Simas. Accession of the EU to the ECHR: issues of the co-respondent mechanism // International Comparative Jurisprudence. Vilnius: Mykolas Romeris University; Amsterdam : Elsevier B.V. ISSN 2351-6674. 2015, Vol. 1, iss. 2, p. 98-105. DOI: 10.1016/j.icj.2016.01.001. [ScienceDirect] [M.kr.: S 001].

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Academic fellowships, internships

2017.10 – 2017.12	Ghent University (Kingdom of Belgium)
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Participation in R&D projects

2016.02 – 2017.12	"*Strengthening European Network Centres of Excellence in Cybercrime*", Nr. HOME/2014/ISFP/AG/7170 – Internal Security Fund-Police 2014-2020 (ISFP)
2016.02 – 2016.12	"*Pilot Programme for Data Exchange of the Passenger Information Units*", Nr. HOME/2014/ISFP/AG/LAWX/7150 – Internal Security Fund-Police 2014-2020 (ISFP)

MYKOLO ROMERIO UNIVERSITETAS

Simas Grigonis

ESTT IR TARPTAUTINIŲ GINČŲ SPRENDIMO INSTITUCIJŲ JURISDIKCIJŲ SĄVEIKA: ES TEISĖS PERSPEKTYVA

Daktaro disertacijos santrauka
Socialiniai mokslai, teisė (S 001)

Vilnius, 2020

Daktaro disertacija rengta 2015–2019 metais Mykolo Romerio universitete, ginama Mykolo Romerio universitete pagal Mykolo Romerio universitetui ir Vytauto Didžiojo universitetui Lietuvos Respublikos švietimo, mokslo ir sporto ministro 2019 m. vasario 22 d. įsakymu Nr. V-160 suteiktą doktorantūros teisę.

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Daktaro disertaciją galima peržiūrėti Lietuvos nacionalinėje Martyno Mažvydo bibliotekoje (Gedimino pr. 51, Vilnius), Mykolo Romerio universiteto bibliotekoje (Ateities g. 20, Vilnius) ir Vytauto Didžiojo universiteto bibliotekoje (K. Donelaičio g. 52, Kaunas).

Simas Grigonis

ESTT IR TARPTAUTINIŲ GINČŲ SPRENDIMO INSTITUCIJŲ JURISDIKCIJŲ SĄVEIKA: ES TEISĖS PERSPEKTYVA

SANTRAUKA

Tyrimo problematika

Sąveika tarp tarptautinės teisės režimų, nustatančių įvairius reikalavimus kitiems režimams, vyksta nuolat.[949] Nors tarptautinių tribunolų, atstovaujančių skirtingus režimus, skaičius nuolat auga,[950] tarptautinė teisė nenumato bendrų taisyklių, kurios koordinuotų šią sąveiką, nes atskiri teisiniai režimai paprastai nėra susaistyti hierarchiniais santykiais. Mokslinėje literatūroje šis reiškinys siejamas su tarptautinės teisės fragmentacijos,[951] teisinio pliuralizmo,[952] „globalios netvarkos“[953] bei „tarp-teisėtumo“[954] (angl. „inter-legality“) sąvokomis. Šiame reguliaciniame vakuume teismai ir tribunolai, konkuruojantys savo jurisdikcija, yra būtent tos institucijos, kurios nustato tarpusavio sąveikos taisykles, pirmiausia spręsdamos jurisdikcijos klausimą konkrečioje byloje.[955]

Nuo pat Europos Bendrijų pradžios, Europos Sąjungos Teisingumo Teismas (ESTT) nustatė taisykles, kuriomis vadovausis santykiuose su tarptautine teise ir tarptautinėmis ginčų sprendimo institucijomis. ESTT nuosekliai tvirtino, kad ES iš esmės turi kompetenciją sudaryti tarptautinines sutartis, numatančias ginčų sprendimo institucijas, turinčias teisę aiškinti tokių sutarčių nuostatas ir priimti ES įpareigojančius sprendimus.[956] Vis dėlto, ESTT padarė ES prisijungimą prie tokių tarptautinių sutarčių priklausomą nuo ES teisinės sistemos autonomijos išsaugojimo. Teismo vertinimu, ES autonomijos išsaugojimas

949 Filippo Fontanelli, “Let’s Disagree to Disagree: Relevance as the Rule of Inter-Order Recognition,” *Italian Law Journal* 4, 2 (2018): 319–20.

950 Gleider I. Hernández, “The Judicialization of International Law: Reflections on the Empirical Turn,” *European Journal of International Law* 25, 3 (2014): 919–34; Benedict Kingsbury, “Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem,” *New York University Journal of International Law and Politics* 31, 4 (1999): 679–96.

951 Martti Koskenniemi, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law.” *Report of the Study Group of the International Law Commission*, (2006), 65-99, http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.; William Thomas Worster, “Competition and Comity in the Fragmentation of International Law,” *Brooklyn Journal of International Law* 34, 1 (2008): 119–50; Eva Kassoti, “Fragmentation and Inter-Judicial Dialogue: The CJEU and the ICJ at the Interface,” *European Journal of Legal Studies* 8, 2 (2014): 21–49.

952 Nicholas W. Barber, “Legal Pluralism and the European Union,” *European Law Journal* 12, 3 (2006): 306–29; Paul Schiff Berman, “Global Legal Pluralism,” *Southern California Law Review* 80, 6 (2007): 1155–1238.

953 Neil Walker, “Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders,” *International Journal of Constitutional Law* 6, 3–4 (July 1, 2008): 373–96.

954 Jan Klabbers and Gianluigi Palombella, eds., *The Challenge of Inter-Legality* (Cambridge: Cambridge University Press, 2019).

955 Yuval Shany, “International Courts as Inter-Legality Hubs,” in Klabbers and Palombella, *op. cit.*, 319–21.

956 Opinion 1/91 *on Compatibility of Draft Agreement concerning the Creation of the European Economic Area with the Treaties* [1991] EU:C:1991:490, paras. 39-40.

reikalauja, kad esminiai ES ir jos institucijų įgaliojimai, ES valstybių narių joms suteikti Sutartimis, po ES prisijungimo prie tarptautinės sutarties išliktų nepakitę.[957] Taip pat autonomija reikalauja, kad tarptautinio ginčų sprendimo mechanizmo, kuriame dalyvauja ES, pateikti ES teisės išaiškinimai neįpareigotų ES ir jos institucijų joms naudojantis pagal Sutartis suteiktais įgaliojimais.[958] Po šiais autonomijos apsaugos reikalavimais slypi siekis užtikrinti vieningą ES teisės aiškinimą, kuris, ESTT vertinimu, yra būtina sąlyga siekiant bendrosios rinkos ir Europos integracijos apskritai.[959] Siekdamas užtikrinti vieningą ES teisės aiškinimą ESTT nuosekliai reikalavo užtikrinti jo išimtinę teisę pateikti galutinį įpareigojantį ES teisės aiškinimą.[960] Bėgant metams ESTT palaipsniui išplėtė autonomijos principo taikymo sritį, apimdamas vadinamąsias esmines ES teisės charakteristikas. Dėl to autonomijos principas tapo itin kompleksiškas ir dinamiškas.

ESTT įvertino visos eilės tarptautinių ginčų sprendimo mechanizmų suderinamumo su ES teise klausimą.[961] Sulig kiekviena nauja byla autonomijos saugomų ES teisės charakteristikų sąrašas buvo išpėstas ir vis labiau detalizuotas. *Nuomonėje 1/76* ESTT suabejojo, ar Fondo tribunolo jurisdikcija yra suderinama su ESTT galia priimti prejudicinius sprendimus pagal Sutartis. Teismas padarė išvadą, kad Fondo tribunolas nebuvo suderinamas su ES Sutartimis, kadangi sudarė prielaidas skirtingiems ES teisės išaiškinimams atsirasti.[962] Taigi, ESTT išimtinė teisė pateikti galutinį ES teisės išaiškinimą jau buvo saugoma ankstyvojoje Teismo praktikoje. *Nuomonėje 1/91* ESTT, vertindamas Europos Ekonominės Erdvės (EEE) susitarimo siderinamumo su ES teise klausimą, suformulavo ir pirmą kartą pavartojo ES teisinės sistemos autonomijos sąvoką.[963] Šį kartą ESTT nusprendė, kad EEE teismo jurisdikcija yra nesuderinama su ES autonomijos principu, kadangi EEE teismo veikla greičiausiai būtų neigiamai paveikusi valstybių narių Sutartimis ES institucijoms suteiktas ir paskirstytas galias.[964] Tokiu būdu ESTT nustatė reikalavimą, kad ES dalyvavimo tarptautinėse sutartyse atveju privalo būti išsaugotos ES ir jos institucijų galios. Vis dėlto, *Nuomonėje 1/91*, pabrėždamas būtinybę užtikrinti savo išimtinę teisę aiškinti ES teisę, ESTT vis dar turėjo omenyje būtent savo galių apsaugą.[965] *Nuomonėje 1/09* ESTT nustojo

957 Opinion 1/00 *on Draft Agreement concerning the Establishment of a Common European Aviation Area* [2002] EU:C:2002:231, para. 12.

958 Ibid., para. 13.

959 Opinion 1/91, *op. cit.*, paras 30-45.

960 Opinion 1/00, *op. cit.*, para. 13; Opinion 2/13 *on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms Agreement with the Treaties* [2014] EU:C:2014:2454, paras. 246-7.

961 Opinion 1/76 *on draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] EU:C:1977:63; Opinion 1/91, *op. cit.*; Opinion 1/92 *on the draft EEA agreement* [1992] EU:C:1992:189; Opinion 1/00, *op. cit.*; Case C-459/03, *Commission of the European Communities v Ireland (Mox Plant)* [2006] EU:C:2006:345; Opinion 1/09 *on Compatibility of Draft Agreement concerning the Creation of the Unified Patent Litigation System with the Treaties* [2011] EU:C:2011:123; Opinion 2/13, *op. cit*.

962 Opinion 1/76, *op. cit.*, paras. 18-22.

963 Opinion 1/91, *op. cit.*, para. 30.

964 Ibid., para. 35.

965 Ibid.

koncentruotis išimtinai prie savo galių, pristatydamas ES teisminės sistemos sąvoką.[966] Pagal ESTT praktiką, ES teisminę sistemą sudaro ESTT ir nacionaliniai teismai, kurie vykdo jiems kartu patikėtas funkcijas, kuriomis siekiama užtikrinti, kad taikant ir aiškinant Sutartis būtų laikomasi teisės.[967] ES teisminės sistemos sąvoka tapo viena iš esminių ES teisės charakteristikų, kurias ESTT griežtai saugo taikydmas ES teisės autonomijos principą. Dėl to, normalus ES teisminės sistemos funkcionavimas taip pat negali būti neigiamai paveiktas tarptautinių susitarimų, numatančių išorinius ginčų sprendimo mechanizmus.[968]

Negana to, remdamasis autonomijos apsaugos argumentais, ESTT sustabdė ES prisijungimo prie Europos Žmogaus Teisių Konvencijos (EŽTK) procesą.[969] Pirmąjį kartą ESTT stojimą sustabdė, nes pagal tuo metu galiojusią ES teisę nebuvo numatyta ES kompetencija prisijungti prie EŽTK.[970] Antrąjį kartą prisijungimą ESTT sustabdė, nepaisydamas aiškios pareigos prisijungti, įtvirtintos Sutartyse,[971] kadangi ES prisijungimo prie EŽTK sutartis (Prisijungimo sutartis) buvo pripažinta nesuderinama su ES teisės autonomija ir esminėmis ES teisės charakteristikomis.[972] *Nuomonėje 2/13* ESTT nusprendė, kad Prisijungimo susitarimas galėjo neigiamai paveikti ES teisminę sistemą,[973] ES ir valstybių narių kompetencijų pasidalijimą,[974] pagrindinių teisių apsaugą,[975] abipusio pasitikėjimo principo tarp valstybių narių įgyvendinimą,[976] ES is valstybių narių pareigą lojaliai bendradarbiauti[977] ir, galiausiai, ES teisinės sistemos autonomijos principą.[978] Kaip rodo šie atvejai, autonomijos sąvoka palaipsniui peraugo į sudėtingą universalių principų tinklą, apimantį visos ES teisinės sistemos pagrindus. Taikydamas autonomijos principą, ESTT saugo šiuos principus ir esmines ES teisės charakteristikas nuo neigiamos tarptautinių sutarčių, numatančių savarankiškus ginčų sprendimo mechanizmus, kurie nenumatyti Sutartyse, įtakos.

Naujausi ESTT sprendimai *Achmea* ir *Nuomonėje 1/17* žymi naujausią ES teisinės sistemos autonomijos doktrinos raidos etapą. Šiuose sprendimuose ESTT priėmė dvi visiškai skirtingas pozicijas dėl dviejų panašių investicinių ginčų sprendimo mechanizmų suderinamumo su ES teise, t.y. investuotojas prieš valstybę ginčų sprendimo (IVGS) išlygų, įtvirtintų ES valstybių narių dvišalėse investicijų apsaugos sutartyse (BITs), bei naujojo „Investicinių ginčų teismų sistemos“ mechanizmo, numatyto ES prekybos sutartyje su Kanada.

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966 Opinion 1/09, *supra* note 961, paras. 82-89.

967 Ibid., para. 69.

968 Ibid., para. 89.

969 Opinion 2/94 *on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] I-01759; Opinion 2/13, *supra* note 960.

970 Opinion 2/94, *op. cit.*, para. 36.

971 “Sąjunga prisijungia prie Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos. <…>” – Europos Sąjungos sutarties 6(2) straipsnis.

972 Opinion 2/13, *op. cit.*, para. 258.

973 Ibid., para. 198.

974 Ibid., paras. 221-31.

975 Ibid., paras. 169-70.

976 Ibid., paras. 191-94.

977 Ibid., para. 173.

978 Ibid., para. 258.

Nors IVGS išlygos, įtvirtintos ES valstybių narių dvišalėse investicijų apsaugos sutartyse, buvo pripažintos nesuderinamomis su ES teisinės sistemos autonomijos principu, naująjį Investicinių ginčų teismų sistemos mechanizmą ESTT patvirtino esant suderinamą su ES teise. Šie nauji sprendimai, kuriuose pateikiamos priešingos pozicijos, rekalauja atsakyti, kodėl šie savo esme panašūs ginčų sprendimo mechanizmai buvo traktuojami skirtingai ir ką tai reiškia ES teisinės sistemos autonomijos principo sampratai.

Pažymėtina, kad nuo Lisabonos sutarties įsigaliojimo tiesioginės užsienio investicijos (TUI) yra ES išimtinės kompetencijos dalis.[979] Turėdama išimtinę kompetenciją TUI srityje, ES iš valstybių narių paveldėjo įvairias investicijų apsaugos sutartis, numatančias IVGS išlygas, suteikiančias investuotojams galimybę kreiptis į tarptautinį arbitražą tiesiogiai prieš valstybę, siekiant įgyvendint jų teises, kylančias iš konkrečios sutarties.[980] Kai kurias investicijų apsaugos sutartis tarpusavyje sudarė valstybės narės, kai tuo tarpu kai kurios iš tų sutarčių yra sudarytos ES valstybių narių su trečiosiomis šalimis. Netrukus paaiškėjo, kad skirtingos dvišalės investicijų apsaugos sutartys ES bus vertinamos skirtingai. Valstybių narių susitarimai su trečiosiomis šalimis iš esmės buvo integruoti į ES investavimo politiką,[981] kai tuo tarpu ES valstybių narių tarpusavio investicijų apsaugos sutartys buvo paskelbtos esančios nesuderinamos su ES teise.[982] Lisabonos sutarties pasirašymo metu tokių su ES teise nesudarinamų sutarčių buvo 191.[983]

Achmea byla buvo pirmasis kartas, kai Teismui buvo suteikta galimybė įvertinti IVGS išlygų, įtvirtintų ES valstybių narių tarpusavio investicijų sutartyse, suderinamumą su ES teise.[984] ESTT vertinimas *Achmea* byloje iš esmės atspindėjo ankstesnę Teismo autonomijos principo taikymo praktiką. Teismas nusprendė, kad SESV 267 ir 344 straipsniai draudžia IVGS išlygas, įtvirtintas valstybių narių sudarytose tarptautinėse sutartyse, pagal kurias vienos iš valstybių narių investuotojas gali pareikšti ieškinį prieš kitą valstybę narę arbitražo teisme.[985] *Achmea* sprendimo rezultatas – konfliktas tarp ES teisės ir tarptautinio investicijų apsaugos režimo. Nors Komisija ir valstybės narės pripažino *Achmea* kaip panaikinančią IVGS tribunolų jurisdikciją visuose vykstančiuose ir būsimuose ES vidaus investiciniuose ginčuose (įskaitant ginčus, kylančius iš Energetikos Chartijos Sutarties),[986] investuotojai ir

979 Vis dėlto, kaip kad buvo pažymėta *Nuomonėje 2/15*, investicinių ginčų sprendimas yra pasidalijamosios kompetencijos sritis. – Opinion 2/15 *on Free Trade Agreement between the European Union and the Republic of Singapore* [2017] EU:C:2017:376, para. 305; Article 207(1) TFEU.

980 European Commission, *Communication: Towards a Comprehensive European International Investment Policy*, Brussels, 7.7.2010, COM(2010)343 Final Communication," 9.

981 Regulation (EU) No 1219/2019 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).

982 European Commission, *Communication: Towards a Comprehensive European International Investment Policy*, *op. cit.*, 11.

983 Wenhua Shan and Sheng Zhang, "The Treaty of Lisbon: Half Way toward a Common Investment Policy," *European Journal of International Law* 21, no. 4 (2010): 1065.

984 Case C-284/16, *Slovak Republic v Achmea BV* [2018] EU:C:2018:158.

985 Ibid., para. 62.

986 Communication from the Commission to the European Parliament and the Council *on Protection of intra-EU investment*, Brussels, 19.7.2018, COM(2018) 547 final; Declaration of the Representatives of the Governments of the Member States of 15 January 2019 *on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the EU*.

IVGS tribunolai atsisakė taikyti *Achmea* savo jurisdikcijos klausimui spręsti.[987] Taigi, dėl išsiskyrusių ES ir tarptautinės teisės pozicijų, *Achmea* suteikė išskirtinę galimybę stebėti, kaip su ES nesusiję tarptautiniai investicijų tribunolai nagrinėja pretenzijas dėl ES teisės taikytinumo jų jurisdikcijos klausimui spręsti.

Vis dėlto, kai tik TUI tapo išimtinės ES kompetencijos dalimi, Europos Komisija pripažino, kad investuotojo prieš valstybę ginčų sprendimo mechanizmas yra taip įsitvirtinęs tarptautinio investicijų apsaugos režimo bruožas, kad yra būtina surasti būdą, leidžiantį ES dalyvauti tokiuose mechanizmuose santykiuose su trečiosiomis valstybėmis.[988] Pagal Europos Komisijos logiką, jeigu ES nedalyvautų IVGS mechanizmuose, investuotojai būtų atgrasyti nuo investavimo ES.[989] Dėl šios priežasties buvo nuspręsta laikinai palikti galioti dvišales valstybių narių sutartis, sudarytas su trečiosiomis valstybėmis, numatančias tradicines IVGS išlygas. Tai padaryta nustatant griežtas jų valdymo ir kontrolės taisykles, iki kol bus sukurtas ES tinkamas investicinių ginčų sprendimo mechanizmas, galėsiąs pakeisti valstybių narių sutartyse su trečiosiomis valstybėmis įtvirtintas IVGS išlygas.[990] Taigi Komisija siekė sukurti novatorišką investicinių ginčų sprendimo mechanizmą tinkamą ES.[991] Komisijos pastangų rezultatas buvo išdėstytas pasiūlant naujojo tipo investicinių ginčų sprendimo mechanizmą – Investicinių ginčų teismų sistemą (ITS). Kaip ir tikėtasi, ITS pasiūlymas sukėlė daugybę diskusijų dėl jos suderinamumo su ES teisinės sistemos autonomijos principu. 2017 m. rugsėjį Belgija paprašė ESTT įvertinti, ar ITS mechanizmas kaip kad jis apibrėžtas ES prekybos sutartyje su Kanada, *inter alia*, yra suderinamas su išimtine ESTT kompetencija pateikti galutinį įpareigojantį ES teisės aiškinimą.[992]

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987 *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 ("Masdar"); *Vattenfall AB and others v. Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018 ("Vattenfall"); *UP and C.D Holding Internationale v Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018 ("UP and C.D Holding"); *Foresight Luxembourg Solar 1 Sàrl, et al v Kingdom of Spain*, SCC Case No 2015/150, Final Award, 14 November 2018 ("Foresight"); *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sà r.l v Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018 ("RREEF"); *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v The Italian Republic*, SCC Case No. V 2015/095, Final Award, 23 December 2018 ("Greentech"); *Marfin Investment Group v The Republic of Cyprus*, ICSID Case No ARB/13/27, Award, 26 July 2018 ("Marfin").

988 European Commission, *Communication: Towards a Comprehensive European International Investment Policy*, *supra* note 980, 9-10.

989 Ibid., 10.

990 Regulation (EU) No 1219/2019, *supra* note 889.

991 European Commission, *Communication: Towards a Comprehensive European International Investment Policy*, *op. cit.*, 9-10.

992 Belgian Request For an Opinion from the European Court of Justice Regarding the Compatibility of CETA, (2017), accessed 7 May 2018, https://diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta.

Kritikų nuostabai,[993] ESTT *Nuomonėje 1/17* padarė išvadą, kad ITS nedaro neigiamos įtakos išimtinei Teismo jurisdikcijai pateikti galutinius ir įpareigojančius ES teisės išaiškinimus.[994] Nors ESTT ankstesnėje savo praktikoje laikė net teorinę galimybę, kad išoriniai tarptautiniai teismai galėtų pateikti ES teisės išaiškinimus, nesuderinama su ES teisinės sistemos autonomija (kaip aptarta aukščiau), šį kartą jis priėjo prie priešingos išvados: tiek ESTT, tiek generalinis advokatas Bot pripažino faktą, kad ITS tribunolai iš esmės turės aiškinti ES teisę, tačiau šį kartą jie nelaikė šio fakto nesudarinamu su ES teise.[995] Toks Teismo požiūrio pasikeitimas *Nuomonėje 1/17* vertinant tarptautinės ginčų sprendimo institucijos pateiktų ES teisės aiškinimų galimybę ES teisinės sistemos autonomijos principo kontekcte gali būti signalas, kad autonomijos doktrina žengė dar vieną žingsnį savo evoliucijoje.

Atsižvelgiant į aukščiau išdėstytą kontekstą, kyla šios mokslinės problemos:

1. Ką ES teisinės sistemos autonomijos principas, atsižvelgiant į jo sudėtingumą ir dinamiškumą, reiškia ES ir jos valstybių narių dalyvavimui tarptautiniuose ginčų sprendimo mechanizmuose, kurie nepatenka tarp Sutartyse įtvirtintų mechanizmų? Ar *Nuomonė 1/17* atspindi esminius ES teisinės sistemos autonomijos principo sampratos pokyčius?
2. Atsižvelgiant į ESTT *Achmea* sprendimą ir IVGS tribunolų reakciją į jį, būtina ištirti, kaip įgyvendinti investicinių ginčų sprendimą besiformuojančioje Europos užsienio investicijų politikoje, kartu užtikrinant ES teisinės tvarkos autonomijos principą bei laikantis tarptautinės teisės reikalavimų?
3. Nors ESTT *Nuomonėje 1/17* padarė išvadą, kad ITS mechanizmas neturės neigiamos įtakos ESTT išimtinei teisei pateikti galutinį ES teisės išaiškinimą, vertindamas šį klausimą ESTT neatsižvelgė į keletą mechanizmo aspektų, kurie galėtų turėti neigiamos įtakos vieningam ES teisės aiškinimui. Jei ITS mechanizmas galėtų daryti neigiamą poveikį vieningam ES teisės aiškinimui ir taikymui, ar ir kokiu mastu toks poveikis būtų nesuderinamas su ES pirmine teise?

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993 Szilárd Gáspár-Szilágyi, "A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union," *The Journal of World Investment & Trade* 17, no. 5 (2016): 701–42; Daniele Gallo and Fernanda G. Nicola, "The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication," *Fordham International Law Journal* 39, no. 5 (2016): 1132; Szilárd Gáspár-Szilágyi, "AG Bot in Opinion 1/17. The Autonomy of the EU Legal Order v. the Reasons Why the CETA ICS Might Be Needed," (2019), *European Law Blog*, accessed 12 March 2020, https://europeanlawblog.eu/2019/02/06/ag-bot-in-opinion-1-17-the-autonomy-of-the-eu-legal-order-v-the-reasons-why-the-ceta-ics-might-be-needed/; Christina Eckes, "Some Reflections on Achmea's Broader Consequences for Investment Arbitration," *European Papers* 4, no. 1 (2019): 79–97.

994 Opinion 1/17 *on Compatibility of Investment Court Sysytem with EU Law* [2019] EU:C:2019:341, para. 136.

995 Ibid., para. 131; Opinion 1/17 *on the Compatibility of Investment Court Sysytem with EU Law*, Opinion of Advocate General Bot [2019] EU:C:2019:72, para. 137.

Tyrimų šioje srityje apžvalga

Šios disertacijos analizės išeities taškas yra istorinė ESTT praktika, kurioje buvo plėtojama autonomijos doktrina.[996] Šie atvejai naudojami kaip nusistovėjusių žinių analizės priemonės, kurios panaudojamos ištirti *Nuomonę 1/17* ir *Achmea* – naujausius ESTT sprendimus, kuriuose vertinami tarptautiniai investicinių ginčų sprendimo mechanizmai. Akcentuotina, kad su kiekvienu ESTT sprendimu, kuriame buvo vertinamas ginčų sprendimo mechanizmų suderinamumas su autonomija ir esminėmis ES teisės charakteristikomis, publikacijų, susijusių su autonomija, skaičius reikšmingai išaugdavo. ES teisinės sistemos autonomijos principas akademinėje literatūroje susilaukė išskirtinio dėmesio.

Tyrimų rezultataus, susijusius su ES teisinės sistemos autonomijos principu, galima suskirstyti į šias kategorijas. Pirma, išskirtina grupė mokslininkų, kurie atliko sisteminę autonomijos principo analizę, siekdami nustatyti ir aprašyti principo esmę. Tarp šių analitinių ir specializuotų tyrimų išsiskiria Contartese, Lindeboom ir Odermatt darbai.[997] Be to, paminėtini keletas svarbių kolektyvinių tyrimų, koncentruotų prie ES ir tarptautinės teisinės sistemų sąveikos problemų.[998] Tarp jų išsiskiria Cremona sudaryta kolektyvinė monografija *Structural Principles in EU External Relations Law,*[999] Lock monografija *The European Court of Justice and International Courts*[1000] bei Klabbers and Palombella sudaryta kolektyvinė monografija *The Challenge of Inter-Legality.*[1001]

Antra, kalbant apie autonomijos principą, išskirtina tyrimų grupė, kurie buvo koncentruoti prie konkrečios ESTT bylos ir jos poveikio ES teisinei sistemai. *Nuomonė 2/13* pastaraisiais metais išprovokavo seriją specializuotų straipsnių, analizuojančių įvairius ESTT motyvus, remiantis kuriais ES prisijungimo prie EŽTK susitarimas pripažintas

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996 Opinion 1/91, *supra* note 956; Opinion 1/92, *supra* note 961; Opinion 1/00, *supra* note 957; Case C-459/03, *supra* note 961; Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] EU:C:2008:461; Opinion 1/09, *supra* note 961; Opinion 2/13, *supra* note 960.

997 Cristina Contartese, "The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the Essential to the Specific Characteristics of the Union and Back Again," *Common Market Law Review* 54, 6 (2017): 1627–1672; Jed Odermatt, "The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?," in *Structural Principles in EU External Relations*, ed. Marise Cremona, 1st ed. (Oxford and Portland: Hart Publishing, 2018), 291–316; Justin Lindeboom, "Why EU Law Claims Supremacy," *Oxford Journal of Legal Studies* 38, 2 (2018): 328–56; Rachel O'Sullivan, "Burning Bridges: The Court of Justice and the Autonomy of the EU Legal Order," *Hibernian Law Journal* 17 (2018): 1–24; René Barents, *The Autonomy of Community Law* (The Hague: Kluwer Law International, 2004).

998 Marise Cremona, ed., *Structural Principles in EU External Relations Law*, 1st ed. (Portland; Oxford: Hart Publishing, 2018); Ramses A. Wessel and Steven Blockmans, eds., *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organizations* (The Hague, The Netherlands: T. M. C. Asser Press, 2013); Enzo Cannizzaro, Paolo Palchetti, and Ramses A. Wessel, eds., *Studies in EU External Relations, Volume: 5: International Law as Law of the European Union* (Leiden and Boston: Brill | Nijhoff, 2011); Tobias Lock, *The European Court of Justice and International Courts*, 1st ed. (Oxford: Oxford University Press, 2015).

999 Cremona, *op. cit*.

1000 Lock, *supra* note 998.

1001 Jan Klabbers and Gianluigi Palombella, eds., *The Challenge of Inter-Legality* (Cambridge: Cambridge University Press, 2019).

nesuderinamu su ES teise.[1002] Šiame kontekste paminėtinas *German Law Journal* specialusis numeris, išleistas būtent *Nuomonei 2/13 išanalizuoti.*[1003] Šio specialaus leidimo autoriai bandė aprėpti visus reikšmingus aspektus, susijusius su ES prisijungimo prie EŽTK sutarties nesuderinamumu su ES teise. Atlikti tyrimai apėmė išsamią bendraatsakovio mechanizmo analizę,[1004] susitarimo suderinamumą su SESV 344 straipsniu,[1005] *išankstinio ESTT įsitraukimo EŽTT procese mechanizmo analizę,*[1006] žmogaus teisių apsaugos standartų, išdėstytų EŽTK 53 straipsnyje ir ES Pagrindinių teisių chartijos 53 straipsnyje, suderinamumo analizę[1007] bei valstybių narių tarpusavio pasitikėjimo principo išsaugojimo po ES prisijungimo prie EŽTK klausimo analizę.[1008] Atsižvelgiant į tai, kad visi reikšmingi *Nuomonės 2/13* aspektai buvo išsamiai išanalizuoti ir sunku prie diskusijos pridėki ką nors naujo, *Nuomonė 2/13 nėra pagrindinis šios disertacijos analizės objektas.*

Vis dėlto, *Nuomonė 2/13* yra vertingas informacijos šaltinis, atskleidžiantis pagrindinių ES teisės charakteristikų ir ES teisinės sistemos autonomijos principo turinį. Todėl šioje disertacijoje *Nuomonė 2/13* yra atspirties taškas siekiant atskleisti autonomijos principo turinį ir įvertinti investuotojo prieš valstybę ir ITS mechanizmo, *įtvirtinto ES prekobos sutartyje su Kanada*, savybių suderinamumą su ES teisinės sistemos autonomijos principu.

1002 Christoph Krenn, "Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13," *German Law Journal* 16, 1 (2015): 147–68; Daniel Halberstam, "It's the Autonomy, Stupid: A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward," *German Law Journal* 16, 1 (2015): 105–46; Stian Oby Johansen, "The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences," *German Law Journal* 16, 1 (2015): 169–78; Adam Lazowski and Ramses A. Wessel, "When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR," *German Law Journal* 16, 1 (2015): 179–212; Steve Peers, "Opinion 2/13 The EU's Accession to the ECHR: The Dream Becomes a Nightmare," *German Law Journal* 16, 1 (2015): 213–22; Piet Eeckhout, "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky," *Fordham International Law Journal* 38, 4 (2015): 955–92; Eleanor Spaventa, "A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13," *Maastricht Journal of European and Comparative Law* 22, 1 (2015): 35–56; Graham Butler, "A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights," *Utrecht Journal of International and European Law* 31, 81 (2015): 104–11; Benedikt H. Pirker and Stefan Reitemeyer, "Between Discursive and Exclusive Autonomy - Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law," *Cambridge Yearbook of European Legal Studies* 17 (2015): 168–88.

1003 GLJ Volume 16 Issue 1 Cover and Front Matter," *German Law Journal* 16, 1 (March 1, 2015): f1–3, https://doi.org/10.1017/S2071832200019490.

1004 Halberstam, *op. cit.*: 115-7.

1005 Johansen, *op. cit.*: 169-78.

1006 Krenn, *op. cit.*: 149-54.

1007 Lazowski and Wessel, *op. cit.*: 190-93.

1008 Peers, *op. cit.*: 219-22.

Ankstesni Teismo sprendimai, kaip kad *Nuomonė 1/09*,[1009] *Kadi*[1010] ir *MOX plant*,[1011] bei iš jų sekusi mokslinė literatūra, disertacijoje panaudojami analogišku būdu kiek tai yra susiję su skirtingais autonomijos principo aspektais. Kadangi autonomijos principas vis dar laikomas dviprasmiška ir neaiškia sąvoka (nepaisant jos tyrimų intensyvumo),[1012] šiame darbe sistemingai analizuojamas autonomijos principo turinys ir apimtis bei siekiama atsakyti, kokios ES teisinės tvarkos charakteristikos patenka po autonomijos apsauga.

Taip pat gausu literatūros, susijusios su Komisijos siūloma investicinių ginčų sprendimo reforma, kuri analizuojama 2-joje ir 3-joje disertacijos dalyse. Šiuos literatūros šaltinius taip pat tikslinga grupuoti pagal ginčų sprendimo mechanizmą, kuris juose analizuojamas. Pirmąją grupę literatūros įkvėpė ESTT *Achmea* sprendimas, kuriame buvo įvertintas „tradicinio" „investuotojas prieš valstybę" ginčų sprendimo (IVGS) mechanizmo, įtvirtinto ES valstybių narių dvišalėse investicijų apsaugos sutartyse, suderinamumo su ES teise klausimas.[1013] 2-ojoje disertacijos dalyje aptariami naujausi IVGS tribunolų sprendimai, kuriuose analizuojami *Achmea* sprendimo pagrindu pareikšti ginčo šalių prieštaravimai dėl šių tribunolų jurisdikcijos teisėtumo, atsižvelgiant į šių tribunolų nesuderinamumą su ES teise išreikštą *Achmea* sprendime.[1014] Antrąją grupę sudaro literatūra, kurioje analizuo-

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1009 Roberto Baratta, "National Courts as Guardians and Ordinary Courts of EU Law: Opinion 1/09 of the ECJ" 38, 4 (2011): 297–320; Allan Rosas, "The National Judge as EU Judge; Some Constitutional Observations," *SMU Law Review* 67, 4 (2014): 717–28; Herman van Harten, "(Re)Search and Discover: Shared Judicial Authority in the European Union Legal Order," *Review of European Administrative Law* 7, 1 (2014): 5–32.

1010 Grainne de Burca, "The European Court of Justice and the International Legal Order after Kadi," *Harvard International Law Journal* 51, 1 (2010): 1–50; Jan Willem van Rossem, "Patrolling the Borders of the EU Legal Order: Constitutional Repercussions of the Kadi Judgment," *Croatian Yearbook of European Law & Policy* 5 (2009): 93–120; Bruno de Witte, "European Union Law: How Autonomous Is Its Legal Order?," *Zeitschrift Für Öffentliches Recht* 65, 1 (March 17, 2010): 141–55; Kushtrim Istrefi and Zane Ratniece, "Think Globally, Act Locally: Al-Jedda's Oscillation between the Coherence of International Law and Autonomy of the European Legal Order," *Hague Yearbook of International Law* 24 (2011): 231–64.

1011 Jasper Finke, "Competing Jurisdiction of International Courts and Tribunals in Light of the MOX Plant Dispute," *German Yearbook of International Law* 49 (2006): 307–26; Nikolaos Lavranos, "The MOX Plant and IJzeren Rijn Disputes: Which Court Is the Supreme Arbiter?," *Leiden Journal of International Law* 19, 01 (2006): 223.

1012 Panos Koutrakos, "The Panos Koutrakos, "The Autonomy of EU Law and International Investment Arbitration," *Nordic Journal of International Law* 88, 1 (2019): 41–64; Steffen Hindelang, "Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU's Judgement in Achmea Put in Perspective," *European Law Review* 44, no. 3 (2019): 386; Cristina Contartese, "Achmea and Opinion 1/17: Why Do Intra and Extra-EU Bilateral Investment Treaties Impact Differently on the EU Legal Order?," *ECB Legal Working Paper Series* 19 (2019): 7–8.Autonomy of EU Law and International Investment Arbitration," *Nordic Journal of International Law* 88, 1 (2019): 41–64.

1013 Simon Burger, "Arbitration Clauses in Investment Protection Agreements after the ECJ's Achmea Ruling: A Preliminary Evaluation," *Yearbook on International Arbitration* 6, 1 (2019): 121–48; Xavier Taton and Guillaume Croisant, "Judicial Protection of Investors in the European Union: The Remedies Offered by Investment Arbitration, the European Convention on Human Rights and EU Law," *Indian Journal of Arbitration Law* 7, 2 (2019): 61–145; Csongor István Nagy, "Intra-EU Bilateral Investment Treaties and EU Law After Achmea: 'Know Well What Leads You Forward and What Holds You Back,'" *German Law Journal* 19, 4 (2018): 981–1016; Eckes, *supra* note 993; Hindelang, *supra* note 1012; Venetia Argyropoulou, "Vattenfall in the Aftermath of Achmea: Between a Rock and a Hard Place?," *European Investment Law and Arbitration Review* 4 (2019): 203–26; Szilárd Gáspár Szilágyi and Maxim Usynin, "The Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment," *SSRN Electronic Journal*, no. Issue 4/2019 The (2019): 1–38; Ivana Damjanovic and Nicolas de Sadeleer, "I Would Rather Be a Respondent State Before a Domestic Court in the EU than Before an International Investment Tribunal," *European Papers* 4, no. 1 (2019): 19–60.

1014 *Masdar*, *supra* note 987; *Vattenfall*, *supra* note 987; *UP and C.D Holding*, *supra* note 987; *Foresight*, *supra* note 987; *RREEF*, *supra* note 987; *Greentech*, *supra* note 987; *Marfin*, *supra* note 987.

jamas Europos Komisijos pasiūlytas ITS mechanizmas. Šiame kontekste paminėtinos dvi Generalinio direktorato išorės politikai atliktos studijos dėl ES užsienio investicijų apsaugos reformos.[1015] Kadangi šie tyrimai priėjo prie išvados, kad naujasis ITS mechanizmas yra suderinamas su Sutartimis, jie išprovokavo gausybę kritinių atsakymų.[1016] Naujos paniavos į ir taip komplikuotą diskusiją įnešė pasirodęs *Achmea* sprendimas bei generalinio advokato Bot pozicija *Nuomonėje 1/17*. Nors *Achmea* sprendimas galėjo būti vertinamas kaip reiškiantis, kad ITS mechanizmas turėtų būti laikomas nesuderinamu su autonomijos principu,[1017] generalinis advokatas Bot pateikė visiškai priešingą poziciją,[1018] kurią galiausiai palaikė pats ESTT. Atsižvelgiant į kontrastingus Investicinių ginčų teismų sistemos mechanizmo suderinamumo su autonomijos principu vertinimus, šis klausimas prašosi papildomos analizės. Yra būtina atsakyti, kodėl naujasis ITS mechanizmas buvo pripažintas suderinamu su autonomijos principu, kai, tuo tarpu, panašaus pobūdžio „tradicinis" „investuotojas prieš valstybę" mechanizmas *Achmea* byloje pripažintas nesuderinamu.

Disertacijos naujumas ir struktūra

Pažymėtina, kad šis darbas yra vienas iš pirmųjų, jei ne vienintelis tyrimas, susijęs su ES teisinės santvarkos autonomijos principu Lietuvos Respublikoje. Autonomijos principas Lietuvoje apskritai *nėra tyrinėtas. Taigi iš esmės akademinė bendruomenė nėra susipažinusi su autonomijo*s principo apimtimi, kompleksiškumu ir reikšmingumu ES teisinės sistemos raidai. Ši disertacija užpildo šią *spragą. Be to, autoriaus žiniomis*, *Achmea* sprendimas ir *Nuomonė 1/17* dar nebuvo nagrinėti Lietuvos mokslininkų, išskyrus keletą paminėjimų spaudoje. Todėl disertacija yra originali lietuvių mokslinės literatūros kontekste.

Ši disertacija yra vienas iš pirmųjų sisteminių tyrimų, analizuojančių ES teisinės tvarkos autonomijos principo normatyvinį poveikį besiformuojančiam Europos investicinių ginčų sprendimo mechanizmui. Tai vienas pirmųjų tyrimų analizuojančių ESTT ir tarptautinių investicinių ginčų sprendimo institucijų jurisdikcijų suderinimo klausimą. Pažymėtina, kad

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1015 Pieter Jan Kuijper et al., Directorate-General for External Policies*, Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements*, 2014, http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU(2014)534979_EN.pdf; Steffen Hindelang and Teoman Hagemeyer, Directorate-General for External Policies, *In Pursuit of an International Investment Court Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective*, 2017, http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603844/EXPO_STU(2017)603844_EN.pdf.

1016 *Pavyzdžiui*: Gallo and Nicola, *supra* note 993: 1081–1152; Szilárd Gáspár-Szilágyi, *supra* note 993: 701–42; August Reinisch, "The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court," *Centre for International Governance Innovation* (2016), accessed 28 June 2018, https://www.cigionline.org/sites/default/files/isa_paper_series_no.2.pdf; Steffen Gáspár-Szilágyi, "Quo Vadis EU Investment Law and Policy ? The Shaky Path Towards the International Promotion of EU Rules," *European Foreign Affairs Review* 23, 2 (2018): 167–86; Inge Govaere, "TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order," in *Speeches and Presentations from the XXVII FIDE Congress, Congress Prroceedings Vol 4*, ed. Gy. Bandi, P. Darak, and K. Debisso (Budapest: Wolters Kluwer, 2016), 123–44.

1017 Christina Eckes, "Dont't Lead With Your Chin! If Member States Continue With the Ratification of CETA, They Violate European Union Law," (2018), *European Law Blog*, accessed 20 January 2019, http://europeanlawblog.eu/tag/achmea/.

1018 Opinion 1/17, AG Bot, *supra* note 995, paras. 95-114.

nepriklausomai nuo to, kad tiesioginės užsienio investicijos tapo išimtine ES kompetencija beveik prieš dešimtmetį, pirmieji svarbūs ESTT sprendimai šioje srityje, kaip kad Nuomonė 2/15, *Achmea* ir *Nuomonė 1/17*, pasirodė tik pastaraisiais metais. Nors kiekvienas iš šių sprendimų buvo analizuotas atskirai, autoriaus žiniomis, kol kas nebuvo atlikta kompleksinė ES investicinių ginčų sprendimo mechanizmų analizė. Ši disertacija šią spragą užpildo, kadangi apima ESTT vertinimus dėl investicinių ginčų sprendimo pagal IVGS *išlygas, įtvirtintas* ES valstybių narių dvišalėse investicijų apsaugos sutartyse, bei naujojo ITS mechanizmo analizę.

Savo ruožtu, iki šiol ES teisinės tvarkos autonomijos principas daugiausia buvo analizuojamas iš vidinės ES teisės perspektyvos. Dėl šios priežasties egzistuoja visa tarptautinės teisės dimensija, į kurią ne taip dažnai atkreipiamas dėmesys, t. y. procesai, vykstantys tarptautinėse ginčų sprendimo institucijose reaguojant į ESTT autonomijos principo taikymo praktiką, kilus poreikiui aiškinti ES teisę ir/ar taikyti ją atitinkamose šių institucijų nagrinėjamose bylose. Pavyzdžiui, *Masdar*, *Vattenfall* ir *UP and C.D Holding* sprendimuose pateikti argumentai dėl *Achmea* ar kitų ES teisės normų taikytinumo ginčijant šių investicinių tribunolų jurisdikciją šiose bylose yra beveik neištirti. Ši spraga yra užpildoma šiame darbe.

Galiausiai, disertacijoje siekiama atsakyti, ar, atsižvelgiant į *Nuomonėje 1/17 išdėstytą ESTT poziciją, galima teigti, kad ES teisinės tvarkos autonomijos principo turinys buvo papildytas, kas žymi naują žingsnį autonomijos doktrinos evoliucijoje.* Autonomijos apsaugos priemonių, numatytų naujajame ITS mechanizme, sąrašas galėtų ir greičiausiai taps autonomijos doktrinos dalimi. Be to, autoriaus žiniomis, *Nuomonė 1/17* nebuvo tiriama atsižvelgiant į autonomijos apsaugos, užtikrinamos pagal ITS mechanizmą, pakankamumą. Ši disertacija pateikia būtiną kritinį tyrimą dėl ITS tribunolų veiklos poveikio Europos teisinei sistemai ir jos autonomijai. Taip pat paminėtina, kad *Nuomonėje 1/17* buvo patikslintas vienas iš esminių ES teisinės sistemos požymių, kuriuos saugo autonomija, būtent – normalus ES institucijų darbas demokratiniame procese. Šie konkretūs aspektai mokslinėje literatūroje dar nebuvo analizuoti iš poveikio autonomijos doktrinos raidai perspektyvos. Todėl, nepaisant to, kad autonomijos principas buvo išsamiai analizuotas anksčiau, yra naujų aspektų, kuriuos būtina ištirti ir kurie yra analizuojami disertacijoje.

Disertaciją sudaro trys dalys. 1-ojoje dalyje siekiama atskleisti ES teisinės sistemos autonomijos principo, suformuluoto ESTT praktikoje, turinį. Siekiama parodyti, kaip šis principas vystėsi Europos integracijos proceso eigoje. Tuo tikslu atliekama išsami ESTT praktikos, kurioje buvo suformuluotas ir išplėtotas ES teisinės sistemos autonomijos principas, analizė. Remiantis šios analizės rezultatais kitose dalyse gvildenami naujausi ESTT išaiškinimai *Achmea* sprendime ir *Nuomonėje 1/17*, susiję su ES teisinės sistemos autonomijos principu. 2-ojoje dalyje analizuojami „investuotojas prieš valstybę“ ginčų sprendimo mechanizmai pagal dvišales ES Valstybių narių investicijų apsaugos sutartis. Nagrinėjama, kaip autonomijos principas yra taikomas pagal tokias išlygas įsteigtiems tribunolams, ir analizuojama, ar *Masdar, Vattenfall*, *UP and C.D Holding* ir kitų tribunolų rekcijos į ESTT *Achmea* sprendimą kelia riziką ES teisės autonomijai, kaip kad ji suprantama iš ES teisės perspektyvos. Pirmiausia analizuojami ESTT argumentai, nulėmę išvadą, kad IVGS *išlygos, įtvirtintos ES valstybių narių dvišalėse investicijų apsaugos sutartyse, yra nesuderinamos su ES teisinės sistemos autonomijos principu. Antra, nagrinėjami minėti investicinių tribunolų*

sprendimai, kuriuose buvo analizuojama, ar jie turėtų atsižvelgti į ESTT Achmea sprendimą kaip pagrindą atsisakyti jurisdikcijos. Taigi, 2-joje dalyje pateikiama kontrastinga tarptautinės investicijų teisės perspektyva, vertinanti galimą ESTT sprendimų poveikį tarptautiniame investicinio arbitražo procese. 3-joje dalyje vertinamas naujojo ITS mechanizmo, numatyto ES prekybos sutartyje su Kanada, suderinamumas su ES teisinės sistemos autonomijos principu. Tiksliau, siekiama išsiaiškinti priežastis, kodėl ESTT šį mechanizmą pripažino suderinamu su ES teisinės tvarkos autonomijos principu, ir įvertinti, ar dėl ESTT *Nuomonėje 1/17* nenagrinėtų priežasčių šis mechanizmas vis tik galėtų turėti neigiamos įtakos autonomijai ar vieningam ES teisės aiškinimui. ESTT argumentacija, pateikta *Nuomonėje 1/17*, vertinama atsižvelgiant į ESTT praktiką, daugiausia dėmesio skiriant ITS mechanizmo poveikiui, kurį jis gali daryti ESTT išimtinei jurisdikcijai pateikti įpareigojančius ES teisės išaiškinimus ir tokiu būdu užtikrinti vieningą ES teisės aiškinimą. Tokia lyginamoji analizė yra būtina siekiant įvertinti, ar *Nuomonė 1/17* atspindi kokius nors ES teisinės sistemos autonomijos principo turinio pokyčius (jeigu tokių yra).

Disertacijos tikslas ir uždaviniai

Šios disertacijos **tikslas** yra sistemiškai išanalizuoti ES teisinės sistemos autonomijos principo norminės įtakos mastą, atribojant ESTT jurisdikciją nuo pasirinktų tarptautinių ginčų sprendimo institucijų, nenumatytų Sutartyse, jurisdikcijų.

Šiam tikslui pasiekti keliami tokie **uždaviniai**:

1. Atskleisti ES teisinės sistemos principo, suformuluoto ESTT praktikoje susijusioje su teismų jurisdikcijų atribojimu, turinį bei kaip šis principas vystėsi Europos integracijos eigoje;
2. Išanalizuoti, kaip autonomijos principas taikomas investicinių ginčų sprendimo institucijoms, įsteigtoms pagal ES valstybių narių tarpusavio investicijų apsaugos sutartis, ir ištirti, ar šių institucijų reakcijos į ESTT praktiką kelia pavojų ES teisės autonomijai;
3. Įvertinti, ar ITS mechanizmas gali turėti neigiamos įtakos ES teisinės sistemos autonomijai, atsižvelgiant į priežastis, nulėmusias ITS mechanizmo suderinamumą su ES teisinės sistemos autonomijos principu *Nuomonėje 1/17*.

Disertacijos ginamieji teiginiai

1. Autonomijos apsaugos priemonės, numatytos ITS mechanizme, yra nepakankamos, kadangi ilgainiui šis mechanizmas neigiamai paveiks ES teisinės sistemos autonomiją.
2. Galimybė pateikti prašymą priimti prejudicinį sprendimą ES teisės aiškinimo klausimais pasirinktoms investicinių ginčų sprendimo institucijoms, leistų užtikrinti vieningą ES teisės aiškinimą vidiniuose ES ginčuose, nagrinėjamuose šių institucijų.

Metodologija

Disertacijoje atliktas tyrimas remiasi *grindžiamosios teorijos* metodu,[1019] remiantis Kathy Charmaz knyga „*Constructing Grounded Theory*".[1020] Grindžiamosios teorijos metodą sudaro sisteminės, bet lanksčios, kokybinių duomenų rinkimo ir analizės gairės.[1021] Grindžiamoji teorija apibūdinama kaip indukcinė analizė, kurioje naudojamos pasikartojančios (angl. *iterative*) strategijos, leidžiančios grįžti „pirmyn ir atgal" tarp duomenų ir analizės, naudojant lyginamąjį metodą ir palaikant tyrėjo sąveiką su duomenis ir gimstančia analize.[1022] Pagrindinis disertacijos mokslinių duomenų rinkimo metodas yra dokumentų analizės metodas.[1023] Be to, kaip kad detalizuojama toliau, atskirose darbo dalyse naudojami specifiniai tyrimo metodai.

ES teisinės tvarkos *autonomijos principui išanalizuoti disertacijoje buvo pasirinktos nagrinėti vadinamosios „sunkios bylos." „Sunkių bylų" sąvoka priskirtina Ronaldui Dworkinui, kuris „sunkiomis bylomis" laikė tas bylas, kurių rezultatas nėra aiškiai padiktuotas įstatymų ar precedento.*[1024] *Iš esmės visi atvejai, kai ESTT taikė ES teisinės tvarkos autonomijos principą, jų nagrinėjimo metu galėj*o būti laikomi sunkiomis bylomis. *Tekstinė analizė* naudojama ištirti pasirinktas bylas ir susijusią literatūrą bei *kategorizuoti* esmines ES teisės charakteristikas, atsispindinčias analizuojamose bylose. *Naratyvinė analizė* naudojama išnagrinėti pasirinktas bylas. Šis metodas orientuotas į konkrečių tekstų analizę, siekiant išsiaiškinti, apie ką kalbama tekste, kokia žinutė juo perduodama ir kokie aspektai yra pabrėžiami auditorijai.[1025] *Šioje disertacijoje analizuojamos bylos sistemingai nagrinėjamos kaip vientisas ESTT suformuotas naratyvas. Pritaikant metodą disertacijos tikslams, siekiama atsakyti į šiuos klausimus: kokią žinią ESTT perduoda per savo praktiką, susijusią su ES teisinės tvarkos autonomijos apsauga?* Kokių tikslų ESTT siekia taikydamas autonomijos principą? Kokius metodus ESTT taiko šiems tikslams įgyvendinti?

IVGS tribunolų sprendimai *Achmea* klausimu nagrinėjami pasitelkiant *atvejo analizės* ir *lyginamosios analizės* metodus. 2-oje disertacijos dalyje taikomas *aprašomasis metodas*, kuriuo siekiama apibūdinti skirtingų analizuotų atvejų faktines aplinkybes, kad būtų galima situacijas palyginti. ITS mechanizmo suderinamumo su ES teise klausimas analizuojamas daugiausia pasitelkiant *lyginamąjį* metodą, kuriuo ieškoma reiškinių panašumų,

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1019 Angl. *Grounded theory approach*. Kol kas nėra nusistovėjusio šio metodo vertimo į lietuvių kalbą, tačiau dauguma autorių naudoja *grindžiamosios teorijos* terminą. – Giedrė Paurienė, "Grindžiamoji Teorija: Samprata, Atsiradimo Istorija, Bendrieji Tyrimo Proceso Aspektai," *Visuomenės Saugumas Ir Viešoji Tvarka* 11 (2014): 176–88.

1020 Kathy Charmaz, *Constructing Grounded Theory*, 2nd ed. (London: SAGE Publications, Inc., 2014); Kathy Charmaz and Antony Bryant, "Grounded Theory," in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa Given (Thousand Oaks, California, United States: SAGE Publications, Inc., 2008), 375–77.

1021 Charmaz, *op. cit*., 1.

1022 Ibid.

1023 Lindsay F. Prior, "Document Analysis," in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa Given (Thousand Oaks California, United States: SAGE Publications, Inc., 2008), 231–32. Charmaz, *op. cit.*, 45.

1024 Ronald Dworkin, "Hard Cases," *Harvard Law Review* 88, 6 (1975): 1057.

1025 Catherine Kohler Riessman, "Narrative Analysis," in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa Given (Thousand Oaks, California, United States: SAGE Publications, Inc., 2008); Robert M. Cover, "The Supreme Court, 1982 Term - Foreword: Nomos and Narrative," *Harvard Law Review* 97, 1 (1983): 1.

skirtumų, sąsajų tarp jų bei atliekamas jų vertinimas.[1026] Šioje disertacijoje lyginamoji analizė pasitarnauja siekiant įvertinti atitinkamus Investicinių ginčų teismų sistemos mechanizmo požymius ankstesnių ESTT bylų kontekste. Galiausiai, siekiant įvertinti bendrą ITS mechanizmo poveikį vieningam ES teisės aiškinimui ilgalaikėje perspektyvoje pasitelkiamas *kritinės analizės* metodas.

Pagrindinės tyrimo išvados

Atlikta analizė leidžia daryti išvadą, kad disertacijos tikslas buvo pasiektas, uždaviniai įgyvendinti, o ginamieji disertacijos teiginiai buvo apginti.

1. Pirmąjį teiginį, kad *autonomijos apsaugos priemonės, numatytos Investicinių ginčų teismų sistemos mechanizme, yra nepakankamos, kadangi ilgainiui šis mechanizmas neigiamai paveiks ES teisinės sistemos autonomiją*, patvirtina šios išvados:
    1.1. ITS mechanizmo, numatyto ES prekybos sutartyje su Kanada, suteikiamos autonomijos apsaugos garantijos yra nepakankamos, kadangi ilgalaikėje perspektyvoje ITS tribunolų veikla greičiausiai neigiamai paveiks vieningą ES teisės aiškinimą. Ypač pabrėžtini šie aspektai:
        1.1.1. *Vyraujančio ES teisės aiškinimo*, kuriuo ITS tribunolai turės remtis, siekdami patys išvengti ES teisės aiškinimo, egzistavimas yra diskutuotinas. Kaip kad parodė *Achmea* istorija, skirtingi proceso dalyviai tą patį sprendimą gali interpretuoti visiškai priešingai. Skirtingų arbitražo proceso šalių ir kitų tribunolų pateikti *Achmea* sprendimo vertinimai parodė, kad ESTT pateikti aiškinimai gali reikalauti tolimesnių išaiškinimų. Kadangi ITS tribunolai neturės teisės kreiptis į ESTT prašydami priimti prejudicinį sprendimą, bus sudarytos sąlygos klaidingiems ES teisės išaiškinimams atsirasti. Jei kai kuriuose ITS tribunolų sprendimuose pasitaikys klaidingų ES teisės išaiškinimų, šie išaiškinimai sudarys gaires, sektinas ateities ITS tribunolų bylose ir neigiamai paveiks vieningą ES teisės aiškinimą ir jos normų veiksmingumą.
        1.1.2. ES teisės eliminavimas iš investiciniams ginčams taikytinos teisės sąrašo yra grindžiamas fiktyviu „teisės kaip teisės“ ir „teisės, kaip fakto“ atskyrimu. Kaip kad buvo įrodyta, net jei teisė laikoma *faktu*, ji vis tiek reikalauja išaiškinimo. Dėl šios priežasties ITS tribunolai turės aiškinti ES teisę ir sukurs paralelines kvazi-precedentines ES teisės išaiškinimų sistemas, kuriomis bus remiamasi kitose ITS bylose. ITS tribunolų sprendimai, pagrįsti tokiais kvazi-precedentais ir privalomi konkretaus ginčo šalims (įskaitant ES), ilgainiui galėtų pažeisti išimtinę ESTT teisę pateikti įpareigojančius ES teisės išaiškinimus.
        1.1.3. Nors ESTT pripažino, kad ITS mechanizmas neigiamai nepaveiks normalaus ES institucijų darbo, akivaizdu, kad bet koks sėkmingas inves-

1026 Melinda C. Mills, “Comparative Research,” in *The SAGE Encyclopedia of Qualitative Research Methods*, ed. Lisa Given (Thousand Oaks, California, United States: SAGE Publications, Inc., 2008), 101-3.

tuotojo ieškinys ITS tribunole gali paskatinti kitus investuotojus įvairių sutarčių, numatančių ITS, pagrindu, apsvarstyti panašius veiksmus prieš ES. Todėl ES institucijoms gali tekti apsispręsti ar mokėti keliems investuotojams, laimėjusiems analogiškus procesus ITS tribunoluose, ar atšaukti susijusius teisės aktus ir išvengti bylinėjimosi bei mokėjimų. Nors ESTT yra teisus teigdamas, kad ITS mechanizmas nesukurs teisinės pareigos ES panaikinti teisės aktus, jų palikimas galioti gali tapti labai brangus ES ir nulemti šių teisės aktų panaikinimą. Taigi, nors ir netiesiogiai, tačiau ES dalyvavimas daugelyje ITS mechanizmus numatančių sutarčių gali tapti kliūtimi normaliam ES institucijų darbui pagal Sutartyse numatytą konstitucinę sistemą.

1.2. Visas šias rizikas ES teisinės tvarkos autonomijai, kylančias dėl daugelio ITS mechanizmų veikimo, būtų galima išspręsti įtraukiant ESTT į daugiašalio investicinio teismo (DIT), kurį ketinama sukurti ateityje, procesą. Galimybė DIT kreiptis į ESTT užtikrintų išimtinę ESTT teisę pateikti įpareigojantį ES teisės išaiškinimą ir sumažintų riziką, kad DIT neteisingai interpretuos ES teisę. Jeigu DIT susidurtų su ginčytinais ES teisės klausimais arba tais atvejais, kai ESTT dar nėra pateikęs aktualių ES teisės išaiškinimų, ESTT galėtų autoritetingai užpildyti šias spragas. ESTT dalyvavimas taip pat atneštų papildomos naudos suteikdamas DIT spredimams legitimumo, kadangi dėl ESTT dalyvavimo DIT sprendimai taptų suderinami su ES teise, tokiu būdu eliminuojant daugumą jurisdikcijos, vykdytinumo ir kitų prieštaravimų, grindžiamų ES teise. ESTT galėtų būti įtrauktas į DIT procesą taikant prejudicinio sprendimo procedūrą arba pasitelkiant specialų išankstinio dalyvavimo mechanizmą, numatytą tarptautinėje sutartyje dėl DIT įsteigimo.

2. Antrąjį teiginį, kad *galimybė pateikti prašymą priimti prejudicinį sprendimą ES teisės aiškinimo klausimais pasirinktoms investicinių ginčų sprendimo institucijoms, leistų užtikrinti vienodą ES teisės aiškinimą vidiniuose ES ginčuose, nagrinėjamuose šių institucijų*, patvirtina šios išvados:

2.1. ESTT sprendimas *Achmea* byloje nulėmė konfliktą tarp ES teisės autonomijos apsaugos ir tarptautinio investicijų apsaugos režimo. Žiūrint iš ES teisės perspektyvos, IVGS tribunolų veikla ES vidiniuose ginčuose gali neigiamai paveikti ESTT išimtinę jurisdikciją pateikti įpareigojantį ES teisės aiškinimą, nacionalinių teismų, kaip ES bendrosios kompetencijos teismų, poziciją ir tinkamą prejudicinio sprendimo procedūros veikimą. Taigi, IVGS tribunolų veikla yra nesuderinama su ES teisinės sistemos autonomijos principu ir normaliu ES teisminės sistemos funkcionavimu, kaip kad jie suprantami ESTT praktikoje.

2.2. Vykdydamos *Achmea* sprendimą ir siekdamos apsaugoti ES teisinės sistemos autonomiją, Komisija ir valstybės narės yra pasiryžusios nutraukti visas ES valstybių narių tarpusavio investicijų apsaugos sutartis ir nebetaikyti IVGS išlygų ginčuose ES viduje. Vis dėlto, šios priemonės yra nepakankamos. Netgi po to, kai valstybės narės nutrauks visas tarpusavio investicijų apsaugos sutartis, dėl daugumoje jų esančių „galiojimo pabaigos išlygų", tribunolai kelis dešim-

tmečius vis tiek galės naudotis savo jurisdikcija ir priimti sprendimus, nesuderinamus su ES teise. Savo ruožtu, ES vis dar nesvarsto galimybės nutraukti Energetikos Chartijos Sutarties, kuri yra daugumos investicinių arbitražo bylų pagrindas. Taigi, netgi nutraukus visas ES valstybių narių tarpusavio investicijų apsaugos sutartis, nebus pašalintos grėsmės ES teisinės sistemos autonomijai, kylančios dėl ES vidinių ginčų sprendimo pagal IVGS išlygas. Labai tikėtina, kad ateityje IVGS procedūros ES viduje bus vis tiek inicijuojamos, visų pirma, pagal Energetikos Chartijos Sutartį, tokiu būdu sukurdamos grėsmę vieningam ES teisės aiškinimui bei autonomijai.

2.3. IVGS tribunolai suformavo bendrą poziciją į prieštaravimus jų jurisdikcijai, grindžiamus *Achmea* sprendimu. Tribunolai nepripažįsta *Achmea* taikytinumo nustatant jų jurisdikciją, kas reiškia, kad šie tribunolai greičiausiai ir toliau vykdys savo jurisdikciją nepaisydami *Achmea* sprendimo. Nepaisant akivaizdžių panašumų, tribunolai mano, kad jų faktinė ir teisinė padėtis skiriasi nuo padėties, kuri buvo susiklosčiusi *Achmea* byloje. Be to, tribunolai laikosi griežtai tekstinio teisės aiškinimo metodo, tokiu būdu apribodami *Achmea* poveikį tik ES valstybių narių tarpusavio investicijų apsaugos sutartims (arba tik Nyderlandų ir Slovakijos sutarčiai minimai sprendime). Taip pat, tribunolai motyvuoja ribotą *Achmea* poveikį pabrėždami, kad jie veikia pagal tarptautinę teisę ir kad ES teisė, nors ir yra tarptautinės teisės dalis, netaikoma jų jurisdikcijai nustatyti nei pagal vieną iš Vienos konvencijos dėl sutarčių teisės taisyklių. Pirmieji tribunolų sprendimai po *Achmea* rodo, kad tribunolai yra linkę pasitikėti vienas kito sprendimais *Achmea* klausimu ir jais vadovautis. Todėl galima pagrįstai tikėtis, kad šiuo metu vykstančiuose (arba būsimuose) ES vidiniuose ginčuose tribunolai taip pat patvirtins turintys jurisdikciją, neatsižvelgdami į *Achmea* sprendimą. Tai nulems, kad grėsmės ES teisės vieningam aiškinimui ir autonomijai, keliamos ES viduje veikiančių IVGS tribunolų, išliks.

2.4. Iš analizės išplaukia, kad reikalingas sprendimas, kuris leistų užtikrinti ES teisinės tvarkos autonomiją, tol kol egzistuoja ES vidinius ginčus nagrinėjantys IVGS tribunolai. ES ir investicijų apsaugos režimai gali būti suderinti įtraukiant ESTT į IVGS tribunolų procesą per prejudicinio sprendimo priėmimo procedūrą, tokiu būdu paverčiant ES viduje veikiančius IVGS tribunolus ES teismų sistemos dalimi. Kadangi prejudicinio sprendimo procedūra jau egzistuoja, šis problemos sprendimas nereikalautų sukurti jokių naujų mechanizmų. Pakaktų, kad ESTT pakoreguotų „valstybės narės teismo“ sąvoką ir į ją įtrauktų ES viduje veikiančius IVGS tribunolus. Tai leistų užtikrinti išimtinę ESTT teisę pateikti įpareigojančius ES teisės išaiškinimus, jei tribunolų nagrinėjamose bylose kiltų ES teisės aiškinimo klausimų. Tokiu būdu būtų užtikrintas vieningas ES teisės aiškinimas, taikymas ir jos veiksmingumas. Pažymėtina, kad leisdamas IVGS tribunolams kreiptis prejudicinio sprendimo, ESTT pademonstruotų IVGS tribunolams pagarbą iš ES pusės, kas gali paskatinti šiuos arbitražus su ESTT bendradarbiauti. Kita vertus, iš tarptautinio investicijų apsaugos režimo perspektyvos būtų išsaugota galimybė spręsti investicinius ginčus nepriklau-

somai nuo nacionalinių valstybių narių teismų – investuotojams būtų naudingiau turėti IVGS su galimybe kreiptis prejudicinio sprendimo į ESTT, nei IVGS galimybės neturėti iš viso.

Autoriaus publikacijos disertacijos tema

1. Grigonis, Simas. Investment court system of CETA: adverse effects on the autonomy of EU law and possible solutions // International comparative jurisprudence. Vilnius: Mykolas Romeris University. eISSN 2351-6674. 2019, vol. 5, iss. 2, p. 127-141. DOI: 10.13165/j.icj.2019.12.003. [DOAJ; Hein Online] [M.kr.: S 001];
2. Daukšienė, Inga; Grigonis, Simas. Accession of the EU to the ECHR: issues of the co-respondent mechanism // International Comparative Jurisprudence. Vilnius: Mykolas Romeris University; Amsterdam : Elsevier B.V. ISSN 2351-6674. 2015, Vol. 1, iss. 2, p. 98-105. DOI: 10.1016/j.icj.2016.01.001. [ScienceDirect] [M.kr.: S 001].

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JURISDICTIONAL INTERACTION BETWEEN THE CJEU AND INTERNATIONAL DISPUTE SETTLEMENT BODIES: EU LAW PERSPECTIVE: daktaro disertacija. – Vilnius, Mykolo Romerio universitetas, 2020, 216 p.

Bibliogr. 158-172 p.

Disertacija „ESTT ir tarptautinių ginčų sprendimo institucijų jurisdikcijų sąveika: ES teisės perspektyva“ siekiama sistemiškai išanalizuoti ES teisinės sistemos autonomijos principo norminės įtakos mastą, atribojant ESTT jurisdikciją nuo pasirinktų tarptautinių ginčų sprendimo institucijų, nenumatytų ES Sutartyse, jurisdikcijų. Siekiant šio užsibrėžto tikslo disertacijoje atskleidžiamas ES teisinės sistemos autonomijos principo, ESTT suformuluoto būtent bylose susijusiose su jurisdikcijų atribojimu, turinys bei reikšmė Europos integracijai. Autonomijos principo taikymo kontekste disertacijoje analizuojami du pastaraisiais metais itin garsiai nuskambėję ESTT sprendimai Nuomonėje 1/17 ir Achmea byloje. Pirma, analizuojama, kaip autonomijos principas taikomas investicinių ginčų sprendimo institucijoms – investiciniams arbitražams, įsteigtiems pagal ES valstybių narių tarpusavio investicijų apsaugos sutartis bei siekiama atsakyti, ar šių arbitražų reakcijos į ESTT praktiką kelia pavojų ES teisės autonomijai. Antra, siekiama įvertinti, ar naujasis Investicinių teismų sistemos mechanizmas, įsteigtas ES prekybos sutartimi su Kanada, gali turėti neigiamos įtakos ES teisinės sistemos autonomijai.

Dissertation “Jurisdictional interaction between the CJEU and international dispute settlement bodies: EU law perspective” aims to systematically analyse the extent of the normative influence of the principle of autonomy of the EU legal order on delimitation of the CJEU’s jurisdiction from jurisdictions of selected international dispute settlement bodies, which fall outside the scope of dispute settlement mechanisms provided under the EU Treaties. Seeking this purpose the content of the principle of autonomy of the EU legal order established in the CJEU’s cases related to jurisdictional delimitation is revealed as well as the principle’s influence on European integration. Within the context of the application of the principle of autonomy, two recent controversial decisions of the CJEU in Achmea and Opinion 1/17 are analysed. First, it is scrutinised how the principle of autonomy is applied in respect of investment arbitral tribunals established under intra-EU BITs and whether responses of these tribunals to the CJEU’s case law reflect any risks for the autonomy of EU law. Secondly, it is assessed if the Investment Court System mechanism, established in the EU’s treaty with Canada, could have adverse effects on the autonomy of the EU legal order.

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JURISDICTIONAL INTERACTION BETWEEN THE CJEU AND INTERNATIONAL DISPUTE SETTLEMENT BODIES: EU LAW PERSPECTIVE

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