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LIMITS OF JURISDICTION OF INTERNATIONAL COURTS AND TRIBUNALS VIS-À-VIS THE CJEU UNDER EU LAW

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Research Article

Abstract

The article examines, within the context of compatibility with the autonomy of the EU legal order of dispute settlement mechanisms established or designated by agreements, the boundaries of jurisdiction of international courts/tribunals drawn by the CJEU under EU law with their grounds in the preservation of external autonomy of the EU legal order against the international legal system and international courts. It draws attention to the balance to be struck between the objectives of protection of specific characteristics of EU law and the autonomy of the EU legal order, and giving the EU, within the context of international law requirements, more leeway to interact with other international law subjects with the purpose of making international agreements establishing or designating dispute settlement mechanisms. It is emphasised that the excessively broad scope of the exclusive jurisdiction of the CJEU and so correlatively the narrower scope of jurisdiction of international courts/tribunals would make the EU prisoner of its autonomy with the consequence of while being an isolated judicial monster in its ivory tower, a rather modest international actor in the construction of a more rule-oriented international legal system.

Keywords: *Autonomy, Exclusive Jurisdiction of the CJEU, Jurisdiction of International Courts, Compatibility Review, EU Judicial System*

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AB Hukuku Çerçevesinde ABAD'a Karşı Uluslararası Mahkemelerin Yargısal Yetkisi

Öz

Makale uluslararası anlaşmalar tarafından kurulan uyuşmazlık çözüm mekanizmalarının AB hukuk düzeninin özerkliğine uygunluğu çerçevesinde, ABAD tarafından uluslararası mahkemelerin yargısal yetkilerinin AB hukukuna göre çizilen sınırlarını, AB hukuku düzeninin dışsal özerkliğini koruma bağlamındaki gerekçeleriyle analiz etmektedir. Makale, AB hukukunun kendine özgü karakteristiklerini ve AB hukuku düzeninin özerkliğini koruma amaçları ile uluslararası hukukun gereklerinin kapsamı dahilinde AB'ye diğer uluslararası hukuk süjeleriyle birlikte uyuşmazlık çözüm mekanizmaları kuracak uluslararası anlaşmalar yapma amacıyla ilişki kurmak adına daha fazla özgürlük alanı bırakma amacı arasında denge kurulması gerekliliğine dikkati çekmektedir. Makalede, ABAD'a tanınan aşırı geniş yargı yetkisi ve dolayısıyla da uluslararası mahkemelere tanınan daha dar bir yargı yetkisinin, AB'nin bir yandan kendi fildişi kulesinde izole bir yargısal dev olarak kalmasına, diğer yandan ise daha kural egemen bir uluslararası hukuk sisteminin inşasında da oldukça mütevazı bir uluslararası aktör olarak kalmasına sebebiyet vererek AB'nin kendi özerkliğinin tutsağı haline gelmesine yol açacağına vurgu yapılmıştır.

Anahtar Kelimeler: *Özerklik, ABAD'ın Münhasır Yargı Yetkisi, Uluslararası Mahkemelerin Yargı Yetkisi, Uygunluk Denetimi, AB Yargısal Sistemi*

Introduction

As regards its case-law on the ex-ante or ex-post compatibility with the autonomy of the EU legal order of dispute settlement mechanisms established or designated by agreements, the Court of Justice of the EU (CJEU) has been accused of safeguarding its own prerogatives from external influences by

using the principle of autonomy[1] and also being selfish,[2] jealous,[3] fearful,[4] egoist,[5] obsessed with control[6] and infected by adolescent disease.[7] The pertinent case-law to some extent gives that impression and reflects the symptoms of intense judicial concerns of a supreme domestic court of a legal order. That is because, that legal order was originally created by an international agreement and especially on the basis of such an Achilles' heel the diligently constitutionalised legal order would be impaired in its relationship with international law. The CJEU has therefore been keen on protecting its exclusive jurisdiction vis-à-vis international courts/tribunals and drawing correlative boundaries to jurisdiction of international courts/tribunals under EU law to protect rather defensively external autonomy of the EU legal order from the influences of the international legal system and international courts and preserve specific characteristics of that constitutional edifice.

The article analyses the limits of jurisdiction of international courts/tribunals under EU law from the CJEU's point of view with their underlying grounds. Within that context, it also discusses whether the current conception of autonomy is overstretched with the consequence of leading the EU to inertia in the external sphere and how a delicate balance should be struck to preclude the EU from being a hostage of its own autonomy in the treaty-making and so from the destined status of inertia in the construction of a more rule-oriented international legal system with powerful and effective treaty-based dispute settlement mechanisms.

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1 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, (2017): 1627.

2 Bruno de Witte, "A Selfish Court? The Court of Justice and the Design of International Dispute Settlement beyond the European Union" in *The European Court of Justice and External Relations Law: Constitutional Challenges* Marise Cremona and Anne Thies (eds), (Oxford: Hart 2014), 33.

3 Paul Gragl, "The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR" *European Yearbook on Human Rights* 15, (2015): 27.

4 Eleanor Spaventa, "A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13" *MJ* 22, (2015): 35.

5 Jean-Félix Delile, "L'avis 1/17 ou le retour en grâce des juridictions internationales auprès de la Cour de justice de l'Union européenne" *R.A.E. – L.E.A*. (2019): 347.

6 Nicolas Petit & Joëlle Pilorge-Vrancken, "Avis 2/13 de la CJUE: l'obsession du contrôle?" *R.A.E. – L.E.A*. (2014): 815.

7 Jed Odermatt, "The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?" in *Structural Principles in EU External Relations Law* Marise Cremona (ed.) (Oxford: Hart, 2018), 291.

I. Exclusive Jurisdiction of the CJEU Both as a Corollary of Autonomy and as a Tool to Protect It

The principle of autonomy conveys that EU law is dependent merely on its own sources for the determination of the scope of its application, definitive content, legality/validity and its relationship with national and international laws to be made exclusively or ultimately by the CJEU on its own sole legal basis.[8] The exclusive jurisdiction of the CJEU forms part of the very foundations of the EU.[9] It thus arises as a corollary of autonomy to be considered within that context. To be precise, autonomy inevitably involves this type of jurisdiction without which autonomy could not endure. Moreover, the CJEU considers observance of the autonomy of the EU legal order to be ensured by itself, with the cooperation of national courts, by virtue of its exclusive jurisdiction conferred on it by Articles 4 and 19 TEU and Articles 267 and 344 TFEU.[10] In other words, exclusive jurisdiction of the CJEU on the one hand arises as a part and parcel of the autonomy of the EU legal order, on the other hand is regarded by the CJEU as the mere tool to ensure it.

Autonomy therefore preserves the monopolistic position of the CJEU as the final arbiter in determining not only the relationship between EU law and national/international laws, but also all relationships within the EU legal order, between institutions, between the EU and its subjects (the Member States or individuals), and between its subjects (the Member States or/and individuals).[11] In that respect, autonomy connotes not only the ultimate power to interpret EU law and supervise its uniform and effective implementation in the EU legal order, but also the sole power to make its legality/validity review and determine delimitation of vertical competences in the EU, what effect international law and judgments of international courts/tribunals will have in the EU legal order and limits of jurisdiction of international courts/tribunals under EU law.

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8 René Barents, *The Autonomy of Community Law* (The Hague: Kluwer, 2004), 12; Cristina Eckes, "The Autonomy of the EU Legal Order: The Case of the Energy Charter Treaty" *Amsterdam Law School Legal Studies Research Paper* 10-2023.

9 *Opinion 1/91* EU:C:1991:490, paras. 35 and 71; Case C-459/03 *Commission* v *Ireland* EU:C:2006:345, para. 123; Joined Cases C-402/05 P and C-415/05 P *Kadi* EU:C:2008:461, para. 282.

10 *Kadi* cit. para. 282; *Opinion 1/17* EU:C:2019:341 para. 111.

11 Cristina Eckes, "International Rulings and the EU Legal Order: Autonomy as Legitimacy?" *CLEER PAPERS* 2-2016.

II. Limits of Jurisdiction of International Courts/Tribunals

Under EU law jurisdiction of international courts/tribunals in relation to interpretation and application of international agreements arises as either/or question vis-à-vis jurisdiction of the CJEU with the exception of their overlapping interpretive jurisdictions over provisions of international agreements concluded by the EU provided that autonomy is preserved.[12] Whereas international courts/tribunals have jurisdiction to resolve disputes relating to the interpretation or application of provisions of those agreements, the CJEU has jurisdiction in relation to interpretation or application of those agreements not only as to their compatibility with EU primary law, but also as to legal effects of their provisions and judgments of their dispute settlement mechanisms in the EU legal order. International agreements and decisions of bodies established or designated by them, including dispute settlement mechanisms, form an integral part of EU law/legal order.[13] Decisions of such courts are accordingly binding on the EU, in particular the CJEU.[14]

It would rather be better to analyse the scope of their jurisdiction from the negative perspective by focusing on what they do not have so as to correlatively denote the exclusive jurisdiction of the CJEU.

It should nevertheless be clarified at the outset as regards the jurisdiction of international courts that the CJEU puts a reservation on their composition. Extra-membership of the members of the CJEU in the composition of international courts/tribunals was considered by the CJEU in *Opinion 1/76* as creating concerns about prejudicing their positions regarding questions which might come before the CJEU after being brought before those courts or *vice versa*. Therefore, such an arrangement conflicts with the obligation of impartiality on the judges.[15] In the envisaged European Economic Area (EEA) Agreement, the EEA Court consisted of eight judges, including five from CJEU. Because of the extreme difficulty, if not impossibility, for the judges, when sitting in the CJEU, of tackling questions with completely open minds, or even in complete independence and impartiality, where they take part in the determination of those questions as members of the EEA Court, the CJEU did

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[12] *Opinion 2/13* EU:C:2014:2454 para. 182; *Opinion 1/17* EU:C:2019:341 para. 106.

[13] Case C-181/73 *R. & V. Haegeman* v *Belgian State* EU:C:1974:41; Case C-192/89 *Sevince* v *Staatssecretaris van Justitie* EU:C:1990:322 paras 8-9.

[14] Opinion 1/91 cit. paras 39-40; *Opinion 2/13* cit. para. 182; *Opinion 1/09* EU:C:2011:123 para. 74; Case C-284/16 *Achmea* EU:C:2018:158 para. 57; *Opinion 1/17* cit. para. 106.

[15] *Opinion 1/76* EU:C:1977:63 para. 22.

not allow in *Opinion 1/91* its members in the composition of international courts.[16]

A.No Jurisdiction to Interpret or Apply EU Law

The CJEU does not claim jurisdictional monopoly on the interpretation of international agreements concluded by the EU. Creation or designation by an international agreement of an international court, which is responsible for the interpretation and application of its provisions and whose decisions are eventually binding on the EU, is, in principle, compatible with EU law.[17] The EU competence in international relations with the capacity to conclude international agreements "necessarily entail the power to submit to the decisions of a court that is created or designated by such agreements as regards the interpretation and application of their provisions".[18]

Whether there is the possibility of interpretation or application of EU law in the disputes before the international court/tribunal however arises as a demarcation line to decide compatibility with autonomy of a pure EU or mixed agreement conferring such a jurisdiction on that court. In that regard the CJEU briefly questions whether the international court/tribunal established or designated by that agreement has the mandate to interpret or apply EU law other than its provisions and then whether that court/tribunal is part of the EU judicial system and whose decisions are subject to judicial mechanisms capable of providing the full effectiveness of EU rules.[19]

The assessment of whether an international agreement grants an international court/tribunal the power to interpret or apply EU law other than its provisions is first dependent upon the determination of whether EU law constitutes applicable law as substantive and/or procedural norm, directly or indirectly as a part of domestic law of the Member States, in the dispute before that court/tribunal. Under international law, determination of applicable law would be made by the rules of procedure of constructed dispute settlement mechanisms or/and by the bilateral or multilateral agreements.[20] EU law may

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16 *Opinion 1/91* cit. paras 51-53.
17 *Opinion 1/17* cit. para. 106.
18 *ibidem*, para. 106; *Opinion 2/13* cit. para. 182.
19 *Achmea* cit. para. 43.
20 Marc Bungenberg & August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to A Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement*, European Yearbook of International Economic Law (Berlin: Springer Open 2020), 119.

therefore arise as applicable law in the dispute before an international court as part of international law as designated by the Contracting Parties,[21] as applicable law chosen by the parties to the dispute or as applicable law decided by an international court/tribunal or by the choice of forum, i.e. *lex arbitri,* as part of the domestic law of the Member States.[22]

If so, the assessment is then dependent upon whether that court is part of the EU institutional and judicial system. The CJEU strictly precludes international courts/tribunals which are not part of the EU institutional and judicial system or whose decisions are not being subject to dispute settlement mechanisms capable of providing the complete effectiveness of the EU rules from interpreting or applying EU law other than the provisions of the agreement concerned.[23] To be precise, international courts standing outside the EU judicial system cannot be conferred any jurisdiction to interpret and apply EU law other than provisions of the international agreement concerned.[24]

Nor can the Member States remove from the jurisdiction of their courts and the CJEU any disputes concerning the interpretation or/and application of EU law, so deprive those courts of their task to implement EU law and grant exclusive jurisdiction by an international agreement to a court/tribunal standing outside the EU judicial system to hear actions brought by individuals and to interpret and apply EU law.[25] In *Opinion 1/09* the CJEU stated that although it has no jurisdiction, which is held by the national courts, to rule on direct actions between individuals in the field of patents, conferring on an international court taking place outside the EU institutional and judicial framework an exclusive jurisdiction to deal with actions brought by individuals regarding the Community patent and in that field to interpret and apply EU law is incompatible with EU primary law. That is because, it would deprive national courts of their powers concerning the interpretation and application of EU law and the CJEU of its powers to reply, through preliminary ruling, to questions referred by those courts. It would

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21 Art. 26(6) of the Energy Charter Treaty.

22 See also art. 21 of the International Chamber of Commerce Arbitration Rules; Art. 33(1) of the UNCITRAL Arbitration Rules; Art. 35(1) of the 2010/2013 UNCITRAL Arbitration Rules; Art. 27(1) of the 2017 Arbitration Rules of the Stockholm Chamber of Commerce; Art. 42(1) of the ICSID Convention; Art. 54(1) of the ICSID Additional Facility Rules.

23 *Achmea* cit. paras 43-60.

24 *Opinion 1/17* cit. para. 118.

25 *Opinion 1/09* cit. para. 89.

consequently alter the essential character of the powers conferred by the EU Treaties both on the EU institutions and the Member States and indispensable to safeguarding the very nature of EU law.[26] In other words, courts standing outside the EU judicial system cannot replace the national courts of their task, as ordinary courts within the EU legal order[27] and disputes therefore cannot be exclusively withdrawn from their jurisdiction. That is because within the EU judicial system only, the full effectiveness, uniform interpretation and application of the EU rules throughout the EU territory and the validity assessment of its provisions could thus be provided.[28]

To ensure the preservation of the EU specific characteristics and the autonomy of the EU legal order, the EU Treaties have established a judicial review system intended to ensure consistency and uniformity in the interpretation and application of EU law. In accordance with Article 19 TEU, through the judicial dialogue under the preliminary ruling procedure it is for the national courts/tribunals and the CJEU to ensure the full application of EU law throughout the EU and the CJEU having exclusive jurisdiction to give the definitive interpretation to EU law.[29] Through that preclusion, authoritative supervision of the CJEU on EU law is preserved in the EU legal order. Being a part of the EU institutional and judicial framework means also fortification of that system to function effectively with the public and private enforcement mechanisms, i.e. respectively the infringement procedure and the principle of State liability.[30] Within the context of obligations of the Member States as to implementation of EU law, national courts are considered not only components of the Member States whose duties are subsumed in the general obligations of their Member States, but also a part of the EU judicial system.

Respect for the preliminary ruling procedure, i.e. preservation of mechanism providing for uniform interpretation and application of EU law, is accordingly emphasised as a condition for an agreement to be compatible with autonomy. For instance the CJEU confirmed that Protocol No 16, which permits advisory opinions to be given by the European Court of Human Rights (ECtHR) on questions requested by the highest courts/tribunals of the Member States relating to the interpretation or application of the rights and freedoms guaranteed by the European Convention on Human Rights (ECHR), creates a

[26] *ibidem* paras 80 and 89.
[27] *ibidem* para. 80.
[28] *ibidem* paras 82-83.
[29] *Opinion 1/17* cit. para. 111.
[30] *Opinion 1/09* paras 86-87.

risk of circumvention of the preliminary ruling procedure by getting it around and so affects the effectiveness of the preliminary ruling procedure and autonomy.[31]

An international agreement concluded by the EU may nevertheless affect the powers of the EU institutions provided "that 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", whose observance is to be ensured by the CJEU by virtue of the exclusive jurisdiction conferred on it by Article 19 TEU as forming part of the very EU foundations.[32] In other words, an international agreement may confer new judicial powers on the CJEU insofar as it does not change the essential character of its function as conceived in the EU Treaties.[33] There is no provision of the EU Treaties preventing an international agreement from conferring on the CJEU jurisdiction to interpret the agreement provisions for the purposes of its application in non-member countries.[34] Nor can any objection be made to the freedom of those countries given in an agreement to authorise or not to authorise their courts/tribunals to ask the CJEU questions.[35]

The European Common Aviation Area (ECAA) Agreement, which gives States Parties the option of permitting their courts/tribunals to refer questions to the CJEU for a preliminary ruling, was therefore found compatible with the indispensable conditions for safeguarding the essential character of the CJEU powers and so as not adversely affecting autonomy.[36] As clarified later by the CJEU, these judicial systems were designed to resolve disputes on the interpretation or application of the provisions of relevant international agreements. While providing powers to the courts of third countries to refer questions to the CJEU for a preliminary ruling, those systems neither affected the powers of the courts/tribunals of the Member States concerning the interpretation and application of EU law, their power to request a preliminary ruling from the CJEU and the power of the CJEU to reply, nor would alter the essential character of the powers conferred by the EU Treaties both on the EU

[31] *Opinion 2/13* paras 196-198.
[32] *Opinion 1/17* cit. para. 107; See also *Kadi* cit. para. 282; *Opinion 1/09* cit. para. 76.
[33] *Opinion 1/09* cit. para. 75.
[34] *Opinion 1/91* cit. para. 59.
[35] *ibidem* para. 60.
[36] *Opinion 1/00* EU:C:2002:231 para. 23.

institutions and the Member States, unlike the judicial system designed in the draft agreement on the European and Community Patents Court.[37]

Therefore the power to refer questions to the CJEU for a preliminary ruling would be allowed to non-EU member state courts/tribunals or courts/tribunals established or designated by international agreements provided that preliminary rulings must be binding for that referring court especially not to have an adverse impact on legal certainty which is essential for the proper operation of the preliminary rulings procedure.[38] As is also confirmed by Article 322 of the EU-Ukraine Association Agreement, which provides for a preliminary ruling to be given by the CJEU upon request by the arbitration panel where a dispute raises a question of interpretation of a provision of EU law,[39] preliminary ruling procedure in principle is not confined to courts/tribunals standing within the EU judicial system.

What was the problem with regard to the Patent Court designed by the Agreement concerned in *Opinion 1/09* then? Other than conferral on the Patent Court, which stands outside the EU judicial system, jurisdiction to interpret or apply EU law beyond the international agreement concerned, namely the future Community patent regulation and other EU law instruments, and even to examine the validity of an EU act, the incompatibility relies also upon the exclusive nature of its jurisdiction in the field, which is held normally by the national courts to ensure the full application of EU law and under that law the effective judicial protection of individual rights.[40] The Patent Court is vested with exclusive jurisdiction in the field of patents and the courts of the contracting Parties, including the courts of the Member States, are divested of that jurisdiction and retain merely those powers which are not subject to its exclusive jurisdiction.[41] Accordingly, the Patent Court in the field of its exclusive jurisdiction takes the place of national courts/tribunals by depriving thus their power to request preliminary rulings from the CJEU in that field and becomes the sole court able to communicate with the CJEU within the context of the preliminary ruling procedure concerning the interpretation and

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37 *Opinion 1/09* cit. para. 89.
38 *Opinion 1/91* cit. paras. 59-65; *Opinion 1/92* EU:C:1992:189 para. 33; *Opinion 1/00* cit. para. 32.
39 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29.5.2014, p. 3-2137.
40 *Opinion 1/09* cit. paras 73, 78.
41 *ibidem* para. 72.

application of EU law.[42] This judicial system thus makes its decisions not being subject to mechanisms capable of ensuring the complete effectiveness of the EU rules.[43] It consequently seems compatible with autonomy insofar as such courts are not vested with exclusive jurisdiction with the legal consequence of depriving national courts of their powers concerning the interpretation and application of EU law, to refer questions to the CJEU and the CJEU of its powers to reply. It could be asserted that non-exclusive referral authority of such courts is compatible with autonomy, provided that preliminary rulings are binding for them.

Although international courts or tribunals might have jurisdiction over disputes relating to interpretation or application of provisions of agreements establishing them, even such a restricted jurisdiction of an international court could be further restricted under EU law whenever the agreement contains provisions identical to provisions of EU law. That is because, such a jurisdiction raises a problem for the definitive interpretation of internal EU rules as will be analysed below.

B. No Jurisdiction over Definitive Interpretation of EU Law

No jurisdiction providing for definitive binding interpretation of EU law could be conferred on international courts as well. Article 19 TEU and Articles 267 and 344 TFEU provide for the CJEU, with the cooperation of national courts/tribunals, exclusive jurisdiction for the definitive interpretation of EU law.[44] The procedures for ensuring uniform interpretation of the provisions of an international agreement and for resolving disputes, in particular any action by the bodies granted decision-making powers by an international agreement, cannot have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law referred to in that agreement.[45]

To preserve the monopolistic jurisdiction of the CJEU on definitive interpretation of EU law, EU law cannot constitute applicable law in the disputes before the international courts/tribunals, which stand outside the EU judicial system and cannot interpret or apply EU law under the principle of autonomy. Even if so, it remains a possibility for an international court to have

[42] *ibidem* para. 79.
[43] *ibidem* para. 82.
[44] *Opinion 2/13* cit. para. 246.
[45] *Opinion 1/00* cit. para. 13; *ibidem* para. 184.

a definitive interpretation of EU law on some occasions whenever the agreement contains provisions identical to provisions of EU law. Where an international agreement provides for a court with jurisdiction to settle disputes between the contracting parties to the agreement and to interpret its provisions, the decisions of that court will be binding on the EU institutions, including the CJEU. Those decisions will be binding in the event that the CJEU is called upon to rule, through preliminary ruling or in a direct action, on the interpretation of the international agreement which forms an integral part of the EU legal order.[46] However, where the agreement takes over an essential part of the EU rules and thus introduces into the EU legal order a large body of legal rules juxtaposed to a corpus of identically-worded EU rules,[47] in order to preclude definitive interpretation of domestic provisions of EU law through interpretation of agreement provisions identical in substance to them, the jurisdiction of international courts, as a precaution, is more restricted compared with courts established or designated by international agreements whose provisions are not identical in substance to EU rules. That is because, EU law does not provide any basis for setting up a system of courts which conflicts with Article 19 TEU and with the very foundations of the EU.[48] Otherwise, ensuring the objective of homogeneity of the law through the extra-territorial application of EU law would determine not only the interpretation of the provisions of the international agreement itself but also the interpretation of the corresponding EU rules.[49]

As for the arbitration procedures established in the EEA Agreement, the CJEU confirms for the preservation of autonomy that no question of interpretation of provisions of that agreement, which are identical to provisions of EU law, may be dealt with by such procedures.[50] In other words, dispute settlement mechanism cannot be allowed to interpret provisions of an agreement which are identical to provisions of EU law. That is because, the autonomy of the EU legal order would not be safeguarded if the dispute settlement mechanisms have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the

[46] *Opinion 1/91* cit. para. 39.
[47] *ibidem* paras 41-42.
[48] *ibidem* para. 71.
[49] *ibidem* para. 45.
[50] *Opinion 1/92* cit. para. 36.

rules of EU law referred to in the a European Common Aviation Area (ECAA) Agreement.[51]

As regards further safeguards in such agreements, the European Free Trade Association (EFTA) Court is required for the purpose of compatibility of the EEA Agreement with autonomy to follow the CJEU case-law under Article 6 of its revised form. Under Article 108(2), the EFTA Court shall be competent for the settlement of disputes between the EFTA States merely. Under Article 111, the EEA Joint Committee shall be competent for the settlement of disputes between the Contracting Parties in relation to the interpretation or application of that Agreement. If a dispute concerns the interpretation of its provisions, which are identical in substance to corresponding rules of EU law and if the dispute has not been settled within three months, the Contracting Parties to the dispute may agree to request the CJEU to give a ruling on the interpretation of the relevant rules. If the EEA Joint Committee could not reach an agreement on a solution within six months, any Contracting Party may refer the dispute to arbitration in which no question of interpretation of such identical provisions of this Agreement may be dealt with. As could be noticed, not only the composition of the Committee, but also its decision-making, competence and alternative procedures are diligently designed for the protection of autonomy as to provisions of the Agreement identical in substance to corresponding provisions of EU law. It is also ensured that the CJEU is not bound by the decisions of the Joint Committee. As expressed later by the CJEU, compatibility is provided, alongside by abandoning the proposal for an EEA Court and creating the EFTA Court, by ensuring that decisions of the EEA Joint Committee responsible for resolving disputes between the EU and the EFTA States and for ensuring uniform interpretation as to the EEA rules could in no circumstances affect the CJEU case-law.[52]

The same kind of arrangement laid down in the ECAA Agreement providing learned indispensable conditions for safeguarding autonomy was vital in *Opinion 1/00* in giving green light to that Agreement in terms of its compatibility with autonomy. The CJEU mentioned in *Opinion 1/00* that the mechanisms for ensuring uniform interpretation of the ECAA Agreement rules and for resolving disputes relating to the interpretation of provisions of the ECAA Agreement, which are identical in substance to provisions of EU law,

[51] *Opinion 1/00* cit. para. 27.
[52] *ibidem* para. 6.

ensure that the CJEU's case-law will be adequately taken into account by the Contracting Parties.[53] In that regard, its basic provisions are required to be interpreted by the Joint Committee, in their implementation and application, in conformity with the rulings of the CJEU relating to the corresponding provisions of EU law.[54] The Joint Committee cannot therefore oblige representatives of the EU sitting on it to accept an interpretation of the agreement rules which conflicts with the CJEU case-law.[55] Decision-making based upon unanimity in the Committee constitutes a further guarantee that the EU will not, in its relations with its subjects, be bound by an interpretation which is at variance with the CJEU case-law and decisions of the Joint Committee shall not affect the CJEU case-law.[56] Any divergences in the interpretation of the rules of the ECAA Agreement which may arise as between the EU and the States Parties as a result of the lacuna arisen because of lack of any means of legal redress for cases in failure of the Joint Committee to reach a decision will not have any impact on the EU legal order regarding identical rules, which will continue to be interpreted autonomously.[57] Any disputes which could not be resolved by the Joint Committee may be referred to the CJEU, whose decision will be final and binding.[58] Those mechanisms consequently will not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the EU rules incorporated in the ECAA Agreement.[59]

For the preservation of autonomy we may face similar arrangements in recent agreements. For instance according to art. 13 of Protocol V of the Stabilisation and Association Agreement with Kosovo, the arbitration panel empowered to apply and interpret this Agreement shall not provide any interpretation of the EU *acquis*. The fact that a provision is identical in substance to a provision of the EU Treaties shall not be decisive in the interpretation of that provision.[60]

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53 *ibidem* para. 34.
54 *ibidem* paras 35 and 39.
55 *ibidem* para. 39.
56 *ibidem* paras 40 and 44.
57 *ibidem* para. 41.
58 *ibidem* para. 44.
59 *ibidem* para. 45.
60 Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, OJ L 71, 16.3.2016, p. 3–321.

C. No Jurisdiction to Make Awards with the Effect of Precluding the EU Institutions from Operating in accordance with the EU Constitutional Framework

An international agreement cannot confer power on an international court/tribunal standing outside the EU judicial system to make an assessment about the level of protection of a public interest established by the EU institutions following the democratic process defined in the EU Treaties or to order the EU to pay damages, so to call into question the choices democratically made, with the legal consequence that the EU or a Member State in the course of implementing EU law has to amend or withdraw legislation.[61] To enable courts/tribunals standing outside the EU judicial system jurisdiction by international agreements to make such awards might have the effect of preventing the EU institutions, including the CJEU, from operating in accordance with the EU constitutional framework and undermines the EU capacity to operate autonomously within this unique constitutional framework.[62]

The CJEU extended to the external sphere the obligation arising from Article 53 of the Charter as formulated in *Melloni* that "the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law".[63] It accordingly demanded Article 53 ECHR, which reserves the power of the Contracting Parties to lay down higher standards of fundamental rights protection than those guaranteed by the ECHR, to be coordinated with Article 53 Charter. So that the power granted to the Member States by Article 53 ECHR is limited regarding corresponding Charter rights to ensure that the level of protection safeguarded by the Charter and the primacy, unity, consistency and effectiveness of EU law are not compromised.[64] In other words, neither can a higher level of national fundamental rights protection than that provided by EU law be demanded on the basis of international law, in particular the ECHR, nor could any higher level of fundamental rights protection than that provided by EU law be subject to external control of the ECtHR. To be precise, the level of fundamental rights

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61 *Opinion 1/17* cit. paras 150-153 and 160.
62 *Opinion 1/17* paras 118 and 150.
63 Case C-399/11 *Melloni* EU:C:2013:107 para. 60; *Opinion 2/13* cit. para. 188.
64 *Opinion 2/13* paras 188-192.

protection determined by EU law, for the sake of its primacy, unity and effectiveness, will be decisive.

D. No Jurisdiction for Legality/Validity Review of EU Acts under EU Law, Including EU Acts in terms of which the CJEU Has No or Limited Jurisdiction

It is the settled case-law that the CJEU has exclusive jurisdiction over validity/legality review of EU measures.[65] In the external sphere, Article 19 TEU and Articles 267 and 344 TFEU provide for the CJEU, in cooperation with the national courts/tribunals, exclusive jurisdiction for the validity review of EU acts.[66] Review of EU acts in accordance with an international agreement is however subject to the two-tier test: purpose, nature and scheme of the agreement shall be appropriate for providing direct effect and then wording of the concerned provision of that agreement must contain unconditional, sufficiently precise and clear obligation not being subject, in its implementation or effects, to any subsequent EU measure to be adopted.[67] In other words, only direct effect of the agreement and decisions of its dispute settlement mechanism provides for legality/validity review of EU acts to be carried out merely by the CJEU.[68]

International courts/tribunals therefore cannot have jurisdiction to determine the validity/legality of an EU measure under EU law, as the domestic law of a contracting party.[69] International courts cannot invalidate EU acts. The jurisdiction of the CJEU to carry out a judicial review of EU measures, actions or omissions cannot be conferred exclusively on an international court/tribunal standing outside the EU institutional and judicial framework even in the fields such as the CFSP where the CJEU has limited or no jurisdiction.[70]

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65 Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* EU:C:1987:452.
66 *Opinion 2/13* cit. para. 246.
67 Case 12/86 *Meryem Demirel* v *Stadt Schwäbisch Gmünd* EU:C:1987:400 para. 14; Case C-213/03 *Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la region* v *Électricité de France (EDF)* EU:C:2004:464 para. 43.
68 Joined Cases C-120/06 P and C-121/06 P *FIAMM* EU:C:2008:476 paras 110-111 and 188.
69 *Opinion 1/00* cit. para. 24; *Opinion 1/17* cit. para. 121.
70 *Opinion 2/13* cit. para. 256; *Opinion 1/09* cit. paras 78, 80 and 89.

E. No Jurisdiction to Rule over Intra-EU Disputes

The jurisdiction of international courts over the intra- EU disputes is also precluded by primary EU law, in particular the principle of autonomy. Exclusive jurisdiction of the CJEU is confirmed by Article 344 TFEU according to which the Member States undertake not to submit a dispute concerning the interpretation or application of the EU Treaties to any method of settlement other than those provided for therein.[71] The CJEU then broadened the scope of Article 344 TFEU to include also disputes between the Member States and the EU and disputes concerning the interpretation or application of entire EU law. Wherever EU law is at issue, the CJEU accordingly has exclusive jurisdiction in intra-EU disputes between the Member States and between the EU and the Member States regarding compliance with an international agreement.[72] Article 344 TFEU preserves the exclusive nature of the procedure for settling intra-EU disputes within the EU, and particularly of the jurisdiction of the CJEU and thus precludes any prior and/or subsequent external scrutiny by any international court.[73] The very nature of EU law "requires that relations between the Member States [or the EU and the Member States] be governed by EU law to the exclusion, if EU law so requires, of any other law."[74]

Having referred to Articles 4(3) and 19 TEU, Articles 267 and 344 TFEU, the CJEU recently extended the scope of its exclusive jurisdiction and so precluded intra-EU disputes to be settled by investor-State dispute settlement mechanisms either established or designated by BITs concluded by the Member States[75] or by multilateral agreements concluded by the EU and the Member States as mixed agreements.[76] That is because, the mechanism established therein for settling investor-State disputes could prevent those disputes concerning the interpretation or application of EU law from being resolved in a manner that ensures the full effectiveness of that law.[77] The possibility of submitting those disputes to a tribunal, which stands outside the EU judicial system, whose decision is final and not being subject to review of

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71 *Commission* v *Ireland* cit. para. 123.
72 *Opinion 2/13* cit. para. 204.
73 *ibidem* para. 210.
74 *ibidem* para. 212.
75 *Achmea* cit. paras 34, 50, 58-60; Case C-638/19 P *Micula* EU:C:2022:50 paras 139-145.
76 Case C-741/19 *Moldova* v *Komstroy* EU:C:2021:655 paras 64-66.
77 *Achmea* cit. para. 56.

a national court to ensure that questions of EU law could be referred to the CJEU by means of the preliminary ruling procedure, calls into question not only the principle of mutual trust between the Member States, but also the preservation of the particular nature of EU law, and is thus incompatible with the principle of sincere cooperation.[78]

F. No Jurisdiction for the Determination of Allocation of Competences and Responsibilities between the EU and the Member States

Delimitation of vertical competences and so determination of the respondent within the context of responsibilities arising from mixed agreements before any dispute settlement mechanism is the EU domestic issue to be made exclusively by the CJEU. International courts accordingly cannot have jurisdiction to rule on competence delimitation between the EU and the Member States arranged by the EU Treaties regarding the matters governed by the provisions of the agreements, the situation of which may arise only with respect to mixed agreements.[79] International courts cannot therefore have jurisdiction to identify the respondent in such disputes. Otherwise jurisdiction would adversely affect the allocation of responsibilities defined in the EU Treaties and autonomy, respect for which must be assured under Article 19 TEU by the CJEU as whose exclusive jurisdiction is confirmed by Article 344 TFEU.[80] The CJEU expressed that since the question of the apportionment of responsibility under the ECHR must be resolved solely in accordance with EU law and be subject to judicial review, if necessary, by the CJEU, which has exclusive jurisdiction to ensure that any agreement between respondent and co-respondent respects those rules, permitting the ECtHR to confirm any agreement that may exist between the EU and the Member States on the allocation of responsibility would be tantamount to allowing it to take the CJEU's place.[81] The CJEU's exclusive jurisdiction to give rulings on the delimitation of vertical competences between the EU and its Member States must therefore be preserved in the mixed agreements.[82]

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78 *ibidem* paras 50-51 and 58.
79 *Opinion 1/91* cit. para. 34; *Opinion 1/00* cit. paras 16-17; *Opinion 2/13* cit. paras 224-225.
80 *Opinion 1/91* cit. para. 35.
81 *Opinion 2/13* cit. para. 234.
82 *Opinion 1/17* cit. para. 132.

As the division of vertical competences and responsibilities are fixed by the EU Treaties, its determination necessarily and essentially entails interpretation of EU law, which is not open either to the international courts standing outside the EU judicial system. Therefore there stand two obstacles before the jurisdiction of international courts to determine allocation of competences and responsibilities and who will be respondent before the dispute settlement mechanism.

III. General Analysis

The abovementioned general inferences as regards jurisdiction of international courts are reflecting the strict standpoint of the CJEU under EU law as distilled from its case-law. As confirmed by the CJEU, under international law the jurisdiction of the CJEU to interpret or apply international agreements does not however take precedence over either the jurisdiction of the courts/tribunals of Contracting parties or, as verified in their various decisions on the basis of applicable-law and/or jurisdiction provisions of the international agreements concerned,[83] that of the international courts/tribunals established by such agreements.[84] Normative and jurisdictional conflicts might thus arise between the CJEU and international courts/tribunals. Because of the reciprocal nature of international agreements and the necessity for maintaining the EU powers in international relations, it is open to the EU under the settled case-law to enter into an agreement conferring on an international court/tribunal jurisdiction to interpret its provisions without that court/tribunal being subject to the interpretations of that agreement given by the courts/tribunals of the Contracting Parties.[85] In that regard, within the context of international law, the CJEU case-law to some extent unilaterally determines jurisdiction of international courts/tribunals. This situation signifies not only a unilateral determination of its own jurisdiction by a court of contracting party regarding international agreements, but also an extrinsic determination by that court of restrictions on jurisdictional kompetenz-kompetenz of international courts/tribunals

[83] *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, (16 May 2018) para. 679; *Eskosol S.p.A. in liquidazione* v. *Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, (7 May 2019) para. 177; *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH* v. *Spain*, ICSID Case No. ARB/15/16, Award (25 Jan 2021) para. 568.

[84] *Opinion 1/17* cit. para. 116; *Opinion 2/13* cit. para. 185.

[85] *Opinion 1/17* cit. para. 117.

established or designated by those international agreements. This approach could be regarded as a judicial reservation of the CJEU to any international agreement with a dispute settlement mechanism to be concluded by the EU and also as a message to the subjects of international law who wish to interact with the EU that such interactions in the international legal system might be only within those constraints articulated in the settled CJEU case-law.

Compatibility with autonomy of an agreement establishing or designating dispute settlement mechanism, which stands outside the EU judicial system, seems to depend on whether the separation is ensured by that agreement between the (co-existent) legal systems, i.e. the EU legal order and the legal system established by that agreement. The CJEU has been nevertheless more inclined to grant confirmation to a dispute settlement mechanism that is completely extraneous to the EU legal order.[86] This arises with two ramifications. On the one side such an agreement and decisions of its dispute settlement mechanism are not supposed to have direct effect in the EU legal order. On the other hand jurisdiction of the international court designated is confined to interpretation of its provisions and so it shall treat EU law as a matter of fact, shall follow prevailing interpretation given to EU law by the CJEU or EU authorities and any meaning given to EU law by those tribunals shall not be binding upon the EU courts or authorities.[87] Since treating municipal law as a matter of fact cannot conceptually interfere with the interpretation of that law or determine its validity/legality, it accordingly protects the jurisdiction of the CJEU in determining both the validity/legality of EU acts and definitive interpretation of EU law.[88] Lack of direct effect on the one hand minimises interferences of the international agreement and decisions of international courts/tribunals to the EU legal order, given direct effect makes the agreement provisions applicable in the EU legal order for the legality/validity review of an EU measure, on the other hand paradoxically fortifies parallel existence of dispute settlement system outside the EU institutional and judicial system.[89] Jurisdiction of those courts/tribunals thus becomes unable to prevent the EU from functioning in an autonomous way,

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[86] Luca Pantaleo, "The Autonomy of the EU Legal Order and International Dispute Settlement in the Wake of Opinion 1/17" *Studi sull'integrazione europea* 14, (2019): 775.

[87] *Opinion 1/17* cit. para. 130.

[88] Cristina Eckes, "The autonomy of the EU legal order" Europe and the World: A law review 4, (2020): 1.

[89] Ana M Lopez-Rodriguez, "Investor-State Dispute Settlement in the EU: Certainties and Uncertainties" *Hous J Int'l L* 40, (2017): 139.

so these co-existing legal systems become able to evolve in two distinct and hermetic legal universes[90] without mutual integration of their legal systems and dispute settlement mechanisms.[91] Since reliance upon a breach of such an agreement before the national or the EU courts is directly ineffective, individuals are left, within the system of two complementary legal remedies which are not substitutes for one another, being content themselves with the pecuniary awards made by those dispute settlement mechanisms as a compensation of their damages or reliance upon EU law or national law subsuming EU law insofar as they contain adequate standards of protection.[92]

Within that framework, there should be a right balance struck between the preservation of specific characteristics and autonomy of EU law and non-isolated international interaction to be carried out by the EU in the external sphere. Considering the reactions of the international courts/tribunals towards certain CJEU case-law, it seems very difficult to convince other subjects of international law to accept even restrictions on jurisdiction of international courts strictly required by the narrow interpretation of the existential principle of autonomy. In that regard, jurisdiction of the international courts/tribunals should not be limited under EU law further than the degree strictly required by the autonomy of the EU legal order in order to fulfil the indispensable conditions for safeguarding specific and unique characteristics of the EU legal order. Further limits denote unprecedented special treatment and immunity from external scrutiny not provided to other subjects of international law.

As regards jurisdiction of international courts/tribunals for the compatibility review of EU law with international agreements, as articulated by Eeckhout, having made the EU subject to external control of international courts as to compatibility with the obligations arising from international agreements might seem in principle acceptable to it, the CJEU however has not digested that idea of external control and considers it as a threat to autonomy.[93]

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90 Delile, "L'avis 1/17 ou le retour en grâce des juridictions internationales" cit.

91 Stephan W Schill, "The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?" (2016) <https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping>, accessed 06.05.2024.

92 *Opinion 1/17* EU:C:2019:72, opinion of AG Bot, para. 168.

93 Piet Eeckhout, "Opinion 2/13 On EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?" *Fordham Int'l L.J.* 38, (2015): 955.

Article 344 TFEU (in cooperation with Articles 4 and 19 TEU and Article 267 TFEU) provides for the CJEU an exclusive jurisdiction in settling intra-EU disputes and precludes any prior or subsequent external control of intra-EU disputes by any international court standing outside the EU judicial system.[94] As regards extra-EU disputes, although legality/validity review of EU acts by international courts standing outside the EU institutional and judicial system under EU law, as a domestic law of the Party,[95] or under international law[96] is not permitted under EU law, compatibility assessment of EU law with the international obligations arising from the agreements seems, in principle,[97] possible to be made by such international courts with certain conditions. Otherwise, there would be no meaning in the creation or designation of international courts by the international agreements for the settlement of disputes in relation to interpretation or application of their provisions to make the EU subject to an external judicial control.

Nonetheless, as stated by the CJEU, the CETA Tribunal has no jurisdiction to declare incompatible with the EU-Canada Comprehensive Economic and Trade Agreement (CETA) concluded by the EU the level of protection of a public interest determined by the EU following a democratic process and on that basis to order the EU to pay damages.[98] Under Article 19 TEU, it is the CJEU's task to ensure the compatibility review of the level of protection of public interests determined by EU legislations with EU primary law.[99] The EU measures directed at public interest objectives therefore seem to be carved out from the jurisdiction of the CETA Tribunals[100] in determining their compatibility with the CETA. With this extension, an international court has no jurisdiction not only to invalidate EU acts, but also to declare substantive incompatibility of EU measures in terms of the level of protection of a public interest within the context of international agreements. Moreover, compatibility review of EU law with the ECHR by the ECtHR cannot compromise the level of protection safeguarded by the Charter regarding the Charter rights that correspond to those guaranteed by the ECHR and the

94 *Opinion 2/13* cit. para. 210.
95 *Opinion 1/17* cit. paras 121-122.
96 *Opinion 2/13* cit. para. 256; *Opinion 1/09* cit. paras 78-80 and 89.
97 *Opinion 2/13* cit. para. 181.
98 *Opinion 1/17* cit. paras 153-156.
99 *ibidem* para. 151.
100 Gesa Kübek, "Autonomy and international investment agreements after Opinion 1/17" *Europe and the World: A law review* 4, (2020).

primacy, unity, consistency and effectiveness of EU law.[101] The CJEU in that regard already mentioned that fundamental rights must be interpreted and applied in the EU in accordance with the framework of the constitutional structure and objectives of the EU.[102]

Within these constraints, international courts/tribunals might be considered having jurisdiction for the conformity review of EU law with international agreements, provided that they treat EU law as a matter of fact by following the prevailing interpretation given to EU law by the CJEU or EU authorities, which will not be bound by the meaning given to EU law by those courts/tribunals.[103] The adverse rulings given by such international courts regarding the EU measures should not automatically affect their validity[104] and the monopolistic jurisdiction of the CJEU for reviewing the legality of those measures.[105]

In that respect we have an objection to certain restrictions made by the CJEU to jurisdiction of international courts to review compliance of EU law with the obligations arising from international agreements. Carving out compatibility review of the level of protection of a public interest determined by the EU following a democratic process from the jurisdiction of the CETA Tribunal on the one hand, that of the level of protection of the Charter rights corresponding to those guaranteed by the ECHR not to compromise the primacy, unity and effectiveness of EU law and that of acts, actions or omissions of the EU in the field of the CFSP from the jurisdiction of the ECtHR on the other hand seem to me overstretched interpretations of the principle of autonomy and exclusive jurisdiction of the CJEU as its corollary. Full compatibility review of EU law should be open to international courts even with regard to certain components or fields of EU law in terms of which the CJEU has no or limited jurisdiction, i.e. primary EU law or the field of the CFSP, provided that they treat EU law as a matter of fact by following interpretation given by the CJEU or EU authorities in settling disputes before them, that assessment does not invalidate EU acts and the CJEU remains the sole authority to draw legal consequences from those decisions on the EU

[101] *Opinion 2/13* cit. paras 188-189.
[102] *ibidem* paras 170 and 177.
[103] *Opinion 1/17* cit. paras 130-131.
[104] Inge Govaere, "Dispute Settlement under Mixed Agreements and the Autonomy of the EC Legal Order" in *Mixed Agreements Revisited: The EU and its Member States in the World* C Hillion and P Koutrakos (eds), (Oxford: Hart 2010), 195.
[105] *Opinion 1/17*, opinion of AG Bot, cit. para. 124.

legal order. We do not see any convincing reason in the CJEU case-law in precluding compatibility review of EU law by international courts/tribunals in accordance with the obligations arising from the agreements concerned, insofar as these safeguards are ensured. Otherwise the EU will be tainted with the requests of carving out special immunity for the EU from the external control of the international courts. What would be the significance of concluding such agreements having dispute settlement mechanism with the purpose of subjecting the EU to external judicial scrutiny if the level of protection guaranteed therein will not in fact be taken into account to ensure?

A refined leeway granted to the EU in treaty-making involving establishing or designating dispute settlement mechanism would therefore be significant to enable it a leading role in the construction of a more rule-oriented international legal system reinforced with the effective and powerful dispute settlement mechanisms.

Conclusion

The CJEU has not restricted only jurisdiction of international courts/tribunals under EU law on the basis of autonomy, but also indeed in tandem the ability of the EU in the international legal order to make, or even to remain in, international agreements establishing or designating dispute settlement mechanisms. The CJEU in *Opinion 1/17* slightly modified its steadfast approach so as to rescue the EU from this dilemma by giving certain signs for autonomy-compatible dispute settlement mechanisms. In the light of those signs, in order to stay within the conforming realm of autonomy the EU may conclude compatible agreements, establishing dispute settlement mechanisms, which set rules identifying exclusively their applicable substantive and jurisdictional law, precluding interpretation or application of EU law, with supplementary procedural and substantive safeguards included into the text as articulated by the CJEU. However even within those limits the relationship of EU law with international legal system inevitably leads to separation of (co-existing) legal systems, which signifies a situation straying from its traditional monistic approach. This steadfast approach in the end would make the EU isolated hostage of its autonomy by clipping its wings in the way to be a global actor in constructing a more rule-oriented international legal order with effective dispute settlement mechanisms. Let alone ex-post arisen autonomy-incompatibilities of dispute settlement mechanisms established by certain agreements, already in force, such as the European Energy Charter, compelling the EU either to modernisation of their texts or

withdrawal from them. If no necessary precautions are taken to withdraw the principle of autonomy into its reasonable bounds as to external judicial scrutiny, the EU seems to be destined to be inertia in its secluded ivory tower within the context of creation of/involvement to any regional or international legal system establishing or designating dispute settlement mechanism.

Notwithstanding the predictions,[106] the principle of autonomy, like the principle of direct effect, seems to remain in EU law forever as an existential and (sub)structural principle. Maturity is expected not to remove autonomy, but to dispel judicial anxiety about it and force the CJEU to refrain from its overstretching comprehension within the context of compatibility review. This approach would otherwise raises doubts about the EU's lack of both maturity and autonomy. To become indeed a real domestic supreme or constitutional court of an autonomous and constitutionalised municipal legal system, by eliminating obstacles before the compatibility review of EU law to full external judicial scrutiny the CJEU should therefore initially get over its obsession about being, in attitude, an international court of a self-contained system, as a sub-system of the international legal system, competing with other international courts on jurisdiction.

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[106] Pierre Pescatore, "The Doctrine of Direct Effect: An Infant Disease of Community Law" *ELRev*. 8, (1983): 155; Odermatt, "The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?" cit.

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