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**Issues Raised by Investor-State Dispute
Settlement under Intra-EU BITs and European
Union International Investment Agreements**

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**Issues Raised by Investor-State Dispute Settlement
under intra-EU BITs and European Union
International Investment Agreements about the
Autonomy of EU Law**

*Why should preliminary references on interpretation of EU law made
by permanent Investment Courts and ICSID investment arbitration
Tribunals be deemed admissible?*

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Abstract

The entry into force of the Lisbon Treaty allows the adoption of European Union (hereinafter “the EU”) international investment agreements on Foreign Direct Investments from third countries into the EU. Until now, scholars have put an emphasis on potential overlap or conflict with certain existing Bilateral Investment Treaties (hereinafter “BITs”) entered into by Member States. Indeed, the EU may join one day the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the “ICSID Convention”) and become a party to ICSID arbitrations, while also maintaining certain existing BITs entered into by individual Member States. Against this backdrop, particularly interesting issues arise about how the autonomy of the EU legal order will be affected by dispute settlement via investment arbitration – ICSID or otherwise – under future EU international investment agreements (hereinafter “EU IIAs”). The paper shows that just as accession of the EU to international convention and dispute settlement thereunder poses no real threat to the autonomy of EU law. Besides, it is suggested that, unless specific provisions are inserted in EU IIAs on how the arbitral proceedings should be stayed pending a judgment of the Court of Justice of the EU on a preliminary reference on interpretation of EU law from the arbitral tribunal (after the case-law of the Court of Justice has been modified in order to allow such a reference), the risk of inconsistent interpretation of provisions of EU law in different fora be addressed by a broad application of the *lis pendens* and *res judicata principles* in international litigation.

List of Abbreviations

BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
EU	European Union
EU IIAs	European Union international investment agreements
ECHR	European Convention on Human Rights
EFTA	European Free Trade Area
EEA	European Economic Area
ICSID	International Convention on the Settlement of Investment Disputes between States and Nationals of Other States
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law

Keywords

EU-Third Countries; Investment Arbitration; Autonomy of the EU Legal Order

Introduction and preliminary remarks

Due to the entry into force of the Treaty of Lisbon, foreign direct investment is now included in the list of matters falling under the common commercial policy. Henceforth, only the EU may legislate and adopt legally binding acts within the area of foreign direct investment. As a consequence, the European Commission issued, to start with, a Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries¹.

The abovementioned Proposal for a Regulation has now been adopted as Regulation (EU) n° 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. It applies a combination of replacement and authorisation systems respectively to pre-Lisbon Treaty BITs and to “in-between” and future Member States’ BITs². This new piece of EU legislation addresses concerns about the prospect of a phasing out of some or all existing BITs entered into by Member States of the EU. The EU has also adopted regulation (EU) n° 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 party”.

Even though the EU is not yet a party to BITs with third countries containing a comprehensive dispute settlement chapter,³ it is not too early to start asking questions about the autonomy of the EU legal order⁴

¹ 2010/0197 COD.

² See Lavranos, Nikos, “In defence of Member States’ BIT Gold Standard: The Regulation n° 1219/2012 establishing a transitional regime for existing extra-EU BITs – a Member State’s Perspective”, *Transnational Dispute Management*, Vol. 10, Issue 2, March 2013, pp 6-11. On intra-EU BITs, see inter alia Tietje, Christian, “Bilateral Investment Treaties between EU Member States (Intra-EU-BITs) – Challenges in the Multilevel System of Law”, *Transnational Dispute Management*, Vol. 10, Issue 2, March 2013.

³ Such EU IIAs are currently being negotiated or are going to be negotiated by the EU with the USA, Canada, Singapore, India, Armenia, Azerbaijan, Egypt, Georgia, Japan, Jordan, Kazakhstan, Morocco, Moldavia, Thailand and Tunisia. The first publicly available draft EU IIAs is that of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, discussed in sections 2 and 3 below. See, generally, Bungenberg, Marc et al., eds., *EU and Investment Agreements* (London: Hart Publishing, 2013); Dimopoulos, Angelos, *EU Foreign Investment Law* (Oxford: Oxford University Press, 2011); Bungenberg, Marc/Reinisch, August/Tietje, Christian (eds.), *EU and Investment Agreements, Open Questions and Remaining Challenges*, Baden-Baden, Nomos, 2013; Kessedjian, Catherine (ed.), *Le droit européen et l'arbitrage d'investissement: European Law and Investment Arbitration* (Paris: Panthéon-Assas, 2011) and Kessedjian, Catherine and Leben, Charles (eds.), *Le droit européen et l'investissement* (Paris: Panthéon-Assas, 2009). The most up-to-date study is now Pernice, Ingolf, Hindelang Steffen, Schwarz, Michael and Reuling, Martin, *Investor-state dispute settlement provisions in the EU's International Investment Agreements*, Volume 2 – Studies, European Parliament, Directorate-General for external policies of the Union, September 2014, available at: <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelang/Studie-fuer-Europaeisches-Parlament/Volume-2-Studies.pdf> (online on 10 July 2017).

⁴ See Hindelang, Steffen, “The Autonomy of the European Legal Order, EU Constitutional Limits to Investor-State Arbitration on the Basis of Future EU Investment-Related Agreements”, in Bungenberg, Marc and Herrmann, Christoph, *Common Commercial Policy after Lisbon*, European Yearbook of International Economic Law (Springer, 2013), 187-198, where it is stated, at p. 189, that over time, the concept of the autonomy of EU law has turned into a comprehensive concept of self-assertion of the EU not just vis-à-vis its Member States, but that it has also been used to limit effects of EU law flowing from public international law.

once it happens. In fact, this analysis is needed before the new BITs are adopted, because when it happens, it will be too late or too difficult to address certain tricky legal problems if it has not been done in the wording of the BITs themselves. One of these tricky problems is the autonomy of EU law.

The autonomy of EU law is a complex issue. It means that EU law determines its own validity, application and interpretation, and its relation to national and international law. As a consequence, the normative content of EU law is independent from any other rule or system of law.⁵ If that were not the case, it could be argued that EU law could not constitute a legal order at all. In fact, Pierre Mayer has already argued that since the EU is a mere “legal system which has become an integral part of the legal systems of the Member States”⁶ where each Member State integrates into its law rules and provisions from the EU, EU law cannot constitute a legal order because it does not have an autonomous existence from Member States’ legal orders.⁷ Yet that criticism, perfectly valid about the early stages of EU law, seems outdated now because EU law has become integrated into Member States’ national laws to the extent that it is now the autonomy of national laws from EU law which has become questionable, even in areas where the Court of Justice of the EU has only limited jurisdiction.

A legal order is “autonomous” in the sense that “*the creation, validity, application and interpretation of the law in that order is exclusively a matter of that legal order and not of any other legal order. [...] Accordingly, within its scope an autonomous legal order has the monopoly to create, apply and enforce the law through its own mechanisms. [...] [W]hat matters is that all law valid and applicable in that legal order is either created by the mechanisms of that order or, if it concerns law from other legal orders, that these rules are valid and applicable only on the basis or within the conditions of the former legal order*”⁸.

However, “*the autonomy of [EU] law does not at all imply that rules and principles from other legal orders cannot be applied within the [EU] legal order.*”⁹ For the EU legal order, the rules and principles flowing from other sources of law, such as international treaties, are relevant as facts having no independent legal effect. It depends exclusively on the contents of EU law whether these facts are or may be relevant in a normative sense. This is the case if

⁵ Barents, René, *The Autonomy of Community Law* (Kluwer Law International, 2004), 12 and 172. The concept of autonomy breaks up the traditional divide between national and international law by adding a new category of law, namely EU law (see Pernice, Ingolf, “The Autonomy of the EU Legal Order – Fifty Years After *Van Gend*”, in *50th Anniversary of the Judgment in Van Gend en Loos*, conference proceedings, Luxembourg, 13 May 2013, p. 57).

⁶ Judgment of the Court of 15 July, *Costa v Enel*, case 6/64, EU:C:1964:66, p. 1158, at p 1159.

⁷ Mayer, Pierre, *Le phénomène de la coordination des ordres juridiques étatiques en droit privé*, Recueil des Cours de droit international (Académie de La Haye) 327, Martinus Nijhoff Publishers, 2007, p 78.

⁸ Barents, René, *The Autonomy of Community Law* (Kluwer Law International, 2004), p. 172, para. 188.

⁹ *Ibid*, p. 260.

EU law itself refers explicitly or implicitly to rules and principles originating from other sources. In that case, “the normative value of these rules and principles is based only on [EU] law.”¹⁰

In its (in)famous opinion 2/13, the Court of Justice of the EU adopted an extremely formalistic and restrictive approach on the autonomy of EU law, whereby any external control of its own case-law would be and should be nearly impossible. This opinion seems to be politically motivated and poorly argued,¹¹ which is why it will not be taken as a basis for the present analysis. Instead of discussing the pros and cons of the various possible views regarding autonomy of EU law, opinion 2/13 implicitly favours the idea put forward by Michel Troper that a legal order may only be autonomous if it is not subject to external norms.¹² This is far too simplistic because such autonomy does not exist. It is far more accurate to say that “the autonomy of a legal order does not at all imply that rules and principles from other legal orders cannot be applied within that legal order.”¹³

With that complex definition in mind, we can see the apparent danger to the autonomy of EU law: arbitral tribunals are “mechanisms” outside the EU legal order that may be deciding issues concerning “the creation, validity, application and interpretation of the law in that order.” Indeed, investment arbitration tribunals under future EU international investment agreements (EU IIAs) will be called upon to decide issues of EU law as the EU will certainly raise compliance with EU law as a defence to claims filed by third country investors based on infringement of their rights under the EU IIAs. This has already happened under a pre-Lisbon Treaty intra-EU BIT: an investment arbitration tribunal decided that EU law was subordinate to international investment law, and that the latter would trump the former in the event of conflict.¹⁴ Investment arbitration tribunals thus seemingly present serious challenges to the autonomy and homogeneity of EU law: pursuant to the reasoning of Opinions 1/09 and 1/91 of the Court of Justice of the EU, the signing of certain types of BITs might be unlawful. Those challenges are due to the fact that compliance of the EU with an arbitral award might amount to a selective non-application of EU law.

¹⁰ Ibid, p. 261.

¹¹ See e.g. Eeckhout, Piet, “Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?”, Jean Monnet Working Paper 01/15, available at <http://jeanmonnetprogram.org/papers/paper-serie/> (online on 10 July 2017), and Popov, Athanase, “L’avis 2/13 de la CJUE complique l’adhésion de l’Union européenne à la CEDH”, February 2015, available at <http://revdh.revues.org/1065> (online on 10 July 2017). Unfortunately, the European Court of Human Rights has followed a similar approach, based on mutual recognition/mutual trust political considerations, in order to keep the *Bosphorus* presumption of compatibility of EU law with the European Convention even after Opinion 2/13: see *Avotins v Latvia*, judgment of 23 May 2016, application n° 17502/07.

¹² Troper, Michel, “La constitution comme système juridique autonome”, *Droits*, vol. 35, 2002, p. 66: “Pour un système normatif, être autonome, c’est donc le fait de n’être pas soumis à des normes externes”.

¹³ See footnote 9.

¹⁴ See *AES v. Hungary*, Award, ICSID Case No. ARB/07/22, 23 Sept. 2010 (publicly available), in which Hungary defended a claim that utility tariff reductions violated the fair and equitable treatment standard under the UK-Hungary BIT by asserting that the tariff reductions were required under EU law.

After explaining the gist of the problem (in a first section), this paper will consider preliminary references by investment arbitration tribunals as a possible solution to the problem of divergent interpretations of EU law which could become binding upon the Court of Justice of the EU itself. Indeed, it could be provided in future EU IIAs that investment arbitration tribunals constituted under these new BITs may make preliminary references to the Court of Justice of the EU on questions relating to the interpretation of EU law (discussion in the second and third section). However, preliminary rulings of the Court of Justice on such references would need to be binding on the arbitral tribunal. Finally the conclusion will address the likelihood of conflicting decisions and effects thereof under international *lis pendens* and *res judicata* rules if the BITs are silent on references to the Court of Justice of the EU.

I. The misconception about a potential threat arising from investor – state dispute settlement under IIAs for the autonomy of the EU legal order

In order to ensure effective enforcement, investment agreements feature investor-state dispute settlement provisions that allow investors to file a claim against a government via binding international arbitration. For instance, the ICSID Convention is open to signature and ratification by states members of the World Bank or parties to the Statute of the International Court of Justice. The European Commission says that it will explore with interested parties the possibility that the European Union seek to accede to the ICSID Convention,¹⁵ which would require, for that to happen, an amendment thereof.¹⁶

Agreements concluded by the EU are binding upon EU institutions and Member States.¹⁷ The provisions of such agreements form an integral part of the EU legal order from their entry into force.¹⁸ Agreements concluded by the Union form part of the Union legal order without there being any necessity to transpose them into internal provisions of Union law.

¹⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards a comprehensive European international investment policy, COM/2010/0343 final, 7 July 2010, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52010DC0343>, third indent before note 22 (online on 10 July 2017). On that Communication, see generally Loquin, Eric and Manciaux, Sébastien “Les propositions de l’Union européenne en matière d’arbitrage d’investissement”, in Pierre Mayer (ed.), *Arbitrage et droit de l’Union européenne*, Actes du colloque du 4 novembre 2011, Université de Bourgogne – CNRS (Paris, 2012, Vol. 38), 153-174.

¹⁶ Art. 67 of the ICSID Convention provides that only States may be parties thereof. Although the EU has legal personality, it is not, legally speaking, a State.

¹⁷ Art. 216(2) of the Treaty on the Functioning of the European Union (hereinafter “TFEU”).

¹⁸ Judgments of the Court of 30 April 1974, R. & V. *Haegeman v Belgian State*, 181/73, EU:C:1974:41, para. 5, and of 26 October 1982, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.*, 104/81, EU:C:1982:362, paras. 11-13.

From an EU law perspective, the rules ensuing from agreements binding on the EU rank higher than acts of the EU institutions. The Court of Justice has ruled that “those agreements have primacy over secondary legislation”.¹⁹ Besides, the Court considers itself bound to examine whether the validity of acts of the institutions may be affected by reason of the fact that they are contrary to a rule of international law.²⁰ However, in the *Kadi* judgment, the Court clarified that agreements binding on the Union cannot have primacy, *within the EU legal order*, over provisions of primary Union law, including fundamental rights.²¹ Thus the Court of Justice makes it clear that it is willing to distinguish between EU law and public international law in a radical manner, with a dualist approach.

The supervision by the Commission in ensuring that Member States comply with EU law also extends to making sure that they comply with international agreements which are binding upon the Union. In practice, the Court of Justice of the EU rarely finds an act of an EU institution to be incompatible with such an agreement.²²

In an action for annulment, individuals may rely on a provision of an agreement concluded by the Union only if the provision in question has direct effect.²³ The test is whether, “regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure”.²⁴ However, no threat to the autonomy of the EU legal order arises from potential direct effect of, let us say, the much debated Transatlantic Trade and Investment Partnership (TTIP), a trade agreement which is currently being negotiated between the European Union and the United States.²⁵ Regardless of whether that treaty has direct effect or not, its interpretation by an arbitral tribunal – and also, if need be, an interpretation of EU law by the latter²⁶ – will be highly authoritative for the Court of Justice of the EU if that court needs to interpret the

¹⁹ Judgment of the Court (Grand Chamber) of 3 June 2008, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, C-308/06, EU:C:2008:312, para. 42.

²⁰ Judgment of the Court of 12 December 1972, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, joined cases 21-24/72, EU:C:1972:115, para. 6.

²¹ Judgment of the Court (Grand Chamber) of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, paras. 285 and 308-309.

²² See, however, judgment of the Court of First Instance (Fourth Chamber) of 22 January 1997, *Opel Austria GmbH v Council of the European Union*, T-115/94, EU:T:1997:3, paras. 122-123 (the regulation in question was annulled because it breached the EEA Agreement and that fact constituted an infringement of the legitimate expectations of the undertaking concerned).

²³ Judgment of the Court of 12 December 1972, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, joined cases 21-24/72, EU:C:1972:115, para. 8.

²⁴ Judgment of the Court of 30 September 1987, *Meryem Demirel v Stadt Schwäbisch Gmünd*, 12/86, EU:C:1987:400, para. 14.

²⁵ The latest publicly available draft may be found at: http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (online on 10 July 2017).

²⁶ See e.g. Pernice, Ingolf, article cited in footnote No 5 above, at p. 78: “While no legal mechanism binding the ECJ to the interpretation of a court or tribunal established by an international agreement on a factual level may be established, the EU might, finally, have no choice other than to adapt its interpretation of EU law to the ruling of the aforesaid court or tribunal if it does not want to face several more investment arbitrations and a ‘patchwork rug’ of factual disapplication of [for instance] EU State aid law”.

same provisions of a BIT as those which will have been interpreted by an arbitral tribunal constituted under the BIT.²⁷

A parallel may be drawn with the European Court of Human Rights, which considers that acts of the EU could not be tested against the European Convention on Human Rights (hereinafter “ECHR”) because the Union is not, as yet, a party to the Convention.²⁸ The European Court of Human Rights nevertheless afforded protection against Member States’ implementation of EU law: according to that Court, an indirect review of such acts may nevertheless be carried out by testing the act by which a Member State gives effect to Union provisions against the Convention.²⁹ That same Court has declared that it is competent to review acts adopted within the framework of the EU against the ECHR in so far as the EU legal order itself does not afford equivalent protection.³⁰

In the case of BITs entered into by the EU, such review of EU measures will not even be indirect, but *direct*, for the Union will be a party to the BIT. Moreover, even under EU law, an international agreement may provide for *its own system of courts*, including a court with jurisdiction to settle disputes between the contracting parties to the agreement and, as a result, to interpret its provisions.³¹ In such a case, the decision of such a court will be binding upon the EU institutions, *including the Court of Justice*.³² The same principle ought to extend to the European Court of Human Rights once the EU has become a party to the European Convention. Piet Eeckhout writes that this principle “continues to await its first application by the Court of Justice”, because the latter “has difficulty in accepting, in practice if not in principle, that it is formally bound by an international judicial decision”.³³ The same author opposes the view taken by legal pluralists³⁴ that

To put it differently, the interpretation by the investment arbitration tribunal will be highly authoritative if not necessarily binding and enforceable strictly speaking, although it is also possible to argue that the said interpretation is binding upon the Court of Justice.

²⁷ See e.g. Bermann, George A., “Navigating EU Law and the Law of International Arbitration”, in *Arbitration International* (2012), pp. 397-445, at p. 438, cited by Pernice, Ingolf, Hindelang Steffen, Schwarz, Michael and Reuling, Martin (see footnote n° 3), at p. 139: “As the European Union increasingly constitutes itself a participant in binding international legal regimes – as if it were a nation-state, even though it most certainly is not – it will find itself correspondingly less comfortable asserting a privilege not to be bound by the authoritative rulings of the judicial bodies of those regimes”.

²⁸ Judgment of the European Court of Human Rights, *Matthews v United Kingdom*, n° 24833/94, para. 32.

²⁹ Judgment of the European Court of Human Rights of 15 November 1996, *Cantoni v France*, n° 17862/91, para. 30.

³⁰ Judgment of the European Court of Human Rights, *Matthews v United Kingdom*, n° 24833/94, paras. 33-34.

³¹ Opinion of the Court of 14 December 1991, 1/91, EU:C:1991:490, paras. 39-40.

³² *Ibid.*, para. 39: “Where an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement and, as a result, to interpret its provisions, **the decisions of that court will be binding on the Community institutions, including the Court of Justice**”. In interpreting a provision of EU law, the Court of Justice of the EU will take into account its construction for instance by the EFTA Court where the same provision also applies in the EFTA States by virtue of the EEA Agreement: e.g. judgments of the Court of Justice and of the General Court in cases C-13/95 *Süzen*, para. 10; C-34-36/95, para. 37; T-70/99, paras. 136 and 156; C-286/02, paras. 34 and 57-60.

³³ Eeckhout, Piet, “The European Convention on Human Rights and Fundamental Freedoms as an integral part of EU law – some reflections on status and effect”, in: Govaere, Inge, Van Elsuwege, Peter, Lannon, Erwan, Adam, Stanislas (eds), *Liber Amicorum Marc Mareseanu* (Leiden, Brill Publishers, 2014), pp. 87-99, at 96-97.

³⁴ See also Eeckhout, Piet, “Human Rights and the Autonomy of EU Law – Pluralism or Integration?”, *Current Legal Problems*, Vol. 66, 2013. On constitutional pluralism, see Avbelj, Matej and Komárek, Jan (eds), *Constitutional Pluralism in the European Union and Beyond*, 2012.

supreme and constitutional courts are bound to consider that they constitute the supreme adjudicative authority within their respective legal systems and that “possible conflicts cannot be resolved from within the law; all the courts can be advised to do is to nurture a judicial dialogue with the aim of avoiding open conflict”.³⁵ Arguably, the EU system of human rights protection is indeed characterised by the integration of laws, not by pluralism,³⁶ and that where a hierarchically superior court or tribunal has found that the EU has violated a Convention or Treaty to which the EU is a party, “there is no room for the EU courts to disagree with that assessment and they should draw the right legal conclusions from that finding in any further cases relating to the violation”.³⁷ Mr Eeckhout draws a crucial distinction between the binding effect of a decision of a hierarchically superior court or tribunal – assuming that the same reasoning applies to the protection of fundamental rights in investment arbitration – and the autonomy of a hierarchically inferior legal order: “There is a clear distinction between specific findings of a violation involving the EU and the broader precedential value of the Strasbourg case-law (...) Such a conception of the binding effect of Strasbourg case-law does not threaten the autonomy of EU law, or the exclusive jurisdiction of the Court of Justice”.³⁸ We shall add the qualification that it is of the utmost importance that the hierarchically superior and the hierarchically inferior court or tribunal nurture a mutual judicial dialogue with the aim of avoiding open conflict, lest the hierarchically inferior legal order be gradually dissolved into the hierarchically superior legal order. Integration of the international arbitral legal order into the legal order of the EU does not necessarily entail a loss of autonomy of the latter,³⁹ quite to the contrary: the international arbitral legal order cannot but benefit from its interactions with EU law and vice versa.

Therefore, the application and interpretation of an EU IIA by an investment tribunal would not affect the autonomy of EU law as it is well established in the case-law of the Court of Justice of the EU that provisions of EU international agreements that are identically or similarly worded to corresponding EU law provisions do not necessarily have to be interpreted identically.⁴⁰ Moreover, as the Court of Justice ruled in its Opinion 1/00, if a dispute settlement body finds that a Union measure violates the provisions of an EU international agreement, the said measure is not automatically invalidated, but it is up to the EU to take appropriate action so as to conform with the EU’s international obligations.⁴¹ The threat to the autonomy of EU law is barred if

³⁵ Ibid, footnote 25, p. 97.

³⁶ Ibid. See also the introduction of this paper, at para. 4.

³⁷ Ibid.

³⁸ Ibid, p. 98.

³⁹ See para. 6 of the introduction above, where René Barents is quoted as writing that “the autonomy of [EU] law does not at all imply that rules and principles from other legal orders cannot be applied within the [EU] legal order”.

⁴⁰ See Dimopoulos, Angelos, “The involvement of the EU in investor-state dispute settlement: a question of responsibilities”, (2014) 51 CML Rev, 1671-1720, at 1698-1699, relying on the Judgments of the Court of 9 February 1982, *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited*, 270/80, EU:C:1982:43, and on the Judgment of the Court of 26 October 1982, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.*, 104/81, EU:C:1982:362.

⁴¹ Opinion of the Court of 18 April 2002, 1/00, (opinion pursuant to Art. 300(6) EC on the proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area), EU:C:2002:231, paras. 18 to 21.

the EU IIAs do not offer direct or indirect remedies that can result in the invalidity of an EU measure absent a prior involvement of the Court of Justice. Given that monetary compensation is the most common remedy in investment arbitration, the obligation to pay damages does not affect directly the validity of challenged EU measures.

II. The usefulness of references for a preliminary ruling to the Court of Justice of the EU made by investment arbitration tribunals constituted under future EU IIAs in order to avoid differing interpretations of EU law

As it has been explained in the previous section, investor – state dispute settlement under BITs to which the EU is a party involves subordination of one legal order to the other. Unfortunately, potential cooperation between arbitral tribunals and the Court of Justice of the EU could not be compared to the actual effective cooperation between the latter and the European Free Trade Area (hereinafter “EFTA”) Court. The EFTA Court is entrusted with the judicial role of interpreting the Agreement on the European Economic Area (hereinafter the “EEA Agreement”) with respect to EFTA states which are parties to the EEA Agreement, namely Iceland, Norway and Liechtenstein. The EFTA Court applies for the most part substantive norms analogous to those of EU law, and often interprets EU law,⁴² even if the EFTA States are not, by definition, Member States of the EU. Indeed, the EEA Agreement is based on the “principle of homogeneity”, which aims to mirror the interpretation and application of EU law. Therefore, the case-law of the EFTA Court is consistent with that of the Court of Justice of the EU and vice-versa. EEA law itself is to a large extent identical in substance to EU law, the reason being that EFTA states are obliged to implement EU law in the areas covered by the EEA Agreement.⁴³ Following this paragon of fruitful cooperation, the Court of Justice

⁴² For a recent example, see judgment of the EFTA Court of 27 June 2014, in case E-26/13, where the EFTA Court held that “it is not compatible with Art. 1 of Directive 90/365/EEC and Art. 7(1)(b) and (d) of Directive 2004/38/EC that an EEA State does not give spouses who have moved to another EEA State the option of pooling their personal tax credits in connection with the assessment of income tax, whereas they would be entitled to pool their personal tax credits if they lived in the home State, in a situation where one of them receives a pension from the home State, and that pension constitutes all or nearly all of that person’s income, while the other spouse has no income” (operative part of the judgment).

⁴³ See Baubenbacher, Carl, “The EFTA Court – an example of judicialisation of international economic law”, *European Law Review*, Vol. 28, n° 6, pp 880-899, and “The EFTA Court and Court of Justice of the European Union: Coming in Parts But Winning Together”, in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (Springer/Asser Press, The Hague, 2013), pp 183-202. EU law and EEA law, two separate legal orders, are essentially identical in substance. This is so because the EFTA Court is bound by special homogeneity provisions to follow relevant case-law of the Court of Justice, rendered before 2 May 1992, the date of signature of the EEA Agreement (Art. 6 of the Agreement) and to take into due account new relevant case-law of the Court of Justice (Art. 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice).

of the EU, the EFTA Court and also the European Court of Human Rights should arguably, and as far as they can, avoid different interpretations of the same or similar treaty articles.⁴⁴

Although it is easy to agree about what should be done, it is highly unlikely that arbitrators will interpret EU law in exactly the same way as the Court of Justice of the EU⁴⁵ unless they receive clear guidance to that effect through a preliminary reference.

In fact, several arbitral awards already deserve particular attention because they show how differently EU law might be interpreted by the Court of Justice and an arbitral tribunal constituted under a BIT: *AES v Hungary*⁴⁶ and *Eureka BV v Slovakia*.⁴⁷

In *AES v Hungary*, the arbitral tribunal explained in an *obiter dictum* that EU competition law has a dual nature: “on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders”. It also held that “it is common ground that in an international arbitration, national laws are to be considered as facts”.⁴⁸ However, that analysis is not entirely accurate: in the twenty-first century, in almost all international arbitrations, law is treated as law; expert opinions on disputed issues of the applicable law will be submitted with the pleadings, and counsel from each team are ready to answer questions from the tribunal by reference to legal authorities from the relevant jurisdiction.⁴⁹ As a consequence, the interpretation of EU law is in the hands of private parties, whereas a neutral interpretation by the Court of Justice of the EU would be preferable.

Eureka BV v The Slovak Republic pertains to a BIT entered into by the Netherlands and the Slovak Republic in 1991. In that award, the arbitral tribunal, after comparing the protections afforded by the BIT to those available under EU law, noted that the free transfer of capital provided for in Article 4 of the BIT could

⁴⁴ Temple Lang, John, “How Can the Problems of Exclusionary Abuses under Article 102 TFEU be Resolved?”, (2012) *European Law Review* 37(4), 13.

⁴⁵ Bernardeau, Ludovic compares the relations between arbitrators and EU judges to “religious wars” (“Sur les relations entre le droit communautaire et l’arbitrage”, *Mélanges en l’honneur du doyen Bernard Gross*, Presses universitaires de Nancy, p. 345). He nevertheless thinks that arbitrators have to apply EU law because of the latter’s direct effect (*op. cit.*, p. 338), yet that view presupposes that the theory of the *lex arbitri* be applied, while the dominant view in investment arbitration, if not in domestic legislation, is that an arbitral Tribunal is not an emanation of the system of justice of the state where the Tribunal has its seat. Emmanuel Gaillard distinguishes three types of philosophical representations of international arbitration: a first one considering it as a mere component of a given state legal order (the so-called *lex arbitri* theory); a second one positing that international arbitration is based on a plurality of state legal orders and a third one (which is now the prevailing theory) positing the existence of a transnational arbitral legal order (Gaillard, Emmanuel, *Aspects philosophiques du droit de l’arbitrage international*, Académie de droit international de La Haye, Martinus Nijhoff publishers (Leiden/Boston, 2008), 32-100). Therefore arbitrators are not likely to feel convinced or bound by EU law because of the latter’s direct effect alone, especially since direct effect of EU law outside the EU would seem far-fetched. A more pragmatic collaboration is required.

⁴⁶ See footnote 11 above.

⁴⁷ Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, 26 October 2010. Publicly available at: <http://italaw.com/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf> (online on 10 July 2017).

⁴⁸ Para. 7.6.6 of the award.

⁴⁹ Redfern, Alan, Hunter, Martin, Blackaby, Nigel and Partasides, Constantine, *Redfern and Hunter on International Arbitration* (Oxford, Oxford University Press, 2009), 410.

arguably be considered as equivalent to the free movement of capital under EU law: “The Tribunal accept[s] that it is at least arguable that there is a duplication of rights to free movement of capital, which exist both under the BIT and under EU law”.⁵⁰

The same tribunal held that the BIT provision on fair and equitable treatment for investors was broader than the prohibition of discrimination offered under Article 18 TFEU, given that a measure applied regardless of distinguishing characteristics with a view to meeting the principle of non-discrimination would not necessarily be fair and equitable.⁵¹

Similarly, the tribunal held that the BIT provisions on full protection and security of investments were wider in scope than the provisions of the EC Treaty on freedom of establishment. In particular, the BIT provisions on that standard of protection remained applicable “for as long as the investment remains in place” and “no matter whether or not the treatment complained of is discriminatory”. On the other hand, it was held that while freedom of establishment under EU law entailed various ancillary rights, it did not cover “the entire ground that the right to full protection and security might be said to cover”.⁵²

The tribunal further considered that Article 5 of the BIT relating to indirect expropriation offered greater protection than the provisions under EU law on the right to property in that the former also covered indirect takings and protected “assets” and “investments”, namely concepts which seem broader in scope than the EU concepts of “possession” or “property”.⁵³ In conclusion, the arbitrators considered that the BIT offered wider protection to investors than the EC Treaty and that it was therefore possible for the provisions of both treaties to co-exist: the protections afforded by the BIT would apply in addition to those afforded by EU law.⁵⁴

To date, there are only a few comparative studies on potential conflicts between the most common standards of protection contained in the BITs and substantive law of the EU. The limited number of published investment arbitration awards comparing EU law and the standards of protection of the BITs does not allow us to draw far-reaching conclusions. There is no case-law of the Court of Justice of the EU analysing the standards of protection of the BITs. Professor Christian Tietje puts forward a summary comparative analysis between the freedom of establishment (Article 49 TFEU) and the free movement of capital and payments (Article 63 TFEU), whose restrictions can be justified on the basis of explicit justifications laid down in the

⁵⁰ Para. 249 of the award.

⁵¹ Ibid, para. 250-259.

⁵² Ibid, para. 260.

⁵³ Ibid, para. 261.

⁵⁴ Ibid, paras. 262-263.

TFEU as well as on the basis of the *Cassis de Dijon* case-law of the Court of Justice of the EU.⁵⁵ He observes, based on recent academic literature, that “similar provisions or possibilities for justification do not exist in BITs, even though it is possible to balance public regulatory interests and investor rights”.⁵⁶ He also observes that EU law and BITs do not provide for similar protection regarding the obligation to pay compensation in case of expropriation because EU law “does not prejudice the system of property rights in Member States” and because no obligation to pay compensation in the case of expropriation results directly from EU law.⁵⁷ On the contrary, practically all investment treaties contain a provision relating to expropriation, and arbitral tribunals oblige offending states to compensate both direct and indirect expropriation.⁵⁸ Another comparison may be drawn about state aid. Under Article 108 (3) TFEU Member States must notify the Commission of any state aid measure to be undertaken, and such measures shall not be put into effect until the Commission has reached a positive final decision. When a Member State or a regional government grants an aid to a foreign investor with a view to give an incentive for creating jobs in the region or otherwise contributing to the general economic welfare, or even just promises to do so in an official statement, without this measure being duly reported to the Commission, this aid is unlawful and, if actually granted, will have to be recovered according to the ECJ case-law and the provisions of Regulation No. 1999/659. The investor may not be satisfied with the said recovery of the aid and argue that it had trusted the government having promised or granted the aid or the otherwise beneficial policy exception later characterised as a state aid. If the complaint proves to be unsuccessful, the investor may invoke the fair and equitable treatment standard granted under the relevant IIA and be awarded the amount equal to that of the state aid in compensation.⁵⁹

In light of such potential discrepancies in the interpretation of EU law, let us imagine that another arbitral tribunal puts forward a bold analysis of EU law which would be inconsistent with that of the Court of Justice of the EU when the EU is a party to the EU IIA whose standards of protection would prevail over the protection afforded by EU law. In such a situation, the Court of Justice will, without a doubt, be able to pursue its own interpretation of EU law within the EU legal order. But what would be the persuasive value of that interpretation when its disregard by several arbitrators paid by the parties to a dispute would be implicitly condoned? It is of the utmost importance for the prestige and the autonomy of the EU legal order that the decisions of the Supreme Court of the Union be authoritative also for arbitral tribunals interpreting EU IIAs. It is not impossible that the standards of protection of EU IIAs be broader than the protection afforded by EU law, yet the Court of Justice should be able to say it in the first place in order to avoid a binding decision

⁵⁵ Judgment of the Court of 20 February 1979, *Reve-Zentral AG/Bundesmonopolverwaltung für Branntwein*, 120/78, EU:C:1979:42, para. 8.

⁵⁶ Tietje, Christian, “Bilateral Investment Treaties between EU Member States (Intra-EU-BITs) – Challenges in the Multilevel System of Law”, *Transnational Dispute Management*, Vol. 10, Issue 2, March 2013, p. 14.

⁵⁷ *Ibid.*

⁵⁸ See for instance Happ, Richard and Rubins, Noah, *Digest of ICSID Awards and Decisions 2003 – 2007* (Oxford, Oxford University Press, 2007), pp 348-352.

⁵⁹ Pernice, Ingolf, Hindelang Steffen, Schwarz, Michael and Reuling, Martin (see footnote 3), p. 143.

by a tribunal which is not specialised in EU law.⁶⁰ Such a right of interpretative priority can only be obtained via an extension of the preliminary ruling mechanism.

Now let us test these theoretical assumptions against the provisions of the draft Comprehensive Economic and Trade Agreement (hereinafter “CETA”), a proposed free trade agreement between Canada and the European Union whose provisional text has been released on 1 August 2014.⁶¹ On 29 February 2016, a new text of the draft CETA was released. The legal revision made various changes to the 2014 text, notably by including an international investment court. The new draft agreement commits the EU and Canada to pursue the creation of a multilateral investment court even beyond the parties’ bilateral relations.

The text of the draft CETA looks like a nearly classic BIT, akin to the Energy Charter Treaty, a BIT to which the EU is a party instead of the Member States of the EU. The CETA will contain provisions on national treatment:

“Each Party shall accord to an investor of the other Party and to a covered investment treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory” (Chapter eight, *Investment*, Section C, *Non-Discriminatory Treatment*, Article 8.6(1): *National Treatment*).

⁶⁰ The Court of Justice has raised this point about the judicial dialogue with the European Court of Human Rights in a “Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms” dated 5 May 2010, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf (online on 10 July 2017): “the possibility must be avoided of the European Court of Human Rights being called on to decide on the conformity of an act of the Union with the Convention without the Court of Justice first having had an opportunity to give a definitive ruling on the point” (para. 9); what is at stake is “the arrangement of the judicial system of the Union in such a way that, where an act of the Union is challenged, it is a court of the Union before which proceedings can be brought in order to carry out an internal review before the external review takes place” (para. 11) and “in order to observe the principle of subsidiarity which is inherent in the Convention and at the same time to ensure the proper functioning of the judicial system of the Union, a mechanism must be available which is capable of ensuring that the question of the validity of a Union act can be brought effectively before the Court of Justice before the European Court of Human Rights rules on the compatibility of that act with the Convention” (para 12). The voice of the Court of Justice has been heard since the Draft agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms provides, in a chapter entitled *Prior involvement of the CJEU in cases in which the EU is a co-respondent*, that without a preliminary ruling from the Court of Justice of the EU, the European Court of Human Rights “would be required to adjudicate on the conformity of an EU act with human rights, without the CJEU having had the opportunity to do so, by ruling on, as the case may be, the validity of a provision of secondary law or the interpretation of a provision of primary law” (para. 65). It is suggested that “the CJEU will not assess the act or omission complained of by the applicant, but **the EU legal basis for it**” (para. 67) and that “the assessment of the CJEU **will not bind** the Court” (para. 68), available at: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf (online on 10 July 2017). This latter aspect is open to criticism as it has been shown, at para. 15 of this paper, that the binding effect of a decision of a hierarchically superior court or tribunal does not necessarily threaten the autonomy of a hierarchically inferior legal order and, we shall add here, vice versa. Indeed, there is no reason why a binding assessment, in a decision of a hierarchically inferior court or tribunal, of the legal basis of an EU legal act, would threaten the autonomy of a hierarchically superior legal order. These issues deserve close scrutiny during the drafting of future EU IIAs.

⁶¹ Available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (online on 10 July 2017).

It will contain classic provisions on classic protection standards such as the “fair and equitable treatment” and “full protection and security”:

“Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security” (Chapter eight, *Investment*, Section D, *Investment Protection*, Article 8.10(1), *Treatment of Investors and of Covered Investments*).

The draft CETA defines “fair and equitable treatment” in the following manner:

“A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:

- (a) denial of justice in criminal, civil or administrative proceedings;*
- (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.*
- (c) manifest arbitrariness;*
- (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;*
- (e) abusive treatment of investors, such as coercion, duress and harassment; or*
- (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.”* (Article 8.10(2))

The draft CETA contains a most favourable nation (MFN) clause:

“Each Party shall accord to investors of the other Party, whose covered investments suffer losses owing to armed conflict, civil strife, a state of emergency or natural disaster in its territory, treatment no less favourable than that it accords to its own investors or to the investors of any third country, whichever is more favourable to the investor concerned, as regards restitution, indemnification, compensation or other settlement” (Article 8.11, *Compensation for Losses*).

It provides for a protection against expropriation:

“A Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation (‘expropriation’), except:

- (a) for a public purpose;*
- (b) under due process of law;*
- (c) in a non-discriminatory manner; and*
- (d) on payment of prompt, adequate and effective compensation”.* (Article 18.12(1), *Expropriation*)

The crucial provision on the applicable law of the 2014 draft was the following:

*“A Tribunal established under this Chapter shall render its decision consistent with this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties”*⁶² (Article X.27(1): Applicable Law and Interpretation).

This provision has been kept, *mutatis mutandis*, as Article 8.31(1) of the 2016 draft.

It is a common feature of arbitration that the applicable law to the merits of the dispute be determined according to the party autonomy principle: the parties may choose themselves the governing law. As we have just seen, in the case of the draft CETA, this law is the Agreement itself, *“as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties”*. Therefore, EU law is not the governing law at first sight. However, an investor filing a claim against the EU because of the treatment that it would have been subjected to in a Member State of the EU would have to assess the conduct of the public authorities applying, inter alia, EU law. Even national measures may be measures of implementation of EU law. As a consequence, the arbitral tribunal may have to interpret EU law. In fact, three types of situations should be distinguished. In *Electrabel v Hungary*,⁶³ the arbitral tribunal held that EU law is “operating at three possible levels: (i) as international law, (ii) as a distinct legal order within the European Union, separate from both national laws of EU Member States and international law and (iii) as part of Hungary’s national law”.⁶⁴ As for the CETA or similarly worded intra or extra-EU BITs, an arbitral tribunal could interpret EU law as part of *“rules and principles of international law applicable between the Parties”*⁶⁵ or as part of the national law of the Member State(s) at issue. An arbitral tribunal would not be able to apply EU law as a distinct legal order because EU law has not been chosen by the parties to the CETA as the applicable law governing potential disputes.

⁶² Part of the wording of Art. 9.22(2) of the draft EU-Singapore Free Trade Agreement, available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> (online on 10 July 2017), was identical: “(...) the tribunal shall apply this Agreement interpreted in accordance with the Vienna Convention on the Law of Treaties and other rules and principles of international law applicable between the Parties”. That provision has now become Art. 9.19(2) of the 2015 draft.

⁶³ *Electrabel S.A. (Belgium) v Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012.

⁶⁴ *Electrabel S.A. (Belgium) v Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 4.20. Similarly, in *Eureko B.V. v Slovak Republic* (see footnote No. 38), the arbitral tribunal also indicated that, when it came to decide the merits of the dispute, EU might be treated as part of the applicable law, absent a provision in the BIT to that effect.

⁶⁵ In *Electrabel*, the Tribunal wrote that “there is no fundamental difference in nature between international law and EU law that could justify treating EU law, unlike other international rules, differently in an international arbitration requiring the application of relevant rules and principles of international law” (para. 4.126; the decision is available at: <http://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf>, online on 10 July 2017). Under the delocalised approach positing the existence of a transnational arbitral legal order, there is no reason why the analysis should be different about extra-EU BITs from that which applies to intra-EU BITs: if EU law is applicable to certain parts of a dispute before state courts, it could also become part of the applicable law before the arbitral tribunal concurrently with the BIT.

We disagree in part with Professor Christian Tietje when he writes that “the interpretation of EU law or the decision upon the applicability of EU law by international tribunals outside the legal order of the EU Member States and outside the EU institutional system would, from an EU law perspective, undermine the exclusive jurisdiction of the ECJ, thereby affecting the autonomy of the EU legal order and thus constitute a breach of EU law” and that “therefore international dispute settlement systems are regarded as incompatible with the EU legal order”.⁶⁶ While the interpretation of EU law by international tribunals outside the EU institutional system is definitely problematic⁶⁷ – a fact which cannot be denied – we have already shown that this does not necessarily undermine the autonomy of the EU legal order if the jurisdiction of the Court of Justice of the EU is preserved. In order to achieve this, arbitral tribunals hearing claims (arising out of a breach of a BIT) and the Court of Justice should engage in a constructive judicial dialogue via preliminary references. If the arbitral tribunal puts forward a binding interpretation of EU, which the Court of Justice has to adopt, the threat to the autonomy of EU law is higher. Yet if the arbitral tribunal stays the proceedings pending the decision of the Court of Justice on the proper interpretation of EU law, the autonomy of EU law is not threatened in any way.

The draft EU-Singapore Free Trade Agreement and the draft CETA still propose investment arbitration (ICSID or UNCITRAL) as the agreed dispute settlement mechanism, yet with additional adjustments based on state court practice. The draft agreements contain provisions on the establishment of a list of permanent arbitrators. The draft CETA provides, at Article 8.27(2), that a CETA Joint Committee shall, upon the entry into force of the Agreement, appoint fifteen Members of the investment Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries. This provision is objectionable since the logic of international arbitration is to appoint arbitrators regardless of their nationality. Insisting on most of the arbitrators having the nationalities of one of the contracting parties hardly guarantees more independence.

The new draft CETA establishes a draft appellate Tribunal to review awards rendered under it. The appellate Tribunal is to review errors of law, but also “manifest errors in the appreciation of the facts, including the

⁶⁶ Tietje, Christian, “Bilateral Investment Treaties between EU Member States (Intra-EU-BITs) – Challenges in the Multilevel System of Law”, (2013) *Transnational Dispute Management* 10(2), p. 19.

⁶⁷ In its Opinion of 8 March 2011, 1/09, EU:C:2011:123, the Court of Justice ruled that “*by conferring on an international court which is outside the institutional and judicial framework of the EU an **exclusive jurisdiction** to hear a significant number of actions brought by individuals... would deprive the Courts of its powers*” (para. 89). With investment arbitration tribunal applying EU law, it is out of the question that they have “exclusive jurisdiction” to interpret certain areas of EU law. Besides, the proposed Patent Court which was unacceptable was to be allowed to examine the validity of an act of the EU (*ibid.*, para. 78), whereas the proposal in this paper for direct preliminary references from investment arbitration tribunals is to the effect that only the Court of Justice of the EU should be allowed to review the validity of EU measures.

appreciation of relevant domestic law”.⁶⁸ In addition, the new draft CETA urges parties to “pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes”,⁶⁹ which would supersede the bilateral investment tribunal. While the setting up of a fully-fledged appellate mechanism is most welcome, the new permanent investment tribunal does not differ significantly from classic investment arbitration tribunals.

As regards the TTIP, the latest publicly available EU draft purports to replace investor-state dispute settlement with a new Investment Court System.⁷⁰ The EU and the US would each appoint to the “Tribunal of First Instance”⁷¹ “fully qualified, independent judges who would have to follow a strict code of conduct”.⁷² Governments and investors “would have the right to appeal against decisions” the Tribunal of First Instance and “the public would have access to hearings and to any documents related to a case”.⁷³ Although the setting up of an Appeal Tribunal⁷⁴ is to be welcomed in light of the current limited possibility of annulment available under the ICSID Convention, it is doubtful that a permanent Investment Court would be so much better than a classic arbitral tribunal. A good example to the contrary is the permanent Court of Arbitration in The Hague, which has recently faced fierce criticism (to an extent unheard of about an investment arbitration tribunal) due to an alleged breach of the duty of confidentiality and impartiality by Jernej Sekolec, one of the arbitrators in the arbitration regarding the territorial and maritime dispute between Croatia and Slovenia.⁷⁵

III. Jurisdictional issues about preliminary rulings by the Court of Justice on references from investment arbitration tribunals

Under Article 267 TFEU, the Court of Justice of the European Union has jurisdiction to give preliminary rulings on the interpretation of the Treaties or on the validity of contested acts. However, only a “court or tribunal of a Member State” may request the Court to give a ruling. Are arbitral tribunals “courts or tribunals

⁶⁸ Art. 8.28(2).

⁶⁹ Art. 8.29.

⁷⁰ See Titi, Catherine, “The European Union’s Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead”, *Transnational Dispute Management*, published 25 May 2016.

⁷¹ Provided for in Art. 9 of section 3 of the EU TTIP Proposal of 12 November 2015 (see above, footnote 25).

⁷² Walford, Alexander, “TTIP – a very short introduction”, *Commission en direct*, No 31, June 2016, p. 41.

⁷³ Ibid. As for public access to the arbitral awards, this has been a common practice for a decade as far as ICSID awards are concerned.

⁷⁴ Provided for in Art. 10 of section 3 of the EU TTIP Proposal of 12 November 2015.

⁷⁵ See Živković, Patricia, “Severe Breaches of Duty of Confidentiality and Impartiality in the Dispute between Croatia and Slovenia: Is Arbitration Immune to Such Violations?”, *Kluwer Arbitration Blog*, 29 July 2015, available at:

<http://kluwerarbitrationblog.com/2015/07/29/severe-breaches-of-duty-of-confidentiality-and-impartiality-in-a-dispute-between-croatia-and-slovenia-is-arbitration-immune-to-such-violations/> (online on 10 July 2017). See also the Croatian newspaper *Vječernji list* from 1 July 2016, p. 2, classifying the scandal, according to international sources, as one out of the ten most important events in international law for 2015.

of Member States”? In 1982, the Court of Justice held that for an arbitral tribunal to be recognised as a “court or tribunal” entitled to refer a preliminary ruling under Article 267 TFEU, public authorities of a Member State need to be involved in the decision to opt for arbitration and to be called upon to intervene automatically in the proceedings before the arbitrator.⁷⁶ However, the ruling in *Nordsee* that *all sorts* of arbitral tribunals are denied the characterisation as “courts or tribunals of Member States” is open to criticism for various reasons. To begin with, there is an increasing trend in academic literature analysing international investment law and international investment arbitration comparing investment tribunals to domestic administrative courts.⁷⁷ Then, in ICSID proceedings, there is no possibility for a court of a Member State of the EU to fulfil its supervisory function of the arbitral proceedings. Even in non-ICSID proceedings, the court of the EU Member State may be involved in its supervisory function only at an extremely late stage in the arbitration proceedings, i.e. when a challengeable award has been rendered or when a final award is recognised and enforced. Moreover, under the *Eco Swiss* case-law, there is only an obligation to apply EU law in proceedings related to an international arbitration if the relevant provision of EU law is sufficiently fundamental as to correspond to EU public policy: any non-fundamental provisions will either remain unapplied or must be somehow incorporated into other, more fundamental principles.⁷⁸

A specific discussion is required regarding the *Nordsee* line of cases. To begin with, it is contradicted by the *Danfoss* case, where the Danish Industrial Arbitration Board was characterised as a court or tribunal of a Member State.⁷⁹ As early as in *Vaassen-Göbbels*,⁸⁰ a Dutch *scheidsgerecht*, that term meaning “arbitral tribunal” was characterised as a court or tribunal of a Member State. It is true that the *scheidsgerecht* is a *permanent* body entrusted with the settlement of professional disputes. The Court notes that the *scheidsgerecht* “is bound by rules of adversary procedure similar to those used by the ordinary courts of law”. However, adversarial procedure or an *inter partes* nature of the proceedings are not required if there is a case pending before the tribunal at issue and if the latter is called upon to give judgment “in proceedings intended to lead to a decision

⁷⁶ Judgment of the Court of 23 March 1982, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, case 102/81, EU:C:1982:107, para. 12. In the reasoning of that judgement, the Court also stressed that it was up to Member State courts to deal with questions of EU law and, if necessary, refer them to it (paras. 14-15). However, with ICSID arbitration, which has not been discussed nor referred to in that case, state courts intervention is not possible in proceedings relating to the enforcement of an arbitral award as in the judgment of the Court of 1 June 1999, *Eco Swiss China Time Ltd v Benetton International NV*, C-126/97, EU:C:1999:269.

⁷⁷ Von Papp, Konstanze, “Clash of ‘autonomous legal orders’: can EU Member State Courts bridge the jurisdictional divide between investment Tribunals and the ECJ? A plea for direct referral from investment tribunals to the ECJ”, (2013) CMLR 50, 1039-1082, at p. 1059. The author also notes that investment treaty arbitration resembles domestic administrative proceedings for it scrutinizes the legality of regulatory State action and for it involves parties which are in a relationship of subordination (*ibid.*, p 1065).

⁷⁸ Von Papp, Konstanze, *op. cit.*, p. 1065.

⁷⁹ Judgment of the Court of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund I Danmark v Danske Arbejdsgiverforening, acting on behalf of Danfoss*, 109/88, EU:C:1989:383, paras. 7 and seq.

⁸⁰ Judgment of the Court of 30 June 1966, *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfonds voor het Mijndbedrijf*, 61/65, EU:C:1966:39.

of a judicial nature”.⁸¹ All in all, it is generally understood that the criteria applied by the Court of Justice in order to determine whether a judicial body is a “court or tribunal of a Member State” do not in each case have to be equally and absolutely met.⁸² For the sake of argument, the criteria that may seem problematic regarding investment arbitration and, in particular, ICSID arbitral tribunals, are the ones requiring that the court or tribunal be “established by law”, have mandatory jurisdiction and be permanent. To begin with, investment arbitration tribunals meet the criterion of being “established by law” insofar as they are constituted on the basis of treaties governed by public international law and not on the basis of private agreements. Moreover, in investment arbitration, one of the parties is always a State (or the EU) and the governing law is public law, not private law. As for mandatory jurisdiction, this criterion is also met because consent to arbitration does not stem from an arbitration clause, as is the case with commercial arbitration, but from the BIT. When a State enters into a BIT, it extends a standing offer to eligible investors to arbitrate any relevant investment dispute through international arbitration. That is the reason why investment arbitration has been characterised as “arbitration without privity”,⁸³ which means that the State is not in a position to revoke its consent to arbitration. Therefore, the jurisdiction of the investment arbitration tribunal is effectively mandatory. As regards the competence to refer a case being attributed, under Article 267 (2) and (3) TFEU, only to courts or tribunals of Member States, it should be observed that the provisions of that article should be construed purposively and that the words a court or tribunal of a Member State should be given a broad interpretation. Indeed, an ICSID arbitral tribunal could be considered as common to a number of Member States. That approach was for instance advocated by Advocate General Sharpston about the Complaints Board of the European Schools in *Paul Miles and Others v. Écoles européennes*, where she took the view that “on a purposive construction, the Complaints Board falls within the scope of Article 234 EC”.⁸⁴ Although the Court took the contrary view in the judgment rendered in that case (i.e. that the Court of Justice has no jurisdiction to rule on a reference for a preliminary ruling made by the Complaints Board of the European Schools because the latter is not a court or tribunal of one of the Member States), that contrary view is premised on the idea that “while it is possible to envisage a development of the system of judicial protection established by the European Schools’ Convention, it is for the Member States to reform the system currently in force”.⁸⁵ The suggestion that an ICSID arbitral tribunal could be considered as common to a number of Member States is not undermined by the recent judgment in *Europäische Schule München v.*

⁸¹ Judgment of the Court (Grand Chamber) of 16 December 2008, *CARTESIO Oktató és Szolgáltató bt.*, C-210/06, EU:C:2008:723, paras. 56-58.

⁸² Von Papp, Konstanze, *op. cit.*, p. 1067.

⁸³ Paulsson, Jan, “Arbitration without privity”, (1995), *ICSID Review – Foreign Investment Law Journal* 10, 232.

⁸⁴ Opinion of Advocate General Sharpston delivered on 16 December 2010, *Paul Miles and Others v. Écoles européennes*, C-196/09, EU:C:2010:777, paras. 56-77.

⁸⁵ Case *Paul Miles and Others v. Écoles européennes*, C-196/09, EU:C:2011:388, para. 45. The argument refers to Case *Unión de Pequeños Agricultores v. Council*, C-50/00 P, EU:C:2002:462, paras. 44 and 45, where this meant that it was not possible for the European Union judicature to modify the standing requirements enshrined in the treaties in order to render judicial protection more effective. This reasoning is irrelevant in the context of preliminary references made by arbitral tribunals; where effective judicial protection is not at issue.

Silvana Oberto and Barbara O'Leary.⁸⁶ In that case, the preliminary reference had been made by a German state court. Although the Court followed its previous case-law in confirming that the respondents' right to effective judicial protection is not affected by the obligation to refer disputes to the Complaints Board of the European Schools, a body which is not allowed to make references to the Court of Justice, the latter nonetheless provides a binding interpretation of the Convention defining the Statute of the European Schools.

Finally, regarding the criterion that the court or tribunal be permanent, the institutional ties of tribunals established under the ICSID Convention are such as to meet the criterion. This is all the more the case with the new Investment Court System proposed in the TTIP and described above. Therefore, even under the existing case-law of the Court of Justice, there are enough reasons to consider that *Nordsee* should not be applied to, at least, ICSID arbitral tribunals. If the arbitral tribunal has to interpret EU law, the Court of Justice will nonetheless be allowed to put forward its own interpretation, yet that will bring about conflicting interpretations of the same provisions, which is precisely what the Court of Justice is aimed at avoiding.⁸⁷ Therefore, the case-law of the Court of Justice could be modified in order to allow preliminary references to be made by arbitral tribunals interpreting intra-EU BITs, EU IIAs and/or EU law. This could be done even absent a modification of the provisions of Article 267 TFEU.

Allowing preliminary references in such cases is also in the interest of the arbitral tribunal and the claimant. First and foremost, EU law is particularly complex and its interpretation requires a considerable expertise and knowledge of comparative law of individual Member States. The Court of Justice, with its one thousand and five hundred lawyers in addition to the 28 judges, is in a better position to deal with EU law. Therefore, future EU IIAs should provide that investor-EU tribunals established under these agreements may request preliminary rulings from the Court of Justice on questions relating to the interpretation of EU law. This would be in the interest of legal certainty.

Sixty-two percent of the investment arbitrations are ICSID arbitrations.⁸⁸ The ICSID Convention provides for an elaborate process designed to make arbitration independent of domestic courts: “*Consent of the parties to arbitration under the Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other*

⁸⁶ Judgment of the Court (Fourth Chamber) of 11 March 2015, *Europäische Schule München v. Silvana Oberto and Barbara O'Leary*, C-464/13 and C-465/13, EU:C:2015:163.

⁸⁷ Schill, Stephan suggests that, in order to avoid conflicting interpretations of EU law, the applicable law be limited in an investment arbitration to the EU IIA and other rules of international law, so that arbitral tribunal do not decide investor-State disputes based on EU law (Schill, Stephan, “Luxembourg limits: conditions for investor-state dispute settlement under future EU investment agreements”, *Transnational Dispute Management* 10(2), p. 17, part of the TDM Special “EU, Investment Treaties and Investment Treaty Arbitration – Current Developments and Challenges”, published in March 2013, p. 14).

⁸⁸ Pascual Vives, Francisco José, “Elección Del Foro Arbitral Y Del Derecho Aplicable en El Incipiente Régimen Europeo de Protección de Las Inversiones Extranjeras”, *Transnational Dispute Management*, provisional issue, July 2014, p. 10.

remedy” (Article 26 of the ICSID Convention)⁸⁹. State courts do not play any role in the reviewing of awards rendered by ICSID tribunals because all contracting parties are, under Article 54 of the ICSID Convention, under an obligation to recognise and enforce awards rendered under the said Convention as if they were final judgments of local state courts. ICSID awards are not subject to review by the courts of the place of arbitration.⁹⁰ They do not fall under the recognition and enforcement rules of the New York Convention. Therefore, with ICSID arbitrations, the only preliminary references that will be possible will be those made by the arbitral tribunal itself, to the extent that the Court of Justice of the EU accepts them. Preliminary references via state courts, for instance at the enforcement stage, will not be possible because ICSID awards are self-executing and do not have to be recognised as binding by a state court.

With arbitrations under the UNCITRAL Arbitration Rules, preliminary references will also be possible via state courts in two types of situations. The first situation may be illustrated by the first EU state court decision that takes a stance on the relationship between EU law and international investment law, namely the decision of the Oberlandesgericht Frankfurt (Higher Regional Court of Frankfurt) of 20 May 2012, in *The Slovak Republic v EUREKO B.V.* After having lost on jurisdiction in investment arbitration proceedings between EUREKO and the Slovak Republic, the Slovak Republic seized the Oberlandesgericht Frankfurt. Indeed, German procedural law (para. 1040(1) of the Code of civil procedure) allows a review of the decision of an arbitral tribunal to uphold jurisdiction. The Oberlandesgericht Frankfurt dismissed all of the objections to the jurisdiction of the arbitral tribunal raised by the Slovak Republic as being unfounded. One of these objections was that the Court of Justice of the EU enjoys exclusive jurisdiction over the interpretation and application of EU law. The Oberlandesgericht pointed out that the Court of Justice of the EU has not been granted a monopoly about the interpretation of EU law.⁹¹ The Oberlandesgericht could have made a reference for a preliminary ruling to the Court of Justice of the EU, yet it declined to do so.⁹² Nonetheless, this is one of the situations where such a reference could have been made by a state court in an arbitral dispute.

The other situation where a reference for a preliminary ruling to the Court of Justice of the EU could have been made by a state court in an arbitral dispute is better known and is exemplified by the *Eco Swiss* case-law of the Court of Justice of the EU.⁹³ Under that case-law, any state court ruling on the enforcement of any type of final arbitral award may make a preliminary reference to the Court of Justice of the EU in order to

⁸⁹ See inter alia Schreuer/Malintoppi/Reinisch/Sinclair, *The ICSID Convention, a Commentary*, 2nd ed., 2009, Art. 26, n° 3.

⁹⁰ Schreuer, Christoph H., Malintoppi, Loretta, Reinisch, August, and Sinclair, Anthony, *The ICSID Convention, a Commentary*, 2nd ed., 2009, Art. 62, pp 1244-1249.

⁹¹ Paras. 98-106 of the decision of the Oberlandesgericht.

⁹² See the full commentary of the decision of the Oberlandesgericht in Keller, Moritz and Miron, Smaranda, “Message From Frankfurt – The Higher Regional Court of Frankfurt (Oberlandesgericht Frankfurt) Speaks on the Relationship Between EU Law and International Investment Law”, *Transnational Dispute Management*, Vol. 10, Issue 2, March 2013.

⁹³ Judgment of 1 June 1999, *Eco Swiss China Time Ltd v Benetton International NV*, C-126/97, EU:C:1999:269.

enable the latter to review questions of EU law. However this is not possible with ICSID arbitrations, which do not allow the intervention of state courts. Therefore, requests for preliminary rulings by investment treaty tribunals may be limited to ICSID arbitrations for various compelling reasons.⁹⁴ Indeed, in ICSID arbitrations, domestic courts have no jurisdiction to set aside or review the arbitral award and hence cannot request preliminary rulings concerning the observation of EU law by the arbitral tribunal. Under the ICSID Convention, the exclusive remedy against an ICSID award is a request for annulment under Article 52 of the Convention, based on strictly limited, primarily procedural grounds.

Stephen Schill notes that it is important for investment arbitration tribunals to engage in a dialogue with the Court of Justice, in order to convince its judges that investor-EU dispute settlement is not a threat to the Court's role as the constitutional court of the EU. Indeed, even though investment arbitration has a governance function for investor-EU relations, arbitral tribunals do not pursue, unlike permanent international courts, an “institutionally backed power strategy that could be in opposition to the CJEU's role as the EU's constitutional court”. On the other hand, the Court of Justice should take care to limit its role to deciding questions related to EU-law and should exercise restraint in interfering with the dispute settlement activity of investment treaty tribunals. Indeed, “even though an expansive reading of the autonomy of EU law may strengthen the power of the Court in the short term, it may weaken the EU in its external relations (...) and thereby ultimately decrease, in the long run, the importance of the Court itself”.⁹⁵

Conclusion

The view has now become relatively widespread that a threat has emerged to the consistent interpretation of EU law by the ever growing number of international tribunals that sit outside the domestic legal order of any particular state:⁹⁶ such tribunals may be called upon to interpret or decide upon the applicability of EU law although they do not form part of the EU institutional system. Examples of international judicial bodies that have had issues of EU law raised before them include the International Court of Justice,⁹⁷ the European

⁹⁴ Schreuer, Christoph, one of the most trusted scholars in the field of ICSID arbitration, emphasises that requests for preliminary rulings by ICSID arbitral tribunals would help to prevent the development of inconsistencies rather than create a costly and time consuming repair mechanism (Schreuer, Christoph, “Preliminary Rulings in Investment Arbitration”, in *Appeals Mechanism in International Investment Disputes* 207, Sauvant, Karl P., ed. 2008, pp. 207-212). See also Gaffney, John, “How important is it to develop a coherent case-law? The role of judicial dialogue in investment arbitration”, in Kessedjian, Catherine (ed.), *Le droit européen et l'arbitrage d'investissement: European Law and Investment Arbitration* (Paris, éditions Panthéon-Assas, 2011), pp. 63-67.

⁹⁵ Schill, Stephan, “Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements”, in Bungenberg, Marc, Reinisch, August, and Tietje, Christian (eds.), *EU and Investment Agreements, Open Questions and Remaining Challenges* (Baden-Baden, Nomos, 2013), p. 54 (concluding remarks).

⁹⁶ See, inter alia, Parish, Matthew, “International courts and the European legal order”, (2012) *European Journal of International Law*, 23(1), p. 142.

⁹⁷ *Jurisdiction and Enforcement of Judgments in Civil and Commercial matters (Belgium v Switzerland*, withdrawn on 5 April 2011). The case raised questions on the construction of the 1998 Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and

Court of Human Rights, the World Trade Organisation Dispute Settlement Body, investment treaty and commercial arbitration tribunals, the International Labour Organisation Administrative Tribunal and the EFTA Court. Instead of seeing in international tribunals a threat to the consistent interpretation of EU law and the autonomy of the EU legal order, it is also possible to perceive them as “agents of harmonisation”.⁹⁸ The ultimate aim of international judicial cooperation should be, from an EU law perspective, that the case-law of all international tribunals interpreting EU law be as consistent as possible with that of the Court of Justice of the EU, as is the case with the case-law of the EFTA Court. If that happens, international investment arbitration tribunals and other international tribunals will help spread EU law and its binding interpretation beyond the EU legal order. This is of course by far preferable to, in case of conflict, EU law being weakened and threatened within the EU legal order itself due to a lack of international prestige and binding effect even when it is applicable to a dispute before an arbitral tribunal.

It is suggested that preliminary references by investment arbitration (ICSID) tribunals be allowed on the interpretation of primary and secondary EU law, and on the validity of secondary law. Indeed, opinion 2/13 of the Court of Justice makes clear that preliminary references on validity of secondary law should always be possible, even under a “prior involvement procedure”.⁹⁹ With such preliminary references, the jurisdiction of the Court of Justice and the autonomy of EU law will be preserved without a risk of an excessive “opening of the floodgates” of the former.¹⁰⁰

Arguably, the arbitral tribunal should seek the attainment of procedural efficiency/effectiveness and the avoidance of conflicting outcomes (i.e. anticipatory *res judicata*)¹⁰¹ in parallel proceedings pending both before it and before the Court of Justice of the European Union. Indeed, it is generally accepted that modern

Commercial Matters, which is identical in content to EU Regulation No. 44/2001. Proceedings were withdrawn after Switzerland conceded that the contested ruling of its Federal Tribunal did not have the inconsistent effect with the Lugano Convention that Belgium feared.

⁹⁸ See Hirsch, Mosche, “International Tribunals as Agents of Harmonization”, in Drabek, Zdanek and Mavroidis, Petros C. (eds), *Regulation of Foreign Investment, Challenges to International Harmonization* (Singapore, World Scientific, 2013), 341-369, describing the role of international arbitral tribunals as that of “agents of harmonization”.

⁹⁹ See paras. 241-243 of the opinion.

¹⁰⁰ For a contrary view, see Von Papp, Konstanze, *op. cit.*: “a particular challenge would be the increased workload for the ECJ, because allowing investment tribunals to refer directly questions of EU law to the ECJ would not take away any power of EU Member State courts (also) to do so” (p. 1079). In fact, it is submitted that no more than five to ten cases per year at most may be expected to end up before the Court of Justice, because there are not so many ICSID cases as one may think, due to the fact that law firms specialised in investment arbitration charge particularly high legal fees (several million euros per case), which only very large investors are prepared to pay. See further Von Papp, Konstanze, *op. cit.*: “in a more and more inter-connected legal world, autonomous legal systems (including dispute resolution systems) need to gradually accept that autonomy is not absolute” (p. 1081). It is submitted that autonomy of EU law cannot be only partial (the logic is that of “all or nothing”, full autonomy or no autonomy at all), but that it may nonetheless be preserved via constant judicial dialogue.

¹⁰¹ See Popov, Athanase, “Ancillary claims, procedural effectiveness and avoidance of conflicting outcomes in parallel and consecutive arbitrations: questions raised by the *ITERA Decision on the Admissibility of Ancillary Claims*”, *Transnational Dispute Management*, Vol. 9, Issue 3, April 2012.

investment treaties have largely done away with the exhaustion of local remedies requirement.¹⁰² Therefore, the arbitral tribunal will not spontaneously be waiting for the Court of Justice of the EU to determine a dispute between the same parties, regarding the same subject-matter of the claim/dispute *petitum* and the same legal foundation of the claim/*causa petendi* (the so-called “triple identity test”) before it determines the same dispute itself. It could nevertheless be argued that the arbitral tribunal should take into account international *lis pendens* and *res judicata* in such situations. For that to happen systematically, there should either be provisions to that effect in future EU IIAs or the arbitral tribunal should, even absent any specific provision in the relevant treaty, like any other court or tribunal seizing the Court of Justice of the EU, stay proceedings of its own motion pending the determination of EU law related issues in a preliminary ruling. Last but not least, there is no reason why the arbitral tribunal should not take into account also the interpretation by the Court of Justice of the applicable BIT. The latter Court has sufficient expertise in order to determine also that kind of issues. Of course, in order to make that possible, the case-law of the Court of Justice needs to be modified in order to allow preliminary references by arbitral tribunals determining disputes where European Union law may be applicable or where the EU is a party.

¹⁰² Rubins, Noah and Kinsella, Stephen, *International Investment, Political Risk and Dispute Resolution* (Oxford University Press/Oceana Publications, 2005), 272. A contrary view, in the context of the accession of the EU to the European Convention on Human Rights is that “as the jurisdiction of the [European Court of Human Rights] is subsidiary and any other domestic remedy must be exhausted before an application is admissible (Art. 35 of the European Convention), the autonomy of the EU legal order is not in question” (Pernice, Ingolf, “The Autonomy of the EU Legal Order – Fifty Years After *Van Gend*” in *50th Anniversary of the Judgment in Van Gend en Loos*, conference proceedings, Luxembourg, 13 May 2013, p. 73). Conversely, the autonomy of the EU legal order is at stake where domestic remedies do not have to be exhausted.