

INVESTMENT COURT SYSTEM OF CETA: ADVERSE EFFECTS ON THE AUTONOMY OF EU LAW AND POSSIBLE SOLUTIONS

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Abstract. The Court of Justice of the European Union (CJEU) has recently assessed the compatibility of the reformatory Investment Court System (ICS) of the EU's trade agreement with Canada (CETA). In the Opinion 1/17, the CJEU ruled the ICS mechanism to be compatible with EU law. This article provides a comprehensive critical assessment of the ICS mechanism and its potential adverse effects on uniform interpretation of EU law. It is proposed that, despite the favourable assessment of the CJEU, the ICS mechanism could result in indirect negative effects on the uniform interpretation of EU law and the autonomy of EU legal order. Involvement of the CJEU in the proceedings of the ICS mechanism is suggested as a possible option to resolve all the incompatibilities of the ICS with the autonomy of the EU legal order, and to ensure the CJEU's exclusive right to interpret EU law.

Keywords: Investment Court System, ISDS, autonomy of EU law, CETA, CJEU

Introduction

Since the Lisbon Treaty, foreign direct investment is a part of the common commercial policy which is an exclusive competence of the EU (*Opinion 2/15*, para. 305). Thus, investment dispute settlement has become a matter of concern for the EU. Most contemporary international investment disputes are resolved under the specific investor-state dispute settlement (ISDS) mechanism, entitling private persons to launch their claims against states before international tribunals (Impact Assessment, 2017, p. 7).² Yet, the Commission considers the existing ISDS system to be unsuitable for the EU (Impact Assessment, 2017, p. 10; Korzun, 2017, p. 358).

The Commission indicated two groups of arguments for the unsuitability of the current ISDS system. First, the EU cannot formally accede to the existing ISDS rules, as they do not foresee the possibility for international organisations to accede (Communication, 2010, p. 10). Secondly, it is claimed that ISDS has drawbacks including: the lack of legitimacy and safeguards for the independence of arbitrators; the lack of consistency and predictability of the case law; the absence of the possibility of review; high costs diminishing its accessibility to small and medium enterprises; and the lack of transparency (Concept Paper, 2015, pp. 1-3). Serious concerns were expressed by opponents regarding the negative effects of ISDS on the states' right to regulate, caused by private arbitrators

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² ISDS is a mechanism entitling an investor to bring a claim directly against the host country before an international tribunal for the breach of international investment agreement. Most of ISDS cases are heard under 1965 Washington Convention, establishing the International Centre for Settlement of Investment Disputes (ICSID). However, other rules are also used for adjudication, such as, arbitration rules of United Nations Commission for International Trade Law (UNCITRAL), the Permanent Court of Arbitration or the International Arbitration Court of the International Chamber of Commerce. – (Impact Assessment, 2017, p. 7)

called upon to decide multi-million dollar claims against sovereign states (Korzun, 2017, p. 358) in response to their laws aiming towards common good for society.³ To address these concerns, in 2010 the Commission launched an initiative to develop an innovative ISDS mechanism suitable for the EU (European Commission, 2010, pp. 9-10). A two-step approach was proposed (Concept Paper, 2015, pp. 11-12). The first step was to include Investment Court System (ICS) clauses in each future EU-level investment agreement. The CETA's ICS was the first mechanism out of many ICSs under negotiation, as the Commission estimates that approximately 20 ICSs should be created by EU investment agreements with third states in the near future (Commission, 2019). The second step will be to eventually replace all the ICSs with the standing Multilateral Investment Court (MIC) for the settlement of the investment disputes (Commission Recommendation, 2017, p. 2). Should the reform succeed, all investment disputes arising out of EU investment agreements would be handled by a single MIC instead of dozens of ICS tribunals.

Immediately, the first step of the reform raised numerous discussions on the CETA's ICS compatibility with EU law. In September 2017 Belgium requested the CJEU to assess whether, *inter alia*, the CETA's ICS mechanism is compatible with the exclusive competence of the CJEU to provide definitive interpretation of EU law (Belgian Request, 2017).

There was not much optimism among scholars prior to the adoption of the *Opinion 1/17* – the prevailing opinion was that the ICS would not pass the test of autonomy (Eckes, 2018; Gáspár-Szilágyi, 2018; Thym, 2018). The CJEU had further entrenched already pessimistic views, with *Achmea* stating that Articles 267 and 344⁴ TFEU had to be interpreted as precluding ISDS clauses in intra-EU investment agreements concluded between the Member States (*Achmea*, para 60). Yet, surprisingly, the *Opinion 1/17* ruled that the CETA's ICS does not adversely affect the autonomy of the EU legal order (*Opinion 1/17*, para. 161).

In the context of the doctrine of autonomy, the *Opinion 1/17* was an atypical decision of the CJEU. While many expected the CJEU to rule the ICS mechanism incompatible with autonomy, the CJEU decided otherwise despite the potential of the mechanism to adversely affect the autonomy of the EU legal order. As the *Opinion 1/17* did not dispel all the doubts surrounding the effects of the ICS mechanism on the EU's judicial system, the issue of whether it will or will not have adverse effects on the uniform interpretation and application of EU law must be resolved. It is asserted in this Article that despite the favourable assessment of the CJEU, the CETA's ICS does not entirely comply with the criteria of the protection of the autonomy of EU legal order. This article aims to explore two main issues: 1) to analyse whether CETA's ICS is indeed compatible with EU law (Chapter 2); 2) to explore what could be done, if necessary, to comply with the requirements of EU law autonomy so that the autonomy of the EU legal order is secured. The possibility to ensure autonomy via the involvement of the CJEU in the ICS's work is examined in detail (Chapter 3).

³ One of the most prominent ISDS cases is *Phillip Morris Asia Ltd v Australia*. The dispute concerned the enactment and enforcement of the so called Tobacco Plain Packaging Measures imposed by Australia in the implementation of preventive health programs and strategies. Plain packaging of tobacco was intended as a measure to improve public health and to achieve related public health objectives. Phillip Morris Asia Ltd claimed that “[t]he plain packaging legislation bars the use of intellectual property on tobacco products and packaging, transforming [the Claimant’s subsidiary in Australia] from a manufacturer of branded products to a manufacturer of commoditized products with the consequential effect of substantially diminishing the value of [the Claimant’s] investments in Australia.” – (*Phillip Morris Asia Ltd.*, 2012, paras. 5-10)

⁴ *Author’s note*: Article 267 TFEU provides for the preliminary ruling procedure, while under Article 344 TFEU the Member States undertake not to submit disputes concerning interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties.

1. Assessment of ICS compatibility with the autonomy of EU law

1.1. Requirements of autonomy protection: preservation of the CJEU's exclusive jurisdiction

The concept of the autonomy of the EU legal order is not futile, as it serves a specific purpose: to ensure the proper functioning of the single market and free competition within it. Uniform interpretation stands at the core of autonomy – homogenous perception of EU rules by all the addressees in different parts of the EU is essential to make the single market work. Rigid self-protection of the CJEU's interpretive powers is thus not a purpose in itself, it is the consequence of the more fundamental purpose – the single market. Autonomy has gradually become one of the general principles of EU law (Gallo & Nicola, 2016, p. 1117) and the driving principle of the EU external relations law (Lenaerts & Gutierrez-Fons, 2014, pp. 7-8). It is now the main reference point for settling the jurisdictional boundaries between the CJEU and international tribunals. As van Rossem summarized, autonomy requires addressing two concerns. First, that an international agreement does not alter the essential character of the EU's and its institutions' powers. Secondly, that procedures for ensuring uniform interpretation of international treaties, involving an external judicial body, would not bind the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of EU law (Rossem, 2012, pp. 61-62). Both of these criteria are closely related to the preservation of the judicial powers of the CJEU.

The CJEU had regularly blocked the EU's international agreements due to the incompatibility of their dispute settlement mechanisms with the autonomy of EU law (*Mox Plant*, para. 123; *Opinion 1/09*, paras. 67-76; *Opinion 1/91*, paras. 30-35; *Opinion 2/13*, 170-183). In each case, the CJEU repeated that an international court could only exist alongside the EU system if it had no adverse effect on the autonomy of the EU legal order. However, the CJEU left a theoretical possibility to establish such a dispute settlement mechanism, stating that “international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law” (*Opinion 2/13*, para. 182). Since jurisdiction of an international court could mostly collide with the jurisdiction of the CJEU, the CJEU's assessments were related to the question of whether an international tribunal's powers interfered with the exclusive competences of the CJEU – i.e. right to provide definitive interpretation of EU law (*Opinion 2/13*, para. 247) and right to rule on division of competencies within the EU (*Opinion 1/91*, paras. 38-46; *Opinion 2/13*, paras. 221-225). Both of these competencies are relevant for the evaluation of CETA's ICS as well.

Two Treaty provisions form the legal basis for the CJEU's exclusive competence to provide the definitive interpretation of EU law. Article 19(1) TEU authorizes the CJEU to ensure that in the interpretation and application of the Treaties, the law is observed. Article 344 TFEU entrenches the Member States' obligation not to submit any dispute concerning the interpretation or application of the Treaties to methods of settlement other than those provided in the Treaties. As the Court explained, its power to interpret EU law forms part of the specific characteristics of EU law that must be preserved. The balance of the Court's competences was designed by the Member States on the basis of the principle of conferral, derived directly from the EU's constitutional structure (*Opinion 2/13*, paras. 165, 237). The Court elaborated: “To ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law” (*Opinion 2/13*, para. 174). It follows that the primary purpose of the entire judicial system of the EU is to ensure uniformity of EU law. The CJEU protects its own powers by seeking to ensure that EU law is understood only in the way that it indicates.

The Commission is well-aware of the requirements of autonomy. To ensure the CJEU's exclusive interpretive rights it has accommodated guarantees, discussed in detail below, to prevent conflicts between the ICS and the CJEU. First, interpretation and application of EU law will not fall under the competence of the ICS tribunals. Secondly, EU law will only be taken as a “matter of fact” by the ICS tribunals. If EU law interpretations are necessary, the ICS tribunals will use the “prevailing interpretation” of the respective norms. Thirdly, EU law

interpretations made by the ICS tribunals will not be binding on the CJEU nor will the tribunals have the right to assess the legality of EU measures. Yet, the sufficiency of these measures is doubtful, as is demonstrated further.

1.2. Exclusion of EU law as an applicable law from investment disputes

Under CETA the domestic law of the parties, including EU law, will not be a part of the applicable law and will be considered as a “matter of fact” (CETA, Article 8.31(2)). The ICS tribunals should only apply the provisions of CETA and other relevant provisions of international law applicable pursuant to the Vienna Convention on the Law of Treaties (CETA, Article 8.31(1)).

The Court undertook a rather formal approach to answering whether the ICS tribunals will not engage in interpretation and application of EU law. In fact, the Court did not engage in the analysis of the question at all. The CJEU considered that the safeguards foreseen under CETA are sufficient to ensure that the ICS tribunals will not have jurisdiction to interpret the rules of EU law (*Opinion I/17*, paras. 130-131). Yet, there is a sharp contradiction in the CJEU’s reasoning. The Court admitted that when the ICS tribunals are called upon to examine the compliance with CETA of the measure challenged by an investor, the ICS tribunals “will inevitably have to undertake, on the basis of the information and arguments presented to it by that investor and by that State or by the Union, of the effect of that measure”⁵ (*Opinion I/17*, para. 130). Determination of the effect of the measure is an evident indication of the interpretation of the measure.⁶ Yet, according to the Court, the examination of the effect of the measure, including EU law, by the ICS tribunals cannot be classified as equivalent to an interpretation. ICS tribunals would have to take domestic law into account as a *matter of fact*, and follow the *prevailing interpretation* given to domestic law by the courts or authorities of a party because the courts and authorities would not be bound by the meaning given to their domestic law by the ICS tribunals (*Opinion I/17*, para. 131). The analysis below will demonstrate that it is doubtful that the ICS tribunals could in practice refrain from interpretation of EU law despite the listed safeguards.

Notion of law as a “matter of fact” was originally introduced within the Common law countries and had to be proven by parties via documentary materials and expert witnesses (Croft, Kee, & Waincymer, 2013, p. 402; Waincymer, 2011, p. 205). It is also a typical notion used in international law. In *Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice (PCIJ) already considered municipal laws as merely facts expressing the will and constituting the activities of states, in the same manner as legal decisions or administrative measures do (*Certain German Interests in Polish Upper Silesia*, 1925, p. 19). The PCIJ found nothing to prevent it from giving judgment on whether, in applying that law, Poland was acting in conformity with its international obligations towards Germany (*Certain German Interests in Polish Upper Silesia*, 1925, p. 19). Likewise, domestic law is considered as a fact by ISDS tribunals. In *AES v. Hungary*, the tribunal concluded that in an international arbitration national laws are to be considered as facts, and the tribunal ruled that a state may not invoke its domestic laws to excuse alleged breaches of its international obligations (*AES v. Hungary*, para 7.6.6).

Thus, the notion of law as a “matter of fact” carries twofold meaning. The first one is purely procedural: law, as any other evidentiary material, must be proven. Secondly, law is considered a fact so that the defendant state may not invoke its domestic laws as an excuse for the breaches of its international obligations. As Rovine elaborated:

The body of law applied in ICSID arbitrations is international law, not national law ...National law is generally not a defence to international law duties. Illustratively, Article 32 of the ...Draft Articles on the Responsibility of States ...states that a State in breach of the duty to provide reparation for an internationally wrongful act may not rely on its own national law to excuse that breach” (Rovine, 2013, p. 121).

⁵ Emphasis added by the author.

⁶ AG Bot was not so subtle with his wording stating that the ICS tribunals “must interpret the Parties’ domestic law *as little as possible*.” (emphasis added by the author) – (*Opinion of Advocate General Bot*, para. 150)

However, the notion of law as a “matter of fact” has become so common that its validity is rarely questioned. In the author’s view, use of the notion of law as a “matter of fact” in the framework of EU law causes serious conceptual and logical inconsistencies. Law is always abstract to a certain degree, and exists in the intellectual form only. Fact, on the other hand, is a notion that is normally opposed to law. With respect to a fact, it can always be stated whether it occurred or not (West’s Encyclopedia of American Law). Application of law is performed as a reaction to the facts of reality. Law cannot be applied without facts. Irrespective of its form, law will require effort to be perceived by the recipient. Yet there is always a possibility that another recipient, or court, could understand the same norm differently (Cover, 1983, p. 40).⁷ According to Cover, the same norm could have the opposite meanings in different communities, depending on the narrative used to endow it with content (Cover, 1983, pp. 11-25). Therefore, law is susceptible to interpretation that may determine many different meanings. The higher a legal act is in a hierarchy of acts, the more likely it is that it will require interpretation and clarification. This idea is supported by the so-called “incomplete contract” theory used in commercial law studies to describe the dynamics of interpretation and application of treaties. As Fontanelli stated, a treaty can be compared to the contract concluded between two or more parties. Due to political and practical reasons, parties may intentionally leave certain provisions of an agreement incomplete, vague, or ambiguous. In case of an “incomplete contract,” clarification of the terms of an agreement is assigned to the subject entrusted with its interpretation in case of dispute – a judge (Fontanelli, 2009, p. 474).

Thus, regarding law as a “matter of fact” does not change the nature of law – to identify its meaning, even as a “matter of fact”, it must be interpreted. Determining the meaning of EU law is even more complicated. Since the Member States have to agree on important issues in various fields covered by the Treaties, reaching an understanding is a difficult task requiring compromises. Therefore, EU legislative negotiations can (and often do) result in vagueness and purposeful incompleteness of legislation. According to Fontanelli, there is an “objective difficulty in adopting new... legislation, amending the existing one and finding an agreement on detailed provisions” (Fontanelli, 2009, p. 474). It is incumbent upon the CJEU to find a coherent interpretation of the legal order and its single provisions (Fontanelli, 2009, p. 474). To that end, the CJEU has established a specific precedent system, aimed at ensuring that EU law is uniformly understood in each of the Member States. A couple of features characterize this system. First, the operative part and *ratio* of the case law of the CJEU has an *erga omnes* effect and is thus mandatory not only in a particular case, but to the rest of the national courts also (De Sadeleer, 2018, p. 366; Vukcevic, 2012, p. 656). Secondly, breaches of the CJEU’s case law performed by national courts are considered to be breaches of EU law (*Köbler*, para. 56). National courts may decide not to refer to the CJEU for a preliminary ruling and invoke its previous interpretations when deciding a case. However, the precedent is not rigid – courts are free to refer to a preliminary ruling despite of the existence of relevant case law, while the CJEU is free to alter its case law if it considers it necessary. This dynamic of the CJEU’s precedent is covered by the *acte éclairé* doctrine (*CILFIT*, para. 14; *Da Costa*, p. 38).

Gallo and Nicola accurately observe that EU law analysis is an essential function that the ICS will have to perform to be able to assess whether an EU’s act infringed CETA (Gallo & Nicola, 2016, p. 1126). To establish an infringement of CETA’s provisions, the tribunals will have to determine the precise requirements of EU law, their effects on respective investors, and to ascertain if it results in what is defined under CETA as discrimination, expropriation, or an unfair and inequitable treatment (Gallo & Nicola, 2016, p. 1126). Therefore, considering law as a “matter of fact” without interpreting it is impossible in practice. It follows that regarding EU law as a “matter of fact” may not prevent the ICS tribunals from interpreting it.

On the contrary, ICS tribunals would have no other choice but to determine EU law content, which may not in itself be a problem if the tribunals do not err in law. The problem of interpretation occurs not in cases where law is clear and precise, but where the substance of EU norms is uncertain, ambiguous, and vague. An error in law is

⁷ *Author’s note*: The same is true in case of perception of facts relevant to the proceedings. Hence, the experts are necessary.

possible irrespective of whether it is interpreted by a legal professional (such as a judge), or by an ordinary citizen – only the probability of error differs. The meaning of applicable law is constantly determined by various actors within the EU (including national courts, institutions, and citizens). There is no other way to directly apply EU rules, for instance regulations, other than by establishing the meaning of the specific norms. The fact that national judges face questions of EU law on a daily basis does not eliminate the possibility of error. Preliminary ruling procedure is in place specifically in order to rectify errors of interpretation if such occur, and to indicate the correct meaning of EU law to be followed henceforth by other actors. Thus, the heart of the problem lies not only in the fact that EU law content would be determined by the ICS tribunals, but in the possibility that the tribunals would make an error in such determinations.

However, the CJEU seems to consider it a matter of principle that EU law interpretation be the CJEU's competence and the CJEU's alone. Even if the ICS tribunals did not make any errors of EU law interpretation and gave the same interpretation as the CJEU would, the mere fact that ICS tribunals could interpret EU law could have been sufficient for the CJEU to consider such an event incompatible with the autonomy of the EU legal order. For instance, in *Achmea* the CJEU found the possibility that an investment tribunal could engage in EU law interpretation contrary to EU law. The case concerned the bilateral investment treaty (BIT) between the Netherlands and Slovakia which provided an ISDS clause. The CJEU recognized that considering all the arbitral tribunal's characteristics, the disputes resolved by it might concern interpretation or application of EU law (*Achmea*, para. 56). The Court concluded that such a mechanism was liable "to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties" (*Achmea*, para. 58). It was thus found incompatible with the principle of autonomy of the EU legal order. Being an institution of a similar nature, CETA's ICS could have been appreciated in the same way as the ISDS tribunals established under the Member States' BITs, but the CJEU concluded that the ICS mechanism was compatible with the principle of autonomy (*Opinion 1/17*, paras. 105-136)

Considering the above, one sharp difference is evident in the *Opinion 1/17* compared to the previous case law of the CJEU. While previously the mere possibility that an "external" tribunal might engage in interpretation of EU law was enough to rule a dispute settlement mechanism incompatible with the autonomy of EU law, in the *Opinion 1/17* even the possibility of direct interpretations of EU law provided by the ICS tribunals were considered to be compatible (see Chapter 2.3). This aspect starkly contrasts with the previous position of the CJEU, which could be an indication that the CJEU's attitude towards interpretations of EU law provided by international tribunals is becoming "more forgiving". The CJEU seems to have come to consider a certain degree of risk of EU law misinterpretation to be compatible with the autonomy of EU law.

The risk of error in determining the meaning of EU law is even higher if, as Lavranos and Lock observe, a person does not come from within the EU system – as is often the case with the judges of international tribunals (Lavranos, 2006, p. 239; Lock, 2009, p. 303). *Iron Rhine* illustrates such a situation. It concerned a dispute between Belgium and the Netherlands over the Iron Rhine railway linking the city of Antwerp and the Rhine basin in Germany via the Netherlands. As part of the route went through the natural reserves of the Netherlands, the Netherlands claimed that Belgium had to comply with its environmental laws and bear the extra costs involved (*Iron Rhine*, para. 236). The Parties disagreed on the allocation of costs for the reactivation and long-term use of the railway (*Iron Rhine*, paras. 22-27). Although the 1839 Treaty of Separation and later treaties were applicable to the dispute, a question of application of the EU's Habitats and Birds directives and a decision on the trans-European transport network arose in the proceedings (*Iron Rhine*, paras. 121-123). To answer whether it should interpret and apply EU law, the Permanent Court of Arbitration (PCA) turned to the CJEU's case law. The PCA chose to apply the relevance test: if the PCA reached the conclusion that it could not decide the case without engaging in the interpretation of EU law, the relevant questions of EU law would have to be submitted to the CJEU (*Iron Rhine*, para. 103). The PCA considered itself to be in an analogous position to the national courts of the Member States in referring for a preliminary ruling (*Iron Rhine*, para. 103). The PCA concluded that EU law application was not necessary to reach a verdict in the case, as it would arrive at the same conclusions irrespective of whether relevant EU law was applied in the case or not (*Iron Rhine*, para. 137). In other words, the PCA applied one of the *CILFIT* criteria to substantiate

its decision to ignore EU law in deciding the case, since the PCA considered that it would not make a difference (*Iron Rhine*, para. 137). According to Lavranos and Lock, the PCA clearly misunderstood the significance of *CILFIT* criteria pursuant to which a domestic court is released from an obligation to refer to the CJEU, but not from applying EU law in the case (Lavranos, 2006, pp. 238-239; Lock, 2009, pp. 302-303). Moreover, even if the international court presides over domestic disputes, it stands outside the EU legal system and thus is not in an analogous position to that of a domestic court (Lock, 2009, pp. 302-303). Surprisingly, other authors considered the PCA's decision to resort to *CILFIT* as an instructive example of judicial comity allowing tribunals to avoid frictions with the CJEU (Bladel, 2006, pp. 23-24; Shigeta, 2009, p. 296). However, the latter view is hardly substantiated, as the PCA was not in a position to apply *CILFIT* in the first place and ultimately applied it in an incorrect way.

Iron Rhine demonstrates that considering EU law as a “matter of fact” may not suffice to prevent ICS tribunals from engaging in EU law interpretations and from asserting jurisdiction over the questions clearly falling under the CJEU's jurisdiction. Involvement of the CJEU in the ICS proceedings could ensure that situations analogous to *Iron Rhine* do not emerge in the ICS (see Chapter 3).

1.3. Ensuring that ICS tribunals' interpretations are not binding the EU

CETA anticipates that “any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party” (CETA, Article 8.31(2)). It evidently aims to eliminate any concerns that respective awards will bind the EU to a particular interpretation of EU rules, as the CJEU's interpretations do (*Opinion 1/00*, para. 13).

According to the CJEU, examination of the effect of EU law cannot be regarded as equivalent to interpretation, since the courts and authorities of the EU block will not be bound by the meaning given to EU law by the ICS tribunals (*Opinion 1/17*, para. 131). As reported by AG Bot, the fact that the ICS tribunals would have to engage in the interpretation of EU law does not affect the CJEU's functions or its position in the EU legal order, since the Court, the EU, its institutions, and the Member States will not be bound by the tribunals' interpretations (*Opinion of Advocate General Bot*, para. 138). However, if this proposal is read systematically, together with other provisions of CETA, its suitability seems doubtful due to the following reasons.

Firstly, the ICS tribunals are not in fact prevented from interpretation of EU law (see Chapter 2.2). The ICS tribunals' reasoning could include important features of EU law interpretation on the basis of which compensation may be awarded to a claimant. Secondly, as ICS awards will bind the Parties, EU law interpretations given by the tribunals would possess the same binding character as an integral part of the award. The CJEU has consistently repeated that if the EU's international agreement provides for a system of courts for settling disputes between the parties to the agreement and interpreting its provisions, decisions of that court could be binding on the EU's institutions (*Opinion 1/91*, paras. 39-40; *Opinion 2/13*, para. 182). As a matter of principle, such an agreement should be compatible with EU law if it does not adversely affect the autonomy of the EU legal order (*Opinion 2/13*, paras. 182-183). Since the EU as a respondent will be bound by the ICS awards, such awards would have to be respected by all the institutions of the EU (Gallo & Nicola, 2016, p. 1127). CETA foresees that: “[a]n award... shall be binding between the disputing parties and in respect of that particular case” (CETA, Article 8.41(1)). Moreover, “a disputing party shall recognise and comply with an award without delay” (CETA, Article 8.41(2)). Therefore, CETA does not ensure in practice that the EU is not bound by interpretations of EU law, if such are provided by the ICS tribunals. According to I. Pernice, ISDS clauses give these tribunals a final and binding say on the relevant interpretation of EU law at stake, even if considered as “facts” only (Pernice, 2014, p. 150). Although this competence to interpret EU law is not exclusive, the tribunals would be the de facto forum, where questions of EU law are adjudicated with a binding effect upon the EU's institutions (Pernice, 2014, p. 150). This is exactly the situation that the CJEU is consistently trying to prevent.

Normally, in arbitration an award would only be binding on the parties to the case. For instance, under UNCITRAL arbitration rules “[a]ll awards... shall be final and binding on the parties” (UNCITRAL Model Law, 2010, Article 34(2)). ICSID convention provides similar provisions under Article 53. However, one of the ISDS’s drawbacks, that the Commission aims to resolve with the ICS, is that “[p]redictability and consistency of case-law are not achieved since arbitrators are not bound by previous decisions and there is no systemic requirement to take account of them” (Impact Assessment, pp. 34-35). Predictability and consistency of the case law are what CETA’s ICS is intended to achieve, albeit within the specific agreement only (Impact Assessment, pp. 34, 39). As the ICS’s Appellate tribunal would promote the consistency of the case law, a sort of precedent system would be created (Impact Assessment, p. 39). The essence of the problem is the question of what to do if an error of EU law interpretation, even if taken as a “fact,” is made by the ICS tribunal of first instance? Firstly, the EU could challenge the award before the Appellate tribunal on the grounds of “manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law” (CETA, Article 8.28(2b)). Notably, only manifest errors could form the grounds to challenge the award, while minor misinterpretations of the ICS tribunal of first instance would not count. Yet if the misinterpretation of EU law is affirmed by the Appellate tribunal all the procedural measures would be exhausted, leaving the EU with no choice but to comply with the award. Importantly, award of the Appellate tribunal may form a precedent for future cases of the ICS where EU law could be misinterpreted again. Notably, investment tribunals tend to increasingly rely on previous decisions to buttress their legal reasoning, and thereby create standards and expectations for the application of often vague provisions (Titi, 2013, p. 831). The manner in which the applicable law is applied in a case is always tied to the facts of the situation. Even if EU law is appreciated as a “matter of fact” in the ICS case, a certain model of CETA’s application in respect to specific legislation of the EU would be formed. If a case concerning the same EU legislation is brought before the ICS afterwards, it is reasonable to assume that the ICS tribunals would apply CETA, in respect to analogous facts, in the same manner. These issues could be resolved if the CJEU was given an opportunity to determine the meaning of EU law in the ICS proceedings (see Chapter 3).

1.4. Use of “prevailing interpretation”

One can infer the Commission’s assumption that the ICS tribunals could avoid interpreting EU law if already existing interpretations were available for its use. Under CETA, if the tribunals are required to ascertain as a “matter of fact” the meaning of a domestic law provision of one of the parties, it shall follow the “prevailing interpretation” of that provision made by the courts or authorities of that party (CETA, Article 8.31(2)). There are two main issues concerning the use of prevailing interpretation in the ICS proceedings. Firstly, the very existence of the “prevailing interpretation” of EU law is doubtful. Secondly, the process of its proof may place the parties in unequal positions.

To begin with, the existence of “prevailing interpretation” is questionable. First, it is unclear what interpretations should be considered prevailing. Would it be those provided by the Court of Justice only, or would the rulings of the General Court count as well? Secondly, the institution authorized to declare interpretations prevalent is also uncertain. Since it is the CJEU that is entitled to interpret an unclear EU law, could an indication of prevalent interpretation fall under the powers of the CJEU? If the Commission is entitled to point to case law and declare it prevalent, it is questionable if it possesses such power under the Treaties. Moreover, according to what criteria would the Commission recognize the case law as “prevailing”? This might be a challenging task, since the CJEU is known for dynamic interpretation of law (Arai-Takahashi, 2002, p. 199). As the Court notes: “Every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied” (*CILFIT*, para. 20). One may ask: what if no interpretation was provided by the CJEU yet, or if two or more conflicting interpretations exist?

The other problem concerns the process of proof of the “prevailing interpretation,” in case of adversarial proceedings. Even if the Commission is not entitled to indicate the “prevailing interpretation,” parties of the case would be placed in an unequal position. Evidently, the institution representing the EU in the ICS proceedings

(most likely, the Commission) would be in a better position to indicate the relevant rules of the EU. Due to the Commission's role as the guardian of the Treaties, its submissions may be regarded as more authoritative than the Canadian investors' (European Commission, 2019). Or at least, investors would have to place significant resources to prove that certain case law comprises "prevailing interpretation", while the Commission, constantly representing the EU in various judicial proceedings, would need significantly less preparations and resources. Furthermore, even if the tribunal is presented with the relevant case law, it may not take it into account, or may misunderstand it. The tribunal may not even be presented with all the relevant case law by the parties, but with the one that proves the parties' arguments best. Thus, clarification of the precise procedures on how the "prevailing interpretation" would be indicated is necessary.

Some guidelines were already provided by the CJEU. As was indicated in *Opinion 2/13*, to manage the CJEU's relationship with an international court it must be ensured that the competent institution of the EU is able to assess whether the CJEU has already given a ruling on the EU law question relevant to that case. If the Court did not have a say yet, prior involvement procedure has to be initiated so that the CJEU could provide such a ruling (*Opinion 2/13*, para. 241). However, under the current ICS model, neither of these conditions are fulfilled as the CJEU cannot intervene or participate in the ICS tribunal proceedings in any capacity.

Notably, existence of a dispute between parties over the "prevailing interpretation" indicates automatically that the question of EU law interpretation is present in a case and requires clarification. Although CETA's ICS aims to ensure uniform interpretation by using an already existing CJEU's case law, it disregards the CJEU's considerations on how the relevant EU law interpretation should be provided to a tribunal established under international agreement.

1.5. Ensuring EU law legality review is not performed by the ICS

CETA anticipates that the ICS tribunals shall not have jurisdiction to determine the legality of EU law measures alleged to constitute a breach of CETA. The CJEU long ago reserved an exclusive right to declare EU institutions' acts invalid (*Foto-Frost*, paras. 19-20). As a result, national courts cannot rule EU law measures invalid, but are entitled to apply EU law by confirming its validity (*Foto-Frost*, paras. 14). By way of analogy, CETA provides that ICS tribunals would not be entitled to assess the legality of EU law measures (CETA, Article 8.31(2)). The CJEU, without engaging in a detailed analysis, has recognised this circumstance as another safeguard of the autonomy and essential characteristics, rendering the ICS mechanism compatible with EU law (*Opinion 1/17*, para 121).

However, in its assessment of whether the ICS mechanism would not have an effect on the operation of the EU institutions in accordance with the EU constitutional framework, the Court introduced a new feature into its autonomy doctrine. It stated that if the EU "were to enter into an international agreement capable of having the consequence that the Union... has to amend or withdraw legislation because of an assessment made by a tribunal standing outside the EU judicial system of the level of protection of a public interest established, in accordance with the EU constitutional framework, by the EU institutions, it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework" (*Opinion 1/17*, para. 150). In other words, if EU institutions will be forced to revoke their acts as a result of the ICS tribunals' awards, it should be considered an adverse effect on the EU legal order. Thus, despite the fact that the ICS tribunals will never directly declare an act of the EU unlawful, the CJEU considered that the ICS could still have adverse effects on the legality of these acts within the EU. Therefore, it may be asked whether it was possible to use the ICS award favouring the investor's position to challenge the legality of respective EU measures under preliminary ruling procedure or action for annulment.

This question is significant in two regards. Firstly, if the ICS tribunals conclude that EU law infringed CETA, it may serve as an argument that the EU measure in question is actually unlawful. The CJEU itself has consistently declared that international agreements concluded by the EU are binding upon its institutions, and prevail over the

acts of the EU (*Air Transport Association of America*, para. 50). Therefore, even one award in favour of the investor could spark questions regarding EU law legality. Secondly, if the respective rules of the EU are not annulled after the first ICS award in favour of the investor, it would make sense for other investors that are in a comparable situation to initiate ICS proceedings and pursue compensation as well. Not to mention that the ICS proceedings under the frameworks of one trade and investment agreement (like CETA) could encourage investors covered under other agreements (like EU agreements with Singapore or Vietnam) to initiate proceedings on the same grounds.⁸ Thus, although the award would only be binding on the parties of the dispute, it could be a strong impetus for numerous further proceedings against the EU, as it is likely that the ICS tribunals would follow the previous case law.⁹ Having numerous ICS proceedings and awards declaring respective rules of the EU to infringe CETA could factually impair the effectiveness of those rules.

Thus, at first glance, there is no reason to believe that EU secondary law could not be challenged as a consequence of the ICS awards. However, the award itself could not be used as grounds for annulment. It would have to be CETA. CETA, being an international agreement concluded by the EU, also forms an integral part of EU law (*Haegeman*, para. 5). As the CJEU recognised, the validity of an act of secondary law may be affected by the fact that it is incompatible with the rules of international law, provided that they comply with three conditions (*Air Transport Association of America*, para. 51). First, the EU must be bound by those rules; secondly, the nature and the broad logic of an international agreement must not preclude the examination of the validity of an act of EU law in the light of that agreement; and thirdly, the provisions of an agreement which are relied upon for the purpose of examining the validity of the EU's act appear, as regards their content, to be unconditional and sufficiently precise (*Air Transport Association of America*, paras. 52-54). The Court interpreted CETA's Article 30(1)¹⁰ as meaning that Canadian investors are entitled to a specific legal remedy against the EU measures, unlike the enterprises and natural persons of the Member States which are not foreign investors in the EU and will not have access to that specific legal remedy - and will not be able to directly invoke CETA's provisions before the courts of the Member States or the EU (*Opinion 1/17*, para. 181). Thus, the Court ruled out that CETA could be used to challenge EU secondary laws.

The CJEU also ruled out the possibility that the EU institutions could be forced to withdraw legislation because of the assessments made by the ICS tribunals. It concluded that the ICS will have no effect on the operation of the EU institutions in accordance with the EU constitutional framework,¹¹ since the ICS tribunals have "no jurisdiction to declare incompatible with CETA the level of protection of a public interest established by the EU measures" (*Opinion 1/17*, para. 153). Yet, despite these assurances of CETA, it is clear that any successful claim by an investor before the ICS tribunals will inevitably invite other investors under various agreements to consider analogous actions against the EU. Therefore, the EU institutions may have to weigh what is more reasonable – to pay the multiple investors,¹² or to better revoke the legislation and avoid at least some of the payments.

Thus, the CJEU has clearly stated that the nature and the broad logic of CETA precludes it from being invoked within the EU judicial system. In doing so, the Court has potentially undermined the principle of equal treatment between purely-EU enterprises and foreign investors. The following Section analyses whether foreign investors

⁸ *Author's note*: It must be noted that the new generation trade and investment agreements tend to be very similar in respect to their contents.

⁹ *Author's note*: It is one of the goals of the ICS to make the investment cases more predictable and consistent. It should be eventually achieved through an application of the precedents formulated by the ICS tribunals.

¹⁰ "Nothing in this Agreement shall be construed as... permitting this Agreement to be directly invoked in the domestic legal systems of the Parties." – (CETA, Article 30(1)).

¹¹ "Article 28.3.2 of that agreement states that the provisions of Section C cannot be interpreted in such a way as to prevent a Party from adopting and applying measures necessary to protect public security or public morals or to maintain public order or to protect human, animal or plant life or health, subject only to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade between the Parties." – (*Opinion 1/17*, para. 152).

¹² "...the Union will have to make payment of that sum when it is ordered to do so..." – (*Opinion 1/17*, para. 145).

and purely-EU investors are in a comparable situation, since the answer may have severe implications for the uniform interpretation and application of EU law.

2. Involvement of the CJEU in ICS: a solution to ensure compatibility

As shown above, inasmuch as ICS tribunals will in fact have to engage in EU law interpretation, it will cause major concerns for the protection of the autonomy of the EU legal order. The author believes that inclusion of the CJEU in the ICS mechanism would eliminate most of the concerns indicated in Chapter 2, as the CJEU would be enabled to provide legitimate interpretation of EU law, to resolve any doubts concerning the legality of secondary law, and to eliminate the need for the ICS tribunals to engage in the same questions themselves. The CJEU's participation would eliminate the probability of error in the interpretation of EU law, particularly, in cases where contentious questions of EU law arise.

Yet, the inclusion of the CJEU in the ICS mechanism would also determine the loss of ICS features that make ISDS attractive for investors in the first place. ISDS is known for depoliticization of investment disputes, making them independent from national interference and providing final and enforceable decisions in a flexible process where disputing parties have considerable control (Sahat, 2016, p. 41). As the CJEU's participation would lengthen the proceedings and deprive the ICS tribunals of a degree of independence from domestic legal systems, ICS would become less attractive compared to traditional ISDS tribunals. Thus, the CJEU's participation may cause a chilling effect on investment in the EU, as investors would not trust the independence of the proceedings and question the probability of success before the ICS. On the other hand, the CJEU would only be given a part of the legal issue to resolve. If the CJEU interprets EU law in a way compliant with CETA, the investor would get satisfaction. If not, the ICS tribunals could still find the EU to have infringed CETA.

Setting aside these concerns, there are two main ways to include the CJEU within the ICS: first through the preliminary ruling procedure; and secondly through a special prior involvement mechanism. Each of these possibilities are presented in detail below.

2.1. Preliminary ruling procedure – amending the concept of the “court or tribunal of the Member State”

While the national courts of the Member States are entitled, or sometimes required, to refer to the CJEU for preliminary rulings, referrals from arbitration panels, including ISDS, have traditionally been held as inadmissible (Basedow, 2015, p. 367). Yet, the involvement of the CJEU in the ICS through the preliminary ruling procedure would be the simplest way, as the procedure already exists and nothing new needs to be invented. Two modifications would be required. First, for the CJEU to reconsider its previous case law and amend the concept of the “court or tribunal of the Member State.” Secondly, for the ICS tribunals to accept the preliminary ruling procedure, and be willing to refer to the CJEU when questions of EU law interpretation arise.

As a first step, the concept of “court or tribunal of the Member State” would have to be broadened significantly. The Court indicated in *Dorsch Consult* that a number of factors must be considered to recognize the referring institution as a court or tribunal, i.e. whether it is established by law, it is permanent, its jurisdiction is compulsory, its procedure is *inter-partes*, it applies rules of law, and it is independent (*Dorsch Consult*, para. 23). *Nordsee* elaborated that certain similarities between the activities of arbitration and ordinary court (like in proceedings being provided within the framework of law, the arbitrator must decide according to law and his award is final and enforceable) were not sufficient to consider the arbitral tribunal as a “court or tribunal of a Member State” (*Nordsee*, para. 10). As the parties were under no obligation, whether in law or in fact, to refer their disputes to arbitration, and German public authorities were not involved in the decision to opt for arbitration or called upon to intervene automatically in the proceedings before the arbitrator, the link between the arbitration and the organization of legal remedies of the Member State in question was not sufficiently close (*Nordsee*, paras. 12–13). In other words, *Nordsee* underlined that not only the arbitral tribunal must have court-like characteristics, but to possess a strong link with a country as well. The ICS complies with most of the conditions indicated in the CJEU's

case law. It is indeed established by international law as an independent institution endowed with exclusive compulsory jurisdiction to hear investment disputes *inter-partes* while applying CETA (CETA, Articles 8.23, 8.27, 8.28.). However, it does not hold the link with a system of a particular Member State, as was also examined by the CJEU in *Christan Dior* and *Achmea (Parfums Christian Dior)*, paras. 21-26; *Achmea*, paras. 47-49). To make ICS referrals for preliminary rulings possible, the CJEU would have to reconsider if this link with a particular Member State is still essential, or make an exception for the ICS tribunals. As ICS is created by both the EU and the Member States together it could, in a way, be considered as sufficiently linked with the national systems of the Member States.

As a second step, ICS tribunals should be willing to refer to the CJEU for a preliminary ruling, when facing the question of EU law interpretation. The tribunals surely cannot be forced to refer to the CJEU, but should do it as an act of a good will and comity. In turn, considering the obligation of the courts or tribunals of the last instance to refer for preliminary ruling under Article 267 TFEU, the Appellate tribunal should also be obliged to refer. As elaborated in *Eco Swiss*, when the misinterpretation or misapplication of EU law performed by an arbitral tribunal concerned “fundamental provisions” of EU law, enforcement of such an award might be refused or it may be annulled by the national court as being contrary to the public policy of the EU (Basedow, 2015, p. 373; *Eco Swiss*, paras. 36-39). Ensuring that the award is enforced successfully and not annulled could be a major stimulus for the ICS tribunals to consider such a reference. Indeed, a national court should not doubt the EU law interpretation contained in the award if the preliminary ruling is received in the case.

It is the author’s belief that the introduction of preliminary ruling procedure in the work of ICS is the option that is easiest to implement, as nothing substantially new would have to be devised. Yet, to make it work it would take a lot of will from both the CJEU and ICS arbitrators.

2.2. Prior involvement of the CJEU under special mechanism

Creation of a special prior involvement mechanism of the CJEU in the ICS proceedings is another possibility to include the CJEU. CETA would have to foresee the legal basis for such mechanism expressed as the ICS tribunals’ obligation to refer to the CJEU if it not yet had an opportunity to provide ruling on EU law relevant to the case. Special mechanism under CETA could help to circumvent the concept of a “court or tribunal of the Member State”: ICS would refer to the CJEU on the basis of CETA and not under Article 267 TFEU. Prior involvement would thus be a special mechanism similar to preliminary ruling in its purpose, but of different origins and legal basis.

Importantly, there was already an attempt to create a special prior involvement mechanism. The EU’s Accession Agreement to ECHR provided a version of prior involvement procedure (*European Council, 2013*). According to the Court, this mechanism was necessary to ensure the proper functioning of the EU’s judicial system, and that the competencies of the EU and the powers of its institutions are preserved (*Opinion 2/13*, paras. 236–237). The CJEU drew the essential conditions for such an involvement. First, all the relevant information concerning the course of the case and case-relevant EU law provisions must be provided to the EU. Secondly, the EU’s institutions must be given a chance to assess whether there is a CJEU’s judgment providing an interpretation of relevant rules of the EU. Third, if it is found that no relevant case law exist, prior involvement procedure must be arranged so that interpretation of the relevant provisions is provided to the tribunal by the CJEU (*Opinion 2/13*, paras. 241–243). However, the CJEU rejected the mechanism because it had limited its interpretive jurisdiction with primary law only, by excluding the interpretation of secondary law. The Court was thus deprived of the possibility to provide definitive interpretation of secondary law (*Opinion 2/13*, paras. 245–7). Evidently, that was a condition that the Court, possessing an exclusive competence to interpret the entire subject-matter of EU law, could not put up with. Although the mechanism envisaged in the Accession Agreement was struck down, the CJEU provided a principle assent to the idea and valuable guidelines on rendering the mechanism compatible with the Treaties.

Moreover, the CJEU verified prior involvement procedure as a legitimate solution that could serve to manage overlapping jurisdictions of the CJEU and international courts. CETA’s ICS foresees no role for the CJEU, or for

the EU's institutions in the resolution of investment disputes. Notably, the idea of the CJEU's prior involvement in the ICS mechanism is not a novelty: recommendations on prior involvement were provided in the study of ISDS provisions in international investment agreements carried out by the Directorate-General for External Policies of the EU (Pernice, 2014, p. 162). According to Pernice, "[i]n cases where local remedies have not been exhausted – and the ECJ has not been given an opportunity to rule on relevant questions of EU law – it would be of great help... to provide for a prior involvement of the ECJ as a part of the ISDS" (Pernice, 2014, p. 162). Clearly, implementing prior involvement of the CJEU in the ICS would require setting up one of the institutions of the EU to continuously provide support to the ICS tribunals, so that information on the relevant CJEU's case law is provided to the tribunals. If no relevant or applicable case law exist, ICS tribunals should refer to the CJEU and obtain its position.

There are several problematic details in this proposal. First, it is questionable if the Commission, or any other institution of the EU, possesses a power under Treaties to indicate which case law is relevant to the specific case and which is not. Moreover, should the socio-economic situation or the EU's legislation change, certain case law might become irrelevant, and the only institution able to adapt case law to the changed circumstances is the CJEU. Secondly, it is unclear what status the CJEU's ruling will have on the ICS tribunals. If the CJEU's ruling is not binding the tribunals, the CJEU could find it incompatible with the autonomy of EU law (*Opinion 2/13*, para. 185). Despite these uncertainties, prior involvement procedure seems a legitimate solution as it was described as such by the CJEU itself in *Opinion 2/13*.

Conclusions

1. The analysis has shown that CETA's ICS mechanism could result in adverse effects on uniform interpretation of EU law and thus negatively affect the autonomy of the EU legal order:
 - 1.1. First, the theoretical distinction of law as a "matter of fact" from law as an "applicable law" is artificial, for even if law is considered as a "matter of fact" it still requires interpretation. Thus, it would not ensure that EU law is not interpreted by the ICS tribunals.
 - 1.2. Secondly, since the ICS tribunal of first instance and Appellate tribunal are not in practice prevented from interpreting EU law, the probability of an error in EU law interpretation made by the ICS tribunal of first instance, or Appellate tribunal, is high. As an integral part of the binding award, EU law interpretations conducted by the ICS tribunals could form a precedent and may be an incentive for future proceedings. If the ICS tribunals err in understanding EU law once, it could lead to similar errors in upcoming cases.
 - 1.3. Thirdly, the use of "prevailing interpretation," foreseen in CETA as a measure for the ICS to avoid engagement in questions of EU law, does not ensure the CJEU's exclusive jurisdiction. On the contrary, if "prevailing interpretation" is given for the Parties to prove, there would be no guarantee that the most relevant case law is presented to the ICS tribunals. Moreover, the submissions of the Commission, as the guardian of the Treaties, could be considered more authoritative than the investor's, placing the parties on unequal terms.
2. The CJEU's involvement in the ICS proceedings is the solution to ensuring the CJEU's exclusive right to interpret EU law and to resolve the incompatibility of the ICS with the autonomy. Inclusion of the CJEU would allow for the ICS tribunal of first instance, or Appellate tribunal, to seek assistance from the CJEU once it faces contentious questions of EU law. As the probability of an error is most likely where complex questions of EU law arise, the CJEU's participation would reduce the likelihood of misinterpretation to a minimum. There are two ways in which the CJEU could be involved. The application of the preliminary ruling procedure should first be considered, as it would not require the creation of a new mechanism. The creation of a special prior involvement mechanism is also a possibility, but would require elaborating the CJEU's role in the ICS proceedings in respective provisions of respective trade agreements.
3. If compared to the previous case law of the CJEU, the *Opinion 1/17* is very different. While previously the mere possibility of an "external" tribunal engaging in interpretation of EU law was considered enough by the CJEU to rule that tribunal incompatible with the autonomy of EU law, in the *Opinion 1/17* even the possibility of direct interpretations of EU law (by examining the effect of EU law measures) provided by the ICS tribunals were considered to be compatible. This aspect starkly contrasts with the previous positions of the CJEU which could be an indication that the CJEU's attitude towards interpretations of EU law provided by international tribunals is

becoming more “forgiving.” The CJEU seems to have come to consider a certain degree of risk of EU law misinterpretation to be compatible with the autonomy of EU law.

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