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TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order

FIDE XXVIIth Congress, Budapest, 18-21 May 2016[1]

Inge Govaere[2]

I. Introduction

As is apparent from the title "TTIP and dispute settlement: potential consequences for the autonomous EU legal order", this paper takes a very targeted focus. The first part of the title was assigned by the organisers of the XXVIIth FIDE congress: "TTIP and dispute settlement". Albeit very interesting and actual, it quickly became clear that such a topic raises a double conceptual problem. How could one possibly deal with such a broad topic in a talk of merely 20 minutes? And especially how to bring novel insights in such a short time span? As Marise Cremona has already mentioned,[3] TTIP is probably the most widely debated and commented development in EU affairs of the last years. It therefore seemed indispensable to drastically narrow down the topic. The focus of this paper will thus firmly lie on the overall topic of the closing session: 'its consequences for the EU'. This implies that the potential impact of TTIP dispute settlement on the USA or the importance thereof for investors or for attracting foreign investment is not as such discussed. The topic is further narrowed down to consider specifically the potential consequences of TTIP dispute settlement provisions for the autonomous EU legal order. The underlying idea is that, as the EU is short of being a state, international dispute settlement may raise crucial legal questions which are specific to the EU legal order and which need to be acknowledged as such.

From the outset a triple caveat is in order. First of all, the paper will raise more questions than providing clear and definite answers. Secondly, it is maintained that the most controversial issues are not necessarily the sole or even the most crucial issues in terms of safeguarding the autonomous EU legal order. Thirdly, as the focus is the effect of TTIP dispute settlement on the autonomous EU legal order the paper will provide an exclusively legal assessment. The more political and economic considerations will be addressed separately in the next paper by János Martonyi.[4]

Although the focus of the talk is put on dispute settlement in TTIP, there seems to be no apparent reason why the questions and findings in relation to TTIP would not be equally valid for other post-Lisbon trade and investment agreements containing similar dispute settlement provisions, such as the Comprehensive Economic and Trade Agreement with Canada (CETA)[5] and the Free Trade Agreement with Singapore (Singapore Agreement).[6]

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[1] The final version of this paper will be published in the XXVIIth FIDE Congress Proceedings.

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[3] See the contribution by Marise Cremona.

[4] See the contribution by János Martonyi.

[5] For the text as "made public exclusively for information purposes", see http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf, as last consulted on 31/05/2016.

[6] For the authentic text as of May 2015, see http://trade.ec.europa.eu/doclib/press/index.cfm?id=961, as last consulted on 31/05/2016.

II. Dispute settlement in TTIP

The proposed system of dispute settlement in the current TTIP negotiations is essentially 3-pronged. It contains "G*overnment-to-Government Dispute Settlement" (GGDS),* "*Investor-to-State Dispute Settlement" (ISDS)*, as well as an express disempowerment of the domestic courts. This simple finding raises the preliminary question of whether a proper and comprehensive assessment of the dispute settlement mechanism provided for in TTIP should not necessarily take into account the dispute settlement system in its entirety. All too often it seems that the discussions are focussing on just one of the 3 pillars, in particular ISDS, as though it were an alone standing or even sole method of dispute settlement provided for in the Post-Lisbon EU trade and investment Agreements. Is it not possible and perhaps even indicated to discern and acknowledge a correlation between those 3 methods of dispute settlement?

The first mechanism to be introduced in TTIP is the more traditional state-to-state dispute settlement, also called the "G*overnment-to-Government Dispute Settlement" (GGDS).* This form of dispute settlement has not received much attention in the TTIP debate most likely because it is hardly controversial. State-to-state dispute settlement is commonly accepted in international agreements even though it can be quite elaborate, suffice it to think of the WTO dispute settlement mechanism. The EU proposals on the GGDS mechanism in TTIP to a large extent build further on the WTO method of dispute settlement.[7] But they also contain important novel elements as compared to similar mechanism in other international agreements, most notably in terms of transparency and impartiality. For instance, the EU proposal inserts public hearings and advance nominations of arbitrators.[8]

It is important to underline that such a revisited TTIP GGDS mechanism is meant to have a horizontal scope. In principle it covers the whole of TTIP rights and obligations including national treatment and investment protection. It is thus possible for GGDS and ISDS to apply in parallel. As the name suggests, GGDS is initiated by the EU or a state. But it may be triggered indirectly also by individuals, be it under certain conditions. Indirect protection for investors is currently offered under the EU Trade Barriers Regulation.[9] Under the International Trade Enforcement Regulation[10] the Commission may also adopt common commercial policy measures to restrict the access to the EU market for goods and services supplied by a third country until compliance with international trade rules is guaranteed. Especially in view of the controversial nature and difficulties associated with ISDS, it is rather surprising to find that the question of whether the full potential of such a system of indirect protection

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[7] See http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf, as last consulted on 31/05/2016. It is expressly stated: "*This TEXTUAL PROPOSAL is the European Union's initial proposal for legal text on "Dispute Settlement (Government to Government)" in TTIP. It was tabled for discussion with the US in the negotiating round of 10-14 March 2014 and made public on 7 January 2015. The actual text in the final agreement will be a result of negotiations between the EU and US*."

[8] Idem, at Article 22 and Annex I, "Rules of Procedure". For a quick overview of the proposed novelties, see also the factsheet on Government-Government Dispute Settlement (GGDS) in TTIP at: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153021.8%20Dispute%20settlement.pdf, as last consulted on 31/05/2016.

[9] Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (codification), OJ L 272, 16.10.2015, p. 1–13.

[10] Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 189, 27.6.2014, p. 50).

for investors under GGDS has been sufficiently explored did not receive much attention so far.

A second and rather novel mechanism of dispute settlement, at least for the EU, is more limited in scope as it is to apply solely in relation to investment disputes. The so-called "*Investor-to-State Dispute Settlement" (ISDS)* is probably the most controversial aspect of the current TTIP negotiations. Besides raising many political and economic issues, which have been widely discussed in the media and elsewhere,[11] it also raises various questions in terms of compatibility of ISDS with the autonomous EU legal order. Some of the key issues in relation to the latter will be raised further on in this paper.

There are basically 2 main models of ISDS dispute settlement that could be opted for under TTIP. A first option would be to fall back on the existing model of 'ISDS Arbitration'. This formula is currently used worldwide, not only by the USA in its recent agreements such as Trans-Pacific Partnership Agreement (TTP)[12] but also by the EU and its Member States. ISDS Arbitration is readily inserted in intra-Member States bilateral investment treaties (BITs) and since the entry into force of the Lisbon Treaty also in investment related agreements concluded by the EU, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA)[13] and EU-Singapore Free Trade Agreement.[14] The other and very novel option, which is tabled for the first time by the EU in the TTIP negotiations, is to replace the system of ISDS Arbitration by a public 'Investment Court'.[15] The idea is that in time this might lead to the setting up of a worldwide 'Permanent International Investment Court'.[16] It is still uncertain which of the two models will finally be withheld in TTIP, in particular as the USA does not seem to be convinced of the merits of an investment court.[17] The question is whether this outcome matters all that much in terms of compatibility with the autonomous EU legal order. Could it be that it is the very nature of ISDS, rather

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[11] See for instance "What is TTIP and why should we be angry about it?", The Guardian 03/08/2015; Jarman, H., "Public health and the Transatlantic trade and investment partnership", European Journal of Public Health, Vol. 24, No. 2, 181; or the following statement by the German Magistrates Association rejecting the Commission's proposals: "Opinion on the establishment of an investment tribunal in TTIP - the proposal from the European Commission on 16.09.2015 and 11.12.2015", DRB-Stellungnahme Nr. 04/16, http://ttip2016.eu/files/content/docs/Full%20documents/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf, as last consulted on 31/05/2016.

[12] Trans- Pacific Partnership Agreement between the United States, Australia, Canada, Japan, Malaysia, Mexico, Peru, Vietnam, Chile, Brunei, Singapore, New Zealand, for the full text see https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text, as last consulted on 31/05/2016.

[13] For the text as "made public exclusively for information purposes", see http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf, as last consulted on 31/05/2016.

[14] For the authentic text as of May 2015, see http://trade.ec.europa.eu/doclib/press/index.cfm?id=961, as last consulted on 31/05/2016.

[15] See http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf, as last consulted on 31/05/2016. It is expressly stated: "*This document is the European Union's proposal for Investment Protection and Resolution of Investment Disputes. It was tabled for discussion with the United States and made public on 12 November 2015. The actual text in the final agreement will be a result of negotiations between the EU and US*". See especially Section 3 - Resolution of Investment Disputes and Investment Court System and in particular Sub-Section 4: Investment Court System. See also Commissioner Cecilia Malmström, "Proposing an Investment Court System", Blog post 16 September 2015, https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en, as last consulted on 31/05/2016.

[16] European Commission, Press release IP/15/5651 , "Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations", Brussels, 16 September 2015, http://europa.eu/rapid/press-release_IP-15-5651_en.htm, as last consulted on 31/05/2016.

[17] See Reuters, 29 October 2015, "U.S. wary of EU proposal for investment court in trade pact", http://www.reuters.com/article/us-trade-ttip-idUSKCN0SN2LH20151029, as last consulted on 31/05/2016.

than the form chosen for ISDS, which might raise concerns specifically for the EU? This issue will be addressed in the next section.

The third mechanism to form an integral part of the dispute settlement system of TTIP is constituted by a total disempowerment of the domestic courts. As the other agreements containing ISDS mentioned above, also TTIP is to contain an express mention that it will not have direct effect.[18] It will therefore not be possible for individuals, including investors, to directly invoke provisions of TTIP before the Court of Justice of the European Union (CJEU) or the national courts of the Member States. Conversely, neither may TTIP be invoked before the USA courts. A choice is thus firmly made in favour of the specific system of dispute settlement as provided for in the agreement, the above-mentioned GGDS and ISDS, to the detriment of the regular public court systems.

It should be recalled that the CJEU has consistently acknowledged that it is indeed in conformity with EU law for the Parties to stipulate in the body of the agreement what effect should be given thereto.[19] It is only in the absence of such an express provision in the agreement itself that it is incumbent on the CJEU to decide on the direct effect, or not, of such agreements in the EU legal order. The novel question appears to be whether and to what extent this still holds true when, in so-doing, jurisdiction of the CJEU is not just plainly set aside but is in fact transferred to dispute settlement set up under the agreement, as appears to be the case with ISDS. In other words, does the combined reading of the three-pronged mechanism of TTIP dispute settlement perhaps alter the given?

III. (Form of) international dispute settlement and the autonomy of the EU legal order

The fact of having dispute settlement provisions in international agreements (IA) is neither novel nor problematic in itself. The CJEU consistently acknowledges that, as the EU has international legal personality, it should be able to participate in setting up international dispute mechanisms. It also accepts as a matter of principle that such decisions will be binding on the EU and its institutions, including the CJEU itself.[20] This is, however, in practice conditional upon safeguarding the 'autonomy' of the specific EU legal order.[21] One can best illustrate the latter concept by picturing the effect of the *Van Gend & Loos* judgment[22] as sliding an empty balloon in between public international law and constitutional law.[23] At the time this might have caused some friction but it did not yet raise any major concerns. Yet since then EU integration has advanced considerably both in terms of substance and participating countries, thus considerably expanding the EU legal framework also. With every new

[18] See for instance Article 30.6 of CETA, o.c..

[19] Case 104/81, Kupferburg, ECLI:EU:C:1982:362, at pt. 17; Case C-149/96, Portugal v. Council (effect of WTO), ECLI:EU:C:1999:574, at pt. 34.

[20] This was also restated in Opinion 2/13, Accession to the ECHR, ECLI:EU:C:2014:2454, at pt. 182: "*The Court of Justice has admittedly already stated in that regard that an 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; that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions (see Opinions 1/91, EU:C:1991:490, paragraphs 40 and 70, and 1/09, EU:C:2011:123, paragraph 74).*"

[21] See also Opinion 2/13, o.c., para 183 ff.

[22] Case 26/62, Van Gend & Loos, ECLI:EU:C:1963:1.

[23] For a detailed analysis of the interaction between the autonomous EU legal order and public international law on the basis of a more elaborate balloon model, see GOVAERE, I., "De Europese Rechtsorde na Lissabon: hoe eigen, hoe autonoom ?", Thorbecke Lezingen Leiden-Gent, Kluwer, 2012.

EU development, more air is blown into the balloon, thereby gradually squeezing out more and more Member States' constitutional law as well as public international law. Such a process naturally causes increased friction and possibly even resistance against a further expansion of the autonomous EU legal order, in particular into fields traditionally governed by public international law.[24] At the same time, as any balloon gets more fragile when inflated, the necessity to shield the intra-balloon or intra-EU relations from 'external' puncturing' and forum shopping in terms of dispute settlement also becomes all the stronger. This explains why the crucial debate on the EU law compatibility of the dispute settlement provisions in TTIP, and more generally of ISDS, has arisen only now. The underlying trigger is undoubtedly the express inclusion of investments in Article 207 TFEU by the Lisbon Treaty, thereby conferring exclusive common commercial policy competence in the matter to the EU and, in so-doing, for the first time bringing it firmly within the balloon of the autonomous EU legal order.

In a nutshell, the conditions to respect the autonomy of the EU legal order, with as a common feature the need to shield the internal application and development of EU law from the effect of external dispute settlement, are essentially four-fold. First of all, the EU should not be bound, in the interpretation and application of primary or secondary internal/unilateral EU law, by the interpretation of provisions of an international agreement given under external dispute settlement.[25] Secondly, the agreement must make it possible to anticipate and prevent any undermining of the objectives enshrined in Art. 19 TEU ('rule of law'). This implies not only guaranteeing the CJEU's exclusive jurisdiction for reviewing the legality of EU acts but, very importantly, also for ensuring the uniform interpretation of EU law.[26] Thirdly, the essential character of the powers of the EU and its institutions "as conceived in the Treaty should remain unaltered".[27] This means for instance the respect for the nature of the CJEU as a court whose decisions are binding.[28] But also that the agreement or external dispute settlement should not affect the allocation of powers between the EU and the Member States.[29] Lastly, dispute settlement mechanisms included in international agreements may (only) be triggered to settle disputes between on the one hand the EU and/or its Member States and on the other hand third countries. Turning to external dispute settlement in such cases is indicated and often necessary as the CJEU, as the supreme court of the EU, has no international jurisdiction. Conversely, the CJEU has made plain in the *Mox* case[30] that it conflicts with the exclusive jurisdiction conferred on the CJEU by Article 344 TFEU to invoke such external dispute settlement mechanisms in order to solve disputes between Member States or between the EU and its Member States, at least for matters falling within EU competence.[31]

Most international agreements contain dispute settlement mechanisms which do not pose major problems in terms of compliance with EU law, such as the WTO or the ECAA. Yet there are rare albeit important cases where the CJEU found that the dispute settlement mechanisms in an envisaged EU agreement were in conflict with

[24] But also increasingly tensions with constitutional law of the Member States. The latter is illustrated by the discussions held in the other sessions of the FIDE congress, such as the merits or not of an 'ultra vires' reasoning by Member States constitutional courts.
[25] Opinion 1/00, European Common Aviation Area (ECAA), ECLI:EU:C:2002:231, at pts. 11 & 13.
[26] Opinion 1/00, o.c., at pt. 11.
[27] Opinion 1/00, o.c., at pt. 12.
[28] Opinion 1/00, o.c., at pt. 25.
[29] Opinion 1/00, o.c., at pt. 15.
[30] C-459/03, Commission v Ireland (Mox), ECLI:EU:C:2006:345, at pt. 123.
[31] For a more detailed analysis, see Govaere, I., "Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order", in Hillion & Koutrakos (eds.), Mixed Agreements revisited: the EU and its Member States in the World, Hart Publishing, Oxford, 2010, pp. 187-207.

the EU autonomous legal order and in need of revision. It concerns the Draft Agreement establishing a European laying-up fund for inland waterway vessels (Opinion 1/76),[32] the first draft EEA agreement (Opinion 1/91), the draft agreement setting up the Community Patent Court (Opinion 1/09) and lately the draft agreement on the EU accession to the ECHR (Opinion 2/13). The interesting question is what the common features were of those 4 'special' cases? First of all, it is striking that all 4 cases concerned the setting up of dispute settlement in the form of a tribunal or court system, not arbitration. Secondly, all 4 cases included dispute settlement provisions to the benefit of individuals rather than providing merely for the traditional state-to-state dispute settlement procedures.
This double finding raises interesting questions for assessing the TTIP dispute settlement mechanisms, in particular ISDS, upon its compatibility with the autonomous EU Legal order. What appears to be most problematic, the 'fact' that investor-to-state dispute settlement is introduced? Or is it rather the 'form' chosen for ISDS? The EU proposal to install an Investment Court in TTIP clearly has major advantages in terms of transparency, independence and accountability and may succeed in taking the edge off a major controversy. But it is clear from the abovementioned 4 negative advisory opinions of the CJEU that opting for a public Court system instead of private arbitration is not, in itself, a guarantee of compatibility with the autonomous EU legal order.

IV. The rationale of ISDS, rights and remedies

An interesting question is to know why ISDS is to be inserted in TTIP at all. Both the EU and the USA already have performant judicial systems. What could then possibly be the reasons for wanting to provide access to international dispute settlement for individuals in TTIP? An answer is provided in the following statement made by EU Trade Spokesman John Clancy on 20 December 2013:
"The reason ISDS is needed in TTIP is that the US system does not allow companies to use international agreements like TTIP as a legal basis in national courts. So European companies – and especially SMEs - will only be able to enforce the agreement through an international arbitration system like ISDS."[33]
Is it thus a problem of lack of possible direct effect of TTIP, specifically in the USA, that is to be solved through introducing ISDS in TTIP? If so, this might also explain why it is expressly mentioned that TTIP cannot have direct effect, whether in the EU or in the USA. The provisions of an international agreement form an integral part of EU law as from their coming into force[34] and, absent such an express statement in the agreement itself, may be given direct effect by the courts (with the WTO as a notable exception[35]) regardless of the lack of reciprocity in this respect.[36] Is it to avoid such a scenario that the insertion of ISDS goes hand in hand with the disempowerment of the domestic courts? If so, would another and easier option, at least from the perspective of compliance with EU law, not have been to simply insert the express mention that TTIP should be given direct effect, both in the EU and the USA?
This leads to a related question of whether the ISDS mechanism is perhaps likely to offer a stronger protection to EU investors than the direct enforceability of TTIP in

[32] Opinion 1/76, Draft Agreement establishing a European laying-up fund for inland waterway vessels, ECLI:EU:C:1977:63.
[33] Statement by EU Trade Spokesman John Clancy, ""Investment protection does not give multinationals unlimited rights to challenge any legislation", Brussels, 20 December 2013, DG Trade, News archive, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1008, as last consulted on 31/05/2016.
[34] Case 181/73, Haegeman, ECLI:EU:C:1974:41, at pt. 5.
[35] Case C-149/96, Portugal v Council, o.c., at pts. 36-49.
[36] Case 104/81, Kupferberg, ECLI:EU:C:1982:362, at pt. 18.

USA courts might do? Even a cursory look at the current statistics raise some doubts in that respect. So-far the USA has never lost an ISDS case, which is also at least part of the reason why the USA is not very keen on the EU proposal for an investment court with possibility for appeal. The U.S. Trade Representative Michael Froman was reported on 29 October 2015 to have given the following statement:

"Because of the high standards and safeguards in our agreements, there have been very few cases against the U.S., and to date, the government has never lost (..). It's not obvious to me why you would want to give companies a second bite of the apple."[37]

If such is the case, what is then the rationale for the EU to want to include ISDS in TTIP? What assurances can be given that ISDS in TIPP will indeed offer more protection to EU investors than absent such a dispute settlement system?

Rather than looking at the possible alternatives and the rationale for ISDS, it is probably much easier to try and formulate an answer to the different though related question of what rights and remedies are, at least theoretically, safeguarded by ISDS.

Among the main rights of investors to be protected by ISDS are the respect for the principle of non-discrimination, in the form of both most favoured nation (MFN) and national treatment (NT), as well as substantive standards of investment protection such as fair and equitable treatment (FET) and protection against uncompensated expropriation. Fair and equitable treatment (FET) essentially protects the legitimate expectations of an investor assessed at the time of the investment, based on the then prevailing legal framework and commitments made by authorities. The protection against uncompensated expropriation includes both direct and indirect expropriation which has occurred without financial compensation to the investor. The most sensitive issue in this respect, which will be addressed in the next section, is the potential application of ISDS to the so-called 'regulatory expropriation', whereby a measures pursues a general objective in the public interest but with as an effect to deprive investors of the commercial value of their investment.

In order to appraise the compatibility of such a system with the autonomous EU legal order it is crucial to take into account the remedy offered under ISDS in case of breach of the investors' rights by a state. The sole purpose of ISDS is to provide monetary damages to the investor; it is not at all concerned with a test of legality of domestic measures. ISDS does, however, entail a test of compatibility of domestic measures, thus potentially including EU acts, with TTIP investment standards regardless of whether the contested EU acts are valid or not under EU law. For the purpose of assessing the compatibility of ISDS with the autonomous EU legal order it is therefore important to acknowledge that the exclusive jurisdiction of the CJEU for legality control of EU acts[38] is left untouched. The question is whether this finding is sufficient to bring ISDS outside the potential conflict zone with the autonomous EU legal order?

V. Risk of a 'regulatory chill' as well as a 'chilling effect' on CJEU case law?

The fact that under ISDS very high amounts of damages may be requested for domestic measures which were lawfully adopted, in the public interest, is a major source of controversy. The discussion under TTIP is fuelled by cases such as the

[37] Reuters, 29 October 2015, "U.S. wary of EU proposal for investment court in trade pact", o.c.

[38] Case 314/85, Foto-Frost, ECLI:EU:C:1987:452, especially at pts. 15-18 where the rationale of the exclusive jurisdiction of the CJEU is explained in terms inter alia of the requirement of uniformity and the 'necessary coherence of the system of judicial protection established by the Treaty".

pending ISDS dispute initiated by Vattenfall against Germany[39] in relation to the Energy Charter Treaty. The Swedish company Vattenfall is reported to claim between 4 billion Euro[40] and 6 billion US Dollars[41] in compensation for Germany's decision to adopt the nuclear opt-out after the March 2011 Fukushima Daiichi nuclear disaster. An aggravating factor is constituted by the fact that, contrary to GGDS, ISDS presents an inherent asymmetry as potentially a high number of investors could claim high damages from the EU with respect to one and the same (lawful or not) EU measure. The threat of incurring such accumulated and sometimes exorbitant ISDS damages entails a risk of a so-called 'regulatory chill', meaning that it could have a deterrent effect on the normal legislative process and in a worst case scenario de facto lead to a democratic disempowerment.

The following two very recent examples whereby ISDS was triggered under different international agreements are illustrative of the risks of regulatory chill which the EU might incur subsequent to the entry into force of TTIP, or any other agreement containing an ISDS mechanism such as for instance the Singapore Agreement or CETA.

A first example concerns the ISDS case initiated by the pharmaceutical company Elli Lilly against Canada.[42] Subsequent to the invalidation of two of its patents by Canadian Federal Courts, Eli Lilly triggered ISDS to claim damages from Canada in the amount of well over 500 million Canadian Dollars.[43] Eli Lilly essentially claims that the case-law as developed by the Canadian Federal Courts with respect to the validity of patents, the so-called 'promise doctrine', is incompatible with Canada's obligations under NAFTA and exceeds the standard for obtaining patent protection set in the TRIPS Agreement. The case is still pending, but it illustrates perfectly that not just EU legislative acts, but also case law of the CJEU developed in an intra-EU context, such as interpretation of internal market rules, might very well be the direct cause for investors to trigger ISDS with resulting awards of damages by way of compensation.

The second example concerns the famous ISDS case launched by Philip Morris against Australia subsequent to the adoption by the latter of the Plain Packaging Tobacco legislation in order to protect public health. Philip Morris to no avail sought financial compensation in the amount of several billions of US Dollars. In the press

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[39] Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12), see https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/12/12&tab=PRO, as last consulted on 31/05/2016.

[40] Association for International Arbitration, "Vattenfall v. Germany (ii) and the familiar irony of ISDS: investors before public interest?", http://www.corporatedisputesmagazine.com/vattenfall-v-germany-ii-and-the-familiar-irony-of-isds-investors-before-public-interest/, as last consulted on 31/05/2016.

[41] See Alexander Hellemans," Vattenfall Seeks $6 Billion in Compensation for German Nuclear Phase-Out ", http://spectrum.ieee.org/energywise/energy/nuclear/swedish-energy-giant-vattenfall-nets-billions-for-nuclear-phaseout, as last consulted on 31/05/2016.

[42] Eli Lilly and Company v. Canada (ICSID Case No. UNCT/14/2), see https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=UNCT/14/2, as last consulted on 31/05/2016.

[43] In the Notice of Arbitration of September 12, 2013 the following claim for damages is made: "Lilly claims on its behalf and on behalf of Lilly Canada: (i) damages for the full measure of direct losses and consequential damages sustained as a consequence of Canada's breach of its obligations under NAFTA Chapter 11, estimated in an amount not less than CDN $500 million plus any payments Lilly or its enterprise is required to make arising from the improvident loss of its Zyprexa and Strattera patents or its inability to enforce its Zyprexa and

Strattera patents; (ii) the full costs associated with these proceedings, including all professional fees and disbursements, as well as the fees of the arbitral tribunal; (iii) pre-award and post-award interest; (iv) payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and (v) such further relief as the arbitral tribunal may deem just and appropriate", see https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC4612_En&caseId=C3544, as last consulted on 31/05/2016.

release of the Permanent Court of Arbitration of 16 May 2016, the conclusions were stated as follows: *"the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection. Accordingly, the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute."*[44] Conversely, this implies that if the timing had been different and Philip Morris had acquired the subsidiaries before the Australian law was in the pipeline, then also the ISDS outcome might have been very different.

It is not inconceivable that similar issues triggering ISDS could arise in relation to the adoption of EU legislation and/or CJEU case law once international agreements concluded by the EU and including ISDS mechanisms, such as in TTIP or CETA, enter into force. It might suffice to point to the three judgments of the CJEU of 4 May 2016 whereby the legality of the EU Directive 2014/40 inter alia prohibiting menthol cigarettes[45] and establishing a specific regime applicable to electronic cigarettes[46] was upheld. Although clearly in the public interest and considered to be lawful under EU law by the CJEU after a careful balancing of various interests involved, it is not at all unthinkable that a company such as Philip Morris, having brought a case to contest the above EU directive, would subsequently claim important financial compensation under ISDS. However, such a possibility would not be limited to solely Philip Morris as ISDS could be triggered by all and any uncompensated investor concerned, regardless of whether or not they had first contested the validity of the EU Directive in court proceedings.

Another related question once TTIP comes into force, is whether investors would still have a sufficient incentive to first trigger legality control or obtain investor friendly interpretation by the CJEU, not in the least considering the duration of such procedures and thus the additional delay in obtaining financial compensation? Why should they not turn directly to ISDS for financial compensation instead, especially in cases whereby it is apparent that the public interest is likely to outweigh private interests before the courts?

Whatever the strategies opted for by investors, it is clear that not only the EU legislator may come to face a regulatory chill in view of the amounts of compensation potentially to be paid for the adoption of EU legislative acts regardless of whether or not such acts are democratic and lawful. Would not also the CJEU be under a double pressure and perhaps 'chilling effect' of, firstly, the potential financial consequences of its rulings and, secondly, the parallel existence of an ISDS mechanism that investors may choose to directly turn to?

The above cases perfectly illustrate the highly controversial issue surrounding ISDS in terms of finding an acceptable balance between the private interests of investors on the one hand and the public interest, especially protection of higher objectives such as public health and environmental protection, on the other hand. The EU Commission is very much aware of the existence of this controversy as well as of the necessity to act upon this. The latter is translated in the specific EU approach to investment protection as tabled in the TTIP negotiations,[47] which as much as

[44] PCA Press Release, Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, The Hague, 16 May 2016, "Tribunal Publishes Redacted Version of Award on Jurisdiction and Admissibility", see at http://www.pcacases.com/web/sendAttach/1713, as last consulted on 31/05/2016. For the other official documents of the PCA in this case, see http://www.pcacases.com/web/view/5, as last consulted on 31/05/2016..

[45] Case C-547/14, Philip Morris Brands and Others, ECLI:EU:C:2016:325; Case C‑358/14, Poland v Parliament and Council, ECLI:EU:C:2016:323.

[46] Case C‑477/14, Pillbox 38, ECLI:EU:C:2016:324.

[47] EU proposals on Transatlantic Trade and Investment Partnership, Trade In Services, Investment and e-Commerce, Chapter II – Investment

possible meets the public interest concerns. As such the EU Commission's efforts to redress the balance are much to be welcomed. The EU proposal contains several important novel issues for the ISDS mechanism to be inserted in TTIP, but will these also be included in the Singapore Agreement and CETA? In the EU TTIP proposals, the objective is to strengthen the substantive standards of investment protection and to limit the scope of the principles of MFN and NT. Also and very importantly, the EU TTIP proposals on investment protection also contain an express reference to the state's 'right to regulate'.[48]
In the assumption that the USA would follow the EU on those TTIP investment proposals, would the potential EU problems with ISDS then be solved? It seems difficult to contest that the EU proposals are an important step towards meeting the above stated public interest concerns, but are they also sufficient? There may be valid reasons to doubt this. The TTIP provisions on Investment protection and ISDS are in the first place meant to safeguard the private interest of investors. Even though the EU proposals somewhat try to redress the balance in favour of the public interest it is most likely inevitable that the public interest element will still be weaker in TTIP than in EU law.[49]

VI. Compatibility of ISDS with the autonomous EU legal order: hierarchy of norms?

The crucial question is whether the assessment of the compatibility of ISDS with the autonomous EU legal order really stands or falls with the outcome of the negotiations on those novel and substantive issues as proposed by the EU. In the hypothesis that the issue of finding the proper balance between private and public interests were to be resolved in TTIP and thus the above controversy put at rest, would ISDS then automatically be compatible with the autonomous EU legal order?
In order to find an answer to this fundamental question it seems opportune to adopt a purely theoretical (because highly unlikely in practice) working hypothesis that both the public and private interests will be equally safeguarded under TTIP ISDS as is done by the CJEU in EU law.
Working on the basis of the above hypothesis, at least 2 other and more structural features of ISDS become immediately apparent which might potentially pose a problem in terms of compatibility with the autonomous EU legal order. The first relates to the fact that ISDS may be triggered only by 'foreign' investors, to the exclusion of domestic investors. The second relates to a potential overlap with the exclusive jurisdiction of the CJEU to rule on non-contractual liability of the EU. Both

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http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf, as last consulted on 31/05/2016. It is expressly stated:"*This document is the European Union's proposal for Investment Protection and Resolution of Investment Disputes. It was tabled for discussion with the United States and made public on 12 November 2015. The actual text in the final agreement will be a result of negotiations between the EU and US."*

[48] Idem, see Article 2 on Investment and regulatory measures/objectives. However, see also Article 7 on observance of written commitments.

[49] Much of the controversy is therefore still ongoing in spite of the improvements proposed by the EU Commission. According to some the EU proposals are still presenting many shortcomings, see for instance the study made by Krajewski, M., "Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective", http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf, as last consulted on 31/05/2016. Others take the opposite stance and fear an undermining of investment protection, see for instance the position paper of the American Chamber of Commerce to the European Union (AmCham EU) "AmCham EU response to EU proposal for investment protection and Court System for TTIP: European Commission proposal for an Investment Court System a step backwards and would weaken investment protection", 26 February 2016, http://www.amchameu.eu/system/files/position_papers/amcham_eu_response_to_eu_proposal_for_investment_protection_and_court_system_for_ttip_-_26.02.2016.pdf, as last consulted on 31/05/2016.

have in common that they raise the most fundamental issue of whether or not the hierarchy of norms can be fully respected when inserting ISDS in EU agreements. International agreements concluded by the EU only take precedence over secondary EU law and member states law by virtue of Article 216(2) TFEU.[50] It follows from Article 218(11) TFEU[51] that international agreements concluded by the EU rank below and thus necessarily have to comply with primary law of the Union, be it the Treaties or the EU Charter of Fundamental Rights.

1. ISDS: protection of 'foreign' investors only?

The TTIP, as the other investment related agreements, essentially provides for reverse discrimination in terms of access to ISDS. In essence only 'foreign' investors may trigger ISDS for breach of TTIP obligations by the host state, to the exclusion of domestic investors. In practice this means that USA investors could trigger ISDS under TTIP in the EU, but not EU investors. Such a 'selective' feature which is inherent in any ISDS mechanism regardless of its form, arbitration or investment court, raises various questions as to the compatibility thereof with the autonomous EU legal order.

A first set of questions relates to the compatibility with the EU Charter of Fundamental Rights which was given horizontal legal effect by the Lisbon Treaty. For instance, how does such a reverse discrimination in terms of access to ISDS square with Article 20 EU Charter of Fundamental rights which stipulates that "*Everyone is equal before the law*"? And does it constitute a breach, or not, of Article 21 of the EU Charter of Fundamental rights which contains a clear prohibition of discrimination based on nationality?

The answer to those questions will most likely be influenced by the following preliminary issue. Especially in relation to international agreements, should one assess the existence of prohibited discrimination in terms of the international/global market or rather in terms of the EU market? If the latter option is withheld, it will most likely be extremely difficult not to conclude to an open discrimination in breach of EU law. But if the first option is withheld, would it then perhaps suffice that reciprocity is guaranteed, whereby US investors may trigger ISDS in the EU but also vice versa, the EU investors in the USA? If so, then this specific feature of ISDS might not of itself pose a problem in terms of compatibility with EU law.

An additional and related question, however, is whether it is opportune, or not, to address this issue from the perspective of the need to ensure the uniform interpretation and application of EU law. All agreements concluded by the EU, thus including TTIP, are an integral part of the EU legal order from their coming into force.[52] The CJEU so far has always underlined the necessity of providing an uniform interpretation and application of such agreements, in particular where they fall within EU exclusive competence. This may be translated into either granting direct effect in the EU and all the Member States, at least in the areas of EU competence (for most agreements)[53] or denying direct effect anywhere in the EU (as is the case for the

[50] Article 216(2) TFEU reads as follows: "*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*".

[51] Article 218(11) TFEU reads as follows: "*A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised*."

[52] Case 181/73, Haegeman, o.c.

[53] The notable exceptions are the part of mixed agreements which are not yet fully transferred to EU competence, see Joined Cases C-300/98 and C-392/98, Dior and Others, ECLI:EU:C:2000:688, pts. 47-48; Case C-431/05, Merck Genéricos, ECLI:EU:C:2007:496, pt. 33-35; C-240/09, Lesoochranárske zoskupenie VLK, ECLI:EU:C:2011:125, pts. 31-34.

WTO[54]). In either case the uniform interpretation and application of EU agreements is guaranteed by the CJEU in conformity with Article 19 TEU. As suggested above,[55] the disempowerment of the CJEU in terms of deciding on direct effect, or not, of TTIP is not in itself problematic as this does not affect the uniform application of the agreement. The question is whether the same benchmark holds true for the ISDS mechanism? It is apparent that under ISDS the provisions of TTIP will be given a different application in the EU, according to whether an EU act affects an USA or an EU investor. Is this consonant with both the principles of non-discrimination under the EU Charter on Fundamental rights as well as the principle of uniform interpretation and application of EU law?

A different question is what the remedy should be in case the reverse discrimination is found to be contrary to primary EU law? In this respect it is interesting to read the decision of the German Bundesverfassungsgericht of 3 March 2016[56] (but only published on 10 May 2016[57]), to refer a preliminary question to the CJEU in relation to ISDS inserted in an intra-Member States BIT. Among the issues raised is the matter of discriminatory access to ISDS which, in an intra-EU context, is questioned upon its compatibility with Article 18 TFEU.[58] Also the EU Commission is of the opinion that intra-EU BITS are incompatible with EU law inter alia because of the breach of the principle of non-discrimination and has launched infringements proceedings against 5 Member States.[59] Although in legal terms such an open

[54] Case C-149/96, o.c.

[55] See supra pt. 2.

[56] Bundesgerichtshof Beschluss, I ZB 2/15, 3. März 2016, Eureko v. Slovakia, ECLI:DE:BGH:2016:030316BIZB2.15.0, see http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&nr=74612&linked=bes&Blank=1&file=dokument.pdff, as last consulted on 31/05/2016.

[57] See also Pressemitteilung Nr. 81/16 vom 10.5.2016, Beschluss des I. Zivilsenats vom 3.3.2016 - I ZB 2/15 – "Bundesgerichtshof legt Europäischem Gerichtshof Fragen zur Wirksamkeit von Schiedsvereinbarungen in Investitionsschutzabkommen vor", http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&nr=74606&pos=2&anz=83, as last consulted on 31/05/2016.

[58] The "Open Skies" cases made it clear that also agreements concluded by the Member States with third countries have to respect the EU law principle of non-discrimination, see for instance C-467/98, Commission v Denmark, ECLI:EU:C:2002:625.

[59] European Commission - Press release, "Commission asks Member States to terminate their intra-EU bilateral investment treaties", Brussels, 18 June 2015, http://europa.eu/rapid/press-release_IP-15-5198_en.htm, as last consulted on 31/05/2016. It is stated inter alia:

"*The European Commission has initiated infringement proceedings against five Member States today requesting them to terminate intra-EU bilateral investment treaties between them ("intra-EU BITs"). BITs are agreements establishing the terms and conditions for private investment by nationals and companies of one state in another one. Intra-EU BITs are agreements that exist between EU Member States.*

Many of these intra-EU BITs were agreed in the 1990s, before the EU enlargements of 2004, 2007 and 2013. They were mainly struck between existing members of the EU and those who would become the "EU 13". They were aimed at reassuring investors who wanted to invest in the future "EU 13" at a time when private investors - sometimes for historical political reasons – might have felt wary about investing in those countries. The BITs were thus aimed at strengthening investor protection, for example by means of compensation for expropriation and arbitration procedures for the settlement of investment disputes.

Since enlargement, such 'extra' reassurances should not be necessary, as all Member States are subject to the same EU rules in the single market, including those on cross-border investments (in particular the freedom of establishment and the free movement of capital). All EU investors also benefit from the same protection thanks to EU rules (e.g. non-discrimination on grounds of nationality). By contrast, intra-EU BITs confer rights on a bilateral basis to investors from some Member States only: in accordance with consistent case law from the European Court of Justice, such discrimination based on nationality is incompatible with EU law.

For all these reasons, the Commission has decided to request five Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) to bring the intra-EU BITs between them to an end. The letters of formal notice, sent today, follow earlier exchanges with the Member States in question. This is not a new issue as the Commission has consistently and over a number of years pointed out to all

discrimination between EU citizens in an intra-MS BIT is of course a very different issue from the reverse discrimination of all EU citizens in TTIP, the solutions offered by the German Bundesverfassungsgericht merit particular attention. It is pointed out by the latter that in case of breach of the principle of non-discrimination it is perhaps not necessary to declare the agreement to be incompatible with EU law. Another and less intrusive option would be for the CJEU to apply the principle of non-discrimination and simply extend the access to ISDS to all EU investors alike. The latter solution when applied to TTIP and similar EU agreements would militate in favour of reconciling EU law and international investment law. But the obvious drawback of such a solution of course lies in the potential multiplication effect in terms of the above mentioned regulatory chill and chilling effect on future case-law. It therefore remains to be seen how the CJEU would tackle such a dilemma.

2. *Interference with EU law on protection of investors?*

The other more structural issue is how the ISDS mechanism relates to the protection of investors under EU law. It is interesting in this respect to ask the question of whether in the absence of an ISDS mechanism in EU agreements foreign investors would be left totally unprotected in the EU. In other words, what recourse could possibly already exist under primary EU law? An answer may perhaps be found in Articles 340 and 268 TFEU. According to the latter provisions, the CJEU has exclusive jurisdiction to rule on non-contractual liability of the EU and may thus award damages to individuals. This EU law procedure combines the crucial elements of full respect of the rule of law with the principle of non-discriminatory access to justice. As such there seems to be no apparent reason why investors, whether foreign or domestic, should be excluded from its scope as long as also the other criteria are met. If this finding is correct, it would be important to assess to what extent the insertion of ISDS in EU agreements, such as TTIP, possibly constitutes an undue interference with the autonomy of the EU legal order as safeguarded by the CJEU.
Recalling the FIAMM case[60] may be helpful in trying to frame this issue. In this case the question was raised of the possible non-contractual liability of the EU for damages to firms, resulting from retaliation taken by the USA for EU non-compliance with WTO obligations.[61] For the sake of argument this may be assimilated to the situation whereby investors would raise the issue of non-contractual liability of the EU for damages to firms resulting from EU non-compliance with TTIP obligations.

a. Level of judicial protection of investors

In the FIAMM case the CJEU first of all recalled its prior case-law, whereby non-contractual liability of the Union and the right to compensation for damages suffered depend on the satisfaction of the following 3 cumulative conditions: *"the unlawfulness of the conduct of which the institutions are accused, the fact of damage and the*

Member States that intra-EU BITs are incompatible with EU law. However, since most Member States have taken no action, the Commission is now launching the first stage of infringement procedures against five Member States. At the same time, the Commission is requesting information from and initiating an administrative dialogue with the remaining 21 Member States who still have intra-EU BITs in place. It is worth noting that two Member States – Ireland and Italy – have already ended all their intra-EU BITs in 2012 and 2013 respectively."

[60] Joined cases C-120/06 P and C-121/06 P, FIAMM, ECLI:EU:C:2008:476.

[61] Joined cases C-120/06 P and C-121/06 P, o.c., pt. 1: "*seeking compensation for the damage allegedly suffered by them on account of the increased customs duty which the Dispute Settlement Body ('the DSB') of the World Trade Organisation (WTO) authorised the United States of America to levy on imports of their products, following a finding by the DSB that the Community regime governing the import of bananas was incompatible with the agreements and understandings annexed to the Agreement establishing the WTO*."

existence of a causal link between that conduct and the damage complained of".[62] It is consistent case-law that only the CJEU may declare EU acts to be unlawful[63] which, in this hypothesis, is the first step needed to award compensation for damages to individuals. However, a prerequisite to be able to establish whether or not an EU act is lawfully adopted in compliance with an EU agreement invoked is that direct effect is given to the latter. To the extent that TTIP expressly excludes direct effect it seems that this option may simply be discarded. Such was also the case in FIAMM as according to consistent case-law of the CJEU the nature of the WTO is such that it does not lend itself to direct effect.[64]

The importance of the FIAMM case lies in that it unequivocally clarifies that non-contractual liability of the EU is not in itself dependent on the possibility for the CJEU to perform a legality control of the contested act. If a contested act is to be considered as lawful under EU law, which may thus ensue from the lack of direct effect of the EU agreement concerned, the EU may still incur liability albeit under more stringent conditions. At least 3 elements will need to be cumulatively fulfilled, consisting not only of the fact of damage and the existence of a causal link between it and the act concerned, but also the 'unusual and special nature of the damage".[65] The latter condition may be a most difficult hurdle to take in practice.[66]

Does this then imply that also the CJEU accepts that the EU may incur liability for legitimate and democratic legislative activity? The FIAMM case seems to offer a carefully formulated positive answer in principle yet coupled with strict conditions, so as to make sure that "*the public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policy*".[67] If such is already the case for legislative choices of economic policy, should then not at least a similar if not even more stringent 'exceptional circumstance test' apply when facing legislative choices in the public interest, for instance to protect higher objectives such as public health?

In FIAMM the CJEU required that "*a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred*"[68] whereas "*the rule of law the breach of which must be found has to be intended to confer rights on individuals*".[69] The TTIP investment protection chapter is clearly meant to confer rights on investors so the latter condition would seem to be fulfilled. As to the first condition, even without direct effect TTIP is still a superior rule to secondary law of the EU. Yet what would constitute a 'sufficiently serious breach' of TTIP by the EU in practice? Most likely a 'simple breach' of TTIP obligations, which might qualify under ISDS, would then not suffice to trigger compensation for damages under EU law?

Highly interesting and very instructive also are the two considerations advanced by the CJEU for adopting such a strict approach to liability on account of an EU legislative measure:

"First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterised by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the

[62] Joined cases C-120/06 P and C-121/06 P, o.c., at para 164.
[63] Case 314/85, Foto-Frost, o.c.,
[64] Case C-149/96, Portugal v. Council, o.c.
[65] Joined cases C-120/06 P and C-121/06 P, o.c., at pt. 169.
[66] For a more recent application of this criterion, see for instance Case C‑ 221/10 P, Artegodan, ECLI:EU:C:2012:216.
[67] Joined cases C-120/06 P and C-121/06 P, o.c., at pt. 171.
[68] Joined cases C-120/06 P and C-121/06 P, o.c, at pt. 172.
[69] Joined cases C-120/06 P and C-121/06 P, o.c, at pt. 173.

institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers".[70]
It thus appears that the underlying reason for the strict liability for EU legislative measures under Articles 340 and 268 TFEU is precisely the necessity to avoid a regulatory chill. Instead of pointing to the need to avoid the latter through raising the standards of protection for individuals in EU law, the CJEU gives thorough consideration to both the intensity and the level of judicial review. Should not a wide margin of discretion of the legislator always and necessarily entail a limited and even very marginal judicial review by the courts, regardless of the substantive standards of protection adopted?

b. *ISDS and hierarchy of norms?*

The FIAMM case also raises another and perhaps even more fundamental question in terms of the introduction of ISDS provisions in EU agreements, such as TTIP. To the extent that EU law remedies are in principle already available to (all) investors, is the insertion of a parallel system of dispute settlement compatible with the autonomy of the EU legal order? This matter arises regardless of the potential discrepancies, or not, in the level of protection and/or judicial review offered to investors under both systems. The crux of the problem seems to be posed in terms of the respect for the hierarchy of norms.
Articles 340 and 268 TFEU, which are by their very nature part of the primary law of the EU, confer an exclusive jurisdiction on the CJEU to rule on the non-contractual liability of the EU. TTIP, on the other hand, is an agreement concluded by the EU and, as such, qualifies as an act of the Union which ranks below primary law.[71] May dispute settlement provisions inserted in an EU agreement, such as ISDS, transfer, conflict with or simply set aside exclusive jurisdiction of the CJEU?
There are most likely important lessons to be drawn in this respect from the MOX case.[72] The facts of this case were admittedly unrelated to ISDS. It concerned state-to-state dispute settlement, triggered between Member States of the EU, in areas of EU law, before a specialised tribunal set up by an international agreement. Yet could the reasoning developed by the CJEU in terms of respect for the EU hierarchy of norms not be held to apply to any form of dispute settlement inserted in EU agreements? The CJEU stated firmly:
"*The Court has already pointed out that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 19 TEU".* [73]
In the Mox case it concerned specifically the exclusive jurisdiction of the Court to settle EU related disputes between Member States as laid down in Article 344 TFEU, a Treaty provision which is not applicable to ISDS. However, as shown above,[74] the CJEU has also claimed exclusive jurisdiction to establish EU liability for damages based on Articles 340 and 268 TFEU. Is it compatible with the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the EU legal order, to create a parallel ISDS system under international agreements aimed at granting compensation for damages for EU acts?
A related double question is to pinpoint why ISDS may be subject to this type of questioning now and why it may be more problematic for the EU to agree to ISDS than for the EU Member States and third countries? As those states have already

[70] Joined cases C-120/06 P and C-121/06 P, o.c, at pt. 174.
[71] See supra pt. 6
[72] Case C-459/03, Mox, o.c.
[73] Case 459/03, Mox, o.c., at pt. 123.
[74] See supra pt. 6.a.

concluded various agreements containing ISDS, should not the EU be able to do likewise? As mentioned above,[75] the timing of the debate is stringently linked to the inclusion of investment protection in Article 207 TFEU by the Lisbon Treaty. As a consequence the EU has only recently, since December 2009, started to negotiate investment related agreements containing ISDS instead of (or 'together with' in case mixity is withheld[76]) the Member States. The issue of compatibility of ISDS with the Treaty provisions conferring jurisdiction to the CJEU is, however, only fully exposed when the EU contracts the international investment protection obligations and may thus itself be held liable for damages. It should be recalled that the CJEU has claimed exclusive jurisdiction to establish specifically EU liability, but not necessarily also Member State liability,[77] for damages based on Articles 340 and 268 TFEU.
What would then be the consequences of a negative answer to the above question? Would it of itself undermine the credibility of the EU as an international actor? Would it be tantamount to negating the very possibility for the EU to engage in international dispute settlement? There is reason to doubt this. The only albeit fundamental precondition, stated by the CJEU in the Mox case, is that the dispute settlement provisions in an EU agreement may not affect the allocation of responsibilities, including those allocated to the CJEU, in the EU Treaties. The CJEU for instance does not have jurisdiction by virtue of the EU Treaties for GGDS with third states. As such there seems to be no reason why such a type of dispute settlement mechanism could not be included and further developed in EU agreements including TTIP, possibly also reinforcing indirect protection of investors,[78] in a manner which fully respects the autonomous EU legal order.

VII. Conclusion: forestall complications?

In view of the existence of highly crucial issues, some of which are mentioned above, the most troubling of all questions is undoubtedly why the CJEU has so far not been requested an Advisory Opinion pursuant to Article 218(11) TFEU on the compatibility of ISDS provisions in EU agreements with the autonomous EU legal order. It is equally striking that until now the CJEU has not been asked to scrutinize (any aspect of) TTIP or CETA in terms of compatibility with EU law.
An Advisory Opinion was asked by the Commission on 16 October 2015 concerning the Singapore Agreement but the questions submitted relate exclusively to the exclusive nature, or not, of the agreement.[79] Such is of course in itself an important issue not in the least because mixed agreements need to be ratified by the EU as well as all the Member States. The envisaged EU agreement with Singapore also contains provisions on investment protection and ISDS; is the fact of non-submission

[75] See supra, at pt. 3.
[76] Whether or not the EU has exclusive competence to conclude the Singapore Agreement is precisely the question addressed to the CJEU in the pending Advisory Opinion 2/15, see infra at pt. 7.
[77] See for instance Joined Cases 106 to 120/87, Asteris, ECLI:EU:C:1988:457, at pt. 15, where the CJEU ruled: "*The Court has exclusive jurisdiction pursuant to Article 178 of the EEC Treaty to hear actions for compensation brought against the Community under the second paragraph of Article 215 of the EEC Treaty. However, national courts retain jurisdiction to hear claims for compensation for damage caused to individuals by national authorities in implementing Community law".*
[78] See above, at pt. 2.
[79] Opinion 2/15, Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU, pending. The question submitted to the CJEU are the following: "Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically,
Which provisions of the agreement fall within the Union's exclusive competence?; Which provisions of the agreement fall within the Union's shared competence? ; and Is there any provision of the agreement that falls within the exclusive competence of the Member States?. See http://curia.europa.eu/juris/document/document.jsf?text=&docid=170868&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=672511, as last consulted on 31/05/2016.

of this chapter for a compatibility check to the CJEU perhaps just a missed opportunity? If so, will a second advisory opinion procedure be triggered by one of the EU institutions or a Member State? The EEA agreement shows that it is perfectly possible to ask several opinions of the CJEU in relation to one and the same envisaged agreement. Could it at all be envisaged that, in the absence of an express question to that effect but considering the legal, economic and political importance of TTIP which contains similar provisions, the CJEU advices on the compatibility of the three pronged dispute settlement mechanism with the autonomous EU legal order of its own motion?

Perhaps the CJEU is not consulted simply because all EU institutions and all Member States are convinced that there is no problem of potential compatibility of such a three-pronged dispute settlement mechanisms with EU law, let alone potential interference with the autonomous EU legal order? If so, it might indeed seem futile to delay the outcome of negotiations with the third countries concerned awaiting an opinion of the CJEU.[80] On the other hand one may wonder whether the existence of highly controversial and unsettled issues in such agreements is really conducive to a smooth ratification process, whether in the EU or its member states.[81]

It would, however, be most problematic if an advisory opinion were not requested for exactly the opposite reason. What could possibly be the wisdom of adopting an ostrich approach in particular in view of the economic and political importance of TTIP? The CJEU has consistently held that the very function of the advisory opinion procedure is inherently preventive. Its sole purpose is to forestall complications that might arise under international law (and for international relations) if an EU agreement were found to be incompatible with EU law after the EU's consent to be bound was already expressed.[82] For sure is that such issues are bound to arise, most likely sooner rather than later, in case an advisory opinion of the CJEU were to be forborne for the wrong reasons. Such is therefore an assessment which is urgently to be made, if not done so yet, by all EU institutions as well as each Member State.

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[80] However, there is no stand-still clause in Article 218(11) TFEU so that nothing would prevent the conclusion of the agreement before the CJEU has been able to render an opinion. In such a case the request for an advisory opinion becomes devoid of purpose so that the CJEU will no longer respond to the questions posed, see Opinion 3/94, GATT /WTO Framework agreement on bananas, ECLI:EU:C:1995:436.

[81] It remains to be seen what the position of the European Parliament will be in the end. But in case TTIP is concluded as a mixed agreement then it is realistic to expect that ratification problems may arise in one or more Member States. This is also the case for CETA, see for instance the warning given by the Walloon parliament in Belgium, as reported by Belga News Agency on 27 avril 2016, "Accords de libre-échange transatlantiques - Le parlement wallon vote le refus des pleins pouvoirs au Fédéral pour signer le CETA", see also RTBF, "La Wallonie refusera les pleins pouvoirs au Fédéral pour signer le CETA", http://www.rtbf.be/info/belgique/detail_la-wallonie-refusera-les-pleins-pouvoirs-au-federal-pour-signer-le-ceta?id=9268089, as last consulted on 31/05/2016.

[82] This was also recalled by the CJEU in Opinion 2/13, o.c., where it held at pts. 145-146: "*It must be borne in mind in that regard that, under Article 218(11) TFEU, the Parliament, the Council, the Commission or a Member State may obtain the Opinion of the Court of Justice as to whether an envisaged agreement is compatible with the provisions of the Treaties. That provision has the aim of forestalling complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the EU (see Opinions 2/94, EU:C:1996:140, paragraph 3; 1/08, EU:C:2009:739, paragraph 107; and 1/09, EU:C:2011:123, paragraph 47).*

A possible decision of the Court of Justice, after the conclusion of an international agreement binding upon the EU, to the effect that such an agreement is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaties could not fail to provoke, not only in the internal EU context, but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries (see Opinions 3/94, EU:C:1995:436, paragraph 17, and 1/09, EU:C:2011:123, paragraph 48)."

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