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# IS THE COURT OF JUSTICE AFRAID OF INTERNATIONAL JURISDICTIONS?

**Abstract:**
*This article analyses the relationship between the Court of Justice and other international jurisdictions. In particular, it addresses the following question: To what extent is the Court of Justice ready to accept that some aspects of EU law are subject to the jurisdiction of an international body? The answer to this question requires analysis of the precise scope of the principle of autonomy of EU law as this principle could potentially constitute grounds on the basis of which the Court of Justice excludes the transfer of judicial competences to external bodies. For this reason, the article refers to the most important decisions in the field: Opinions 1/91 and 1/92, Opinion 1/09, Opinion 2/13, judgment in C-146/13 Spain v. Parliament and Council and judgment in C-284/14 Achmea. It also discusses the consequences of the application of Article 344 TFEU.*

**Keywords:** Achmea, Article 344 TFEU, autonomy of EU law, dispute settlement, EU law and international law, opinion 1/09, opinion 2/13

## INTRODUCTION

When the Court of Justice of the European Union (Court of Justice or Court) ruled on 18 December 2014, in its Opinion 2/13[1] that the Draft Agreement on accession of the European Union (EU) to the European Convention on Human Rights (ECHR) was not compatible with Article 6(2) of the Treaty on European Union (TEU) or with Protocol (No. 8) relating to Article 6(2) TEU, a number of critics were quick to claim that the Court of Justice was afraid of the European Court of Human Rights (ECtHR).[2] As I am well aware that entire monographs have dealt with the Court

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[1] Opinion 2/13 (Accession of the EU to the ECHR), EU:C:2014:2454.

[2] Among others: E. Spaventa, *A very fearful Court?*, 22 Maastricht Journal of European and Comparative Law 35 (2015); W. Michl, *Thou shalt have no other courts before me*, VerfBlog, 23.12.2014, available at: http://verfassungsblog.de/thou-shalt-no-courts/ (accessed 30 June 2018).

of Justice and international courts,[3] this article does not exhaustively deal with the relationship between the Court of Justice and (other) international jurisdictions. It is rather confined to addressing the admittedly provocative question of whether the Court is afraid of other international jurisdictions. In doing so, I should first like to recall a number of features in the relationship between EU law and international law, and then turn to a number of decisions of the Court on the concept of autonomy in the EU legal order, before examining the above referenced Opinion. Perhaps not surprisingly, I shall conclude that the relationship between the Court and other international jurisdictions, as reflected in the Court's case-law, is a consequence of the normative institutional framework of the Treaties and that the question posed in the title of this article is, accordingly, to be answered in the negative.

This article deals with international jurisdictions which have been set up pursuant to an international treaty or convention to which the EU is a party,[4] and which have a mandate to adjudicate conflicts arising from the implementation of such treaty or convention. It does not, however, deal with the specific dispute-settlement mechanisms of arbitration in the context of investment treaties the EU has entered into.[5] In this context one should also mention the recent Opinion 2/15 concerning the Free Trade Agreement with Singapore, in which the Court ruled that the dispute resolution mechanism contained in this Agreement falls within the competence shared between the Union and the Member States.[6] Moreover, very recently the Court replied to questions asked by the German Bundesgerichtshof in the *Achmea* judgment.[7] The procedure concerned the compatibility of the recourse to arbitration in a dispute resolution clause contained in a bilateral investment treaty concluded between two EU Member States. This decision of the Court of Justice, even though it does not concern an international agreement to which the EU is a party, is nevertheless important for the purposes of this article, to the extent that it deals with the autonomy of EU law.

[3] *See e.g.* T. Lock, *The European Court of Justice and International Courts*, Oxford University Press, Oxford: 2015; and specifically dealing with the relationship of the Court of Justice and the ECtHR, P. Gragl, *The EU's Accession to the ECHR*, Hart Publishing, Oxford: 2013; and more recently F. Fabbrini, J. Larik, *The Past, the Present and the Future Relation between the European Court of Justice and the European Court of Human Rights*, 35 Yearbook of European Law 145 (2016).

[4] Whether it has been already been a party initially (*see e.g.* Opinion 1/91 (EEA Agreement – I), EU:C:1991:490, and Opinion 1/92 (EEA II) EU:C:1992:189, below) or has become a party to such an international treaty or convention (*see e.g.* Opinion 2/13 (Accession of the EU to the ECHR)) concerning the Council of Europe and the ECHR).

[5] On this question, *see* M. Szpunar, *Referrals of Preliminary Questions by Arbitral Tribunals to the CJEU*, in: F. Ferrari (ed.), *The Impact of EU Law on International Commercial Arbitration*, Jurisnet, New York: 2017, pp. 85-123; and A. Rosas, *The EU and international dispute settlement*, 1(1) Europe and the World 1 (2017), pp. 18-26.

[6] Opinion 2/15 (EU-Singapore Free Trade Agreement), EU:C:2017:376, paras. 285-304.

[7] Case C-284/16 *Slowakische Republik (Slovak Republic) v. Achmea BV*, EU:C:2018:158.

## 1. INTERNATIONAL LAW BEFORE THE COURT OF JUSTICE

It is well known that the EU is founded on international treaties, adopted by the Member States and ratified according to the constitutional requirements of these states. These treaties constitute the very foundation of the EU legal order. In addition to the Treaties, international agreements concluded by the Union with other subjects of international law (states or international organisations) constitute an integral part of EU law,[8] as does, of course, secondary law adopted by the Union itself according to the procedures provided for in the Treaties.

Questions relating to the interpretation of the Treaties and the interpretation and validity of secondary law constitute the "bread and butter" of the Court's activity. In the vast majority of cases, the Court deals with a wide variety of issues of substantive primary or secondary law – starting with the four freedoms, cooperation in criminal and civil matters, through to asylum law, taxation, consumer protection and many other areas in which the EU legislator has exercised its competence. By contrast, the interpretation of international agreements and of international law constitutes, in quantitative terms, only a marginal area of the Court's activity.

One can therefore observe in the case-law of the Court that while the very existence of EU law stems from international law, international law does not normally constitute a subject matter of disputes arising from the application of EU law. One could compare this situation to domestic legal practice. Even though a domestic legal order is based on a national constitution (written or unwritten), one could hardly say that the majority of practicing lawyers are constitutional lawyers.[9]

When addressing the somewhat complex relationship of EU law and international law, I think that the mere fact that EU law has its origins in international law is not necessarily crucial. I would submit that the most interesting questions concerning the relationship between EU law and international law result from the fact that the EU itself acts as an international player. After the entry into force of the Treaty of Lisbon, there is no doubt that the EU is vested with legal personality in international law and can therefore take upon itself this role vis-à-vis the international community.[10]

## 2. INTERNATIONAL AGREEMENTS

The EU exercises its external competence by concluding international agreements, as provided for in Article 216 of the Treaty on the functioning of the European Union

[8] This has been settled case-law since case 181/73 *R. & V. Haegeman v. Belgian State*, EU:C:1974:41, para. 5.

[9] The Court of Justice has expressly referred to the Treaties as the "constitutional charter" of the EU, despite them being concluded in the form of an international agreement, *see* Case C-294/83 *Parti écologiste Les Verts v. European Parliament*, EU:C:1986:166, para. 23; and reiterated this point in Opinion 1/91 (EEA I), para. 21, in relation to the international order.

[10] Even prior to the Treaty of Lisbon, there was never any doubt that the European Community had legal personality; *see* ex-Article 281 EC and now Article 47 TEU.

(TFEU). Since this provision is a specific expression of the principle of conferral enshrined in Article 4(1) TEU,[11] the rules on the exercise of EU competences apply as follows: if the competence in question is exclusive, the EU must act alone; if this competence is shared with the Member States, and not yet exercised, the EU has the choice whether it acts alone or together with the Member States, in the form of a mixed agreement.

As the judicial institution of an organisation which is marked by the principle of institutional balance,[12] it is the task of the Court to ensure, in the words of Article 19 TEU, that in the interpretation and application of the Treaties the law is observed. Together with the specialised provisions in the TFEU, this provision ensures that the Court has the last word when it comes to determining the validity of international agreements and secondary EU law, as well as interpreting any provision of EU law, including primary law. Article 19 TEU and its predecessors (Article 164 EEC and Article 220 EC) have been used by the Court on numerous occasions in support of this argument.[13]

One of the reasons for the considerable powers of the Court in the field of external relations of the EU is the Opinion procedure, enshrined in Article 218(11) TFEU. By virtue of this provision, 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. In this procedure, which has been resorted to less than 20 times since 1957,[14] the Court acts in a quasi-legislative capacity. This "exceptional procedure of a prior reference to the Court of Justice"[15] exists in order "to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the [Union]."[16]

If the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended, or the Treaties are revised. In other words, the Court's role is confined to interpreting. The consequences of such interpretation are determined by the Treaty in Article 218(11) TFEU. If an agreement cannot enter into force, it is not the fault of the Court. It is the "fault", if you like, of the Treaties.

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[11] S. Lorenzmeier, in: E. Grabitz, M. Hilf, M. Nettesheim (eds.), *Das Recht der Europäischen Union*, C.H. Beck, Munich: 2016, Article 218(6) TFEU.

[12] Which is the corollary to the institutional aspects pertaining to the rule of law in a regular state.

[13] *See e.g.* Case 294/83 *Parti écologiste Les Verts v. European Parliament*, para. 25.

[14] The first time being in 1975, Opinion 1/75 (OECD Understanding on a Local Cost Standard) EU: C:1975:145.

[15] *Ibidem*, para. 11.

[16] *See ibidem*, para. 10. For instance, the Union might be held liable on the international plane if it had to pull out of an agreement it adhered to because subsequently the Court found this agreement to be incompatible with the Treaties. For this reason, the procedure is referred to as "preventive judicial review." *See* Lorenzmeier, *supra* note 11, Article 218 TFEU, pt. 69.

## 3. EU COMPETENCE TO ENTRUST JUDICIAL COMPETENCES TO AN INTERNATIONAL BODY

The Court has on numerous occasions affirmed that the Union has the competence to conclude agreements which grant jurisdiction to external judicial bodies. Thus, in Opinion 1/91 (EEA Agreement – I), the Court held that "the Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions."[17] This view was repeated in Opinion 1/09[18] and Opinion 2/13.[19] These cases are discussed in more detail below.

At the same time, EU law imposes certain limits on the creation of external judicial bodies by Member States and by the Union acting internationally. Such limits can result from the Treaties themselves or from the principles developed by the Court of Justice in its case-law, such as the principle of autonomy of EU law, understood as the preservation of the "essential character" of the Court's judicial function.[20]

## 4. ARTICLE 344 TFEU: A LIMIT TO ENTRUSTING JURISDICTION

Article 344 TFEU, according to which "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein", confers an exclusive jurisdiction on the Court of Justice in matters of EU law. As a consequence of this provision, Member States cannot "escape" into the sphere of public international dispute resolution when it comes to an area which is governed by EU law. Article 344 TFEU is a key provision of the whole EU constitutional order and a specific expression of the principle of loyal cooperation under Article 4(3) TEU.[21] Nevertheless, this provision has not been invoked by the Court as often as Article 19 TEU. Indeed, it took considerably longer for Article 344 TFEU to surface in the Court's jurisprudence.[22]

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[17] Para. 40.

[18] Opinion 1/09 (Agreement creating a unified patent litigation system), EU:C:2011:123, para. 74. For a critical reception of this principle in the legal doctrine, *see e.g.* C. Eckes, *EU Accession to the ECHR: Between Autonomy and Adaption*, 76(2) Modern Law Review 254 (2013); T. Lock, *Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order*, 48(4) Common Market Law Review 1025 (2011).

[19] Opinion 2/13 (Accession of the EU to the ECHR), para. 182.

[20] *See* in detail *infra*.

[21] Case C-459/03 *Commission v. Ireland*, EU:C:2006:345, para. 169, and Opinion 2/13 (Accession of the EU to the ECHR), para. 202.

[22] Although Article 344 TFUE has been mentioned in different cases such as Opinion 1/91 (EEA I), para. 85, and Opinion 1/09 (Agreement creating a unified patent litigation system), EU:C:2011:123, para. 63, it was not given a prominent role until the ruling in Opinion 2/13 (Accession of the EU to the ECHR). *See also* S. Johansen, *The Reinterpretation of TFEU Article 344 in Opinion 2/13 and its Potential Consequences*, 16(1) German Law Journal 169 (2015), p. 171.

For the first time the provision of Article 344 TFEU was interpreted by the Court in the MOX Plant case,[23] in which Ireland brought actions against the United Kingdom before an arbitral tribunal and before the International Tribunal of the Law of the Sea in Hamburg - on the basis of the United Nations Convention on the Law of the Sea (UNCLOS) - with respect to resolving the dispute concerning the MOX plant located at Sellafield, on the British coast of the Irish Sea.

The Commission took the position that Ireland and the UK were in dispute in an area governed by substantive EU law and that they were therefore subject to the exclusive jurisdiction of the Court of Justice.[24] As UNCLOS is a mixed agreement, the Commission argued that the provisions of the Convention on which Ireland relied before the Arbitral Tribunal came within the scope of the Community's external competence in matters relating to environmental protection, as provided for under Article 192 TFEU,[25] and thus the interpretation and application of those provisions in the context of a dispute between Member States are matters falling within the exclusive jurisdiction of the Court by virtue of Article 344 TFEU.[26]

The Court sided with the Commission. It held[27] that by instituting dispute-settlement proceedings against the United Kingdom of Great Britain and Northern Ireland under the United Nations Convention on the Law of the Sea concerning the MOX plant, Ireland had failed to fulfil its obligations under Articles 4(3) TFEU[28] and 344 TFEU.[29]

We can see, therefore, that Article 344 TFEU substantially limits the capacity of Member States to bring disputes in the domain of public international law to entities outside the EU edifice.[30] Thus, Article 344 TFEU shields the EU legal order from external influences and, in consequence, guarantees its autonomy.[31]

## 5. THE PRINCIPLE OF AUTONOMY OF EU LAW AS A LIMIT TO ENTRUSTING JURISDICTION

The principle of autonomy has both an internal and an external dimension.[32] While the internal dimension of autonomy of the EU legal order vis-à-vis the Member States

[23] Case C-459/03.

[24] For the arguments on which the Commission relied in the proceedings, *see ibidem*, paras. 60 et seq.

[25] Formerly Article 175 EC.

[26] Formerly Article 292 EC.

[27] Case C-459/03 *Commission v. Ireland*, para. 182.

[28] Principle of loyal cooperation, formerly Article 10 EC.

[29] Formerly Article 292 EC.

[30] For the impact of Article 344 TFEU also in the light of Opinion 2/13 (Accession of the EU to the ECHR), *see* Johansen, *supra* note 22, p. 169.

[31] Opinion 1/91 (EEA I), para. 25; Lock, *supra* note 3, p. 81; S. Douglas-Scott, *Autonomy and Fundamental Rights: The ECJ's Opinion 2/13 on Accession the EU to the ECHR*, Europarättslig Tidskrift 29 (2016), p. 33.

32 For these terms *see* Lock, *supra* note 18, p. 1028; *see also* P. Gragl, *Strasbourg's External Review after the EU's Accession to the ECHR: A Subordination to the Luxembourg Court?*, 17 Tilburg Law Review 32 (2012), p. 36.

has been a prominent subject in the Court's case-law since the landmark judgments in cases 26/62 *Van Gend en Loos* and 6/64 *Costa/ENEL*,[33] the Court has only had the chance to rule on the external dimension vis-à-vis the international legal order, and especially its capacity to limit external jurisdiction, in a rather small number of cases, which are presented below.

### 5.1. Opinions 1/91 and 1/92

Opinions 1/91 and 1/92 dealt with the system of judicial oversight established by the draft EEA agreement.

The first draft agreement provided for a system with an "EEA Court" composed of eight judges, including five from the Court of Justice, and an "EEA Court of First Instance" composed of five judges including three from the (then) Court of First Instance.

The Court held, in Opinion 1/91 (EEA I), that the Union acting in the international sphere may "submit itself to the decisions of a court which is created or designated by [the international] agreement as regards the interpretation and application of its provisions."[34] However, where the agreement restates or refers to the fundamental provisions of the EU legal order, the judicial mechanism must respect the exclusive jurisdiction of the Court.[35]

The Court found that *in casu* the dispute resolution mechanism provided for in the draft agreement was incompatible with EU law,[36] as it risked undermining the autonomy of the EU legal order, inasmuch as the EEA Court, in interpreting the term "contracting party", would have to rule on the respective competences of the Union and the Member States as regards the matters governed by the provisions of the EEA agreement.[37] Furthermore, as the EEA agreement replicated a good deal of primary and secondary internal market law, coupled with an obligation of homogeneous interpretation, the EEA court, in interpreting the EEA agreement, would have to determine the meaning of corresponding provisions of EU law.[38] Moreover, the Court took issue with the organic links between the Court of Justice and the EEA Court. It would almost be impossible for the judges sitting on both the Court of Justice and the EEA court, when sitting in the Court of Justice, to tackle questions with completely open minds where they had already taken part in determining those questions as members of the EEA Court.[39] Finally, the Court found the proposed system of non-binding preliminary rulings unacceptable, under which the Court of Justice was to give to the courts and tribunals of the EFTA

[33] Respectively: EU:C:1963:1 and EU:C:1964:66.

[34] Opinion 1/91 (EEA I), para. 40; M. Bronckers, *The Relationship of the EC Courts with Other International Tribunals: Non-Committal, Respectful or Submissive?* 44 Common Market Law Review 601 (2007), p. 614, doubts the validity of this statement in the light of the case-law to date.

[35] Opinion 1/91 (EEA I), paras. 41-46.

[36] *Ibidem*, para. 36.

[37] *Ibidem*, para. 34.

[38] *Ibidem*, para. 45.

[39] *Ibidem*, para. 52. This is what I would refer to as "normative schizophrenia."

states purely advisory opinions.[40] This, in the opinion of the Court, would have changed the nature of the function of the Court as conceived by the Treaties.[41]

Following Opinion 1/91, the contracting parties to the EEA agreement did their homework and created a system under which a new EFTA Court was completely separated from the Court of Justice and under which that court could not determine the interpretation of EU provisions. Accordingly, in Opinion 1/92, the Court, after reiterating that an international agreement may confer new powers on the EU judiciary provided that this "does not change the essential character of the function of the Court as conceived in the treaties",[42] found the envisaged system to be compatible with the Treaties.

### 5.2. Opinion 1/00

Roughly ten years later, in Opinion 1/00,[43] the Court found that the preservation of the autonomy of the EU legal order required that the essential character of the powers of the EU and its institutions as conceived in the Treaty remain unaltered.[44] However in the case before it, given that judicial oversight of the agreement on the establishment on a European Common Aviation Area was to be ensured by the Court of Justice, the question of the relationship between that Court and other jurisdictions did not arise.

### 5.3. Opinion 1/09

Another landmark decision of the Court concerning the competence to interpret EU law by an external judicial organ is Opinion 1/09.[45] The EU Member States and third-states parties to the European Patent Convention[46] were considering the creation of a court with jurisdiction to hear actions related to European and Community patents. The envisaged agreement was to establish a European and Community Patent Court composed of a court of first instance, comprising a central division and local and regional divisions, and a court of appeal, having jurisdiction to hear appeals brought against decisions delivered by the court of first instance.

According to Article 48 of the draft agreement, the Patent Court was empowered (and the Appeal Court was obliged) to refer the questions of interpretation and validity of EU law to the Court of Justice. Preliminary rulings handed down by the Court of Justice would be binding on the Patent Court.

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[40] This envisaged procedures had been characterised by the fact that it would have the EFTA states free to authorise (or not) their courts to refer questions to the Court of Justice, that it would not have made such a reference obligatory in the case of courts of last instance in those states and that there would have been no guarantee that the answers given by the Court of Justice in such proceedings would have been binding on the courts making the reference.

[41] *Ibidem*, para. 61.

[42] Opinion 1/92 (EEA II), EU:C:1992:189, para. 32.

[43] Opinion 1/00 (European Common Aviation Area), EU:C:2002:231.

[44] *Ibidem*, para. 12.

[45] Opinion 1/09 (Agreement creating a unified patent litigation system), EU:C:2011:123.

[46] Signed in Munich on 5 October 1973.

In Opinion 1/09, the Court recalled that the creation of such a court was precluded neither by Article 262 TFEU nor by Article 344 TFEU. The former provision provides for the option of extending the jurisdiction of the European Union courts to disputes relating to the application of acts of the European Union which create European intellectual property rights. The latter provision – as has been already recalled above – prohibits Member States from submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties.[47]

Nevertheless, the Court observed that such a court would be placed outside the institutional and judicial framework of the EU. It would not be a part of the judicial system provided for in Article 19(1) TEU.[48] The Court continued that an international agreement providing for the creation of a court responsible for the interpretation of its provisions was not, in principle, incompatible with EU law.[49] EU competence in the field of international relations and its capacity to conclude international agreements necessarily entailed the power of the Union to submit itself to decisions of a court created or designated by such agreements regarding the interpretation and application of their provisions.[50]

The Court noted, however, that the agreement under consideration intended to create a court whose jurisdiction would not be limited to the interpretation of that agreement but would principally cover the application of other EU law instruments.[51] Thus the Court found the draft agreement to be incompatible with EU law.

The essential argument was not that the draft agreement would affect the competencies of the Court of Justice itself, but rather that it would deprive national courts of the Member States of the application of some EU law instruments.[52] The Court concluded that

> conferring on an international court which is outside the institutional and judicial framework of the EU an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply EU Law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of EU Law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the EU and on the Member States and which are indispensable to the preservation of the very nature of EU Law.[53]

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[47] In this respect, Article 344 TFEU is seen as a provision addressed to Member States to deal with cases of doubt about which court to refer to in a case of parallel jurisdiction; *see* Johansen, *supra* note 22, p. 174.

[48] *See* Opinion 1/09 (Agreement creating a unified patent litigation system), para. 71.

49 *See e.g.* Opinions 1/91 (EEA I), and 1/92 (EEA II), as well as Opinion 1/00 (European Common Aviation Area).

[50] *See* Opinion 1/09 (Agreement creating a unified patent litigation system), paras. 40 and 70.

[51] *Ibidem,* paras. 77-78. These would concern essentially the EU Regulations creating the system of a Community Patent (now a Unitary Patent).

[52] *Ibidem,* para. 80.

[53] *Ibidem*, para. 89. The Court, differently than in its Opinion 1/91 on the establishment of an EEA Court, does not base its reasoning on the ability of the Patent Court to rule on provisions of EU law, but rather on the fact that the involvement of an external court would change the system of judicial cooperation between the Court and the Member States, *see* Eckes, *supra* note 18, p. 259.

It is true that the draft agreement provided for a preliminary ruling mechanism. Nevertheless, this factor was not relevant for the Court, since the proposed Patent Court would have been an external judicial body. In that sense, the Patent Court cannot be treated in the same way as, for example, the Benelux Court which is "a court common to a number of Member States, situated, consequently, within the EU judicial system."[54] For this reason, the Patent Court's decisions would not be subject to "mechanisms capable of ensuring the full effectiveness of EU Law", such as Member States' liability and infringement actions for breach of EU law.[55]

The obstacles to the creation of a Patent Court resulting from the Opinion 1/09 had to be overcome by the Member States by drafting another instrument that would take into account the Opinion of the Court. The Agreement on a Unified Patent Court (UPC) was finally adopted in 2013. It is open to accession by the Member States only.

This implies that, from the point of view of the Court, the Patent Court must be considered as a court or tribunal of a Member State within the meaning of Article 267 TFEU.[56] This status of the Patent Court is confirmed by several provisions of the Agreement. The possibility of referring preliminary questions to the Court of Justice is expressly provided for in Article 21 of the agreement. Article 22 reaffirms that the Member States are "jointly and severally liable for damage resulting from an infringement of Union law by the Court of Appeal, in accordance with Union law concerning non-contractual liability of Member States for damage caused by their national courts breaching Union law." In accordance with Article 23, the actions of the Unified Patent Court are "directly attributable to each contracting Member State individually, including for the purposes of Articles 258, 259 and 260 TFEU, and to all contracting Member States collectively."

### 5.4. Case C-146/13 *Spain v. Parliament and Council*

The issues discussed by the Court in Opinion 1/09, which concerned the competence to interpret EU law by an external body, constituted one of the aspects of the litigation in case C-146/13 *Spain v. Parliament and Council*.[57] It is important to recall that the so-called "patent package" consists not only of the Agreement on the UPC, but also of two EU Regulations: one creating a European patent with unitary effect ("unitary patent"); and the second establishing a language regime applicable to the unitary patent. These regulations implement enhanced cooperation in the creation of unitary patent protection. All EU countries will participate in this enhanced cooperation except for Spain, Italy and Croatia.

[54] *Ibidem,* para. 80.

[55] *Ibidem*, paras. 86-88.

[56] This is questioned by legal doctrine with regard to the criteria established by the Court of Justice in case C-196/09 *Paul Miles and Others v. Écoles européennes*, EU:C:2011:388. *See e.g.* M. Amort, *Zur Vorlageberechtigung des Europäischen Patentgerichts: Rechtsschutzlücken und ihre Schließung*, Europarecht (2017), p. 56; J. Gruber, *Das Einheitliche Patentgericht: vorlagebefugt kraft eines völkerrechtlichen Vertrags?*, Gewerblicher Rechtsschutz und Urheberrecht International (2015), p. 323.

[57] EU:C:2015:298.

Following the adoption of the two Regulations in December 2012, the majority of Member States, except for Poland but with the addition of Italy,[58] proceeded to sign the Agreement on a Unified Patent Court. As has been already stated, the Patent Court will deal with disputes relating to European and unitary patents, at to which it will have exclusive jurisdiction.

The Agreement on a Unified Patent Court entrusts to the Court of Justice the competence to interpret both of the EU law instruments that form part of the "patent package", i.e. Regulation (EU) No 1257/2012 of 17 December 2012[59] implementing enhanced cooperation in the area of the creation of unitary patent protection and Regulation (EU) No 1260/2012 of 17 December 2012[60] establishing a language regime applicable to the unitary patent.

Regulation No 1257/2012 has been intentionally stripped of all its substantive content. The proposal for a Unitary Patent Regulation specified, in Articles 6 to 8, the content of the exclusive right granted to patent holders. However, part of the patent community and the UK government vigorously lobbied for the deletion of those articles, on the grounds that they paved the way for preliminary rulings of the Court of Justice. This would arguably unduly prolong infringement proceedings and expose highly technical matters of patent law to examination and assessment by a non-specialised court. Consequently, those articles were deleted from the proposal for a Unitary Patent Regulation and transferred to the Agreement on a Unified Patent Court (see Articles 25-27 thereof).

This is exactly one of the essential problems that Spain sought to target in case C-146/13 *Spain v. Parliament and Council*, in which Spain challenged the validity of Regulation No 1257/2012. One of the pleas questioned in particular whether Article 118 TFEU could constitute the legal basis of the Regulation. According to Spain, that Regulation did not create the "uniform protection" mentioned in Article 118 TFEU insofar as it did not define and harmonize the content of such a uniform protection. The Court dismissed that plea as well as all others, thereby confirming the validity of Regulation No 1257/2012.

In the absence of any substantive provision in Regulation No. 1257/2012, one may legitimately wonder to what extent the Court of Justice will influence European patent law. One could take the view that Article 5 of Regulation No. 1257/2012 may be viewed as incorporating Articles 25 to 27 of the Agreement on a Unified Patent Court into the EU legal order by way of reference. Thus Article 5(3) of that regulation refers to national laws. Those national laws would have been superseded by Articles 25 to 27 of the Agreement on a Unified Patent Court. This would mean that Article 5(3) of Regulation No. 1257/2012 also contains an indirect reference to Articles 25 to 27 of

[58] Even though Italy and Spain do not participate in this enhanced cooperation due to an unresolved conflict about the language regime; *see* Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, [2011] OJ L 76.

[59] [2012] OJ L 361.

[60] [2012] OJ L 361.

the agreement on a Unified Patent Court, which in turn would mean that the Court of Justice is competent to rule on those articles.

### 5.5. Opinion 2/13

By way of the Opinion procedure,[61] the Court was asked to reply to the question of the Commission whether the draft agreement between the Member States of the Council of Europe and the European Union providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms was compatible with the Treaties.

As is well known, the Court found that it was not. The Court's Opinion is clear and leaves no room for doubt: the draft accession agreement is not compatible with the Treaties. More specifically, the Court identified seven specific points in which the draft agreement lacked necessary provisions or requires modification.

First, the agreement does not contain a provision clarifying the relationship between Article 53 ECHR and Article 53 of the Charter.[62]

Secondly, the draft agreement does not contain a provision securing the observance of the principle of mutual trust between the Member States of the EU, which risks undermining the autonomy of EU law.[63] Such principle excludes an approach, based on the ECHR, whereupon one Member State would have to check in each specific case whether the other Member State has observed the human rights of the ECHR.[64]

Thirdly, the draft agreement does not contain a provision clarifying the relationship between Protocol No. 16 ECHR[65] and the preliminary reference procedure under Article 267 TFEU.[66]

Fourthly, the Court declared that the accession agreement should contain a provision *expressly* excluding the ECtHR's jurisdiction within the scope of EU law, so as to make it compatible with Article 344 TFEU.[67]

Fifthly, the co-respondent mechanism envisaged by the draft agreement does not ensure that the specific characteristics of the EU and EU law are preserved.[68] The Court

[61] Opinion 2/13 (Accession of the EU to the ECHR).

[62] *Ibidem*, paras. 188-190. For an in-depth analysis of this argument, *see* E. Alkema, R. van der Hulle, *Safeguard Rules in the European Legal Order: The Relationship between Article 53 ECHR and Article 53 of the CFR*, 35 (1-8) Human Rights Law Journal 8 (2015), pp. 17-19.

[63] Opinion 2/13 (Accession of the EU to the ECHR), paras. 194-195.

[64] The emphasis on the principle of mutual trust has been widely criticised. In this context it is important to recognise that mutual trust must not be confused with blind trust, which might encourage turning a blind eye to violations of fundamental rights between Member States. For a detailed analysis of this problem, *see* K. Lenaerts, *La vie après l'avis: Exploring the Principle of Mutual (Yet not Blind) Trust*, 54 Common Market Law Review 805 (2017).

[65] Protocol No. 16 ECHR, signed on 2 October 2013, i.e. after the finalization of the draft agreement on EU accession, provides for advisory opinions by the ECtHR on the interpretation of the ECHR rights at the request of courts from the contracting parties that have acceded to the Protocol.

[66] Opinion 2/13 (Accession of the EU to the ECHR), paras. 198-199.

[67] *Ibidem*, para. 213.

[68] *Ibidem*, para. 235.

finds fault in the fact that it would be the ECtHR which would take a binding decision on the EU rules concerning the division of competences and on the criteria for the attribution of acts in the context of the co-respondent mechanism.[69]

Sixthly, the prior involvement procedure envisaged by the draft agreement runs afoul of EU law in that the question whether prior involvement is triggered cannot be left to the ECtHR, but must be conferred on an EU institution.[70] Moreover, the prior involvement procedure should be extended to the interpretation of secondary law, instead of just with respect to its validity.[71]

Finally, in its seventh point the Court holds that it would prove incompatible with the "specific characteristics" of EU law to confer jurisdiction in matters of Common Foreign and Security Policy (CFSP) exclusively on an international court like the ECtHR, while at the same time they fall outside the ambit of judicial review by the Court of Justice.[72]

From the mere description of these seven points, it is clear that it is not accession to the ECHR as such that poses a problem with respect to the EU, but that it is the role of the European Court of Human Rights and, in particular, its relationship with the Court of Justice of the European Union that has not been adequately addressed in the draft accession agreement. Many critics were quick to pass a very negative judgment on the Opinion,[73] while others were more balanced and could see some sense in what the Court of Justice was doing.[74]

### 5.6. Case C-284/16 *Achmea*

The decision of the Court in *Achmea* did not concern the interpretation of a dispute resolution clause contained in an agreement to which the EU is a party. It dealt with a bilateral investment treaty (BIT) concluded between two Member States, namely the Netherlands and the Slovak Republic (which succeeded to the rights and obligations of the Czech and Slovak Federative Republic). Article 8 of this BIT, as it is the case in a

[69] *Ibidem*, paras. 224-225.

[70] *Ibidem*, para. 238.

[71] *Ibidem*, paras. 244-247.

[72] *Ibidem*, paras. 249-257. As for points 4 and 7, the Court only invokes Article 344 TFEU insofar as areas of EU competence are concerned. It does not reject the jurisdiction of the ECtHR in the area of CFSP on the grounds of Article 344 TFEU. Therefore, the criticism that the Court could not reject the ECtHR's competence in CFSR matters as a result of Article 344 TFEU is somewhat beside the point, *see* S. Peers, *The EU's accession to the ECHR: The dream becomes a nightmare*, 16 German Law Journal 213 (2015), p. 221. Even if one would like to invoke Article 344 TFEU in this context, it should be stressed that – as already mentioned above – Article 344 TFEU not only attributes exclusive jurisdiction, but more generally enshrines the autonomy of the EU legal order.

[73] *See e.g.* Peers, *supra* note 72, p. 213; F. Picod, *La Cour de justice a dit non à l'adhésion de l'Union européenne à la Convention EDH. Le mieux est l'ennemi du bien, selon les sages du plateau du Kirchberg*, 6 La Semaine Juridique – Edition générale (2015), p. 145.

[74] *See e.g.* D. Halberstam, *"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward*, 16(1) German Law Journal 105 (2015); A. Łazowski, R. Wessel, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, 16 German Law Journal 179 (2015).

vast majority of BITs, provided for investment arbitration in order to resolve disputes between one contracting party and an investor of the other contracting party.

It has to be recalled that problems of the potential incompatibility of BITs with EU law have been discussed in the legal writings for many years.[75] BITs – by definition – privilege investors from one country in relation to domestic investors or investors coming from countries which have not concluded a BIT with the host country. Such a conclusion is not necessarily altered by the existence of a most favourable nation clause in almost all BITs. The fundamental freedoms of the internal market are based on the principle of non-discrimination.[76] The internal market should constitute an equal and level playing field for all undertakings. The existence of privileged investors being able to rely on the possibility of invoking protection that goes further than the protection guaranteed by EU law inevitably results in discrimination. In this context it has to be emphasized that many of the typical BIT provisions[77] coincide with or overlap with the rules of EU law, especially of the internal market.[78] Another problem pertaining to the compatibility of BITs with EU law is the possibility for an investor to resort to international arbitration. This may potentially result in the exclusion of these types of disputes from EU judicial review and – as a consequence – in disregarding the primacy and autonomy of EU law.

It is precisely this latter problem which constituted the core issue of the Court's decision in *Achmea*. The Court first recalled the principle of the autonomy of EU law, which is "justified by essential characteristics of the EU and its law, relating in particular to the constitutional structure of EU and the very nature of that law."[79] The Court further continued that, in accordance with Article 19 TFEU, it is for the national courts and tribunals and the Court of Justice to ensure the judicial protection of the rights of individuals under EU law.[80] In this context the Court invoked the preliminary ruling procedure as the keystone of the judicial system of the Union.[81] For the Court of Justice, arbitration based on a BIT cannot be considered as a court or tribunal of a Member State under Article 267 TFEU, and therefore such arbitration cannot refer questions to the Court of Justice.[82] At the same time, such arbitration "may be called on to interpret or indeed to apply EU law, particularly the provisions concerning fundamental freedoms, including freedom of establishment and free movement of capital."[83]

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[75] *See e.g.* T. Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46(2) Common Market Law Review 383 (2009), pp. 407-426.

[76] In fact, the fundamental freedoms go beyond non-discrimination and also cover mere obstacles to intra-Union trade, i.e. measures which, although they are indistinctly applicable, in law and in fact, to home and foreign economic operators, lead to a diminution of cross-border economic activity.

[77] *E.g.* Fair and equitable treatment, full security, and protection or prohibition of illegal expropriation.

[78] *See* a detailed analysis of this problem in AG Wathelet's Opinion in case C-284/16 *Slowakische Republik (Slovak Republic) v. Achmea BV*, EU:C:2017:699, paras. 179-228.

[79] C-284/16 *Slowakische Republik (Slovak Republic) v. Achmea BV*, para. 33.

[80] *Ibidem*, para. 36.

[81] *Ibidem*, para 37.

[82] *Ibidem*, paras. 43-49.

[83] *Ibidem*, para. 42.

For the above reasons, the Court concluded that under EU law, in particular Article 267 and Article 344 TFEU, a dispute resolution clause providing for investment arbitration, contained in a BIT between two Member States, calls "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."[84]

## CONCLUSIONS

To allege from the above-mentioned case-law that the Court of Justice is afraid of another international jurisdiction does not quite get to the heart of the matter. It should not be forgotten that it took the Court of Justice decades to assert the scope of its jurisdiction in relation to national courts, especially national courts of last instance or national constitutional courts.[85] This is why, in my opinion, the Court is very wary when it comes to ceding jurisdiction to another international court or tribunal.

It should not be forgotten that "ceding" jurisdiction has another, less obvious effect. It fosters what I call an "escape into public international law." If two states, both of them members of the European Union, can turn to an international jurisdiction to solve a dispute in the domain of EU law, the Court of Justice would no longer be able to fulfil its role, which is to ensure that in the interpretation and application of the Treaties the law is observed. Apart from that, such an "escape" would in itself be contrary to Article 344 TFEU.[86] This provision is a key provision of the whole constitutional order of the EU. It has been in the (EEC) Treaty since the EEC's inception in the 1950s.

In my view, the Court was quite right to recall this provision in Opinion 2/13, just as it was correct in finding that Ireland infringed EU law when it took the United Kingdom before the International Tribunal of the Law of the Sea instead of the Court of Justice in a matter concerning environmental law, which falls within the scope of EU law.

Opinion 2/13 should also be seen in the broader context of the role of the Union, and by extension the role of its Court of Justice, in the protection of fundamental rights. In joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* case,[87] in setting aside a case of the General Court on appeal, the Court held, among many other things, that measures adopted by the Union institutions to give effect to United Nations Security Council (UNSC)

[84] *Ibidem*, para. 58.

[85] The German Constitutional Court, for example, referred a question to the Court of Justice for preliminary ruling for the first time ever in 2014; *see* case C-62/14 *Peter Gauweiler and Others v. Deutscher Bundestag*, EU:C:2015:400.

[86] *Cf.* Opinion 2/13 (Accession of the EU to the ECHR), para. 258. Moreover, as Johansen, *supra* note 22, p. 174-175, argues, Art 344 TFEU is not only directed at the Member States by instructing them what to do when faced with another Court competent to decide a matter concerning Union law, but also when they are faced with any agreement "liable to affect" Article 344 TFEU.

[87] EU:C:2008:461.

resolutions are subject to review on grounds of their respect of the fundamental rights as protected by EU law.[88] In doing so, it reserved for itself the right to control whether an EU regulation implementing a UNSC resolution is compatible with EU fundamental rights. The Court adopted a somewhat dualist approach,[89] by holding that whilst it does not have power to review the lawfulness of a UNSC resolution, it does have jurisdiction to review the compatibility of measures adopted by the Union institutions with the Treaty – whatever the real origin of such measures.[90]

Through *Kadi* and Opinion 2/13, the Court thus completes the image of the EU legal order as autonomous, not only in relation to its own Member States (through the principles of primacy, direct effect and uniformity), but also vis-à-vis the international world.[91] Although one may certainly criticise such an approach, I would submit that it is legitimate for the Court to preserve the legal order of the Union, the establishment of which has been a very long and arduous process.[92]

One could therefore conclude that as regards the attitude of the Court towards international jurisdictions, the Court is essentially concerned about assuring the autonomy as well as the uniform application of EU law.[93] The law of the EU is a very unique legal order that cannot exist without the legal orders of the Member States. The very existence of this fragile legal order depends on establishing an adequate balance - on the one hand between EU law and national law; and on the other between EU law and international law. This is the task of the Court of Justice (alone).[94]

In Opinions 1/91, 1/92, 1/09 and 2/13, the Court was extremely strict with respect to its competence and the external competence of the Union. However, in *Spain v. Parliament and Council*, the Court did not find a problem that substantive provisions defining the scope of protection of a unitary patent were transferred from the Regulation to the international agreement (to which the EU is not a party).

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[88] *Ibidem*, para. 290.

[89] *See* P. Gragl, *The Silence of the Treaties: General International Law and the European Union*, 57 German Yearbook of International Law 375 (2014), p. 382.

[90] C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, para. 326.

[91] Some authors read the *Kadi* judgment as the recognition of the EU as a "constitutional entity" and thus completing the concept of autonomy of the EU legal order. *See* Halberstam, *supra* note 74, p. 115; *see also* G. de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, 51 Harvard International Law Journal 1 (2010), p. 23.

[92] The Court expressively addresses the aim of maintaining the functioning of the well-balanced system of judicial cooperation between the national courts and the Court of Justice in Opinion 1/09 (Agreement creating a unified patent litigation system), EU:C:2011:123, para. 31. *See also* Eckes, *supra* note 18, p. 259.

[93] For this reading of the Court of Justice's case-law in relation to international law in general *see* de Búrca, *supra* note 91, pp. 23 and 31-34. In this context, the Court has been accused of putting autonomy before fundamental rights, *see* Douglas-Scott, *supra* note 31, p. 37; Halberstam, *supra* note 74, p. 113.

[94] Before the Court's ruling in Opinion 2/13 (Accession of the EU to the ECHR), it had therefore been suggested to exclude EU primary law from judicial review by the ECtHR, *see* for discussion Gragl, *supra* note 32, pp. 55-56; however, this clearly incompatible approach only highlights the fact that the authority to interpret EU law should stay with the Court of Justice alone.

In this context, one should bear the following thought in mind: the areas relating to the internal market (EEA, *Achmea*) and to fundamental rights (ECHR) are "horizontal" ones, which means that they are cross-cutting through virtually all (other) areas of competence and policy. By ceding the authority to interpret a wide range of these provisions to another court, the task of the Court as enshrined in Article 19 TEU, i.e. to guarantee the lawful and uniform application of EU law, risks being undermined and jeopardised.[95] Moreover, the interpretation of the internal market provisions, which since the outset have been central to the EU integration project, has an effect on a whole range of other policy fields, such as the environment, health, consumer protection and cultural policy, to name a few. The Court has fuelled the motor of integration in this area, and ceding jurisdiction would be tantamount to handing over the petrol can. Fundamental rights have the same effect, as they have to be protected in all areas of EU law and thus, by their very nature, are not limited to certain fields. The consequences of their application are very far-reaching, since even national provisions and practices have to comply with EU fundamental rights when Member States implement EU law, i.e., when the relevant national provisions fall within the scope of application of EU law.[96]

In my view, it is therefore understandable that the Court of Justice is very careful about autonomy when it comes to such large and important areas of law as the internal market or fundamental rights. Where, however, an area is highly specialized and more or less severable from the rest of EU law – as for example patents – it is a lot easier for the Court of Justice to take a more lenient view on autonomy.

This is the main reason why the Court of Justice is wary of entrusting jurisdictions to outside bodies. It concerns the breadth of the area at stake, and is not a subjective feeling of fear.

[95] Eckes, *supra* note 18, p. 259.

[96] *See*, in this respect, case C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105.