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Change in the Constitutional Framework of the European Union with regard to regulating foreign direct investment[1]

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Abstract

Since the Lisbon Treaty entered into force, the European Union (EU) has assumed powers over foreign direct investment. This article describes the system for allocating powers in this area between the Union and member states. It also comments on the powers still retained by the member states (which they exercise through bilateral investment treaties) and outlines the instruments that could make the EU's investment policy compatible with that of member states. It focuses in particular on developments in the EU's policy based on new global investment agreements that are about to be ratified or are still in the negotiation stage (such as the agreements with Canada, Singapore and the United States) and explores the consequences of establishing a state/investor dispute resolution system, which is envisaged by these agreements, and its compatibility with the principle of EU legal autonomy.

Key words: foreign direct investment, constitutional law, European Union law, bilateral investment treaties, European Union investment agreements, state/investor dispute resolution system.

1. Introduction

The process of European integration in relation to investment law is sparking controversial consequences in the sphere of the organisation of public power and the system of sources which is beginning to reveal the interest in constitutionalist and administrativist doctrine (Schill, 2010; Schneideman, 2000, 2008 & 2013; Terhechte, 2013).

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As we shall see, the main topic of discussion is currently the establishment of an international investor/state arbitration mechanism within the framework of the global trade agreements between the European Union and a third state (a debate which is specifically coming to the fore in the negotiations on what is call the Transatlantic Trade and Investment Partnership, or TTIP, between the United States and the EU). However, several thorny issues on the relationship between public law and investment law are beginning to arise beyond the reforms in competences introduced by the Lisbon Treaty and during the course of the investment policy implemented by the EU institutions in recent years.

The main change brought about when the Lisbon Treaty entered into force consisted of foreign direct investment matters being exclusively transferred to the European Union as part of the common trade policy (articles 206 and 207 in relation to article 3.1.e of the Treaty on the Functioning of the European Union, henceforth TFEU). That is, with the intention of consolidating a global investment pole, the member states seemed to give up an essential instrument in the economic policy of capital imports and exports.

Before the reforms introduced by the TFEU, international investment relations were primarily channelled via the states; therefore, the states had developed a constellation of bilateral investment treaties (BITs) with third states subjected to international public law that regulated the foreign investment system by establishing preferential treatment systems and dispute resolution mechanisms in international arbitration courts. Until 2014, all the EU member states as a whole had signed approximately 1,200 BITs, a figure that was slightly under half of the BITs in force around the world.[2] One noteworthy particularity of the system of litigation designed by some of the BITs signed by the EU member states is that the arbitral rulings from the international arbitration courts can be directly executive and not subject to control (or subjected to very limited control) by the states' judicial authorities.[3] In this circumstance, with the implementation of the EU's power over investment matters, the problem arises of how the agreements which the EU may reach with third states can coexist side by side with the BIT system which many member states have with the same third states, and to what extent they are compatible.

One concern stemming from the new organisation of investment law, and perhaps the most noteworthy one, is to what extent the transfer of the interpretative power and application of investment agreements in the event of conflict to international arbitration courts, as envisaged in the EU/third state global investment agreements, could entail a fracture in the subjection of the European public powers to European law. As the arbitration rulings would be directly executive, this would be a gap through which to avoid the control of both the courts of the member states, which would judge the conflict according to local law and EU law, and the Court of Justice of the EU (CJEU). As we shall see, judging from the zeal with which the CJEU defends its jurisdiction in other

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[2] See the 2014 report on investments from the United Nations Conference on Trade and Development, *UNCTAD Investment Report 2014*, available at <http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf>.

[3] A good summary of the particularities of international investment arbitration which refers to these BITs can be found in Lavranos (2013a: 201-205).

areas, such as those related to human rights, this possibility could be discarded were it not for the fact that even today, as we shall explain below, the mechanisms of interaction among the international arbitration courts and European jurisdiction display a series of significant difficulties.

This article is organised into a description of the evolution of the constitutional framework of the European Union in relation to investment law divided into the three phases mentioned above: first, the regulation of foreign direct investment matters before the Lisbon Treaty entered into force; secondly, the situation created with the entry into force of the Lisbon Treaty, with particular emphasis on the investment agreements reached under the new system; and thirdly, an analysis of the negotiation processes of the new EU/third state investment agreements still pending ratification which show remarkable (and highly questionable) new developments compared to the agreements reached in the previous phase (we shall particularly examine the cases of the EU/Canada and EU/Singapore agreements, which could determine the regulatory framework of EU/USA TTIP). Likewise, based on the narrative of the integration process and investment law, we shall also analyse the main compatibility problems between the EU system and the systems of the member states articulated around BITs, as well as the main instruments envisaged to overcome these problems.

2. First phase: The EU's constitutional framework in investment matters before the Lisbon Treaty entered into force

Even though the EU was attributed no explicit powers over foreign direct investment, European law did have a significant influence on this matter.[4] Its powers over the movement of capital, the common trade policy, competition law, the freedom of establishment and the environment set limits on the member states' ability to attract investment from outside the EU, as well as on the system of their investments in these third states. For example, principles like the ban on discrimination on the basis of nationality applied to all EU citizens theoretically prevented a member state from negotiating exclusive privileges with the national investors from one state and required any guarantees established in favour of a citizen or company from one member state to extend to any citizen or company in the EU.[5] In a similar vein, and as yet further proof of the influence of EU law on the system of investments from third states, it should be borne in mind that the public authorities of each of the EU member states had to abstain from attracting foreign capital via direct aid or tax exemptions which would violate European competition law. With regard to the freedom of establishment, the European Community could also adopt measures

[4] Regarding the system of power in the field of foreign direct investment before the Lisbon Treaty entered into force, see Dimopoulos (2011: 66-95).

[5] This doctrine, that the advantages offered to a national of a given member state in an agreement with a third state had to extend to all the nationals of all the EU member states can be inferred from a series of cases known as *Open Skies*: Case 466/98, *Commission vs. the United Kingdom* [2002] *ECR* I-9427; Case 467/98, *Commission vs. Denmark* [2002] *ECR* I-9519; Case 468/98, *Commission vs. Sweden* [2002] *ECR* I-9575; Case 469/98, *Commission vs. Finland* [2002] *ECR* I-9627; Case 471/98, *Commission vs. Belgium* [2002] *ECR* I-9681; Case 472/98, *Commission vs. Luxemburg* [2002] *ECR* I-9741; Case 975/98, *Commission vs. Austria* [2002] *ECR* I-9797; and Case 976/98, *Commission vs. Germany* [2002] *ECR* I-9855.

on access to an economic activity which is related to the initial investment made by a national from a third state (Vidal Puig, 2013: 147).

The uncertainty regarding the EU's powers in investment matters meant that its authorities tended to promote action based on the doctrine of the implicit powers stemming from former article 308 of the EC Treaty (ECT) in relation to the projection abroad of the range of internal powers (article 301 ECT).[6] This regulatory structure allowed the European authorities to take measures such as negotiating and reaching agreements incorporating some of the provisions on investment matters with third states, either within the framework of an association agreement in the context of a third state that sought to become an EU member,[7] within the framework of a cooperation agreement aimed at economic development,[8] or within the framework of an association or free-trade agreement with a non-European state in which the investment had a key influence on the movement of goods or the freedom to provide services.[9] This latter circumstance reinforced the role of the European Union institutions in representing all the member states in global economic organisations such as the World Trade Organisation, as well as its ability to negotiate the agreements on investment matters that might be reached in these forums.[10]

However, the vagueness of the EU's authority over investment law continued to allow the member states to implement an investment policy in relation to third states separate from the integration process, which took shape in BITs, as mentioned above. Before the Lisbon Treaty entered into force, these BITs may have been incompatible with EU law precisely because of its influence over certain matters, like the movement of capital, the freedom of establishment and competition law, as under the EC Treaty this authority was unequivocally attributed to the European Community. A conflict that is not yet free of consequences besieged BITs signed between an EU member state and the third European state that later joined the union, back when the third state was not yet a member of the organisation, with all the difficulties of fit that would later stem from abiding by the rules of international public law between two EU member states even if some of them ran counter to EU law. However, in this article we shall not focus on this issue, which is usually referred to as the conflict between intra-BIT and EU law. Instead, we shall focus on the issue of possible incompatibilities between EU action in relation to non-European third states on

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[6] Regarding the doctrine on implicit competences associated with foreign action, see Klamert, Marcus and Maydell, Niklas (2008: 493-513). See too, among others, Opinion 2/91 of the Court of Justice of the European Communities, *Convention No. 170 of the ILO* [1993] *ECR* I-106, paragraph 7.

[7] Such as the Association and Stabilisation Agreement with Croatia, OJ 2001 L-330/1.

[8] In this sense, see the example of the economic association agreement between the EU and the Caribbean states (CARIFORUM) oJ 2008 L 289/I/3.

[9] As in the agreements with Chile and Mexico. See the EU/Chile Association Agreement OJ 2002 L-352, signed on the 18th of November 2002, and the agreement between Mexico and the EU on the liberalisation of services (Mexico/EU agreement dated the 27th of February 2001 [2001/153/EC] OJ 2001 L 70/7).

[10] Such as the Agreement on Trade-Related Investment Measures, approved as an appendix in the final report of the agreements resulting from the Uruguay Round which led to the reform of the General Agreement on Trade and Tariffs (GATT) in 1994.

investment matters and the regulation of investments contained in the BITs that the member states have with these same third states (the issue of what are called extra-BITs).

3. Second phase: The European investment law system after the Lisbon Treaty entered into force

As we have seen, the entry into force of the Lisbon Treaty entailed the European Union authorities' taking on exclusive powers in foreign direct investment matters associated with the common trade policy (articles 206 and 207 in relation to article 3.1 TFEU).[11] The new articulation of powers stemmed from the realisation that the liberalisation of the movement of goods and services proposed and the trade policy with regard to third states or other regional economic integration organisations also called for the liberalisation of investments and capital flows, as well as en masse European Union intervention in the matter in order to strengthen its negotiation and competitive position in the global investment market.

The explicit incorporation of the term "foreign direct investment" into the EU Treaty also allowed some of the uncertainty about the EU's and the member states' spheres of action to be clarified. Despite this, as we shall see, there were still areas about which there is controversy when determining whether the power corresponds to the EU or the member states, or under which structure the powers are allocated (that is, whether it is an exclusive EU power, as can apparently be deduced from the regulation in the TFEU on foreign direct investment in relation to the common trade policy, or whether in reality it is a shared EU/member state power). We can understand the application of the CJEU's jurisprudence grounded on "implicit powers" in aspects in which the provisions of the Lisbon Treaty have not defined the scope of the EU's powers with sufficient clarity as a consequence of the continuum of these blurry areas of attributed powers (Hindelang & Maydell, 2013).

We should note that the interpretation of the concept of foreign direct investment was already present in the jurisprudence of the Court of Justice of the European Communities before the Lisbon Treaty entered into force; it referred "to any kind of investment made by physical or legal persons which is used to create or maintain direct, long-term relations between the supplier of the funds and the company for which these funds are meant for the development of an economic activity".[12] This definition was inspired by the notion of foreign direct investment formulated by other international

[11] Regarding the structure of powers in foreign direct investments matters after the Lisbon Treaty entered into force, see, among others: Bungenberg (2011), Dimopoulos (2011), Eilmansberger (2009), Ortino & Eeckhout (2012), Pascual Vives (2011), Reinisch (2013), Strick (2014), Torrent (2010), Vidal Puig (2013) and Woolcock (2010).

[12] As in, for example, CJEC decisions C-446/04, *Test Claimants in the FII Group Litigation vs. Commissioners Inland Revenue* [2006] *ECR* I-11753, paragraph 181; C-157/05 *Winfried L. Holböck vs. Finanzamt Salzburg Land* [2007] *ECR* I-4051, paragraph 34; and C-112/05, *Commission vs. Germany* [2007] *ECR* I-8995, paragraph 18.

organisations within the global economic sphere,[13] and it allows the terms mentioned in article 206 and 207 TFEU to be interpreted.

However, some state actors, such as the Federal Constitutional Court of Germany (FCCG), have promoted a restrictive idea of what is meant by foreign direct investment, which would entail a series of limitations on the powers transferred to the EU.[14] Thus, foreign direct investment would be limited to the initial phase in the transfer of capital and the establishment of the investment ("the investment which is used to gain shares in the control of a company", to word it in the FCCG's terms[15]); however, as we shall see, it would not include some aspects associated with investment activity which, according to this perspective, would be retained by the authorities of the member states. Thus, from the aforementioned position of the FCCG (setting aside the debatable circumstance of whether a constitutional court of a member state should be able to define the outlines of a power attributed exclusively to the EU) (Terhechte, 2013), and from many sectors of doctrine (Dimopoulos, 2011; Reinisch, 2013: 180 and forward; Tietje, 2009: 237), we can glean that the EU's recognised power in foreign direct investment would not include, at least not exclusively, what is called portfolio investment, which consists of purchasing securities in the capital market "without any intention of influencing the management and control of the company",[16] a sphere in which the states can still reserve some powers of regulation. Likewise, foreign direct investment would not affect the states' power to determine the property system nor, consequently, to determine the guarantees on foreign investments in phases after the establishment of the investment, such as the expropriation system or the conflict-resolution system if the ownership of the investment is affected by the state authorities.

Generally speaking, while the EU's sphere of action extends to most aspects related to the initial admission of the investment (with the aforementioned exception of portfolio investment or the acquisition of real estate by physical persons for personal use) (Vidal Puig, 2013), situating the powers related to dealing with foreign investment after admission, such as the issue of property law and expropriations,[17] as well as the specific regulations

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[13] In the case of the International Monetary Fund, see International Monetary Fund: *Balance of Payments Manual*, 1993, paragraph 362, available at <https://www.imf.org/external/pubs/ft/bopman/bopman.pdf>. In the case of the OECD, see Organization for Economic Cooperation and Development: *Benchmark Definition of Foreign Direct Investment*, 2008, available at <http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>.

[14] Ruling by the Federal Constitutional Court of Germany on the Treaty of Lisbon 2 *BvE* 2/08, 30 June 2009, paragraph 379.

[15] Ibid, paragraph 379.

[16] This would be the definition of portfolio investment according to the Court of Justice of the European Communities, formulated in the cumulative affairs of Cases C-282/04 and C-283/04, *Commission vs. Netherlands* [2008] *ECR* I-9141, paragraph 19.

[17] The property law system is reserved for the member states in accordance with article 345 TFEU, although quite a few measures contained in EU law affect the configuration of property law, such that we could state that it is an area of shared powers at the very least (Ortino & Eeckhout, 2011). The system of property law attributed to the member states has not hindered the CJEC from admitting that certain measures contained in EU law that affect property law do not violate the system of allocating powers. Thus, for example, regarding the compatibility among the member states' measures regulating the system of acquiring real estate and EU law's provisions on the movement of capital, see opinion C-452/01 of the Court of Justice in *Ospelt vs.*

stemming from the different sectors of economic activity in which the investment is used, is more controversial (Vidal Puig, 2013: 141-147). These gaps in the system of assigning powers on investment matters outlined by articles 206 and 206 TFEU justifies the member states' maintaining a legal basis of action to continue developing their own investment policies in the field of guarantees after the investment is established. Therefore, they are poised to continue developing the systems of guarantees against expropriations and conflict resolutions incorporated in the BITs reached with third states. For example, since the EU would have no powers to regulate the causes of expropriation of foreign investment, nor over its procedure, nor over the system of resolving disputes between a foreign investor and the public authorities, the international private investor/state arbitration mechanisms contained in BITs and referred to in the international arbitration structures provided for in multilateral treaties could be maintained, such as the Convention on the International Centre for Settlement of Investment Disputes (henceforth, ICSID),[18] part of the World Bank. This diversity of powers between the EU and the member states, which in practice is framed as a sphere of shared power instead of alluding to an exclusive EU power, has meant that in the European investment law system, the EU's policy has still had to coexist alongside the exercise of the states' powers. This situation has generated the need to seek ways to make joint European action compatible with the bilateral action of the member states.

3.1 The EU institutions and investment agreements after Lisbon

Therefore, the first direct consequence of the explicit attribution of power over foreign direct investment matters to the EU has to do with the increasing involvement of the EU institutions in negotiating and reaching investment agreements with third states and, in consequence, the implementation of a Europe-wide investment policy. Since the Lisbon Treaty entered into force, the strategy of the EU authorities has been to negotiate global bilateral trade agreements which include provisions on investments. One example of the former is what are called the "new-generation" free trade agreements (referring to the fact that they were reached after the reforms introduced by the Lisbon Treaty), such as the Free Trade Agreement between the European Union and the Republic of Korea, which includes provisions on investment related to the freedom of establishment.[19]

Even though the issue is secondary to our analysis, it is not specious to remark that European investment policy takes shape within the framework of free trade agreements instead of specific bilateral investment treaties (unlike what has become the practice of the member states), and that there is a clear focus on establishing bilateral relations outside of global forums like the World Trade Organisation. This is the pathway also taken in the third phase of

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Schlössle Weissenberg Familienstiftung [2003] *ECR* I-9743, paragraph 24; and regarding industrial law, see SCJEC C-350/92, *Council vs. Spain* [1995] *ECR* I-1985, paragraphs 13-22.

[18] Convention on the Settlement of Investment Disputes between states and nationals of other states reached in Washington on the 18th of March 1965.

[19] See chapter VII of the Free Trade Treaty between the European Union and the Republic of Korea, 2011/265/EU L 127 (Decision of the Council on the 16th of September 2010).

European actions on investment matters which is materialising in the negotiation of bilateral agreements with Canada, Singapore and the United States. As we shall discuss below, the main difference between the agreements in the second and third phases, such as the Treaty with Korea, is that in the third phase not only are there specific chapters on investments unrelated to trade freedoms, but there are also investor/state conflict resolution mechanisms which were absent in the previous regulations, even in the case of agreements approved after the Lisbon Treaty entered into force, which only provided for mechanisms to resolve conflicts between public powers, such as EU/third state.

3.2 Maintenance of BITs between member states and third states

The second situation related to the development of investment law within the new framework of European powers refers to the maintenance of the member states' investment policies, which has taken shape in the fact that their BITs reached with third states have remained in force. Inasmuch as the member states retain powers in investment matters, such as in the configuration of property law, the regime of expropriation and the system to resolve conflicts stemming from state actions on foreign investment, the international public law instruments ratified by the states are still operative. However, this circumstance will not be altered in the event that the EU does not implement an investment policy with a specific state, nor will it mean that state BITs will be fully replaced by agreements between the EU and the same state with which the member state has reached a BIT. In order for the latter to happen, there would have to be a complete match between the subject and the matter regulated in the state BITs and the EU agreements that would allow us to accept that one treaty has been replaced by another according to the Vienna Convention on the Law of Treaties,[20] or that the BIT between the member state and the third state with which the EU also has an agreement has been nullified.

Therefore, the BITs of the member states will remain in force with all the states with which the EU has not reached any agreement, as well as in cases in which there are aspects regulated by the BIT which are not provided for in the EU/third state agreement. This second possibility includes cases in which the BIT between a member state and a third state contains clauses regarding absolute investment protection against expropriation or political risks, or that it refers to an investor/state dispute resolution process, which, as we discussed above, has thus far been absent from the EU agreements.[21]

The entry into force of the Lisbon Treaty and several of the agreements with third states reached by the EU authorities have called for the adoption of measures that confirm the compatibility between the investment system in the European framework and the investment systems of the member states. These measures, spearheaded by the European institutions, entail recognition of the continuation of state powers on this matter, since if the power over foreign direct investment was truly "exclusive" to the EU within the framework of the

[20] Article 59 of the Vienna Convention on the Law of Treaties, from the 23rd of May 1969.

[21] With regard to EU/third state agreements and member state/third state BITs, we should bear in mind that the agreement between the EU and Singapore (still pending ratification) calls for the automatic termination of the BITs reached previously by member states.

common trade policy, any state action would run counter to EU law even if there were no actual collision between state law and EU law (or even if the EU had not exercised its power).[22] In another sense, as we shall see, the general regulation on the compatibility between the EU's action and the member states' action through their BITs with third states governed by international public law represents an attempt to avoid conflicts caused by the coexistence of two systems having to be resolved case by case by the CJEU, as happened in the past.[23] Finally, we should stress that the concern with precisely determining the applicable system is one of the crucial imperatives in a matter like investment law, which depends decisively on the ability to provide legal security in order to attract capital. It would be a paradox if the area of the world with the highest capital flows generated via investment had the greatest uncertainty on the applicable law through the effect of the coexistence between the state systems and the EU system.

3.3 Compatibility measures between the EU's investment policy and the member states' investment policies

The first measure to bear in mind to ensure the coherence between the member states' and the EU's investment policy is that the agreements reached between the EU and a third state are usually negotiated in mixed EU/member state agreements. Therefore, they are international treaties in which the member states are also parties. This was the formula suggested by the FCCG itself in its ruling on the Lisbon Treaty when, as it analysed the assumption of EU powers in foreign direct investment matters and noted that a range of powers influencing the matter were still held by the member states, it stated that an EU agreement that affected spheres allocated to the states, such as the investment protection system, would have to be reached as mixed agreements.[24] The practice of mixed agreements, which was not unknown in the community institutions' foreign actions before the Lisbon Treaty entered into force, has nonetheless become widespread since then and, indeed, characterises all the free-trade agreements which include precepts on investments (such as in the aforementioned free trade agreement with the Republic of Korea).

The second consideration that allows for headway in the implementation of a coherent investment policy between the EU and the member states is naturally the very process of approving the agreement, in which majority consent of the states in the Council is needed. It is true that since there are aspects of investment included in free-trade agreements, and judging from the

[22] In this sense, see the opinion of Advocate General Tizzano in the *Open Skies* series [2002] *ECR* I-9427, paragraphs 112-114; the opinion of Advocate General Maduro in Case 205/06, *Commission vs. Austria* [2009] *ECR* I-1301; and Case 249/06, *Commission vs. Sweden* [2009] *ECR* I-1335, paragraph 28. In the same vein, see Cremona (2008).

[23] This can be gleaned from the decisions of the Court of Justice of the European Union: Case 205/06, *Commission vs. Austria* [2009] *ECR* I-1301; Case 249/06, *Commission vs. the Kingdom of Sweden* [2009] *ECR* I-1335; and Case 118/07, *Commission vs. Finland* [2009] *ECR* I-10889. In all of them, the CJEU noted the incompatibility with EU law of the bilateral investment treaties that the defendant states had with third states. Regarding these decisions, see Díez-Hochleitner (2010) and Ghouri (2010).

[24] Ruling of the Federal Constitutional Court of Germany on the Lisbon Treaty, 2 *BvE* 2/08, 30 June 2009, paragraph 379. See Terhechte (2013: 26).

exclusive nature of the Union's power and the approval procedure which, according to article 207.4 of the TFEU, requires the same majorities in the spheres of external action as in internal action, it would be possible to reach an agreement with a third state with only a qualified majority of the member states. In other words, a treaty on investment could be approved counter to the desire of some member states. However, practice tell us that this situation has never occurred, since the EU's instruments of foreign action have always been unanimously agreed upon; likewise, there are matters of competence which must earn the consent of all the member states both internally and externally. In short, the unanimous approval of the member states' representation in the Council, either by the practical practice of reaching economic treaties or by procedural requirements inasmuch as matters subjected to the role of qualified majority are affected, contributes to the fact that there are not too many divergences between the action of each of the member states related to foreign investment and the desire expressed by the state representations to the EU institutions which consent to joint action.

Finally, as hinted at above, the EU institutions themselves have stipulated that the implementation period of investment policies with third states or organisations in the sphere of economics must be extensive over time, and they have chosen to construct a provisional system that minimises the contradictions with the member states' BITs. This is the structure stemming from EU Regulation 1219/2012, of the European Parliament and Council, dated the 12th of December 2012, which establishes transitory provisions on bilateral investment agreements between member states and third countries.[25] Thus, the general principle of Regulation 1219/2012 is declaring that the member states' BITs reached with third states remain in force, and that the member states are obligated to notify the Commission of the existence of these agreements reached before the EU attained powers in foreign direct investment matters.[26] The notification allows the Commission to evaluate whether the member state's BIT in force with a third state poses a serious obstacle to the Union's negotiating and reaching an investment agreement with the same third state. Thus, by following the trail of the duty of cooperation that the EU Treaty stipulates on how to make the international obligations of a member state before it joined the EU compatible with EU law,[27] Regulation 1219/2012 states that the member states should adopt any measures needed to guarantee that the BITs in which they are engaged with third states do not hinder the implementation of EU action in investments.[28] Partly for this reason, because of the member state's eventual need to renegotiate a BIT to adapt it to EU law or to agree to its termination, the aforementioned regulatory framework states that the Commission may authorise and monitor the action of a member state that is attempting to amend a BIT.[29] Despite this, Regulation 1219/2012 does not prevent the Commission from authorising the member state to start negotiations and reach a new BIT

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[25] OJ L 351, 20.12.2012, 40-46. For a comment on Regulation 1219/2012, see Pastor Palomar (2013).

[26] Article 3 of Regulation 1219/2012.

[27] Former article 307 of the EC Treaty, an aspect regulated today by article 351.2 TFEU.

[28] Article 6 of Regulation 1219/2012.

[29] Article 9 of Regulation 1219/2012.

with a third state, which confirms member states' ability to continue developing their own investment policies despite the redistribution of powers effected by the Lisbon Treaty (albeit conditioned upon the consent of the Commission and the possibility of it being informed of and even participating in the course of the negotiations).[30] This last situation is probably envisaged for the circumstance that the member state wishes to reach an investment treaty with a state with which the EU has neither an agreement of this kind nor plans to start negotiations on the issue in the immediate future. Therefore, Regulation 1219/2012 contains a three-fold system on member states' BITs reached with a third state, namely: 1) if the BIT was signed before the 1st of December 2009 (the date the Lisbon Treaty entered into force) or before the EU member state joined the EU for states that did so after the 1st of December 2009; 2) if they were signed between the 1st of December 2009 and the 9th of January 2013 (the date Regulation 1219/2012 entered into force); or 3) if they were signed after the 9th of January 2013.[31] Thus, the Commission's capacity for intervention to ensure the compatibility between the BIT and EU law (and thus the BIT's compatibility with the investment policy developed by the EU in relation to a third state) is greater in the second and third groups than in the first group, which, as mentioned above, apart from the obligation to notification, is subjected to regulation similar to what is provided for in member states' international treaties reached prior to their accession to the EU.

Despite the modifications introduced by Regulation 1219/2012 (and always without prejudice to the procedures that ensure the efficacy of EU law, such as appeals on noncompliance before the CJEU), the vagueness of the powers that allow a state to continue to reach investment agreements and the EU's vacillations and delays in the development of its own investment policy, as well as the indeterminate nature of the mechanisms that allow coherence to be assured between the two levels of governance (such as whether or not authorisation to negotiate a member state/third state BIT is granted by the Commission, as provided for in Regulation 1219/2012 itself), this does not prevent there from being contradictions in foreign direct investment matters which ultimately stem from the very shortcomings that besiege the EU's foreign action and its harmony with the foreign action of the member states in all spheres.

3.4 Consequences and possible tensions from the transfer of powers to the EU on investment matters and foreign policy of member states

The fact that the aspects stemming from investment law and the international relations system have historically been closely tied together can be seen, for example, by the fact that some BITs were framed as part of the entire set of provisions included in what are called friendship treaties, which reflected broader foreign policy initiatives. With the reform sparked by the Lisbon Treaty, the transfer to the EU institutions of the decision on the establishment of privileged relations in investment matters with a third state has contributed to

[30] Article 10 of Regulation 1219/2012.

[31] See Lavranos (2013b) for a striking critique of the system of Regulation EU 1219/2012, given, according to the author, the EU authorities' unnecessary interference in the member states' investment systems via BITs, which provided certainty to investors from third states.

the consolidation of joint foreign action, while it also questions the states' capacity to develop a policy with a third actor which contradicts the will of the EU. For example, if the EU wants to promote a system of privileged investment relations only with states which pledge to maintain a liberal democratic regime and a given standard of laws comparable to what the EU recognises, it seems difficult to claim that the member states are able to preserve bilateral investment regimes with third states that do not meet these conditions. In the same vein, if certain aspects of common foreign policy advise dealing with a crisis via a series of sanctions towards a third state which includes trade limitations, an initiative of this kind is hardly compatible with the circumstance that one or several member states encourage capital to be attracted from the citizens and companies of this conflictive state.

If tensions of this sort have not yet emerged in full bloom it is because the EU has not yet adopted a clear decision on investment matters associated with its foreign policy (Dimopoulos, 2011). The EU institutions themselves have not yet reached an unequivocal agreement on whether a common investment policy prioritises the EU's economic growth and competitiveness in a global capital market without seriously considering human rights and democracy conditions related to the selection of the potential states with which treaties could be reached (this seems to be hinted at from the Commission's intentions in the 2010 Communication which designed the EU's proposed investment policy),[32] or whether investment treaties have to be negotiated preferentially with states that share the EU's principles on democracy and human rights, in addition to their having environmental protection and labour law credentials similar to those in the EU (as the European Parliament seemed to suggest in its 2011 decision on investments).[33]

Fuzzy areas like this are what initially led to the EU's failure to adopt clear measures in relation to the agreements that can be maintained with a third state when the latter is the cause of a crisis which poses a challenge to common foreign policy. For example, the conflict between the Russian Federation and the Republic of Ukraine unleashed in November 2013, in part as the consequence of the process of ratifying the Association Agreement between the EU and Ukraine, did not prompt an in-depth revision of the EU's agreements with the Russian Federation, some of which include aspects related to investments, such as the 1994 Partnership and Cooperation Agreement between the European Communities and Russia.[34] The only consequence for the investment system between the EU and Russia stemming from the political crisis in Ukraine was the suspension of bilateral talks in the negotiations for a

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[32] *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Towards a comprehensive European international investment policy.* COM(2010)343 dated 7 July 2010. See especially pages 6-7.

[33] See *European Parliament Report on European International Investment Policy.* 2010/2203(INI) dated 6 April 2011.

[34] *Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and Their Member States, of One Part, and Russia, of the Other Part*, dated 28 November 1997, OJ L 327/3.

global trade agreement which would include a chapter on investments,[35] bearing in mind that before the conflict in Ukraine the European Commission had opened negotiations on an agreement of this kind.[36] In another vein, it is worth noting that the paralysis in the negotiations on a EU/Russian Federation agreement has not stopped the 18 BITs reached by the member states and this partner from remaining in force (Dralle, 2014: 335).

Secondly, the vacillations on an investment policy in EU governance have led to a failure to reconsider the fact that the majority of member states have investment treaties with third states which are not liberal democracies, some of which entered into force during the first decade of the 21st century. Despite this, we should note that some commitment can be perceived in the EU's foreign action with liberal political systems which are respectful of rights, given that the global trade and investment agreements that have been reached after the Lisbon Treaty entered into force (such as with the Republic of Korea) or which are pending ratification (such as with Canada) or which are in advanced phases of negotiation (such as with the United States) are with liberal democracies. The only exception is the opening of negotiations with the People's Republic of China in order to reach a global EU-China agreement on investments (in this case, it is a specific agreement on investments, not a chapter within a free-trade agreement).[37] Despite this, we should also note that these negotiations with the People's Republic of China are in a very preliminary phase.

This general attitude among European authorities when choosing the partners with which to reach free trade and investment agreements (all of them liberal democracies with the exception of China) holds true even though, as we shall see, the member states maintain relations with authoritarian regimes in the normal course of affairs through their capital import and export traffic.

Another focal point of tensions which leads to contradictions between a unified investment policy centred in the EU and the action of the member states has less to do with the conditions of the subject with which the agreement is reached and more to do with the economic policy needs of each member state, which can be quite disparate. For example, making the investment system uniform within the framework of the European Union hinders the member states from being able to define their own approach to investments according to whether they are receiving the capital (and therefore likely to seek more flexible forms of intervention on the foreign investments made in their territory) or exporting capital (in which case they would be more interested in establishing a system of guarantees for their investors in the territory of the third state) (Market, 2011). Likewise, global European investment action would blur the member states' capacity to compete with each other to attract foreign investment, even though the latter is highly limited by the uniform enforcement

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[35] On the system of investments between the European Union and the Russian Federation, see Dralle (2014).

[36] *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Towards a comprehensive European international investment policy.* COM(2010)343 dated 7 July 2010, p. 7.

[37] The start of negotiations to reach an EU-China investment agreement was announced at the sixteenth EU-China summit held on the 21st of November 2013. See <http://europa.eu/rapid/press-release_IP-14-33_en.htm>.

of EU law. Certainly the possibilities of offering incentives to foreign investors which allow a regime different to the investment policy implemented by another member state may contradict EU law if, for example, they entail state aid or losses in the level of environmental protection, or if they are associated with discriminatory treatment in favour of the third-state investor which harms other nationals from the EU member states.

3.5 The conflict resolution system in EU/third state investment agreements and its articulation with the conflict resolution mechanisms provided for in BITs

As we have seen, the interpretation of the system of allocating powers between the EU and the member states, which entered in force with the regulation established by the Lisbon Treaty, leaves the door open for the powers retained by the states on matters related to the legal property and expropriation system authorises them to agree to conflict-resolution systems on foreign investment. Thus, in practice, this would materialise in the preservation of member state/third state BITs and the conflict-resolution mechanisms contained therein, subjected to international public law. The main incompatibility which might arise with the survival of BITs in this sphere and EU law would occur if the BIT refers to a conflict-resolution system in an arbitration court regulated by international public law whose decisions are directly enforceable. In this case, it is conceivable that an arbitral ruling may be applicable without the possibility of checking its fit with EU law, since either the legal apparatus of the member state that signed the BIT has no access to this arbitral ruling or, if it does, it cannot exercise any power of review which reaches the point of promoting its inapplicability if it is deemed counter to EU law, or to elevate a prejudicial issue to the CJEU.[38] As mentioned above, the ICSID system, to which a considerable number of BITs between EU member states and third states refer, envisages this scenario, since the arbitral rulings on investment issued within the framework of that organisation are executive and in theory not subjected to judicial review by the legal authorities of the BIT signatory states (Von Papp, 2013: 1060). According to article 54.1 of the ICSID Convention, the contracting parties are bound to recognise the arbitral rulings issued by the convention system as equivalent to the final decision of a court of the member state in the convention (Von Papp, 2013: 1058). Generally speaking, no external power of control over the arbitral rulings in the ICSID system are envisaged beyond the controls contained in the convention itself[39] (therefore, nor is control derived from EU law envisaged), just as the ability to oppose an exception associated with a public policy that impedes or regulates the enforcement of an arbitral ruling is highly restricted both within the ICSID system and by any other autonomous legal order (Kleinheisterkamp, 2012: 421). In these circumstances, the possibility that an arbitral ruling from outside of EU law (even, as mentioned above, in a sphere of EU power such as foreign direct investment) is applicable without intervention by any judicial authority that

[38] On the difficulties of enforcing an arbitral ruling from the ICSID system in the European Union, see the case *Ioan Micula et al. vs. Romania*, ICSID case no. ARB/05/20 (11 December 2013).

[39] See “Article 54”, in Schreuer (2009), paragraph 81.

enforces EU law (neither the member states nor the CJEU) has meant that numerous voices are calling for some kind of connection between the conflict resolution system in the BITs and the system of enforcing EU law (Pascual Vives, 2014; Schill, 2011; Von Papp, 2013). In this sense, there are several obstacles to ensuring the possibility of EU law's control over an arbitral ruling, particularly in the sphere of the CJEU's final word. The most noteworthy objections are that first the member states' commitment not to subject conflicts on the interpretation or implementation of the treaties to procedures different to those provided for in the Treaties (that is, for example, a jurisdiction other than the CJEU) is only applied in relation to conflicts with public entities and not, as happened in investments and in the conflict-resolution procedures envisaged in the BITs, between a state and a private party (private investor). On the other hand, it would be difficult to interpret that the investment arbitration courts could be regarded as "judicial bodies" in that they are legitimate for elevating a prejudicial matter before the CJEU, since, among other crucial attributes, they are neither the judicial authority of a member state nor permanent bodies (Von Papp, 2013).[40]

Nonetheless, in the past decade there have been examples of EU law being applied to disputes over investments, either in the jurisdictional sphere of the EU or in the sphere of an investment arbitration[41] in which EU law has been regarded as the applicable law as it falls within a set of norms within relevant international public law or "local" law to decide on the case or to understand that it is a "deed" agreed upon by the parties and essential to resolve the conflict (Von Papp, 2013). One of the assumptions of the CJEU's intervention materialises when the Commission must file a grievance due to noncompliance, especially stemming from a state's lack of action in resolving the incompatibilities between a BIT reached previously to the state's joining the EU and EU law.[42] Therefore, we should note that in this circumstance the involvement of the EU's jurisdictional system depends exclusively on the discretion of the Commission and is not ensured by the same judicial structure articulated between the judges and courts of the member states and the CJEU. Something similar can be said about the considerations that an investment arbitration court, as part of the ICSID or in another context, could make in relation to the application of EU law: the arbitration court is not bound by EU law and there is no certainty that it will invoke EU law in its ruling, which, as mentioned above, cannot be subjected to subsequent judicial control within either the member states or the CJEU. In short, in the current legal order of investment law, EU law cannot exert an influence in either substantive or institutional terms, even if the EU has assumed powers in matters involving foreign direct investment.

In any case, as we shall analyse in the section below, the tendency taking shape in the EU's future global investment agreements with third states does

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[40] The Court of Justice of the European Communities itself declared that the arbitral courts of the member states could not be considered "courts" for the purposes of elevating a preliminary ruling. See SCJEC Case 125/04, *Denuit & Cordenier vs. Transorient* [2005] *ECR* I-923.

[41] See, for example, *Electrabel S.A. vs. Hungary*, ICSID case no. ARB/07/19, a resolution on jurisdiction, applicable law and liability (30 November 2012).

[42] Such as in the CJEU ruling in Case 264/09, *Commission vs. Slovak Republic* [2011] *ECR* I-08065.

not so much ensure the possibility of EU legal authorities' reviewing disputes on investment matters but instead, with all the tensions that this can entail with the CJEU jurisprudence, maintaining the system of referring to the dispute resolution mechanism provided for in international public law through which arbitration courts that hand down executive rulings are shaped.

4. Third phase: The UE's global investment policy and the negotiation of free trade agreements with the inclusion of a chapter on investments

With the approval of the communication entitled *Towards a comprehensive European international investment policy*,[43] the Commission informed the other institutions of the directives that shall prevail in the exercise of the power on matters of foreign direct investment assumed by the EU, and in particular on the objectives that will determine negotiating and reaching investment agreements with third states or with international economic integration organisations. The aforementioned document already hinted at the desire to include a chapter on investments in the course of the negotiations of global trade agreements (thus acknowledging the need to associate trade with the capital flows stemming from investment relations) as well as the possibility of recognising an arbitration mechanism to resolve disputes on private party/state investments.[44] While until now trade agreements (and the precepts on investments included in those agreements) only envisaged arbitration instruments that pitted public entities (state/state or EU/state) against each other, largely associated with diplomatic strategies, in the new wave of investment agreements considered by the EU, investor/state arbitration would at least be complementary to the arbitration involving states.[45] Developing the general principles shaped in the communication *Towards a comprehensive European international investment policy*, the trade agreements reached or currently in the negotiation phase with Canada, Singapore, the United States and India include a chapter on the investment system[46] and an international investor/state arbitration system which, somewhat similarly to the dispute resolution mechanisms provided for in the member states' BITs, offer a panoply of arbitration systems from which the investor may choose, which at least include referral to the ICSID structure and to the rules of the United Nations Commission on International Trade Law (UNCITRAL). Of the aforementioned free trade agreements, the negotiations with India and the United States are far from reaching their conclusion, but in the cases of Canada and Singapore the agreements are about to be ratified. What is more, the EU-Singapore agreement is pending a consultation in the CJEU which affects the compatibility between

[43] *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Towards a comprehensive European international investment policy.* COM(2010)343 dated 7 July 2010,.

[44] In the context of investment agreements envisaged as mixed EU/member state agreements reached with a third state, those referring to dispute resolution structures would be purely allowed to pit a private investor from a third state against the EU and/or the member states. See Iruretagoiena Agirrezabalaga (2011).

[45] This is what leads some commentators to refer to the tendency to move towards a "hybrid" model of arbitration in investment matters. See Roberts (2014).

[46] In the case of China, as mentioned above, only an investment agreement is being negotiated.

the provisions on investment and those on the arbitration mechanisms provided for in EU law. The CJEU's ruling will thus further flesh out a key aspect in regard to investment arbitration courts and EU law, such as whether the provision of arbitration courts devoted to resolving investor/state disputes contradicts the autonomy of the EU's legal order and, more pointedly, the status of the CJEU as the ultimate interpretative authority on aspects related to EU law.

In another sense, the EU institutions' desire to get this organisation involved in investor/state dispute resolution systems led to the approval of Regulation 912/2014 dated the 23rd of July 2014, which establishes the rules of dividing financial responsibility between the EU and the member states in the resolution of lawsuits by an arbitration court established according to future investment agreements which may be reached between the EU and a third state.[47]

4.1 The EU's adherence or not to international treaties on mechanisms to solve investor/state disputes

As mentioned above, the new wave of EU investment agreements with a third state calls for the establishment of mechanisms to resolve investor/state conflicts with referrals to the rules of the ICSID, for example. However, the EU is not a party to the ICSID convention. What is more, the EU's potential adherence to that convention would require that it be amended, which would necessitate the consent of all 151 signatories of the ICSID Convention, since article 67 of that convention states that this instrument is only open to being signed "by states", which excludes regional economic integration organisations like the EU.[48] The fact that global investment agreements with third states are reached as "mixed agreements" and therefore with the EU member states which, with the exception of Poland, have ratified the ICSID Convention as part of those agreements, does not detract from the EU's role as a main actor in the application of the agreement nor from the possibility that non-compliances that instigate a demand that an arbitration mechanism be set up originate in an act of the EU institutions. These institutions are not subject to the dispute resolution system agreed to with the third state, thus generating a climate of uncertainty which is hardly appropriate in a field such as investments, which requires regulatory clarity to be consolidated. The experience of the EU's adhesion to the European Human Rights Convention would be a precedent which would demonstrate the possibility of reforming an international treaty to which other non-EU states belong in order to include the EU as a member, although it is also a process that reveals the enormous complexities entailed in

[47] Regulation 912/2014, of the Parliament and Council, dated the 23rd of July 2014, establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party. OJ L 257/121, 28.08.2014. Regarding Regulation 912/2014 and the critique of the complex compatibility between the rules of allocating responsibilities established in that regulation and the rules of international responsibility, see Dimopoulos (2014); Fernández Rozas (2014).

[48] Specifically, article 67 of the ICSID Convention states that it is open to the signing of states that are members of the World Bank, an organisation of which the EU is also not a member either. Regarding the impossibility for the EU to join ICSID Convention without this instrument being reformed, see Burgstaller (2009: 215).

articulating the EU's legal order with a legal order generated by a treaty that is subjected to international public law. If the ICSID system should be one of the main models when resolving investor/state conflicts on the agreements to which the EU is a party, bearing in mind the EU institutions' desire to become crucial actors in the world flow of investments, the imperatives of regulatory certainty and legal security would require the amendment of the ICSID Convention so that the EU could join it as a member, despite the series of technical obstacles and delays that this would entail. Despite this, and with the exception of objections on the autonomy of EU law which we shall outline below, precisely because of the scope of the volume of investment that the major global EU agreements will promote, it might be more useful to instate an ad hoc investor/state conflict resolution mechanism for each agreement or envisage a general arbitration instrument that could be ratified by the EU, its member states and other third states with which the EU reaches investment agreements.

4.2 Investment arbitration courts and the autonomy of EU law. A constitutional boundary?

As discussed above, one of the primary obstacles to instating investor/state conflict resolution mechanisms in the agreements reached between the EU and a third state is the potential incompatibility between these structures and the principle of EU legal autonomy.[49] In recent decades, this principle, which was first developed to delimit the relationship between European law and the law of the member states, has also been associated with the determination of the relations between the EU's legal order vis-à-vis international public law.[50]

The basic idea linked to the principle of autonomy alludes to the fact that the Constituent Treaties generate a legal order that is independent[51] of the legal orders of the member states and international public law in general, such that any conflicts that arise from a norm within the EU legal order shall be resolved within the EU's regulatory system and the procedures established therein. The scheme in question would be projected by the jurisdictional organisation with the allocation in the CJEU of the ultimate authority in interpreting and applying EU law.[52] Specifically, regarding the structure of the jurisdictional organisation derived from the principle of EU autonomy, the CJEU and the legal bodies of

[49] Regarding international investment arbitration courts and the potential collision with the principle of the autonomy of EU law, see primarily Dimopoulos (2014) and Hindelang (2011).

[50] The concept of the autonomy of EU law in relation to international public law and the CJEU's status as the supreme authority in the interpretation of EU law in relation to other international courts are issues which have been particularly developed in the CJEU's rulings on the membership of the European Communities or the EU in other international organisations. See Opinion CJEC 1/91, *European Economic Area I* [1991] *ECR* I-6079; Opinion CJEC 1/92, *European Economic Area II* [1992] *ECR*, I-3493; Opinion CJEC 1/00, *European Common Aviation Area* [2002] *ECR* I-3493; Opinion CJEU 1/09, *European and Community Patent Court* [2011] *ECR* I-1137; and Opinion CJEU 2/13, *Adhesion to the European Human Rights Convention* dated the 18th of December 2014.

[51] The idea of the principle of autonomy of EU law is contained in the founding rulings of the Court of Justice of the European Communities: *Van Gend & Loos* and *Costa vs. ENEL*, SCJEC C-26/62, *Van Gend & Loos vs. Nederlandse Administratie der Belastigen* [1963] *ECR* 1; SCJEC C-6/64, *Costa vs. ENEL* [1964] *ECR* 585.

[52] Article 19.1 TEU.

the member states would be in charge of guaranteeing respect for the EU legal order through a cooperation system in which, to ensure that there are no divergences in the application of EU law by the state courts, there is an obligation to consider the prejudicial matter when there are doubts about the interpretation or validity of the EU's legal provisions, and it is the CJEU's duty to monitor the proper exercise of this task via the trial mechanisms which allow it to uncover noncompliance.[53]

The principle of EU legal autonomy and the allocation of the ultimate interpretative authority of EU law to the CJEU would not prevent EU institutions from reaching international treaties in which jurisdiction is conferred upon a body other than the CJEU.[54] However, this attribution would violate the principle of the autonomy of EU law if the legal body instated by the international treaty of which the EU was a party: 1) when there is any possibility of interpreting EU law in a definitive fashion;[55] or 2) when the interpretation of the applicable norms by the international legal body affects the system of power allocation between the EU and the member states as regulated in the EU constituent treaties, and over which the CJEU holds the maximum interpretative authority.[56]

Bearing in mind these conditions, it is plausible to think that an EU/member states investment agreement with a third state which instates a system to resolve disputes based on international arbitration courts with the authority to rule on investor/state lawsuits might infringe upon the principle of autonomy of EU law if the arbitration court makes an interpretation of original or derivative EU law which the CJEU has no ability to control. This circumstance, as hinted at above, is not unlikely to happen in a system in which arbitral rulings are not susceptible to judicial revision, or when this revision is extremely limited and that, therefore, the courts of the member states cannot file a prejudicial matter before the CJEU or even guarantee the effet utile of EU law. Thus, it is not inconceivable that an international investment arbitration court might become involved in a broad spectrum of areas which EU law could affect (which can range from competition law in relation to state aid to the freedom of movement of capital or energy policy) and that it is decided

[53] See, for example, CJEU Opinion 1/09, *European and Patents Court of the Community* [2011] *ECR* I-1137, especially paragraphs 65, 66, 67, 68, 83, 84 and 86. Regarding the autonomy of EU law and jurisdictional organisation, see Azpitarte Sánchez (2013).

[54] Regarding the possibility that an international agreement envisages the creation of a jurisdictional body whose decisions bind the EU institutions, including the CJEU, as long as the autonomy of the EU law system is respected, see CJEU Opinion 2/13, *Adhesion to the European Human Rights Convention*, dated the 18th of December 2014, paragraphs 182 and 183 and the jurisprudence cited therein.

[55] See CJEC Opinion 1/91, *European Economic Area I* [1991] *ECR* I-6079, paragraphs 41-46; and regarding the possibility that the CJEU is not allowed to provide a definitive interpretation of the law stemming from the EU on matters related to the compatibility between EU derivative law and the European Human Rights Convention reviewed by the ECHR and, therefore, and according to the CJEU, in noncompliance with the principle of the autonomy of EU law, see CJEU Opinion 2/13, *Adhesion to the European Human Rights Convention*, dated the 18th of December 2014, paragraphs 236-248.

[56] In this vein, see, CJEC Opinion 1/91, *European Economic Area I* [1991] *ECR* I-6079, paragraphs 31-36, and CJEU Opinion 2/13, *Adhesion to the European Human Rights Convention*, dated the 18th of December 2014, paragraphs 215-225.

according to an interpretation of the EU norms outside the jurisdictional sphere of both the EU member states' courts and the CJEU.

In another sense, regarding the systems for resolving investor/state disputes, we should say that in theory, as mentioned above, this does not compromise the member states' obligation not to subject disputes on the interpretation of the application of treaties to different procedures than those provided for in the Treaties (article 344 TFEU), since this imperative only affects lawsuits between states, but not those between a private individual and a state. The intervention of private individuals in the conflict may justify an attenuation of the CJEU's jurisdictional scope,[57] but it is unlikely to entail this body's refusal to intervene structurally in conflicts that imply an interpretation of EU law or that cast doubt on the efficacy of this legal order. In any event, in relation to the international arbitration formulas which pit member states against each other, the CJEU already had the opportunity to determine that these states, which are subject to article 344 TFEU, could not avoid the jurisdiction of the CJEU through the international arbitration courts provided for by international treaties if interpretation of EU law is part of the dispute.[58] Thus, according to this jurisprudence, the CJEU prevents member states from resorting to international arbitration in disputes between them, unless they had been subjected to CJEU control before the conflict (Lavranos, 2013a).

We should stress that it is very unlikely for the CJEU to structurally accept a limitation on its jurisdictional scope such as the kind that would stem from a pronouncement in an opinion on a global investment agreement (such as the EU/Singapore agreement, which is pending resolution), even if it provides for an arbitration system to resolve not state/state disputes but investor/state disputes. As mentioned above, however, the incidence of the decisions from international arbitration courts on EU law without the possibility of judicial control (or with very limited control) already happens because of the validity of the member states' BITs with third states. In short, the gap that can be seen in the efficacy of EU law (and, in fact, in one of the principles that guarantees the state's subjection to law, such as judicial control) in a future global investment agreement between the EU and a third state is the same gap that can already be gleaned from the application of the mechanisms to resolve disputes included in

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57 This reinforced nature in defence of the CJEU's jurisdictional sphere in conflicts between public entities based on article 344 TFEU can be found in CJEU Opinion 2/13 on Adhesion to the European Human Rights Convention. The CJEU opined that the adhesion agreement ran counter to article 344 TFEU in that it admitted the possibility that an inter-state or EU/member state lawsuit could be filed with the European Human Rights Court for violations of the ECHR law in relation to EU law without an opinion from the CJEU. CJEU Opinion 2/13, *Adhesion to the European Human Rights Convention*, dated the 18th of December 2014, paragraphs 201-214.

58 This appears in what is known as the "controversy of the MOX factory" (SCJEC C-459/03, *Commission vs. Ireland* [2006] *ECR* I-4635, paragraphs 123 and forward). The case referred to a lawsuit that pitted Ireland against the United Kingdom in relation to radioactive emissions in the Sellafield plant. This controversy affected two international treaties which provided for the possibility of establishing ad hoc arbitration courts, the United Nations Convention on the Law of the Sea and the Convention for the Protection of the Marine Environment of the North-East Atlantic. Despite this, while understanding the EU law was also applicable in environmental matters, the European Commission filed an appeal on noncompliance against the Republic of Ireland for having subjected the dispute to an international arbitration court instead of the CJEC, as stems from the Constituent Treaties, an allegation which was supported by the CJEC.

the BITs, even though they are rarely impugned by the Commission, and rarely does it push for their amendment or termination under the terms of Regulation 1219/2012, mentioned above. Perhaps the difference consists of the fact that hindering the judicial review of an international investment arbitration and its subjection to EU law and ultimate interpretation by the CJEU may have much greater economic and perhaps even political repercussions than disputes stemming from a BIT, due to the volume of trade and investment relations of the EU as a whole with a third state. A fundamental part of economic systems within the context of globalisation would be avoiding the mandates of the rule of law that decisively accompanied the advent of constitutionalism. In contrast, without yet knowing how it is going to evolve, it should at the very least not go unnoticed.

5. Conclusions

The transfer of powers on foreign direct investment matters to the EU authorities via the Lisbon Treaty could definitively limit the spheres of decision-making of the member states on matters of economic policy and foreign action. Likewise, the Commission's assumption of the capacity to negotiate global investment agreements with third states, and the European Council and Parliament's assumption of the capacity to close these agreements, could have far-reaching repercussions on the organisation of public power and the order of the system of sources of law. Despite this, the EU authorities are still quite far from implementing a global investment policy, even though they have reached some agreements in this regard with third states and are on the verge of ratifying other agreements with investment regulations that affect all spheres of this phenomenon (initial investment, regulation after the establishment of the investment, treatment standards, guarantees against expropriation and conflict resolution). The intention at the level of EU governance to make headway in this area does not downplay the fact that the uncertainties in the system of allocating powers and the member states' traditional involvement in investment policy with third states through international public law instruments, namely BITs, augur the continuity of the member states as prime actors in the development of investment law. At least, as can be gleaned from the structure of Regulations 1219/2012 and 912/2014, the EU institutions themselves seem to recognise a phase of coexistence between investment policy channelled through the member states and the initiative in investment matters spearheaded by the EU. The main uncertainties regarding the compatibility between the plurality of investment systems lies in the conflict solving mechanism and the possibility that in the next phase in the implementation of EU/third state global investment agreements, an arbitration mechanism is articulated to resolve investor/state disputes which changes the application of EU law and the principle of autonomy of the European legal order. This latter does not exclude the risk, already present in the numerous BITs existing between the member states and third states, that the very notion of the rule of law becomes weakened if the arbitral rulings are not subjected to the possibility of judicial control. However, it seems difficult for the instatement of an international investor/state arbitration mechanism provided for in a global EU/third state agreement to be accepted by the CJEU if we bear in mind its jurisprudence on the impossibility for an international body other than the CJEU to have the last word on the interpretation of EU law and the EU/member state allocation of powers.

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