Judging International dispute settlement

From the Investment Court System to the Aarhus Convention's Compliance Committee

Ankersmit, L.

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JUDGING INTERNATIONAL DISPUTE SETTLEMENT: FROM THE INVESTMENT COURT SYSTEM TO THE AARHUS CONVENTION’S COMPLIANCE COMMITTEE

Laurens Ankersmit
Judging international dispute settlement: from the Investment Court System to the Aarhus Convention’s Compliance Committee

Laurens Ankersmit

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Dr Laurens Ankersmit is a lawyer at ClientEarth, Brussels and teaches EU external relations law at the Brussels School of International Studies of the University of Kent. The author would like to thank professor Ludwig Krämer, professor Christina Eckes, Dr Jessica Lawrence, Anne Friel, and Anais Berthier for their comments on a previous version of this article. The author was not involved in the ClientEarth case before the ACCC discussed in this article.
Abstract

This working paper explores the legal limits set by the EU Treaties on the EU’s ability to submit itself to international dispute settlement in the context of the Aarhus Convention and the Comprehensive Economic and Trade Agreement (CETA). Both the Investment Court System (ICS) under CETA and the Aarhus Convention Compliance Committee (ACCC) may be faced with questions of EU law when deciding cases brought to them by individuals. This may raise questions about their compatibility with the EU’s system of judicial dialogue between the courts of the Member States and the European Court of Justice, which ensures the uniform interpretation and application of EU law. In order to determine whether and to what extent this is problematic in the context of the EU’s autonomous legal order, this working paper compares the nature of dispute settlement and the powers of ICS and ACCC in light of the legal limits set by the EU Treaties. As a result of this comparative analysis, the working paper concludes that both the nature of the ACCC as a non-judicial consultative body and its more limited powers pose less of a threat to the autonomy of the EU’s legal order than ICS.
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Introduction
The Commission’s recent approach towards external oversight mechanisms in international agreements is paradoxical. On the one hand, the Commission has objected to the findings of the Aarhus Convention’s Compliance Committee (ACCC) on the EU’s non-compliance with its obligations under that treaty on the ground that the ACCC’s findings ‘do not recognise the EU’s special legal order’ and ‘challenge constitutional principles of EU law that are so fundamental that it is legally impossible for the EU to follow and comply with the findings’. ¹ On the other hand, the Commission has been an enthusiastic proponent of creating international tribunals in trade agreements that would have jurisdiction to hear claims by foreign investors against the EU and its Member States, expressing its confidence on multiple occasions in the compatibility of such mechanisms with the Treaties.²

This position is puzzling, as the powers of these investment tribunals are far greater than that of a compliance committee such as the ACCC, making them more intrusive for the EU’s legal order. Individuals can bring cases before these investment tribunals and the tribunals would be in the position to deliver binding decisions that may result in significant monetary awards against the EU and its Member States. These awards, in turn, are enforceable throughout the world with only very limited possibilities to review them. The ACCC, by contrast, is a non-judicial body that issues reports on compliance and may issue recommendations. The Aarhus

² Commission, ‘Investment in TTIP and beyond – the path for reform Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court’ (Concept Paper 2015), 9; See also the Commission’s interventions at the Greens/EFA public conference ‘Investor-State Dispute Settlement (ISDS) in the EU law and international law’ held in Brussels on 2 March 2015 and the European Parliament Joint INTA/JURI meeting on ‘the compatibility of the Investment Court System in CETA with the Treaties’ on 13 October 2016.
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Convention does not provide the complainants with remedies, nor does it prescribe the legal effects of the ACCC’s reports in domestic legal orders. One may wonder therefore whether the Commission’s position is solely based on sound legal considerations.

The purpose of this working paper is to shed further light on the constitutional limits set by the EU Treaties in relation to external oversight in international agreements concluded by the EU. It will do so by first exploring the legal limits set by the ECJ on the EU’s ability to conclude international agreements with external oversight mechanisms, in particular by looking at the relationship between the ‘keystone’ of the EU’s judicial system, the preliminary reference procedure, and powers granted to such mechanisms. It will then make a comparison between the Investment Court System in CETA and the ACCC in light of those limits set by the ECJ and their effect on the autonomy of the EU’s legal order. The working paper will argue that both the nature of the ACCC as a non-judicial consultative body and its more limited powers pose less of a threat to the autonomy of the EU’s legal order than ICS. Finally, this working paper will discuss the implications of the ECJ’s case-law and the Commission’s positions for the EU’s role as a credible actor on the international scene.

I. The EU’s judicial system and international tribunals

In principle, agreements establishing courts that are designed ‘in essence, to resolve disputes on the interpretation or application of the actual provisions of the international agreements’ are compatible with EU law, provided that the agreement in question safeguards the ‘essential character’ of the powers of the Union courts and consequently preserving the autonomy of the EU legal order.3

3 Opinion 1/09, European and Community Patents Court [2011] ECR I-1137, para 74; Opinion 2/13, Accession to the ECHR, EU:C:2014:2454, para 183; Opinion 1/00, ECAA [2002] ECR I-3493, paras 21, 23 and 26. It is thus clear from the EU Treaties that the EU can enter into an international agreement with dispute settlement provisions for
However, the ECJ has had considerably more difficulty with international courts and tribunals that can hear disputes involving individuals as parties. Such mechanisms may affect the powers of Union courts under the preliminary reference procedure of Article 267 TFEU, a procedure that is fundamental to the EU’s legal system. The ECJ rejected the formation of the European and Community Patent Court as it affected the powers of the courts of the Member States to make preliminary references.\(^4\) It also did not accept the draft accession agreement of the EU to the ECHR because among other things it would affect the powers of the Court of Justice to give a definitive interpretation of EU law.\(^5\)

The preliminary reference procedure is perhaps the single most important element in the unique construction of the EU legal order. It has allowed the EU to become a legal order of its own by binding the courts of the Member States to the ECJ in resolving disputes that involve questions of EU law. With this procedure, the ECJ was able to ensure that the question of the nature and effect of EU law in national legal orders was not left to domestic courts alone and allowed it to engage with individuals and Member States of the EU for questions of EU law through the courts of the Member States.

This unique judicial set-up empowers the courts of the Member States to hear claims by individuals where questions of EU law are involved and gives effect to any rights these individuals may have on the basis of EU law, while entrusting the ECJ with the task of ensuring that EU law is interpreted and applied uniformly throughout the EU by giving guidance to the courts of the Member States. The preliminary reference procedure therefore ensures that EU law is interpreted uniformly and consistently throughout the Union, that EU law is fully applied, and that individual’s rights are judicially protected.\(^6\)

\(^4\) Opinion 1/09, European and Community Patents Court [2011] ECR I-1137
\(^5\) Opinion 2/13, Accession to the ECHR, EU:C:2014:2454, paras 236-248
\(^6\) Ibid, paras 174-175. The autonomy of the EU legal order finds its basis in part in this delicate judicial balance. In Case 26/62, Van Gend & Loos [1963] ECR 12, the ECJ concludes inter alia from the preliminary reference system that the EEC Treaty created a new legal order.
Indeed, the ECJ has referred to itself and the national courts as the ‘guardians of the EU legal order and the judicial system of the EU’.

Moreover, the ECJ has referred to the preliminary reference procedure as the ‘keystone’ of the EU judicial system, ‘which, by setting up a dialogue between one court and another, […] has the object of securing uniform interpretation of EU law […] , thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties […]’. Article 267 is essential for avoiding divergences in the interpretation of EU law and giving EU law its full effect, as well as for ensuring the protection of individual rights.

As a result, any international court system that interferes with the preliminary reference process is particularly dangerous to the autonomy of the EU legal order in the eyes of the Court. It would therefore be essential that any form of international dispute settlement does not negatively affect the relationship and the powers under the Treaties of the courts of the Member States and that of the Union courts.

II. The Investment Court System in CETA and the Aarhus Convention’s Compliance Committee

Before assessing the challenges ICS and the ACCC pose to the EU’s legal system, it is worth recalling a number of essential features of both mechanisms. This section will also use the ClientEarth case before the ACCC as a case-study as an illustrative example of such a potential challenge and assess whether a similar case challenging the EU Treaties’ standing rules can be brought by a foreign investor under CETA before the ICS.
A. The Investment Court System in CETA

The Investment Court System in CETA is a form of dispute settlement between foreign investors and their host governments. ICS is intended to provide foreign investors with an alternative to domestic courts to resolve disputes between the foreign investor and the government. A foreign investor is entitled to bring a claim for damages on its own behalf or on that of its locally established companies based on an infringement by the host government of several rights contained in CETA.¹⁰ The rights contained in CETA are typical of most investment treaties and include for instance the right to ‘fair and equitable treatment’ that entitles investors to bring a claim for ‘denial of justice in criminal, civil or administrative proceedings’.¹¹

ICS is a form of dispute resolution that foreign investors can only use if the dispute cannot be resolved amicably through consultations.¹² However, there is no requirement to exhaust local remedies before making use of ICS.¹³ ICS contains an appeal mechanism with the establishment of an Appellate Tribunal.¹⁴

Tribunals under ICS may issue awards against the host government that grants the foreign investor monetary damages and any applicable interest or alternatively restitution of property.¹⁵ As previous cases under other investment agreements have shown, such claims and awards can be extensive, reaching billions of euros, and allow tribunals to affect vast areas of government decision-making.¹⁶

Lastly, ICS in CETA contains a strong and detailed system of enforcement of awards. Foreign investors can enforce awards in both the host state and other states and the options of reviewing

¹⁰ The rights are listed in Sections C and D of Chapter 8 of CETA. See article 8.18 (1) CETA
¹¹ Article 8.10 CETA
¹² 8.22 (1) (b) CETA
¹³ Article 8.22 (1) (f-g) CETA
¹⁴ 8.28 CETA
¹⁵ Article 8.39. In the case of the latter, the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation.
¹⁶ G. van Harten, Investment Treaty Arbitration and Public Law (Oxford, Oxford University Press, 2008). CETA contains a number of provisions that attempt to limit the impact on government decision-making, notably article 8.9 and Annex 8-A CETA.
awards of tribunals are severely limited. This is in line with the rationale of the system as an alternative and independent source of judicial relief, escaping the substantive judicial scrutiny of national courts, and constitutional courts. ICS only has a limited possibility of procedural review in cases of manifest unfairness and exceptionally where the award would violate the forum state’s most basic notions of morality and justice.17

B. Aarhus Convention’s Compliance Committee

The Aarhus Convention is one of the most important international environmental agreements to which the EU is party.18 It seeks to guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters. Like most international environmental agreements, the Aarhus Convention primarily encourages and facilitates compliance through non-judicial means, although the Convention also provides for an opt-in to compulsory state-to-state dispute settlement.19

One of the key mechanisms that facilitate compliance in the convention is the Aarhus Convention Compliance Committee, a non-judicial consultative body empowered to review compliance inter alia based on communications from the public. Article 15 of the Convention requires the Meeting of the Parties to establish arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the Convention. This compliance mechanism must allow for appropriate public involvement, which may involve ‘communications’ from the public.20 To that end, the Meeting of the Parties adopted decision 1/7 establishing the ACCC. The decision sets out the structure and functions of the ACCC as

17 Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968). The public policy exception is commonly regarded as imposing a very high standard for the state to meet.
19 Article 16 of the Convention
20 The Bern Convention has also introduced a so-called ‘case-file system’ which allows complaints to be filed by NGOs, although this system is more based on passive monitoring than pro-active role of the ACCC in issuing recommendations.
well as the procedures for submitting complaints. The decision specifies that members of the public may make communications concerning a Party's compliance with the convention.\textsuperscript{21}

The powers of the ACCC underline the consultative and non-judicial nature of the compliance mechanism. While the Committee is required to consider communications from the public, its powers are limited to examining compliance issues and making findings and recommendations.\textsuperscript{22} What is more, the Committee does not normally issue those recommendations to the Party concerned but to the Meeting of the Parties, which is responsible for deciding upon appropriate measures to bring about full compliance with the Convention by the Party concerned.\textsuperscript{23} The Meeting of the Parties may take several measures, all of which also reflect the consultative, non-confrontational, and non-judicial nature of the mechanism.\textsuperscript{24} In practice, the Meeting of the Parties generally endorses the findings of the Committee and issues recommendations in line with the Committee’s recommendations. Neither the Committee nor the Meeting of the Parties can issue fines, or order cessation or any form of remediation, such as compensation.

There are no provisions in the Aarhus Convention or in the decisions taken by the Meeting of the Parties that explicitly state that Parties are required to abide by any of the recommendations issued by the Committee, whether or not the Meeting of the Parties endorses these findings. Indeed, as the ACCC itself has pointed out, it is entirely for the Parties themselves to implement

\textsuperscript{21} UNECE, \textit{Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Report of the First Meeting of the Parties, Addendum, Decision I/7, Review of Compliance}, adopted at the first meeting of the Parties held in Lucca, Italy, on 21–23 Oct. 2002, UN Doc. ECE/MP.PP/2/Add.8See, section VI. In addition, a Party may make a submission about compliance by another Party or about its own compliance and the secretariat may also make a referral to the Committee.
\textsuperscript{22} Ibid, Rule 13 and 14
\textsuperscript{23} Ibid, Rule 37. Decision 1/I sets out the rules of procedure of the Meeting of the Parties, see Rule 35 of UNECE, \textit{Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Report of the First Meeting of the Parties, Addendum, Decision I/1} adopted at the first meeting of the Parties held in Lucca, Italy, on 21–23 Oct. 2002, UN Doc. ECE.MP.PP2/Add.2. Generally, the every effort shall be made to reach a decision by consensus, but if this is not possible the MoP can decide on substantive issues by a three/fourth majority.
\textsuperscript{24} See above n 21, Rule 37
the obligations under the Convention within their own legal systems. This is contrast to the awards issued by tribunals under the Investment Court System and, for instance, judgments of the European Court of Human Rights.

Notwithstanding these limited powers, the ACCC has proven to be a success. It has given citizens and environmental organisations an independent and external means of addressing compliance with the Convention. To date the ACCC has received 148 communications from the public. One of those communications concerned the EU’s compliance with the Aarhus Convention’s provisions on administrative and judicial review. As the findings by the ACCC were opposed by the Commission for constitutional reasons relevant for the EU’s relationship with international courts and tribunals, this working paper will use this case as a study to assess the compatibility issues identified under section I.

C. Case Study: Denial of justice by the EU under CETA and Aarhus

Ironically, while the EU’s judicial system and the preliminary reference procedure in particular are key constitutional limitations for the EU’s ability to subject itself to international courts and tribunals, the system itself has been criticised for not giving effective judicial relief. While the ECJ has maintained that the Treaties offer a ‘complete system of judicial remedies’ for individuals, Member States, the EU institutions and its agencies and bodies, its jurisprudence on standing for individuals in direct actions before the EU courts are notoriously strict. In defence of this restrictive stance on standing is that individuals can always seek judicial relief in the courts of the Member States and the preliminary reference procedure will ensure that EU rights and obligations will be respected in such procedures.

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25 UNECE, Findings and recommendations of the Aarhus Convention Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union, adopted by the Compliance Committee on 17 March 2017, para 39
26 Article 46 (1) ECHR.
27 Opinion 1/09 European and Community Patents Court [2011] ECR I-1137, para 70
However, one may question whether Article 267 TFEU is sufficient in providing access to justice. First of all, it is a procedure and not a remedy; a court of a Member State decides on a referral and how to formulate questions and it is not in the hands of the parties to a case. Second, only the highest courts in the Member States are required to make a referral, lower courts are not required to make references. Lastly, the length of the procedure can act as a powerful deterrent for referring by national courts. Therefore, the EU’s judicial system itself may be the subject of proceedings before international bodies on grounds of denial of justice. This may be the case both before the ACCC and ICS.

i) ACCC/C/2008/32 European Union
On 1 December 2008 environmental NGO ClientEarth filed a communication to the ACCC on the EU’s compliance the Aarhus Convention’s access to justice provisions. The Aarhus Convention requires parties to provide members of the public access to internal review of decisions with effects on the environment (article 9 (2) of the Convention); access to courts to challenge acts or omissions that contravene environmental law (article 9 (3) of the Convention) and provide adequate and effective remedies (article 9 (4) of the Convention).

In short, ClientEarth alleged that the EU did not comply with those rules because the ECJ’s interpretation of the Treaty rules on standing before the EU Courts were too strict and the criteria for access to internal review under the Aarhus Regulation were too limited. In particular, ClientEarth alleged that the ECJ’s interpretation of ‘individual concern’ under Article 263 (4) TFEU (the infamous Plaumann test) ensured that citizens and NGO’s were effectively barred from challenging acts from EU institutions contravening environmental law. Moreover, the Aarhus Regulation did not properly implement article 9 (2) of the Convention because it did not grant individuals other than NGOs access to internal review and its scope was limited to decisions that were of an individual nature.

30 Communication ACCC/C/2008/30, the Communication can be found at http://www.unece.org/env/pp/compliance/compliancecommittee/32TableEC.html (accessed on 23 August 2017)
More than eight years later, on 17 March 2017 the ACCC issued a report containing its findings and recommendations. The ACCC found that the EU had failed to comply with article 9, paragraphs 3 and 4, of the Convention ‘with regard to access to justice by members of the public because neither the Aarhus Regulation, nor the jurisprudence of the CJEU implements or complies with the obligations arising under those paragraphs.’

The ACCC report recommended that the Meeting of the Parties should recommend that all relevant EU institutions ‘within their competences take the steps necessary to provide the public concerned with access to justice in environmental matters’ in accordance with the Convention. In particular, the ACCC suggested that the EU should either amend the Aarhus Regulation or adopt new legislation fully in compliance with the Convention. In relation to the jurisprudence on standing for direct actions, the ACCC recommended to assess the legality of the EU’s implementing measures in light of the Convention’s obligations or interpret EU law in a way, which, to the fullest extent possible would be consistent with the obligations under the Convention.

The Commission reacted to the ACCC report by proposing that the Council cast a negative vote in the Meeting of the Parties, thus rejecting the report’s findings. According to the Commission, ‘the Committee findings challenge constitutional principles of EU law that are so fundamental that it is legally impossible for the EU to follow and comply with the findings’. The Commission’s main contention with the findings was that they did not recognize the EU’s special legal order because the findings ‘neither acknowledge the central role of national courts as ordinary Court of EU law, nor recognise the system of preliminary rulings under Article 267 TFEU as a valid means of redress’. For the Commission, NGOs and citizens would still have the possibility of finding judicial relief through the courts of the Member States, who would be in the position to make a preliminary reference to the ECJ if necessary. The Commission therefore disagreed

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31 See above n 25, para 123
32 Ibid, paras 124-126
33 See above n 1
34 Ibid, p 7
35 Ibid, p 5
with the ACCC’s findings because in its view the ACCC did not consider the preliminary reference procedure sufficient as to comply with the Convention.

The majority of the EU’s Member States opposed the Commission’s proposal, however. As a result, a compromise solution was found in which the EU would accept the draft decision of the secretariat of the Convention subject to several amendments.\(^36\) The findings of the ACCC would no longer be ‘endorsed’, but the Meeting of the Parties would ‘take note of’ the findings. Moreover, significant parts of the recommendations were deleted and the EU was only required to ‘consider’ the recommendations.

The Commission’s reaction to the ClientEarth case did not go so far as to state that the Aarhus Convention’s compliance mechanism was incompatible with EU law. However, its response demonstrates its strong objections to an external body’s findings in relation to questions of EU law – particularly when those findings have the potential to interfere with the preliminary reference procedure.

ii) CETA and denial of justice

Despite the strong stance it took with respect to the ClientEarth case, however, the Commission has raised no such concerns over a potential ‘mischaracterisation’ of the EU legal system with respect to the ICS system in CETA. This is inconsistent, as ICS raises very similar issues with respect to access to justice in the EU legal order.

Under CETA foreign investors are entitled to ‘fair and equitable treatment’ and can therefore bring a claim before the ICS tribunals against the host government for ‘denial of justice in criminal, civil or administrative proceedings’.\(^37\) As the Commission pointed out in its submissions before the ACCC in the ClientEarth case, ‘there have been numerous cases where actions brought by economic operators or associations thereof have been declared inadmissible by the Community

\(^{36}\) [Council Decision (EU) 2017/1346 of 17 July 2017 on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention as regards compliance case ACCC/C/2008/32 (2017) OJ 2 186/15]

\(^{37}\) [Article 8.10 CETA]
Therefore, it is certainly conceivable that a foreign investor might be denied standing before the EU courts. While it is undeniable that the Court’s standing requirements have a greater negative impact on members of the public and NGOs, the Commission’s statements beg the question whether this lack of access to justice before the Union courts could be construed as a breach of CETA’s investment provisions by foreign investors.

The Lisbon Treaty has significantly improved the opportunities for economic operators (in contrast to that of members of the public and NGOs) by also allowing challenges of non-legislative acts of general application that are of direct concern and that do not entail implementing measures. However, there may still be instances in which the particularities of the EU legal system may give rise to a claim by a foreign investor based on denial of justice in civil or administrative proceedings. This could happen in a number of different ways.

First of all, there have been several instances since the entry into force of the Lisbon Treaty where the ECJ has denied standing to economic operators for direct actions because of the Court’s restrictive interpretation of Article 263 (4) TFEU. In Telefónica v. Commission a multinational telecommunications company was denied standing before the Union courts to challenge a Commission decision addressed to Spain declaring an aid scheme (through tax breaks) partially incompatible with the common market. According to the ECJ, Telefonica could have contested the rejection of an application for grant of the tax advantage in question before the national courts. In T & L Sugar a group of sugar cane refiners was denied standing to challenge a series of Commission acts that increased the supply of beet sugar on the internal market and restricted the amount of imports of cane sugar. Here the ECJ found that the applicants did not have standing because they were, first, not directly concerned enough to

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The Commission provided a non-exhaustive list of 37 cases where economic operators or associations thereof were denied standing before the courts.


40 C-274/12 P Telefónica SA v Commission EU:C:2013:852

41 Ibid, paras 27-36, 59

42 Case C-456/13P T & L Sugars Ltd and Sidul Açúcares, Unipessoal Lda v Commission EU:C:2015:284
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challenge the measures relating to the production of beet sugar (as they were cane sugar refiners) and, second, because the measures restricting imports of cane sugar entailed implementing measures at national level.43

These cases demonstrate that foreign investors, might be denied access to justice before EU courts for EU acts that negatively affect their investments, either because they are not directly concerned or because of the ECJ’s narrow reading of ‘implementing measures’. The first criterion may be relevant when acts might not affect the legal position of the applicant, but its economic position, for instance where the decision benefits a competitor. The latter criterion may still require a foreign investor to breach the law in order to obtain judicial review, a long-standing criticism of the ECJ’s case law.44

In any event, the reliance on Member State courts to bring preliminary references relating to the validity of EU acts implemented by Member State authorities may in itself be seen as inadequate by investment tribunals. Similar to the findings of the ACCC, such tribunals might find that the preliminary reference procedure cannot be a basis for denying direct access to Union courts or be properly considered an appeal mechanism by which investors can have access to the Union courts in order to challenge EU acts.45

Moreover, there may be many other aspects of the EU’s judicial system that may amount to a denial of justice in civil and administrative proceedings for foreign investors. One obvious example is a situation similar to that of the applicants in the 2008 FIAMM case. In FIAMM, the undertakings in question suffered economically from retaliatory measures imposed by the United States because of the EU’s non-compliance with a ruling of the WTO Appellate Body.

43 The alleged mechanical nature of the implementing measures, merely rubber stamping the Commission’s acts, was not found to be relevant by the ECJ, see paras 41-50
44 Case C-50/00P Unión de Pequeños Agricultores v Council [2002] ECR I-6677, Opinion of AG Jacobs, para 43
45 UNECE, Meeting of the Parties to the [Aarhus Convention], Compliance Committee, Thirty-second meeting, Report of the Compliance Committee Addendum Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, UN Doc. ECE/MP.PP/C.1/2011/4/Add.1, para 90
The ECJ found that the EU was not liable for these economic losses because the act causing the retaliatory measures was lawful and therefore could not be subject to a claim for damages.46

III. Compatibility with EU law

The particularities of the EU’s judicial system may give rise to successful proceedings before both the ACCC and ICS tribunals, as aspects of the EU system amount to a denial of justice according to both regimes. The question then becomes whether both systems sufficiently safeguard the ‘essential character’ of the powers of the Union courts and consequently preserves the autonomy of the EU legal order. Several factors suggest that the ICS tribunals in this sense pose a much more significant threat to the autonomy of the EU legal order than the ACCC.47

A. Adverse effect on the powers of Union and Member State courts

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46 Joined cases C-120/06P and C-121/06P FIAMM and others v Council and Commission EU:C:2008:476
First of all, in contrast to ICS, the ACCC is explicitly not intended to replace domestic legal proceedings and is not to be construed as an alternative to domestic courts. As stated in the Aarhus Convention, the ACCC is of a non-confrontational, non-judicial and consultative nature. This is clear from the fact that it does not resolve disputes between Parties to the agreement (this is done by the means of dispute settlement under article 16 of the Convention). It merely reviews compliance (often based on communications from the public), reports, and makes recommendations to the Meeting of the Parties, the main executive body under the Convention. The ACCC therefore does not have powers in itself to resolve disputes and take binding decisions.

Although there is no requirement to exhaust domestic remedies before the public can lodge a communication to the ACCC, the ACCC is required to be and has in practice been deferential towards domestic court proceedings. The ACCC will wait for domestic courts to issue judgments that may ensure compliance with the Convention, before making its findings. In ClientEarth the ACCC therefore took great care in awaiting decisions of the EU courts before proceeding with its findings, only issuing its final report more than eight years after the initial complaint by ClientEarth.

By contrast, ICS in CETA is a quasi-judicial body intended to offer investors an alternative form of judicial relief to domestic courts. ICS tribunals have the power to issue binding decisions, compensate investors through monetary awards, and resolve disputes between investors on the one hand and a Party to CETA on the other.

Moreover, under ICS in CETA, foreign investors can bring claims even if domestic courts have not yet had an opportunity to rule upon the legal questions faced by the investment tribunals.

48 Decision I/7 (see above n 21), Rule 21 also provides that ‘the Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not prove an effective and sufficient means of redress’.
49 The ACCC decided to wait for ECJ rulings on 1) a possible new approach towards standing under Article 260 (4) TFEU with the entry into force of the Lisbon Treaty 2) the interpretation of standing rules in light of the EU’s accession to the Aarhus Convention and 3) two cases pending before the ECJ challenging the validity of the Aarhus Regulation.
In fact, CETA ensures that a foreign investor must choose to bring proceedings either before domestic courts or before an ICS tribunal requiring a foreign investor to discontinue domestic proceedings or starting them. This provision thus effectively undermines the powers of domestic courts to hear similar claims and ensures that investment tribunals will be the sole arbitrator for a claim brought by a foreign investor. Indeed, in relation to the investor-state dispute settlement mechanism in the EU-Singapore Free Trade Agreement, the ECJ has observed that such a regime 'removes disputes from the jurisdiction of the courts of the Member States'.

The specific nature of ICS as an alternative to domestic courts of the EU therefore poses a legal problem under the EU Treaties in three distinct ways. First, it may affect the powers of the courts of the Member States to make preliminary rulings. Second, it may inhibit the ECJ’s monopoly in giving a definitive interpretation of EU law. Finally, third, it may affect the ECJ’s monopoly on deciding on the non-contractual liability of the EU.

i) The power to make a preliminary reference

As was highlighted above, the importance of Article 267 TFEU in the EU’s judicial system can hardly be overstated. The ECJ refers to the provision as the ‘keystone’ of the Union’s judicial system and the courts of the Member States as ‘guardians’ of the Union’s legal order. The courts of the Member States therefore play a vital part in its operation by having the power to make preliminary references to the Court of Justice. As ICS does not require investors to exhaust domestic remedies when bringing a claim before an ICS tribunal and even requires them to discontinue domestic legal proceedings if they want to bring an ICS complaint, foreign

50 Article 8.22 (1) (f) and (g) CETA
51 Opinion 2/15, EUSFTA, EU:C:2017:376, para 292
investors can and sometimes must avoid going to the courts of the Member States for claims that may involve questions of Union law.

If investors are not required to go to the courts of the Member States first, and will seek judicial relief elsewhere, the powers of those courts of the Member States to make preliminary references and apply EU law are likely to be diminished. This issue has already been pointed out by the Commission in the context of intra-EU Bilateral Investment Treaties. For instance in Achmea B.V. v. Slovakia the Commission’s legal service argued:

‘There are some provisions of the Dutch-Slovak [investment agreement] that raise fundamental questions regarding compatibility with EU law. Most prominent among these are the provisions of the BIT providing for an investor-State arbitral mechanism […] and the provisions of the BIT providing for an inter-State arbitral mechanism […]. These provisions conflict with EU law on the exclusive competence of the EU court for claims which involve EU law, even for claims where EU law would only partially be affected. The European Commission must therefore […] express its reservation with respect to the Arbitral Tribunal’s competence to arbitrate the claim brought before it […]’.

In another amicus curiae submission, the legal service of the European Commission pointed out in the context of a Member State investment treaty:

‘The arbitral tribunal is not a court or tribunal of an EU Member State but a parallel dispute settlement mechanism entirely outside the institutional and judicial framework of the European Union. Such mechanism deprives courts of the Member States of their powers in relation to the

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53 Although foreign investors can still bring domestic cases, article 8.22 (1) (f)-(g), (2) and (3) makes their claims before an ISDS tribunal inadmissible. So if an investor wants to bring his case before an ICS tribunal the investor is required to not pursue the case domestically.

54 European Commission, Amicus Curiae submission in European American Investment Bank AG (EURAM) v. Slovak Republic (13 October 2011); Commission Amicus Curiae submission as quoted by the arbitration tribunal in Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (award on jurisdiction 7 December 2012), para 193

55 As quoted by the arbitration tribunal in Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (award on jurisdiction 7 December 2012), para 193
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interpretation and application of EU rules imposing obligations on EU Member States, which are presumably relevant in the arbitral proceeding.\(^{56}\)

The fact, that ICS tribunals may only consider EU law as a matter of fact further negatively affects ensuring the full effectiveness of EU law, as EU law may not be fully applied altogether. For instance, where domestic courts may be required to interpret legal acts in light of EU law principles, an investment tribunal might be prevented from doing the same.

Indeed, by negatively affecting the powers of the courts of the Member States to make preliminary references, it is questionable whether ICS safeguards the ‘essential character’ of the powers of the Union courts and consequently preserves the autonomy of the EU legal order.\(^{57}\) As Article 267 is essential for avoiding divergences in the interpretation of EU law and giving EU law its full effect, as well as for ensuring the protection of individual rights, it may come as no surprise that the ECJ has had difficulties with international tribunals that may affect those powers.\(^{58}\) In Opinion 1/09 the Court found that the powers of the national courts to make preliminary references and to interpret EU law may not be affected by introducing a court system in an international agreement that operates entirely outside the EU judicial framework.\(^{59}\)

Moreover, in contrast to the courts of the Member States, any infringement of EU law by ICS tribunals themselves cannot be corrected via the EU’s legal system. ICS in CETA does not foresee the possibility for the EU institutions or individuals negatively affected by such infringement to remedy or discipline them.\(^{60}\) In Opinion 1/09 the fact that neither the infringement procedure nor the principle of non-contractual liability of Member States for breaches of EU law was a reason for the ECJ to oppose the European and Community Patents

\(^{56}\) European Commission, Amicus Curiae submission in European American Investment Bank AG (EURAM) v. Slovak Republic (13 October 2011)

\(^{57}\) See above n 3

\(^{58}\) Opinion 1/09, European and Community Patents Court, EU:C:2011:123, paras. 83 and 84

\(^{59}\) Opinion 1/09, European and Community Patents Court, EU:C:2011:123, para 77

\(^{60}\) Under CETA, the CETA Joint Committee may issue binding interpretations of CETA’s investment provisions. This may provide an avenue for the Commission and the Council, if Canada agrees, to correct certain interpretations of the agreement that are contrary to EU law for future cases. It does not however remedy the cases that have already been decided.
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Under ICS, it would also neither be possible to claim damages, nor start infringement proceedings for any breach of EU law by ICS tribunals.

ii) The power to give a definitive interpretation of EU law

ICS may also affect another of the cornerstones of the EU’s legal architecture that is inextricably linked to the preliminary reference procedure: the ECJ’s monopoly on giving a definitive interpretation of EU law.

The ECJ’s exclusive power to give a definitive interpretation of EU law ensures the uniform and consistent interpretation of EU law. It also guarantees that the autonomous nature of EU law and its special characteristics are preserved. As a result, the ECJ has required that international agreements concluded by the Union must not have the effect of binding the EU to a particular interpretation of EU law. In Opinion 2/13, for example, the ECJ held that the draft agreement for the EU’s accession to the ECHR was incompatible with the Treaties because it infringed on the ECJ’s power to give a definite interpretation of all EU law, including secondary law, and in particular on the power to interpret EU law in light of the rights guaranteed by the ECHR.

ICS faces similar challenges, not least because it operates independently of the ECJ. An ICS tribunal exercises external control over the EU and its institutions the same way the ECtHR would have: the ECtHR may declare an EU measure in conflict with the ECHR, just as an arbitration body may declare an EU measure in conflict with the investment provisions of EU investment agreements. Similar to the ECtHR, ICS bodies do not have the power to invalidate EU legislation, but merely the power to award damages for a breach of an international

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61 Opinion 1/09, European and Community Patents Court, EU:C:2011:123, para 88
62 Opinion 2/13, see above n 5, para 184
63 Ibid, paras 246-247
agreement. Both systems interpret the respective international agreement, and the EU, as a signatory, and its Court of Justice are bound by these interpretations.

CETA offers a number of safeguards in order to preserve the ECJ’s exclusive powers in this regard. First, ICS tribunals must follow the ‘prevailing interpretation’ of EU law given by domestic courts. Second, ICS tribunals can only assess EU law ‘as a matter of fact’. Third, and lastly, CETA stipulates that ‘any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party’. However, the most obvious way to remedy any incompatibility problems is not included in CETA: there is no provision that requires the prior involvement of the ECJ if a tribunal is faced with a question of EU law. It remains to be seen whether any of the three safeguards that were included are sufficient.

With respect to the first safeguard, following the prevailing interpretation of EU law only partially helps to protect the ECJ’s exclusive authority, as this approach begs the question what the Tribunal has to do if no such prevailing interpretation exists, or if the scope or content of the ‘prevailing interpretation’ is unclear. The Court of Justice has found that only in exceptional circumstances are the highest courts of the Member States relieved from their duty to make a preliminary reference to the Court of Justice when such courts are faced with questions of Union law. Moreover, the ECJ is also free under EU law to change its opinion and reverse or change its case law. Therefore, the reliance on the ‘prevailing interpretation of domestic law’ falls short of requiring prior involvement of the ECJ in relation to questions of EU law.

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64 Which after conclusion by the EU becomes an integral part of the EU legal order, see Case 181/73 R. & V. Haegeman v Belgian State [1974] ECR 449, para 5.
65 Opinion 2/13, see above n 5, paras 182, 184, 185. Awards of ICS tribunals are binding, see Article 8.41 CETA.
66 The determination of law as a matter of fact originates from a judgment from the Permanent Court of International Justice in German Interests in Polish Upper Silesia from 1925. See German Interests in Polish Upper Silesia (Germ. v. Pol.), 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25)
67 8.31 (3) CETA
68 Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health EU:C:1982:335, para 16
70 I am grateful to professor Krämer for pointing this out.
With respect to the second safeguard, it remains to be seen whether the ECJ is willing to accept the distinction between interpretation of EU law as a ‘matter of fact’ and other ways of interpreting EU law. In addition, the proposed ICS Appeals Tribunal would have the power to review whether an ICS Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law.71 This power to review whether the Tribunal has correctly appreciated EU law as a matter of fact would require the involvement of the ECJ as the Appeals Tribunal would be reviewing whether the Tribunal has assessed EU law correctly.72

The third safeguard is also problematic. While CETA may provide that the interpretation of EU law is not binding on the ECJ, an award itself is binding on the EU and its institutions.73 The approach chosen in CETA would thus require the ECJ to endorse the idea that it is merely bound by a decision to transfer funds and that the reasoning underpinning that decision has no bearing on the EU’s judicial system. At the same time, ICS tribunals might very well provide for a specific avenue of judicial relief and set a precedent for future claims. In that sense, there appears to be no possibility to remedy any incorrect assessment made by the ICS tribunals. 74

iii) Non-contractual liability of the EU under Article 340 TFEU

A third adverse effect ICS has on the powers of the EU judiciary is that it may serve as an alternative for damages claims against EU and thereby affect the ECJ’s exclusive powers to rule on the non-contractual liability of the EU.75 It has been argued that Article 340 TFEU does not

71 Article 8.28 (2) (b) CETA
72 Consider the situation in which one of the Parties appeals because it claims that EU law has been wrongly interpreted by the Tribunal or that the Tribunal did not follow the prevailing interpretation of domestic law.
73 Article 8.41 CETA states that an ‘award issued pursuant to this Section shall be binding between the disputing parties and in respect of that particular case.’ In accordance with Article 216 (2) TFEU and the Court of Justice’s case-law therefore an award which may have been based on a particular interpretation of EU law will be binding on the EU institutions, including the Court of Justice.
74 Opinion 1/09, European and Community Patents Court, EU:C:2011:123, para. 86-88
75 It is settled case-law that ‘With regard to the [EU]’s non-contractual liability, such disputes fall within the jurisdiction of the Court of Justice. Article [19 TEU] provides that the Court of Justice has jurisdiction to hear and determine actions seeking compensation for damage brought under the second paragraph of Article [340 TFEU], which covers such non-contractual liability. That jurisdiction of the [EU] Courts is exclusive.’ See Case C-377/09 Hanssens_Ensch v. European Community [2010] ECR I- 7751, para 16. See also Case C-275/00 European Community v First NV and Franex NV [2002] ECR I- 10943, para 43; Case C-282/90 Vreugdenhil v Commission [1992] ECR I-1937, para 14; Case 281/84 Zuckerfabrik Bedburg AG and others v Council and
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preclude the EU from incurring responsibility for violations of an international agreement, and that it therefore does not preclude the EU from concluding an international agreement containing investment protection and ISDS provisions. While it is true that article 340 TFEU does not preclude the EU from incurring international responsibility generally, it is questionable whether the possibility of incurring international responsibility automatically makes a mechanism such as ICS compatible with article 340 TFEU, not least because the EU institutions cannot circumvent its constitutional framework. The fact remains that the power to decide on damages claims against the EU is exclusive competence of the EU judiciary.

ICS does offer the possibility to claim damages through a judicial mechanism that is an alternative to that of the EU and foreign investors may consider that ICS offers a better opportunity to obtain judicial relief than by going through the EU judicial system. One reason for opting for ICS might be the ECJ’s deference towards the legislator in claims for damages. For the ECJ, the 'exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests'. As a result, damages are only awarded if there is 'a sufficiently flagrant violation of a superior rule of law for the protection of the individual'. The sufficiently serious breach entails that the EU public authority in question 'manifestly and gravely disregarded the limits on its discretion'. Accordingly, it is very difficult to claim damages for lawful acts of the EU. This strict approach by the ECJ towards damages claims is further exemplified by the obligation of the injured party to 'show reasonable
diligence in limiting the extent of the loss or damage, or risk having to bear the loss or damage himself.82

CETA, on the other hand, does not necessarily provide similar safeguards. For example, the remedy under ICS exists irrespective of the legality of the measure under domestic law in contrast to the EU’s system of non-contractual liability of the EU. ICS arbitrators are also not part of the system of government of the host state and are not empowered to apply domestic legislation. CETA only offers indirect assurances that arbitrators will consider the impact of their rulings on the legislative function of the host state.83

B. The legally binding nature of decisions and awards

ICS presents more challenges to the autonomy of the EU legal order than the ACCC because it operates as a form of judicial relief that exists in parallel to the EU judiciary. A significant aspect of this is that in contrast to the ACCC’s findings, ICS awards are binding on the EU and its institutions.

That being said, one may wonder whether a decision by the Meeting of the Parties to endorse the ACCC’s findings has the same legal effects as an award issued by an ICS tribunal. Even here, a decision of the Meeting of the Parties appears to be less intrusive. The Meeting of the Parties can only take a decisions that are in line with the non-confrontational and non-judicial nature of the compliance mechanism such as issuing recommendations and declarations of non-compliance by endorsing or taking note of the findings.84 In other words, the Convention does not explicitly contain a provision that makes clear that a Party is bound by a decision of the

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82 Case C-445/06 Danske Slagterier v Germany [2009] ECR I-02119, para 61
83 See article 8.9 CETA
84 See Article 10 Convention and Rule 37 Decision I/7, see above n 21
Meeting of the Parties and therefore functions similar to an authoritative interpretation of the Convention.85

By contrast, a decision under the Convention’s dispute settlement provisions is legally binding on the parties to the dispute brought before either the International Court of Justice or an arbitration tribunal.86 Similarly, a decision of a tribunal established under Chapter Eight of CETA is binding on the Parties.87

C. Remedies available

A third distinguishing feature between the ACCC’s reports and ICS is that the latter provides for remedies. A member of the public that submits a communication to the ACCC has no recourse to any remedy. The ACCC merely reports to the Meeting of the Parties and makes recommendations to it in order to bring about compliance with the Convention by the Party concerned. ICS ensures that a tribunal may award monetary damages to the claimant against the host state. In other words, ICS proceedings have financial consequences, whereas proceedings before the ACCC do not. These financial consequences can be significant and may pose a drain on the public finances of the Party concerned.88

85 While not legally binding on the Parties from an international law point of view, such an interpretation may produce legal effects and therefore require a Council decision under Article 218 (9) TFEU. In fact, the Commission reconsidered its position after initially suggesting that the EU’s position in the Meeting of the Parties concerning the ACCC’s findings in the ClientEarth case did not produce legal effects in the sense of Article 218 (9) TFEU. The decision of the Meeting of the Parties can be seen as a formal declaration of non-compliance based on a report issued by the Committee. This is not unlike an authoritative interpretation in the sense of article 31 (3) (a) of the VCLT, since the Parties agreed to the compliance procedure and rules of procedure of the MoP by consensus.

86 See Article 16 Aarhus Convention, Articles 59 and 60 of the ICJ statute and point 17 of Annex II of the Aarhus Convention.

87 Article 8.41 CETA

88 To give just one example, in the Rosia Montania gold mine ICSID case, the foreign investor announced submitting an ISDS claim as high as 4 billion dollars against Romania, roughly equivalent to Romania’s annual health care budget. See Thomas Biesheuvel and Irina Savu, ‘Paulson-Backed Gabriel Threatens $4 Billion of Claims in Romania’ 11 September 2013 available at https://www.bloomberg.com/news/articles/2013-09-11/paulson-backed-gabriel-threatens-4-billion-of-claims-in-romania (accessed on 24 August 2017). The case is currently pending, Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania, ICSID Case No. ARB/15/31
D. Enforcement of decisions and awards

Lastly, ICS presents a rather unique system of enforcement of awards within the domestic legal orders of the Parties. CETA not only requires a disputing Party to ‘recognise and comply with an award without delay’, it also ensures that an award is given the status of an award under both the ICSID and the New York conventions.\(^8^9\) This means that there is no or limited scope for judicial review of such awards and that execution can also be sought in states other than the Party against which the award was issued.\(^9^0\)

By contrast, the Aarhus Convention does not contain any explicit provisions about the effects of either the ACCC’s findings or the Meeting of the Parties’ decisions in the respective legal orders of the Parties. It is therefore up to the Parties to recognise and determine the legal effects such findings and decisions may have in their domestic legal orders.

Concluding remarks on the Commission’s current approach towards external oversight in the EU’s international agreements

The European Commission is both the guardian of the Treaties and the EU’s default representative in external relations. This dual task may not always be easy. It requires the Commission to be mindful of the EU’s constitutional particularities when pursuing its constitutional mandate externally. Yet, the Commission has chosen a remarkable path of vehemently opposing the findings of the ACCC, while at the same time extensively promoting the ICS in its trade agreements.

As this paper has shown, both external oversight mechanisms may be faced with similar questions of EU law, yet compliance mechanism under the Aarhus Convention is far less intrusive for the EU’s legal order than ICS. ICS is explicitly intended as an alternative to judicial

\(^{8^9}\) Article 8.41 (2) CETA
\(^{9^0}\) Article 8.41 (4-6) CETA
relief to domestic courts and may therefore have more significant effects on the powers granted to the EU judiciary in the Treaties. Rulings of ICS tribunals are also binding, may have financial consequences, and can be effectively enforced in domestic legal orders of states, none of which is provided for in the Aarhus Convention.

The Commission’s approach is to be regretted. If the Commission is so opposed to endorsing the findings of the ACCC, it should have been even more alarmed by the prospects of the ICS. At the very least, the EU’s constitutional particularities could have prompted the Commission to add the question of compatibility of ISDS with the Treaties in its Request for an Opinion in Opinion 2/15. Alternatively, the Commission could have used its very lenient approach towards ICS as an example to endorse the findings of the ACCC. Instead, the Commission has allowed considerable legal uncertainty to persist about ICS while at the same time dealing a substantial blow to international environmental governance under the Aarhus Convention and the EU’s global environmental leadership.