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Francisco de Abreu Duarte

**“But the last word is ours” – The monopoly of jurisdiction
of the Court of Justice of the European Union
in light of the Investment Court System**

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“But the last word is ours” – The monopoly of jurisdiction of the Court of Justice of the European Union in light of the Investment Court System

Francisco de Abreu Duarte¹

ABSTRACT:

This paper develops the concept of the monopoly of jurisdiction of the Court of Justice of the European Union (CJEU) through the analysis of the case-study of the recently challenged Investment Court System. By providing a general framework over the criteria which have been developed by the Court, the work intends to be both pragmatic and theoretical. On the one hand, the criteria are developed as operative tools extracted from the jurisprudence of the CJEU, which are then applied to answer the specific question of the validity of the Investment Court System under the light of such monopoly. On the other hand, the paper questions the reasoning behind such idea of monopoly and discusses the concept of autonomy of the European Union as a claim for power of the CJEU, criticizing the legitimacy of its foundations. Both dimensions will hopefully help to provide some clarity over the meaning of the monopoly of jurisdiction, while at the same time promoting a larger discussion on its impact on the external action of the European Union.

¹ Francisco de Abreu Duarte, L.L.M New York University (NYU) and Assistant Researcher of the Lisbon Centre for Research in Public Law (CIDP) – University Lisbon, Law School. This paper is the result of research during my time in 2017 at NYU – School of Law. All comments are welcome at francisco.abreu.duarte@gmail.com.

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“But the last word is ours” –
The monopoly of jurisdiction of the Court of Justice

“Narcissus does not fall in love with his reflection because it is beautiful but because it is his. If it were his beauty that enthralled him, he would be set free in a few years by its fading.”

W.H Auden, *The Dyer's Hand*

1. Introduction

Since the Treaty of Lisbon, the matters related to direct foreign investment have assumed greater importance in the agenda of the European Union (EU), constituting today a great amount of the external action of the European Union. This increase in the investment area can be seen both through positive action, in the increasing number of FTA Agreements celebrated by the EU which contain investment chapters (besides TTIP and CETA now also Vietnam, Singapore and to be Japan), as well as through negative action, on the strong pressure on member-states to avoid any bilateral investment treaty relations². This wave of international investment, highly incentivized by the exclusivity of competences given to the EU by the Treaty of Lisbon, is not however without risks - the intervention of the Union as a global player, subject to pre-existing legal frameworks (WTO, ITLOS and now International Investment Arbitration), poses considerable challenges to its own internal allocation of powers. The existence of multiple concurring international jurisdictions might put in question one fundamental premise of European integration, namely the monopoly of jurisdiction of the Court of Justice of the European Union (**CJEU or the Court**). By displacing the Court of its role as the sole judge and placing it as one between many courts and tribunals interpreting EU Law, the European institutions might be playing a dangerous game.

² The recent *Achmea* case is the perfect example of this - CJEU, *Achmea*, C- 284/16, ECLI:EU:C:2018:158. This case has given rise to intense commentary on the blogosphere with some authors claiming a “death sentence” for investment tribunals (Thym) or the end of “intra-EU-BIT’s” (Lavranos).

The blogposts are available at:

<http://eulawanalysis.blogspot.fi/2018/03/the-cjeu-ruling-in-achmea-death.html> (Thym)

<http://www.borderlex.eu/comment-end-of-intra-eu-bits-what-next/> (Lavranos).

<http://europeanlawblog.eu/2018/03/23/from-conflicts-rules-to-field-preemption-achmea-and-the-relationship-between-eu-law-and-international-investment-law-and-arbitration/> (Schepel).

Precisely under such environment, the current work addresses in detail the relationship to be established between the monopoly of jurisdiction of the Court, as defined by its own jurisprudence, and the creation of a parallel system of investment courts (the so-called Investment Court System, as a successor to the classic investor-state dispute settlement mechanisms). The purpose of the work is to use the case-study of the Investment Court System (**ICS**) to critically analyze the monopoly of jurisdiction of the CJEU and its consequences to the international development of the European Union. As it will be explained, the proposed ICS raises troubling similarities with past confrontations, namely the tortuous pathway followed in 2013, with the failure of the accession of the EU to the European Convention of Human Rights through the negative opinion of the CJEU. We dare to say that, much like in such moment, the ICS proposal contains several of the same obstacles which led to the negative Opinion 2/13, and that are most likely to be identified by the Court as breaching the monopoly of jurisdiction of the CJEU. If such assumption is correct, then a new disappointment might be on the horizon.

To explain the possible obstacles which the ICS might face, this work develops a certain logical construction: i) first, it provides a critical analysis of the monopoly of jurisdiction of the CJEU, by identifying the major criteria in which the Court has based its negative case law, and rethinking the meaning of its monopoly under the broader *constitutionalization* process of the EU; ii) secondly, based on such critique, it analyzes the practical example of investment arbitration, namely the evolution from Investor-State dispute settlement mechanisms (ISDS) to the new ICS' legal framework, in order to understand the EU's motivations and objectives with the creation of such system; iii) thirdly, it identifies each of the potential obstacles which the ICS might face and confronts them to the critical analysis of the notion of the monopoly of jurisdiction; iv) finally, some concluding remarks are given on the consequences of adopting such narrow view of the monopoly of jurisdiction, namely its impact in the EU's external action.

This work will not address the merits (both political and economic) of the construction of the new ICS nor judge upon the political reasons which might have lead the Commission and the European Parliament to revise the original investor-state disputes

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settlement mechanisms (**ISDS**) already in place in some Investment Treaties. The purpose is rather to provide an analysis of the reasons behind the monopoly of jurisdiction and the potential consequences that such vision of the role of the CJEU might have on the international field. By using the study case of the former ISDS clauses and the new ICS, it is possible to systematize the notion of monopoly of jurisdiction as defended by the CJEU and to forecast whether such framework represents a sustainable pathway for EU’s investment policy.

2. The monopoly of jurisdiction of the Court of Justice of the European Union

a. The criteria

The monopoly of jurisdiction of the CJEU is a concept which eludes a clear definition. Dictated by article 344.^o of the Treaty on the Functioning of the European Union (**TFEU**), it aims at ensuring the uniformity of EU law by representing a *prima facie* impossibility of having other international judicial organs judging based upon the law of the European Union. However, more than a mere prohibition of external interpretation, the CJEU has interpreted its scope to go much beyond. A possible way to address such complex principle is then to try to identify some definitive operative criteria out of the vast jurisprudence on the matter.

Since the 70’s³, and then with increasing importance in the 90’s⁴, the Court has been faced with Commission’s proposals of cooperation with other legal systems, some of them containing their true mechanisms of settlement of disputes. On the face of the threat that other judicial interpreters of EU Law might pose to the uniformity of the EU’s legal system, the CJEU reacted by reaffirming the autonomy of EU law⁵ and its

³ Advisory Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, C-1/76, ECLI:EU:C:1977:63.

⁴ Advisory opinion 1/91, *European Economic Area*, C-1/91, ECLI:EU:C:1991:490; Advisory opinion 1/92, *European Economic Area*, C-1/92, ECLI:EU:C:1992:189.

⁵ See the systematical work of ODERMATT, by distinguishing between an internal and external notion of autonomy. According to the author, on a first phase, the CJUE was concerned only with the autonomy of the EU from Member States, reflected in the creation of the fundamental principles of supremacy and direct effect (the internal autonomy); on a second phase, however, the CJEU turned into International Law and claimed autonomy from international dispute settlement bodies which could jeopardize its monopoly of jurisdiction (the external autonomy). See ODERMATT, J., *When a fence becomes a cage: the principle of autonomy in EU external relations law*, EUI Research Paper, EUI, 2016, pp. 3-5.

monopoly of jurisdiction. Although always formally accepting the admissibility of the creation of other international courts by the EU institutions⁶, the CJEU affirmed itself as the sole judicial interpreter of EU Law by defining the limits upon which such organs could function. Based on a series of advisory opinions⁷, the *Mox Plant Case*⁸, and the most recent *Achmea*⁹ case regarding internal BIT's, it can be argued that the Court created three fundamental requisites to be observed by any dispute settlement mechanism which aims at interpreting, directly or indirectly, EU Law¹⁰:

- i) "The allocation of competences between member states and the Union" - The Court used the monopoly as a prohibition of external courts to judge upon the division of competences/powers or the allocation of responsibilities between the EU and Member States;
- ii) "The respect for the mechanism of preliminary ruling" - The Court requires the judicial organ to observe the existence of the preliminary ruling system as the keystone of the EU legal system;
- iii) "The control of EU Law" - The Court uses its monopoly as a guarantee of compliance to EU Law, blocking any external activity which cannot be controlled by the CJEU by means of sanctions.

Let us observe how each of these dimensions can be identified in the jurisprudence of the EU.¹¹

⁶ Advisory opinion 1/91, *European Economic Area*, C-1/91, ECLI:EU:C:1991:490, ¶40.

⁷ Advisory opinion 1/91, *European Economic Area*; Advisory opinion 1/92, *European Economic Area*, C-1/92, ECLI:EU:C:1992:189; Advisory Opinion 2/94, *on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, C-2/94, ECLI:EU:C:1996:140.; Advisory opinion 1/00, *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area*, C-1/00, ECLI:EU:C:2002:231; Advisory opinion 1/09, *European and Community Patents Court*, C-1/09, ECLI:EU:C:2011:123; Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, C-2/13, ECLI:EU:C:2014:2454.

⁸ *Comission v. Ireland*, C-459/03, ECLI:EU:C:2006:345.

⁹ *Achmea*, C- 284/16, ECLI:EU:C:2018:158.

¹⁰ Adopting a different systematization of the criteria see HILLION, C. e WESSEL, R., *The European Union and International Dispute Settlement: Mapping Principles and Conditions*, CREMONA, M., THIES, A. and WESSEL, R.A (Eds.), *The European Union and International Dispute Settlement*, Oxford: Hart Publishing, 2017, p. 4.

¹¹ Critically predicting the challenges of the principle of autonomy of the EU in relation to ISDS mechanisms in Investment Treaties see LENK, H., *Investment Arbitration under EU Investment Agreements: Is there a Role for an Autonomous EU Legal Order?*, *European Business Law Review*, 28, 2,

i. Allocation of competencies/powers

The first criterion or dimension of the monopoly is connected to CJEU’s concern that other dispute settlement bodies, apart from national courts, could interpret the allocation of competencies/powers between the EU and its member states. The obstacle was initially identified by the Court in its first advisory opinion on the agreement to constitute the European Economic Area (EEA), namely when the CJEU highlighted the fact that the EEA Court would indirectly have to judge upon the division of competences inside the EU. The Court explained “*when a dispute relating to the interpretation or application of one or more provisions of the agreement is brought before it, the EEA Court may be called upon to interpret the expression 'Contracting Party', within the meaning of Article 2(c) of the agreement, in order to determine whether, for the purposes of the provision at issue, the expression 'Contracting Party' means the Community, the Community and the Member States, or simply the Member States*”¹². This meant that the EEA Court would be placed in a position as to make a judgement on the interpretation of the party to the dispute, which would necessarily mean an interpretation of the community’s rules on allocation of powers/competences. This, according to the CJEU, breached the monopoly of jurisdiction on the interpretation of the EU granted to the CJEU by the founding treaties as “*is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty*”¹³.

This historical view on the monopoly of jurisdiction has been continuously upheld along the following decades and shows no evidence of change. Three contemporary examples illustrate precisely this point: the contentious case which opposed the Commission and Ireland concerning Sellafield’s power Plant (the *Mox Plant case*)¹⁴; the failure of the

2017, pp. 135–147. Also his previous work LENK, H., *An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada*, European Papers, 1, no. 2, 2016.

¹² Advisory opinion 1/91, *European Economic Area*, C-1/91, 14 of December 1991, ECLI:EU:C:1991:490, ¶ 34.

¹³ Advisory opinion 1/91, *European Economic Area*, C-1/91, 14 of December 1991, ECLI:EU:C:1991:490, ¶ 35.

¹⁴ *Comission v. Ireland*, C-459/03, ¶ 123.

accession to the ECHR with the negative Opinion 2/13 and the most recent example of the denial of an arbitral clause within the Slovakia-Netherlands BIT in the *Achmea case*¹⁵.

In the *Mox Plant case*, the CJEU condemned Ireland based upon an infringement proceeding moved by the EU Commission, precisely because it had recurred to an external tribunal to settle the dispute instead of taking the case to the CJEU¹⁶. The problem, although reflecting a wider danger of fragmentation in international law¹⁷, placed the CJEU in a difficult position – the UNCLOS Tribunal could have enacted a judgment by recourse to rules of EU Law without any intervention of the CJEU. The mere possibility of conflicting interpretations of EU law concerning the allocation of responsibilities was enough to constitute a breach of the monopoly of jurisdiction of the CJEU as “*The act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to Community law*”¹⁸. From this case two main conclusions can be drawn which reinforce our understanding of the monopoly of jurisdiction of the Court: first that the CJEU views the mere possibility, and not necessarily the effective interpretation of EU law, as a breach of the monopoly of jurisdiction. This means that Ireland was already in breach of the monopoly by the time it recurred to an international adjudicator which could chose the “contracting party” to appear before the Tribunal (in the case the arbitral tribunal before ITLOS). Secondly, that such restrictive view of the monopoly of jurisdiction can

¹⁵ *Achmea*, C- 284/16, ECLI:EU:C:2018:158.

¹⁶ On the topic LAVRANOS, N. *The MOX Plant Judgment of the ECJ: How Exclusive is the Jurisdiction of the ECJ?*, European Energy and Environmental Law Review, vol. 15, n.º 10, 2006, pp. 291–296; DE WITTE, B., *European Union Law: How Autonomous is its Legal Order?* Zeitschrift Für Öffentliches Recht, vol. 65,1, 2010, p. 150.

¹⁷ This topic has been subject to extensive literature. Initiating the debate in the doctrine the fundamental work of Bruno Simma- SIMMA, B., *Self-contained regimes*, Netherlands Yearbook of International Law, vol. 16, 1985, p. 111; also later SIMMA, B., e PULKOWSKI, D., *Of planets and the universe: Self-contained regimes in international law*, European Journal of International Law, vol. 17, n.º 3, 2006, p. 493. Simultaneously the International Law Commission discussed the matter under Crawford and Koskenniemi’s guidance leading up to the 2006 Report - International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, vol. II, part 2, 2006.

¹⁸ *Comission v. Ireland*, C-459/03, ¶ 177.

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place States in often difficult positions, namely by placing them in situations of true conflicting duties (to obey one Tribunal is to disrespect another)¹⁹.

The same construction was then fully applied in the controversial opinion of the CJEU regarding the accession of the Union to the European Convention of Human Rights²⁰. The argument was built precisely under the same line of thought: by constructing a co-respondent mechanism²¹, the project of accession allowed the European Court of Human Rights to choose who to bring before the dispute (the EU, the member states or both), namely by means of a non-binding invitation. Such choice would necessarily presuppose an assessment of the rules on the division of powers/competences between the EU and member states, something which only the CJEU would be entitled to make²². To this respect the Court would affirm “*However, the fact remains that, in carrying out that review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU. [...] Such a review would be liable to interfere with the division of powers between the EU and its Member States.*”²³ Moreover, the fact that the project would allow for an exception to the joint responsibility of the co-respondent and the respondent, by allowing the ECtHR to choose to only condemn one, affected precisely the same dimension of autonomy.²⁴

Most recently, the CJEU had a chance to change this jurisprudence concerning the effect of its monopoly on the relation to arbitral courts in investment arbitration. Although

¹⁹ Such was not exactly the case in the *Mox Plant* case as the UNCLOS Tribunal decided not to hear the case as soon as the rumors that the CJEU might understand such process as a breach of its own jurisdictional monopoly. But such decision was taken by the Tribunal itself, out of judicial comity, and therefore cannot be ruled out that one day a different court or tribunal will act in a different manner.

²⁰ Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, C-2/13, 18 December 2014, ECLI:EU:C:2014:2454.

²¹ Article 3(2) to (8) of the Draft Agreement of Accession.

²² Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, C-2/13, 18 December 2014, ECLI:EU:C:2014:2454, ¶ 218-225.

²³ Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, C-2/13, 18 December 2014, ECLI:EU:C:2014:2454, ¶ 224-225.

²⁴ Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, C-2/13, 18 December 2014, ECLI:EU:C:2014:2454, ¶ 229-235.

fundamentally different from the above cases, where the question was one of international law bodies potentially threatening the monopoly of jurisdiction of the CJEU, in the *Achmea* case what was in stake were the provisions of an intra-EU BIT²⁵. Nonetheless, the CJEU resorted to the exact same mechanisms when addressing a question posed by the German court²⁶, namely on whether an arbitral clause in the Slovakia-Netherlands BIT would be valid if the arbitral tribunal could indirectly interpret the law of the EU. The CJEU invoked its jurisprudence on the Opinion 2/13 and once again observed “*it should be recalled that, according to settled case-law of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties*”²⁷. This meant that, in case the arbitral tribunal could not be considered as an equivalent to a national court (the Court recalled the jurisprudence in that Portuguese case *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta, C-377/13*)²⁸, then it would constitute an external judicial body to the treaties’ system, something expressly forbidden by article 344.^o TFEU. As indeed the arbitral tribunal was a mere *ad hoc* investment tribunal²⁹, the lack of permanence would never allow it the characterization as a national court and hence it was forbidden from any interpretation of EU law.³⁰ As it will be explained below, it is even very arguable

²⁵ Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic.

Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/968>

²⁶ The preliminary reference was made by the Bundesgerichtshof and can be consulted here <http://curia.europa.eu/juris/document/document.jsf?docid=182687&mode=req&pageIndex=1&dir=&oc c=first&part=1&text=&doclang=EN&cid=450088>

²⁷ *Achmea*, C- 284/16, ECLI:EU:C:2018:158, ¶ 32.

²⁸ *Ascendi Beiras Litoral e Alta, Auto-Estradas das Beiras Litoral e Alta*, C-377/13, EU:C:2014:1754), ¶ 25 and 26.

²⁹ The Court explained the differences of reasoning between investment arbitration and commercial arbitration tribunals in the light of the principle of autonomy. The different treatment was justified by the fact that investment arbitration derived from the will of the States to remove the jurisdiction of their own courts by treaty, while the commercial arbitration derived from the mere will of private parties and was hence subject to the scrutiny (and eventual preliminary ruling questions) of the courts of member states. See *Achmea*, ¶ 55.

³⁰ *Achmea*, C- 284/16, ECLI:EU:C:2018:158, ¶ 44-49.

whether such actual threat does even exist, given the reduced amount of cases where arbitral tribunal do recur to EU law to fundament their decisions.³¹

According to the CJEU’s interpretation, although accepting the existence of relations between the EU and other international dispute settlement bodies³², such bodies would always be precluded from enacting any interpretation on the division of competencies between the EU and member states. That prerogative was to be executed by the CJEU and the CJEU alone.³³

ii. The respect of the mechanism of preliminary ruling

The second dimension of the autonomy is also a product of an historical jurisprudential line and it is connected to CJEU’s notion of the core importance of preliminary ruling to the uniformity of EU law. In 2009, when the institutions of the EU sought a new solution for the fragmentation of intellectual property rights in the European context, it was the Court who once again blocked the first version of the project of an European and Community Patents Court³⁴. This time the reasoning was different: it was not because the Patent Court could assess the rules on the division of powers between EU and member states, as it would only have jurisdiction upon individual claims³⁵, but rather the fact that allowing the Court to possess exclusive jurisdiction on those matters³⁶ would deprive national courts from the keystone role of interlocutors with the CJEU. By attributing exclusive jurisdiction to that international court, it would be up to the

³¹http://europeanlawblog.eu/2018/03/15/achmea-a-perspective-from-international-investment-law/#_ftnref1

³² Advisory opinion 1/91, *European Economic Area*, C-1/91, 14 of December 1991, ECLI:EU:C:1991:490, ¶40; Advisory opinion 1/09, *European and Community Patents Court*, ¶ 74-75.

³³ These types of arguments have lead some authors to qualify CJEU’s actions as selfish attitudes with a degree of internal incoherence (for example in the treatment given to BIT’s). See DE WITTE, B., *A selfish court? The Court of Justice and the design of international dispute settlement beyond the European Union*, in *The European Court of Justice and external relations law: constitutional challenges*, CREMONA, M. and THIES, A. (eds.), Oxford University Press, Hart, 2014, pp. 33-46.

³⁴ Advisory opinion 1/09, *European and Community Patents Court*, C-1/09, 8 of March de 2011, ECLI:EU:C:2011:123.

³⁵ Advisory opinion 1/09, *European and Community Patents Court* ¶ 63.

³⁶ According to the Article 15 of the project - to actions for actual or threatened infringements of patents, counterclaims concerning licenses, actions for declarations of non-infringement, actions for provisional and protective measures, actions or counterclaims for revocation of patents, actions for damages or compensation derived from the provisional protection conferred by a published patent application, actions relating to the use of the invention before the granting of the patent or to the right based on prior use of the patent, actions for the grant or revocation of compulsory licenses in respect of Community patents, and actions for compensation for licenses.

Patents Court to choose when to place questions on the basis of the “preliminary ruling mechanism” (which the Agreement had mimicked from the provision of today’s 267 TFEU), destroying therefore the classic relationship between national courts and the CJEU on those matters. The Court explained its reasoning in such manner “ *While it is true that the Court has no jurisdiction to rule on direct actions between individuals in the field of patents, since that jurisdiction is held by the courts of the Member States, nonetheless the Member States cannot confer the jurisdiction to resolve such disputes on a court created by an international agreement which would deprive those courts of their task, as ‘ordinary’ courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU, or, as the case may be, the obligation, to refer questions for a preliminary ruling in the field concerned.*”³⁷

This meant that the monopoly of jurisdiction of the Court was no longer only dependent on the actions of the international body itself, namely whether it could interpret rules of EU Law, but rather on the fact that the national courts were deprived of such role on those specific matters. To break the existential link between national courts³⁸, as true courts of the EU, and the CJEU, would mean to jeopardize the CJEU’s control through national member states and the nature of EU law itself – “[...] *the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties*”³⁹.

This preliminary ruling obstacle played also a critical role on the rejection of the accession under the Opinion 2/13. Although controversially, the CJEU identified this second obstacle on the dangers that the new project of Protocol no. 16 to the ECHR would pose to the cooperation between national courts and the CJEU. The objective of such Protocol was to address the growing concerns of excessive length in the judgements of the cases and the lack of celerity of procedures, elements which were

³⁷ Advisory opinion 1/09, *European and Community Patents Court* ¶ 80.

³⁸ LAVRANOS, N., *Designing an International Investor-to-State Arbitration System After Opinion 1/09*, Common Commercial Policy after Lisbon, BUNGENBERG, M., HERRMANN, C. (Eds.), Springer, 2013, pp. 212-215.

³⁹ Advisory opinion 1/09, *European and Community Patents Court* ¶85.

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mining the ECHR system according at the time (and still are)⁴⁰. The CJEU, however, would identify nonetheless an existential threat in such Protocol: it might happen that an advisory opinion requested under such Protocol would trigger the mechanism of prior involvement of the CJEU and therefore exempt the courts or tribunals of member states to respect the mandatory provisions of article 267.^o TFEU (preliminary ruling mechanism). According to the reasoning of the Court, the Protocol no. 16 could be used as a means of defrauding the “*keystone of the judicial system*” meaning the judicial cooperation between the CJEU and member state’s courts⁴¹. This was highly in contrast with the Advocate-General’s conclusions on the problem, described rather as a compliance problem easily solved through the normal sanctions mechanisms provided by the treaties⁴². It seems that such guarantees of compliance, which the mandatory character of article 267^o TFEU in conjunction with potential infringement proceedings (258^o and 260^o TFEU) would impose, were not enough for the CJEU.

Interestingly, it was also this second dimension of the monopoly of jurisdiction which provided the fundamental argument to deny the validity of the arbitral clause in the *Achmea case*. After justifying its negative response to the preliminary ruling question posed by the national German court on the division of competences, the CJEU emphasized the importance of the preliminary ruling and the dangers that such arbitral tribunal could pose to the link between national courts and the CJEU. It stated “ *the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, 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*”⁴³. The line of thought was then the following: because such arbitral tribunal did not match the criteria

⁴⁰ SPIELMANN, D., *Whither Judicial Dialogue?*, speech given at the *Sir Thomas More Lecture*, Lincoln’s Inn, 12 October 2015, p. 5. See also the Explanatory Report - Council of Europe, *Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms - Explanatory Report*, p. 2. Available at: www.echr.coe.int/Documents/Protocol_16_ENG.pdf

⁴¹ Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, ¶ 196-200.

⁴² Advocate-general view on Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, ECLI:EU:C:2014:2475, ¶ 141.

⁴³ *Achmea*, C- 284/16, ECLI:EU:C:2018:158, ¶ 37.

to be qualified as a true national court of a member-state, and its judgments could not be revised by any national court (in the case the German ones) based upon its non-compliance with EU law, then there was not pathway between such decision and an opinion of the CJEU under the mechanism of preliminary ruling.⁴⁴ This would then constitute a breach of autonomy (in the sense of monopoly of jurisdiction) and the principle of sincere cooperation between states and the EU. Although applicable to intra-EU-BIT's, the resemblance of the Court's legal reasoning to the international treaties celebrated by the EU is remarkable.

This second criterion demands that even remote possibilities of breaking the close relationship between the CJEU and member state courts, as a guarantee of uniformity of EU law⁴⁵, are to be avoided, as they constitute an unlawful breach of the autonomous internal connections between courts of the EU.

iii. The control of EU law

The third and final dimension of the monopoly of the CJEU can be traced to the problem of the control/compliance to EU Law. This criterion is built by the Court as a prohibition of the creation of entities which would preclude CJEU's control of the legality of EU law, namely when national courts disrespect the mechanism of preliminary ruling.

Highly connected to the second criterion, the control of the EU was used several times as a second argument derived from the importance of the preliminary ruling on ensuring the uniformity of EU law. For example, in Opinion 1/09, the CJEU argued that if the Patents' Court became the sole interlocutor with the CJEU in those matters⁴⁶ (instead of the courts and tribunals of member states), the control of when and how it would pose preliminary questions would no longer be under the control of the CJEU. The Court stated in that Opinion "*It must be added that, where European Union law is infringed by a national court, the provisions of Articles 258 TFEU to 260 TFEU provide for the opportunity of bringing a case before the Court to obtain a declaration*

⁴⁴ *Achmea*, C- 284/16, ECLI:EU:C:2018:158, ¶ 58.

⁴⁵ Advisory opinion 1/09, *European and Community Patents Court*, ¶ 84.

⁴⁶ As the project mimicked the provisions of now article 267.^o TFEU to ensure that the Patent's Court could place preliminary ruling questions to the CJEU.

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*that the Member State concerned has failed to fulfil its obligations. [...] It is clear that if a decision of the PC were to be in breach of European Union law, that decision could not be the subject of infringement proceedings nor could it give rise to any financial liability on the part of one or more Member States.*⁴⁷ This is because, while in the case of the national courts the possibility of condemning the member state in case of infringement was a reality for the CJEU (as well as eventual state responsibility for the judicial power⁴⁸), in the case of the Patent’s Court there would be no mechanism of control for when it refused to place a mandatory question or chose to disrespect a response provided by the CJEU. In this event, the CJEU would no longer be able to control the legality and uniformity of the judicial application of EU Law, which would ultimately result in a breach of its monopoly of interpretation.

This same line of thought can be found in the Court’s 2/13 opinion regarding the relationship between article 344.^o TFEU and article 33.^o of the ECHR (interstate dispute). In interstate disputes brought before the ECtHR, which would then be truly disputed as EU Law (through the assimilation that the *Hägeman*⁴⁹ doctrine would impose), the CJEU noted that the lack of a norm of precedence of its jurisdiction over the ECtHR in matters of EU Law would breach the principle of autonomy of the EU⁵⁰. According to the CJEU this would undermine “*the very nature of EU law, which [...] requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law.*”⁵¹ Here too, the problem is one of control of the legality of EU law, namely the fact that the CJEU could not control the

⁴⁷ Advisory opinion 1/09, *European and Community Patents Court*, ¶ 87-88.

⁴⁸ See the early case where the matter was discussed *Köbler*, C-224/01, ECLI:EU:C:2003:513, ¶33-36. Also, *Traghetti del Mediterraneo*, C-173/03, ECLI:EU:C:2006:391, ¶ 30-31 and *Commission v. Spain*, C-154/08, ECLI:EU:C:2009:695, ¶125.

⁴⁹*Hägeman*, C-181/73, ECLI:EU:C:1974:41, ¶ 5. This case was one of the first to propose the idea that all the treaties celebrated by the Union are to be integrated in the EU Legal order as true primary EU Law. This would mean, in the case of the accession to the ECHR, that the Convention itself would become part of the *acquis communautaire* and therefore every single judgment of the ECHR relating to Member State dispute would be considered as an EU Law matter to the CJEU. See also *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, ¶ 73.

⁵⁰ The CJEU was not satisfied with the existence of a norm which would relieve the High Contracting parties to the ECHR from taking every single interstate dispute concerning the application of the ECHR to the ECtHR (article 55^o). The CJEU argued that such possibility still existed, even if not mandatory, and that would suffice as a breach. See Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, ¶ 205-210.

⁵¹ Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, ¶ 212.

application of material EU Law when the ECtHR was judging an interstate dispute and had no power to sanction the ECtHR for wrong interpretations. And it did not suffice to come up with creative solutions such as those proposed by the Advocate-General. Unlike the court, KOKOTT saw no unsurpassable obstacle on this point and suggested a double solution: either to grant a system similar to the one found in UNCLOS⁵², with the ECtHR declaring itself incompetent in such cases in deference to the CJEU; or to ensure that the mechanism of prior involvement of the CJEU would be always mandatory in these cases⁵³.

These three fundamental criteria, which are argued as the foundational premises of monopoly of jurisdiction of the CJEU, provide the necessary insight into the legal methodology of the Court. But serve, at the same time, as clues to the self-reflective idea that the judges have of themselves and the role that the institution should play in external relations. For these reasons, while analyzing the legality of the ICS in the light of such criteria, the following sections will indirectly provide a deeper analysis of the motivations of the CJEU.

b. Critical analysis

These three requisites shed some light on the CJEU's vision of its monopoly of jurisdiction and present the Court's idea of its own role as guarantor of the uniformity of EU law. But they only provide a description of what the monopoly of jurisdiction *is*, according to the Court, and not necessarily what *ought to be*. After having understood the jurisprudential genesis, a deeper analysis should ask three fundamental questions: first, whether this interpretation of the monopoly of jurisdiction is a reasonable one, according to what is established in the Treaties and the actual practice of international courts and tribunals. This analysis is therefore of an almost factual nature, on whether the risks alerted by the CJEU actually exist. Second, however, it is more important to ask whether the "chaos" of legal multiplicity, the one which autonomy claims to protect the EU from, provides for a real advantage to the development of EU Law. This analysis takes the first steps into the *ratio* behind the concept of autonomy, by revisiting

⁵² Article 282 of the United Convention on the Law of the Sea (UNCLOS).

⁵³ Advocate-general view on Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, ECLI:EU:C:2014:2475, ¶ 115-120.

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WEILER’S theory of equilibrium and discovering the reasons that justify its existence. Finally, irrespective of the merits and reasons of such idea of monopoly, it is crucial to understand the impact that the CJEU’s vision might have on the future investment arbitration, namely on the future of the ICS.

While the first and second questions are critically analyzed below, the impact of this interpretation of the monopoly in the ICS will be analyzed in detail in an autonomous section.

i. Is this a reasonable interpretation of the monopoly of jurisdiction?

An analysis of the several advisory opinions of the Court on the matter of autonomy/monopoly of jurisdiction immediately indicates a common line of argumentation of the CJEU: the monopoly exists to protect the uniformity of EU from the outside threats that new international dispute settlement bodies might pose to the uniformity of EU law⁵⁴. Under this premise, a fundamental question is then to assess whether such international bodies *do* pose a threat to the monopoly of interpretation of EU law or, at least, how big is the risk of that happening. As HILLION and WESSEL⁵⁵ put it *“The problem therefore seems to flow from the risk that the application and interpretation of internal EU law (in disputes between Member States inter se or between Member States and the Union) will be by-passed. However, the question is how big a risk this is”*. From a normative point of view, the interpretation of the Treaties seems to be rather favorable to the integration and development of international law solutions: article 3(5) of the TEU sets the development of international law as an objective of the Union and article 21 TEU complements and densifies such objective with a mandate for good governance and multilateral cooperation. This means therefore that the EU is not only entitled, but actively encouraged by the Treaties, to

⁵⁴ Agreeing with this see LOCK, T, *The Not So Free Choice of EU Member States in International Dispute Settlement.* *The European Union and International Dispute Settlement*, Ed. Marise Cremona, Anne Thies and Ramses A Wessel, Oxford: Hart Publishing, 2017, p. 117. THIES seem to adopt another route – the justification lies on the principle of loyal/sincere cooperation between Member States and the CJEU, THIES, A, *European Union Member States and State–State Arbitration: What’s Left?.* *The European Union and International Dispute Settlement*, Ed. Marise Cremona, Anne Thies and Ramses A Wessel. Oxford: Hart Publishing, 2017, p. 145.

⁵⁵ HILLION, C., and RAMSES, W. *The European Union and International Dispute Settlement: Mapping Principles and Conditions*, *The European Union and International Dispute Settlement*. Ed. Marise Cremona, Anne Thies and Ramses A. Wessel. Oxford: Hart Publishing, 2017, p. 18.

promote international cooperation and compliance⁵⁶. Nonetheless, such mandate for internationalization must be harmonized with the possibility that these new entities might break the fundamental cooperation link between member states' courts. It was precisely under this mindset that the Court developed those three requisites, namely to ensure that it maintained the control over incoherent interpretations of EU Law and the respect for the division of competences established by the Treaties.

However, if one analysis each of the potential problems raised by the CJEU, it is not evident that there is a reasonable fear of incoherent interpretations or the destruction of the CJEU's role.

For example, regarding the problem of the division of competences between member states and the CJEU, one could wonder whether such criterion serves indeed any protective purpose. As we have seen, the CJEU understands that any international judicial body which is able to decide on who to call for in the proceedings is most likely exercising a judgment over the division of competencies between the EU and member states. Even in the distant Opinion 1/91, it was the power of the EEA Court to interpret the concept of "Contracting Party" that dictated the violation of the autonomy of the EU⁵⁷ followed then by the Mox Plant and Opinion 2/13 examples. One way, one might think, of mitigating this problem and complying with the Court's vision of its monopoly, was to build a system where the CJEU could intervene in the first steps of the proceedings before the international judicial body. It was precisely with this in mind that, when attempting to access the ECHR, the EU institutions carefully designed a system of co-respondent⁵⁸, where member states and the EU itself could be present simultaneously before the ECtHR. This would guarantee that the problem of allocation of powers and responsibility would be safeguarded from the dangers of the monopoly of jurisdiction, by having both players present. However, this was not enough for the CJEU. As GRAGL explains "*What the Court took issue with was, however, the option of*

⁵⁶ That seems to be also HILLION and RAMSES opinion, *The European Union and International Dispute Settlement: Mapping Principles and Conditions*, The European Union and International Dispute Settlement, p. 24.

⁵⁷ Advisory opinion 1/91, *European Economic Area*, C-1/91, 14 of December 1991, ECLI:EU:C:1991:490, ¶ 34.

⁵⁸ Article 3 of the Accession Agreement.

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*either the EU or a Member State becoming a co-respondent by decision of the ECtHR upon the request of the Contracting Party in question. [...] In the opinion of the CJEU, such a review by the ECtHR would include an assessment of the division of competences under EU law as well as the criteria for the attribution of their acts and omissions, which could encroach upon the autonomy of Union law*⁵⁹. Because the ECtHR could be entitled to review the reasons provided by the parties to justify their intervention (e.g. if the EU wanted to become co-respondent would have to provide reasons before the ECtHR and to be therefore subject to their decision), the CJEU considered it to breach its monopoly in the dimension of the allocation of competencies/powers just like it had done in the 90's. It is arguable whether such interpretation of its monopoly is a reasonable one. The danger foreseen by the CJEU might be ill founded: on the one hand, because the ECtHR has shown deference, comity and respect towards EU law in the multiple decisions over the years, one comity supported by a strong presumption of compatibility⁶⁰. If this has been the relation between both courts in the European arena, it is very difficult to conceive a situation where the ECtHR would simply disregard a request by the CJEU to become a co-respondent, especially when such rejection would be based upon an interpretation of the division of competencies between member states and the EU. On the other hand, the danger was minimized by the fact that article 3(5) of the accession project clearly defined the review power of the ECtHR in very limited terms of “plausibility”⁶¹, meaning that the control of the reasons why the EU or a member state should join as co-respondents would be of a very soft nature. This interpretation of the first criterion thus seem to be a rather over restrictive interpretation of its monopoly, one that could be tempered with some reasonableness from the Court.

Similarly, concerning the dangers of losing the preliminary reference connection between member states and the CJEU, it is too very arguable whether it this constitutes a reasonable interpretation of its monopoly of jurisdiction. In Opinion 2/13 for example,

⁵⁹ GRAGL, P., *The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR*, in W. Benedek, F. Benoit-Rohmer, W. Karl, and M. Nowak (eds), *European Yearbook on Human Rights*, 2015, p. 33.

⁶⁰ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98 (Eur. Ct. H.R. 30 June 2005) available at <http://hudoc.echr.coe.int/eng?i=001-69564>.

⁶¹ Article 3(5) draft agreement.

the Court rejected the project, *inter alia*, because it alleged that the new Protocol no. 16 to the ECHR could jeopardize precisely such preliminary ruling link.⁶² However, a closer look at the question seems to prove rather different⁶³: first, because the so-called fears of “Forum Shopping”⁶⁴ were very difficult to perceive in practice, as the questions posed to the ECtHR would be non-binding and would therefore have no effect on the State’s obligation to pose the question to the CJEU in the case of EU law related lawsuits. As the Advocate-General KOKOTT correctly pointed out at the time, if the national court refused to place the preliminary reference before the CJEU, then the normal infringement procedures and responsibility pathways would remain fully open to force compliance.⁶⁵ Secondly, because such risk exists nevertheless, as long as there is a European Court of Human Rights which can (and often does) judge upon the compatibility of EU Law acts with the ECHR. And the fact is that such potential chaotic situation, foreseen by the CJEU in the event of an accession, where the ECtHR would render a EU law norm incompatible with the ECHR, is continuously treated under a general presumption of compatibility and comity between both Courts, one which avoids the conflict (see for example the recent *Avotnis v. Latvia* case, where the ECtHR could have radically altered the rules of the game)⁶⁶. Likewise, in the project of the Patent’s Court, the Commission also insured that the court would have the same obligations to pose preliminary references to the CJEU, just like national courts do, therefore making sure that the uniformity of EU law would be fully safeguarded. However, once again, the Court refused such strategy and alerted to an apparent danger of that Patent’s Court refusing to pose questions to the CJEU and taking such competence from the national courts. Even more acutely, in Opinion 2/13, the CJEU

⁶² Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, ¶ 196-200.

⁶³ Against this see HALBERSTAM, D., *It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, University Michigan, Public Law Research Paper No. 439, February 2015, pp. 14 ff.

⁶⁴ ¶ 198.

⁶⁵ Advocate-general view on Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, ECLI:EU:C:2014:2475, ¶ 141

⁶⁶ The classic *Bosphorus* presumption was recently reaffirmed in the *Avotiņš* case, clearly confirming the continuation of good relations between both European Courts. See the classic *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98 (Eur. Ct. H.R. 30 June 2005) available at <http://hudoc.echr.coe.int/eng?i=001-69564> and the most recent case of *Avotiņš v. Latvia*, App. No. 17502/07, Judgment of the Grand Chamber, (Eur. Ct. H.R. 23 May 2016) available at <http://hudoc.echr.coe.int/eng?i=001-163114>.

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was not convinced that the compatibility between article 55 ECHR and article 344 TFEU could be ensured by the draft agreement, even taking into consideration that any interstate litigation outside the CJEU would be strongly sanctioned by the same Court. Again, the Advocate-general opinion proved to be rather unpersuasive⁶⁷. The same exercise could be made for the relation between EU law and investment arbitration as one can doubt whether the danger raised by the Court in those matters exists in practice. In the case of intra-EU-BIT's, we have seen that the Court seems to have taken a big step against investment arbitration between member states. However, in its reasoning, there is not a factual analysis on the actual impact that those tribunals have on EU law, or how much is it actually relevant for their decisions.

Finally, the fears of the CJEU concerning the control of EU law seem even more difficult to understand. It is true that the uniformity of EU law is only achieved through a strict system of checks, either under the control of national courts (preliminary reference), by the CJEU in annulment or infringement proceedings or even eventually by individuals in (national) actions of responsibility. And it is also true that such control is fundamental for the subsistence of the Union itself, as it ensures the consistency of EU law and the equality between member states. However, for CJEU, that control is not sufficient to respect the requirements of its monopoly. It seems better to ensure the non-existence of the international judicial bodies *tout court* than to use the control mechanisms in case of a breach of EU law. Unlike the *Mox Plant* case, where the CJEU condemned Ireland precisely under an infringement proceeding raised by the Commission, in both Opinion 1/09 and 2/13, the Court was not satisfied with the possibility of having control through the mere imposition of sanctions on the member states. The Court simply preferred to deny the project before the eventual breach exists rather than to have a *post-factum* control. This approach is, however, arguably reasonable. For example, in the case of the accession to the ECHR, if a member state chose to use the interstate dispute mechanism of the ECHR in detriment of the CJEU route, the Court of Justice would remain in power to judge upon eventual (and very likely) infringement proceedings and sanction the State for such action (just like in the

⁶⁷ Advocate-general view on Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, ECLI:EU:C:2014:2475, ¶118.

Mox Plant case). Of course, this does not immediately prevent the case to be filled as only a formal structure preclusion of competence would; but no member state would remain in proceedings while the CJEU applies heavy sanctions on public funds. It is then safe to say that the EU control mechanisms already contemplate situations where member states recur to other international bodies and the solution is to sanction them for such individual breaches and not to destroy the entire system on the basis of potential future breaches. To have such preventive view on the control of EU law has obvious unreasonable and pernicious effects – it simply prevents States or the EU from creating international judicial bodies because of the mere future possibility that those bodies would not respect EU law. It would be better to trust the sanctioning mechanisms already established by the treaties and to ensure that the States or the EU have the limited freedom to conduct its external relations.

But then, if these fears are not realistic, or if when all the safeguards have been put in place the CJEU continues to make a claim for autonomy and monopoly, one could then ask: what is the reason for the existence of the monopoly of jurisdiction? Why is the CJEU so afraid of losing control over its jurisdiction?

ii. Is “chaos” such a bad thing? - Equilibrium revisited

A possible answer to our questions is one of almost instinctive nature. A first immediate glance at the monopoly of jurisdiction provides a misleadingly simple answer: the monopoly guarantees the uniformity of an independent and autonomous legal system and is therefore essential to the creation of the *constitutional* framework of the European Union. This type of legal thinking is often based on domestic constitutional visions of a legal order as a hierarchical system of rules, where unity is provided by the Constitution and safeguarded by some supreme court dictating the correct interpretation. It is this classic idea of a *grundnorm* and a *guardian* which justifies our common admiration for unity in the national legal systems. Under this view, the defense of the monopoly of jurisdiction of the Court is not, as such, a bad thing. It was indeed a necessary step in the early construction of the European Union, as proven by

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WEILER’S⁶⁸ analysis of the early “constitutionalization”⁶⁹ of the EU⁷⁰, through the creation of the necessary link between direct effect and supremacy.⁷¹ As it was the use of autonomy for the protection of fundamental rights in the *Kadi* case⁷², where the EU legal system directly conflicted with a binding resolution of the Security Council.⁷³ It is a classic protective tool of one legal order against norms outside of the system.

However, as those authors very early understood, unlike domestic constitutional law, the process of *constitutionalization* of Europe is a much more dynamic one, where different legitimacies clash to produce law⁷⁴ - one of constitutional pluralism⁷⁵. Unlike the state level, where traditional democratic popular legitimacy confers power to its judicial organs, in the EU there are several legitimacies in play: the member states claiming sovereign autonomy, the Commission arguing for independence of the Union, the European Parliament representing the diverse peoples in Europe. In such situation, a claim can be made that such pluralism, which presupposes conflict, has been a healthy dimension of the development of the European Union. POIARES MADURO puts it very clearly when addressing the potential conflict between national courts and the CJEU: “*What we see in the practice of courts is an attempt to accommodate the claims of*

⁶⁸ WEILER, J.H.H., *The transformation of Europe*, p. 2413. See also the recent work of POIARES MADURO and MARLENE WIND, in editing a contemporary analysis of WEILER’S “*Transformation of Europe*” - MADURO, M., & WIND, M. (Eds.), *The Transformation of Europe: Twenty-Five Years On*, Cambridge: Cambridge University Press, 2017. Specifically on the principle of the autonomy of EU Law, in a legal critique to Schilling, WEILER, J., HALTERN, U., *The autonomy of the Community legal order: through the looking glass*, Harvard International Law Journal, 37, 1996, pp. 411–448.

⁶⁹ In a very recent analysis, see HALBERSTAM’S interpretation of WEILER’S constitutional idea and the lack of a “Generative Space” to allow such “constitutionalization” to take place. HALBERSTAM, D., *Joseph Weiler, Eric Stein, and the Transformation of Constitutional Law*, in MADURO, M., & WIND, M. (Eds.), *The Transformation of Europe: Twenty-Five Years On*, Cambridge: Cambridge University Press, 2017, p. 223-227.

⁷⁰ On the same note, VAN ROSSEM, J.W., *The Autonomy of EU Law: More is Less?*, in R.A. Wessel and S. Blockmans (Eds.), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations*, The Hague: T.M.C. Asser Press/Springer, 2013, pp. 15 ff.

⁷¹ WEILER, J.H.H., *The transformation of Europe*, p. 2414.

⁷² *Kadi I*, T-315/01, ECLI:EU:T:2005:332, and *Kadi II*, C-402/05, ECLI:EU:C:2008:461. On the aftermath, DE BURCA, G. *The EU, the European Court of Justice and the International Legal Order after Kadi*, Harvard International Law Journal, vol. 1, n.º 51, 2009.

⁷³ KOKOTT, J. and SOBOTTA, C., *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?*, in The European Court of Justice and external relations law: constitutional challenges, Cremona, M. and Thies, A (eds.), Oxford University Press, Hart, 2014, pp. 216-222.

⁷⁴ HALBERSTAM, D., *Joseph Weiler, Eric Stein, and the Transformation of Constitutional Law*, in MADURO, M., & WIND, M. (Eds.), *The Transformation of Europe: Twenty-Five Years On*, Cambridge: Cambridge University Press, 2017, p. 223-227.

⁷⁵ MACCORMICK, N., *Beyond the Sovereign State*, 56 The Modern Law Review, 1993, pp. 1-18.

*those legal orders without severing ties with either of them. When conflicting claims may exist they make use both of principles of EU law, such as supremacy and direct effect, and of principles developed under national law, such as the so lange doctrine of the German Constitutional Court or the counter-limits of the Italian Constitutional Court, to reconcile those claims*⁷⁶.

Why should it be different in the integration of the EU in the global broader international legal order? Can there be a claim for a **new** clash, one which no longer opposes national and European courts but rather the CJEU and other international courts and tribunals?

This counterintuitive view, of a positive-outcome clash, was identified long ago by WEILER in its theory of judicial empowerment, by pointing out how the conflict between national and European courts had actually produced positive results for both spheres of integration. In its more general theory of equilibrium, WEILER addressed the paradox of early integration by stating *“The “harder” the law in terms of its binding effect both on and within states, the less willing states are to give up their prerogative to control the emergence of such law’s “opposability” to them. When the international law is “real,” when it is “hard” in the sense of being binding not only on but also in States, and when there are effective remedies to enforce it, decision making suddenly becomes important, indeed crucial*”⁷⁷. This meant that integration was appealing to states as long as, and only if, the states retained some dimension of control over European politics (which at the time meant unanimity rules)⁷⁸. And if it is true that the balance of such equilibrium has been consistently shifting towards the supranational side, with further integration and the reinforcement of the powers of the institutions, the *theory of equilibrium* maintains its actuality.⁷⁹ Its fundamental paradox, that States allow

⁷⁶ MADURO, M. P., *Three Claims of Constitutional Pluralism*, in *Constitutional Pluralism in the European Union and Beyond*, Matej Avbelj and Jan Komárek (eds), Hart Publishings, p. 72.

⁷⁷ WEILER, J.H.H., *The transformation of Europe*, p. 2426.

⁷⁸ See also the analysis of SWEET, A.S and KELEMEN, D.R., *Assessing the Transformation of Europe: A View from Political Science*, *Faculty Scholarship Serie*, Paper 4623, 2013.

⁷⁹ Arguing for its actuality from a different lens see LINDSETH, P. L., *Disequilibrium and Disconnect: On Weiler’s (Still Robust) Theory of European Transformation*, in MADURO, M., & WIND, M. (Eds.), *The Transformation of Europe: Twenty-Five Years On*, Cambridge: Cambridge University Press, 2017, p. 121-134.

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integration but always require powers of control is a constant reminder of the dangers of imposing a unique view over what EU law must mean.

Autonomy brings us a new paradox which helps explaining why the Court insists on such notion of autonomy and its monopoly of jurisdiction. Unlike the classic paradox between supranationalism and intergovernmentalism of the early times of the Communities, where States accepted more integration in exchange of an overall control (through veto powers granted by unanimity in the Council) the monopoly of jurisdiction of the CJEU exposes something new: on the one hand, the institutions push forward for more international integration, with the European Union expanding its competences and becoming a global player in the areas of trade, fundamental rights or investment. This meant replacing the role of states in some international organizations, joining international bodies (or trying to) and celebrating new trade and investment agreements with third countries. On the other hand, however, one of such institutions, the CJEU, only accepts such global integration if, and only if, it retains a veto power over the measures taken. That veto power is expressed precisely through the use of a monopoly of interpretation, which results in a “**last word**” from the Court. The veto is then the *raison d'être* of the monopoly. The irony is evident – WEILER'S classic theory of equilibrium has now advanced from the state level to the integration of the EU itself in the global sphere and the principle of autonomy and the monopoly of jurisdiction are the classic state “veto power” which controls this limited integration. Just like in the case of early integration, where some dimensions of the State pushed for integration while others refused it, so too inside the European Union some voices claim for global integration while others demand a veto.

This new equilibrium, one between institutions and no longer between states and the EU, proves that the CJEU might have a claim for power, very similar to the ones member states claimed in the early integration.

This view of the CJEU as a counter majority power, with the monopoly dressed as veto, is coherent with those authors which equate autonomy and the monopoly with an almost emotional reaction by the CJEU. For example, DE WITTE explains it under a

“selfish” character of the Court⁸⁰ in relation to other dispute settlement bodies and GRAGL prefers to describe it as “jealousy”⁸¹. In DE WITTE’s words “*the diffident attitude raises the question whether the Court might have been acting “selfishly”, i.e. acting to protect its own authority and prerogatives against rival international dispute settlement mechanisms.*”⁸². This claim for power might be rooted in two fundamental causes, one benign one problematic. On the kind side, the Court might have been forced to adopt such “selfish” attitude as a normal consequence of the adoption of a monist view of the EU legal system, one that has been defended since the 70’s with the *Hägeman* case⁸³. By adopting a monist view of its relationship with International Law and therefore automatically transforming every received international law act as true EU law (which we have seen it was a major argument in the Opinion 2/13), the Court is obliged to see obstacles of monopoly of jurisdiction in every single international agreement as all of them are, by means of direct incorporation, automatically EU law. It does not, however, fully explain the challenges of coherence we raised above. On the problematic side, it might be that it is not only the desire for the protection of the essential characteristics of the judicial system that motivates the Court, but rather a matter of the maintenance of certain *status quo* and a position of power. In an analysis of the relations of power between the Court of Justice and the other players of EU, it is possible to understand the monopoly not as an external tool of protection (against international bodies), but as an internal mechanism of control of the relations between the CJEU, the EU institutions and the member states. In this position, the “selfishness” of the Court is then to be understood as a claim for power and status, a way to ensure that a certain *constitutionalization* of the EU is done towards specific goals. If this last reason is the prevailing one, however, then there is room to criticize the Court of Justice for prevailing its own interests over the general interest of the European Union.

⁸⁰ DE WITTE, B., *A selfish court? The Court of Justice and the design of international dispute settlement beyond the European Union*, in *The European Court of Justice and external relations law: constitutional challenges*, Oxford University Press, Hart, 2014, pp. 33-46.

⁸¹ GRAGL, P., *The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR*, in W. Benedek, F. Benoit-Rohmer, W. Karl, and M. Nowak (eds), *European Yearbook on Human Rights*, 2015.

⁸² DE WITTE, B., *A selfish court? The Court of Justice and the design of international dispute settlement beyond the European Union*, pp. 33-34.

⁸³ *Hägeman*, C-181/73, ECLI:EU:C:1974:41, ¶ 5.

3. The compatibility of the Investment Court System with the monopoly of jurisdiction of the CJEU

This notion of the monopoly of jurisdiction of the CJEU might come with consequences to the external relations of the EU and have a severe impact on the specificities of International Investment Law⁸⁴. To assess whether the new proposed ICS is compatible with this monopoly, it is necessary previously to understand what motivated such proposal, namely the shift from *ad hoc* type solutions under ISDS mechanisms to a true centralized and permanent system of courts.

a) The classical approach: ISDS mechanisms

With the fast-growing litigation around investment matters⁸⁵, the creation of ISDS solutions allows individuals and companies to avoid national litigation and obtain a theoretically more neutral and impartial proceeding. Because of the *ad hoc* nature of such proceedings, and the lack of centralized structures which provide for a single solution, ISDS clauses may vary according to the specific treaty at hand and are dependent on the will of the contracting parties. Typically, these methods of settlement of disputes between investors and States aim at the protection of some fundamental guarantees. SCHWIEDER identifies⁸⁶ four fundamental guarantees: 1) protection against discrimination, under the classic BIT “national treatment” and “most favored nation” provisions; 2) protection against expropriations without due compensation; 3) protection against unfair and inequitable treatment and 4) protection against government actions restricting capital flows. It is fair to say that such investor protections can be found precisely in the investment chapters of the several agreements already celebrated or to be celebrated by the EU: for example, the CETA Agreement, which has provisionally entered into force in September of 2017, under its chapter 8 provides guarantees to investors on the basis of “national treatment” (Art. 8.6) and most favored nation (Art. 8.7) clauses, but also on protections against expropriation without

⁸⁴ On the evolution, suggesting a *space-continuum* analogy to explain facultative mixity see <https://www.ejiltalk.org/united-in-mixity-the-future-of-the-eu-common-commercial-policy-in-light-of-the-cjeus-recent-case-law/>

⁸⁵ LATEK, M., *Investor-State Dispute Settlement (ISDS): State of Play And Prospects For Reform*, European Parliamentary Research Service, 2014, pp. 3-9.

⁸⁶ SCHWIEDER, R.W., *TTIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication*, Columbia Journal of Transnational Law, 55, 1, 2016, p. 185.

compensation (Art. 8.12), freedom of capital transfers (art. 8.13) and a full protection and security provision (Art. 8.11).⁸⁷ In the same manner, the Vietnam FTA, in its chapter 8 - Trade in services, investment and e-commerce – provides for investor guarantees on national protection (art. 3), most favorable nation clause (art. 4), fair and equitable treatment (art. 14), full protection and security (art. 15) as well as protections against unlawful expropriations (art. 16) and free transfer of capitals (art. 17). The same exercise could be done for the recent Singapore agreement⁸⁸. These fundamental guarantees would then be ensured by an *ad hoc* system of settlement of disputes through arbitration, much like one could find in BIT's, which was immediately subject to a severe set of criticism leading to lively scholar debate⁸⁹.

In response to this, on the 27th of March 2014, the EU Commission would promote a public consultation where over 150,000 submissions were submitted showing precisely the dimension of such debate⁹⁰. Although the scope of this work is not to judge upon the merits of such ISDS solutions, but rather to observe how the ICS might be treated in the light of the monopoly of jurisdiction of the CJEU, it is important to briefly consider what were the challenges that the Commission was responding to with the creation of the new permanent system of Courts. This will provide a more complete analysis of the new ICS.

The criticism to the original ISDS provisions can be divided into two general categories: i) policy concerns, connected to the practical effects of adopting such system; ii) legal arguments, directed at the incompatibility of the ISDS provisions with EU Law.

i. Policy Concerns

⁸⁷ Interesting is the detailed enunciation of the right to regulate, as a clear exception to possible Fair and Equitable Treatment claims based upon the lack of stability or predictability of the national legislation on these matters see art. 8.9 CETA.

⁸⁸ Chapter 9 of the EU-Singapore Free Trade Agreement (authentic text as of May 2015), available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>

⁸⁹ For example, debating the validity of the criticism and defending the solution of having ISDS clauses in such Treaties see ALVAREZ, G. M., BLASKIEWICZ, B., VAN HOOLWERFF, T., KOUTOUZI, K., LAVRANOS, N., MITSU, M., SPITERI-GONZI, E., MENA, A. V., WILLINSKI, P., *A Response to the Criticism against ISDS by EFILA, Journal of International Arbitration*, 33, 1, 2016, pp. 1–36. Making a case against the ISDS clauses, arguing *inter alia* based on the breach of the principle of autonomy of the EU, see ANKERSMIT, L. and HILL, K., *Legality of investor-state dispute settlement (ISDS) under EU law Legal study*, Client Earth Legal Documents, October 2015, p. 5-25.

⁹⁰European Commission, *Public consultation on modalities for investment protection and ISDS in TTIP*, Available at: http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf

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Under the first category, of policy criticism, one could argue that three main concerns were subject to the discussion: a) transparency and impartiality concerns; b) economical or regulatory concerns; and c) predictability and uniformity concerns.

The most widely debated concern can be traced to the fear of some EU Member-States⁹¹, or even some regions inside the States (such as Wallonia in Belgium), that these arbitration proceedings would not present enough transparency both procedurally and substantively. Procedurally because the choice of arbitrators did not present the same levels of impartiality⁹² as nationally appointed judges, as the parties could choose the arbitrators. More than a general mistrust towards arbitration, this criticism was based on the lack of a true diversified pool of arbitrations (the problem of the so called “Elite group of arbitrators”) and on the fact that such private appointed judges could be indeed taking decisions of sovereign public interest⁹³. Moreover, this would especially affect the States side, as the 101 Professors Report⁹⁴ alerted at the time of TTIP negotiations, namely because arbitrators were paid per case and claims could only be submitted by investors. This procedural unbalancing between the protection granted to the investor and the position of the State, unable to bring proceedings, rendered the mechanism a potential dangerous game for States.⁹⁵

Substantively, on the merits of the decisions, the criticism pointed above all to a certain *pro* investor tendency of arbitration tribunals in detriment of the States interests connected to an excessive vagueness of the substantive guarantees. Indeed, because of the vagueness of clauses such as “Fair and Equitable Treatment”, it would be possible

⁹¹ <https://www.euractiv.com/section/trade-society/news/france-and-germany-to-form-united-front-against-isds/>

⁹² OECD conduct an impartial and serious study on the matter, through the comparison of several BIT and Multilateral agreements – p. 25.

Available at: <http://www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf>

⁹³ Addressing the paradox of arbitration, JACOBS, B., *A perplexing paradox: “De-Statification” of “Investor-state” Dispute Settlement?*, Emory International Law Review, 30, 1, 2015.

⁹⁴ Available at: <https://stop-ttip.org/wp-content/uploads/2016/10/13.10.16-Legal-Statement-1.pdf>, p. 2.

⁹⁵ At the same time, some others argued the question was not clearly stated from the beginning, as it was not a matter of knowing whether the arbitrators were all impartial, but rather if the system provided for any kind of safeguards in case they were not. And according to them those systems existed at the national level, in the institutional rules (when the treaties provided for criteria of selection), in the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) and in the efforts towards transparency present in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html

for arbitrators to scrutinize public interest policies and to apply relatively loose interpretations of the impact of such measures on the investors protection.⁹⁶ Against this idea, some renowned Professors pointed towards the effective statistics of both the United Nations Commission on International Trade Law⁹⁷ or the ICSID caseload, to prove that such *pro* investor stance was not an actual fact-based claim, but rather the product of a general skepticism of States towards arbitration.⁹⁸, and that the vagueness of such clauses had been actually motivated by States as a means to attract more foreign direct investment.

Nonetheless, alongside such transparency concerns, some voices tried to raise awareness for the practical economical costs and regulatory implications of such clauses. The argument here was twofold: on the one hand, these *ad hoc* proceedings would mean substantial costs for the States (OECD has averaged it around 8 million per proceeding⁹⁹) to be paid with public money; on the other hand, they meant a possible “regulatory chill” meaning the possible effect on States refraining from or altering existing legislation out of fear of litigation (that can eventually heavily penalize public budget)¹⁰⁰. An interesting argument, considering specifically the impact of ISDS provisions on regulatory freedom of the States, was made by ANKERSMIT in his EU law analysis – it could happen that such regulatory chill would not only work as a deterrent

⁹⁶ The 101 Professors Report placed the question like this “*ISDS provisions let investors call on an arbitration panel composed of three arbitrators to invoke these substantive rights and scrutinize any political, administrative or judicial decision that affects their businesses. Investors can thereby hold the state liable for their lost profits, even if the state’s measures are non-discriminatory, lawful from a domestic perspective and designed e.g. to protect the environment, public health or workers’ rights, to renationalize railways, water or energy supply or healthcare systems.*”, p. 1.

⁹⁷ UNCTAD, World Investment Report 2014

⁹⁸ ALVAREZ, G. M., BLASIKIEWICZ, B., VAN HOOLWERFF, T., KOUTOUZI, K., LAVRANOS, N., MITSU, M., SPITERI-GONZI, E., MENA, A. V., WILLINSKI, P., *A Response to the Criticism against ISDS by EFILA, Journal of International Arbitration*, p. 3-5.

⁹⁹ See OECD Report: Investor-State Dispute Settlement Public Consultation: 16 May - 9 July 2012, ¶ 32, available at: <http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf>

¹⁰⁰ This regulatory chill has now been studied by governance and political science structures, and attempts have been made to categorize and objectively analyze its validity, but arguments seem to be going both ways while a statistical analysis proves almost impossible to conduct. See the analysis of the potential impact of the TTIP on the Netherlands by TIETJE, C. and BAETENS, F., *The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, ¶ 68 – 73, available at: <https://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf> . Also, TIENHAARA, K. *Regulatory Chill and the Threat of Arbitration: A View from Political Science - evolution in investment treaty law and arbitration*, Chester Brown, Kate Miles, eds., Cambridge University Press, 2011. Available at SSRN: <https://ssrn.com/abstract=2065706>

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to approve or alter legislation, but could also work as a true incentive on member states to disrespect EU law, as it would be less costly to face an infringement on the EU courts than to face a multi-million award by an arbitral tribunal¹⁰¹.

Finally, the predictability concerns analyzed the problematic of uniformity of the decisions, fundamentally important to States’ public policy. The claim here was that States, given the uncertain nature of arbitral awards, would not be able to shape their policy according and the regulatory chill would then be even increased out of the fear of litigation. Indeed, in arbitral tribunals, and more general in international law¹⁰², there is no such thing as a strict system of precedent, one that could ensure absolute predictability to States. This was even confirmed by investment arbitral tribunals themselves¹⁰³, based upon the multiplicity of different bilateral arrangements in the different BIT’s and interpretations by the arbitral tribunals. According to the contrary position, this was but a “*natural consequence of the system*” derived from the inexistence of a true global investment treaty¹⁰⁴.

ii. Legal arguments

Apart from the matters of policy, and somehow in the shade of the discussion, important legal arguments were put forward against the ISDS solutions proposed to the TTIP and CETA Agreements (in their original versions). It is very important to revisit this discussion to understand whether things have truly changed with this new ICS system, or whether the criticism remains valid and can be transposed to this new reality. According to ANKERSMIT¹⁰⁵ and HILL, one could then identify four main legal obstacles to the compatibility of ISDS mechanisms with EU law: a) The problem of the monopoly of interpretation of EU law by the CJEU and the existence of external judicial or quasi-

¹⁰¹ ANKERSMIT, L. and HILL, K., *Legality of investor-state dispute settlement (ISDS) under EU law Legal study*, Client Earth Legal Documents, October 2015, p. 13. One should however consider that, in the EU level, the existence of lump sum penalties is often accompanied by penalty payments, which can last indefinitely and therefore be way costlier than any arbitral award.

¹⁰² Article 59 of the Statute of the International Court of Justice.

¹⁰³ *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, ¶ 16.

¹⁰⁴ ALVAREZ, G. M., BLASIKIEWICZ, B., VAN HOOLWERFF, T., KOUTOUZI, K., LAVRANOS, N., MITSU, M., SPITERI-GONZI, E., MENA, A. V., WILLINSKI, P., *A Response to the Criticism against ISDS by EFILA*, *Journal of International Arbitration*, p. 13.

¹⁰⁵ ANKERSMIT, L. and HILL, K., *Legality of investor-state dispute settlement (ISDS) under EU law Legal study*, p. 7.

judicial bodies exercising control over EU law; b) The problem of EU's liability to pay damages and the exclusive competence of the EU on matters of non-contractual liability; c) The role of the CJEU as the sole definer of the division of competences between EU and Member-States; d) The distortion of competition rules on EU's internal market, namely on the risk of discriminatory treatment between EU undertakings and EU nationals and the conflict with state aid rules. As for the scope of this work let us focus on the first and third legal argument, as it is believed they both reflect one single idea of jurisdictional monopoly of the CJEU over other dispute settlement bodies.

As mentioned previously in this work, the monopoly of jurisdiction of the Court has already posed some practical and significant challenges to EU action, and even served as a limitation to the will of the States to freely conduct external relations. Among the several obstacles we have identified, there is a general idea that it is up for the CJEU, and only to the CJEU, to interpret EU law, therefore restringing the possibility of external entities doing the same. Precisely with this in mind, when one addresses the creation of an ISDS framework, through independent arbitration proceedings, the question immediately arises as to the compatibility of such external control with article 344 TFEU. This means that, even before the ICS system was thought of, there were already those who raised the same concerns *à propos* of the ISDS system.

Several arguments were advanced to detail the claim above.

The first (i) contended that, although the *ad hoc* tribunals would only address EU Law as a "matter of fact" and not as a matter of law, it did not really matter for the analysis of the monopoly. Indeed, a brief analysis of the opinions of the CJEU on this matter, namely its opinion 2/13, quickly dismiss this measure as a safeguard against the risks of autonomy/monopoly. Just like in the case of ECHR, which never possessed the power to invalidate EU Law, the fear of the CJEU was rather of different and contradictory interpretations of EU law and not only of matters of validity. This means that it would suffice that an arbitral tribunal would take into consideration a certain EU act for the risk of contradictory interpretations to arise. That was also confirmed clearly on the *Mox*

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Plant case, where the mere filing of the case before another Tribunal (the ITLOS Annex VII arbitration) would already suffice as a risk of contradictory interpretations¹⁰⁶.

The second (ii) analyzed the relationship between the *ad hoc* tribunal and the CJEU, namely under the framework of potential interactions similar to the preliminary ruling mechanism. Being an external judicial body, of a non-permanent nature¹⁰⁷, it was not perceived as an entity which could pose questions to the CJEU under a mechanism close to the preliminary ruling system. As we have seen, the Court has previously dealt with these situations in a very negative way in Opinion 1/09, by rejecting the Patent’s Court ability to pose questions or in the recent *Achmea* case on the role of the arbitral investment court under the Netherlands-Slovakia BIT. As it is well pointed out by ANKERSMIT, it was very unlikely that such mechanism would ever be applicable on investment arbitrations, as that would be inconsistent with the general purpose of a speedy and decentralized procedure¹⁰⁸.

The third (iii) argument of the ISDS critics was connected to the role of member states courts in the process, especially considering the classic unreviewable character of arbitral awards by national courts. This would mean that, if a certain arbitral award would have taken into consideration EU Law (in the conditions set above), such award would be considered final and would not be subject to the revision of any national Courts or the CJEU (as there was no mechanism of prior involvement in place, like the one created for the ECHR). This would mean two things: first that the member state’s courts were put aside of their role as courts of the EU (the second criterion we have identified), a fundamental role attributed by the Treaties to guarantee the connection between national laws and the CJEU; and second that the CJEU would lose its possibility to control the respect for EU Law, as such arbitral tribunals could not be subject to any type of EU Law classic sanctions (the third criterion we have identified). As we have seen, the final criterion of the monopoly of jurisdiction of the CJEU is precisely connected to the control of the respect of EU Law, namely by ensuring that traditional sanctioning mechanisms remain fully available. Exactly as in the case of the

¹⁰⁶ *Commission v. Ireland*, C- 459/03, ECLI:EU:C:2006:345, ¶ 154-156.

¹⁰⁷ *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, C-377/13, EU:C:2014:1754, ¶ 25 and 26.

¹⁰⁸ P. 11.

Patent's Court, these *ad hoc* investment tribunals would not be subject to any control of the CJEU, as both infringement proceedings (258.^o TFEU) would not be possible (as simply there was not a State attached to the arbitral court, like in the case of national courts), nor actions of responsibility in a *Köbler* scenario. This would mean that, even if some mechanism of cooperation between Tribunals and the CJEU would be envisioned, the lack of control of the respect for the answer of the Court would always constitute a breach of the monopoly of jurisdiction in the eyes of the CJEU.

It was then safe to say that, along with complicated policy questions, the background legal obstacles would have dictated a potential invalidity of the traditional ISDS clauses in the EU arena. Especially taking into consideration the second and third criterion of the monopoly (as we envisage them), it would be very simple for the CJEU to strike down such proposal based on the protection of its monopoly and to jeopardize the efforts of the Commission in external investment law.

Because of both concerns, the Commission reacted. Let us now see how this reaction tackled these obstacles, namely by analyzing the so-called Investment Court System, and by evaluating whether such changes prove to be more successful than their predecessors.

b. The Investment Court System: a danger ahead?

In the advent of such wave of criticism, from both academia and civil society, on the 16th of September 2015, the European Commission resorted to action and presented a proposal for a centralized solution that could address all the shortcomings which had been pointed out by the several stakeholders¹⁰⁹. This plan was a direct reaction to previously bitter discussions had in the context of the negotiations of CETA, above all with the Belgium authorities which were facing an internal blockade over the Wallonia question¹¹⁰. This blockade had been only solved through a compromise, for four conditions to be met in order to consider the ratification of the Treaty (and implicitly

¹⁰⁹ http://europa.eu/rapid/press-release_IP-15-5651_en.htm

¹¹⁰ See that the Parliament of Wallonia passed a resolution demanding the regional government to act before the federal government on this regard with very specific demands, among which the request of an advisory opinion by the CJEU.

See page 3 - available at: http://nautilus.parlement-wallon.be/Archives/2015_2016/RES/212_4.pdf

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accept the ICS methodology): i) that an advisory opinion would be asked of the CJEU over the validity of the ICS; ii) to have the CETA agreement qualified as a mixed agreement before the Council, therefore entitling Belgium to a veto vote (and, moreover, to a true Wallonian veto due to the Belgium domestic ratification procedure¹¹¹); iii) to refuse any provisional entry into force of the CETA before all domestic ratification procedures would be finished and finally iv) to give priority to state-state settlement of dispute solution, very much based on the WTO dispute settlement mechanism, in line with what the European Parliament had already stated when addressing the CETA agreement¹¹².

Once the conditions were *prima facie* met, the Commission idea was to use the ICS to guarantee the political acceptance of member-states on the different FTA treaties being discussed at the time, namely the TTIP and the Vietnam Agreement, and to ensure its acceptance by the Court of Justice. In fact, the major FTA's or Economic Partnerships celebrated by the EU so far (or on the negotiations phase) seem to follow the ICS route. If one takes a quick look at the dispute settlement chapters, the ICS is deeply embedded in their provisions: the TTIP proposal¹¹³, even if potentially never agreed upon, has its article 9 (section 3); CETA its article 8.27 (Section F, chapter 8); the Vietnam FTA, with the different name of Investment Tribunal System, its subsection 4 (section 3 of chapter 8¹¹⁴). Indeed, even regarding Japan, the European Commission made very clear that “*As regards investment protection specifically, during these negotiations, the EU has tabled to Japan its reformed proposal on the Investment Court System. For the EU, it is clear that there can be no return to the old-style Investor to State Dispute Settlement System (ISDS).*”¹¹⁵. The repercussion of adopting such solution had echoes around the world, with the American Bar Association¹¹⁶ raising once again concerns of democracy and transparency and stating “ *the Investment Court meets some of its goals, but in*

¹¹¹ Article 167 (3) of the Belgium Constitution.

¹¹² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011IP0257&from=EN> ¶1-2.

¹¹³ TTIP textual proposal on investment protection and investment court system, chapter II, section 3, subsection 4. Available at: http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf

¹¹⁴ http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf

¹¹⁵ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1687>

¹¹⁶ https://gallery.mailchimp.com/aee5b715166a845543ec9bcfb/files/ABA_ITWG_Investment_Court_Discussion_Paper_2016_10_14.pdf

other areas, the objectives of the Investment Court are simply not reached".¹¹⁷, while South-Korean doctrine alerted for the failed attempts of multilateral investment treaties in the 90's and the advised "it could be more realistic to establish such mechanism within the framework of existing international institutions such as the Permanent Court of Arbitration (PCA) or ICSID rather than starting from scratch considering the huge amount of cost and human resources to be dedicated"¹¹⁸.

It seems then safe to say that the Commission's vision for the settlement of disputes in such agreements is now absolutely clear: the ICS is the model to be adopted in every single investment partnership to be celebrated with third countries, which means having very similar dispute settlement chapters in every agreement. This conclusion should not be taken lightly – it means that, in case the CJEU declares such system to be invalid, namely on its incompatibility with the monopoly of jurisdiction of the Court, then a true spread of invalidity might take place as the entirety of FTA Agreements celebrated by the EU with third countries should be contaminated. This domino effect would bring obvious economic and political consequences and place the EU institutions in a very difficult bargaining position. This is why, in the face of such dangerous possibility, it is crucial to revisit the ICS model under the criteria set forth above, especially taking into consideration the end of the period of submission of the public consultation on the implementation of the ICS system launched by the Commission¹¹⁹.

How does the ICS depart from the traditional approach of the ISDS mechanisms¹²⁰? Let us first observe the policy matters and then the legal obstacles.

i. Policy concerns

¹¹⁷ Page 124-125.

¹¹⁸ YANG, H., *The EU's Investment Court System and prospects for a New Multilateral Investment Dispute Settlement System*, Korea Institute for International Economic Policy Research Paper, 12th October 2017, p. 66. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063843

¹¹⁹ http://europa.eu/rapid/press-release_IP-16-4349_en.htm

¹²⁰ For a comprehensive analysis of the changes between ISDS and ICS see LÉVESQUE, C., *The European Commission Proposal for an Investment Court System: Out with the old, in with the new?* Investor-state arbitration series paper no. 10, August 2016.

Available at: <http://www.css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/CIGI%20-%20The%20European%20Commission%20Proposal%20for%20an%20Investment%20Court%20System.pdf>

First the Commission wanted to respond to the transparency critiques. According to the TTIP draft proposal¹²¹, slightly modified in CETA, Vietnam and to be Japan, the ICS would be composed of a double tier, namely one court of first instance and an instance of appeal. In the TTIP case, the judges of first instance would be chosen by a committee on the number of 15¹²², where 8 judges would be appointed for a renewable once 6-year mandate¹²³ and the remaining 7 for an extended 9-year mandate. Similarly, in the CETA example, the 15 judges would be divided into 5-year mandates (8 judges) renewable once and extended 6-year term for the remaining¹²⁴. Only the Vietnam FTA seems to shorten the bench, by providing only 9 judges of first instance. Like this, to respond to the critiques on the independence and impartiality of arbitrators, the Commission would then remove the unilateral power of the parties to choose the judges. Moreover, it stated that the individual cases would be taken in randomly assigned chambers of three judges, one national of the EU, one national of the Contracting Party and a third state national presiding, ensuring therefore the existence of true impartiality of such judges¹²⁵. By removing the unilateral power of selecting the arbitrators from the parties, the EU departed considerably from the classic investment arbitration ISDS.

To tackle the growing concerns of arbitrators being remunerated in a case to case basis, the judges of the ICS would be entitled to a monthly retainer fee which could then be turned into an actual salary¹²⁶, making sure the judge served on a full-time basis and was forbidden from engaging in any other occupation¹²⁷. A very similar set of rules was designed for the appeal body judges¹²⁸.

To the same purposes of enhancing transparency and legitimacy, some fundamental changes were made in regard the qualifications of the judges making it resemble the

¹²¹Available at: http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

¹²² In which 5 should be US nationals, 5 EU nationals and 5 members of a third country.

¹²³ TTIP proposal - Section 3, sub-section 4, article 9 (2).

¹²⁴ CETA, Chapter 8, Section F, article 8.27.5.

Available at: <http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf>

¹²⁵ TTIP proposal - Section 3, sub-section 4, article 9(6).

¹²⁶ As Lévesque puts it, it is not absolutely clear which entity would pay this salary raising again some doubts on the effect of this measure on transparency. See LÉVESQUE, C., *The European Commission Proposal for an Investment Court System: Out with the old, in with the new?*, p. 8.

¹²⁷ Section 3, sub-section 4, article 9 (15).

¹²⁸ For example, for the TTIP in the number of 6 under the same nationality distribution (ex. 2 US, 2 EU and 2 third countries).

demands of the ICJ judges of the CJEU judges and adopting codes of conduct (Annex II TTIP) to avoid situations of conflict of interests.

ii. Legal obstacles

These fundamental changes aimed at solving some of what could be called policy concerns, namely the most mediatic complaints raised by the general public. However, they seem to ignore the *legal* challenges raised at the time of the approval of the ISDS solutions. As LENK puts it *“Although EU policy makers and technocrats appear to have listened to civil society, this mechanism fails to respond to internal constitutional challenges.”*¹²⁹. So, the question remains: is the ICS legally compatible with the principle of the monopoly of jurisdiction of the CJEU as described above? This was one of the fundamental questions of Belgium’s most recent request for an advisory opinion pursuant article 218 (11) TFEU when asking whether *“The exclusive competence of the CJEU to provide the definitive interpretation of European Union law”*¹³⁰ was safeguarded.

By following the framework established above, it is useful to revisit the three criteria set forth above and to contrast them to this new system, namely a) the allocation of competencies/powers between member states and the Union; b) the respect for the mechanism of preliminary ruling and c) the control of EU Law.

Regarding the first criterion, the allocation of competencies/powers between the member states and the Union, some fundamental problems may rise out of the ICS’ framework. The first one concerns the inexistence of a mechanism of intervention of the CJEU in the procedures, one which would ensure that the respect for the division of competences could be done in compliance to EU Law. According to the several agreements analyzed, there is a general lack of intervention or consultation of the CJEU during the procedures or of any mechanism which the CJEU could use to ensure that the ICS would correctly interpret EU Law. This is especially dangerous given the arguments advanced by the CJEU in Opinion 2/13, where the project of accession even

¹²⁹ LENK, H., *An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada*, European Papers, 1, no. 2, 2016, p. 13.

¹³⁰ https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf

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contained a mechanism of co-respondent, especially designed to allow for the intervention of the Court, and not even that was enough¹³¹. If even under this context, the CJEU rejected the project nonetheless, what else could the Court say, if it chooses to be coherent, but to repudiate a system where there is no intervention at all? Connected to this problem, a second obstacle arises. Even outside of the scope of the co-respondent mechanism, which could guarantee the necessary correct allocation of competencies (in the limit by always inviting the member states and the Union to the proceeding), the ICS project lacks also any mechanism of prior involvement of the CJEU during the procedure itself. As we have seen, in the ECHR case, the accession project guaranteed the respect for the *acquis* through the necessary involvement of the CJEU (the so called *prior involvement*), a mechanism designed to let the CJEU enact an opinion on the validity of EU norms in EU related matters. In the ICS construction however, because EU law seems to be treated purely as fact (explained below), the EU institutions saw no reason to create such intervention moment for the CJEU. The risk here is again great: while in Opinion 2/13 what led to the negative opinion was the nature of this prior involvement (of being of pure validity and not also of interpretation)¹³², the assumption was always that there was some kind of involvement of the CJEU. In the absence of any intervention, either to ensure the division of competences or to guarantee the respect for the *acquis*, the ICS might be risking following the same footprints of previous external projects of the EU.

Concerning the second criterion, the respect for the mechanism of preliminary ruling, it was shown that the CJEU places great importance on the “keystone” of EU cooperation, namely the role that national Courts play as guarantors of the uniformity of EU Law. Two problems seem to directly arise of the construction of the new ICS: in a first moment, the problem of the interpretation of EU law without a mechanism of preliminary reference (or the existence of some type of prior involvement of the CJEU); in a second moment, the problem of the enforcement and review of the decisions of the ICS, as they remain fully independent from states or the EU.

¹³¹ Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, C-2/13, 18 December 2014, ECLI:EU:C:2014:2454, ¶ 224-225.

¹³² Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, C-2/13, 18 December 2014, ECLI:EU:C:2014:2454, ¶ 243-248.

Regarding the first problem, the Commission tried to tackle the matter by clearly stating that EU Law could only be interpreted as “*a matter of fact*”¹³³ (even if only present in the TTIP proposal and EU-Vietnam Agreement) and should “*follow the prevailing interpretation of that provision made by the courts or authorities of that Party.*”. This would mean that the ICS would be bound by the *acquis* of the CJEU and should take EU Law as fact and not as law. However, one could wonder whether this would be enough to comply with the CJEU’s vision of its monopoly. It seems difficult to believe in such compatibility as the system allows for the review of the decision of the first instance court by the appeals court, meaning in any case a review of the legality of EU law (because of the monist impact of the *Häggeman* doctrine all the provisions would constitute primary law of the EU). Even if such appeal would not directly address the misinterpretation of an EU act by the first instance court, the mere possibility of such interpretation would most likely be considered as breaching the monopoly of jurisdiction of the CJEU. This is what happened in the Opinion 1/09 with the project of the Patent’s Court and the rationale for the destruction of the accession to the ECHR with the mere possibility of interstate disputes based on article 33 ECHR¹³⁴. Moreover, it is very easy to construct scenarios where it is not a direct interpretation of an EU act which is at stake, but rather an indirect evaluation of the conduct of a State while executing EU law (e.g. the execution of a Directive) or in the context of EU policies (e.g. result of a recommendation). It is often the case where the open-ended nature of investment protection clauses (such as Fair and Equitable Treatment) touch upon national acts which are a result of EU policy. This would mean to interpret, indirectly, acts of EU law and to breach the monopoly of the CJEU. As ANKERSMIT puts it “*It is in these situations that the ordinary role of the courts of the Member States might be affected, and, as a consequence, isds may not be compatible with EU law.*”¹³⁵.

Regarding the second problem, this uniformity might be also jeopardized when taking into consideration the provisions of the FTA agreements concerning the enforcement of

¹³³ TTIP proposal – Section 3, sub-section 4, article 13, (3).

¹³⁴ Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, C-2/13, 18 December 2014, ECLI:EU:C:2014:2454, ¶ 207-208.

¹³⁵ ANKERSMIT, L., *The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System*, *Journal for European Environmental & Planning Law*, 13, 2016, p. 53.

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the decisions of the ICS. According to the TTIP proposal and the EU-Vietnam Agreement¹³⁶, national courts are absent from any review process, as the judgements “*shall not be subject to appeal, review, set aside, annulment or any other remedy*”. This is coherent with the Commission idea of creating a true *self-contained regime*, one that is not dependent on member state jurisdiction, ensuring therefore the necessary speed to the procedures. However, by isolating the justice system from national jurisdictions, the Commission risks to break the fundamental link of the preliminary ruling, and therefore face again a 2/13 type approach. In the absence of any prior involvement of the CJEU and any type of preliminary reference mechanism, the parallel between both situations is evident. A negative response by the CJEU is even more likely given the fact that, even when the project of accession to the ECHR had all of these safeguards, namely the prior involvement and the co-respondent mechanisms, the CJEU still saw an incompatibility with its monopoly of jurisdiction. It is very likely that it will repeat it in the absence of such guarantees. As ANKERSMIT’s very well exemplifies “*An ISDS 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 investment provisions of EU investment agreements*”¹³⁷. The danger therefore remains quite vivid.

This set of obstacles is deeply connected to the third and final criterion, namely the control of the respect for EU law. Although understandable from the practical point of view¹³⁸, the Commission’s view of creating a true self-contained regime will be easily understood by the Court as a dangerous isolation from the CJEU’s control. As we have seen in the several opinions of the Court and on the recent *Achmea* case, a final dimension of the CJEU’s monopoly is to ensure that, when in face of a disrespect of EU law, the traditional infringement and responsibility proceedings can be triggered. In the absence of any prior or post involvement of the CJEU in the ICS proceedings, any misinterpretation of EU law would simply not be able to be sanctioned by the CJEU. This is exactly what happened in Opinion 1/09, as the CJEU rejected the existence of an

¹³⁶ TTIP proposal, article 30(1) and EU-Vietnam FTA, article 31(1).

¹³⁷ ANKERSMIT, L., *The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System*, p. 56.

¹³⁸ Namely the principle of stability of arbitral awards.

international court which could interpret EU law and not be held accountable for such interpretations¹³⁹, or in Opinion 2/13 with the lack of control over ECtHR's decisions in interstate proceedings¹⁴⁰. In fact, in this last case there were even mechanisms of prior involvement of the CJEU (the so-called co-respondent mechanism), which lays even more doubts on the compatibility of the ICS without any mechanism of that sort. The only solution to ensure compatibility would be then to sanction the State who is targeted by the ICS proceedings, for having been party to the proceedings (Kokott's solution for the ECHR problem). This is however, tremendously unfair for the State and might leave it a potential position of a truly conflict duties (to obey the ICS e to disrespect EU law and to face sanctions by the CJEU). The State would then be engaged in ICS because of an EU creation and, once object of proceedings, would be subject to sanctions because of its non-voluntary participation on them. As the Court even denied the infringement proceedings as a possible escape route¹⁴¹, this alone seems not to provide an effective solution. Again, it seems that the ICS might face some legal constraints on this point.

Some authors, however, try to minimize this risk and seem to have a more positive approach to the future. SCHILL explains that *"it is possible, through careful ISDS design, to meet the CJEU's concern to protect the primacy and autonomy of EU law and its own jurisdiction to apply an interpret EU Law"*¹⁴². For the author, one of the risks raised above, the breach of the fundamental link between the CJEU and Member States through the preliminary reference procedure does not seem to constitute an imperative to respect autonomy/monopoly of jurisdiction – *"after all, it is questionable whether*

¹³⁹ Advisory opinion 1/09, *European and Community Patents Court*, ¶ 87-88.

¹⁴⁰ See the contrary opinion of the European Commission – *"The Commission states that it is not necessary for the draft agreement to make provision for a specific objection of inadmissibility in the case of applications brought before the ECtHR, under Article 33 of the ECHR, by the EU against a Member State or, conversely, by a Member State against the EU in a dispute regarding the interpretation or application of the ECHR, given that such applications would be manifestly contrary to EU law. Not only would they constitute a circumvention of Article 258 TFEU, but the decision to make such an application could be challenged by an action for annulment under Article 263 TFEU. In addition, an application brought by a Member State against the EU would constitute a circumvention of Article 263 TFEU or, as the case may be, of Article 265 TFEU, which would be subject under EU law to the infringement procedure."* [emphasis added]. Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, C-2/13, 18 December 2014, ECLI:EU:C:2014:2454, ¶ 104.

¹⁴¹ Advocate-general view on Advisory opinion 2/13, *Accession to the European Convention of Human Rights*, ECLI:EU:C:2014:2475, ¶ 141.

¹⁴² SCHILL, S. W., *Editorial: Opinion 2/13 – The End for Dispute Settlement in EU Trade and Investment Agreements?*, *Journal of World Investment & Trade*, 16, 2015, p. 384.

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an ISDS mechanism would ever need to interpret EU law or determine the conformity of a norm of EU law with the applicable EU IIA”. The problem, however, is that the notion of the monopoly as theorized by the CJEU goes well beyond the mere revision of legality: based on the monist vision imposed by the *Hägeman* doctrine, this type of agreements would always constitute EU law and therefore the typical investment guarantees would no longer be purely international law but would rather be incorporated as EU law. This would render *any* interpretation by the ICS of these agreements an interpretation of EU law, unsusceptible of review by member states’ courts or the CJEU. And even conceiving a depart from *Hägeman* on this case, mere incidental interpretations of EU law acts seem to suffice as a breach of autonomy. This is very likely to happen, given the nature of the appeal procedure within the ICS, where the review of legality by the appeals court might indirectly happen, as it will have to judge upon the legal merits of the decision of the first instance (and therefore establish a certain interpretation of a EU act as valid or invalid).

Nonetheless, SCHILL seems to see no obstacle in the possibility of a judicial review on the matters of Common Foreign and Security Policy (against what we have seen be LOCK’S position), as “*an ISDS mechanism, by contrast, would need to be excluded from applying EU law always*”¹⁴³. However, as we have seen, this exclusion is made by treating domestic law (and also EU law) as a matter of fact and not of law – this would not, nonetheless, impede the obstacle of reviews by the Appeal’s Court, which often would have to interpret (indirectly taking into consideration the law of the EU) acts of execution of EU Law, resulting in the same effect.

4. Conclusions

It is impossible to predict what will be the outcome of the opinion of the Court of Justice of the European Union in response to Belgium’s recent request. Nor is it likely to be an easy decision. What is more important, however, is to understand the risks and consequences of the jurisprudential understanding of the monopoly of jurisdiction of the CJEU. Based upon the three fundamental requisites of the monopoly of jurisdiction

¹⁴³ SCHILL, S. W., *Editorial: Opinion 2/13 – The End for Dispute Settlement in EU Trade and Investment Agreements?*, p. 387.

of the CJEU, namely the allocation of powers, the respect for preliminary ruling and the control of EU law, the Court has developed an increasingly more restrictive view on the international freedom of the remaining institutions and member states. This construction of its monopoly has already proven to have practical consequences, shaping EU's external action in unexpected ways, and is most likely facing another important moment with the definition of the limits of the ICS. This analysis might therefore prove fundamental to address the more immediate concerns with the validity of the ICS, by highlighting the potential shortcomings of the project. But its major contribution should be on the long run, by raising the debate on the general consequences of the monopoly, to lay the first theoretical framework to a deeper understanding of the meaning of the autonomy of EU law. By theorizing such principle under those three fundamental pillars, the CJEU places considerable constraints on the external action of both the EU and member states, one constraint that deserves to be critically analyzed. More than tacitly accepting this definition of the CJEU's monopoly, one should inquire about the true reasons which justify having such monopoly in the first place, namely to understand whether from "constitutional chaos" and conflict can there be positive normative development. It is, in the end, to understand whether the institutional equilibrium which allowed the Union to grow is not being threatened by this univocal approach.

It is true that the role of the monopoly of the CJEU is a crucial one, one of defending the specific nature of the EU as unique system of law. But it cannot, or should not, become a politically oriented mechanism for the choice of routes of external action, by rejecting the integration of certain dispute settlement bodies such as the ECtHR, but accepting others such as the WTO or ITLOS. Regardless of the decision of the CJEU on the Belgium request and to the validity of the Investment Court System, what is urgent is a larger critique of the monopoly in terms of coherence and legitimacy, one that analyzes the actual dangers that international law bodies might pose to the uniformity of EU, one which ensures some predictability for future external action.