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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*

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## **Abstract**

*This article 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 Investment Court System (ICS). By providing a general framework over the criteria that have been developed by the Court, the work sheds light on the controversial principle of autonomy of the European Union (EU) and its implications to the EU’s external action. The work intends to be both pragmatic and analytical. On the one hand, the criteria are extracted as operative tools from the jurisprudence of the CJEU and then used in the context of the validity of the ICS. This provides the reader with some definitive standards that can then be applied to future cases whenever a question concerning autonomy arises. On the other hand, the article questions the reasons behind the idea of the monopoly of jurisdiction of the CJEU, advancing a concept of autonomy of the EU as a claim for power and critiquing the legitimacy and coherence of its foundations. Both dimensions will hopefully help to provide some clarity over the meaning of autonomy and the monopoly of jurisdiction, while, at the same time, promoting a larger discussion on its impact on the external action of the EU.*

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## 1 Introduction

Since the Treaty of Lisbon, the matters related to trade and 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 EU.<sup>1</sup> This increase in the investment area can be seen both through positive action, in the increasing number of free trade agreements (FTA) celebrated by the EU, as well as through negative action, based on the strong pressure on member states to avoid any bilateral investment treaty (BIT) relations.<sup>2</sup> This wave of international investment, however, which has been highly incentivized by the exclusivity of competences given to the EU by the Treaty of Lisbon, is not without risks; the intervention of the Union as a global player, subject to pre-existing legal frameworks (World Trade Organization [WTO], International Tribunal for the Law of the Sea [ITLOS], the European Convention on Human Rights [ECHR] 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). By displacing the Court of its role as the sole judge and placing it as one of many courts and tribunals interpreting EU law, the European institutions might be playing a dangerous game.

Precisely under such an environment, this article addresses in detail the relationship to be established between the monopoly of jurisdiction of the CJEU, as the corollary of autonomy, and the creation of a parallel system of investment courts (the so-called Investment Court System (ICS), as a successor to the classic investor-state dispute settlement mechanisms). The purpose of the work is to use the case study of the (ICS) to critically analyse the monopoly of jurisdiction of the CJEU and its consequences on the EU's international development. As 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 ECHR through the negative opinion of the CJEU. As before, the ICS proposal also contains several of the same obstacles that led to the negative Opinion 2/13, which could have been identified by the Court as breaching the monopoly of jurisdiction of the CJEU.<sup>3</sup> However, in the recent Opinion 1/17, the CJEU accepted the ICS in a decision that is worth analysing from both a legitimacy and coherence point of view.<sup>4</sup>

<sup>1</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007, OJ 2007 C 306 (Treaty of Lisbon).

<sup>2</sup> The *Achmea* case is the perfect example of this. Case C-284/16, *Achmea* (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); [www.borderlex.eu/comment-end-of-intra-eu-bits-what-next/](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).

<sup>3</sup> Opinion 2/13, *Accession to the European Convention of Human Rights* (EU:C:2014:2454).

<sup>4</sup> Opinion 1/17, *Accord ECG UE-Canada* (EU:C:2019:341).

To explain the possible obstacles that the ICS might encounter in light of the principle of autonomy and the monopoly of jurisdiction of the CJEU, this work develops a certain logical construction. 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 rethinks the meaning of autonomy under the broader 'constitutionalization' process of the EU. Second, based on such critique, it analyses the practical example of investment arbitration – namely, the evolution from investor-state dispute settlement mechanisms (ISDS) to the new ICS's legal framework. This will help us in understanding the EU's motivations and objectives with the creation of such a system. Third, it identifies each of the potential obstacles that the ICS raises and confronts them in a critical analysis of the notion of autonomy in light of Opinion 1/17. Finally, some concluding remarks are given on the consequences of adopting such narrow views – namely, their impact on the EU's external action.

This article will not address the merits (both political and economic) of the construction of the new ICS nor judge the political reasons that might have led the Commission and the European Parliament to revise the original ISDS already in place in some investment treaties. Nor will it judge the effectiveness of the Commission's newest trade and investment policy of splitting trade and investment agreements with third countries. Rather, the purpose is to provide an analysis of the reasons behind the monopoly of jurisdiction and the potential consequences that such a vision of the role of the CJEU might have on the international field. By using the case study 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 a framework represents a sustainable pathway for the EU's investment policy.

## 2 The Monopoly of Jurisdiction of the CJEU

### *A Criteria*

The monopoly of jurisdiction of the CJEU is a concept that eludes a clear definition. Dictated by Article 344 of the Treaty on the Functioning of the European Union (TFEU), which is often seen as a facet of the general principle of autonomy of the EU, it aims at ensuring the uniformity of EU law by representing a *prima facie* impossibility of having other international judicial organs providing judgments based on EU law.<sup>5</sup> However, more than a mere prohibition of external interpretation, the CJEU has interpreted its scope to go much beyond this level. A possible way to address such complex principles then is to try to identify some definitive operative criteria out of the vast jurisprudence on the matter.

Since the 1970s,<sup>6</sup> and then with increasing importance in the 1990s,<sup>7</sup> the Court has been faced with the European Commission's proposals of cooperation with other

<sup>5</sup> Treaty on the Functioning of the European Union (TFEU), OJ 2016 C 202/47.

<sup>6</sup> Case C-1/76, *Draft Agreement Establishing a European Laying-up Fund for Inland* (EU:C:1977:63).

<sup>7</sup> Case C-1/91, *European Economic Area* (EU:C:1991:490); Case C-1/92, *European Economic Area* (EU:C:1992:189).

legal systems, some of them containing their own mechanisms for the 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 has reacted by reaffirming the autonomy of EU law,<sup>8</sup> its monopoly of jurisdiction and the 'very nature of EU law'<sup>9</sup> as a constitutional construction.<sup>10</sup> Although always formally accepting the admissibility of the creation of other international courts by the EU institutions,<sup>11</sup> the CJEU has 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 opinions,<sup>12</sup> the *Mox Plant* case<sup>13</sup> and the *Achmea* case,<sup>14</sup> it can be argued that the Court has created three fundamental requisites to be observed by any dispute settlement mechanism that aims at interpreting, directly or indirectly, EU law:

- i. 'The allocation of competences between member states and the Union' – the Court has used the monopoly as a prohibition of external courts to make a judgment on the division of competences/powers or the allocation of responsibilities between the EU and its member states.
- ii. 'The respect for the mechanism of preliminary ruling' – the Court has required 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 has used its monopoly as a guarantee of compliance with EU law, blocking any external activity that cannot be controlled by the CJEU by the means of sanctions.<sup>15</sup>

Let us now observe how each of these dimensions can be identified in the jurisprudence of the EU.<sup>16</sup>

<sup>8</sup> 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 Court of Justice of the European Union (CJEU) was concerned only with the autonomy of the European Union (EU) from member states, reflected in the creation of the fundamental principles of supremacy and direct effect (the internal autonomy); in a second phase, however, the CJEU turned to international law and claimed autonomy from international dispute settlement bodies that could jeopardize its monopoly of jurisdiction (the external autonomy). See J. Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law', EUI Research Paper (2016), at 3–5.

<sup>9</sup> Case C-621/18, *Wightman* (EU:C:2018:999), para. 45.

<sup>10</sup> Opinion 1/17, *supra* note 4, para. 110.

<sup>11</sup> Case C-1/91, *supra* note 7, para. 40. Also very recently in Opinion 1/17, *supra* note 4, paras 106, 115.

<sup>12</sup> Case C-1/91, *supra* note 7; Case C-1/92, *supra* note 7; Case C-2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (EU:C:1996:140); Case C-1/00, *Proposed Agreement between the European Community and Non-Member States on the Establishment of a European Common Aviation Area* (EU:C:2002:231); Case C-1/09, *European and Community Patents Court* (EU:C:2011:123); Opinion 2/13, *supra* note 3; Opinion 1/17, *supra* note 4.

<sup>13</sup> Case C-459/03, *Comission v. Ireland* (EU:C:2006:345).

<sup>14</sup> C-284/16, *supra* note 2.

<sup>15</sup> We believe the CJEU itself has adopted somehow this methodology as stated in para. 110 of Opinion 1/17, *supra* note 4. Adopting a different systematization of the criteria, see Hillion and Wessel, 'The European Union and International Dispute Settlement: Mapping Principles and Conditions', in M. Cremona, A. Thies and R. Wessel (eds), *The European Union and International Dispute Settlement* (2017) 4.

<sup>16</sup> Critically predicting the challenges of the principle of autonomy of the EU in relation to investor-state dispute settlement (ISDS) mechanisms in investment treaties, see Lenk, 'Investment Arbitration under EU Investment Agreements: Is there a Role for an Autonomous EU Legal Order?', 28(2) *European Business Law Review* (2017) 135; see also Lenk, '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', 1(2) *European Papers* (2016) 666.

### 1 Allocation of Competencies/Powers

The first criterion or dimension of the monopoly is connected to the 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. This 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 make a judgment on the division of competences inside the EU. The Court explained that:

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.<sup>17</sup>

This statement meant that the EEA Court would be placed in a position as to make a judgment 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. According to the CJEU, this breached its monopoly of jurisdiction granted by the founding treaties, which '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'.<sup>18</sup>

This historical view on the monopoly of jurisdiction has been continuously upheld throughout the following decades and shows no evidence of change. Three contemporary examples illustrate precisely this point: the contentious case between the Commission and Ireland concerning Sellafield's power plant (the *Mox Plant* case),<sup>19</sup> the failure of the accession to the ECHR with the negative Opinion 2/13 and the denial of an arbitral clause within the Slovakia-Netherlands BIT in the *Achmea* case.<sup>20</sup>

In the *Mox Plant* case, the CJEU condemned Ireland based upon an infringement proceeding, initiated by the EU Commission, precisely because it had recurred to an external tribunal to settle the dispute instead of taking the case to the CJEU.<sup>21</sup> The problem, although reflecting a wider danger of fragmentation in international law,<sup>22</sup> placed

<sup>17</sup> Case C-1/91, *supra* note 7, para. 34.

<sup>18</sup> *Ibid.*, para. 35.

<sup>19</sup> Case C-459/03, *supra* note 13, para. 123.

<sup>20</sup> C-284/16, *supra* note 2.

<sup>21</sup> On this topic, Lavranos, 'The MOX Plant Judgment of the ECJ: How Exclusive Is the Jurisdiction of the ECJ?', 15(10) *European Energy and Environmental Law Review* (2006) 291, at 291–296; De Witte, 'European Union Law: How Autonomous Is Its Legal Order?', 65(1) *Zeitschrift für Öffentliches Recht* (2010) 141, at 150.

<sup>22</sup> This topic has been subject to extensive literature. Initiating the debate in the doctrine is the fundamental work of Bruno Simma. Simma, 'Self-Contained regimes', 16 *Netherlands Yearbook of International Law* (1985), at 111; Simma and Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', 17(3) *European Journal of International Law* (2006), at 493. Simultaneously, the International Law Commission (ILC) discussed the matter under Crawford and Koskeniemi's guidance leading up to the 2006 report. ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 2(2) *ILC Yearbook* (2006) 65.

the CJEU in a difficult position – the United Nations Convention on the Law of the Sea’s (UNCLOS) tribunal could have enacted a judgment by recourse to the rules of EU law without any intervention of the CJEU.<sup>23</sup> 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 since ‘[t]he 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’.<sup>24</sup> From this case, two main conclusions can be drawn that reinforce our understanding of the monopoly of jurisdiction of the Court. The first conclusion is 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 resorted to an international adjudicator that could choose the ‘contracting party’ to appear before the tribunal (in this case, the arbitral tribunal before ITLOS). The second conclusion is that such a restrictive view of the monopoly of jurisdiction can place states in often-difficult positions – namely, by placing them in situations of true conflicting duties (to obey one tribunal is to disrespect another).<sup>25</sup> Both of these dimensions will prove essential for the analysis of Opinion 1/17 later in this article.

The same construction was then fully applied in the controversial opinion of the CJEU regarding the accession of the Union to the ECHR.<sup>26</sup> The argument was built precisely according to the same line of thought: by constructing a co-respondent mechanism,<sup>27</sup> the project of accession allowed the European Court of Human Rights (ECtHR) 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 its member states, something that only the CJEU would be entitled to make.<sup>28</sup> In this respect, the Court stated:

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.<sup>29</sup>

<sup>23</sup> Convention on the Law of the Sea (UNCLOS) 1982, 1833 UNTS 3.

<sup>24</sup> Case C-459/03, *supra* note 13, para. 177.

<sup>25</sup> 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 rumours circulated that the CJEU might understand such a process as a breach of its own jurisdictional monopoly. Case C-459/03, *Comission v. Ireland* (EU:C:2006:345). But such a decision was taken by the Tribunal itself, out of judicial comity, and, therefore, it cannot be ruled out that one day a different court or tribunal will act in a different manner.

<sup>26</sup> Opinion 2/13, *supra* note 3.

<sup>27</sup> Article 3(2)–(8) of the Draft Agreement of Accession (Accession Agreement), European Council Doc. 47 + 1(2013)008rev2, 10 June 2013, Appendix I.

<sup>28</sup> Opinion 2/13, *supra* note 3, paras 218–225.

<sup>29</sup> *Ibid.*, paras 224–225.

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.<sup>30</sup>

In 2018, 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 fundamentally different from the earlier cases, where the question was one of international law bodies potentially threatening the monopoly of jurisdiction of the CJEU, what was at stake in the *Achmea* case were the provisions of an intra-EU BIT.<sup>31</sup> Nonetheless, the CJEU resorted to the exact same mechanisms when addressing a question posed by the German court – 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.<sup>32</sup> The CJEU invoked its jurisprudence on Opinion 2/13 and once again observed:

[I]t 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.<sup>33</sup>

This meant that, if the arbitral tribunal could not be considered to be an equivalent to a national court (the Court recalled the jurisprudence in the Portuguese case *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*),<sup>34</sup> then it would constitute an external judicial body to the treaties' system, something expressly forbidden by Article 344 of the TFEU. Indeed, since the arbitral tribunal was a mere ad hoc investment tribunal,<sup>35</sup> the lack of permanence would never allow it to be characterized as a national court, and, hence, it was forbidden from any interpretation of EU law.<sup>36</sup> Its implications promised to shake investment arbitration forever in the EU.<sup>37</sup>

<sup>30</sup> *Ibid.*, paras 229–235.

<sup>31</sup> Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (Slovakia-Netherlands BIT), 1 January 1992, available at [https://arbitrationlaw.com/sites/default/files/free\\_pdfs/netherlands-slovakia.pdf](https://arbitrationlaw.com/sites/default/files/free_pdfs/netherlands-slovakia.pdf).

<sup>32</sup> *Ibid.* The preliminary reference was made by the Bundesgerichtshof and is available at <http://curia.europa.eu/juris/document/document.jsf?docid=182687&mode=req&pageIndex=1&dir=&occ=first&art=1&text=&doclang=EN&cid=450088>.

<sup>33</sup> C-284/16, *supra* note 2, para. 32.

<sup>34</sup> Case C-377/13, *Ascendi Beiras Litoral e Alta, Auto-Estradas das Beiras Litoral e Alta* (EU:C:2014:1754), paras 25, 26.

<sup>35</sup> 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 the member states. See C-284/16, *supra* note 2, para. 55.

<sup>36</sup> *Ibid.*, paras 44–49.

<sup>37</sup> Eckes, 'Some Reflections on Achmea's Broader Consequences for Investment Arbitration', 4(1) *European Papers* (2019) 80.

Similarly, in Opinion 1/17, when addressing the compatibility of the ICS system that is built into the EU–Canada Comprehensive Economic and Trade Agreement (CETA),<sup>38</sup> the CJEU turned once again to this criterion by stating:

The fact that there is no jurisdiction to interpret the rules of EU law other than the provisions of the CETA is also reflected in Article 8.21 of that agreement, which confers not on the CETA Tribunal, but on the Union, the power to determine, when a Canadian investor seeks to challenge measures adopted by a Member State and/or by the Union, whether the dispute is, in the light of the rules on the division of powers between the Union and its Member States, to be brought against that Member State or against the Union. The exclusive jurisdiction of the Court to give rulings on the division of powers between the Union and its Member States is thereby preserved.<sup>39</sup>

While reserving a deeper analysis of this opinion for Part 3.B of this work, it is worth saying that this decision means, once again, that autonomy demands that any ISDS mechanism must respect the power of the CJEU to make a judgment on the division of competences between the EU and its member states.

In conclusion, according to the CJEU's interpretation, although it accepted the existence of relations between the EU and other international dispute settlement bodies,<sup>40</sup> these bodies are always precluded from enacting any interpretation on the division of competencies between the EU and the member states. This prerogative is to be executed by the CJEU and the CJEU alone.<sup>41</sup>

## 2 *Respect for the Mechanism of Preliminary Ruling*

The second dimension of the autonomy is also a product of historical jurisprudence, and it is connected to the CJEU's notion of the core importance of a 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 that once again blocked the first version of the project of a European and Community Patents Court.<sup>42</sup> This time, the reasoning was different: it was not because the Patents Court could assess the rules on the division of powers between the EU and its member states, as it would only have jurisdiction upon individual claims.<sup>43</sup> Rather, it was the fact that allowing the Court to possess exclusive jurisdiction on those matters would deprive national courts from their keystone role as interlocutors with

<sup>38</sup> EU–Canada Comprehensive Economic and Trade Agreement (CETA) (signed 30 October 2016, not yet in force), available at [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf).

<sup>39</sup> Opinion 1/17, *supra* note 4, para. 132.

<sup>40</sup> Case C-1/91, *supra* note 7, para. 40; Case C-1/09, *supra* note 12, paras 74–75.

<sup>41</sup> These types of arguments have led some authors to qualify CJEU's actions as selfish attitudes with a degree of internal incoherence (for example, in the treatment given to bilateral investment treaties [BITs]). See De Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement beyond the European Union', in M. Cremona and A. Thies (eds), *European Court of Justice and External Relations Law: Constitutional Challenges* (2014) 33.

<sup>42</sup> Case C-1/09, *supra* note 12.

<sup>43</sup> *Ibid.*, para. 63.

the CJEU.<sup>44</sup> By attributing exclusive jurisdiction to that international court, it would be up to the 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 Article 267 of the TFEU), therefore destroying the classic relationship between national courts and the CJEU on these matters. The Court explained its reasoning in such a 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.<sup>45</sup>

This statement 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, also dependent on the fact that the national courts were deprived of such a role on those specific matters. Break the existential link between the national courts,<sup>46</sup> as true courts of the EU, and the CJEU would mean jeopardizing the CJEU’s control through national member states and the nature of EU law itself: ‘[T]he 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.’<sup>47</sup> This preliminary ruling’s obstacle also played a critical role in the rejection of accession under Opinion 2/13. Although, controversially, the CJEU identified this second obstacle as the danger that the new project of Protocol no. 16 to the ECHR would pose to the cooperation between national courts and the CJEU.<sup>48</sup> The objective of this protocol was to address the growing concerns of excessive length in the judgments of the cases and the lack of celerity of procedures, elements that were undermining the ECHR system at that time (and still are).<sup>49</sup>

<sup>44</sup> According to Art. 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.

<sup>45</sup> Case C-1/09, *supra* note 12, para. 80.

<sup>46</sup> Lavranos, ‘Designing an International Investor-to-State Arbitration System after Opinion 1/09’, in M. Bungenberg and C. Herrmann (eds), *Common Commercial Policy after Lisbon* (2013) 199, at 212–215.

<sup>47</sup> Case C-1/09, *supra* note 12, para. 85.

<sup>48</sup> Protocol no. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2013, ETS 214.

<sup>49</sup> Spielmann, ‘Whither Judicial Dialogue?’, Speech given at the *Sir Thomas More Lecture*, Lincoln’s Inn, 12 October 2015, at 5; see also Council of Europe, Protocol no. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms: Explanatory Report (2013), at 2, available at [www.echr.coe.int/Documents/Protocol\\_16\\_ENG.pdf](http://www.echr.coe.int/Documents/Protocol_16_ENG.pdf).

The CJEU, however, nonetheless identified Protocol no. 16 as an existential threat; it might happen that an advisory opinion requested under this protocol would trigger the mechanism of prior involvement of the CJEU and therefore exempt the courts or tribunals of the member states from the mandatory provisions of Article 267 of the TFEU (preliminary ruling mechanism). According to the reasoning of the Court, 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 courts of the member states.<sup>50</sup> This judgment greatly contrasted with the Advocate General’s conclusions on the problem, which were described as a compliance problem easily solved through the normal sanctions’ mechanisms provided by the treaties.<sup>51</sup> It seems that such guarantees of compliance, under the mandatory character of Article 267 of the TFEU, in conjunction with the potential infringement proceedings, which Articles 258 and 260 of the TFEU would impose, were not enough for the CJEU.

Interestingly, it was also this second dimension of the monopoly of jurisdiction that 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 an arbitral tribunal could pose to the link between national courts and the CJEU. It stated:

[T]he 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.<sup>52</sup>

This line of thought continued as follows: because such an arbitral tribunal did not match the criteria to be qualified as a true national court of a member state, and its judgments could not be revised by any national court (in this case, the German ones) based upon its non-compliance with EU law, there was no pathway between such a decision and an opinion of the CJEU under the mechanism of the preliminary ruling.<sup>53</sup> It therefore constituted a breach of autonomy (in the sense of a monopoly of jurisdiction) and the principle of sincere cooperation between states and the EU. Although applicable to intra-EU BITs, the resemblance of the Court’s legal reasoning to the international treaties celebrated by the EU is remarkable.

Surprisingly enough, in Opinion 1/17, the CJEU departed from the idea of the preliminary ruling as the “keystone” of the EU judicial system,<sup>54</sup> with no reference to this

<sup>50</sup> Opinion 2/13, *supra* note 3, paras 196–200.

<sup>51</sup> Advocate General’s view on Opinion 2/13, *supra* note 3, para. 141.

<sup>52</sup> C-284/16, *supra* note 2, para. 37.

<sup>53</sup> *Ibid.*, para. 58.

<sup>54</sup> In fact, unlike Opinion 2/13, *supra* note 3, or Case C-284/16, *supra* note 2, where this principle constituted the fundamental argument for the decisions, in Opinion 1/17, *supra* note 4, there is no mention of the preliminary ruling as having this fundamental or ‘keystone’ character.

qualification, even if it still confirmed the fundamental importance of such a mechanism.<sup>55</sup> In fact, the reasoning seems to be that if a court or tribunal stands completely outside the EU judicial system (which is very arguable, as we shall see later in this discussion), then there is no need for any mechanism of prior involvement or preliminary ruling.<sup>56</sup> The keystone character subsists, but only for those ISDS mechanisms that are somehow connected to the EU legal order.

In conclusion, this second criterion demands that even remote possibilities of breaking the close relationship between the CJEU and the courts of its member states, as a guarantee of uniformity of EU law,<sup>57</sup> are to be avoided since they can constitute an unlawful breach of the autonomous internal connections between the courts of the EU.

### 3 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 of / compliance with EU law. This criterion is built by the Court as a prohibition of the creation of entities that would preclude the CJEU's control of the legality of EU law – namely, when national courts disrespect the mechanism of the 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 matters<sup>58</sup> (instead of the courts and tribunals of the 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 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.<sup>59</sup>

This is because, while in the case of the national courts, the possibility of condemning the member state for its infringement was a reality for the CJEU (as well as eventual state responsibility for the judicial power<sup>60</sup>), in the case of the Patents Court there would be no mechanism of control when it refused to place a mandatory question or

<sup>55</sup> Opinion 1/17, *supra* note 4, para. 111.

<sup>56</sup> *Ibid.*, paras 134–136.

<sup>57</sup> Case C-1/09, *supra* note 12, para. 84.

<sup>58</sup> As the project mimicked the provisions of now Art. 267 of the TFEU, *supra* note 5, to ensure that the Patents Court could place preliminary ruling questions to the CJEU.

<sup>59</sup> Case C-1/09, *supra* note 12, paras 87–88.

<sup>60</sup> See the early case where the matter was discussed, Case C-224/01, *Köbler* (EU:C:2003:513), paras 33–36; see also Case C-173/03, *Traghetti del Mediterraneo* (EU:C:2006:391), paras 30–31; Case C-154/08, *Commission v. Spain* (EU:C:2009:695), para. 125.

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 CJEU's Opinion 2/13 regarding the relationship between Article 344 of the TFEU and Article 33 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*<sup>61</sup> 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 EU.<sup>62</sup> 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'.<sup>63</sup> Here, too, the problem is one of control of the legality of EU law – namely, the fact that the CJEU could not control the 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, Advocate General Juliane Kokott saw no unsurpassable obstacle on this point and suggested a double solution: either to grant a system similar to the one found in UNCLOS,<sup>64</sup> 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 always be mandatory in these cases.<sup>65</sup>

In Opinion 1/17, the CJEU deflected this obligation by resorting to a similar reasoning as explained above. In its opinion, the control of EU law would never be put into question simply because EU law itself would never be judged by the ICS but merely taken into consideration as 'a matter of fact'.<sup>66</sup> Hence, there would be no need to even question the existence of such responsibility as no breach could ever take place. As will be further explained in Part 3.B, such an understanding is both controversial (what does it mean to take law as fact?) and possibly dangerous (what happens if the ICS misinterprets EU law as 'a matter of fact?'). These three fundamental criteria, which are argued to be the foundational premises of the monopoly of jurisdiction of the CJEU,

<sup>61</sup> Case C-181/73, *Hägeman* (EU:C:1974:41), para. 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 disputes would be considered to be EU law matter for the CJEU. See also Case C-366/10, *Air Transport Association of America and Others* (EU:C:2011:864), para. 73.

<sup>62</sup> The CJEU was not satisfied with the existence of a norm that would relieve the high contracting parties to the ECHR from taking every single interstate dispute concerning the application of the ECHR to the ECtHR (Art. 55). The CJEU argued that such possibility still existed, even if it was not mandatory, and that would suffice as a breach. See Opinion 2/13, *supra* note 3, paras 205–210.

<sup>63</sup> *Ibid.*, para. 212.

<sup>64</sup> UNCLOS, *supra* note 23, Art. 282.

<sup>65</sup> Advocate General's opinion in Opinion 2/13, *supra* note 3, paras 115–120.

<sup>66</sup> This understanding is quite clear in para. 131, where the Court states: 'That examination may, on occasion, require that the domestic law of the respondent Party be taken into account. However, as is stated

provide the necessary insight into the legal methodology of the Court. But they serve, at the same time, as clues to the self-reflective idea that the judges have of themselves and of the role that the institution should play in external relations. For these reasons, while analysing 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 it 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, based on whether the risks alerted by the CJEU actually exist. Second, one should ask whether the 'chaos' of legal multiplicity – that which autonomy claims to protect the EU from – provides a real advantage to the development of EU law. This analysis takes the first steps into the rationale behind the concept of autonomy, by revisiting Joseph Weiler's theory of equilibrium and discovering the reasons that justify its existence. Finally, irrespective of the merits and reasons of such an idea of monopoly, it is crucial to understand the impact that the CJEU's vision might have on the future of investment arbitration – namely, on the future of the ICS. While the first and second questions are critically analysed below, the impact of this interpretation on the monopoly in the ICS will be analysed in detail in a later section.

#### *1 Is This a Reasonable Interpretation of the Monopoly of Jurisdiction?*

An analysis of several advisory opinions of the CJEU on the matter of autonomy/monopoly of jurisdiction immediately indicates a common line of argumentation by the Court: the monopoly exists to protect the uniformity of the EU from outside threats that new international dispute settlement bodies might pose to the uniformity of EU law.<sup>67</sup> 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,

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unequivocally in Article 8.31.2 of the CETA, that examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law, but consists, on the contrary, of that domestic law being taken into account as a matter of fact, while that Tribunal is, in that regard, obliged to follow the prevailing interpretation given to that domestic law by the courts or authorities of that Party, and those courts and those authorities are not, it may be added, bound by the meaning given to their domestic law by that Tribunal.' Opinion 1/17, *supra* note 4, para. 131.

<sup>67</sup> Agreeing with this, see Lock, 'The Not So Free Choice of EU Member States in International Dispute Settlement', in Cremona, Thies and Wessel, *supra* note 15, 117. Thies seems to adopt another route – the justification lies on the principle of loyal/sincere cooperation between Member states and the CJEU. Thies, 'European Union Member States and State–State Arbitration: What's Left?', in *ibid.*, 145.

at least, how great is the risk that this may happen. As Christophe Hillion and Ramses Wessel 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 bypassed. However, the question is how big a risk this is’.<sup>68</sup> From a normative point of view, the interpretation of the treaties seems to be rather favourable 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 EU and Article 21 of the TEU complements and densifies such an objective with a mandate for good governance and multilateral cooperation.<sup>69</sup> This means therefore that the EU is not only entitled but also actively encouraged by the treaties to promote international cooperation and compliance.<sup>70</sup> Nonetheless, such a 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 control over the incoherent interpretations of EU law and the respect for the division of competences established by the treaties.

However, if one analyses 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 a criterion indeed serves any protective purpose. As we have seen, the CJEU understands that any international judicial body that 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 its member states. Even in the distant Opinion 1/91, it was the power of the EEA Court to interpret the concept of a ‘Contracting Party’ that dictated the violation of the autonomy of the EU,<sup>71</sup> followed then by the *Mox Plant* and Opinion 2/13 examples. One way of mitigating this problem and complying with the Court’s vision of its monopoly, one might think, is 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 a co-responder,<sup>72</sup> where the 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 Paul Gragl explains, ‘[w]hat the

<sup>68</sup> Hillion and Wessel, ‘The European Union and International Dispute Settlement: Mapping Principles and Conditions’, in Cremona, Thies and Wessel, *supra* note 15, 18.

<sup>69</sup> Treaty on European Union, OJ 2010 C 83/13.

<sup>70</sup> That seems to be also Hillion and Ramses’ opinion. Hillion and Ramses, ‘The European Union and International Dispute Settlement: Mapping Principles and Conditions’, in Cremona, Thies and Wessel, *supra* note 15, 24.

<sup>71</sup> Case C-1/91, *supra* note 7, para. 34.

<sup>72</sup> Accession Agreement, *supra* note 27, Art. 3.

Court took issue with was, however, the option of 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'.<sup>73</sup> Since the ECtHR could be entitled to review the reasons provided by the parties to justify their intervention (for example, if the EU wanted to become a co-respondent, it would have to provide reasons before the ECtHR and therefore be subject to its decision), the CJEU considered it to have breached its monopoly in the dimension of the allocation of competencies/powers just like it had done in the 1990s. 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 multiple decisions over the years, one comity supported by a strong presumption of compatibility.<sup>74</sup> 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 a rejection would be based upon an interpretation of the division of competencies between the EU and its member states. 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',<sup>75</sup> 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 seems 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 also very arguable whether this constitutes a reasonable interpretation of its monopoly of jurisdiction. In Opinion 2/13, for example, the Court rejected the project, *inter alia*, because it alleged that the new Protocol no. 16 to the ECHR could jeopardize precisely such a preliminary ruling link.<sup>76</sup> However, a closer look at the question seems to prove rather different:<sup>77</sup> first, because the so-called fears of 'forum shopping' were very difficult to perceive in practice, since 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 Advocate General Kokott correctly pointed out at the time,

<sup>73</sup> Gragl, 'The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR', in W. Benedek *et al.* (eds), *European Yearbook on Human Rights* (2015) 27, at 33.

<sup>74</sup> ECtHR, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, Appl. no. 45036/98, Judgment of 30 June 2005. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

<sup>75</sup> Accession Agreement, *supra* note 27, Art. 3(5).

<sup>76</sup> Opinion 2/13, *supra* note 3, paras 196–200.

<sup>77</sup> Against this, see D. Halberstam, '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, at 14ff.

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.<sup>78</sup> Second, such risk exists, nevertheless, as long as there is an ECtHR, which can (and often does) make judgment on the compatibility of EU law with the ECHR. And the fact is that such a 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 that avoids the conflict (see, for example, the *Avotiņš v. Latvia* case, where the ECtHR could have radically altered the rules of the game).<sup>79</sup>

Likewise, in the project of the Patents 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 a strategy and was alerted to the apparent danger of the Patents 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 was not convinced that the compatibility between Article 55 of the ECHR and Article 344 of the 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's opinion proved to be rather unpersuasive.<sup>80</sup> The same exercise could be made for the relation between EU law and investment arbitration since one can doubt whether the danger raised by the Court in those matters exists in practice. In the case of intra-EU BITs, 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 on how much it is 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, whether 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 the CJEU, this control is not sufficient to respect the requirements of

<sup>78</sup> Advocate General's opinion in Opinion 2/13, *supra* note 3, para. 141.

<sup>79</sup> The classic *Bosphorus* presumption was recently reaffirmed in the *Avotiņš* case, clearly confirming the continuation of the good understanding between both European Courts. See ECtHR, *Bosphorus Hava Yolları Turizm Ve Ticaret Anonim Şirketi v. Ireland*, Appl. no. 45036/98, Judgment of 30 June 2005; see also the most recent case of ECtHR, *Avotiņš v. Latvia*, Appl. no. 17502/07, Judgment of 23 May 2016.

<sup>80</sup> Opinion 2/13, *supra* note 3, para. 118.

its monopoly. It seems better to ensure the non-existence of the international judicial bodies *tout cour* 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 existed rather than to have *post-factum* control.

This approach, however, is arguably reasonable. For example, in the case of the accession to the ECHR, if a member state chooses to use the interstate dispute mechanism of the ECHR in detriment of the CJEU route, the CJEU would remain in power to judge upon the eventual (and very likely) infringement proceedings and sanction the state for such action (just like in the *Mox Plant* case). Of course, this does not immediately prevent the case from being filled as only a formal structure preclusion of competence would, but no member state would remain in the proceedings while the CJEU applies heavy sanctions on public funds. It is then safe to say that the EU's 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 a 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 their external relations.

But, then, if these fears are not realistic, or if the CJEU continues to make a claim for autonomy and monopoly once all of the safeguards have been put in place, one could then ask: what is the reason for the existence of the monopoly of jurisdiction? And how to explain the sudden change in Opinion 1/17?

## 2 Is 'Chaos' Such a Bad Thing: Equilibrium Revisited

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 EU. 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 the "Lord of the Rings" approach – one court to rule them all. It is this classic idea of a *grundnorm* and a guardian that justifies our common admiration for unity in the national legal systems. Under this view, the defence 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 EU, as proven by Weiler's

analysis<sup>81</sup> of the early ‘constitutionalization’<sup>82</sup> of the EU,<sup>83</sup> through the creation of the necessary link between direct effect and supremacy.<sup>84</sup> And it was this autonomy that was used for the protection of fundamental rights in the *Kadi* case,<sup>85</sup> where the EU’s legal system directly conflicted with a binding resolution of the United Nations Security Council.<sup>86</sup> 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 in Europe is a much more dynamic one, where different legitimacies clash to produce law<sup>87</sup> – one of constitutional pluralism.<sup>88</sup> Unlike at 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 and the European Parliament representing the diverse peoples in Europe. In such a situation, a claim can be made that such pluralism, which presupposes conflict, has been a healthy dimension of the development of the EU. Miguel 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 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 *solange* doctrine of the German Constitutional Court or the counter-limits of the Italian Constitutional Court, to reconcile those claims.<sup>89</sup>

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 that no longer opposes

<sup>81</sup> Weiler, ‘The Transformation of Europe’, 100(8) *Yale Law Journal* 2405, at 2413; see also the recent work of Poiares Maduro and Wind, in editing a contemporary analysis of Weiler’s ‘Transformation of Europe’. M. Poiares Maduro and M. Wind (eds), *The Transformation of Europe: Twenty-Five Years On* (2017). Specifically on the principle of the autonomy of EU law, in a legal critique to Schilling, Weiler and Haltern, ‘The Autonomy of the Community Legal Order: Through the Looking Glass’, 37 *Harvard International Law Journal* (1996) 411.

<sup>82</sup> 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, ‘Joseph Weiler, Eric Stein, and the Transformation of Constitutional Law’, in Poiares Maduro and Wind, *supra* note 81, 219, at 223–227.

<sup>83</sup> On the same note, see Van Rossem, ‘The Autonomy of EU Law: More Is Less?’, in Wessel and Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (2013) 14, at 15ff.

<sup>84</sup> Weiler, *supra* note 81, at 2414.

<sup>85</sup> Case T-315/01, *Kadi I* (EU:T:2005:332); Case C-402/05, *Kadi II* (EU:C:2008:461). On the aftermath, see De Burca, ‘The European Court of Justice and the International Legal Order after Kadi’, 1(51) *Harvard International Law Journal* (2009) 1.

<sup>86</sup> Kokott and Sobotta, ‘The Kadi Case: Constitutional Core Values and International Law – Finding the Balance?’, in Cremona and Thies, *supra* note 41, 211, at 216–222.

<sup>87</sup> Halberstam, *supra* note 82, at 223–227.

<sup>88</sup> MacCormick, ‘Beyond the Sovereign State’, 56 *Modern Law Review* (1993), at 1–18.

<sup>89</sup> Maduro, ‘Three Claims of Constitutional Pluralism’, in M. Avbelj and J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (2012) 67, at 72.

national and European courts but, rather, the CJEU and other international courts and tribunals?

This counter-intuitive view, of a positive-outcome clash, was identified long ago by Weiler in his 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.<sup>90</sup>

This idea 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).<sup>91</sup> 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 institutions, the theory of equilibrium maintains its actuality.<sup>92</sup> Its fundamental paradox – that states allow 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. Unlike the classic paradox between supranationalism and intergovernmentalism of the early times of the Communities, where states accepted more integration in exchange for 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 EU expanding its competences and becoming a global player in the areas of trade, fundamental rights and investment. This has 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 these institutions, the CJEU, only accepts such global integration if, and only if, it retains a veto power over the measures taken.

This veto power is expressed precisely through the use of a monopoly of jurisdiction, 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

<sup>90</sup> Weiler, *supra* note 81, at 2426.

<sup>91</sup> See also the analysis of A. Stone Sweet and R.D. Kelemen, 'Assessing the Transformation of Europe: A View from Political Science', Faculty Scholarship Series Paper no. 4623 (2013).

<sup>92</sup> Arguing for its actuality from a different lens, see Lindseth, 'Disequilibrium and Disconnect: On Weiler's (Still Robust) Theory of European Transformation', in Póiares Maduro and Wind, *supra* note 81, 120, at 121–134.

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 EU some voices push 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 and not just a selfish<sup>93</sup> or jealous<sup>94</sup> attitude towards international courts or tribunals.

### 3 The Compatibility of the ICS 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 law.<sup>95</sup> To assess whether the new proposed ICS is compatible with this monopoly and critically analyse Opinion 1/17, it is necessary to understand what motivated such a proposal – namely, the shift from ad hoc-type solutions under the ISDS mechanisms to a true centralized and permanent system of courts.

#### *A The Classical Approach: ISDS Mechanisms*

With increasing frequency of litigation around investment matters,<sup>96</sup> 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 that 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 settling disputes between investors and states aim to protect some fundamental guarantees. Robert Schwieder identifies four fundamental guarantees: (i) protection against discrimination under the classic BIT ‘national treatment’ and ‘most favoured nation’ provisions; (ii) protection against expropriations without due compensation; (iii) protection against unfair and inequitable treatment; and (iv) protection against government actions restricting capital flows.<sup>97</sup> It is fair to say that such investor protections can be found precisely in the investment chapters of the numerous agreements already celebrated or that will be celebrated by the EU – for example, CETA, which provisionally

<sup>93</sup> De Witte, ‘A Selfish Court? The Court of Justice and the Design of International Dispute Settlement beyond the European Union’, in Cremona and Thies, *supra* note 41, 33, at 33–46.

<sup>94</sup> Gragl, ‘The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR’, 15 *European Yearbook on Human Rights* (2015) 27.

<sup>95</sup> On the evolution, suggesting a space continuum analogy to explain facultative mixity, see Montanaro and Paulini, ‘United in Mixity? The Future of the EU Common Commercial Policy in Light of the CJEU’s Recent Case Law’, *EJIL Talk!* (2 February 2018), available at [www.ejiltalk.org/united-in-mixity-the-future-of-the-eu-common-commercial-policy-in-light-of-the-cjeus-recent-case-law/](http://www.ejiltalk.org/united-in-mixity-the-future-of-the-eu-common-commercial-policy-in-light-of-the-cjeus-recent-case-law/).

<sup>96</sup> Latek, ‘Investor-State Dispute Settlement (ISDS): State of Play and Prospects for Reform’, *European Parliamentary Research Service* (2014) 1, at 3–9.

<sup>97</sup> Schwieder, ‘TTIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication’, 55(1) *Columbia Journal of Transnational Law* (2016) 180, at 185.

entered into force in September 2017, provides guarantees to investors in its Chapter 8 not only on the basis of 'national treatment' (Article 8.6) and most favoured nation (Article 8.7) clauses but also on protections against expropriation without compensation (Article 8.12), freedom of capital transfers (Article 8.13) and a full protection and security provision (Article 8.11).<sup>98</sup> In the same manner, the EU-Vietnam Free Trade Agreement, in its Chapter 8 entitled 'Trade in Services, Investment and e-Commerce', provides for investor guarantees on national protection (Article 3), most favourable nation issues (Article 4), fair and equitable treatment (Article 14), full protection and security (Article 15) as well as protections against unlawful expropriations (Article 16) and free transfer of capital (Article 17).<sup>99</sup> The same exercise could be done for the EU-Singapore Free Trade Agreement.<sup>100</sup> These fundamental guarantees would then be ensured by an ad hoc system for the settlement of disputes through arbitration, much like one could find in the BITs, which were immediately subject to severe criticism and led to a lively scholar debate.<sup>101</sup>

In response to this, on 27 March 2014, the EU Commission promoted a public consultation where over 150,000 submissions were submitted showing precisely the dimension of such debate.<sup>102</sup> Although the scope of this article is not to judge the merits of such ISDS solutions but, rather, to observe how the ICS might be treated in light of the monopoly of jurisdiction of the CJEU, it is important to briefly consider what were the legal challenges that the Commission was responding to with the creation of the new permanent system of courts.<sup>103</sup> This will provide a more complete analysis of the new ICS.

According to Laurens Ankersmit and Karla Hill, one could identify four main legal obstacles to the compatibility of ISDS mechanisms with EU law: (i) the problem of the monopoly of interpretation of EU law by the CJEU and the existence of external judicial or quasi-judicial bodies exercising control over EU law; (ii) the problem of EU's liability to pay damages and the exclusive competence of the EU on matters of

<sup>98</sup> 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 CETA, *supra* note 38, Art. 8.9.

<sup>99</sup> EU-Vietnam Free Trade Agreement (EU-Vietnam FTA), 30 June 2019, ch. 8, Arts 3, 4, 14–17, available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

<sup>100</sup> Free Trade Agreement between the European Union and the Republic of Singapore (EU-Singapore FTA), 19 October 2018, ch. 9, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>; Investment Protection Agreement between the European Union and the Republic of Singapore, 19 October 2018, ch. 2, Arts 2.2.–2.8, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>.

<sup>101</sup> For example, debating the validity of the criticism and defending the solution of having ISDS clauses in such treaties, see G.M. Alvarez *et al.*, 'A Response to the Criticism against ISDS by EFILA', 33(1) *Journal of International Arbitration* (2016) 1. Making a case against the ISDS clauses, arguing, *inter alia*, based on the breach of the principle of autonomy of the EU, see L. Ankersmit and K. Hill, 'Legality of Investor-State Dispute Settlement (ISDS) under EU Law Legal Study', Client Earth Legal Documents, October 2015, at 5–25.

<sup>102</sup> European Commission, Public Consultation on Modalities for Investment Protection and ISDS in TTIP, 13 July 2014, available at [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179).

<sup>103</sup> Apart from legal challenges, there were several policy concerns. For a detailed analysis, see Alvarez *et al.*, *supra* note 101.

non-contractual liability; (iii) the role of the CJEU as the sole definer of the division of competences between the EU and its member states; (iv) the distortion of competition rules on the EU's internal market – namely, on the risk of discriminatory treatment between EU undertakings and EU nationals and the conflict with state aid rules.<sup>104</sup> As for the scope of this work, let us focus on the first and third legal arguments, as they are believed to reflect one single idea of the CJEU's jurisdictional monopoly 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 has 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 to the CJEU, and only to the CJEU, to interpret EU law, therefore restricting 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 of the TFEU. This means that, even before the ICS system was thought of, there were already those who raised the same concerns *à propos* the ISDS system.

Several arguments were advanced to detail this claim. The first argument contends 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, Opinion 2/13 – quickly dismiss this measure as a safeguard against the risks of autonomy/monopoly. Just like in the case of the 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 and risk contradictory interpretations arising. That was also confirmed clearly in the *Mox Plant* case, where the mere filing of the case before another tribunal (ITLOS Annex VII arbitration) already served as a risk of contradictory interpretations.<sup>105</sup>

The second argument analyses 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 nature,<sup>106</sup> it was not perceived as an entity that 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 Patents Court's ability to pose questions, or in the recent *Achmea* case on the role of the arbitral investment court under the Netherlands-Slovakia BIT.<sup>107</sup> As

<sup>104</sup> Ankersmit and Hill, *supra* note 101, at 7.

<sup>105</sup> Case C-459/03, *supra* note 13, paras 154–156.

<sup>106</sup> Case C-377/13, *supra* note 34, paras 25, 26.

<sup>107</sup> Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, 1 January 1992, available at [https://arbitrationlaw.com/sites/default/files/free\\_pdfs/netherlands-slovakia.pdf](https://arbitrationlaw.com/sites/default/files/free_pdfs/netherlands-slovakia.pdf).

Ankersmit points out well, it was very unlikely that such a mechanism would ever be applicable on investment arbitrations as that would be inconsistent with the general purpose of a speedy and decentralized procedure.

The third argument of the ISDS critics is connected to the role of the member state 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 out above), such an award would be considered final and would not be subject to revision by 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, it would mean that the role of the member state courts was put aside 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. Second, it would mean that the CJEU would lose the possibility of controlling the respect for EU law, as such arbitral tribunals could not be subject to any type of classic EU law sanction (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 respect for EU law – namely, by ensuring that traditional sanctioning mechanisms remain fully available. Just like in the case of the Patents Court, these ad hoc investment tribunals would not be subject to the control of the CJEU, as both infringement proceedings (Article 258 of the TFEU) would not be possible (as there simply was not a state attached to the arbitral court, as in the case of national courts), or to 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 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. Taking into consideration the second and third criterion of the monopoly (as we envisage them), in particular, it would be very simple for the CJEU to strike down such a proposal based on the protection of its monopoly and to jeopardize the efforts of the Commission in external investment law. As a result of these concerns, the Commission reacted. Let us now see how this reaction dealt with these obstacles – namely, by analysing the so-called ICS as well as the Commission's newest strategy of separating trade and investment to protect mixity problems.<sup>108</sup>

### ***B The ICS: The Final Challenge to Autonomy?***

In the advent of such a wave of criticism, from both academia and civil society, the European Commission resorted to action on 16 September 2015 and presented a

<sup>108</sup> The analysis is focused on the ICS, although not ignoring the recent proposals for the creation of a true multilateral investment court. It is believed that, before reaching for such revolutionary solution, the EU should first ensure that this first, untested solution is legally viable.

proposal for a centralized solution that could address all of the shortcomings that had been pointed out by the numerous stakeholders.<sup>109</sup> This plan was a direct reaction to the previously bitter discussions that had taken place in the context of the negotiations over CETA – in particular, with the Belgian authorities who were facing an internal blockade over the Wallonia question.<sup>110</sup> This blockade had only been solved through a compromise, whereby four conditions would be met in order to consider the ratification of the treaty (and implicitly accept the ICS methodology).<sup>111</sup> These conditions included that Wallonia would require Belgium to ask an opinion of the CJEU, under Article 218(11) of the TFEU, on the compatibility of the ICS with the principle of autonomy. This gave rise to Opinion 1/17, which is analysed further below.<sup>112</sup>

Indeed, if one takes a quick look at the dispute settlement chapters of several of these agreements, the ICS is deeply embedded in their provisions: the proposal for the Transatlantic Trade and Investment Partnership (TTIP),<sup>113</sup> even if potentially never agreed upon, has its Article 9, section 3; CETA has its Article 8.27, Chapter 8, section F; the EU-Vietnam FTA, with the different name of Investment Tribunal System, has its subsection 4 (section 3 of Chapter 8).<sup>114</sup> Even regarding Japan, the European Commission made very clear that, '[a]s 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)'.<sup>115</sup> The Singapore case was even critically analysed by the CJEU,<sup>116</sup> where an opportunity to settle the legality of the ICS was largely ignored in favour of a judgment that focused solely on the division of competencies between the Union and the member states.<sup>117</sup>

More recently, in 2017 and 2018, the Commission's vision for trade and investment has strategically changed. The EU's current policy seeks to continue to celebrate

<sup>109</sup> European Commission, 'Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations', 16 September 2015, available at [http://europa.eu/rapid/press-release\\_IP-15-5651\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5651_en.htm).

<sup>110</sup> 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 Résolution du Parlement Wallon sur l'Accord économique et commercial global (AECG), 25 April 2016, at 3, available at: [http://nautilus.parlement-wallon.be/Archives/2015\\_2016/RES/212\\_4.pdf](http://nautilus.parlement-wallon.be/Archives/2015_2016/RES/212_4.pdf).

<sup>111</sup> European Parliament Resolution on EU-Canada Trade Relations, Doc. C380E/20, 8 June 2011, paras 1–2, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011IP0257&from=EN>.

<sup>112</sup> Opinion 1/17, *supra* note 4.

<sup>113</sup> Transatlantic Trade and Investment Partnership's (TTIP) (draft dated 12 November 2015), textual proposal on investment protection and investment court system, ch. II, s. 3, subsection 4, available at [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf).

<sup>114</sup> EU-Vietnam FTA, *supra* note 99.

<sup>115</sup> EU-Japan Economic Partnership Agreement, 1 February 2019, ch. 21, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1687>.

<sup>116</sup> Case C-2/15, *Free Trade Agreement with Singapore* (EU:C:2017:376), para. 305.

<sup>117</sup> Yotova, 'Opinion 2/15 of the CJEU: Delineating the Scope of the New EU Competence in Foreign Direct Investment', 77(1) *Cambridge Law Journal* (2018) 19, at 29–32.

more FTAs while replacing traditional ISDS mechanisms for more permanent solutions such as the ICS or a new international multilateral investment court. This new dynamic, supported by the majority of the parties at the European Parliament, led the Commission to seek new creative solutions even before it had any legal certainty over the ones currently in place (such as the ICS). This strategy comprised two dimensions: (i) to separate to protect by splitting trade and investment into different agreements and (ii) to innovate and think ahead with the discussions around a global multilateral investment court.<sup>118</sup>

After the setback of Opinion 2/15, where the CJEU ruled that the provisions of the EU-Singapore FTA relating to non-direct foreign investment and those relating to dispute settlement between investors and states did not fall within the exclusive competence of the EU, the Commission shifted its methodology.<sup>119</sup> Rather than face the Court once again, it chose to split investment chapters from the core trade provisions, introducing two independent agreements and, hence, escaping the dangers of mandatory mixity.<sup>120</sup> A good example of this is the current trade negotiations with New Zealand<sup>121</sup> and Australia<sup>122</sup> in which investment provisions are totally absent and the dispute settlement clauses resemble those of traditional WTO disputes.<sup>123</sup> Here, absolute separation of trade and investment has taken place, as a sign of the Commission's commitment to this new strategy. Although an analysis of the merits of this new policy is clearly outside the scope of this article, one could wonder whether this strategy will end the controversy.

Together with this policy of separation to protect, the Commission has been promoting a wide debate on the creation of a multilateral investment court system that cannot be ignored.<sup>124</sup> On 26 March 2018, the Council adopted the negotiating directives authorizing the Commission to negotiate a convention establishing a multilateral court for the settlement of investment disputes, the so-called Multilateral Investment Court.<sup>125</sup> It suffices to say that, for the scope of this work, such a solution might constitute a way forward to overcome any remaining problems concerning the monopoly

<sup>118</sup> Under our own terminology.

<sup>119</sup> Case C-2/15, *supra* note 116, para. 305; EU-Singapore FTA, *supra* note 99.

<sup>120</sup> Following the advice of some doctrine. See Gáspár-Szilágyi, 'Opinion 2/15: Maybe It Is Time for the EU to Conclude Separate Trade and Investment Agreements', *European Law Blog*, 20 June 2017, available at <https://europeanlawblog.eu/2017/06/20/opinion-215-maybe-it-is-time-for-the-eu-to-conclude-separate-trade-and-investment-agreements/>.

<sup>121</sup> The negotiating directives can be found in Council of the European Union, 'Negotiating Directives for a Free Trade Agreement with New Zealand', 8 May 2018, available at [www.consilium.europa.eu/media/35796/st07661-ad01dc01-en18.pdf](http://www.consilium.europa.eu/media/35796/st07661-ad01dc01-en18.pdf).

<sup>122</sup> *Ibid.*

<sup>123</sup> The draft dispute-settlement clauses can be found in *ibid.*, at 21.

<sup>124</sup> This work was designed to find the general criteria of the monopoly of jurisdiction, applicable for the future, using the ICS as a practical example. Although we do not ignore the new project to create a true multilateral investment court, we are of the opinion that one should first ensure the legality of the ICS before taking extra steps.

<sup>125</sup> The negotiating directives can be found in Council of the European Union, 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes', 1 March 2018, available at <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>.

of jurisdiction of the CJEU, as it seems to now be confirmed by the CJEU in Opinion 1/17.<sup>126</sup> But it is remarkable, nonetheless, that the Commission advanced such cutting-edge proposals before the formal decision by the CJEU concerning the ICS had effectively been taken. In fact, many of the obstacles discussed above concerning the compatibility of the ICS with the monopoly of jurisdiction of the CJEU are perfectly extensible to this new multilateral approach.

Nonetheless, on 30 April 2019, the CJEU enacted its opinion on the compatibility of the ICS with CETA, hence reassuring the Commission of the merits of its chosen pathway for external action.<sup>127</sup> The fact is that, although the Advocate General's opinion has supported a positive scenario since the beginning, by qualifying autonomy as 'not a synonym for autarchy',<sup>128</sup> there had been many voices challenging Advocate General Yves Bot's assertions<sup>129</sup> before Opinion 1/17 was even enacted.<sup>130</sup>

What legal obstacles does the ICS face then?<sup>131</sup> What can one make of such a controversial decision?<sup>132</sup> By following the framework established above, it is useful to revisit the three criteria set forth above and to critique the coherence of the decision according to the jurisprudence of the CJEU. For this purpose, let us separately look at (i) the allocation of competencies/powers between member states and the Union, (ii) the respect for the mechanism of preliminary ruling and (iii) the control of EU law.

### *1 The Allocation of Competences between Member States and the Union*

Regarding the first criterion – the allocation of competencies/powers between the member states and the Union – CETA seems to have largely taken into account the jurisprudence of the CJEU and the risks of the allocation of powers. According to Article 8.21 of CETA, an opportunity has been granted to the CJEU to decide on the division of competences between the Union and its member states, having a final and binding word on the

<sup>126</sup> Opinion 1/17, *supra* note 4, para. 118.

<sup>127</sup> Peers, 'We 'Aren't' the World': The CJEU Reconciles EU Law with International (Investment) Law', *EU Law Analysis*, 2 May 2019, available at <http://eulawanalysis.blogspot.com/2019/05/we-arent-world-cjeu-reconciles-eu-law.html>.

<sup>128</sup> Advocate General's opinion in Opinion 1/17, *supra* note 4, para. 59.

<sup>129</sup> Schepel, 'A Parallel Universe: Advocate General Bot in Opinion 1/17', *European Law Blog*, 7 February 2019, available at <http://europeanlawblog.eu/2019/02/07/a-parallel-universe-advocate-general-bot-in-opinion-1-17/>.

<sup>130</sup> Gatti, 'Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold?', 4(1) *European Papers* (2019) 109, at 110–121.

<sup>131</sup> For a comprehensive analysis of the changes between ISDS and ICS, see Lévesque, '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 [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](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).

<sup>132</sup> As Lenk puts it, '[a]lthough EU policy makers and technocrats appear to have listened to civil society, this mechanism fails to respond to internal constitutional challenges'. Lenk, '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', 1(2) *European Papers* (2016) 666, at 666–677.

respondent of the legal action (the EU or the member states). By doing so, CETA accepts the jurisprudence of the CJEU and is mindful that the last word regarding the division of competences must necessarily be the Court's. However, CETA does not predict any true mechanism of a co-respondent, just like the ECHR prescribed, which will necessarily lead to a binary choice by the CJEU in all matters that might entail shared competences with the EU. The Court will always have to make a choice on how much a certain measure will affect the interests of the Union or the member states and choose which one is the most likely to be competent to serve as a respondent in an arbitral action before the ICS.

In Opinion 1/17, the CJEU was satisfied with the solution achieved with Article 8.21 and claimed the compatibility of such procedural prior involvement with the principle of autonomy of the EU and the respect for its own monopoly and distinguished it clearly from the failure of Opinion 2/13. As we have seen above, a fundamental obstacle was the fact that ECHR could choose who to bring before the Court (the EU, the member states or both) – hence, making an interpretation on EU law. With this ability, according to the CJEU, CETA would become protected from the dangers of autonomy. However, things are not so simple regarding the second and third criteria.

## *2 Respect for the Mechanism of Preliminary Ruling*

Concerning the second criterion, the respect for the mechanism of the preliminary ruling, it was shown that the CJEU places great importance on the 'keystone' mechanism of EU cooperation – namely, the role that national courts play as guarantors of the uniformity of EU law. This connection between the ISDS mechanisms and the CJEU can be seen in two ways. On the one hand, the system can establish a direct connection to the CJEU with some sort of substantive prior involvement of the CJEU in the decisions of the court or tribunal, so that judgments potentially affecting the interpretation of EU law could be preventively interpreted. On the other hand, the system must maintain the indirect connection to the CJEU through domestic courts, which will make use of the mechanism of preliminary ruling to establish the necessary connection to the Court. These two links have been always demanded by the CJEU across its jurisprudence. Surprisingly, the ICS seems to lack both.

Regarding the substantive prior involvement of the CJEU, CETA (and the ICS more generally) does not prescribe any duty for that system to consult with the CJEU prior to any decision-making apart from the division of competencies analysed above. As we have seen, in the ECHR case, the accession project guaranteed the respect for the *acquis* through the necessary involvement of the CJEU, 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 ask for such intervention. The risk here was again great; while what led to the negative opinion in Opinion 2/13 was the nature of this prior involvement (of being of pure validity and not of interpretation),<sup>133</sup> the assumption was always that there was some kind of involvement by the CJEU. In the absence of any intervention, the ICS risked following the same footprints of previous external projects of the EU.

<sup>133</sup> Opinion 2/13, *supra* note 3, paras 243–248.

Both Advocate General Bot and the Court saw no problem here. The first suggested adding a policy consideration to the reasoning:

From that perspective, it is understandable that those Parties have not provided either a mechanism for the prior involvement of the Court or that the awards issued by the Tribunal should systematically be subject to full review by the courts and tribunals of the Parties. Providing for such a link to the judicial system of the Parties would have been at odds with the intention of those Parties to establish a dispute settlement mechanism which specifically stands outside their judicial systems.<sup>134</sup>

This seems to be aimed directly against what the CJEU had asked for in Opinion 2/13 and raises troubling concerns. Clearly, up until Opinion 1/17, such policy concerns (even those protecting human rights) did not outweigh the protection of the monopoly of jurisdiction of the CJEU, which could only be ensured by a proper mechanism of prior involvement. However, the CJEU largely drifts away from its decade-long jurisprudence on this point and accepts the non-existence of any mechanism of prior involvement, deeming it ‘unnecessary’ since CETA would not have direct effect and would only interpret EU law as a ‘matter of fact’. In fact, this idea of the law as ‘a matter of fact’ seems to be the cornerstone argument that tipped the balance for the compatibility of the ICS.<sup>135</sup> The Court states:

that examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law, but consists, on the contrary, of that domestic law being taken into account as a matter of fact, while that Tribunal is, in that regard, obliged to follow the prevailing interpretation given to that domestic law by the courts or authorities of that Party, and those courts and those authorities are not, it may be added, bound by the meaning given to their domestic law by that Tribunal.<sup>136</sup>

While it is true that domestic courts and tribunals, including the CJEU, would not be bound by such an interpretation, there is an entity that is likely to suffer the consequences of such a decision – the member states. In fact, states are bound to respect the decision of CETA, from which there is no appeal before their domestic courts. This means that, in case the ICS fails to interpret the *acquis*, willingly or not, it might not bind domestic courts or the CJEU, but it will oblige member states to change their legislation in order to avoid further investor claims – a change that will be against the CJEU’s own jurisprudence. Again, the shadow of conflicting duties casts some practical problems for member states.

Simultaneously, regarding the mechanism of preliminary ruling, the CJEU abandoned the ‘keystone’ narrative to accept its non-existence in CETA. Two problems seem to directly arise out of this scenario: first, there is the problem of the interpretation of EU law without a mechanism of preliminary reference and, second, there is the problem of the enforcement and review of the decisions of the ICS, as they remain fully independent from the member states or the EU. Regarding the first problem – the

<sup>134</sup> Advocate General’s opinion in Opinion 1/17, *supra* note 4, para. 179.

<sup>135</sup> *Ibid.*, paras 130–131.

<sup>136</sup> *Ibid.*, para. 130.

absence of a sort of mechanism of preliminary ruling – the Commission tried to tackle the matter by clearly stating that EU law could only be interpreted as ‘a matter of fact’ 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 the interpretation of a given measure by the domestic courts and authorities of the party, as explained in Article 8.31.2 of CETA. The CJEU largely agreed with such a vision and reiterated the fundamental idea of the separation between the two legal orders.<sup>137</sup> According to the Court:

Since the CETA Tribunal and Appellate Tribunal stand outside the EU judicial system and since their powers of interpretation are confined to the provisions of the CETA in the light of the rules and principles of international law applicable between the Parties, it is, moreover, consistent that the CETA makes no provision for the prior involvement of the Court that would permit or oblige that Tribunal or Appellate Tribunal to make a reference for a preliminary ruling to the Court.<sup>138</sup>

This is a rather surprising departure from the Court’s long-lasting jurisprudence and introduces a very interesting paradox: while, in Opinion 2/13, the danger was precisely the fact that the Court would stand outside the jurisdiction of the CJEU – hence, jeopardizing the CJEU’s control over its interpretations of EU law – it is now, in Opinion 1/17, the prevailing factor for the compatibility of the ICS with the principle of autonomy of the EU.

One could argue that the difference lies, again, in taking EU law as a matter of fact. It seems difficult, however, to believe in such complete separation between legal orders 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. The Court’s argument on this point is a contentious one:

Nor will the CETA Appellate Tribunal be called upon to interpret or apply the rules of EU law other than the provisions of the CETA. Article 8.28.2(a) of that agreement states that the Appellate Tribunal will be able to ‘uphold, modify or reverse the Tribunal’s award based on ... errors in the application or interpretation of applicable law’, that ‘applicable law’ covering, in the light of the law to be applied by the CETA Tribunal under Article 8.31.1 of that agreement, the CETA and the rules and principles of international law in the light of which that agreement has to be interpreted and applied. While Article 8.28.2(b) of the CETA adds that the Appellate Tribunal may also identify ‘manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law’, it is nonetheless clear from the preceding provisions that it was in no way the intention of the Parties to confer on the Appellate Tribunal jurisdiction to interpret domestic law.<sup>139</sup>

Indeed, never before had the CJEU put so much emphasis on the will or intention of the parties. Its jurisprudence has always shown something rather different, with hypothetical threats to autonomy deemed likely realities, dangerous enough to destroy well-intentioned projects such as accession to the ECHR. But now, in Opinion

<sup>137</sup> *Ibid.*, paras 130–135.

<sup>138</sup> *Ibid.*, paras 130–131.

<sup>139</sup> *Ibid.*, para. 133.

1/17, the mere good intention of the lawmakers will suffice, even if the danger of the appellate tribunal actually reviewing the relevant domestic law seems quite possible.

We dare to say that, even if such an appeal would not directly address the misinterpretation of an EU act by the first instance court, the mere possibility of such interpretation should most likely be considered as breaching the monopoly of jurisdiction of the CJEU according to its decade-long jurisprudence. This is what happened in Opinion 1/09, with the project of the Patents Court and the rationale for the destruction of the accession to the ECHR, which demonstrated the mere possibility of interstate disputes based on Article 33 of the ECHR.<sup>140</sup> Moreover, it is very easy to construct scenarios where it is not a direct interpretation of an EU act that is at stake but, rather, an indirect evaluation of the conduct of a state while executing EU law (for example, the execution of a directive) or in the context of EU policies (for example, the result of a recommendation). This is often the case where the open-ended nature of investment protection clauses (such as fair and equitable treatment) touches upon national acts, which are a result of EU policy. In these cases, if the appellate tribunal wishes to conduct a control of manifest error in the appreciation of the facts, it would have to interpret, indirectly, acts of EU law and to breach the monopoly of the CJEU. As Ankersmit puts it, '[i]t 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'.<sup>141</sup>

Neither of these two obstacles convinced either the Advocate General or the Court. Advocate General Bot simply assumed that the separation of both legal orders would not affect this mechanism. This is to say that as long as national courts retained the competence to place preliminary rulings, and given the fact that ICS decisions had no direct effect and were binding only *inter partes*, there was no obvious breach of such a keystone principle. And, moreover, the existence of an appeal<sup>142</sup> would precisely ensure that correct interpretations of the EU were given (even if the appeals tribunal had, again, no obligation to consult the CJEU when reviewing the judgment of first instance). The Court agreed.<sup>143</sup> The question is contentious in our view; in the situation described above, the state executing EU law can be put in an impossible conflict of duties (which might even incentivize it to disrespect EU law). If the ICS declares some measure taken under national law to be incompatible with CETA, having no mechanism of cooperation between both courts, it might happen that a certain domestic measure is interpreted differently by both the ICS and the CJEU (in the case, for example, that there is no previous jurisprudence of the CJEU on this matter) or even just that the ICS misinterprets some existing case law. In that case, the state in question will have to choose between disrespecting the EU's *acquis* or continuously paying huge sums to investors in its country.

<sup>140</sup> Opinion 2/13, *supra* note 3, paras 207–208.

<sup>141</sup> Ankersmit, 'The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System', 13 *Journal for European Environmental and Planning Law* (2016), at 53.

<sup>142</sup> Advocate General's opinion on Opinion 1/17, *supra* note 4, para. 148.

<sup>143</sup> *Ibid.*, paras 134–135.

Regarding the second problem – the enforcement and review of the decisions – this uniformity might also be jeopardized when taking into consideration the provisions of the FTA agreements concerning the enforcement of the decisions of the ICS. According to the TTIP and the EU-Vietnam FTA,<sup>144</sup> national courts are absent from any review process since the judgments ‘shall not be subject to appeal, review, set aside, annulment or any other remedy’. This is coherent with the Commission and Advocate General Bot’s idea of creating a true self-contained regime, one that is not dependent on member state jurisdiction, ensuring therefore the procedures’ necessary speed. However, by isolating the justice system from national jurisdictions, the Commission risks breaking the fundamental link in the preliminary ruling and therefore facing again an Opinion 2/13-type approach. This is particularly strange when other recent projects have taken this into consideration – namely, the dispute settlement body created to rule on conflicts in a post-Brexit scenario,<sup>145</sup> where problems of autonomy were indeed considered by the CJEU.<sup>146</sup> 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 would then seem very 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. As Ankersmit exemplifies very well, ‘[a]n 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’.<sup>147</sup>

Nonetheless, the CJEU once again surprised legal audiences by accepting the exclusion of domestic courts from enforcement by stating:

For the same reasons, it is, moreover, consistent that the CETA confers on those Tribunals the power to give a definitive ruling on a dispute brought by an investor against the investment host State or against the Union, without establishing any procedure for the re-examination of the award by a court of that State or by the Court and without that investor being permitted – subject to the specific exceptions listed in Article 8.22.5 of the CETA – to bring, during or on the conclusion of the procedure before those Tribunals, the same dispute before a court of that State or before the Court.<sup>148</sup>

This argumentation raises the same problem explained above, placing the member states in a potential situation of conflicting duties. If, as just proven, there is the possibility for the ICS to actually depart from a given interpretation or *acquis* from the CJEU, either by erroneous interpretation or wilful intention, the definitive nature of

<sup>144</sup> TTIP, *supra* note 113, Art. 30(1); EU-Vietnam FTA, *supra* note 99, Art. 31(1).

<sup>145</sup> Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 14 November 2018, Arts 167–181, para. 174.

<sup>146</sup> Case C-621/18, *supra* note 9, para. 45.

<sup>147</sup> Ankersmit, *supra* note 141, at 56.

<sup>148</sup> Opinion 1/17, *supra* note 4, para. 135.

the ruling will exclude the CJEU and domestic courts from any final control of legality. This can have the pernicious effect of launching the member state into a problematic conflict of duties: to respect the decision of the ICS, and to execute it in a domestic jurisdiction, will mean eventually facing the wrath of the CJEU (for example, through an infringement procedure) for its breach of EU law.

### 3 *The Control of EU Law*

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 a practical point of view,<sup>149</sup> the Commission's view of creating a true self-contained regime could be easily understood by the Court as a dangerous means of isolation from the CJEU's control. As we have seen in several opinions of the Court and in the recent *Achmea* case, a final dimension of the CJEU's monopoly is to ensure that, when facing the 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 international court that could interpret EU law and not be held accountable for such interpretations,<sup>150</sup> or in Opinion 2/13, which involved the lack of control over the ECtHR's decisions in interstate proceedings.<sup>151</sup> In fact, in this last case, there were even mechanisms of prior involvement of the CJEU (the so-called co-respondent mechanism), which lays more doubts on the compatibility of the ICS without any mechanism of that sort. The only solution to ensure compatibility would then be to sanction the state that is targeted by the ICS proceedings for having been party to the proceedings (Kokott's solution for the ECHR problem). This would bring us back, however, to the same dead end described above, especially when the Court even denied the infringement proceedings as a possible escape route.<sup>152</sup>

The opinion of the Court on this point is based on the idea that the ICS rulings would not have a binding effect on the interpretation of domestic cases as they have no effect on the possible contrary interpretations of a given legal act. Moreover, as the ICS was bound to respect domestic law as 'a matter of fact', following the prevailing

<sup>149</sup> Namely, the principle of stability of arbitral awards.

<sup>150</sup> Case C-1/09, *supra* note 12, paras 87–88.

<sup>151</sup> 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). Opinion 2/13, *supra* note 3, para. 104.

<sup>152</sup> Advocate General's opinion in Opinion 2/13, *supra* note 3, para. 141.

interpretation by domestic courts or authorities, there was no need to even consider a problem of responsibility for the breach of EU law. As described above, it is not clear whether the interpretation of law 'as a matter of fact' would be decisive to safeguard the CJEU's interpretation of a given measure, especially in those cases where there is no clear interpretation of EU law or simply when arbitrators choose to depart from such interpretation. In those cases, it would be essential to possess some tool of control – typically, infringement procedures or a preliminary ruling through the domestic courts – which are mechanisms that are simply absent from CETA.

## 4 Conclusions

Opinion 1/17 was always meant to be a controversial decision, and the debate over its coherence, legitimacy and legal merits will continue for many years to come. One thing that the ICS debates show us, however, is that there is a deeper, almost psychological, influence of the principle of autonomy in the CJEU's thinking. Opinion 1/17 highlights its abstract and volatile notion, subject to different interpretations according to the matter at hand, and shows us the lack of legal certainty in this domain. Nonetheless, this article has argued that, more than understanding the circumstantial risks and consequences of this notion of the autonomy of the CJEU, what is more important is to develop a profound analysis of its meaning and the roots of its constitutional legitimacy as a core principle of EU law. Based on the three fundamental requisites put forth – namely, the allocation of powers, the respect for preliminary ruling and the control of EU law – the Court has increasingly developed a more restrictive view of the international freedom of the remaining institutions and member states. This construction of its monopoly has already proven to have practical consequences, shaping the EU's external action in unexpected ways, forcing the Commission to take innovative steps to circumvent the Court. This analysis might therefore prove fundamental to address the more immediate debate on the validity of the ICS, by highlighting the potential incoherence of Opinion 1/17.

However, its major contribution in the long run should be by raising the debate on the general consequences of the monopoly and laying the first theoretical framework to a deeper understanding of the meaning of the autonomy of EU law. By theorizing such a principle under those three fundamental pillars, the CJEU places considerable constraints on the external action of both the EU and its member states – one constraint that deserves to be critically analysed. More than tacitly accepting this definition of the CJEU's monopoly, one should inquire about the true reasons that justify having such a monopoly in the first place – namely, to understand whether positive normative development can come from 'constitutional chaos' and conflict. In the end, it is to understand whether the institutional equilibrium that allowed the Union to grow is not being threatened by this incoherent 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 a 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 ICS. What is urgent is a larger critique of the monopoly in terms of coherence and legitimacy, one that analyses the actual dangers that international law bodies might pose to the uniformity of the EU and one that ensures some predictability for future external action.