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Francisco de Abreu Duarte

European University Institute
Department of Law

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Abstract

This short paper puts forth the idea of a "new external equilibrium" between the different actors of the European Union and proposes to revisit the classic dualism of *exit* and *voice* as suggested by Albert Hirschman and applied to European integration by Joseph H. H. Weiler. By resorting to the idea of an *internal* equilibrium between European institutions and member states in the early times of European integration, the paper develops the concept of "new *external* equilibrium" as a necessary balance in the external integration of the EU. It is suggested that a shift has occurred and that the traditional *internal* clash between the CJEU and member states has now transformed into a more complex discussion between a broader range of actors with different power-relations being formed. One the one hand we have the CJEU which, through the use of the principle of "autonomy" of the EU, claims a new *voice* and curbs external integration. On the other hand, member states and the remaining institutions push for further external integration and a globalized Union of law. After examining this new distribution of the relative power between institutions, member states and the CJEU, this chapter attempts to explain some of the controversial decisions by the CJEU regarding external integration, such as Opinion 2/13 or Opinion 1/17.

Keywords

Autonomy; Equilibrium; Power-tool; Court of Justice of the EU; J.H.H. Weiler.

Author contact details:

Francisco de Abreu Duarte
Law Department
European University Institute
Francisco.deabreu@eui.eu

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Introduction

In 1991, Joseph H. H. Weiler published one of the most famous pieces of EU law scholarship. In "*The Transformation of Europe*", Weiler systematized some of the core principles of EU law, analyzing the growth in power of the institutions and the definition of the core principles of EU law. Exposing the inherent paradox of a state-dominated Community looking for further integration, Weiler spoke of a delicate "equilibrium" between member states and the institutions. An equilibrium that, if shattered by a drastic integration, would mean the end of the (to be) European Union. The tension underlying Weiler's delicate equilibrium depended on the distribution of powers between all the actors involved, on the processes of legitimation of member-states and the Union's institutions. Such tension thus revolved around issues of the internal allocation of powers between players of the same legal order, the *internal* equilibrium of the EU.

Weiler summarized the apparent paradox of two conflicting forces looking for integration in a fundamental question: why would states be willing to give more power to the Union and integrate, if this would necessarily mean a consequent loss of their relative power? For Weiler, inspired by the duality present in Hirschman's work[1], the answer partly lied within the rule of unanimity in the Council, which allowed states to retain classic intergovernmental powers, and hence protect their sovereignty from supranationalism: as long as states had that "veto", then a power-balance was always achieved, and the last word was theirs. According to Weiler, if this delicate equilibrium were to be destroyed by replacing unanimity for ever increasing majority voting, as the Single European Act put forth, then it could mean the end of the European project.

After the Single European Act and the creation of the European Union in 1992, Weiler's equilibrium was upset by the transition towards the limitation of unanimity voting and the strengthening of the EU supranational institutions such as the European Parliament. Yet, the Union stood strong and survived. Some looked at Weiler's theory as a prophecy of an evil that never was[2]. This paper argues instead that Weiler's equilibrium remains of tremendous actuality, although its underlying tension and dynamics have evolved. As opposed to the original *internal* equilibrium of "*The Transformation of Europe*", this paper discusses the existence of a new *external* equilibrium of the EU which has developed between those who want the European Union to integrate with other international legal orders and those who want to protect it from outside threats; between those who wish to open the confines of the EU legal system, and those who support its "sovereignty" and want to protect the *status quo*. While the original Weilerian *internal* equilibrium saw the CJEU as the integrationist force against the sovereign blockade of some member states, in the new *external* equilibrium the CJEU shifts position to become the primary opponent to the integration of the EU in international law. The tool that the CJEU use to shift the balance to its advantage is the principle of the autonomy of EU law.

In order to explain the new *external* equilibrium, the paper is divided into two main parts. Section 1 includes a description of Weiler's original theory of *internal* equilibrium, explaining how it shaped the early times of the EU and the conflicting forces into play at the time. It also looks at unanimity as a fundamental "power-tool" to maintain such balance. This will be key to frame a comparison with the new *external* equilibrium. The following section 2 puts forth the concept of the new *external* equilibrium as a new balance between European institutions and member states regarding the integration of the EU in international law structures. Section 2 explains how the principle of autonomy of EU law serves as a

[1] Albert Hirschman, *Exit, Voice and Loyalty: Responses to decline in Firms, Organizations and States* (Harvard University Press, 1970).

[2] Peter Lindseth explains this by telling a personal story of a colleague stating precisely this - that the equilibrium was a thing from the past. See Peter Lindseth, 'Disequilibrium and Disconnect: On Weiler's (Still Robust) Theory of European Transformation', in Miguel Maduro and Marlene Wind (Eds.), *The Transformation of Europe: Twenty-Five Years On* (Cambridge University Press, 2017), pp. 121-122.

new power-tool, this time from the CJEU, to either block (eg. Opinion 2/13 or *Achmea*) or allow (eg. Opinion 1/17) fundamental steps of EU external action.

Throughout the paper it will be argued that the "conservative" approach of the CJEU to external integration can be explained as a claim for control of the direction and future of the EU, by means of the concept of autonomy of EU law. The ultimate aim of this work will be to rationalize certain controverted decisions of the CJEU, such as the declaration of compatibility with EU law of the Investment Court System (ICS) in Opinion 1/17, but the rejection of the accession of the EU to the ECHR in Opinion 2/13, and to frame them in the wider analysis of the role of the CJEU facing international law.

The Original Internal Equilibrium: Unanimity as Power-Tool

To accurately describe J. H. H. Weiler's theory of European integration is a Herculean task, which falls outside of the scope of the present work. What this section attempts to do is to sketch the broad lines of what Weiler's original equilibrium meant in the context of European integration and how it shaped the legitimization process of the Union in its early days. The concepts put forward under this section will then be compared with those underlying the new *external* equilibrium theorized in this paper.

Weiler´s discussion of the centripetal and centrifugal forces underlying the equilibrium rests on three main texts: the notion of *Voice, Exit and Loyalty*, originally found in the work of Albert Hirschman; Weiler's own early work in *The Dual Character of Supranationalism*, and his final construction in "*The Transformation of Europe*"[3].

As an economist, Hirschman explained that economics should dialogue with other subjects—including political science and law—claiming that they had something to learn from each other. For the author, in pure economics, one could devise three main concepts which explained how companies' could deal with the normal deterioration of their sales with time: *Exit, Voice and Loyalty*[4]. According to Hirschman, customers could show their discontent with the quality of a product in one of two ways: either by *exiting* the given market—ie. by not buying the products or services of such company and switching to another— or by *voicing* their concerns to the board or decision-making structure—therefore informing the company of this deterioration[5]. The tension presented by Hirschman translates a constant balancing between a normal deterioration of the sales with time, the need for consumers to express their concern (*voice*) or rather take measures and give up on the product (*exit*). This very simple framework is easily extensive to the realm of political science[6], as the author himself[7] clarified, and it fits perfectly in an analysis of international law. Hirschman's theory accurately describes tensions inside international organisations formed by a plurality of international actors (states and international organisations): the consumers/members of the organization need to express their discontent by *voicing* them, ie. raising their discontent in the appropriate fora, or, where voice is not enough, by *exiting* it.

Hirschman's impact on Weiler was tremendous. The dual choice between *voice* one's concerns or to exit the organization appears in the Weilerian literature on European integration to explain the clash of forces in the early times of the EU: this time the member-states, consumers/members of the organisation,

[3] This systematic analysis of the influences is done in the first part of Lindseth's work "Disequilibrium and disconnect". Peter Lindseth, 'Disequilibrium and Disconnect: On Weiler's (Still Robust) Theory of European Transformation', in Miguel Maduro and Marlene Wind (Eds.), *The Transformation of Europe: Twenty-Five Years On* (Cambridge University Press, 2017).
[4] Albert Hirschman, *Exit, Voice and Loyalty: Responses to decline in Firms, Organizations and States*, (Harvard University Press, 1970).
[5] Albert Hirschman, *Exit, Voice and Loyalty: Responses to decline in Firms, Organizations and States* (Harvard University Press, 1970) p. 4.
[6] William Robert Clark and Sona Nadenichek Golder, 'The British Academy Brian Barry Prize Essay: An Exit, Voice and Loyalty Model of Politics*'* [2017] British Journal of Political Science, vol. 47, no. 4, at 719-748.
[7] Albert Hirschman, *Exit, Voice and Loyalty: Responses to decline in Firms, Organizations and States* (Harvard University Press, 1970) pp. 15-20.

are the ones in need of a *voice* to express their concerns; the European institutions, above all through the CJEU, are responsible to find fora for states to express or risk their *exit*. This exit, however, is transformed in Weiler's work. It no longer only relates to an actual exit, e.g. exiting the Union itself, but it becomes a *selective exit*, through which through which states remained in the Union but largely ignored its rules.

The difficult internal equilibrium could then be described as such: on the one hand we have member-states in need of a *voice* to obtain more control of the decision-making processes of the EU threatening an *exit* at all times; on the other hand, we have the European institutions, with the CJEU at the forefront, with the role to curb such potential *exit*, but eager to promote further integration through the power of the law.

It is over this tension/equilibrium that Weiler turns to use as the basis of *The Dual Character of Supranationalism, describing* the conflict between the CJEU and member states. Indeed, in *Van Gend en Loos*[8], *Costa v. ENEL*[9], *Internationale Handelsgesellschaft*[10] and other landmark cases, the CJEU played a fundamental role taming political forces to promote legal integration. The first "uneasy tension"[11] in European integration was the opposition of the CJEU to member states, pushed by the Court through the creation of a "new legal order of international law"[12]. This is why, when one discusses contemporary challenges such as *Achmea*[13] or the *Opinion 2/13*[14], every reference to the autonomy of the EU always comes back to the original formulation in *Van Gend den Loos.*

By opposing legal supranationalism, forcing integration through law, to the political control of member states, the CJEU gave an almost epistemological legitimacy to the EU. During that period, integration in the EU existed because the "Law" dictated so and not because member states decided to[15]. This created an obvious tension between the CJEU and member states, the latter feeling like losing power to the supranational institution. Predicting this, the CJEU quickly understood the dangers of a direct clash against member states and brought national judicial authorities to side by the CJEU in this fight, through the mechanism of preliminary ruling and the turn of national courts into EU courts. This promoted a balancing between a forced integration through law, but the respect for national judicial authorities.

Weiler saw in this an equilibrium. Instead of looking at it as a doomed system, where one of the sides would necessarily have the upper hand, Weiler preferred to cherish this constant tension and praise it as something necessary for the European future. Almost as in the famous third newtonian law of motion[16], equilibrium ruled over the early institutional framework of the EU ensuring perfect coexistence. When one force pushed for integration and limited the *exit*, the other, surrounded by limited exit possibilities, *voiced* in return. As long as there was room to *voice their concerns*, member states would accept integration and the equilibrium would be maintained.

In the *Transformation*, Weiler takes an extra step and analyses what keeps this equilibrium intact. This is to say, what kind of tool did states use to *voice* their concerns and retain power.

[8] C- 26-62, *Van Gend en Loos*, [1963], ECLI:EU:C:1963:1.
[9] C- 6-64, *Costa v. ENEL*, [1964], ECLI:EU:C:1964:66.
[10] C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970], ECLI:EU:C:1970:114.
[11] J. H. Weiler, 'The Transformation of Europe', [1991], 100 Yale L.J, p. 2480.
[12] C- 26-62, *Van Gend en Loos*, [1963], ECLI:EU:C:1963:1, para. 12.
[13] C- 284/16, *Slowakische Republik v. Achmea BV*, [2018], ECLI:EU:C:2018:158.
[14] C-2/13, *Accession to the European Convention of Human Rights*, [2014], ECLI:EU:C:2014:2454.
[15] J.H.H Weiler, *The Transformation of Europe*, p. 2428.
[16] "When one body exerts a force on a second body, the second body simultaneously exerts a force equal in magnitude and opposite in direction on the first body, leads to a perfect balance" -Sir Isaac Newton, *Philosophiae naturalis principia mathematica (*Londini, Jussu Societatis Regiæ ac Typis Josephi Streater. Prostat apud plures Bibliopolas, 1687).

The Power-Tool in the Original Internal Equilibrium: The Rule of Unanimity

In that early period, member states reaction to the rising legal forces of the CJEU was a claim for more power in decision-making structures. As explained, this meant that member states would need to find specific fora to *voice* their concerns over a growing EU, or otherwise the entire project could be jeopardized by a massive exit of its members. In the early days of the EU such specific forum of discussion could be found in the Council of the EU and its voting majority.

The Council of the EU, being one of the organs of the EU where states could retain power and guide integration towards their own interests, represented the more classical intergovernmentalist approach to international law. At the time, such intergovernmentalism was very clear in the way the organ voted and approved decisions as every decision would require a unanimous decision. This is very important in order to understand the balancing of forces in the internal equilibrium – as long as states retained a unanimous *voice* in the Council, the dangers of a forced integration by the EU institutions could always be stopped. One could then say that the way member states expressed their *voice* was through unanimity voting in the Council of the EU, namely by retaining a true veto power over European integration. Unanimity worked back then as a power-tool to allow for more or less integration to take place, according to the will of member states, and was the crucial tool to retain the balancing of forces between member states pushing for less integration and European institutions pushing for a stronger Union. The internal equilibrium was achieved in such a way: when the CJEU pushed too much for integration, the governments reacted by *voicing* their power in the Council and vetoing the advancements proposed by the institutions.

A good example on how this equilibrium was so crucial for member-states to accept growing integration is the famous "empty chair crisis" of the 1960's. When discussions started over whether the Council of the EU should transit to a majority voting, hence becoming a more democratic majority-based organ, the reaction of some states represented precisely their fears of losing a *voice.* France was among the most vociferous and rejected any solution which would require losing unanimity in the Council as that represented a loss of the sovereign power to reject any further integration. Here one can easily spot the delicate internal equilibrium: once the institutions proposed to change the power-tool of unanimity, removing it from the hands of member states, they risked shattering the power-balance and states immediately threated to *exit.* Indeed France, with General De Gaulle as President, refrained from attending the Council meetings for over 6 months, hence blocking any decision from being taken and risking the future of the still young European Communities.

The crisis was finally averted with the famous Luxembourg Agreements[17], where states agreed on maintaining a similar veto structure on matters of "very important national interests". Again, what was at stake was the use of a veto tool, a true power-tool, to retain power and control over the integration of the EU. Once that was restored so was the internal equilibrium that allowed integration and the EU to survive the early times of its construction.

Of course, reality went a different way. Member states eventually accepted an increasingly more majority based voting and the equilibrium was not fundamentally destroyed. However, the initial clash left its marks. Silently and unnoticed, a different tension kept rising and other power relations were necessarily formed. We tend to look at integration as a clash between the European institutions (CJEU, EP and the EC) and the member states, because we focus too much on *internal* integration. When it comes to *external* integration, the power relation is often very different. A new external *equilibrium* was silently formed and should not be ignored.

[17] Bulletin of the European Communities, March 1966, 3-66, pp 5 – 11.
Available at: https://web.archive.org/web/20120303234622/http://www.eurotreaties.com/luxembourg.pdf

The New *External* Equilibrium: Autonomy of EU law as a Power-Tool

As for the *internal* equilibrium, the *external* equilibrium departs from an existing tension. At the external level the tension is pushed at least by three factors. The first one is globalization, which makes the European Union a more important economic player than its single member states and creates an economic incentive to act on its own. A kind of federal incentive regarding external economic relations is then put forth, as the Union feels entitled to negotiate big international treaties or even represent individual member states in trade organizations such as the WTO. The second is the growth of international law itself and the profusion of international courts and tribunals. From trade to investment, from the law of the sea to human rights, the fragmentation of international law in multiple regimes has contributed to an inevitable internationalization of the EU. In order to avoid *intra*-European conflicts, whereby some states would belong to some international organizations and not others, the EU has decided to join most of these organizations and hence gained increasing power as a global player. This came with a necessary loss of the relative power of member states in such organizations as the tendency is to speak and negotiate with the big entity rather than its individual parts. The third one is the rise of international investment law and the shift in competencies on this matter. With the EU acquiring exclusive competency on investment, member states have conceded in giving full power to the Union and reshaped the delicate equilibrium we discussed above. This has already proven to be a center of conflict, as the *Achmea*[18] case illustrates, and it proves the importance that states have always given to maintaining control or otherwise risking to *exit*. While the CJEU seeks a uniform Union of Law, based on the principle of mutual trust between member state's jurisdictions, the individual governments struggle with their own existing BIT's now needing phase-out. Again, the tension is evident.

These three factors contributed to create a new tension between the European actors. The two Weilerian clashing forces of the original *internal* equilibrium—those who wish to integrate and those who do not—have transformed but not disappeared in the new *external* equilibrium.

In the original *internal* equilibrium, the tension rises within the international organisation, in a clash between its member states and the institutions of the Union. On the one hand we have member states accepting integration and an increase of EU's powers as long as they maintain a *voice* (absolute decision-making power in the Council). If such voice is curbed by the institutions, above all by the CJEU, then there is a risk of *exit*, either by fully exiting the Union (e.g. Brexit) or through a selective exit (by undermining Union's action thought their power in the Council). On the other hand, pushing towards the opposite direction, we have all the remaining institutions eager to integrate.

In the new *external* equilibrium, however, the tension arises in the context of the EU external relations and sees a shift in the position of the actors involved. On the one hand, most EU institutions, and particularly the EU Parliament and the European Commission, together with the member states, push for external integration of the Union in other international legal orders, *e.g.* trade treaties with third-countries or the adhesion to the ECHR or WTO, wanting a cosmopolitan Union which is part of a global network of different "international laws". On the other side, the CJEU takes the role, opposed to that adopted in the *internal* equilibrium, of curbing external integration. The same fears that member states had in the past appear now to be shared by the CJEU: just like member states feared losing their sovereignty and their control of the EU in the early times, the Court appears to fear losing control over EU law *vis-à-vis* the introduction of different courts and tribunals with the power to interpret EU norms.

It is very interesting to note that this kind of reasoning, one where the main worry is to retain control, fits perfectly into Hirschman's construction as explained above. What the CJEU looks for when it discusses the process of external integration in other international legal orders, is to ensure that it maintains a ***voice*** as the main interpreter of EU law.

[18] C- 284/16, *Achmea*, [2018], ECLI:EU:C:2018:158.

The parallel with *internal* equilibrium is evident: member states accepted internal integration as long as they had a veto power, the unanimity power in the Council of the EU, and mediated more or less integration accordingly; now, the CJEU accepts *external* integration as long as it has the monopoly of jurisdiction over EU law so it mediates more or less external integration accordingly. Both work as a veto power to block integration or to direct it in a certain way. If this is not respected, just like member states threated with ***exiting in the internal equilibrium***, the CJEU exercises a similar power by rejecting every legal order that can pose a threat to its monopoly of jurisdiction and impeding integration. This is to say, the CJEU exercises its legal powers of review in order to ensure the maintenance of its *status quo* or rather proposes a sort of "exit" from international law.

This new *external* equilibrium dictates then that those who want to integrate, namely the Commission, the Parliament and member states, must always carefully design their action not to shatter the delicate equilibrium between having a globalist approach to the EU and at the same time respecting the role of the CJEU and granting it a true *voice.*

Throughout the jurisprudence of the CJEU, moments of external integration have been directly connected to references to the "autonomy of EU law" or to "the monopoly of jurisdiction" of the CJEU. I wish now to turn to this point to understand the connection between the *external* equilibrium and the principle of autonomy of EU law.

The Power-Tool of the External Equilibrium: The Principle of Autonomy of EU Law

In the first section of this work I submitted that, based on the work by Joseph Weiler, the early times of integration were only possible because an equilibrium between forces was achieved. The equilibrium survived based on the power of member states to dictate how much more integration they wanted through the use of their veto power in the Council of the EU, still subject to a rule of unanimous decision-making at the time. This meant that unanimity served as a power-tool to ensure equilibrium, as a way to direct integration according to the will of member states.

I now submit that, in the new *external* equilibrium, one can also find a power-tool to lead external integration in a certain direction. In external equilibrium, that power-tool is the principle of autonomy of the EU. However, because players have fundamentally shifted sides, and is now the CJEU who rejects integration, this tool is unavoidably different than a decision-making veto. While member states are political entities, whose power resides on taking decisions, the CJEU is a judicial entity bound to apply the sources of EU law. For this, the tool is no longer unanimity but rather a legal principle. Both the use of a decision-making majority or the use of a legal principle can be easily used to ascertain a position, and might both hide a claim for power, for or against integration.

The claim that the principle of autonomy might serve as "power-tool" of the CJEU requires a brief overview over CJEU's construction of such principle. In each of the following cases one can see how the CJEU has used the legal principle to shape or allow for more or less external integration. The vagueness of the notion of the autonomy of EU law, with scarce textual references in the treaties, has allowed for the CJEU to possess an effective tool to veto the initiatives it thinks might have jeopardize its own independence.

The construction of the principle of autonomy has been above all jurisprudential, with brief references to the monopoly of jurisdiction of the CJEU granted only in article 344 TFEU. Since the 70's[19], and then with increasing importance in the 90's[20], the Court has been faced with Commission's proposals of cooperation with other legal systems, often supported by member states, some of them containing their

[19]C-1/76, *Draft Agreement establishing a European laying-up fund for inland*, [1976], ECLI:EU:C:1977:63.

[20]C-1/91, *European Economic Area*, [1991], ECLI:EU:C:1991:490 and C-1/92, *European Economic Area*, [1992], ECLI:EU:C:1992:189.

own mechanisms of settlement of disputes. This has been fertile ground for the development of this "power-tool".

Let us observe how the CJEU used this tool to acquire a *voice*, often expressed as monopoly of jurisdiction in the jurisprudence of the CJEU.

Through a series of advisory opinions[21], the *Mox Plant Case*[22], the *Achmea*[23] case and the recent Opinion 1/17[24], the CJEU consistently used autonomy in one of three ways[25]:

> 'The allocation of competences between member states and the Union' - The Court does not allow external courts to judge upon the division of competences/powers or the allocation of responsibilities between the EU and member states as this would jeopardize its power;
>
> 'The respect for the mechanism of preliminary ruling' - The Court requires the judicial organ to observe the existence of the preliminary ruling system as the keystone of the EU legal system so that it can uniformize EU law according to its will;
>
> 'The control of EU Law' - The Court needs to have its final word on the guarantee of compliance to EU Law, blocking any external activity which cannot be controlled by the CJEU by means of sanctions.

Let us observe how each of these uses can be identified in the jurisprudence of the EU[26] and how it relates to the external equilibrium.

Allocation of competencies/powers

According to the Court, no external tribunal is entitled to interpret the division of competencies between the institutions and the member states as established by the Treaties. The reasoning behind this assumption is relatively simple: the CJEU appears to believe that, should it allow other tribunals or courts to freely chose who to bring before their judicial instances, then it would lose its control over that choice and over the interpretation of the EU treaties—and consequently the EU legal order. Fearing somehow losing the EU to another court or tribunal, the CJEU worries it might lose its *voice* as the sole interpreter of EU law.

The issue arose when the Court enacted its advisory opinion on the agreement to constitute the European Economic Area (EEA). There it noted that the EEA Court would indirectly have to judge upon the

[21] C-1/91, *European Economic Area*, [1991], ECLI:EU:C:1991:490; C-1/92, *European Economic Area*, [1992], ECLI:EU:C:1992:189; C-2/94, *on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996], ECLI:EU:C:1996:140;, C-1/00, *Proposed agreement between the European Community and non-member states on the establishment of a European Common Aviation Area*, [2002] , ECLI:EU:C:2002:231; C-1/09, *European and Community Patents Court*, [2011], ECLI:EU:C:2011:123; C-2/13, *Accession to the European Convention of Human Rights*, [2014], ECLI:EU:C:2014:2454.

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

[23] C- 284/16, *Achmea*, [2018], ECLI:EU:C:2018:158.

[24] C-1/17, *Accord ECG UE-Canada*, [2017], ECLI:EU:C:2019:341.

[25] These three criteria are developed in my own work Francisco de Abreu Duarte, 'But the Last Word Is Ours': The Monopoly of Jurisdiction of the Court of Justice of the European Union in Light of the Investment Court System', *European Journal of International Law*, 4, 2019.

[26] Hannes Lenk, 'Investment Arbitration under EU Investment Agreements: Is there a Role for an Autonomous EU Legal Order?', [2017] European Business Law Review, 28, 2, pp. 135–147. Also his previous work Hannes 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' [2016], European Papers, 1, 2.

division of competences inside the EU[27]. According to the CJEU, the EEA Court could be placed in a position as to make a judgement on the interpretation of the party to the dispute, hence indirectly interpreting the community's rules on allocation of powers/competences[28]. Similarly, in the *Mox Plant case*[29], where the CJEU ruled on an infringement proceeding moved by the Commission, sanctioning Ireland for having recurred to an external tribunal, the CJEU feared that other international tribunals could risk its interpretation of the division of competences[30]. In both cases the decision came as a reaction to a potential loss of relative power. And the CJEU reaffirmed its *voice* in both instances, either by rejecting the project or sanctioning member states.

Another very good example is the *Achmea*[31] case. Although fundamentally different from the above-mentioned cases, where the question was one of international law bodies potentially threatening the monopoly of jurisdiction of the CJEU, in the *Achmea*[32] case what was in stake were the provisions of an intra-EU BIT[33]. Nonetheless, the CJEU resorted to the exact same mechanisms when addressing a question posed by the German court[34], namely on whether an arbitral clause in the Slovakia-Netherlands BIT would be valid if the arbitral tribunal could indirectly interpret the law of the EU. The CJEU invoked its jurisprudence on the Opinion 2/13 to once again ascertain a *voice* "it should be recalled that, according to settled case-law of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court"[35].

Interestingly, the continuous denial of some of the major breakthroughs of external integration had some effects on how the Commission shapes modern treaties. In Opinion 1/17[36], regarding the compatibility of the ICS system with EU law, the Commission took precautions to protect the *voice of the Court* in several instances. One of the ways it did so was through the creation of a mechanism whereby the CJEU had to be preventively heard on the division of competences/powers (article 8.21 CETA Agreement[37]). This means that the equilibrium between those who want to externally integrate and the CJEU is dynamic and is constantly being tested at each new international agreement. The integration into international law, even if legitimate and needed, must always pay due account to the *voice* of the CJEU and the Commission seems to have understood this.

The respect for the mechanism of preliminary ruling

A second use of autonomy advanced by the CJEU is the respect for the mechanism of the preliminary ruling. Again, it is about control and maintaining a *voice* over international law and member states.

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[27] C-1/91, *European Economic Area*, [1991], ECLI:EU:C:1991:490, ¶ 34.

[28] C-1/91, *European Economic Area*, [1991], ECLI:EU:C:1991:490, ¶ 35.

[29] C-459/03, *Comission v. Ireland*, [2006], ECLI:EU:C:2006:345, ¶ 123.

[30] On the topic Nikos Lavranos, 'The MOX Plant Judgment of the ECJ: How Exclusive is the Jurisdiction of the ECJ?', [2006], European Energy and Environmental Law Review, 15,10, pp. 291–296; Bruno de Witte, 'European Union Law: How Autonomous is its Legal Order?' [2010], Zeitschrift Für Öffentliches Recht, 65, 1, p. 150.

[31] C- 284/16, *Achmea*, [2018], ECLI:EU:C:2018:158.

[32] C- 284/16, *Achmea*, [2018], ECLI:EU:C:2018:158.

[33] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic.
Available at: http://investmentpolicyhub.unctad.org/Download/TreatyFile/968

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

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

[36] C-1/17, *Accord ECG UE-Canada*, [2017], ECLI:EU:C:2019:341, ¶132.

[37] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, art. 8.21.

For instance, in 2009, when the institutions of the EU sought a new solution for the fragmentation of intellectual property rights in the European context, the CJEU opposed the first version of the project of a European and Community Patents Court[38]. This time the reasoning was not based on a problem of competences as the Patent's Court would only have jurisdiction upon individual claims[39], but rather the fact that allowing the Court to possess exclusive jurisdiction on those matters[40] would deprive national courts from the keystone role of interlocutors with the CJEU. To break the existential link between national courts[41] and the CJEU would mean to lose the decade-long relationship explained above and to lose its most powerful allies in maintaining control and monopoly over the interpretation of EU law. This is also a problem of *voice* – the CJEU speaks through national courts and through the mechanism of preliminary ruling. Without them the CJEU loses control and a *voice* in dictating the uniformity of EU law.

In the *Achmea*[42] case the problem was very similar. After justifying its negative response to the preliminary ruling question posed by the national German court on the division of competences, the CJEU emphasized the importance of the preliminary ruling and the dangers that such arbitral tribunal could pose to the link between national courts and the CJEU[43]. The line of thought was then the following: because such 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 the case the German ones) based upon its non-compliance with EU law, then there was not pathway between such decision and an opinion of the CJEU under the mechanism of preliminary ruling[44]. What was at stake was ensuring that national courts could be called upon to interpret EU law (which indirectly would mean to pose preliminary rulings and call the CJEU itself to answer).

The same problem can be spotted in Opinion 2/13[45], when the CJEU rejected the accession of the Eu to the ECHR. What was at stake was to understand how the power-relations between the CJEU and the European Court of Human Rights would be changed and how it would affect article 267 TFEU. When the CJEU claimed that Protocol no. 16 to the ECHR would threaten the cooperation between national courts and itself, it is again the fear of losing a fundamental connection for the uniformity of EU law. According to the Court, it might happen that an advisory opinion requested under such Protocol would trigger the mechanism of prior involvement of the CJEU and therefore exempt the courts or tribunals of member states from respecting the mandatory provisions of article 267 TFEU. The Protocol no. 16 could then be used as a means of defrauding the 'keystone of the judicial system' meaning the judicial cooperation between the CJEU and member state's courts[46].

In Opinion 1/17 the equilibrium of forces has also changed, again because the Commission tried to restore it by introducing novel mechanisms. In the CETA agreement, fearing a repetition of what we have described above relating to Opinion 2/13[47], the Commission introduced the idea of EU law as a

[38] C-1/09, *European and Community Patents Court*, [2011], ECLI:EU:C:2011:123.

[39] C-1/09, *European and Community Patents Court*, [2011], ECLI:EU:C:2011:123, ¶ 63.

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

[41] Nikos Lavranos, 'Designing an International Investor-to-state Arbitration System After Opinion 1/09', Bungenberg and Herrmann (Eds.), *Common Commercial Policy after Lisbon,* (Springer, 2013), pp. 212-215.

[42] C- 284/16, *Achmea*, [2018], ECLI:EU:C:2018:158.

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

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

[45] C-2/13, *Accession to the European Convention of Human Rights*, [2014], ECLI:EU:C:2014:2454

[46] C-2/13, *Accession to the European Convention of Human Rights*, [2014], ECLI:EU:C:2014:2454, ¶ 196-200.

[47] *Supra*, 2.1.

"matter of fact"[48], suggesting it stood outside the interpretation of the ICS and should be taken into account as interpreted by the jurisprudence of the CJEU. The Court accepted such construction and felt that its *voice* could be heard like that and its monopoly of power protected.

The control of EU law

The final obstacle identified by the CJEU when referring to the autonomy is the control of EU law, which allows the CJEU to have a *voice*: as a self-contained system, the EU must be protected from different or conflicting interpretations of its law. To ensure this, the CJEU must be in control and must be able to sanction those who disrespect it.

For example, in Opinion 1/09, the CJEU argued that if the Patents' Court became the sole interlocutor with the CJEU in those matters[49] (instead of the courts and tribunals of member states), the control of when and how it would pose preliminary questions would no longer be under the sanction hand of the CJEU. This is because, while in the case of the national courts the possibility of condemning the member state in case of infringement was a reality for the CJEU (as well as eventual state responsibility for the judicial power[50]), in the case of the Patent's Court there would be no mechanism of control for when it refused to place a mandatory question or chose to disrespect a response provided by the CJEU. In this event, the CJEU would no longer be able to control the legality and uniformity of the judicial application of EU Law, which would ultimately result in a breach of its control.

Opinion 2/13 follows the same path when describing the relationship between article 344 TFEU and article 33 of the ECHR (interstate dispute). In interstate disputes brought before the ECtHR, 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[51]. Here too, the problem is one of control of the legality of EU law, namely the fact that the CJEU could not control the application of material EU Law when the ECtHR was judging an interstate dispute and had no power to sanction the ECtHR for wrong interpretations.

In all three obstacles, what is at stake is having the final word on external integration. Either by choosing who should be brought before these new international bodies (member states, the EU or both), or by maintaining the fundamental link between national courts and the CJEU and therefore being able to speak the interpretation of EU law through them, it is always about having *a voice*. If that *voice* is eventually disrespected, is about having the tools to sanction member states for having accepted these constructions. It is no different from the old battles of the *internal* equilibrium: it is about who controls integration and how far we can go as a Union, both internally as externally.

Conclusions

The work intended to introduce the concept of *external* equilibrium as an explanation for the balancing of forces between the different actors in the external action of the European Union.

[48] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, art. 8.31.2.

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

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

[51] The CJEU was not satisfied with the existence of a norm which would relieve the High Contracting parties to the ECHR from taking every single interstate dispute concerning the application of the ECHR to the ECtHR (article 55º). The CJEU argued that such possibility still existed, even if not mandatory, and that would suffice as a breach. See C-2/13, *Accession to the European Convention of Human Rights*, [2014], ECLI:EU:C:2014:2454, at 205-210.

Just like Weiler identified decades ago, European integration is only possible if its actors retain a *voice* in the process, if they do not feel threatened by a relative loss of power. The early times of integration were defined by an internal equilibrium of forces, a balance between the power of the CJEU, pushing for further integration, and member states eager to retain sovereignty. As a reaction to the growing push for integration, member states reaffirmed their *voice* through the use of the power-tool of unanimity in the Council and restored the equilibrium. This dynamic was essential for the whole European project and allowed for the EU to thrive in its early difficult times.

Nowadays, regarding external action, such balance of forces has changed but remains a crucial part of the success of the European project. By proposing the concept of a new external equilibrium, I suggest that a new balance was achieved: on the one hand, it is now the CJEU who is afraid of losing control and wishes to retain "sovereignty" over its legal order; member states, and even the remaining institutions, on the other hand, see international law and a globalized EU as the next steps for European integration. The CJEU response to this potential "exit" to international law has consisted of using a legal power-tool (the principle of autonomy) to reaffirm its position and curb such *internationalization* of the EU whenever such integration could jeopardize its position of power.

Perhaps the CJEU always aimed at protecting the EU from threats, both domestic (internal autonomy) and externally (external autonomy). Through the analysis of the jurisprudence of the CJEU on autonomy one could notice that its biggest concern is always one of control. The principle of autonomy, used as a power-tool, allows for the CJEU to ascertain power and chose a certain pathway for the external integration of the EU. A way in which it is the Court that must have the final saying. However, by acting in such way, the CJEU puts into question the fundamental balance achieved between the different European actors.

The fundamental question for the future will be then to know how institutions and member states will react to this position of the Court and how this will influence the delicate equilibrium that has been the cornerstone of European integration. A backlash from the Court has commenced, with the denial of fundamental moments of integration such as Opinion 2/13 or even *Achmea*. Opinion 1/17 might however appease member states and have restored some power to the other side of the scale. Only the future will tell whether this will be enough to restore the equilibrium or whether a new balancing must be achieved between the judicial and political legitimacies within the EU.

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