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# Judicial Politics under Article 344 TFEU and What it Could Mean for Judicial Dialogue

**by**

**Merijn Chamon***

## Abstract

(French version below)

*The present contribution looks at the Court's jurisprudence on Article 344 TFEU to shed greater light on the Court's willingness to open up to other international courts and legal orders, an undeniable pre-condition to any meaningful judicial dialogue. The Court's interpretation of Article 344 TFEU and its insistence on autonomy has been described by some as autarkic. In more neuter non-legal terms, the Court's attitude may be seen as a result of its self-consciousness being the supreme and constitutional court of the EU legal order, a trait it shares with some constitutional courts of the EU Member States. Not coincidentally these courts at times also entertain difficult relationship with the Court. While this puts the Court's attitude in context it does not deter from the conclusion that the Court's position is problematic from the perspective of judicial dialogue. In addition, the Court's position only seems tenable if other international courts accept the CJEU as a kind of primus inter pares of international courts. This premise may come under pressure with the ongoing proliferation of international legal systems and tribunals. ITLOS' judicial activism may serve as an illustration of this.*

**Keywords:** Autonomy of the EU legal order, Judicial dialogue, Judicial politics, Court of Justice, Article 344 TFEU, Mox Plant, Opinion 2/13, ITLOS

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## Résumé

*La présente contribution se penche sur la jurisprudence de la Cour concernant l'article 344 TFUE en vue d'identifier sa bienveillance à s'ouvrir aux autres cours internationales et aux ordres juridiques internationaux, ce qui est indéniablement une condition préalable pour un dialogue judiciaire significatif. L'interprétation de l'article 344 TFUE par la Cour et son insistance sur l'autonomie de l'ordre juridique de l'UE ont été décrites comme étant autarciques. En des termes plus neutres, on peut aussi concevoir l'attitude de la Cour comme le résultat de sa conscience de soi, qui la fait se percevoir comme la cour suprême et constitutionnelle de l'ordre juridique de l'Union européenne. La Cour partage ce trait avec quelques cours constitutionnelles des États membres de l'UE, ce qui fait que ce n'est pas par hasard que les relations entre ces cours constitutionnelles et la Cour de justice ont été tendues de temps en temps. Bien que cela serve à contextualiser le comportement de la Cour, cela n'ôte rien à la conclusion que la position de la Cour est problématique pour le dialogue judiciaire. En outre, la position de la Cour n'est tenable que si les autres juridictions internationales acceptent la Cour de justice comme un primus inter pares des tribunaux internationaux. Cette prémisse se revendiquerait erronée si la prolifération des systèmes et tribunaux internationaux se poursuit, ce qui est assez bien illustré par l'activisme judiciaire du TIDM.*

**Mots-clés :** Autonomie de l'ordre juridique de l'Union, Dialogue judiciaire, Politique judiciaire, Cour de justice, Article 344 TFUE, Mox Plant, Avis 2/13, TIDM

# Judicial Politics under Article 344 TFEU and What it Could Mean for Judicial Dialogue

## I. Introduction

The present contribution, from a more general perspective, looks at the jurisprudence of the Court of Justice on the autonomy of the European Union (EU) legal order, and tries to verify the Court's understanding of the EU's autonomy (and its own role in safeguarding this autonomy). The basic assumption underlying this paper is that the way in which the Court makes sense of the EU's autonomy should, logically, tell us something about the Court's (general) capacity to engage in judicial dialogue with other international courts. To make things more concrete and to keep a sufficient focus, this is mainly done by looking at the Court's interpretation of Article 344 TFEU notably in the *Mox Plant* case and in Opinion 2/13 on the EU's accession to the European Convention of Human Rights. In this jurisprudence a problematic 'self-consciousness' of the Court of Justice may be identified, constituting a psychological hurdle which also several national constitutional courts (of the EU Member States) have had (or still have) to overcome when they were confronted with the new EU legal order, created by the original Rome Treaties and confirmed as being autonomous by the Court of Justice in *Van Gend & Loos*. As will be explained, the 'self-consciousness' of a court could be one of the variables explaining whether and to which extent that court engages in judicial dialogue. Of course the contribution starts with a brief conceptualisation of judicial dialogue.

## II. Judicial Dialogue

Eeckhout notes that the notion of judicial dialogue is an essentially contested concept,[1] but in "*a world of proliferating and expanding legal systems, and of increasing recourse to judicial-type settlement*"[2], the importance of the interdependence and, as a result, the necessary interaction between different courts is well recognized, requiring courts to engage in judicial dialogue.

[1] EECKHOUT Piet, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?', *Jean Monnet Working Paper Series* 01/15, p. 3.
[2] *Ibid.*, p. 2.

According to Bengoetxea, judicial dialogue may be understood in a number of ways, *i.e.* as debate, institutional cooperation, citations and networks.[3] Of course, these are just idealtypes and as Derosier notes 'judicial dialogue' is not a positivist legal mechanism but an empirical, *i.e.* the observation that judges dialogue, or even ideological, *i.e.* the finding that judges ought to dialogue, concept.[4] As a result it seems more fruitful to try and grasp the concept of judicial dialogue by its purpose: why do we care about judicial dialogue? From this perspective judicial dialogue may indeed be a debate and institutional cooperation between judges in a context of inter-normativity (which does not necessarily imply a conflict of norms)[5] to ensure a harmonious relation between different levels in one legal order or even between different legal orders. Eeckhout observes that these different (*i.e.* a plurality of) legal orders are often presented under the paradigm of legal pluralism (which knows many variations), as if these legal orders co-exist in a horizontal and heterarchical way, while in fact these legal orders are characterized "*by a growing integration*."[6] Without entering into this debate further, the above noted inter-normativity indeed implies that these different legal orders do no simply co-exist next to each other, but that they share (to a greater or lesser extent) certain legal principles and/or rules and by virtue of this they are (to a greater or lesser extent) integrated. Regardless of one's ontological position then, judicial dialogue appears necessary and especially so if one holds to the idea of integrated (rather than pluralist) legal orders.

Since the judicial dialogue which will be focused on is that between the Court of Justice of the European Union and other international courts, the contribution focusses specifically on horizontal dialogue,[7] between courts from different legal orders. From a social sciences perspective then, judicial dialogue may be conceptualized as a dependent variable the value of which (*i.e.* whether it occurs and the degree to which it occurs) may be explained by reference to the following (non-exhaustively listed) independent variables.

## A. Inter-normativity

Obviously, the inter-normative context (cf. *supra*) means that the courts concerned should at least share the same basic values and principles. To illustrate, a court in a legal system that does not recognize individual human rights would find it very difficult if at all possible to meaningfully dialogue with a court such as the European Court of Human Rights (ECtHR). Further, judicial dialogue should also intensify if the jurisdiction of the courts

[3] See BENGOETXEA Joxerramon, 'Judicial and interdisciplinary dialogues in European Law', *in* Menétry Séverine & Hess Burkhard (ed), *Les Dialogues des Juges en Europe*, Bruxelles, Larcier, 2014, p. 21.
[4] DEROSIER Jean-Philippe, 'Le dialogue des juges : de l'inexistence d'un concept pourtant éprouvé', *in* Menétry Séverine & Hess Burkhard (ed), *Les Dialogues des Juges en Europe*, Bruxelles, Larcier, 2014, p. 54.
[5] MENETREY Sévérine, 'Dialogues et communications entre juges: pour un pluralisme dialogal', *in* Menétry Séverine & Hess Burkhard (ed), *Les Dialogues des Juges en Europe*, Bruxelles, Larcier, 2014, p. 124.
[6] EECKHOUT Piet, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration', (2013) 66 *Current Legal Problems* 1, pp. 173-174.
[7] *I.e.* between courts of the same status, see SLAUGHTER Anne-Marie, 'A Typology of Transjudicial Communication', (1994) 29 *University of Richmond Law Review* 1, p. 103.

concerned encompasses the same, similar, overlapping or adjacent areas of law. After all, in those cases the need and opportunity to engage in judicial dialogue is also greater. To illustrate: a court of first instance will naturally engage in a dialogue (even if it may be rather one-sided) with the court functioning as the appellate court. Of course, courts should not necessarily be part of the same legal system. A German and a Dutch employment tribunal may also engage in judicial dialogue, for instance as a result of them being confronted with problems coming under the scope of EU law. A final illustration is the dialogue between the Court of Justice and the ECtHR. Even if the jurisdiction *ratione materiae* of both courts is different, they may be connected by virtue of the fact that the human rights contained in the Convention have a universal vocation and have also been recognized, by the Court of Justice, as being binding on the EU.

## B. Formal requirements

A next variable is the existence of formal requirements, instructing one (or both) of the courts to engage in a dialogue. Naturally a court whose decisions may be quashed by an appellate court will draft its judgments with this possibility in mind and may substantiate its decision by citing previous jurisprudence (*i.a.*) of the appellate court. For EU lawyers, the best known formal requirement probably is the procedure under Article 267 TFEU. Slaughter has also identified Article 34 ECHR as such a formal requirement[8] and indeed the procedure of Article 34 ECHR shares some similarities with an ordinary appeal procedure.

## C. Self-consciousness?

Lastly, from a more sociological perspective, another variable which could be thought of is the 'self-consciousness' of the courts in question. A self-conscious court, which is not necessarily an activist court, can then be understood as a court that does not simply act as an instrument of the polity in which it functions, but which may instead also act as a force furthering the interests or objectives of its polity, an actor in its own right. The effects of this variable on the occurrence and extent of judicial dialogue do not seem completely clear but at least a certain tension with the purpose of judicial dialogue may be noted.

Although judges never act as a passive *bouche de la loi*, their behaviour should be informed by an aim to resolve conflicts according to the relevant law's prescription, which in an inter-normative context, involves taken into account norms from different legal systems and ensuring these legal systems can co-exist harmoniously. A self-conscious court that does

[8] *Ibid.*, p. 101.

not only act in the interest of 'the law',[9] but whose behaviour is also informed by considerations such as its polity's interest or its own institutional interest,[10] could then prioritize these interests over the interest of a harmonious co-existence between legal systems.

Measuring the self-consciousness of a court may not be straightforward but it will not be disputed that courts such as the Court of Justice of the European Union and some national constitutional courts show a special concern in their jurisprudence for the functioning of respectively the EU and the national state, also stressing their role in protecting that functioning. In the case of an international court such as the CJEU such a self-consciousness is of course greatly facilitated by provisions in the establishing Treaties such as Article 19 (1) TEU which *i.a.* provides that the Court "*shall ensure that in the interpretation and application of the Treaties the law is observed*" and Article 344 TFEU which provides that "*Member States [cannot] submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.*" Former President of the Court Skouris' view on the Court's nature should therefore not come as a surprise: "*I do believe […] that the most accurate characterisation of the European Court of Justice is that of a hybrid court performing both the functions of a supreme and a constitutional court.*"[11]

## III. Self-conscious national constitutional courts and their judicial dialogue with the CJEU

How the self-consciousness of a court may affect that court's behaviour (or even capacity to engage) in judicial dialogue can be seen in the position taken by a number of national constitutional courts of EU Member States vis-à-vis the CJEU. In this regard, especially the positions of the German Bundesverfassungsgericht (BVG) and the Italian Corte Costituzionale (CC) show the difficult relationship which these courts (have) entertain(ed) with the European Court of Justice. In the *Granital* case,[12] which should be situated in the *Frontini-Fragd* line of cases,[13] the Italian CC reiterated that the Union and Italian legal systems

[9] Vauchez, in a sociological study of the members of the Court, notes that *"Le « bon juge » communautaire est [...] celui qui a su servir de manière égale tous les intérêts en présence dans la polity européenne, tout en ne servant jamais que le droit."* See VAUCHEZ Antoine, À quoi « tient » la cour de justice des communautés européennes ? Stratégies commémoratives et esprit de corps transnational, (2010) 60 *Revue française de science politique* 2, p. 16. This indeed conforms to the discourse of the members of the Court but ignores that in reality a 'good Union judge' also acts in the interest of the Court as an institution.

[10] Remarkably, that the Court would also act in its own self-interest does not seem fully recognized. Stone Sweet for instance notes: "*There is, today, broad consensus on the following three assumptions about the Court. First, the ECJ will use its powers to promote integration (values that inhere in the treaties). Second, the Court has an interest in maximizing the coherence of its case law, not least, to build the political legitimacy for its lawmaking role. Third, the Court worries about the compliance of national judges, EU organs, and the Member States with its decisions, and will develop techniques to enhance compliance.*" See STONE SWEET Alec, The European Court of Justice and the judicialization of EU governance, (2010) 5 *Living Reviews in European Governance* 2, p. 24. The Court's political role is then recognized but only to the extent that the Court pushes an integration agenda. Heisenberg and Richmond note that "*[i.a.] the ECJ's broadly stated powers and the many vague or undefined substantive Treaty provisions, have served to hand the ECJ the opportunity to act as a political entrepreneur.*" See HEISENBERG Dorothee and RICHMOND Amy, Supranational institution-building in the European Union: a comparison of the European Court of Justice and the European Central Bank, (2002) 9 *Journal of European Public Policy*, 2, p. 206. This is indeed subscribed to but the question remains which (political) interests guide the Court's behaviour.

[11] See http://www.us-rs.si/o-sodiscu/katalog-inf-javnega-znacaja/contributions/presentation-by-dr-vassilios-skouris-president-of-the-european-court-of-justice/ (accessed 27/10/2015).

[12] Corte Costituzionale, 05/06/1984, N° 17/1984.

[13] MAYER Franz and WENDEL Mattias, 'Die verfassungsrechtligen Grundlagen des Europarechts', *in* Hatje Armin & Müller-Graff Peter-Christian (eds), *Europäisches Organisations- und Verfassungsrecht*, Baden-Baden, Nomos, 2014, p. 228.

are separate yet coordinated,[14] and for a long time the CC held that it was simply not in the capacity to refer preliminary questions to the Court of Justice under the current Article 267 TFEU, since it was not a court in the sense of that Article.[15] According to Cartabia the CC's approach should be understood as an attempt to prevent being subjected to the CJEU and to retain its independence and supremacy.[16] The BVG's fundamental rights reservations in *Solange I* and *II* are well known and were further complemented by the *ultra vires* control elaborated in the *Maastricht*, *Lisbon* and *Honeywell* cases and the Identity review, also foreseen in the *Lisbon* ruling.[17] Under the *ultra vires* control, the BVG claims for itself an ultimate authority to verify whether the EU has respected the principle of conferred powers, subject to the CJEU having been invited to rule on the issue (through an Article 267 TFEU referral) and if the transgression of competence by the EU has been manifest and the contested act highly significant in vertical structure of competences.[18]

In a way, these constitutional courts therefore also acknowledge that the CJEU is a partner, since, for instance, the CC emphasised that the EU and Italian legal systems ought to be coordinated, while the BVG confirmed that "*[t]he tensions, which are basically unavoidable according to this construction [i.e. the relation between the EU Treaties and the German Constitution], are to be harmonised cooperatively in accordance with the European integration idea and relaxed through mutual consideration.*"[19] However, this call for a harmonious cooperation cannot hide the problematic nature, from an EU perspective, of a national constitutional court reserving to itself the ultimate authority to scrutinize EU acts in light of the national law ratifying the EU Treaties in the national legal order. The problematic nature of an *ultra vires* review, from a legal perspective, becomes and became very clear when a national constitutional court tries to put this review into practice, as evidenced by the BVG's decision to refer a question on the legality of the ECB's OMT decision to the Court of Justice.[20] Now that the CJEU has answered the BVG's first ever request for a preliminary ruling,[21] it will be interesting to see how the BVG will engage with the CJEU's answer.

As to the Italian CC, it should be noted that it has abandoned its original position when it held in 2008 that it was competent to refer preliminary questions to the CJEU (in direct

[14] See the unofficial translation in GAJA Giorgio, 'Constitutional Court (Italy), Decision No. 170 of 8 June 1984, *S.p.a. Granital v. Amministrazione delle Finanze dello Stato*', (1984) 21 *Common Market Law Review* 4, p. 760.
[15] POLLICINO Oreste, 'From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court', (2014) 10 *European Constitutional Law Review* 1, pp. 144-145. Of course, from an EU perspective it is the CJEU that defines which bodies come under the notion of national courts, not the national court itself. See *i.a.* Case C-394/11, *Belov*, ECLI:EU:C:2013:48, para. 38.
[16] CARTABIA Marta, 'Taking Dialogue Seriously: The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union', (2007) *Jean Monnet Working Papers* 12/07, p. 28.
[17] See BVerfG, Maastricht, BverfGE 89, 155; BVerfG, Lissabon, ECLI:DE:BVerfG:2009:es20090630.2bve000208, para. 240 et. seq.; BVerfG, Honeywell, ECLI:DE:BVerfG:2010:rs20100706.2bvr266106. Generally, see Mayer & Wendel, *op. cit.*, pp. 229-238.
[18] See *BVerfG*, Honeywell, ECLI:DE:BVerfG:2010:rs20100706.2bvr266106 , paras 60-61.
[19] *Ibid.*, para. 57 (translation from the BVerfG website).
[20] This will not be further discussed here, but see WENDEL Mattias, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference', (2014) 10 *European Constitutional Law Review* 2, pp. 271-284.
[21] See Case C-62/14, *Gauweiler*, ECLI:EU:C:2015:400.

actions), further holding that the EU and Italian legal systems are *integrated* legal orders rather than *separate but coordinated*.[22] In 2013 then, the Italian CC for the first time referred a preliminary question to the CJEU in a case brought to it under an interlocutory procedure. Pollicino explains the Italian CC's change of heart,[23] showing how the Court's self-perception may have changed (*i.e.* in *Granital* describing itself as not being a court in the sense of the current Article 267 TFEU) but not its self-consciousness. After all, the Court changed its strategy and chose to engage with the CJEU because its initial strategy left it side-lined and unable to assert its own interests and to perform its task as the protector of the Italian Constitution.

## IV. The CJEU's capacity to engage in judicial dialogue

In light of the observations on the German and Italian constitutional courts, the CJEU's capacity to engage in judicial dialogue with other international courts may be better appreciated. Still, while analogies may be useful, a caveat is in place: formally, the CJEU's position vis-à-vis other international courts is different from the EU national constitutional courts' position vis-à-vis the CJEU and the EU and the CJEU[24] are not are not equally mature (or 'unassailable') as national states and national constitutional courts. While the latter may have reasons to feel 'threatened' by the CJEU, the CJEU may well have even more reasons to feel threatened by other jurisdictions (national and international alike).

### A. The autonomous EU legal order

An important element here is the autonomy of the EU legal order which the CJEU created itself in *Van Gend en Loos*[25] and which it has zealously protected ever since. Already in *Van Gend en Loos* the Court implied that the EU legal order was autonomous from (general) public international law and not just from national law.[26] In the first *Kadi* case, the Court of Justice confirmed that not even the UN Charter could affect the autonomy of the EU legal system as safeguarded by the Court pursuant to its exclusive jurisdiction under Article 19 TEU.[27] The special role which the Court sees for itself in upholding the judge-created autonomy of the EU legal order can be seen more generally in the Court's jurisprudence on international agreements (bound to be) concluded by the EU. In Opinion 1/00 the Court effectively found that the autonomy of the EU legal order requires (when the Union concludes international agreements) (i) that the allocation of powers between the EU and the

[22] POLLICINO, *op. cit.*, p. 148.
[23] *Ibid.*, pp. 151-153.
[24] Linking this to Eeckhout's observation (cf. *supra* footnote 6), the legal orders of the EU Member States are much more 'integrated' in that of the EU (and that of the EU much more in the ECHR's) than the EU's legal order in the general international legal order.
[25] Case 26/62, *Van Gend en Loos*, ECLI:EU:C:1963:1.
[26] GOVAERE Inge, 'Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order, *in* Hillion Christophe and Koutrakos Panos, *Mixed Agreements Revisited*, Oxford, Hart Publishing, 2010, p. 187.
[27] See Case C-402/05 P, *Kadi*, ECLI:EU:C:2008:461, para. 282.

Member States is not affected,[28] (ii) that the essential character of the powers of the EU and its institutions is not altered[29] and (iii) that any dispute settlement mechanisms in the agreement do not bind the EU to a particular interpretation of EU rules referred to in the agreement.[30] As Govaere notes these three conditions appear so fundamental that an international agreement would have to meet them cumulatively lest it be found to contravene the EU's autonomy.[31]

Of the three conditions the last two are especially relevant for the Court of Justice, since it reserves to itself the prerogative 'to say what the (EU) law is', following Article 19 TEU and it evidently sees this exclusive jurisdiction as an essential characteristic of the powers granted to the EU institutions. In this regard, Govaere has noted the tension between the autonomy of the EU legal order, as interpreted by the Court and the *effet utile* of establishing dispute settlement mechanisms in international agreements: "*[I]t would not make much sense to allow the EU to set up such mechanisms in the first place*" if the autonomy of the EU legal order means that "*acts of the EU institutions could not be challenged for breach of international agreements under [these] international dispute settlement mechanisms.*"[32] After all, such disputes do not always simply revolve around questions of interpretation (of the international agreement) but will often also pertain to alleged breaches by one of the contracting parties of its obligations under international law.

Of course, cases like *Van Parys* show that this tension may be resolved by detaching the two legal orders concerned. A decision of a WTO DSB body then does not affect the internal EU legality of an EU act. However such a solution also inhibits judicial dialogue between the CJEU and other international courts since such a detachment ignores the objective inter-normativity noted above which requires judges to engage in a dialogue.[33]

A similar problem is posed by the third condition that no interpretation of EU law is imposed on the EU and the Court of Justice. Again a legal fiction may be introduced here whereby an international court's binding interpretations of provisions in an international agreement would not affect the Court's interpretation of similar (or even identical) provisions internally in EU law. This would then again detach (objectively interconnected) legal orders, inhibiting judicial dialogue.

[28] Opinion 1/00, ECLI:EU:C:2002:231, para. 15.
[29] *Ibid.*, para. 12.
[30] *Ibid.*, para. 13.
[31] GOVAERE, *op. cit.*, p. 192.
[32] *Ibid.*, p. 195.
[33] Further, as Govaere notes, the *Van Parys* solution may not be appropriate to regulate the EU's relations with international legal systems other than the WTO's which is still characterized by flexibility. See GOVAERE, *op. cit.*, p. 196. In addition, a further densification of international legal regimes (cf. *supra*) may gradually diminish such flexibility and so could an increase in the self-consciousness of other international courts.

## B. The autonomy of the EU legal order under Article 344 TFEU

These general observations on the possible effect of the autonomy of the EU legal order may be illustrated by looking at the *Mox Plant* case and Opinion 2/13, the two main cases in which the Court set out its views on Article 344 TFEU.

### 1. Opinions 1/91, 1/00 and the Mox Plant case

In its first opinion on the EEA agreement, the Court of Justice found that to allow the envisaged EEA Court to interpret the notion of 'contracting party' to the EEA Agreement, would also have enabled it to decide on the delimitation of competences between the Community and the Member States and would hence have adversely affected Article 344 TFEU.[34] In his opinion to the *Mox Plant* case, AG Poiares Maduro concluded from this that the Court's exclusive jurisdiction "*is a means of preserving the autonomy of the Community legal order*."[35] Refuting Ireland's argument to the effect that the ratification of UNCLOS by the EU integrated the dispute settlement mechanisms of UNCLOS into EU law, the AG noted that "*Article [344 TFEU] stands in the way of a conferral of the Court's exclusive jurisdiction, by way of international agreement, to another court or tribunal*."[36] Ireland then violated Article 344 TFEU according to the AG since it had submitted a dispute with the UK to the Tribunal in relation to UNCLOS obligations that coincide with EU obligations.[37] Similarly, the Court found that the obligations invoked by Ireland formed part of the EU legal order and confirmed the exclusive character of its jurisdiction, referring to opinions 1/91 and 1/00.[38] In addition, the Court noted that UNCLOS itself in principle provides, in Article 282, that the dispute settlement mechanisms provided in Section 2 (of UNCLOS Part XV) are residual and give precedence to the procedures foreseen in (*i.a.*) the EU Treaty.[39] As to the problem that only part of the dispute came within the scope of EU law, the Court simply noted that this was still a significant part and that it was up to the Court to identify the areas falling outside its jurisdiction.[40]

The Court's ruling in the *Mox Plant* illustrates how the Court interweaves the autonomy of the EU legal order with its exclusive jurisdiction. As Govaere notes, following *Mox Plant* any dispute between the Member States and/or EU institutions as regards provisions of an international agreement coming within EU competence is necessarily reserved to the Court

[34] See Opinion 1/91, ECLI:EU:C:1991:490, paras 35-36. This issue did not play in relation to the draft ECAA Agreement, since that agreement was concluded exclusively by the EU. Any possible disputes would then be disputes between the third country states or between those states and the EU, not the EU Member States. See Opinion 1/00, ECLI:EU:C:2002:231, para. 17.
[35] Opinion of AG Poiares Maduro in Case C-459/03, *Commission v. Ireland*, ECLI:EU:C:2006:42, para. 10.
[36] *Ibid.*, para. 41.
[37] *Ibid.*, para. 51.
[38] See *supra* footnote 34.
[39] See Case C-459/03, *Commission v. Ireland*, ECLI:EU:C:2006:345, paras 124-125.
[40] *Ibid.*, para. 135. This is especially problematic since other international courts are not formally bound by the CJEU's claim to exclusive jurisdiction, see *infra* footnote 82 and at footnote 95.

of Justice, even if the EU is not party to the agreement.[41] Other, possibly more specialised,[42] forums then lose jurisdiction. Further, the Court's observation on its competence in disputes coming only partially under EU law (indirectly) requires other international courts to defer to the unilateral decision of the CJEU as to their jurisdiction.

In terms of judicial dialogue, it is clear that in so far as it concerns inter-EU disputes the exclusivity claimed by the Court precludes direct dialogue. More generally then the Court being so adamant about its exclusive jurisdiction (and the way in which it defines it) may be indicative of an inward looking court, which would be far from conducive to judicial dialogue.

Although *in se* unrelated to the issue of judicial dialogue, the exclusivity claimed by the Court may also result in conflicting obligations under international and EU law, imposed on the Member States, regarding the appropriate forum to submit disputes to. Here judicial disconnection clauses in international agreements may be envisaged, reserving inter-EU conflicts to the CJEU,[43] but such clauses in themselves would not ensure a smooth connection of the EU legal order with international law and might again reduce incentives for the Court of Justice to engage in judicial dialogue. Following *Mox Plant*, Bronckers in 2007 concluded that "*if it simply follows its case law to date, the ECJ may well distance itself from the international courts or tribunals established by these [mixed] agreements for some or all of the reasons it expressed previously. Not only would this render illusory the ECJ's original willingness to subject itself to the interpretation of international agreements by the very tribunals set up by these agreements. More importantly, this risks creating a situation where the EC courts will operate in clinical isolation from other international tribunals. That is not a desirable outcome in a globalizing world, where countries are increasingly bound to cooperate with each other and where courts have a role to play in facilitating and reinforcing such cooperation*."[44]

## 2. Opinion 2/13

This possibility of a disconnection clause leads to the latest important case involving Article 344 TFEU, *i.e.* Opinion 2/13 on the EU's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 5 of the draft Agreement indeed contained such a clause,[45] since Article 55 ECHR contains a provision similar to Article 344 TFEU reserving inter-state disputes related to the ECHR to the ECtHR under Article 33 ECHR. As AG Kokott noted, the disconnection clause solved the problem of conflicting obligations, since it would have *allowed* Member States to bring proceedings before the CJEU without violating their obligation under Article 55 ECHR, but it did not *bar*

[41] GOVAERE, *op. cit.*, pp. 202-203.
[42] This was also hinted at by the Irish government in *Mox Plant*, but rejected by the Court. See Case C-459/03, *Commission v. Ireland*, ECLI:EU:C:2006:345, paras 137-138.
[43] GOVAERE, *op. cit.*, pp. 203-204
[44] BRONCKERS Marco, 'The Relationship of the EC Courts with other International Tribunals: Non-Committal, Respectful or Submissive', (2007) 44 *Common Market Law Review* 3, pp. 613-614.
[45] GRAGL Paul, *The Accession of the European Union to the European Convention of Human Rights*, Oxford, Hart Publishing, 2012, p. 189.

EU Member States from bringing cases against each other before the ECtHR and neither would it have prevented the ECtHR from hearing such cases. To this end, the AG noted, Article 5 of the Draft Agreement would not simply have to provide that the proceedings before the CJEU are not means of dispute settlement referred to in Article 55 ECHR but that Article 344 TFEU takes precedence over the dispute settlement mechanisms of the ECHR.[46] While mentioning this possible reading, AG Kokott herself did not go as far and noted that the existing provisions in EU law already constitute sufficient safeguards for the Court's exclusive jurisdiction.

The Court, however, ruled differently, drawing attention to the differences with the *Mox Plant* case. While Article 282 UNCLOS in principle gives precedence to the dispute settlement mechanisms under other international agreements, such as the EU Treaties, the Court remarked that a similar provision was lacking in the ECHR (or Draft Agreement). In addition, the Court found that the possibility still left by Article 5 of the Draft Agreement for the Member States to present cases to the ECtHR was unacceptable. Whereas the AG had taken a more pragmatic approach,[47] the Court seemed to want to exclude any eventualities, despite there hardly being any inter-state disputes before the ECtHR in practice,[48] observing that "*[t]he very existence of such a possibility undermines the requirement set out in Article 344 TFEU.*"[49] As a result, the Court concluded that "*only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope ratione materiae of EU law would be compatible with Article 344 TFEU.*"[50]

According to Johansen, the Court thereby reinterpreted, in a more strict manner, Article 344 TFEU in its Opinion on accession to the ECHR compared to its reading of the Article in the *Mox Plant* case.[51] Thus in *Mox Plant*, the Court was allegedly satisfied by the provision in Article 282 UNCLOS because it allowed the EU Member States to still comply with the provision of Article 344 TFEU, which Johansen identifies as the relevant threshold. From this perspective the Court was indeed more strict in Opinion 2/13 since Article 5 of the Draft Agreement indeed also allowed Member States to comply with their obligation under Article 344 TFEU. However, this argument depends wholly on the threshold as identified

[46] See View of AG Kokott in Opinion procedure 2/13, ECLI:EU:C:2014:2475, para. 115.
[47] AG Kokott also noted that the EU and its Member States could issue a declaration clarifying their intention not to rely on Article 33 ECHR in disputes coming within the scope of EU law. See View of AG Kokott in Opinion procedure 2/13, ECLI:EU:C:2014:2475, para. 120. The Court did not consider this possibility, even if it did accept a similar solution in its second opinion on the EEA agreement, see Opinion 1/92, ECLI:EU:C:1992:189, paras 22-23.
[48] JACQUE Jean-Paul, 'Pride and/or prejudice? Les lectures possibles de l'avis 2/13 de la Cour de justice', (2015) 51 *Cahiers de droit européen* 1, p. 28.
[49] See Opinion 2/13, ECLI:EU:C:2014:2454, para. 208.
[50] *Ibid.*, para. 213.
[51] JOHANSEN Stian Øby, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences', (2015) 16 *German Law Journal* 1, p. 172.

by Johansen. After all, the Court was not wrong in Opinion 2/13 to distinguish the arrangement *in casu* from that at issue in *Mox Plant*: Article 282 UNCLOS[52] gives precedence to the dispute settlement mechanisms in the EU Treaties, while Article 5 of the Draft Agreement merely cancels the precedence claim by Article 55 ECHR. For the Court the threshold clearly is that the international agreement in question (accession agreement or original agreement) recognizes the precedence of the dispute settlement mechanisms of EU law.

Johansen is still right to note that even Article 282 UNCLOS does not completely rule out that EU Member States make use of the dispute settlement mechanisms provided in UNCLOS. As the Court also noted "*the system for the resolution of disputes set out in the [EU Treaties] must in principle take precedence over that contained in Part XV of [UNCLOS].*"[53] After all, Article 282 UNCLOS provided in the precedence of the procedures in the EU Treaties "*unless the parties to the dispute otherwise agree.*" As a result Article 282 UNCLOS, even if more strictly worded, just like Article 5 of the Draft Agreement does not completely rule out the possibility of EU Member States ignoring the obligation of Article 344 TFEU. While this means that the international agreements at issue in *Mox Plant* and Opinion 2/13 resembled each other more than the Court would care to admit (on this point), it might be exaggerated to find a reinterpretation of Article 344 TFEU in Opinion 2/13. This also because the argument which the Court developed in *Mox Plant* in relation to Article 282 UNCLOS was already superfluous, since it had early found that the dispute concerned EU law and that it had exclusive jurisdiction. From this perspective, Opinion 2/13, although evidently criticisable,[54] may be seen as simply confirming the Court's established interpretation of Article 344 TFEU.

Here it may be interesting to juxtapose the literal provision with the provision as interpreted by the Court. As noted above, Article 344 TFEU provides: "*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 therein.*" The Court has given a very expansive reading to this provision by ruling (i) that 'a dispute concerning … the Treaties' encompasses 'a dispute concerning … primary and secondary law',[55] (ii) that the 'Member States' are the 'Member

[52] The full Article provides: "*If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.*"

[53] See Case C-459/03, *Commission v. Ireland*, ECLI:EU:C:2006:345, para. 125.

[54] Pernice notes how the Court held the possibility of Member States bringing actions against the EU before the ECtHR contrary to Article 344 TFEU, even if the latter only deals with disputes between Member States. In addition he showed how the solution proposed by the Court itself would not meet its own strict standard, since the ECtHR would still have to rule on the admissibility of an action brought by a Member State. While the ECtHR should then find that it does not have competence, the eventuality that it accepts jurisdiction can never be excluded and as a result, also the Court's solution would be 'liable to affect Article 344 TFEU'. See PERNICE Ingolf, 'L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme est suspendue' (2015) 51 *Cahiers de droit européen* 1, pp. 63-64.

[55] See Case C-459/03, *Commission v. Ireland*, ECLI:EU:C:2006:345, para. 152

States and the EU (institutions)',[56] (iii) that 'primary and secondary EU law' includes 'international rules coming within the scope of EU competence',[57] (iv) that the prohibition to 'submit a dispute' is actually a prohibition on 'the (theoretic) possibility that a dispute might be submitted',[58] and that (v) the 'method of settlement other than those provided in [EU law]' means the 'method of settlement other than those provided in EU primary law'.[59]

## 3. Judicial dialogue in the shadow of Article 344 TFEU

So what does the Court's interpretation of Article 344 TFEU reveal about its capacity to engage in judicial dialogue? As noted by a number of commentators (cf. *infra*), the Court's expansive reading of Article 344 TFEU (and the resulting strict requirements which it identified for the EU's accession to the ECHR) show a Court that appears (hyper?)sensitive to any encroachment on its function. According to Dubout the Court's understanding of the EU's autonomy, following its interpretation of Article 344 TFEU, is inspired by an 'absolutist conception of autonomy',[60] or as Eeckhout puts it the Court sees the EU's identity and autonomy as being self-contained and unbridgeable, bordering on autarky.[61] This (hyper)sensitive approach by the Court thereby shows a great mistrust in, *in casu*, the ECtHR, whereby the Court seems to assume that the ECtHR will not respect its own mandate. Eeckhout finds these fears far-fetched and out of place and resulting from a lack of trust.[62] Such lack of trust between courts, Eeckhout notes, is far from conducive for a genuine judicial dialogue.[63] Whether the Court should be denounced for its apparent mistrust is a different matter which will not be addressed here. As noted above, the EU and the CJEU are not as uncontested as national states and national constitutional courts, meaning the Court might rightly be sensitive about its (and the EU's) autonomy. More specifically, perhaps the Court felt threatened by certain antecedents in the jurisprudence of the ECtHR. As Eeckhout points out, the *M.S.S.* case[64] in which the ECtHR had found that Belgium

[56] See Opinion 2/13, ECLI:EU:C:2014:2454, para. 213 and View of AG Kokott in Opinion procedure 2/13, ECLI:EU:C:2014:2475, para. 107.

[57] See Case C-459/03, *Commission v. Ireland*, ECLI:EU:C:2006:345, para. 120.

[58] See Opinion 2/13, ECLI:EU:C:2014:2454, para. 212. This may be juxtaposed with the Arbitral Tribunal's reading of Article 344 TFEU in the Iron Rhine arbitration case between Belgium and the Netherlands. The EU's Trans-European Network policy and the Habitats directive were also invoked in this regard but the Tribunal did not find this problematic under Article 344 TFEU, since it found that there was no real dispute about the interpretation of those EU rules and even if there was one that a dispute on the correct interpretation of EU law was not decisive in coming to a judgment. See Arbitral Tribunal, Award in the Arbitration regarding the Iron Rhine Railway (Belgium v. Netherlands), 24 May 2005, Reports of International Arbitral Awards, Vol. XXVII, paras 102-106, 120 & 137. The Ribunal thereby applied by analogy some of the Court's jurisprudence on domestic courts in the preliminary procedure, without qualifying itself as a court or tribunal of a Member State in the sense of Article 267 TFEU, contrary to what Van Badel claims. See VAN BADEL Ineke, The Iron Rhine Arbitration Case: On the Right Legal Track? An Analysis of the Award and of its Relation to the Law of the European Community, (2005) 18 *Hague Yearbook of International Law*, pp. 14-16. The Tribunal's interpretation of Article 344 TFEU is of course markedly more narrow compared to that of the Court of Justice. From the latter's Opinion 2/13, the Tribunal, by interpreting Article 344 TFEU, also intruded on the Court's jurisdiction. See by analogy Opinion 2/13, ECLI:EU:C:2014:2454, para. 224.

[59] See Case C-459/03, *Commission v. Ireland*, ECLI:EU:C:2006:345, paras 130-132.

[60] DUBOUT Edouard, 'Une question de confiance: nature juridique de l'Union européenne et adhésion à la Convention européenne des droits de l'homme', (2015) 51 *Cahiers de droit européen* 1, p. 80.

[61] EECKHOUT, *op. cit.*, pp. 38-39. Besselink has even suggested the notion of 'autism' to describe the Court's position. See BESSELINK Leonard, Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13, 23/12/2014, *Verfassungsblog.de*.

[62] EECKHOUT, *op. cit.*, pp. 13 & 29-31

[63] *Ibid.*, p. 18.

[64] ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09.

had violated the ECHR even if it only applied the EU Dublin rules on asylum application had been integrated by the Court in its *N.S.* judgment in which it had ruled that systemic violations of fundamental rights by EU Member States could justify that one EU Member State does not automatically send back an asylum seeker to the first point of entry in the EU, even if in principle there should be mutual trust between EU Member States on each other's asylum systems.[65] In *Tarakhel* however, the ECtHR further undermined the principle of mutual trust between EU Member States by requiring states bound by the Dublin rules to set aside that principle in every single case in which the Convention rules are not respected, rather than only in case of systemic violations.[66] Here critics of the CJEU might argue that its mistrust is in fact a result of being confronted with an activist international court like itself, a point which will be briefly returned to later.

Dubout draws parallels between the (hyper)sensitive approach of the Court in Opinion 2/13 with the position taken by certain national constitutional courts.[67] Indeed, one cannot rid oneself of the impression that the Court of Justice, aware of what its own jurisprudence has meant for national constitutional courts, has vetoed the EU's adhesion to the ECHR to remain a sovereign court of an autonomous rather than an (internationally) integrated legal order.[68] In addition, the distance between the ECtHR and the CJEU following Opinion 2/13 appears much greater than that currently between the national constitutional courts and the CJEU. The parallel between the CJEU's approach to the ECtHR and that (at least originally) of the national constitutional courts vis-à-vis the CJEU is clear. The CJEU is currently insisting on the EU's (and its own) autonomy in such a way that several commentators have already noted that EU accession to the ECHR is impossible (on the terms spelled out by the CJEU in Opinion 2/13).[69] The Court's insistence on its autonomy, perhaps seeing the EU and the ECHR 'legal orders' as separate but coordinated, could very well backfire and leave it sidelined, similarly to the Italian CC originally (cf. *supra*). In respect of several objections of the Court in Opinion 2/13 Eeckhout also notes that the possible negative effects for the CJEU of the EU joining the ECHR (on the terms of the Draft Agreement) are less severe than the possible negative effects for the EU's autonomy under the status-quo.[70] The CJEU's insistence on its autonomy itself already not being beneficial for (formal) judicial dialogue between the CJEU and the ECtHR, the Court's Opinion could

[65] Joined Cases C-411/10 and C-493/10, *N.S.*, ECLI:EU:C:2011:865, para. 94.
[66] ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12, para. 104. This judgment contradicts the Court's ruling in *Abdullahi* (confirming *N.S.*), see Case C-394/12, *Abdullahi*, ECLI:EU:C:2013:813, para. 60.
[67] DUBOUT, *op. cit.*, p. 81.
[68] Wachsmann, following the Court's first opinion on ECHR adhesion already noted: "*Afin de ne pas devenir elle-même une juridiction interne, à l'égard d'une autre juridiction internationale, elle bloque avec beaucoup d'énergie les tentatives d'intégration de la Communauté dans un ensemble plus vaste comportant une juridiction.*" See WACHSMANN Patrick, 'L'avis 2/94 de la Cour de justice relatif à l'adhésion de la Communauté européenne à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales', (1996) 32 *RTDE* 3, p. 489.
[69] SAURON Jean-Luc, 'L'avis 2/13 de la Cour de justice de l'Union européenne: la fin d'une idée anachronique? (2015) *Gazette du Palais* 1, pp. 4-6; Editorial Comments, 'The EU's Accession to the ECHR – a "NO" from the ECJ!', (2015) 52 *Common Market Law Review* 1, p. 14. Bausback notes that the Court simply does not want the EU to adhere to the ECHR and instead wants to protect its own competences. See BAUSBACK Winfried, 'Wer hat Angst vor dem EGMR' (2015) *Zeitschrift für Rechtspolitik* 4, p. 97.
[70] See *i.a.* EECKHOUT, *op. cit.*, p. 17.

also be interpreted by the ECtHR as a rejection of its role as the ultimate guardian of human rights in Europe, further affecting the relations between the two courts.[71]

Summarizing briefly, the Court's conceptualisation of the autonomy of the EU legal order, exemplified in its interpretation of Article 344 TFEU poses an obstacle to genuine judicial dialogue with other international courts. This would not seem confined to the cases actually coming under Article 344 TFEU since the Court's interpretation of that Article may be seen as revealing its broader approach towards international courts. Indeed, a self-conscious court of an autonomous legal order which in effect acts as an autarkic court has few reasons to engage in meaningful dialogue with other international courts. However, this preliminary conclusion also depends on whether the Court's interpretation of Article 344 TFEU is truly representative of its understanding of the EU's autonomy. After all, the Court's expansive reading of Article 344 TFEU could also be the result of the very peculiar cases in which this Article figures and the Commission's reluctance to bring infringement cases (on this issue) to the Court.[72]

## V. The Supreme Court of the autonomous EU in an international context

In this final section the broader international context in which an international judicial dialogue would take place will be briefly looked at. As noted above, this context is a dynamic one in which multiple legal systems are proliferating and whereby a trend of judicialisation[73] has caught academic attention since the 1990's.[74] The jury still seems out on whether this trend leads to fragmentation or whether the proliferating international courts and tribunals actually share a common purpose or a shared agenda.[75] Still, even those authors taking a positive perspective caution that different international tribunals should share a coherent understanding of international law,[76] that the proliferation should go hand in hand with specialisation[77] and that these international judges should show good faith and respect vis-à-vis their previous holdings and to "*relevant holdings of other international tribunals in the interest of judicial harmony*."[78] Dupuy and Viñuales warn that the proliferation should not result in fragmentation but rather in integration, rightly noting that "*no effort at integration can succeed if*

[71] EECKHOUT, *op. cit.*, p. 37
[72] See in this regard the Iron Rhine case between Belgium and the Netherlands disputed before an Arbitral Tribunal. While the dispute was much less connected to EU law than Mox Plant, a case could still be made that both Member States violated Article 344 TFEU by agreeing to bring the dispute before an Arbitral Tribunal. See also VAN BADEL *op. cit.*, pp. 20-22. The Commission, however, never brought proceedings under Article 258 TFEU.
[73] Alter notes that the number of international courts has grown from 7 (in 1985) to 26 (in 2008). See ALTER Karen, Agents or Trustees? International Courts in their Political Context, *in* Alter, *The European Court's Political Power: Selected Essays*, Oxford, OUP, 2009, p. 237.
[74] See for instance the 1998 New York University symposium entitled 'The Proliferation of International Courts and Tribunals: Piecing Together the Puzzle', the proceedings of which were published in (1999) 31 *New York University Journal of International Law* 4.
[75] ALVAREZ Jose, 'Three Responses to Proliferating Tribunals', (2009) 41 *New York University Journal of International Law* 4, pp. 1011-1012.
[76] Charney as cited in RAO Pemmaraju Sreenivasa, 'Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation', (2004) 25 *Michigan Journal of International Law* 4, p. 959.
[77] ABI-SAAB George, 'Fragmentation or Unification: Some Concluding Remarks, (1999) 31 *New York University Journal of International Law* 4, p. 925.
[78] RAO Pemmaraju Sreenivasa, *op. cit.*, p. 961.

*judges themselves are unwilling or simply unable to keep the 'big picture' of international law in mind.*"[79] Indeed, it is too often assumed that international courts, regardless of their origin, act in function of a coherent international legal system, rather than in function of interests or objectives more specific to their constituent charter and that they are willing and able to engage in genuine judicial dialogue with each other. It downplays the possibility that an international court such as the CJEU, despite having explicitly confirmed that the EU is not a state,[80] might act similarly to national supreme/constitutional courts which are not firstly concerned with the benign objective of ensuring a harmonious and coherent development of the international legal system and which have no interest in 'specialising' to this end.

How the Court's relationship with these other international courts or tribunals will evolve of course also depends on how the latter react to the Court's stretching of the frontiers of its *jurisdictional territory* (i.a.) in its interpretation of Article 344 TFEU.[81] Generally speaking, the Court's interpretation of its mandate under EU law is not binding on other international courts and tribunals. Whether the latter will respect the frontiers of the Court's exclusive jurisdiction, as defined by the Court itself, is far from settled.[82] That the Court tries to solve jurisdictional conflicts unilaterally, rather than in a spirit of 'mutual respect and comity',[83] may then not be well-received by other international courts and tribunals.[84]

Two illustrations may serve to shed light on the greater international context. First, the international proceedings initiated by Ireland in the Mox Plant case will be looked into. Subsequently the judicial activism of the ITLOS in case 21 will be commented.

[79] DUPUY Pierre-Marie & VIÑUALES Jorge, 'The Challenge of "Proliferation": An Anatomy of the Debate', *in* Romano Cesare, Alter Karent & Shany Yuval (eds), *The Oxford Handbook of International Adjudication*, Oxford, Oxford University Press, 2014, p. 149.

[80] See Opinion 2/13, ECLI:EU:C:2014:2454, para. 156.

[81] See AFROUKH Mustapha & COUTRON Laurent, 'La competence – exagérément?- exclusive de la Cour de justice pour l'examen des recours interétatiques, (2015) *Revue des Affaires européennes* 1, p. 67. In relation to the jurisdictional territory of regional courts, Kapteyn noted that Article 344 TFEU assures that no negative conflicts of jurisdiction arise and that (generally) regional courts "*their jurisdiction should be clearly confined to the interpretation and application of the regional body of law they have to administer*". See KAPTEYN Paul, 'Regional Courts' *in* Heere (ed.), *International Law and The Hague's 750th Anniversary*, The Hague, Asser Instituut, 1999, p. 428 & p. 431. However, the Court's interpretation of Article 344 TFEU cannot be said to result in a clearly confined jurisdiction, see *supra* footnote 57.

[82] For instance, in *Electrabel v. Hungary*, an investor-state dispute under the Energy Charter Treaty not covered by Article 344 TFEU, the arbitrators noted: "*It is however doubtful whether this decision of the ECJ [i.e. Mox Plant] would prevent, for example, the International Court of Justice (ICJ) from deciding any issue of EU law, if raised in a dispute involving two or more EU Member States.*" See Arbitral Tribunal, Electrabel S.A. v. The Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.150.

[83] See *infra* at footnote 89.87

[84] The mutual respect and comity referred to by the Arbitral Tribunal in the *Mox Plant* case (cf. *infra* footnote 89) is of course an elegant way to ignore the fundamental problem of the precise relationship between (two) different legal orders. Barents notes in this regard that there are only two options (*tertium non datur*), either they are both autonomous vis-à-vis each other or they are integrated in which case the law of one legal order enjoys primacy over that of the other. See BARENTS René, De voorrang van unierecht in het perspectief van constitutioneel pluralisme, (2009) 57 *SEW* 2, p. 47. By emphasising self-restraint, mutual respect and comity, conflicts, which raise the issue of primacy, may then be avoided.

## A. Mox Plant from an international perspective

The immediate cause of the Mox Plant case before the Court of Justice under current Article 258 TFEU was Ireland's decision to bring proceedings against the UK under international dispute settlement mechanisms. To be precise, Ireland had (i) initiated proceedings before an OSPAR Arbitral Tribunal arguing that the UK had violated Article 9 of the OSPAR Convention by providing Ireland with only partial access to certain reports on the Mox plant at Sellafield. Further Ireland (ii) initiated proceedings before an UNCLOS Annex VII Arbitral Tribunal to prevent the UK from authorizing the operation of the plant. Lastly, Ireland (iii) initiated proceedings before the ITLOS to have interim measures prescribed, preventing the UK from authorizing the operation of the plant.[85]

Before these three bodies, the issue of the possible exclusionary effect of Article 344 TFEU presented itself and before the UNCLOS Tribunals, the disconnection clause of Article 282 UNCLOS had to be addressed as well. When confronted with the issue whether Article 9 of the OSPAR Convention that was modelled on an EU Directive should also be interpreted in light of the Directive, the OSPAR Tribunal simply referred to the reasoning developed by the ITLOS.[86] The latter had found, following the UK's claim that its dispute with Ireland mainly came under OSPAR and EU rules, that "*even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the [UNCLOS], the rights and obligations under those agreements have a separate existence from those under the Convention; [and] that the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux préparatoires.*"[87] The ITLOS thereby confirmed the Annex VII Tribunal's *prima facie* jurisdiction to hear the case (pursuant to Article 290 (5) UNCLOS). It further interpreted Article 282 UNCLOS restrictively, finding that it only applies to the settlement of disputes concerning UNCLOS,[88] whereas Article 259 TFEU concerns disputes on EU law. The Annex VII Tribunal however found that, *i.a.* in light of Article 344 TFEU, the possibility of an infringement procedure pursuant to Article 258 TFEU and "*bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, […] it would be inappropriate for it to proceed further with hearing the Parties on the merits of the dispute in the absence of a resolution of*

[85] For a discussion of the Mox Plant saga, see CHURCHILL Robin, MOX Plant Arbitration and Cases, Max Planck Encyclopedia of Public International Law, OUP, September 2007.
[86] OSPAR Tribunal, Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v United Kingdom of Great Britain and Northern Ireland), Final Award, 2 July 2003, paras 141-142.
[87] ITLOS, Mox Plant (Ireland v. United Kingdom), Order, 3 December 2001, paras 50-51.
[88] *Ibid.*, paras 48-49.

*the problems referred to. Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties.*"[89]

The Arbitral Tribunal indeed had to deal with the substantive and procedural parallelism,[90] which exists in international law and which becomes increasingly significant with the proliferation of specialised regimes and tribunals. On this parallelism, another Annex VII Arbitral Tribunal (in the *Southern Bluefin Tuna* (SBT) Case) noted: "*[The] Tribunal recognizes […] that it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. The current range of international legal obligations benefits from a process of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention.*"[91] The Tribunal in the SBT case held that the parties were confronted with one single dispute and subsequently had to identify the applicable dispute settlement, finding that the parallel CSBT Convention excluded recourse to the dispute settlement mechanisms under Section 2 of UNCLOS Part XV, thus concluding that it lacked jurisdiction.

Although the ITLOS' finding of *prima facie* jurisdiction for an Arbitral Tribunal when it has to decide on provisional measures is entirely different from an Arbitral Tribunal's findings on its jurisdiction,[92] ITLOS clearly takes a more activist approach than the Arbitral Tribunals. Indeed, Kwiatkowska notes that (in Mox Plant), "*the ITLOS in a number of ways appears to set in advance the goal of giving priority to the LOSC, Part XV, Section 2, i.e. Annex VII Arbitral Tribunal, and subordinated all its holdings to that goal.*"[93] This was itself only possible following the ITLOS' finding that Mox Plant concerned several disputes, rather than only one.[94]

The resulting picture then is a rather nasty one. The UNCLOS Arbitral Tribunals give a broad reading of Articles 281 and 281 UNCLOS, resulting in the exceptional applicability of the mechanisms of Section 2 of Part XV UNCLOS. The ITLOS on the other hand interprets these Articles restrictively, conforming its own jurisdiction (or that of other Tribunals and Courts foreseen in Section 2 of Part XV UNCLOS), splitting up a single dispute

[89] UNCLOS Arbitral Tribunal, Mox Plant (Ireland v. United Kingdom), Order N° 3, 24 June 2003, para. 28.
[90] See also KWIATKOWSKA Barbara, The Ireland v. United Kingdom (Mox Plant) Case: Applying the Doctrine of Treaty Parallelism, (2003) 18 *International Journal of Marine and Coastal Law* 1, p. 4.
[91] UNCLOS Arbitral Tribunal, Southern Bluefin Tuna (Australia and New Zealand v. Japan), Award on Jurisdiction and Admissibility, 4 August 2000, para. 51.
[92] SHABTAI Rosenne, 'Settlement of Disputes: A linchpin of the Convention – Reflections on fishery management disputes', *in* Proceedings of the Twentieth Anniversary Commemoration of the opening for signature of the United Nations Convention on the Law of the Sea, p. 127 (available at: https://www.isa.org.jm/sites/default/files/files/documents/commrep_web.pdf).
[93] KWIATKOWSKA, *op. cit.*, p. 25.
[94] As a result, ITLOS could find that part of the dispute fell under UNCLOS and another under EU and OSPAR law. This was very much criticised by Kwiatkowski, pp. 26-28. Elsewhere Kwiatkowska refers to the ITLOS' holdings as "*contradicting the requirements of 'judicial courtesy and propriety'*." See KWIATKOWSKA Barbara, The Southern Bluefin Tuna Arbitral Tribunal Did Get It Right: A Commentary and Reply to the Article by David A. Colson and Dr. Peggy Hoyle, (2003) 34 *Ocean Development and International Law* (3-4), p. 381.

to be settled through different procedures. The Court of Justice, equally, or even more, activist, claims exclusive jurisdiction based on Article 344 TFEU since most elements of the disputes come under EU law (in a broad sense) and arrogates to itself the power to identify those elements of the dispute which come under the jurisdiction of other international courts.[95]

## B. Further ITLOS activism: case 21

A second development is the first advisory opinion by the ITLOS as a full court delivered on the second of April 2015. While the advisory jurisdiction of the ITLOS' Seabed Disputes Chamber is provided in Articles 159 (10) and 191 UNCLOS, the advisory jurisdiction of the full court is not foreseen in UNCLOS or even in ITLOS' statute and has instead been provided in Article 138 of the Rules of Procedure which the ITLOS itself adopts pursuant to Article 16 of its Statute. That Article 138 provides in paragraph 1: "*The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.*" As Qiang notes several elements in this provision are far from clear and there is an evident possibility that ITLOS, through Article 138 of its Rules of Procedure, expands its jurisdiction,[96] in ways not foreseen or meant by the contracting parties to UNCLOS.

The advisory opinion in case 21 was requested by the Sub-Regional Fisheries Commission (SRFC), a West-African organisation established to combat illegal, unreported and unregulated (IUU) fishing in the exclusive economic zones (EEZs) of the members of the SRFC. IUU fishing is a question of great importance also for the EU (and its Member States) which has concluded agreements with several West-African states securing access to their EEZs for European fishermen. During the proceedings in case 21, the EU and several of its Member States lodged observations. The UK had argued that the ITLOS lacked jurisdiction since Article 138 of the Rules of Procedure was *ultra vires* and,[97] in the alternative, that ITLOS should decline to give the requested opinion because international courts ought to be cautious in exercising advisory jurisdiction.[98] Germany on the other hand found that the ITLOS did have jurisdiction, referring *i.a.* to UNCLOS and the Statute as 'living instruments.[99] The EU explicitly did not address the issue of the ITLOS' jurisdiction but it did

[95] Case C-459/03, *Commission v. Ireland*, ECLI:EU:C:2006:345, para. 135.
[96] QIANG Ye, 'A Study on the Advisory Proceedings before the ITLOS as a Full Court', (2014) *China Oceans Law Review* 19, p. 26.
[97] See Written Statement of the UK Government in case 21 Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), first round, para. 35.
[98] *Ibid*., para. 36.
[99] See Written Statement of the German Government in case 21 Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), first round, para. 8. The French government merely noted that the ITLOS' jurisdiction was uncertain, while the Netherlands emphasised that ITLOS could only have jurisdiction in so far as the opinion was limited to the activities of the SRFC and its members. The Spanish government argued along the lines of the UK government, without going as far as explicitly qualifying Article 138 of the Rules of Procedure as ultra vires.

question the admissibility of the questions which were too broadly formulated and did not actually call for the interpretation of any particular agreement.[100]

In the end the ITLOS confirmed its jurisdiction,[101] and found the questions referred to it admissible, *i.a.* by being satisfied that the questions referred to it had 'a sufficient connection' with the agreement which it was called to interpret.[102] The ITLOS further confirmed its discretion in entertaining requests referred to it, but found the questions sufficiently precise and did not take issue with the fact that it would pronounce itself on the rights and obligations of states which are not member of the SRCF (and therefore had not consented to the referral to ITLOS). According to ITLOS their consent was not necessary, since the opinion is only addressed to the SRCF.[103] In a separate opinion, Judge Lucky not only repeated the description of UNCLOS and the ITLOS Statute as 'living instruments', but also observed: "*Contrary to the views of many, this Tribunal is a court of superior record not a tribunal set up to enquire into or to determine a specific matter.*"[104] Of the other Judges, only Judge Cot was more critical. While also finding that the ITLOS had jurisdiction, he cautioned against the great willingness of the ITLOS to answer questions of a limited number of coastal states with special relevance to the flag states (uninvolved in drafting the questions) and warned how the ITLOS could become compromised if other different states or regional organisation would refer questions to the ITLOS to gain advantages over other parties.[105]

The ITLOS thus affirmed its jurisdiction with an assertiveness resembling that of the CJEU. It should be clear however that if other international courts, such as ITLOS, affirm their broad jurisdiction and are content as long as the questions referred to them have a sufficient connection to the material rules falling within their competence, judicial dialogue becomes necessary. At the same time the ITLOS heightened self-consciousness, as evidenced by the observation by Judge Lucky, may also hinder judicial dialogue should courts like ITLOS also start to emphasise the necessary autonomy of, *in casu*, UNCLOS from general public international law.

As a final note it may be observed that the EU and its Member States did not act in a concerted manner before the ITLOS in case 21 even if it concerned a matter of exclusive

[100] See Written Statement of the EU in case 21 Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), first round, paras. 1-17.
[101] This *i.a.* using a technique which is not unknown to the CJEU either, see ITLOS, Advisory Opinion in case 21, Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), para. 57. In an annotation to the case, Ruys and Soete remark how the Tribunal's conclusion on its jurisdiction was unsurprising but the still regretted the brevity and the unconvincing nature of the Tribunal's reasoning on this issue. See RUYS Tom and SOETE Anemoon, 'Creeping' Advisory Jurisdiction of International Courts and Tribunals? The Troublesome Case of the International Tribunal for The Law of the Sea (August 17, 2015), pp. 27-29 (Available at SSRN: http://ssrn.com/abstract=2645895 or http://dx.doi.org/10.2139/ssrn.2645895).
[102] ITLOS, Advisory Opinion in case 21, Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), para. 68
[103] *Ibid.*, para. 76.
[104] See separate opinion of Judge Lucky in case 21 Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), para. 18.
[105] See declaration of Judge Cot in case 21 Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), para. 9.

EU competence. This was a result of a dispute, also brought before the Court, between the Council and Commission on whether the latter needed the approval of the Council to intervene before the ITLOS. In any event, the fact that the Member States intervened separately from the EU is doubtful in light of *Commission v. Greece* and *Commission v. Sweden*.[106] On the Commission's intervention before the ITLOS without prior approval by the Council, the Court ruled that this was not problematic, since the Commission has the general competence to represent the Union externally and because its submissions did not constitute the formulation of a (new) policy but merely the representation of the EU law position.[107] The Court confirming this competence of the Commission undoubtedly has an (indirect) effect on the judicial dialogue with international courts: If the Commission can express the EU opinion without requiring a Council mandate, the chances will be greater that an international court will receive a proper account of any relevant EU rules, which appears as a minimum condition for that court to engage with the CJEU in a judicial dialogue (on EU law).

## VI. Conclusion

The present contribution started from the premise that the EU legal order and the CJEU operate in an international and inter-normative context; and that the EU legal order should co-exist harmoniously with other international legal systems. To this end judicial dialogue appears indispensable. While the CJEU has the formal capacity to engage in such judicial dialogue, its insistence on and its specific interpretation of the autonomy of the EU legal order as exemplified in its interpretation of Article 344 TFEU would seem to constitute a significant hurdle for the Court to engage in a genuine judicial dialogue with other international courts. This depends on the question whether the Court's interpretation of Article 344 TFEU and its understanding of the EU's autonomy (in very specific cases such as Mox Plant and Opinion 2/13) indeed permeate its entire jurisprudence.

The CJEU's approach resembles (ultimately unsuccessful) strategies originally employed by some national constitutional courts in their relation with the CJEU itself. This both shows the risks involved in the Court's apparent strategy as well as the possibility of a more constructive relation with other international courts. On the other hand, the motives for the Court to insist on the autonomy of EU law are not immediately dismissed. This would require addressing the question whether the Court might indeed have very good reasons to be sensitive about its 'exclusive jurisdiction' which is continuously under pressure from the national level (both from the judicial, executive and legislative branches) and the international level.

[106] These cases concerned unilateral action by Member States in international organisations on matters coming under the scope of EU law. See Case C-45/07, *Commission v. Greece*, ECLI:EU:C:2009:81; Case C-246/07, *Commission v. Sweden*, ECLI:EU:C:2010:203.
[107] Case C-73/14, *Council v. Commission*, ECLI:EU:C:2015:663.

That said, the inter-normativity in which the CJEU also operates remains an objective reality which cannot be ignored by (internally) affirming the autonomy of the EU legal order. Despite all possible well-founded reservations on the part of the CJEU, judicial dialogue remains necessary. The Court claiming a kind of *primus inter pares* position among international courts then seems only tenable if this is also accepted by other international courts. This is not self-evident, especially if other international courts acquire a higher degree of 'self-consciousness' similarly to the CJEU.

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