Body, to the criticism levelled by the United States.[35] By doing so, the Panel may have planted the seed for a softened notion of precedential strength—a compromise, to be sure, but one that might have been embraced by the United States and the Appellate Body alike, thereby improving the chances for the long-term survival of the dispute settlement system.

In light of the Appellate Body's previous holdings on these matters, and its record in chastising "rogue" panels, its pronouncement on Canada's appeal would have been of considerable interest. Having been appealed, the Panel Report remains in a limbo,[36] and it remains to be seen whether panels tasked with resolving similar matters will find guidance in it.[37]

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Reference for a preliminary ruling—effective judicial protection—principle of judicial independence —primacy of EU law

Joined Cases C-585/18, C-624/18, C-625/18. Judgment. *At* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0585.
Court of Justice of the European Union, Grand Chamber, November 19, 2019.

The judgment of the Grand Chamber of the Court of Justice of the European Union (CJEU) announced on November 19, 2019 in response to a preliminary reference from the Polish Supreme Court is of fundamental importance for the independence of courts and judges in EU countries, establishing a pillar on which subsequent CJEU decisions have been based. The CJEU concluded that a national court is not an independent and impartial tribunal within the meaning of the European Union (EU) law where the objective circumstances in which that court was formed, its characteristics, and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external interference. In particular, a court may cease to be seen as independent or impartial when it appears to be under the direct or indirect influence of the legislature and/or the executive, or where doubts emerge about their neutrality with respect to the interests before them. Such circumstances threaten the trust that justice in a democratic society must inspire in subjects of the law.

The specific case, and the questions posed by the Polish Supreme Court, also involve a dialogue between a national court and the CJEU as they work through a complicated puzzle of the competences of the EU and the member states. Although the organization of the judiciary is a member state competence, while exercising that competence member states have a

[35] *See* Trade Policy Agenda, *supra* note 2, at 26–29.

[36] Until new Appellate Body members are appointed or, the argument has been advanced, by the WTO Dispute Settlement Body by *positive* consensus. For the argument, see Joost Pauwelyn, *WTO Dispute Settlement Post-2019: What to Expect?*, 22 J. Int'l Econ. L. 297, 310 (2019).

[37] In particular, a dispute with some similarities initiated by Vietnam was delayed by the COVID-19 pandemic. *See* United States—Anti-dumping Measures on Fish Fillets from Vietnam, Communication from the Panel, WTO Doc. WT/DS536/6 (June 5, 2020).

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duty to comply with their obligations under EU law, and the procedure for appointing judges must be free from defects that may raise doubts as to the standards of independence of courts and judges. In the judgment, the CJEU determined that the manner of choosing judges may be subject to assessment under EU law.

Pursuant to the Law on the Supreme Court of Poland of December 8, 2017, judges of this court (and judges of the Supreme Administrative Court, to which this law is also applicable), as a rule, must retire at the age of sixty-five unless they submit a declaration of intent to continue in their position, present a medical certificate, and the president of Poland consents to their continuing as a judge for another three years (with a possibility of only one further extension). In accordance with the procedure specified in this Act, before granting consent, the president is obliged to consult the National Council of the Judiciary.

Two judges of the Supreme Court and one judge of the Supreme Administrative Court brought cases before the Polish Supreme Court alleging, inter alia, a violation of the prohibition of discrimination on grounds of age in the field of employment, guaranteed by EU Law, specifically, Article 2(1) of Directive 2000/78.

Two wrinkles potentially stood in the way of a preliminary reference to the CJEU. First, according to the Law on the Supreme Court of Poland, cases related to employment of Supreme Court judges are to be adjudicated by the newly created Disciplinary Chamber of the Supreme Court. The referring court raised serious doubts whether this new Disciplinary Chamber and its members would provide sufficient guarantees of independence and impartiality given the circumstances in which the new judges of that court were to be appointed.

Second, in the course of the case, there was an attempt to terminate the preliminary reference. The Polish National Council of the Judiciary (KRS), the public prosecutor, and the Polish government argued that a law amending the New Law on the Supreme Court was passed on November 21, 2018, removing the controversial obligation for the current judges of the Supreme Court to retire at the age of sixty-five. In the opinion of the Polish government, this should have closed the case, because all three proceedings before the referring court would be subject to mandatory discontinuation—no preliminary ruling was therefore needed. The CJEU reminded the Polish government that it is solely for the national court before which the dispute has been brought to determine the need for a preliminary ruling. Because the Polish Supreme Court upheld the legitimacy of its questions, the cases continued.

The referring court asked:

> whether Article 2 and the second subparagraph of Article 19(1) [Treaty on European Union (TEU)], Article 267 [Treaty on the Functioning of the European Union (TFEU)] and Article 47 of the Charter[1] must be interpreted as meaning that a chamber of a supreme court in a Member State, such as the Disciplinary Chamber, which is called on to rule on cases falling within the scope of EU law, satisfies, in the light of the circumstances in which it was formed and its members appointed, the requirements of independence and impartiality required by those provisions of EU law. If that is not the case, the referring court asks whether the principle of the primacy of EU law must be interpreted as

[1] Charter of Fundamental Rights of the European Union, Oct. 26, 2012, OJ EU 2000/C 364/01.

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meaning that that court is required to disapply the provisions of national law which reserve jurisdiction to rule on such cases to that chamber of that court.[2]

In order to understand the true meaning of these questions, it is necessary to present the legal changes that were made to the procedure for appointing judges in 2017 and thereafter.

Under Article 179 of the Polish Constitution, the president shall appoint judges, based on a proposal of the KRS, for an indefinite period. The KRS shall be the guardian of the independence of the courts and of the judges[3] and shall be composed of members representing all three powers (judicial, dualistic executive, and legislative) providing a nuanced balance between them. The Constitution further states that fifteen members of the KRS shall be elected from among the judges of the Supreme Court, the ordinary courts, the administrative courts, and the military courts.[4] While the Constitution does not specify who should perform such election, it does not contain a presumption of parliamentary competence either, and the practice before the adoption of the 2017 law was that judges elected the judicial members of the KRS. It has also been well established in constitutional doctrine that state institutions must act on the basis and within the limits of the law (i.e., there is no implied powers doctrine). For example, the same article of the Constitution sets forth the powers of both houses of parliament to nominate their representatives on the KRS from among the parliamentarians but not from among the judges. According to the Constitution, the regime applicable to the KRS and the procedure by which its members are elected (but not by whom they are elected) shall be laid down by law.

On December 8, 2017, two key statutes were adopted. The first statute, the Law Amending the Law on the National Council of the Judiciary, shifted the competence to elect the fifteen judicial members of the KRS from the judges themselves to the Parliament. It also terminated the term of office of the previous KRS. The general composition of the KRS was preserved, but the judicial members of the KRS were elected by the lower chamber of the Parliament and not by the assemblies of judges, as before. According to the Polish government, this change made the judiciary more transparent and representative. The second statute established a new chamber in the Polish Supreme Court: the Disciplinary Chamber.[5] Among the cases that fall within the jurisdiction of the Disciplinary Chamber are disciplinary proceedings involving Supreme Court judges, labor law and social security proceedings involving Supreme Court judges, and proceedings concerning the compulsory retirement of a Supreme Court judge—the key provision at issue in two cases, C-624/18 and C-625/18, referred to the CJEU. It is worth stressing that the establishment of the Disciplinary Chamber in the Supreme Court and the takeover by politicians of control over the elections of the majority of the members of the KRS met with widespread criticism in professional and nonprofessional circles as well as social protests.

Among the factors pointed to by the referring court were: (1) the fact that KRS, as newly composed, was formed by reducing the ongoing four-year terms of then members of that

[2] Joined Cases C-585/18, C-624/18, C-625/18, Judgment, para. 72 (Ct. Just. EU, Grand Chamber Nov. 19, 2019).

[3] Constitution of the Republic of Poland, Art. 186.1.

[4] *Id.* Art. 187.1.2.

[5] Act of 8 December 2017 on the Supreme Court.

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body; (2) the fact that the fifteen judicial members of the KRS, previously elected by their peers, are now elected by a branch of the legislature from candidates proposed by groups of two thousand citizens or twenty-five judges; and (3) the fact that the political authorities would now elect twenty-three out of twenty-five members of the KRS.[6] The referring court also pointed out the potential for other irregularities. It highlighted that under the New Law on the Supreme Court, the Disciplinary Chamber must be constituted solely of newly appointed judges, thereby excluding judges already serving in the Supreme Court, that this Chamber is to enjoy a particularly high degree of autonomy within the Supreme Court, and that this Chamber has been granted exclusive jurisdiction to rule on cases of the employment, social security, and retirement of judges of the Supreme Court (paras. 147, 150–51).

The Polish Government claimed that it is the exclusive competency of the EU member states to organize the internal structure of their national courts. In its response, the CJEU acknowledged that the organization of the judiciary is the exclusive competence of the EU member states, as the government of Poland rightly claimed. Yet, the CJEU emphasized the linkage to the EU law: that in the proceedings before the Polish Supreme Court both Article 47 of the Charter of Fundamental Rights of the EU, which enshrines the right to effective judicial protection, and Article 9(1) of Council Directive 2000/78/EC of 27 November 2000 may apply. Further, the CJEU stated that

> although it is for the domestic legal system of every Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, the Member States are, however, responsible for ensuring that those rights are effectively protected in every case, compliance with the right to effective judicial protection of those rights as enshrined in Article 47 of the Charter. (Para. 115)

The CJEU also emphasized that the requirement of judicial independence is a guarantee of cardinal importance that has two aspects to it—external (no hierarchical constraint or subordination to any other body) and internal (equal distance from the parties to the proceedings and their respective interests).

> Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. (Para. 123)

"Moreover," the CJEU explained, "the independence of the judiciary must be ensured in relation to the legislature and the executive" (para. 124). "In that regard, it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence" (para. 125).

Another important contribution of the CJEU judgment is its reference to the jurisprudence of the European Court of Human Rights (ECtHR):

[6] The other two members are the first president of the Supreme Court and the president of the Supreme Administrative Court.

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> According to settled case-law of [the ECtHR], in order to establish whether a tribunal is "independent" within the meaning of Article 6(1) of the ECHR, regard must be had, inter alia, to the mode of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body at issue presents an appearance of independence. (Para. 127)

The CJEU aligned itself with the position of the ECtHR that there is no requirement for states to adopt a particular constitutional model governing the relationship and interaction between the various branches of the state, nor a requirement for states to comply with any theoretical constitutional concepts regarding the permissible limits of such interaction. The question is always whether, in a given case, the requirements of independence have been met (para. 130).

The CJEU concluded that it was ultimately for the referring court to rule on the matter after having made the relevant findings. In particular, it was for the referring court "to ascertain whether or not the KRS offers sufficient guarantees of independence in relation to the legislature and the executive, having regard to all of the relevant points of law and fact relating both to the circumstances in which the members of that body are appointed and the way in which that body actually exercises its role" (para. 140). The same was true of the Disciplinary Chamber. If a national court finds that a provision of national law is contrary to EU law with direct effect, namely failing to ensure the right to effective judicial protection and the fundamental right to a fair trial, that national court as a body of a member state has an obligation not to apply that national law in the case pending before it.

* * * *

Many in Poland were disappointed that the CJEU did not take a tougher position on the independence of the Disciplinary Chamber (and the KRS), especially since the CJEU's advocate general took a more categorical position in his opinion.[7] It should be emphasized, however, TFEU Article 267 does not empower the CJEU to apply rules of EU law to a particular case, but only to rule on the interpretation of the treaties and of acts adopted by the EU institutions (para. 132). The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions, but rather that it is necessary for the effective resolution of a dispute (para. 70).

The judgment of the Grand Chamber did not end disputes about the reform of the Polish judiciary. On the contrary, in the subsequent weeks and months, the parties stiffened their positions. On January 23, 2020 the Polish Supreme Court (the combined Civil, Criminal, Labor Law, and Social Security chambers) adopted a resolution[8] stating that the court is improperly appointed or unlawful within the meaning of the Polish Civil and Criminal Procedure laws where one of its members has been appointed by the KRS after the December 8, 2017 reforms. The Supreme Court later extended this finding to all judgments

[7] Joined Cases C-585/18, C-624/18, C-625/18, Opinion of Advocate General Tanchev (Ct. Just. EU, Grand Chamber June 27, 2019).

[8] Case BSA I-4110-1/20, Resolution of the Formation of the Combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber (Sup. Ct. Pol. Jan. 23, 2020) (Pol.), *available at* http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf.

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issued with the participation of judges of the newly formed Disciplinary Chamber, irrespective of the date of such judgments.[9]

In passing this resolution, the Supreme Court enforced the 2019 judgment of the CJEU in cases C-585/18, C-624/18, and C-625/18 discussed here. The Supreme Court stated unequivocally that "courts which are no longer impartial and independent turn into adjudicating institutions which enforce the will of the governing group and the current parliamentary majority."[10]

Anticipating this result, the Polish Parliament enacted a so-called "muzzle law"[11] on December 20, 2019 that barred judges from contesting the validity of judicial appointments. The drafters of the law argued that the president's decision to appoint a judge is of paramount importance. The review of candidates performed by the KRS is only part of this procedure, and not the most important one. Presidential nomination is irrevocable and indisputable—and inherently related to the need to guarantee the irremovability of judges. Only the president is responsible for the fulfillment of this prerogative and that act cannot effectively be challenged, even in the event of previous deficiencies.[12]

This "muzzle law" entered into force on February 14, 2020 despite widespread protests, and on April 29, 2020, the European Commission launched an infringement procedure against Poland regarding its provisions. The Commission claims the "muzzle law" undermines the judicial independence of Polish judges and is incompatible with the primacy of EU law. Moreover, the new law prevents Polish courts from directly applying certain provisions of EU law protecting judicial independence and from referring questions to the CJEU. The Polish government had two months to reply to the Letter of Formal Notice,[13] but, at the time of writing, has not yet responded.[14]

At the time of writing, there are a number of cases pending in the CJEU relating to the reforms of the Polish judiciary. Among them is an action brought by the European Commission on October 25, 2019,[15] prior to the enactment of the muzzle law, challenging the Disciplinary Chamber under EU law. On April 8, 2020, the Court granted the Commission's application for interim measures in that case, ordering Poland to immediately suspend the application of the provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges. As the arguments of the parties remain unchanged, it seems likely that the Polish government will lose this case before the CJEU as well.

[9] *Id.*

[10] *Id.*, para. 14.

[11] The Act of 20 December 2019 Amending the Act – Law on the Structure of Common Courts, the Act on the Supreme Court and some Other Acts, Dz. U. 2020, para. 190.

[12] Justification of the Draft Law, at 14 (Dec. 12, 2019), *at* http://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=69 (in Polish).

[13] Eur. Comm. Press Release, Daily News, Rule of Law – European Commission Launches Infringement Procedure to Safeguard the Independence of Judges in Poland (Apr. 29, 2020), *at* https://ec.europa.eu/commission/presscorner/detail/en/MEX_20_776.

[14] Updates can be checked on the European Commission Infringement decisions website, at https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?typeOfSearch=false&active_only=1&noncom=0&r_dossier=20202182&decision_date_from=&decision_date_to=&EM=PL&title=&submit=Szukaj&lang_code=en (Infringement number: 20202182).

[15] Commission v. Poland, Case C-791/19 (Ct. Just. EU).

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The question remains: did all this have to happen? It is impossible to avoid the impression that the Polish Supreme Court deliberately sought a preliminary ruling on the questions analyzed above in the hope that the CJEU would make a forceful statement regarding judicial independence. This is evidenced by the fact that the proceedings before the Polish Supreme Court regarding retirement could have been resolved in the light of the subsequent amendment to the law and reinstatement of the judges. Yet, the referring court chose to continue the reference to the CJEU. It had the right to do so, and the response provided, although narrowed to a specific case, has since formed the basis for subsequent statements of courts and legal doctrine.

However, this solution cannot be considered typical. It is true that national courts have the right to ask the CJEU about the interpretation of EU law, but this question went far beyond an individual case. The purpose of the question asked was to provoke the CJEU to make a general statement, to interpret institutional solutions regarding the system of judiciary in an EU member state. According to Polish legal tradition, such issues should have been the subject of analysis of the Constitutional Tribunal, which assesses the compliance of statutes with ratified international agreements and the Constitution.[16] The problem is, however, that the Tribunal had already been the object of personnel changes and is now staffed almost exclusively by judges nominated by the ruling coalition in the Parliament. The widely held view in the Polish legal establishment is that the Constitutional Tribunal, hollowed out to an unprecedented degree, does not currently guarantee independence.

In this situation, the CJEU preliminary ruling analyzed here and the Court's subsequent opinions are important as never before. One could even say that they are an attempt to defend the Polish state against itself.

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United Kingdom Supreme Court—United Nations Convention Against Torture—universal jurisdiction—international criminal law—liability of nonstate actors

R v. Reeves Taylor (Appellant). [2019] UKSC 51. *At* https://www.supremecourt.uk/cases/uksc-2019-0028.html.

UK Supreme Court, November 13, 2019.

The First Liberian Civil War (1989–1996), in which Charles Taylor's National Patriotic Front of Liberia (NPFL) waged an ultimately successful military campaign to depose President Samuel Doe, was characterized by widespread atrocities.[1] During this period,

[16] In Poland, the Constitutional Tribunal decides, among other things, on the incompatibility of national statutory solutions with international law (including the European law).

[1] *See* Human Rights Watch, *Liberia at a Crossroads: Human Rights Challenges for the New Government* (Sept. 30, 2005). Later, Charles Taylor was convicted of multiple crimes including war crimes and crimes against humanity

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