MYKOLAS ROMERIS UNIVERSITY

FACULTY OF LAW

INSTITUTE OF INTERNATIONAL AND EUROPEAN UNION LAW

&

UNIVERSITY OF BORDEAUX

FACULTY OF LAW AND POLITICAL SCIENCE

SIMAS GRIGONIS

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PRINCIPLE OF EUROPEAN UNION'S AUTONOMY AND RECEPTION OF INTERNATIONAL LAW: PROBLEMATIC ASPECTS

Master thesis

Supervisor

Doc. Dr. Regina Valutytė

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ABBREVIATIONS

the Court, CJEU – Court of Justice of the European Union

CFI – Court of First Instance of the European Union

GC – General Court of the European Union

ICJ – International Court of Justice

TFEU – The Treaty on Functioning of European Union

TEU – The Treaty on European Union

Treaty (Treaties) – TEU or TFEU, or both

Community/Communities – European Economic Community or European Community

Member State/s – the member state/s of EU

EU – the European Union

ECHE – the Convention for the Protection of Human Rights and Fundamental Freedoms

UN – United Nations

INTRODUCTION

Actuality of the topic

Generally, the most extensive analysis of the principle of autonomy of the EU legal order and its effects was provided by R. Barents over a decade ago[1]. During this time, however, at least two landmark decisions in *Kadi*[2] and *Emissions Trading Scheme*[3] were provided by CJEU that have caused an active public and academic debates which are still going on up until today. Indeed, the cases that handled the relationship between the EU and international legal orders had been a contentious ones that had drawn attention of both international and EU lawyers.

It appears that there is a good chance for CJEU to encounter cases involving EU law relationship with international law in the future. Back in 2001 it was asked in Laeken whether Europe does not *"[...] now that is finally unified, have a leading role to play in a new world order, […] able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples?"*[4] The question was answered by visualising that the role Europe *"[...] has to play is that of a power [...] to change the course of world affairs in such a way as to benefit not just the rich countries but also the poorest [...} to set globalisation within a moral framework […]."*[5] The EU has set itself an ambitious task that is difficult to implement. For instance, by imposing *Emissions Trading Scheme* the EU has unilaterally shown the world a way to tackle a climate change. Yet, such actions were met with discontent and hostility by a significant part of an international community. *Emissions Trading Scheme* indicate that international community is reluctant to accept the leading role of the EU. Thus favourable circumstances exist for the future clashes between the EU and international legal orders.

It is especially so, whereas the EU, while claiming the leading role in the international community is at the same time constraining the reception of international law within the EU legal order. What seems to be an ongoing trend is that the EU legal order autonomy would be protected by CJEU as a limit which may not be overstepped. Just as it happened very recently when CJEU ruled that the draft agreement on the EU's accession to the ECHR was incompatible with EU law and, therefore, could not become an integral part of EU law whereas it was *"[…] liable adversely*

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[1] Barents, R. *The Autonomy of Community Law.* Hague: Kluwer Law International, 2004;
[2] Joined Cases C-402/05 P and C-415/05 *P Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351; Case T-315/01, *Kadi v. Council & Comm'n (Kadi II)*, [2005] ECR II-3649;
[3] Case C-366/10 *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change* (*Emissions Trading Scheme*) [2011] I-13755;
[4] Presidency Conclusions of European Council Meeting in Laeken, Declaration on the Future of Europe, 14-15 December 2001, SN 300/1/01 REV 1, p. 20 [also available as interactive source at: http://ec.europa.eu/smart-regulation/impact/background/docs/laeken_concl_en.pdf];
[5] Ibid.

to affect the specific characteristics and the autonomy of EU law[6]*."* It seems that autonomy protection requirements are placed by the Court as the rules of ultimate constitutional importance that may not be infringed by any kind of source of international law. Consequently, while proposing international legal standards to the others EU seems to be unwilling to accept international legal sources that are imposed on it.

Therefore, an interaction between the constitutional notions of the EU law and reception of international law within the EU legal order is and would seemingly be in the future a contentious topic that requires a close attention.

The problematic aspects raised in the research

In most general terms, the Master thesis concentrates on the relationship between the two fundamental notions that must be balanced by CJEU: the autonomy of the EU law and the reception of international law. The idea that defines the relationship between the two notions – the more autonomy there is, the more difficult the reception becomes. In order to crack down this fundamental issue a several smaller issues are scrutinized in the thesis.

The first block of the problems concentrates on the means by which the principle of autonomy is implemented by CJEU. In parallel, the influence of autonomy implementation on the Court's status is scrutinized. Namely, it is claimed in this thesis that CJEU acts similarly as a national constitutional court in cases where an international law is involved.

The second block of the problems concerns the reception of the sources of international law within the EU legal order. The reception of mixed agreements is analysed in most detail whereas it seems to be unique and the most problematic source of international law within the EU legal order. It is firstly sought to answer what rules are applied by the Court for the interpretation and application of the mixed agreements. Secondly, an issue of liability for the infringements of the mixed agreement's provisions is discussed. Thirdly, the possibility to invoke international agreements to contest EU secondary law is presented. International customary law is chosen as the second source of international law. Its reception is discussed through the analysis of direct invocability to contest EU secondary legislation issue since this problem concerns most of the case-law of the Court.

Finally, a problem of the competing jurisdictions of CJEU and other international courts and tribunals is discussed. The principle of autonomy requires from CJEU to claim jurisdiction over all the disputes where the question of EU law interpretation arise. Therefore, a possibility of

[6] Opinion 2/13 *on Draf Agreement on Accession of EU to ECHR*, [2014] ECR I__(delivered 18 December 2014), para. 258;

the clashes of jurisdiction always exists whereas at some instances only part of the dispute concerns EU law while the other part could be handled by the other international tribunal alone.

All the problems that are discussed in the second part of the thesis are designed to indicate in what manner the reception of the international law within EU legal order is performed by CJEU and how the protection of autonomy is implemented.

Scientific and practical significance of the thesis

The mere fact that a significantly high number of the scholars up until now are publishing articles relevant to the Master thesis indicate the scientific significance of the topic. It is not surprising, since the possibility to actually use the sources of international law within EU legal order depends greatly on the way the relationship between the EU legal order and international legal order is perceived. Systematic analysis scrutinizing the effect EU constitutional notions have on the reception of international law is scientifically significant since it helps to clarify the content of the conditions under which international law acquires power within EU legal order. Therefore, the Master thesis could prove to be useful practically for anyone trying to invoke a specific source of international law within EU legal order to contest secondary legislation because it describes the conditions necessary to fulfill in order to invoke international agreements and international customary rules.

Furthermore, the Master thesis could prove to be useful for anyone studying EU or international law whereas it introduces the principle of autonomy and how it is operated by CJEU in the EU's external relations and indicates how the sources of international law are practically accepted in the domestic legal system of the EU. The thesis could be significant for the researchers concerned with the place of CJEU in the EU legal order since the first part of the thesis scrutinizes the functions and status of the Court.

The objects of the research

1. The principle of autonomy of the EU legal order in the field of external relations;
2. Rules on the reception of international law within the EU legal order.

The aim of the research

To analyse autonomy principle implementation in EU external relations in order to indicate its effect to the status of CJEU in cases where sources of international law are involved and to the reception of the sources of international law within EU legal order.

The targets of the research

1. To analyse CJEU's cases where the sources of international law are involved and to indicate by what means the principle of autonomy is implemented in the field of external relations;
2. To evaluate to what extent the application of the principle of autonomy in the field of external relations has influenced the status of CJEU in cases where the sources of international law are involved;
3. To indicate the conditions imposed by CJEU on the sources of international law as a result of the autonomy protection and to analyse whether these conditions hinder the reception of different sources of international law within the EU legal order.

Defended statement

1. International law is accepted within EU legal order to the extent it is compatible with primary law of the EU and the principle of autonomy.

Research methods

The following methods were used in order to achieve the aim of the Master thesis:

1. **Linguistic method.** Linguistic method was used to understand the meaning of the legal concepts and their definitions while analysing the legal norms of the founding Treaties and the jurisprudence of CJEU. It was especially helpful to indicate the implicit and explicit meanings of the different statements of CJEU.
2. **Comparative method.** Comparative method was used to compare the opinions of different authors regarding the same subjects and issues. Also, in order to indicate whether the functions performed by CJEU match the functions performed by the other international courts and tribunals and to assess whether CJEU performs some functions that could resemble the functions that are usually performed by the national constitutional courts.
3. **Systematic analysis method.** Systematic analysis method was used to clarify the meaning of the principle of autonomy in the EU legal order while analysing EU primary law, CJEU's jurisprudence and publications of legal scholars. It is also employed to assess and systematize different sources of information in order to identify the most relevant problems. The knowledge provided by the different disciplines of law were used in conjunction to provide a complex analysis.
4. **Method of comparative historical analysis.** Comparative historical analysis is used to describe the evolution of the international judicial dispute settlement in the course of

history in order to clarify the features that are common to the contemporary international courts and tribunals.

5. **Method of logics.** Is used in conjunction while applying other utilized methods to raise assumptions, assess whether they could be confirmed or denied.

Bibliography used

The topics discussed in the Master thesis were analyzed only minimally in Lithuania. Most detailed analysis was carried out by M. Limantas with regard to the mixed agreements[7]. A publication of I. Daukšienė had analyzed an issue of the dispute settlement between the Member States[8]. A research concerning the interaction between transnational legal systems was recently published by the collective of authors[9]. However, save mixed agreements, most of the issues discussed[10] in the Master thesis are original in the context of Lithuanian scientific society. Consequently, it was the publications of the foreign authors that were mostly used in the thesis.

There are two detailed researches, carried out by foreign scholars, regarding the separate topics of the Master thesis that were used in the research. Firstly, *"The Autonomy of Community Law"* by R. Barents[11] that was used to scrutinize the concept of the autonomy of the EU legal order. Secondly, the collection of academic publications edited by E. Cannizzaro, P. Palchetti and R.A. Wessel named *"Studies in EU External Relations, Volume 5: International Law as Law of the European Union"*[12] that provides a variety of materials regarding the EU law relationship with international law. Publications of G. de Búrca, E. de Wet and P. Hilpold were studied for the autonomy issue[13]. Book of P. Eeckhout was analyzed with regard to the place of mixed agreements

[7] Limantas, M. *Mišrūs Susitarimai Europos Sąjungos Teisės Sistemoje.* Doctoral thesis. Vilnius: Vilnius university, 2014, [also available as interactive source at: http://www.google.lt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&sqi=2&ved=0CDQQFjAC&url=http%3A%2F%2Fvddb.library.lt%2Ffedora%2Fget%2FLT-eLABa-0001%3AE.02~2014~D_20140630_153918-90648%2FDS.005.0.01.ETD&ei=FmohVJv_KujmyQP4pYC4CQ&usg=AFQjCNFz6b_rMFp3ulB_jTQ8-sAR9hKQuQ&sig2=MEIQoLXwkno56LL6cEhi9A&bvm=bv.75775273,d.bGQ];

[8] Daukšienė, I. *Europos Sąjungos Valstybių Narių Tarpusavio Ginčai ir Europos Sąjungos Teisingumo Teismo Jurisdikcija*. Jurisprudencija, Vol. 18(4), 2011, p. 1349 – 1368 [also available as interactive source at: https://www.google.lt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CDMQFjAD&url=https%3A%2F%2Fwww.mruni.eu%2Flt%2Fmokslo_darbai%2Fst%2Farchyvas%2Fdwn.php%3Fid%3D303929&ei=rS92VKCqMIfpywPFpoDgBQ&usg=AFQjCNG9gVGprYR8LbePCu6eoyIKMGKSHg&sig2=Fo_w5W2e0XeubNkdXTlQyg&bvm=bv.80642063,d.bGQ&cad=rja];

[9] Katuoka, S, Jarašiūnas, E., Tamavičiūtė, V., Žalimas, D, Mikša, K. Račkauskaitė-Burneikienė, A., Vitkauskaitė-Meurice, D., Valutytė, R., Nasutavičienė, J. *Transnacionalinės teisinės sistemos - santykio ir sąveikos problemos: mokslo studija*. Vilnius: Mykolo Romerio universitetas, 2014;

[10] *For example:* autonomy effects to CJEU's status and to the reception of international law within EU, reception of customary international law, possibility to directly invoke international agreements to contest EU secondary legislation;

[11] Barents, R. *supra* note 1;

[12] Cannizzaro, E., Palchetti, P., Wessel R.A. (eds.) *Studies in EU External Relations, Volume 5: International Law as Law of the European Union.* Leiden and Boston, the Netherlands: BRILL, 2011 [also available as interactive source at: http://site.ebrary.com/lib/mrulibrary/detail.action?docID=10511491];

[13] de Wet, E. *The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation?* European Constitutional Law Review, Vol. 5, 2009 [also available as interactive

in the EU external relations[14], while for the problems related to the international customary law publications of T. Konstadinides and A. Gianelli were scrutinized[15]. Articles of N. Lavranos and B. Hofstotter were helpful to tackle the jurisdictional issues[16]. I. Brownlie and M.N. Shaw were used while dealing with general questions of international law. As recent as possible sources were chosen in order to make the research up-to-date by complementing the findings acquired from publications with the analysis of the relevant case-law.

A case law of different courts and tribunals is utilized in the thesis. Most of the jurisprudence are cases of CJEU. However, several judgments of ICJ[17] were used to illustrate the functions that are common to international courts. In addition, several cases of arbitration were presented for the purposes of comparative analysis[18].

Originality of the thesis

Literature review has shown a need for a complex analysis of the issues of autonomy and reception of international law. To the knowledge of the author, nobody else apart R. Barents has provided a detailed research concentrating on the issue of autonomy of the EU legal order. In turn, other author's, like M. Limantas, T. Konstadinides, limit their researches to the analysis of the problems related to particular sources of international law but leaving aside the principle of autonomy. By analysing the principle of autonomy along with the issues of reception of particular sources of international law the Master thesis is original in the context of other researches.

In addition, the Master thesis employs an interdisciplinary analysis of the problems raised in the research. EU law is analysed not in isolation from international law and national

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source at: http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=6095724&fileId=S1574019609002843]; de Búrca, G. *The European Court of Justice and the International Legal Order After Kadi*. Harvard International Law Journal, Vol. 51, No. 1, Winter, 2010 [also available as interactive source at http://heinonline.org/HOL/Page?handle=hein.journals/hilj51&collection=journals&set_as_cursor=1&men_tab=srchresults&type=matchall&id=3]; Hilpold, P. *EU Law and UN Law in Conflict: The Kadi Case.* Max Planck Yearbook of United Nations Law, Vol. 13, 2009 [also available as interactive source at http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.intyb/maxpyb0013&collection=intyb&set_as_cursor=1&men_tab=srchresults&type=matchall&id=159];

[14] Eeckhout, P. *EU External Relations Law.* 2nd edition. Oxford: Oxford University Press, 2011;

[15] Konstadinides, T. *When in Europe: Customary International Law and EU Competence in the Sphere of External Action.* German Law Journal, Vol. 13, 2012 [also available as interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/germlajo13&id=1238]; Gianelli, A. *Customary International Law in the European Union.* In: Cannizzaro, E., Palchetti, P., Wessel R.A. (eds.) *supra* note 12;

[16] Lavranos, N. *The Solange-Method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals*. Loyola of Los Angeles International and Comparative Law Review, Vol. 30, 2008 [also available as interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/loyint30&id=281]; Hofstotter, B. *'Can She Excuse My Wrongs?' - The European Court of Justice and International Courts and Tribunals*. Croatian Yearbook of European Law & Policy, Vol. 3, 2007 [also available as interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.intyb/cybelp0003&id=397];

[17] *Author's note:* see page 17 of this thesis.

[18] *Author's note:* see page 15 for *Alabama Claims* arbitration, and Chapter 2.4. for *Iron Rhine* arbitration.

constitutional laws of the Member States. On the contrary, certain aspects of different branches of law are used in conjunction whereas it is helpful to better understand the meaning and necessity of the principle of autonomy and, most importantly, its influence to the CJEU's reasoning in cases with an element of international law. Therefore, the research performed in the thesis provides a complex view to the phenomenon of the autonomy development and implementation within the EU legal order.

Thesis structure

The thesis consists of introduction, two parts that are divided into chapters and sub-chapters (where needed), conclusions and the list of references.

The first part of the thesis deals with the notion of autonomy of EU legal order and the question whether, and in what way, if affects CJEU's status. Specifically, the first chapter analyses whether from the perspective of public international law CJEU is comparable to other international courts and tribunals. The second chapter concentrates on the principle of autonomy of EU legal order and seeks to answer whether it has any impact on the Court's status in the cases where the sources of international law are involved. The final chapter of the first part is concerned with the *Kadi saga* and seeks to establish the limits of external autonomy that applies after *Kadi* cases.

The second part of the thesis is concerned with the reception of the sources of international law within EU legal order. Each of the chapters and sub-chapters examines problems arising due to the reception of international law. The first chapter is concerned with mixed agreements, their nature and necessity, rules of their interpretation and application, liability for the infringement of their provisions. The second chapter is concerned with the conditions of direct invocability of the mixed and purely EU agreements to challenge the EU secondary legislation. Third chapter handles the reception of international customary law and conditions to invoke it to contest secondary legislation. The final chapter concerns the jurisdictional issues that CJEU faces when solving the disputes under international law that at the same time fall under jurisdiction of other international tribunals. In the end, the list of references is presented that is structured according to the nature of the sources into: legal acts, books, cases etc.

1. STATUS OF CJEU IN IMPLEMENTING PRINCIPLE OF AUTONOMY IN EU EXTERNAL RELATIONS

Actions of CJEU are legitimate only to the extent they are allowed under the constitutional treaties of the EU. CJEU does not act in legal vacuum – the basis for and lawfulness of every decision it takes lies in the Treaties. Being a court of an international organization it was initially enabled to perform a relatively limited function to interpret the international treaties founding the organization. Currently, however, when European integration project has overcome an initial phases, not less than ever one of the biggest problems arising when talking about CJEU is that its' status is far from being clear. Questions of how CJEU is seen in the world as well as the weight it carries in the international relations are rather vague. For the purposes of this thesis it is significant to develop a clear understanding of what kind of institution CJEU is in the beginning of the thesis. Not knowing CJEU's nature would hinder an understanding of further topics regarding the reception of international law within EU legal order and CJEU's relationship with other functioning international courts and tribunals. Therefore, a combination of external and internal factors determining CJEU's status in the world must be analyzed.

The first section of this part takes a look at CJEU externally focusing on the initial aspect of CJEU's nature – the fact that it was, looking historically, established as a judicial institution of the international organization. It is particularly focused on the problem whether CJEU at current state, looking from the perspective of public international law, is comparable with other international courts and tribunals established under international law. The powers of EU and, consequently, the Court, changed gradually over the years. Therefore, CJEU might not resemble judicial institutions of other international organizations anymore albeit CJEU was created according to a similar model.

Even if CJEU preserved some features that are common among other international tribunals these features might not be anymore sufficient to describe Court's nature. Internal notions of EU law, such as autonomy, are so influential and significant that it might determine the extent and the way by which CJEU acts as an international court. A question whether CJEU's nature as international court is only secondary after its' internal constitutional functions seems to be reasonable. The problem of balance between the autonomy of EU legal order and the reception of an international law, therefore, is chosen as a central issue in the second section since CJEU is the central figure endowed with the assignment to maintain equilibrium between these two poles. While handling this issue CJEU acts as both constitutional and international tribunal. Consequently, it can be helpful to indicate which part of the Court's nature – constitutional or international – is dominant.

Finally, as after *Kadi* saga[19] the equilibrium between autonomy and reception was disbalanced the third section is concerned with identifying whether the limits of the autonomy of EU legal order have recently been changed by CJEU. Since *Kadi* is the most recent and problematic case-law regarding autonomy, it might offer some insights as to where Court's approach is turning.

The answers to the latter questions will provide a view of the status of CJEU in the international relations. In addition, a legal environment in accordance with which the Court must act would be described, in particular, the motives for the protection of the autonomy of EU legal order and for uniformity of EU law. These findings will be highly important in the second part of this thesis which will focus on the Court's approach towards reception of specific sources of international law.

[19] Joined Cases C-402/05 P and C-415/05 *Kadi*, *supra* note 2; Case T-315/01 *Kadi II*, *supra* note 2;

1.1. CJEU as a court of an international organization

1.1.1. CJEU in the context of international dispute settlement institutions

CJEU's descriptions substantially differ depending on what legal system is chosen as a basis to explain its place in the world. At first sight, from the perspective of international law, CJEU could be identified and compared with an international court or a tribunal. On the other hand, if its status was analyzed purely from the positions of EU law – it could be argued to constitute a constitutional court[20] of the EU[21]. However, neither of the approaches is self-sufficient to comprehensively explain the status of the CJEU in wider context. A complex analysis of both approaches is needed to acquire an accurate view regarding its place in the international relations. The purpose of this chapter would be to look at CJEU from the perspective of public international law.

If public international law is taken into account "it is states and organizations […] which represent a normal types of legal person on the international plane"[22]. Given that "the origins, powers and objectives of the three Communities are all to be found in international treaties"[23] the EU from the perspective of the international law, first of all, is an international organization. It is no coincidence that EU legal framework starting with the Treaty of Paris and ending with the Treaty of Lisbon was shaped under public international law. As claimed by B. de Witte, there was an intentional "[…] use of international law as a tool used by the European Union and its Member States when developing their own 'domestic' agenda of European integration"[24]. Integration

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[20] *See for example:* Bauer, L. *The European Court of Justice as a Constitutional Court.* Vienna Online Journal on International Constitutional Law, Vol. 3, 2009 [also available as interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/vioincl3&collection=journals&set_as_cursor=0&men_tab=srchresults&type=matchall&id=264]; Vesterdorf, B. *A Constitutional Court for the EU?* International Journal of Constitutional Law, Vol. 4, 2006 [also available as interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/injcl4&collection=journals&set_as_cursor=1&men_tab=srchresults&type=matchall&id=623]; Lavranos, N. *Protecting European Law from International Law.* European Foreign Affairs Review, Vol. 15, 2010 [also available as interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.kluwer/eurofa0015&collection=kluwer&set_as_cursor=1&men_tab=srchresults&type=matchall&id=269];

[21] A current approach is based on the idea of *constitutional pluralism* claiming that plurality of constitutions exist within EU legal order in which EU Treaties form transnational constitution interpenetrating with national constitutions of the Member States. Since Treaties are regarded to be a constitution of the EU, logically, CJEU is to be regarded as the guardian of this transnational constitution – Tuori, K., Sankari, S. *The Many Constitutions of Europe.* United Kingdom: Ashgate Publishing Ltd., 2010, p. 3 [also available as interactive source at: http://site.ebrary.com.skaitykla.mruni.eu/lib/mrulibrary/reader.action?ppg=1&docID=10417815&tm=1412597900946]; *Author's note:* due to a limited scope of this thesis an issue of CJEU's place in the context of constitutional pluralism would not be further developed;

[22] Brownlie, I. *Principles of Public International Law.* 6th edition. Oxford: Oxford University Press, 2003, p. 58;

[23] McMahon, J.F. *The Court of the European Communities: Judicial Interpretation and International Organisation*. British Yearbook of International Law, Vol. 37, 1961, p. 320, 329; [cited from: Moorhead, T. *European Union Law as International Law*. European Journal of Legal Studies, Volume 5, Issue 1, 2012, p. 106 [also available as interactive source at http://www.ejls.eu/10/128UK.pdf];

[24] de Witte B. *Using International Law for the European Union's Domestic Affairs.* In: Cannizzaro, E., Palchetti, P., Wessel R.A. (eds.) *supra* note 12, p. 133;

project could be considered rather successful. Gradually, the EU has become a full-fledged international legal person capable of representing interests of itself and of its Member States. No longer there are any doubts whether EU possesses an international legal personality[25]. As Ian Brownlie states, "[…] many important institutions undoubtedly have legal personality, including […], the European Union […]"[26]. Consequently, the presence of the EU in the international relations is respected by absolute majority of the states and international organizations in the world.

However, the EU is considered to be a unique entity[27]. Ever since the judgment of *Van Gend en Loos*, which named the EEC as "a new legal order of international law"[28], it was referred in respect of the EU as to a *sui generis* legal order[29]. "The prevailing view concerning the nature of the European Union legal order is that it is sui generis in character given the institutional characteristics it shares with both international and municipal orders."[30] According to Jean Allain, "what sets apart the 'new legal order' from public international law, generally speaking, is not the law itself, but its application."[31] The features of the EU law such as direct applicability[32], supreme character[33] in respect of national law, "[...] supranational institutional framework empowered to both legislate and provide legally binding adjudication [...]"[34] are the characteristics of the EU law that are normally referred to when trying to distinguish EU law from the international law. And although it is continuously attempted to underline the "one of a kind" character of the EU law it cannot be denied that this unusual body of law was created within an international organization that was actually brought into the existence by the tools of the international law[35]. As D. Bethlehem

[25] "The criteria of legal personality in organizations may be summarized as follows: 1. a permanent association of states, with lawful objects, equipped with organs; 2. a distinction, in terms of legal powers and purposes, between the organization and its member states; 3. the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states." – Brownlie, I. *supra* note 22, p. 649;
[26] Ibid.;
[27] *Author's note:* it was CJEU itself that gave rise to the unique understanding of the EU legal order by stating in respect of the European Economic Community that "[t]he Community constitutes *a new legal order of international law* (emphasis added by author) for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals." – Case 26/62 NV *Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1;
[28] Ibid.;
[29] *See for example:* Hilpold, P. *supra* note 13, p. 165;
[30] Moorhead, T. *supra* note 23, p. 106;
[31] Allain, J. *The European Court of Justice is an International Court.* 68 Nordic Journal of International Law, 1999, p. 261 [cited from: Szabó, M. *The EU under Public International Law: Challenging Prospects*. The Cambrdige Yearbook of European Legal Studies 2007-2008. Vol. 10, Oxford and Portland, Oregon: Hart publishing, 2008, p. 304 [also available as interactive source at http://heinonline.org/HOL/Page?handle=hein.intyb/camyel0010&collection=intyb&set_as_cursor=1&men_tab=srchresults&type=matchall&id=369];
[32] Moorhead, T. *op. cit.*, p. 107;
[33] Ibid.;
[34] Ibid.;
[35] *Author's note:* the Treaty of Paris (1951) establishing the European Coal and Steel Community and the Treaty of Rome (1957) establishing the European Economic Community with all the consequent amending treaties (Single European Act, Maastricht Treaty, Treaty of Amsterdam, Treaty of Nice, Lisbon Treaty) - each one of the founding

accurately summarizes, in its origins and methodology of creation EU law is international law, "while at the same time being a source of law applicable in the municipal sphere and prevailing over municipal law[36]."

Whilst EU law is such an exceptional order of international law the problem of the status of CJEU appears. Does the fact that the EU is not an ordinary international legal order mean that CJEU, as a judicial institution of that order, does not act as typical court or tribunal established by a standard international organizations? In other words, could CJEU be comparable to other international courts and tribunals established by other self-contained regimes of public international law? Even if it is comparable, is it the true nature of the court? Maybe it could be described more accurately if attention was paid to other functions of the Court? To find answers to these problems CJEU will be compared with other judicial institutions established under international law.

As M. N. Shaw observes, generally speaking, there are two techniques of inter-state conflict management on the international plane: diplomatic procedures and adjudication[37]. For the purposes of the current chapter we would concentrate on the latter technique. It is performed by the arbitration[38] or the judicial body, which is an impartial third party in respect of the dispute, by involving the legal and factual issues of the dispute[39]. When arbitration or judicial settlement is employed it is a binding decision obtained on the basis of international law that is wanted[40]. It was arbitration that historically was first developed and which inspired the creation of the permanent international judicial institutions[41].

Emergence of contemporary arbitration[42] is associated with the rise of the tribunals[43], following strictly judicial procedure, composed of national arbitrators together with neutral and impartial arbitrators. A modern arbitral tribunal that would most commonly be found nowadays

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treaties of the EU are international treaties concluded under the rules of the international treaty law. – *see for example:* Craig, P., de Búrca, G. *EU Law: Text, Cases and Materials.* 5th edition. Oxford: Oxford university press, 2011, p. 5-24;

[36] Bethlehem, D. *International Law, European Community Law, National Law: Three Systems in Search of a Framework.* In: Koskenniemi, M. (ed.) *International Law Aspects of the European Union.* The Hague: Martinus Nijhoff Publishers, 1997, p. 173; [cited from: Szab*ó*, M. *supra* note 31, p. 304];

[37] Shaw, M. N. *International law.* 6th edition. New York: Cambridge University Press, 2008, p. 1011;

[38] *See particularly:* Merrills, J.G. *International Dispute Settlement.* 5th edition. New York: Cambridge University Press, 2012, p. 83 - 115;

[39] Shaw, M. N. *op. cit.*, p. 1011;

[40] Merrills, J.G. *op. cit.*, p. 83;

[41] Ibid.;

[42] It was an *Alabama Claims* case that is said to be the first case when a very similar to modern arbitration procedure was used for the first time. - Merrills, J.G. *op. cit.*, p. 86; Case *Alabama claims,* (1871-1872) [available as interactive source at: http://legal.un.org/riaa/cases/vol_XXIX/125-134.pdf];

[43] *Author's note:* according to the legal dictionary the concept 'tribunal' is a "general term for a court, or the seat of a judge" [available as interactive source at: http://legal-dictionary.thefreedictionary.com/tribunal]. Therefore, terms that are used in this thesis - 'tribunal' and 'court' - would be employed as a synonyms depending on the context of the particular chapter.

"[…] is a collegiate body consisting of an uneven number of persons, generally three or five, with the power to decide the case by a majority vote."[44] The appointment[45] of the arbitrators rests in the hands of the parties as well as the question under what proceedings the dispute would be solved and what issues the tribunal would be asked to untangle[46]. Therefore, the composition, jurisdiction, order of the proceedings of the arbitral tribunal is, generally, significantly dependent on the will of the states. Consequently, states can enjoy more flexibility while dealing with the dispute compared to the system of compulsory jurisdiction implemented by the standing court[47].

It is an international law that is in most cases used to base the decisions of the arbitral tribunal[48]. Yet, if the parties do not believe that international law would be appropriate to decide the dispute, they can instruct the arbitrators to decide on some other basis[49]. For example, by employing municipal law in case there are no relevant international rules that could be used to resolve the case[50]. There are hundreds, if not thousands international treaties concluded every year on international plane. Some of them establish more or less autonomous subsystems of international law or a 'self-contained regimes'[51]. It is a common feature that the legal regimes established under international treaties regulate the procedures regarding the dispute settlement and interpretation of the treaty[52]. In case other dispute settlement methods such as negotiation, mediation or conciliation[53] do not work, a composition of an arbitration body is a popular solution to deal with the dispute settlement issue.

Differences between dispute settlement by arbitration or by judicial authority has become formal recent years[54] which means that there cannot be drawn a sharp line between the arbitration and judicial settlement of disputes[55]. International court can be applied to perform any function of the arbitral tribunal while settling disputes between states according to the international law[56]. Absence of a significant differences could be explained historically – more institutionalized types of judicial institutions were derived from arbitral experience[57]. First manifestation of the court-alike bodies was emergence of the *ad hoc* arbitral tribunals, mixed commissions and specialized

[44] Merrills, J.G. *supra* note 38, p. 83;
[45] *Author's note:* the rules according to which a particular arbitral tribunal is composed are highly dependent on the particular agreement (and the arbitration clause included within agreement) which norms are a subject-matter of the dispute. Therefore, the laws applicable, composition, procedural rules of different arbitral tribunals could vastly differ.
[46] Merrills, J.G. *op. cit.*, p. 89 – 90;
[47] Brownlie, I. *Principles of Public International Law.* 7th edition. Oxford: Oxford University Press, 2008, p. 703;
[48] Merrills, J.G. *op. cit.*, p. 94;
[49] Ibid., p. 95;
[50] Ibid., p. 95 – 96;
[51] Szab*ó*, M. *supra* note 31, p. 305;
[52] *Author's note:* In this regard EU is not an exception since it established CJEU to oversee the interpretation and application of the Treaties.
[53] Merrills, J.G. *op. cit.*, p. 1 – 40, 58 – 82;
[54] Brownlie, I. *op. cit.*, p. 702;
[55] Ibid., p. 704;
[56] Ibid.;
[57] Brownlie, I. *supra* note 47, p. 705;

tribunals of a semi-permanent character[58]. Shortly, the first permanent international courts were established.

Two of the best-known and articulated international courts are Permanent Court of International Justice (PCIJ) and International Court of Justice (ICJ). Permanent Court of International Justice was "[…] the first permanent international tribunal with general jurisdiction"[59] and was active in the period from 1922 to 1946[60]. ICJ became its successor and is the main judicial institution contributing to the development of the public international law for almost 70 years. Court's advisory opinions, decisions in the disputes between states are seen as authoritative sources of law.

Nowadays, concept of the international court presupposes a reference to ICJ. Permanent nature and broad jurisdiction is what differs ICJ from all the other international tribunals. They are commonly specialized judicial bodies dealing with a disputes within a limited fields of international law, e.g. within the framework of international treaty, and not necessarily permanent by their nature. Yet what all of these international judicial bodies, including ICJ, have in common is that they all interpret and apply sources of international law, one way or another. However, when it comes to difficult questions of law, for instance, determining whether a particular international customary rule exists[61], or whether a general principle of law is also a principle of public international law[62], it is ICJ that is competent and authoritative enough to speak up on these questions[63].

1.1.2. Comparability of CJEU with other international tribunals

There are two functions performed by CJEU that conform the features typical to international judicial bodies indicated in sub-chapter 1.1.1. The first function that CJEU performs is tackling the disputes between countries, as it is an initial task for any kind of international court

[58] Ian Brownlie enumerates several examples of such judicial bodies, such as, the United Nations Tribunal in Libya, the United Nations Tribunal in Eritrea, the Supreme Restitution Court of the German Federal Republic, the Arbitral Commission on Property, Rights, and Interests in Germany, etc. - Brownlie, I. *supra* note 47, p. 705;
[59] Publications of the Permanent Court of International Justice (1922-1946) [available as interactive source: http://www.icj-cij.org/pcij/?p1=9] (last time accessed 17 September 2014);
[60] Ibid.;
[61] *See for example:* Brownlie, I. *supra* note 22, p. 6 – 12; Case *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* , I.C.J. Reports 1969, p. 3, 20 February 1969; Case *Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, I.C.J. Reports 1986, p. 14, 27 June 1986;
[62] Brownlie, I. *supra* note 22, p. 15 – 19; *Factory at Chorzow (Germ. v. Pol.)*, P.C.I.J., ser. A, No. 9, 1927 July 26; *Corfu Channel Case (United Kingdom v. Albania), Assessment of Compensation*, 15 XII 49, I.C.J. Reports 1949, p. 244, 15 December 1949;
[63] *Author's note:* although ICJ is most authoritative institution when it comes to explaining international law, it is only minority of the cases that reach this institution (according to the official cite of ICJ during 2014 it has tried 5 cases overall) [available as an interactive source at: http://www.icj-cij.org/docket/index.php?p1=3&p2=2] (last time accessed 7 October 2014). Therefore, most of the cases concerning disputes regarding international law are tackled by the other kinds of judicial institutions – specialized arbitral tribunals, ad hoc tribunals, or special commissions.

or tribunal. There are several possible situations that could potentially occur. According to the first scenario, the subject matter of the dispute concerns the EU legal framework and originates between two or more Member States of the European Union[64]. In another event a case would concern a dispute between Member State(s) of the EU and non-Member State(s) with the subject matter of the dispute arising from the provisions of the international agreement regardless of whether it would be EU agreement or a mixed agreement[65]. Either way, CJEU acts as an international court by performing a function of a dispute settlement body in disputes between nations.

The second function concerns interpretation and application of the sources of the international law. Importantly, it is an attribute of tribunals of self-contained regimes as they are initially established to interpret and apply the laws founding an organization or a legal regime. CJEU is not an exception since first of all it was established to perform its functions with regard to the Treaties, which are, in their nature, sources of international law. Art. 31 of the original version of ECSC Treaty stating that "[t]he function of the Court is to ensure the rule of law in the interpretation and application of the present Treaty and of its implementing regulations" confirms this statement.[66] A similar but not an analogous provision could be found in the Art. 164 of the EEC Treaty stating that "[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."[67] It is apparent that the provision in the EEC Treaty was formulated in the narrower manner excluding from the wording the part regarding implementing regulations. Yet both of the historical versions of the texts of the Treaties suggest that the primary function of CJEU was the supervision of the uniform interpretation and application of the founding treaties of the Communities[68].

What is very specific to CJEU in comparison with other international tribunals is that it does not limit itself with the founding laws of the EU. The Court claims jurisdiction over other sources of public international law. First of all, the Court has affirmed the jurisdiction over EU international/mixed agreements. Since each of these sources are international treaties by interpreting or applying them CJEU performs a function of an international tribunal. Furthermore, not only written sources of international law are applied by CJEU. International customary rules,

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[64] "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" - Consolidated Version of the Treaty on the Functioning of the European Union, Art. 344, 2012 O.J. C 326/47; *see for example:* Case C-416/11 P, *United Kingdom of Great Britain and Northern Ireland v Commission* [2012] ECR I__(delivered 29 November 2012);

[65] *See for example:* Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.* [1982] ECR 3641;

[66] Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140, expired by its terms 23 July 2002;

[67] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11; *Author's note:* the provision cited was left unchanged all the way until the Lisbon Treaty (according to which EC Treaty was replaced by the TFEU) entered into force on 1 December 2009.

[68] *Author's note:* in the context of this thesis the right to interpret the Treaties as an international law is the most relevant for the survey. Therefore, the survey in this part would be not concentrated on the interpretation of the implementing laws of the EU constitutional treaties, such as, regulations, directives and decisions.

as decided in *Poulsen*[69], *Racke*[70] and *Emissions Trading Scheme* [71], would also be invoked to contest EU secondary legislation if certain conditions are satisfied[72]. Therefore, it is safe to say that CJEU applies a wide range of sources of a public international law.

To summarize, the question whether CJEU is comparable to other international courts and tribunals should be answered in affirmative since CJEU, to the extent it performs the dispute settlement between states and international law interpretation and application functions, is acting as an international court. Indication that CJEU is created by international treaties, endowing it with a limited jurisdiction to oversee the founding treaties, is not an exceptional feature in the context of other international courts whereas CJEU becomes associable with them. Consequently, observations stemming from comparative analysis from the angle of public international law, taking into account Court's functions, its way of creation, let us conclude that CJEU resembles a usual type of a tribunal of an international organization. Not surprisingly, in the world CJEU is seen as an internal institution of EU endowed with a limited functions stemming from the founding Treaties. Yet it is only several functions among all the other performed by CJEU overall. Therefore, definition of CJEU as an international tribunal is insufficient to define CJEU as an entity since such a definition covers only part of CJEU features. This leads us to the fundamental notions of the EU, namely, the notion of autonomy and reception of international law that incarnates additional features of the Court necessary to reveal a full picture of CJEU's nature in external relations.

[69] Case C-286/90 *Poulsen* and Diva Navigation [1992] ECR I-6019;
[70] Case C-162/96 *Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR 1-3655;
[71] Case C-366/10 *Emissions Trading Scheme, supra* note 3;
[72] *Author's note:* the rules of reception of international customary law is analyzed in 2.3. chapter of this thesis.

1.2. Balancing two poles: CJEU as ultimate adjudicator of relationship between EU autonomy and reception of international law

As indicated in previous section, CJEU seems to be rather ordinary international court if it is analyzed from the perspective of international law. Yet from the internal perspective of EU law CJEU's status would, normally, not be associated with notion of international court. Notwithstanding the view analyzed in the previous section, CJEU stands out from the other international tribunals and becomes specific because of the particular features originating from the very nature of the EU legal order itself. Not surprisingly, CJEU is rather called a constitutional court of EU than international tribunal if EU law is taken into account since it covers a more significant part of the functions the Court performs. To be more precise, CJEU was supposed to be a tribunal endowed with a limited jurisdiction to identify the meaning of the Treaty provisions and the way they should be implemented. However, with the promulgation of *Van Gend en Loos* and *Costa/ENEL*[73] CJEU took the first step to reveal that the EU is not a usual international organization legal order abiding the rules of the international law but rather an unconventional legal order, which could be called autonomous and self-regulated by an independent source of law. Thus the foundations were laid for the Court to develop the EU legal doctrine by interpreting and applying the laws of the Communities while in parallel protecting these laws from the outside intervention by gradually evolving the doctrine of EU autonomy.

Notion of autonomy is in a core of EU constitutional doctrine and is central when examining both topics – EU external relations and CJEU's status as an international court. It is extremely important for this thesis since only EU autonomy can explain why the reception of different kinds of sources of international law is performed by CJEU in one way or another. The more autonomous EU legal order is, the more difficult reception of international law within the EU legal system becomes. CJEU's specificity in respect of other international court's and tribunals lies in the fact that the Court finds itself in the position of an ultimate adjudicator deciding what the balance between the EU and international legal orders would be. Not only it interprets and applies the sources of international law in the disputes between states, but it does it in a peculiar way by creating a unique set of constitutional rules explaining under what conditions and in what way sources of international law should be accepted within the EU law. Besides, it does it not only with the sources that form an integral part of the EU law, but also with the sources that concern only Member States and third countries. Such activism of the Court is the feature that distinguishes it in the context of other international courts. Consequently, the current section will crack the problem of balancing the autonomy of EU law with a reception of the sources of international law.

[73] Case 6/64 *Flaminio Costa v. ENEL* [1964] ECR 585.

When speaking about autonomy of the EU legal order the first fundamental issue that must be elaborated is what it is supposed to be autonomous form. The concept itself, since being formulated[74] in the famous *Costa/ENEL*[75] decision, "[…] was largely inspired by concerns of internal nature"[76] meaning that the EU legal order had to be autonomous in respect of the Member States[77]. If the EU legal order was still constitutionally dependent on the Member States it would have been extremely difficult to "[…] establish the notions of direct effect and supremacy, the bedrock pillars of the EU's special constitutional construction […]."[78] These notions were the ones necessary to achieve the uniformity of the EU law[79]. Therefore, internally the principle of autonomy started to be revealed through the introduction of the EU law supremacy doctrine that was done by *Costa/ENEL*.

Interestingly, autonomy from the Member States that CJEU declared in *Costa/ENEL* created uncertainty whether EU "[…] properly continue to form a part of the international legal order."[80] Since "from a traditional perspective, international law is ultimately supposed to be derivative of national law"[81] the fact that EU legal order has autonomy from the national legal orders raised question whether EU law could properly function as an international legal order[82]. Such a paradoxical outcome of the autonomy from the domestic legal systems of the Member States particularly underlines the *sui generis* character of the EU legal order. It gets even more complicated when EU law, theoretically stemming from national law, acquires the primacy effects within national legal orders of the Member States in relation to their domestic laws. Accordingly, evolvement of the principle of autonomy established a ground for the EU to gradually become a supranational organization.

However, over time theories explaining how the EU could function being autonomous, in other words, not a derivative of the national laws of the Member States, emerged. The most comprehensive analysis, provided by R. Barents, grounds the research by stating the EU law character as a law of 'Community'. Description of the body of law as a law of 'Community' indicates not only its origins but a character as well: it is of indivisible nature. Indivisibility of a

[74] *Author's note:* although the conception and understanding of the autonomy from the Member States intervention is explained in the *Costa/ENEL* judgment this exact notion is not utilized in the wording of the decision.
[75] Case 6/64 *Costa v. ENEL, supra* note 73;
[76] van Rossem, J.W. *The EU at Crossroads: a Constitutional Inquiry into the Way International Law is Received Within the EU Legal Order*. In: Cannizzaro, E., Palchetti, P., Wessel R.A. (eds.) *supra* note 12, p. 60;
[77] "[…] the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question." – Case 6/64 *Costa v. ENEL, op. cit.;*
[78] van Rossem, J.W. *op. cit.*, p. 60;
[79] Ibid.;
[80] Ibid.;
[81] Ibid.;
[82] Ibid.;

legal order presupposes one very significant premise – as far as its' application terms go whether it is material, personal, geographical or temporal scope – it must be applied in the same way all over the system. EU law "[…] validity and application in the territory of the Member States cannot, in any way, be dependent on national legal orders."[83] Such dependence would deprive the nature of 'Community' from EU law character.[84] Therefore, R. Barents contends that only autonomy from the national legal orders can ensure the proper functioning of the EU law since any attempts to explain EU law from the perspective of national law would shatter indivisible body of law into many different pieces. That would be contrary to the whole idea of achieving a single market.

In the field of external relations[85], on the other hand, development of the concept of autonomy was rather slow. Only several cases and opinions[86] provided by the Court over years gives us an understanding of what elements the concept of autonomy consist of in the field of external relations. Firstly, according to the Court, autonomy requires "[…] that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered."[87] Secondly, "[…]the procedures for ensuring uniform interpretation of the rules of the [...] (international)[88] [a]greement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement."[89] In other words, the first element demands that the international agreement would not change the division of the powers and competences between: (1) the Member States and EU; (2) between the EU institutions among themselves[90]. It seems that, with the first element, CJEU had its own position in mind, especially the exclusive right of judicial review of the EU legal acts[91]. Meantime, the second one stipulates "[…] that procedures for ensuring uniform interpretation of the treaties, specifically procedures that involve an external judicial body […]"[92] interpreting EU law, do not have the effect of binding the EU and its institutions. CJEU clearly stated that neither EU nor Member States would be bound by an interpretation of EU law provided by an outside judicial body.

It is Art. 344 TFEU (292 EC) requiring Member States "not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than

[83] Barents, R. *supra* note 1, p. 239;
[84] Ibid.;
[85] *Author's note:* when we speak here about the field of external relations of the EU, we mainly have in mind the relationship of the EU law with the sources of international law.
[86] *See for example:* Opinion 1/91 *EEA Agreement* [1991] ECR I-6079; Opinion 1/00 *ECAA Agreement* [2002] ECR I-3493; Case C-459/03 *Commission v. Ireland (Mox Plant)* [2006] ECR I-4635;
[87] Opinion 1/00 *ECAA Agreement*, *op. cit.*, para. 12;
[88] *Author's note:* added by the author;
[89] Opinion 1/00 *ECAA Agreement*, *op. cit.*, para. 13;
[90] van Rossem, J.W. *supra* note 76, p. 61 – 62;
[91] Ibid., p. 62;
[92] Ibid., p. 61;

those provided for therein"[93] that embodies the second element of the external autonomy concept. In addition, the allocation of powers between the EU institutions among themselves, as well as, between the EU and the Member States is in detail regulated by the Treaties. Therefore, it is not accidental that the way CJEU dealt with an autonomy issue in respect of the international law is referred as to constitutional approach[94] since the grounds for the action of the Court are explicitly inscribed in the constitutional treaties. In turn, the interpretations of autonomy provisions provided by CJEU forms a part of the constitutional jurisprudence of the Court.

Here the question why was the autonomy of the EU legal order of such an importance that it was necessary to entrench it explicitly in the Treaties and develop it further in detail in the case-law emerges. According to J. W. van Rossem, ultimately autonomy can be traced back to the theme of coherent order. Preventing international agreements and judicial bodies established by those agreements from eroding EU legal order from within was the biggest concern of CJEU. Putting at risk a specific institutional structure of the EU, particularly EU judicial system, could have endangered a *sui generis* nature of the EU legal order, "[…] which, in order to make good on its integrationist promise, has to be applied in a fundamentally uniform and effective manner all over EU."[95]

Allowing outside judicial bodies to intervene into the process of the interpretation of the EU legal rules would have a distorting effect not only to the coherency of the legal order, but could trigger disruptions of a single market. According to R. Barents, market unity requires that all the important decisions would obey equally to the common rules that are interpreted in a uniform manner[96]. Requirement of a uniform interpretation is of a paramount importance "[…] since any violation of the uniform application and interpretation of the rules in question threatens market unity."[97] Therefore, autonomy is not a goal in itself. It serves for a bigger purpose – coherency of the single market that is the essence and the most fundamental feature of the project of EU[98]. Autonomy is an inevitable tool without which a single market might become unachievable.

Consequently, autonomy of EU law is an objective category inseparable from the very nature of the legal system. Since, as R. Barents contends, Community (now EU) law is of indivisible nature – it is the same in all Member States regardless of the circumstances. If

[93] Consolidated Version of the Treaty on the Functioning of the European Union, art. 344, 2012 O.J. C 326/47;
[94] van Rossem, J.W. *supra* note 76, p. 61;
[95] Ibid., p. 64;
[96] Barents, R. *supra* note 1, p. 209;
[97] Ibid.;
[98] "[…] the Court of Justice has to secure observance of a particular legal order and to foster its development with a view to achieving the objectives set out in particular in Articles 2, 8a and 102a of the EEC Treaty and to attaining a European Union among the Member States, as is stated in the Solemn Declaration of Stuttgart of 19 June 1983 […]" - Opinion 1/91, *supra* note 86, para. 17, 50;

indivisibility of a character of the EU law is recognized, the EU can find its legal basis only in single source – EU Treaties. Scope and legal effects of EU law are determined by what Treaties provide. Therefore, EU law relationship with other systems of law can only be explained and stipulated by the Treaties themselves.[99] The extent to which the norms of other systems can penetrate into the EU legal order are also decided by the autonomy of EU legal order. Such an indivisible nature of the EU body of law "[…] can only be conceptualized as an independent system of law […]"[100] that dictates its relationship with other legal systems of law by itself.

Autonomy did not occur after particular event, it existed since the very beginning of the Communities. There is no need to look for a CJEU's decision, stating the existence of the autonomous legal order, nor there is a need to explain EU's autonomy from the perspective of the national constitutional laws of the Member States[101]. Autonomy stems from EU law as an indivisible body that must be understood and applied in the same manner in every region where it applies. Such an aim of a uniform interpretation requires that neither internal, nor external interventions would be allowed if the EU integration project is to be successfully implemented.

As far as a reception of international law goes, the EU is an open system of law that accepts sources of international law within its order if such reception does not breach the conditions dictated by the characteristic of autonomy. To be precise, a source of international law, for instance – an international agreement, can only be accepted within EU legal order if it does not contain provisions that threaten to affect powers' division established within the EU system and does not threaten uniformity of the system. Once an agreement fulfilling the autonomy criteria becomes an integral part of EU legal order it starts to be protected by CJEU. The Court would, as a general rule, not accept neither interpretations of the provisions of that agreement provided by other international judicial body, nor would it allow these interpretations to be binding the EU or its institutions. In other words, CJEU would allow a sources of international law to become a part of EU law, to be interpreted and applied, only if it is not a menace to a coherent order and a single market.

Thus CJEU decides whether international agreement or other source of international law is compatible with EU law. Since it is the domestic constitutional courts that supervise the compatibility of international agreements with national constitutions[102], analogically, by

[99] Barents, R. *supra* note 1, p. 239;
[100] Ibid.;
[101] "[...] from the theoretical point of view any attempts to explain the contents and nature of Community law on the basis of national law inevitably results in a partitioning into as many parts as there are Member States and, as a consequence, precludes Community law from being conceptualised as an intrinsic unity, thus depriving it of its Community character [...]" – Barents, R. *op. cit.*, p. 239;
[102] For instance, according the Art. 105 (part 2, clause 3) of the Constitution of the Republic of Lithuania "[t]he Constitutional Court shall present conclusions: 3) whether international treaties of the Republic of Lithuania are not in conflict with the Constitution." [available as an interactive source at:

implementing the characteristic of autonomy of EU legal order CJEU performs the function of compatibility check at the level of the EU. Consequently, from the EU law point of view CJEU acts as a constitutional court of EU[103]. CJEU's status as a constitutional court of EU extremely affects the way it deals with the sources of international law that falls into its hands. CJEU does not only have to interpret and apply the law (manifestation of international tribunal's functions) – it must also assess whether its contents does not threaten the coherency of the EU legal order (manifestation of constitutional tribunal's functions). Only non-threatening sources of international law are allowed to be applied within EU legal order. Thus functions that are performed by CJEU as an international court are limited by the functions performed by CJEU as a constitutional court of EU.

To sum up, CJEU's status as a constitutional court seems to dominate over CJEU's status as an international court. This inevitably leads us to the conclusion that at current moment CJEU is a constitutional court of EU rather than an international tribunal. Accordingly, although CJEU was created as an international tribunal, development of the EU legal order has determined a significant changes of the Court's status subordinating its functions performed as an international court under the prevailing functions performed as a constitutional court.

http://www3.lrs.lt/home/Konstitucija/Constitution.htm], (last time accessed 9 October 2014). According to Art. 188 (part 1, clause 1) of the Constitution of the Republic of Poland "[t]he Constitutional Tribunal shall adjudicate regarding the following matters: 1. the conformity of […] international agreements to the Constitution." [available as an interactive source at: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm], (last time accessed 9 October 2014);

[103] *Author's note:* although, for the purposes of this thesis, only compatibility check of EU international agreements' with EU law, performed by CJEU, is analyzed, there are other functions that could be assignable to CJEU as to constitutional court. For instance, L. Bauer argues that CJEU at least acts as a constitutional court of the EC while deciding on conflicts of competence between institutions and by performing judicial review regarding the compliance of national law with the EC law. – Bauer, L. *supra* note 20, p. 274, 280;

1.3. In search of autonomy limits: *Kadi* judgment as indicator of restoring *status quo* in the EU relationship with international legal order

It was mainly constitutional jurisprudence of CJEU that created the notion of autonomy. The previous section explained the rules of case-law that were gradually created by CJEU over decades. Yet most recent decisions in *Kadi* regarding EU autonomy must be discussed since it caused confusion with regard to the limits of autonomy.

Despite the constitutional restrictions set up by CJEU on the reception of the sources of international law CJEU has always declared its respect towards international law. Consistently proclaimed adherence to the international law conditioned the establishment of the view that the relationship between the EU legal order and an international law was rather constitutionalist than pluralist[104]. Yet if significant number of scholars is right[105], *Kadi*[106] symbolizes a shift towards pluralistic approach resting on a completely opposite side. Since the adoption of the pluralistic approach would most probably mean tightening of the conditions of EU autonomy, what concerns the author the most in this thesis is the consequences this tightening would cause to the reception of international law within EU legal order. Consequently, this chapter would attempt to answer whether, according to the rules formulated in *Kadi* cases, autonomy of EU legal order is strengthened and whether it makes a reception of international law more difficult. In other words, question whether *Kadi* substantially changes the limits of autonomy of the EU legal order would be analyzed.

Kadi decisions inspired a fierce discussions[107] regarding the relationship of the EU legal order with the international law and, particularly, with the law of the UN Security Council. The dispute concerned the validity of the EU regulations implementing various UN Security Council's

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[104] *Author's note:* a dichotomy between constitutionalism and pluralism is used for the purposes of this thesis by neglecting a classical dichotomy of monism and dualism. It should be stressed that it is a prevailing direction of thought that promotes the constitutionalism/pluralism construction in order to explain the relationship between a municipal legal orders and international law. Monism/dualism, on the other hand, are abandoned because of inability to actually explain the problems of the relationship between municipal and international legal orders. – *see for example:* Wessel, R.A. *Reconsidering the Relationship between International and EU Law: Towards a Content-based Approach?* In: Cannizzaro, E., Palchetti, P., Wessel R.A. (eds.) *supra* note 12, p. 7 – 33; Buchanan, R. *Reconceptualizing Law and Politics in the Transnational: Constitutionalist and Legal Pluralist Approaches.* Socio-Legal Review, Vol., 5, 2009 [also available as an interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/soclerev5&collection=journals&set_as_cursor=8&men_tab=srchresults&type=matchall&id=27]; Ulfstein, G. *The Relationship between Constitutionalism and Pluralism.* Goettingen Journal of International Law, Vol. 4, 2012 [also available as an interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/gojil4&collection=journals&set_as_cursor=11&men_tab=srchresults&type=matchall&id=601]; Sweet, A.S. *Constitutionalism, Legal Pluralism, and International Regimes*. Indiana Journal of Global Legal Studies, Vol. 16, 2009 [also available as an interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/ijgls16&collection=journals&set_as_cursor=29&men_tab=srchresults&type=matchall&id=625];

[105] *See for example*: de Búrca, G. *supra* note 13; Hilpold, P. *supra* note 13;

[106] Joined Cases C-402/05 P and C-415/05 *Kadi*, *supra* note 2; Case T-315/01 *Kadi II*, *supra* note 2;

[107] *See for example*: de Búrca, G. *op. cit.* 12; Hilpold, P. *op. cit.* 12;

resolutions freezing funds and other financial assets that were directly or indirectly controlled by the individuals and entities indicated by the Sanctions Committee of the Security Council as being associated with Usama bin Laden, Al-Qaeda and the Taliban[108]. Claiming that several of their fundamental rights have been breached – particularly, right to be heard, right to respect for the property and right to effective judicial review[109] – Mr. Kadi, Saudi resident, and Al Barakaat International Foundation, based in Sweden, brought actions for annulment of the respective regulations before the CFI in so far as the regulations concerned them[110].

CFI (now GC) took a view that UN law was of a superior character in respect of EU law. Firstly, using analogy with the *International Fruit Company*[111] to state that the UN Charter binds EU[112], CFI concluded that EU "has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations[113]." In other words, it used a 'functional succession'[114] doctrine in order to theoretically explain why EU should be held bound by the Charter. Consequently, according to CFI the Community must take all measures necessary to ensure that those resolutions are put into effect[115] and must "[…] leave unapplied any provision of Community law, whether a provision of primary law or a general principle of Community law, that raises any impediment to the proper performance of their obligations under that Charter."[116] *Kadi II* judgment not only gave primacy to the UN law with regard to EU secondary law. Primacy over the primary law of EU was granted as well.

Therefore, commentators of the judgment have met *Kadi II* as a manifestation of adoption of a constitutionalist approach towards international law. In order to understand in what way *Kadi II* promoted constitutionalist approach it is extremely important to understand the meaning of the notion. A distinction between strong and soft constitutional approaches exists in the legal doctrine. As accurately contended by G. de Búrca, "[w]hat strong constitutionalist approaches to the international order have in common is their advocacy of some kind of systemic unity, with an agreed set of basic rules and principles to govern the global realm. The strongest versions of constitutionalism as such propose an agreed hierarchy amongst rules to resolve conflicts of authority between levels and sites."[117] Therefore, the strong constitutionalist approach insists of a

[108] Joined Cases C-402/05 P and C-415/05 *Kadi*, *supra* note 2, para. 28 – 32;
[109] Ibid., para. 49;
[110] Ibid., para. 46;
[111] Joined Cases 21/72 to 24/72 *International Fruit Company and Others (International Fruit Company)* [1972] ECR 1219;
[112] Case T-315/01 *Kadi II*, *supra* note 2, para. 203;
[113] Ibid.;
[114] *Author's note:* the issue of 'functional succession' is discussed in 2.2. Chapter of this thesis.
[115] Case T-315/01 *Kadi II*, *op. cit.*, para. 189;
[116] Ibid.;
[117] de Búrca, G. *supra* note 13, p. 36;

clear hierarchy of rules with constitutional norms at the top[118]. What soft constitutional approach relies on is key components that comes as follows: first is an assumption of an international community of some kind; second is emphasis of universalizability; and, third is an emphasis on common norms or principles of communication for addressing conflict[119]. What differs a soft constitutionalist approach from a strong approach is that "[…] it does not insist on a clear hierarchy of rules but rather on a commonly negotiated and shared principles for addressing conflict."[120] As it will be shown further it is strong constitutionalist approach that seems to be more appropriate as to describe the approach chosen by CFI in *Kadi II*.

Importantly, proponents of the constitutional approach do not propose an existence of some kind of international constitutional document. On the contrary, it is disputed that international legal system is not based on a formal constitution[121]. A reference towards 'international constitutional norms' is given instead[122]. A nature of the norm as constitutional norm is stipulated not by the fact that it is entrenched in some formal legal document or treaty, but by the subject matter contained within the norm. 'International constitutional norms' contain the fundamental substantive elements of the international legal order that include the norms with a strong ethical underpinning, for instance – human rights, that have acquired a special hierarchical position vis-à-vis other international norms through state practice[123]. Therefore, when talking about constitutional approach towards international law a notion 'constitution' is used to characterize a system of different regimes of national, regional or functional character that form the building blocks of the international community and "[…] is underpinned by a core value system common to all communities and embedded in a variety of decentralised legal structures for its enforcement"[124]. As a result a common superior value system reduces a possibility of normative conflicts between the norms of different regimes[125]. In addition, a mere existence of 'international constitutional norms' constitutes outer limits for the Security Council's and other regional normative actors', for instance EU, actions[126]. No entity in the world has a right to contest or infringe a common value. What values could be recognized as common constitutional norms?

It is human rights norms that are unquestionably spoken to be the core of international value system embodied by 'international constitutional norms'[127]. Since most of the *jus cogens*

[118] Wessel, R.A. *supra* note 104, p. 26;
[119] de Búrca, G. *op. cit.*, p. 39;
[120] Ibid.; Wessel, R.A. *op. cit.*, p. 26;
[121] Ulfstein, G. *supra* note 104, p. 577;
[122] Wessel, R.A. *op. cit.*, p. 25;
[123] Ibid.; de Wet, E. *supra* note 13, p. 286 – 287;
[124] de Wet, E. *op. cit.*, p. 287;
[125] Wessel, R.A. *op. cit.*, p. 25;
[126] Ibid.;
[127] de Wet, E. *op. cit.*, p. 289;

norms and *erga omnes* obligations that were ever established contain a subject-matter of human rights protection[128] it is particularly these rules that should be taken into account when trying to distinguish 'international constitutional norms'. *Kadi II* is a good example since it confirmed such an assumptions by placing human rights norms at the highest spot in the hierarchy of the rules of international law.

It was precisely *jus cogens* that CFI examined in *Kadi II* after it declared the primacy of UN law in respect of the primary and secondary laws of the EU[129]. Consequences of the UN law primacy over EU law, according to CFI, are as follows. Firstly, CFI denied having jurisdiction in respect of UN law[130] and added that it was bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations[131]. On the other hand, CFI asserted that it was empowered to "check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible"[132]. Jurisdiction to check (even indirectly) the validity of UNSC resolutions proposed by CFI was met with a strong opposition[133].

What is of extreme significance is that CFI proposed the existence of superior rules of international law falling within the ambit of *jus cogens*[134], which is the first symptom of adoption of a constitutional approach towards international law. What is more, the Court literally stated that such norms are not to be derogated neither by the Member States nor by the bodies of the UN since they constituted "intransgressible principles of international customary law"[135]. As discussed above it is a feature of 'international constitutional norms' to constitute an outer limit for the actions of any institution in the world. Thus it was implemented by CFI in *Kadi II* as well. Finally, the Court indicated the consequences of any deviations from peremptory norms – any instrument is considered to be void if departs from the *jus cogens*[136]. Consequently, it is apparent that CFI

[128] de Wet, E. *supra* note 13, p. 289;
[129] Case T-315/01 *Kadi II*, *supra* note 2, para. 189;
[130] Ibid., para. 225;
[131] Ibid.;
[132] Case T-315/01 *Kadi II*, *supra* note 2, para. 226;
[133] *See for example:* Cannizzaro, E. *A Machiavellian Moment? The UN Security Council and the Rule of Law.* International Organizations Law Review, Vol. 3, 2006 [also available as an interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/iolr3&collection=journals&set_as_cursor=17&men_tab=srchresults&type=matchall&id=193]; Milanovic, M. *Norm Conflict in International Law: Whither Human Rights.* Duke Journal of Comparative & International Law, Vol. 20, 2009 [also available as an interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/djcil20&collection=journals&set_as_cursor=1&men_tab=srchresults&type=matchall&id=71];
[134] Case T-315/01 *Kadi II*, *op. cit.*, para. 231;
[135] Ibid.;
[136] CFI motivated the consequences of the deviation from the peremptory norms by indicating Art. 53 of the Vienna Convention of the Law on Treaties providing that "[a] treaty is void if, at the time of its conclusion, it conflicts with

adopted a form of strong[137] constitutionalist approach towards the law of the UN by perceiving and implementing a clear form of hierarchy of norms in the international plane.

CJEU released a substantially different decision notwithstanding the motives and arguments provided by CFI. As observed by M. Cremona, the issue in *Kadi* was not that EU institutions had enacted secondary law that was in breach of international law. An issue was rather in the desire of the institutions' to comply with the international obligations of the EU because of which the primary law of the EU was breached in the case[138]. Thus CJEU was enabled to treat the case as an essentially 'internal affair' meaning not EU law versus international law but secondary EU law versus primary EU law[139]. Firstly, CJEU denied a jurisdiction to review the lawfulness of the resolutions of UN Security Council even if it was limited to the examination whether the respective resolution was compatible with *jus cogens*[140]. Secondly, CJEU indicated that it must, in accordance with the powers conferred on it by the EC Treaty, ensure the full review of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, as was the occasion in the case[141]. Consequently, CJEU ruled that the appellants were deprived from their fundamental rights to be heard, to an effective legal remedy, and to a right to defense[142]. It is not surprising that commentators lauded this decision for championing human rights, although its importance lies with the pluralist reasoning, which emphasized the EU legal orders' separateness from international law[143].

While CFI decision was inspired by constitutional motives, CJEU took a totally different view. According to the G. de Búrca in *Kadi* "[...] CJEU has chosen to use the much-anticipated

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a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." In addition, it referred to Art. 64 of the same convention: "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." - Case T-315/01 *Kadi II*, *supra* note 2, para. 227 – 228; United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: http://www.refworld.org/docid/3ae6b3a10.html [accessed 14 October 2014];

[137] Wessel, R.A. *supra* note 104, p. 29; de Búrca, G. *supra* note 13, p. 7;

[138] Cremona, M. *External Relations and External Competence of the European Union: the Emergence of an Integrated Policy.* In: Craig, P., de Búrca, G. (eds.), *The Evolution of EU Law.* 2nd edition. Oxford: Oxford University Press, 2011, p. 266;

[139] Ibid.;

[140] Joined Cases C-402/05 P and C-415/05 *Kadi*, *supra* note 2, para. 287;

[141] Ibid., para. 326;

[142] Ibid., para. 348 – 353 ;

[143] Arslanian, V. *Great Accountability Should Accompany Great Power: The CJEU and the U.N. Security Council in Kadil & II.* Boston College International and Comparative Law Review, Vol. 35, 2012 [also available as an interactive source at: http://heinonline.org/HOL/Page?handle=hein.journals/bcic35&collection=journals&set_as_cursor=1&men_tab=srchresults&type=matchall&id=619];

Kadi ruling as the occasion to proclaim the primacy of its internal constitutional values over the norms of international law"[144]. According to the scholar, by reaching this decision "[…] CJEU adopted a strongly pluralist approach which emphasized the internal and external autonomy and separateness of the EC's legal order from the international domain"[145]. In order to clearly understand which way CJEU turned the meaning of the pluralism must be indicated. G. de Búrca underlines that "[p]luralist approaches share with dualism the emphasis on separate and distinct legal orders. Pluralism, however, emphasizes the plurality of diverse normative systems, while the traditional focus of dualism has been only on the relationship between national and international law[146]".

Pluralist approaches are connected by the fact that they ascribe a paramount significance to the existence of multiplicity of distinct and diverse normative systems. The pluralists welcome clashes of authority-claims and competition for primacy in certain contexts. From their perspective, constant risk or mutual rejection of the authority-claims of different functional or territorial sites provides a more promising model to achieve a more responsible and responsive global governance that cannot be achieved by constitutional models underlining coherence and unity.[147] Supremacy, which is claimed by one legal order, is regarded as a fact rather than a norm within another legal system[148]. Therefore, pluralist approaches do not seek to find common norms applicable to every legal system since every order has its own hierarchy of norms.

Importantly, pluralism is not to be differentiated from constitutionalism on the ground of a lack of interest in values[149]. It is rather a practical reason that forces towards promotion of pluralism. Pluralism is seen as a way of enhancing accountability in global governance[150]. In addition, as claims R. A. Wessel not focusing on the fact of interdependence of the legal orders in order to ensure the human rights protection, democracy, pluralist approaches seems to force law to discover a more pragmatic solutions[151].

All in all, what seems to be the very essence of the debate is that pluralism appears to draw attention to the elementary division of the legal orders[152]. As J. d'Aspremont and F. Dopagne

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[144] de Búrca, G. *supra* note 13, p. 49;
[145] Ibid.;
[146] Ibid., p. 31 – 32;
[147] Ibid., p. 33;
[148] Wessel, R.A. *supra* note 104, p. 26;
[149] Ibid., p. 27 ;
[150] Krisch, N. *The Pluralism of Global Administrative Law.* The European Journal of International Law, Vol 17, 2006 [also available as an interactive source at: http://www.google.lt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&sqi=2&ved=0CCMQFjAA&url=http%3A%2F%2Fwww.ejil.org%2Fpdfs%2F17%2F1%2F70.pdf&ei=h48-VNO_Hee7ygO29oHABw&usg=AFQjCNEocO58icZPMLNO-svnxdB-hN4pRA&sig2=y8hx5swlwAjeicv7wdFp8Q&bvm=bv.77412846,d.bGQ];
[151] Wessel, R.A. *supra* note 104, p. 27;
[152] Ibid., p. 29; d'Aspremont, J., Dopagne, F. *Kadi: The CJEU's Reminder of the Elementary Divide between Legal Orders.* International Organizations Law Review, Vol. 5, 2008 [also available as an interactive source at:

sharply observed "[b]ehind the reasoning of the CJEU lies the idea that the relationship between legal orders is essentially designed by the constitutional rules and principles of each legal order. In other words, each legal order decides for itself whether or not it incorporates rules laid down in another legal order and, if so, how such incorporation must be carried out. And this is not different in the case of the European legal order as was more expressly recalled by the […] CJEU. The relation between European law and international law is governed by *European law* to the same extent as the relationship between municipal law and international law is governed by municipal law[153]." Consequently, if the legal order of UN and EU legal order are two separate legal orders, as was reminded by CJEU in *Kadi*, the rules of UN system are not automatically part of the EU legal order[154]. What was inconsistent in CFI decision was that it not only reviewed a European legal act on the basis of a norm of reference originating in another legal order but it also ventured to review a legal act originating in another legal order (namely, a Security Council resolution)[155]. By doing so CFI ceased to be a European constitutional court applying European constitutional principles. On the contrary, it adopted an international constitutionalist posture as it transformed the values and principles of the international community into European values and principles used as standards of its control of legality. It was an evident disapproval of fundamental divide between EU and UN legal orders.[156]

Therefore, the decision of CJEU in *Kadi* should not be seen as a decision bringing something new into the relationship of EU and international law. On the contrary, it only restored the *status quo* that has been disordered after an unsuccessful attempt of CFI to adopt a strong constitutionalist approach towards an understanding of international legal order. CJEU underlined that EU legal order is not embedded in the international legal order and is, therefore, not directly subjected to the rules of the UN. In other words, CJEU defended separateness and autonomy of EU legal order. However, it does not mean that with *Kadi* CJEU strengthened the conditions of autonomy in respect of international law nor does it mean that it made a reception of international law more difficult[157]. What CJEU did was taking a step back into the right track by leaving EU legal order open to international law as ever before (subject to the conditions implementing principle of autonomy listed in previous chapter). It is not surprising that opinions regarding the adoption of the pluralist approach appeared after Kadi since this approach emphasizes the

http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/iolr5&collection=journals&set_as_cursor=43&men_tab=srchresults&type=matchall&id=377];

[153] d'Aspremont, J., Dopagne, F. *supra* note 152, p. 373;

[154] Ibid., p. 375;

[155] Ibid., p. 375;

[156] Ibid., p. 375;

[157] "Indeed, [...] the European legal order has proven very monist in that it has not subjected the introduction of treaty law and customary international law to any formal act of incorporation" - d'Aspremont, J., Dopagne, F. *op. cit.*, p. 376 – 377;

existence of separate legal orders competing with each other. Yet *Kadi* is more about coming back to pluralism than accepting it for the first time.

1.4. Summary

To sum up the outcomes of the analysis it is clear that as far as CJEU solves the disputes between states and applies and interprets the sources of international law it exercises functions of an international court. In this respect CJEU is comparable to the other international courts and tribunals.

Yet the true nature of CJEU currently should not be paralleled with the international tribunal. As proved in the second Chapter, it is the constitutional side of the Court that prevails. Internal motives of protecting uniformity, ensuring coherency of the EU legal order, that both fall under the scope of the notion of EU law autonomy, endows CJEU with a crucial task to ensure the compatibility of the international law with the foundations of EU legal system. Therefore, the reception of international law is made significantly dependent from the constitutional function of CJEU to ensure the protection of the autonomy of EU legal order. Consequently, the Court can interpret and apply (perform functions of international tribunal) sources of international law, solve disputes on the basis of them, only if the sources pass the constitutionality test. Thus the international tribunal's functions performed by the Court are subordinated under superior constitutional functions.

Importantly, as stated in *Kadi*, separateness of EU legal order from the other legal systems is to be maintained. Therefore, it can be expected that the Court would be consistent with the limits of autonomy and would, most likely, follow the rules formulated in its' previous case-law. Consequently, the constitutionality test in respect of the sources of international law would be performed by the Court according to the rules repeatedly reiterated in the *Opinion 1/91*, *Opinion 1/00* or *Mox Plant* whereas these rules are still relevant. Therefore, it is these rules of autonomy that would be taken into account in the second part of this thesis while analyzing the reception of different kinds of sources of international law into EU legal order.

2. INFLUENCE OF THE PRINCIPLE OF AUTONOMY ON THE RECEPTION OF INTERNATIONAL LAW

This part of the thesis would be concerned with the reception of the sources of international law within EU legal order. As it would be shown further in this part, the constitutional function of protection of autonomy of EU legal order highly influences the way CJEU interprets the sources of international law. Under Art. 38(1) of the Statute of ICJ it is international conventions, international custom, general principles of law and judicial decisions and the teachings of the most highly qualified publicists that are accepted as a sources of international law in accordance with which ICJ would decide the disputes[158]. Yet, it would be only international treaties and international customary law that this part of the thesis would analyze since they appear to be the most problematic and receives the most attention from CJEU.

Structurally, first of all, the reception of mixed agreements of the EU would be focus of the first Chapter whereas it is a unique source of international law specific for the EU and causing the most practical and theoretical problems. Importantly, purely EU agreements, as less problematic, would not be discussed in the separate Chapter since it is depicted while analyzing mixed agreements for the comparative purposes. In the second Chapter, conditions (common to both mixed and purely EU agreements) necessary to fulfill in order to invoke an international agreement to challenge EU secondary legislation will be discussed. The third chapter will address the reception of customary international law while particularly concentrating on the possibility to grant direct effect to the rules of international customary law and contest EU secondary legislation. Finally, an issue of jurisdictional rivalry between CJEU and other international courts and tribunals will be analyzed.

Importantly, each chapter will scrutinize the specific constitutional conditions imposed by CJEU while accepting the sources of international law within EU legal order. As it is shown in every Chapter – the rationale behind majority of the reception conditions lies in the reasoning of the autonomy protection of the EU legal order.

[158] United Nations, *Statute of the International Court of Justice*, 18 April 1946 [available as interactive source at: http://www.refworld.org/docid/3deb4b9c0.html] [last accessed on 24 November 2014];

2.1. CJEU and reception of mixed agreements

As has been mentioned above the principal problem that this chapter will address is the extent to which CJEU accepts mixed agreements as a source of EU law. The answer to this principal question can only be provided if internal competence division of EU is analyzed. The first sub-chapter aims to show that the very existence of mixed agreements is possible (and at the same time - inevitable) because of a complicated competence division between the Member States and the EU. Secondly, since each mixed agreement belong partially to the EU competence (whether exclusive or shared) and partly to the Member States – a question to what extent the provisions of such an agreement are binding on the EU institutions occurs. The latter issue is analyzed in the second sub-chapter. Moreover, an issue of liability, which will be addressed in the third sub-chapter, is also relevant: which entity (EU or the Member States) and to what extent is responsible for the proper fulfillment of the provisions of mixed agreement. Importantly, every sub-chapter would aim to indicate in what ways the principle of autonomy affects the reception of mixed agreements within EU legal order.

2.1.1. Mixed agreements – a sequel of internal competence division within EU

Mixed agreement is a unique institute of EU law that incarnates the essence of EU integration – a constant tension and struggle between pro-integrationist supranationalism and intergovernmentalism defending the interests of the Member States[159]. According to P. Eeckhout "[…] all observers agree that mixity is a hallmark of the EU's external relations."[160] Since mixed agreements combines at least four different legal systems (EU Member States, EU, international law, and a legal systems of third countries) it is extremely difficult to find one definition that would be accurate[161]. There are two possible ways to define mixed agreements.

The first group of definitions is composed by paying attention to the formal element of the mixed agreements, namely, the fact that a mixed agreement is concluded by the EU, one or several Member States, and one or several third parties. Being an agreement of both EU and the Member States a mixed agreement is of a very complex nature since there are as many voices as Member States plus the EU[162]. Therefore, according to this point of view, it is a structure of the parties to an agreement that defines the nature of the mixed agreement.

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[159] Limantas, M. *supra* note 7, p. 33;
[160] Eeckhout, P. *supra* note 14, p. 212;
[161] Limantas, M. *op. cit.*, p. 33 – 34;
[162] Leal-Arcas, R. *The Resumption of the Doha Round and the Future of Services Trade.* Loyola of Los Angeles International and Comparative Law Review, Vol. 29, 2007, p. 442 [also available as interactive source at: http://heinonline.org/HOL/Page?handle=hein.journals/loyint29&collection=journals&set_as_cursor=4&men_tab=srchresults&type=matchall&id=345];

However, there is another group of definitions, concentrating on the problem of the competence division within the EU that is more practical when trying to define a concept of mixed agreements[163]. For instance, P. Eeckhout while ignoring the formal criteria begins his analysis by stating that "[…] the legal justification for mixity is that an agreement cannot be concluded by the EU alone, because its competences do not cover the entire agreement[164]." According to M. Limantas, one of the most accurate definitions of a mixed agreement was offered by H. Schermers. It defines mixed agreements as an international treaties, parties of which are an international organization, one or several member states of that organization and one or several third states or international organizations, for implementation of which neither international organization nor its member states have a full competence[165]. Evidently, this definition is preeminent since it covers not only formal composition of the parties to the international agreement but the subject-matter of the relevant agreement as well.

It is not surprising that most of the authors define mixed agreements through the issue of EU competence since a mere existence of such kind of agreements is possible only because of the presence of the division of powers between the EU and the Member States. It is a well-known fact that the limits of the EU action are determined by the principle of conferral entrenched in Art. 5 TEU. EU has only those competences that it was provided with by the Member States[166]. The competences that were not transferred to EU remain with the Member States whereas EU itself is not entitled to define the limits of its competence since it rests exclusively with the Member States[167]. Specific fields in which EU can act are explicitly entrenched in the Treaties. Consequently, EU has to tie its every act to a Treaty provision empowering it to approve such a measure[168].

Although EU was conferred with both internal and external competence, it is the former that most of the provisions of the Treaties are concerned with[169]. What is specific to the EU external competence is that not only can it be explicitly entrenched within the Treaties[170] but can be derived implicitly as well. It was *ERTA* case[171] that introduced the first principle of the *implied powers doctrine*[172]. CJEU pointed out that Community's authority to enter into an international

[163] Limantas, M. *supra* note 7, p. 36;
[164] Eeckhout, P. *supra* note 14, p. 213;
[165] Schermers, H. *Typology of Mixed Agreements.* In: O'Keeffe, D., Schermers, H. (eds.). *Mixed Agreements*. Deventer, Kluwer, 1983, p. 26; [referred from: Limantas, M. *supra* note 7, p. 37]
[166] Limantas, M. *op. cit.*, p. 42 ;
[167] Ibid. ;
[168] Opinion 2/00 [2001] ECR I-9713, para. 5;
[169] Limantas, M. *op. cit.*, p. 44;
[170] For instance, explicit right to conclude an international agreement is entrenched in Art. 186 TFEU regarding research and technological development, Art. 191(4) TFEU regarding environment protection;
[171] Case 22/70 *Commission v. Council (ERTA)* [1971] ECR 263;
[172] ERTA principle is also known as *principle of pre-emption* of EU law. - Limantas, M. *op. cit.*, p. 45;

agreements arises not only from the express conferment of the Treaties, but may equally flow from the other provisions of the Treaties and from measures adopted, within the framework of those provisions, by the Community institutions[173]. In addition, every time the Community adopts provisions stipulating common rules that implement common policy envisaged by the Treaties, "[…] Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules."[174] Consequently, a Court reached a conclusion that since the moment common rules are laid within EU it is only EU itself in a position "to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system."[175] It is evidently a manifestation of the protection of the autonomy of the EU legal order.

Kramer[176] introduced a second principle of an *implied powers doctrine*. Case concerned a field of conservation of fish resources. Having established that the EU had competence in the field the Court made a statement that the only way to effectively and equitably ensure the conservation of the biological resources was through a system of rules binding on all the states concerned, including non EU Member States[177]. Since Community concluded a North-East Atlantic Fisheries Convention (Fisheries Convention) at the moment when there has not been adopted any internal regulations relating to the sea-fishing industry[178], adoption of the Fisheries Convention was the first step of the Community exercising the conferred competence in the fish resource conservation field[179]. Therefore, with *Kramer* CJEU provided for the first time that implied power to conclude an international agreement could arise even if EU had not yet exercised the powers conferred on it internally.

The content of the *Kramer* principle was purified with the *Opinion 1/76*[180]. The Court verified that implied external competence could also exist in cases when EU had not legislated yet inasmuch as EU possessed an internal competence in the field to achieve certain objectives and it was necessary to utilize external competence to achieve the objectives laid down in the Treaties[181]. According to the Court's reasoning despite that "[…] internal Community measures are only adopted when the international agreement is concluded and made enforceable […] the power to bind the Community *vis-a-vis* third countries nevertheless flows by implication from the

[173] Case 22/70 *ERTA*, *supra* note 171, paras. 15 – 16;
[174] Ibid., para. 17
[175] Ibid., para, 18;
[176] Joined Cases 3, 4, and 6/76 *Kramer* [1976] ECR 1279, paras. 34 – 35;
[177] Ibid., para. 30 – 33;
[178] Ibid., paras. 35 - 38;
[179] Ibid.;
[180] Opinion 1/76 *regarding draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] ECR 741;
[181] Limantas, M. *supra* note 7, p. 47;

provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is […] necessary for the attainment of one of the objectives of the Community[182].” However, it is important to underline the fact that such an implied right of the EU to conclude an agreement *only exist* if it is *indispensable* to reach the goals stipulated by the Treaties. Therefore, conclusion of an international agreement by the EU, if there have not been any EU internal legislation yet, should be initiated only as a last resort when internal competence could not be implemented any other way.

Prior to the Treaty of Lisbon, EU was entitled to conclude an international agreement at limited occasions[183] that were supplemented by the CJEU’s case law delineating the circumstances under which conclusion of an international agreement could be allowed[184]. Working Group on External Action recommended that this case law had to be reflected by the provisions of the Treaties[185]. Recommendations were embodied in the Constitutional Treaty and transferred to the Lisbon Treaty as well. The case-law of the Court that was discussed above was transformed into provisions of two articles, namely, Art. 3(2) TFEU and Art. 216 TFEU both of which should be read in conjunction[186]. In addition, the Treaty of Lisbon introduced a non-exhaustive list of competences. Indication of a list of exclusive competences (Art. 3(1) TFEU), shared competences (Art. 4 TFEU) and supporting, coordinating and supplementary competences (Art. 6 TFEU) developed a relatively clearer understanding of the power division within EU and the Member States. However, the boundaries between the fields of EU’s exclusive competence and competences that are shared still remain vague. For instance, distinguishing between the fields of competition rules necessary for internal market to function (field of an exclusive competence) and a rules regarding internal market (field of a shared competence) could be rather problematic[187].

Codification of CJEU case-law within the Treaties brought more clarity into understanding what competences belong where. Yet, matters remain complicated if the fact that

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[182] Opinion 1/76, *supra* note 180, para. 4;
[183] Articles 111, 133, 174(4), 181, 310 EC - Craig, P., de Búrca, G. *supra* note 35, p. 79;
[184] Ibid.;
[185] CONV 459/02, *Final Report of Working Group VII on External Action.* Brussels, 16 Dec 202 [also available as interactive source at: http://www.google.lt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.europarl.europa.eu%2Fmeetdocs%2Fcommittees%2Fdeve%2F20030218%2F489393EN.pdf&ei=lRYpVNrfH4HnyQP6zICoCg&usg=AFQjCNGh5HY1VvgUAG7PX1dJDAkIn3pPEQ&sig2=2IN_e86FKyHdrA_xQCsvog&bvm=bv.76247554,d.bGQ] [referred from: Craig, P., de Búrca, G. *op. cit.*, p. 79];
[186] Craig, P., de Búrca, G. *op. cit.*, p. 79; *Author’s note:* Article 3(2) stipulates that “[t]he Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.” Art. 216(1) states that “[t]he Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.”
[187] Ibid.;

each field of the shared competence could become an area of an exclusive competence of EU is raised. According to P. Eeckhout, shared competences are as real as exclusive ones. The only difference between them is that in case of shared competences EU might decide not to exercise its competence and leave it to the Member States to exercise.[188]

In the context of such a highly complicated EU competence division regulation mixed agreements steps in as a most convenient solution. Choosing to conclude a mixed agreement is a way of avoiding the need to agree on the exact delimitation of the EU and the Member States' powers[189]. As such separation most of the time would probably be of more or less complex nature, tricky and, at some instances, even impossible to perform at all[190], a choice to conclude a mixed agreement and avoid all the trouble seems to be a reasonable decision. It is especially true in the light of the fact that the borders between competences are changing constantly[191] as more and more competence fields are comprehensively regulated with the EU measures depriving Member States from the ability to conclude international agreements independently. Consequently, implementation of the principle of conferral resembles a constantly ongoing process of the transference of powers, usually, from the Member States towards EU thus enabling EU to perform an actions necessary to achieve the objectives entrenched within the Treaties. The issue of highly complex competence division appears as an outcome of such a dynamic manner of implementation of the principle of conferral.

Since mixed agreements are needed because of insufficient competence of EU to conclude an agreement alone, issue of lack of competence requires a closer attention. There are two different kinds of situations when EU could be lacking competence to conclude an agreement by itself without Member States included. Under first scenario, the EU lacks exclusive external competence[192]. If the subject-matter of an international agreement is fully covered by the EU exclusive competences only EU is entitled to conclude an agreement[193]. In case agreement is not entirely covered by the fields of exclusive competence – a necessity for a conclusion of a mixed agreement arise[194].

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[188] Eeckhout, P. *supra* note 14, p. 216;
[189] Ibid., p. 221;
[190] Limantas, M. *supra* note 7, p. 74;
[191] Ibid.;
[192] Ibid., p. 49;
[193] Eeckhout, P. *op. cit.*, p. 214;
[194] For instance, in *Portugal v. Council* a Republic of Portugal contested the Council's decision to conclude an international agreement with the Republic of India since it was concluded without having sufficient competence in the fields of energy, tourism and culture that were regulated with the respective agreement. CJEU rejected Portugal's claims because of two motives. Firstly it took into account the nature of an agreement which was a development cooperation agreement. Secondly, it analyzed the scope of the provisions that included disputed fields of competence into the agreement. CJEU concluded that it was of such scope that it could be incorporated within the framework of development cooperation agreement and fit under the Art. 181 EC as the basis for the agreement. However, would the provisions regarding contested fields of competence be of wider scope, a necessity of mixed agreement could arise. – Case C-268/94 *Portugal v. Council* [1996] I-6177, paras. 49 - 55; Limantas, M. *op. cit.*, p. 50-51;

Under second scenario, EU lacks competence because of the non-exclusive nature of its competence[195]. It should be noted that it is the *nature of the competence* rather than the *fact of existence of exclusive competence* that was used to justify the conclusion of the mixed agreements[196]. That is so since there are very few fields of EU exclusive competences, but it would be difficult to find a field in which EU would not possess any competence at all[197]. Since there is minority of fields where EU has all the competence an international agreement can only be concluded with the participation of the Member States that possess the other part of the competence. CJEU's case-law provides with numerous examples indicating the need of mixed agreements within the scope of non-exclusive competences[198]. Clearly, in both situations one way or another EU lacks exclusive competence to act alone without participation of the Member States.

To sum up, mixed agreements not only embody the EU struggle between supranationalism and intergovernmentalism but is an inevitable tool that is essential if all the aims provided in the Treaties are to be achieved. EU's internal competence division is complex matter in itself. Yet it becomes even more complicated provided that the balance of powers is constantly changing. In this legal environment mixed agreements come as a solution capable of combining internal complexity of EU law into a practical and enforceable tool enabling to implement the purposes and interests of the EU while fully cooperating with a wider world. Although mixed agreements are inevitable they incarnate a wide range of practical and theoretical problems most significant of which would be analyzed in the following sub-chapters.

2.1.2. Interpretation and application rules applied to mixed agreements by CJEU

The first problem concerns the rules on interpretation and application of the agreements within EU legal order. The problem lies in the fact that mixed agreements are generally concluded because of the limited competence of both EU and the Member States to conclude an agreement alone. Therefore, it seems to be a logical consequence that certain parts of the mixed agreement should fall under an exclusive competence of EU while other parts should belong to the competence of the Member States (which might be shared with EU as well)[199]. Deciding what competence belongs where is not an easy task though. In addition, it is not clear to what extent mixed agreement should be considered binding on the EU institutions and Member States as a

[195] Limantas, M. *supra* note 7, p. 51 – 52;
[196] Ibid.;
[197] Ibid., p. 52;
[198] *See for example:* Ruling 1/78 [1978], 2151; Opinion 2/91 *regarding the ILO convention No. 170 concerning safety in the use of chemicals at work* [1993] I-1061, paras. 35 – 36; Case C-268/94 *Portugal v. Council*, *op. cit.*, paras. 49 – 55 ;
[199] Neframi, E. Mixed Agreements as a Source of European Union Law. In: Cannizzaro, E., Palchetti, P., Wessel R.A. (eds.) *supra* note 12, p. 325;

matter of EU law[200]. In other words, a question whether a mixed agreement is a source of EU law in its entirety or only as far as provisions falling under exclusive competence of EU are concerned arise[201]. Unlike in case of purely EU agreements that are regulated by Art. 216(2) TFEU[202], the status of mixed agreements is not established by the Treaties. Therefore, CJEU's case-law and the interpretations of legal scholars are probably the only sources that could provide some answers to the questions raised.

Firstly, it is important to stress that provisions of mixed agreements falling under exclusive competence of EU have the same status as the provisions of a purely EU agreement[203]. It was *Haegeman* that initially regulated the EU agreements' place within EU legal system with a famous wording: *"[t]he provisions of the Agreement, from the coming into force thereof, form an integral part of Community law"*[204]. The rules formulated by the case-law of CJEU with regard to purely EU agreements should be read in conjunction with the Treaties in what is now an Art. 216 TFEU[205]. Consequently, both EU international agreements and provisions of mixed agreements falling under the exclusive competence of EU would be treated according to the same rules under which it would be regarded as a binding and integral part of the EU law.

The CJEU's approach towards provisions of mixed agreements falling outside exclusive competence of the EU is far more complicated. Provisions would be considered to fall outside the exclusive competence of EU if it fell under the field of shared competence or under exclusive competence of the Member States. These provisions could not be included into agreement by the EU if the Member States were not participating[206]. Importantly, the conclusion of a mixed agreement does not mean that EU exercises its shared competence – shared competence before a mixed agreement remains shared competence after the conclusion of such agreement[207]. Such a regulation flows directly from the case law of CJEU.

The first *attempt* of CJEU to define the status of the provisions of mixed agreement falling under the competence of the Member States or under shared competence was in *Demirel*[208]. However, since the case concerned an association agreement of EU CJEU assumed the entirety of the interpretative jurisdiction denying an assertion that Court's interpretative jurisdiction should not extend to provisions whereby Member States have entered into commitments with regard to

[200] Neframi, E. *supra* note 199, p. 325;
[201] Ibid., p. 325;
[202] "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States"- Consolidated Version of the Treaty on the Functioning of the European Union, art. 216(2), 2012 O.J. C 326/47;
[203] Neframi, E. *op. cit.*, p. 331;
[204] Case 181/73 *Haegeman* [1974] ECR 449, para. 5;
[205] Consolidated Version of the Treaty on the Functioning of the European Union, art. 216(2), 2012 O.J. C 326/47, *op. cit.*;
[206] Neframi, E. *op. cit.*, p. 331;
[207] Ibid.;
[208] Case 12/86 *Meyrem Demirel v. Stadt Schwäbisch Gmund (Demirel)* [1978] ECR 3719;

Turkey in the exercise of their own powers which was the case of the provisions on freedom of movement for workers[209]. Further cases, however, purified the Court's approach.

As it is apparent from *Dior*[210] and *Hermès* [211] it is direct effect of the provisions that are outside of the exclusive competence of EU that should be paid a closer attention. Both of the two cases concerned an issue of direct effect of the TRIPs provision, Art. 50(6), imposing time limits on the national interim measures. What CJEU stipulated with regard to an issue is of a great significance for our topic: "[…] in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, *Community law neither requires nor forbids*[212] that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPs or that it should oblige the courts to apply that rule of their own motion[213]." What seems to be the main idea of the Court's approach is that if the relevant provision falls under the competence of the Member States it is the national judge who decides whether provisions of a mixed agreement are capable of being invoked in the national legal system.

Merck[214] and *Aarhus Convention*[215] continued to develop a chosen line of thought. CJEU once again reiterated that the field in which the Community has not legislated yet falls within the competence of the Member States[216]. Since the case concerned TRIPS provision regarding the period of protection of patents, the Court by referring to *Dior* continued by stating that "[…] the protection of intellectual property rights and measures taken for that purpose by the judicial authorities do not fall within the scope of Community law, so that the latter neither requires nor forbids the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the TRIPs Agreement or to oblige the courts to apply that rule of their own motion[217]." The Court concluded that "[…] since Article 33 of the TRIPs Agreement forms part of a sphere in which, at this point in the development of Community law, the Member States

[209] Case 12/86 *Demirel, supra* note 208, paras. 7 – 9;
[210] Joined cases C-392/98 and C-300/98 *Parfums Christian Dior SA v. Tuk Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v. Wilhem Layher GmbH & Co. KG and Layher BV (Dior)* [2000] ECR I-11307;
[211] Case C-53/96 *Hermès International v. FHT Marketing Choise BV (Hermès)* [1998] ECR I-3603;
[212] *Author's note:* highlighted by the author.
[213] Joined cases C-392/98 and C-300/98 *Dior*, *op. cit.*, para. 48;
[214] Case C-431/05 *Merck Genéricos-Produtos Farmacêuticos v. Merck & Co. Inc. and Merck Sharp & Dohme Lda (Merck)* [2007] ECR I-7001;
[215] Case C-240/09 *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky (Aarhus Convention)* [2011] ECR I__ (delivered on 8 March 2011);
[216] Case C-431/05 *Merck, op. cit.*, para. 34;
[217] Ibid.; Case C-240/09 *Aarhus Convention*, *supra* note 215, para. 32;

remain principally competent, *they may choose whether or not to give direct effect to that provision*[218]."

Consequently, as observes E. Neframi, CJEU does not have jurisdiction to grant or deny the direct effect for the provisions of the mixed agreements that belongs to the competence of the Member States[219]. For a national judge, on the other hand, the appreciation of direct effect for the provision of a mixed agreement is a matter of international law[220], meaning that a national judge while deciding an issue of direct effect must deal with a provision of a mixed agreement falling under the Member States' competence as with a provision of other international agreements concluded by the Member State. CJEU is not to participate in this process of application of mixed agreement.

If it is for the judges of the Member States to decide whether to apply directly the provisions of mixed agreements within the national legal order does it mean that a provisions which do not fall under the exclusive competence of EU are not a source of EU law? Does it mean that it should be handled by the Member States as a source of international law only?[221] Could national judges freely interpret and apply these provisions without any intervention of the CJEU?

Notwithstanding that CJEU left for the Member States to decide the issue of direct effect of the provisions of mixed agreements not falling under the exclusive EU competence, it did not surrender the right to establish the contents of the provisions. CJEU consistently promoted its interpretative jurisdiction over the entirety of a relevant mixed agreements. There are several reasons for such an approach. Firstly, because in order to clear up whether a provision was assumed under the competence of EU it must be interpreted. This motive was concisely explained by the Court in *Merck*: "[t]he WTO Agreement, of which the TRIPs Agreement forms part, has been signed by the Community and subsequently approved […]. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the Community legal order […]. Within the framework of that legal order the Court has jurisdiction to give preliminary rulings concerning the interpretation of that agreement […][222]." Therefore, since the TRIPs agreement has been concluded "[…] by the Community and its Member States by virtue of joint competence, the Court, hearing a case brought before it in accordance with the provisions of the EC Treaty […] *has jurisdiction to define the obligations which the Community has thereby assumed and, for that purpose, to interpret the provisions of the TRIPs Agreement*[223]."

[218] Case C-431/05 *Merck, supra* note 214, para. 37; *Author's note:* highlighted by the author.
[219] Neframi, E. *supra* note 199, p. 333;
[220] Ibid.;
[221] Ibid.;
[222] Case C-431/05 *Merck, op. cit.*, para. 31;
[223] Ibid., para. 33; *Author's note:* highlighted by the author.

Secondly, the Court seems to be protecting the uniformity of EU law and, at the same time, the autonomy and coherency of EU legal order. As it explained in *Dior* and *Hermès* "[…] where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply[224]." Therefore, it is clear that CJEU is free to substantively interpret the provisions of mixed agreements falling outside the exclusive competence of EU thus precisely stipulating the contents of the provisions[225].

Consequently, the status of mixed agreements within EU legal order should be explained by drawing distinction between the interpretative jurisdiction and jurisdiction to implement mixed agreements. Interpretative jurisdiction of CJEU does not depend on the exclusivity of the EU competence[226]. In order to be able to establish which provisions belong to the exclusive competence of the EU it must have an ability to interpret all the provisions: CJEU has no other option but to affirm its interpretative jurisdiction over the entirety of the agreement. It is not possible to puzzle out the dependence of a specific norm to a particular competence field if it is not interpreted and its contents are not elucidated.

Equally, an aspiration of CJEU to eliminate any possibilities of different interpretations of provisions of mixed agreements is nothing else but an implementation of EU autonomy with regard to mixed agreements. Mixed agreements are accepted within EU legal order provided that it would be interpreted in a uniform way. As has been explained in Section 1.2., uniformity requires that EU law would be interpreted by CJEU only. Allowing interpretations of an outside judicial bodies[227] to have binding effect on the Member States or the institutions of EU would threaten the indivisibility of an EU legal order since there would be as many ways to understand provisions of mixed agreements as there are Member States in the EU. Therefore, looking from the perspective of EU law it seems to be reasonable, that CJEU claims exclusive interpretative jurisdiction in respect of mixed agreements since it is the only way to ensure uniformity of their interpretation. In fact, technically, it seems that the only way in which mixed agreements could be accepted within EU legal order is by conferring CJEU a right to interpret the entirety of the agreements. Not granting such a right would most likely lead to chaos and confusion since there would not be any unifying institution that would set the basic rules stipulating how to handle the agreements.

[224] Case C-53/96 *Hermès, supra* note 211, para. 32; Joined cases C-392/98 and C-300/98 *Dior, supra* note 210, para. 35;
[225] Neframi, E. *supra* note 199, p. 335;
[226] Ibid.;
[227] *Author's note:* in case of mixed agreements – it would be national courts of the Member States. On the other hand, likewise, CJEU would most probably not accept an interpretations of other international courts as binding the EU or the Member States;

If there are any internal rules of EU that could be affected by the interpretations of mixed agreement, autonomy of EU legal order requires that a mixed agreement would be interpreted by CJEU. Moreover, provisions falling under the exclusive competence of the Member States are also caught under the interpretative jurisdiction of CJEU since it is the only way for CJEU to check whether provision does not belong to the competence of the EU. Thus CJEU's jurisdiction to interpret mixed agreements covers all the provisions notwithstanding the competence division within mixed agreement and it is the consequence of the protection of the autonomy of EU legal order.

However, competence division has a practical significance as we speak about the jurisdiction to implement the provisions of mixed agreement – as was explained above, provisions not falling under the exclusive competence of the EU acquire direct effect by the decision of a national judge. In other words, although CJEU deprived national courts from the interpretative jurisdiction of provisions of mixed agreements, it has left the implementation of such provisions to be dealt with by the national courts. Hence CJEU has a right to stipulate the contents of the provisions of the mixed agreements, but the national courts are free not to implement it directly within their domestic systems.

To conclude, mixed agreement is a source of EU law in its entirety for the purposes of the uniform interpretation and protection of the EU law autonomy. Yet, if the jurisdiction to implement is at issue, mixed agreement is a source of EU law as far as its provisions fall under a field covered by EU legislation[228]. Consequently, parts of mixed agreement that fall under the exclusive competence of EU have the same status in the EU legal order as purely EU agreements does. Both interpretation and implementation are concentrated in the hands of CJEU in respect of purely EU agreements and provisions of mixed agreement that fall under exclusive competence of EU.

2.1.3. Liability for breaches of mixed agreements

As some provisions under mixed agreement fall under exclusive competence of the EU, and some under shared competence or exclusive competence of the Member States – a question who is to be held responsible for its proper implementation is relevant. Which entity bears an international responsibility for the breaches of the mixed agreement? In order to answer these questions in detail, again, an issue of responsibility must be analyzed from two different perspectives – firstly, EU law, and, afterwards – international law perspective.

[228] Neframi, E. *supra* note 199, p. 337;

In case of agreement that is concluded only by EU it is the EU itself who is responsible for the proper implementation of the agreement before the third parties[229]. It is not surprising since the Member States of EU cannot conclude international agreements in the field of the exclusive competence of EU[230]. The Member States, on the other hand, have the obligation under EU law to properly implement a purely EU agreement. Therefore, in case of non-compliance with an EU agreement by the Member States an infringement procedure might be initiated by the Commission under Art. 258 TFEU[231].

From EU law perspective, analogically, Member States are considered to have obligation under EU law to implement properly the provisions of entirety of mixed agreement even if they fall outside the exclusive competence of the EU[232]. Court's reasoning, for instance, was clearly presented in *Berne Convention*[233]. The Court, firstly, reminded that an action for failure to fulfill obligations could have as its subject only the failure to comply with obligations under the Community law[234]. CJEU continued by stating that "[t]he Court has ruled that mixed agreements concluded by the Community, its Member States and non-member countries *have the same status in the Community legal order as purely Community agreements*[235], as these are provisions coming within the scope of Community competence[236]." From this the Court has concluded that, in ensuring respect for commitments arising from an agreement concluded by the Community institutions, the Member States fulfill, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement[237]." What seems to be suggested by this decision of CJEU is that it is EU that bears the responsibility under international law before the third parties for the due performance of the mixed agreement. However, according to the Court, Member States while not being bound under international law are bound under EU law.

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[229] *See for example:* Case 104/81 *Kupferberg, supra* note 65; "Regarding agreements concluded by the Community alone, the *Haegeman* case law does not cause much difficulty. All provisions of these agreements must be regarded as part of Community law resulting in an exclusive competence of the CJEU to interpret them." – Lock, T. *The European Court of Justice: What are the Limits of its Exclusive Jurisdiction?* Maastricht Journal of European and Comparative Law, Vol. 16, 2009, p. 295 [also available as interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/maastje16&id=291];

[230] "When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts." – Consolidated Version of the Treaty on the Functioning of the European Union, Art. 2(1), 2012 O.J. C 326/47;

[231] *See for example:* Case C-266/03 *Commission v. Grand Duchy of Luxembourg* [2005] ECR I-4828, paras. 38 – 41; Case C-433/03 *Commission v. Germany* [2005] ECR I-7011, paras. 41 – 47; Case C-246/07 *Commission v. Sweden* [2010] ECR I-03317, paras. 71 – 72;

[232] Neframi, E. *supra* note 199, p. 335;

[233] Case C-13/00 *Commission v. Ireland (Berne Convention)* [2002] ECR 2943;

[234] Ibid., para. 13;

[235] *Author's note:* highlighted by the author.

[236] Case C-13/00 *Berne Convention, op. cit.*, para. 14; *see also:* Case 12/86 *Demirel, supra* note 208, para. 9;

[237] Case C-13/00 *Berne Convention, op. cit.*, para. 15; *see also:* Case 12/86 *Demirel, op. cit.*, para. 11;

Importantly, what the Court calls an obligation under EU law is nothing but a duty of loyal cooperation of the Member States[238]. If EU undertook an international obligation that could lead to an international responsibility of the EU, Member States have a duty to perform all actions that are in their power to help the EU to fulfill the international obligations and to avoid international responsibility. According to the wording of the Court "[…] Article 10 EC requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty[239]." As was stated in *Kupferberg* "[i]n ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfill an obligation not only in relation to the non-member country concerned *but also and above all in relation to the Community*[240] which has assumed responsibility for the due performance of the agreement[241]." As the duty of loyal cooperation does not depend on the exclusivity[242] of the competence, Member States have the duty to cooperate in respect of all the provisions of the mixed agreement, including provisions that fall under shared competence and even the ones that are under the exclusive competence of the Member States since it is the EU who, according to CJEU, would bear the responsibility in case of infringement of these provisions.

Etang de Berre[243] complemented Court's approach. A case concerned the Protocol[244] and a Convention[245] for the Protection of the Mediterranean Sea against pollution, which was concluded by EU and the Member States as a mixed agreement under shared competence[246]. Since environmental protection was in very large measure regulated by Community legislation, the provisions of the measures in question (the Convention and Protocol) covered a field, which fell

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[238] *See for example:* Neframi, E. *The Duty of Loyalty: Rethinking Its Scope Through its Application in the Field of EU External Relations.* Common Market Law Review, Vol. 47, 2010 [also available as interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.kluwer/cmlr0047&id=327]; de Cendra de Larragin, J. *United We Stand, Divided We Fall: The Potential Role of the Principle of Loyal Cooperation in Ensuring Compliance of the European Community with the Kyoto Protocol.* Climate Law, Vol. 1, 2010 [also available as interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/climatla1&id=157];

[239] Case C-433/03 *Commission v. Germany*, *supra* note 231, para. 63; *Author's note:* it is now Art. 4(3) TEU that entrenches the principle of loyal cooperation. It reads as follows: "[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives." - Consolidated Version of the Treaty on European Union Art. 4(3), 2012 O.J. C 326/13;

[240] *Author's note:* highlighted by the author.

[241] Case 104/81 *Kupferberg*, *supra* note 65, para. 13;

[242] Case C-433/03 *Commission v. Germany*, *op. cit.*, para. 64;

[243] Case C-239/03 *Commission v. France (Etang de Berre)* [2004] ECR I-9325;

[244] Signed at Athens on 17 May 1980 and approved on behalf of the European Economic Community by Council Decision 83/101/EEC of 28 February 1983, OJ 1983 L 67, p. 1;

[245] Signed at Barcelona on 16 February 1976 and approved on behalf of the European Economic Community by Council Decision 77/585/EEC of 25 July 1977, OJ 1977 L 240, p. 1;

[246] Case C-239/03 *Etang de Berre*, *op. cit.*, para. 24;

to a large extent under the Community's competence[247]. "[…] [T]he Court has inferred that, in ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfill, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement[248]." Since the Convention and the Protocol created rights and obligations in the field that was covered to a large extent by Community rules, there was a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments[249]. The Court finished by stating that the fact that discharges of fresh water and alluvia into the marine environment, that at that exact moment had not yet been a subject of Community legislation, was not capable of calling the finding of Community's interest into question[250]. Thus CJEU indicated that it had competence over the entirety of the Convention and Protocol not only in cases where EU had already acquired exclusive competence. For CJEU to be responsible over the entirety of the agreement it was sufficient that EU competence was exercised to some limited extent.

Therefore, as far as the EU law regulates the reception of the mixed agreements CJEU claims a sole responsibility of the EU under obligations stemming from the mixed agreements. However, the Court demands a responsibility of the Member States, but because of the different ground stemming from a principle of loyal cooperation. Consequently, from the point of view of EU law both EU and the Member States are responsible for the implementation of mixed agreements, yet different reasons direct their liability. According to CJEU, EU is responsible under international law while Member States – under EU law. Analogically, they are liable to a different entities: EU, as claimed by CJEU, is to be responsible before the third parties while the Member States are responsible to EU.

However, matters are a little different if the responsibility under mixed agreements issue is reviewed from the international law point of view. Notwithstanding what EU law stipulates regarding the responsibility, third parties to an agreement look at the issue of responsibility from different perspective that is not based on internal laws of the EU. Two scenarios are possible that depends on the particular agreement that is at stake.

Under first case scenario a mixed agreement contains the declaration of competences that reveals the allocation of competence between the EU and the Member States[251]. In this situation "[i]nternational responsibility aligns to an objective parameter, which is the declaration of competences, and non-Member States rely on the Union's statement without verification of

[247] Case C-239/03 *Etang de Berre*, *supra* note 241, para. 27 – 28;
[248] Ibid., para. 26;
[249] Ibid., para. 29;
[250] Ibid., para. 30;
[251] Neframi, E. *supra* note 199, p. 339; *Author's note:* it is United Nations Convention on the Law of the Sea that contains a declaration of competence.

whether the competence declared meets exclusivity[252].” It follows that in case such a declaration exist within a mixed agreement the extent of the responsibility of the EU and the Member States is determined by the declaration provided within agreement and not according to the extent of exclusive competence of the EU. As claimed by C. Ahlborn, since division of competences within the EU is frequently changing**,** these declarations could be seen as a suitable means to externalize the internal division of competences within EU so that each responsible actor, whether it is EU or the Member States, is only regarded responsible for its share of the injury[253]. Therefore, theoretically, both EU and the Member States could be liable separately for non-fulfillment of the provisions of a mixed agreement.

Under a second scenario a declaration of competence would be absent as is the case in a significant number of mixed agreements. Therefore, EU and the Member States would be considered to bear a joint and several responsibility[254] for the execution of the mixed agreement as a whole[255] while the division of competences would be left as a purely internal matter[256]. The prospect of joint and several responsibility, allowing the injured party to sue only one of the responsible actors for the whole burden of shared responsibility, may be one of the reasons why the EU has developed a practice of attaching special declarations of competence to mixed international agreements[257] since it allowed for the third parties to avoid the need to go deep into the questions of internal competence division of the EU. Interestingly, an application of the principle of a joint and several responsibility is regarded to be defending an interests of the third parties and, at the same time, not that beneficial to the EU and the Member States. Therefore, rightly claims C. Ahlborn stating that “[w]hile the responsible entity may subsequently turn to the other responsible parties *internally* to pay their share of reparation, the rationale behind the principle 'joint and several responsibility' is directed at the protection of the interests of the injured party and is thus rather unsatisfactory from the perspective of the responsible parties[258].”

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[252] Neframi, E. *supra* note 199, p. 340;
[253] Ahlborn, C. *The Rules of International Organizations and the Law of International Responsibility*. International Organizations Law Review, Vol. 8, 2011, p. 463 [also available as interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/iolr8&id=405];
[254] *For a detailed analysis see:* Nollkaemper, A., Jacobs, D. *Shared Responsibility in International Law: A Concept Paper*. ACIL Research Paper No 2011-07 (SHARES Series), finalized 2 August 2011 (www.sharesproject.nl) [also available as interactive source at: http://www.google.lt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.sharesproject.nl%2Fwp-content%2Fuploads%2F2011%2F08%2FNollkaemper-Jacobs-Shared-Responsibility-in-International-Law-A-Concept-Paper.pdf&ei=mKtPVKmQAujNygOQ74GIDw&usg=AFQjCNEeBKXzfkBsDs2Lmgt4zpOAQ7knLQ&sig2=QGb0ZQ2PpwZH1b94DJ53Dw&bvm=bv.77880786,d.bGQ];
[255] Neframi, E. *supra* note 199, p. 341;
[256] Neframi, E. *supra* note 238, p. 335;
[257] Ahlborn, C. *op. cit.*, p. 463;
[258] Ibid.;

Notwithstanding the differences of the two views, in practice, neither of them is used in a pure form to identify an entity responsible for the fulfillment of the mixed agreement. A European group (EU and the Member States) is generally seen as a single contracting party and the division between them is not intentionally underlined[259]. From the perspective of the third parties it is much more practical to perceive EU as a single entity. In turn, EU consistently declares an aspiration of the unity in the international representation[260]. Loyal cooperation between EU and the Member States seems to be essential in ensuring that Community represents itself as a unified system in the world[261]. International responsibility of the EU for provisions of a mixed agreement falling outside its exclusive competence derives from the fact that the duty of loyal cooperation obliges EU and the Member States to act as a unitary actor and a single contracting party on the international level[262].

Therefore, it is reasonable that an intermediary approach combining an EU law approach promoting unity of EU external representation and international approach preferring to see EU and its Member States as a single contracting party is chosen. It is European group that is held responsible for the implementation of the agreement in its entirety, and EU and the Member States bear a subsidiary responsibility when the responsible party fails to fulfill its obligations (in case there is a declaration of competences), or a joint and several responsibility when the responsible party cannot be determined because of the evolutionary character of the division of competences (in case there is no declaration of competences)[263].

[259] Neframi, E. *supra* note 238, p. 335;
[260] Opinion 1/94 *regarding WTO Agreements* [1994] ECR I-5267, para. 108; Opinion 2/91, *supra* note 198, para. 36;
[261] The need for a unity of international representation of the EU was promoted by AG Tesauro in *Hermès*. – Opinion of Advocate General Tesauro, Case C-53/96 *Hermès International v. FHT Marketing Choise BV* [1997] I-3606, para. 21;
[262] Neframi, E. *supra* note 199, p. 344;
[263] Neframi, E. *op. cit.*, p. 335;

2.2. International agreement as a ground to challenge EU secondary law

Since the status and the most fundamental rules of the reception of international agreements have been discussed an issue of direct applicability of their provisions can be analyzed. Not every agreement or its provision could be invoked in the EU to contest the validity of the EU secondary law. It is so, notwithstanding that it is expressly established in the constitutional Treaties that international agreements are of a binding nature. CJEU, starting with *International Fruit Company* and finishing with *Emissions Trading Scheme* made such a possibility dependent on fulfilment of a number of conditions which are decisive for those willing to invoke the international agreement directly. The pattern indicating a gradual tightening of the conditions can be indicated from the analysis of Court's jurisprudence. The aim of the chapter would be to reveal the content of each of the conditions necessary to fulfill in order to directly invoke EU international agreements to contest EU secondary law. It would be pursued to answer in what way the strict conditions applied by the CJEU on the direct effect of the provisions of international agreements are influenced by the reasoning of EU as an autonomous legal order.

In the *Emissions Trading Scheme* CJEU pointed out that "[…] by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, *they prevail over acts of the European Union*"[264]. Consequently, the Court reiterated the conditions formulated initially indicated in *Intertanko* under which the validity of an act of the EU may be assessed in the light of the rules of an international agreement. Firstly, "[…] the European Union must be bound by those rules"[265]. Secondly, the validity of an act of European Union law can be examined "[...]in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this"[266]. Thirdly, "[…] it is also necessary that the provisions of that treaty which are relied upon for the purpose of examining the validity of the act of European Union law appear, as regards their content, to be unconditional and sufficiently precise"[267]. Further analysis would be concentrated on the content of each of these criteria.

First condition: binding effect of the agreement. It appears that there are two possible ways by which EU would be held bound under international agreement. Firstly, an agreement is binding because EU itself *becomes a contracting party to the agreement* in accordance to Art. 216 of the TFEU. CJEU specifically indicates that the international agreements concluded by the EU prevail over the acts of the European Union[268]. Therefore, international agreement concluded by

[264] Case C-366/10 *Emissions Trading Scheme, supra* note 3, para. 50;
[265] Ibid., para 52;
[266] Ibid., para 53;
[267] Ibid., para 54;
[268] Case C-366/10 *Emissions Trading Scheme, supra* note 3, para. 50;

the EU is placed somewhere between the primary law of the EU and the secondary law in the EU's hierarchy of the legal sources[269]. The second method by which EU can become bound by an international agreement is much more problematic. It is a method of 'functional succession'[270] under which EU does not have to become a party to an international agreement in order to become bound by it. Instead, an assumption and takeover of all the powers under agreement previously exercised by the Member States is necessary[271].

The doctrine of 'functional succession' was developed in *International Fruit Company* where the Court stated that "[…] in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the Community"[272]. Consequently, CJEU followed analogous approach in *Intertanko* where it made a distinction between Marpol 73/78[273] (Marpol) and GATT 1947 stating that in respect of the latter "Community progressively assumed powers previously exercised by the Member States, with the consequence that it became bound by the obligations flowing from that agreement"[274] which was not the case with Marpol. Accordingly, the provisions of GATT 1947 "had the effect of binding the Community *even without it formally becoming a Party to that agreement*[275]". On the other hand, in respect of Marpol the Court claimed that the Community must exercise its powers in observance of international law, including provisions of international agreements to which the Community is not a party, but only so far as those provisions codify the customary rules of international law.[276] The Court went on by stating that neither of the relevant provisions of the annexes of the Marpol contained customary rules of international law[277] and concluded that the validity of directive could not be assessed in the light of Marpol, even though it was binding the Member States.[278] Therefore, it is clear that, according to the Court, the EU has an obligation to exercise its powers with regard to the provisions of international agreements that are not binding EU but contains a subject-matter of international

[269] Konstadinides, T. *supra* note 15, p. 1178;
[270] De Baere G., Ryngaert C. *The CJEU's Judgement in Air Transport Association of America and the International Legal Context of the EU's Climate Change Policy*. European Foreign Affairs Review, Vol. 18, 2013, p. 395 [also available as interactive source at: http://www.google.lt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC4QFjAA&url=http%3A%2F%2Fdspace.library.uu.nl%2Fbitstream%2Fhandle%2F1874%2F286933%2FRyngaert%2520-%2520The%2520CJEU%27s%2520Judgement.pdf%3Fsequence%3D1&ei=mWJCU5KNFcHnywOUwoFo&usg=AFQjCNHJsMYOj3r8-GJwJxb5u7zACVHlUA&sig2=Qh-L_Ndcm_u6Xd9YNudt-A&bvm=bv.64125504,d.bGE];
[271] Case C-366/10 *Emissions Trading Scheme*, *supra* note 3, paras. 62-63;
[272] Joined Cases 21/72 to 24/72 *International Fruit Company*, *supra* note 111, para. 18
[273] The international Convention for the Prevention of Pollution from Ships, signed in London on 2 Nov. 1973;
[274] Case C-308/06 *Intertanko and Others* [2008] ECR I 4057, para. 48;
[275] Opinion of Advocate General Kokott, Case C-366/10 *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change* (*Emissions Trading Scheme*) [2011] ECR I-13755, para. 61; *Author's note:* highlighted by the author.
[276] Case C-308/06 *Intertanko*, *op. cit.*, para. 51;
[277] Ibid.;
[278] Ibid., para. 52;

customary rules. Basically, it means that it would be possible to use a provision of non-binding international agreement to contest EU secondary law[279].

Although *Intertanko* threshold for 'functional succession' was rather high [280] the *Emissions Trading Scheme* judgment introduced additional requirement making the test even more difficult to pass. The Court stated that *EU must have exclusive competence* in the entire relevant field in order to be capable to assume the obligations under the relevant Convention.[281] In other words, the mere fact that the Member States retain some of the competence to act independently in the respective field covered by the international treaty determines that EU is not to be held bound by the relevant treaty since EU cannot be held to have assumed the entirety of the powers from the Member States[282]. In *Emissions Trading Scheme* the Member States have retained powers relating to the award of the traffic rights, setting of airport charges and determining the prohibited areas in their territory which may not be flown over, all of which fell under the scope of the Chicago Convention[283]. Preservation of such a rights in the hands of the Member States determined CJEU's decision indicating that EU shall not be held bound by the Chicago Convention by a way of 'functional succession'. Notably, "[…] the mere fact that all the Member States of the European Union are Contracting Parties to the Chicago Convention is not, as such, sufficient to make that agreement binding on the European Union."[284] 'Functional succession' requires that the entirety of the rights and obligations embraced by the Member States are taken over by the EU and thus ceased to be performed by the Member States individually.

Requirement of exclusive competence created an additional problem of what to consider a field of exclusive competence of the EU: is it only competences indicated in Art. 3(1) TFEU or should the "shared competences that have become exclusive through the operation of Art. 2(2) and 3(2) TFEU <…> also qualify."[285] Currently, as it appears, CJEU follows the only undisputable example that was provided in *Intertanko* regarding the EU's position to the GATT 1947 agreement directly linked to the exclusive competence of the EU in the field of the common commercial policy and advocating the view that exclusive competence should be understood narrowly under the meaning of the Art. 3(1) TFEU.

In addition, Advocate General Kokott in her Opinion in *Intertanko* also expressed an uncertainty regarding the possibility for the EU to become bound by the international agreement

[279] *Author's note:* detailed analysis of the possibility to invoke international customary law to contest EU secondary legislation is provided in the following chapter.
[280] De Baere G., Ryngaert C. *supra* note 270, p. 395;
[281] Case C-366/10 *Emissions Trading Scheme*, *supra* note 3, para. 69 – 71;
[282] Ibid.;
[283] Ibid.;
[284] Opinion of Advocate General Kokott in Case C-366/10 *Emissions Trading Scheme*, *supra* note 275, para. 65;
[285] De Baere G., Ryngaert C. *op. cit.*, p. 396;

falling into the field of the shared competence.[286] Kokott assumed that since the GATT 1947 agreement, specifically, "assumption of trade-policy powers, to which GATT 1947 related, was laid down expressly in the Treaty"[287] the EU had to assume the powers under the GATT 1947 agreement "under the […] Treaty."[288] Therefore, if we follow such an approach, only the fields of competence expressly provided in the Treaties can be exercised by assumption of powers under international agreement. However, if we take Art. 2(2) and 3(2) TFEU "the phrase 'under the EEC Treaty' does not appear to be conclusive"[289] since the possibility for shared competences to become exclusive evidently derives from the scope of the TFEU as well[290].

Second condition: nature and the broad logic of the agreement does not preclude the assessment of the validity of the EU secondary law. It is apparent from the case law of CJEU that the fulfillment of this condition is highly dependent on the very nature, aims and precision of the particular agreement. Agreements containing a significant amount of flexible provisions, allowing to implement the agreement at the comfortable scope and within optional period of time, as well as an agreements which do not contain a precise and instantly enforceable legal commitments, are to be recognized as not fulfilling the second criterion. For instance, as far as WTO agreements are concerned, it is a general rule that WTO agreements "may not be invoked before EU Courts[291]." "It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules."[292] Consequently, the WTO agreements can be introduced as one of the examples when the very nature and the broad logics of the agreement precludes the assessment of the validity of the EU secondary legislation, since "[…] those agreements are not in principle among the rules in the light of which the Community courts review the legality of action by the Community institutions[293]."

The reasoning to exempt WTO agreements from the acts possible to be used to challenge the legality of the EU act was introduced in *Portugal* case[294]. CJEU highlighted that "[…] the system resulting from those agreements nevertheless accords considerable importance to negotiation between the parties[295]." Therefore, the legality review performed by the CJEU would

[286] Opinion of Advocate General Kokott, Case C-308/06 *Intertanko and Others* [2007] ECR I-4057, para. 43;
[287] Ibid.;
[288] Ibid.;
[289] De Baere G., Ryngaert C. *supra* note 270, p. 396;
[290] Ibid.;
[291] Craig, P., de Búrca, G. *supra* note 35, p. 303;
[292] Joined cases C-120/06 P and C-121/06 P *FIAMM and Others v. Council and Commission* [2008] ECR I-6513, para. 112;
[293] Ibid., para. 98;
[294] Case C-149/96 *Portugal v. Council* [1999] ECR I-8395;
[295] Ibid., para. 36;

undermine the Community's and other contracting parties' attempts to reach a mutually acceptable solutions to the disputes in conformity with the WTO rules[296] under the WTO dispute-settlement procedures. In addition, CJEU emphasized that "[…] to accept that the Community courts have the direct responsibility for ensuring that Community law complies with the WTO rules would effectively deprive the Community's legislative or executive organs of the scope for maneuver enjoyed by their counterparts in the Community's trading partners[297]." The scope of maneuver is highly significant if the context of WTO agreements whereas they are founded "[…] with a view to entering into reciprocal and mutually advantageous arrangements[298]." In other words, the clearly and precisely binding legal commitments[299] is not a feature of the WTO agreements. Firstly, because the compensation is permitted in certain circumstances as an alternative to direct enforcement of the agreement's provisions[300]. Secondly, because it is possible to negotiate over the recommendations of the WTO dispute-settlement body[301]. To conclude, the very nature of the WTO agreements requires CJEU not to interfere within the negotiations since the active role of the CJEU could aggravate the negotiations, disorganize a settled WTO's dispute-settlement procedures and put the EU to a disadvantageous position in the negotiations.

In *Emissions Trading Scheme* CJEU analyzed whether Kyoto Protocol's nature and broad logic precluded it to be used to contest the EU directive. The Court stressed out that by Kyoto Protocol the parties set the objectives for reducing greenhouse gas emissions and undertook to adopt measures necessary in order to attain the aims.[302] In order to assess the agreement's compatibility with the criterion of nature and broad logics CJEU took into account the following facts: certain degree of flexibility in the implementation left for the transition to market economies, permission for certain parties to meet the requirements collectively[303] and that the parties to the protocol may comply with their obligations in the manner and at the speed upon which they agree[304]. These factual circumstances led the Court to the conclusion that as far as the content of the Kyoto Protocol is concerned its provisions "[…] cannot in any event be considered to be unconditional and sufficiently precise so as to confer on individuals the right to rely on it in legal proceedings in order to contest the validity <...>"[305] of the EU secondary law. This leads us to the third condition imposed by the Court.

[296] Joined cases C-120/06 P and C-121/06 P *FIAMM, supra* note 292, para. 117;
[297] Ibid., para. 119;
[298] Case C-149/96 *Portugal v. Council*, *supra* note 294, para. 42;
[299] Craig, P., de Búrca, G. *supra* note 35, p. 348;
[300] Ibid.;
[301] Ibid.;
[302] Case C-366/10 *Emissions Trading Scheme*, *supra* note 3, para. 75;
[303] Ibid.;
[304] Ibid., para. 76;
[305] Ibid., para. 77;

Third condition: provisions are unconditional and sufficiently precise. The explanation of criterion was provided by stating, that "[…] such a condition is fulfilled where the provision relied upon contains a clear and precise obligation which is not a subject, in its implementation or effects, to the adoption of any subsequent measure."[306] Criteria is met if the relevant provision of an international agreement fits the criteria of *direct effect.*[307]

As is apparent from the *Emissions Trading Scheme,* the Court established a close link between the criteria of nature and the broad logic of the agreement and a criteria of unconditionality and precision. The reasoning of the Court suggest that the nature and broad logics of an agreement is evaluated by establishing the degree of a precision of its provisions[308]. It seems that the nature and the broad logics of the agreement shall be recognized as precluding the EU laws to be assessed in the light of it if the relevant provision(s) of the agreement are not clear, precise enough and require implementing measures to be adopted. Consequently, the second and the third conditions should be perceived in a close connection with each other.

Consequently, it is apparent that CJEU has created a relatively complicated structure of requirements that are extremely difficult to fulfill. Not only CJEU evaluate the specific provisions' ability to grant direct effect but the very nature of agreement is important as well. Such a solid requirements could be explained through the angle of constitutional requirements of EU law that are inspired by the autonomy protection. If the agreement in question pass the test and fulfills all the relevant conditions it can be said that it is no longer a threat to the coherency of EU legal order and, therefore, could be held an integral part of the EU law. In turn, the validity of the secondary law of the EU can be assessed only in accordance with norms that are part of the same legal system. The detailed test used by the Court is the way to check whether the relevant agreement correspond to the constitutional requirements of the EU and, consequently, can become an integral part of the EU legal order. Therefore, it can be concluded, that the conditions of direct invocability are a reflection of autonomy protection of EU legal order while granting an international agreement an ability to be used directly in the EU legal system.

[306] Case C-366/10 *Emissions Trading Scheme, supra* note 3, para. 55;
[307] Case 26/62 *Van Gend en Loos, supra* note 27;
[308] Case C-366/10 *Emissions Trading Scheme, op. cit.*, para. 77;

2.3. CJEU and reception of customary international law

Reception of international customary law is performed in a very similar way as the reception of international agreements. In general, a legal basis for the reception of international customary law (as well as international agreements) within EU is Art. 3(5) TEU providing that "[…] the EU shall uphold and promote […] the strict observance and the development of international law […][309]." Yet, there is no provision specifically dealing with the place of international customary law within EU. The duty to respect international customary law is rather a consequence of the international personality of the EU and it exist in international law independently from the express recognition in the founding documents of the EU[310]. However, a general obligation to comply with international law in 3(5) TEU put it among the goals of the EU whereas it is no longer an implied necessity[311]. Therefore, a proper implementation and compliance with customary international law is an aim that is sought to be achieved by EU and that is comparable to the other aims of EU such as achieving single market and economic and monetary union.

Historically, CJEU declared compliance with international customary law. What is clear is that the Court claims EU to be bound by the principles of customary international law even if these customary rules are codified by an international convention of which the EU is not a signatory. Therefore, CJEU would interpret the provisions of conventions even not being a party to it if those provisions express customary rules of international law. For example, the Vienna Convention on the Law of the Treaties is not binding EU or all of its Member States. Yet, many provisions in that convention reflect the rules of international customary law which are binding EU institutions and it forms a part of the EU legal order.[312]

Generally, international customary law has been utilized as a tool that can be relied on in internal situations when there is a need to delineate the limits of EU jurisdiction[313], interpret

[309] Consolidated Version of the Treaty on European Union Art. 3(5), 2012 O.J. C 326/13;
[310] Gianelli, A. *supra* note 15, p. 94;
[311] Ibid., p. 102;
[312] Konstadinides, T. *supra* note 15, p. 1183 – 1184; *See also:* Case C-162/96 *Racke*, *supra* note 70, para. 24; Case C-386/08 *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen* [2010] ECR 1-01289, para. 42; Opinion of Advocate General Sharpston, Case C-508/08 *Comm'n v. Malta* [2010] ECR 1-10589, para. 4;
[313] "[…] it is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence." – Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337, para. 22; Konstadinides, T. *op. cit.*, p. 1185;

international agreements[314], and fill the gaps in the absence of EU rules governing certain aspect[315]. Yet the most fundamental issue that the jurisprudence of CJEU has been concerned with is the possibility to invoke international customary rules directly to contest EU secondary legislation. Therefore, this chapter would aim to identify the conditions under which international custom could become a tool in the light of which the validity of EU law would be assessed. Identification of these conditions would most likely provide us with a relatively accurate view of the current status of international customary law within EU legal order, and the way autonomy affects the reception of customary international law.

Autonomy is, indeed, relevant if the reception of customary international law is analyzed. Dualist (pluralistic) approach that was adopted in *Kadi I* can hardly be limited to EU agreements whereas it indicated that it is a choice of the EU acting in accordance with internal principles of the EU law to decide under what conditions and limitations the EU legal system would open itself up for the international law. It is EU law that determines how much of the reception there would be. Such a general rule must be applied to the relationship with customary international law as well.[316]

An early case-law of the Court was rather restrictive with regard to the reception of customary law. In *Poulsen* CJEU opined that the relevant laws of the EU must be interpreted in the light of international customary law[317]. Thus it was through an obligation of consistent interpretation that the Court sought to implement customary law in the very first case law. In a further case of *Opel Austria*[318] it was proposed by CFI that international customary law was to be applied in the EU legal order by the way of transformation into a general principle of EU law[319]. That way an international customary law principle of good faith was transformed into the principle of protection of legitimate expectations[320]. Yet it was not exactly through a direct application of the custom that CFI decided to implement it. Instead, in order to give the effect to the custom CFI had to find an EU law ground that by its subject matter would be the most similar to the customary rule, and then apply that EU law rule. Therefore, despite the friendly-looking approach towards

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[314] "[…] customary rules of international law on treaty interpretation are used widely by the Community courts in order to interpret international agreements concluded by the Community and even – from time to time – the EC Treaty itself." – Wouters, J., Nollkaemper, A., de Wet, E. (eds.) *The Europeanisation of International Law: the Status of International Law in the EU and its Member States.* The Hague, The Netherlands: T.M.C. Asser Press, 1st edition, 2008 p. 92 – 93;

[315] *Author's note:* here the Court (although in the context of EU rules) invokes a rule of customary nature stating that "[…] it is for each Member State […] to lay down the conditions for the acquisition and loss of nationality." - Case C-135/08 *Rottman v. Bayern* [2010] ECR. I-1449, para. 39; Konstadinides, T. *supra* note 15, p. 1185;

[316] Gianelli, A. *supra* note 15, p. 101;

[317] Case C-286/90 *Poulsen, supra* note 69, paras. 9 – 10;

[318] Case T-115/94 *Opel Austria GmbH v. Council* [1997] ECR 11-0039, paras. 83, 90, 93;

[319] Ibid.; *Author's note:* similarly, CJEU in *Mangold* stated that the principle of non-discrimination on the grounds of age must be regarded as a general principle of Community law. – Case C-144/04 *Mangold v. Helm* [2005] ECR I-9981, para. 74;

[320] Konstadinides, T. *op. cit.*, p. 1187;

international customary law CFI avoided the question whether the rules of international customary law could produce direct effects[321].

The situation changed completely with CJEU's decision in *Racke*[322]. The case was essentially concerned with a question whether the EU could rely directly on customary international law (notion of *rebus sic stantibus*) to unilaterally terminate, by suspending regulation, a Cooperation Agreement with the Federal Republic of Yugoslavia due to a fundamental change of circumstances[323]. First of all CJEU acknowledged that "[…] the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order[324]." Further, the Court affirmed that individuals may resort to custom in order to challenge the validity of the suspending EU regulation[325]. However, CJEU did not allow the possibility to invoke international customary rules without any restrictions whereas customs are less precise than treaty norms and do not *per se* create rights to the individuals. Therefore, two conditions must be fulfilled if the custom is to be applied: 1) the rules of customary international law have to be 'fundamental'[326]; 2) by adopting the suspending act, the institution of EU must have made a manifest error of assessment concerning the conditions for applying those rules[327]. This is where the Court introduced the protection of the autonomy of EU legal order. Notions of 'fundamental customary rules' and 'manifest errors of assessment' are widely open for interpretation, and at every instance, would highly depend on the subjective evaluation of the Court. Consequently, by introducing these conditions CJEU made the possibility to invoke international customary rules to contest EU secondary legislation absolutely dependent on the will of the Court itself. Thus although CJEU indicated that it is possible to invoke international customary law directly in the EU legal order it straightway made such a possibility dependent on its own interpretations.

Several additional conditions were introduced by the Grand Chamber of CJEU in the most recent decision in *Emissions Trading Scheme.* The Court was inquired whether several rules of customary international law were capable of being relied upon to challenge the validity of the EU directive creating the EU Emissions Trading Scheme[328]. It was suggested in the opinion provided

[321] Konstadinides, T. *supra* note 15, p. 1188;
[322] Case C-162/96 *Racke, supra* note 70;
[323] Konstadinides, T. *op. cit.*, p. 1188;
[324] Case C-162/96 *Racke, op. cit.*, para. 46;
[325] Ibid., para. 51;
[326] Ibid., para. 48;
[327] Ibid., para. 52;
[328] *Author's note:* the Court was inquired to opine with regard to 4 principles: a) the principle of customary international law that each State has complete and exclusive sovereignty over its airspace; b) the principle of customary international law that no State may validly purport to subject any part of the high seas to its sovereignty; c) the principle of customary international law of freedom to fly over the high seas; d) the principle of customary

by AG Kokott that the same conditions that applied to the international treaties should be applicable to the international customary law as well. It was, firstly, because the Court could not find a good reason why individuals should be permitted to rely on principles of customary international law under less stringent conditions than when relying on international agreements[329]. Secondly, since many principles of customary international law have now been codified in international agreements it would have made no sense if, when individuals are relying on one and the same principle of international law, different conditions were to apply according to whether it was being relied upon as a principle of customary international law or as a principle under an international agreement[330]. Therefore, AG proposed that the same conditions that were formulated in *Intertanko*[331] for the invocation of the international agreements would have to be satisfied if international customary law was to be invoked to contest EU secondary legislation. Firstly, there must exist a principle of customary international law that is binding on the European Union[332]. Secondly, the nature and broad logic of that particular principle of customary international law must not preclude such a review of validity[333]. Thirdly, the principle in question must also appear, as regards its content, to be unconditional and sufficiently precise[334]. It is not surprising, that AG Kokott concluded that the principles in the case should not be capable of being invoked directly to contest EU legislation as they, most certainly, could not fulfill the condition regarding the nature and the broad logic of the customary rule[335]. Firstly, because the principles of customary international law mostly determine the scope of sovereignty of States and limit their jurisdiction[336] and, consequently, by no means are capable of having an effect on the legal status of an individuals[337].

CJEU went along with the findings of the AG's opinion. Yet, the Court did not agree with a proposition that individuals could not rely on certain principles of customary international law as benchmarks to contest an EU legislative act[338]. The Court indicated that the principles of customary international law may be relied upon by an individual for the purpose of the Court's examination of the validity of an act of the European Union in so far as: firstly, those principles are capable of calling into question the competence of the EU to adopt that act; secondly, the act

international law (the existence of which is not accepted by the Defendant) that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by international treaty. – Case C-366/10 *Emissions Trading Scheme, supra* note 3, para. 45;

[329] Opinion of Advocate General Kokott in Case C-366/10 *Emissions Trading Scheme*, *supra* note 275, para. 111;

[330] Ibid., para. 112;

[331] *Author's note:* these conditions were in detail discussed in the previous chapter;

[332] Opinion of Advocate General Kokott in Case C-366/10 *Emissions Trading Scheme*, *op. cit.*, para. 113;

[333] Ibid.;

[334] Ibid.;

[335] Ibid., para. 134;

[336] Ibid., para. 135;

[337] Ibid., para. 136;

[338] Konstadinides, T. *supra* note 15, p. 1195;

in question is liable to affect rights which the individual derives from EU law or to create obligations under EU law in his regard[339]. Therefore, a new test was proposed with *Emissions Trading Scheme* with regard to invocability of international customary law.

However, the Court did not finish its reasoning by indicating the new conditions since it remembered the jurisprudence formulated in *Racke.* Again, CJEU stated that since a principle of customary international law does not have the same degree of precision as a provision of an international agreement, judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the EU made manifest errors of assessment concerning the conditions for applying those principles[340]. Consequently, it is clear that *Emissions Trading Scheme* has only complemented the rules established in *Racke* on the invocability and reliance of custom by the private parties by adding even more requirements to an already restrictive test[341].

Therefore, as it is accurately summarized by T. Konstadinides the following conditions would most likely be applicable with regard to the reception of international customary law. Firstly, the rules of customary international law invoked to challenge an EU act must be fundamental *(Racke condition).* Secondly, in adopting an act that is being challenged the EU legislature has to make a manifest error of assessment concerning the conditions of applying the rules of customary international law invoked (*Racke condition*). Thirdly, the principles of customary international law invoked are calling into question the competence of the EU to adopt the challenged EU legislative act *(Emissions Trading Scheme).* Fourthly, the EU legislative act challenged is liable to affect the rights which the individual derives from EU law or creates obligations under EU law *(Emissions Trading Scheme).*

The rules imposed by CJEU on the reception of international customary law symbolizes a gradual strengthening of the protection of EU autonomy from an undesirable effects customary law could potentially cause to the uniformity and coherency of EU legal order. As an autonomous legal order, EU legal order determines itself in what manner would it allow customary international law within legal order. As a general rule, EU is consistent by confirming a general obligation to respect international law since it compose a constitutional principle and an objective of the EU. A. Gianelli confirms this assumption by stating that "[o]ne should conclude that the duty to respect international law amounts today to a constitutional principle of the EU; in case of its conflict with other constitutional principles, the duty to respect will have to bow only in front of the most fundamental among those principles – in the words of ECJ, of the "very foundations" of the EU."

[339] Case C-366/10 *Emissions Trading Scheme*, *supra* note 3, para. 107;
[340] Ibid., para. 110 – 111;
[341] Konstadinides, T. *supra* note 15, p. 1195;

Indeed, it is a question worth attention whether the protection of EU autonomy is among those 'very foundations'. However, fact that a very restrictive test is applied in order to make international custom invocable to challenge EU secondary legislation suggests that CJEU is reluctant to provide a broader effects to the international customary law within EU legal order. Consequently, it seems that at current state CJEU gives a greater importance to the autonomy rather than implementation of customary international law. Therefore, practically, it is consistent interpretation by EU institutions with regard to international custom that would provide the actual effects to the custom in the EU legal order rather than direct invocation[342].

[342] *Author's note:* as observes A. Gianelli, in practice, compliance with custom often represents a requirement in the adoption of normative acts having purposes other than the implementation of customary rules. Therefore, international customary law is, firstly, implemented and applied together with other sources of EU law. Institutions would choose the type of act and procedure considering what may be required by the Treaties concerning the subject matter of the provisions and competences of the EU, rather than the goal of implementing customary law. So implementing customary international law is not an objective in itself, but it steps in while seeking the other objectives under the Treaties and while interpreting them. - Gianelli, A. *supra* note 15, p. 101 – 102;

2.4. Jurisdictional rivalry between CJEU and other international courts and tribunals

Once the reception of the sources of international law is discussed the last issue of competing jurisdictions between different courts and tribunals can be scrutinized. As the previous Chapter showed, CJEU acts in precision when it comes to autonomy protection of the EU legal order. If there are any laws of the EU that concerns the dispute one can be sure that the Court would claim the jurisdiction over the case. As it already happened in several cases, another tribunals might claim jurisdiction in the same case as well since not all the subject matter of the case might concern the EU law.

It can generally be explained by the phenomenon of multiplication of an international courts and tribunals that can be observed during recent decades[343]. As there is no hierarchy between different courts and tribunals as well as there are no rules regulating their relationship with each other – they are not bound by each other's jurisprudence[344]. This means that courts and tribunals are basically permitted to act in isolation[345]. Overlapping jurisdictions of different judicial institutions could potentially give rise to the divergent or conflicting decisions that may put states at an awkward position of having to pick and choose one of the decisions[346]. It is especially the case with mixed agreements that stipulate a specific dispute resolution procedure not involving CJEU. As it would be shown in the current Chapter, while handling its relationship with other courts and tribunals that possess competing jurisdiction CJEU remains consistent with the reasoning of EU autonomy protection. Yet, as would be shown further, the hands of CJEU are tight when it comes to its ability to enforce its exclusive jurisdiction whereas it can only affirm the jurisdiction with regard to the cases that are actually referred to it. Until a case is transferred to the Court it is up to other actors – the Member States, the Commission, the other tribunals – to decide how the case would be further handled. After discussing the legal basis for the Court's jurisdiction to handle international disputes, two problematic cases would be further presented in order to illustrate the mentioned problematic aspects.

As far as legal grounds for CJEU jurisdiction goes, it is the Art. 19 TEU[347] (EC 220) that, in general, grants CJEU with a jurisdiction of an ultimate arbiter over EU law and compulsory jurisdiction over the Member States[348]. Yet it is Art. 344 TFEU (EC 292), stating that *"Member States undertake not to submit a dispute concerning the interpretation or application of the*

[343] Hofstotter, B. *supra* note 16, p. 391; Lavranos, N. *supra* note 16, p. 276;
[344] Ibid., p. 277;
[345] Ibid.;
[346] Hofstotter, B. *op. cit.*, p. 392;
[347] "The Court of Justice [...] shall ensure that in the interpretation and application of the Treaties the law is observed." - Consolidated Version of the Treaty on European Union Art. 19(1), 2012 O.J. C 326/13
[348] Hofstotter, B. *op. cit.*, p. 393;

Treaties to any method of settlement other than those provided for therein"[349] that express CJEU's jurisdiction's exclusive nature. In addition, Art. 273 TFEU provides that *"The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties."* What these provisions read in conjunction basically mean is that CJEU has exclusive jurisdiction over the disputes concerning the interpretation and application of the EU Treaties[350]. However, in cases of disputes that only relate to the *subject matter of the EU Treaties* Member States retain their power under international law to settle their disputes peacefully by means of their own choice[351]. Yet, importantly, it seems that CJEU adopted a broad understanding of the notion 'interpretation and application of the Treaties' since it covers not only the primary law of EU, but secondary law, including mixed agreements, as well[352]. Therefore, if the dispute in question concerns an EU law measure, regardless it is primary or secondary law measure, it is most likely that CJEU would discover to possess jurisdiction in the case.

Cases concerning an actual application of the above provisions are few. In fact, Art. 344 TFEU was a 'dead letter'[353] before decision in *Mox Plant*[354], with a single exception of *Opinion 1/91*[355]. As *Mox Plant* remains one of the most significant cases that handled an issue of jurisdictional rivalry between CJEU and other tribunal, it must be discussed here. The Commission initiated an infringement procedure against Ireland on the ground of Art. 344 TFEU. Ireland was accused of instituting dispute-settlement proceedings against United Kingdom in the Arbitral Tribunal under the United Nations Convention on the Law of the Sea (UNCLOS) to settle a dispute[356]. Since UNCLOS was a mixed agreement the Court established that the provisions of the Convention that were in issue in dispute came within the scope of the Community competence[357] and that its provisions formed an integral part of the Community legal order[358]. Consequently, the

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[349] Consolidated Version of the Treaty on the Functioning of the European Union, art. 344, 2012 O.J. C 326/47;
[350] Hofstotter, B. *supra* note 16, p. 394;
[351] Ibid.; *Author's note:* it is Art. 33(1) of the UN Charter that provide a legal basis for dispute settlement under international law. The wording goes as follows: *"The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."* - United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, [available at: http://www.refworld.org/docid/3ae6b3930.html], [last accessed 17 November 2014];
[352] Hofstotter, B. *op. cit.*, p. 394 – 395;
[353] Ibid., p. 393;
[354] Case C-459/03 *Mox Plant, supra* note 86; *Author's note:* the case concerned two arbitral proceedings by two different arbitral tribunals. The first one was initiated under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) while the second one under the UN Convention on the Law of the Sea (UNCLOS). It is only the second proceedings that are discussed in this thesis. For a detailed summary of the case facts see - Lavranos, N. *supra* note 16, p. 278 – 285;
[355] *Author's note:* as the findings of the Court in *Opinion 1/91* were discussed in 1.2 chapter of this thesis, it would not be further developed here.
[356] Case C-459/03 *Mox Plant, op. cit.*, para. 1;
[357] Ibid., para. 126;
[358] Ibid.;

Court pointed out "that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the EU legal system, compliance with which the Court ensures under Article 220 EC."[359] Therefore, the fact that UNCLOS provided for the dispute settlement mechanism that, under the public international law, could potentially be used in the circumstances of the case, did not provide Ireland with the right to initiate proceedings there, because it infringed the exclusive power of judicial review of the CJEU[360]. As a result, exclusive right of the Court to interpret EU law is seen as a constituent part of the principle of the autonomy, which is actively protected by the CJEU by rejecting the authority of the other international judicial bodies to interpret international agreements that constitute an integral part of an EU legal order.

Naturally, the Court, first of all, analyzed whether the subject matter of the dispute fell under the exclusive competence of the EU, since only in such a case CJEU would have an exclusive competence to handle a case. The Court did not have any difficulties finding that the agreement was an integral part of the EU law whereas mixed agreements have the same status in the EU legal order as a purely EU agreements. As accurately observed B. Hofstotter, once an agreement becomes an integral part of the EU law "[...] the Court clearly reserves for itself a *competence de la competence* of sorts to determine the outer limits of its exclusive jurisdiction, and in this way hedges its pre-eminence over international arbitral tribunals[361]." According to CJEU '[i]t is for the Court, should the need arise, to identify the elements of the dispute which relate to provisions of the international agreement in question which fall outside its jurisdiction[362].' Again, the entitlement of the right to interpret mixed agreement, an integral part of the EU law, to a tribunal other than CJEU threatens to affect the competence division system established by the Treaties and, consequently, the autonomy of the EU legal order. Therefore, only if the Court decided that no EU law issues were involved in the dispute would Member States be allowed to bring the dispute before another tribunal[363].

However, according to N. Lavranos, *Mox Plant* had revealed that CJEU is helpless when it comes to enforcing its exclusive jurisdiction until the moment a case is actually referred to it since neither it can prevent Member States from going to other tribunals, nor can it force the Commission to take action against such moves of the Member States whereas it is the competence of the Commission to initiate the infringement procedure[364]. Furthermore, as shown by *Iron*

[359] Case C-459/03 *Mox Plant, supra* note 86, para. 123; *Author's note:* Art. 220 EC was replaced, in substance, by Article 19 TEU after the Treaty of Lisbon.
[360] van Rossem, J.W. *supra* note 76, p. 63;
[361] Hofstotter, B. *supra* note 16, p. 400;
[362] Ibid.;
[363] Lavranos, N. *supra* note 16, p. 285;
[364] Ibid.;

Rhine[365] arbitration case, CJEU is helpless as well in cases where other judicial bodies are not really concerned with a possibility that a certain case might be under the exclusive jurisdiction of the CJEU[366]. In such case tribunals would rather seize their jurisdiction and decide the case by presenting a flawed legal arguments instead of referring a parties to the CJEU.

The conflict in *Iron Rhine* concerned Ijzeren Rijn railway line, which was one of the first international railway lines in Europe running from Antwerp through the Netherlands to the Rhine basin-area in Germany. Belgium had obtained a right of transit through the Netherlands on the basis of two treaties dating back to 1839 (Treaty of Separation) and 1897 (Railway Convention). Since 1991 the railway line was no longer used. In the meantime, the Netherlands assigned an area (the Meinweg, close to the city of Roermond) which the railway line crosses) as a "special area of conservation" according to the EC Habitats Directive. In 1994 the Netherlands also identified it as a special protected area in accordance with the EC Birds Directive. The Birds Directive was afterwards superseded by the Habitats Directive. Under domestic legislation, evidently implementing the rules of EU directives, the Meinweg area was identified as a national park and a "silent area". Thus EU law relevancy became apparent.[367]

Since the area fell under strict environmental regulations it was estimated that the additional costs of five hundred million euros for revitalization would have to be imposed. Netherlands and Belgium did not reach an agreement on who should pay the costs and, consequently, brought the dispute before the Permanent Court of Arbitration (PCA). It was called upon to settle the dispute on the basis of international law, including necessary EU law, while respecting obligations under Article 292 of the EC Treaty[368].

Interestingly, PCA found itself in a position analogous to that of a domestic court of the EU Member State[369] and thus it asserted that the exceptions to refer for a preliminary ruling under Art. 267(3) (234(3) EC) were applicable[370]. Remarkably, PCA continued by stating that if it arrived at the conclusion that it could not decide the case brought before it without engaging in the interpretation of the rules of EU law which constitute neither *acte clair* nor *acte éclairé*, the Parties' obligations under Art. 292 would be triggered in the sense that the relevant questions of EU law would need to be submitted to CJEU[371]. Hence the Tribunal engaged with an analysis of *CILFIT*[372]

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[365] *Iron Rhine Arbitration,* Award of 24 May 2005 in case *Belgium v. Netherlands* by Permanent Court of Arbitration in Hague [available as interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.intyb/riaa0027&id=45];
[366] Lavranos, N. *op. cit.*, p. 290;
[367] Ibid., p. 286;
[368] *Iron Rhine Arbitration*, *op. cit.*, para. 28;
[369] Ibid., para. 103;
[370] Lock, T. *supra* note 229, p. 301;
[371] *Iron Rhine Arbitration*, *op. cit.*, para. 103;
[372] "In its famous CILFIT decision, the ECJ postulated three exceptions to that duty: firstly, where the question is not relevant and can thus not affect the outcome of the case; secondly, where the question raised is materially identical

criteria[373]. Yet, only the first criteria regarding the relevancy of the EU law to achieve a decision in the case was examined by PCA. More precisely, it was intended to answer the question whether it would arrive to a different decision in the case if the relevant EU law did not exist[374]. The Tribunal reached a conclusion that it was not necessary for it to interpret the Habitats directive in order to render its award in the case whereas, according to Tribunal, it was sufficient for it to employ the national legislation and the relevant provisions of the treaty concluded between the parties all the way back in the 19th century[375]. That led to Tribunal's decision that Netherland's had to grant a right of transit to Belgium based on the 1839 and 1897 treaties while the financial costs were to be split.

According N. Lavranos, it is remarkable that PCA considered itself able to decide on award despite that EU law was clearly applicable in the case. Therefore, since the Tribunal was not in the position to refer for a preliminary decision it should have referred a case to the only proper forum – CJEU. By not doing so PCA caused fragmentation within EU legal order since it adjudicated the case that was clearly a matter of EU law. In addition, as observed by N. Lavranos and T. Lock, PCA did not really understand the consequences of the CILFIT jurisprudence: "[c]ontrary to what the Tribunal suggests, the consequence is merely that a domestic court is released from its obligation to make a reference but not from actually applying Community law[376]." Accordingly, what PCA did is apply CJEU case-law in an incorrect manner to create for itself a false jurisdiction to decide on awards. Thus *Iron Rhine* verifies an actual reality that at some instances international tribunals can actually be ignorant with regard to an evident jurisdiction of CJEU.[377]

Evidently, from the point of view of CJEU, its exclusive jurisdiction is all-encompassing and should guarantee that the Court itself has the final say in the matter by restricting the Member States in their choice of forum[378]. Therefore, from the Court's point of view Member States suspecting that EU law interpretation might be relevant to have the dispute settled, first of all, are to have CJEU decide whether it has jurisdiction to hear the case, namely, whether the provisions

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with a question already decided by the ECJ (so-called *acte éclairé);* and thirdly, where the correct application of Community law is so obvious that there is no room for reasonable doubt (so-called *acte clair).*" - Lock, T. *op. cit.*, p. 300; Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v. Ministero della Sanità* [1982] ECR 3415, paras. 10, 13-14;

[373] *Iron Rhine Arbitration*, *supra* note 365, para. 104;

[374] Ibid., para. 137;

[375] Ibid.;

[376] Lock, T. *supra* note 229, p. 302 - 303; *see also:* Lavranos, N. *The Mox Plant and Ijzeren Rijn Disputes: Which Court is the Supreme Arbiter?* Leiden Journal of International Law, Vol. 19, 2006, p. 239 [also available as interactive source at: http://journals.cambridge.org/action/displayFulltext?type=1&fid=430043&jid=LJL&volumeId=19&issueId=01&aid=430042];

[377] Lavranos, N. *supra* note 16, p. 289 – 290;

[378] Lock, T. *op. cit.*, p. 299;

in question are an integral part of the EU law. Only if the Court provides a negative answer can the Member States bring the case to another international tribunal[379]. Yet, it is possible that CJEU would assume only part of the dispute as falling under its exclusive jurisdiction. Consequently, it is possible for the Member States to split the case up and bring the remainder not concerning EU law before another international tribunal or, alternatively, have the entirety of the dispute decided by the CJEU by way of an agreement under Article 273 TFEU. However, these options that are open for the parties to the dispute seems to be excessively complicated and time-consuming.[380]

It seems reasonable that states at most of instances have an interest in a quick dispute resolution. Therefore, having dispute quickly settled in an arbitral tribunal, where it is up to the parties to decide on a composition of the bench and procedural rules, seems to be more attractive option[381]. It is not surprising, that in both *Mox plant* and *Iron Rhine* cases the parties to a dispute referred their disputes to the tribunals as it might have seen as a more suitable option to achieve the desired result. Yet the outcome of both cases went two absolutely different directions as in *Mox plant* CJEU got the chance to exercise its jurisdiction, while in *Iron Rhine* it did not. The reason for different outcome – the reactions of the Commission and the relevant tribunal to the dispute. In case of *Mox plant* the Commission initiated an infringement procedure against Ireland. It had raised the UNCLOS tribunal's fear of two possibly conflicting decisions which would be unhelpful to the parties seeking resolution of their dispute and it obviously contributed to the tribunal's decision to stay the proceedings[382]. By staying the proceedings and requesting the parties to check first whether the jurisdiction of the ECJ was triggered in this case UNCLOS arbitral tribunal showed comity[383]. Indeed, the principle of comity[384] is seen by various authors as a

[379] Lock, T. *supra* note 229, p. 299;
[380] Ibid.;
[381] Ibid., p. 300;
[382] Hofstotter, B. *supra* note 16, p. 398;
[383] Lavranos, N. *supra* note 16, p. 285;
[384] *Author's note:* according the Black's Law Dictionary Judicial Comity is „[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." – Black, H.C. *Black's Law Dictionary*. 6th edition. St. Paul, Minn.: West Publishing Co, 1990, p. 267. Yet, the definition provided by A. Nollkaemper, R. Howse and R. Teitel is more detailed. They suggest that comity should govern the relations between multiple courts. The ground for comity is found in the notion of mutual recognition – the idea that jurists recognize one another as authentic practitioners of judicial authority, associated with the qualities of independence, impartiality, giving of reasons, due process. – Nollkaemper, A. *Concerted Adjudication in Cases of Shared Responsibility.* New York University Journal of International Law and Politics, Vol. 46, 2013 – 2014, p. 844 [also available as interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/nyuilp46&id=829]; Howse, R., Teitel, R. *Cross-Judging Revisited.* New York University Journal of International Law and Politics, Vol. 46, 2013 – 2014, p. 873 – 874 [also available as interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/nyuilp46&id=887]; For a detailed description of possible comity techniques see: D'Alterio, E. *From Judicial Comity to Legal Comity: a Judicial Solution to Global Disorder.* International Journal of Constitutional Law, Vol. 9, 2011 [also available as interactive source at: http://icon.oxfordjournals.org/content/9/2/394.full.pdf+html];

solution to the cross-judging problem[385]. It is because of the willingness of the tribunal to cooperate with CJEU in the case the Court acquired an opportunity to enforce its exclusive jurisdiction.

An opposite situation was in *Iron Rhine* case where the tribunal was more willing to give an award in the case itself than refer it to the CJEU. The Commission, in turn, was also passive as the Netherlands was closely consulting with it in order to adequately delimit the subject matter of the dispute in the light of Art. 344 TFEU[386]. It could be inferred from the fact of these consultations that the parties were not intending to submit PCA any EU law matters to decide. Yet, the tribunal had to deal with an EU law question anyway. As a result, it took 15 pages[387] for PCA to explain why EU law should not be applicable in the case (this fact alone proves the relevance of EU law to the case) where a false interpretation of *CILFIT* conditions was also provided[388]. Therefore, *Iron Rhine* stands as an example of what kind of chaos and legal uncertainty could non-cooperating judicial institutions create.

This leads us to affirmation that first of all problem of competing jurisdictions could and should be solved by the judicial institutions themselves by following the principle of comity. It seems to be a reasonable suggestion as there are at least two good examples, concerning human rights protection, where principle of comity was successfully implemented to regulate the CJEU's relationship with other courts. ECtHR in Bosphorus provided the first example[389] while the second one is found in *Solange II*[390] provided by the Federal Constitutional Court of Germany (GCC). According to E. D'Alterio both of these cases implement an equivalence criterion, which is one of the possible methods to implement the comity[391]. This criterion means that "[…] when two systems are "in competition" with each other, the EU system applies, if it can provide fundamental rights with a "protection equivalent" to the one guaranteed by the convention[392]." Similarly, GCC declared it would abstain from verifying the compatibility of EU acts with its own national constitutional principles "provided that" (*Solange*) the EU system guaranteed a protection equal to the one […] under German laws[393]." Evidently, there are already several examples of successful cooperation between CJEU and different tribunals.

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[385] *See for example:* Ulfstein, G. *International Courts and Judges: Independence, Interaction, and Legitimacy.* New York University Journal of International Law and Politics, Vol. 46, 2013 – 2014, p. 858 [also available as interactive source at: http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein.journals/nyuilp46&id=869];
[386] Hofstotter, B. *supra* note 16, p. 410;
[387] Lock, T. *supra* note 229, p. 303;
[388] Hofstotter, B. *op. cit.*, p. 410;
[389] Case No. 45036/98 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, European Court of Human Rights, 2005;
[390] Case 2 BvR 197/83 *Wünsche Handelsgesellschaft* decision of 22 October 1986 by Federal Constitutional Court of Germany, Europäische Grundrechte-Zeitschrift, 3 CMLR 225, 1987;
[391] D'Alterio, E. *supra* note 384, p. 403;
[392] Ibid.;
[393] Ibid.;

An aspiration for more cooperation between international courts and tribunals seems to be more desirable than jurisdictional struggle between them. As shown by *Iron Rhine*, such struggles could lead to paradoxical decisions and distortions of law. The same applies to CJEU: it is active with regard to autonomy protection of EU legal order. Yet, excessively proposed jurisdiction could have a distorting effects to the other legal regimes and negative outcome to the parties of the dispute. Therefore, comity between courts is indeed a solution to competing jurisdictions problem whereas it only takes willingness of the court to consider a possibility that another court could have a stronger jurisdiction in the case. Therefore, accurately claims R. Higgins with her statement, as it seems to be the most realistic option:

> "We judges are going to have to learn how to live in this new, complex world, and to regard it as an opportunity rather than a problem:
>
> - We must read each other's judgments.
> - We must have respect for each other's judicial work.
> - We must try to preserve unity among us unless context really prevents this[394]."

[394] Higgins, R. *A Babel of Judicial Voices? Ruminations from the Bench.* International and Comparative Law Quarterly, Vol. 55, 2006, p. 804 [also available as interactive source at: http://journals.cambridge.org/abstract_S0020589300069748].

2.5. Summary

The second part of the thesis has shown that autonomy of EU legal order is protected by CJEU in cases where sources of international law are involved. As a consequence, the reception of the sources of international law is hindered by CJEU by imposing an autonomy protection requirements. Firstly, the Court is reluctant and unwilling to grant direct effect to the sources of international law within EU legal order whereas it has made the possibility to invoke the sources of international law to challenge EU secondary law subject to a stringent conditions. It was proved to be the case with regard to both international agreements and the rules of international customary law.

Secondly, the Court is unwilling to give away its exceptional right to interpret the sources of international law that are affirmed to be an integral part of EU law. By doing so, a uniform interpretation (one of the means for the autonomy protection) of EU legal order is being protected. However, by claiming jurisdiction in every case that involves some part of EU law CJEU risks facing competing jurisdictions of other tribunals and their competing decisions. It is suggested that a judicial comity could lead to a more harmonious and predictable international dispute settlement system.

Consequently, the second part of the thesis has proved that by performing the autonomy protection of EU legal order CJEU burdens the reception of the sources of international law within EU legal order, makes it complicated and uneasy.

CONCLUSIONS

1. The autonomy of EU legal order was consistently defended and strengthened by CJEU since the very beginning of EU functioning. In *Kadi* CJEU once again underlined the separateness of EU legal order from the other legal systems. Sources of international law, therefore, do not acquire effects within EU legal order automatically – they are granted effect by CJEU if they do not threaten EU legal order autonomy. Only those sources that do not intend to (1) alter internal power division within EU, and (2) do not threaten uniform interpretation of EU law, would be accepted within EU legal order. By checking whether the source of international law fulfills these conditions CJEU investigates whether the particular international source is compatible with EU law notions of constitutional importance. By performing this constitutionality test CJEU acts similarly to the national constitutional courts of the Member States. Consequently, the development of the constitutional principle of autonomy has influenced the CJEU's status in cases with external element: at current moment CJEU rather acts as a constitutional court of EU than an international tribunal.
2. The effect of the principle of autonomy to the reception of international law is highly significant. Firstly, CJEU shows a reluctance to grant the sources of international law direct effect within EU legal order by making such a possibility subject to a stringent conditions. Secondly, if CJEU confirms that a particular source of international law is an integral part of EU law, for the sake of autonomy protection, it would feel free to stipulate the contents of the source regardless of the existence of competing jurisdictions of other tribunals.
3. For the protection of the autonomy requirement of uniform interpretation, mixed agreement is a source of EU law in its entirety if the interpretational jurisdiction is taken into account. However, only the provisions of mixed agreement that fall under the exclusive competence of EU form part of EU legal order if the jurisdiction to implement (grant direct effect) is taken into consideration. Provisions that do not fall under exclusive competence of EU acquire direct effect by the decision of a national judge which applies the provisions of mixed agreement as the norms of international law.
4. From EU law point of view, both EU and the Member States are liable for the proper implementation of the provisions of mixed agreements. CJEU claims a sole responsibility of the EU before the third parties. In turn, the Member States are liable before EU because of the principle of loyal cooperation. However, the third parties see the European group as a single contracting party.
5. Imposition of excessively strict conditions that are necessary to fulfill in order to invoke international agreement to challenge EU secondary law reflects unwillingness of CJEU to grant

international agreements direct effect within EU legal order. Only the agreements that are compatible with the principle of EU autonomy are accepted by the CJEU as a part of EU legal order and can be invoked to challenge EU secondary legislation.

6. The rules imposed by CJEU with regard to the reception of international customary law are even more stringent than with regard to the EU agreements. The possibility to directly invoke the rules of international customary law to challenge EU law is difficult to implement whereas it is subject to a several stringent conditions. Only *fundamental rules* of customary law can be invoked and only in cases where the EU institutions have made a *manifest errors of assessment* concerning the application of the customary rule. Moreover, a customary rule, that is intended to be used, has to be capable of calling into question EU competence to adopt the challenged EU act. The challenged act must be liable to affect the rights and obligations which the individual derives from EU law. Since all of these conditions must be fulfilled to invoke a customary rule, it becomes extremely complicated to directly invoke international customary rule. Consequently, the more realistic way of granting customary law an actual effects within EU legal order is through the method of consistent interpretation.
7. Since CJEU, due to the requirement of uniform interpretation stemming from the EU law autonomy, would claim jurisdiction over all cases that to some extent concern EU law, a possibility of conflicting jurisdiction with other courts and tribunals over the same case exists. Since there is no hierarchy between different tribunals or specific rules how to handle such jurisdictional disputes, it is suggested that a judicial comity should be used as a possible solution to the jurisdictional rivalry problem. Willingness to cooperate with other tribunals, readiness to acknowledge their decisions could lead to a more harmonious and predictable international dispute settlement system.

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ANNOTATION

Keywords: EU autonomy, reception of international law, CJEU

The Master thesis analyze the influence that the principle of autonomy, forming part of the EU law constitutional doctrine, has on the reasoning and status of CJEU while performing the reception of international law. It is aimed to indicate by what means the principle of autonomy is implemented within EU legal order in the field of external relations and what influence it has on the CJEU's approach in the cases where the questions of application of the sources of international law are involved.

The research has shown that the principle of autonomy of EU legal order significantly influences the reception of the sources of international law. The possibility to grant international legal sources an effect within EU legal order is made a subject to a restrictive conditions that are difficult to fulfill. By checking whether the sources of international law meets the conditions of autonomy protection CJEU acts similarly as a national constitutional court.

ANOTACIJA

Raktiniai žodžiai: ES autonomija, tarptautinės teisės recepcija, ESTT

Magistrinis darbas nagrinėja autonomijos principo, sudarančio ES konstitucinės doktrinos dalį, įtaką ESTT statusui ir argumentacijai bylose, kuriose ES teisė susiduria su tarptautine teise. Darbe siekiama išsiaiškinti ir įvardyti kokiomis priemonėmis autonomijos principas yra įgyvendinamas ES išorės santykiuose ir kaip autonomijos įgyvendinimas paveikia ESTT motyvus pasisakant bylose, kuriose sprendžiamas tarptautinės teisės taikymo ES teisinėje tvarkoje klausimas.

Tyrimas parodė, kad ES teisinės tvarkos autonomijos principas daro reikšmingą įtaką tarptautinės teisės šaltinių recepcijai ES teisinėje tvarkoje. Galimybė tarptautinės teisės šaltiniams suteikti galią ES teisinėje tvarkoje autonomijos apsaugos motyvais yra padaryta priklausoma nuo ribojančių sąlygų, kurias įgyvendinti yra sudėtinga. Savo ruožtu, kontroliuodamas ar tarptautinės teisės šaltiniai atitinka ES teisinės tvarkos autonomijos apsaugos sąlygas ESTT veikia panašiai kaip nacionaliniai konstituciniai teismai.

SUMMARY

PRINCIPLE OF EUROPEAN UNION'S AUTONOMY AND RECEPTION OF INTERNATIONAL LAW: PROBLEMATIC ASPECTS

The purpose of the Master thesis is to analyse autonomy principle implementation in EU external relations in order to indicate its effect to the status of CJEU in cases where the sources of international law are involved and to the reception of the sources of international law within EU legal order.

The thesis consists of two parts that are divided into chapters. The first part of the thesis has as its object an implementation of the principle of autonomy in the field of EU external relations. A relevant case-law and scientific literature is discussed in order to indicate the means by which the principle of autonomy is implemented by CJEU externally. It is aimed to describe the influence of the development of the principle of autonomy on the status of CJEU in cases with an element of international law. The first part of the thesis has shown that the principle of autonomy is protected consistently and stringently by CJEU. What is more, it seems that the principle of autonomy is seen as a notion of constitutional importance by CJEU. By checking whether the sources of international law are compatible with the principle of autonomy of EU law CJEU acts similarly as the national constitutional courts of the Member States.

The second part of the thesis analyses how the principle of autonomy of EU legal order affects the reception of different sources of international law within EU legal order. The reception of mixed agreements and international customary law is analysed. What is more, the conditions that needs to be fulfilled in order to invoke international agreements and customary rules to challenge the secondary legislation of EU are scrutinized. Finally, jurisdictional rivalry between CJEU and other international courts and tribunals is discussed. The second part of the thesis shows that CJEU is reluctant to grant the sources of international law direct effect within EU legal order by making such a possibility subject to a stringent conditions. However, if CJEU confirms that a particular source of international law is an integral part of EU law, for the sake of autonomy protection, it would feel free to stipulate the contents of the source and implement it regardless of the existence of competing jurisdictions of other international tribunals.

Consequently, Master thesis confirms that in cases where the sources of international law are involved CJEU consistently protects the autonomy of EU legal order. While performing an active protection of autonomy CJEU acts similarly as a national constitutional court.

SANTRAUKA

EUROPOS SĄJUNGOS AUTONOMIJOS PRINCIPAS IR TARPTAUTINĖS TEISĖS RECEPCIJA: PROBLEMINIAI ASPEKTAI

Šio magistrinio darbo tikslas – išanalizuoti kaip autonomjos principo ES išorės santykiuose įgyvendinimas įtakoja ESTT statusą bylose su tarptautinės teisės elementu ir ištirti kokią įtaką autonomijos apsauga daro tarptautinės teisės šaltinių recepcijai ES teisinėje tvarkoje.

Magisrtinis darbas susideda iš dviejų dalių, kurios suskirstytos į skyrius. Pirmojoje darbo dalyje kaip objektas nagrinėjamas autonomijos principas ES išorės santykiuose. Tam kad identifikuoti priemones, kuriomis ESTT įgyvendina autonomijos principą, nagrinėjama aktuali teismų praktika ir mokslinė literatūra. Siekiama nusakyti, kokią įtaką ES teisinės tvarkos autonomijos principo ES išorės santykiuose formavimasis padarė ESTT statusui bylose su tarptautinės teisės elementu. Prieinama prie išvadų, kad ESTT autonomijos principą įgyvendina nuosekliai ir santykinai griežtai. Be to, panašu, kad ESTT autonomijos principui suteikia konstitucinę reikšmę. Savo ruožtu, tikrindamas ar konkrečių tarptautinės teisės šaltinių recepcija yra suderinama su autonomijos principu ESTT veikia panašiai kaip nacionaliniai konstituciniai teismai.

Antroji dalis yra sukoncentruota autonomijos apsaugos įtakos tarptautinės teisės šaltinių recepcijos ES teisinėje tvarkoje problemai. Analizuojama mišrių susitarimų ir tarptautinės paprotinės teisės recepcija, aptariamos sąlygos, kurios turi būti išpildytos norint panaudoti tarptautinius susitarimus ir tarptautinės paprotinės teisės normas ginčyti ES antrinės teisės aktų teisėtumui. Aptariama konfliktuojančių jurisdikcijų tarp ESTT ir kitų tarptautinių teismų ir tribunolų problema. Antroji magistrinio darbo dalis parodo, kad ESTT nenoromis suteikia tarptautinės teisės šaltiniams tiesioginį veikimą ES teisinėje tvarkoje, kadangi padaro jį priklausomą nuo sunkiai įgyvendinamų sąlygų. Vis dėlto, ESTT pripažinus tarptautinės teisės šaltinį esant integralia ES teisės dalimi, autonomijos apsaugos labui Teismas apsiims išaiškinti tarptautinės teisės turinį ir ją įgyvendinti neipaisydamas konfliktuojančios kitų tarptautinių teismų ir tribunolų jurisdikcijos.

Magistrinis darbas patvirtino, kad bylose, susijusiose su tarptautinės teisės šaltiniais, ESTT nuosekliai saugo ES teisinės tvarkos autonomiją. Atlikdamas aktyvią autonomijos apsaugą ESTT veikia panašiai kaip nacionaliniai konstituciniai teismai.