INFLUENCE OF SOURCES OF INTERNATIONAL LAW ON THE INTERPRETATION OF EU LAW

Alexander J. Bělohlávek,* Jan Šamlot**

Abstract: *In the interpretation of EU law as well as international law, the autonomous interpretation is well established. It is, however, still necessary to reflect the specific nature of EU law and of international law and the resulting interaction between these two groups of sources of law. For international treaties in particular, the question arises of how the treaties affect autonomous interpretation. This article thus aims to provide a comprehensive analysis of the possible influence of international law, in particular international treaties, on the interpretation of EU law.*

Keywords: *autonomous interpretation, EU law; international law, sources of law, WTO law; CJEU*

INTRODUCTION

It is an established practice that instruments and sources of international law must be interpreted autonomously. The same applies for EU law, while EU law needs to be interpreted independently of the law of Member States. However, neither primary nor secondary sources of EU law provide any *guidance* on how the EU law is to be interpreted or what the correct procedure is for autonomous interpretation. Although the CJEU tries to explain the proper approach in its long-standing case law, many questions are still unresolved.

The autonomous interpretation is especially specific in relation to sources of (public) international law. There is no doubt that legal instruments of international law have a major influence on EU law and, thus, on its interpretation as well. However, according to the definition of autonomous interpretation itself, this interpretation should be done *independently*, i.e., regardless of other legal systems. The question thus arises as to how exactly sources of international law are affecting the interpretation of EU law and how this influence should be reflected in the process of its autonomous interpretation.

The relationship between public international law and EU law can be aptly demonstrated by WTO law. This article therefore also presents an analysis of WTO law and shows the influence of its possible direct and indirect effects on the interpretation of EU law.

* Prof. Dr. et Mgr., Ing. Alexander J. Bělohlávek, prof. hon., dr.h.c., professor on the Dept. of International Law, Faculty of Law University of West Bohemia in Pilsen, Pilsen, Czech Republic, professor on the Dept. of Law, Faculty of Economics Technical University in Ostrava, Ostrava, Czech Republic, professor of international law on the Institute of International Law and International Relations Collegium Humanum University in Warsaw, Warsaw, Poland, practising lawyer and arbitrator, for instance also Vice-President of the Prague International Arbitration Court at the ČMKBK etc. He also served as President of the WJA – World Jurist Association in Washington D. C., USA and Member of the ICC International Court of Arbitration on behalf of the Czech Republic in Paris, France. ORCID: 0000-0001-5310-5269.

** JUDr. Jan Šamlot, Lawyer at Law Offices Bělohlávek, Arbitrator, Prague, Czech Republic. ORCID: 0009-0002-4225-7851.

I. SOURCES OF INTERNATIONAL LAW

I.1. Material sources of international law

Sources of law in general are traditionally divided into material and formal sources. The distinguishing features of international law are observable as early as on this fundamental level, in connection with the division of sources, because proper differentiation of a material source of international law from a formal one requires special endeavour. *Kaczorowska*, with reference to *Brownlie*, refers to the composition of the material sources that manifest their inevitable, but also unusable, inherent generality.[1] Such sources often consist of *some* non-binding documents from which these rules are derived. *Thirlway* points out the varying *medley* of documents that could represent such a source, whether an [international] treaty, resolution of an international organisation (primarily UN resolutions), court decision, or even academic writings. The example provided by this author is the definition of a state pursuant to Article 1 of the Montevideo Convention that stipulates that the fundamental qualifications of a state are: a permanent population, a defined territory, government and capacity to enter into relations with the other states.[2] This definition is accepted by the international community. It is also commonly mentioned in and accepted as a general legal fact by academic writings, as well as binding rules (sources) of international law.[3]

Hence, the identification of a material source does not require having regard to the legal authority of the textual instrument as such.[4] *Šturma* argues that these are (approximate translation to English, cit.):

"[...] extralegal factors that condition the creation, content, or even the degree of effectiveness of legal norms. These include international relations, in particular the balance of power between states, their economic needs, traditions, public opinion, and possibly also certain extralegal normative systems (legal consciousness, morality, religion)."[5]

---

[1] KACZOROWKA, A. *Public International Law*. Abingdon: Routledge Cavendish, 2005, p. 14 (in English, cit.): "[T]he peculiarity of international law calls into question a clear distinction between substantive and procedural elements of a rule of international law. As Professor Brownlie stated, it is difficult to maintain the distinction between formal and material sources taking into account that material sources consist simply of quasiconstitutional principles of inevitable but unhelpful generality. What matters is the variety of material sources, the all-important evidence of the existence of consensus among states concerning particular rules of practice."

[2] See Article 1 of the Montevideo Convention.

[3] See SHAW, M. N. *International Law. 6th ed.* Cambridge: CUP, 2008, p. 198; BROWNLIE, I. *Principles of Public International Law. 7th ed.* Oxford: OUP, 2008, pp. 70 et seq.; EVANS, M. D. *International Law. 2nd ed.* Oxford: OUP, 2006, p. 231; CHEN, F. T. The Meaning of "States" in the Membership Provisions of the United Nations Charter. *Indiana International & Comparative Review*. 2001, Vol. 12, No. 1, pp. 25–51 etc.

[4] THIRLWAY, H. The Sources of International Law. In: Malcom D. Evans (ed.). *International Law*. Oxford: OUP, 2006, p. 116 (in English as the original version, cit.): "[I]n identifying a material source, no account need be taken of the legal authority of the textual instrument[...]".

[5] See ŠTURMA, P. Prameny mezinárodního práva. In: Dušan Hendrych et al. *Právnický slovník. 3rd ed.* Praha: C. H. Beck, 2009 (in Czech as the original version, cit.): "[...]mimoprávní faktory, které podmiňují vznik, obsah, popř. též míru efektivity právních norem. Patří sem mezinárodní vztahy, zejm. poměr sil mezi státy, jejich ekonomické potřeby, tradice, veřejné mínění, popř. též některé mimoprávní normativní systémy (právní vědomí, morálka, náboženství)."

I.2. Formal sources of international law

Formal sources of international law represent a not quite closed set of acts that enable the identification of the contents of international law. The absence of any clear definition of the sources of international law is also mentioned in academic writings, which also point out that (approximate translation to English, cit.):

"[T]here is no definition of sources in general international law, i.e., a definition that we could call legally binding. The definition of the concept of sources in its various meanings is therefore the product of doctrine. For this reason, the concepts of different authors can and do differ."[6]

However, a certain premise concerning the sources of international law can be found in Article 38 of the Statute of the International Court of Justice (ICJ Statute), which stipulates that, when deciding disputes in accordance with international law, the ICJ applies (in English, cit.):

"[...]a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

However, some authors criticise Article 38 of the ICJ Statute quoted in the preceding paragraph. For instance, *Kaczorowska*[7] points out that judicial decisions and teachings of the most highly qualified publicists are on an equal footing and not merely subsidiary, because, in practice, judicial decisions naturally have a significantly greater weight and impact. Another notable factor is the time that has lapsed since the articulation and incorporation of the quoted provision of the ICJ Statute. Considering our present society, globalised and suffering from an information revolution, where ideas are being exchanged at the speed of light, one must wonder at how unduly rigid our current system is. However, the system is recognised *de lege lata*. The above-mentioned author, *Kaczorowska*, also points out the difference in meaning between the terms contained in the English version of the ICJ Statute and those in the French version, and criticises the general nature of the language as such. This excessive *generality* forces the doctrine to infer by interpretation which instruments are in fact included in and covered by Article 38 of the ICJ Statute, and when no such source of law can be subsumed under the said provision, one may conclude how incomplete the ICJ Statute actually is. *Thirlway*[8] joins those who criticise the ICJ Statute and adds that the entire concept of sources of public international law could be replaced with *"recognized manifestations of international law"*, or that there is at least reason to expand the list to include other forms of sources.

---

[6] See ONDŘEJ, J. *Mezinárodní právo veřejné, soukromé, obchodní. 2nd ed.* Plzeň: Aleš Čeněk, 2007, p. 55 (in Czech as the original version, cit.): "[N]eexistuje žádná definice pramenů v obecném mezinárodním právu, tj. definice, kterou bychom mohli označit za právně závaznou. Vymezení pojmu prameny v různých významech je tudíž výsledkem činnosti nauky. Z tohoto důvodu se pojetí různých autorů mohou odlišovat a také se odlišují."

[7] KACZOROWKA, A. *Public International Law.* p. 14.

[8] THIRLWAY, H. The Sources of International Law. In: Malcom D. Evans (ed.). *International Law.* p. 119.

Although the undeniable importance of the ICJ Statute as the fundamental premise for a systematic classification of sources of international law must be recognised, one should also not dismiss the development that the law, as well as the international community, have undergone in the meantime.[9] Indeed, this development itself must be considered a material source for any future amendment of the ICJ Statute, to the extent it would correspond to modern requirements of a system of rules in the international environment, legal doctrine, as well as subjects of the international community as such.[10] However, in view of the difficulties attending the adoption of any new international agreement (international treaty), an amendment of the ICJ Statute in the foreseeable future is unlikely.[11] Viewed from the historical perspective, though, the ICJ Statute can be considered the reflection of the needs at the time of its adoption. It is certainly not obsolete and should not be relegated to legal history. The ICJ Statute is rather a necessary basis that requires attention so that it keeps abreast of the speed of legal development in any branch with cross-border dimensions. In this regard, the interpretation of the ICJ Statute is an important basis on which this source may rely.

II. INFLUENCE OF INTERNATIONAL TREATIES ON AUTONOMOUS INTERPRETATION OF EU LAW

Disregarding the human rights documents, which are separately briefly analysed below, one must generally conclude that among the principal sources of international law are undoubtedly international treaties. At the same time, international treaties are fundamental for the autonomous interpretation provided by the CJEU. The CJEU has already ruled that international treaties are simultaneously a source of EU law with a potential for direct effect on the individual. The Court of Justice has jurisdiction to interpret international treaties as a source of EU law.[12] However, there are various types of international treaties

[9] Cf. e.g. GOLDKLANG, J. M. House Approves Proposal Permitting ICJ to Advise Domestic Courts. *The American Journal of International Law*. 1983, Vol. 77, No. 2, pp. 338–340.

[10] Cf. e.g. SHELTON, D. Form, Function, and the Powers of International Courts. *Chicago Journal of International Law*. 2009, Vol. 9, No. 2, pp. 537–571, here also p. 543 etc.

[11] Cf. also. TELESETSKY, A. Binding the United Nations: Compulsory Review of Disputes Involving UN International Responsibility before the International Court of Justice. *Minnesota Journal of International Law*. 2012, Vol. 21, pp. 75 et seq., here p. 77; TRAVISS, A. C. Themple of Preah Vihear: Lessons on Provisional Measures. *Chicago Journal of International Law*. 2012, Vol. 13, No. 1, pp. 317–344, here p. 319 etc.

[12] See judgment of the Court of Justice (Fifth Chamber), Case C-439/01 of 16 January 2003, *Libor Cipra* et *Vlastimil Kvasnicka* v. *Bezirkshauptmannschaft Mistelbach*, ECLI:EU:C:2003:31 (in English, cit.): "[I]n the light of the foregoing, it must be held that the AETR Agreement forms part of Community law and that the Court has jurisdiction to interpret it." Cf. also: BLAŽO, O. Legal Character of Acts of the Association and Joint Bodies under International Agreements of the European Union. Transcarpathian Legal Readings. Materials of the XI-th International Scholarly Conference (April 11-13, 2019, Uzhorod, Chapter 2, pp. 14–25). In: *SSRN* [online]. 19. 3. 2020 [2023-08-12]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3525032>; MAC GREGOR PELIKÁNOVÁ, R. The Analysis of the Case Law of the Court of Justice of EU on the Unfair Commercial Practices. *Acta academica karviniensia*. 2019, Vol. XIX, No. 1, pp. 47–58; SEHNÁLEK, D. *Specifika výkladu práva Evropské unie a jeho vnitrostátní důsledky*. Praha: C. H. Beck, 2019, here p. 19 (approximate translation to English, cit.): "[T]he European Union enters into international legal relations, primarily through international treaties. These subsequently have the status of a source of European Union law with potential direct effect on individuals." (in Czech as the original version, cit.): "[E]vropská unie totiž vstupuje do mezinárodněprávních vztahů, a to především prostřednictvím mezinárodních smluv. Ty mají následně status pramene práva Evropské unie s potenciálním přímým účinkem pro jednotlivce."

in the context of EU law. Such differentiation is in turn capable of resulting in the application of different interpretation methods, or indeed enables the CJEU to provide the interpretation in the first place. In this connection, however, scholars have not arrived at a clear and unambiguous categorisation of international treaties in the context of EU law. The individual sources differ as to the number of categories recognised by them. On the one hand, one may encounter the following "simple" differentiation:

– international treaties concluded by the European Union;
– international treaties concluded by the European Union and one or more Member States; and
– international treaties concluded by one or more Member States.[13]

On the other hand, a more profound and detailed differentiations can also be found:

– international treaties concluded exclusively by the European Union;
– international treaties concluded simultaneously by the European Union and by the Member States (parallel treaties);
– international treaties concluded by the Member States outside the scope of EU competences, but in line with the objectives of the EU (*subsidiary treaties*);
– international treaties concluded simultaneously by the European Union and by the Member States (*mixed treaties*);[14]
– international treaties originally concluded by the Member States, to which the European Union has become a party by succession; and
– international treaties concluded by the Member States for the European Union based on a decision of the latter.[15]

The distinguishing features of the individual categories are also manifested in the approach of the CJEU to the interpretation of these treaties. But before we embark on the analysis of the differences in interpretation based on the different methods of negotiating an international treaty, it is necessary to provide a general explanation of the differences between the autonomous interpretation in the construction of international treaties and the *general* autonomous interpretation of EU law. It is necessary to bear in mind that an international treaty, as such, is created by the consensus of two or more parties and this process is subject to international law. However, in view of the nature of an international treaty, the conclusions derived by the CJEU from the interpretation (in those cases where the CJEU has the jurisdiction to interpret these sources) are always only binding on the EU itself or the EU Member States, as applicable.[16] The autonomous interpretation pro-

[13] Such differentiation is provided, for instance, in ROSAS, A. The Status in EU Law of International Agreements Concluded by EU Member States. *Fordham International Law Journal*. 2011, Vol. 34, No. 5, pp. 1304–1345, here p. 1345.

[14] The difference from parallel treaties, whose point description is very similar to mixed treaties, inheres in whether or not the Member States and the European Union are a single contracting party. The Member States and the European Union are a single contracting party in the case of mixed treaties, but different contracting parties in the case of parallel treaties.

[15] This division of international treaties was also presented by SEHNÁLEK, D. *Specifika výkladu práva Evropské unie a jeho vnitrostátní důsledky*. pp. 20 et seq.

[16] See SEHNÁLEK, D. *Specifika výkladu práva Evropské unie a jeho vnitrostátní důsledky*. p. 27.

vided by the CJEU is not binding on the other party to the treaty. The CJEU's interpretation has no legal consequences for the other party. As a rule, the only authority capable of providing an interpretation of the international treaty binding on both parties (where the parties do not interpret the treaty by and for themselves) is an authority set up in order to provide such interpretation which, again, applies its own form and method of autonomous interpretation, and such interpretation could, to some extent, be different[17] from the interpretation provided by the Court of Justice.

The CJEU case law also indicates that, when interpreting an international treaty, the Court of Justice is bound by and complies with the "procedures" of interpretation according to international law. Hence, it especially applies the interpretation rules of the Vienna Convention,[18] regardless of the fact that the Court of Justice itself is not bound by the Vienna Convention. The CJEU has defined *for itself* a certain degree of "binding nature" of the Vienna Convention in its rulings; this applies to those provisions of the Vienna Convention whose contents are generally considered to be general customary international law.[19] Indeed, the Court of Justice has ruled that (in English, cit.):

"[…] even though the Vienna Convention does not bind either the Community or all its Member States, a series of provisions in that convention reflect the rules of customary international law which, as such, are binding upon the Community institutions and form part of the Community legal order (see, to that effect, Racke, paragraphs 24, 45 and 46; see, also, as regards the reference to the Vienna Convention for the purposes of the interpretation of association agreements concluded by the European Communities, Case C-416/96 El-Yassini [1999] ECR I-1209, paragraph 47, and Case C-268/99 Jany and Others [2001] ECR I-8615, paragraph 35 and the case-law cited)."[20]

II.1. International treaties concluded by European Union

The first autonomous category of international treaties consists of international treaties concluded directly by the European Union. The EU has the power to conclude such treaties on the basis of the exclusive competences entrusted to the EU.[21] Apart from the areas in which exclusive competences apply, which are specified in Article 3(1) TFEU, Ar-

[17] The differentiating feature of autonomous interpretation means that the interpretation is performed by another separate authority, which, depending on the circumstances, could be governed by various interpretational rules that ultimately need not coincide with the "classical" and generally employed methods.

[18] Vienna Convention on the Law of Treaties (1969).

[19] Cf. ODERMATT, J. The Use of International Treaty Law by the Court of Justice of the European Union. *Cambridge Yearbook of European Legal Studies*. 2015, Vol. 17, pp. 121–144; BECK, G. The Macro Level: The Structural Impact of General International Law on EU Law: The court of Justice of the EU and the Vienna Convention on the Law of Treaties. *Yearbook of European Law*. 2016, Vol. 35, No. 1, pp. 484–512; CARDUCCI, G. A State's Capacity and the EU's Competence to Conclude a Treaty, Invalidate, Terminate – and "Preclude" in Achmea – A Treaty or BIT of Member States, a State's Consent to be Bound by a treaty or to Arbitration, under the Law of Treaties and EU Law, and the CJEU's Decision on EUSFTA and Achmea: Their Roles and Interactions in Treaty and Investment Arbitration. *ICSID Review*. 2018, Vol. 33, No. 2, pp. 582–619, here also p. 588 etc.

[20] See judgment of the Court of Justice (Fourth Chamber) of 25 February 2010, Case C-386/08, Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen, ECLI:EU:C:2010:91, para. 42. See also judgment of the Court of Justice, Case C-268/99 of 20 November 2001, Aldona Malgorzata Jany et al. v. Staatssecretaris van Justitie, ECLI:EU:C:2001:616, para. 35.

[21] See Article 3(1) TFEU.

ticle 3(2) TFEU also lays down the possibility of negotiating international treaties in exclusive areas (in English, cit.):

"[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."

This provision is further supplemented by Article 216(1) TFEU (in English, cit.):

"[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."

If such an international treaty is concluded by the European Union, the treaty is *ipso facto* binding upon the Member States, as well as all institutions of the EU.[22]

No conflicts should occur in this area as regards the provisions of a binding interpretation of the treaty. In view of the fact that only the EU is a party in this case (and, naturally, at least one other party to the relationship established by the treaty) and not the individual Member States themselves, there can be no doubts about the possibility of performing autonomous interpretation. Taking into consideration the European Union only, this interpretation is performed by the EU itself and it is in turn binding on the Member States. This EU competence is based on the fact that the international treaty becomes part of EU law. As soon as this happens, the EU judicial authority has the power to interpret the international treaty.[23]

But it is also necessary to have regard to the above analysis – naturally, the international treaty is not exempt from the general interpretation procedures and methods pursuant to public international law. This means that it is also possible to set up a forum authorised to provide autonomous interpretation binding on both, or more, parties. The EU compet-

[22] See Article 216(2) TFEU.

[23] See judgment of the Court of Justice (Fifth Chamber), Case C-439/01 of 16 January 2003, Libor Cipra and Vlastimil Kvasnicka v. Bezirkshauptmannschaft Mistelbach, ECLI:EU:C:2003:31. The proper "classification" of international treaties within the hierarchy of European law could be subject to debate. The best approach would probably be to perceive international treaties as somewhere between primary law and secondary law. See also: ROSAS, A. The Status in EU Law of International Agreements Concluded by EU Member States. *Fordham International Law Journal*. 2011, Vol. 34, No. 5, p. 1310, pp. 1304–1345, here p. 1310; SOMSSICH, R. et al. (Research team of P & V International). Studies on translation and multilingualism, Final Report for the "Study on Language and Translation in International Law and EU Law", 6/12, EU Commission Project - DGT/2011/MLM2. In: *European Commission* [online]. 30. 7. 2012 [2024-01-20]. Available at: <https://termcoord.eu/wp-content/uploads/2013/08/Study_on_language_and_translation_EU.pdf>. The quoted decision concerned the international agreement AETR (The European Agreement concerning the Work of Crews of Vehicles engaged in International Road Transport); the EU Member States are parties to the agreement as well. Hence, it does not fall among those cases in which the treaty was only concluded by the EU. At this point, the decision is mentioned only with respect to the quoted segment, which constitutes case law that confirms the general possibility of the Court of Justice to interpret international treaties that have become part of Community (EU) law.

ence to provide a binding interpretation of such an international treaty means only the possibility of providing such interpretation for the Member States themselves (they are not direct parties to the given international treaty). Hence, there is no dispute in the field of interpretation performed by the Member States and by the EU itself. Consequently, the autonomous interpretation itself is not affected, because such interpretation is performed in the usual and common manner, in the same way that other legal acts comprising EU law would be construed. Hence, the only difference is that the interpretation is only binding on the European Union itself, not on the other parties. But this interpretation must again meet all requirements for an autonomous interpretation, i.e. it must be independent of other legal systems, including EU law.

II.2.Parallel treaties

International treaties concluded by the EU as well as selected Member States as parties are referred to as parallel treaties. Parallel treaties are also described as treaties that were not entered into by the EU and the Member States jointly (as one subject), but as separate subjects.[24] The distinguishing feature of these treaties is the application of autonomous interpretation to their provisions. In view of the fact that the parties in this case are the EU itself as well as the individual EU Member States, the interpretation could be performed by each of the parties or, as applicable, at least two of them, i.e. the European Union and another Member State. Naturally, this provides the possibility for, and entails the risk of, two different interpretations. Such risk is by no means only hypothetical, and diverging interpretations do indeed occur.

In order to minimise the risk of differences in interpretation, the Member States are bound by the general duty to abide by the principle of sincere cooperation with the EU and with other Member States.[25] In this connection, the Court of Justice has held that (in English, cit.): *"[...] this duty of genuine cooperation is of general application and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries [...]."*[26] Hence, one may conclude that, with the exception of an outright *ultra vires* action, the Member States adhere to the principle of sincere cooperation with the EU. After all, as mentioned above in respect of international treaties concluded by the European Union, but not the Member States, EU law as such is inherently incapable of having any influence on the autonomous interpretation of the international treaty.

II.3. Mixed treaties

The European Union may act alone on the international scene, or the Member States may participate alongside it. The latter scenario is referred to as "mixed action" or "mixed

[24] See e.g. DE WITTE, B. Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements. In: Bruno De Witte et al. (eds.). *The Many Faces of Differentiation in EU Law*. Antwerpen: Intersentia, 2001, pp. 231–267 etc.

[25] See Article 4(3) TEU.

[26] See judgment of the Court of Justice (Grand Chamber), Case C-246/07 of 20 April 2010, Europeiska kommissionen v. Konungariket Sverige, ECLI:EU:C:2010:203, para. 71.

treaty". The parties to the treaty again include the Member States and the European Union. In comparison to parallel treaties, however, they all (the EU and the Member States) constitute a single party to the treaty. This *subtype* of international treaty is also anticipated in Article 4(1) TFEU,[27] which provides for the sharing of competences with the Member States. However, it is necessary to repeat that the autonomous interpretation of these treaties is performed by the Court of Justice for the Member States and the Union itself, not for any third country.

Such treaties therefore inherently belong to sources of international law and their interpretation is based on the rules of international law, i.e. naturally the Vienna Convention and the rules of interpretation provided therein.[28] The Vienna Convention is predominantly a codification of international legal custom;[29] and consequently, the rules contained therein can be applied despite the fact that the European Union is not bound by the Vienna Convention. The reason is that the EU is in these cases also obliged to comply with international law, as required by international customs. After all, a similar procedure was also applied by the ICJ in *Kasiliki/Sedudu*.[30] Despite the fact that neither of the parties to the dispute was a signatory of the Vienna Convention, both parties considered the rules of interpretation contained in Article 11 of the Vienna Convention to be a reflection of international custom. Consequently, mixed treaties are also subject to an autonomous interpretation independent of EU law.[31] The objective of such autonomous interpretation performed by the EU is in fact the simultaneous elimination of the effects of the *mixed quality (mixed nature)* of these treaties.[32]

II.4. Bilateral treaties between Member States

The basis for the interpretation of bilateral treaties entered into between Member States is obviously characterised by the above-mentioned principle of sincere cooperation pursuant to Article 4(3) TEU. In their mutual dealings, Member States are clearly obliged to refrain from negotiating a treaty contrary to the objectives of the EU and the procedures for the accomplishment of these objectives.

However, the Member States are free to enter into any treaties that comply with EU objectives. As the CJEU has held (in English, cit.):

---

[27] See Article 4(1) TFEU.

[28] Cf. also: KOUTRAKOS, P. The Interpretation of Mixed Agreementp. In: Christophe Hillion (ed.). *Mixed Agreements Revisited – The EU and its Member States in the World*. Oxford: Hart Publishing, 2010, pp. 116–137; HELISKOSKI, J. The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements. *Nordic Journal of International Law*. 2000, Vol. 69, No. 4, pp. 395–412; KOUTRAKOS, P. The Interpretation of Mixed Agreements under the Preliminary Reference Procedure. *European Foreign Affairs Review*. 2002, Vol. 7, No. 1, pp. 25–52.

[29] See SEHNÁLEK, D. *Specifika výkladu práva Evropské unie a jeho vnitrostátní důsledky*. p. 27.

[30] See judgment of the ICJ of 13 December 1999, in the cross-border dispute: Kasiliki/Sedudu Botswana v. Namibie, I.C.J. Reports 1999, p. 1045.

[31] Cf. KARAYIGIT, M. T. Why and to What Extent a Common Interpretative Position for Mixed Agreements? *European Foreign Affairs Review*. 2006, Vol. 11, No. 4, pp. 445–469.

[32] CIEŚLIŃSKI, A. The Phenomenon of Mixed Agreements – between Public International and European Union Law. *Wroclaw Review of Law, Administration & Economics*. 2018, Vol. 8, No. 2 – Special Issue, pp. 429–446, here p. 432.

"[I]t follows that, since the bilateral instruments at issue now concern two Member States, their provisions cannot apply in the relations between those States if they are found to be contrary to the rules of the Treaty, in particular the rules on the free movement of goods (see, to that effect, Case C-469/00 Ravil [2003] ECR I-5053, paragraph 37 and the case-law cited)."[33]

II.5. International treaties concluded by Member States and third countries

Treaties concluded by the Member States before the establishment of or, as applicable, before their accession to the European Union constitute a special category of international treaties. The status of such treaties is provided for in Article 351 TFEU, according to which the application of these treaties takes precedence over EU law.[34] The Court of Justice has repeatedly held that it does not have jurisdiction to interpret an international treaty concluded between a Member State and a non-member country.[35]

Hence, the autonomous interpretation of such a treaty is performed exclusively within the relationship of these two parties, not in connection with the autonomous interpretation of EU law, and *vice versa*, the autonomous interpretation of EU law is not connected to the autonomous interpretation of the given international treaty between the Member State and a third country. This approach is predictable and complies with international law, which is binding on the EU, as the Union itself admits, and not only implicitly.

The European Union respects and must respect international law in the exercise of its powers.[36] However, this requirement also applies to its own legislative power. The Court of Justice has ruled that (in English, cit.):

"[I]t should be noted in that respect that, as is demonstrated by the Court's judgment in Case C-286/90 Poulsen and Diva Navigation [1992] ECR I-6019, paragraph 9, the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country. It follows 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."[37]

---

[33] See judgment of the CJEU, Case C-478/07 of 8 September 2009, Budějovický Budvar, národní podnik v. Rudolf Ammersin GmbH, ECLI:EU:C:2009:521, para. 98.

[34] See resolution of the Supreme Court of the Czech Republic, Case No. 30 Nd 25/2014 of 25 June 2014. See also a commentary to this decision in: VOJTEK, P. Výběr rozhodnutí z oblasti civilněprávní. *Soudní rozhledy*. 2016, Vol. 22, No. 11 (in English, cit.): "[A] bilateral international treaty governing jurisdiction to which the Czech Republic was bound prior to its accession to the European Union takes precedence in application over EU law pursuant to Article 351 TFEU." In Czech as the original version (cit.:) "[D]voustranná mezinárodní smlouva upravující soudní pravomoc, kterou byla Česká republika vázána před svým vstupem do Evropské unie, má podle čl. 351 SFEU aplikační přednost před unijním právem."

[35] Judgment of the Court of Justice (Grand Chamber), Case C-533/08 of 4 May 2010, TNT Express Nederland BV v. AXA Versicherung AG, ECLI:EU:C:2010:243, para. 61.

[36] See judgment of the Court of Justice, Case C-286/90 of 24 November 1992, Anklagemyndigheden v. Peter Michael Poulsen a Diva Navigation Corp, ECLI:EU:C:1992:453, para. 9.

[37] See judgment of the Court of Justice, Case C-162/96 of 16 June 1998, A. Racke GmbH & Co. v. Hauptzollamt Mainz. ECLI:EU:C:1998:293, para. 45 and 46.

Hence, the Court of Justice has consistently held that the requirements of international law must be respected, especially as concerns external actions of the EU.[38]

II.6. International treaties that are not binding on European Union or on Member State

International treaties that are not binding on the EU or on any Member State are not affected by EU law. They are the exclusive domain of public international law as the subject of autonomous interpretation, primarily according to the general rules of interpretation applicable in customary law. Alternatively, the interpretation involves customs or, as applicable, customary general rules of interpretation codified in Article 31 of the Vienna Convention.

The effects of such treaties are determined by the very essence of the [international] treaty as such. They are binding on the subjects that acceded to the treaty, which also holds true for the interpretation of such a treaty, being inherently autonomous, i.e. it is binding on the parties to the treaty. The above-described *inter partes* relationship is typical for treaties. International treaties concluded between any subjects of international law possess the same quality. These treaties have effects within the scope of the relationship provided for in the treaty, i.e. between these subjects. Consequently, the interpretation of such treaties, whether in the performance thereof or in the decision-making required for dispute resolution, is autonomous as concerns the contents and subject matter of and the parties to the treaty.

II.7. De facto influence of international treaties on interpretation of EU law

The nature of international treaties that are binding on neither the EU nor its Member States also inevitably implies the relationship between such treaties (or their autonomous interpretation) and the autonomous interpretation of EU law. The autonomous interpretation of any treaties in which the EU and its Member States do not participate has absolutely no conceivable, let alone actual, influence on the autonomous interpretation of EU law. In other words, the parties to an international treaty from another part of the world are bound by a relationship that is restricted to the subjects (parties) that acceded to the treaty and agreed to perform such treaty based on their own will.

There are exceptions to this rule, though, namely those cases when an act of EU law invokes the international treaty. The Austrian Supreme Court (*Der Oberste Gerichtshof*) has commented on such a situation as follows (approximate translation to English, cit.):

"[A]lthough the Court of Justice of the European Union is not in principle called upon to interpret international treaties of the member states, Art 15 EuUVO explicitly refers to the aplicability of the 2007 Hague Protocol. When a legal act of the Union refers to such a treaty, the Court of Justice of the European Union exceptionally has interpretative competence. In addition, the European Union (with the exception of Denmark and the United Kingdom)

[38] See judgment of the Court of Justice (Grand Chamber), Case C-104/16 P of 21 December 2016, Conseil de l'Union européenne v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario), ECLI:EU:C:2016:973, para. 290. See judgment of the Court of Justice (Grand Chamber), Case C-402/05 of 3 September 2008, Yassin Abdullah Kadi et Al Barakaat International Foundation v. Europeiska unionens råd et Europeiska gemenskapernas kommission, ECLI:EU:C:2008:461, para. 291 and 292.

ratified the 2007 Hague Protocol by Council Decision of 30. 11. 2009, thus establishing the interpretative competence of the Court of Justice of the European Union."[39]

The Austrian Supreme Court (*Der Oberste Gerichtshof*) has emphasised the obligation of autonomous interpretation of international law, as well as Community law even before the Lisbon Treaty. Naturally, the autonomous interpretation of EU law is primarily based on the sources of EU law. In this regard, the Austrian Supreme Court has also ruled as follows in its 1997 decision (approximate translation to English, cit.):

"[T]he Hague Convention on the Uniform Law for the International Sale of Movable Property [of 1 July 1964] is a multilateral [international] treaty, which is applied and interpreted by the Member States concerned. Article 17 of that Convention presumes that questions relating to matters dealt with in the Convention but not expressly provided for shall be determined in accordance with the general principles on which the Convention is based. If the Member States are thus obliged to fill in the gaps in the so-called autonomous, i.e. international, character of the Convention, the same applies all the more to the interpretation of the rules of Community law."[40]

III. INFLUENCE OF OTHER SOURCES OF INTERNATIONAL LAW ON AUTONOMOUS INTERPRETATION

III.1. Human rights documents

Human rights documents[41] are undoubtedly another source of international law. The concept of human rights protection is currently based on natural law. Fundamental human

[39] The *ratio* was adopted from the website of the Austrian Federal Chancellery (approximate translation). See decision of the Supreme Court of Austria (Oberstes Gerichtshof), Case 8 Ob45/16z of 28 March 2017. In: ECLI:AT:OGH0002:2017:RS0131352. In: *Austrian Federal Chancellery* [online]. [2024-01-20]. Available at: <https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=876c8b08-ceea-4a3b-8778-55c377125bd2&Position=1&Abfrage=Justiz&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AendAenderungen=Undefined&SucheNachRechtssatz=True&SucheNachText=False&GZ=&VonDatum=&BisDatum=31.08.2019&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=101&Suchworte=Auslegung+der+internationalen+Abkommen&Dokumentnummer=JJR_20170328_OGH0002_0000OB00045_16Z0000_002>. (in German as the language of the proceedings, cit.): "[D]er Gerichtshof der Europäischen Union ist zwar nicht grundsätzlich zur Auslegung von internationalen Abkommen der Mitgliedstaaten berufen, jedoch verweist Art 15 EuUVO ausdrücklich auf die Anwendbarkeit des Haager Protokolls von 2007. Wenn ein Rechtsakt der Union auf ein solches Abkommen verweist, so kommt dem Gerichtshof der Europäischen Union ausnahmsweise die Auslegungskompetenz zu. Zusätzlich hat die Europäische Union (mit Ausnahme Dänemarks und des Vereinigten Königreichs) das Haager Protokoll von 2007 mit Ratsbeschluss vom 30. 11. 2009 (2009/941/EG) ratifiziert, womit die Auslegungskompetenz des Gerichtshofs der Europäischen Union begründet wurde." See also Article 267 of the Lisbon Treaty.

[40] The *ratio* was adopted from the website of the Austrian Federal Chancellery (approximate translation). See decision of the Supreme Court of Austria (*Der Oberste Gerichtshof*), Case 5 Ob 538/95 of 27 May 1997. In German as the language of the proceedings (cit.): "[D]as Haager EKG ist ein multilaterales Abkommen, das von den jeweiligen Mitgliedstaaten anzuwenden und auszulegen ist. Art 17 dieses Abkommens sieht vor, daß Fragen, die im Übereinkommen geregelte Materien betreffen, aber nicht ausdrücklich entschieden sind, nach den allgemeinen Grundsätzen, die dem Abkommen zugrunde liegen, zu entscheiden sind. Sind die Mitgliedstaaten somit zu einer sogenannten "autonomen", das heißt dem internationalen Charakter des Abkommens Rechnung tragenden Lückenfüllung verpflichtet, so gilt dies umsomehr für die Auslegung von Normen des Gemeinschaftsrechtes."

[41] Here in the sense of a *document* of some qualified form, typically international convention. Naturally, not every document addressing a topic of human rights can automatically be categorized as a source of law.

rights are therefore natural rights and as such (in English, cit.): *"[…] recognizing the inviolability of the natural rights of man, the rights of the citizen and the sovereignty of the law, building on the universally shared values of humanity and the democratic and self-governing traditions of our peoples […]."*[42] The nature of human rights as natural law means that human rights cannot be posited; they can only be declared. Viewed from this perspective, there is not a single document that would not be an embodiment of the state's duties. The international declaration of human rights is rather a specification, or perhaps a clarification, of the importance of such a treaty. The same applies to the nature of Article 6(3) TEU and the documents it refers to since the provision reads as follows (in English, cit.):

"[F]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

Human rights documents are a source of law, but one should keep in mind that they set out the means for the protection of human rights, rather than their existence *per se*. Fundamental human rights themselves are much closer to legal customs. In this regard, see *De Schutter* (in English as the original version, cit.): *"[T]he growing consensus is that most, if not all, of the rights enumarated in the Universal Declaration of Human Rights have acquired a customary status in international law."*[43] Such approach is indeed logical. If the requirements of *opinio juris* and *usus longaevus*, as the defining features of a legal custom, are fulfilled, human rights must be presumed to possess such status. These rights have been used for decades throughout the international community. However, the fact that the essence of human rights has the quality of natural law also means that they are binding on the subjects of public international law. Hence, the sources of human rights can be perceived on two levels: either as documents such as declarations or other conventions (treaties) of international law, or as rules of customary law. They share this essence simultaneously. But they are still derived from a single basis, which has the quality of natural law.

Nevertheless, the above-described nature of human rights is also important with respect to the hierarchy of law when the legal value of such documents is subject to comparison. Their normative quality has ensured that human rights enjoy a special status among other rights both within the scope of the law of the international community, and in national law.

The fundamental human rights document from the perspective of EU law is the CFR EU. Article 6 TEU recognises that the CFR EU has the same legal value as the Treaties.[44] The wording of the provision clearly indicates that it is a declaratory provision. Hence, one should not presume that the CFR EU would not have the same effects in the absence of this provision. However, the CFR EU also contains its own rules on the scope and inter-

[42] Cf. also: Preamble of Resolution No. 2/1993 Coll. of the Presidium of the Czech National Council on the declaration of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic, Charter of Fundamental Rights and Freedoms (in Czech as the original version, cit.): "[…]uznávajíc neporušitelnost přirozených práv člověka, práv občana a svrchovanost zákona, navazujíc na obecně sdílené hodnoty lidství a na demokratické a samosprávné tradice našich národů […]."

[43] DE SCHUTTER, O. *International Human Rigths Law*. Cambridge: CUP, 2010, p. 50.

[44] See Article 6(1) TEU.

pretation of rights and principles, and these rules must be applied to the interpretation of the CFR EU, i.e. the interpretation must be autonomous, different from the other Treaties.[45]

The above-mentioned Universal Declaration of Human Rights is undoubtedly one such document in the field of international law. Although the Universal Declaration of Human Rights is more succinct than the CFR EU, it also contains a provision on interpretation that explicitly prohibits the states from construing the document contrary to the established rights.[46] This is another clear and unambiguous imperative requesting autonomous interpretation.

III.2. Legal custom

Legal custom, similarly to international treaties, is another dominant source of international law. As the oldest source of law, custom has stood the test of time thanks to its undeniable ability to meet the needs of the international community on the basis of consent. Hence, it is based on two fundamental defining aspects, namely long use (*usus longaevus*) and the general recognition of its binding nature (*opinion juris*). Legal custom must be attributed a position equal to international treaties. The parties may agree on a particular issue, but only the autonomous interpretation of their agreement will clarify the will of the parties. This is based on the fundamental principle *lex specialis derogat legi generali*.

The creation of an international custom is a continual process. It is difficult to determine with any precision the exact moment from which it can be regarded as custom. The very essence of the first defining feature, *usus longaevus*, is simultaneously the foundation of custom and the source of its ambiguity. The reason is that the moment from which the behaviour of subjects of international law can be considered a custom need not be entirely clear.

As mentioned above, custom and treaties as sources of international law can be considered equivalent in the hierarchical structure of legal value. Consequently, if any conflict occurs between these two sources of law, it is appropriate to apply the fundamental legal principle *lex posterior derogat legi priori*. This situation therefore also covers the founding [T]reaties, or even EU secondary law.

The states provided for their mutual rights and obligations for the future by creating the EU and EU law, and thereby excluded the application of any existing international legal customs conflicting with the above. However, it is necessary to consider the creation of subsequent customs, arising from the current conditions of EU law.

The European Union is based on the uniform interpretation of EU primary law, as well as secondary or tertiary EU law. It is, in theory, conceivable that a new legal custom could be established in a particular area among all Member States, or within the framework of the EU institutions. This would only occur if all Member States or institutions in a particular area behaved in an identical manner, in line with the defining features of the legal custom. This scenario is essentially rather unusual, although not unlikely and certainly not impossible. Indeed, the behaviour of each subject is based on the existing source of

[45] See Article 53 of the CFR EU.
[46] See Article 30 of the Universal Declaration of Human Rights.

law, i.e. EU law and its uniform, autonomous interpretation. Exceeding the bounds of EU law cannot be perceived as the origin of a new legal custom, but as an infringement of European law. As the academic writings confirm (in English as the original version, cit.): *"[O]f course, examples of EUCL are mostly historical to the extent that EUCL, once it is sufficiently established to be qualified as such, is often rapidly codified into EU primary law for reasons of legal security."*[47] Where EU law applies, international custom can be applied only *intra legem* or *praeter legem*. In this regard, the Court of Justice has confirmed that a *contra legem* application of customs is unacceptable. International custom cannot amend or derogate from EU primary law.[48]

However, the influence of international custom cannot be criticised; nor can it be clearly assessed. The European Union, as a supranational entity with its own legal personality, is obliged to observe the law of the international community, including international customs.

III.3. Ex aequo et bono

The second paragraph of Article 38 of the ICJ Statute[49] mentions another source of law. The provision accepts an agreement of the parties that allows the ICJ to decide *"ex aequo et bono"*.[50] This enables the judges themselves to decide in accordance with their own inner perception of justice and right. Instead of applying any available law, the judge creates the *law*.

This method of decision making is undoubtedly disproportionately more subjective than the resolution of disputes outside the *"ex aequo et bono"* regime.[51] One may argue in favour of this method with reference to the elimination of a formalistic application of the law. However, there is no known case in which both parties agreed on the application of this provision of the ICJ Statute.[52] Hence, the absence of any practical application of the said provision justifies only a summary comment.

IV.AUTONOMOUS INTERPRETATION OF WTO LAW IN EUROPEAN UNION

IV.1. Negative approach of Court of Justice to direct effect of WTO law

The first outline of global rules regulating international trade was incorporated into GATT in 1947. But the World Trade Organisation (WTO) came into being as late as on 1 January

[47] BESSON, P. General Principles And Customary Law In The EU Legal Order. In: Stefan Vogenauer - Stephen Weatherill (eds.). *General Principles of EU Law*. Oxford: Hart Publishing, 2017, pp. 105–130, here p. 116.

[48] BESSON, P. General Principles And Customary Law In The EU Legal Order. In: Stefan Vogenauer – Stephen Weatherill (eds.). *General Principles of EU Law*. pp. 105–130, *here* p. 121 (in English as the original version, cit.): "[W]hat is clear from the Court' s practice, however, is that, when there is EU primary law in place, EUCL may only be used to develop it infra or praeter legem, but never contra legem. EUCL cannot be invoked either to amend or derogate from EU primary law."

[49] See Article 38(2) of the ICJ Statute.

[50] The translation of this phrase refers to *equality*, as the word *"aequo"* indicates.

[51] Cf. e.g. FAUCHALD, O. K. The Legal Reasoning of ICSID Tribunals – An Empirical Analysis. *European Journal of International Law*. 2008, Vol. 19, No. 2, pp. 301–364.

[52] Cf. e.g. DOTHAN, P. Ex Aequo Et Bono: The Uses of the Road Never Taken. In: Achilles Skordas (ed.). *Research Handbook on the International Court of Justice*. Cheltenham: Elgar Publishing, 2018.

1995, following the *Marrakesh* meeting within the framework of the Uruguay Round. The WTO is now a full-fledged international organisation and not merely the sum of the GATS, GATT and TRIPS international agreements.

The interpretation, and especially the direct effect of EU law where it conflicts with GATT, has also been repeatedly addressed by the Court of Justice. The doctrine of direct effect can be traced back to the decision of the Court of Justice in *Van Gend en Loos*.[53] But the pivotal decision concerning the effects of EC (EU) law and GATT is the preliminary ruling in *International Fruit Company NV et al.*[54] The said case was the first decision in which the Court of Justice addressed such a conflict, i.e. a collision between GATT and EC law. Indeed, the Court of Justice has held that (in English, cit.):

"[U]nder that formulation, the jurisdiction of the Court cannot be limited by the grounds on which the validity of those measures may be contested. Since such jurisdiction extends to all grounds capable of invalidating those measures, the Court is obliged to examine whether their validity may be affected by reason of the fact that they are contrary to a rule of international law."[55]

In its judgment in *International Fruit Company NV et al.*, the Court of Justice has also addressed the compatibility of the Treaties (primary law) and GATT. The Court of Justice has to a significant extent [*somewhat*] *rephrased* the issue and proposed that individuals and entities may only invoke the invalidity of EU law for being contrary to international law if the international law has direct effect.[56] In order to make such a determination, the Court of Justice examined the spirit and structure of GATT, similarly to *Van Gend en Loos*. Following this examination, the CJEU has held that (in English, cit.): *"[T]hose factors are sufficient to show that, when examined in such a context, Article XI of the General Agreement is not capable of conferring on citizens of the Community rights which they can invoke before the courts."*[57] In other words, the Court of Justice has concluded that the respective provision cannot be attributed direct effect, as is the case with the sources of EU secondary law if certain specific conditions are met. This conclusion was supported with arguments based on the high degree of flexibility of the Agreement.

Hence, an international treaty is only capable of influencing the validity of secondary Community (EU) law if the Community (EU) is bound by the international treaty. At the same time, it is necessary to determine whether the international treaty is capable of

[53] Judgment of the Court of Justice, Case C-26/62 of 5 February 1963, N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingten, ECLI:EU:C:1963:1.

[54] Judgment of the Court of Justice in the Joined Cases C-21/72, 22/72, 23/72, 24/72 of 12 December 1972, International Fruit Company NV et al. v. Produktschap voor Groenten en Fruit, ECLI:EU:C:1972:115.

[55] See judgment of the Court of Justice in the Joined Cases C-21/72, 22/72, 23/72, 24/72 of 12 December 1972, International Fruit Company NV et al. v. Produktschap voor Groenten en Fruit, ECLI:EU:C:1972:115, para. 5 and 6.

[56] See judgment of the Court of Justice in the Joined Cases C-21/72, C-22/72, C-23/72, C-24/72 of 12 December 1972, International Fruit Company NV et al. v. Produktschap voor Groenten en Fruit, ECLI:EU:C:1972:115, para. 7 (in English, cit.): "[B]efore the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision."

[57] See judgment of the Court of Justice in the Joined Cases C-21/72, 22/72, 23/72, 24/72 of 12 December 1972, International Fruit Company NV et al. v. Produktschap voor Groenten en Fruit, ECLI:EU:C:1972:115, para. 27.

conferring on citizens of the Community (EU) any rights that they could invoke before the courts, i.e. whether it has a direct effect.[58] The Court of Justice reiterated this opinion in *Germany* v. *Council*.[59] The CJEU has therefore repeated that the provisions of GATT are highly flexible. Considering the overall spirit of GATT, they cannot be attributed any direct effect. In view of the nature of the proceedings, i.e. an action lodged by the State, not by an individual, the Court of Justice repeated its arguments and added that (in English, cit.):

"[T]hose features of GATT, from which the Court concluded that an individual within the Community cannot invoke it in a court to challenge the lawfulness of a Community act, also preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State under the first paragraph of Article 173 of the Treaty."[60]

However, it is necessary to add and point out the exceptions to the rule that GATT has no direct effect in EU law. These exceptions include the *clear reference exception* and the *transposition exception*. In these situations, the Court of Justice accepted the direct effect of GATT law.

The clear reference exception was the subject matter of the decision of the Court of Justice in *Fediol*.[61] As the name of the clear reference exception indicates, if EU law explicitly refers to a particular GATT provision, it is appropriate to have regard to GATT in the assessment of the validity of the secondary legal acts of the Community (EU). Hence, the Court of Justice has ruled that (in English, cit.):

"[I]t should be recalled that the Court has certainly held, on several occasions, that various GATT provisions were not capable of conferring on citizens of the Community rights which they can invoke before the courts (judgments of 12 December 1972 in Joined Cases 21 to 24/72 International Fruit Company ((1972)) ECR 1219; 24 October 1973 in Case 9/73 Schlueter ((1973)) ECR 1135; 16 March 1983 in Case 266/81 SIOT ((1983)) ECR 731; and 16 March 1983 in Joined Cases 267 to 269/81 SPI and SAMI ((1983)) ECR 801). Nevertheless, it cannot be inferred from those judgments that citizens may not, in proceedings before the Court, rely on the provisions of GATT in order to obtain a ruling on whether conduct criticized in a complaint lodged under Article 3 of Regulation No 2641/84 constitutes an illicit commercial practice within the meaning of that regulation. The GATT provisions form part of the rules of international law to which Article 2(1) of that regu-

[58] See judgment of the Court of Justice in the Joined Cases C-21/72, C-22/72, C-23/72, C-24/72 of 12 December 1972, International Fruit Company NV et al. v. Produktschap voor Groenten en Fruit, ECLI:EU:C:1972:115 (in English, cit.): "[T]he validity, within the meaning of Article 177 of the EEC Treaty, of measures taken by the institutions may bejudged with reference to a provision of international law when that provision binds the Community and is capable of conferring on individuals rights which they can invoke before the court."

[59] Judgment of the Court of Justice, Case C-280/93 of 5 October 1994, Bundesrepublik Deutschland v. Rat der Europäischen Union, ECLI:EU:C:1994:367.

[60] See judgment of the Court of Justice, Case C-280/93 of 5 October 1994, Bundesrepublik Deutschland v. Rat der Europäischen Union, ECLI:EU:C:1994:367, para. 109. See also para. 110 of the quoted decision (in English, cit.): "[T]he special features noted above show that the GATT rules are not unconditional and that an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of GATT."

[61] Judgment of the Court of Justice, Case C-70/87 of 22 June 1989, Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission des Communautés européennes, ECLI:EU:C:1989:254.

lation refers, as is borne out by the second and fourth recitals in its preamble, read together." [62]

The second exception, as mentioned above, is the transposition exception. The transposition exception applies when the purpose of a particular EU law was the implementation of a specific obligation arising from GATT. The Court of Justice held in *Nakajima*[63] that, as opposed to *International Fruit Company et al.*, the applicant did not invoke direct effect. The contested anti-dumping regulation was assessed as the transposition of GATT into Community law. Consequently, the conflict between the provision and Community law could be addressed.[64] Despite the fact that the decision of the Court of Justice on the merits was negative, both cases represent a way to assess, and thereby have significant regard for the purposes of interpretation, the conflict between GATT and EU law.

The negative approach of the Court of Justice to the direct effect of GATT, and subsequently the WTO legal framework, has not been revisited, save for the above-mentioned exceptions, in the almost fifty years following the decision in *International Fruit Company et al.*, or the more recent (by twenty years) decision in *Germany* v. *Council*.[65] The Court of Justice has indeed also confirmed its approach in another case. The CJEU conclusions on the nature and structure of the WTO agreements were reiterated in *Portugal* v. *Council*.[66] The creation of the WTO did not bring about any major departure from the adjudicated standpoint of the Court of Justice. Similarly to the decision in *Germany* v. *Council*, *Portugal* v. *Council* concerned an action brought by a Member State. The Court of Justice has reaffirmed its negative approach as follows (in English, cit.):

"[A]lthough the Court held in Case C-280/93 Bundesrepublik Deutschland v. *Council [1994] ECR I-4973, paragraphs 103 to 112, that the GATT rules do not have direct effect and that individuals cannot rely on them before the courts, it held in the same judgment that that does not apply where the adoption of the measures implementing obligations assumed within the context of the GATT is in issue or where a Community measure refers expressly to specific provisions of the general agreement. In such cases, as the Court held in paragraph 111 of that judgment, the Court must review the legality of the Community measure in the light of the GATT rules. // It follows from all those considerations that, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions." That interpretation corresponds, moreover, to what is stated in the final recital in the preamble to Decision 94/800, according to which 'by its nature, the Agreement establishing*

[62] Judgment of the Court of Justice, Case C-70/87 of 22 June 1989, Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission des Communautés européennes, ECLI:EU:C:1989:254, para. 19.

[63] Judgment of the Court of Justice, Case C-69/89 of 7 May 1991, Nakajima All Precision Co. Ltd v. Conseil des Communautés européennes,. ECLI:EU:C:1991:186.

[64] Judgment of the Court of Justice, Case C-69/89 of 7 May 1991, Nakajima All Precision Co. Ltd v. Conseil des Communautés européennes, ECLI:EU:C:1991:186, par. 31 (in English, cit.): "[I]t follows that the new basic regulation, which the applicant has called in question, was adopted in order to comply with the international obligations of the Community, which, as the Court has consistently held, is therefore under an obligation to ensure compliance with the General Agreement and its implementing measures."

[65] Judgment of the Court of Justice, Case C-280/93 of 5 October 1994, Bundesrepublik Deutschland [DEU] v. Rat der Europäischen Union, ECLI:EU:C:1994:367.

[66] Judgment of the Court of Justice, Case C-149/96 of 23 November 1999, República Portuguesa v. Conselho da União Europeia, ECLI:EU:C:1999:574.

the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts'."[67]

The Court of Justice has held that the GATT rules have no direct effect in Community (EU) law, notwithstanding the change in the nature and spirit of the agreements in light of the establishment of the WTO. The excessive flexibility of GATT, subjected to a continuing criticism of the Court of Justice, apparently has not been sufficiently limited by the creation of the World Trade Organisation to such degree of rigidity as to be satisfactory for the Court of Justice.

This negative approach was maintained by the Court of Justice in *Atlanta*,[68] *Cordis*,[69] *Bocchi Food*[70] and *Port*.[71] These cases did not involve actions brought by a Member State, but actions for damages whereby the respective subjects claimed compensation for losses sustained as a result of the adoption of secondary law.[72] This case has been, justifiably, heavily criticised by lawyers.[73]

It also determines the proper method to be applied in the autonomous interpretation of the WTO/GATT law.

IV.2. Direct effect of TRIPS

The WTO legal framework also includes, as an integral part thereof, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The Court of Justice has addressed the potential direct effect of TRIPS in EU law. However, it reiterated its negative standpoint with essentially the same reasons (in English, cit.): *"[T]he Court ruled that the provisions of TRIPs do not have direct effect, inasmuch as they are not such as to create rights upon which individuals may rely directly before the national courts by virtue of Community law […]."*[74]

---

[67] Judgment of the Court of Justice, Case C-149/96 of 23 November 1999, República Portuguesa v. Conselho da União Europeia, ECLI:EU:C:1999:574, para. 27, 47, 48.

[68] Judgment of the Court of Justice (Fifth Chamber), Case C-104/97 of 14 October 1999, Atlanta AG et al. v. Kommission der Europäischen Gemeinschaften et Rat der Europäischen Union, ECLI:EU:C:1999:498.

[69] Judgment of the Court of First Instance (Fifth Chamber), Case T-18/99 of 20 March 2001, Cordis Obst und Gemüse Großhandel GmbH v. Kommission der Europäischen Gemeinschaften, ECLI:EU:T:2001:95.

[70] Judgment of the Court of First Instance (Fifth Chamber), Case T-30/99 of 20 March 2001, Bocchi Food Trade International GmbH v. Kommission der Europäischen Gemeinschaften, ECLI:EU:T:2001:96.

[71] Judgment of the Court of First Instance (Fifth Chamber), Case T-52/99 of 20 March 2001, T. Port GmbH & Co. KG v. Kommission der Europäischen Gemeinschaften, ECLI:EU:T:2001:97.

[72] Council Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation (EEC) No 404/93 on the common organisation of the market in bananas, CELEX 31998R1637, and Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community, CELEX 31998R2362.

[73] See PETR, M. Účinky právních norem WTO v rámci komunitárního právního řádu. Právní rozhledy. 2004, No. 8, pp. 292 et seq. (In Czech as the original version, cit.): „Jakkoliv je možné se závěry a s argumentací Soudu nesouhlasit, závěr pro praxi je jednoznačný – subjekty mezinárodního obchodu nejen, že se nemohou přímo dovolávat norem WTO, ale nemohou ani žádným právně relevantním způsobem zpochybnit platnost sekundární komunitární legislativy, která by se s nimi dostala do rozporu."
(approximate translation to English, cit.): "While one may disagree with the Court's conclusions and reasonings, the conclusion for practice is clear – not only can intenrational trade actors not directly invoke WTO norms, but they also cannot challenge the validity of secondary Community legislation that would conflict with them in any legally relevant way."

[74] Judgment of the Court of Justice, Case C-89/99 of 13 September 2001, Schieving-Nijstad vof et al. v. Robert Groeneveld, ECLI:EU:C:2001:438, para. 53.

In its reasoning, the Court invoked the above-mentioned decision in *Portugal* v. *Council,* and again refused to recognise any direct effect in EU law (in English, cit.):

"[I]t follows that, in the absence of any Community rules in the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules relating to actions for the enforcement of intellectual property rights."[75]

IV.3. Indirect effect of WTO laws

Despite the fact that the WTO laws have no direct effect, it is possible to at least observe the influence that the laws have on EU law in the form of indirect effect, i.e. in the form of the obligation of EU-compliant interpretation. This doctrine was established and is most commonly connected with the binding nature of directives vis-à-vis the Member States, but the Court of Justice inferred the application of the doctrine with respect to the law of the World Trade Organisation (WTO). In this regard, the basis was adjudicated by the Court of Justice in *Von Colson*.[76] In the said case, the Court of Justice addressed the issue of whether a directive can have any legal consequence in the absence of direct effect. The provision of the directive in that case did not inherently give rise to any direct effect in terms of the requirements clarified in *Van Gend en Loos*[77] because the directive did not meet the requirements of being clear and unconditional. After all, the Court of Justice has repeatedly rejected the direct effect of directives vis-à-vis individuals[78] (in English, cit.): *"[I]t follows that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties."*[79] This does not mean, however, that directives have no other effects.

Indeed, in *Von Colson*, the Court of Justice has ruled that the binding nature of directives and the duty of sincere cooperation of the Member States require that the national courts interpret their national law in light of the directives implemented by the national law. Naturally, the approach of the CJEU has undergone significant developments. Presently, according to the current theory, or the adjudicated opinion, the national court (in English, cit.):

---

[75] Judgment of the Court of Justice, Case C-89/99 of 13 September 2001, Schieving-Nijstad vof et al. v. Robert Groeneveld, ECLI:EU:C:2001:438, para. 34.

[76] Judgment of the Court of Justice, Case C-14/83 of 10 April 1984, Sabine von Colson et Elisabeth Kamann v. Land Nordrhein-Westfalen, ECLI:EU:C:1984:153.

[77] Judgment of the Court of Justice, Case C-26/62 of 5 February 1963, N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingten, ECLI:EU:C:1963:1.

[78] Judgment of the Court of Justice, Case C-152/84 of 26 February 1986, M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching), ECLI:EU:C:1986:84, para. 48 (in English, cit.): "[W]ith regard to the argument that a directive may not be relied upon against an individual , it must be emphasized that according to article 189 of the eec treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each member state to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person."

[79] Judgment of the Court of Justice (Grand Chamber) in Joined Cases Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) et Matthias Döbele (C-403/01) v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV, of 5 October 2004, ECLI:EU:C:2004:584.

"[…]when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive."[80]

That being said, the principle applies in essentially the same manner to the indirect effect of WTO law. Hence, the duty arises to interpret EU secondary law in compliance with superior international agreements (treaties), such as the WTO agreements,[81] (in English, cit.):

"[W]hen the wording of secondary Community legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the Treaty. Likewise, an implementing regulation must, if possible, be given an interpretation consistent with the basic regulation (see Case C-90/92 Dr Tretter v Hauptzollamt Stuttgart-Ost [1993] ECR I-3569, paragraph 11). Similarly, the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements."[82]

CONCLUSION

The sources of international law have a great, often underestimated, influence on EU law. Although both EU law and international law are subject to a strict principle of the need for autonomous interpretation and the autonomous interpretation of EU law is widely not the same as autonomous interpretation of international law, the relevant sources are often interrelated and mutually influential.

To properly understand the interpretation of EU law in the context of international law and mainly international treaties, it must always be remembered that international treaties and the approach to them vary widely within the EU depending on the *kind* of

[80] Judgment of the Court of Justice (Grand Chamber) in Joined Cases Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) a Matthias Döbele (C-403/01) v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV, z 5. října 2004, ECLI:EU:C:2004:584.

[81] Judgment of the Court of Justice, Case C-89/99 of 13 September 2001, Schieving-Nijstad vof a další v. Robert Groeneveld, ECLI:EU:C:2001:438, para. 35 (in English, cit.): "[N]evertheless, it is apparent from the Court's case-law that, in a field to which TRIPs applies and in respect of which the Community has already legislated, the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs [...]." See also paragraph 55 of the quoted decision (in English, cit.): "[T]he answer to the first question must therefore be that the procedural requirements of Article 50 of TRIPS, and in particular Article 50(6), are not such as to create rights upon which individuals may rely directly before the Community courts and the courts of the Member States. Nevertheless, where the judicial authorities are called upon to apply national rules with a view to ordering provisional measures for the protection of intellectual property rights falling within a field to which TRIPs applies and in respect of which the Community has already legislated, they are required to do so as far as possible in the light of the wording and purpose of Article 50(6) of TRIPs, taking account, more particularly, of all the circumstances of the case before them, so as to ensure that a balance is struck between the competing rights and obligations of the right holder and of the defendant."

[82] Judgment of the Court of Justice, Case C-61/94 of 10 September 1996, Kommission der Europäischen Gemeinschaften v. Bundesrepublik Deutschland [DEU], ECLI:EU:C:1996:313, para. 52.

a treaty in question. Similarly, the possible influence of international customs cannot be forgotten in the context of the interpretation of EU law.

A particular issue, which gives the link between international sources and EU law a suitable practical dimension, is for instance the influence of WTO law on the interpretation of EU law. Although a rather negative approach of the CJEU to this issue can be observed, it is nevertheless possible to identify certain situations/cases where EU law must also be interpreted, albeit autonomously, but also in the light of WTO law.