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RECOGNITION OF JURISDICTION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN INTERNATIONAL COURTS

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Abstract. *From the point of the EU law, the CJEU has the exclusive competence to interpret the EU legal norms and decide upon validity of the legal acts adopted by the EU institutions because it is the most effective method to ensure the unilateral interpretation of the EU law and to prevent its fragmentation. Thus, it can be presumed that all disputes between the Member States regarding the EU law must be solved by the CJEU. The paper aims at finding the answer to the question whether international courts under the international law must refuse their jurisdiction in cases where disputes of the Member States relate with the EU law. With the view of this aim, arguments arising from the international law (for instance, prohibition of intervening into affairs of another legal system, prohibition of abuse of laws), on the basis of which an international court should decline its jurisdiction, and applicability of such arguments to the situation discussed is assessed and an independent approach is formulated.*

Keywords: *exclusive jurisdiction of the CJEU, interpretation of the EU law, jurisdiction of international courts regarding the EU law.*

Introduction

The correlation of the international law and the law of the European Union (further — the EU) is un-avoidable and this results in relevant problems of both theoretic and practical nature. One of these problems is the problem of separation of jurisdiction of the Court of Justice of the European Union (further — the CJEU) and jurisdiction of international courts. Recently this issue is especially relevant and it is related to the fact that the role of the European Union in the international arena is increasing. The EU is a party to a number of international treaties, some of which are the so-called mixed agreements.[1] Often such agreements provide for separate conflict-resolution institutions, which are granted the competence to solve disputes over interpretation and application of these agreements. However, under the EU law, the exclusive competence to interpret the EU legal norms is entitled to the CJEU. The Court has also established that it has exclusive competence to interpret the provisions of mixed agreements that fall within the competence of the Union. On the basis of what was said, it can be claimed that all disputes of the Member States regarding the EU law, including the provisions of mixed agreements that fall within the competence of the EU, must be solved by the CJEU. Thus addressing any other international court (arbitral tribunal) would infringe the exclusive competence of the CJEU under Article 344 of the Treaty on the Functioning of the European Union (further — the TFEU), and that could inspire the European Commission to bring the matter to the CJEU under Article 258 of the TFEU.

Granting of the exclusive competence to interpret a legal norm of the EU and decide on the validity of the legal acts adopted by the EU institutions to the CJEU is the most effective method to ensure the unilateral interpretation of the EU law and to prevent its fragmentation. Nevertheless, the exclusive competence of the CJEU is based on arguments that arise from the *sui generis* nature of the EU legal system. Thus naturally a question arises whether from the point of view of the international law, the Member States have lost their competence to entrust their disputes relating with the EU law to another international court. In other words, this paper aims at finding the answer to the question whether international courts under the international law must refuse their jurisdiction in case the disputes of the Member States relates with the EU law. Moreover, it analyses should the refusal of such jurisdiction be treated as the expression of respect to another legal system, or should it be based on additional legal argumentation. Therefore, the paper aims to analyse the issue of the exclusive competence of the CJEU through the lensis of the international law.

With the view of this purpose, first of all, the paper discusses the exclusive competence of the CJEU to interpret the EU legal norms from the position of the EU law. This part separately focuses on the problematics of the competence of the CJEU to interpret provisions of mixed agreements. In the second part of the paper, some examples of good practice of international courts are presented in order to show their approach

1 Mixed agreements are treaties between the EU, the EU member states and states which are not the member states of the EU.

to the exclusive competence of the CJEU. Finally, the author analyses, in her opinion, the most relevant arguments presented from the point of view of the international law, on the basis of which international courts should refuse their jurisdiction. Relying on an individual approach, the author assesses the reasonability of such arguments in the discussed situation.

With the view of the aim of the paper, the logical, analysis, and comparative research methods have been used.

1. Exclusive Competence of the CJEU to Interpret the EU Legal Norms, from the Point of View of the EU Law

The European Union is an independent *sui generis* legal system, in favour of which the Member States have restricted their sovereign rights in some areas, and in which the Member States cannot give precedence to a later-adopted unilateral instrument against the legal system approved on the mutual basis.[2] The CJEU is the guarantee of the unilateral interpretation and application of the EU law. Granting of the exclusive competence to interpret the EU legal norm and decide on the validity of the legal acts adopted by the EU institutions to the CJEU is the most effective method to ensure the unilateral interpretation of the EU law. Thus from the point of view of the EU law, neither the courts of the Member States, nor other international courts are entitled to interpret the EU legal norms, because in an opposite case, the threat of the EU law fragmentation would arise. Moreover, in order to substantiate the granting of the exclusive competence to the CJEU, it is necessary to stress that differently from most of the international courts, the EU courts are permanent courts, which ensure the continuity of the EU legal jurisprudence, and specialize in the EU law, which is peculiar and differs from the international law. Finally it is necessary to underline that there are certain procedural peculiarities of the CJEU, which do not apply to other international courts, especially the International Court of Justice. For instance, in the proceedings over infringement of the Treaty under Article 258 or Article 259 of the TFEU, the participation of the European Commission is mandatory, and under Article 258 of the TFEU, the pre-trial procedure applies. Another peculiarity of the CJEU is that in order to ensure the implementation of court decision, there is a possibility to apply a monetary sanction to the Member State. Finally, in other international courts there are no Advocate Generals, who would have the duty, acting with complete impartiality and independence, to make reasoned submissions to the Court in accordance with Article 252 (2) of the TFEU.

The exclusive competence of the CJEU is first of all ensured by Article 267 of the TFEU which entrenches the procedure for cooperation of national courts and the CJEU

2 The independence of the legal system of the EU, as well as its distinctiveness from national and international law was first recognized in 1963 in the historical case of *Van Gend & Loos* (26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1); the principle of supremacy of the EU law was formulated in case *Costa v. ENEL* (6/64, *Costa v. ENEL* [1964] ECR 585).

in the context of preliminary ruling, and also Article 344 of TFEU, which obliges the Member States to submit the disputes concerning interpretation or application of the Treaties to the CJEU.

Interpretation of the EU law includes not only the EU Treaties and the EU secondary law, but also non-statutory law, e.g. the general principles of law.[3] Regarding the international agreements of the EU with third countries or international organizations, it needs to be stressed that they are the integral part of the legal system of the EU.[4] This means that the CJEU has the competence to interpret the provisions of such agreements and to adopt a decision in cases where the Member States fail to fulfil their obligations under such provisions.[5] Nevertheless, it can be concluded from the case practice of the CJEU that the Court has the exclusive competence to interpret the provisions of agreements which fall within the competence of the Union.[6] The crucial rule in this respect is that having the Union's competence is related to the existence of the EU legal acts in the area, irrespective whether the provisions of the agreement have an effect on them. This rule is applied without regard whether this international agreement includes independent procedures of conflict resolution. It shows that the CJEU recognizes the precedence of its jurisdiction over other dispute resolution institutions provided for in the agreements. This can be clearly seen from the decision of the CJEU in *Mox Plant* case, where the Court established that Ireland, haven started the dispute resolution procedure against the United Kingdom in an arbitral tribunal under the United Nations Convention on the Law of the Sea[7] (further — the Convention or Montego Bay convention), infringed the exclusive competence of the CJEU under Article 344 of TFEU.

Thus, the CJEU substantiates its exclusive competence on the *sui generis* nature of the EU legal system and relies on the argument of ensuring unilateral interpretation of the EU law. Nevertheless, the CJEU's view on its exclusive competence in some cases seems particularly wide, and this is mostly related to the issue of interpretation of mixed agreements. It is criticized in the relevant literature that such wide interpretation of the CJEU's jurisdiction very much restricts the international instruments of conflict resolution and at the same time, the right of the Member States to choose such measures.[8]

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3 Oppermann, T. *Europarecht*. München: C.H. Beck Verlag, 2009, p. 117.

4 Case 181/73, *Haegeman v. Belgian State* [1974] ECR 449, paras 5, 6.

5 Opinion of the Court of 14 December 1991 delivered pursuant to the second subparagraph of Article 228(1) of the EEC Treaty - Opinion 1/91 - Draft agreement between the European Community and the countries of the European Free Trade Association relating to the creation of the European Economic Area [1991] ECR I-6079, para 38.

6 Case C-459/03, *Commission v. Ireland* [2006] ECR I-4635.

7 United Nations Convention on the Law of the Sea. *Official Gazette.* 2003, No. 107-4786.

8 On the exclusive competence of the CJEU over mixed agreements, see, for instance, Daukšienė, I. Europos Sąjungos valstybių narių tarpusavio ginčai ir Europos Sąjungos Teisingumo Teismo jurisdikcija [Disputes Between Members States of the European Union and Jurisdiction of the Court of Justice of the European Union]. *Jurisprudencija.* 2011, 18(4): 1349–1368.

2. Examples of International Court Practice to Show the CJEU's View of Exclusive Competence

Already the early case practice of international courts shows that the courts tend to decline their jurisdiction despite the agreement of the parties to the dispute, if they find that the dispute falls within compulsory jurisdiction of another court. The International Court of Justice has held repeatedly that it must always be satisfied that it has jurisdiction and undertake such verification *proprio motu*.[9]

The Permanent Court of Arbitration (further — the PCA or Arbitral Tribunal) has adopted an interesting approach to the exclusive competence of the CJEU in its decision over the dispute of Belgium and Holland regarding the renewal of a historical railway line *IJzeren Rijn*.[10] The dispute concerned the issues of the scope of application of Holland's law, environmental protection and the costs of the railway line renewal. The links of the dispute with the EU legal system are shown not only by the fact that the dispute arose between two EU Member States, but also by the fact that this section of the railway was included into the list of the EU general interest projects within trans-European network area. Moreover, the EU legal acts regulate issues on the protection of natural habitats, and wild fauna and flora. Despite the clear connections with the EU law, the parties to the dispute decided to address the Permanent Court of Arbitration rather than the CJEU. In their agreement they clearly noted that the PCA will solve the dispute under international law and the EU law, in consideration of the duties of parties under Article 344 of TFEU.

The PCA first of all aimed to determine whether the EU law is important in determination of this dispute. The PCA claimed that it is in a similar position as a national court of a Member State, thus in its opinion, the provisions on the duty of the national last instance courts to address the CJEU for a preliminary ruling under Article 267 (3) of TFEU applied, as established in *Cilfit* case.[11] According to *Cilfit* jurisprudential rule, the national courts or tribunals, against whose decisions there is no judicial remedy under national law, are not obliged to refer to the Court in three cases: 1. The question raised is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case. 2. The CJEU has already dealt with the point of law in question, even though the questions at issue are not strictly identical (*acte éclairé* doctrine); 3. The correct application of the EU law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved (*acte clair* doctrine).[12] Thus, the PCA applied an analogy with the *Cilfit* case in

9 For instance, the case of the International Court of Justice of 26 April 1928, Rights of the minorities in Upper Silesia (minority schools), cited in: Lock, T. *Das Verhältnis zwischen dem EuGH und internationalen Gerichten*. Tübingen: Mohr Siebeck, 2010, p. 214.

10 Permanent Court of Arbitration, Award of 24 May 2005, *Belgium v. Netherlands* ("Iron Rhine Arbitration) [interactive]. [accessed on 01-05-2012]. <http://www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf>.

11 *Ibid*., para 103.

12 Case 283/81, *CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415, paras 10, 13, 14, 16.

order to assess whether these exceptions apply in the case. In principle the analysis was aiming at verification of significance of the EU law for the dispute resolution. Finally, the PCA decided that the EU law is not determinative for the dispute resolution, thus Article 344 will not be infringed.[13]

The argumentation of the PCA regarding the (non)significance of the EU law to the dispute considered and the position to apply an analogy with the *Cilfit* case does not seem persuading. Nevertheless, in our opinion the important aspect in this decision is the fact that the PCA did raise the question of a possible infringement of the EU law. This shows that it recognized the precedence of the CJEU's jurisdiction.

The International Tribunal for the Law of the Sea (further - the Tribunal or ITLOS) also showed respect to the EU legal system in its decision in the dispute between Ireland and United Kingdom regarding exploitation[14] of a MOX plant[15] in Northeast England, on the sea-shore of Ireland.

On 25 October 2001, Ireland instituted dispute proceedings against the United Kingdom in the Annex VII tribunal, claiming that the United Kingdom has infringed provisions of Montego Bay Convention for the protection and conservation of the marine environment, and also the duty to cooperate. It must be noted that Ireland asked the PCA to interpret the norms of the Convention and take due regard of other international documents that are mandatory to Ireland and United Kingdom, and to consider specific EU directives on the issues of environmental protection. First, the Arbitral Tribunal decided to suspend the proceedings and requested for more detailed information whether the dispute is connected with the Union law. In its order the Arbitral Tribunal claimed that some issues that are closely connected with the Union law did arise, for instance, the right of Ireland and the United Kingdom to submit a claim, distribution of competences of the Community and its Member States, related to the Convention, and exclusive competence of the CJEU.[16] Therefore, it considered that a real chance exists that the dispute must be solved by the CJEU. After the CJEU adopted the decision, the PCA found that the dispute at stake is mostly connected with the internal functioning of a separate legal system, thus it has to be solved by the Community institutions, and first of all, the CJEU. Thus it declined the jurisdiction under Article 282 and terminated the proceedings.[17]

The decision of the Arbitral Tribunal in part has likely been inspired by the fact that the European Commission initiated the dispute settlement proceedings against Ireland in the CJEU under Article 258 of TFEU because it thought that Ireland infringed exclusive competence of the CJEU under Article 334 of the TFEU. If the Commission had not

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13 Permanent Court of Arbitration, Award of 24 May 2005, *supra* note 10, paras, 107, 121.

14 Permanent Court of Arbitration. Order of 6 June 2008 (order No. 6) [interactive]. [accessed on 01-05-2012]. <http://www.pca-cpa.org/upload/ files/MOX%20Plant%20Order%20No.%206.pdf.>.

15 MOX Plant was built for production of "med oxide fuel" (Mox) out of nuclear fuel, that could be used as a source of energy in nuclear plants.

16 Permanent Court of Arbitration, Order of 24 June 2003 (order No. 3) [interactive]. [accessed on 01-05-2012]. <http://www.pca-cpa.org/upload/ files/MOX%20Plant%20Order%20no3.pdf.>.

17 Permanent Court of Arbitration, Order of 6 June 2008 (order No. 6), *supra* note, 15.

have started the proceedings on infringement of obligations in CJEU, the Tribunal itself would have probably decided on the scope and significance of application of the EU law in the dispute between the Member States. Thus, this decision shows that international courts tend to decline their jurisdiction in cases where the dispute is related with compulsory jurisdiction of another legal system's court.

The International Tribunal for the Law of the Sea (the ITLOS) has undertaken a different approach in the same *Mox Plant* dispute. Ireland applied to ITLOS on 9 November, 2001 for application of provisional protective measures, i.e. demanding that the UK would immediately suspend the validity of the permission on the use of the *Mox plant*. The ITLOS recognized that *prima facie* it has the jurisdiction under Article 290 (5) of the Montego Bay Convention and established that before the final decision, the parties to the dispute have the duty of cooperation.[18] In its decision the ITLOS rejected the objection on jurisdiction of the United Kingdom, which claimed that certain aspects of the accusations of Ireland fell within the scope of Community law, thus the CJEU had the exclusive competence to consider the dispute. The UK based its objection on Article 282 of the Montego Bay Convention which provides that of the parties to the dispute have decided to solve the dispute under another procedure that provides for a binding decision, that procedure must apply instead of the proceedings under part XV of the Convention. In this case the ITLOS chose to interpret Article 282 narrowly, claiming that if treaties of the Union contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention.[19]

Ireland started parallel proceedings regarding this dispute in the Arbitral Tribunal under the Convention for the Protection of the Marine Environment of the North-East Atlantic[20] (further — the OSPAR Convention), claiming that the United Kingdom has infringed Article 9 of the OSPAR Convention on the right to freely access the information on environment. The European Commission in this case refrained from bringing the dispute proceedings to the CJEU. However, in consideration of the CJEU jurisprudence on its exclusive competence to interpret provisions of mixed agreements it is possible to tell that the Court would have established its exclusive competence on interpretation of Article 9 of the OSPAR Convention (the EU joined in 1990). In this dispute, the Arbitral Tribunal also decided on significance of the EU law in dealing with this dispute and concluded that the OCPAR Convention establishes a different legal regime to the one under the EU law, thus the consideration of the dispute does not raise any threats to unilateral interpretation of the EU law.[21]

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18 ITLOS Order of 3 December 2001, the *Mox Plant* case (*Ireland v. United Kingdom*), List of cases No. 10, [interactive]. [accessed on 01-05-2012]. <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf>.

19 ITLOS Order of 3 December 2001, *supra* note 18, paras 49, 50.

20 Convention for the Protection of the Marine Environment of the North-East Atlantic [interactive]. [accessed on 01-05-2012]. <http://www.ospar.org/html_documents/ospar/html/ospar_convention_e_updated_text_2007.pdf>.

21 Arbitral award of 2 July 2003 [interactive]. [accessed on 01-05-2012]. <http://www.pca-cpa.org/upload/files/OSPAR%20Award.pdf.>.

The examples above show that international tribunals are likely to refuse their jurisdiction if they consider that a Member States dispute can be attributed to exclusive jurisdiction of another court. The decisions lack clearly formulated legal arguments on the obligation of international courts to decline consideration of such disputes. Thus the denial of jurisdiction may be treated as a sign of respect of another legal system and most probably, an aim to avoid conflict of two legal systems. The latter may arise in case of discrepancies between the positions of an international curt and the CJEU on the relations of the dispute with the EU law. For instance, this could have happened in case of *IJzeren Rijn,* where the tribunal did not see any significant links of the dispute with the EU law and this conclusion seems to be debatable. If the CJEU adopted an opposite position on that, we would have to face a collision of the international and EU law, because under the international law, the states would be bound by an international court‘s decision and under the EU law — by the decision of the CJEU.

3. Legal Arguments on Recognition of the Prevalence of the CJEU‘s Jurisdiction

As mentioned above, the previously analysed decisions of the arbitral tribunals did not contain any legal arguments for substantiating the obligation of the international courts to refuse their jurisdiction over a dispute of Member States, if that dispute is related with the legal system of the EU. The search of these legal arguments is very important in order to avoid a possible collision of two legal systems. Thus in this part of the work, the author analyses arguably the most relevant legal arguments in the doctrine on the obligation of international courts to refuse their jurisdiction and attempts to assess the reasonability of these arguments in the situation discussed.

3.1. Prohibition to Intervene into Another Legal System‘s Affairs

The relevant literature contains a position that an international court that considers a dispute of Member States that falls within the jurisdiction of the CJEU under Article 344 of the TFEU, should decline its jurisdiction based on the principle of international law that prohibits to intervene into affairs of another legal system (further — the principle of non-intervention).[22] Although under the norms of international law, this principle is aimed at protection of the state‘s internal jurisdiction,[23] according to the representatives of

22 This position is revealed in the works of, for instance, Neumann, J. *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen.* Berlin, Verlag: Duncker & Humblot, 2002, p. 609; Ruffert, M. Zuständigkeitsgrenzen internationaler Organisationen im institutionellen Rahmen der internationalen Gemeinschaft. *Archiv des Völkerrechts* (ArchVR). 2000, 38: 129−168, p 161; Oen, R. *Internationale Streitbeilegung im Kontext gemischter Verträge der Europäischen Gemeinschaft und ihrer Mitgliedstaate*n. Auflage: 1 A. Berlin: Duncker & Humblot, 2005, p. 162.

23 Article 2 (7) of the UN Charter: ”Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.“

this position, the application of this principle may also apply to relations of international organization and this means that an international organization may not adopt decisions that have an effect on the aspects of an internal legal system of another international organization. Thus, it is argued that based on the principle of non-intervention, the international court should have the obligation to decline its jurisdiction, to the extent that the dispute falls within the exclusive jurisdiction of the CJEU.[24] Another alternative is that the international court should rely on the practice of the CJEU or even to address the CJEU and ask to interpret the most relevant norms of the EU law.[25] Obviously, this alternative may not be realized at the moment, because the Union law does not provide for a possibility of international dispute resolution institutions to address the CJEU with the request for preliminary ruling, and this right (or duty) under the Article 267 of the TFEU applies only to the Member States courts.

Currently there has not been any practice of international courts, where they would decline the jurisdiction, based on direct reliance on the principle of non-intervention in the context of international organizations.[26] However, there are many examples where the refusal of jurisdiction is indirectly based on this principle. The decision of the International Court of Justice in the case of *Legality of the Use By a State of Nuclear Weapons In Armed Conflict* can be provided as an example of such practice. The Court decided to decline the application of the World Health Organization (further — WHO) for an advisory conclusion, on the basis of the fact that the competence of the WHO is limited to the issues of health care.[27] Although in this case the application was declined based on Article 96(2) of the UN Charter, which provides that other organs of the United Nations and specialized agencies, for instance, the WHO, may request advisory opinions of the Court on legal questions arising within the scope of their activities, it may be claimed that this written rule is an expression of the principle on non-intervention.[28] Another example of such practice may be the decision of ITLOS in the *Mox Plant* case, as discussed above, and other decisions of international dispute resolution institutions, discussed in the second part of this work. In all cases, the issue of relatedness of the dispute with another legal system was raised and a presumption on declining the jurisdiction was made in cases where the interpretation of the EU law was found to be significant for the dispute resolution. This respect to another legal system may be treated as an expression of the principle of non-intervention.

Nevertheless, certain dogmatic considerations raise some doubts regarding the obligation of international courts to decline their jurisdiction based on the principle of non-intervention. Most likely, the question may be raised whether an international court dealing with a dispute between EU Member States, where they rely on an international treaty concluded by the EU, always faces the affairs of a foreign legal system. This is in

24 Oen, R., *supra* note 22, p. 162.

25 Neumann, J., *supra* note 22, p. 609.

26 Lock, T. *Das Verhältnis zwischen dem EuGH und internationalen Gerichten*. Tübingen: Mohr Siebeck, 2010, p. 206.

27 Neumann, J., *supra* note 22, p. 400.

28 Lock, T., *supra* note 26, p. 207.

particularly clear when such an international treaty established independent institutions of dispute resolution, which have the duty to ensure a unilateral interpretation of such agreement in consideration of disputes between the Parties. The circumstance alone that such an international treaty is a part of the Union's legal system and the fact that interpretation of its norms may cause threats to unilateral interpretation of the EU norms, do not seem sufficient. Following this logic, the decline of jurisdiction may be connected with the fact that such treaty after ratification becomes an inherent part of the legal system of a state, thus the interpretation of it may have an effect on the national law's norms. This thought could be clearly illustrated by an example related with the jurisdiction of the European Court of Human Rights (further — the EctHR). It would be difficult to imagine, after the EU becomes the party to the European Convention on Human Rights and Fundamental Freedoms[29] (further — the ECHR or the Convention) and thus, the ECHR becomes an integral part of the Union's legal system, the ECtHR (the guarantee of unilateral interpretation of the Convention) would decline to settle a dispute between Member States under Article 31 of the Convention, if it found some relations with the EU legal system.

Nevertheless, in all other cases, i.e. if for examples the dispute of Member States relates to the founding treaties of the EU or the EU secondary legislation, the application of the principle of non-intervention seems to be more acceptable. However, if we talk about the obligation of international courts to decline jurisdiction on the basis of the principle of non-intervention, an application of this principle in the context of international organizations would need a formation of a new custom of international law, and a global recognition of the rule is needed in this case, which should express itself through *opinio juris* and case practice of the states.[30] At the moment, the evidence of such global recognition can hardly be seen as sufficient.

3.2. The Abuse of Law Principle in Case of Compulsory Jurisdiction

The doctrine also provides a position that in order to solve the conflict of jurisdictions of courts, the abuse of law principle under international law may be applied.[31] The abuse of law means that the state which implements its rights in respect of another state, aims in essence at only one purpose — to damage another state (materially or not).[32] Transfer of the application of this principle to the problem of separation of jurisdictions, it could mean that the state does not apply to the court of compulsory jurisdiction (for instance, the CJEU), but applies to another court, seeks only to harm another party to the dispute.[33]

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29 European Convention for the Protection of Human Rights and Fundamental Freedoms. Amended by protocols No 11, with supplementing protocols No 1, 4, 6 and 7. *Official Gazette*. 2000, No. 96-3016.

30 Lock, T., *supra* note 26, p. 207.

31 For instance, this presumption is considered by: Shany, Y. *The Competing Jurisdiction of International Courts*. Oxford, 2004, p. 258; Marceau, G. Conflicts of Norms and Conflicts of Jurisdictions. The Relationship between the WTO Agreement and MEAS and other Treaties. *JWT*. 2001, 35: 1113; Lock, T., *supra* note 26, p. 209.

32 Marceau, G., *ibid*.

33 Lock, T., *supra* note 26, p. 209.

This could also involve cases where the state attempts to avoid unfavourable practice of the CJEU, which could restrict its expectations of a favourable decision.

Nevertheless, it is doubtful whether the abuse of law principle could apply to the present situation. First, this is because the compulsory effect of the international courts' jurisdiction depends on the recognition of jurisdiction of such courts by the dispute parties. It can be expressed in various ways, for instance, through a special agreement of the states to transfer their dispute to a particular court. Therefore, if there is a clear consent of the defendant party, especially in *ad hoc* cases, it becomes clear that the conditions of abuse of law principle are not satisfied.

3.3. Application of the Rules on Conflicts of Legal Norms

The problem of separation of jurisdiction of international courts is without a doubt related with the issue of conflict of international law norms, thus we should analyse the possibilities of application of conflict-of law rules on international treaties and legal norms, first of all, *lex poserior derogat legi priori* (further — *lex posterior*) and *lex specialis derogat legi generali* (further — *lex spacialis*).

Article 30 (3) of the Vienna Convention on the Law of Treaties of 1969 (further — Vienna Convention) [34] establishes *lex posterior*[35] rule on conflicts of treaties according to which any earlier treaty applies only inasmuch as its provisions are compatible with those of the later treaty. Article 30(3) of the Vienna Convention does not require any agreement of the states on amendment or termination of the previous treaty. Thus, the conclusion of a later treaty does not automatically mean that the former agreement is terminated. It only means that the legal norms that contradict the later agreement cannot be applied. Thus on the basis of *lex posterior* principle, it may be claimed that agreements of the Member States on conflict resolution, concluded after their accession of the EU, should have precedence over Article 344 of the TFEU. Nevertheless, without analysing separate conditions of the application of the principle of *lex posterior*, it may be claimed that, considering that the founding treaties of the EU are periodically renewed and approved off, the application of the principle of *lex posterior* in their respect is hardly plausible in practice.[36]

Lex specialis principle, according to which special norms are above the general norms, differently from the principle of *lex posterior*, is not established under the Vienna Convention of 1969. However, it is recognized in practice of international courts as a general principle of law, or a customary norm of law.[37] It can be agreed that *lex specialis* rule should apply in dealing with the issue of separation of jurisdictions of international

34 Vienna Convention on the Law of Treaties. *Official Gazette*. 2002, No. 13-480.

35 Article 30 (3) of Vienna Convention: "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

36 This position is also upheld, for instance, by Pauwelyn, J. *Conflicts of Norms in Public International Law*. Cambridge, 2003, p. 406.

37 Lock, T., *supra* note 26, p. 85.

courts.[38] These could be the cases where the Member States make a declaration under Article 36 (2) of the Statute of the International Court of Justice, to recognize that *ipso facto* and without special agreement, the compulsory jurisdiction of the International Court of Justice (further — the ICJ) in relation to any other state accepting the same obligation.[39] In such a case Article 344 of the TFEU may be treated as *lex specialis*. Moreover, 17 EU Member States have recognized the compulsory jurisdiction of the ICJ under Article 36 (2) of the Statute of the ICJ, and most of them (except for Belgium, Denmark, Finland, Greece and Sweden) made these declarations with reservations, i.e. they established that the declaration of the compulsory jurisdiction of the Court will not be valid if the states adopt another agreement on dispute resolution.[40] Article 344 of the TFEU, which establishes the exclusive competence of the CJEU, may be attributed to these agreements.

Application of *lex specialis* principle does not always substantiate the precedence of the application of Article 344 of the TFEU. For instance, if the Member States conclude a special agreement to transfer their dispute to international court or an arbitral tribunal, this agreement should be considered as *lex specialis*.[41] It is also doubtful whether Article 344 of the TFEU may be treated as a special norm in respect of mixed agreements, for instance, in case of *Mox Plant.* Therefore, it may be claimed that, for instance Conventions of Montego Bay, OSPAR, or ECHR, provide for special procedures of dispute resolution in respect of the EU law.

3.4. Other Dogmatic Considerations

The position and arguments of scholar T. Lock on the jurisdictional conflict of the CJEU and international courts need to be discussed separately. This author represents the position that the court of non-compulsory jurisdiction, despite an agreement of the states to transfer their dispute to an international court, should decline its jurisdiction in case the dispute falls within the jurisdiction of the court with the exclusive competence, i.e. the CJEU.[42] He stresses that the Member States infringe Article 344 of the TFEU if they conclude an agreement to submit their dispute, related with the EU law, to an international court. Such behaviour could inspire the European Commission to initiate proceedings in CJEU on infringement of obligations. If the CJEU established that it did have the exclusive competence to consider the dispute between the Member States, and found that a Member State has infringed the EU law, then this Member State would not be able to rely on the international court‘s decision. According to Article 260 (1) of the TFEU, the Member State is required to take the necessary measures to comply

38 Lowe, V. Overlapping Jurisdiction in International Tribunal. *Australian Year Book of International Law*. 1999, 11: 195.

39 Charter of the United Nations. *Official Gazette*. 2002, No. 15-557.

40 Member States declarations on recognition of compulsory jurisdiction of the Court under Article 36 (2) of the Statute [interactive]. [accessed 2012-04-26]. <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>.

41 Lock, T., *supra* note 26, p. 211.

42 *Ibid.,* p. 213.

with the judgement of the Court, thus it would need to terminate the infringement. In this case it would mean that the Member State should seize implementation of the international court's decision or adequately recall its implementation. The legal situation for the Member States, according to the scholar, would be clear — they would have to implement the judgement of the CJEU.

To substantiate his position, the author indicates that in relation between the Member States, i.e. under their mutual agreement, a Member State would not be able to rely on the rule established under Article 27 and Article 46 of the Vienna Convention of 1969 on the prohibition to rely on internal law with the view of infringement of international obligations.[43] The latter norm of international law, aimed that protection of international law from difficulties arising from internal law of the states, may be applied to members of supra-national organization. This would mean that the Member States would not be able to rely on provisions of the EU law on distribution of competences and in order to base their infringement of international obligations. However, this norm would not be relevant in the internal relations of the Member States, i.e. in case third parties' interests are not infringed. In other words, application of this norm is also relevant in relation of the Member State and a third party, and that would mean that the Member State cannot rely on the lack of its internal competence to conclude an agreement with a third state, in order to base the noncompliance with obligations or to dispute its consent to consider the treaty binding.[44]

Thus, based on the fact that Article 344 of the TFEU is compulsory to the Member States and they have to implement the judgement of the CJEU, and provided that no interests of third parties are infringed, T. Lock claims that the decision of an international court would not bind the Member States. Therefore, this court should decline its jurisdiction and in other words, to recognize the precedence of the court with the exclusive competence — the CJEU.[45]

The position of this scholar, in our opinion, is based on a more practical considerations, because more thorough legal arguments are not provided on why the EU law and at the same time, the judgements of the CJEU are given the precedence over the international law and adequately, over decisions of international courts. Indeed, looking solely through the lense of international law, the right of the Member States to address another international court, rather than the CJEU, is not restricted. This restriction is based only on internal provisions of the EU law. Thus the claim that the Member States would not have an obligation to implement the decision of such an international court,

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43 Article 27 of the Vienna Convention of 1969: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."
Article 46 (1): "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance."

44 Lock, T., *supra* note 26, p. 213.

45 Schmalenbach, K. Struggle for Exclusiveness: The ECJ and Competing International Tribunals. In: Hafner, G.; Buffard, I.; Crawford, J.; Pellet, A.; Wittich, S. (eds.). *International Law between universalism and fragmentation*. Leiden, 2008, p. 1054.

based on that they had no right to address the court under the internal provisions of the EU law, does not seem to be sufficiently substantiated. Especially dubious are the cases where the dispute of the Member States relates to a provision of a mixed agreement and the states agree to address a dispute settlement institution, provided for in such agreement. Although the practice shows that international courts decide on the issue of own jurisdiction, however, as seen in the example above in *IJzeren Rijn* case, they may conclude that the dispute falls within their jurisdiction and adopt a decision. Thus, from the point of view of international law, the Member States should implement such a decision. If later the CJEU establishes that the states infringed Article 344 of the TFEU, the Member States in essence would be stuck in a legal dead-end, because under the international law, they would have to implement the decision of an international court, and under the EU law — the judgement of the CJEU.

Conclusions

The problem of separation of jurisdiction of the international courts and the CJEU is becoming more and more relevant both in theory and practice. Most of all, it significance increases with increasingly active role of the European Union in the international arena. Therefore, in an increasing number of cases it is necessary to distinguish between the jurisdiction of the CJEU and the jurisdiction of an international court (arbitral tribunal), established under a relevant mixed agreement.

The issue of separation of jurisdiction of the CJEU and international courts should not only be solved through the lense of the EU law, but also from the perspective of international law. If we looked for the solution of the problem only from the position of the EU law, the conclusion would be clear: the CJEU has the exclusive competence to solve the disputed between the Member States related with provisions of the EU law, thus Member States infringe Article 344 of the TFEU if they address any other court. The CJEU interprets its exclusive competence on interpretation of the EU norms very widely. This is shown by its position of the CJEU on its exclusive competence to interpret provisions of mixed agreements, with regard to which the EU has a competence, irrespective whether this treaty may have separate institutions for dispute resolution.

The legal doctrine aims at looking to the issue of separation of the jurisdiction of the CJEU and international courts from the perspective of international law. To this end, various arguments arising from international law are distinguished and it is assessed whether they can be applied in order to substantiate the obligation of international courts to decline their jurisdiction. This publication analysed (to the author‘s opinion) the most relevant arguments, i.e. on prohibition to intervene into matters of another legal system, the principle of abuse of law, the issue of application of conflict-of-law norms and provides other dogmatic considerations.

The analysis undertaken allows to claim that currently the international law does not provide for an obligation of international courts to decline their jurisdiction in cases where the dispute between the Member States relates with the EU law. The most

plausible argument is based on the prohibition to intervene into affairs of another legal system. However, at least at the moment, the obligation to decline jurisdiction cannot be derived from it, because application of this principle in the context of international organizations would require the formation of a new custom of the international law.

Case-practice of international courts shows that the courts tend to deny their jurisdiction in case they think that the dispute is related with the exclusive competence of another court. This position can be treated more as an expression of respect to another legal system, because it is not substantiated by clearly formulated legal arguments.

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EUROPOS SĄJUNGOS TEISINGUMO TEISMO JURISDIKCIJOS PRIPAŽINIMAS TARPTAUTINIUOSE TEISMUOSE

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Santrauka. *Tarptautinės teisės ir Europos Sąjungos teisės koreliacija neišvengiama ir tai sukelia aktualių teorinio bei praktinio pobūdžio problemų. Viena iš jų – Europos Sąjungos Teisingumo Teismo ir tarptautinių teismų jurisdikcijos atskyrimo problema. Pastaruoju metu šis klausimas tampa ypač aktualus ir tai susiję su vis ryškesniu Europos Sąjungos vaidmeniu tarptautinėje arenoje. ES yra prisijungusi prie daugelio tarptautinių sutarčių, dalis jų numato atskiras ginčų sprendimo institucijas, kurioms suteikta kompetencija spęsti ginčus, kylančius dėl tokių susitarimų aiškinimo ir taikymo. Tačiau pagal ES teisę išimtiniai įgaliojimai aiškinti ES teisės normas suteikti ESTT. Teismas yra nustatęs ir savo išimtinius įgaliojimus aiškinti tas mišrių sutarčių nuostatas, dėl kurių Sąjunga turi kompetenciją. Taigi galėtume teigti, kad valstybės narės visus tarpusavio ginčus, kylančius iš ES teisės, įskaitant ir mišrios sutarties nuostatas, dėl kurių Sąjunga turi kompetenciją, privalo spręsti ESTT. Todėl jų kreipimasis į kitą tarptautinį teismą (arbitražą) pažeistų išimtinius ESTT įgaliojimus pagal Sutarties dėl Europos Sąjungos veikimo (toliau tekste – SESV) 344 straipsnį, o tai*

galėtų inspiruoti Europos Komisiją pradėti ginčo sprendimo procedūrą ESTT pagal SESV 258 straipsnį

Išimtinių įgaliojimų aiškinti ES teisės normas bei spręsti dėl ES institucijų priimtų teisės aktų galiojimo suteikimas ESTT yra efektyviausias būdas užtikrinti vienodą ES teisės aiškinimą ir užkirsti kelią ES teisės fragmentacijai. Vis dėlto šie išimtiniai ESTT įgaliojimai paremti argumentais, išplaukiančiais iš ES teisinės sistemos sui generis pobūdžio. Tuo tarpu šioje publikacijoje siekiama pažvelgti į ESTT ir tarptautinių teismų jurisdikcijos atskyrimo klausimą ne tik iš ES teisės, bet ir iš tarptautinės teisės pozicijų. Todėl siekėme atsakyti į klausimą, ar tarptautiniai teismai pagal tarptautinę teisę privalo paneigti savo jurisdikciją tuo atveju, jei ginčas tarp valstybių narių siejasi su ES teise. Šiuo tikslu analizavome tam tikrus tarptautinių teismų sprendimus, kurie iliustruoja jų požiūrį į ESTT išimtinius įgaliojimus aiškinti ES teisės normas. Nors, kaip rodo teismų praktika, jie yra linkę paneigti savo jurisdikciją tuo atveju, jei mano, kad ginčas priskirtinas kito teismo išimtinei jurisdikcijai, tačiau nepateikia aiškių tokios pozicijos teisinių argumentų. Todėl publikacijoje analizavome iš tarptautinės teisės kylančius argumentus (pavyzdžiui, draudimo kištis į svetimos teisinės sistemos reikalus, draudimo piktnaudžiauti teise), kuriais remdamasis tarptautinis teismas privalėtų paneigti savo jurisdikciją, bei formuluodami savarankišką požiūrį vertinome tokių argumentų tinkamumą aptariamai situacijai.

Reikšminiai žodžiai: *ESTT išimtinė jurisdikcija, ES teisės aiškinimas, tarptautinių teismų jurisdikcija dėl ES teisės.*

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