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„We regret to announce the death of our most reputable colleague Prof. JUDr. Zdeněk Kučera, DrSc. from Czech Republic. We are thankful for his efforts invested in our common project. His personality and wisdom will be deeply missed by the whole editorial team."

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All contributions in this book are subject to academic review.

List of Abbreviations

AB	Appellate Body
ADR	Alternative Dispute Resolution
AWS	Amazon Web Services
BIT	Bilateral Investment Treaties
CD	Co-operation and Development
CJEU	Court of Justice of the EU
Court	European Court of Human Rights (Cour européenne des droits de l'homme), Strasbourg, France
CUP	Cambridge University Press
e-arbitration	Electronic arbitration
e-banking	Electronic banking
ECA	Electronic Commerce Agreement
EEC	European Economic Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, as amended by Protocols Nos. 11 and 14
ICDO	International Civil Defence Organization
ICRC	International Committee of the Red Cross
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PACE Resolution	Parliamentary Assembly of the Council of Europe Resolution 1096 (1996) on measures to dismantle the legacy of former communist totalitarian systems- text adopted by the Assembly on 27 June 1996 (23rd Sitting)
PCIJ	Permanent Court of International Justice

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN GA	General Assembly of the United Nation
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organisation

Articles

David Sehnálek

Interpretation of International Agreements Concluded by the European Union and its Member States

Key words:
Interpretation | *Mixed Agreements* | *International Agreements* | *Competence-competence* | *Competence to Interpret* | *European Union* | *International Law*

Abstract | *The European Union has competence to enter into international-law relations and conclude international agreements. From a theoretical point of view, these agreements do not constitute a homogeneous source of EU and international law but differ based not only on a criterion of their content, but also who is their party. Some of these agreements have been concluded solely by the European Union, some together with its Member States and some by Member States on behalf of the Union. The article thus provides a classification of the international agreements that have been concluded by the European Union and in its second part it focuses on problems with interpretation of these agreements. Since both the European Union and Member States are involved, the crucial question is who is competent to determine the authoritative, correct, and binding interpretation of these agreements and to what extent.*

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I. Introduction

14.01. Based on a number of provisions of the Treaty on European Union (hereinafter the "TEU") and the Treaty on the Functioning of the European Union (hereinafter the "TFEU"), the European Union has been given competence to enter into international-law relations and conclude international agreements with other public international law entities.[1] The number of concluded agreements alone shows that the EU often makes use of this option. However, in some cases the circumstances prevent the European Union from concluding a certain international agreement directly and/or independently, i.e. without participation of the Member States. This problem is often overcome by involving the Member States, which then conclude the relevant international agreement either jointly with the European Union or even in its stead. In political terms, this procedure rarely causes any serious difficulties. It does, however, raise a number of issues related to legal theory. This article will deal with the most significant issues and analyse them. We are mainly interested in whether or not these agreements can be considered one of the sources of European Union law and whether or not they should be interpreted this way. We are also interested in who – the European Union or the Member States – determines their authoritative, correct, and binding interpretation[2] and to what extent. In other words, we inquire whether the European Union bodies may determine the interpretation of an agreement to its full extent, i.e. also in situations where its subject-matter falls, in substance, within the competence of the Member States. To answer these questions, we will first establish certain classification of international agreements concluded by the European Union and clarify their status within the framework of European Union law. Indeed,

[1] This competence is explicitly stipulated in the following articles: Article 79 (3) TFEU, as part of common border, asylum and immigration policy; Article 191 (4) TFEU, as part of the environmental policy; Article 207 (3) TFEU, as part of the common commercial policy; Article 209 (2) TFEU, as part of the policy in the field of development cooperation; Article 212 (3) TFEU, as part of the economic, financial and technical cooperation with third countries; Article 214 (4) TFEU, as part of humanitarian aid policy; Article 216 (1) TFEU, 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 EU act or is likely to affect common rules or alter their scope; Article 217 TFEU, to regulate association with one or more third countries or international organisations; Article 219 TFEU, in matters concerning monetary or foreign exchange regime in relation to other currencies; Article 8 TEU, as part of the neighbourhood policy; Article 37 TEU, within the framework of the common foreign and security policy in areas covered by Chapter 2 of the Treaty on European Union; Article 6 (2) TEU, concerning accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The possibility is also implicitly stipulated in Article 352 TFEU in the area of subsidiary powers and Article 218 (6) in conjunction with the provision stipulating the competence to regulate some internal policies, which enables to conclude international agreements, e.g., in the areas of judicial cooperation in civil matters based on Article 81 (2) TFEU.

[2] I.e. interpretation within the meaning of Article 19 (1) TEU.

the international agreements under scrutiny are very diverse. Subsequently, we will analyse the manners of interpretation[3] of these agreements exclusively in respect to the issues of competences as these issues are specific for agreements concluded by the European Union and its Member States. On the other hand, we will not focus on general interpretation issues as these have been addressed well in scholarly literature as well in textbooks of public international law.

II. Categorisation of international agreements concluded by the European Union and the Member States for the purposes of interpretation

14.02. In an ideal world, the European Union, given its supranational nature, would be able to conclude international agreements independently, without direct involvement of the Member States as usual in federal States. However, the European Union is not a federation – nor a State, for that matter – even if it often behaves as one. Furthermore, competences in external relations were only delegated to the European Union by the Member States in a limited scope and, therefore, do not cover all the possible activities on the international stage. The consequences are clear. The Member States remain a parallel subject of public international law and continue to exercise their powers to the extent of the competences they have not delegated to the European Union. The same obviously applies to concluding international agreements.[4] At the same time, in some cases the non-State nature of the European Union prevents it from concluding a certain international agreement, although it is allowed to do so under both the founding treaties. Indeed, the principles of public international law often clearly distinguish between States and international organisations and set

[3] Interpretation may also be provided by various European Union institutions and also bodies (courts) in the Member States; however, we are exclusively interested in authoritative and binding interpretation pursuant to Article 19 TEU. For the nature and specific details of interpretation provided by the Court of Justice of the European Union, see e.g. TÝČ, V. ZÁKLADY PRÁVA EVROPSKÉ UNIE PRO EKONOMY (EU Law Basics for the Economists). Prague: Leges, s.r.o., 98 (2010).

[4] At this point, it is necessary to compare the European Union to standard federal States. The United States of America is often considered a model federation against which the EU is frequently compared. The US is a closed federation in that it does not grant international legal personality to its individual constituent States. However, there may also be open federations, where constituent States do have such legal personality and where the federation and its constituent States act in parallel or even compete with each other. Belgium is an oft-mentioned example of such a federation. However, public international law is generally dismissive towards this type of federation, which is again demonstrable on Belgium. See SCHÜTZE, R. FEDERALISM AND FOREIGN AFFAIRS: MIXITY AS AN (INTER)NATIONAL PHENOMENON in HILLION, Ch., KOUTRAKOS, P. eds., MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD. Bloomsbury Publishing 73, 57 *et seq*. (2010).

different standards for each of them. A number of international agreements can thus be concluded exclusively by States, and international organisations – including the European Union – cannot participate in them as a party, even if the will of their member states and the delegation of powers make them function as entities analogous to States, legally and practically speaking.[5]

14.03. To generalise, we may conclude that the need for the joint conclusion of international agreements by the European Union and its Member States may be caused both by factors arising from the European Union law and factors ensuing from the public international law. Taking the above into consideration, international agreements that are directly or non-directly binding on the European Union may be classified into the following categories:

1. international agreements concluded exclusively by the European Union;
2. international agreements concluded by the European Union and also the Member States – the so-called *parallel agreements;*
3. international agreements concluded by the Member States that fall outside EU's competence but are in accordance with its objectives – the so-called *subsidiary agreements*;
4. international agreements concluded jointly by the European Union and the Member States – the so-called *mixed agreements;*
5. international agreements concluded by the Member States where the European Union became a contractual party by succession;
6. international agreements concluded by the Member States on behalf of the European Union, based on its decision.

14.04. In this article, we will not be focusing on agreements concluded exclusively by the European Union as their status is clear and there can be no doubts about who – i.e. the European Union or its Member States – should interpret these agreements and to what extent. For the same reason, we will not be dealing with parallel agreements, i.e. agreements concluded by the European Union and its Member States not as one party, as is the case

[5] As an example, see the Convention for the Protection of Human Rights and Fundamental Freedoms, which in its Article 59 (2) stipulates the possibility for the European Union to accede to the Convention. The aforesaid provision clearly shows that the Union is not considered a State but merely an international organisation with some specific features and privileged position in comparison to other international organisations. Adoption of this provision was a necessary international-law prerequisite for the accession of the European Union to the Convention, despite the fact that the existence of the right to accede is beyond any doubt from the point of view of the Union's internal law.

in mixed contracts, but each on their own behalf to the full extent. The Convention for the Protection of Human Rights and Fundamental Freedoms will be an example of such an agreement, once the European Union accedes to it.[6] The parallel nature of these agreements also shows in their interpretation by the European Union and the Member States: they interpret them independently of each other.[7] Albeit less than ideal in terms of legal theory, this theoretically permits differing interpretation of the same notions or effects (i.e. the matters of immediate applicability) of the given agreement. Nevertheless, this reality of the public international law stemming from its specific nature has been known for a long time and is hardly surprising.[8]

14.05. Subsidiary agreements likewise fall outside the scope of this paper, although we are not denying their importance. After the Lisbon Treaty cancelled Article 293 of the Treaty establishing the European Community, one could assume that these agreements became an obsolete representative of a previous stage of EU's development.[9] However, in reality they are anything but. They continue to exist in a modified form, as demonstrated i.e. by the conclusion of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. We also believe that subsidiary agreements may offer a legal "way out" of the current crisis in the European Union, where some Member States and a part of the European public believe that further strengthening of EU powers is no longer desirable, while there is a strong need for increased cooperation in areas currently outside EU competence. The model of intergovernmental agreements concluded by Member States in accordance with the goals of the European Union could offer a viable alternative.

[6] The existence and exercise of European Union's competence in case of parallel agreements does not exclude powers of the Member States and their ability to exercise them. See SVOBODA, P. PRÁVNÍ PROBLÉMY TZV. VNĚJŠÍCH SMLUV EVROPSKÉ UNIE *(Legal issues associated with the so-called external agreements of the European Union).* Prague: Charles University in Prague 80 (2009).

[7] With the exception in the form of sincere cooperation. However, this only has a general nature and applies to any activity of the Member State. For more on the issues associated with exercising influence of the Union law in areas where competence has not been delegated, see Michal TOMÁŠEK, *Aktuální projevy neutralizace národního práva právem EU (Current manifestations of national law neutralisation by EU law)* 2012(3) PRÁVNÍ RÁDCE 34 *et seq.* (2012).

[8] The concept of the central court and preliminary rulings as instruments of unifying interpretation is still specific to the European Union and is not common in public international law. See STEHLÍK, V. ŘÍZENÍ O PŘEDBĚŽNÉ OTÁZCE V KOMUNITÁRNÍM PRÁVU *(Preliminary ruling procedure in Community law).* Olomouc: Palacký University Olomouc 11 (2006).

[9] Agreements in the area of private international law and procedure were concluded in this manner, in particular. Subsequently, they were replaced by directives applicable among the EU Member States, excluding Denmark. These include e.g. the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, and the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. For more on these conventions and their relation to EU law, see BĚLOHLÁVEK, A. *Pravomoci soudů a výkon rozhodnutí v kontextu vývoje evropského civilního procesu (Court powers and enforcement of decisions in the context of development of European civil procedure).* 2004(12) PRÁVNÍ RÁDCE 15-19 (2004).

From the legal point of view, these agreements may pose a problem in terms of possible other views of their nature. Some scholars consider subsidiary agreements a source of public international law and not of EU law,[10] while others consider it tertiary law,[11] which *is* a source of EU law.[12] We tend to agree with the first opinion; the second seems extensive and without basis in the founding treaties.[13] Of relevance for this study is the fact that these agreements are interesting given that the Court of Justice of the EU[14] was unilaterally asked to interpret them, i.e. without the Union as the recipient of the duty giving its consent as a party.[15] Nevertheless, the issue of determining the entity responsible for determining a binding and correct interpretation of these agreements is thus resolved and requires no further investigation.

14.06. Mixed agreements are generally concluded in areas where the Union completely lacks competence or where the relevant competence has only been delegated partially, or where the Union has not yet exercised the competence. It follows that such agreements cannot be concluded in the areas of exclusive competence, albeit this is not categorically impossible. The existence of this category of agreements was brought about by necessity:[16] it is often impossible to conclude a certain agreement in a manner not interfering with the competences of the European Union and the Member States.[17] The practicality here conflicts with legality, which creates boundaries where

[10] See BĚLOHLÁVEK, A. *Pravomoci soudů a výkon rozhodnutí v kontextu vývoje evropského civilního procesu (*Court powers and enforcement of decisions in the context of development of European civil procedure*)*. 2004(12) PRÁVNÍ RÁDCE 15-19 (2004), Iss. 12.

[11] See ROZEHNALOVÁ N., TÝČ V. et NOVOTNÁ, M., *EVROPSKÉ MEZINÁRODNÍ PRÁVO SOUKROMÉ (*European private international law), Brno: Masaryk University 36 (2000).

[12] HORSPOOL, M. HUMPHREYS, M. EUROPEAN UNION LAW. Oxford: Oxford University Press 71 (2006).

[13] This is because we do not understand former Article 293 of the EC Treaty as a legal basis for adopting these agreements in EU law, but rather as a confirmation of the fact that the European Union, or European Community at that time, had no powers in the aforementioned areas. For this reason, agreements thus concluded could not have served as a source of its law.

[14] See e.g. the First Protocol on the interpretation of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, by the Court of Justice of the European Communities.

[15] Given the fact that the European Union was not a party, this agreement created a third-party obligation.

[16] The pre-Lisbon legislation clearly anticipated these agreements in the common commercial policy in areas of cultural and audiovisual services, education services and social and health care services. It expressly stated that agreements in these areas had to be concluded jointly by the Community and its Member States. In practice, however, mixed agreements were also concluded outside the area of common commercial policy.

[17] However, it is naturally necessary to assess the concluded international agreements *ad hoc*. The case law of the Court of Justice of the EU shows that the procedure in determining whether a certain matter belongs to the EU or the Member States should not be mechanistic. It should not be possible to look at the individual provisions of an agreement and determine whether or not they fall under the competence of the European Union; an agreement must be assessed in its entirety in view of the objective and purpose the agreement pursues. Inclusion of a certain provision in the agreement does not, according to the Court of Justice, entail creation of legislative powers. See judgment of the Court of Justice of 3 December 1996. Portuguese Republic v Council of the European Union. Case C-268/94. ECLI:EU:C:1996:461.

there are none in reality. Member States' participation need not result only from the lack of competence on the part of the Union, but may also be based on a request of a third country,[18] or even the Member States themselves,[19] although they are severely limited in this by EU law.[20]

14.07. Mixed agreements are similar to the aforementioned parallel agreements. However, we see a difference in the fact that while in parallel agreements, the Union and the Member States are considered separate parties to the agreement, in mixed agreements, they only make up one party.[21] Mixed agreements pose a problem in that it is extraordinarily difficult to clearly identify the parts of such an agreement where competences belong to the Member States as opposed to the ones falling under the EU powers. Obviously, no such problem arises in analysis of parallel agreements. This shortcoming is also clear in interpretation of these agreements, which we will analyse further in this paper.

14.08. International agreements concluded by the Member States where the European Union became a contractual party by succession represent another specific category of international agreements. The provisions of international law concerning succession as included in the Vienna Convention on Succession of States in respect of Treaties are fragmentary,[22] limited

[18] The position of the socialist bloc countries in negotiation with the European Communities is an example of a situation where third countries insists on Member States' participation. See BLOED, A. THE EXTERNAL RELATIONS OF THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE. Martinus Nijhoff Publishers, 194 (1988).

[19] Permissibility of this situation is mentioned in literature; it is seen as a general possibility e.g. by MUCHANOV, A. DIE HANDELSBEZIEHUNGEN ZWISCHEN DEREUROPÄISCHEN UNION UND RUSSLAND IM LICHTE DES VÖLKERRECHTS, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht 740 (2006), available at: http://www.zaoerv.de/66_2006/66_2006_3_b_737_768.pdf, specifically in the case of the association agreement with Turkey in KUIJPER, P. J., WOUTERS, J., HOFFMEISTER, F., BAERE, G. d., & RAMOPOULOS, T. THE LAW OF EU EXTERNAL RELATIONS: CASES, MATERIALS, AND COMMENTARY ON THE EU AS AN INTERNATIONAL LEGAL ACTOR. Oxford: Oxford University Press 105 (2013). Svoboda further mentions the association agreement with Nigeria from 1966, which also was conceived as a mixed agreement for political reasons. See SVOBODA, P. PRÁVNÍ PROBLÉMY TZV. VNĚJŠÍCH SMLUV EVROPSKÉ UNIE *(Legal issues associated with the so-called external agreements of the European Union).* Prague: Charles University in Prague 79 (2009).

[20] Cf. the arguments presented by the Court of Justice of the European Union in its judgement of 4 September 2014 in European Commission v Council of the European Union, Case C-114/12, ECLI:EU:C:2014:2151, concerning successful action for annulment where the European Commission sought invalidation of the decision of the Council and the Representatives of the Governments of Member States meeting in the Council on 19 December 2011 concerning the participation of the European Union and its Member States in the negotiations for a Convention of the Council of Europe on the neighbouring rights of broad casting organisations. The European Commission maintained that the EU had exclusive competence in the matter and opposed the participation of the Member States.

[21] A common feature lies in the fact that their adoption is arranged by the European Union and each of the Member States separately, fully in compliance with their constitutional rules. Dashwood thus expresses his wish (which will be very difficult to put in practice) to introduce a unified and simplified adoption procedure that would replace individual adoption. DASHWOOD, A. MIXICITY IN THE ERA OF THE TREATY OF LISBON in HILLION, Ch., KOUTRAKOS, P. eds., MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD. Bloomsbury Publishing 351 (2010).

[22] The codification took place in the 1960s – the era of de-colonisation – which influenced its contents.

in scope[23] and applicable only in relation to States as opposed to international organisations. In addition, they can hardly be considered a codification of an international custom, which therefore remains an important source of law governing the succession of States.[24] The importance of Vienna Convention on Succession of States in respect of Treaties lies especially in the recognition of the elementary principles of legal succession of States, i.e. free consent, good faith and the principle of *pacta sunt servanda*.[25] Indeed, the issue of succession can only be satisfactorily resolved if application of the above principles helps achieve a just balance[26] between the interests of the successor State and the other contractual party. This has occurred in rare cases; e.g. with respect to GATT 1947.[27] The agreement was concluded by the Member States – in case of the founding countries before the establishment of the European Economic Community (hereinafter the "EEC"). EEC has never formally become a party to the agreement. Nevertheless, on 1 July 1968, following the end of the so-called transitional period, the EEC succeeded to the agreement (EU perspective) and this fact was subsequently recognised (international law perspective) by other signatory countries.[28] As a result of succession, the European Union assumed the obligations under the agreement on behalf of its Member States, which in terms of interpretation meant the creation of the power of the Court of Justice to give binding and correct interpretation of the agreement.[29]

[23] This agreement required ratification by at least 15 countries to come into force. It was concluded in 1978, but it only met the minimum required number of ratifications in 1996. It currently binds 22 countries, which in all due respect are not a representative sample of the total number of international actors. See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en

[24] Cf. SCHÜTZE, R. THE "SUCCESSION DOCTRINE" AND THE EUROPEAN UNION in Essays in ARNULL, A., BARNARD, C., DOUGAN, M.,SPAVENTA, E., EU LAW IN HONOUR OF ALAN DASHWOOD. Oxford: Hart Publishing, Bloomsbury Publishing (2011), available at https://books.google.cz/books?id=thbVBAAAQBAJ&pg=PT385&lpg=PT385&dq=succession+to+treaties+in+respect+to+european+union&source=bl&ots=NChB2D5r0o&sig=YwxyG5roxKO9rehdQ2Vmmaa9QL0&hl=cs&sa=X&ved=0ahUKEwi55IfL1vDKAhVDgXIKHe9ZBd4Q6AEIKTAC#v=onepage&q=succession%20to%20treaties%20in%20respect%20to%20european%20union&f=false. These conclusions are also supported by other sources. See also AUST, A. VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT OF TREATIES - INTRODUCTORY NOTE, available at: http://legal.un.org/avl/ha/vcssrt/vcssrt.html.

[25] See the preamble of the Vienna Convention on Succession of States in respect of Treaties.

[26] Our line of argumentation is based on Rawls' "veil of ignorance" and his other ideas. Any country may find itself in any of the possible roles, i.e. in the role of the original State, the successor or the other contractual party. These roles are mutually equal; neither can be considered good or bad, lawful or unlawful – they represent a fact. Legal rules concerning succession must thus be formulated justly so that none of the roles puts a country at an advantage or disadvantage. See RAWLS, J., A THEORY OF JUSTICE. Harvard University Press 12 (1971).

[27] See Allan ROSAS, *The Status in EU Law of International Agreements Concluded by EU Member States*. 43/5 FORDHAM INTERNATIONAL LAW JOURNAL 1327 (2001).

[28] See the judgement of the Court of Justice of 16 March 1983 in *Administration des finances de l'État* v. *Società petrolifera italiana SpA (SPI) and SpA Michelin italiana (SAMI)*, Joined cases 267/81, 268/81 and 269/81, ECLI:EU:C:1983:78, paragraph 17.

[29] Of general knowledge is, e.g., the subsequent case law tied to the direct effect of GATT 1947 in the laws of the European Union and of its Member States.

14.09. International agreements concluded by the Member States on behalf of the European Union, based on its decision, serve to resolve situations where the European Union is unable to conclude an international agreement alone, even though it has competence to do so delegated to it by the Member States.[30] A procedure is thus possible where the European Union decides to confer the authority to conclude such an international agreement on the Member States, thereby legitimating their actions in terms of EU law. The agreement is then concluded with the third country or an international organisation by the Member States.[31] It is questionable whether an agreement concluded in this fashion can be considered a part of EU law in terms of the relationship between the Member States and the European Union. There is no obligation created for the EU under international law; the obligation only affects the Member States. However, we believe that these agreements are a source of EU law. From the viewpoint of the other contractual parties, the aforementioned relationship between the European Union and its Member States is an internal matter with which they cannot interfere. Such an agreement, in our opinion, becomes a part of EU law by incorporation via Council's decision conferring authority to conclude the agreement. Any other conclusion would contradict the principle of supranationality and would entail a possibility for the Member States to act independently in areas falling under the European Union's competence. This therefore results in the EU's power to interpret the agreement and determine its binding and correct interpretation for the Member States, again through the Court of Justice of the EU. From the Member States' perspective, the agreement is not what it seems to be *prima facie*.

III. Background of interpretation of international agreements – position of the Court of Justice of the EU

14.10. This paper's underlying theoretical basis lies in our conception of international law and EU law as two autonomous legal systems. This approach is best reflected by the decision-making

[30] There can be many reasons. For example, the contractual party may only be another State, or the third country refuses to negotiate with the European Union. In the past, the countries of the socialist bloc did not recognise the exclusive competence of the EEC in the area of regulation of international trade. Negotiations thus had to be held not just by the EEC, but by the Member States as well, even though they were not competent to do so under the internal EEC rules. See BLOED, A. THE EXTERNAL RELATIONS OF THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE. Martinus Nijhoff Publishers 194 (1988).

[31] See e.g., the Council decision of 18 November 2002 authorising the Member States to ratify the Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea of 1996 or to accede to the Convention.

practice of the Court of Justice of the EU.[32] The European Union, as approached by the Court of Justice of the EU, was created on the basis of an international agreement; however, this agreement is special in that it created a basis of a new system of EU law. At the same time, international agreements concluded by the European Union itself form a part of EU law, take precedence over secondary law and may have direct effect. The above gives rise to a dualistic approach to international law, albeit with strong (but not absolute) monistic elements. But what are the implications for interpretation of international agreements as such? The dual approach and the declared autonomy also imply an autonomous approach to construction of international law, which may thus potentially differ from interpretation of EU law. Conversely, the monistic elements indicate a possibility of a synthesis in the methodology of interpretation of international law with the methodology of interpreting EU law. We agree with Pelikánová's assertion that if law has unified effects (i.e. when one system permeates the other), one must approach it commensurately to this fact.[33] Any potential highlighting of differences in interpretation is thus unwarranted, both for practical reasons and in terms of legal theory. Nevertheless, one can hardly ignore that there are differences in construction of the two legal systems and, as a matter of fact, the Court of Justice of the EU does not deny them.

14.11. From the Member States' perspective, the aforementioned differences in approach to interpretation of international law are of fundamental importance. The ramifications concern especially mixed agreements. In terms of its dual character, it should not be of decisive importance whether interpretation concerns the part of an agreement falling under the EU competence or the part in which the Member States have competence. The procedure in interpretation will be based on the methods and rules of public international law and should thus be the same, or at least very similar. However, if the other approach is taken, the construction of the international agreement will be carried out under public international law rules, but while reflecting the rules of interpretation based in EU law. Pelikánová herself concedes that interpretation of EU law is specific.[34] Its specific features are then necessarily reflected in interpretation of international law, which can thus differ from

[32] In the spirit of the well-known decision in case *Costa* v. *E.N.E.L.*

[33] Irena PELIKÁNOVÁ, *Rozum, právo a interpretace (Reason, law and interpretation)*, 2010(12) BULLETIN ADVOKACIE 25 (2010).

[34] She notes that in relation to national law; however, we believe that her assertion has broader applicability, also encompassing international law. See PELIKÁNOVÁ, I., cited above.

construction carried out by the Member States. Such a situation is not ideal from the perspective of legal theory. However, the first possibility, i.e. that interpretation of international law and EU law may differ, is also less than ideal.

14.12. Returning back to the main topic of this paper, we can conclude that the second approach results, in practice, in the necessity to determine the extent in which the power to interpret an international agreement belongs to the European Union, on the one hand, and to the Member States, on the other hand. However, the same necessity also arises in case of the first approach. Indeed, the Member States are not doctrinally uniform and have diverse approaches to international law,[35] meaning it is impossible to speak of conformity with the European Union and the approach taken by the Court of Justice of the EU. In that case, however, the same problem has to be addressed in delimitation of mixed agreements.

14.13. The basic approach to interpretation of international agreements in case law of the Court of Justice of the European Union is based on international law itself. In their interpretation, the Court of Justice of the European Union commonly refers to the Vienna Convention on the Law of Treaties,[36] despite the fact that it is not binding on the European Union. This is chiefly because the Convention mostly comprises codification of international customs.[37] Autonomy is accentuated in the interpretation of international agreements by the Court of Justice of the EU, both in relation to national[38] and EU law.[39] It is thus true that despite the monistic approach of the Court of Justice of the EU to international law in terms of precedence and direct effects, its approach to interpretation of international agreements remains strictly dualistic. The same terms used in EU law, or even in the

[35] See TÝČ, V. ZÁKLADY PRÁVA EVROPSKÉ UNIE PRO EKONOMY *(EU Law basics for the economists)*. Prague: Leges, s.r.o. 98 (2010).

[36] The Second Vienna Convention, i.e. the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 1986 has not yet come into force. Even if this Convention was accepted as a possible codification of international customs, prudence is advisable. It was specifically the different practice of international organisations at the time of negotiating the Vienna Convention on the Law of Treaties that caused the failure in codifying the convention on the law of treaties between States and international organisations or among international organisations alongside the convention on treaties among States, which was successful. See Miroslav POTOČNÝ, M. *Vídeňská úmluva o smluvním právu (Vienna Convention on the Law of Treaties)*. XIV(1) ČASOPIS PRO MEZINÁRODNÍ PRÁVO 6-7 (1970).

[37] See the judgement of the Court of Justice (Fourth Chamber) of 25 February 2010 in *Firma Brita GmbH* v. *Hauptzollamt Hamburg-Hafen*, Case C-386/08, ECLI:EU:C:2010:91, paragraph 42.

[38] See judgment of the Court of Justice of 14 October 1976 in LTU *Lufttransportunternehmen GmbH* & *Co. KG* v. *Eurocontrol*, Case 29-76, ECLI:EU:C:1976:137, paragraph 3.

[39] This does not apply in reverse. International treaties thus form a framework for interpretation of EU laws. See the opinion of Advocate General Jääskinen of 8 May 2014 in Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht, Joined cases C-401/12 P to C-403/12 P, ECLI:EU:C:2014:310, paragraph 44.

founding treaties themselves, could thus be given a different meaning in comparison to identical terms used in agreements concluded by the European Union. Verwey points out the potential associated problems, especially in terms of third country expectations, and argues that this approach could be seen by third countries as a material change in circumstances.[40]

14.14. The Court of Justice of the EU defends its approach by referring to the Vienna Convention on the Law of Treaties and thus the need to not only consider the text, but to construe its wording also from the teleological perspective.[41] This results in the already mentioned potential difference in interpretation of otherwise identical notions and even whole legal concepts. However, a counter-argument could be made on the basis of the general interpretation rule shared by both international law and EU law, i.e. that same terms should not arbitrarily be assigned different meanings. However, the practice is different and, in our opinion, hardly defendable in terms of legal theory. Pragmatic approach and politics have prevailed over the pure legalistic approach.

14.15. Interpretation of international agreements as approached by the Court of Justice of the EU is thus independent of EU law, but not absolutely separated. It is the fact that the Court of Justice of the EU is independent in deciding which line of interpretation is correct. However, public international law allows other institutions, i.e. especially the Commission and the Council, to influence the interpretation of an international agreement by the Court of Justice of the EU by means of a subsequent interpretation agreement concluded with the relevant third country, or by practice.[42] Interpretation by the Court of Justice of the EU is not bound by opinions of bodies of other international organisations, but in practice, it is willing to take them into account[43] especially with regard to their purpose and the persuasive (non-legal) authority these bodies might have.[44]

[40] VERWEY, D. *The European Community, the European Union and the International Law of Treaties*. The Hague: T.M.C. Asser Press 210 (2004).

[41] Judgment of the Court of Justice (Fifth Chamber) of 1 July 1993 in *Metalsa* Srl, Case C-312/91, ECLI:EU:C:1993:279, paragraph 11-12.

[42] See Article 31 in each of the Vienna Conventions.

[43] See the Judgment of the Court of Justice of 19 November 1975 in Douaneagent der *NV Nederlandse Spoorwegen* v. *Inspecteur der invoerrechten en accijnzen*, Case 38/75, ECLI:EU:C:1975:154, paragraph 24.

[44] VERWEY, D. THE EUROPEAN COMMUNITY, THE EUROPEAN UNION AND THE INTERNATIONAL LAW OF TREATIES. The Hague: T.M.C. Asser Press 212 (2004).

IV. The matter of competence (judicial Kompetenz-Kompetenz) and its implications in interpretation of international agreements

14.16. Interpretation of international agreements concluded by the European union is carried out, in principle, in any kind of court proceedings before the Court of Justice of the EU. From the perspective of national courts, there is the important possibility, or rather an obligation, to request a preliminary ruling in cases that may also concern provisions of international agreements.[45] These are, for this purpose, considered to legal acts of EU institutions.[46] This concerns international agreements binding the European Union in the broadest possible sense, i.e. both mixed agreements[47]and agreements concluded by Member States on the Union's behalf, or agreements into which the Union succeeded as result of delegation of competence.[48] It is questionable, however, whether this power includes mixed agreements in their entirety, or whether there is a room for Member States' courts' own interpretation. It would be reasonable for such room to exist. In cases where the Members States are parties to an agreement alongside the European Union due to its lack of competence to conclude such an agreement, it would be reasonable for them to be permitted to interpret the agreement to the extent in which it falls under their competence.

14.17. If we reach the conclusion that the powers of the Court of Justice do not extend to all provisions of mixed agreements, it will be necessary to determine the entity authorised to decide which provisions are excluded. In other words, it must be decided who is competent to interpret a mixed agreement for the purpose of determining the court competent to construe it. Hoops calls this situation "*judicial Kompetenz-Kompetenz*".[49]

14.18. We believe that the issue of interpretation we introduced is in fact merely a part of a broader problem concerning the powers of the European Union. The Member States delegate to the EU some of their competences, where it is then up to

[45] See Article 267 (1)(b) of the Treaty on the Functioning of the European Union.

[46] Opinion of Advocate General Melchior Wathelet delivered on 27 January 2016 in SECIL, Case C-464/14, ECLI:EU:C:2016:52, paragraph 32.

[47] See the judgment of the Court of Justice of 16 June 1998 in *Hermès* International (société en commandite par actions) v. *FHT Marketing Choice BV*, Case C-53/96, paragraph 32.

[48] Judgment of the Court of Justice of 16 March 1983 in *Administration des finances de l'État* v. *Società petrolifera italiana SpA (SPI) and SpA Michelin italiana (SAMI)*, Joined cases 267/81, 268/81 and 269/81, ECLI:EU:C:1983:78.

[49] See Björn HOOPS, *The Interpretation of Mixed Agreements in the EU after Lesoochranárske Zoskupenie*. 10(1) HANSE LAW REVIEW (HanseLR) Available at: http://www.hanselawreview.org/pdf14/Vol10No01Art01.pdf (accessed on August 21, 2016).

the European Union, acting through the Court of Justice of the EU, to determine the extent to which the competences were delegated. This system gives the European Union the power to interpret mixed agreements and determine which of their parts fall substantively under the EU law;[50] this is a manifestation of its supranational nature. It also eliminates the risk of differing interpretation that could arise if this matter was decided by the courts of the individual Member States in an uncoordinated manner. Such an approach could jeopardise the unified and correct application of EU law in the individual Member States. The EU – or the Court of Justice of the EU, to be more specific – has the power to determine the Union's areas of interest on its own.[51]

14.19. Mixed agreements are concluded jointly by the European Union and its Member States. We have already established that the Court of Justice of the EU has competence in matters of interpretation. Does this mean, however, that it can interpret both the EU part as well as the parts of mixed agreements that fall outside EU's competence? Legal doctrine offers no unambiguous conclusions. The issue lies especially in shared competences, particularly in situations where they have not yet been internally exercised by the European Union. This means they belong to the Member States. However, this can change in the future if the EU decides to exercise them. It is naturally possible to consider that in both cases the external competence belongs directly to the European Union.[52] Such a solution would, however, be rather purpose-driven.

14.20. Another problem lies in the practicability of separating the content of a mixed agreement into parts falling under EU's competence and parts falling under the competence of Member States. While this is, of course, theoretically possible, it will, however, often be impossible in practice to draw clear boundaries separating the individual parts of an agreement. The principle of delegated competences will necessarily contradict the need for coherent interpretation of the whole agreement.

14.21. The Court of Justice of the EU has thus inferred its competence to interpret the inseparable provision of mixed agreements.[53]

[50] Cf. arguments of the Advocate General Darmon in his opinion of 19 May 1987 in *Meryem Demirel* v. *Stadt Schwäbisch Gmünd*, Case 12/86. ECLI:EU:C:1987:232, paragraph 10 – 12.

[51] Indeed, this was confirmed by the Court itself in paragraph 37 of the judgment of the Court of Justice (Grand Chamber) of 11 September 2007 in *Merck Genéricos - Produtos Farmacêuticos Ld[a]* v. *Merck* & *Co. Inc. and Merck Sharp* & *Dohme Ld[a]*, Case C-431/05, ECLI:EU:C:2007:496.

[52] See HOOPS, B. THE INTERPRETATION OF MIXED AGREEMENTS IN THE EU AFTER LESOOCHRANÁRSKE ZOSKUPENIE. 10(1) HANSE LAW REVIEW (HanseLR) 18 (2014). Available at:http://www.hanselawreview.org/pdf14/Vol10No01Art01.pdf. (accessed on August 21, 2016).

[53] See the judgment of the Court of Justice of 30 September 1987 in *Meryem Demirel* v. *Stadt Schwäbisch Gmünd*, Case 12/86. ECLI:EU:C:1987:400, paragraph 6 – 12.

It inferred even its competence to interpret those provisions where the EU has not yet exercised its competence and which thus belonged to the Member States at the time the mixed agreement was being concluded.[54] Such an approach is undoubtedly associated with the supranational (federal) principle of the functioning of the European Union, which has long been clearly discernible in the case law of the Court of Justice of the EU. Nevertheless, we are not fully convinced that this approach is correct. As fittingly pointed out by Cremona, the Court of Justice of the EU has abandoned the competence perspective and prefers the EU's interest in observance of mixed agreements, at least in the area of mixed competences.[55] In our own words, it should then hold that the power of the European Union to adopt law is not, in substance, identical in its scope to the power of the European Union to interpret law.

V. Conclusion

14.22. The above clearly shows that international agreements concluded by the European Union and its Member State with third countries are far from being a homogeneous category. Additionally, certain agreements not concluded directly by the European Union can also be considered EU agreements. The approach taken by the Court of Justice of the European Union to these matters is extensive: it considers them to be part of EU law, while inferring its competence to interpret them and to determine the manner of their interpretation by the Member States. Such an extensive approach is also applied to mixed agreements. Even though the Member States have the competence to conclude these agreements jointly with the European Union, case law does not give them the freedom to interpret the agreements independently of the European Union. We believe that such an approach is at variance with the principle of delegation of competences. We are of the opinion that the Court of Justice of the EU – perhaps to make its task easier – has over-accentuated pragmatism in interpretation of

[54] See paragraph 42 of the decision in *Lesoochranárske zoskupenie*, where the Court noted: "Where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, it is clearly in the interest of the latter that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply." Judgment of the Court of Justice (Grand Chamber) of 8 March 2011. *Lesoochranárske zoskupenie VLK* v. *Ministerstvo* životného *prostredia Slovenskej republiky*, Case C-240/09, ECLI:EU:C:2011:125.

[55] Cremona further quotes Dashwood: "As Dashwood has said, the limits of Community powers are not the same as the limits of the scope of application of the Treaty, the objectives of the Treaty being attained through action not only of the Community itself but also by the Member State." See CREMONA, M. EXTERNAL RELATIONS OF THE EU AND THE MEMBER STATES: COMPETENCE, MIXED AGREEMENTS, INTERNATIONAL RESPONSIBILITY, AND EFFECTS OF INTERNATIONAL LAW, EUI Working Paper LAW 18 No. 2006/22.

these agreements. At the same time, we note that there is no universally applicable solution to the problem. In conclusion, we believe the most appropriate approach in terms of legal theory is the one that comprises assessment of each agreement and each of its individual provisions on an *ad hoc* basis.

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Summaries

FRA [***L'interprétation des accords internationaux conclus par l'Union européenne et ses États membres***]
L'Union européenne s'est vue accorder le pouvoir de devenir acteur des relations de droit international et de conclure des traités internationaux. D'un point de vue théorique, les traités ainsi contractés ne forment pas une source homogène du droit de l'Union ou du droit international. Ils diffèrent entre eux non seulement quant à leur objet, mais aussi quant à la partie contractante pour l'Union. En effet, ces traités ont été conclus soit par l'Union européenne seule, soit par l'Union et ses États membres, ou encore par les États membres représentés par l'Union. Cet article procède à une classification de ces traités, avant de proposer des conclusions pour leur interprétation. Dans ce contexte, la question de savoir comment il faut interpréter ces traités ne semble pas cruciale : on appliquera ici les règles du droit international et du droit de l'UE. En revanche, il faut savoir qui est autorisé à réaliser cette interprétation. Les interventions des États membres en raison du défaut de compétence de l'Union européenne indiquent que ceux-ci devraient avoir la possibilité de proposer leurs propres interprétations, indépendantes de l'avis de la Cour de justice de l'UE, tout au moins dans les limites des compétences qui leur sont propres. Le mécanisme de répartition des compétences au sein de l'Union européenne témoigne toutefois du fait qu'il n'en est pas ainsi.

CZE [***Výklad mezinárodních smluv uzavřených Evropskou unií a členskými státy***]
Evropské unii byla svěřena pravomoc vstupovat do mezinárodněprávních vztahů a uzavírat mezinárodní smlouvy. Z pohledu teoretického však takto uzavřené smlouvy netvoří homogenní kategorii a pramen unijního a mezinárodního práva. Liší se totiž vzájemně nejen svým obsahem, ale též tím, kdo je na straně Unie smluvní stranou. Část těchto smluv totiž byla uzavřena Evropskou unií samostatně, část společně s členskými

státy a část členskými státy v zastoupení Evropské unie. Článek proto provádí klasifikaci těchto smluv, aby ve své druhé části zhodnotil důsledky pro jejich výklad. Klíčovou otázkou totiž není jak tyto smlouvy vykládat. Zde se plně použijí pravidla mezinárodního a unijního práva. Otázkou však je, kdo je oprávněn provést výklad. Zapojení členských států z důvodu nedostatku pravomoci Evropské unie totiž naznačuje, že by měly mít též prostor pro vlastní Soudním dvorem EU neovlivněný přístup k výkladu těchto smluv přinejmenším v rozsahu, který spadá do jejich pravomocí. Mechanismus nastavení pravomocí v Evropské unii však dokazuje, že tomu tak ve skutečnosti není.

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POL [***Wykładnia umów międzynarodowych między Unią Europejską a państwami członkowskimi***]
Niniejszy artykuł został poświęcony specyficznej kwestii dotyczącej umów międzynarodowych, zawartych przez Unię Europejską i jej państwa członkowskie z państwami trzecimi. Umowy te nie tworzą bowiem jednorodnej kategorii, co pociąga za sobą wątpliwości co do tego, kto posiada kompetencje w zakresie ich wykładni. W pierwszej części artykułu dokonano podziału umów na poszczególne typy oraz oceny, w jakim stopniu są one problematyczne pod względem ich wykładni przez Unię Europejską i państwa członkowskie. Druga część artykułu omawia kwestię tego, który z dwóch wskazanych wyżej podmiotów ma rzeczywiste kompetencje w zakresie wykładni tychże umów międzynarodowych.

DEU [***Auslegung internationaler, von der Europäischen Union bzw. ihren Mitgliedstaaten eingegangener Abkommen***]
Dieser Beitrag befasst sich mit einer recht spezifischen Fragestellung, was die von der Europäischen Union bzw. ihren Mitgliedstaaten mit Drittländern geschlossenen internationalen Abkommen anbelangt. Diese Abkommen stellen nämlich keine homogene Kategorie dar, was Folgen für die Bestimmung einer auslegungsberechtigten Instanz hat. Der erste Teil des Beitrags nimmt eine Kategorisierung der verschiedenen Arten von Abkommen vor und wertet aus, inwieweit diese aus Sicht ihrer Auslegung durch die Europäische Union und ihre Mitgliedstaaten problematisch ist. Im zweiten Teil wendet sich die Aufmerksamkeit der Lösung der Frage zu, welcher der beiden genannten Akteure denn nun tatsächlich über die Kompetenz

verfügt, eine Interpretation internationaler Abkommen anzustellen.

RUS [***Интерпретация международных соглашений, заключенных Европейским Союзом и его государствами-членами***]

В статье рассматривается специфический вопрос, связанный с международными соглашениями, заключенными Европейским Союзом и его государствами-членами с третьими странами. Эти соглашения не представляют собой однородную категорию, что имеет значение для определения того, кто имеет право их толковать. В первой части статьи совершена сортировка на различные типы соглашений и приведена оценка, до какой степени представляют проблем с точки зрения их толкования Европейским Союзом и его государствами-членами. Во второй части статьи сосредоточено внимание на решении вопроса, кто из вышеупомянутой пары компетенцией толкования международных договоров фактически выполняет.

ESP [***La interpretación de tratados internacionales celebrados por la Unión Europea y Estados miembros***]

El artículo aborda la cuestión concreta de los tratados internacionales celebrados por la Unión Europea y sus Estados miembros con Estados terceros. Estos tratados no forman una categoría homogénea, con las consecuencias que ello conlleva para determinar quién es competente para interpretarlos. En la primera parte del artículo se clasifica los tratados en varios tipos y se evalúa hasta qué punto constituyen un problema desde la perspectiva de su interpretación por la Unión Europea y los Estados miembros. La otra parte se centra en la cuestión de determinar cuál de los dos anteriormente citados realmente dispone de la competencia para interpretar tratados internacionales.

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