1. The EU: Unifying or fragmenting force in international law?

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1. INTRODUCTION

In this chapter, I focus on the interaction between the Court of Justice of the European Union ('CJEU') and the International Court of Justice ('ICJ'), which is the principal judicial organ of the United Nations and a symbol of general international law. I consider whether the European Union is a unifying or fragmenting source in international law by focusing on the case law of its judicial branch.

Fragmentation is not merely a matter of having different interpretations.² 'Genuine fragmentation' occurs where judicial decisions give rise to conflicting developments in the law that are either unconscious due to lack of awareness of other courts' decisions or are a conscious departure from existing case law. Cases of genuine fragmentation are rare in standing courts with public decisions. Greater risk of fragmentation occurs in ad hoc arbitral tribunals, which may not have public decisions. 'Apparent fragmentation' arises where judicial decisions have variations due to contextual factors and therefore appear to be conflicting, although through clarification and interpretation the underlying legal reasoning can be resolved and rendered compatible. It occurs most commonly where judges are interpreting different legal instruments on the same legal issue.

In international law, the aim is not to have uniformity, but rather to achieve unification or integration so that similar factual scenarios and legal issues are treated in a consistent manner and any disparity in treatment is explained and justified. The desired outcome is harmony and compatibility, with allowances

¹ I am grateful to Giulia Bernabei for excellent research assistance and to Niccolò Ridi for helpful conversations on citation analysis.

² Philippa Webb, *International Judicial Integration and Fragmentation* (OUP 2013), Chapter 1.

for minor variations and the tailoring of solutions to disputes that come before the courts.

The assessment of unification or fragmentation in this chapter is not a rigorous empirical exercise. I have not analysed the 11,000 or so CJEU Judgments. Instead, I have looked at a sample of cases where the CJEU directly cites the case law of the ICJ and a very small sample of one case in which the ICJ cited the CJEU. Citations are an imperfect metric.³ We do not know the number of times the CJEU *could* have cited the ICJ but chose not to (and for what reason). It is not always clear whether ICJ case law was pleaded by one or more of the parties or by the winning party. It is beyond our knowledge as to whether the ICJ approach was deliberated upon by the judges or simply ignored as irrelevant or exotic. Instead, in this chapter, I am interested in the overall posture and attitude of the courts to each other.

Some recent writing on the CJEU's dialogue with the ICJ characterised it as follows:

the CJEU has proven, so far at least, a *shy disciple, rather than an enquiring peer ...* showing a high degree of deference to the case law of the ICJ.⁴

I do not perceive the CJEU to be a 'shy disciple'. I instead see a robust and independent Court that wishes to avoid fragmentation with international law, but also has little incentive to actively promote integration through dialogue.

In this chapter, I first examine the CJEU's posture towards the ICJ and then contrast it with the only case in which the ICJ has cited the case law of the CJEU. I then identify three explanatory factors for the CJEU's approach and conclude with some thoughts on how a self-referential approach to autonomy is compatible with greater judicial dialogue.

³ Niccolò Ridi, 'Mirages of an Intellectual Dreamland? Ratio, Obiter and the Textualisation of International Precedent' (2019) 10(3) *Journal of International Dispute Settlement* 361.

⁴ Eva Kassoti, 'Fragmentation and Inter-Judicial Dialogue: The CJEU and the ICJ at the interface' (2015) 8 *European Journal of Legal Studies* 21, 46 (emphasis added). See also Eva Kassoti and Lisa Louwerse, 'Like Ships in the Night? The CJEU and the ICJ at the Interface', Geneva Jean Monnet Working Paper 06/2016, 21 https://www.ceje.ch/files/3314/6122/9300/Geneva_JMWP_06-Kassoti-Louwerse.pdf, accessed 18 May 2019:

However, the previous exposition showed that the Court has shied away from delving too deeply into international law. It is noteworthy that, in none of the cases discussed above, did the Court take a proactive stance by exploring the relevant questions beyond the ICJ's dicta: it merely, unquestioningly deferred to the latter's authority. In this sense, the CJEU has proven, so far at least, a shy disciple, rather than an enquiring peer – a fact that somewhat diminishes the quality of judicial dialogue between the two courts.

2. THE CJEU'S POSTURE TOWARDS THE ICJ

Although the primary task of the CJEU is 'to examine the legality of EU measures and ensure the uniform interpretation and application of EU law',⁵ there is a legal basis for a unified approach to *international law*. Article 3(5) of the Treaty of the European Union provides that in 'its relations with the wider world', the EU contributes to the 'eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to *the strict observance and the development of international law, including respect for the principles of the United Nations Charter*'.⁶ And Article 21 on principles inspiring the EU's external action refers to 'respect for the principles of the United Nations Charter of 1945 and international law'.

At the same time, international law, including the case law of other courts, is not expressly part of the applicable law of the CJEU, unlike the reference to other 'judicial decisions' in Article 38 of ICJ Statute.⁷ Neither the Statute of the CJEU nor its Rules of Procedure refer to what law can be applied by the Court.

Over 30 CJEU Judgments between 1955 and January 2019 have directly cited the ICJ.⁸ Citations have also appeared in opinions of the Advocate-General.

⁵ Court of Justice of the European Union, 'The Court of Justice in the legal order of the European Union', https://curia.europa.eu/jcms/jcms/Jo2_7024/en/#competences, accessed 18 May 2019.

⁶ Emphasis added.

⁷ The main treaties stipulate the jurisdiction of the CJEU (Consolidated Versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) 2016/C 202/01, Part Six, Title I, Chapter 1, Section 5; Consolidated Version of the Treaty Establishing the European Atomic Energy Community, Title III, Chapter 2, Section 4) but do not mention the 'applicable law' as such.

⁸ Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs* [2018] ECLI:EU:C:2018:118, paras 38, 41; Case C-104/16 P *Front Polisario* (n 7), paras 28, 29, 88, 91, 104–105; Case T-512/12 *Front Polisario* (n 8), paras 7, 8, 9, 206, 208; Joined Cases C-464/13 and C-465/13 *Europäische Schule München v Silvana Oberto and Barbara O'Leary* [2015] ECLI:EU:C:2015:163, para 61; Case C-179/13 *Raad van bestuur van de Sociale verzekeringsbank v LF Evans* [2015] ECLI:EU:C:2015:12, para 36; Joined Cases T-208/11 and T-508/11, *Liberation Tigers of Tamil Eelam (LTTE) v Council of the European Union* [2014] ECLI:EU:T:2014:885, para 69; Case T-468/08 *Tisza Erőmű kft, formerly AES-Tisza Erőmű kft v European Commission* [2014] ECLI:EU:T:2014:235, para 321; Case C-466/11 *Gennaro Currà and Others v Bundesrepublik Deutschland* [2012] ECLI:EU:C:2012:465, paras 6, 7, 20; Case C-347/10 *A. Salemink v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* [2012] ECLI:EU:C:2012:17, para 32; Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-13755, para 104; Joined Cases C-402/05

The most recurrent legal issue that the CJEU has referred to is the ICJ's interpretation of the principle of good faith.⁹ The next most recurrent clusters

P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351, para 88; Case T-231/04 *Hellenic Republic v Commission of the European Communities* [2007] ECR II-00063, paras 2, 85; Case C-459/03 *Commission of the European Communities v Ireland* [2006] ECR I-04635, para 15; Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2005] ECR II-03533 paras 233, 234, 282; Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-03649, paras 183, 184, 231; Case T-353/00 *Jean-Marie Le Pen v European Parliament* [2003] ECR II-01729, para 61; Case C-37/00 *Herbert Weber v Universal Ogden Services Ltd* [2002] ECR I-02013, para 34; Case T-196/99 *Area Cova, SA and Others v Council of the European Union and Commission of the European Communities* [2001] ECR II-03597, para 7; Case C-162/96 *A Racke GmbH & Co v Hauptzollamt Mainz* [1998] ECR I-03655, paras 24, 50; Case T-115/94 *Opel Austria GmbH v Council of the European Union* [1997] ECR II-02739, para 90; Case T-572/93 *Odigitria AAE v Council of the European Union and Commission of the European Communities* [1995] ECR II-02025, para 4; Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others* [1994] ECR I-03087, paras 35, 49; Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] ECR I-06019, para 10; Joined Cases C-138/81 and 139/81 *Directeur des Affaires Maritimes du Littoral du Sud-Ouest and Procureur de la République v Javier Marticorena-Otazo and Manuel Prego Parada* [1982] ECR 03819, pp. 3831, 3832; Case C-181/80, *Procureur général près la Cour d'Appel de Pau and others v José Arbelaiz-Emazabel* [1981] ECR 02961, p 2974; Ruling 1/78 *Ruling delivered pursuant to the third paragraph of Article 103 of the EAEC Treaty - Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports* [1978] ECR 02151, pp. 2154, 2155 and para 10, p. 2169; Case C-3/76 *Cornelis Kramer and others* [1976] ECR 01279, p. 1290; Case C-37/74 *Chantal Van den Broeck v Commission of the European Communities* [1975] ECR 00235, para 2 (a), p. 240; Case C-48/69 *Imperial Chemical Industries Ltd v Commission of the European Communities* [1972] ECR 00619, para 1 (A) (a) p. 624, para 1 (B) (b) (aa) p. 628, 629, para (D) (c) (aa) p. 633; Case C-52/69 *J. R. Geigy AG v Commission of the European Communities* [1972] ECR 00787, para 1 (A) (b) page 794, para 1 (B) (a) p. 796, 797, para 1 (C) p. 798, para 1 (D) (a) p. 800, para 2 p. 803; C-5/55-ITRP *Associazione Industrie Siderurgiche Italiane (ASSIDER) v High Authority of the European Coal and Steel Community* [1955] ECR 00263, para 3, p. 142.

⁹ *Tisza Erőmű kft, formerly AES-Tisza Erőmű kft v European Commission*, *ibid*, para 321; *Hellenic Republic v Commission of the European Communities*, *ibid*, para 85; *Opel Austria GmbH v Council of the European Union*, *ibid*, para 90. See also Case C-104/16 P *Front Polisario*, *ibid*, para 3.

are law of the sea;¹⁰ the relationship between the UN Charter and treaties;¹¹ the customary status of treaties; and issues of territory, sovereignty and recognition.¹²

A typical citation appears in *Hellenic Republic v Commission of the European Communities*. This case concerned an agreement between the Commission and several Member States, including Greece, on the sharing of costs relating to the housing of representations in the Commission's offices in Abuja, Nigeria. Having decided that Greece had not paid its share of the costs according to the agreement, the Commission proceeded to recovery by offsetting the relevant sums. Greece brought an action for annulment against the act of offsetting and argued, *inter alia*, that it was not bound by the agreement in question since it had not ratified it. The Court ruled that, as well as the act of ratification, Greece's conduct and more particularly the expectations that its conduct led others to entertain were also relevant in assessing the case:¹³

In that regard, the Court would point out that the principle of good faith is a rule of customary international law, the existence of which has been recognised by the Permanent Court of International Justice [...] (*German interests in Polish Upper Silesia*), and subsequently by the International Court of Justice and which, consequently, is binding in this case on the Community and on the other participating partners.

That principle has been codified by Article 18 of the Vienna Convention of 23 May 1969 on the Law of Treaties, [...]

It should also be noted that the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which, according to the case-law, forms part of the Community legal order (Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, para 93).

Three features of this citation may be highlighted. First, the ICJ is cited by the CJEU for a rule of CIL without the CJEU conducting its own examination of state practice and *opinio juris*. It cites the ICJ as an indicator of the state

¹⁰ *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* (n 7), para 10; *Herbert Weber v Universal Ogden Services Ltd* (n 7), para 34, cited by Judge Allan Rosas, 'The European Court of Justice and Public International Law, Meeting of the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI)' (23 March 2018), 9 <https://rm.coe.int/statement-delivered-by-judge-allan-rosas-at-the-55th-cahdi-meeting-55t/16807b3b04>, accessed 19 May 2019.

¹¹ *A Racke GmbH & Co v Hauptzollamt Mainz* (n 8), paras 24, 50, cited by Judge Allan Rosas, *ibid*.

¹² Case C-104/16 P *Front Polisario* (n 7), paras 28, 88, 91, cited by Judge Allan Rosas, *ibid*.

¹³ *Hellenic Republic v Commission of the European Communities* (n 8), paras 85–87.

of public international law.¹⁴ Second, a link is made to an international treaty – the Vienna Convention on the Law of Treaties. Third, and importantly, the CJEU draws a link back to its own case law and the Community legal order.

Another illustration of citation techniques is found in the *Wightman* case¹⁵ on whether Article 50 could be unilaterally revoked. In that case, the CJEU had the opportunity to deliver a judgment resting on international law principles, but it instead asserted its central role in the European legal order.¹⁶ It stated:¹⁷

[...] it must be borne in mind that the founding Treaties, which constitute the basic constitutional charter of the European Union [...] established, unlike ordinary international treaties, *a new legal order, possessing its own institutions*, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para 157 and the case-law cited).

According to settled case-law of the Court, that autonomy of EU law with respect both to the law of the Member States and to international law *is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the very nature of that law*. EU law is characterised by the fact that it stems from an independent source of law, namely the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally as well as binding its Member States to each other (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, para 33 and the case-law cited).

This reasoning represents what Takis labels ‘autonomy’ as a ‘self-referential blueprint’.

Interestingly, the Advocate-General’s opinion had based its reasoning on the substance of the Vienna Convention on the Law of Treaties and cited the

¹⁴ Judge Allan Rosas (n 10), 9.

¹⁵ Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:999.

¹⁶ Oliver Garner, ‘Case C-621/18, *Wightman v Secretary of State for Exiting the European Union*: The European Court of Justice confirms that Article 50 notification can be unilaterally revoked’ (*European Law Blog*, 11 December 2018) <https://europeanlawblog.eu/2018/12/11/case-c-621-18-wightman-v-secretary-of-state-for-exiting-the-european-union-the-european-court-of-justice-confirms-that-article-50-notification-can-be-unilaterally-revoked/>, accessed 18 May 2019.

¹⁷ *Andy Wightman and Others v Secretary of State for Exiting the European Union* (n 15), paras 44–45 (emphasis added).

ICJ.¹⁸ By contrast, the judgment's starting point is the specific constitutional features of the EU, with its reasoning firmly grounded within EU law. The provisions of the Vienna Convention are only cited in corroboration of the main argument, and even then they are explicitly hooked to the source of EU law through their utilisation in the preparatory work of the Treaties.¹⁹

3. THE ICJ'S POSTURE TOWARDS THE CJEU

Strikingly, only one ICJ Judgment has cited the CJEU since 1946.²⁰ The ICJ has traditionally been reluctant to cite the case law of other courts, as it considers its role as the principal judicial organ of the UN as setting itself apart. However in the last two decades it has started to cite decisions of international and regional courts and arbitral tribunals.²¹

The only ICJ case in which the Court has referred to a case of the CJEU was the *Application of the Interim Accord of 13 September 1995*.²² The ICJ held that Greece's objections to the Former Yugoslav Republic of Macedonia's ('FYROM') application for membership of the North Atlantic Treaty Organization ('NATO') breached Greece's obligations under international law. Specifically, Greece violated Article 11(1) of the Interim Accord with the FYROM of 13 September 1995, which was intended to improve the strained relations between the two states and establish a roadmap for the resolution of the underlying dispute over the official name of the FYROM. The ICJ's judgment did not determine the controversial naming issue that has long divided Greece and the FYROM.²³

In its Judgment, the ICJ cited Case 10/61 *Commission v Italy* and Case C-249/06 *Commission v Sweden*.²⁴

Turning to the Respondent's interpretation of Article 22 [of the Interim Accord], the Court notes the breadth of the Respondent's original contention that its 'rights' under a prior agreement (in addition to its 'duties') take precedence over its obliga-

¹⁸ Opinion of -G Campos Sánchez-Bordona (4 December 2018) (1), points 63–85.

¹⁹ Garner, (n 16).

²⁰ Citations have also appeared in dissenting and separate judicial opinions.

²¹ See e.g., Vladyslav Lanovoy, 'The Authority of Inter-state Arbitral Awards in the Case Law of the International Court of Justice' (2019) 32(3) *Leiden Journal of International Law* 561.

²² *The former Yugoslav Republic of Macedonia v Greece*, Judgment of 5 December 2011, [2011] ICJ Rep 644, para 109.

²³ Following a compromise under which Greece lifted its objections to Macedonia joining NATO and the EU, and ratification by the parliaments of both states, the Republic of North Macedonia became the official name in February 2019.

²⁴ Case 10/61 *Commission v Italy* [1962] ECR I, 10 and Case C-249/06 *Commission v Sweden* [2009] ECR I-1348, para 34, cited in *The former Yugoslav Republic of Macedonia v Greece* (n 21), para 109 (emphasis added).

tion not to object to admission by the Applicant to an organization within the terms of Article 11, paragraph 1. That interpretation of Article 22, if accepted, would vitiate that obligation, because the Respondent normally can be expected to have a 'right' under prior agreements with third States to express a view on membership decisions. The Court, considering that the parties did not intend Article 22 to render meaningless the first clause of Article 11, paragraph 1, is therefore unable to accept the broad interpretation originally advanced by the Respondent [Greece]. In this regard, *the Court notes that the Court of Justice of the European Communities [...] has interpreted a provision of the Treaty establishing the European Economic Community which states that 'rights and obligations' under prior agreements 'shall not be affected by' the provisions of the treaty. The European Court has concluded that this language refers to the 'rights' of third countries and the 'obligations' of treaty parties, respectively* (see Case 10/61 *Commission v Italy* [1962] ECR, p. 10; see also Case C-249/06 *Commission v Sweden* [2009] ECR I-1348, para. 34).

The citation is matter of fact, technical and descriptive. There is no comment from the ICJ on the weight to be accorded to the CJEU case law.

4. WHAT EXPLAINS THE POSTURE OF THE CJEU?

Three factors help explain the posture of the CJEU to international law as represented by its citation of ICJ case law: its institutional features, its sense of identity, and the distinction between jurisdiction and applicable law.

4.1 Institutional Features

Several institutional features of the CJEU militate against an extensive and proactive dialogue with international law.

First, the CJEU does not have a provision such as Article 38(1)(d) of the ICJ Statute providing that judicial decisions are a secondary source of law. It is entirely possible for them not to even consider a relevant judicial decision. Second, the CJEU will not necessarily hold an oral hearing or obtain an official opinion from the Advocate General, which limits the opportunities for an exploration of international law issues.²⁵ Third, the CJEU does not publish separate opinions, which makes it difficult to assess whether in practice international law issues were discussed. Fourth, there is a large volume of cases which limits the amount of time and energy that can be allocated to the consideration

²⁵ Arts 20, 53 and 59 of the Statute of the CJEU; Art 76 of the Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013, 65) and on 19 July 2016 (OJ L 217, 12.8.2016, 69); Art 252 TEU and TFEU (ex Art 222 TEC).

of international law and efforts to integrate it into the jurisprudence.²⁶ Finally, the Court's location in Luxembourg rather than the 'international legal capital' of The Hague restricts opportunities for judicial exchanges in person.

In 2006, the then President of the ICJ, Judge Rosalyn Higgins, referred to the burgeoning of international courts and tribunals over the preceding decades. She noted that '[w]e are forging cordial relationships with each other. The Court has set up an informal system of exchange whereby judges at the ICTY and ICC receive summaries and/or relevant excerpts of our cases that address legal questions of particular interest, and vice versa'.²⁷ President Higgins observed:

The authoritative nature of ICJ judgments is widely acknowledged. It has been gratifying for the International Court to see that these newer courts and tribunals have regularly referred, often in a manner essential to their legal reasoning, to judgments of the ICJ with respect to questions of international law and procedure. Just in the past five years, the judgments and advisory opinions of the ICJ have been expressly cited with approval by the International Tribunal for the Law of the Sea, the European Court of Human Rights, the European Court of Justice, the United Nations Commission on Human Rights, the Inter-American Commission on Human Rights, the International Centre for Settlement of Investment Disputes, the International Criminal Tribunal for the former Yugoslavia, and arbitral bodies including the Eritrea-Ethiopia Claims Commission. The International Court, for its part, has been following the work of these other international bodies closely.

In 2007, she explained to the legal advisers of UN Member States:²⁸

I remain convinced that so-called 'fragmentation of international law' is best avoided by regular dialogue between courts and exchanges of information. A detailed programme of co-operation between the ICJ and other international judicial bodies is now in place. We have an especially advanced programme of co-operation with the International Criminal Tribunal for the former Yugoslavia (ICTY).

²⁶ 37,127 judgments and orders have been delivered between 1952 and January 2019, of which roughly 21,703 by the Court of Justice, 13,875 by the General Court (since 1989) and 1,549 by the Civil Service Tribunal (2005–2016): CJEU website, https://curia.europa.eu/jcms/jcms/P_80908/en/, accessed 18 May 2019.

²⁷ HE Judge Rosalyn Higgins, President of The International Court Of Justice, 'Speech to The General Assembly of The United Nations' (26 October 2006), 7 <https://www.icj-cij.org/files/press-releases/9/13149.pdf>, accessed 18 May 2019.

²⁸ HE Judge Rosalyn Higgins, President of The International Court of Justice, 'Speech At The Meeting Of Legal Advisers Of The Ministries Of Foreign Affairs' (29 October 2007), 3–5 <https://www.icj-cij.org/files/press-releases/7/14097.pdf>, accessed 18 May 2019.

The CJEU was not part of the programme of cooperation among the courts, most of which were based in The Hague, with the exception of ITLOS and the European Court of Human Rights.

4.2 Sense of Identity

The second factor is that the CJEU has tended not to see itself as an *international* court, but rather as a constitutional or supreme court in a supranational system. As mentioned above, the CJEU is not part of the inter-court dialogue set up by the ICJ. However, the CJEU does regularly meet with national supreme and constitutional courts. The CJEU prefers to act as a ‘protectionist domestic court’ rather than committing itself to international dialogue with international law courts.²⁹

President Lenaerts has described the CJEU as ‘the guarantor of the rule of law within the EU, whose role is, in effect, to act as both the Constitutional and Supreme Court of the European Union’.³⁰ He has also defined ‘autonomy’ as the ‘European Union legal system functioning as a self-referential, complete legal system’.³¹

The Court of Appeal of England and Wales had cause to consider the role of the CJEU in a case on state immunity:

We accept that the CJEU’s primary role is to decide matters of EU law. However, its role with regard to international law is just like that of a domestic court. It may be necessary for the CJEU – or a domestic court – *to decide directly or indirectly a question of international law in order to decide disputes properly brought before it* (see, for example, Case C-466/11 *Curra v. Bundesrepublik Deutschland*, 12 July 2012 (Third Chamber) at [18]).³²

²⁹ Szilard Gaspar-Szilagi, ‘The CJEU: An Overzealous Architect of the Relationship between the European Union Legal Order and the International Order’ [2016] *Revista de Drept Constitutional* 44, 63.

³⁰ Koen Lenaerts, ‘The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection’ (Solemn hearing for the opening of the Judicial Year, 26 January 2018) https://www.echr.coe.int/Documents/Speech_20180126_Lenaerts_JY_ENG.pdf, accessed 18 May 2019.

³¹ Koen Lenaerts, ‘Keynote Speech’ (III LAWTTIP Conference: EU Law, Trade Agreements, and Dispute Resolution Mechanisms: Contemporary Challenges, King’s College London, 21–22 March 2019) https://www.youtube.com/watch?v=qBOepzvPB_Y, accessed 18 May 2019.

³² *Benkharbouche & Anor v Embassy of the Republic of Sudan* (Rev 1) [2015] EWCA Civ 33, [2016] QB 347, para 52.

In deciding such a question of international law, the CJEU has the power to do more than make a passing citation to the ICJ – it could engage in dialogue, but its identity is closer to that of a domestic court rather than an international one.

4.3 Jurisdiction v Applicable Law

The third factor for the CJEU's posture towards international law is the relationship of the concepts of jurisdiction and applicable law.

The logical sequence of decision-making is:

- (1) Jurisdiction;
- (2) Applicable law;
- (3) Interpretation;
- (4) Application.

But these categories are not neat: 'application' often inevitably involves some measure of 'interpretation';³³ and provisions on applicable law and jurisdiction can easily be conflated. These concepts need to be kept distinct if the Court is not to exceed, or be thought to exceed, the jurisdiction conferred upon it by the parties to the dispute before it.

The CJEU, highly aware of its jurisdictional reach, keeps a tight rein on its applicable law. The *Mox Plant* dispute was illustrative of this. In this dispute, three linked sets of litigation arose out of the UK's decision to authorise the construction and operation of a plant to make mixed oxide fuel ('MOX'): first, proceedings instituted by Ireland against the UK under OSPAR Convention;³⁴ second, proceedings instituted by Ireland against the UK under the 1982 United Nations Convention on the Law of the Sea;³⁵ and third, proceedings instituted by the European Commission against Ireland before the European Court of Justice complaining that it had breached Article 292 Treaty estab-

³³ 'Art. 19. Interpretation of Treaties. Draft convention on the law of treaties' (1935) 29 AJIL Supp2 937, 938. There is, however, a recognised distinction between the two processes. Interpretation is the process of determining the meaning of a text; application is the process of determining the consequences which, according to the text, should follow in a given situation.'

³⁴ *Mox Plant Case (Ireland v United Kingdom)*, PCA, Order No 3 (24th June 2003) 126 ILR 310, (2003) 42 ILM 1187, ICGJ 366 (PCA 2003); and *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v United Kingdom)*, PCA, Final Award, (2nd July 2003) XXIII RIAA 59, (2003) 42 ILM 1118, ICGJ 377 (PCA 2003).

³⁵ *Mox Plant Case (Ireland v United Kingdom)*, ITLOS Case No 10, ICGJ 343 (ITLOS 2001), Order, Request for Provisional Measures (3rd December 2001); and *Mox Plant Case (Ireland v United Kingdom)*, PCA, Annex VII Tribunal, Order No 6 (6th June 2008).

lishing the European Community,³⁶ which required EC Member States not to submit disputes concerning EC law to a body other than the European Court of Justice.³⁷

The European Court of Justice found that it had *exclusive jurisdiction* over the interpretation or application of mixed agreements like the UN Convention.³⁸ It was a robust assertion of jurisdiction matched by the application of European law to an international dispute, as seen in *Wightman*.

A more unifying approach would have been to safeguard the integrity of exclusive jurisdiction while taking a broad approach to applicable law, including using international law as an aid in the interpretation of European law.

5. CONCLUSIONS

In the relationship of the EU and its judicial branch to general international law, we do not see *genuine* fragmentation, but we also do not observe *genuine engagement*. This lack of engagement by the CJEU with the case law of the ICJ is not a product of shyness, but rather of a strong sense of self-confidence and a concept of autonomy that equates to it being self-referential.

The EU and the CJEU do not, however, exist in a vacuum. Although the CJEU is the guardian of the European legal order, it also has a role in the international legal order and being self-referential should not require self-containment. As Bruno Simma, a former ICJ Judge, has observed: 'The EU's claim to autonomy is not problematic to the unity of the system since it conforms to a fundamental rule thereof, namely the *lex specialis* rule.'³⁹ A claim to autonomy is not incompatible with a horizontal, decentralised international legal system or with a constructive dialogue among courts.

³⁶ Case C-459/03 *Commission of the European Communities v Ireland* [2006] ECR I-04635.

³⁷ Robin R Churchill, 'Mox Plant Arbitration and Cases', *The Max Planck Encyclopedia of Public International Law* (June 2018) <http://opil.ouplaw.com/home/EPIL>, accessed 19 May 2019.

³⁸ Ireland was therefore in breach of Art 292 EC Treaty by instituting proceedings against the UK before the Annex VII Tribunal (*Commission v Ireland* (n 36), paras 80–139).

³⁹ Bruno Simma and Dirk Pulkowski, 'Of Planets and The Universe: Self-Contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483, 500.