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The autonomy of the EU legal order and the law-making activities of international organizations

Some examples regarding the Council most recent practice

Jeno Czuczai[(*)]

I. Introduction

The EU is an autonomous legal order: this is a very early doctrine, established by the Court of Justice of the EU already in early 60s in the famous Costa v. E.N.E.L case, when the Court said:

'*By contrast with ordinary international treaties , the EEC Treaty has created its own legal system, which , on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own legal capacity and capacity of representation on the international plan, and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves. ….the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question'* [1](emphasis added).

It is interesting to note that three years later, in 1967, in its first ever ruling on the European Economic Community, the German Federal Constitutional Court also described the Community legal order as follows:

[(*)]The author is legal adviser in the Legal Service of the Council of the EU and Professor in the College of Europe, Brugge. This article is mainly based on my presentation at the international CLEER conference on "The influence of international organizations on the EU: the EU as an autonomous legal order?", held in The Hague on 5 November 2010, but was further inspired also by my intervention at the College of Europe conference on "The Institutional System of the Union-Two Years after the Entry into Force of the Lisbon Treaty: towards a New Balance?", held in Brugge on 21 November 2011. The views and opinions, expressed in this contribution are personal and exclusively those of the author and cannot be attributed at all to the Council of the EU or to its Legal Service. The handscript was principally closed down in December 2011.

[1] Costa v. ENEL /Case 6/64/ in 'The relationship between EC law and national law. The cases' /Ed: A. Oppenheimer/, CUP 1994, Cambridge, pp. 66-67.

"*The Community is not a state and not even a federal state. Rather it is a Community of a special nature in the process of an ever closer integration, in inter-governmental institution within the meaning of article 24/1/ of the Basic law, to which the Federal Republic of Germany, in common with other Member States has transferred certain sovereign rights. A new public authority has thereby been created, which is* ***autonomous*** *and independent vis-à-vis the public authorities of each Member State. Consequently its acts do not require approval /ratification/ by the Member States, nor can they be annulled by those States. The EEC Treaty to a certain extent constitutes the Constitution of the Community,….it forms its own legal order which is part of neither public international law nor the national law of the Member States. Community law and municipal law of Member States are two internal legal orders which are distinct and different from each other….*"[2](emphasis added).

It is generally believed that while the principle of the autonomy of the EU legal order, in the sense of constitutional and institutional autonomy that is to say what concerns the autonomous decision-making of the EU, has been clearly strengthened by the most recent jurisprudence of the Court of Justice (eg. Mox-plant[3], Intertanko or the Kadi/Al Baraakat judgements or the Opinion 1/2009 of the CJEU etc.) as well as, in my opinion, in many aspects by the Treaty of Lisbon, it is still valid to add that the principle of a favourable approach, stemming from the Court jurisprudence, for the enhanced openness of the EU legal order to international law has remained equally important for the EU[4].

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[2] See: the annotated judgment and the original reference to the BverfG decision: idem in fn 2, pp. 412-413.

[3] In its ruling C-459/2003 Commission v. Ireland the Court, for example, at paragraph 123 stressed: '*The Court has already pointed out that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under article 220 EC. The exclusive jurisdiction of the Court is confirmed by article 292 EC , by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein. /see, to that effect, Opinion 1/91 /1991/ ECR I-6079, paragraph 35, and Opinion 1/2000 /2002/ ECR I-3493, paragraphs 11-12/. It should be stated at the outset that the Convention precisely makes it possible to avoid such a breach of the Court's exclusive jurisdiction in such a way to preserve the autonomy of the Community legal system*'.(emphasis added). See still: Case C-308/06, Intertanko, (2008) ECR I-4057, paragraphs 39 et seq; Case C-402/05P Kadi v. Council and Commission, (2008) ECR I-6351, paragraphs 285 et seq, or Opinion 1/2009 of 8 March 2011, not yet reported etc.

[4] See: Case 181/73 Haegeman (1974) ECR 449, or from the most recent jurisprudence of the CJEU Case C-386/08, Brita, judgment of 25 February 2010, not yet reported, as well as Case C-366/10 Air Transport Association of America et alts v. Secretary of State for Energy and Climate Change /hereinafter: ATAA case/, handed down on 21 December 2011, not yet reported, in particular paragraphs 101., 122. For the last case see still: M. Gehring: 'Air Transport Association of America v. Energy Secretary before the ECJ: Clarifying direct effect and guidance for future instrument design for a green economy in the EU', University of Cambridge, Legal Studies Research Paper Series, paper No. 12/2012, electronic version can be loaded down at http://www.law.cam.ac.uk/ssrn/, especially Chapter III.

On the other hand, it should be also seen that in a globalized world, and following the increased role of the EU as an international actor, its indispensable and crucial role concerning the creation of world (legal) order in many policy fields (for example let's think about the G20 issues, the global economic and financial crisis, the role of the EU in promoting and protecting human rights worldwide, the implementation of the multilateral or regional conventional law, developed in the framework the UN (e.g. in the field of agriculture or environment etc) or what concerns the Kyoto process on climate change or the conservation of marine biological resources at international level etc), it seems reasonable and justified to submit that the influence, for example, of the law-making activities of the main stakeholder international organizations in the mentioned policy-areas on the EU (especially on the development of its constantly evolving legal order) or vice-versa the influence of the EU law-making practice on these international organizations is significant, in many aspects mutually interdependent and more and more remarkable. This tendency of the 21st century doesn't mean, however, in my view, that the notion of the autonomy of the EU legal order would have been weakened by this increasing interaction between international law and EU law over the passed years.

This contribution is going to demonstrate and prove these departuring points by giving some concrete examples from the most recent practice of the Council (all occuring either in the second half of 2009 or after the entry into force of the Lisbon Treaty), and which relate to two very important policy areas in the EU, namely the protection of human rights and the Common Fishery Policy.

II. The post-Lisbon legal context for interactions between international law and EU law :

Before entering into the detailed presentation on the concrete examples, I would like to recall some of the main governing pillars of the relationship between international law and EU law, developed on the one hand in the Court case law during the last fifty years, and on the other hand clearly strengthened in many provisions of the Lisbon Treaty:

- Article 216 TFEU shall apply, including that "*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*" (emphasis added);

- it is also to be noted that in accordance with Article 3(5) TEU : "(the Union shall contribute…) to *the strict observance and the development of international law*, including respect for the principles of the United Nations Charter" as well as that Article 21(1), first paragraph, TEU mentions among the guiding principles, based on which the external action of the EU on the international scene shall be developed, the: "*respect for the principles of the United Nations Charter and international law*" (emphasis added);[5]

- '*the European Community must respect international law in the exercise of its powers /*[6] *including applicable customary international law/*'[7], and the customary principle of good faith.[8] The only limitation is the protection of or the respect for the principle of the autonomy of EU decision-making or the assurance of the full implementation of an important EU policy in the territory of the EU (e.g. environmental protection)[9];

- where it is apparent that the subject matter of an international agreement falls partly within the competence of the Union and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the Union institutions, both in the process of negotiation and conclusion and in the fulfilment of commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Union and its Member

[5] This is further amplified by Declaration No 13, attached to the Lisbon Treaty, on Common Foreign and Security Policy, which provides that: '/The Conference/ *stresses that the EU and its Member States will remain bound by the provisions of the Charter of the UN and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security*'.

[6] See: C-286/1990 Poulsen and Diva Navigation, (1992) ECR I-6019, paragraph 9 or T-115/1994 Opel Austria Gmbh v Council, /1997/ ECR II-39, paragraphs 90., 93. Similarly, see: Joined cases T-186/1997 etc. Kaufring and others v Commission, (2001), ECR II- 1337, paragraph 237 or C-327/1991 French Republic v Commission, (1994) ECR I-3641, paragraph 25.

[7] See: inter alia Case C-61/94 Commission v. Germany (1996) ECR I-3989. It should be noted that in the Case C-366/10 ATAA case the Court of Justice of the EU has confirmed the EU law relevance of the basic principles of customary international law of the sea and those of the customary international air law as well, see in particular paragraphs 45., 104-106., 111.

[8] See: Case C-308/06 Intertanko fn. No 4 above. paragraph 52.

[9] See: Case C-366/10 ATAA case at paragraph 128, where the CJEU stressed that: '..*as EU policy on the environment seeks to ensure a high level of protection in accordance with Article 191(2) TFEU, the EU legislature may in principle choose to permit a commercial activity, in this instance air transport, to be carried out in the territory of the EU only on condition that operators comply with the criteria that have been established by the EU and are designed to fulfil the environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the EU is a signatory, such as the Framework Convention and the Kyoto Protocol.*"(emphasis added). From the secondary literature on this case see for example: L. Clément-Wilz:'Le system européen d'échange de quotas d'émission de gaz á effet de serre face aux regles du droit international, R.A.E.-L.E.A., 2011/4, pp. 859 et seq.

States.[10] The duty of sincere cooperation is further strengthened in the Lisbon Treaty under Article 4(3) TEU.

- the autonomy of the EU decision-making in terms of international treaty-making is assured by Article 218 TFEU and its practice. The Council, on behalf of the EU, (in most of the cases and in fact as a general rule with some exemptions, but just as far as the conclusion phase is concerned, after obtaining the consent of the European Parliament, which is a novelty, introduced by the Lisbon Treaty etc) undertakes in an autonomous manner obligations, which thereafter will bind on the EU (Article 218(4)-(6) TFEU) (emphasis added).

Finally, it should be stressed that it is also the Council, on behalf of the EU, and following the applicable EU internal rules, which is entitled to decide on whether or not to make a reservation to any of the concrete provisions of an international treaty, to which the EU as such wants to accede, and, if yes, when exactly (at the time of signature or later etc)?[11] Similarly, it is the Council, which shall decide on whether or not to terminate the provisional application of an international agreement in accordance with Article 25/2/ of the Vienna Convention of 1969. Last but not least, it is also the Council, in my view, which shall decide on whether or not to object to a recommendation of an international organization, which, if become legally binding under international law, would impose obligations on the Union. All these interesting situations of the existing legal framework are going to be demonstrated by concrete examples later in this contribution.

III. The Council practice concerning its autonomous decision-making powers in international treaty-making:

In order to show how important is the role of the Council in maintaining the institutional balance in international treaty-making process by the EU, I would like to bring two interesting examples, which raised recently a number of practical legal questions:

[10] See: inter alia Case C-246/07 Commission v. Sweden, judgment of 20 April 2010, not yet reported.
[11] It should be noted that the Vienna Convention of 1969 on the law of international treaties shall *mutatis mutandis* also apply to the EU as customary international law despite the fact that the EU as such is not party to this multilateral Convention /see: C-162/1996 Racke v. Hauptzollamt Mainz, (1998) ECR I-3655, paragraphs 45-46./.

A., The first example is about a reservation, made on behalf of the European Community, to Article 27/1/ of the UN Convention on the rights of persons with disabilities, which provision provides for equal treatment of persons with disabilities in public employment, including their employment by armed forces**.** Such a reservation was proposed by the Commission to be made in an Annex attached to the Council decision on the conclusion of this UN Convention, by the European Community, because of Article 3/4/ of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation[12], which stipulates that "Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces". This is because in some Member States disabled persons can be employed by armed forces, while in some others they cannot be.

In addition, some Member States still argued that as regards the employment of disabled persons by armed forces, there is in fact no Community competence, therefore, the European Community as such cannot make a reservation to any provision of an international agreement dealing specifically with that issue, because this area clearly falls under Member States competence. Yet, they advanced the point that the EU undertook in the past, within the framework of the United Nations, not to make any reservation to UN multilateral human rights conventions.[13]

Finally, the reservation was made by the Council, on behalf of the Community, because otherwise, after the entry into force of the Convention vis-à-vis the Community and its Member States, the derogation possibility, stemming from EU law, namely from Article 3(4) of the Directive, could not be enjoyed by the concerned Member States, and thus the aim of the reservation was, at least in my view, also to protect the autonomous nature of the EU legal order in this respect.[14]

B., The second example relates the interpretation of Article 218(5) TFEU[15], in particular the right of the Council to authorise the provisional application of an agreement, if found necessary, before its entry into force. The facts: following the

[12] OJ L 303, 2.12.2000, p. 16.
[13] See: in more general terms: A. Rosas: 'Is the EU a human rights organization?', CLEER Working Papers 2011/1.
[14] See: Council Decision No 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community , of the UN Convention on the rights of disabled persons, OJ L 23, 27.1.2010, p. 35, especially on p. 61.
[15] Article 218(5) TFEU provides that 'The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force'.

adoption by the Council of restrictive measures against the Republic of Guinea because of the tragic events of 28 September 2009[16], when the Government forces in the capital city of Guinea opened fire on protesting crowds resulting in over 150 deaths, it was also raised how the EU could give an end to the Fisheries Partnership Agreement (FPA), signed by the EU with Guinea, but which was at that time, however, only provisionally applied subject to a later conclusion.[17] In general, the nature of the FPAs is that under such agreements the EU pays substantial amount of money to third states in exchange of fishing opportunities in their waters. These agreements are concluded only by the EU because of the exclusive external competence of the EU in this field. It was, however, not the intention of the EU after September 2009 to continue this relationship with Guinea, a country where human rights were so seriously violated. At the beginning it was argued that no Council involvement was needed, because Article 25/2/ of the Vienna Convention of 1969 was clear, and the required unilateral notification on the termination of the provisional application towards the Guinean authorities could practically be made by the Commission, on behalf of the EU. Finally, the Council, in full agreement with the Commission, decided otherwise, and based on Article 218(5) TFEU, adopted a decision on the termination of the provisional application in accordance with the autonomous decision-making of the EU and also by respecting for international law[18].

Under Article 2 of this Council Decision, the President of the Council was authorised to designate the person, empowered to notify the Republic of Guinea, in accordance with Article 25(2) of the Vienna Convention on the Law of Treaties, that the European Union no longer intended to become a party to the FPA between the European Community and the Republic of Guinea. That notification was to be made in the form of a letter, attached to the Council Decision. In practice, the President of the Council authorised the competent Commissioner to carry out the notification, on behalf of the EU, by mean of forwarding the subject letter to the competent Guinean authorities.

IV. The norms-setting activities of international organizations and their possible typology from a practical point of view?

[16] See: Council Regulation /EU/ No 1284/2009 of 22 December 2009 imposing certain specific measures in respect of the Republic of Guinea, OJ L 346, 23.12.2009, p.26.
[17] See: Council Decision No 2009/473/EC of 28 May 2009 concerning the conclusion of an Agreement in the form of an Exchange of Letters on the provisional application of the Fisheries Partnership Agreement between the EC and the Republic of Guinea, OJ L 156, 19.06.2009, p. 31.
[18] See. Council Decision No 2009/1016/EU of 22 December 2009 repealing Decision 2009/473/EC concerning the conclusion of an Agreement in the form of an Exchange of Letters on the provisional application of the Fisheries Partnership Agreement between the EC and the Republic of Guinea, OJ L 348, 29.12.2009, pp. 53-54.

Concerning the binding effect of international treaties/conventions/agreements (hereinafter: international agreements) /which created international organizations/, especially in terms of their norms-setting activities, in my opinion, distinction should be made between self-executive and non-self-executive international agreements, as well as between international agreements, which make it possible, for example, for Regional Economic Integration Organizations to accede to them (e.g. by mean of approval of the agreement, see: later in this contribution what is written on the accession of the EU to the FAO Convention on State Port Measures etc.) and those where the conclusion of an Act of Accession, for the purpose that an entity having legal personality under international law, for example the EU as such, could become member in a given international organization, is necessary (e.g. accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms).

In both cases, the conditions on accession (or on how to become a member in a particular international organization) are accepted in an autonomous manner by the EU, following its own internal rules, which rules all are, however, based on the general principle of EU autonomous decision-making. Of course, if in such accession instruments, the EU restricts to certain extent its own autonomous decision-making, that is a freely-undertaken sovereign decision of the EU itself, the consequences of which must be later on well-respected. The most important is that such self-restriction is undertaken by the EU, following its own autonomous decision-making procedures, where the allocation of responsibilities of the different EU institutions, defined in the founding Treaties, shall be respected.

It should be also obvious that in case of **non-self-executive agreements**, and the 'law-making activities' of the international organizations, created by them (like some so-called Regional Fisheries Management Organizations (hereinafter: RFMOs), for example, the NASCO[19] etc), the transposition (or incorporation) of the measures, adopted by such organizations, into the EU legal order is legally and practically needed in order to make those international norms also binding on Union citizens, economic operators, and other individuals or legal entities within the EU[20]! In case of

[19] Established by the 1982 Convention for the Conservation of Salmon in the North Atlantic Ocean, 1338 UNTS 33.

[20] In this respect, it should be noted that the wording of such international norms/measures in most of the cases are very vague, therefore, it does not really fulfil the criteria of the principle of direct effect /*'having regard to its wording, its purpose and its nature, it contains a clear and precise obligation which*

self-executive agreements, of course, the key question is that whether there is direct effect of the international norms, adopted under such agreements in the EU legal order or not[21]? If yes, the next possible question is that with what restrictions (safeguards of constitutional nature) they shall be implemented at EU level in order to protect at the same time the autonomous nature of the EU legal order as well?

The last distinction, which from a practical point of view might be relevant , and, therefore, needs to be made is between legally binding international norms (e.g. recommendations, adopted within the framework of most of the above-referred RFMOs after the so-called objection period has expired) and those norms, which are legally not binding, so-called 'soft law' measures (guidelines, explanatory notes, code of conducts, international standards (e.g. CPM standards) for example adopted in the context of FAO, OECD, International Plant Protection Convention (IPPC), European Plant Protection Convention (EPPC), OEI (International Animal Health Organization) etc), and which international standards as such typically legally do not bind on the EU[22], nevertheless the EU takes them into account when drawing up its own internal measures/legislative and non-legislative acts in the respective fields of CAP. In this context a further complicating element could be that what is the room for manoeuvre for the EU to implement these international norms, as well as is their an 'EU public order clause', or a 'red-line' (e.g. a general constitutional principle of the EU legal order) in which case the EU in principle could even refuse at the end of the day the implementation of the legally already binding international norms or make reservations on their incorporation into the EU legal order under certain conditions?

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is not subject to the adoption of any subsequent implementing measure'/- see in this respect: Case C-366/10 ATAA case, in particular paragraphs 49-55. They are addressed to the contracting parties and not to the economic operators/individuals in the EU. Moreover, one should not forget about that somehow they should also be published in the OJ of the EU, which is also a requirement of the autonomous EU legal order /Article 297 TFEU/.

[21] According to settled case law,' *acts adopted by decision-making bodies set up under an international agreement to which the Community is a party form an integral part of the Community legal order if and when they have become binding pursuant to the rules of the organization'* /see: Case 181/1973 Haegeman /1974/ ECR 449, at paragraph 9/. Nevertheless, it is a standard practice to transpose these recommendations by EU legal acts in order to give effect to / in other words to practically implement/ the obligations, contained in those recommendations, in the EU legal order. It should be added that it also follows from the established case law that '*since they are directly linked to the agreement which they implement, measures emanating from a body, established by the agreement and entrusted with the responsibility for its implementation also form part of the Community legal orde*r' /see: C-188/91 Deutsche Shell /1993/ ECR I-363, at paragraph 17/.

[22] As a contrast see, however, with regard to the indirect legally binding effect of the food and health safety standards, adopted within the framework of the Codex Alimentarius Commission: M. D Masson-Matthee:'The Codex Alimentarius Commission and Its Standards', T.M.C. Asser Press, The Hague, 2007, in particular Chapter III.

V. **Concrete examples from the practice of the Council regarding the influence of norms-creating/setting activities of international organizations on the EU legal order**

1, The participation of the EU in the adoption process of international norms

In the last years the transposition/implementation of recommendations (decisions, regulatory measures, circulars etc. hereinafter: 'recommendation(s)'), adopted by RFMOs has raised a lot of interesting legal questions, in particular as far as the autonomous decision-making of the EU is concerned. As mentioned before, the recommendations of the RFMOs will become under international law binding on the EU provided that the so-called objection period elapses without any intervention of the EU as a contracting party. The objection procedure is well-regulated in the respective multilateral conventions, which established the different RFMOs[23]. From an EU law point of view what is really the practical question is that how the decision on objection is to be adopted, under which procedure? Is it the Council, and only the Council, of course on a proposal from the Commission, which shall decide on whether or not to object to an already adopted recommendation of an RFMO? This is a very important legal question, since if the Council so decides, of course within the established objection period, the subject recommendation (as international norm) cannot bind on the EU as such. Another interesting legal question is that how and when the EU position on the concrete draft recommendations of the RFMOs shall be defined in the bodies, established by these international RFMO conventions, and under which procedure from an EU institutional point of view? It is now generally believed that the EU position on such recommendations etc (since they are 'acts having legal effects' on the legal order of the EU as a contracting party) "shall be defined by the Council, on a proposal from the Commission, based on Article 218(9) TFEU. But, is it so obvious always in the practice too? Let's see some examples.

A., It is to be noted that concerning the international framework of fisheries management, at the moment there are cc. 15 RFMOs[24], out of which the majority

[23] The objection period to a recommendation, adopted by ICCAT (International Commission for the Conservation of Atlantic Tunas) is, for example, 6 months- see. Article VIII of the Convention. For the General Fisheries Commission for the Mediterranean (GFCM), it is 120 days, see article 5 of that Convention. For the Commission for the Conservation of Antarctic Marine Living Resources (CCMLAR), it is 90 days, see: Articles IX-XII of that Convention etc.

[24] See: Robin Churchill-Daniel Owen :The EC Common Fisheries Policy, Oxford EC Law Library, OUP 2010, Oxford, pp. 112-118 and pp. 359-375. It should be noted that the reader can find the explanations on all the abbreviations, used in this contribution, in relation to RFMOs in the Churchill-Owen handbook on EU Common Fisheries Policy pp. 113-114.

pursues extremely important norms-setting activities /including even fixing on fishing opportunities in the Convention-regulated zones and allocation of quotas among the contracting parties, or the adoption of technical, control or inspection measures etc/. These RFMOs are established by international conventions, and inter alia contain provisions on the legal nature of their norms and their entry into force etc. The EU decision-making is well-established concerning the EU position to be taken in the different RFMOs, depending, of course, on whether or not the subject measure aims at producing legal effect or not. This means in practice that within the EU there are so-called general mandates, adopted by the Council, based on article 218/9/ TFEU[25], and there are more specific ones, if it is about a very detailed, long and politically sensitive draft norm of the given RFMO. It is the European Commission, which negotiates, on behalf of the EU, on a draft recommendation, proposed in the mentioned international bodies and when the recommendation is adopted, the already mentioned objection period is opened up for the contracting parties in order to make any objection before the recommendation would become legally binding under international law.[26] The interesting legal question in practice is that who acts, on behalf of the EU, during this objection period?

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[25] See: for example Council doc No 11385/1/12 Rev 1 on the draft Council decision establishing the position to be adopted on behalf of the EU in the framework of the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea.

[26] Article 11 of the 1980 NEAFC Convention /as amended between 2004-2006/ provides: '*1.The Commission shall, without undue delay, notify Contracting parties of the Recommendations adopted by the Commission under this Convention*. ' Article 12 of the same NEAFC Convention reads: '*1. A recommendation shall become binding on the Contracting Parties subject to the provisions of this Article and shall enter into force on a date determined by the Commission, which shall not be before 30 days after the expiration of the period or periods of objection provided for in this Article. 2./a/ Any contracting party may, within 50 days of the date of notification of a recommendation adopted under paragraph 1 of Article 5, under paragraph 1 of Article 8 or under paragraph 1 of Article 9, object thereto. In the event of such an objection, any other Contracting Party may similarly object within 40 days after receiving notification of that objection. If any objection is made within this further period of 40 days other Contracting Parties are allowed a final period of 40 days after receiving notification of that objection in which to lodge objections. /b/ A recommendation shall not become binding on a Contracting Party which has objected thereto. /c/ If three or more Contracting Parties have objected to a recommendation it shall not become binding on any Contracting Party. /d/ Except when a recommendation is not binding on any Contracting Party according to the provisions of sub-paragraph /c/, a Contracting Party which has objected to a recommendation may at any time withdraw that objection and shall then be bound by the recommendation within 70 days, or as from the date determined by the Commission under paragraph 1, which ever is the later. /e/ If a recommendation is not binding on any Contracting Party, two or more Contracting Parties may nevertheless at any time agree among themselves to give effect thereto, in which event they shall immediately notify the Commission accordingly.3. In the case of a recommendation adopted under paragraph 1 of Article 6, under paragraph 2 of Article 8, or under paragraph 2 of Article 9, only the Contracting Party exercising jurisdiction in the area in question may, within 60 days of the date of notification of the recommendation, object thereto, in which case the recommendation shall not become binding on any Contracting Party. 4. The Commission shall notify the Contracting Parties of any objection and withdrawal immediately upon the receipt thereof, and of the entry into force of any recommendation and of the entry into effect of any agreement made pursuant to sub-paragraph /e/ of paragraph 2*.' (emphasis added). The similar provisions, concerning NAFO, are Articles XI/7/ and XII. It is to be noted that the Community became party to NEAFC in 1982 by Council Decision 81/608/EEC of 13 July 1981 concerning the conclusion, on behalf of the European Economic Community, of the Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries (NEAFC), OJ 1981 L 227, p.21.

It was in 2009, when for the second time in the history of the EU, the Commission seriously considered to object, on behalf of the EU, to three NEAFC (North-East Atlantic Fisheries Commission) recommendations. In early December 2009, the European Commission just wanted to inform the Council about its intention, but it did not submit any formal proposal for a Council decision to this effect, based on Article 218(9) TFEU, mainly because of the very short objection period, which was practically still at the disposal of the EU in order to make any objection (only a couple of working days left before the Christmas holidays)[27]. In principle, there could have been another legal argument in favour of that the Commission should only inform the Council , namely that based on settled case law of the Court of Justice of the EU it is the Commission who is empowered to represent the EU in the RFMOs, in the present case in the NEAFC, therefore, it should be the Commission who should lodge the objection, on behalf of the Union, based on its general negotiating mandate, given by the Council, but nobody wanted to follow this line either.[28]

The three draft NEAFC recommendations in question related to:

-conservation and management measures for deep and shallow pelagic redfish in the Irminger Sea and adjacent waters in the NEAFC Convention area in 2010,

- management measures for orange roughy in 2010 and 2011
- ban on discards in the NEAFC Regulatory area.

It goes without saying that all the three draft NEAFC recommendations had influences on the business interests of Union fishing vessels, especially the last one, which aimed at introducing a ban on discards in the NEAFC Regulatory area.

The interesting legal issue under the given circumstances was, therefore, that without a formal proposal from the European Commission (the adoption of which would have taken several weeks), of course, the Council could not adopt a formal Decision on the objection under Article 218(9) TFEU, so what to do? It was clear that a decision on whether or not to object, in the name of the EU, to the above draft NEAFC

[27] It should be noted that, according to the archives of the Council General Secretariate, on 27 February 1995 the Council adopted already –via a written procedure- a Decision on an objection to the proposal on the allocation of the TAC for Greenland halibut in NAFO (North Atlantic Fisheries Organization), in which the Council decided that an objection to the proposal on the allocation of the total allowable catches (TAC) for Greenland halibut in NAFO areas 2 and 3 for 1995 was to be presented to the Executive Secretary of NAFO under Article XII of the NAFO Convention, and authorized the Commission to notify that objection to the Executive Secretary of NAFO.

recommendations, it is in fact deciding about whether or not to undertake international obligations on behalf of the EU in this respect, and that decision clearly falls under the competence of the Council according to the autonomous decision-making institutional balance of the EU! The Council finally and due to the time pressure- with the support of the European Commission- and in the interest of the EU and its Member States adopted Council conclusions on the subject objection case, and at the same time authorised the Commission to notify the objections, on behalf of the EU, to the NEAFC Commission.

Ii is to be noted, however, that in the last point of these Council conclusions, nevertheless, the Council ' *invites the Commission to submit to it in the future in such type of objection cases a proposal for a Council Decision, as required by the Treaty on the functioning of the European Union.*' [29]

2. Implementation of international norms in the EU legal order

B., Another area, where legal issues arise in the Council practice, is the concrete implementation of the RFMOs' recommendations since they substantially influence on the EU legal order concerning conservation and management of fishery resources at EU level and in the context of the EU. Let's take as an example the new Regulation laying down a Scheme of control and enforcement applicable in the area covered by the NEAFC Convention[30]. The practical questions occurred by the fact that following the entry into force of the Lisbon Treaty, the Common Fishery Policy became an EU policy area, where the so-called ordinary legislative procedure shall apply from 1 December 2009 (Article 43/2/ TFEU), which never was the case before Lisbon. The ordinary legislative procedure, however, is very time-consuming in practice, normally in our specific area it takes 18-26 months to adopt a legislative act, whereas the implementation needs of recommendations of the different RFMOs would require for a more speedy and pragmatic procedure at EU level, taking into account the fact that these recommendations (or if one wishes to call them: international norms) they are already binding on the EU as a matter of international law (Article 216(2) TFEU). So, the real issue, which arises, is that how to implement

[28] See: Case C-405/92 'Mondiet' (1993) ECR I-6133, at paragraphs 26 et seq.
[29] See: Council doc No 17309/09, p. 4.
[30] See: Regulation (EU) No 1236/2010 of the European Parliament and the Council of 15 December 2010 laying down a scheme of control and enforcement applicable in the area covered by the

internationally already binding obligations of the EU efficiently and especially within reasonable time? For that purpose, during the legislative deliberations of the draft NEAFC Regulation, finally the two wings of the Union legislator could agree on a practical and from a legal point of view, in my view, creative solution, which is the delegated act solution (Article 290 TFEU) for future amendments of the basic Regulation.[31] The relevant Article 51 of the new NEAFC Regulation, for the first time in the post-Lisbon legal environment, provides that:

" *As far as is necessary, in order to incorporate into Union law amendments to the existing provisions of the Scheme which become obligatory for the Union, the Commission may amend the provisions of this Regulation by means of delegated acts in accordance with Article 47 and subject to the conditions set out in Articles 48 and 49, concerning:*

a; participation of Contracting Parties in the fishery in the Regulatory area as referred to in Article 5;

b; removal and disposal of fixed gear and the retrieval of lost gear as referred to in Articles 6 and 7;

c; use of VMS as referred to in Article 11;

d; cooperation and communication of information to the NEAFC Secretary as referred to in Article 12;

e; requirements for separate stowage and labelling of frozen fishery resources as referred to in Articles 14 and 15;

f; assignment of NEAFC inspectors as referred to in Article 16;

g; measures to promote compliance with the Scheme by non-Contracting Party fishing vessels under Chapter VI;

Convention on future multilateral cooperation in the North-East Atlantic fisheries and repealing Council Regulation (EC) No 2791/1999, OJ L 348, 31.12.2010, p.17 (hereinafter: NEAFC Regulation)

[31] It is to be noted that the Court in its judgment of 27 October 1992 in Case C-240/1990 /Germany v Commission/ already stressed that' *once the Council has fixed the essential rules for the matter in question in its basic Regulation, it may delegate to the Commission general authorization to adopt the detailed implementing rules without having to stipulate the essential features of the powers thus*

h; the list of regulated resources set out in the Annex.

When adopting such delegated acts, the Commission shall act in accordance with the provisions of this Regulation"[32]

Article 51 of the NEAFC Regulation shows that a considerable part of the basic act has been considered by the Union legislature as covering areas where a delegation of powers to the Commission for future amendments with the aim of implementing new but related recommendations, adopted by NEAFC, in the EU in a more efficient way was found possible and acceptable by the EU legislature for practical reasons (namely in order to speed up the implementation process at the EU level in the future).[33]

C., I should add that a similarly creative and very practical solution was also agreed upon between the Council and the European Parliament -in an early second reading agreement- after a very intensive almost two-years negotiations in the so-called GFCM implementation case. It relates the Commission proposal for a draft Regulation (EU) No ../2011 of the European Parliament and of the Council on certain provisions for fishing in the GFCM (General Fisheries Commission for the Mediterranean) Agreement area and amending Council Regulation (EC) No 1967/2006 concerning management measures for the sustainable exploitation of fishery resources in the Mediterranean Sea (hereinafter: the GFCM Regulation).[34]

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delegated and that a provision worded in general terms provides a sufficient basis for such empowerment' (emphasis added), (1992) ECR I-5383, paragraph 37.

[32] See also Recital (12) of the NEAFC Regulation.

[33] Since the entry into force of the NEAFC Regulation, one Commission Delegated Regulation entered already in force (Commission Delegated Regulation (EU) No 32/2012 of 14 November 2011 supplementing Regulation (EU) No 1236/2010 of the European Parliament and of the Council laying down a scheme of control and enforcement applicable in the area covered by the Convention on future multilateral cooperation in the North-East Atlantic fisheries, OJ L 13, 17.1.2012, p.1, and which was about an update of the Annex to the NEAFC Regulation on the list of fishery resources) and another adopted one has been submitted by the Commission to the Council and the European Parliament on 30 April 2012 for review (Commission Delegated Regulation (EU) No…/2012 of 30 April 2012 amending Regulation (EU) No 1236/2010 of the European Parliament and of the Council laying down a scheme of control and enforcement applicable in the area covered by the Convention on future multilateral cooperation in the North-East Atlantic fisheries, see Council doc No 9503/12, which is based on Article 51(d) of the NEAFC Regulation, but the two months objection period is not yet expired).

[34] See: Council doc. 12607/2/11 REV 2 ADD 1-2, as well as the first reading position of the European Parliament of 8 March 2011 (EP T7-0079/2011), not yet published in the OJ. The Regulation was finally adopted in mid December 2011. See: Regulation (EU) No 1343/2011 of the European Parliament and of the Council of 13 December 2011 on certain provisions for fishing in the GFCM (General Fisheries Commission for the Mediterranean) Agreement area and amending Council Regulation (EC) No 1967/2006 concerning management measures for sustainable exploitation of fishery resources in the Mediterranean Sea, OJ L 347, 30.12.2011, p.44.

This GFCM Regulation aims at implementing several Recommendations, adopted by the GFCM between 2005-2009, so the main purpose of this legislative act is exactly the same what we have seen above with regard to the NEAFC Regulation.[35] It aims at implementing GFCM Recommendations in the EU legal order, against which the EU has not made any objection, therefore, they have already become obligatory for the EU. This legal situation is very elegantly motivated in Recital (4) of the GFCM Regulation in the following way: "Recommendations adopted by the GFCM are binding on its contracting parties. As the Union is a contracting to the GFCM Agreement, these recommendations are binding on the Union and should therefore be implemented in Union law unless their content is already covered thereby."

The key provision about the so-called 'delegated act solution' is Article 26 of the GFCM Regulation, which reads as follows:

"*As far as is necessary, in order to implement in Union law amendments that become obligatory for the Union to existing GFCM measures that have already been implemented in Union law, the Commission shall be empowered to adopt delegated acts, in accordance with Article 27, in order to amend the provisions of this Regulation in respect of the following:*

a; the provision to the Executive Secretary of the GFCM of information under Article 15(4);

b; the transmission of the list of authorised vessels to the Executive Secretary of the GFCM under Article 17;

c; port state measures set out in Articles 18 to 22;

d; cooperation, information and reporting set out in Articles 23 and 24;

e; the table, the map and the geographical coordinates of GFCM Geographical Sub-Areas ("GSA") as set out in Annex I;

f; port state inspection procedures for vessels set out in Annex II; and

[35] See: Recitals (5)-(13) of the GFCM Regulation.

g; GFCM statistical matrices as set out in Annex III."[36]

The European Parliament (EP) had considered, in its first reading position of March 2011, still a number of elements of Article 26 as being the essential elements of the basic act, which, therefore, could not be delegated under Article 290(1) TFEU. Finally, however, the EP accepted the above-quoted text in the Council first reading position of 20 October 2011 for the sake of finding a compromise solution.[37]

Since the GFCM Regulation was adopted with the Article 26 solution above, which means that with the inventive delegated act solution for future amendments of the basic Regulation, following new recommendations, adopted by GFCM and falling under the scope of application of Article 26 of the Regulation, this means that this delegated act model (accepted already in two concrete cases), in principle, might become a quasi legislative pattern for a quick and efficient implementation technique of RFMO international norms in the EU legal order, although, in my view, in terms of the precise scope of every delegation of powers situation, it needs to be carefully assessed by the legislator on a case by case basis in the future too.[38] We should also not forget about that pursuant to Article 290(2) TFEU the legislator (thus either the Council or the European Parliament) has each the right either to object against any adopted delegated act, submitted by the Commission, or even the right to revoke the delegation of powers at any time, if any of the two wings of the legislator finds such an action appropriate[39].

[36] See also Recital (6) and Recital (15) of the GFCM Regulation.

[37] See: Council doc. 12607/11 REV 2 ADD 1 as well as the EP recommendation for second reading, dated 26 October 2011 (PE475.765v01-00), in which the EP Rapporteur suggested to approve the Council first reading position of 20 October 2011 without further changes (p.5, point 1). See still further the tabled second reading legislative report of 23 November 2011 of the EP competent Committee (EP A7-0392/2011), which was finally voted upon at the plenary session of the EP on 13 December 2011. This means that the GFCM Regulation could enter into force on 19 January 2012.

[38] This is exactly why both the Council as well as the Commission made a statement at the adoption of the Council first reading position on the draft GFCM Regulation on 20 October 2011, which were entered into the Council minutes. The Council statement reads: "The Council welcomes the prospect of the rapid adoption of the Regulation of the European Parliament and of the Council on certain provisions for fishing in the GFCM Agreement area. The Council, however, wishes to stress that the final text adopted in relation to Article 26 does not prejudice the position of the Council on delegated acts in the future." The Commission statement reads: "The Commission expresses concern that the limited powers delegated to it by the co-legislators may affect the EU's ability to ensure the timely transposition in EU law of measures taken by the GFCM in the future that revise or update the international conservation and management measures of this organisation. The Commission therefore may propose amendments to the Regulation increasing the number of measures which should be adopted by delegated acts in case the transposition through the ordinary legislative procedure leads to delays which would jeopardise the EU's ability to comply with its international obligations." See: Council doc No 15273/11 ADD 1 COR 1. It is to be noted finally that since the entry into force of the GFCM Regulation the Commission has not yet submitted any delegated acts based on Article 26 of that Regulation.

[39] See: Article 27 in the GFCM Regulation and Articles 46-49 of the NEAFC Regulation.

3. The protection of the autonomy of the EU legal order

D., My fourth example relates also the above-mentioned GFCM Regulation[40], in so far what concerns the European Commission proposal for implementing the GFCM Recommendation of 2009[41] on the protection of sensitive habitats in the living marine areas of the Mediterranean therein. This GFCM Recommendation aims at introducing a ban on fishing with towed dredges and bottom trawl nets in certain protected zones in order to protect deep-see sensitive habitats and to maintain the biological diversity of the Mediterranean. During the legislative deliberation of the subject GFCM Regulation in this respect it was raised whether the waters falling under the Exclusive Economic Zone (hereinafter: EEZ) of a Member State should be exempted from the application of the protection obligation, stemming from the Recommendation, specifically concerning‘ the impacts of any other activity than fishing activity’. The legal argument, put forward, was that the Union legislator could not adopt a legislative act with the territorial scope of application over an EEZ of a Member State because that would violate Article 56/1/a of UNCLOS[42] and a number of provisions of the GFCM Protocol concerning specifically protected areas and biological diversity in the Mediterranean[43]. Consequently, the autonomous decision-making power of the EU is limited in this respect, since the EU cannot introduce a ban with the effect over the EEZ of a Member State even if the Union acts with the aim of implementing an international norm, which legally already binds on the EU.

After a careful analysis, however, it turned out that the above legal reasoning was not supportable and not just because such an objection was not raised by the EU (or by any of its Member States being a contracting party to the GFCM Agreement) when the subject recommendation was negotiated and finally adopted in 2009, but also due to the fact that when the European Community acceded the UNCLOS in 1998,

[40] The European Community has become a party to the GFCM Agreement since 1998 by Council Decision 98/416/EC of 16 June 1998 on the accession of the European Community to the GFCM, OJ L 190, 7.4.1998, p.34. . It is to be noted, however, that GFCM is a special RFMO because it covers also matters falling under Member States' competences and that is why, alongside with the European Community, there are certain EU Member States (namely: Bulgaria, Romania, France, Spain, Greece, Italy, Cyprus, Malta and Slovenia) which are also contracting parties to the GFCM Agreement.
[41] See: Recommendation GFCM/33/2009/1 on the establishment of a fisheries restricted area in the gulf of lions to protect spawning aggregations and deep sea sensitive habitats, Council doc. 10652/09, p.4.
[42] Article 56/1/a of UNCLOS reads: ‘In the exclusive economic zone , the *Coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from waters, currents and winds*.’
[43] See: Article 5/1/ and Article 9/2/ of the GFCM Protocol.

the Community made a so-called Declaration of Competences[44], which contains that: "Matters for which the Community has exclusive competence: The Community points out that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence, in this field it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and, within its competence, to enter into external undertakings with third states or competent international organization. The competence applies to waters under national fisheries jurisdiction.."[45], which obviously covers thus Exclusive Economic Zones of the EU Member States as well. This means, in my view, that the legislative authority of the Union legislator in the field of EU Common Fishery Policy is unlimited within the EU in terms of territorial scope[46], especially when it implements the related international law-based obligations in the EU legal order.

The practical problem was, therefore, rather of legal drafting nature, namely that the relevant point of the GFCM Recommendation stipulated that:*' For the fisheries restricted area referred to in paragraph 1, Members and Cooperating Non-members of GFCM* ***shall call the attention of the appropriate national and international authorities in order*** *to protect this area from the impact of any other human activity jeopardizing the conservation of the features that characterize this particular habitat as an area of spawners' aggregation*'(emphasis added).[47] The European Commission in order to implement this point of the 2009 GFCM Recommendation in its original draft legislative proposal under article 11 proposed that:' ***Member States shall ensure the protection of the deep-sea sensitive*** *habitats in the areas referred to in article 10* ***and shall ensure in particular that those areas are protected*** *from the impacts of any other activity than fishing activity jeopardising the conservation of the features that characterise those habitats*.'(emphasis added). It was clear from the comparison of the two texts that the draft implementing legislative proposal in its wording went to some extent beyond the above-quoted GFCM obligation. Finally, the EU legislator implemented the subject point of the 2009 Recommendation in the following manner: "*Member States shall ensure that their competent authorities are called upon to protect the deep-sea sensitive habitats in the areas referred to in Article 10 from, in particular, the impact of any other activity jeopardising the conservation of the features that characterise those*

[44] See: Council Decision No 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, OJ L 179, 23.6.98, p.1.
[45] See: Council Decision in fn. 45., at pp. 129 et seq in Annex II thereof.
[46] See: also Article 355 TFEU.

habitats."(emphasis added), which text was already literally in line with the international obligation, undertaken by the EU and its Member States in this context in the GFCM.[48] This concrete example shows it well that, from a legal drafting point of view, sometimes it is not so easy to find the right wording in order to properly implement the concrete norms of international organizations in the EU legal order.

E., My last example from the area of EU Common Fishery Policy is about how in practice one may protect the autonomous legal order of the EU by a so-called EU constitutional 'red line'. It relates the approval process, on behalf of the EU, of the so-called FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing (hereinafter: FAO Agreement on Port State Measures)[49], in which international agreement there is a clause which aims at putting this FAO Convention beyond the EU founding Treaties in case of future conflicts between the two legal regimes.

The European Commission on 20 October 2009 submitted a Proposal for a Council Decision on the signing, on behalf of the European Community, of the FAO Agreement on Port State Measures.[50]

In the Annex to this draft Council Decision, which contained the draft FAO Agreement itself, under Article 28/2/ point c. of the agreement it was required that if a Regional Economic Integration Organization (which is the EU in our case) wanted to participate in the agreement, then it should make a statement at the time of signature or accession, inter alia, on that it accepts the rights and obligations of States under the agreement and that:

'in the event of a conflict between the obligations of such organization under this Agreement and its obligations under the Agreement ***establishing*** *the organization or any acts relating to it, the obligations under* ***this*** *Agreement* ***shall prevail'***.(emphasis added)[51]

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[47] See: GFCM Recommendation 33/2009/1 point 7.
[48] See: Article 11 of the GFCM Regulation.
[49] See: Council Decision No 2011/443/EU of 20 June 2011 on the approval, on behalf of the European Union, of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, OJ L 191, 22.07.2011, p.1.
[50] See: Council doc. 14729/09.
[51] See Council Decision in fn 50. at page 11.

This clause in practice puts the FAO State Port Measures Agreement –in the event of any future conflict- beyond the EU founding Treaties.

During the deliberation of the subject draft Council Decision it was argued that such clauses were standard clauses in previous UN multilateral Conventions dealing with either the law of the sea in general or with specific international fishery law issues. Concrete references were made, for example, to Article 4(6) of Annex IX in the UNCLOS as well as to Article 47(2) point c. in the UN Straddling Fish Stock Agreement /UNFSA/.[52] The European Community acceded both UN Convention, mentioned before, and in these multilateral conventions exactly the same clause could be found, as now in the draft FAO Agreement, but the Council, on behalf of the Community, approved these UN conventions without problem in the past.

It should be noted, however, that both UN conventions in question were approved, on behalf of the European Community, before 2000, and this is an important fact. In the meantime, namely since 2000, and this must be seen, the ECJ jurisprudence has substantially developed as far as the protection of the autonomy of EU legal order is concerned including, for example, the above-referred Mox-Plant or Intertanko judgements[53], but most importantly the Kadi (I) appeal judgement, in which case the ECJ in 2008 ruled the following:

'*It follows from all those considerations that the obligations, imposed by an international agreement* ***cannot have the effect of prejudicing the constitutional principles of the EC Treaty'***.
(and thereafter still added:) '..*the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law,* ***of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement***."(emphasis added)[54]

[52] See: Agreement for the implementation of the provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995, 2167 UNTS 3. The Agreement entered into force on 11 December 2001. In more detail, see Churchill-Owen op.cit. in fn. 25., from pp. 98 et seq and pp. 320 et seq. See also Council Decision 98/414/EC of 8 June 1998 on the ratification by the European Community of the Agreement for the implementing of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling stocks and highly migratory fish stocks, OJ L 189, 3.7.1998, p.14.
[53] See: Case C-308/06 R/ International Association of Independent Tanker Owners /Intertanko/ and others v. Secretary of State for Transport, (2008) ECR I-6351, in particular paragraphs 39., 49-66, 74.
[54] See: Case C-402/05P Kadi v. Council and Commission, (2008) ECR I-6351, at paragraphs 285. et seq. See still in more general terms: M. Kumm: 'How does the EU law fit into the World of Public Law?

This most recent Court jurisprudence means that no international agreement can prevail over the EU founding Treaties, in particular over the constitutional principles and guarantees stemming from them 'as an autonomous legal system'. Exactly for this reason /because of this constitutional 'red line', required by the most recent development in the Court case law/ the Council made, when approving the FAO Agreement on Port State Measures, on behalf of the European Union, in June 2010, in the Declaration of Competence submitted pursuant to point (a) of Article 28(2) of the Agreement still the following additional statement:

"*5. The European Union states that, in the event of the occurrence of a conflict as referred to in Article 28(2)c of the Agreement, it will apply the obligations stemming from that provision in accordance with the Treaty establishing the European Community as interpreted by the European Court of Justice*." [55]

By doing so, the Council, in my view, applied in practical terms a constitutional safeguard in order to protect, when incorporating an international agreement into the EU legal order, de lege ferenda the autonomy of the EU decision-making system, founded on the principle of rule of law.

VI. Some concluding remarks:

1; In the light of the above examples from the Council most recent practice what one may conclude is that for example in the EU Common Fishery Policy area the principle of openness of the EU applicable legal framework to international law in general and more precisely to the international norms, adopted by the RFMOs, has been clearly further strengthened in the last couple of years, fully in line with the new emphasis which the amended TEU (by the Lisbon Treaty) places upon compliance with international law, and which practice is made today even more conducive, in practical terms, to the pressing needs for more simple and quicker implementation-related law-making techniques at EU level, if necessary at all, in the context of the RFMOs-created international norms, legally anyhow already binding on the EU. It is also clear that the influence of the norms-setting activities of the RFMOs on the

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Costa, Kadi and Three Conceptions of Public Law' in 'Political Theory of the EU' (Eds: Neyer and Wiener), OUP, 2010, Chapter 6.

[55] See: Council Decision in fn. 50., at page 18. See also Article 2 of the subject Council Decision.

development of the EU legal framework on Common Fishery Policy is getting to become more and more important and decisive and it is based on mutual interactions, since the EU (and in certain RFMOs, where it covers also areas of shared competence the EU and the related Member States) actively participate as well in the creation of the relevant and applicable international law.

2; What concerns the question about how to protect, if necessary, the autonomy of the EU legal order vis-à-vis the more and more increasing influence of the constantly evolving norms-setting activities of international organizations on the EU legal practice- as the given examples in the selected two policy areas of the EU legal system in this contribution may show it- , in my view, that aspect is also ensured and preserved even in a post-Lisbon context of the EU institutional balance, defined in the founding Treaties.

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