

# **The ‘Janus Face’ of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order’s Relationship with International and Member State Law**

Lando Kirchmair\*

## Table of Contents

A. Introduction.....	678
B. The ‘Autonomy’ of the EU Legal Order.....	680
I. A Monistic Approach Unifies the EU Legal Order Relating to its Member States.....	680
II. A Dualistic Approach Safeguards the Stability of the EU Legal Order Relating to International Law .....	683
C. Is the ‘Janus Face’ of the ECJ Justifiable?.....	685
I. Theoretical (In-)Appropriateness of the Position of the ECJ.....	686
II. The (In-)Appropriateness of Monism and Dualism.....	687
D. Conclusion .....	690

\* Lando Kirchmair, Dr. iur. (University of Salzburg, Austria) 2012; Mag. iur. and Mag. iur. rer. oec. (University of Innsbruck, Austria) 2008 & 2009. I was a research and teaching fellow at the Department of Public Law/International Public Law at the University of Salzburg while writing this essay. Currently I am working at the Congress of Local and Regional Authorities of the Council of Europe, Strasbourg, France. However, any expressed opinions and any committed errors remain mine alone. Contact: [lando.kirchmair@auslandsdienst.at](mailto:lando.kirchmair@auslandsdienst.at).

## Abstract

For many years, the ECJ has postulated the autonomy of the EU legal order. At the same time, it has also stressed the importance of noting that the UN and the EU are distinct legal orders. In light of this situation, we have one and the same international organization applying two diametrically opposed theoretical doctrines. Regarding the inner relationship with its Member States, the ECJ proclaims a unified legal order based on the monistic doctrine. Dualistic arguments, in contrast, serve to separate the EU legal order from international law. This paper intends to clarify whether this obvious contradiction is due to a simple misinterpretation by the ECJ or is grounded in flaws within the almost 100 year old theories of monism and dualism which can no longer serve to explain the relationship between legal orders satisfactorily. The paper concludes that the situation cannot be characterized as black and white. However, in order to establish fundamental foundations, a clear theoretical line is essential.

## A. Introduction

Two lawyers have the task of discussing a problem and presenting a solution. After hours of painful negotiations they come up with three different solutions. Is this just an ironic representation of the way lawyers see themselves? Bearing the latest judgments of the Court of Justice of the European Union (ECJ)<sup>1</sup> in mind, however, this simple joke has much more than a grain of truth to it.

On the one hand the ECJ has postulated the “autonomy of the Community legal order”<sup>2</sup> for many years in order to unify European Union (EU) and Member State law. To the contrary, it has also found it “important

<sup>1</sup> In this article, ECJ is used as the well-known abbreviation even though its new name, after the Treaty of Lisbon, is simply the Court of Justice.

<sup>2</sup> See *Costa v. ENEL*, ECJ, Judgment, Case No. 6/64, 15 July 1964, para. 3 (“the EEC treaty has created its own legal system”; the German version states “*Rechtsordnung*”); the French version uses “*ordre juridique*” [ENEL]; cf. *EEA I*, ECJ, Opinion 1/91, 14 December 1991, para. 2 postulated the “autonomy of the Community legal order”, compare the German version “*Autonomie des Rechtssystems der Gemeinschaft*”; see furthermore on this W. Schroeder, *Das Gemeinschaftsrechtssystem: Eine Untersuchung zu den rechtsdogmatischen, rechtstheoretischen und verfassungsrechtlichen Grundlagen des Systemdenkens im Europäischen Gemeinschaftsrecht* (2002), 104-105 (with further references in Fn 6 and 7).

to note at the outset that Security Council resolutions and Council common positions and regulations originate from distinct legal orders”.<sup>3</sup> In light of this situation, we have one and the same international organization introducing two different opinions. Depending on its perspective – and not on a different standpoint of the observer – the ECJ applies a monistic doctrine relating to its Member States and a dualistic doctrine relating to international law, two completely diverging doctrines. The relationship between international and national law has been, and probably always will be, a long-running debate in public international law. Even though this discussion has been trivialized as “unreal, artificial and strictly beside the point”,<sup>4</sup> the so-called “globalization of law”<sup>5</sup> framed in the famous “Constitutionalization of International Law”<sup>6</sup> is testimony to the topicality, as well as to the ongoing and even growing importance of this debate. As this introductory example demonstrates, international organizations such as the EU are obvious examples of entities based on international law acting within the legal orders of its Member States as much as on the international stage. International organizations with decision-making capacities do have an enormous influence on and within the legal orders of Member States and even Non-Member States. The theoretical foundation of this relationship

<sup>3</sup> See *Bank Melli Iran*, ECJ, Judgment, Case No. 548/09 P, 16 November 2011, para. 100 [Bank Melli]; Cf. *Kadi & Al Barakaat International Foundation*, ECJ, Judgment, Case No. 402/05P and 415/05 P, 3 September 2008, paras 285 *et seq.* 326-327 [Kadi]; see also B. Fassbender, ‘Triepel in Luxemburg: Die dualistische Sicht des Verhältnisses zwischen Europa- und Völkerrecht in der “Kadi-Rechtssprechung” des EuGH als Problem des Selbstverständnisses der Europäischen Union’, 63 *Die öffentliche Verwaltung* (2010) 8, 333, 336 *et seq.*

<sup>4</sup> G. Fitzmaurice, ‘The General Principles of International Law: Considered from the Standpoint of the Rule of Law’, 92 *Recueil des Cours de l’Académie de Droit International* (1957), 1, 71; furthermore Fitzmaurice argued that “in the same way it would be idle to start a controversy about whether the English legal system was superior to or supreme over the French or *vice-versa*, because these systems do not pretend to have the same field of application”. *Id.*, 71-72.

<sup>5</sup> Compare for this nomination J.-B. Auby, ‘Globalisation et droit public’, 14 *European Review of Public Law* (2002) 3, 1219, 1219 (“De tous les phénomènes qui ont affecté l’évolution de nos systèmes juridiques à la fin du siècle dernier, et qui détermineront le cours de leur évolution pendant celui-ci, la globalisation est l’un des plus importants: c’est probablement même le plus important.”). Cf. A. Peters, ‘The Globalization of State Constitutions’, in J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007), 251.

<sup>6</sup> Compare A. Verdross’s groundbreaking *Die Verfassung der Völkerrechtsgemeinschaft* (1926); similarly J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009).

always was and still is dominated by the heavily disputed monistic [II. 1]) and dualistic [II. 2]) doctrines. However, this leads us to the crucial question to be addressed in this paper: Is the ECJ to be criticized for mixing two different approaches [III. 1])? Or does this example uncover flaws in these doctrines, which fail to explain current developments satisfactorily [III. 2])? One might say: in for a penny, in for a pound. Once the decision has been taken in favor of one doctrine, a stringent application of that one doctrine should be maintained consistently. However, in order to address these complex problems, it is important to broaden the scope of the discussion.

## B. The ‘Autonomy’ of the EU Legal Order

### I. A Monistic Approach Unifies the EU Legal Order Relating to its Member States

A long time ago, the ECJ postulated the “autonomy of the Community legal order”.<sup>7</sup> This general statement was accompanied by the direct effect of EU law on the national laws of the Member States,<sup>8</sup> just like the primary application of EU law.<sup>9</sup> This was truly necessary in order to establish and guarantee the success of the EU by establishing a strong and effective autonomous legal system. Considering the far-reaching effects on the national legal orders of EU Member States it is important to base these decisions on a theoretical foundation. Bearing in mind the famous debate about the relationship between international and national law, scholarly debate began as soon as these ECJ rulings were established to analyze, in theoretical terms, the practical steps taken by the ECJ. Consequently, some authors tried and still try to fit the relationship between the EU and its Member States into a monistic scheme.<sup>10</sup>

<sup>7</sup> See *supra* note 2.

<sup>8</sup> See *Van Gend & Loos*, ECJ, Judgment, Case No. 26/62, 5 February 1963.

<sup>9</sup> Again *ENEL*, *supra* note 2; and *Internationale Handelsgesellschaft*, ECJ, Judgment, Case No. 11/70, 17 December 1970, paras 3-4; *Simmenthal II*, ECJ, Judgment, Case No. 106/77, 9 March 1978.

<sup>10</sup> See, for instance, the former president of the ECJ G. C. Rodríguez Iglesias, ‘Zu den Grenzen der verfahrensrechtlichen Autonomie der Mitgliedstaaten bei der Anwendung des Gemeinschaftsrechts’, 24 *Europäische Grundrechtezeitschrift* (1997) 14-16, 289, 295; N. Michel, ‘L’imprégnation du droit étatique par l’ordre juridique international’, in D. Thürer, J.-F. Aubert & J. P. Müller (eds), *Verfassungsrecht der Schweiz* (2001), 63, 67; S. Griller, ‘Völkerrecht und Landesrecht – unter Berücksichtigung des

However, the main characteristic of monism, a theory developed most prominently by Georges Scelle, Hans Kelsen and Alfred Verdross at the beginning of the 20th century,<sup>11</sup> is the assumption of a single unified legal system. Promoted at the EU level, the monistic doctrine would unify the EU legal order with the national legal orders of its Member States. However, should norm conflicts arise between international, EU, or national law, the monistic doctrine needs to deal with the question as to which jurisdiction shall prevail. While a monistic doctrine, with the so-called primacy of national law must be traced back to a very nationalistic view of international law, which no longer can be considered suitable,<sup>12</sup> monism with the primacy

Europarechts', in R. Walter, C. Jabloner & K. Zeleny (eds), *Hans Kelsen und das Völkerrecht: Ergebnisse eines internationalen Symposiums in Wien* (2004), 83, 109 [Griller, Völkerrecht und Landesrecht]; S. Griller, 'Der Stufenbau der österreichischen Rechtsordnung nach dem EU-Beitritt', 8 *Journal für Rechtspolitik* (2000) 4, 273, 284; M. Potacs, 'Das Verhältnis zwischen der EU und ihren Mitgliedstaaten im Lichte traditioneller Modelle', 65 *Zeitschrift für Öffentliches Recht* (2010) 1, 117, 120; T. Öhlinger, 'Die Einheit des Rechts: Völkerrecht, Europarecht und staatliches Recht als einheitliches Rechtssystem?', in S. L. Paulson & M. Stolleis (eds), *Hans Kelsen: Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts* (2005), 160, 169, concerning the very abstract interpretation of Kelsen's monism which Öhlinger favors, this kind of interpretation is possible. However, one has to bear in mind that this abstract monism cannot provide a theoretical concept explaining, for instance, the primacy of EU law (*id.*, 172); see also Schroeder, *supra* note 2, 113, 122; P. Pescatore, *L'ordre juridique des Communautés Européennes: Étude des sources du droit communautaire*, 2nd ed. (1975), 151.

<sup>11</sup> As advocates of the monistic doctrine take H. Krabbe, *Die moderne Staatsidee*, 2nd ed. (1919) [1969]; L. Duguit, *Souveraineté et liberté* (1922); G. Scelle, *Précis de droit des gens: Principes et systématique*, Vol. I (1932); H. Kelsen, 'Les rapports de système entre le droit interne et le droit international public', 14 *Recueil des Cours de l'Académie de Droit International* (1926), 227, 299; A. Verdross, 'Le fondement du droit international', 16 *Recueil des Cours de l'Académie de Droit International* (1927), 247, 287; cf. C. Amrhein-Hofmann, *Monismus und Dualismus in den Völkerrechtslehren* (2003), 152 *et seq.*

<sup>12</sup> Walz classified this perception of monism as "pseudomonistic", G. A. Walz, *Völkerrecht und staatliches Recht: Untersuchung über die Einwirkungen des Völkerrechts auf das innerstaatliche Recht* (1933), 40 (translation by the author); see also J. G. Starke, 'Monism and Dualism in the Theory of International Law', 17 *British Yearbook of International Law* (1936), 66, 77, where he stated, "[r]educing to its lowest terms, the doctrine of State primacy is a denial of international law as law, and an affirmation of international anarchy." For this reason the monistic conception with the primacy of municipal law is left aside here. H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer Reinen Rechtslehre*, 2nd ed. (1928), 317, himself equated the monistic doctrine with the primacy of national law as the "negation of all law". However, later on he left the decision up to

of international law, on the contrary, has attracted a lot more attention. In order to justify this primacy, the monistic doctrine stipulated the premise of a hypothetical unity,<sup>13</sup> being kept together by the “chain of validity”<sup>14</sup> (*‘Stufenbau nach der rechtlichen Bedingtheit’*). The ultimate ground for validity is the famous basic norm (*‘Grundnorm’*) of Hans Kelsen<sup>15</sup> on which the perception is based that States and their law-making capacities are dependent on, or directly derive from, international law.<sup>16</sup> Even though this

political science, see H. Kelsen, *Reine Rechtslehre*, 2nd ed. (1960), 339 *et seq.* (translated by Max Knight as *The Pure Theory of Law* (1978), 339 *et seq.*

<sup>13</sup> Compare Kelsen, *supra* note 12, 196 *et seq.*, 221-222 (*id.*, *The Pure Theory of Law*, 193 *et seq.*, 215 (“A norm of general international law authorizes an individual or a group of individuals, on the basis of an effective constitution, to create and apply as a legitimate government a normative coercive order. That norm, thus, legitimizes this coercive order for the territory of its actual effectiveness as a valid legal order, and the community constituted by this coercive order as a ‘state’ in the sense of international law.”).

<sup>14</sup> The term “chain of validity” stems from J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd ed. (1980), 105; cf. Starke, *supra* note 12, 75; C. Richmond, ‘Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law’, 16 *Law and Philosophy* (1997) 4, 377, 388.

<sup>15</sup> Compare Kelsen, *supra* note 12, 196 *et seq.* (*id.*, *The Pure Theory of Law*, *supra* note 12, 193 *et seq.*); R. Walter, ‘Entstehung und Entwicklung des Gedankens der Grundnorm’, in *id.* (ed.), *Schwerpunkte der Reinen Rechtslehre* (1992), 47; *id.*, ‘Die Grundnorm im System der Reinen Rechtslehre’, in A. Aarnio *et al.* (eds), *Rechtsnorm und Rechtswirklichkeit: Festschrift für Werner Krawietz* (1993), 85; H. Mayer, ‘Rechtstheorie und Rechtspraxis’, in C. Jabloner & F. Stadler (eds), *Logischer Empirismus und Reine Rechtslehre: Beziehungen zwischen dem Wiener Kreis und der Hans Kelsen Schule* (2002), 319; R. Dreier, ‘Bemerkungen zur Theorie der Grundnorm’, in Hans Kelsen-Institut (ed.), *Die Reine Rechtslehre in wissenschaftlicher Diskussion* (1982), 38, 39, note the “function of the basic norm stipulating unity” (*‘Funktion der Grundnorm als Einheitskonstituante’*); for criticism see generally N. Hoerster, *Was ist Recht?: Grundfragen der Rechtsphilosophie* (2006), 134, as much as 138 *et seq.*; P. Koller, ‘Meilensteine des Rechtspositivismus im 20. Jahrhundert: Hans Kelsens Reine Rechtslehre und H. L. A. Harts “Concept of Law”’, in O. Weinberger & W. Krawietz (eds), *Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker* (1988), 129, 157 *et seq.* with further evidence; Griller, *Völkerrecht und Landesrecht*, *supra* note 10, 87-89; as much as Schroeder, *supra* note 2, 75 *et seq.*

<sup>16</sup> See *supra* note 13; compare also A. Verdross, *supra* note 6, who argues from the viewpoint of a(n) (international) basic norm from which also municipal law derives. “The freedom of states is nothing else than a margin of discretion depending on international law” (translation by the author). According to Verdross (*id.*, 48 *et seq.*) the lawmakers of public international law are not States, but the international

premise of authorization (*‘Delegationszusammenhang’*) is surely highly debatable concerning the relationship of the EU legal order to its Member States,<sup>17</sup> it still holds true that many monistic arguments fit the interplay of EU and Member State law. The direct interaction between international or EU law and individuals, for example, an integral element of monism, has become more and more relevant in light of current developments.

## II. A Dualistic Approach Safeguards the Stability of the EU Legal Order Relating to International Law

Although the position of the ECJ regarding the internal relations of the EU to its Member States is clearly driven by monistic arguments, the court does not seem to be totally convinced by these theoretical conceptions. Faced with United Nations (UN) Security Council Resolutions on the violation of human rights, the Court clarified that UN law and EU law “originate from distinct legal orders”.<sup>18</sup> By stressing the concept of different legal orders, the ECJ evoked the opposite of a monistic doctrine. As introduced by Heinrich Triepel’s famous phrase, stating that the international and national legal order are “two circles, which possibly touch, but never cross each other”,<sup>19</sup> dualism divides international or EU law and

community, acting through an international organ with supranational power; cf. Krabbe, *supra* note 11, 305 *et seq.* & 309.

<sup>17</sup> For a general critique, see J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (2011), 192-193; *id.*, ‘Kelsen – Which Kelsen?: A Reapplication of the Pure Theory to International Law’, 22 *Leiden Journal of International Law* (2009) 2, 225, 240 *et seq.* with further references.

<sup>18</sup> Compare *Kadi*, *supra* note 3, paras 285 *et seq.*, 326-327; and *Bank Mellî*, *supra* note 3, para. 100 (“It is important to note at the outset that Security Council resolutions and Council common positions and regulations originate from *distinct legal orders*” (emphasis added by the author.)). See also Fassbender, *supra* note 3, 336 *et seq.* Cf G. de Burca, ‘The European Court of Justice and the International Legal Order After *Kadi*’, 51 *Harvard International Law Journal* (2010) 1, 1, 2 “adopting a sharply dualist tone”. For references to a more open, if not to say monistic, case law regarding to international law in earlier terms see K. Schmalenbach, ‘Normentheorie vs. Terrorismus: Der Vorrang des UN-Rechts vor EU-Recht’, 61 *Juristenzeitung* (2006) 7, 349, 352.

<sup>19</sup> H. Triepel, *Völkerrecht und Landesrecht* (1899), 111 (“Völkerrecht und Landesrecht sind nicht nur verschiedene Rechtsteile, sondern auch verschiedene Rechtsordnungen. Sie sind zwei Kreise, die sich höchstens berühren, niemals schneiden” (emphasis omitted) (translation in the text by the author).).

national law into two different legal systems. This subdivision of legal systems was primarily based on the view that the law of international or EU and national legal systems emanates from different sources, leading to the supposition that international or EU law and national law have arisen from different legal orders relying on different grounds for validity.<sup>20</sup> Although it still holds true that international and national law emanate from different sources, dualism also assumes that the addressees and content of international and national law cannot be identical.<sup>21</sup> This argument, however, has a flaw. While the impossibility of identical addressees of international and EU law would lead to the exclusion of any kind of norm conflict between these two legal orders,<sup>22</sup> this obviously is not the case. Taking the *Kadi case*<sup>23</sup> as an example, it becomes quite clear that international and EU law alike might well concern the same addressee as much as the same content. *Kadi* would not have been able to challenge the measures of the Security Council Resolution before the EU courts if he had not been the same person. Applying for protection under EU law against UN measures clearly shows that international and EU law alike deal with the same content. Furthermore, dualism turns a blind eye towards the direct interaction between international law and individuals by stating that international law is purely inter-State law and can only stipulate obligations for States,<sup>24</sup> which does not share the same addressees with EU or national law.<sup>25</sup>

<sup>20</sup> Compare D. Anzilotti, *Lehrbuch des Völkerrechts* (1929), 38-39.

<sup>21</sup> See Triepel, *supra* note 19, 9, 11, 228-229; cf. Anzilotti, *supra* note 20, 41-42.

<sup>22</sup> See Triepel, *supra* note 19, 254 *et seq.*; Anzilotti, *supra* note 20, 42.

<sup>23</sup> Compare *supra* note 3.

<sup>24</sup> See Triepel, *supra* note 19, 228-229, 119-120, 271; see also Anzilotti, *supra* note 20, 41 *et seq.*; cf. Walz, *supra* note 2, 238-239, who was considered to be a moderate dualist, yet he did not postulate the impossibility of international law addressing individuals, but stated in 1933 that the character of international law at the time was mediatized through municipal law. Moreover, he did propose a differentiation between international law addressing States and international law created in order to address individuals (he called the former material and the latter formal international law), but this, however, would still have to be mediatized through States (see *id.*, 242-244).

<sup>25</sup> This criticism was already expressed by A. Verdross, 'Die normative Verknüpfung von Völkerrecht und staatlichem Recht', in M. Imboden *et al.* (eds), *Festschrift für Adolf Julius Merkl zum 80. Geburtstag* (1970), 425, 432 *et seq.*; cf. R. P. Mazzechi, 'The Marginal Role of the Individual in the ILC's Articles on State Responsibility', 14 *The Italian Yearbook of International Law* (2004), 39, 42-43 with further references in footnote 12, "This means that international law now regulates *some* relationships



The division of the legal systems implies that international law may not derogate from national law, and national law may not derogate from international law.<sup>26</sup> In order to give international law an effect within a national legal system, dualism demands a special procedure to transform or incorporate the international norm into a national norm.<sup>27</sup> As a result of this, the ground for validity ('*Geltungsgrund*') of international law within EU or national law rests solely within the latter. The main weakness of this argument becomes immediately clear when trying to establish a unitary legal subjectivity of international organizations (be it the UN or the EU) from a dualistic point of view. International norms are based on a national ground for validity within the dualistic doctrine. As a consequence, international organizations would be based on international validity and furthermore on as many national grounds of validity as they have Member States.<sup>28</sup> This insecure starting point complicates the effect of the legal measures of these international organizations within EU or national law when applying the dualistic doctrine. In that light, the approach of the ECJ confronting the outside world with an explicit reference to different legal orders is open to criticism.

### C. Is the 'Janus Face' of the ECJ Justifiable?

On the one hand, the ECJ borrowed monistic arguments in order to establish the "autonomy" of the EU legal order, unifying the legal order of its Member States with the legal system of the EU. On the other hand, the ECJ reprimanded the General Court,<sup>29</sup> when it applied this monistic approach to the relationship between EU law and international law as well.<sup>30</sup> Facing foreign law, which is possibly dangerous for the EU legal order, the

between States and individuals *in a formal manner* (and not only in a substantive one)"; cf. *LaGrand (Germany v. USA)*, Judgment, ICJ Reports 2001, 466, 494, para. 77.

<sup>26</sup> See Triepel, *supra* note 19, 257-258; Anzilotti, *supra* note 20, 38.

<sup>27</sup> *Id.*, 41, 45-46.

<sup>28</sup> For this illustrative criticism, see Griller, *Völkerrecht und Landesrecht*, *supra* note 10, 97; see also the general criticism by Starke, *supra* note 12.

<sup>29</sup> Formerly known as the the European Court of First Instance.

<sup>30</sup> Compare *Yassin Abdullah Kadi*, ECJ, Judgment, Case No. T-315/01, 21 September 2005, para. 214; as much as *Ahmed Ali Yusuf and Al Barakaat International Foundation*, ECJ, Judgment, Case No. T-306/01, 21 September 2005, para. 265 applying the monistic doctrine also relating to international law.

ECJ prefers a dualistic argument separating its own from external legal systems. This provokes the question as to whether this ‘Janus Face’ can be justified.

## I. Theoretical (In-)Appropriateness of the Position of the ECJ

Is it possible to uphold a monistic argument concerning the inner relations of EU law while defending, at the same time, its autonomy by confronting the outside world with a dualistic view? In light of this situation, one and the same international organization – depending on its perspective and not on the different standpoint of the observer – would have to be categorized according to two completely diverging doctrines. Bearing in mind the controversy between monists and dualists, it is far from easy to imagine that this question provoked by the ECJ would have met with positive support by either dualistic or by monistic scholars. Monists are convinced by the unitarian legal (world)<sup>31</sup> order, which is structured as a hierarchical complex of norms.<sup>32</sup> Having this proclaimed unity in mind – inherently based on one fundamental basic norm from which all lower norms are delegated (*‘Delegationszusammenhang’*) – an inevitable consequence arises: national law (also constitutional law) would have to be seen as delegated from EU law, and EU law in turn from international law. Dualists, in contrast, talk about the theoretical impossibility of the same addressee, content, and sources of international or EU and national law. As a consequence, they were convinced that the separation of legal orders is not a choice to make but a theoretical necessity. These theoretical discrepancies between dualists and monists are far from being unified in one consistent position. Nevertheless, *Maduro* opined that the EU legal order is “a municipal legal order [postulating a dualistic separation in confrontation to international law] of trans-national dimensions, of which it forms the ‘basic constitutional charter’ [postulating a monistic unity of the EU and its Member States]”.<sup>33</sup> If one is not willing to accept the view of the EU as a federal State, which would make a monistic view relating to its Member

<sup>31</sup> Compare A. Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (1923); cf. Kelsen, *supra* note 12, 329 (*id.*, *The Pure Theory of Law*, *supra* note 12, 328-329).

<sup>32</sup> See above C. II.

<sup>33</sup> *Kadi & Al Barakaat International Foundation*, ECJ, Opinion of Advocate General Maduro, Case No. 402/05 P & 415/05 P, 16 January 2008, para. 21.

States no longer necessary, the theoretical inconsistency of this position is faced with the above-mentioned criticism. To save itself from these discrepancies, it could at least be argued that neither the monistic nor the dualistic doctrine should be adopted concerning the internal as well as external relations of the EU. However, although this is clearly conceivable from a practical point of view, it is unsatisfactory from a theoretical perspective.

## II. The (In-)Appropriateness of Monism and Dualism

Given the theoretical flaws of the ECJ's position regarding the relationship of EU law with its Member States on the one hand and international law on the other, the question arises as to whether the underlying doctrines can still provide satisfactory explanations of current developments. By applying two diametrically opposed doctrines as one entity, the ECJ was criticized on theoretical grounds.<sup>34</sup> However, monism and dualism were developed before the rise of supranational organization(s). Furthermore, these doctrines have to be seen against the background of the political conditions of the times in which they were formulated. In this respect, another crucial point of criticism is the political dimension of this intrinsically legal<sup>35</sup> question.<sup>36</sup> Already Hans Kelsen's uncertainty regarding monism with the primacy of international law and municipal law was triggered by the fact that this question was a matter of politics from his point

<sup>34</sup> See above C. I.

<sup>35</sup> For this paper, the difference between political and legal decision making is simply the legal bindingness of the latter. Legal decisions are consensus-based decisions which only might be modified by consensus (e.g. by a majority agreed in advance). Political decisions in contrast might be taken solely on the basis of the selfish interests of a single State.

<sup>36</sup> See also J. Nijman & A. Nollkaemper, 'Introduction', in J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007) 1, 9; see also A. Peters, 'Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse', 65 *Zeitschrift für Öffentliches Recht* (2010) 1, 3, 25-26. Cf. the criticism of G. M. Danilenko, 'Application of Customary International Law to Municipal Law', in G. I. Tunkin & R. Wolfrum (eds), *International and Municipal Law* (1988), 13, 23 ("Experience indicates that positive results depend not only on the legal techniques used, but also on a number of political factors related to the attitude of a given State towards existing international law and relevant international obligations.").

of view.<sup>37</sup> However, in general it is possible to draw an analogy between the genesis of the aforementioned theories and the historical circumstances at that time. The origin of the monistic view governed by national law can be found in the eighteenth century and lasted until the late nineteenth century.<sup>38</sup> This period (and thus the theory) can be classified as extremely nationalistic, since a few authoritarian States ruled over the whole world and public international law was seen as “external State law”.<sup>39</sup> Historical progress is represented by its successor: the dualistic doctrine. The following period of political moderation also influenced the theory governing the relationship between international and national law. The devolution of history in world politics and the parallel development of the two theories culminated in the monistic doctrine with the primacy of international law. So the monistic doctrine with primacy of international law, which was more or less developed after the First and the Second World War, can be seen as the output of a pacifist world-view.<sup>40</sup> At least nowadays the identification of the aforementioned theories with the political developments of their times leads to the conclusion that these theories, or at least fundamental elements of them, have to be qualified either way as inappropriate. On the one hand extremely nationalist, and on the other hand utopian world-views, left their traces in the diverging theories. This may disqualify them from providing an adequate theoretical explanation for the current relationship between international and EU law as much as EU law and national law. In light of these connections, the diverging positions of the ECJ become far more understandable, at least in pragmatic terms. It is quite

<sup>37</sup> See H. Kelsen, *Reine Rechtslehre* (1934), 142; and similar *id.*, ‘*Die Einheit von Völkerrecht und staatlichem Recht*’, 19 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1958), 234, 246 *et seq.*; but cf. J. v. Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010), 104 *et seq.* Cf. J. Nijman & A. Nollkaemper, *supra* note 36, 9, identifying the monists Scelle and Kelsen as value driven defenders of democracy and the individual against State power.

<sup>38</sup> Compare major advocates of monism with the primacy of national law G. W. F. Hegel, *Grundlinien der Philosophie des Rechts* (1821), § 330 *et seq.*; A. Décencière-Ferrandière, ‘*Considerations sur le droit international dans ses rapports avec le droit de l’État*’, 40 *Revue Générale de Droit International Public* (1933) 1, 45, 64 *et seq.*; and also G. Jellinek, *Die rechtliche Natur der Staatenverträge* (1880), 7, 40; however, on page 45 doubts were already expressed concerning this doctrine.

<sup>39</sup> For this term (in German “*äußeres Staatsrecht*”) see Hegel, *supra* note 38, § 330 *et seq.*, § 547.

<sup>40</sup> See for a more detailed elaboration A. Cassese, *International Law*, 2nd ed. (2005), 213 *et seq.*

striking to see that the reason for adopting a dualistic point of view is driven by protectionism. The smaller entity prefers a reticent approach in order to safeguard itself against the suspicious bigger entity. Neither the high courts of Member States like a too dominant role of EU law<sup>41</sup> nor does the ECJ itself want EU law to be defenseless against international law.<sup>42</sup>

<sup>41</sup> Compare, for example, *Lisbon*, German Federal Constitutional Court, Judgment, 2 BvE 2/08, 30 June 2009, para. 339 ("The primacy of application of European law remains, even with the entry into force of the Treaty of Lisbon, a concept conferred under an international treaty, i.e. a *derived concept* which will have legal effect in Germany only with the order to apply the law given by the Act Approving the Treaty of Lisbon. This derivative connection is not altered by the fact that the concept of primacy of application is not explicitly provided for in the treaties but was developed in the early phase of European integration in the case law of the Court of Justice by means of interpretation. It is a consequence of the continuing sovereignty of the Member States that in any case in the clear absence of a constitutive order to apply the law, the inapplicability of such a legal instrument to Germany is established by the Federal Constitutional Court." (emphasis added by the author) (available in English at <http://www.bundesverfassungsgericht.de/entscheidungen/es200906302bve000208en.html> (last visited 28 January 2013)); for further references, see Schroeder, *supra* note 2, 168 *et seq.*; for an overview, see *id.*, 248-249 with further references in note 270; cf. M. Thaler, 'Rechtsphilosophie und das Verhältnis zwischen Gemeinschaftsrecht und nationalem Recht', 8 *Journal für Rechtspolitik* (2000) 1, 75, 77 with further references in note 5.

<sup>42</sup> Compare *Kadi*, *supra* note 3, paras 285 *et seq.*, 326-327; and *Bank Melli*, *supra* note 3, para. 100 ("It is important to note at the outset that Security Council resolutions and Council common positions and regulations originate from *distinct legal orders*." (emphasis added by the author)). See also Fassbender, *supra* note 3, 336 *et seq.* Cf. the defensive attitude of the ECJ concerning WTO Dispute Settlement Body decisions within the EU legal order. Concerning the WTO Agreements in general see *Portugal v. Council*, ECJ, Judgment, Case No. 149/96, 23 November 1999; concerning DSB decisions and their direct effect on EU law see *Léon Van Parys*, ECJ, Judgment, Case No. 377/02, 1 March 2005; cf. *IKEA*, ECJ, Judgment, Case No. 351/04, 27 September 2007, paras 29 *et seq.*; *FIAMM et al.*, ECJ, Judgment, Case No. 120/06 P & 121/06 P, 9 September 2008, paras 117 *et seq.*; cf. K. Schmalenbach, 'Struggle for Exclusiveness: The ECJ and Competing International Tribunals', in I. Buffard *et al.* (eds), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (2008), 1045, 1056 *et seq.* See also G. de Burca, *supra* note 18, 5 ("In fact, the broad language, carefully-chosen reasoning, and uncompromising approach of this eagerly-awaited judgment [*Kadi* case] by the plenary Court suggests that the ECJ seized this high-profile moment to send out a strong and clear message about the relationship of EC law to international law, and most fundamentally, about the autonomy of the European legal order.").

Why is this to be criticized? Are political decisions not the daily bread of international and national law as well? This is true concerning the genesis of law. However, the bindingness and, later on, the enforcement of law are strictly to be qualified according to legal and not political reasons. This is important in order to retain the politically achieved compromise or consensus as agreed between the decisive persons or organs. If there is leeway concerning the bindingness or the enforcement of a compromise agreed between political entities, then there is no point making this compromise, because either way it could be abandoned unilaterally afterwards. The decisive distinction and, coincidentally, the crucial point of criticism lie in the difference between political and legal reasons. The former are relevant to reach the agreement (strictly speaking the norm), and the latter are in charge of enforcing the decision once it has been taken. By mixing this, the whole concept of agreements and in more general terms the concept of law loses effect.

#### D. Conclusion

It can be concluded that the ECJ follows two diametrically diverging doctrines regarding the relationship of legal orders to one another. However, from a theoretical perspective, this is inconceivable. One and the same organization cannot follow two different approaches, one based on a dualistic and one on a monistic view. However, from a pragmatic perspective, this Janus Face of the ECJ is quite understandable. Bearing in mind the historical background of the origins of both doctrines, political influences regarding both doctrines show their benefits. Monism, on the one hand, is an expression of legal unity, which is absolutely necessary for the EU to safeguard its integration process. On the other hand, dualism helps to secure the stability of this integration process by separating the EU legal order from far reaching international influences. As Janus is known as the god representing the beginning and the end, the monistic face regarding the relationship of the EU to its Member States may represent the end of an integration process. The dualistic face might indicate the beginning of broader integration regarding international law. However, while this cannot be a conclusion in absolute terms, it is necessary to emphasize that none of these integration processes is absolute. Neither has the EU been turning into a federal State representing a “municipal legal order”, nor is it possible to separate the EU legal order – itself representing an international organization – that strictly from international law. Respecting this, it would

be wise not to build up absolute structures regarding other legal systems while being in a phase of transformation. However, at the same time, this is the reason why almost 100 year old theories might not offer the theoretical framework capable of accompanying a reasonable balance between the legal spheres involved. Knowing the presumed indecisiveness of lawyers, finding a possible solution for the dilemma discussed might be a calling, prevalent in other cases, for the "Lords of the Treaties".