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Oxford University Press
2018

Klabbers , J A M 2018 , The Reception of International Law in the EU Legal Order . in R Schütze & T Tridimas (eds) , Oxford Principles of European Union Law : Volume I: The European Union Legal Order . Oxford University Press , Oxford , pp. 1208-1233 .

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The Reception of International Law in the EU Legal Order: In Defense of the Realm

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Ever since the early 1970s, the question as to the precise status and effects to be accorded to international norms within the EU¹ legal order has given rise to puzzlement, controversy, and debate. Some claim that the EU is, in the wonderful German phrase, *völkerrechtsfreundlich*: it is thought that the EU has a friendly and accommodating position towards international law, marred only by the generally acknowledged exception concerning WTO law.² Others maintain that, as a general matter, the position of WTO law actually reflects the general practice: WTO law is not the exception, but the general rule.³ Yet others perceive a temporal development: starting from a friendly disposition towards international law, the EU has become, over time, less accommodating.⁴ And at least one author posits something close to the reverse, suggesting that the EU is actually increasingly receptive to international law, the latter increasingly being interwoven in EU law.⁵

I have written elsewhere that, as a general matter, the EU is not quite as *völkerrechtsfreundlich* as is often assumed, and this guarded attitude towards international law also plays out when it comes to allowing international law to enter the EU legal order: the EU is reluctant to allow this. In the absence of much political guidance, the CJEU exercises a firm gatekeeping role and displays a businesslike disposition towards international law, willing to embrace it when convenient or beneficial, but far less interested when international law threatens the integrity of EU law and autonomy of the EU legal order. In other words, what matters more than anything is the defense of the realm.⁶

¹ Terminological note: I shall consistently use post-Lisbon terminology except when citing or when the context demands a specific reference to the EC, EEC, or some other construction.

² The point is made in brief general terms by Christiaan Timmermans, 'The EU and Public International Law', (1999) 4 *European Foreign Affairs Review*, 181-194.

³ See Jan Klabbers, 'Völkerrechtsfreundlich? International Law and the Union Legal Order', in Panos Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives* (Cheltenham: Edward Elgar, 2011), 95-114.

⁴ See, e.g., Gráinne de Búrca, 'The ECJ and the International Legal Order: A Re-evaluation', in Gráinne de Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism* (Cambridge University Press, 2012), 105-149.

⁵ See Pieter Jan Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story', in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011), 256-278.

⁶ See Jan Klabbers, 'International Law in Community Law: The Law and Politics of Direct Effect', (2002) 21 *Yearbook of European Law*, 263-298; Jan Klabbers, *The European Union in International Law* (Paris: Pédone, 2012); Klabbers, *supra* note 3.

Normatively, this guarded approach is not necessarily deplorable, for at least three reasons.⁷ First, a political entity that remains on guard towards international law may still be characterized by a high degree of compliance with international law. Second, not all international law is worth embracing: international law can be (and is) used for good purposes, but can sometimes also be utilized for less commendable activities.⁸ Third, international law is sometimes, justifiably, seen as entailing a massive shift of power away from local democratic bodies to the executive branches of governments, as it is often the executive branch that makes and applies international law – and that is problematic in and of itself, regardless of the contents of international law.⁹

It should perhaps not come as a surprise that many uphold the idea that the Court has been very open towards international law. As I will suggest below, it has indeed been very receptive with respect to one category of treaties: those radiating EU law outward. Such treaties do not threaten the autonomy of the EU legal order in any way, and can thus happily be applied. What is more, far from threatening EU law's integrity, such treaties strengthen the EU by exporting EU law to territories not formally part of the EU, whether in the developing world, North Africa and the Middle East, or Eastern Europe.¹⁰ In other words, the friendly disposition concerns a group of treaties that is the largest group to come before the court, and has inspired the largest amount of cases involving international agreements before the Court. Yet, as so often, mere statistics flatter to deceive: a more substantive analysis reveals that while the CJEU has been happy to accept these EU-law radiating treaties, it has been reluctant to accept other manifestations of international law.¹¹

In order to come to understand the EU's approach, a number of conceptual remarks need to be made first, as there are many different situations when international norms may knock on the Union's door.¹² Section

⁷ To this extent, Skordas' claim that my position is strongly normative is misguided. See Achilles Skordas, 'Völkerrechtsfreundlichkeit as Comity and the Disquiet of Neoformalism: A Response to Jan Klabbers', in Koutrakos (ed.), supra note 3, 115-144.

⁸ See generally Jan Klabbers, *International Law* (Cambridge University Press, 2013).

⁹ See, e.g., J.H.H. Weiler, 'Dialogical Epilogue', in De Búrca and Weiler, (eds.), supra note 4, 262-309, at 263.

¹⁰ See also Koutrakos, who notes that this group of treaties serves as the 'foundation for gradual integration' between the parties (i.e. the EU and its partners), so much so that the Court often uses a presumption of direct effect with respect to this category of treaties. See Panos Koutrakos, *EU International Relations Law* (Oxford: Hart, 2006), at 238.

¹¹ Peters too spots a distinction but of a different nature: between those cases where member state action is at issue, and those where action by one of the EU institutions is at issue. See Anne Peters, 'The Position of International Law within the European Community Legal Order', (1997) 40 *German Yearbook of International Law*, 9-77, at 63-64. Writing earlier, Völker distinguishes between 'regular' and GATT cases: see E.L.M. Völker, 'The Direct Effect of International Agreements in the Community's Legal Order', (1983) *Legal Issues of European Integration*, 131-145, while Eeckhout, after some hesitant beginnings (at 281-283), distinguishes between cooperation agreements, GATT/WTO law, and 'other multilateral agreements': see Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, 2004), 283-300.

¹² Much of this follows the excellent study by Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (Oxford University Press, 2013). See also Marc Maresceau, 'Bilateral Agreements Concluded by the European Community', (2004) 309 *Recueil des Cours*, 128-451, at 246.

II of this paper will be devoted to establishing a framework for analysis, distinguishing the various situations (and the various kinds of norms) that may wait to enter the Union legal order, and the various distinct legal issues to which such situations may give rise. The heart of the paper (sections IV-VIII) will be devoted to an overview of the answers provided by the Court of Justice of the EU and, on occasion, the EU General Court. The Courts play a pivotal role here, since it is a marked characteristic that the written constitution of the EU says extremely little about the effects of international norms in the EU legal order, as section III will briefly discuss. The concluding section of the paper (section IX) will address the political costs involved in the Court's struggle to safeguard the autonomy of the EU legal order.

One word of warning is in order. The topic of the reception of international law in the EU legal order is already the subject of a few lengthy monographs and thick edited volumes: it cannot be captured in all its richness and nuances, or twists and turns, within a few dozens of pages.¹³ In particular, the case-law seems to be slaloming quite a bit, and necessarily so, as each case comes with its unique set of facts and demands its own approach. As a result, the current chapter is limited to the sketching of a general picture, at the cost of considerable detail.

II. Towards A Conceptual Framework

Among international and constitutional lawyers, the reception of international law in any domestic legal order is often discussed in terms of dualism and monism. Dualists have suggested, since the late 19th century, that international law and domestic law are separate spheres which rarely come into contact: international law predominantly regulates relations between states, domestic law predominantly regulates relations between individuals, and rarely the twain shall meet. Consequently, for any international rule to enter a domestic legal order, a dualist constitution will dictate that it must be given a form recognized by that domestic order – it must be transformed into a domestic legal act, such as an act of parliament, or a governmental decree.

Monists, by contrast, developed the theory that since international law is increasingly concerned, much like domestic law, with relations involving individuals and companies, the empirical premise underlying dualism is not tenable. Instead, the better view, so monists claim, is to see international law and domestic law as

¹³ See Mendez, The Legal Effects; Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds.), *International Law as Law of the European Union* (Leiden: Martinus Nijhoff, 2012). Very useful on the consequences of accepting international law in the EU legal order is Rasmussen Holdgaard, 'Principles of Reception of International Law in Community Law', (2006) 25 *Yearbook of European Law*, 263-314.

intimately related, so much so that domestic legal orders can allow international law to enter without being transformed into a locally recognized act. The one condition then often upheld is that such international legal rules must be capable of having what is often called 'direct effect': the rule must speak to the public at large, rather than to the legislator, and this is usually determined by interpreting the provision concerned, perhaps in conjunction with the treaty (or other instrument) in which it is embedded.

Herewith, the doctrine of direct effect assumes great relevance, and acts as a gatekeeper in monist systems, with the gates being diligently patrolled by the courts.¹⁴ In states with a monist constitution (the Netherlands is the textbook example), local judges can apply international law without further ado, as long as they feel the rule addresses the individual. By way of example, a provision stating that 'no one shall be subjected to torture', clearly meets this requirement, whereas a provision saying that 'the states parties to this convention shall criminalize torture' rather addresses the legislator.

If it typically depends on domestic constitutional law whether a state is considered to be monist or dualist, the one major exception concerns the fate of EU law, itself at least in part a manifestation of international law. Wary of the risk that dualism in its member states could jeopardize the application of EU law in those member states, the CJEU opined already in the early 1960s¹⁵ that the effect of EU law in the legal orders of its member states depends on EU law, and does not depend on the constitutional law of those member states. Hence, internally, the EU has a strong monist orientation; it is the argument of this chapter, however, that the EU comes closer to dualism in its attitude towards international law.¹⁶

In order to see the forest for the trees, a first question to be asked is what sort of norms can possibly enter the EU legal order. The most obvious category resides in the notion of treaties, but here already various distinctions are in order. These can relate to the circle of parties of treaties (and much of what will follow will be discussed in these terms), but can also relate to the subject matter of those treaties. Thus, it is not uncommon to divide the treaties to which the EU is a party into three broad groups: association and trade agreements, a category of GATT/WTO agreements, and a leftover category comprising other treaties, addressing such things as civil aviation, environmental cooperation, or maritime issues and which, since the recent accession to the Convention on the Rights of Persons with Disabilities and perhaps, at some future date, the possible accession to the European Convention on Human Rights¹⁷, may also come to comprise

¹⁴ Note that in a strict dualist system, the question of whether an international provision is directly effective cannot arise.

¹⁵ It did so in case 26/62, *Van Gend & Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1.

¹⁶ See in further detail, Klabbers, *International Law*, supra note 8.

¹⁷ That date may be far away still, given the Court's reluctance: see Opinion 2/13 (*Accession to the European Convention*), 18 December 2014.

human rights treaties.¹⁸ Other divisions are conceivable as well, e.g. between 'exclusive' EU agreements, agreements solely binding the member states, and so-called mixed agreements, concluded by both the EU and all or some of its member states. The latter category gives rise to specific issues relating to such issues as jurisdiction to interpret which I will, however, largely leave aside.¹⁹

With respect to the circles of parties, a first category of treaties are those *concluded by the Union* as such with third parties (i.e. non-member states). These cover a variety of situations, but fall mainly within those policy fields where the EU is deemed to be exclusively competent and where, as a result, the member states are pre-empted from concluding agreements. A second category consists of so-called *mixed agreements*: agreements with third parties to which both the Union and its member states are parties, with a further subdivision between treaties to which all member states are parties, and those to which some but not all member states are parties. Examples of the former include the Agreement establishing the World Trade Organization and the UN Convention on the Law of the Sea; examples of the latter would seem to be found predominantly in the field on international environmental law. Adding complications is the circumstance that under some of these mixed agreements, decision-making bodies have been established: Association Councils in the case of EU Association Agreements, or COPs or MOPs under environmental agreements. These take decisions, and those decisions themselves may need to be given effect to, in one way or another.

A third category comprises treaties to which *all member states are parties*, but the EU itself is not. This is, in principle, a large category, but for practical purposes its size is less intimidating than might first appear, as many such treaties are devoted to policy fields that have little or no bearing on the EU, such as, say, the 1961 Vienna Convention on Diplomatic Relations.²⁰ That said, given the continuous development of EU law, there is no guarantee that such treaties do not end up giving rise to EU law issues at some point in the future. After all, similar developments characterize the EU's position towards the UN Charter, the European Convention on Human Rights, the Refugee Convention and Protocol, as well as some conventions concluded under auspices of the International Labour Organization. Moreover, such treaties may come before the Court in an incidental manner, an example being the *Diakite* case in which the Court was asked whether the EU law concept of 'internal armed conflict' is identical to the international law concept of

¹⁸ On the putative accession to the ECHR, see Jan Klabbers, 'On Myths and Miracles: The EU and its Possible Accession to the ECHR', (2013) 1 *Hungarian Yearbook of International and European Law*, 45-62. De Witte wisely remarks that depending on one's definition of what constitutes a human rights treaty, this may not be the first one that the EU has become a party to. See Bruno de Witte, 'The EU and the International Legal Order: The Case of Human Rights', in Malcom Evans and Panos Koutrakos (eds.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart, 2011), 127-147.

¹⁹ See generally Christophe Hillion and Panos Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford: Hart, 2010).

²⁰ This was confirmed by the Court in Case C-364/10, *Hungary v Slovakia*, 16 October 2012.

‘armed conflict not of an international character’, and held that it was not: the EU concept, so it held, was meant to be broader in scope and therewith offer more protection to victims than the international law concept.²¹

A fourth category consists of treaties concluded by *member states with third parties* which come to be seen to overlap, or even to be in downright conflict, with that member state’s obligations under EU law. It may not be entirely appropriate to discuss these under the heading of their status in EU law in that, in a way, they have no such status; yet they do, potentially, affect EU law, and in recent years have given rise to quite a bit of litigation before the CJEU.²²

For completeness’ sake, a fifth category must be mentioned, consisting of treaties concluded *between the EU and one or more of its member states*. This is a small and, thus far, legally inconsequential category, but it serves useful political purposes, in that it may help solidify the exceptional position of a member state on a policy issue generally covered by the EU. Related are treaties concluded between most or all member states either as demanded by Union law (so-called complementary agreements, e.g. on double taxation or enforcement of civil judgments), or initially concluded outside the Union framework but closely related or even incorporated. This may apply to the Schengen agreements (which covers most member states, and a few non-member states) and the Europol convention, later transformed into a Community decision.²³ Such treaties may on occasion also be seen to circumvent established EU procedures, and therewith generate considerable legal and political controversy.²⁴

As an entity operating within the international realm, the EU is also bound by *customary international law and general principles of law*, which raises the question whether and how these can enter the EU legal order. Being an international organization, the EU is bound by, as the ICJ once put it, the ‘general rules of international law’²⁵, and while it is not immediately clear what that phrase exactly refers to, at the very least it would seem to encompass the so-called secondary rules of international law: rules on the making of international law, such as those codified in the two Vienna Conventions on the Law of Treaties, as well as

²¹ Case C-285/12, *Aboubacar Diakite v Commissaire general aux refugies at aux apatrides*, 30 January 2014. The treaties concerned were the 1949 Geneva Conventions.

²² See generally Jan Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, 2008).

²³ On this, see Bruno de Witte, ‘Using International Law for the European Union’s Domestic Affairs’, in Cannizzaro et al. (eds.), *supra* note 13, 133-156.

²⁴ See, e.g., on the Treaty establishing the European Stability Mechanism, Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, 27 November 2012.

²⁵ See *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, advisory opinion, [1980] ICJ Reports 73, para. 37.

those outlining the basics of international responsibility, to the extent that these are considered to be of customary nature.²⁶

As a matter of international law, the EU is also bound by *decisions of international organizations* of which it is a member.²⁷ This comprises the various quasi-universal institutions that the EU has joined or helped found, such as the Food and Agriculture Organization and the World Trade Organization, but such organizations rarely take decisions that are binding on their membership beyond 'household matters' such as financing or admission of new members. The category however also comprises the various Association Councils that are created by means of Association (and similar) agreements between the EU and individual states (or groups of states), and these Councils may well take binding decisions. Hence, the effect of these decisions in the EU legal order is a topic of relevance to this Chapter, and a considerable body of case law exists.

And then there is a final, amorphous and jurisprudentially under-theorized category which, for want of a better term, may perhaps be designated as (international) *legal concepts*. These are not creative of obligations in any direct manner, but nonetheless need to be respected by actors, and would cover such things as the notion of jurisdiction, or the concept of treaty. Put differently, the EU, like any international actor, will occasionally have to make use of those concepts and cannot on its own invent new ones or circumvent existing ones.

In other words, international law can come to knock on the Union's door – and thus threaten the EU's autonomy – in a variety of guises. It can also do so in a variety of settings, depending on the situation within the EU. Perhaps the most obvious situation to arise is that where an *individual or legal person* would argue that certain behavior is in conflict with an international norm, and that behavior can be either behavior of a *domestic authority* in one of the member states or, less often, behavior by the *Union authorities*. This applies across the range of treaties singled out above, in particular with respect to the first three categories (i.e. treaties of the EU, whether mixed or not, and treaties of the member states without the EU participating, such as the UN Charter). It may also arise in connection with individual member state agreements, although practice suggests this is relatively rare.²⁸ Likewise, individuals have sometimes relied on customary international law in order to combat measures taken by the EU.

²⁶ See further Jan Klabbbers, 'The Sources of International Organizations Law', in Samantha Besson and Jean d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford University Press, forthcoming).

²⁷ Literature is scarce, one notable exception being Nikolaos Lavranos, *Legal Interaction between Decisions of International Organizations and European Law* (Europa Law Publishing, 2004).

²⁸ In Case C-158/91, *Criminal Proceedings against Jean Claude Levy*, [1993] ECR I-4287, the opposite occurred: Levy relied on an EU directive against a French law that was implementing an earlier, outdated treaty.

Individual member state agreements more often play a role in *infringement cases*, brought by the Commission against a member state. Such infringement procedures can commence in connection with agreements to which the EU itself is a party, whether the agreements are mixed or not.

The international law concepts tend to arise in litigation mostly in an incidental fashion. This is not to say they are unimportant: it sometimes happens that the CJEU explicitly accepts a particular conceptualization of an international institution in a manner that paves the way for further developments. Arguably, the Court's holding that the EEC (at the time) possessed international legal personality in *ERTA* is an example: it set the scene for the further development of the international role of the Union, although it probably was not necessary for the Court to say anything about international legal personality in order to decide the case before it and regardless of the absence of argumentation.²⁹

Likewise, the notion of treaty has come before the CJEU on a few occasions, but usually in incidental fashion. In one prominent case, the Court declined to accept (and rightly so) an argument made by the Commission to the effect that international law would recognize the existence of a category of so-called administrative agreements in addition to regular treaties³⁰, and has on occasion confirmed its adherence to the standard international law concept of treaties when holding that commitments on the international level are by definition to be regarded as treaties unless they leave implementation to the voluntary action of the parties.³¹

The concept of jurisdiction too has come before the court on several occasions, and again it could only stay within limits recognized under international law versions of the concept. It has done so in the context of competition law, accepting that the EU can exercise a certain amount of extra-territorial jurisdiction under the so-called 'effects doctrine'³²; it has done so in the context of the scope of social security schemes³³; It has done so in the context of human rights protection³⁴; and has also done so in the context (highly

²⁹ See Case 22/70, *Commission v Council (ERTA)*, [1971] ECR 273. See also former Advocate General Francis G. Jacobs, 'Direct Effect and Interpretation of International Agreements in the Recent Case Law of the European Court of Justice', in Alan Dashwood and Marc Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, 2008), 13-33, at 13.

³⁰ See Case 327/91, *France v Commission*, [1994] ECR I-3641. See generally Jan Klabbers, *The Concept of Treaty in International Law* (The Hague: Kluwer, 1996).

³¹ See Case C-233/02, *France v Commission*, [2004] ECR I-2759. For discussion, see Jan Klabbers, 'International Courts and Informal International Law', in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds.), *Informal International Lawmaking* (Oxford University Press, 2012), 219-240, esp. at 233-234. In Joined cases C-103/12 and C-165/12, *European Parliament and Commission v Council*, 26 November 2014, the Court accepted that an offer made by the EU and acceptance thereof by Venezuela constituted a treaty for purposes of international law.

³² See Joined Cases 89, 104, 116, 125-129/85, *Ahlström Osakeyhtiö and others v Commission*, [1993] ECR I-1307.

³³ See Case C-347/10, *Salemink v Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen*, 17 January 2012.

³⁴ See Case C-131/12, *Google Spain and Google Inc v Agencia Espanola de Proteccion de Datas and Mario Costeja Gonzalez*, 13 May 2014, esp. paras. 54-55.

incidental) of military operations, discarding an argument that in seizing a ship on the high seas, the Dutch navy would have acted outside the bounds of its jurisdiction under international law.³⁵ And it should perhaps be mentioned that while the Court has steadfastly refused to rely on the doctrine of implied powers as recognized by the International Court of Justice in *Reparation for Injuries*³⁶, its own rendition of the doctrine has nonetheless stayed within the (admittedly broad) limits of that doctrine, even if the Court has seen fit to provide a different rationale.³⁷

There are many more examples, hypothetically if not necessarily arising in practice. It seems reasonably clear that the EU is not in a position to, e.g., treat Greenpeace as an intergovernmental organization, as doing so would depart from the way that concept is regularly used. Likewise, it would be wrong to deny an entity's statehood on account of it showing a low per capita income – a certain minimum per capita income is not generally seen as one of the elements of statehood. These notions are highly fluid and socially constructed; they are not 'binding' in any conventional sense of the word, and while departing from them would not constitute an internationally wrongful act, nonetheless doing so would be considered wrong. I will leave this category for what it is, and will not return to it, except in order to discuss the notion of direct effect. This, after all, is one of the central concepts refracting international obligations throughout the Union, and therewith requires some serious attention.

III. The Written Constitution

The EU's written constitution has always been very succinct with respect to the role of international law in the Union. For one thing, there has never been any explicit reference to the international legal personality of the EU, with the exception of a proviso in article 6 ECSC.³⁸ Beyond this, the treaties have always been silent on the issue, perhaps on the theory (which used to be more or less generally accepted) that a grant of external powers would by definition constitute international legal personality, at least if combined with a willingness on the part of third parties to engage with the Union. Put differently, it would be unthinkable for an entity with a well-developed commercial policy, with provisions on the conclusion of association agreements and other similar provisions, not to be an international legal person, regardless of any specific grants of personality. Still, matters came to heated political discussion when the newly created TEU (at

³⁵ See Case C-177/95, *Ebony Maritime and others v Prefetto delle Provincia di Brindisi and others*, [1997] ECR I-1111.

³⁶ See *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, [1949] ICJ Reports 174.

³⁷ For further discussion, see Jan Klabbers, *An Introduction to International Institutional Law*, 3rd ed. (Cambridge University Press, 2015), 56-63..

³⁸ Article 6 ECSC stated that ECSC had legal personality, and then indicated what this meant in 'international relations'.

Maastricht) lacked such a specific clause, and politicians of varying ilk used this absence to argue that the EU was not a legal person for purposes of international law and thus (so the implication went) did not constitute an abdication of sovereignty. This created the unlikely picture of an entity with ambitions in the policy fields such as foreign policy, security, and immigration, and with the required powers to act, yet ostensibly without international legal personality.³⁹ Clearly, as far as legal argument goes, this was never particularly convincing, and the drafters of the still-born Treaty establishing a Constitution for Europe quickly realized that an explicit grant of legal personality might be useful to dispel any doubts. Such a clause was inserted⁴⁰, and survived in the TEU, albeit in pithy form: 'The Union shall have legal personality'.⁴¹ This is still not very explicit in its formulation, but given *ERTA* there can be little doubt that it must be seen as comprising the personality of the EU under international law.⁴²

Beyond this, the TEU says little or nothing on the international role of the Union, other than granting it a number of specific powers and tasks and creating some institutional means. Thus, the Union is ordered to accede to the ECHR and shall develop a special relationship with neighbouring countries. It shall appoint a High Representative for Foreign Affairs and Security Policy, it shall be guided by certain principles in its foreign policy, and has treaty-making powers in the field of foreign policy. The TEU does not, however, contain anything on the relationship with the international legal order, and this is only to a limited extent remedied by the TFEU.

The TFEU, like its predecessors, contains little on international matters, although it does state in its preamble that the development of 'the overseas countries' should take place 'in accordance with the principles of the Charter of the United Nations'. This is a rather convoluted phrase, expressing a reluctance to be specific as to which countries it concerns and, more remarkably, manifesting a reluctance to legally tie the EU to the UN – it links the EU to the principles contained in the Charter, but not to the Charter itself. As far as tying oneself to the mast of international law goes, the knots remain fairly loose.

If the TFEU says little about the EU's relationship with international law, it nonetheless says a lot about treaty-making: the EU has exclusive competence in the field of commercial policy (and this has been expanded in Lisbon so as to include investment relations⁴³) and partial, complementary or shared competences in a number of other policy fields, ranging from humanitarian aid to development assistance and including other forms of economic, financial and technical cooperation. While the TFEU contains

³⁹ See further Klabbers, *supra* note 37, 46-50.

⁴⁰ Article I-7 Treaty establishing a Constitution for Europe.

⁴¹ Article 47 TEU.

⁴² Article 335 TFEU specifies the capacity of the Union under the domestic laws of its member states, and does not speak of personality. Declaration No 24 of the Lisbon Final Act still suggests some political discomfort: the EU's legal personality is not to be seen as authorizing the Union to act beyond its conferred competences.

⁴³ Article 207 TFEU.

detailed provisions on judicial cooperation in civil and criminal matters, agreements on the topics with third states seem to be concluded on the basis of the foreign policy powers of articles 24 and 38 TEU.⁴⁴

In addition, the TFEU provides in article 351 that agreements concluded by the member states before the EU was created or before their accession shall be protected, although incompatibilities between such treaties and EU law must be eliminated. This provision has a long pedigree, having been part of the EEC Treaty since its first inception, as article 234 EEC.⁴⁵ It also has gone through a remarkable career before the CJEU: the first case brought on this basis goes back to early 1960s, but it was only in 2000 that the Court started to discuss the consequences of there being any incompatibilities between EU law and such a third party agreement.⁴⁶

IV. EU Trade, Association and Partnership Treaties

The largest class of cases involving the effects of international law in the EU legal order are treaties to which the EU is itself a party, either alone (with a third party, obviously), or in conjunction with some or all of its member states. Within this category, the largest sample is made up by trade, association and partnership agreements, ranging from treaties with the former colonies (nowadays in the form of the Cotonou agreement) to treaties with future member states and, in some cases, with aspiring member states that have little or no chance of full membership, such as Israel or Morocco (for geographical reasons) or perhaps even Turkey or, following a possible Brexit, the United Kingdom (for other, unspecified reasons). What this group of treaties has in common relates to their contents: to a greater or lesser extent, they are substantively based on EU law, aiming to export it to other places. Such treaties rarely, if at all, contain norms that the EU is uncomfortable with or that would require it to change its legislation; instead, they radiate EU law outwards, and thus hardly constitute a threat to the autonomy of the EU.

It should come as no surprise, therefore, that the CJEU has in general been very friendly disposed towards such treaties: it could afford to be friendly disposed, since doing so would not involve much political costs, at least not in the sense of having to accept rules difficult to reconcile with the fundamentals of the EU's constitutional construct. Already in early cases involving this class of agreements, the CJEU saw fit to

⁴⁴ See Council Decision 7746/09 of 7 April 2009 with respect to the agreements on extradition and on mutual legal assistance between the EU and the US.

⁴⁵ For excellent early commentary, see Ernst-Ulrich Petersmann, 'Article 234', in H. von der Groeben, Jochen Thiessing and Claus-Dieter Ehlermann (eds.), *Kommentar zum EWG-Vertrag*, 4th ed. (Baden-Baden: Nomos, 1991), 5725-5753.

⁴⁶ See Jan Klabbbers, 'Moribund on the Fourth of July? The Court of Justice on Prior Agreements of the Member States', (2001) 26 *European Law Review*, 187-197.

pronounce that, upon entry into force, such agreements come to form an 'integral part' of the EU legal order.⁴⁷ Still, by pointing out that the purposes of such agreements need not be identical to the objectives of the Union, the Court also kept open the possibility to deny effects to such agreements which it would be happy to accept within its own order. A case in point is the *Polydor* case, in which the Court held that since the purposes of the (then) EEC Treaty and the Free Trade Agreement with Portugal were not identical, it followed that 'in the context of the Agreement restrictions on trade in goods may be considered to be justified on the ground of the protection of industrial and commercial property in a situation in which their justification would not be possible within the Community.'⁴⁸

This signifies that even though the Court is relatively open to this class of agreements, it does not provide them with a blank check: it remains for the Court to decide whether or not such an agreement can have effects in the EU legal order, and the overriding concern is not the formal status of the agreement as an instrument of international law, nor its abstract characteristic as being somehow concerned with free trade, but whether or not the agreement is compatible with the autonomy of the EU legal order. In *Polydor*, the Court accepted that the relevant provision in the agreement with Portugal could be read differently from a similarly worded provision in the EEC Treaty: a limitation on imports coming from outside the EU was not immediately to be construed as a prohibited trade restriction.⁴⁹ In other words, even though the agreement radiated EU law outward, this did not entail that EU law would have to be affected.

If the Court held in *Haegeman* that international agreements are to be considered an integral part of the EU legal order and in *Polydor* that not all provisions in free trade agreements work within the Union, some eight months after *Polydor* the Court had the chance to tie a few loose ends together. The case concerned was *Kupferberg*, again involving the free trade agreement concluded with Portugal. Mr Kupferberg had been importing wines from Portugal, and was wondering whether he could rely directly on provisions of the free trade agreement, something the court had left unaddressed in both *Haegeman* and *Polydor* and even, it seemed, declined in the latter when holding that provisions need not be given identical meaning if laid down in different agreements. For, at the end of the day, if the meaning of similarly worded provisions can differ from agreement to agreement, it would seem to follow that the possibilities of relying on such provisions without interference by the legislator become very slender indeed.

The Court started by explaining the logic behind *Haegeman*: agreements concluded by the EU are binding on both the institutions and the member states and therewith it follows that both the institutions and the

⁴⁷ See Case 181/73, *Haegeman v Belgium*, [1974] ECR 449.

⁴⁸ See Case 270/80, *Polydor v Harlequin*, [1982] ECR 329, para. 19.

⁴⁹ Earlier, in Case 87/75, *Bresciani v Amministrazione Italiana delle Finanze*, [1976] ECR 129, the Court had already held that lack of reciprocity did not in itself constitute a bar to direct effect (para. 23). *Bresciani* concerned the Yaoundé agreement, meant to stimulate development in former colonial territories by creating an association with the EU, by and large following the EU model.

member states assume responsibility for compliance, with the Union assuming the main responsibility. Hence, as the Court famously stated, such constructions give rise, 'above all', to an obligation of the member states vis-à-vis the Union. Hence they must be seen as forming an integral part of the Union legal order.⁵⁰

Having stated this, the Court naturally continued by stipulating that the EU nature of external agreements therewith also demanded their uniform application throughout the Union, and from what followed it seemed that the Court was willing to instrumentalize the doctrine of direct effect to this end: granting direct effect to provisions takes implementation out of the hands of the member state authorities and into the hands of the courts, reliably guided by the CJEU. The member states had presented various arguments why provisions in the agreement at issue should not be given direct effect, relating to the distribution of powers in the EU's external relations, relating to the reciprocity (*vel non*) underlying such agreements, and relating to the institutions set up under these agreements and the possibility of invoking safeguard clauses.⁵¹ The Court, however, rejected all arguments, concluding that there was nothing in the nature or the structure of the agreement preventing traders from relying on its provisions directly.⁵² What remained then was the question whether the wording was sufficiently precise and unconditional to make a finding of direct effect plausible, and here the Court answered in the affirmative, while also confirming that this did not mean that the provision was to be taken as identical or analogous to a corresponding provision in the EEC Treaty.⁵³

Kupferberg therewith, in essence, provided a fairly clear guideline for the further handling of litigation involving free trade and similar agreements or even, possibly, for all agreements concluded between the EU and third parties. The one relevant thing to do is verify whether the provision invoked is of such a nature as to be relied on directly by traders or others, on the general theory that there are few factors relating to the nature or structure of treaties which will present legitimate obstacles to direct effect.

Still, a new challenge arose under the association agreements which had set up their own common institutions with decision-making powers. Provisions in those agreements could possibly be directly effective, as the court implicitly confirmed in *Demirel*⁵⁴ (but denied in light of the wording of the provision

⁵⁰ See Case 104/81, *Hauptzollamt Mainz v Kupferberg*, [1982] ECR 3641, para. 13. This pleasantly implied, quite obviously, that the Court could also assume jurisdiction over the interpretation and application of such agreements.

⁵¹ See *Kupferberg*, para. 16.

⁵² See *Kupferberg*, para. 22.

⁵³ See *Kupferberg*, paras. 27, 31.

⁵⁴ See Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*, [1987] ECR 3719.

invoked by Ms Demirel)⁵⁵, but how about provisions in decisions taken by the association councils? This was politically all the more salient as many of those provisions dealt not so much with free movement of goods or services but with free movement of persons, thus potentially facilitating an inflow of individuals from associated countries such as Turkey or Morocco into the EU. Still, in *Sevince*, the Court proved not to be deterred, and claimed that provisions of decisions of an association council form part of Union law (following the *Haegeman* and *Kupferberg* logic), and could well be directly effective as long as ‘the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.’⁵⁶

Following the fall of communism the EU concluded a number of so-called Europe agreements with eastern European countries, largely with a view to paving the way for future EU membership. Provisions included in these agreements too were held to be directly effective⁵⁷ as was, more surprisingly perhaps, a provision in a partnership and cooperation agreement with Russia in *Simutenkov*.⁵⁸ The surprise here resides in the circumstance that the agreement with Russia cannot be seen a prelude to Russian EU membership (unlike the Europe agreements, or some association and free trade agreements), nor really as a substitute for EU membership (as with some of the remaining association agreements). Still, as one commentator notes, *Simutenkov* marks the transposition of EU law to an external agreement.⁵⁹

The Court’s enthusiasm for these treaties is further underlined by its willingness even to grant provisions direct effect as between private parties, so-called horizontal direct effect. This need not have been a necessary outcome: much of the theory behind direct effect suggests that treaty provisions, when granting rights to private parties, place corresponding obligations on public authorities; after all, these are the actors concluding treaties. Thus, a treaty between the EU and Russia may create a directly effective right for individuals but only, traditionally, opposable against the actors concluding the treaty in question. The idea of horizontal direct effect goes a step further though by holding that such a directly effective right can be invoked not only against the treaty-making authority but also, as the case may be, against other individuals or private parties. Therefore, granting horizontal direct effect is by definition controversial, and while the CJEU has a long pedigree in attaching such direct effect to provisions of the EU treaties, it has been far less forthcoming with respect to EU directives.

⁵⁵ Note though that while directly effective, such provisions could still be given a fairly limited scope: see e.g. Case C-416/96, *El-Yassini v Secretary of State for the Home Department*, [1999] ECR I-1209, therewith limiting the impact of the provision concerned.

⁵⁶ See Case 192/89, *Sevince v Staatssecretaris van Justitie*, [1990] ECR 3461, para. 15.

⁵⁷ See, e.g., case C-268/99, *Jany and others v Staatssecretaris van Justitie*, [2001] ECR I-8615.

⁵⁸ Case C-265/03, *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, [2005] ECR I-2579.

⁵⁹ See Mendez, *supra* note 12, at 294.

Yet, with the category of trade and association agreements, the Court has on occasion seen fit to allow parties to directly rely on provisions of such agreements (or emanating therefrom, as with decisions of association councils). It did not do so from the start: commentators have noticed that *Polydor*, e.g., involving claims between private parties, contained some of the direct effect language but no actual analysis in those terms⁶⁰, but eventually the Court would cross the bridge in *Kolpak*.⁶¹ This concerned a claim by a Slovak handball player employed in Germany that his status should not, according to the EU-Slovakia agreement, be any different than that of an EU citizen. The Court agreed that the rules of the German Handballbund could not be reconciled with the provisions of the agreement.⁶²

Friendly as the Court has been to association and free trade agreements, a new generation of free trade agreements seems to change the picture. Such agreements have been concluded with a variety of states, most of which will never aspire to join the EU (think of South Korea, or Iraq), although some eventually might (Serbia, e.g.). These agreements tend to incorporate elements of WTO law and create their own dispute settlement mechanisms; perhaps for these reasons, they often also explicitly preclude direct effect, and if that is the case, the Court has little choice but to honour explicit provisions to this effect.⁶³

To conclude, the CJEU has on the whole been very friendly disposed towards association agreements and free trade agreements concluded by the EU. Such treaties have been deemed to constitute integral parts of Union law, and the court has allowed individuals to rely directly on provisions contained in such agreements, even against other private parties, and has allowed individuals to rely directly on decisions of institutions set up under these treaties. It is no coincidence that commentators can speak of ‘maximalist’ treaty application⁶⁴ in this context, but any conclusions concerning the *Völkerrechtsfreundlichkeit* of the CJEU (or the EU at large, really) should come with a caveat: these are treaties that fit the traditional realist paradigm of treaty-making, in which the dominant party (the EU) only commits to what it wants to do at any rate.⁶⁵ The broad category of association, free trade, and partnership agreements has as its overarching goal the exportation of EU law to other states; these treaties contain little that would not apply to EU law itself (even if those treaties do not always have goals that are identical to the goals of EU law) and thus, importantly, do not in any way threaten the integrity of EU law or the autonomy of the EU legal order: quite the opposite.

⁶⁰ *Ibid.*, at 98-99.

⁶¹ Case C-438/00, *Deutscher Handballbund eV v Maros Kolpak*, [2003] ECR I-4135, paras. 31-37.

⁶² It would follow a similar logic in *Simutenkov*, upholding a claim against the Spanish Football Federation.

⁶³ For discussion, see Alik Semertzi, ‘The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements’, (2014) 51 *Common Market Law Review*, 1125-1158.

⁶⁴ See Mendez, *supra* note 12.

⁶⁵ For a recent re-formulation, see Jack L. Goldsmith and Eric O. Posner, *The Limits of International Law* (Oxford University Press, 2005).

V. GATT and WTO law

If the CJEU has been generous with respect to association and free trade agreements, it has been decidedly stingy with respect to another large category of cases: those involving, first, the law of the General Agreement on Tariffs and Trade and, since 1995, the law of the World Trade Organization. This has surprised commentators, for a variety of reasons, one of them being the circumstance that external commercial relations traditionally mark the one policy field where the EU has come to subsume its member states. Thus, external trade is of pivotal importance for the EU, and one might have expected *Völkerrechtsfreundlichkeit* to extend to this most important of policy fields.

The first case to involve the GATT already illustrated some of the dilemmas involved. For one thing, the EU itself never was a party to GATT⁶⁶, although its member states were, and this sat uncomfortably with the exercise of exclusive powers by the EU. Hence, in the first relevant case, the Court felt compelled to devise a theory in order to cement the EU's role in connection to GATT – otherwise there would have been a decent chance that the exclusive powers of the idea in external commerce would have remained a dead letter.

The Court did so in *International Fruit Company* by launching a theory of legal succession: by means of transferring competence to the EU, the member states had also transferred (and had intended to transfer) their obligations under GATT to the EU. In addition, it seemed that this had been accepted by the Union's partners in GATT: the Court made a point of noting that the succession of obligations has been 'recognized by the other contracting parties'.⁶⁷

Yet, the Court would not allow the applicant to rely on the provisions of GATT. The applicant complained that some EU instruments relating to dessert apples were in contravention of GATT's provisions on quantitative restrictions to trade (article XI GATT) and has asked for the EU instruments to be invalidated. This now the Court refused to do, by declining to accept the direct effect of GATT: GATT was characterized by great flexibility, allowed for derogations and safeguard measures, and did not have a very 'hard' or

⁶⁶ If GATT can be said to have had parties to begin with: it was applied on the basis of a Protocol of Provisional Application.

⁶⁷ See Cases 21-24/72, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, [1972] ECR 1219, para. 16. For discussion, see Robert Schütze, 'The "Succession Doctrine" and the European Union', in Anthony Arnall *et al.* (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford: Hart, 2011), 459-484.

‘legal’ dispute settlement mechanism.⁶⁸ In other words, the spirit and general scheme of GATT prevented GATT from being considered directly effective.

The interesting thing in the Court’s analysis was its handling of the direct effect doctrine: it concluded already on the basis of the general scheme and spirit of GATT that GATT should not be given direct effect. Put differently, at no point did it look at the actual wording of the provision involved, article XI GATT. Had it done so, it could not have reached the same conclusion all that easily, in that at least the first paragraph of article XI, laying down a general prohibition of quantitative restrictions, is rather unequivocal and quite precise, prohibiting quantitative trade restrictions and doing so in a form (‘No prohibitions or restrictions ... shall be instituted or maintained by any contracting party...’) reminiscent of the *Van Gend and Loos* scenario.⁶⁹

Be that as it may, in *International Fruit Company* the Court killed two birds with one stone, both highly instrumental in upholding the autonomy of the EU legal order. It made clear that in the framework of GATT, the EU had become the relevant actor, and provided the underlying theory. By the same token, it made clear that individual traders could not rely directly on the provisions of GATT. Hence, it managed to shield the EU against its own member states and their external commerce ambitions, and shield the EU institutions against being overruled by GATT law.

While the succession theory would be relied on again a few years later in *Nederlandse Spoorwegen* in connection to the Customs Cooperation Council⁷⁰, it subsequently lead a dormant existence for several decades until re-discovered after the turn of the millennium.⁷¹ By contrast, the debate on the relationship between the EU and GATT/WTO never calmed down. Still before GATT was transmogrified into the WTO, the Court saw the need to soften its absolutist stance by creating two exceptions. GATT may not have been directly effective in the Union legal order, but there are situations where GATT norms are of relevance even in litigation within the Union. One of these arises when EU law explicitly aims to implement GATT law; this came to the fore in connection with anti-dumping, with an EU anti-dumping instrument having been designed to implement the GATT’s Anti-Dumping Code. If this is the case, if the EU instrument is adopted ‘to comply with the international obligations’ of the EU then, so the Court held, the legality of the EU measures may be tested against the underlying international norm.⁷²

⁶⁸ *International Fruit Company*, esp. para. 21.

⁶⁹ Admittedly, article XI GATT does come with exceptions and some interpretative difficulties, but then again most provisions do.

⁷⁰ See Case 38/75, *Nederlandse Spoorwegen*, [1975] ECR 1439.

⁷¹ I will get back to this below.

⁷² See Case C-69/89, *Nakajima All Precision Co. v Council*, [1991] ECR I-2069, esp. para. 31.

The other exception is a few years older, and often referred to as the *Fediol* exception: where EU law makes it possible for traders to complain to the Commission about the trading practices of other states, including in light of GATT, it follows that they can invoke the GATT. There is not much point in the EU providing relief against 'illicit commercial practices' if the Commission's handling of complaints cannot be reviewed against the norms relied on, after all.⁷³ That said, neither the *Nakajima* nor the *Fediol* exception have been of great practical relevance: they have rarely resulted in annulment of a measure taken by the EU.⁷⁴

In *International Fruit Company*, the Court had declined direct effect because of the spirit and general scheme of the GATT. Consequently, when GATT was replaced by the WTO, some predicted – or hoped – that the CJEU might now be willing to reconsider its strict line.⁷⁵ After all, the main outstanding feature of the new WTO was its re-vamped dispute settlement mechanism. While under GATT, panel decisions would mostly be taken by trade diplomats and could be blocked by the 'losing' state, under the new rules a proper judicial body was envisaged in the form of the Appellate Body, and decisions could only be deprived of legal effect by means of a negative consensus: the losing state is no longer in a position to block panel reports. Hence, so the expectation arose, the Court could no longer rely on the spirit and general scheme of the WTO to deny direct effect. This turned out to be mistaken though: Mendez, writing in 2013, has calculated that there have been at least 68 requests for review in light of WTO law, all of them rejected.⁷⁶

The Court considered the new WTO setting in *Portuguese Textiles*. The EU had concluded agreements on textiles with Pakistan and India, much to the chagrin of Portugal, which saw its own textiles industry endangered and argued that the agreements in question violated the EU's obligations under several WTO agreements. The Court found that, while certainly the WTO looked more legalistic than the old GATT, nonetheless it still revolved around trade negotiations; violations can be met by compensation, in certain circumstances; and there is no reciprocity envisaged in applying the WTO directly in the legal orders of the major trading blocs. In other words, WTO law was still too open-ended, too indeterminate, to lend itself for direct effect in the Community legal order.⁷⁷

To bolster its conclusion, the Court also recalled that in the preamble of the instrument adopting the WTO Agreement in the Union (Decision 94/800), the Union had made clear that provisions of WTO law were not

⁷³ See Case 70/87, *Fediol v Commission*, [1989] ECR 1781, esp. para. 22.

⁷⁴ Mendez, *supra* note 12, suggests that together, they have done so in only one case: at 248.

⁷⁵ See, e.g., Joanne Scott, 'GATT and Community Law: Rethinking the 'Regulatory Gap'', in Jo Shaw and Gillian More (eds.), *New Legal Dynamics of European Union* (Oxford: Clarendon Press, 1995), 147-164.

⁷⁶ See Mendez, *supra* note 12, at 247.

⁷⁷ See Case C-149/96, *Portugal v Council*, [1999] ECR I-8395, esp. paras. 36-47.

to be given direct effect in the Union legal order.⁷⁸ In these circumstances, the only avenues remained those opened up by *Nakajima* and *Fediol*, and *in casu*, the Court held that neither of these applied.

The Court went a step further still in *Van Parys*.⁷⁹ Here, the applicant complained against decisions by Belgium's import authorities not to grant him a license for the importation of as many bananas as he wished to import, following EU law. Van Parys argued that the EU rules in question violated WTO law, and had even been found by the WTO's Appellate Body (confirmed politically by the Dispute Settlement Body) to violate WTO law. In essence, as the Court saw it, Van Parys aimed to rely on the direct effect of Dispute Settlement Body decisions, yet such was unwarranted.⁸⁰ Not only did WTO law provide for negotiations to settle findings of incompatibility, it also allowed for temporary compensation. In other words, the matter was still left largely to trade diplomacy; providing direct effect to such decisions would deprive the legislative and executive authorities of the possibility to strive for a negotiated settlement.⁸¹

The *FIAMM* case further underlines the Court's reluctance to allow parties to rely on WTO law. Here, the applicants found themselves on the receiving end of US import limitation on their products, limitations imposed in response to the EU's import limitations on bananas, and imposed following a finding by the WTO that the EU's bananas regime was incompatible with WTO law. In other words, the US cross-retaliated: the advantages for banana importers came at the expense of European exporters of other products, in this case batteries and spectacle cases, predominantly. Hence, *FIAMM* and others filed an application to hold the Union liable for the losses they had suffered as a result of the Union's reluctance to bring its banana regime in line with its obligations under WTO law.

The General Court dismissed the complaint, and was backed up in this by the CJEU: the non-contractual liability of the EU could not be at stake in a situation, such as under WTO law, where the executive and legislative authorities are granted some leeway when it comes to remedying issues of non-compliance, not even once the period of grace granted by the WTO to enable the correction of the wrongfulness, has expired. Since the WTO allows for negotiated settlements, individual traders in the EU cannot directly rely on findings by the WTO Dispute Settlement Body, all the more so as the other major trading blocs (the US and Japan) do not offer such possibilities to their traders.⁸²

⁷⁸ *Ibid.*, para. 48.

⁷⁹ See Case C-377/02, *Leon van Parys v Belgisch Interventie- en Restitutiebureau*, [2005] ECR I-1465.

⁸⁰ *Ibid.*, para. 38. Whether the Court's conceptualization of this as relying on the direct effect of DSB decisions is compelling, strikes as debatable.

⁸¹ *Ibid.*, para. 48.

⁸² See Joined cases C-120/06 and C-121/06 P, *FIAMM and others v Council and Commission*, [2008] ECR I-6513, paras. 117, 119. For discussion, see Anne Thies, *International Trade Disputes and EU Liability* (Cambridge University Press, 2013).

Still, perhaps to make up for its reluctance to grant direct effect to WTO law, the Court did create what many hold to be a third exception to the 'no direct effect' position, although this exception is different in nature from *Nakajima* and *Fediol*. In a case involving the International Dairy Arrangement, concluded under GATT auspices, the Court held that 'so far as is possible', where there is a discrepancy between EU secondary legislation and international agreements, the EU instrument must be interpreted in a manner 'consistent with' those international agreements.⁸³ This stops short of providing direct relief, but in practice might do a lot to mitigate the worst discrepancies.

Nonetheless, the case was received with mixed feelings. While it suggested that WTO law had a role to play within the EU legal order after all, it was considered not without relevance that the case was brought not by an individual trader relying on WTO law, but by the Commission in infringement proceedings against a member state. This raised a suspicion of double standards: individual traders cannot rely on WTO law to protect them against EU law, yet the EU institutions can rely on it to combat member state practices. Whether that was a convincing line of criticism is doubtful. As Mendez points out, within the exclusive competences of the EU it would be 'illogical' to allow member states to chart separate courses.⁸⁴

To conclude: it is abundantly clear that with respect to the GATT and the WTO, the CJEU has followed a strict line, and has done so consistently. There are, arguably, good reasons for doing so: the world trading regime is indeed, as the Court has repeatedly emphasized, characterized by a certain amount of flexibility, and while it can be claimed that the degree of flexibility has decreased with the advent of the WTO, it has not disappeared completely.

More to the point perhaps, the politics of reciprocity should not be underestimated either: as long as the other major trading blocs are not keen on granting the WTO direct effect in their legal orders, neither will the EU: doing so would create a comparative disadvantage, as it would limit the EU's room for manoeuvre while keeping that of the US and others intact. A related concern is that while GATT formally also applied to agriculture, in practice it never did: both the US and the EU have traditionally exempted the agricultural sector from GATT disciplines. Hence, cases such as *International Fruit Company*, or the many bananas cases of the 1990s, revolving around agricultural products, were essentially attempts to get the CJEU to enforce GATT on the agricultural sector, and to do so unilaterally. Surely, politically this would have been very difficult for the CJEU to accomplish in the absence of similar court proceedings in the US.⁸⁵

⁸³ See Case C-61/94, *Commission v Germany*, [1996] ECR I-3989, esp. para. 52.

⁸⁴ See Mendez, *supra* note 12, at 200.

⁸⁵ See Mendez, *supra* note 12, at 191-193.

VI. Other Treaties

If the Court has been generous with respect to association and free trade agreements, and stingy with respect to GATT/WTO law, the third large category of remaining treaties has met with a mixed, but largely lackluster, reception in the EU legal order. Even when the CJEU has seemed, on its face, abundantly friendly, it turns out that its friendliness masks an ambivalent attitude, or rather: international norms can only enter the EU legal order on the CJEU's terms – and the CJEU is not above adapting the contents of the international norm in question.

Emblematic is the decision in *IATA and ELFAA*. Part of the issue in this case was the question whether an EU Regulation relating to care-taking and compensation for air passengers for delay in flights was in conformity with the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, which the EU had joined in 2001. According to the applicants, the EU Regulation went much further than the Montreal Convention and ignored the self-contained nature of the Montreal Convention (in that the Convention only allows for claims to be brought under the Convention's regime); it should therefore be annulled as being incompatible with the EU's international commitments. While the Court was happy to make the observation that the relevant provisions of the Montreal Convention could be directly effective, the way it interpreted those provisions was highly controversial and critically received by aviation law experts.⁸⁶

Much of the EU's external activities outside the policy field of trade and commerce relate to the protection of the environment: it is a party to quite a few environmental treaties, and thus it is no surprise that such treaties on occasion become the subject of litigation. Often these are mixed agreements, to which both the Union and all or most of its member states have become parties. The first case to be brought via the preliminary reference procedure involving a mixed environmental agreement concerned the 1980 Athens Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources.⁸⁷ A group of fishermen had complained that the French electricity company EDF had discharged water from a power station into a saltwater marsh without prior authorization, whereas the Athens Protocol suggested that such authorization was indispensable. The Court agreed with the fishermen: the provision concerned in the Athens Protocol was to be considered directly effective, in part because the object of the Athens Protocol

⁸⁶ See Case C-344/04, *IATA and ELFAA v Department of Transport*, [2006] ECR I-403, esp. paras. 39-48. For strong criticism see John Balfour, 'Further Comment on Case C-344/04, *The Queen ex parte International Air Transport Association, European Law Fares Airline Association v Department for Transport*, Judgment of the Court (Grand Chamber) of 10 January 2006', (2007) 44 *Common Market Law Review*, 555-560. It should be noted that Balfour acted for one of the applicants.

⁸⁷ See Case C-213/03 *Pêcheurs de l'Étang de Berre v EDF*, [2004] ECR I-7357.

was to prevent, abate, combat and eliminate pollution of the Mediterranean Sea, to be policed by national courts.⁸⁸ Mendez suggests that while the Court was not wrong in stating this, its reasoning is at such a high level of abstraction as to become virtually meaningless: 'at this level of abstraction ... it would rarely be the case that a treaty will not have its purpose served by domestic judicial enforcement.'⁸⁹ Another element that might help explain the Court's willingness to allow applicants to rely on the Protocol directly was the absence of any legislative intervention despite the Protocol's provision that relevant standards should be set by domestic authorities: neither the French nor the EU authorities had done so, as the Court remarked somewhat in passing.⁹⁰ As a result (also given the absence of a declaration outlining the respective competences of the EU and the member states) the EU could have been held responsible for member state inaction without having the means to enforce its obligations under international law; in such a scenario, holding the provision concerned to be directly effective and thus enforceable by domestic courts may be of assistance.⁹¹

By contrast, in *LZ VLK*, the Court denied the direct effect of article 9, paragraph 3 of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters: it lacked precision and clarity, as evidenced by its explicit reference to criteria for access to justice laid down by national law.⁹² Still, the Court managed to provide for a strong duty of consistent interpretation, and it was this that caused surprise, as some suggest that the Court should have declined jurisdiction to begin with. In light of the circumstance that the declaration of competence through which the EU joined the Aarhus Convention indicated that access to justice was still a matter of domestic law, and that indeed EU law on access to justice against action by member states was conspicuously absent (and 'politically dead', as one observer noted⁹³), it was surprising that the Court could find jurisdiction. The case can be seen as supportive of international law, despite the rejection of direct effect, in that it posits a strong duty of consistent interpretation; the case can, however, also be seen as the CJEU using international law to strengthen the position of EU law vis-à-vis the member states.

⁸⁸ *Ibid.*, paras. 44-47.

⁸⁹ See Mendez, *supra* note 12, at 252.

⁹⁰ See *Étang de Berre*, paras. 33-34. A few months later, in infringement proceedings, the Court would hold that France had therewith infringed the Athens Protocol and related provisions, and thus also EU law: see Case C-239/03, *Commission v France (Étang de Berre)*, [2004] ECR I-9325.

⁹¹ The suggestion is raised by Frank Hoffmeister, 'Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States', in Hillion and Koutrakos (eds.), *supra* note 19, 249-268, at 265.

⁹² See Case C-240/09, *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, [2011] ECR I-1255.

⁹³ See Jan H. Jans, 'Who is the Referee? Access to Justice in a Globalised Legal Order', (2011) 4 *Review of European Administrative Law*, 85-97, at 89.

Observers agree that in recent cases, the ECJ has been fairly strict, although they disagree as to whether this marks a departure from earlier case-law or not.⁹⁴ Two cases stand out, both dealing in separate ways with maritime pollution. In *Mox Plant*, involving the relationship between the UN Convention on the Law of the Sea and EU law, the Commission brought infringement proceedings against Ireland, as Ireland has started proceedings against the UK before an international arbitral tribunal in order to protect its marine environment against nuclear waste, and had asked the International Tribunal for the Law of the Sea for interim measures of protection against a nuclear plant operated in England.⁹⁵ The Commission thereupon went to the CJEU arguing that in doing so Ireland had failed to respect the exclusive jurisdiction of the CJEU in matters involving EU law, had ignored its duty of consultation with EU institutions and therewith also its duty of loyalty towards the Union (the notion of *Gemeinschaftstreue*). The Court had no problem in finding that the provisions of the UN Convention on the Law of the Sea on which Ireland relied had become part of the EU legal order and that consequently the Court had jurisdiction, and exclusive jurisdiction at that: international agreements '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...'.⁹⁶

Even if *Mox Plant* did not address the reception of international law in the Union legal order *per se*, it is illustrative of the attitude of the CJEU towards international law: what matters most is the autonomy of the Union legal order. The outcome was, as one prominent commentator held, stunning: 'it falls squarely on the oldest, and most conservative trajectory of European thinking about the role of international law and its relations with national law.' And somewhat more biting he added that the decision reminded him of how Soviet dissidents were prevented from relying on international human rights conventions during the days of 'hermetic absolutism' in the USSR.⁹⁷

Intertanko also concerned the relationship between EU law and the law of the sea, more in particular the position of the International Convention for the Prevention of Pollution from Ships (Marpol), concluded in 1973 and supplemented in 1978.⁹⁸ While Marpol aims to implement the UN Convention on the Law of the Sea, the EU is not a party to it (although it is a party to the UN Convention). The applicants, a conglomerate from the shipping industry, had argued before a UK court that an EU Directive on ship-based pollution was much stricter than the Marpol convention, and thus ought to be invalidated, at least in part. The Court held that the EU was not bound by Marpol and that its provisions were not reflecting customary international

⁹⁴ See, e.g. Christina Eckes, 'International Law as Law of the EU: The Role of the Court of Justice', in Cannizzaro et al. (eds.), *supra* note 13, 353-377.

⁹⁵ See Case C-459/03, *Commission v Ireland (Mox Plant)*, [2006] ECR I-4635.

⁹⁶ *Ibid.*, para 123.

⁹⁷ See Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education', (2007) 1 *European Journal of Legal Studies*, at 1-2.

⁹⁸ See Case C-308/06, *The Queen, ex parte International Association of Independent Tanker Owners (Intertanko) and others v Secretary of State for Transport*, [2008] ECR I-4057.

law.⁹⁹ Moreover, while the EU is bound by the UN Convention, the latter's 'nature and ... broad logic' resisted any direct effect of its provisions.¹⁰⁰

To conclude: where the Court has held provisions to be directly effective in this category of treaties, it has sometimes adapted them beyond recognition. It has prevented a member state from looking outside EU law for enforcement of an international treaty, and resisted the application of the law of the sea and the Aarhus convention in any direct way in the EU legal order. And where the CJEU has allowed international law to enter the EU legal order, it has possibly been inspired mainly by fears about being held internationally responsible for infringement otherwise: absent implementing legislation at both the national and the EU level, the only way to force the authorities into compliance would be by assigning the provisions concerned direct effect.

VII. Customary International Law

It is difficult to discuss the reception of customary international law in domestic legal orders, for several reasons. Perhaps the most important of these is that there is a lot of uncertainty on what exactly customary international law is beyond a basic description, despite its centuries-old acknowledged existence. What is generally agreed is that states can engage in regular behavior which, over time, can be said to crystallize into norms which are accompanied by a sense of legal obligation and therewith become obligatory.¹⁰¹ Traditionally, when international law was still said to govern solely relations between states, this did not pose much of a problem: states could claim, for instance, a customary right to self-defense, or the customary sanctity of their diplomatic mail. However, with the rise of international rules addressing the situation of individuals, the problem of the reception of customary international law in domestic legal orders also arose.

The Permanent Court of International Justice theorized the effect of international law in domestic legal orders as being dependent on the intentions of the authors of international law¹⁰², but this reasoning cannot be transplanted to customary international law. After all, customary international law, being the aggregate of discrete state acts, is, strictly speaking, authorless: there is no legislative intent behind customary international law, and hence little point in asking about whether the direct effect of customary

⁹⁹ *Ibid.*, paras. 50-51.

¹⁰⁰ *Ibid.*, para. 65.

¹⁰¹ See Klabbers, *supra* note 8, 26-34.

¹⁰² See *Jurisdiction of the Courts of Danzig*, advisory opinion, [1928] Publ. PCIJ, Series B, no. 15.

rules in the domestic legal order is intended or not. This implies that legal orders which accept the idea of direct effect of international law as a matter of principle either need to block off customary international law completely, or allow actors to invoke all norms which are sufficiently precise to be relied on directly.

It seems that the CJEU has taken the latter approach, though not without some difficulty. The Court has repeatedly suggested that the EU is bound to respect international custom. The first relevant occasions arose in connection with the law of the sea, e.g. in *Poulsen & Diva Navigation*. Here things were made relatively easy for the Court though, as the customary rule invoked corresponded with the UN Convention on the Law of the Sea which, although not yet in force, had been confirmed by the EU by the time the case came before the Court.¹⁰³ The court ended up, effectively, testing EU law against a convention which was about to enter into force, and held that EU law faithfully implemented the relevant international law.

The 1998 *Racke* case¹⁰⁴, however, was not quite as easy for the court, as it involved a body of law traditionally only capable of being applied in relations between public authorities. The law of treaties addresses questions concerning the conclusion, application, validity and termination of treaties and, as such, has no radiating effect on actors that do not themselves conclude treaties. This body of law is often said to be of long-standing customary nature, and has been laid down in two conventions, one covering treaties concluded between states (the 1969 Vienna Convention), and one covering treaties concluded between states and international organizations or between international organizations *inter se* (the 1986 Vienna Convention). The EU is not a party to either, and the 1986 Convention is not in force to begin with. Consequently, when the law of treaties ends up before the courts, it does so under the guise of customary international law.¹⁰⁵

Racke revolved around the question whether the EU was justified in suspending its cooperation agreement with Yugoslavia after the outbreak of conflict in that country in the early 1990s. Mr Racke contested the legality of the suspension, whereas the Council invoked the so-called *rebus sic stantibus* doctrine in support: a fundamental change of circumstances allows parties to terminate treaties or suspend the operation of those treaties.¹⁰⁶ The Court did not seem to think of the law of treaties in terms of direct

¹⁰³ See Case C-286/90, *Anklagemyndigheden v Poulsen and Diva Navigation*, [1992] ECR I-6019; see also Case C-405/92, *Mondiet v Armement Islais SARL*, [1993] ECR I-6133.

¹⁰⁴ See Case 162/96, *Racke v Hauptzollamt Mainz*, [1998] ECR I-6133.

¹⁰⁵ The need to argue for the identity of custom and the Vienna Convention is increasingly ignored: see e.g. Case C-386/08, *Brita v Hauptzollamt Hamburg-Hafen*, [2010] ECR I-1289 para. 41.

¹⁰⁶ The Court, inexplicably, claimed that it was Racke who invoked the *rebus sic stantibus* doctrine (*ibid.*, para. 49). This would border on the nonsensical: since it was not Racke who suspended the treaty, there is no reason why he would even want to invoke the *rebus sic stantibus* doctrine, unless the Court meant to say that he invoked its non-applicability – but if so, the Court's way of phrasing the issue was highly convoluted.

effect.¹⁰⁷ Instead, it pointed out that Racke relied directly on a provision in the suspended cooperation agreement, and in such circumstances was entitled to question whether the suspension of the cooperation was lawful or not: this would, after all, directly affect his directly effective rights under the cooperation agreement.¹⁰⁸ In the end, it upheld the suspension, having limited itself somewhat lazily to marginal review of the Council's action due to 'the complexity of the rules in question and the imprecision of some of the concepts to which they refer'.¹⁰⁹ The Court found that the existence of peace and stable state institutions in Yugoslavia had been a vital condition for the conclusion of the cooperation agreement, and the outbreak of conflict therefore marked a fundamental change of circumstances. Or, at least, in so holding the Council had made no manifest errors of assessment.

The most striking aspect of *Racke* is that even if it can be said, formally, that the CJEU applied customary international law, substantively it did so in ways that few international lawyers would recognize. The *rebus sic stantibus* doctrine has met with general acceptance among international lawyers, with various tribunals, including the ICJ, recognizing its existence. Yet, since the doctrine is diametrically opposed to the fundamental idea that treaties are binding (*pacta sunt servanda*), not a single tribunal had ever allowed a party to rely on the doctrine: habitually, tribunals would find that the state invoking the doctrine had not met its stringent conditions. The doctrine holds that international law recognizes that a fundamental change of circumstances may be invoked by a party to unilaterally terminate a treaty or suspend its operation, but only if several strict conditions are met. These, moreover, must be interpreted narrowly: the original circumstances must have been essential to induce the state concerned to conclude the treaty to begin with; the change must have been unforeseen; and the change must radically transform the extent of the obligations still to be performed. Finally, there is widespread consensus that the conditions are cumulative: it is only when all are met that an application should have any chance of success.

This now the CJEU did not follow. In particular its finding that the cooperation agreement was concluded against a background of peace and stable institutions, however plausible in itself, is far too broad to serve as a criterion: virtually all treaties are concluded against this background, with the possible exception of treaties on the law of armed conflict. Moreover, the drafters of the Vienna Convention explicitly excluded the effects of armed conflict on treaties from the Vienna Convention's scope – consequently, subsuming the outbreak of hostilities under the heading of *rebus sic stantibus* can only be deemed an unfaithful application of the latter. Making such an argument would entail a strong claim that the customary doctrine

¹⁰⁷ Advocate-general Jacobs had seriously struggled with the issue. Eeckhout suggests an application of direct effect of the law of treaties by stealth, with the direct effect of the law of treaties being a logical complement to judicial review of international agreements: if agreements confer rights on individuals, then it make sense that measures affecting those rights (such as a treaty suspension) can be scrutinized as well. See Eeckhout, *supra* note 11, at 333.

¹⁰⁸ See *Racke*, para. 51.

¹⁰⁹ *Ibid.*, para. 52.

of *rebus sic stantibus* differed from its Vienna Convention counterpart, but that argument was no longer open to the Court after it claimed, following the ICJ, that article 62 reflected customary international law.¹¹⁰

Moreover, as the Court acknowledged, a certain volume of trade with Yugoslavia continued to take place, rendering it impossible to argue convincingly that the change in circumstances had made it well-nigh impossible to continue trade relations with Yugoslavia. At any rate, contrary to the Court's suggestion, what matters is not so much the physical impossibility of continued relations, but its political impossibility.¹¹¹ The Court, in the same paragraph, indeed hinted at political impossibility, but then interpreted this so broadly as to undermine its very rationale when suggesting that there was 'no point' in stimulating trade with a dissolving treaty partner.¹¹²

Another case involving the law of treaties, decided a short while before *Racke* by the General Court (at the time the Court of First Instance), had presented the Court with similar difficulties. In this case, the Council had imposed a new tariff on products produced by Opel Austria, less than two weeks before doing so would have become unlawful, pending the entry into force of the EEA Agreement between the EU and, amongst others, Austria. Opel Austria started proceedings, complaining that the Council's action violated the so-called 'interim obligation' in the law of treaties: parties should not defeat the object and purpose of a treaty pending its entry into force. As in *Racke*, the Court struggled first of all with the question of whether a private party could rely on the law of treaties, and as in *Racke*, the answer was artificially sought in a curious notion of 'anticipatory direct effect': the article concerned in the EEA agreement would clearly have had direct effect upon entry into force. Hence, Opel Austria could rely on it already prior to its entry into force: it created a legitimate expectation, and in this way the Court was able to wed the EU principle of protection of legitimate expectations to the interim obligation in the law of treaties.¹¹³

The General Court also accepted the customary status of the interim obligation, codified in article 18 of the Vienna Convention, but then construed it in a manner at odds with its proper language: under article 18, what matters is whether behavior defeats the object and purpose of a treaty pending entry into force. This now was, given the facts of the case, rather unlikely: it is difficult to sustain the argument that the

¹¹⁰ *Ibid.*, para. 24. This implies that it could not follow the approach of some academics, holding that article 62 is too strict and has already been relaxed in its application in practice, possibly crystalizing into a new customary rule. For such an approach (without the new custom suggestion, understandably, given its publication only a short time after the adoption of the Vienna Convention), see Arie E. David, *The Strategy of Treaty Termination: Lawful Breaches and Retaliations* (New Haven CT: Yale University Press, 1975), esp. at 54-55.

¹¹¹ See *Racke*, para. 57. Physical impossibility to perform a treaty as also recognized in the 1969 VCLT, but in article 61, and limited, it seems, to impossibility resulting from natural occurrences (earthquakes, floods, and the like).

¹¹² *Ibid.*

¹¹³ As Kuijper felicitously puts it, the Court thus 'feigned application' of article 18 VCLT. See Kuijper, *supra* note 5, at 271. The seminal study of general EU law principles is Takis Tridimas, *The General Principles of EC Law* (Oxford University Press, 1999).

imposition of a single tariff against a single producer undermines the object and purpose of a complex and large-scale treaty such as the EEA Agreement. Consequently, the General Court applied a different test, boiling down to a finding that the Council had not behaved properly. Again, then, while the General Court ostensibly applied customary international law, it did so – however understandably - in a manner at odds with the regular construction of the rule in question under customary international law.¹¹⁴

Article 18 VCLT also returned in the *Abuja* case, concerning the construction of new Commission premises in Nigeria's new capital Abuja, which would also house the legations of several member states.¹¹⁵ A Memorandum of Understanding between the Commission and various member states was concluded in 1994, followed by an additional Memorandum in 1998. Greece had signed but not ratified the 1998 Memorandum, and claimed that it was not bound to help pay for the project. The General Court disagreed, basing itself on the interim obligation: Greece may not have ratified, but at no point had it indicated an intention not to become bound. Quite the contrary: its behavior had suggested that it remained a full participant.

Again, the Court's application of article 18 VCLT was questionable. Arguably, this was not a matter of Greece defeating the object and purpose of the 1998 Memorandum: the Court may well have made a category mistake here. The Court itself recalls that the 1998 Memorandum itself provided for provisional application.¹¹⁶ Consequently, under the terms of the Memorandum, supported by article 25 VCLT, Greece would have been bound to respect its terms until such time as it indicated an intention not to become bound. The result is the same, but the legal institution is different: provisional application is based directly on explicit consent, whereas respect for the interim obligation derives from consent mediated through good faith.¹¹⁷

Notably, while in all three cases the reasoning was questionable, in *Opel Austria* and *Abuja* the Court upheld international law, while in *Racke* it found in favour of the Council, effectively undermining international law. In part, the divergence can be explained, again, in terms of the nature of the treaty concerned: the EEA Agreement aspired to radiate EU law towards future member states. In *Racke*, however, such was not the case: there was little chance, at the time the agreement was concluded, of any

¹¹⁴ I have further explored this elsewhere: see Jan Klabbbers, 'How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent', (2001) 34 *Vanderbilt Journal of Transnational Law*, 283-331. The CFI had little choice here: article 18 VCLT is written with purely contractual arrangements in mind, and inadequate for dealing with law-making or institutional treaties.

¹¹⁵ See Case T-231/04, *Greece v Commission*, [2007] ECR II-63.

¹¹⁶ *Ibid.*, para 101.

¹¹⁷ The CJEU, on appeal, upholds the CFI's judgment based on a combination of provisional application and good faith, claiming that the latter was an 'additional basis' for Greece's obligations. See Case C-203/07 P, *Greece v Commission*, [2008] ECR I-8161, para. 64.

intimate relationship between the EU and Yugoslavia beyond an agreement to cooperate. And in *Abuja*, international law actually supported the EU legal order against a recalcitrant member state.

VIII. Some Treaties of the Member States

It stands to reason that the EU is not, as such, bound by treaties concluded by its member states.¹¹⁸ Hence, as a general rule, such treaties cannot come before the CJEU either, except (again as a general rule), when a member state treaty can be in conflict with EU law. While this raises all sorts of issues concerning the Court's attitude to international law, it does not create issues with respect to the effect of those treaties in the EU legal order.¹¹⁹ Alternatively, sometimes secondary EU law explicitly refers to international law obligations shared by all or most member states: an example is Directive 2004/83 on minimum standards for refugee status, which refers to the 1951 Refugee Convention and its 1967 Protocol, and has come up in the case law.¹²⁰ There are two treaties of this sort which need to be discussed, since both treaties aspire to be of a constitutional nature (whatever that may mean, precisely), and both count all member states of the EU as parties: it concerns the European Convention on Human Rights and the United Nations Charter.

The relationship between the EU and the European Convention is characterized by a notable degree of ambivalence. After initially proclaiming that EU law and human rights law have little to do with one another¹²¹, during the 1960s the Court started to accept that there might be a connection, and that it would be wise for the EU to respect human rights. It has made statements to this effect time and again, without, however, ever embracing the European Convention *per se*. The stock phrase goes that the EU draws 'inspiration from constitutional traditions common' to its member states as well as from 'international treaties ... on which the member states have collaborated or of which they are signatories'.¹²² In other words, there is no explicit acceptance of the relevance of the European Convention, and when asked to define the precise relationship between the EU and the European Convention, the Court

¹¹⁸ For a general overview, see Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States', (2011) 34 *Fordham International Law Journal*, 1304-1345.

¹¹⁹ The Court has accepted though that the Union can become bound when succeeding to member state obligations in certain specific settings: see *International Fruit Company*. In *Intertanko*, it rejected the suggestion that this had taken place with respect to a convention (and a supplement) relating to ship-based pollution, as well as (discussing two other conventions on maritime pollution) in case C-188/07 *Commune de Mesquer v Total France and Total International Ltd*, [2008] ECR I-4501, and with respect to the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air in Case C-301/08, *Bogiatzi v Deutscher Luftpool and others*, [2009] ECR I-10185.

¹²⁰ See Case C-31/09, *Bolbol v BAH*, [2010] ECR I-5539; Case C-364/11, *El Kott and others v BAH*, 19 December 2012.

¹²¹ See Case 1/58, *Stork v High Authority*, ECR Special English edition, 17.

¹²² See, e.g., Case 4/73, *Nold v Commission*, [1974] ECR 491, para. 13.

proclaimed that there were limits to that relationship: the EU could not join the Convention without constitutional amendment.¹²³ Two decades later, confronted with a draft agreement on accession to the European Convention, it again held that accession was incompatible with EU law.¹²⁴

Even where the Court does protect human rights, it tends to do so by way of exception to its own proclaimed fundamental rights and freedoms: those of the internal market. Typical is the approach in *Schmidberger*¹²⁵, where the Court upheld the freedom of expression, but did so explicitly as an exception to the free movement of goods. In other words: free movement is the rule, human rights form the exception, and this may entail that human rights end up subordinated to the general rule. Invoking the European Convention may offer little solace: the Court gave it pride of place in *Schmidberger*, but has been reluctant to go any further. Either way, the Court has made clear that it has no general human rights jurisdiction: it can only engage with human rights violations if these are, somehow, connected to EU law, but will have to decline jurisdiction if a situation is purely internal to a member state.¹²⁶

The EU's relationship to UN law has provoked an immense amount of discussion in recent years, in the wake of the CJEU's decision in *Kadi*. As is well known, despite the EU not being bound directly by the UN Charter, it felt compelled to channel UN sanctions against individuals. One of these, Mr Kadi, consequently complained against the EU regulation implementing sanctions against him, claiming that those sanctions violated some of his human rights. The General Court had, initially, disagreed, but the CJEU agreed, holding in effect that in making EU law (including instruments implementing law from other sources), the EU is bound to respect its own commitment to human rights. Consequently, the instrument by which sanctions were imposed against Mr Kadi had to be partly invalidated. While this stopped short of reviewing the legality of Security Council decisions, the message was clear: even the law of the UN cannot prevail over the EU's own legal order, despite the circumstance, generally accepted, that UN law prevails over any other manifestations of international law by virtue of article 103 of the Charter.¹²⁷

Kadi has spawned a cottage industry of legal commentary. To some, it marks the CJEU's new-found dualist approach to international law¹²⁸, whereas others tend to see it as the logical culmination of the constitutionalist project started by the Court in *Van Gend and Loos*, building the equivalent of a *Rechtsstaat*

¹²³ See Opinion 2/94 (*European Convention on Human Rights*), [1996] ECR I-1759.

¹²⁴ See Opinion 2/13 (*Accession to the European Convention*), 18 December 2014.

¹²⁵ See Case 112/00, *Schmidberger v Austria*, [2003] ECR 5659.

¹²⁶ See case C-27/11, *Anton Vinkov, v Nachalnik Administrativno-nakazatelna deynost*, 7 June 2012.

¹²⁷ In addition, it has been suggested that where the CJEU does aim to implement UN law, it takes great liberties in interpreting the relevant Security Council instruments, e.g. in Case C-348/12 P, *Council v Kala Naft*, 28 November 2013. See the critique by Pierre-Emmanuel Dupont, 'The ECJ and (Mis)Interpretation of Security Council Resolutions: The Case of Sanctions against Iran', at ejiltalk.org, 23 December 2013.

¹²⁸ So De Búrca, *supra* note 4.

at the European level.¹²⁹ Both may be right, up to a point: the *Kadi* decision does mark a dualist mindset but, as suggested above, this is nothing new. And *Kadi* does contribute to 'project *Rechtsstaat*', but at the expense of international law, in particular the UN Charter. Again, this is nothing new, but should be acknowledged, as protecting the autonomy of the EU legal order does come at a price.¹³⁰

IX. To Conclude: The Cost of Autonomy

It was noted earlier that a dualist or lackluster approach to international law is, in principle, not normatively problematic, as long as entities comply with their obligations in one way or another. In fact, in some cases the CJEU protects rights in ways that go further than international law: human rights in *Kadi*, refugee rights in *Diakite*, the marine environment in *Intertanko*, and consumer rights in *IATA and ELFAA*, e.g. Thus, if anything, a normative argument can be made that the CJEU is justified in its disregard or adaptation of international law under such circumstances. Moreover, to some extent the question of the EU's *Völkerrechtsfreundlichkeit* is a matter of perspective: while the international lawyer may claim the glass is half empty, the EU lawyer may suggest it is half full.

And yet, the EU's approach to international law should raise a few eyebrows, for the protection of the autonomy of the EU legal order is in tension with some of the core tenets of the EU's self-image, in two ways. A first, somewhat superficial argument, is that hypocrisy may creep in when the EU often insists on treaty partners respecting the Rule of Law, but is itself reluctant to do so, as exemplified by the Court's desire to keep free hands in GATT/WTO cases, its (charitably put) re-conceptualizing of customary norms, its reluctance to embrace the European Convention on Human Rights, and its downright resistance against UN sanctions. This suggests the use of double standards: insisting on the Rule of Law in agreements with third parties (especially weaker ones¹³¹), but carving out a special position for itself.¹³²

¹²⁹ So Deirdre Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford University Press, 2009), at 199.

¹³⁰ For intelligent post-*Kadi* theorizing on the relationship between international law and domestic law, see André Nollkaemper, 'Inside or Out: Two Types of International Legal Pluralism', in Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law. Exploring Global Governance* (Cambridge University Press, 2013), 94-139.

¹³¹ The Cotonou agreement, e.g., refers to the rule of law in several places.

¹³² Another manifestation of the same is the use of the 'disconnection clause' in a number of external agreements, to the effect of applying different rules between EU member states than with other treaty partners. The seminal critique is Constantin P. Economidès and Alexandros G. Kolliopoulos, 'La clause de deconnexion en faveur du droit communautaire: une pratique critiquable', (2006) 110 *Revue Générale de Droit International Public*, 273-302.

There is, however, a deeper or more structural variant on the same argument thinkable. Neil Walker has pointed out how the EU has always 'sought to make a special virtue out of its adherence to the form of law'. The EU is not a legal instrumentalist, but a legal universalist: the idea of law has value in and of itself, in good times as well as bad times, and has been central to what he calls the 'situational ethics of the EU'.¹³³ In other words (or consequently perhaps), the Rule of Law has never been a mere particularist political project for the EU, but has been central to its identity.¹³⁴ This worked nicely as long as various legal regimes pointed in the same direction: it could subsume the domestic law of the member states under EU law by virtue of those member states having abdicated some of their sovereignty, by means of international law instruments, to the EU: domestic law, EU law and international law here could all work together, and as soon as the domestic legal order was deemed subservient, the entire process could get under way, only threatened every now by reluctant supreme courts of member states, willing to allow the supremacy of EU law in practice but not in principle.

The relationship with international law however, creates different complications, as the influence of the EU on the contents of international law can vary considerably from treaty to treaty, is negligible at any rate when it comes to customary international law, and non-existent with respect to treaties to which it is not a party. It is for this reason that the above classification of treaties assumes relevance: the Court (and by extension the EU at large) is much more friendly disposed towards treaties that reflect the EU's priorities, especially those that radiate EU law outward, than it is with respect to other manifestations of international law. Here then, a clash between optics was inevitable, and while *Kadi* represents its most dramatic manifestation, the gist of the current chapter is that *Kadi* is by no means exceptional, but merely the logical result of the Court's *jurisprudence constante*. In short: while the EU is certainly friendly disposed towards international law when it contributes to the EU's objectives and does not threaten its autonomy, it is far less friendly disposed when it feels that international law threatens the autonomy of the EU legal order. Ironically, in the long run, this may well come to have consequences with respect to the central function of law in building and maintaining the EU's autonomous legal order: a cavalier attitude towards international law may come to alter the EU's very identity.

¹³³ See Neil Walker, 'The Place of European Law', in De Búrca and Weiler (eds.), *supra* note 4, 57-104, esp. at 89.

¹³⁴ A similar point is made by legal sociologist Antoine Vauchez, for whom 'Law is somehow coextensive with the European Union' and provides 'a genuine metaphysics of Europe'. See Antoine Vauchez, 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)', (2008) 2 *International Political Sociology*, 128-144, at 130 and 134, respectively (emphases omitted – JK).