The Contribution of the Court of Justice of the European Union to the Development of International Law

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1 Introduction

The purposes for which public international law is involved before the European Court are various and interesting. And it is fascinating for an international lawyer to see, through the prism of the jurisprudence of the European Court, the place of public international law in the legal disputes of the Community.¹

One way that the EU behaves as a ‘global actor’ is through the jurisprudence of its Court of Justice. Discussing the Court of Justice of the European Union (CJEU) in this way goes against the typical academic discussion of the Court, which is normally compared to a domestic constitutional court. Rosas argues, “it should be recalled that the ECJ, or the other EU courts, including the national courts of the Member States, are not international courts primarily called upon to deliver authoritative interpretations of public international norms.”² As Allain sets out, “[f]ew would care to characterize the European Court of Justice as an international Court.”³ In many respects this is entirely true; the CJEU has been instrumental in establishing a unique European legal order. The role of judges in Luxembourg more closely resembles that of a domestic court than that of judges at the International Court of Justice in The Hague. Yet the CJEU still plays an important role in the international legal order. As Crawford points out:

Clearly decisions of judicial organs, such as the International Court of Justice and the Court of Justice of the European Union, contribute to the development of the law of treaties including principles of interpretation as well as general international law. The specialized function of such bodies may naturally limit their contribution to the latter.⁴

This ‘specialized function’ of the CJEU does not necessarily diminish the role of the CJEU and its contribution in developing key concepts of public international law, including notions of jurisdiction, customary international law, the effect of treaties, treaty interpretation, and the sources of law. It has also developed a body of

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influential jurisprudence that has contributed to the law in specific fields of public international law, notably diplomatic and consular law, immigration and asylum, and the law of the sea. While it often does so tangentially, focusing primarily on issues of European law before it, it nevertheless can be seen as an international court, one that has influence beyond Europe.

Studies have been made of the contribution of other courts, such as the International Court of Justice, or the European Court of Human Rights, to the development of international law. This contribution discusses the contribution of the CJEU. Rather than is not to undertake such an intensive or comprehensive study of the many ways the Court has developed international law, it seeks to illustrate, using examples from its jurisprudence, the variety of ways that international law questions come before the Court and how the Court approaches international law issues that have come before it. It goes further than the one-dimensional narrative of the Court’s ‘openness’ or ‘friendliness’ to international law, and discussing the multiple ways in which the CJEU acts as an international court, applying and interpreting public international law when resolving disputes before it.

The first part briefly examines the legal literature that has analysed the Court’s approaches to international law. Long regarded as ‘open’ to international law, many scholars now view the Court’s recent case law as demonstrating a more guarded approach towards international law issues. Yet a much more nuanced understanding of the Court’s approach to international law is needed; it cannot be described as simply ‘open’ or ‘closed’, ‘friendly’ or ‘unfriendly’. It then discusses the basis upon which the Court could develop a more principled approach to international law issues. The Court may be guided in this regard by the EU Treaties, the legal traditions of the EU Member States, and by the CJEU’s nature as a Court of an international organization.

The next part turns to the case law of the CJEU and analyses the multiple ways in which the Court deals with international law issues. The Court comes into contact with international law in many ways. Whereas much of the literature has focused on how the CJEU has dealt with the effect of international law in the EU legal order, this is only one facet of the Court’s relationship with international law. It shows how the way in which the Court approaches international law issues depends largely on the way in which those questions come before the Court. The final part discusses some of

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9 See J. G. Merrills, The Development of International Law by the European Court of Human Rights (Manchester, Manchester University Press, 1988).
The ways in which the Court may help the EU to contribute to the “strict observance and the development of international law” while maintaining the autonomy of the EU legal order and the integrity of EU law.

Of course, the Court of Justice is but one part of the larger EU entity, which comprises also the legislative/political institutions and other bodies, as well as the Member States, each with their own approaches to international law. Such a focus on the Court is warranted given the prominent role that the Court plays in defining the legal relationship between the EU and the international legal order. The Court is the enforcer of international law in much of the EU legal order, yet it is also the gatekeeper; it decides how international law is given effect within the EU legal order. It also decides on issues regarding the representation of the EU in international organs, and plays an influential role in both ex-ante and ex-post review of international agreements entered into by the Union. Given such a role, an analysis of the Court’s approach to international law is justified. One may also examine, for example, the role of the European Commission, the Council, the Parliament, or even the legal traditions of Member States, and identify their approaches to international law issues. The focus of this contribution is on the EU’s judicial body, one that continues to contribute to the development of public international law.

2 The CJEU’s Approaches to International Law

2.1 Approaches in the Literature

The Court’s relationship with international law is complex and ever-evolving, and has been the subject of rich academic debate in recent years. While this renewed attention, especially following the Kadi line of case law, should be welcomed, there are some drawbacks in this ever-expanding body of literature. The first is the


tendency to view the CJEU’s jurisprudence relating to international law as a monolith. This leads to a tendency to present the Court’s approach to international law in terms of open and closed, friendly and unfriendly, which tends to overlook the multiple ways in which international law issues come before the Court, and how the Court’s approach to international law issues is closely tied to the way in which those issues arise in judicial proceedings. The second tendency is to focus on landmark, ‘ground-breaking’ judgments. While it is important to examine how the Court approaches international law in these cases, especially as they often set the tone for future judgments, international law is often dealt with by the Court in other, more subtle ways, which are not always obvious. Focusing, for instance, on landmark judgments such as *Kadi I* and *Mox Plant*, tends to present an incomplete picture, painting the Court as ‘unfriendly’ towards international law. These landmark cases tend to involve clashes of legal orders, and are of course fascinating for both EU and international law scholars, yet they are not necessarily representative of the Court’s approach to international law in other fields. Another tendency in the literature is to focus on the issue of direct effect, particularly the effect of international agreements and other instruments within the EU legal order. The incorporation of international law into the EU legal order is of course a key legal issue, but it by no means the only one. The present contribution therefore aims to overcome some of these deficiencies in the existing literature, widening the scope of the study to analyze the multiple ways in which international legal issues come before the Court.

A final deficiency in the literature is the lack of critical discussion about how the Court interprets and applies international law. The literature tends to focus on how international law enters the EU legal order and the conditions under which the Court will give effect to international law. Yet there has been far less discussion about whether the Court applies international law in an appropriate way. When the Court deals with issues such as treaty interpretation, diplomatic and consular law, the law of the sea, or jurisdiction, does it do so in a way that international lawyers would recognise as appropriate? The question in this case, is not whether the Court is ‘open’ or ‘closed’ to international law, but whether it engages with international law issues in an appropriate manner.

The literature on the Court’s approach to international law tells strikingly different stories. Whereas some scholars describe the EU legal order and the CJEU as ‘völkerrechtsfreundlich’ others view the Court’s attitude, particularly since the *Kadi* judgment, as one that is much less open to international law. The dominant view is that the CJEU is generally ‘open’ to international law, but retains the prerogative to determine how and under what circumstances international law has an

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13 E. Cannizzaro, ‘Neo-monism of the European Legal Order’, in Cannizzaro et al, *supra* note 11, 57: “the European Union is among the völkerrechtsfreundlichsten contemporary legal orders”.
influence in the EU legal order. In a recent book examining the relationship between the EU and international law, Kochenov and Amtenbrink summarise this position:

    Although openness to international law is the prevalent vision, whether international law should function in the EU internally depends on the blessing of the Union, which can also be withheld, should it contradict the EU’s policy, objectives, rationale or principles.  

Some writers have pointed out that the Court has generally taken an “international-law-friendly approach”, asserting that the CJEU’s case law is “particularly friendly towards international law”. Kaddous argues that “[i]n recent years the Court has taken a very open approach to the effects of international agreements within the EU legal order.” Eckes states that “[d]espite its openness towards international law as a matter of principle, the EU has developed its own distinct legal order.” Regarding its approach to treaties, Mendez argues that the CJEU has taken a ‘maximalist’ approach. Similarly, Petersen contrasts the CJEU’s approach to international law with the ‘sovereignty paradigm’ of the US Supreme Court, arguing that the CJEU “primarily adopts an internationalist standpoint.” Regarding the reception of international law into the EU legal order, Martines states “the EU order … appears rather permeable to international law provisions.”

Recent scholarship, however, tends to pointed out CJEU’s ‘judicial recalcitrance’ towards incorporating international law norms. Klabbers, for example, posits that CJEU “is highly reluctant to give any effect to international law,” challenging the assumption that the EU should be regarded as ‘friendly’ towards international law:

    This position has no doubt contributed to the image of the EU as an actor that is friendly disposed towards international law, but the image is deceptive: the EU is friendly disposed towards EU law, and while it may have been fashionable to regard EU law as an emanation of international law, this is no longer habitually done. The fact that EU law prescribes monism with respect to its own domestic effect is understandable and

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18 C. Kaddous, *supra* note 11, 311.
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has in all likelihood contributed greatly to the longevity and success of the EU, but is not based on a particularly friendly attitude towards international law.\textsuperscript{25} According to Klabbers the Union and its Court of Justice are in reality far less friendly towards international law than is presented in the scholarship.\textsuperscript{26}

It is also common to discuss the CJEU’s relationship with international law in terms of adopting a ‘monist’ or ‘dualist’ approach:

> Depending on its perspective – and not on a different standpoint of the observer – the ECJ applies a monistic doctrine relating to its Member States and a dualistic doctrine relating to international law, two completely diverging doctrines.\textsuperscript{27}

It is often stated that the CJEU’s approach to international law is a ‘monist’ one.\textsuperscript{28} Lenaerts states, for instance, that “[t]he incorporation of public international law into EU law follows, to some extent, a ‘monist approach’.\textsuperscript{29} However, as Eckes argues, “[i]n recent landmark cases such as Kadi or Intertanko, the Court of Justice’s approach to international law appears to be more ‘dualist’ in that it restricts the effects of international law within the European legal order.”\textsuperscript{30} De Búrca similarly argues that in Kadi the CJEU adopted “a sharply dualist tone in its approach to the international legal order and to the relationship between EC law and international law.”\textsuperscript{31} This progression from monism to dualism has been noticed by both EU and international lawyers alike:

> Not long ago the communis opinio among scholars viewed the European legal order as inspired by a monist philosophy in its relations with international law. After Kadi, however, it has been more frequently argued that the European order is rapidly moving towards a radical dualism.\textsuperscript{32}

The Court’s approach to international law, according to this literature, seems to oscillate between ‘open’ and ‘closed’, ‘friendly’ and ‘unfriendly’, ‘monist’ and ‘dualist’. Both international law and EU law scholars have noted that the CJEU’s

\textsuperscript{25} Klabbers, supra note 24, 71.
\textsuperscript{26} “[T]he EU has a much less friendly disposition towards international law than is commonly assumed.” J. Klabbers, ‘The Validity of EU Norms Conflicting with International Obligations’ in Cannizzaro et al, supra note 11, 112.
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approach to international law seems to have shifted over time, and that that does not appear to be a single, principled approach to issues of public international law.\(^{33}\)

Should we really expect anything different? The way in which international law comes before the Court, and the way in which the Court utilises principles of international law, differs from case to case, and can expect that the Court’s jurisprudence would reflect this diversity. The problem with terms like ‘openness’ and ‘friendliness’ is that they obscure what is in fact a much more complex relationship, one that should be understood as multiple relationships. At times the Court acts like a domestic constitutional court. It determines the circumstances under which international law may be used to challenge EU acts or to interpret Union law. In these cases we find, perhaps unsurprisingly, a more ‘dualist’ approach, since in these cases the Court endeavours to strike a balance between respect for international law on the one hand and the need to safeguard the ‘autonomy’ of the EU legal order on the other. Such constitutional concerns seem to play a far less significant role, however, in circumstances where the Court essentially employs international law as a tool to help resolve legal disputes. Here the Court has shown a much more progressive attitude; its role is closer to that of an international court than a domestic constitutional one. A one-dimensional narrative that describes the Court’s approach in terms of ‘openness’ overlooks these multiple relationships and roles.

2.2 Towards a Principled Approach to Public International Law Issues

It is generally accepted that the EU, like other subjects of international law, is free to develop its own approach to the effect of international law within its own legal system. But it does not do so in a vacuum. In determining how to approach international law questions, the CJEU draws upon a variety of influences.

2.2.1 EU Treaties

Unlike the constitutions of some national legal orders, the EU Treaties do not specify how the Court should deal with international law issues.\(^{34}\) Despite the lack of any specific clauses on this issue, the EU Treaties are not entirely silent on the issue of international law, and these should be used as a starting point in developing the Court’s approach to international law issues. The Court must, first and foremost, fulfil the role that has been given to it by the EU Treaties. The TEU sets out that one of the roles of the Court is to ensure that “in the interpretation and application of the Treaties the law is observed.”\(^{35}\) However, this role of ensuring that ‘the law is observed’ is wider than only ensuring the observation of EU primary and secondary law. It also

\(^{33}\) “The case law of the ECJ on the effect of decisions of international authority within the EU legal system is not entirely homogenous.” Petersen, supra note 21, 248.

\(^{34}\) Klabbers notes that “the TEU (nor any of the other relevant foundational treaties) says nothing whatsoever about the effect of international law within the ‘internal’ legal order of the EU.” Klabbers, supra note 24, 72.

\(^{35}\) Art. 19 TEU.
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encompasses international law, which, according to the Court’s own case law, is binding upon the EU and the Member States.

Respect for international law plays a strong role in the EU Treaties. This includes Article 3(5) TEU, which sets out that the EU “shall contribute […] to the strict observance and the development of international law” and Article 21(1) TEU providing that the EU’s “action on the international scene” should be guided by “respect for the principles of the United Nations and international law”. When developing its approach to international law, the CJEU can be guided by the importance given to international law in the EU Treaties. For example, the Court can attempt to avoid divergences between the approach of the Court and the other EU organs in the field of international commitments. It could do so by viewing the respect for international law, not as merely a foreign policy goal of the Union’s political organs, but as a constitutional principle that can be used to guide the CJEU. It has been argued that

One should conclude that the duty to respect international law amounts today to a constitutional principle of the EU; in case of its conflict with other constitutional principles, the duty to respect will have to bow only in front of the most fundamental among these principles – in the worlds of the ECJ, of the “very foundations” of the EU.38

Especially since the Lisbon Treaty, respect for international law is not only a goal of the Union, but a constitutional obligation. The Court could employ Article 3(5) TEU as a starting point in developing a more consistent and principled approach when dealing with international law questions. Of course, respect for international law must also be balanced against other interests. The TEU sets out that the EU shall “promote peace, its values and the well-being of its peoples.”40 The very same article that sets out that the Union shall contribute to the strict observance of international law and the principles of the UN Charter, also states that in its foreign relations, the Union “shall uphold and promote its values and interests and contribute to the protection of its citizens.”41 In its action on the international scene, the Union must not only respect the principles of the United Nations Charter and international law, but must also “safeguard [the Union’s] values, fundamental interests, security, independence and integrity”.42 The requirement to respect international law, therefore, must be balanced against other aims, particularly the values and fundamental interests of the Union, or

36 Art. 21(1) TEU. See Opinion in Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, C-366/10, EU:C:2011:637, para. 43.
37 See Wouters et. al., supra note 10.
39 A. Gianelli, ‘Customary International Law in the European Union’, in Cannizzaro et al, supra note 11, 102-103: “The obligation to comply with international law is today considered among the goals of the Union. It is no longer an implied necessity, which the Union comes across accidentally in its daily life, but a strongly worded task given to the EU.”
40 Art. 3(1) TEU.
41 Art. 3(5) TEU.
42 Art. 21(2)(a) TEU.
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as the Court puts it the “very foundations” of the EU. While the Court must take its role in applying and interpreting international law very seriously, it must keep in mind issues such as safeguarding the interests and values of the Union as well as the fundamental rights of its citizens.

2.2.2 Legal Traditions of the EU Member States

Another source of inspiration for the Court is the legal traditions of the EU Member States. In developing its approach to a number of international law issues, the Court could examine how these have been dealt with in the rich jurisprudence of the highest courts of the EU Member States. Given the diversity of legal traditions within the EU, the question then arises regarding which courts and which legal traditions should be taken into account. On many questions of international law, particularly the issue of direct effect of treaties and customary international law, the CJEU would find no consistent practice. The Court has made little use of the legal traditions of the EU Member States in its jurisprudence in this field. Indeed, Kuijper argues that, in developing a ‘monist’ approach to treaties the CJEU diverged from the legal traditions of the major EU Member States, which have developed more or less ‘dualist’ systems. Given the diversity of approaches to international law among the EU Member States on certain issues, it may be inappropriate to ground the EU’s approach to international law in the traditions of the Member States.

This does not wholly exclude the role of the Member States, however. There may be instances where courts of EU Member States have been faced with similar issues, or where ‘state practice’ of the Member States is clearly indicating the movement in a specific direction. When faced with distinct international law questions, such as the interpretation of a particular treaty provision, the Court may not only find applicable practice in international courts and tribunals, but should also be guided by the jurisprudence of Member States. While the Court is by no means bound by such an interpretation, it should endeavour to find uniform interpretation of international law within the EU. The relationship may also work in the opposite direction, with the Member States being influenced by the CJEU on issues related to international law.

2.2.3 International Law

International law does not dictate the precise method by which it is to be given effect within the legal orders of its subjects. As Denza states:

> International law does not itself prescribe how it should be applied or enforced at the national level. It asserts its own primacy over national laws, but without invalidating

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44 “In many ways this was not an evident position to take, since two of the three big founding Member States in 1958, Italy and Germany, had a strictly dualist system, based on transformation, for treaty law.” Kuijper, supra note 11, 592.
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those laws or intruding into national legal systems, requiring a result rather than a method of implementation. National constitutions are therefore free to choose how they give effect to treaties and to customary international law. It is generally accepted in this regard that the CJEU is free to determine its own relationship with international law. While the CJEU is a constitutional court in the EU legal order, it also the judicial organ of an international organization, one that is established by treaties, according to international law. One might expect, then, that as a creature of international law itself, the CJEU would show an open attitude towards international legal issues. Cannizzaro et al. refer to a certain ambiguity that exists regarding the EU’s approach to international law:

The ambiguity lies in its claim to be an open society, which aims to play an increasingly active role in the global legal order, while simultaneously presenting itself as an isolated monad, safeguarding the autonomy of its domestic system of values.

A similar point is made by de Búrca:

If the EU perceives of itself as a uniquely internationally engaged entity, and as a political system founded on the idea of transnational legal and political cooperation, we would be inclined to expect that its Court of Justice would reflect something of this internationalist orientation too.

The reality is that the CJEU does not see itself as an ‘international court’ in this way. Its case law from early on demonstrated that the EU Member States have developed “a new legal order of international law”. Since Van Gend en Loos, the Court has held that it is not international law that is determinative when applying the EU Treaties, but EU law.

This does not mean that the CJEU’s status as a court of an international organization should have no bearing on how it approaches issues of public international law. The Court can and does decide for itself how to give effect to international law, but when deciding upon these issues, the Court should not lose sight of the fact that it is a judicial organ of a body that is itself founded on international co-operation.

Ziegler argues that there is a duty for the EU to engage with international law stemming from the fact that the EU is itself a ‘creature of international law’. The argument is that, since the EU has multilateralism and international law in its DNA, its Court should take an approach that exhibits this friendly approach. This may be an attractive way to find an obligation for the Court to show greater respect for international law. One could make the following argument. The CJEU does not enjoy

46 Cannizzaro et al, supra note 11, 1.
50 “The fact that international organisations are creatures of international law (treaties) might even justify a stricter requirement of comity towards other parts of international law.” Ziegler, supra note 11, 24.
complete freedom to determine its relationship with international law since it is not a constitutional court of a sovereign state. The EU Member States are free to determine how they approach to international law, but this is a corollary of the sovereign equality of states and flows from the principle that international law does not prejudice the domestic legal order. The CJEU, on the other hand, is not the highest judicial body of a sovereign state, but a legal organ of an international organization, tasked with the interpretation and application of EU law. As such, its relationship with international law should be determined by international law. The problem with this argument is that the Court is both an international and domestic court. It deals with powers that have been conferred upon it by the EU Member States. When it deals with international law issues, it is often not acting like the ICJ or ITLOS, but as a domestic constitutional court of a sovereign state.

Another argument that has been advanced for the CJEU to engage fully with international law is the approach of ‘system integration’. Art. 31(3)(c) of the 1969 Vienna Convention on the Law Treaties sets out a rule of treaty interpretation whereby a Court may take into account “any relevant rules of international law applicable in the relations between the parties.” In Namibia, the ICJ found that “[a]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.” This article was famously applied in the Oil Platforms Case. According to Dörr the interpretive approach set out in Art. 31(3)(c) “views the international legal order as one single system”, and therefore has “great potential to be one of the means to mitigate the effects of the much described fragmentation of international law.” Indeed, Article 31(3)(c) VCLT was discussed in this way the ILC’s Study on the Fragmentation of International Law. Ziegler finds in Art. 31(3)(c) VCLT an obligation “to avoid conflicts and to preserve unity with other areas of international law, or at least respect and reflect comity towards it.” Based on Art. 31 VCLT, Zielger argues that there is a ‘duty to engage’ with other areas of international law, which would be applicable to international bodies, including the EU.

While Art. 31(3)(c) is a principle of customary international law that applies to the European Union, it is difficult to see how it can be used in favour of a more general

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56 Ziegler, supra note 11, 23.
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duty on the part of the CJEU to engage with international law. It is, after all, a rule on treaty interpretation and should not be used to import a more general duty to engage with international law. As will be discussed below in Section 3.4. on the Law of Treaties, Art. 31(3)(c) can be used in order to ‘bring in’ other relevant rules of international law. But in most cases a treaty can be applied and interpreted using its own terms, without the need to look outside the treaty framework.

The CJEU does not interpret and apply international law in a vacuum. It should first and foremost be guided by the EU Treaties, which enshrine a principle of respect for international. Yet it may also be influenced by the legal traditions of the EU Member States, and by international law. The Court should acknowledge that it has a role that is larger than interpreting and applying EU law; it is also contributing to the development of international law.

3 Case Law of the CJEU on International Law

3.1 Role of the Court of Justice

The CJEU is not the International Court of Justice. When issues of international law come before the CJEU, they are often incidental to the main issue at hand, which concern the interpretation and application of EU law. The Court’s approach to international law is largely shaped by the Court’s role as the primary judicial organ of a regional organization, aimed, among others, at creating an internal market. Like any domestic constitutional court, the CJEU plays an influential role in the governance of the EU legal order. Through its decisions, it influences the development of the EU legal order, the balance of power between the EU and the Member States, the balance of power between the EU institutions and important issues concerning fundamental rights. While the Court is above else a judicial organ, it does, and indeed must, take into account these ‘political’ issues. The way in which it applies international law should also be understood in the light of this. The Court’s approach to international law will often involve a careful balancing act, taking into account issues such as the role of the Member States, the inter-institutional balance, the need to respect individual rights, the consistent application of EU law, the autonomy of the EU legal order, and the constitutional principle of respect for international law enshrined in the EU Treaties. International law issues may therefore come before the Court in a variety of ways. It may be through a review of the legality of acts or omissions by the EU institutions of the Member States, or may be through the Court settling disputes between the EU institutions, between the institutions and the Member States, and in some cases between the Member States themselves. The Court will also often deal
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with international law issues when providing an Opinion under Article 218(11) TFEU\(^57\) on whether an international agreement is compatible with the EU Treaties.

When examining the Court’s approach to international law issues, the way in which international law comes before the Court must be taken into account. Is international law being used as a sword to challenge the validity of an EU act? Is international law being invoked as a shield to defend the powers of the institutions or the Member States? Or are principles of international law being invoked by the Court to assert its jurisdiction? In addition to the political context of the cases, the highly varied ways in which international law comes before Court also explains the Court’s different approach to international law. The next section turns to the variety of ways that international law has come before the Court, and the way that the Court balances these issues with the need to respect international law.

### 3.2 Effect of Treaties

The most common way that international law comes before the CJEU is when it is called upon to interpret and apply international agreements. This can include treaties to which EU is a party and those to which some or all the Member States are parties. As discussed above, the literature on the Court’s engagement with international law tends to examine the issue of the ‘direct effect’ of international law within the EU legal order. This is undoubtedly an important issue for the EU legal order, since it concerns the conditions under which international law may be invoked before EU Courts. Indeed, much of the traditional story of the CJEU being ‘open’ to international law stems from the Court’s early case law on the issue. The Court was confronted with this question in *Haegeman*.\(^58\) In following a monist approach, the Court chose not to follow the legal traditions of the Member States; rather it was influenced by the need for the Court to give uniform and consistent interpretation of rules binding on the EU Member States. The agreements that the CJEU was dealing with in these earlier cases included bilateral trade agreements,\(^59\) bilateral and multilateral Association Agreements,\(^60\) and decisions of Association Councils.\(^61\) In many ways these types of agreements were concerned with expanding the EU *aquis* and promoting greater market liberalisation. In this context one can understand the open approach to international law since it allowed for the further development of the EU project. These early decisions helped to create the perception that the CJEU was

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\(^57\) Art. 218 TFEU: “A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.”


\(^60\) E.g. the 1963 Yaoundé Agreement, the predecessor to the present ACP Agreement, in Judgment in *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze*, Case 87-75, EU:C:1976:18.

generally open to international law. However, later cases demonstrate a much more nuanced and complicated story.

3.2.1 Sources: What is a Treaty?

There are certain instances where the CJEU has been called upon to determine whether the instrument before it should be regarded as an international treaty. This is most often the case when the Court has to determine whether the instrument can be regarded as an ‘international agreement’ for the purposes of EU institutional law. Article 218 TFEU sets out the procedure for the negotiation and conclusion by the Union of “agreements between the Union and third countries or international organisations.” Yet the EU Treaties do not define an ‘agreement’ for these purposes. There are a variety of instruments that the EU adopts at the international level with third states and international organizations under various nomenclature. For instance, the EU often utilises the Memorandum of Understanding (MOU), which in most cases are not legally-binding instruments under international law. In the field of Common Foreign and Security Policy (CFSP) the EU enters into a variety of agreements with different titles. Which of these are to be considered ‘agreements’ under EU law? Although in most cases it will be abundantly clear whether the instrument before the Court is an international agreement, there are certain instances where the status of the instrument is in question. In determining whether the instrument before it should be regarded as an ‘agreement’, the Court has relied in part on the public international law definition.

‘Treaties’ under International Law

The precise definition of a ‘treaty’ in international law has long been a point of academic discussion, and was the subject of debate at the International Law Commission when drafting the Vienna Convention on the Law of Treaties. Article 2 defines a treaty, for the purposes of that convention, as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (‘VCLT-IO’) uses an almost identical definition. International practice shows that there is a wide and varied nomenclature used for international

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62 Art. 218 TEU.
64 VCLT, supra note 51.
66 It adds that for the purposes of the convention, the treaty is between states and an international organization, or between international organizations.
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treaty,⁶⁷ and the title of an instrument cannot be relied upon alone when determining whether it is a treaty. Rather, elements such as the intentions of the parties and the content of the instrument itself are examined.

The first part of the definition is that a treaty is between two or more subjects of international law. A state may make a unilateral binding commitment under international law, but this does not fall within the definition of a treaty. The treaty must also be in written form, but this criterion is not applied restrictively. The third element is that the agreement is governed by international law, and not, for example, governed by the municipal law of one of the parties. Above all a treaty requires the intention of the parties to enter into a legal agreement. This requirement distinguishes treaties from other kinds of non-binding instruments. The UN Treaty Handbook stresses that “[a] treaty or international agreement must impose on the parties legal obligations binding under international law, as opposed to mere political commitments.”⁶⁸ There must be more than a commitment to enter into obligations, but an intention to enter into legal obligations subject to international law.

‘Agreements’ under EU Law

The TEU/TFEU give little guidance on what can be considered an ‘agreement’ for the purposes of Article 218 TFEU, referring simply to “agreements between the Union and third countries or international organisations.”⁶⁹ It may be assumed that the term ‘agreement’ in EU law was intended to carry the same meaning as a treaty under international law. The use of the term ‘agreement’ rather than ‘treaty’ avoids confusion with the EU Treaties. Yet one can glean from case law subtle differences between the Court’s definition of ‘agreement’ in EU law and the term ‘treaty’ in international law.

In Opinion 1/75⁷⁰ the Court discussed the meaning of ‘agreement’ for the purposes of the EEC Treaty.⁷¹ The Court defined an agreement as “any undertaking entered into by entities, subject to international law which has binding force, whatever its formal designation.”⁷² The agreement at issue was the draft ‘Understanding on a Local Cost Standard’ developed under the auspices of the OECD. It was held that the Standard fulfilled these conditions since it contained “a rule of conduct, covering a specific field, determined by precise provisions, which is binding upon the participants.”⁷³ The Court’s definition has two elements: an ‘agreement’ must (i) be subject to international law and (ii) have binding legal force on its participants.

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⁶⁹ Art. 218 TFEU.
⁷⁰ Opinion 1/75, EU:C:1975:145.
⁷³ Opinion 1/75, supra note 70, 1360.
The Court also examined the question of what constitutes an ‘agreement’ in Case C-327/91 France v Commission.74 The European Commission had concluded a bilateral cooperation agreement with the United States in the field of competition law.75 One of the issues raised was whether the Commission had the competence to conclude such an agreement under EU law. The Commission argued that the instrument constituted an ‘administrative agreement’, which it had competence to conclude. The Court found, however, that the instrument fell within the definition of an international agreement concluded between an international organization and a State according to Article 2(1)(a)(i) of the 1986 VCLT-IO.76 One of the relevant factors was that the agreement produced legal effects,77 since the Community would incur responsibility at the international level in the event of non-performance of the agreement.78 The Court therefore found that the administrative agreement between the European Commission and the US Antitrust Division was an ‘agreement’ for the purposes of EU law.

The Court further elaborated on the meaning of an ‘agreement’ in Opinion 1/13.79 This involved a request by the European Commission for an Opinion (pursuant to Article 218 (11) TFEU) on the question whether an envisaged agreement is compatible with the Treaties. The question put to the Court was whether the acceptance of the accession of third States to the 1980 Hague Convention80 (to which the EU is not a party) falls within the exclusive competence of the Union. The Commission argued that the decision on accession of third States was an exclusive competence of the EU and therefore the Member States should not independently accept accession of third states. In determining whether the request was admissible, the Court had to decide whether a ‘declaration of acceptance of accession’ should be regarded as an ‘agreement’ for the purposes of Article 218 TFEU. The Court acknowledged that under Article 2(1)(a) of the VCLT, an international agreement may be formed, not only by a formal agreement between the parties, but also by the “expression of the ‘convergence of intent’ on the part of two or more subjects of international law, which those instruments establish formally.”81 The Court found that such a convergence of intent did in fact exist. The act of accession on the one hand, and the declaration of acceptance on the other, represent such a meeting of minds, and therefore creates an ‘international agreement’ upon which the Court could provide its opinion.

75 Agreement Between the Government of the USA and the Commission of the European Communities Regarding the Application of their Competition Laws (23 September 1991).
76 France v. Commission, supra note 74, para. 25.
77 France v. Commission, supra note 74, para. 23.
78 France v. Commission, supra note 74, para. 25.
81 Opinion 1/13, supra note 79, para. 37.
In *Venezuelan Fishing Rights* there was similar disagreement over whether the instrument before the Court constituted an ‘agreement’ for the purposes of Art. 218 TFEU. The instrument in question was a Council Decision granting fishing opportunities to Venezuelan fishing vessels off the coast of French Guiana (an overseas department of France). On the face of it, the Decision in question does not resemble a typical bilateral treaty. According to Advocate General Sharpston, it was a ‘unilaterally binding declaration’. While it is not uncommon for a state to express its consent to be bound through a unilateral statement, there is little practice of unilateral binding statements being made by international organizations. According to AG Sharpston, this gave rise to questions under EU law because the EU Treaties do not explicitly govern the procedure for the adoption of such ‘unilateral’ instruments. The lack of such a provision in the EU Treaties is not surprising since, as AG Sharpston noted, “unilaterally binding declarations by international organisations are almost unprecedented”. AG Sharpston concluded that the EU Declaration “is an instrument emanating from the EU that is intended to produce legal effects under international law and to be a basis on which Venezuelan vessels can rely to apply for fishing authorisations.” However, this does not mean that it is an international agreement: “neither those features nor the fact that the act is called a ‘Declaration’ resolve whether the Declaration is, as a matter of international law, a unilaterally binding instrument or an element of an international agreement.” AG Sharpston found that while the Declaration was intended to produce legal effects, Venezuela, the country intended to benefit under the Declaration, had not accepted to be bound by it. AG Sharpston stressed that:

However wide the definition of the term, it is clear that (in whatever context) an agreement presupposes the meeting of minds of at least two parties. It thus does not cover the circumstance where the EU expresses its intention to be bound by the terms of its declaration without the need for acceptance by the third State in whose favour that declaration is made. Nor does it apply to instruments whereby no binding commitment is entered into.

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83 Council Decision 2012/19/EU of 16 December 2011 on the approval, on behalf of the European Union, of the Declaration on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of the Bolivarian Republic of Venezuela in the exclusive economic zone off the coast of French Guiana, OJ 2012 L 6, 8.
84 Verwey, *supra* note 72, 93. *Nuclear Test Case* (New Zealand v. France), I.C.J. Reports (1974) 457, para. 46: “It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations … An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiation, is binding.”
86 Opinion in *Venezuelan Fishing Rights*, *supra* note 85, para. 107.
87 Opinion in *Venezuelan Fishing Rights*, *supra* note 85, para. 78.
88 Opinion in *Venezuelan Fishing Rights*, *supra* note 85, para. 78.
89 Opinion in *Venezuelan Fishing Rights*, *supra* note 85, para. 81.
90 Opinion in *Venezuelan Fishing Rights*, *supra* note 85, para. 96.
It was not sufficient that the instrument produced legal effects; it also had to include the ‘meeting of minds’ between two parties. Since this second requirement was not fulfilled the instrument could not be considered to be an ‘agreement’ under EU law.

The Court disagreed with the Advocate General’s assessment on this key issue. Recalling its previous case law, it stated that an ‘agreement’ is “any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.” According to the Court, the EU decision fit this definition, and was therefore an agreement governed by Art. 218 TFEU. This conclusion turned on a different interpretation of the facts. To the Court, a ‘meeting of minds’ had been established by the parties, since there had been both an ‘offer’ and ‘acceptance’, although these took place at different times. According to the Court, the declaration at issue was as an ‘offer’ made by the EU on behalf of the coastal state to Venezuela, and Venezuela then subsequently ‘accepted’ the offer through its subsequent behaviour.

The Court’s approach to what constitutes an ‘agreement’ is broad and non-formalistic and is wider than that under international law. Verwey concludes that when determining whether something is an ‘agreement’ under EU law “[w]hat matters, is that it has to be an agreement between the [Union] and one or more subjects of international law, governed by international law and legally binding on the parties concerned.” First, the definition in the two Vienna Conventions is primarily concerned with whether the agreement is governed by international law. While this is also a criterion in the Court’s definition, it also takes into account whether the instrument has ‘binding force’ on the parties or ‘produces legal effects’. Moreover, the Court is less concerned with the type of entity that has entered into the agreement. Whereas the two Vienna Conventions apply to treaties between states and international organizations and other subjects of international law, the CJEU views an international agreement as an “undertaking entered into by entities.”

Another difference between the definitions is the importance placed on the intention to establish legal relations. Under international law, not only must there be consensus ad idem (‘meeting of the minds’) but an intention to enter into a legal relationship. It is difficult to see how Venezuela intended to create legal obligations vis-à-vis the European Union in this case. On the contrary, Venezuela had rejected the
establishment of a formal binding agreement. Yet the Court infers from Venezuela’s behaviour that it had accepted an offer by the EU. Had the Court determined the instrument to be a unilateral declaration, as the Advocate General had done, it would have been faced with the complex task of determining which rules and procedures apply to the adoption of such instruments under EU law. By finding that the decision to be an ‘agreement’ falling under Art. 218 TFEU, the Court rather conveniently avoided this issue.

There is no reason why the Court cannot develop an autonomous meaning of ‘agreement’ for the purposes of EU law. Since the Court has in certain instances developed a meaning of international law terms in the European context, “[t]he Court could, therefore, provide its own [Union] definition of the term agreement.” In the cases discussed above the Court is primarily focused on the definition of ‘agreement’ for the purposes of EU law – it is primarily concerned with the internal legal processes by which the EU enters into international commitments, such as the legal basis of the instrument, or the participation of the European Parliament. The Court need not apply the term ‘agreement’ in a formulistic or overly narrow fashion. Yet the Court need not base its definition of ‘agreement’ on the VCLT definition of ‘treaty’, since these differ in several respects.

3.2.2 Treaties Not Binding on the Union

In most cases the question of whether a particular instrument should be regarded as a ‘treaty’ is not an issue. In many cases the question will be whether the treaty in question is binding upon the Union, and if so, what legal consequence flow from this. The issue of whether a particular agreement is binding upon the Union is usually straightforward; the Court can enquire whether the Union has given its consent to be bound by a particular treaty, and in many cases will refer to the Council Decision approving the agreement to demonstrate that it is binding upon the EU. A more complicated question arises in cases where the EU is not a formal party to an agreement, but all or nearly all EU Member States are bound by it. In cases where the Member States have transferred powers to the EU in fields covered by the international agreement, the EU may in certain cases nevertheless be bound by the

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98 Verwey, supra note 72, 96.
99 Judgment in International Fruit Company and Others v Produktschap voor Groenten en Fruit, Joined Cases 21 to 25/72, EU:C:1972:115, para. 7: “Before the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision”. See also Judgment in Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, C-366/10, EU:C:2011:864, para 52; Judgment in Intertanko and Others, C-308/06, EU:C:2008:312, paragraph 44.
100 In ATAA, supra note 99, para. 73: “It is apparent from Decisions 94/69 and 2002/358 that the European Union has approved the Kyoto Protocol. Consequently, its provisions form an integral part of the legal order of the European Union as from its entry into force.” Judgment in R. & V. Haegeman v Belgian State, Case 181-73, EU:C:1974:41, para. 3: “The Athens Agreement was concluded by the Council under Articles 228 and 238 of the Treaty as appears from the terms of the Decision dates 25 September 1961.”
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obligations under that agreement. In this way, the Union may be bound by the obligations under an agreement via the doctrine of ‘functional succession’. The Court famously applied this principle to the General Agreement on Tariffs and Trade (GATT) in *International Fruit Company* where it held that in circumstances where the EU has ‘assumed the powers previously exercised by Member States’ in the area covered by an international agreement, “the provisions of that agreement have the effect of binding” the EU.\(^{101}\) Technically, it is not the agreement itself that is binding on the EU, but the obligations under the agreement.

Parties have sought to apply the functional succession argument to other agreements to which the EU is not a party, yet the Court has not applied the functional succession doctrine to agreements outside the context of the GATT. For instance, in *ATAA*, airline associations argued that the EU was bound by the obligations emanating from the Convention on International Civil Aviation (‘Chicago Convention’)\(^ {102}\) an agreement to which the EU is not a contracting party, but all EU Member States are. It was argued that since the EU has competence in the field of air transport under Article 100(2) TFEU and has legislated extensively in the fields covered by the Chicago Convention, the Union had become bound by the obligations under this treaty. The Court stated “in order for the European Union to be capable of being bound, it must have assumed, and thus had transferred to it, all the powers previously exercised by the Member States that fall within the convention in question”.\(^ {103}\) The Court reiterated, therefore, that the requirement is not for the majority of the powers to have been transferred to the Union, but for a “full transfer of the powers previously exercised by the Member States”\(^ {104}\) to have taken place. In order to determine whether a full transfer has occurred, the Court will look at the extent of EU legislative action in the field in question.\(^ {105}\) The Court found that the EU Member States retain powers in some areas covered by the Convention: the award of traffic rights, airport charges, and the prohibition of territory which may be flown over.\(^ {106}\) In the scheme of the entire Convention, these powers are relatively marginal. Nevertheless, since there had not been a full transfer of powers, the EU cannot be deemed to have succeeded to the obligations under this Convention.\(^ {107}\)

The case law of the CJEU sets a very high threshold for functional succession to have taken place. It now seems that it would be virtually impossible for succession to take place short of an explicit amendment to the EU Treaties.\(^ {108}\) In her Opinion in

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\(^ {101}\) *International Fruit Company*, supra note 99, para. 18. This principle of succession has been confirmed on numerous occasions by the Court, e.g. in *ATAA*, supra note 99, para. 62 and cases cited therein.


\(^ {103}\) *ATAA*, supra note 99, para 63.

\(^ {104}\) Judgment in *Intertanko and Others*, C-308/06, EU:C:2008:312, para. 49 (emphasis added).


\(^ {106}\) *ATAA*, supra note 99, para. 70.

\(^ {107}\) *ATAA*, supra note 99, paras 69 and 71.

\(^ {108}\) However, De Baere and Ryngaert have raised the question whether the Court would limit functional succession to *a priori* exclusive competences enshrined in Art 3(1) TFEU, or whether shared
Intertanko, Advocate General Kokott suggested that even *exclusive competence* would not necessarily be sufficient to demonstrate a succession of legal obligations short of an explicit transfer via the Treaties:

Irrespective of whether or not the Community’s competence is now exclusive, there must also be doubts as to whether such an assumption of powers resulting from the exercise of competence is sufficient as a basis on which to conclude that the Member States’ obligations under international law are binding on the Community. In any event, the assumption of trade-policy powers, to which GATT related, was laid down expressly in the Treaty.\(^{109}\)

The requirement for a ‘full transfer of powers’ to have taken place is problematic given the nature of competences within the Union. Even where the EU exercises exclusive competence in a field covered by a treaty, the Member States will still retain some competence under that agreement. By its very nature, as an example of cooperative federalism, it would be difficult to find an area where Member State participation is entirely extinguished. Even in relation to the GATT, where the Court did find a full transfer of powers had taken place, the Agreement retains some functions for the Member States. For example, provisions relating to meetings of the parties and modifications to the Agreement\(^{110}\) still applied to the contracting parties, and could not apply to the EU.

Indeed, the full transfer of powers is not the only condition for functional succession to have taken place. In the case of *International Fruit Company*, not only had the Member States transferred powers to the EU in the fields of trade and tariff policy,\(^{111}\) it was also clear that the EU had functionally replaced the Member States in international negotiations.\(^{112}\) The Court also found it relevant that third states had accepted that the Community acted like a contracting party to the agreement.\(^{113}\) Aside from the situation of the GATT, the Court has been extremely reluctant to accept the EU’s succession of obligations in other situations,\(^{114}\) and the high threshold set by the

\[\text{competences that have become exclusive via Art 2(2) TFEU would also qualify. G. De Baere and C. Ryngaert, ‘The ECJ’s Judgment in Air Transport Association of America and the International Legal Context of the EU’s Climate Change Policy’ 18 European Foreign Affairs Review (2013) 389, 396.}\]

\[\text{General Agreement on Tariffs and Trade (entry into force provisionally 30 October 1947) 55 UNTS 187. Art XXV (‘Joint Action by the Contracting Parties’) and Art XXX (Amendments) arguably only applied to the ‘Contracting Parties’ to the GATT.}\]

\[\text{International Fruit Company, supra note 99, paras 16–18.}\]

\[\text{International Fruit Company, supra note 99, 1225: “Third countries which are members of GATT accept that the Community in fact acts like a contracting party to this agreement.” The actual participation of the EU in the relevant organisation, and the acceptance of succession by other parties, continues to be a factor. As AG Kokott argues in Opinion inATAA, supra note 36, para. 64: “there is no indication that the European Union, or the European Community before it, would act as the successor to the Member States in the context of the ICAO and that such action would be agreed to by the other parties to the Chicago Convention as in the case of the 1947 GATT.”}\]

\[\text{See, for example, ATAA, supra note 99, para. 63; Intertanko, supra note 104, paras 48–49; Bogiatzi, supra note 105, para 33.}\]
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Court (‘full transfer of powers’) means that we are unlikely to see succession to take place in other situations. The situation in *International Fruit Company* has been described as “[a] very special case […] probably by now only of historical importance.”

Rather than being a precedent for other instances of succession, the GATT was a rather exceptional case, made possible due to a number of factors.

The functional succession doctrine seeks to resolve a problem that arises from the situation whereby all Member States are party to an agreement in a field where the EU has significant competence and exercises legislative activity, but is not a formal party to the agreement. Succession may seem like a convenient method of ensuring that the EU Member States do not evade their international responsibilities under and agreement by transferring powers to the EU, which is not bound by the same treaty obligations. Yet the functional succession doctrine gives rise to as many problems as it attempts to resolve.

First, functional succession is problematic from the perspective of international law. Despite using the term ‘succession’, the Court developed and applied the succession doctrine with little reference to public international law principles. Indeed, international law gives little guidance on the topic of how international organisations may ‘succeed’ to obligations of its members. International law relating to succession of legal obligations has developed in a state-centric manner, and applies primarily to succession from one state to another. The Vienna Convention on Succession of States in respect of Treaties, for example, applies only to succession as “the replacement of one State by another in the responsibility for the international relations of territory”. De Schutter argues that the term ‘succession’ in this context is actually misleading: “[s]ince international organisations are not sovereign entities, they do not ‘succeed’ to their Member States as happens in situations of succession of

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115 Kuijper, *supra* note 11, 593.
116 Opinion in *TNT Express Nederland*, C-533/08, EU:C:2010:50, para. 62: “The GATT is a special case … as the transfer of commercial powers was governed expressly by the then EC Treaty”. De Schutter points out that the EC’s succession to the GATT, “is not unique, but remains exceptional”, arguing that substitution of international obligations “may be allowed under certain circumstances, so narrowly defined however that this would in any event remain exceptional”. O De Schutter, ‘Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility’ in J. Wouters, E. Brems, S. Smis and P. Schmitt (eds), *Accountability for Human Rights Violations by International Organisations* (Antwerp, Intersentia, 2010) 63.
118 J.F. Weis, ‘Succession of States in Respect of Treaties Concluded by the European Communities’ 42 *Tijdschrift voor Europese en Economisch Recht* (1994) 668: “[T]here are no general legal rules on … succession between international organizations”.
120 Art 2(1)(c), Vienna Convention on Succession of States in respect of Treaties, *supra* note 119.
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Succession has also been discussed in the context of the succession by a federation to the pre-federation treaties entered into by the members of the federation. The situation whereby a group of states have transferred powers to an international organisation, while still retaining their status as sovereign states, is far less clear in international law. Schütze argues that “[i]n the absence of a doctrine of succession in international law, only treaties to which [the EU] is a formal party will internationally bind the Union”. It should be remembered, however, that becoming a party to an international treaty is only one way in which an entity may express its will to be bound under international law. Uerpmann-Wittzack argues that in the case of the GATT, what actually occurred was not a real case of succession under international law, but an instance of the EU’s “implied accession.”

The succession doctrine does not seem to have been developed with international law principles in mind. Rather, it finds its origins in German legal scholarship, and the doctrine of Funktionsnachfolge or funktionelle Rechtsnachfolge. Moreover, the limited legal scholarship on functional succession has mostly focused on the unique situation of the ECHR. Functional succession in this context was seen as a potential method by which the EU could be made subject to human rights obligations, avoiding a gap in legal protection caused by the EU not being a contracting party. Neither the CJEU nor the European Court of Human Rights has accepted succession of human rights obligations by the EU.

A version of the succession doctrine was also applied by the Court of First Instance in Kadi I. The Court stated that “[b]y conferring [the powers necessary for the performance of the Member States’ obligations under the UN Charter] on the

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121 De Schutter, supra note 116, 57.
122 R. Schütze, supra note 117, 462–67.
123 Id., 475.
124 Klabbers argues that “the succession theory is perfectly acceptable, under international law, as a means of expressing consent to be bound” and is in harmony with international treaty law including the Vienna Convention on the Law of Treaties, Klabbers, supra note 24, 73.
125 Uerpmann-Wittzack, supra note 17, 166.
127 See Uerpmann-Wittzack, supra note 17; Schütze, supra note 117.
128 Ahmed & de Jesús Butler, supra note 117, 788: “[I]t is possible to argue that, although the EU has not become party to a human rights treaty itself, the obligations incurred by its Member States by virtue of their membership of such treaties might impose obligations on the EU per se.” H.G. Schermers, ‘The European Communities Bound by Fundamental Human Rights’ 27 Common Market Law Review (1990) 249, 251-2. “In transferring power to a newly established Community, the Member States could not grant the Community any possibility to infringe the rights guaranteed by the Convention. Any rules made by the Community contrary to the Convention are therefore void.”
129 “[D]espite its virtual application of the ECHR as such and the reference to the ECHR in Article 6 TEU, [the CJEU] has not held that the EU is bound by the ECHR as such nor that it is a party thereto. Although some have argued that the substitution theory set out by the ECJ in respect of the GATT could be applied to the ECHR, this has clearly not been the case.” See F. Naert, ‘Binding International Organisations to Member State Treaties or Responsibility of Member States for their Own Actions in the Framework of International Organisations’ in Wouters et. al. supra note 116, 138.
Community, the Member States demonstrated their will to bind it by the obligations entered into by them under the Charter of the United Nations".\textsuperscript{130} This argument is based, by analogy, on \textit{International Fruit Company}.\textsuperscript{131} The Court of Justice did not take up this argument in its judgment, and rightly so.\textsuperscript{132} The notion advocated by the Court of First Instance that the EU has succeeded to the obligations of its Member States under the UN Charter was subject to criticism.\textsuperscript{133} The theory of functional succession, though accepted and applied by the Court regarding the EU, is far from being a generally recognised principle within public international law.\textsuperscript{134}

Another key problem with the succession doctrine is that it undermines the separate and distinct legal personality of the EU, which is an international legal person in its own right. The EU is a distinct legal entity with its own legal personality; it is not merely a "bundle of Member States jurisdictions".\textsuperscript{135} Functional succession does not view the EU as a distinct legal actor, but as a legal amalgamation of the Member States. If the EU is seen as a separate legal entity, on the other hand, it can only be subject to obligations to which it has voluntarily entered into in its own right. From an international law perspective, it would be problematic if a separate legal entity could be bound by international legal obligations to which it had not given its explicit consent, merely due to the fact that its constituent members have joined a particular treaty. It would mean that the EU is potentially bound by international obligations stemming from various treaties to which the EU has never given its formal consent. It may even have the effect of discouraging States from establishing international organizations if, upon its creation, that body was automatically encumbered by the obligations of its members. Instead, the approach under international law has been to treat international organizations as separate legal entities that are only bound by treaties to which they have voluntarily entered into, rather than as an amalgamation of the legal obligations of the various members.

Indeed EU law has detailed procedures by which the organization can become a contracting party to an international agreement and give its consent to be bound. These procedures could be undermined were the EU to be automatically bound by agreements via the membership of the EU Member States. Since it would be difficult to know which treaties applied to the Union via functional succession, this doctrine may also reduce legal certainty.

\textit{Norms binding on the Member States but not the Union}

Even if we reject the functional succession doctrine, international courts, including the CJEU, will still faced with the underlying question of how to deal with international legal norms that are binding upon the organization’s member states, but not the international organization itself. This has been an issue, for example, in the

context of the ECtHR, where the EU is not a contracting party, whereas all the EU Member States are. Having largely rejected the application of functional succession in cases outside the GATT, the Court will continue to be faced with a similar questions: how should the Court deal with agreements to which the EU is not a party but all its Member States are? This question is mostly relevant in situations where the EU exercises significant competences in a field covered by the international agreement. On the one hand, in cases where the EU is not a party an agreement, it is not bound as a matter of international law. On the other, the EU Member States should not be able to disregard their obligations under a treaty by transferring powers to an international organization. In cases where the EU has taken over powers previously exercised by its Member States, the entity in the position to actually implement the agreement is no longer the Member States, but the Union. Without addressing this issue in some way, the EU would be permitting “the very situation that functional succession was designed to avoid,” that is, allowing the EU Member States to escape treaty commitments through creating and transferring powers to an international organisation. Indeed, the Court’s rejection of the succession argument in ATAA led to this very criticism. Havel and Mulligan, for instance, noted “the EU’s highest court felt at liberty to discard international aviation law’s foundational treaty as irrelevant to the most vexed international aviation dispute in recent memory.” To these commentators, it was perplexing that, although all EU Member States are bound by the Chicago Convention, they are nonetheless free to act through an international organization that is not bound by that treaty.

How, then, should this issue be addressed? One way to remedy this situation would be for the EU to become a party to the international agreement (alongside its Member States). For example, the EU and the Member States sought to address the dilemma caused by the EU Member States being contracting parties to the European Convention on Human Rights (ECHR) while the EU was not by deciding that the EU should become a contracting party in its own right. Yet as the example of the EU’s accession to the ECHR demonstrates, the EU becoming a contracting party alongside its Member States is not always a straightforward process. To accede, both the EU Treaties and the ECHR had to be amended. This was followed by a long process of negotiations and litigation before the CJEU. Moreover, some international agreements only allow states to become a party and would require a treaty modification to allow EU participation. Another significant obstacle is the political

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137 This was part of the reasoning in the ECtHR in Matthews v United Kingdom, Application no 24833/94 (ECtHR, 18 February 1999), para 32.


139 Havel & Mulligan, supra note 138, 10.

140 These negotiations led to a draft Accession Agreement on EU accession, which was subsequently rejected by the CJEU in Opinion 2/13, EU:C:2014:2475.
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and legal difficulties facing EU Member States and the institutions in agreeing on having the Union accede to international treaties.

This means that there will continue to be situations where the EU remains unbound by the legal framework of a particular treaty despite membership of all its Member States.\footnote{Van Rossem, \textit{supra} note 136, 183–227.} In fields where the EU has significant legislation this is likely to continue to cause legal disputes. One approach that has been put forward is to develop a doctrine of succession under EU law, rather than international law, that would bind the EU to obligations of the Member States whenever it acted in a field covered by an international agreement to which all Member States are parties.\footnote{A similar approach is discussed in van Rossem (\textit{supra} note 136): “such self-binding would lie in ruling out the eventuali- ty of conflict between obligations of the Member States to the EU and at the international level”, 214.} Another approach would be for the Court to still ‘take account’ of the agreement without finding that the EU is necessarily bound by it. This would include, for instance, further developing the concept of ‘consistent interpretation’ to ensure that CJEU interprets EU law in a way that reduces the possibility of clashes with the obligations of the Member States. As the EU expands its legislative activity in fields that are covered by international agreements to which it is not a party, it is likely that the Court will find itself confronted with this dilemma in future cases.

3.2.3 Treaties Binding on the Union

Once it has been determined that a treaty is binding upon the Union, the Court will be faced with the question of the effect that should be given to that agreement. The CJEU’s case law in this field is far more complex than it is sometimes portrayed.\footnote{See K. Lenaerts, ‘Direct Applicability and Direct Effect of International Law in the EU Legal Order’ in I. Govaere, E. Lannon, P. van Elsuwege, S. Adam (eds) \textit{The European Union in the World: Essays in Honour of Marc Maresceau} (Leiden, Martinus Nijhoff Publishers, 2014) 45.} Treaties come before the Court under a variety of different circumstances. They may be invoked by individuals or by a Member State to challenge the validity of a Union act, they may be used as an interpretive aid, or to resolve issues under Union law. Moreover, the types of treaties involved also vary, from Association Agreements that seek to liberalise trade between the EU and a third country to multilateral framework agreements, that set out broad goals to be achieved over time, rather than binding legal rules. The Court’s somewhat inconsistent case law on direct effect must be understood in the light of these varied uses of treaties before the CJEU.

\textit{Direct Effect of Treaties}

As discussed above, the Court is often described as taking a monist approach, since it accepts, as a starting point, that treaties binding upon the EU are a part of the EU legal order. Agreements to which the EU is a party are binding on the EU, its institutions, and the EU Member States.\footnote{Art. 216(2) TFEU.} Despite this apparent openness to
international law, the Court has developed conditions determining how these treaties may be given effect in the EU legal order. The Court summarized its position in *Demirel*:

>a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measures.¹⁴⁵

As a starting point, the Court will look at the intention of the parties in determining whether the agreement was intended to have direct effect. In *Kupferberg* the Court emphasised the importance of examining the intentions of the parties to the agreement in question:

>In conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the treaty.¹⁴⁶

The Court will also look at whether there are any reasons that might preclude direct effect. As a first step, the Court will determine whether the ‘nature and broad logic’ of that agreement might exclude it from having direct effect in the EU legal order. The Court will examine, looking at the international agreement as a whole and “in particular […] its aim, preamble and terms”¹⁴⁷ whether there are reasons that preclude its provisions from being capable of having direct effect.¹⁴⁸ This test was applied to the GATT/World Trade Organization (WTO)¹⁴⁹ and the UN Convention on the Law of the Sea (UNCLOS),¹⁵⁰ which were found to be incapable of having direct effect because of the nature and ‘broad logic’ of those agreements.

The Court will also examine whether the particular provisions of the agreement in question are sufficiently precise and unconditional to be capable of being relied upon.¹⁵¹ Recent case law in this field emphasizes the requirement for the provision to establish rules that may provide rights capable of being relied upon by individuals. In *Intertanko*, the Court found that UNCLOS did not establish rules intended to provide rights to individuals.¹⁵² This requirement, however, seems to confuse two separate

¹⁴⁶ *Kupferberg*, supra note 59, para. 17.
¹⁴⁷ *Intertanko*, supra note 104, para 54.
¹⁵² *Intertanko*, supra note 104, para 64.
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concepts: the concept of direct effect, designed to protect individuals, and the conditions under which the Court will determine whether EU law conforms to international legal obligations.

This approach has been criticised for essentially applying “the same tests to determine whether an agreement creates individual rights and whether it can serve as a standard of legality”. Rather, a distinction between the two can be made. This is in line with the view that “as long as a behavioural norm for the [Union] can be derived from an international agreement, this agreement can serve as a norm for reference when the validity of [EU] law is at stake”. Recent case law confirms the Court’s approach. In ATAA, the Court closely followed the approach it took in Intertanko, confirming that the Court’s emphasis on whether an agreement aims to provide rights to individuals was not an “isolated incident”.

An approach that emphasises whether an agreement can be relied upon by individuals significantly reduces the range of international instruments that may be given effect in the EU legal order. The types of agreements that the Court has found to be capable of being relied upon by individuals have concerned trade agreements, association agreements, as well as partnership and cooperation agreements. Kaddous argues that this shows how the Court has adopted “a very open approach to the effects of international agreements within the EU legal order”. Yet these agreements only represent one category of agreement to which the EU is a party. As Klabbers argues, “[i]f there is one category of treaties that the ECJ is happy to endow with directly effective provisions, it is the group of association agreements and related instruments, such as decisions of association councils set up under those association agreements: the concept of direct effect, designed to protect individuals, and the conditions under which the Court will determine whether EU law conforms to international legal obligations.

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154 P. Eeckhout, ‘Case C-308/06 The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport, judgment of the Court of Justice, (Grand Chamber) of 3 June 2008’ 46 Common Market Law Review (2009) 2053.
156 Following Intertanko some questioned whether the Court’s focus on individual rights represented a significant shift in the Court’s approach, and whether future case law might moderate its effects. J. Wouters and P. de Man, ‘International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Cooperation Committee, Lloyd's Register and International Salvage Union V. Secretary of State for Transport. Case C-308/06’ 103 American Journal of International Law 3 (2009) 560–61: “In the end, future ECJ decisions will have to clarify Intertanko’s reach – which will, it is to be hoped, serve as opportunities to moderate the effects of the judgment's sweeping language.”
159 See e.g. Judgment in Pabst & Richarz KG v Hauptzollamt Oldenburg, C-17/81, EU:C:1982:129 regarding an association agreement between the EC and Greece.
160 Kaddous, supra note 11, 311.
agreements”. These types of agreements tend to extend EU law principles such as free movement outside of the EU, and will often contain precise and unconditional language capable of being relied upon by individuals.

Other types of international agreements, especially multilateral treaties, usually touch upon different matters and will naturally contain provisions that are worded less closely to EU standards. Such multilateral treaties rarely employ precise and unconditional clauses capable of being relied on by individuals; rather, their provisions are generally couched in broader terms, giving the parties greater room to implement the agreement. As Cannizzaro argues, “[a]greements which confer rights to individuals enforceable in the international legal order are notoriously rare”. Requiring an international agreement to confer rights upon individuals in order for that agreement to be used to assess the validity of EU legislative acts, he argues, would in effect “nullify the domestic effect of international law”. This approach practically excludes the legal effect of a great number of agreements binding on the Union.

The Court’s case law on the direct effect and invocability of the GATT/WTO really warrants a separate discussion. The Court ostensibly applies the same test to every agreement, irrespective of its type. Yet the Court can now be seen as having developed a specific line of case law regarding the direct effect of the GATT/WTO obligations. The Court has found that the GATT/WTO does not have direct effect in the EU legal order, a finding that has provoked a deal of academic discussion. This was not based on the specific provisions of the GATT/WTO but the overall structure of the agreement. In Bananas, the Court examined the characteristics of the agreement:

which according to its preamble is based on the principle of negotiations undertaken on the basis of “reciprocal and mutually advantageous arrangements”, is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.

This conclusion was confirmed in Dior regarding the provisions of TRIPS, which “are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law”. This conclusion is based on both legal reasoning regarding the nature of the GATT/WTO and also certain political considerations.

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161 Klabbers, supra note 24, 81.
162 It has also been argued that the Court has shown less willingness to use international agreements as a standard of review of EU acts compared with its stance regarding action of the Member States. See M. Mendez, ‘The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques’ 21 European Journal of International Law (2010) 104.
163 E. Cannizzaro, ‘The Neo-Monism of the European Legal Order’ in Cannizzaro et. al., supra note 11, 49.
164 Id.
165 Wouters and van Eeckhoutte supra note 153, 221: “one may say that it uses a different test for the invocability of GATT 1947 provisions.”
167 Judgment in Dior and Others, C-300/98, EU:C:2000:688, para. 44.
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Despite finding that the GATT/WTO does not have direct effect in the EU legal order, the Court has established two main exceptions. The first is in the situation where the EU intends to implement an international obligation (Nakajima\textsuperscript{168} exception). The second situation is where the EU act has specifically referred to an international agreement, in which case it may be employed in interpreting that act (Fediol\textsuperscript{169} exception).

### 3.2.4 Other Influences of Treaties

The discussion above examines treaties to which the EU is a party and the circumstances under which they may be given direct effect in the EU legal order. Even where direct effect is denied, agreements may have influence in the EU legal order in other ways.

International agreements binding on the EU but lacking direct effect may be given “general effect”\textsuperscript{170} or “indirect effect”\textsuperscript{171} when the Court interprets EU law in the light of the agreement. The concept is developed in order to avoid conflicts as far as possible:

\begin{quote}
This principle is logical and obvious. The coherence of a legal system requires that its various provisions are as much as possible interpreted in the light of each other, so as to avoid conflict between them, and consistent interpretation is a preferred judicial technique for such conflict prevention.\textsuperscript{172}
\end{quote}

While the Court refers to the principle of consistent interpretation, there are few instances where the Court has explicitly carried out such an exercise. In \textit{Intertanko} it stated that the Directive in question should be interpreted “taking account of”\textsuperscript{173} Marpol 73/78.\textsuperscript{174} In that case the Court did not actually go on to perform such an exercise, however.\textsuperscript{175} Despite referring implicitly to consistent interpretation with regard to Marpol 73/78, the Court in \textit{Intertanko} did not make a similar reference to UNCLOS, to which the EU is a party, thus “ignor[ing] the fact that the measure to be assessed was actually implementing the two conventions”.\textsuperscript{176} Picking up on this ‘consistent interpretation’ reasoning the Advocate General in \textit{ATAA} embarked on such an exercise with regard to the Chicago Convention, given that all EU Member


\textsuperscript{170} F. Casolari, ‘Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation in Cannizzaro et. al., supra note 11, 396.

\textsuperscript{171} Van Rossem, \textit{supra} note 136, 207.


\textsuperscript{173} \textit{Intertanko and Others}, \textit{supra} note 104, para 52.

\textsuperscript{174} International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978, 1340 UNTS 61.

\textsuperscript{175} Eeckhout, \textit{supra} note 154, 2056.

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States are parties to it. However, in ATAA the Court did not engage in consistent interpretation, merely reiterating its case law with regard to the effect of customary international law on the interpretation of EU legislation.\footnote{ATAA, supra note 99, para 123.}

Consistent interpretation requires the Court to, as far as possible, interpret EU legislation in a manner consistent with international agreements.\footnote{Judgment in Commission v Germany, C-61/94, EU:C:1996:313, para 52.} The doctrine of consistent interpretation, if properly applied, has the advantage that it both reaffirms the claim of the EU that it aims to promote the strict observance and development of international law and preserves the power of the Court to safeguard the integrity of the EU legal order. However, like other tools developed by the Court to deal with international law, the principle of consistent interpretation can be applied in a narrow or broad fashion depending on the instrument at issue. If not properly applied, the doctrine risks becoming merely a gesture towards international law, allowing the Court to refer to international law while continuing to deny its binding legal nature. Instead, consistent interpretation should stem from a sense of constitutional obligation, in particular Article 3(5) TEU.

When should EU legislation be interpreted in conformity with international law? This was one of the questions before the Court in Diakité.\footnote{Judgment in Diakité, C-285/12, EU:C:2013:500.} One of the key questions was whether the definition of ‘internal armed conflict’ is to be based on the criteria established by international humanitarian law, or whether it can be given a separate, autonomous meaning for the purposes of European law. Specifically, the Court was asked to interpret the term ‘internal armed conflict’ used in Article 15(c) of Directive 2004/83/EC\footnote{Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12.} setting out minimum standards for granting refugee status or subsidiary protection status. The referring Court, the Belgian Conseil d’État, asked whether the terms should be defined according to international humanitarian law, in particular with reference to Common Article 3 of the four Geneva Conventions of 12 August 1949.

In his Opinion\footnote{Opinion in Diakité, C-285/12, EU:C:2013:500.} Advocate General Mengozzi referred to Article 3(5) TEU, as well as relevant case law, and noted that EU measures should interpreted in the light of relevant rules of international law. This includes, not only treaties binding upon the Union, but also customary international law. However, he noted that the term ‘internal armed conflict’ in the Directive is used for a different purpose than that of ‘non-international armed conflict’ in international humanitarian law. The Court followed this reasoning, stating that the terms relate to two different fields of law, both of which have different aims and involve different protection regimes.\footnote{Diakité, supra note 179, para. 24.}
Since the Directive itself does not define the term ‘internal armed conflict’ the Court interpreted the term according to its usual meaning in everyday language, taking into account the purposes of the legislation.\(^{183}\) The Court then defined the term ‘internal armed conflict’ as “a situation in which a State’s armed forces confront one or more armed groups or in which two or more armed groups confront each other.”\(^{184}\) Under international humanitarian law, specifically Common Article 3, for hostilities to be considered as “a conflict of a non-international character”, they must meet specific criteria. The hostilities must have reached a certain threshold of intensity, setting them apart from isolated and sporadic acts of violence or banditry, and the hostilities must involve non-governmental forces that have some kind of organized command structure. The Court therefore established a much broader definition of the term for the purposes of EU law. The Court justifies the separate definitions on the basis that international humanitarian law and the relevant EU Directive were designed for different purposes and spheres of application.

One might argue that this an example of the CJEU finding an autonomous, ‘European’ meaning of a term that is already defined by international law, even contributing to the ‘fragmentation’ of international law. In this way, it is reminiscent of the divergence between the International Court of Justice and the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia concerning the test to determine the nature of an armed conflict. The ICTY Appeals Chamber, in applying an ‘overall control’ test, appeared to deviate from the ‘effective control’ test applied by the ICJ in the *Nicaragua*. However, this apparent divergence can be explained by the fact that the ICJ and ICTY Appeals Chamber were applying these tests in different legal contexts. In *Tadić*, the Appeals Chamber was determining whether or not an armed conflict exists for the purpose of determining whether the grave breaches system would apply for the purposes of international criminal law. In *Nicaragua*, however, the ICJ was primarily concerned with the topic of state responsibility, not individual criminal responsibility. In the *Bosnia Genocide Case*, the ICJ rejected the notion that a single test had to apply to both bodies of law.\(^{185}\)

Likewise, the definition of internal armed conflict for the purposes of EU legislation can require a lower level of intensity and organization of armed groups than that required by international humanitarian law. Although the CJEU applied a different definition in this case, its approach in *Diakité* is not antagonistic towards international law. The assessment may have been different, however, had the EU Directive intended to implement an international legal obligation. In such a case the Court should endeavour to apply the definition used at the international level.

\(^{183}\) *Diakité*, supra note 179, para. 27.

\(^{184}\) *Diakité*, supra note 179, para. 28.

\(^{185}\) Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) (26 February 2007) ICJ Rep 2007, para. 405. “[T]he degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.”
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The Court has acknowledged the principle of ‘consistent interpretation’, which stems in part from the EU’s duty to respect international agreements under Article 216(2) TFEU. It has been suggested that the application of this principle would be “a useful means for the removal of divergences between two or more norms without resorting to the modification of those norms through the legislative process”. The precise scope of this duty remains unclear, as there are few instances of the Court applying the doctrine of constituent interpretation in practice.

3.3 Customary International Law

Along with treaties, customary international law is binding upon the Union, and can be given effect within the EU legal order. The Court’s approach to customary international law differs from its approach to treaties. This section examines how the Court identifies principles of customary international law and how the Court employs it within the EU legal order.

Customary international law is the second source of law mentioned in Article 38(1) of the ICJ Statute. Customary international law is also important to the EU, which has welcomed the recent inclusion of the formation and evidence of customary international law as a subject to be addressed by the International Law Commission. The ILC will include the practice of the international organizations, including the EU, and judicial bodies, including the European Court of Justice, when examining the formation of customary international law. The EU is therefore not only subject to customary international law, but plays a role in its formation. The way in which the EU’s Court of Justice approaches issue of customary international law has wider consequences outside of the EU legal order. The way in which it approaches these issues further contributes to international practice and the development of customary law.

Whereas the EU Treaties mention the conclusion of international agreements, they are silent on the role of customary international law. Unlike the constitutions of some EU Member States, which spell out the role of customary international law in their legal orders, the EU Treaties give no such guidance. The starting point is the Court’s assertion Poulsen that “the European Community must respect international law in the

187 The Court shall apply inter alia “international custom, as evidence of a general practice accepted as law” Art 38(1)(b) Statute of the International Court of Justice.
189 Some national constitutions state that customary law is part of the national legal order, such as Art. 8(1) Portugal 1976 Constitution; Art. 9 Austrian Constitution; Art. 25 German Basic Law.
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exercise of its powers"\(^{190}\) which is often cited when referring to the Court’s approach to customary international law and may give the impression that the Court is open to customary international law. The reality, again, is more nuanced.

3.3.1 Sources: What is Customary International law?

Before deciding upon what effect to give to a norm of customary international law, the Court must first decide whether in fact the rule has the status of customary international law. How does the CJEU identify customary international law rules? In certain cases the customary law status of a norm may be in question, and the Court will be called upon to determine the status of the rule being invoked. In many cases it will be relatively easy to demonstrate that a rule has customary status. The Court, for instance, often relies on the provisions of the 1969 VCLT insofar as they represent customary international rules of treaty interpretation. Since the 1969 VCLT was intended largely to codify the international law of treaties, the Court has had little trouble finding that certain provisions represent customary international law.

Yet there have been instances where it is not clear whether or not the rule has status of customary international law. In these cases, the Court has been reluctant to undertake its own investigation of state practice and opinion juris in order to identify customary international law. The Court prefers instead to refer to the case law of other Courts and international tribunals, particularly the International Court of Justice. ATAA gives some insight into how the Court decides whether a rule has customary international law status. First, the Court will examine whether the customary rule in question is codified in an international treaty.\(^{191}\) In ATAA, the Court noted that the principles being invoked are enshrined in Article 1 of the Chicago Convention,\(^{192}\) Article 2 of the Geneva Convention of 29 April 1958 on the High Seas,\(^{193}\) and the United Nations Convention on the Law of the Sea.\(^{194}\) Second, the Court will refer to the jurisprudence of the International Court of Justice and the Permanent Court of International Justice\(^{195}\) or other international courts to demonstrate that a rule has customary


\(^{192}\) ATAA, supra note 99, para. 104.

\(^{193}\) ATAA, supra note 99, para. 104.

\(^{194}\) ATAA, supra note 99, para. 104.

\(^{195}\) ATAA, supra note 99, para. 104. In Poulsen, supra note 190, the Court referred to the following judgments in support of the proposition that the provisions of certain treaties represented the state of international maritime law: Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Region, Canada v United States of America, ICJ (1984) 294, para. 94; Case Concerning the Continental Shelf, Libyan Arab Jamahiriya v Malta, ICJ (1985) 30, para. 27; Case Concerning the
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international law status. In Racke, for instance, the Court relied on the ICJ’s judgment in Gabčíkovo-Nagymaros in support of its conclusion that the principle of fundamental change of circumstances is an important customary law principle. Third, the Court will take into account whether any of the parties contested to the existence of the rules of customary international law in their written observations or during court proceedings. Thus, for certain rules it was rather straightforward for the Court to demonstrate that they were regarded as forming rules of customary international law.

The Court’s approach is less clear when the rule’s customary status is contested. This was the case regarding the alleged principle “that aircraft overflying the high seas are subject to the exclusive jurisdiction of the State in which they are registered”. The Court simply did not examine this issue in ATAA, merely stating that “insufficient evidence exists to establish that the principle of customary international law”. The Court did not undertake an independent review of whether the rule has customary law status. In some cases, the Court will simply state that a particular rule has customary law status with little or no legal reasoning in support of this. In Hungary v. Slovakia, the Court determined that privileges and immunities enjoyed by a Head of State were part of customary international law, however the Court decided this without any analysis or references to international or domestic case law. In Vinkov the Court found that provisions of the Convention on Driving Disqualifications, which had not yet entered into force and was therefore not binding upon Bulgaria, “should be considered to express a rule of customary international law…” The Court did explain how it arrived at such a conclusion. The Court seems open to acknowledging the findings of other Courts regarding the existence of a rule of customary international law, but reluctant to conduct such an enquiry itself.

3.3.2 Direct Effect of Customary International Law

Like international agreements to which the EU is a party, customary international law is equally binding upon the Union, and may be used to review the validity of acts of

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196 Kuijper, supra note 11, 597: “Normally, the Court will adduce judgments of the ICJ in order to confirm that certain provisions of international conventions to which the EU is not a party are declaratory of customary international law.”
199 ATAA, supra note 99, para. 105.
200 ATAA, supra note 99, para. 106.
201 ATAA, supra note 99, para. 106.
203 Hungary v. Slovakia, supra note 202, para. 46: “[O]n the basis of customary rules of general international law … the Head of State enjoys a particular status in international relations which entails, inter alia, privileges and immunities.”
The EU. However, the Court has developed a remarkably different approach to the issue of ‘direct effect’ of customary international law than its approach to treaty law. The Court’s approach to customary international law has also undergone quite some change throughout its history.\textsuperscript{205} Higgins argues that the Court’s approach to customary international law seems to be “in marked contrast to the confidence shown as to its capabilities in international law shown by the Court in other cases.”\textsuperscript{206} The Court justifies its different approaches to treaty and customary international law on the basis that “a principle of customary international law does not have the same degree of precision as a provision of an international agreement”.\textsuperscript{207} In \textit{Racke}, the Court justified this different approach concerning customary international law:

\[\ldots\] because of the complexity of the rules in question and the imprecision of some of the concepts to which they refer, judicial review must necessarily, and in particular in the context of a preliminary reference for an assessment of validity, be limited to the question whether, by adopting the suspending regulation, the Council made manifest errors of assessment concerning the conditions for applying those rules.\textsuperscript{208}

The Court bases its different approach to customary international law due to its lack of ‘precision’. The Court’s premise that customary international law is necessarily less precise than treaty law, and the legal consequences it draws from that, must be challenged.\textsuperscript{209} First, many of the customary international rules applied by the Court are included in international treaties or other instruments. As explained above, the Court will often rely on the fact that a particular rule exists in a treaty in order to demonstrate its status as a customary rule, such as with the provisions of the VCLT.\textsuperscript{210} Customary international law may also be found ‘codified’ in other instruments, such as the ILC’s Draft Articles of Responsibility.\textsuperscript{211} Second, a treaty provision is not necessarily any more precise than a rule of customary international law. Although some international agreements contain detailed provisions and unambiguous rules, many international agreements employ broad language and give wide scope for contracting parties to implement the agreement. In this way, these instruments are no more precise than customary international law rules. The Court should rather examine the content of the rule being invoked, instead of whether or not it stems from a formal international instrument.

\textsuperscript{206} Higgins, \textit{supra} note 1, 9.
\textsuperscript{207} \textit{ATAA}, \textit{supra} note 99, 110.
\textsuperscript{208} \textit{Racke}, \textit{supra} note 197, para. 52.
\textsuperscript{209} See Wouters and van Eekhoutte, \textit{supra} note 153, 229–31.
\textsuperscript{210} For instance, the Court of Justice has applied the provisions of the 1969 Vienna Convention on the Law of Treaties insofar as they represent customary international law. See Judgment in \textit{Brita v Hauptzollamt Hamburg Hafen}, C-386/08, EU:C:2010:91, paras 40–45.
\textsuperscript{211} In \textit{Walz} the Court referred to these draft articles as indicative of customary international law. Judgment in \textit{Walz v Clickair SA}, C-63/09, EU:C:2010:251, para. 27.
How, then, does the Court approach the issue of the direct effect of customary international law? The Court clarified its approach to this issue in *ATAA*, in which the EU’s emissions trading scheme was challenged, *inter alia*, on the basis that it breached several principles of customary international law. Upon identifying whether certain rules invoked represented customary international law, the Court turned to the question of whether they could be used to challenge an act of the EU. Although the customary international law principles being relied upon will generally apply in relations between states, they may nevertheless be relied upon by individuals in certain circumstances. First, the rules of customary law being relied upon must be “capable of calling into question the competence of the European Union to adopt that act”.212 Second, they must be “liable to affect rights which the individual derives from European Union law or to create obligations under European Union law in this regard”.213

In coming to this conclusion, the Court cited its previous case law, including *Woodpulp* and *Mondiet*. Advocate General Kokott pointed out, however, the Court’s previous case law did not touch upon the specific question, as arose in *ATAA*, as to whether a principle of customary international law could be used to test the validity of EU acts.216 The Court had not given clear criteria on this issue, since “[i]t would appear that the Courts of the European Union have not in the past had occasion to undertake such a review of validity; customary international law has, up to now, been called upon only in relation to the interpretation of provisions and principles of EU law.”217 AG Kokott distinguished cases such as *Mondiet*, *Poulsen* and *Brita*, since in those cases customary law was used to interpret acts of the institutions, not to challenge them. AG Kokott distinguishes *Opel Austria* in this regard because “the benchmark for the validity of the disputed EU act was ultimately an international agreement (the EEA Agreement) rather than a general principle of EU law or customary international law.”220 Interestingly, AG Kokott did not mention the landmark *Woodpulp* case, except in order to state that the EU must respect customary international law in respect of its powers.221 This case has been described in the literature as the “first implicit acceptance of the invocability of customary international law for the review of the legality of Community acts.”222

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214 *Ahlström Osakeyhtiö and Others*, supra note 212.
215 *Mondiet*, supra note 212.
218 Judgment in *Poulsen*, supra note 190.
219 Brita, supra note 210.
220 Opinion in *ATAA*, supra note 36, footnote 104.
221 Opinion in *ATAA*, supra note 36, para. 142.
222 Wouters and van Eeckhoutte supra note 153, 199.
AG Kokott and the Court disagreed over whether Racke was relevant to the legal dispute in ATAA. In Racke, the Court itself stressed that the claimant was “incidentally challenging the validity of a Community regulation under those rules in order to rely upon rights which it derives directly from an agreement of the Community with a non-member country. This case does not therefore concern the direct effect of those rules.” The AG therefore distinguished Racke on that basis. The Court in ATAA, however, decided to rely upon Racke to assert the proposition that, concerning customary international law:

[J]udicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles.

It is curious why the Court decided to apply the ‘manifest error of assessment’ standard from Racke. In that case, the EC sought to suspend unilaterally a co-operation agreement with the Socialist Federal Republic of Yugoslavia, relying on the customary international law principle concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances (rebus sic stantibus) due to the war in that country. The Court was asked to determine whether the regulation suspending the co-operation agreement was valid insofar as it correctly applied the conditions under customary international law regarding rebus sic stantibus. It was the Community that had originally invoked the customary international law principle by way of the contested regulation. The claimant, whose rights were affected by that regulation, was seeking to ensure that this principle was applied according to the law. As Wouters and Van Eeckhoute point out, “it seems as if the invocability of a rule of customary international law to review the legality of a Community act is furthermore restricted to the situation in which this Community act is, in fact, an implementation of the invoked rule of customary international law.” They argue that there are parallels with the Nakajima case law where the Court found that GATT rules may be invocable to review the legality of EU acts when they intended to implement GATT obligations.

It was in this context that the ‘manifest errors of assessment’ standard was developed, where the EU act is the implementation of customary international law. Since the Community was relying on customary international law to justify the suspending regulation, the Court examined whether the Community made “manifest errors of assessment concerning the conditions for applying those rules.” The manifest error

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223 Racke, supra note 197, para. 47. Emphasis added.
224 Opinion in ATAA, supra note 36, footnote 104.
225 ATAA, supra note 99, para. 110.
226 Klabbers argues that both the Advocate General and the Court come to the “erroneous conclusion that it had been the individual concerned who invoked the rebus sic stantibus rule. Rather, it was the Council who relied on rebus sic stantibus, in order to justify the suspension of the Co-operation Agreement.” J. Klabbers, ‘Case C-162/96, A. Racke GmbH & Co. v. Hauptzollamt Mainz, judgment of 16 June 1998, nyr’, Common Market Law Review (1999) 183.
227 Wouters and van Eeckhoute, supra note 153, 203.
228 Racke, supra note 197, para. 52.
standard stems from the Advocate General Jacobs’s Opinion in Racke, where it was stated:

[A]lthough I do not wholly exclude the possibility that under certain circumstances individuals could base a Community law claim on rules of customary international law of treaties, I take the view that that should be exceptional in the light of the overall purpose and nature of such rules. I will thus suggest that only manifest violations of the law of treaties can give rise to a ruling of invalidity. 229

AG Jacobs wanted to limit the judicial review of the EC’s decision to suspend the EC-Yugoslavia Agreement, especially given the highly political dimension of that decision. It is in this context that the manifest error test was first applied. Given the clear differences between the two cases it is curious why the Court in ATAA chose to apply the ‘manifest error of assessment’. Unlike the regulation in Racke, the contested directive in ATAA was not intended to apply rules of customary international law. In ATAA, the Court examines the rules of customary international law, but only “within the limits of review as to a manifest error of assessment attributable to the European Union regarding its competence, in the light of those principles, to adopt that directive”. 230 In the end, the Court simply examines whether the directive violates any of the principles being invoked 231 and the issue of ‘manifest error’ did not come into the equation. It must be questioned, then, why the Court chose to refer to this vague formulation, one that was developed in a much different context.

A more appropriate option would be to approach the issue of direct effect of customary international law in a similar manner to that of international treaty law. This is the path chosen by the Advocate General in ATAA, who does not mention the ‘manifest error’ test. Rather, AG Kokott argues that

there appears to be no good reason why individuals should be permitted to rely on principles of customary international law under less stringent conditions than when relying on international agreements. Nor have the claimants in the main proceedings or the associations supporting them raised any such argument in the proceedings before the Court of Justice. 232

AG Kokott notes that many principles of customary international law are found in international agreements, including the Chicago Convention, the Convention on the High Seas and parts of the Convention on the Law of the Sea. From this AG Kokott argues that:

It would make no sense if, when individuals are relying on one and the same principle of international law, different conditions were to apply according to whether it was

230 ATAA, supra note 99, 111.
231 These were: (i) the principle that each State has complete and exclusive sovereignty over its airspace; (ii) that no State may validly purport to subject any part of the high seas to its sovereignty, and the principle which guarantees freedom to fly over the high seas. A fourth principle, that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by international treaty, was contested by the defendant and not accepted by the Court.
232 Opinion in ATAA, supra note 36, para. 111.
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being relied upon as a principle of customary international law or as a principle under an international agreement.233

De Baere and Ryngaert argue in favour of a middle position between that of the Court and the Advocate General. They argue that “if principles of customary international law appear, as regards their content, to be unconditional and sufficiently precise, individuals should be able to rely on them in the same way as with respect to international agreements and a full review should take place. If it is found that such principles miss the necessary degree of precision, they could be relied on for the marginal review suggested by the ECJ.”234 The Court decided, however, to apply a different standard where customary international law is concerned, including the ‘manifest errors of assessment’ threshold.

The Court’s approach to customary law seems rather open at first glance, as the Union is bound by customary international law and must respect it in the exercise of its powers. It has been argued, for instance, that the “Poulsen case the Court shows itself to be thoroughly modern in accepting that customary law nowadays can be derived largely from solemn declarations and conventions that have not (yet) been ratified and entered into force”235 Yet the way in which the Court assesses the conditions under which a customary international rule may have direct effect in the EU legal order demonstrates a much more guarded approach.

There are a number of factors that may explain the Court’s different approach regarding customary international law. First, there is the reason that the Court invokes: the ‘imprecise’ nature of customary law. As argued above, even if this were the case it does not justify the radically different approaches to direct effect. Another reason is that principles of customary international law often relate to inter-state relations, rather than principles capable of being directly invoked by individuals. The Court may be uneasy with allowing individuals to invoke these inter-state norms to challenge EU legislation. Third, the Court may have concerns with the method by which customary international law is developed. Unlike treaty law, which seeks to demonstrate the intentions of the parties in a written agreement, customary international law develops through state practice and is often less easily identified. The Court is more comfortable with written agreements. This is demonstrated by the fact that, when asked to identify whether a particular rule has customary international law status, the Court will immediately examine whether that rule exists in an international agreement. This is not the approach to identifying customary international law that is taken by international lawyers. The Court is also clearly more comfortable with applying customary international law where it involves individual and directly effective rights. But as Klabbers argues, this is based on a

233 Opinion in ATAA, supra note 36, para. 112.
235 Kuijper, supra note 11, 596.
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“misconception about the nature of customary international law.” Unlike treaties, customary international law “is not the result of any legislative will or contractual intention, and thus it cannot be said that the parties to the rule would have intended the rule to be directly effective.” A related explanatory factor is that, unlike treaties to which the EU or the Member States are party, the EU has not given its explicit consent to norms of customary international law, and may have not played a role in their development. Customary international law is seen as something developed ‘outside’ the EU legal order and is met with a certain level of mistrust. The Court’s guarded approach to customary international law is not justified, however, particularly in the light of the EU’s goal to contribute to the respect and progressive development of international law.

The cases above have dealt with a private party invoking customary international law to challenge an EU act. There may also be instances where a privileged applicant, such as a Member State, may seek to invoke a customary international law principle. This was the case, for instance, when the UK sought to challenge the validity of an EU measure, namely a decision authorising enhanced cooperation in the area of financial transaction tax (FTT). The United Kingdom challenged the decision inter alia, on the basis that it was in violation of a rule of customary international law, specifically that the FTT would produce extraterritorial effects. It is therefore not only individuals who have invoked customary international law, but the Member States and institutions who have relied on these principles.

The previous section examined how the Court has used identified customary international law, and how it has dealt with the issue of ‘direct effect’. Yet in most cases where customary international law comes before the Court, it is not where it is being used to challenge an EU act. The Court’s case law on issues such as jurisdiction, good faith, and other legal issues have involved the application of customary international law. Indeed, the Court’s use of the law of treaties, discussed in the next section, is largely an exercise in the application of customary international law. Customary international law is not only used to limit the powers of the EU or the Member States, but also may act as a ‘gap filler’ in the absence of EU law. Judgments involving questions regarding nationality or state succession have also relied on customary international law in their reasoning.

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236 Klabbers, supra note 24, 87.
237 Klabbers, supra note 24, 87.
240 Wouters and van Eeckhoutte, supra note 153, 186–96.
241 Judgment in Micheletti and Others, C-369/90, EU:C:1992:295, para. 10: “[u]nder international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality”. Judgment in Kaur, C-192/99, EU:C:2001:106, Judgment in Yvonne van Duyn v Home Office, Case 41-74, EU:C:1974:133, para. 22: “it is a principle of international law, which the EEC treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence.”
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3.4 The Law of Treaties

The previous section examined how the CJEU gives effect to international law in the EU legal order. It is this part of the Court’s relationship with international law that has received the most attention in academic literature. The Court also contributes to the development of international law through the way it applies and interprets international law. This section examines the how the Court has interpreted and applied the international law of treaties. It does not examine the extent to which the Court uses principles of treaty law when interpreting the EU Treaties. In this regard, the CJEU has developed an independent approach to treaty interpretation, which differs from the techniques set out in the VCLT in many respects. According to Article 5 of the VCLT, the Convention applies to the constituent treaties of an international organization. This is a reservation clause which sets out that the VCLT rules are ‘without prejudice’ to the relevant rules of the international organization. The CJEU has rejected the proposition that the VCLT applies to the EU’s founding treaties, emphasising their special character. The CJEU has progressively developed special techniques of treaty interpretation for its own legal order. As Kuijper points out “[t]he question of what is being interpreted is an important one […] : international agreements concluded by the EU, the EU treaties themselves, or even secondary EU law?” The focus in this part is on the first of these: international agreements to which the EU (and the Member States) are party.

The Court has on numerous occasions employed the international law of treaties in its judicial reasoning, including references to the provisions of the 1969 Vienna Convention on the Law of Treaties (VCLT) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLT-IO). By applying the VCLT, the CJEU can be seen as contributing to the “strict observance and the development of international law”. Like any domestic Court, however, the CJEU may at times employ international treaty law in a way that deviates from established practice in international law.

242 Judgment in Budějovický Budvar, C-216/01, EU:C:2003:618.
243 Art. 5, VCLT, supra note 51: “The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.”
244 See Judgment in SP Spa et al v Commission, Joined Cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, EU:T:2007:317, para. 58: “The reference to international law, and in particular to Articles 54 and 70 of the Vienna Convention (on the Law of Treaties), fails to have regard to the sui generis nature of the Community legal order. The indivisibility of the Community legal order and the lex specialis to lex generalis relationship between the ECSC and EC Treaties mean that the consequences of the expiry of the ECSC Treaty are not governed by the rules of international law but must be assessed in the light of the provisions existing within the Community legal order.”
246 VCLT, supra note 51.
247 VCLT-IO, supra note 65.
248 Art. 3(5) TEU.
Although the CJEU is the judicial organ of a regional organization established under international law, the Court’s approach to law of treaties is examined through the prism of a domestic, rather than an international court. In a recent study on treaty interpretation by domestic courts, for example, the CJEU is examined alongside the Supreme Courts of Mexico and the United States.

Since the EU is neither a party to the VCLT nor the VCLT-IO it generally applies the provisions of these agreements to the extent that they represent international customary law. As Crawford points out, the CJEU generally applies the law of treaties as set out in the VCLT: “The European Court of Justice has observed that the customary international law of treaties forms part of the European legal order, and it generally follows the VCLT (implicitly or explicitly)” This means the CJEU will sometimes contribute to international law by deciding upon the customary international law status of the VCLT rules.

The Court will not always explicitly refer to the VCLT when interpreting a treaty, however. For instance in Hoesch the Court did not refer to the VCLT when it invoked the principle of pacta sunt servanda: it stated that an international agreement is “characterized by the fact that its provisions are binding on the Community institutions and on the Member States pursuant to the Treaty and must be implemented in good faith in respect of the other contracting party in accordance with the applicable rules of public international law”.

Similarly, in Kupferberg, the Court states that “[a]ccording to the general principles of international law there must be bona fide performance of every agreement” without mentioning the VCLT.

This section examines how principles of the law of treaties have been employed by the CJEU in various ways. To what extent is the Court’s approach to treaty interpretation influenced by its approach to interpretation of EU law? How does the EU employ international treaty law in a ‘novel’, ‘creative’ or even ‘selfish’ fashion? And in which ways can the Court’s jurisprudence be seen as having contributed to the development of the international law of treaties?

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249 R. Gardiner, Treaty Interpretation (Oxford, Oxford University Press, 2010) 125: “As regards both the EC internal legal order and also the Community’s conduct of external relations, the ECJ acts more in the manner of a national court interpreting a constitution.”

250 H.P. Aust, A. Rodiles, P. Staubach, ‘Unity or Uniformity? Domestic Courts and Treaty Interpretation’ 27 Leiden Journal of International Law 1 (2014) 75, 100 arguing that “[i]t has become more and more common, however, to regard the ECJ as being functionally equivalent to a municipal court.”

251 Brita, supra note 210, para. 42.


253 Racke, supra note 197, para. 58-9 regarding whether formal requirements in Art. 65 of the Vienna Convention constitute customary international law.


255 Id., para. 30.

256 Kupferberg, supra note 59, para. 18.
3.4.1 Conclusion and Entry into Force

First, the CJEU has been called upon to examine the scope of the obligations that exist under international law during the period before an international agreement enters into force. Before an agreement enters into force a state or international organization is under an interim obligation “to refrain from acts which would defeat the object and purpose of a treaty”. This principle is enshrined in Article 18 VCLT and VCLT-IO and represents a rule of customary international law. It is a manifestation of the general principle of good faith, and establishes an interim obligation for parties that have committed themselves to a treaty text, but have not yet become formally bound by the instrument.

The Article 18 interim obligation was dealt with incidentally by the Court in Opel Austria. In this case Austria argued that the Council had acted in breach of the principle of good faith in international law when it adopted Regulation No 3697/93 imposing a 5.9% duty on gearboxes produced by General Motors Austria. Opel sought to annul the regulation on the basis inter alia that it violated the obligation under international law not to defeat the object and purpose of a treaty before its entry into force. The Court found that the principle of good faith was a rule of general international law and thus binding upon the Community. It found this principle of good faith to be the public international law corollary of the EU law principle of the protection of legitimate expectations. The Court referred in this context to the decision of the Permanent Court of International Justice in Certain German Interests in Polish Upper Silesia, in which the Permanent Court indicated that a signatory state may be “under an obligation to abstain from any action likely to interfere with [the treaty’s] execution when ratification has taken place”. The CJEU found that there was a legitimate expectation on the part of traders such as Opel that the Council and other parties to the EEA Agreement would not act so as to defeat the object and purpose of that agreement. Interestingly, it was not the principle in Art. 18 that gave rise to actionable rights, but the equivalent EU law principle regarding the protection of legitimate expectations. The Council Regulation was not annulled due to a deficiency stemming from public international law, but a violation of a principle of EU law. The Council argued that Art. 18 VCLT and VCLT-IO only applied between sovereign states and international organizations and since they do not confer rights

257 Art. 18, VCLT, supra note 51: “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”
258 Dörr, ‘Article 18 - Obligation not to defeat the object and purpose of a treaty prior to its entry into force’ in Dörr & Schmalenbach, supra note 54, 220.
260 Certain German Interests in Polish Upper Silesia, (1925) PCIJ Ser A, No 7, 5.
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upon individuals, they could not be invoked in order to challenge the validity of EU acts.261

From a public international law perspective, one may question the way in which the Court applied the principle in Art. 18 VCLT. It is an interim obligation not to defeat the object and purpose of the treaty; it is not intended to allow the provisions of the treaty to be valid prior to its entry into force.262 As Dörr puts it, “the States concerned are not bound to comply with the treaty, but not to destroy its very essence, thus not to render its entry into force de facto meaningless.”263 The interim obligation is concerned with acts that would make the performance of the treaty difficult or impossible. Did the Regulation in question really defeat the object and purpose of the EEA Agreement? One of the purposes of the Agreement was “[to establish] a dynamic and homogeneous European Economic Area.” It is doubtful that the EU’s behaviour threatened the Agreement in such a manner.264 Although Opel Austria is one of the very few judicial pronouncements on Art. 18 VCLT it is not a real application of the interim obligation, but an application of the more general principle of good faith.266

Other cases demonstrate that the principle of good faith, not the Article 18 obligation is applied by the CJEU. A week and half before its entry into the EC, Sweden introduced a new tax on sugar. In Danisco Sugar267 a company which was subject to this hefty tax sought to annul the sugar law. Relying on Opel Austria, it argued that the sugar law contravened the ‘principle of good faith’, and amounted to a violation of the interim obligation.268 Again, the principle being invoked was actually that of the protection of legitimate expectations under EU law, rather than the principle in Art.18 VCLT. The facts are quite different from Opel Austria, however. Danisco Sugar’s expectations under the Treaty were not frustrated by an act of the EU, but by a national act of Sweden. At the intergovernmental level, between Sweden and the EU, neither party was of the view that the sugar law defeated the object and purpose of the Treaty. On the contrary, the sugar law was designed to prevent speculation in sugar and the accumulation of excessive stock, taking into account the increased price of sugar that would apply upon Sweden’s entry into the Community. In such a situation it would be difficult to find that the ‘legitimate expectation’ of a private company was

261 Opel Austria, supra note 259, para, 86.
263 O. Dörr, ‘Article 18 - Obligation not to defeat the object and purpose of a treaty prior to its entry into force’ in Dörr & Schmalenbach, supra note 54, 220.
266 See O. Dörr, supra note 263, 222: “it becomes clear that the Court of First Instance was simply applying the good faith principle as such, and not the interim obligation as one of its concrete emanations.”
268 Danisco Sugar, supra note 267, para. 20.
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frustrated by the national law. The Court found it unnecessary to touch upon the issue of the interim obligation, resolving the issue on other grounds. Yet the case demonstrates the difficulty of applying the principle of Art. 18 VCLT to the situation where it is a private entity, not a party to the agreement, relying on the interim obligation.

The Court also dealt with the interim obligation in *Case T-231/04 Greece v. Commission*. The Commission and certain Member States entered into a Memorandum of Understanding (MOU) related to the sharing of the costs of their representations in Abuja, Nigeria. The Commission took steps to recover amounts that it believed were due to be paid by Greece under the MOU. Greece disputed this amount. The Commission relied, *inter alia*, on the conduct of Greece and the principle of good faith in international law. The Court found that Greece, “as a signatory of the additional memorandum, was bound to act in good faith as regards the other partners.” Not only had Greece not informed the other parties of its intention to withdraw from the agreement, it continued to act as a full participant in the project. Therefore, “by reason of the principle of good faith, the Hellenic Republic could not evade its financial commitments by pleading that it had not ratified the additional memorandum.” Once again, while the Court explicitly refers to Art. 18 VCLT, this is really another application of the principle of good faith.

Klabbers argues that in these cases, and others ostensibly involving the interim obligation, what is actually being applied is a ‘manifest intent’ test. This is outlined in the following way:

> if behavior seems unwarranted and condemnable, it may be assumed to have been inspired by less than lofty motivations and ought to be condemned, regardless of whether anyone’s legitimate expectations are really frustrated or can reasonably be said to have been frustrated, regardless of actual proof of bad faith.

It should be remembered that the obligation under Art. 18 VCLT is primarily one between states. While there are cases where the interim obligation has been invoked before the Court, the Court is really applying a principle of good faith, or perhaps even a ‘manifest intent’ test, rather than a true judicial application of Art. 18 VCLT. As Aust points out that “[t]here is virtually no practice in the application of [Article 18]”. The few EU cases dealing with the provision do not shed much light on it.

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269 *Danisco Sugar*, supra note 267, para. 31.
275 Klabbers, supra note 270, 330.
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3.4.2 Treaty Interpretation

Arts 31-33 VCLT concern the general rules of treaty interpretation. The main way in which the Court has applied the law of treaties is through its application of general rules of interpretation, as set out in Article 31 of the VCLT and VCLT-IO. The Court has made use of these provisions on a number of occasions in order to interpret international agreements and resolve legal disputes. The VCLT states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Like other domestic courts, the CJEU has put its own ‘spin’ on things. It primarily uses Art. 31 in order to examine the object and purpose of the agreement, but has only rarely employed the other tools of interpretation available.

Interpreting the Provisions of an International Agreement

In Case C-344/04 IATA and ELFAA277 the Court was called upon to decide whether a regulation on air carrier liability in the event of accidents was consistent with the Montreal Convention.278 IATA and ELFAA argued that the contested regulation was inconsistent with the Convention as regards delay in two ways: no defence of extraordinary circumstances was possible and no limit was provided to the level of the carrier’s liability. The Court looked at the object and purpose of that convention, particularly with reference to the preamble,279 which refers to “equitable balance of interests” and the desirability of “collective State action for further harmonization.”280

The Court found that the drafters had not intended “to shield [air] carriers from any other form of intervention” than those in the Convention and found that the Regulation at issue could not be considered to be inconsistent with the Montreal Convention.281 While the two instruments shared similar objectives, they essentially regulated different legal issues arising from flight delays and hence there was no inconsistency.282 The case was criticised for its ‘selective’ use of the preamble to the Montreal Convention.283 It was argued that Art. 29 of that convention provides for the exclusivity of the remedies in respect of passengers. This article had been interpreted by the UK House of Lords284 and US Supreme Court285 in a way that confirmed the

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279 The Court regularly refers to the preamble to determine the aim and content when interpreting EU law. See e.g. M. Klamert, ‘Conflict of Legal Basis: No Legality and No Basis but a Bright Future Under the Lisbon Treaty?’ 35 European Law Review (2010) 499, arguing that “the Court, in recent cases, has perhaps relied too heavily on the preamble as expression of this aim thus risking the undermining of the rule of objectivity.”
280 IATA and ELFA, supra note 277, para. 41.
281 IATA and ELFA, supra note 277, para. 45.
exclusive nature of this Convention. While the preamble of a convention may be used to identify its object and purpose, it cannot be used to contradict the meaning of the article itself. The CJEU did not examine the way in which the Convention had been interpreted by other Courts, focusing on what it considered to be the object and purpose of the agreement. In doing so, it arguably deviated from the established international judicial practice on the Montreal Convention.

In Walz, the Court interpreted the term “damage” in Art. 22(2) of the Montreal Convention, and found that it must be interpreted in accordance with the rules of interpretation of general international law in Art. 31 VCLT. The Court had to determine whether “damage” included purely material damage, both material and non-material damage, or some other combination thereof. The Court stresses the need for a “uniform and autonomous interpretation” of the term. In order to determine the ordinary meaning of the term, the Court employed Art. 31(2) of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (‘ASR’). According to the Court, the ASR, which are non-binding under international law, aim “to codify the current state of general international law”. This is another example of the Court employing Art. 31 VCLT to examine the wider context of international law, including principles of customary international law, to interpret an agreement.

**Interpreting International Agreements Which Resemble EU Law**

The Court has also employed Art. 31 VCLT when deciding whether to interpret a provision of an international agreement in the same manner as a similar rule under EU law. It has done this mainly in the context of examining the object and purpose of association agreements between the EU and third states. In Jany it was argued that the term “economic activities as self-employed persons” in the Association Agreements should be interpreted differently from the term “activities as self-employed persons” in Art. 52 of the EC Treaty (Maastricht). The question arose whether prostitution could be conceived as an “economic activity.” The Court looked at the preamble of the agreements and found that their purpose was to promote “expansion of trade and harmonious economic relations between the Contracting

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285 Tseng v. EL Al, 525 US 155, 119 S Ct 662 (1999), 26 Avi 16,141.
287 Art. 31 (2) VCLT, supra note 51: “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.”
288 Walz, supra note 211.
289 Walz, supra note 211, para. 22-23.
291 Walz, supra note 211, para. 28.
Parties in order to foster dynamic economic development and prosperity.” The Court found that there was nothing in the object and purpose of the agreements to lead the Court to interpret the two terms differently. When finding the ‘ordinary meaning’ of a term in an international agreement, the Court conveniently found that it was the same as the meaning used in EU law.

In *Pabst & Richarz v Hauptzollamt Oldenburg* the Court found it relevant that the provision of an association agreement with Greece on non-discriminatory taxation “fulfils … the same function as that of Article 95 [EEC Treaty] (now Art. 110 TFEU).” Looking at the objective and nature of the association agreement, the Court found no reason to interpret the provision differently from the corresponding EU law. Similarly in *Administration des Douanes v Legros and Others* the Court was faced with the meaning of “charge having equivalent effect” in an agreement between the EC and Sweden. It found that the agreement “would be deprived of much of its effectiveness if the term ‘charge having equivalent effect’ contained in Article 6 of the [EC Sweden] agreement were to be interpreted as having a more limited scope than the same term appearing in the EEC Treaty.” The Court did not do so automatically from the identical wording in the two treaties. Rather, it looks at the provision of the agreement in the light of its object and purpose and its context.

The Court has also used the object and purpose of an international agreement to stress the exceptional nature of the EU and EU law. In *Polydor* the Court made use of the object and purpose of an agreement between the EC and Portugal to find that a different interpretation should be given to that under EU law. The Court looked at the object and purpose of the agreement, including reference to the preamble, to find that it was aimed at consolidating and extending economic relations between the EC and Portugal. The provisions of that agreement were expressed in terms that were almost identical to those in the EEC Treaty regarding the abolition of restrictions on trade within the Community. The Court found, however, that there was a relevant difference between the EC-Portugal agreement and the EEC Treaty. As the Court

294 *Jany and Others*, supra note 292, para. 36.
295 *Jany and Others*, supra note 292, para. 36.
296 C. Hillon, “Cases C-63/99 Secretary of State for the Home Department ex parte Wieslaw Głoszewzuk and Elżbieta Głoszewzuk; C-235/99 Secretary of State for the Home Department ex parte Eleanora Ivanova Kondova; C-257/99 Secretary of State for the Home Department ex parte Julius Barkoci and Marcel Malik; judgments of the Full Court of 27 September 2001; Case C-268/99 Aldona Małgorzata Jany e.a v. Staatssecretaris van Justitie, judgment of the Full Court of 20 November 2001; Case C-162/00 Land Nordrhein-Westfalen v. Beata Pokrzeptowicz-Meyer, judgment of the Full Court of 29 January 2002”, 40 Common Market Law Review 2 (2003) 448, fn 90: “One does not really know whether the Community meaning is derived from the “ordinary meaning” or whether it is the other way around.”
298 *Pabst & Richarz*, supra note 297, para. 27.
301 *Administration des Douanes v Legros and Others*, supra note 299, para. 23.
303 *Polydor and Others*, supra note 302, para. 10.
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found in Opinion 1/91, the fact that an international agreement and provisions of EU law use similar or identical words does not mean that they must be interpreted in the same manner.\textsuperscript{304} The Court found that the EEA Treaty “merely creates rights and obligations as between the Contracting Parties”\textsuperscript{305} whereas the EEC Treaty “constitutes the constitutional charter of a Community based on the rule of law.”\textsuperscript{306} In these two cases the Court distinguishes the EEC Treaty, which includes primacy and direct effect, from a ‘normal’ international treaty.\textsuperscript{307}

In \textit{Metalsa}\textsuperscript{308} the Court was asked to decide whether an article of a free trade agreement between the EEC and Austria should be interpreted in the same way as Art. 95 of the EEC Treaty. The Court again found that in order to decide whether to extend the European interpretation to the article of a separate agreement, one must examine the aim pursued by that provision, taking in the object and purpose of the agreement.\textsuperscript{309} The Court found that the EEC Treaty aims to establish a common market, whereas the EC-Austria FTA was to progressively eliminate obstacles to trade, in accordance with the provisions of the GATT concerning free trade areas. The Court was faced with a similar issue in \textit{Eddline El-Yassini}\textsuperscript{310} where it was asked to apply its case law concerning the rules governing EEC-Turkey Agreement to the EEC-Morocco Agreement. Again, the Court used Article 31 VCLT to examine these agreements in light of their object and purpose. Upon comparing the two agreements, the Court found that they had different goals and objectives. One difference was that, unlike the EEC-Turkey agreement, the EEC-Morocco agreement did not intend progressively to secure the free movement of workers.\textsuperscript{311} The Court’s case law relating to the EC-Turkey agreement could therefore not be applied by analogy to the second agreement.\textsuperscript{312}

Gardiner is critical of the Court’s approach to the interpretation of agreements in these cases. While the Court states that it is applying the principles of the Vienna Convention, its approach seems to deviate from the spirit of the VCLT: “in \textit{Polydor} the Court’s approach was much closer to the purposive approach of the Harvard draft than to the Vienna rules.”\textsuperscript{313} Moreover, the Court’s use of the ‘object and purpose’ in these cases has been viewed as diverging from the established use under international law:

\begin{quote}
In general international law, the reference to the object and purpose of the treaty is frequently understood to allow for a progressive, evolutive interpretation which
\end{quote}

\textsuperscript{305} Opinion 1/91, supra note 304, para. 20.
\textsuperscript{306} Opinion 1/91, supra note 304, para. 21.
\textsuperscript{308} Judgment in \textit{Metalsa}, C-312/91, EU:C:1993:279.
\textsuperscript{309} \textit{Metalsa}, supra note 308, para. 11.
\textsuperscript{311} \textit{El-Yassini}, supra note 310, para. 58.
\textsuperscript{312} \textit{El-Yassini}, supra note 310, para. 61.
\textsuperscript{313} R. Gardiner, \textit{Treaty Interpretation}, 2\textsuperscript{nd} edn (Oxford, Oxford University Press, 2010) 123.
potentially decouples a treaty from the original will of the states parties. For the ECJ, however, the reference to the object and purpose of the EEA agreement served to underline the limitations of traditional international agreements as compared to the dynamic nature of Community law.\(^\text{314}\)

As Kuijper notes, the Court’s use of Art. 31 VCLT is interesting in these cases since “it constitutes an attempt to base the exceptional character of the Community legal order on normal rules of treaty interpretation.”\(^\text{315}\) Even though the provisions of the agreement and the EU Treaties are similar, the Court finds, using Art. 31 VCLT, that the object and purpose of the agreements differ. Kuijper is critical of this (mis)use of Art. 31, since the Court is essentially using its own case law on the EU as a ‘new legal order’ to interpret the provisions of an international agreement. Although the Court sees the EU as a highly distinctive legal order, this should not be taken into account as a contextual element under Art. 31(2) VCLT. Kuijper concludes that “trying to found the exceptional character of the Community as compared to other treaty systems on the normal rules of treaty interpretation is bound to fail.”\(^\text{316}\)

**Determining Legal Basis**

The Court has also made use of Art. 31 when determining the appropriate legal basis for the conclusion of an agreement under EU law. *Opinion 2/00*\(^\text{317}\) concerned *inter alia* the proper legal basis for the conclusion by the Union of the *Cartagena Protocol to the Convention on Biological Diversity*.\(^\text{318}\) The Court was called upon to determine the legal basis of the agreement: was it predominantly an environmental agreement with aspects of trade, a trade agreement with aspects of environmental issues, or were the two issues inextricably linked? The Court found that in order to answer this question it was required to interpret an international agreement, and it should make use of Art. 31 VCLT,\(^\text{319}\) allowing it to take into account the wider context in which the Protocol was adopted. This included the *Convention on Biological Diversity*, which had been concluded by the Community on the basis of Article 130s EC. Taking this wider context into account, the Court found that the Protocol “pursues and environmental objective, highlighted by mention of the precautionary principle, a fundamental principle of environmental protection referred to in Article 174(2) EC”.\(^\text{320}\) Its main purpose therefore is the protection of biological diversity.

In the *Energy Star*\(^\text{321}\) case the Court also looked at the object and purpose of an agreement although without explicitly mentioning its use of Art. 31 VCLT. The Court

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\(^{314}\) Aust, Rodiles, & Staubach, *supra* note 250, 102.

\(^{315}\) Kuijper, *supra* note 307, 3.


\(^{317}\) *Opinion 2/00*, EU:C:2001:664.


\(^{319}\) *Opinion 2/00, supra* note 317, para. 24.

\(^{320}\) *Opinion 2/00, supra* note 317, para. 29.

referred to the preamble of the Energy Star Agreement\textsuperscript{322} between the EC and the US, and found that it intended to promote energy efficiency and therefore pursued an environmental objective.\textsuperscript{321} However, the Court came to a different conclusion in this case, finding the commercial objective of the agreement to be predominant. In \textit{Daiichi Sankyo}\textsuperscript{324} the Court examined the object and purpose of the TRIPS Agreement\textsuperscript{325} including reference to its preamble, to determine that the agreement was aimed at “reducing distortions of international trade.”\textsuperscript{326} Since the TRIPS agreement seeks to facilitate international trade, the relevant sections of the TRIPS agreement could fall within the Common Commercial Policy for the purposes of EU law.

Despite the fact that the Court refers to context as a method of treaty interpretation under Art. 31 VCLT, international law really does not play a large role in the case law on identifying the appropriate legal basis. Academic commentary on these cases does not discuss the role of the VCLT in the Court’s reasoning.\textsuperscript{327} The law on the choice of appropriate legal basis remains very much an internal issue for the EU legal order on which public international law plays little if any role. Nonetheless, these cases demonstrate how the Court employs Art. 31 VCLT in order to examine the object and purpose of an agreement.

\textit{Other means of interpretation in Art. 31}

The Court has made use of Art. 31 VCLT on a number of occasions in order to examine the object and purpose of the treaty under examination.\textsuperscript{328} Yet there are fewer examples of the Court using the other elements of treaty interpretation found in Art. 31.\textsuperscript{329} One method the Court employs is to use Art. 31 to ‘bring in’ other principles of international law as part of the ‘wider context’ in which an agreement should be read. When applying the \textit{pacta tertiis} principle in \textit{Brita} (discussed below), or applying customary rules regarding damage in \textit{Walz}, the Court employed Art. 31

\begin{footnotesize}
\textsuperscript{322} Agreement between the Government of the United States of America and the European Community on the coordination of energy-efficient labelling programs for office equipment, signed in Washington on 19 December 2000.
\textsuperscript{323} \textit{Commission v Council}, supra note 321, para. 38.
\textsuperscript{324} Judgment in Daiichi Sankyo and Sanofi-Aventis Deutschland, C-414/11, EU:C:2013:520.
\textsuperscript{325} Agreement on Trade-Related Aspects of Intellectual Property Rights (‘TRIPS’) Annex 1C of the Marrakesh Agreement establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994, 1869 UNTS 299.
\textsuperscript{326} Daiichi Sankyo, supra note 324, para. 58.
\textsuperscript{328} C. Brölmann, ‘Specialized Rules of Treaty Interpretation: International Organizations’ in D. B. Hollis, \textit{Oxford Guide to Treaties} (Oxford, Oxford University Press, 2012) 517: “Although the CJEU has not rejected the VCLT framework, it has tended to cite only the first paragraph of Article 31”. See Kuijper, supra note 307, 2: “What is remarkable about the way in which the Court of Justice invokes Article 31 of the Vienna Convention, explicitly in Opinion 1/91, and implicitly in Polydor, is the emphasis that is placed on the object and purpose of the treaty.”
\textsuperscript{329} Kuijper, supra note 307, 7: “The elements referred to in the third paragraph of Article 31, such as a subsequent agreement on the interpretation, subsequent practice in the application of the treaty, and any relevant rules of international law applicable between the parties to the agreement are not mentioned \textit{sua sponte} by the Court.”
\end{footnotesize}
VCLT in order to ‘bring in’ these other principles of international law. On the whole, however, the Court has not made much use of other elements of treaty interpretation in Article 31. For example, subsequent agreement between the parties on the interpretation of the agreement; or subsequent practice in the application of the agreement are rarely employed by the Court.

Supplementary Means of interpretation

Art. 32 VCLT sets out supplementary means of interpretation, to be used as means of interpretation when interpretation according to Art. 31 VCLT leads to an obscure or ambiguous result, or one that is which is manifestly absurd or unreasonable. They may also be used to confirm a meaning resulting from applying Art. 31 VCLT.

Preparatory Work

In this regard Art. 32 VCLT acknowledges that preparatory work (travaux préparatoires) may be used as a supplementary means of interpretation in certain instances. When interpreting the EU Treaties and EU law the CJEU has for the most part chosen not to examine the work that took place in negotiating and drafting those instruments. Whereas other international and domestic courts have examined preparatory work in order to further interpret the provisions of a treaty, EU law is “somewhat hostile to the principle of historical interpretation” favouring ‘autonomous interpretation’. One reason for this may simply be that there is often little in the way of documentation that could be relied upon by the Court when determining the drafter’s intentions. The EU Treaties went through a complex and drawn-out drafting process, including multiple revisions and language versions, in a process that was largely outside the public’s gaze. Identifying the intention of drafters though examination of preparatory work is always difficult, doing so in the context of the EU Treaties would be particularly complicated. Another reason may be more ideological. The Court sees the EU Treaties as living instruments to be interpreted according to their plain meaning, the context and their object and purpose. As the Court states, “every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.” The Court may not wish to be drawn into

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330 Art. 31 (3)(a) VCLT, supra note 51: “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”.
331 Art. 31 (3)(b) VCLT, supra note 51: “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.
332 Art. 32, VCLT, supra note 51: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”
334 Judgment in CILFIT v Ministero della Sanità, C-283/81, EU:C:1982:335, para. 20.
debates, such as in American constitutional law, regarding ‘originalism’ and the intention of the drafters, preferring the EU Treaties to remain ‘living instruments’.

The CJEU’s reluctance to examine supplementary work may slowly be waning, however. In *Pringle*, the CJEU was asked to interpret the meaning of the so-called ‘no-bail-out’ clause (Art. 125 TFEU). In order to determine the objective pursued by that article, the Court looked at the preparatory work relating to the Treaty of Maastricht, in particular the *Bulletin of the European Communities*. Upon examining this preparatory work, the Court found that the original objective of the ‘no-bailout’ clause was to encourage sound budgetary policies in the Member States of the Euro: “that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline.” The Court has subsequently applied *Pringle* to assert that “[t]he origins of a provision of European Union law may also provide information relevant to its interpretation.” In *Inuit Tapiriit Kanatami* the Court examined the travaux préparatoires of articles of the proposed treaty establishing a Constitution for Europe, which are identical to the relevant parts of the TFEU under consideration. In these cases the Court uses the preparatory work more as a primary means of interpretation in order to find the objective of the provisions in question, rather than as a supplementary means of interpretation to confirm the meaning of the provision or to remove ambiguity, as set out in Article 32 VCLT. It is not yet clear whether the reference to preparatory work in these cases is an anomaly, or whether it marks a turn away from its usual reluctance to examine the drafting history of the Treaties. As more preparatory documentation becomes publicly available, the Court may become more open to using them as a means of interpretation.

When it comes to the interpretation of international agreements, the Court is just as reluctant to examine travaux préparatoires. In *Bolbol* the Advocate General went into quite some detail examining the drafting history behind the Geneva Convention

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338 *Pringle*, supra note 336, para. 135.
341 ‘Historical interpretation is probably here to stay and is not just a one day wonder mobilized ‘pour besoin de la cause’ in a difficult constitutional case like *Pringle*, where it was necessary to convince many sceptical European citizens.” ’ From the Board ‘International Law in the Case Law of the Court of Justice: Recent Trends’ 41 *Legal Issues of Economic Integration* 1 (2014) 4.
342 See S. Schonberg and K. Fric, ‘Finishing, Refining, Polishing: on the use of Travaux Préparatoires as an Aid to the Interpretation of Community Legislation’ 28 *European Law Review* 2 (2003) 149, 170-171, who argue that “[t]he preparatory documents issued by the different actors in the Community legislative process are gradually becoming more voluminous, detailed and carefully drafted and, therefore, more relevant as aids to interpretation, and the efforts made by the institutions to improve the quality of the Community legislation include the quality of the travaux préparatoires.”
343 See Verwey, supra note 72, 231.
of 28 July 1951 Relating to the Status of Refugees. The Court, having found the wording of Article 1D of that convention to be sufficiently clear, did not examine the preparatory work of that convention. The Court’s reluctance to refer to preparatory work regarding international agreements most likely stems from its general inclination towards teleological reasoning.

Subsequent Practice

Another issue that Courts may take into account when interpreting a treaty is the subsequent practice of the parties. Art. 31(3) VCLT allows the interpreting body to take into account “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” The Court has rejected the notion that ‘subsequent practice’ is of relevance when interpreting EU primary law, stating that “mere practice cannot override the provisions of the Treaty.” While the Court can and does adapt to changes that take place over time, it seeks to ensure that the Court’s interpretation of the Treaties guide the actions of the Member States, not the other way round: “its function is to ensure that the law is observed and that the Treaty, not the practice of the Member States, predominates.”

The CJEU is also reluctant to take into account subsequent practice when interpreting international agreements. While the Court has shown that subsequent practice may be relevant, the Court “tends to formulate rather strict requirements for practice to be relevant”. In Cayrol v Rivoira the Court employed the “settled practice of the parties to the agreement” to confirm its interpretation of an agreement. In Anastasiou the Court noted that, in accordance with Art. 31 VCLT, “substantial importance properly attaches to the object and purpose of a treaty and any subsequent practice in its application…” The Court found in this case that the practice of the parties, in particular the de facto acceptance of certificates issued by the Turkish Republic of Northern Cyprus (TRNC), did not “warrant a departure from the clear,

344 Opinion in Bolbol, C-31/09, EU:C:2010:119, paras 41-47.
346 Kuijper, supra note 245, 260: “[t]here has always been a tendency at the Court to argue that the special character of the Community legal order required special, more teleologically oriented, interpretation methods than was usual in international law.” Brölmann, supra note 328, 517: “in its (sparse) references to the rules of interpretation as part of the general law of treaties, the CJEU can be seen to employ a large degree of teleological reasoning coupled with a reluctance to use the travaux préparatoires as a supplementary means of interpretation.”
347 Art. 31(3) VCLT, supra note 51.
349 Gordon Slynn, supra note 348, 144.
351 Nolte, supra note 350, 301.
352 Cayrol v Rivoira, supra note 350, para. 18.
353 Anastasiou, supra note 350, para. 43.
precise and unconditional provisions” of the 1977 Protocol. A key difficulty in employing subsequent practice is determining which and whose practice is relevant in interpreting the agreement. In Anastasiou, the practice had been accepted by the European Commission and by the United Kingdom, but certainly not by other Member States, particularly Greece.

The Court seems equally reluctant to attach importance to subsequent practice when interpreting international agreements as it is when interpreting EU law.\(^{354}\) Georg Nolte, Special Rapporteur on the ILC Study Group on “Subsequent agreements and subsequent practice in relation to interpretation of treaties” identified that the CJEU has been reluctant to employ subsequent practice in interpreting the EU Treaties. He notes that this reluctance to employ subsequent practice also applies to the interpretation of agreements concluded between the Union and third states.\(^{355}\) Nolte contrasts the CJEU’s reluctance to employ subsequent practice with the practice of the European Court of Human Rights, and argues that the difference may stem from the “special nature of Union law as it has been developed by the Court.”\(^{356}\) Nolte points out that for the CJEU the attainment of the Treaty objectives is of great relevance and therefore “any practice is potentially regarded as a threat and should consequently only be taken into account with great care and reluctance.”\(^{357}\) In public international law, subsequent practice can be used to identify the intentions of the parties to the agreement. In the EU context, however, ‘subsequent practice’ is treated with much more suspicion.

It is perhaps unsurprising that the Court will apply a similar approach to the interpretation of international law as it does to its own law. This is because Courts and Tribunals develop a certain culture towards issues of interpretation and the application of legal norms:

Tribunals develop their own hermeneutics connected with many of these institutional factors – thus the WTO Appellate Body purports to adhere closely to the underlying treaty texts, while the Court of Justice of the European Community [sic] (CJEU, formerly ECJ) is more expressly teleological in aiming to achieve the purposes of the EU treaties.\(^{358}\)

We can see how the Court’s approach to certain international law issues is often influenced by its approach towards the EU Treaties and EU law generally.

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\(^{355}\) Nolte, \textit{supra} note 350, 301: “Even in cases concerning agreements by the Union with third states the Court hardly ever refers to subsequent practice.”

\(^{356}\) Nolte, \textit{supra} note 350, 301.


The Contribution of the CJEU to the Development of International Law

3.4.3 Treaties and Third States

It is a well-established principle of treaty law that a treaty only applies to the parties to the agreement, and therefore cannot bind third states without their consent. The Court has applied this principle of pacta tertiis nec nocent nec prosunt (‘a treaty binds the parties and only the parties; it does not create obligations for a third state’) enshrined in Art. 43 VCLT. The pacta tertiis rule was applied in Poulsen in which the Court found that EU law could not be applied in respect of a vessel outside of the EU’s jurisdiction. The vessel in question was registered in Panama and flew the Panamanian flag. Since Panama is not a party to the EU Treaties, EU law cannot be applied to its vessels and therefore an EU regulation could not be applied to it in relation to conduct that took place outside the EU or EU waters.

The Court also applied the pacta tertiis principle in Brita although in more tangential fashion. Brita, a German company, imported drinks makers from an Israeli supplier, Soda Club Ltd. The German authorities refused to give preferential treatment to Brita under the EC-Israel Association Agreement on the grounds that it could not be established conclusively that the imported goods fell within the scope of the agreement. This is because Brita had stated that the goods’ country of origin as Israel, although they were manufactured in Mishor Adumim, in the West Bank. The question was whether the goods should have been given preferential treatment in any event, since they would have fallen under the either the EC-Israel Association Agreement or EC-PLO Association Agreement. The Court was therefore called upon to interpret the provisions of an international agreement, and referred to Art. 31 VCLT in in order to employ “relevant rules of international law applicable in the relations between the parties”. One of the rules that the Court sought recourse to was the general international law principle of the relative effect of treaties, according to which treaties do not impose any obligations, or confer any rights, on third States.

The Court sought to interpret Article 83 of the EC-Israel Association Agreement, which defines the territorial scope of that agreement, in a manner that is consistent with the pacta tertiis principle. The Court considered that if it were to interpret Article 83 in a way that the Israeli customs authorities enjoy competence in respect of products originating in the West Bank, this would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the EC-PLO Protocol. Such an interpretation, according to the Court, would create an obligation for a third party without its consent, and therefore would thus be contrary to the pacta tertiis principle.

359 Art. 43, VCLT, supra note 51.
360 Judgment in Poulsen, supra note 190.
361 Brita, supra note 210.
362 Brita, supra note 210, 43.
As discussed above, Art. 31 VCLT has been used by the Court in numerous judgements to ‘bring in’ other principles of law. Here the Court used Art. 31, a rule of treaty interpretation, to have recourse to Art. 34 VCLT, a rule about the relative effect of treaties. The case can be seen as an example of the Court applying international law, as Klabbers states, “in ways which are all but unrecognizable to the international lawyer.” The Court’s application of the pacta tertiis principle in order to interpret the treaty led to critical response from some international lawyers. Cannizzaro is critical of the Court’s use of the pacta tertiis rule:

In spite of its persuasive force, this approach can hardly have a legal basis in the international principles on treaty interpretation, which little the relevance of other international rules to those applicable between the parties. One fails to see how the agreement between the EC and the Palestinian authority can be taken into account in the interpretation of another unrelated agreement between the EC and Israel.

The Court has been criticised for misusing the principle: “the result of their application is somewhat stretching the scope of the pacta tertiis rule.” One can understand that the Court did not want to weigh in on the politically sensitive topic of the territorial application of treaties with Israel. Reliance on the pacta tertiis rule seems like a convenient way to avoid dealing with this thorny issue, rather than a genuine application of rules of international law.

### 3.4.4 Invalidity, Termination and Suspension of the Operation of Treaties

Section 3 of the VCLT deals with issues related to the invalidity, termination and suspension of the operation of treaties. Unlike the rules on interpretation, there have been only a few occasions where the Court has applied these provisions. Nevertheless, the Court’s few judgments are particularly illuminating regarding the way it deals with international law.

Art. 62 VCLT sets out that a fundamental change of circumstances may not be used to terminate or withdraw from a treaty, unless two conditions are fulfilled:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

As the International Court of Justice states in Gabčíkovo-Nagymaros “[t]he negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.”

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363 J. Klabbers, supra note 24, 72.
365 Aust, Rodiles, & Staubach, supra note 250, 103.
366 Art. 62(1) VCLT, supra note 51.
cases.”367 The reason for the restrictive approach to the principle of fundamental change of circumstances is clear. If parties were able to use a change of circumstances to avoid obligations arising from a treaty, this would potentially destabilise treaty relations. The principle is an exception to the fundamental rule of pacta sunt servanda underlying treaty law. The rebus sic stantibus principle in Art. 62 VCLT is therefore a controversial one,368 particularly since “[i]t would be an intolerable offense against the international rule of law if a party could unilaterally relieve itself of treaty commitments which according to its own subjective interpretation had turned out to be overly burdensome.”369

There is relatively little international judicial or other practice where the principle set out in Article 62 VCLT has been employed. This makes the European Court’s use of the rebus sic stantibus principle particularly interesting. The principle was famously applied in Racke,370 discussed above in relation to customary international law. The issue gives rise to two questions before the Court. First, whether the conditions for the application of rebus sic stantibus were fulfilled; second, whether an individual could rely on the application of this doctrine in proceedings before the Court. The Court found that the outbreak of hostilities was a fundamental change of circumstances under Art. 62 VCLT, which would allow for the termination of the treaty. At first sight, it may appear that the outbreak of hostilities would constitute the very type of change of circumstances envisaged by Article 62. However, it would be highly problematic if the outbreak of war or civil unrest in a country were a sufficient condition to allow a third state to terminate a treaty.371 Indeed, the issue of “Effects of armed conflicts on treaties” is a complex topic, one that has been considered by the International Law Commission.372 Yet the Court accepted that the outbreak of armed conflict and the subsequent sanctions regime sufficed to trigger rebus sic stantibus principle.

A related question in Racke was whether it was permissible to suspend the Cooperation Agreement without adhering to the procedural requirements, including prior notification and a waiting period, as required by Art. 65 VCLT (‘Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the

367 Gabčíkovo-Nagymaros, supra note 198, para. 104.
370 Racke, supra note 253.
372 See, International Law Commission, Draft articles on the effects of armed conflicts on treaties 2011, at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10, para. 100), Art. 3: “The existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties: (a) as between States parties to the conflict; (b) as between a State party to the conflict and a State that is not.”
operation of a treaty’). The Court notes that, prior to termination, the Community had made it clear that it would terminate the Cooperation Agreement if a ceasefire were not observed. However, the Court argues that the procedural requirements in the VCLT do not apply to the EU in any event: “[e]ven if such declarations do not satisfy the formal requirements laid down by Article 65 of the Vienna Convention, it should be noted that the specific procedural requirements there laid down do not form part of customary international law.” Although the ICJ has not found Article 65 to represent customary international law, it found that the procedural aspects “at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith.” The US Restatement of the Law claims that these procedural requirements apply “with special force where the right to suspend or terminate is claimed on grounds of rebus sic stantibus, since that basis for termination is particularly subject to self-serving and subjective judgments by the state invoking it.” In asserting that the procedural requirements in Art. 65 do not represent customary international law the Court does not provide any support for this bold conclusion.

The termination of a treaty is a highly political act, closely related to issues of foreign policy. The Court evidently did not want to second-guess a decision so closely associated with the Community’s foreign policy. Like in Brita, the Court’s reluctance to deal with sensitive political issues led it to use international law to avoid grappling with delicate legal issues. Higgins argues that in Racke, the correct approach under international law was not to apply the principle of a fundamental change of circumstances, but the law of countermeasures. Even if international lawyers criticise the Court’s application of the principle in this case, the judgment is one of the few applications in practice, and is thereby an example of the Court contributing to the development of international law.

3.4.5 The Court’s Contribution to Treaty Law

This section examined the numerous ways in which the CJEU has dealt with the customary law of treaties when approaching legal issues before it. While the Court has made use of international treaty law, and often refers to the principles enshrined in the two Vienna Conventions, it does not always do so in a way that corresponds with the approach understood in international law. While the Court refers to the methods of

373 Art. 65 VCLT, supra note 51.
374 Racke, supra note 253, para. 58. Emphasis added.
375 Gabčíkovo-Nagymaros, supra note 198, para. 109.
377 Higgins, supra note 1, 9: “the underlying facts in this case look, to a public international lawyer, as much a question of counter measures for non-compliance with obligations (that is, the law of state responsibility) as fundamental change in the law of treaties.”
378 Racke “is a notable exception to the general trend according to which the plea of fundamental change of circumstances has rarely been applied by international courts and tribunals” O. Elias, ‘General International Law I the European Court of Justice: From Hypothesis to Reality’ 31 Netherlands Yearbook of International Law 3 (2000) 17, 21.
treaty interpretation in Art. 31, it has done this mostly in order to examine the object and purpose of the agreement. It remains reluctant to employ other methods of interpretation, particularly examination of subsequent practice or the preparatory work. This may stem from the Court’s reluctance to use these methods of interpretation when interpreting the EU Treaties and EU law. The Court’s application of international treaty law is thus influenced by its approach the interpretation of EU law.

It should be expected that a domestic court would apply international treaty law in a way that reflects its own judicial order. It is unsurprising that the Court sometimes uses treaty law in a way that deviates from the accepted approach in international law. The issue becomes more problematic, however, when the Court is not just putting its own spin on international law, but misusing international law. Its application of the *rebus sic stantibus* and *pacta tertiis* principles can been criticised for doing just that. As the judicial organ of a major regional organization, the Court plays an influential role in the development of public international law. It has been argued that its “pick and choose attitude” regarding the law of treaties may contribute to the fragmentation of international law. When applying international law, the Court should be mindful of the fact that it is also contributing to the development of international law.

### 3.5 Jurisdiction

The issue of jurisdiction is a much-debated topic in international law and the Court continues to contribute to the jurisprudence in this field. It has done so by employing international law to define the legal space of the EU, and to determine the legal limits international law imposes on the EU’s jurisdiction. Since the EU is not a state, EU judicial practice also contributes to our understanding about how the concept of jurisdiction is applied in the context of regional integration organizations.

#### 3.5.1 Defining EU Legal Space

Unlike a state, the EU does not itself possess territory. Rather, Article 52 TEU sets out that the EU Treaties shall apply to the EU Member States. In multiple cases the CJEU has been asked to define the territorial scope of EU law, and in so doing has referred to international law. In *Salemink* the referring Court asked whether the professional activity in question, which took place on a gas-drilling platform on the continental shelf adjacent to the Netherlands, outside the Netherlands’ territorial waters, was covered by EU law. The Court referred in this instance to the ICJ’s *North Sea Continental Shelf Cases* and Article 77 of the Convention on the Law of the Sea.

379 Aust, Rodiles, & Staubach, *supra* note 250, 110: “With this pick-and-choose attitude, the case law of the ECJ might also contribute to further fragmentation. As a powerful actor watched closely by other courts and tribunals, it could set a negative example for other courts.”

and determined that a Member State has sovereignty (although limited) over the continental shelf adjacent to it. The Court concluded that “[a] Member State which takes advantage of the economic rights to prospect and/or exploit natural resources on that part of the continental shelf which is adjacent to it cannot avoid the application of the EU law provisions designed to ensure the freedom of movement of persons working on such installations.” Work carried out at an offshore installation on the continental shelf should therefore be understood as having taken place within the territory of the Netherlands for the purposes of EU law. Similarly in Weber the Court held that “in the absence of any provision in the Brussels Convention governing that aspect of its scope or any other indication as to the answer to be given to this question, reference must be made to the principles of public international law relating to the legal regime applicable to the continental shelf and, in particular, the Geneva Convention…”

The delimitation of territory remains an essential Member State competence. Yet the definition of national boundaries may have an effect on EU law. In Case C-146/89 Commission v United Kingdom the Member State relied on public international law as a defence for failing to fulfil obligations arising out of EU law. In 1987 the United Kingdom extended its territorial waters from three to twelve nautical miles, in accordance with public international law, allowing it to extend the territory in which its fishers had exclusive rights, to the detriment of other Member States. The Commission brought a case against the United Kingdom, arguing that it had unilaterally altered fishing rights in violation of EU law. There was never any doubt about whether the UK’s action was in accordance with international law. Rather, the UK employed international law as a defence against claims that it had violated EU law. The Court observed that “[i]nternational law merely authorizes States to extend their territorial sea to 12 nautical miles and, in certain circumstances, to draw the baselines used to measure the breadth of the territorial sea to and from low-tide elevations which are situated within that territorial sea.” In these cases “the decision to make use of the options under the rules of international law” was attributable solely to the United Kingdom, which had unilaterally altered the scope of the Regulation. The Court rejected the UK’s claim that Territorial Sea Act 1987 could not be considered unilateral owing to the fact that it complied with international law. There was no conflict between international law and Community law in this instance – according to the Court, international law merely authorised the UK to act, however, in doing so the UK was still bound to respect its obligations under EU law.

The Court may also employ international law when discussing issues regarding the territorial application of EU law. In Jersey Potatoes, the Court examined the issue of export restrictions between Jersey and the United Kingdom. The Court examined

381 Salemink, supra note 380, para. 36.
383 Judgment in Commission v United Kingdom, C-146/89, EU:C:1991:294
384 Commission v United Kingdom, supra note 383, para. 25. Emphasis added.
whether the territory of the United Kingdom, the Channel Islands and the Isle of Man should be treated as the territory of a single Member State for the purposes of EU law on free movement of goods. The Advocate General relied on principles of international law, particularly the VCLT:

By virtue of a rule commonly accepted in public international law, the geographical scope of the Treaty covers, in principle, the territory of the Member States of the Community that are bound by the Treaty. It follows that, in order to determine whether the Treaty is applicable to a given geographical area, it is first necessary to ascertain whether that area forms part of the territory of one of the Member States, as defined by the domestic law of the latter.  

International law questions come into play, therefore, when defining the territory on which EU law applies. The practice of the Court in this field also contributes to the development of international law in the field of territorial jurisdiction, especially regarding how these principles apply in the context of a regional organization.

3.5.2 Limits on Jurisdiction

A more complex question arises when the Court is faced with questions regarding the limits of EU jurisdiction. As Ryngaert notes, not all states are willing to give effect to customary international law, but “[w]hen the customary norm is a norm which purportedly authorizes the exercise of a pre-existing State jurisdiction, most legal systems may be willing to give effect to it.” This has been the case where the Court has been asked to decide on the EU’s jurisdiction regarding behaviour that takes place outside the territory of the EU Member States.

*Woodpulp* involved the Commission applying European competition law in respect to conduct, the establishment of a price cartel, which took place outside the territory of the European Community. According to the Commission, that conduct fell within its jurisdiction since it had economic repercussions inside the Community. Advocate-General Darmon discussed extensively the ‘effects doctrine’ and explicitly accepted it as a basis for jurisdiction in international law. The Court, however, avoided a discussion of this issue. The Court found that the Commission had not violated international law because its jurisdiction “was covered by the territoriality principle, as universally recognized by public international law.” The Court was therefore able to avoid a discussion of the ‘effects doctrine’ under international law. In its earlier *Dyestuffs* case the Court also avoided the issue of limits to its jurisdiction based on customary international law. In that case it employed the so-called ‘single

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388 *Woodpulp*, supra note 212.
390 *Woodpulp*, supra note 212.
economic entity doctrine’ to impute anticompetitive conduct of a subsidiary in the EEC to a parent company established outside the EEC and in this way did not weigh in on the ‘extraterritorial effect’ of EU law.

The Court was called upon to apply customary international law as a limit on the EU’s jurisdiction in *ATAA*. In 2003 the EU adopted legislation establishing a scheme for greenhouse gas emission allowance trading, and in 2008 amended this Directive to include emissions from international aviation within the ETS. The ETS applied to flights that arrive or depart from the territory of an EU Member State. It applied to the entire flight, even in cases where the majority of the flight took place outside the airspace of EU Member States. It was argued that the EU’s ETS was in violation of customary international law *inter alia* due to the ‘extra-territorial’ scope of the legislation.

According to the Court, the Directive did not apply ‘extraterritorially’ because it only applied when certain activity took place within the EU, that is, when a flight lands or departs from the territory of an EU Member State. The Court stated that the Directive did not infringe the principle of territoriality “since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union.” Since the Directive only applies when a flight arrives or departs from the territory of an EU Member State, it does not technically apply extra-territorially – it merely ‘takes into account’ activity that took place outside the EU.

While the Court relied mainly on the territorial link to justify the jurisdictional basis for the 2008 Directive, it still felt the need to address the issue that the Directive takes into account activity that takes place outside the EU. In some instances, the territorial link to the EU would have been minimal, such as when a flight took place almost entirely over the High Seas or over the territory of non-EU countries. The Court referred to *Woodpulp* and *Commune de Mesquer* to support the argument that EU law may deal with acts that occur partly outside the EU, referring to the so-called ‘effects’ doctrine, whereby the EU may legislate activity taking place outside the EU as long as it has a substantial effect within the EU. There is no discussion, however, about how the reasoning in those cases applies to the issue of global climate change and the Directive in question.

The Advocate General was much more explicit in employing the effects doctrine as a basis for the Directive. The Advocate General pointed out that such an approach is especially justified in the field of environmental protection due to the transboundary effects of air pollution.

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393 *ATAA*, supra note 99, para. 126.
394 *Ahlström Osakeyhtiö and Others*, supra note 212.
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The territoriality principle does not prevent account also being taken in the application of the EU emissions trading scheme of parts of flights that take place outside the territory of the European Union. Such an approach reflects the nature as well as the spirit and purpose of environmental protection and climate change measures. It is well known that air pollution knows no boundaries and that greenhouse gases contribute towards climate change worldwide irrespective of where they are emitted; they can have effects on the environment and climate in every State and association of States, including the European Union. 396

Although there is a territorial link between the ETS Directive and the flights taking place over non-EU airspace it is clear that “the Directive does have certain extraterritorial effects”. 397 This is because the Directive ‘takes into account’ activity, that is, carbon emissions, that take place outside the airspace of an EU Member State. According to the Court’s reasoning, the Directive may take into account this activity as long as there is at least some territorial link to the EU. In cases where the aircraft does not land or depart from an EU Member State, the Court points out, the Directive would not apply to flights over non-EU airspace. In order to find the 2008 Directive to be valid, the Court had to find a sufficient legal jurisdictional basis for the inclusion of foreign flights within the ETS. The Court did so by essentially combining the territorial jurisdictional basis (the fact that the flights originate or land in an EU Member State) and the ‘effects-based’ doctrine (the fact that the EU is affected by activity such as carbon emissions taking place outside EU airspace). Since ATAA was decided, the EU legislator has backed down somewhat. There is currently a transitional regime in force under which flights to and from non-EU Member States are exempt from the ETS. This regime exists pending the outcome of international negotiations. 398

Climate change is an example of a global challenge that has no geographical boundaries and where efforts to combat it give rise to complex questions about jurisdictional limits. A similar problem arises regarding the effort of states to deal with numerous issues regarding another global phenomenon: the internet. One relevant issue in this regard is the “extraordinarily complex” 399 issue of the application of EU data protection law. This is a field where the growing importance of privacy as a human right comes into conflict with the commercial interest in data and the increasing ‘commodification’ of personal information. 400 In addition, the global reach of the internet, especially the phenomenon of cloud computing, challenges a territorial-based understanding of sovereignty and jurisdiction. This was one of the

396 Opinion in ATAA, supra note 36, para. 154.
397 De Baere and Ryngaert, supra note 234, 400.
issues that arose in Google Spain. While the main focus of the case has been on the ‘right to be forgotten’, it also deals with issues of jurisdiction and the extent to which the EU may legislate regarding activity that takes place outside the EU. In this vein, the Court is likely to face cases in the future examining the territorial limits of its jurisdiction as the EU legislates in a way that has ‘effects’ outside of the EU, further contributing to the development of public international law in these areas.

4 Conclusion

In a statement at the Sixth Committee, the EU stated, “it is far from exceptional or rare for the EU judiciary to deal with public international law issues.” As this contribution has made clear, this is an understatement. This contribution has discussed the various ways in which international law issues come before the CJEU, and the different approaches the Court has taken towards these issues. While primary involved with the interpretation and implementation of EU law, the Court is now often is faced with complex issues involving public international law. In so doing, the Court contributes to the development of public international law, especially regarding the way state-centric concepts, such as jurisdiction, are applied in the context of a regional organization.

The first part of this essay showed how the literature on the Court and international law has focused mainly on the issue of the direct effect of international law, especially international agreements. This focus on direct effect is understandable, since the issue goes to the heart of the constitutional architecture of the EU where a balance is to be found between openness to international law, legal certainty, and compliance with international obligations assumed by the EU, and the integrity of the constitutional principles which define its identity.

This contribution has demonstrated that, in addition to the complex issue of direct effect, the Court is called upon to interpret and apply international law in a variety of other circumstances. Its approach in a given situation depends largely on the way in which the rule comes before the Court. Moreover, where international law is employed as a benchmark against which to review EU acts, or when international law is employed by a Member States as a defence against allegations that it has violated EU law, the Court is reluctant to give effect to international law. In these situations the Court seeks to respect international law, but also protect the autonomy of the EU legal order. It shows the same reflexes as a constitutional court of state.

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401 Judgment in Google Spain and Google, C-131/12, EU:C:2014:317.
403 Martines, supra note 22, 132.
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Yet as this contribution has shown, international law is used by the Court in various other ways: to determine jurisdiction, to apply principles of treaty interpretation, to identify the sources of international law, and so on. In these situations, there is a less pressing need for the Court to safeguard the autonomy of the EU legal order. In these situations the Court is acting more like an ‘international court’ and should show greater fidelity towards international law.

The contribution also showed how there is still missing a consistent and principle approach to public international law issues. The Court will often restate the phrase “the European Community must respect international law in the exercise of its powers”, or cite Art. 3(5) TEU. Beyond that, its approach to international law is highly varied. The Court has the tools to develop a more principled approach to international law issues, founded in the provisions of the EU Treaties, taking into account the legal traditions of the Member States, and by acknowledging the CJEU’s role as a Court of an international organization.

This essay has also given numerous examples of the Court applying a principle of international law, but in a way that deviates from how it is generally understood in international law, or how other it has been interpreted by other domestic and international courts. The Court is open to apply international law in a way that is appropriate, according to its own legal tradition and in the context of the EU Treaties. The problem arises, however, when a ‘European’ approach to an issue becomes a misuse of international law. The Court’s approach to the principle of *rebus sic stantibus* or *pacta tertii* rule are just some examples where public international lawyers were puzzled by the Court’s application of international law rules. This “instrumentalization of international law” by the Court should be resisted. It risks undermining the integrity of international law and the uniform application of these principles. Even if the Court is ‘open’ to the application international law norms, as it has been argued, it is problematic if the Court applies them in a restrictive, narrow, or ‘selfish’ fashion, or with no references to how other subjects of international law have applied and interpreted certain rules. Moreover, such an approach goes against the goes against the principles of respect for international law enshrined in the EU Treaties.

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404 Klabbers, *supra* note 24, 87.