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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS



# CLEER

## International law as law of the EU: The role of the Court of Justice

Christina Eckes

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS  
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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**INTERNATIONAL LAW AS LAW OF THE EU:  
THE ROLE OF THE COURT OF JUSTICE\***

**CHRISTINA ECKES\*\***

**CLEER WORKING PAPERS 2010/6**

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- \* See also earlier in this working papers series: Jan Willem van Rossem, 'Interaction between EU Law and international law in the light of Intertanko and Kadi: the dilemma of norms binding the Member States but not the Community', CLEER Working Papers 2009/4.
- \*\* Amsterdam Centre for European Law and Governance <<http://jur.uva.nl/acelg>>, University of Amsterdam; <[c.eckes@uva.nl](mailto:c.eckes@uva.nl)>. I would like to thank Joana Mendes, Ronald van Ooik and Jure Vidmar for their insightful comments on earlier drafts. Any remaining errors are of course my own.

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## ABSTRACT

Lately, the Court of Justice has been harshly criticised for having unduly restricted the effects of international law within the European legal order. Cases such as *Van Parys*, *Kadi*, *Mox Plant*, *Intertanko*, and *Commune de Mesquer* have led scholars to argue that the Court of Justice is becoming less international law friendly. This brings interesting questions to the fore: has the case-law changed? And if there is a change, is this change due to a different attitude of the Court of Justice towards international law? What factors could have influenced the recent decisions of the Court of Justice? This working paper addresses these questions. It analyses the Court's recent decisions concerning international law, contrasts them with earlier rulings and places them in the broader context of the Court's understanding of the European legal order. The analysis leads to a more nuanced conclusion. The Court's attitude towards international law cannot easily be placed on a one dimensional scale of 'international law friendliness'. Finally, four observations are made on what might have influenced the Court's rulings in recent years.



## 1. INTRODUCTION

International law becomes more and more important in domestic litigation everywhere.<sup>1</sup> The European Court of Justice is also asked more and more often to consider international law in its rulings. This extends the Court's important role as the creator and defender of the European legal order as we know it today, to matters of international law. The Court must position international law within the European legal order by deciding on the binding force and status of international legal obligations.<sup>2</sup>

In 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. This brings interesting questions to the fore: Has the case-law changed? And if there is a change, is this change due to a different attitude of the Court of Justice towards international law? What factors could have influenced the recent decisions of the Court of Justice?

This working paper analyses the Court's decisions concerning international law, contrasts those of the past six years with earlier rulings and places them in the context of the Court's case-law more broadly. It is structured as follows. Section 2 will provide the background against which the Court of Justice's rulings concerning international law should be read. It will sketch the Court's role in shaping the autonomous and supreme nature of European legal order. Most well-known is the case of *Van Gend & Loos*<sup>3</sup> of 1963, but the Court's contribution to the European construction also includes cases confirming the EU's autonomy from international law, such as the case of *Haegeman*<sup>4</sup> in 1974. Section 3 will map the Court of Justice's settled case-law concerning international obligations. This will serve as a basis of comparison for the Court's recent decisions. Section 4 will offer an analysis of the Court of Justice's case-law involving international law in the past five years. It aims at placing these cases in the broader context of the Court of Justice's case-law. Section 5 will give tentative explanations for recent developments in the Court's case-law involving international law. It will attempt to find possible reasons in the circumstances of the individual cases and in the broader context of

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<sup>1</sup> Oxford Reports on International Law in Domestic Courts, published by Oxford University Press <[www.oxfordlawreports.com](http://www.oxfordlawreports.com)>.

<sup>2</sup> See e.g.: ECJ, Case C-308/06, *Intertanko*, [2009] ECR I-405; ECJ, C-402/05 P and C-415/05 P, *Kadi*, [2008] ECR I-6351; ECJ, Case C-188/07, *Commune de Mesquer*, [2008] ECR I-4501; ECJ, Cases C-120/06 P and C-121/06 P, *FIAMM v Council and Commission*, [2008] ECR I-6513; ECJ, Case C-459/03, *Commission v. Ireland* [2006] ECR I-4635; ECJ, Case C-377/02, *Van Parys*, [2005] ECR I-1465.

<sup>3</sup> ECJ, Case 26/62, *Van Gend & Loos*, [1963] ECR 1.

<sup>4</sup> ECJ, Case 181/73, *Haegeman v Belgium* [1974] ECR 449 (establishing that the decision to conclude an international agreement can be challenged in the light of primary European law).

legal developments. Final remarks wrap up the discussion and sketch a brief outlook into the post-Lisbon era.

## 2. THE COURT OF JUSTICE: THE MASTER IN ITS OWN HOUSE

The role of the Court of Justice in creating the European legal order can hardly be overestimated. The Court has created the European legal order as we know it. Scholars speak of the “established meta-narrative” of “Europeanisation-through-case-law”.<sup>5</sup> Needless to discuss in detail the Court of Justice’s case-law in which it not only gave European law<sup>6</sup> the status of a ‘new legal order’<sup>7</sup> different from international law and supreme to national law, but also conferred on individuals the capacity to directly enforce their European law rights within their national jurisdictions (direct effect). As early as 1975, Toth identified “the elevation of the individual to the rank of a subject of law alongside of the Member States”<sup>8</sup> as one of the distinctive features of European law. Indeed, it is purported that within the European legal order “the individual is paramount. His dignity is inviolable. His rights are inalienable.”<sup>9</sup> As is also well-known, the creation of the autonomous supreme European legal order and the prominent role of individuals as rights-holders went hand in hand and reinforced each other.

Besides supremacy and direct effect, the most important achievements of the Court of Justice in constructing a constitutional legal order for the European Union<sup>10</sup> are probably the development of the general principles of European law<sup>11</sup> and the use of the duty of loyal co-operation.<sup>12</sup> General principles of European law have for a long time been substituting for the fact that the EU did not have a fundamental rights catalogue.<sup>13</sup> Indeed, the general principles have been crucial to ensuring that national constitutional courts accepted the supremacy of European law.<sup>14</sup> The

<sup>5</sup> A. Vauchez, ‘The transnational politics of judicialization. Van Gend en Loos and the making of EU polity’, *European Law Journal* 2010, pp. 1-28.

<sup>6</sup> In this working paper, the term ‘European law’ is used to refer to the law of the European Union.

<sup>7</sup> ECJ, Case 26/62, *Van Gend & Loos*, *supra* note 3.

<sup>8</sup> A.G. Toth, ‘The Individual and European Law’, *International and Comparative Law Quarterly*, 1975, pp. 659.

<sup>9</sup> Berlin Declaration of the European Council Summit held in Berlin on 24/25 March 2007 in celebration of the 50<sup>th</sup> anniversary of the signature of the Treaties of Rome.

<sup>10</sup> The Union has replaced and succeeded the Community (Article 1 (3) TEU). This working paper will use the term ‘Union’ including where it refers to what was pre-Lisbon the Community; except where the context requires otherwise.

<sup>11</sup> T. Tridimas, ‘The Court of Justice and judicial activism’, *E.L. Rev.*, 1996, pp. 199-210.

<sup>12</sup> J. Temple Lang, ‘The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC’, *Fordham Int’l LJ*, 2007-2008, p. 1483 *et seq.*

<sup>13</sup> See for an overview of the general principles: Takis Tridimas, *General Principles of EU Law*, Oxford: Oxford University Press, 2<sup>nd</sup> ed, 2006.

<sup>14</sup> German Constitutional Court, Solange I-decision, BVerfGE 37, 271 (1974); Solange II-decision, BVerfGE 73, 339 (1986).

Court of Justice's case-law concerning the general principles of European law has been codified in Article 6 (3) TEU (former Article 6 (1) TEU) and in the Charter of Fundamental Rights. Recently, the Court has elevated Article 6 TEU to express the "very foundations" of the European legal order.<sup>15</sup> These foundations are the principles of liberty, democracy, respect for human rights and fundamental freedoms, as well as the rule of law. They form part of the EU accession criteria.<sup>16</sup>

The duty of loyal co-operation (former Article 10 TEC, now Article 4 (3) TEU) has been used to create a wide variety of constitutional rules. The duty of loyal co-operation is of fundamental importance in a legal construction such as the European Union, where national law and European law have in many areas entered into an inseparable embrace and are applied by the same institutions. With some sort of federal vision in mind, the Court has interpreted the duty of loyal cooperation into an all-encompassing *effet utile* doctrine that requires national authorities, including national courts, to give full effect to European law under almost all circumstances.<sup>17</sup> This entails for example enforceable obligations even in the absence of binding Union legislation,<sup>18</sup> not to interfere with the operation of European law,<sup>19</sup> and to take all practical measures to actively ensure the operation of European law.<sup>20</sup>

It is fair to say that the Court of Justice in many ways took up the functions of a constitutional court within the European construction.<sup>21</sup> In fact, the Treaties

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<sup>15</sup> In *Kadi* the ECJ referred to Article 6(1) TEU in this precise way [ECJ, C-402/05 P and C-415/05 P, *Kadi*, *supra*, paras 303-304].

<sup>16</sup> They form part of the so-called "Copenhagen criteria" that were drawn up in June 1993 at the European Council meeting in Copenhagen and applied in the last three accession rounds in 1995, 2004 and in 2007.

<sup>17</sup> See e.g.: ECJ, Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1892, para 26; Case 2/88 *Zwartveld* [1990] ECR I-3365; Case C-105/03, *Pupino* [2005] ECR I-5285. See: J. Temple Lang, 'Community Constitutional Law: Article 5 EEC Treaty' (1990) 27 *CMLRev* 645.

<sup>18</sup> *Fisheries* cases: Case 141/78, *France v UK* [1979] ECR 2941 (The Court ruled that the duty of loyal cooperation is particularly necessary in a situation in which it has appeared impossible, by reason of divergences of interest, to establish a common policy in an area of Union competence. If a Member State adopts legislation in such a situation it first has to notify the Commission.); Case 32/79 *Commission v UK* [1980] ECR 2403 (The Court established a duty to act in the interest of the whole Union even when in the absence of Union legislation they act under their own jurisdiction.); Case 804/79, *Commission v UK* [1981] ECR 1045 (In an area of exclusive competence the Council had failed to adopt legislation proposed by the Commission. Even in the absence of legislation the Court found the Member State to be under a special duty of loyal cooperation requiring it to consult the Commission and not to jeopardize Union objectives expressed in the Commission's proposal.)

<sup>19</sup> See e.g.: ECJ, Case 40/69, *Hauptzollamt Hamburg Oberelbe v Bollmann* [1970] ECR 69, para 4; Case 85/85, *Commission v Belgium* [1986] ECR 1149, paras 22-23; Case 281/87, *Commission v Greece* [1989] ECR 4015, paras 16-18.

<sup>20</sup> ECJ, Case C-265/95 *Commission v France* [1997] ECR I-6959; Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659.

<sup>21</sup> See on the Court's constitutional role in the area of external relations: R.A. Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation', *European Constitutional Law Review* 2009, pp. 117-142, in Section 4.



have given the Court of Justice these functions from the start.<sup>22</sup> Beyond and above that, the Court has expanded its role. On the one hand, by ensuring that acts intended to have legal effects are subject to review even where the wording of the Treaty is more limited.<sup>23</sup> On the other hand, the Court adjudicates on the division of powers between the institutions and the Member States where the powers conferred by the Treaty are – to say the least – ambiguous.<sup>24</sup> Furthermore, the Court of Justice has for a long time used the constitutional semantics in its rulings. In 1986, the Court of Justice famously referred to the European Treaties as a ‘constitutional charter’, making a strong statement in favour of judicial protection from all acts of the European institutions.<sup>25</sup> Recently, it has introduced the terms “constitutional principle” and “constitutional guarantee”.<sup>26</sup>

However, the Court of Justice’s mission continues. Despite – or even because of – the increasing constitutional language, the European Union has been described as existing in a “constitutional chaos”.<sup>27</sup> The Treaty of Lisbon attempted to codify the Court of Justice’s case-law and improve transparency and coherence. It renamed existing legal instruments, distinguished different types of competences, codified existing case-law, merged the first and the third pillar and integrated the second pillar more firmly within the single institutional framework.<sup>28</sup> At the same time, bringing order into the constitutional chaos of the EU remains an uphill struggle in the highly political environment surrounding treaty amendments.<sup>29</sup> The difficulties of making existing constitutional law visible and accessible are best demonstrated by the controversy surrounding the inclusion of a provision on primacy in the Constitutional Treaty.<sup>30</sup> It is now no longer part of the Lisbon Treaty but has now been replaced by Declaration 17.<sup>31</sup> Another example would be the discussion on the consequences of the protocol on the application of the Charter of Fundamental Rights to Poland and the UK and of the unilateral declaration of

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<sup>22</sup> Now Article 19(1) TEU; Articles 263, 267, and 218(11) TFEU: ensure observance of the law in the interpretation of the Treaties; review of compatibility of legislation or an envisaged international agreement with a higher act, of the exercise of powers of organs of the Union and the Member States, and of the division of competences.

<sup>23</sup> ECJ, Case 294/83, *Parti Ecologiste ‘Les Verts’ v Parliament* [1986] ECR 1339; Case C-355/04 P, *Segi v Council* [2007] ECR I-1657.

<sup>24</sup> ECJ, Case C-170/96, *Commission v. Council (Airport Transit Visa case)*, [1998] ECR I-2763; Case C-176/03, *Commission v. Council (Environmental Crime Case)*, [2005] ECR I-7879; Case C-91/05, *Commission v. Council (ECOWAS)* [2008] ECR I-3651.

<sup>25</sup> ECJ, Case 294/83, *Parti Ecologiste ‘Les Verts’ v Parliament* [1986] ECR 1339, para 23; Opinion 1/91 *EEA* [1991] ECR I 6079, para 21.

<sup>26</sup> ECJ, *Kadi*, *supra* note 2, paras 285 and 290.

<sup>27</sup> D. Curtin, ‘The Constitutional Structure of the Union’, *Common Market Law Review*, 1993, pp. 17 et seq, at 67.

<sup>28</sup> R.H. van Ooik and R.A. Wessel (Eds.), *De Europese Unie na het Verdrag van Lissabon*, Deventer: Kluwer, 2009.

<sup>29</sup> J.-C. Piris, *The Lisbon Treaty – A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010.

<sup>30</sup> Article I-6 of the Treaty Establishing a Constitution for Europe.

<sup>31</sup> ‘17. Declaration Concerning Primacy’, O.J. 2010 C 83/344.

the Czech Republic limiting the effects of the charter.<sup>32</sup> It remains unclear whether the protocol excludes the application of fundamental rights as they are expressed in the Charter<sup>33</sup> as general principles beyond the limitations of the Charter's horizontal provisions.<sup>34</sup> The lack of clarity on this issue illustrates the continuous important role of the Court of Justice to bridge the systemic flaws of European constitutional law.

In the area of foreign policy, the Court of Justice has equally played a pivotal role as constitutional court. The Court has greatly contributed to the Union's capacity to act on the international plane through the development of its case-law on implied competences and on the above-mentioned duty of loyal co-operation. The former has its origins in the well-known *ERTA* doctrine,<sup>35</sup> which has incrementally been developed into the understanding that implied competences may be both exclusive and shared<sup>36</sup> and that even though internal and external competences run largely parallel there is no longer an 'inextricable link' between external and internal action. Exceptionally, an exclusive external competence can exist even in the absence of prior internal legislation.<sup>37</sup> In the area of foreign policy, the latter (duty of loyal co-operation) is particularly relevant for the exercise of shared competences.<sup>38</sup>

By way of conclusion, the well-established and partially codified constitutional foundations of the European Union – which we take for granted today – are (to a large extent) the incremental achievement of many years of case-law delivered by the Court of Justice. During all these years, the Court of Justice has filled gaps in the constitutional construction of the European Union, reconciled incoherencies, and given first priority to the effectiveness of European law. At the same time, the Court has contributed to giving the Union the necessary tools to become an international player. Yet, despite the Treaty of Lisbon's attempts to codify and structure European constitutional law the Court of Justice will need to continue playing an important role as the constitutional court of the Union.

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<sup>32</sup> Protocol 30 and Declaration 53.

<sup>33</sup> In a parallel to the Court's reasoning in the case of *Mangold*, where it found the prohibition of age discrimination to be a directly effective general principle that had found expression in a directive that did not have direct effect (period of implementation had not yet expired): ECJ, Case C-144/04, *Mangold* [2005] ECR I-9981. Compare also: ECJ, Case C-555/07, *Kücükdeveci*, judgment of 19 January 2010 (directive did not have direct effect even after the period for implementation had expired).

<sup>34</sup> Articles 51 to 54 of the Charter clarifying the Charter's scope and applicability.

<sup>35</sup> ECJ, Case 22/70, *Commission v Council (ERTA)* [1971] ECR 263.

<sup>36</sup> This was confirmed by Opinion 1/03 [2006] ECR I-1145, paras 114-115; M. Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law', *EU Working Paper Law* 2006/22.

<sup>37</sup> ECJ, Opinion 1/76, [1977] ECR 741, para 4 and 7; confirmed by Opinion 1/03 [2006] ECR I-1145, para 115.

<sup>38</sup> See e.g.: ECJ, Opinion 2/91 (re ILO Convention No.170) [1993] ECR I-1061, at paras 36-38; Opinion 1/94 (re WTO Agreements) [1994] ECR I-5267 at para 108 and Case C-25/94 *Commission v Council (FAO Fishery agreement)* [1996] ECR I-1469.

### 3. TAKING STOCK: THE COURT OF JUSTICE'S VIEW OF INTERNATIONAL LAW

The Union is party to roughly a thousand international agreements.<sup>39</sup> A considerable number of these agreements are so-called mixed agreements concluded jointly by the Union and the Member States. Additionally, Member States have concluded a large body of multilateral and bilateral agreements that could at least potentially affect European law even though the Union is not directly bound by them. Furthermore, customary international law is considered to be binding on both the Union and its Member States.<sup>40</sup> Whether customary law is also directly effective has not yet been fully clarified.<sup>41</sup> However, as a matter of fact individuals can challenge Union law in the light of customary international law – at least as to the effects, this equals direct effect.<sup>42</sup>

The Court of Justice has been said to take a “maximalist approach to [international] treaty enforcement” that has certain ‘parallels with the approach to internal [Union] law’.<sup>43</sup> There are a number of early examples. In the case of *Haegeman* of 1974,<sup>44</sup> which was the first ever reference concerning a(n) (mixed) international agreement, the Court of Justice ruled that the former Greek Association Agreement ‘form[ed] an integral part of Community law’.<sup>45</sup> In the case of *Bresciani* of 1976,<sup>46</sup> the Court of Justice established that Community [now: Union] association agreements could be used in national courts to challenge national law (direct

<sup>39</sup> Many were concluded by the Community, see: A. Rosas, ‘The European Court of Justice and Public International Law’, in J. Wouters, A. Nollkaemper and E. de Wet (Eds.), *The Europeanisation of International Law – The Status of International Law in the EU and its Member States*, The Hague: T.M.C. Asser Press, 2008, pp. 71 et seq. at 75.

<sup>40</sup> See e.g.: ECJ, Case C-286/90, *Anklagemyndigheden v. Poulsen and Diva Navigation* [1992] ECR I-6019.

<sup>41</sup> ECJ, Case C-162/96 *Racke* [1998] ECR I-3655, pars 45-47. See for a detailed discussion of the potential direct effect of customary law the opinion of AG Jacobs in the same case. The ECJ referred to the direct effect of the agreement rather than of customary international law.

<sup>42</sup> See also: P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations*, Oxford: Oxford University Press, 2004, page 332.

<sup>43</sup> M. Mendez, ‘The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques’, *European Journal of International Law*, 2010, pp. 83-104.

<sup>44</sup> ECJ, Case 181/73, *Haegeman*, *supra* note 4. This case was cited above as an example of the Court’s case-law establishing an autonomous European legal order. The Court distinguished (some argue artificially) between the decision to conclude the agreement and the agreement itself and considered itself competent to annul the former.

<sup>45</sup> *Ibid.*, para 5; see most recently on the Montreal Convention for the Unification of Certain Rules for International Carriage by Air: ECJ, Case C-63/09, *Axel Walz v CLickair SA*, judgment of 6 May 2010, para 20.

<sup>46</sup> ECJ, Case 87/75, *Bresciani / Amministrazione delle finanze dello Stato*, [1976] ECR 129; ; see also: ECJ, Case C-18/90, *Office national de l’emploi v Kziber*, [1991] ECR p. I-199 (Association Agreement between the Community and Morocco) and ECJ, Case C-268/99, *Jany and others* [2001] ECR I-8615 (Provisions of the Association Agreement between the Community and Poland and the Community and Czech Republic have direct effect notwithstanding the fact that the authorities of that State remain competent to apply to those nationals their own national laws and regulations regarding entry, stay and establishment.).

effect). The case of *Kupferberg* also of 1982<sup>47</sup> confirmed the direct effect of an ‘ordinary’ bilateral trade agreement (not an accession agreement). Finally in *Sevince*, the Court found decisions adopted by an Association Council created by an association agreement as capable of having direct effect provided they fulfil the same criteria that determine whether an international agreement has direct effect.<sup>48</sup>

From the start, WTO law has been an exception<sup>49</sup> – indeed, a very controversial one.<sup>50</sup> This is not the place to discuss whether the Court’s reasons for treating it differently are convincing. The fact is that the Court has always given WTO law a special position.<sup>51</sup> By creating the concept of functional succession in the case of *International Fruit Company*, the Court of Justice accepted, even before the Community had become a party, that the Community is fully bound by 1947 GATT obligations.<sup>52</sup> At the same time, the Court has never given individuals the possibility to enforce on WTO law against the Union (clearly identified and limited exceptions excluded<sup>53</sup>). By contrast, the Court has very well accepted other multilateral treaties to be directly effective.<sup>54</sup> Denial of direct effect is one way of making the acceptance of binding force of international obligations on the Union more palatable to the European institutions and the Member States.<sup>55</sup>

More generally, the Court’s commitment to international agreements is also reflected in the terminology it uses. It is settled case-law that “*the primacy of international agreements* concluded by the Community [Union] over secondary [...] legislation requires that the latter be interpreted, in so far as is possible, in conformity with those agreements.”<sup>56</sup> Hence, international agreements concluded by the Union require consistent interpretation of secondary law. Beyond this it

<sup>47</sup> ECJ, Case 104/81, *Hauptzollamt Mainz / Kupferberg & Cie.*, [1982] ECR 3641.

<sup>48</sup> ECJ, Case C-192/89, *Sevince v Staatssecretaris van Justitie*, 1990 ECR I-3461.

<sup>49</sup> ECJ, Case C-149/96, *Portugal v Council*, [1999] ECR I-8395.

<sup>50</sup> E.-U. Petersmann, ‘The EEC as a GATT Member – Legal Conflicts between GATT Law and European Community Law’, in M. Hilf, F. Jacobs and E.-U. Petersmann (Eds.), *The European Community and GATT*, Kluwer Law International, 1989, pp. 53-59; K.J. Kuilwijk, *The European Court of Justice and the GATT Dilemma*, Beuningen: Nexed Editions, 1996.

<sup>51</sup> A. Rosas, *op. cit.*, p. 76.

<sup>52</sup> ECJ, Joined Cases 21/72, 22/72, 23/72 and 24/72 *International Fruit Company*, [1972] ECR 1219.

<sup>53</sup> Exceptionally Union law can be reviewed in the light of WTO law where the former implements or refers to the latter: ECJ, Case 70/87 *Fediol v Commission* [1989] ECR 1781; Case C-69/89 *Nakajima v Council* [1991] ECR I-2069.

<sup>54</sup> *E.g.*: Yaounde Convention of 1963: ECJ, Case 87/75, *Bresciani / Amministrazione delle finanze dello Stato*, ECR [1976] 129, paras 15-26; Fourth Lomé Convention: ECJ, Case C-469/93, *Amministrazione delle finanze dello Stato / Chiquita Italia*, ECR [1995] I-4533, paras 30-37; Montreal Convention: ECJ, Case C-344/04, *IATA and ELFAA*, ECR [2006] I-403, para 39.

<sup>55</sup> See also in the following Section Intertanko on the lack of direct effect of UNCLOS.

<sup>56</sup> ECJ, Case 335/05, *Řízení Letového Provozu ČR, s.p. v Bundesamt für Finanzen*, [2007] ECR I-4307 para 16 with reference to: Case C-61/94 *Commission v Germany* [1996] ECR I-3989, paragraph 52; Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 33; Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, paragraph 25; and Joined Cases C-447/05 and C-448/05 *Thomson and Vestel France* [2007] ECR I-2049, paragraph 30.

also allows the review of the legality of the latter in the light of binding international agreements concluded by the Union.<sup>57</sup>

For international agreements binding on the Member States only, the European Treaties distinguish between anterior and posterior agreements. The former are agreements concluded before 1958 (creation of the Community) or before accession; they enjoy a special status under Article 351 TFEU. Member States are under specific conditions allowed to derogate from European law to comply with their prior obligations towards third states. The Court of Justice has interpreted Article 351 TFEU (ex-Article 307 TEC) rather restrictively.<sup>58</sup> The Court has in particular given the Member States' duty to give full effect to Union law (paragraph 2) an extensive reading<sup>59</sup> limiting the effect of Article 351 TFEU. Yet, even where Article 351 TFEU is not applicable, treaties binding on the Member States only, can have effects within the European legal order. As is well-known, the European Convention on Human Rights (ECHR), a convention to which all the EU Member States but not the Union are parties,<sup>60</sup> has long been used by the Court of Justice to fill the gaps in human rights protection under European law.<sup>61</sup> But the Court has also conferred a sort of soft law status to other conventions to which only the Member States are parties<sup>62</sup> (even if not all Member States are parties) and interpreted Union law consistently as a consequence of the principle of loyal cooperation (Article 4(3) TFEU).<sup>63</sup>

#### 4. DOING THINGS THE EUROPEAN WAY: RECENT CASE-LAW

Recent case-law could be seen and has been seen<sup>64</sup> as more restrictive than the Court's earlier case-law concerning international obligations. This section will

<sup>57</sup> ECJ, Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079; ECJ, Case C-344/04, *IATA and ELFAA*, ECR [2006] I-403 (in both cases the secondary law instrument was found not to be incompatible to the international convention in the light of which it was reviewed).

<sup>58</sup> Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, *Commission v United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany (Open Skies cases)*, [2002] ECR I-9427.

<sup>59</sup> See on the earlier interpretations of Article 351 (2) TFEU (ex-Article 307 (2) TEC): C. Hillion, 'Case C-62/98 Commission of the European Communities v. Portugal, and Case C-84/98 Commission of the European Communities v. Portugal', *CML Rev.* 2001, pp. 1269–1283.

<sup>60</sup> Pursuant to the 1993 Copenhagen criteria states can only accede to the EU if they are a contracting party to the ECHR. For further remarks on the accession of the EU to the ECHR, see section 6 below.

<sup>61</sup> R. Uerpmann, 'International Law as an Element of European Constitutional Law: International Supplementary Constitutions', *Jean Monnet Working Paper* 9/03.

<sup>62</sup> Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94, *RTI and others / Ministero delle Poste e Telecomunicazioni*, ECR [1996] I-6471.

<sup>63</sup> See e.g.: ECJ, Case C-308/06, *Intertanko*, *supra* note 2, para 52; Case C-84/95, *Bosphorus Airways* [1996] ECR I-3953, para 14.

<sup>64</sup> For *Kadi*: G. de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*', *Jean Monnet Working Paper* No. 01/09, p. 4, criticizing the ECJ for expressing 'impor-

examine case-law of the past six years (2005 to 2010), starting with the Court of Justice decision to deny WTO dispute settlement body decisions direct effect in the case of *Van Parys*,<sup>65</sup> to further discuss whether the approach of the Court to international law has changed in recent years. The underlying question will be: is the Court's approach more restrictive? Obviously, much depends on the definition of what is 'restrictive' and what is 'international law friendly'. The present argument focuses on the effects of international law and on the Court's frame of legal reference. On the extreme side of 'international law friendly' are methods of interpretation that the Court of Justice uses to integrate European law into national law. Still international law friendly is the specific attempt to take the perspective of international law into account, including international law that is not directly binding on the Union. On the extreme side of 'restrictive' is an approach that does not give internal effects to international law in the European legal order and that reasons within a frame of reference that is entirely based on considerations of European law disregarding the perspective of international law.

In a number of cases concerning international obligations of the Member States, such as *Mox Plant*,<sup>66</sup> *Intertanko*,<sup>67</sup> *Commune de Mesquer*,<sup>68</sup> and *Bogiatzi*,<sup>69</sup> the Court has been said to have unduly restricted the effects of international law in the European legal order.<sup>70</sup> On other occasions, such as *Van Parys* and *FIAMM*,<sup>71</sup> the Court has addressed obligations under WTO law and, arguably, taken a restrictive position. The case of *Kadi*, in which the Court of Justice refused to give effect to a United Nations (UN) Security Council resolution, has probably caused the greatest stir.<sup>72</sup> These cases are all well known. It suffices to briefly recall why they were seen as 'international law unfriendly'.

In the case of *Mox Plant*, the Commission brought an infringement action against Ireland for setting up an arbitration tribunal and starting proceedings under the UN Convention on the Law of the Sea (UNCLOS). UNCLOS was concluded as a mixed agreement. It is binding on the Member States as well as on the Union and

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tant parts of its reasoning in chauvinist and parochial tones'; J. Klabbers, *Treaty Conflict and the European Union*, Cambridge: Cambridge University Press, 2009, p. 219, criticizing the ECJ to act like an 'ostrich'. See also the very critical remarks of the General Court in Case T-85/09, *Kadi v Commission*, Judgment of 30 September 2010, paras 114-122. For *Mox Plant*: N. Lavranos, 'Protecting Its Exclusive Jurisdiction: The Mox Plant-judgment of the ECJ', *The Law and Practice of International Courts and Tribunals*, 2006, pp. 479-493; for *Van Parys*: P. Eeckhout, 'Does Europe's Constitution Stop at the Water's Edge?', *Fifth Walter van Gerven Lecture* (available at: <https://www.law.kuleuven.be/ccle/pdf/wvg5.pdf>), 2005, p. 15.

<sup>65</sup> ECJ, Case C-377/02, *Van Parys*, *supra*.

<sup>66</sup> ECJ, Case C-459/03, *Mox Plant*, *supra*.

<sup>67</sup> ECJ, Case C-308/06, *Intertanko*, *supra*.

<sup>68</sup> ECJ, Case C-188/07, *Commune de Mesquer*, *supra*.

<sup>69</sup> ECJ, Case C-301/08, *Irène Bogiatzi v Deutscher Luftpool, Société Luxair, European Communities, Luxembourg, Foyer Assurances SA*, [2009] ECR I-10185.

<sup>70</sup> See e.g.: G. de Búrca, N. Lavranos and P. Eeckhout, *op. cit.*

<sup>71</sup> ECJ, Cases C-120/06 P and C-121/06 P, *FIAMM*, *supra*.

<sup>72</sup> See comprehensively: C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford: Oxford University Press, 2009.

governs areas that belong to both national and European competence spheres. In *Mox Plant*, the Court of Justice held that a Member State cannot call upon international arbitration in a dispute with another Member State where Union competences could potentially be affected. The Court made very explicit that “[...] an international agreement cannot affect the allocation of responsibilities defined in the Treaties [...]”<sup>73</sup>

*Intertanko* concerned the enforceability of UNCLOS and Marpol 73/78 before the Court of Justice. The Court found the Union bound by UNCLOS, but Marpol only binding on the Member States.<sup>74</sup> It then denied UNCLOS direct effect because of the overall nature of the convention.<sup>75</sup> Yet, the Court saw itself obliged to ‘take account’ of Marpol when interpreting Union law. Besides the principle of loyal cooperation in Article 4(3) TFEU (Article 10 TEC), the Court also based this obligation on good faith, a general principle of law. Hence, the Court did not review Union law in the light of binding international law but took account of the Member States’ obligations and related its reasoning to international law principles.

In *Commune de Mesquer* and in *Bogiatzi*, the Court of Justice recently delimited its long standing doctrine of functional succession. First, the Union can only be bound by international agreements to which all the Member States are parties.<sup>76</sup> Second, a “full transfer of powers” from the Member States to the Union must have taken place, so that Union competences cover all areas governed by the international agreement.<sup>77</sup> Further, in *Commune de Mesquer* the Court ended all speculations as to whether Article 351 TFEU could be applied in analogy to certain (parts of) international agreements into which the Member States enter after 1958 (or their accession): both primary and secondary European law prevails over all subsequent international treaties concluded by the Member States.<sup>78</sup> Moreover in 2009, the Court of Justice gave a series of rulings on Member States obligations under Article 351 (2) TFEU (ex-Article 307 (2) EC) concerning investment agreements between Member States and third countries.<sup>79</sup> The Court considered that the Member States in question should have taken steps to eliminate the risk of conflict with Council measures<sup>80</sup> because (or even though) the anterior agree-

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<sup>73</sup> ECJ, Case C-459/03, *Mox Plant*, *supra*, para 123.

<sup>74</sup> ECJ, Case C-308/06, *Intertanko*, *supra*, para 52.

<sup>75</sup> Critical: P. Eeckhout, Case C-308/06, *The Queen on the application of Intertanko and Others v Secretary of State for Transport*, *CMLRev* 2009, pages 2041-57, at 53 *et seq.*

<sup>76</sup> ECJ, Case C-188/07, *Commune de Mesquer*, para 85.

<sup>77</sup> ECJ, Case C-301/08, *Bogiatzi*, *supra*.

<sup>78</sup> See also: C. Eckes, ‘Case C-188/07, *Commune de Mesquer v. Total France and Total International Ltd.*, Judgment of the Court (Grand Chamber) of 24 June 2008 [2008] ECR I-4501; Case C-301/08, *Irène Bogiatzi v. Deutscher Luftpool, Société Luxair, European Communities, Luxembourg, Foyer Assurances SA*, Judgment of the Court (Fourth Chamber) of 22 October 2009, not yet reported’, *Common Market Law Review*, 2010, pp. 899 *et seq.*

<sup>79</sup> ECJ, Case C-205/06, *Commission v Austria*, ECR [2009] I-1301; C-249/06, *Commission v Sweden* ECR [2009] I-1335; C-118/07, *Commission v Finland*, judgment of 19 November 2009.

<sup>80</sup> E.g.: ECJ, Case C-249/06, *Commission v Sweden*, paras 35-45.

ments did not contain any provision reserving to the Union the possibility to restrict movements of funds. These rulings confirm the far-reaching nature of the Member States obligations under Article 351(2) TFEU.

Furthermore in the case of *Van Parys*,<sup>81</sup> the Court of Justice ended all speculations<sup>82</sup> on the enforceability of WTO law after the dispute settlement body (DSB) has declared the European measure to be inconsistent with WTO law. WTO obligations do not have direct effect even if specifically confirmed by the DSB. The Court of Justice confirmed this line in the *FIAMM* appeal.<sup>83</sup> However, the appeal decision in *FIAMM* is interesting with regard to a different point: the Court rejected the possibility of claiming compensation in the absence of unlawful conduct.<sup>84</sup> The conduct of the institutions can only be unlawful if WTO law has direct effect. The General Court's ruling (allowing as a matter of principle compensation for unusual damage even in the absence of unlawful conduct<sup>85</sup>) had opened a new avenue for compensation for the breach of not directly effective WTO law obligations. The Court of Justice closed this avenue.

Finally in the *Kadi* appeal, the Court of Justice resorted to what it knows best: the European legal order as the one and only frame of reference and was strongly accused to break with its international law friendly attitude of the past by taking a more 'dualist' position.<sup>86</sup> *Kadi* concerned counter-terrorist sanctions imposed by the UN Security Council against private individuals. Since the Union is not a member of the UN, the Charter imposes obligations on the Member States only. After briefly recalling the Community's track record of respecting international law,<sup>87</sup> the Court left no doubt that "[t]he question of the Court's jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights."<sup>88</sup> Hence, the Court of Justice saw no legal reason *under European law* for denying judicial review,<sup>89</sup> and annulled the European measures adopted to give effect to UN Security Council resolutions.

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<sup>81</sup> ECJ, Case C-377/02, *Van Parys*, *supra* note 2; General Court, Case T-19/01, *Chiquita Brands International v. Commission (Chiquita)*, [2005] ECR I- 315.

<sup>82</sup> Such speculations came up after the Court's ruling in: ECJ, Case C-93/02 P, *Biret International v. Council (Biret)*, [2003] ECR I-10497.

<sup>83</sup> ECJ, Cases C-120/06 P and C-121/06 P, *FIAMM*, *supra* note 2.

<sup>84</sup> *Ibid.*, paras 161-179.

<sup>85</sup> General Court, Case T-69/00, *FIAMM and FIAMM Technologies v Council and Commission*, [2005] ECR II-5393, paras 155 *et seq.*

<sup>86</sup> See de Búrca and Klabbers, *op. cit.*. Dualism indeed allows courts to ignore one another and one another's legal orders. It is 'the easiest and most drastic form of norm conflict avoidance' M. Milanovic, 'Norm Conflict in International Law: Whither Human Rights?', *Duke Journal of Comparative & International Law*, 2009, pp 69 *et seq.*, at 102.

<sup>87</sup> *Ibid.*, para 291.

<sup>88</sup> *Ibid.*, para 317.

<sup>89</sup> ECJ, Cases C-402/05 P and C-415/05 P, *Kadi*, *supra*, para 300.



At the same time, the Court of Justice has continued to take an international law friendly line in a number of recent cases. For instance in the case of *Brita*,<sup>90</sup> concerning the application of the EC-Israel Association Agreement and the EC-Palestinian Liberation Organisation Agreement (PLO) of 1997, the Court of Justice used the Vienna Convention of 1969 as a means of interpretation (the principle of good faith and the principle of the relative effect of treaties) and made for the first time the effort of explaining its recourse to this instrument.<sup>91</sup> The Court had to decide whether products originating in the West Bank qualify for preferential customs treatment under the EC-Israel Agreement and answered this question in the negative. The Vienna Convention, even though governing agreements between states (not other subjects of international law, such as international organisations), is applicable to an agreement concluded by the Union and binding on the Union to the extent that it expresses general international customary law.<sup>92</sup> Furthermore in the case of *IATA*,<sup>93</sup> the Court of Justice took an international law friendly approach despite the fact that the challenge was directed against Union law.<sup>94</sup> It found that the Montreal Convention qualified as a basis for review but found in the end no breach. Moreover, the Court recently ruled that Member States when the Commission has submitted a proposal to the Council intended to result in concerted action in a particular field can already fetter the Member States in their room for manoeuvre.<sup>95</sup> This brings in fact the effect of international treaties (that the Union might conclude) forward to the point in time when it takes the decision to act.

By way of conclusion, in the most recent period the Court of Justice has at times taken a more dualist approach. In some of these rulings (*e.g. Kadi*) it ruled from a perspective firmly rooted in European law, explicitly stating that international law could not alter the fundamentals of European law. However, this should not lead to the immediate conclusion that the Court has become less international law friendly. First, there are also cases where the Court of Justice was very open to international law, also in the past six years. Second, not compromising on the legal perspective does not necessarily mean that the Court was not willing to take international law into account. Indeed, it does so in different ways. One conclusion should perhaps be that assessing the Court's case-law in terms of 'friendliness towards international law' is prone to be too simplistic. Potentially, a distinction between attitude and outcome could help. Only because in a specific ruling international law was not given full effect does not mean that the Court of Justice has changed its *attitude*.

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<sup>90</sup> Case C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, judgment of 25 February 2010.

<sup>91</sup> Case C-386/08, *Brita*, *ibid.*, paras 40-42; see also: P.J. Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story', in E. Cannizzaro (Ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford: Oxford University Press, 2011 (forthcoming), section II A.

<sup>92</sup> *Ibid.*, paras 40-42.

<sup>93</sup> ECJ, Case C-344/04, *IATA* [2006] ECR I-403.

<sup>94</sup> Mendez, 'The Legal Effect of Community Agreements', *op. cit.*, at 98.

<sup>95</sup> ECJ, Case C-247/07, *Commission v Sweden*, Judgment of 20 April 2010.

## 5. TENTATIVE EXPLANATIONS: CONTEXT, EXTENDING COMPETENCES AND JURISDICTION

It would be too simplistic to draw the general conclusion that the Court of Justice has become less international law friendly in the past six years. However, there are a number of recent rulings that have in their outcome not given effect to international law within the European legal order. These rulings also demonstrate the Court's willingness to have recourse to a certain degree of dualism. Four observations will be made that could help to explain that the recent case-law is not the result of a change in the Court of Justice's attitude as a matter of principle. The first two observations are more general and relate to the broader developments of international and European law. The latter two are more specific and relate more closely to the specific circumstances of the cases.

First, a general point concerns the sheer *quantity* of international law. An ever greater number of attempts are made to manage global challenges in a coordinated manner.<sup>96</sup> As a result, domestic courts, including the Court of Justice, are more often than before asked to rule on the relationship between international law on the one hand and European and/or national law on the other. This observation does not entail a value judgment of whether domestic courts are the best fora to rule on matters of international law or whether domestic judges are well equipped to do so. It is a purely factual observation. The result of this trend is that the range of international law issues with which they have to deal broadens: more and different issues arise before domestic courts and give domestic courts a greater role in defining the effects of international law (within their domestic legal orders). Furthermore, the Union has started to participate in international relations almost on a par with states. It has become an additional and active international player that concludes treaties in an ever more treaty regulated world<sup>97</sup> that have effects within the European legal order. This development has its roots in the international presence of the Community within certain limited contexts, such as the WTO.<sup>98</sup> More recently, the international law presence of the Union has extended into other less obvious areas.<sup>99</sup> This leads to an increasing body of international

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<sup>96</sup> To name but selected areas: on the increasing number and influence of international tribunals: E. Benvenisti and G. W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', *European Journal International Law* 2009, pp. 59-72; on international economics: S. W. Schill, *The Multilateralization of International Investment Law*, Cambridge University Press, 2009; D. Nayyar, *Governing Globalization – Issues and Institutions*, Oxford: Oxford University Press, 2002; on the proliferation of international solutions to environmental challenges: R. Leichenko, K. O'Brien, *Environmental Change and Globalization: Double Exposures*, Oxford: Oxford University Press, 2008; on security issues: T.V. Paul, N. Ripsman, *Globalization and the National Security State*, Oxford: Oxford University Press, 2010. See further the increasing number of UN Security Council resolutions at: <<http://www.un.org/Docs/sc/>>.

<sup>97</sup> See the UN Treaty Database available at: <<http://treaties.un.org>>.

<sup>98</sup> ECJ, Joined Cases 21/72, 22/72, 23/72 and 24/72 *International Fruit Company*, *supra*.

<sup>99</sup> See e.g.: R.A. Wessel, L. Marin and C. Matera, 'The External Dimension of the EU's Area of Freedom, Security and Justice', in C. Eckes and T. Konstadinides, *Crime within the Area of*

law that is directly binding on the Union. At the same time, Member States continue to conclude international agreements and join international organisations, or cooperate more informally on the international plane. An extensive interpretation of implied powers, and in particular the fact that implied Union competences can be shared, increases the interface between European and international law in areas where Member States retain competence and continue to enter into international agreements either alone or jointly with the Union. This leads to an increase of situations in which the Court faces several layers of norms (European law, international law – either binding on the Member States, the Union, or both – and potentially national law) that govern the same subject matter. These different layers of norms are not (necessarily) identical. This creates an increased potential for conflict of norms which the Court of Justice must solve in a way that does not undermine the functioning of the European legal order. Giving greatest possible effect to international law might however mean that, in the event of a conflict of norms, European law has to give way.

Second, not only the increasing quantity of international obligations leads to a greater number of (potential) conflicts, but also the changing *quality* of international law. International law conditions the lives of individuals more and more<sup>100</sup> and affects the functioning and operation of domestic legal orders. Individual sanctions (*Kadi*) are but one example of international norms that directly change the legal position of individuals. The origins of this development lie further in the past (*e.g.*, the laws on piracy).<sup>101</sup> Already in 1965, William Coplin identified the changing relation of the individual to the international legal order as one of the ‘challenges of the state system’.<sup>102</sup> However in the past twenty years, this development has considerably accelerated: international human rights law best illustrates the changing role of the individual (from being a mere object to becoming a subject).<sup>103</sup> However beyond this, international organisations such as the WHO and the OECD increasingly develop programmes that no longer need implementation by States to affect individuals.<sup>104</sup> Individuals have also claimed a more active role: non-governmental bodies and organizations, and herewith also their mem-

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*Freedom, Security and Justice – A European Public Order*, Cambridge: Cambridge University Press, 2011 (forthcoming).

<sup>100</sup> Focusing on the participation of the individual in the international legal order: R. McCorquodale, ‘The Individual in the International Legal System’, in M. Evans (Ed.), *International Law*, Oxford: Oxford University Press, 2003, pp. 299-325.

<sup>101</sup> A. Cassese, *International Law*, Oxford: Oxford University Press, 2004, Chapter 12, p. 217.

<sup>102</sup> W.D. Coplin, ‘International Law and Assumptions about the State System’, *World Politics*, 1965, pp. 615-634, at 628 et seq.

<sup>103</sup> See notably, the individual complaint procedures to the UN HR treaty bodies. See also: R. McCorquodale, *op. cit.*

<sup>104</sup> Examples are: the Program for International Student Assessment (PISA) by the OECD; operational standards of the World Bank and decisions of the World Bank Inspection Panel; certificates for aircrafts and personnel issued by the ICAO; recommendations on quarantine and travel by the WHO; registration of trademarks by the WIPO.

bers, have become more influential in international law making.<sup>105</sup> Moreover, the International Court of Justice (ICJ) recognized in the case of *LaGrand* that individuals can be rights holders under an international agreement (the Vienna Convention on Consular Relations).<sup>106</sup> With regard to the UN in particular, it has for a long time been the understanding that European law is only indirectly affected by obligations under the UN Charter because only its Member States are directly bound. This has certainly changed with the adoption of individual sanctions and the long list of challenges against these measures.<sup>107</sup> The Union's particular nature places it in the same position as states when implementing international law.<sup>108</sup> Through implementation it constructs or at least strengthens the link between individuals and international law. With a little help of the Court of Justice,<sup>109</sup> the Union has been placed in an authoritative position capable of adopting measures that directly affect fundamental rights of individuals. More recently, also the Union's external actions have become directly relevant for individuals. This is the result of a combination of international law that becomes more and more intruding into the legal sphere of individuals and Union law, which has for a long time directly governed the rights and obligations of individuals. It also gives rise to more litigation in Luxembourg. The increase in litigation is further intensified by the fact that the Union has international organisation origins itself.<sup>110</sup> This adds further potential controversies over internal competence delimitations and compatibility of European and national law.

The change in the quality of international law (direct link between international law and individuals) leads not only to more litigation, but also precludes the

<sup>105</sup> P. Schiff Berman, 'A Pluralist Approach to International Law', *The Yale Journal of International Law* 2007, pp. 301-329.

<sup>106</sup> ICJ, *Germany v USA (LaGrand)*, judgment, ICJ Reports 2001, p. 466, para 77.

<sup>107</sup> Challenges against individual sanctions giving effect to UN Security Council resolutions: General Court, Case T-315/01, *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649; Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533; Case T-49/04, *Hassan v Council and Commission* [2006] ECR II-52; Case T-253/02, *Chafiq Ayadi v Council* [2006] ECR II-2139; Case T-318/01, *Omar Mohammed Othman v Council and Commission* [2009] ECR II-1627; Most recently: Case T-135/06, *Al-Faqih v Council*, Judgment of 29 September 2010; Case T-85/09, *Kadi v Commission*, Judgment of 30 September 2010. ECJ: Case C-117/06, *Gerda Möllendorf and Christiane Möllendorf-Niehuus* [2007] ECR I-8361; Cases C-402/05 P and C-415/05 P, *Kadi*, *supra* note 2; Cases C-399/06 P and C-403/06 P, *Hassan and Ayadi v Council and Commission*, Judgment of 3 December 2009; Case C-340/08, *M and Others*, Judgment of 29 April 2010.

<sup>108</sup> As is well known, the Union has for a long time been adopting measures that directly condition the legal sphere of individuals. The effects of part of its legislation on individuals are equivalent to the effects of national law (directly applicable regulations; direct effect). The EU Courts further refers to the European legal order as domestic legal order (see *e.g.* ECJ, C-402/05 P and C-415/05 P, *Kadi*) and Article 216-218 TFEU regulate whether and how international law acquires effects within the European legal order as most national constitutions do.

<sup>109</sup> See above Section 2 'The Court of Justice: The Master in Its Own House'.

<sup>110</sup> As is well known, the Union is created by international agreements. See more specifically on the consequences. C. Eckes, Commentary on Articles 48 and 50 TEU, in: Smit and Herzog (eds.), *Commentary on the Law of the European Union* (2011, *forthcoming*).

Court of Justice from applying some of the tested methods of reconciling international and European law, such as consistent interpretation. Usually, the European Courts make an attempt to interpret Union law in the light of international law in order to avoid a conflict between the two.<sup>111</sup> Or, as Advocate-General Maduro put it: the EU constitutes a “‘new legal order’, beholden to, but distinct from the existing legal order of public international law [...] [with its own] basic constitutional charter”.<sup>112</sup> Yet, this “does not mean [...] that the Community’s municipal legal order and the international legal order pass by each other like ships in the night”.<sup>113</sup> While this may be so, consistent interpretation might not be possible where international law directly regulates the right of individuals in a very precise way. This is the case where the international law obligation is so precise that there is simply no room for interpretation. Individual sanctions giving effect to UN Security Council resolutions constitute one of the most well-known examples of the Court’s more restrictive recent case-law. Here, the Member States’ obligations under the UN Charter were so specific (freeze specific assets of singled out individuals) that there was no room to opt for a form of consistent interpretation.<sup>114</sup> Either the Union gave effect to these very specific obligations or it did not.

By way of conclusion, the qualitative change of international law places the Court of Justice in a position where it cannot reconcile different layers of law through receptive methods of interpretation. It has to take a decision which of the different obligations it gives effect to. This may at times result in a denial of effect of international law.

Third, some differences between earlier cases and the more recent cases might be explained by adopting a conceptual perspective. This perspective is based on three distinctions. First, the status and binding force of obligations of the Union (*Intertanko*, *Van Parys*) differ in effect from those of the Member States (*Kadi*, *Commune de Mesquer*). In principle only the former bind the Union while the latter have the same status as national law within the European legal order. Second, a distinction is in order between challenges to Union law (*Kadi*, *Intertanko*) and challenges to national measures (*Bresciani*). Even though it might be too simplistic to say that the Court of Justice will always favour the Union at the expense of the Member States<sup>115</sup> it appears to make a difference in whether the case concerns a challenge to a Union measure or to a Member State measure.<sup>116</sup> The Court

<sup>111</sup> General Court, Case T-45/06, *Reliance Industries v. Council and Commission* [2008] ECR II-2399, paras 100 *et seq.* See a discussion of the General Court’s methods of interpretation at: P.J. Kuijper, ‘The European Courts and the Law of Treaties: The Continuing Story’, *op. cit.*, section II B.3. ECJ, Case C-310/06, *FTS International* [2007] ECR I-6749; see M. Bronckers, ‘From “Direct Effect” to “Muted Dialogue”’: Recent Developments in the European Courts’ Case-law on the WTO and Beyond’, *Journal of International Economic Law*, 2008, p. 885.

<sup>112</sup> ECJ, Opinion of AG Maduro in: C-402/05 P and C-415/05 P, *Kadi*, *supra* note 2, paras 21-22.

<sup>113</sup> *Ibid.*

<sup>114</sup> See also C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights*, *op. cit.*, Chapter 5, p. 247 *et seq.*

<sup>115</sup> T. Tridimas, ‘The Court of Justice and judicial activism’, *E.L. Rev.* 1996, pp. 199-210, at 202.

<sup>116</sup> Mendez, ‘The Legal Effect of Community Agreements’, *op. cit.*

of Justice has shielded Union law better from review in the light of international agreements than national law. However, in the light of the Court of Justice's broader case-law this is unsurprising. The Court of Justice has long been seen to make a difference between obligations of the Union institutions and of the Member States.<sup>117</sup> Applying international law more strictly (and hence being more international law friendly) in challenges against national measures than in challenges against Union law is well in line with applying rules of European law more strictly to Member States than to the Union institutions. Third, the binding force on the Union should be distinguished from the question of whether international obligations are directly effective. The latter is particularly relevant for WTO law. Yet, the Court of Justice's approach to WTO law in *Van Parys* and *FIAMM* is neither new nor surprising. The judgments only re-emphasized the Court's commitment to a clear separation between WTO law and Union law. At the same time, despite or because of the lack of direct effect, the Court of Justice has for a long time given WTO law great relevance when interpreting European law – both to the point of deviating from the traditional methods of legal reasoning used by the Court<sup>118</sup> and deviating from the usual substantive interpretation of European law.<sup>119</sup> Factual and legal differences require also a differentiation in the Court's approach to international law, e.g. WTO has always been seen as different from other bilateral or multilateral agreements and there are reasons for this – whether one agrees with the outcome or not.

Fourth, the Court of Justice's case-law on the binding force and status of international law cannot easily be placed within a systematic framework. The precise conditions under which international agreements or their provisions are (a) binding upon the Union and (b) have direct effect (serve as yardstick for review of Union law) have not been fully and finally established.<sup>120</sup> Certain parameters are well known.<sup>121</sup> However, the Court of Justice's position on other issues continues to require further refinement. For instance, the concept of functional succession was created long ago in the case of *International Fruit Company* in 1971; yet, it has only been applied to the exceptional case of the GATT. It still needed further qualifications. The qualifications in *Intertanko*, *Commune de Mesquer* and *Bogiatzi* (all Member States need to be parties and full transfer of powers must have occurred) might be limiting. However, they are not surprising and appear to have always been implicitly part of the concept. Another question that still remains open concerns the requirements of direct effect. Do international agreements need

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<sup>117</sup> E.g. participation requirements are interpreted more restrictively when applied to Member States: J. Mendes, *Participation in EU Rulemaking – A Rights-Based Approach*, Oxford: Oxford University Press, 2011 (forthcoming), Chapter 4, Section 4.1.3. More implicitly: P. Craig, *EU Administrative Law*, Oxford: Oxford University Press, 2006, p 323 *et seq.*

<sup>118</sup> P.J. Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story.', *op. cit.*, section II B.3.

<sup>119</sup> M. Bronckers, *op. cit.* at 889-890.

<sup>120</sup> Mendez, 'The Legal Effect of Community Agreements', *op. cit.*, at p 94 *et seq.*

<sup>121</sup> See above Section 3 'Taking Stock: The Court of Justice's View of International Law'.

to confer rights upon individuals in order to be directly effective (invocable)? On the one hand, there is evidence that the Court of Justice appears to see the conferral of rights on individuals as a crucial criterion. This was for example the case in *Intertanko*<sup>122</sup> or in the body of case-law dealing with WTO law. On the other hand, the Court of Justice has ruled in the *Biotech* case that ‘[e]ven if [...] the CBD [Convention on Biological Diversity] contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement’.<sup>123</sup> This might require further qualifications in the future. This includes qualifications that, by falling short of what scholars and litigants hoped for, might appear as new limitations.

## 6. CONCLUSIONS AND OUTLOOK

Arguably, the Court of Justice has at occasions ruled decisively more international law friendly in the past than it did in *Van Parys*, *Mox Plant*, *Kadi*, and *Intertanko*. The previous section has outlined some of the factors that may have influenced the Court’s decisions in these rulings. Moreover, in the light of the first section there is a different way of looking at the Court’s recent and more restrictive rulings: they form a logical part of the Court of Justice’s vision of the European legal order and of its understanding of its own role in making this vision reality. In the 1960s, the Court of Justice acted as the midwife of the European legal order, declaring it autonomous from both national and international law.<sup>124</sup> Until today, the Court continues to take a crucial role in the European legal order’s coming-of-age. It continues to prioritise the integration and autonomy of European law over the interests of individual Member States. Recently, the increasing relevance of international law requires the Court more often to reconcile international obligations either of the Union or its Member States with its autonomous vision of the European legal order.

*Kadi* for instance confirmed the *status quo* of the autonomous European legal order by agreeing to review the internal lawfulness of the contested regulation in the light of principles of European law. Indeed, the Court took the same domestic outlook as Advocate-General Maduro, using “the landmark ruling in *Van Gend en Loos*”<sup>125</sup> as the ‘logical starting point’ and emphasizing that the role and function of the Court was “... first and foremost, to preserve the constitutional framework

<sup>122</sup> ECJ, Case C-308/06, *Intertanko*, *supra* note 2, paras 59-64. See critical: Eeckhout, *CMLRev*, *op. cit.*

<sup>123</sup> ECJ, Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079, para 54.

<sup>124</sup> ECJ, Case 26/62, *Van Gend & Loos*, *supra* note 3; Case 6/64, *Falminio Costa v. ENEL* [1964] ECR 585.

<sup>125</sup> Opinion of AG Maduro, in: para 21.

created by the Treaty.”<sup>126</sup> The Court of Justice defended the Community’s autonomy, both at the institutional and at the substantive level, by stating that obligations under international agreements can neither “affect the allocation of powers fixed by the Treaties”,<sup>127</sup> nor can they “have the effect of prejudicing the constitutional principles of the EC Treaty”.<sup>128</sup> For support the Court cited both its more recent case-law (*Mox Plant*<sup>129</sup>) and older case-law (*Germany v. Council (Banana Agreement)*<sup>130</sup>). The Court could have equally turned to different older cases, such as *Opinion 1/91*,<sup>131</sup> *1/92*<sup>132</sup> or *1/00*,<sup>133</sup> to make its argument on the importance of the autonomy of the European legal order; or to its case-law on the effects of WTO law.<sup>134</sup> Albeit in a slightly different context and arguably in very specific circumstances, with regard to the WTO the Court of Justice has always prioritised the political autonomy of the European Union and its margin for negotiation over the integration of the EU into an overarching international legal system.<sup>135</sup> Hence, the Court of Justice’s focus on ensuring and protecting the autonomy of the European legal order is far from new.<sup>136</sup>

More than before the EU’s external actions contribute to shaping its identity and polity.<sup>137</sup> This gives the Court’s approach towards international law and the Union’s external actions additional relevance. Indeed, the opening up of international law towards individuals by accepting them as duty-bearers and rights-holders<sup>138</sup> in combination with the increasing external presence and competences of the Union,<sup>139</sup> will render the Court’s approach towards international law decisive for the functioning and coherence of the Union.

Additionally, the entering into force of the Lisbon Treaty could further increase litigation in the European Courts that relates to international law. The Union’s external presence and its capacity to act on the international plane has been one of the central considerations in the long process cumulating in the entering into force of the Lisbon Treaty. Despite the criticism that its amendments concerning foreign

<sup>126</sup> *Ibid.*, para 24.

<sup>127</sup> ECJ, *Kadi*, *supra* note 2, para 282.

<sup>128</sup> *Ibid.*, para 285.

<sup>129</sup> ECJ, Case C-459/03, *Commission v Ireland* [2006] ECR I 4635, para 123 and *Opinion 1/91 EEA* [1991] ECR I 6079, paras 35 and 71.

<sup>130</sup> ECJ, Case C-122/95 *Germany v Council* [1998] ECR I-973.

<sup>131</sup> ECJ, *Opinion 1/91, Draft Treaty on European Economic Area* [1991] ECR I-6079.

<sup>132</sup> ECJ, *Opinion 1/92, EEA Agreement* [1992] ECR I-2821.

<sup>133</sup> ECJ, *Opinion 1/00, Common Aviation Area* [2002] ECR I-3493.

<sup>134</sup> *E.g.*: ECJ, Case C-149/96, *Portugal v Council*, *supra*.

<sup>135</sup> R. Uerpmann-Witzack, ‘The Constitutional Role of International Law’, in A. von Bogdandy and J. Bast (Eds.), *Principles of European Constitutional Law*, Hart, 2009, 2<sup>nd</sup> ed., p. 147.

<sup>136</sup> B. de Witte, ‘European Union Law: How Autonomous is its Legal Order?’, *ZÖR*, 2010, 141-155.

<sup>137</sup> C. Bickerton, *European Union Foreign Policy: From Effectiveness to Functionality*, Palgrave, 2011 (forthcoming), Chapter 4.

<sup>138</sup> See above Section 5 ‘Tentative Explanations: Context, Extending Competences and Jurisdiction’.

<sup>139</sup> See below.



policies are not as significant as some claim,<sup>140</sup> it is likely that the Court of Justice will play an important role in defining the scope and meaning of the new Treaty provisions. To give but one example, Article 3 (2) TFEU sets out the *exclusive* competences of the Union to conclude international agreements, while Article 216 (1) TFEU provides for Union competences to conclude international agreements without specifying whether these competences are exclusive. The two articles differ but both appear to codify the case-law on exclusive external competences.<sup>141</sup> Also, the Court of Justice has now been given slightly more jurisdiction over issues of Common Foreign and Security Policy (CFSP). It has the power to rule on the legality of counter-terrorist measures against individuals (Article 275 (2) TFEU). Article 40 TEU, the successor of former Article 47 TEU, no longer prioritizes former-Community policies but has set CFSP and other policies on equal footing. The Lisbon Treaty further makes clear that the general principles of European law as they are set out in Title I of the TEU apply to the whole of European law.<sup>142</sup> Within the scope of its limited jurisdiction over CFSP matters, this will require new consideration by the Court of Justice.<sup>143</sup> Furthermore, the great constitutional effect of the ECHR, as a human rights treaty to which only the Member States but not the Union are parties, might decrease as a result of the binding force of the Charter of Fundamental Rights. This would then be a consequence of a change of law and not a change in attitude of the Court of Justice towards international law. Accession of the Union to the ECHR would again change the situation.<sup>144</sup> It would make the Convention directly binding on the Union which would place the Union and its institutions under external (human rights) review.. The general principles of Union law expressed in the now binding Charter of Fundamental Rights do not completely but largely align with general principles of international law.<sup>145</sup> Where they differ from international law new room for litigation and for ‘less international law friendly’ interpretation will develop.

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<sup>140</sup> P. Koutrakos, ‘Primary Law and Policy in EU External Relations: Moving Away From the Big Picture’, *E.L. Rev.* 2008, pp. 666-686.

<sup>141</sup> Examples are the concept of necessity in Opinion 1/76, *Draft Agreement on the establishment of European Laying-up Fund for Inland Waterway Vessels* [1977] ECR 741 that is reflected in both provisions.

<sup>142</sup> This was still controversial for the second and third pillar before the entering into force of the Lisbon Treaty.

<sup>143</sup> See on the potential for litigation on the scope of Article 40 TEU: P. van Elsuwege, ‘EU External Action After the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency’, *Common Market Law Review*, 2010, pp. 987-1019, particularly Section 4.

<sup>144</sup> This is not to be expected too soon. Even though Protocol 14 to the ECHR has entered into force and accession is rooted in the European Treaties, it remains subject to ratification by all 27 Member States (Article 218 TFEU). We have seen in the context of the adoption of the Constitutional Treaty and the Lisbon Treaty to how much delay this requirement can lead.

<sup>145</sup> R. Uerpmann-Witzack, *op. cit.*, p. 132.