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The direct effect (or lack thereof) of international law in the EU legal order, *today*

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Although the Chapter is the product of common efforts of the authors, Daniele Gallo is the author of sections II–X, while Clara H. L. Labus is the author of section XI. Sections I and XII were jointly written by both. The contribution heavily relies on D Gallo, *Direct Effect in EU Law* (OUP 2025).

ABSTRACT

The relationship between international law and European Union (EU) law remains the subject of intense debate. This Chapter revisits a crucial aspect of that broader conversation: the direct effect – or absence thereof – of international law within the EU legal order. From a primarily doctrinal standpoint, we examine the trajectories of this 'external' form of direct effect in the case law of the Court of Justice of the EU (CJEU) with two objectives in mind. First, to critically assess both the virtues and the (many) flaws of this jurisprudence, while advancing alternative approaches to the conceptualization and application of direct effect in this area of EU law. Second, to compare the role of direct effect in shaping the legal effects of international law in the EU legal order with the case law on the direct effect of EU law in the legal orders of the Member States. Placing these two phenotypes of direct effect side by side allows us to reflect more widely on the contemporary content, scope, and limits of the principle. In this vein, the Chapter aspires to provide an original contribution to the understanding of direct effect as a *primus inter pares* principle and as a constitutional cornerstone of the EU legal order. We argue that the recurrent non-recognition of direct effect to international agreements often rests on considerations largely external to law, revealing direct effect as a political construct, not only as a legal notion. This tendency is reinforced by the increasingly common practice of expressly precluding external direct effect in the very text of international agreements concluded by the EU – a development with far-reaching consequences for the role of the CJEU as the principal 'gatekeeper' of EU law vis-à-vis international law. Ultimately, we contend that the denial of external direct effect – amounting to the denial of legality review of EU law – must be handled with utmost care, not least because the CJEU often deploys it to pursue objectives which, though politically legitimate, have little to do with the enforcement of EU law.

KEYWORDS: direct effect; EU international agreements; gatekeeper; European Court of Justice; EU external relations; international law

I. SCOPE, STRUCTURE, AND AIMS OF THE CHAPTER

The relationship between international and European Union (EU) law is still an object of heated debate. This Chapter will revisit a key part of this broader conversation, investigating the direct effect, or lack thereof, of international law in the EU legal order. Seven years ago, N. Ghazaryan put forward an impressive analysis of the role that direct effect occupies in this regard, focusing on the question of whether the Court of Justice of the EU (CJEU) still acts as a gatekeeper of EU law in respect to international law.[1] In continuation of this debate, we will delineate the nature and significance of the direct effect of international law in the EU law, *today*. More specifically, we will address the direct effect of international treaties to which the Union is a party either exclusively or jointly with the Member States,[2] as well as of the decisions adopted by the bodies established by those agreements.[3] General international law will also be considered.[4] The subject of this Chapter, therefore, is neither the possible direct effect of the EU 'legislative instruments implementing' the agreements concluded by the EU,[5] nor the indirect effect of the rules and principles of international law in the EU legal system.[6]

From a primarily doctrinal standpoint, we will dissect the trajectories of such 'external' form of direct effect[7] in the case law of the CJEU in order to achieve two aims. The first is to critically assess both the lights and (many) shadows of that jurisprudence, while

[1] N Ghazaryan, 'Who Are the "Gatekeepers"? In Continuation of the Debate on the Direct Applicability and the Direct Effect of EU International Agreements' (2018) 37 Yearbook of European Law 27–74.

[2] Generally, on mixed agreements, including on their effects, see, amongst others, D O'Keeffe and HG Schermers (eds), *Mixed Agreements* (Kluwer 1983); MJFM Dolmans, *Problems of Mixed Agreements* (TMC Asser Press 1985); KD Stein, *Der gemischte Vertrag im Recht der Außenbeziehungen der Europäischen Wirtschaftsgemeinschaft* (Duncker and Humblot 1986); JHJ Bourgeois, J-L Dewost and MA Gaiffe (eds), *La Communauté et les accords mixtes. Quelles perspectives?* (Presses interuniversitaires européennes 1997); A Rosas, 'Mixed Union: Mixed Agreements' in M Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer 1998) 125–48; J Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer 2001); E Neframi, *Les accords mixtes de la Communauté européenne: aspects communautaires et internationaux* (Bruylant 2007); M Cremona, *Defending the Community Interest: The Duties of Cooperation and Compliance* in M Cremona and B de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart 2008) 125–69; C Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the Union' in M Cremona (ed), *Developments in EU External Relations Law* (OUP 2008) 10–36; R Holdgaard, *External Relations Law of the European Community. Legal Reasoning and Legal Discourses* (Kluwer 2008) 156–63; C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited* (Hart 2010); M Cremona, 'Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the EU' in A Arnull and others (eds), *A Constitutional Order of States—Essays in Honour of Alan Dashwood* (OUP 2010) 435–57; E Baroncini, S Cafaro and N Criseide, *Le relazioni esterne dell'Unione Europea* (Giappichelli 2012) 75–89; P Eeckhout, *EU External Relations Law* (2nd edn, OUP 2012) 212–66; M Cremona and A Thies, *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart 2014); J Heliskoski, 'Mixed Agreements: The EU Law Fundamentals' in R Schütze and T Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (OUP 2018), 1174–207; M Chamon, *Constitutional Limits to the Political Choice for Mixity* in E Neframi and M Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018) 137–66; B Van Vooren and RA Wessel, *EU External Relations Law: Text, Cases and Materials* (OUP 2014); M Chamon and I Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Martinus Nijhoff 2020); J Wouters and others, *The Law of EU External Relations: Cases, materials, and Commentary on the EU as an International Legal Actor* (3rd edn, OUP 2021) 101–27, 105, and 124–26; N Levrat and others (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart 2022).

[3] On the connected, yet distinct, matter of the status and ranking of international agreements within the EU legal order see, *ex multis*, J Wouters, A Nollkaemper and E de Wet, *The Europeanisation of International Law—The Status of International Law in the EU and its Member States* (Asser Press 2008); A Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 Fordham International Law Journal 1304; E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012); E Neframi, 'Status and Enforceability of EU International Agreements within the Domestic Legal Systems of the Member States: *Kupferberg*' in G Butler and RA Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart 2022) 155–65.

[4] On the quite subtle differences between customary law and general principles of international law, both encompassed in the broad notion of general international law, see I Brownlie, *Principles of Public International Law* (9th edn, OUP 2019) 6–12 and 15–18. In this Chapter, the focus will be on customary law since this is the term normally used by the CJEU.

[5] Expression borrowed from M Mendez, *The Legal Effects of EU Agreements* (OUP 2013) XX. On the need to differentiate EU measures implementing the international agreement and the agreement itself see T Hartley, 'International Agreements and the Community Legal System: Some Recent Developments' (1983) 3 European Law 383, 390–91.

[6] See, amongst contributions specifically devoted to this matter, F Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation' in Cannizzaro, Palchetti and Wessel (n 3) 395–415.

[7] The term 'external direct effect', just as the term 'internal direct effect', are borrowed from Eeckhout (n 2) 229–30.

proposing alternative solutions for the conceptualization and practice of direct effect in this domain of EU law. The second aim is to compare the use of direct effect in the context of the legal effects of international law in EU law to the case law on direct effect of EU law in Member States' legal orders. In other words, the functioning of 'external direct effect' is compared to 'internal direct effect' in the CJEU's jurisprudence. As a matter of fact, there is a clear link between direct effect of EU law in national legal orders and direct effect of international law in the EU legal order in so far as international law is a source of EU law.[8] Additionally, examining the direct effect of international law within EU law also means dwelling on the direct effect of international law within the legal orders of the Member States[9] because the national authorities are bound to respect EU law 'via Community law in Member State law'.[10] Within this framework, the comparison between the two phenotypes of direct effect will allow us to reflect more broadly on the contemporary content, scope, extent, and limits of direct effect. In this vein, our Chapter aspires to provide an original contribution to the understanding of direct effect as a *primus inter pares* principle and as a constitutional cornerstone of the EU legal order. In doing so, we will argue that the recurrent denial of direct effect of international agreements rests on reasons largely extraneous to law, revealing direct effect to be a political construct as much as a legal category.

Against this backdrop, Sections II–VII evaluate the rich EU case law on direct effect of international law, including the few judgments on customary international law.

Section VIII explores the interplay between direct effect, legality review, and the controversial *Fediol/Nakajima* doctrine.[11]

Section IX dives into the horizontal dimension of direct effect of international law.

Section X analyses the similarities and divergences between 'internal' direct effect, ie direct effect of EU law within national legal orders, and 'external' direct effect. To this end,

[8] International agreements concluded by the EU (either alone or with Member States) are regarded as acts of the European institutions; see, eg CJ, *S. Z. Sevince v Staatssecretaris van Justitie*, C-192/89, EU:C:1990:322, para 10.

[9] On the effects of international law in domestic legal orders at large see, *inter alia*, H Mosler, 'L'application du droit international public par les tribunaux nationaux' (1957) 91 Recueil des Cours 619–709; JJ Paust, 'Self-Executing Treaties' (1988) 82 American Journal International Law 760; A Bleckmann, *Begriff und Kriterien der innerstaatlichen Anwendbarkeit völkerrechtlicher Verträge* (Duncker & Humblot 1970); A Koller, *Die unmittelbare Anwendbarkeit völkerrechtlicher Verträge und des EWG-Vertrages im innerstaatlichen Bereich* (Stämpfli 1971); MJM Verhoeven, 'La notion d'"applicabilité directe" du droit International' (1980) 13 Revue belge de droit International 243; FG Jacobs and S Roberts (eds), *The Effect of Treaties in Domestic Law* (Sweet & Maxwell 1987); E Jiménez de Aréchaga, 'Self-Executing Provisions of International Law' in K Hailbronner, G Resse and T Stein (eds), *Staat und Völkerrechtsordnung: Festschrift für Karl Doehring* (Springer 1989) 409–19; T Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law' (1992) 235 Recueil des Cours 303–400; B Conforti, *International Law and the Role of Domestic Legal Systems* (Martinus Nijhoff 1993); JH Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) 86 American Journal of International Law 310; G Buchs, *Die unmittelbare Anwendbarkeit völkerrechtlicher Vertragsbestimmungen am Beispiel der Rechtsprechung der Gerichte Deutschlands, Österreichs, der Schweiz und der Vereinigten Staaten von Amerika* (Nomos 1993); M Fitzmaurice and C Flinterman (eds), *Interactions between International and Municipal Law: A Comparative Case Law Study* (TMC Asser Instituut, 1993); PM Eisemann (ed), *The Integration of International and European Community Law into the National Legal Order* (Kluwer 1996); JM Henckaerts, 'Self-Executing Treaties and the Impact of International Law on National Legal Systems: Research Guide' (1998) 26 International Journal of Legal Information 56; PE Holzer, *Die Ermittlung der innerstaatlichen Anwendbarkeit völkerrechtlicher Vertragsbestimmungen* (Schulthess 1999); H Charlesworth, *The Fluid State: International Law and National Legal Systems* (Federation Press 2005); DB Hollis, MR Blakeslee and LB Ederington (eds), *National Treaty Law and Practice* (Martinus Nijhoff 2005); K Kaiser, 'Treaties, Direct Applicability' in *Max Planck Encyclopedia of Public International Law* (2013); D Sloss, 'Self-Executing Treaties and Domestic Judicial Remedies' (2004) 98 American Society of International Law Proceedings 346; A Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011); M Oesch, 'Direct Effect of International Agreements' in T Cottier and K Nadakavukaren Schefer (eds), *Elgar Encyclopedia of International Economic Law* (Edward Elgar 2017) 277–79; R Baratta, 'L'effetto diretto delle disposizioni internazionali *self-executing*' in G Palmisano (ed), *Il diritto internazionale ed europeo nei giudizi interni. Atti del XXIV Convegno SIDI di Roma*, 5–6 June 2019, 2020, 75–111.

[10] A Peters, 'The Position of International Law within the European Community Legal Order' (1997) 40 German Yearbook of International Law 9–77, 19.

[11] CJ, *Fédération de l'industrie de l'huilerie de la CEE (Fediol)*, 70/87, EU:C:1989:254; CJ, *Nakajima*, C-69/89, EU:C:1991:186.

several considerations are made on the advantages and downsides of the limping process of externalization of direct effect that began in the seventies and is now slowing down.

Section XI scrutinizes the increasingly common practice of precluding 'external' direct effect in the text of the international agreements concluded by the EU. It will be queried whether the CJEU is still the 'gatekeeper'[12] of EU law against international law, as the current practice seems to challenge this role.

Finally, Section XII serves as the conclusion to this analysis.

II. 'EXTERNAL' DIRECT EFFECT AND THE INCORPORATION OF INTERNATIONAL LAW

A. The legal status of international law in the EU legal order and the matter of direct effect: setting the scene

The starting point for testing the operability of 'external' direct effect in the light of the CJEU case law is that neither the Treaty on European Union (TEU) nor the Treaty on the Functioning of the European Union (TFEU) stipulate which effects international law produces in EU law, just as they do not explain the internal effect of EU law in domestic legal orders. As early as 1997, the European Parliament had called 'for a clear statement of the relationship between international law and European law to be written into the EC Treaty, in terms of the EC being equated with nation states, which means that international law is applicable not directly but only after it has been declared applicable by an internal legal act of the EC or after its substance has been transposed into EC legislation'.[13] However, this appeal has not led to any Treaty amendments. Instead, references to the observance of international law by the EU and its Member States are made in Articles 21(1) TEU,[14] 3(5) TEU,[15] and 216(2) TFEU. In particular, Article 216(2) TFEU provides that 'agreements concluded by the Union are binding upon the institutions of the Union and on its Member States'. In this respect, there is a limit to the entry of such agreements into the EU legal order. Indeed, in the event of a conflict between the international agreement and EU primary law (TEU, TFEU, Protocols, Charter of Fundamental Rights, general principles), it is primary law that prevails. This result is confirmed by Article 218(11) TFEU, which allows the Court of Justice (CJ) to issue a (binding) opinion on the compatibility of a negotiated agreement with EU primary law.[16] It could not be otherwise since EU law is not standard international law and, for this reason, the legal status of its constitutional backbone cannot be 'simply'

[12] See F Snyder, 'The Gatekeepers: The European Courts and WTO Law' (2013) 50 Common Market Law Review 313, who has been the first to use the term 'gatekeeper' to describe the CJ's role in determining the effects of international law in the EU legal order. See also Ghazaryan (n 1).

[13] European Parliament, Resolution on the relationships between international law, Community law and the constitutional law of the Member State, OJ C 325, 27 October1997, 26, Recital 14.

[14] '1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.'

[15] '5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.'

[16] '11. 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.' For an example of an Opinion that found the draft agreement incompatible with EU law see CJ, *France v Commission*, C-327/91, EU:C:1994:305.

governed by international rules and principles on the conflict of treaties and the internal law of international organizations.[17] On the other hand, international agreements are above EU legislation and thus pre-empt inconsistent EU secondary acts. As held by the CJ, 'where international agreements are concluded by the European Union they are binding upon its institutions and, *consequently*, they prevail over acts of the European Union'.[18] This is the reason why the question of the direct effect of international agreements becomes vital: if a provision of an international agreement is not considered by the CJEU to be directly effective, the 'validity' of an EU act, according to the Court, 'cannot be affected' by that provision.[19] The denial of direct effect, consequently, breaches the judicial protection of those who are affected by the EU's failure to comply with its international obligations under the agreement concluded with a Third Country (or other international organizations), be they individuals (Article 267 TFEU on the validity of EU law or Article 263(4) TFEU) or Member States (Article 263(2) TFEU). Likewise, lacking direct effect, a national norm, which comes into play in domestic proceedings and/or interpretive preliminary ruling proceedings and is in conflict with international law, in the opinion of the CJEU, cannot be disapplied. The non-recognition of direct effect thus also affects individuals' prerogatives in proceedings before domestic courts and/or interpretative preliminary rulings proceedings. This is a serious consequence, capable of curtailing the applicants' interests before national courts and public administrations, as well as before EU courts.[20] Additionally, direct effect is not only relevant from the point of view of safeguarding individual prerogatives frequently associated with natural and legal persons, but also from the point of view of compliance with the agreement, that is, its proper enforcement.

Against this backdrop, there are multiple reasons for which the CJEU has frequently denied the direct effect of international agreements and, in this regard, softened the monistic facet of EU law.[21] This practice will be discussed in detail in the following sections.

B. Direct effect and direct applicability of international agreements

At this stage, a closely connected matter shall be examined: the incorporation of international agreements in the EU legal order.[22] Indeed, logically, the analysis as to how international agreements penetrate EU law precedes the analysis of their effects in the context of (national and EU) judicial proceedings concerning the validity of EU secondary law or the compatibility of domestic law. Since the European Treaties do not contain any decisive indication regarding either their effects or their incorporation, the main problem is whether international agreements, in order to be able to bind the EU institutions, must be transposed into EU law by means of further acts of secondary legislation.

[17] In this vein see Peters (n 10) 11.

[18] See CJ, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:864, para 50 (italics added). See also, amongst many others, CJ, *Commission v Germany*, C-61/94, EU:C:1996:313, para 52; CJ, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, C-402/05 P and C-415/05 P, EU:C:2008:461.

[19] CJ, *International Fruit Company*, joined cases 21-24/72, EU:C:1972:115, para 28.

[20] Ghazaryan (n 1) 40 wrote that international agreements devoid of direct effect are 'toothless as far as their enforcement in national courts is concerned'. For a criticism on considering direct effect as a precondition for challenging EU secondary law see Sections VIII, X, and XII of this Chapter.

[21] As observed by R Schütze, 'On "middle ground". The European Union and Public International Law' in R Schütze (ed), *Foreign Affairs and the EU Constitution: Selected Essays* (CUP 2014) 47–90, 51, the doctrine of direct effect represents 'a yardstick for the actual openness of a legal system: it is a *chiffre* for the intensity of its monist creed'. See in detail the subsection 'Direct effect and direct applicability of international agreements'.

[22] 'Incorporation' is a recurring term in the literature. Among the first to use it was F Casolari, *L'incorporazione del diritto internazionale nell'ordinamento dell'Unione Europea* (Giuffrè 2008). See, more recently, Mendez (n 5) 62.

In the literature,[23] most authors consider EU law to be monist because, as the CJ has stated since *Haegeman II*,[24] provisions of EU international agreements 'form an integral part of Community law' from their entry into force.[25] This would therefore imply an automatic entry of international agreements into the EU legal order,[26] and of decisions taken by bodies established by these agreements as they are 'directly linked to the agreement which they implement'.[27]

A minority of authors believe, on the other hand, that the EU legal system is not, in truth, monist, but dualist, because integration into the EU legal system would take place by means of acts of transposition of secondary law, that is, through a transposition carried out by the European legislator.[28] This reconstruction is, again, based on *Haegeman II*, where the CJ wrote that the Association Agreement with Greece is 'an act of one of the institutions of the Community'.[29] *Haegeman II*, therefore, following this reasoning, should be interpreted in the sense that the agreement can only become part of EU law by means of a further act adopted by the EU institutions, most notably by the decision of the Council to conclude the agreement with the Third Country, that is, Greece in the case at hand. Moreover, the circumstance that in *Haegeman II* reference is made to the fact that the provisions of the agreement, rather than the agreement itself, are incorporated into the EU legal order, would seem to imply that this incorporation passes through acts of implementation. In the words of J. Klabbers, 'otherwise, why not simply say that the agreement is an integral part of Community law? Why make a distinction between the agreement and its provisions?'[30] Additionally, it should not be forgotten that, in this judgment, the CJ used precisely the phrase contained in Article 267(1)(b) TFEU in order to justify, in explicit terms, the admissibility of the preliminary reference raised by the *Tribunal de Première Instance* of Brussels, which can only be made when the object of interpretation is an act of the EU institutions.

[23] On monism and dualism in international law see, *ex multis*, H Triepel, *Völkerrecht und Landesrecht* (C. L. Hirschfeld 1899); D Anzilotti, *Il Diritto Internazionale nei Diritti Interni* (ESI 1905). On monism see H Kelsen, 'Les Rapports de Système Entre le Droit Interne et le Droit International Public' (1926) 14 Recueil des Cours 226–331; A Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer 1926). For more recent contributions see B Conforti, *International Law and the Role of Domestic Legal Systems* (Martinus Nijhoff 1993) 26–28; R Higgins, *Problems & Process: International Law and How We Use It* (Clarendon Press 1995) 206–17; C Tomuschat, 'International Law Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law' (1999) 281 Recueil des Cours 9–438, 363–64; G Arangio-Ruiz, 'Dualism Revisited: International Law and Interindividual Law' (2003) 86 Rivista di Diritto Internazionale 909; C Amrhein Hofmann, *Monismus und Dualismus in den Völkerrechtslehren* (Duncker & Humblot 2003); H Keller, *Rezeption des Völkerrechts* (Springer 2003); J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide between International and National Law* (OUP 2007); A von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 International Journal of Constitutional Law 397, 398; Mendez (n 5) 37–47; P Koutrakos, *EU International Relations Law* (2nd edn, Hart 2015) 257; P Gragl, *Legal Monism: Law, Philosophy, and Politics* (OUP 2018).

[24] The ruling has been delivered in the context of a preliminary ruling procedure on both interpretation and validity concerning the Association Agreement with Greece of 1961. CJ, *R. & V. Haegeman v Belgian State* (*Haegeman II*), 181-73, EU:C:1974:41, has been confirmed in the case law: two examples are CJ, *Kupferberg*, 104/81, EU:C:1982:362, para 13, and CJ, *Brita*, C-386/08, EU:C:2010:91, para 39.

[25] *Haegeman II* (n 24), para 5.

[26] See, *inter alia*, K Lenaerts, 'Direct Applicability and Direct Effect of International Law in the EU Legal Order' in I Govaere and others (eds), *The European Union in the World. Essays in Honour of Marc Maresceau* (Martinus Nijhoff 2013) 45–64; Mendez (n 5) 63; P Eeckhout, 'The Integration of Public International Law in EU Law. Analytical and Normative Questions' in P Eeckhout and M López Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart 2019) 189–204; B de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (3rd edn, OUP 2021) 187–227, 199. Mendez (n 5) 17–37, carried out a survey on the characteristics of treaty incorporation, also in the light of the comparison among EU Member States. On monism and mixed agreements see Gáspár-Szilágyi, 'EU Member State Enforcement of "Mixed" Agreements and Access to Justice: Rethinking Direct Effect' (2013) 40 Legal Issues of Economic Integration 163; R Schütze, 'Federalism and Foreign Affairs: Mixity as an (Inter)national Phenomenon' in Hillion and Koutrakos (eds) (n 2) 57–86.

[27] In these terms CJ, *Deutsche Shell AG*, C-188/91, EU:C:1993:24, para 17.

[28] Hartley (n 5) 383; J Klabbers, 'International Law in Community Law: The Law and Politics of Direct Effect' (2001) 21 Yearbook of European Law 263–98, 293.

[29] *Haegeman II* (n 24), para 4, and *Brita* (n 24), para 39.

[30] Klabbers (n 28) 276.

On the other hand, as Klabbers himself pointed out,[31] the *Haegeman II* judgment 'attach[es] relevance to the moment of entry into force *of the agreement*', rather than to the decision to adopt or approve it. As a matter of fact, the CJ itself clarified that the nature of the act that approved the international agreement 'cannot affect whether it is recognized as having direct effect'.[32] Thus, further confirmation that the agreement is directly incorporated into EU law, without the need for measures of transposition, also comes from the irrelevance of these measures in terms of the agreement's legal effects.

Therefore, despite a certain ambivalence in the CJ's reasoning,[33] an interpretation in the sense that reception is automatic seems preferable *prima facie*.[34] Nonetheless, there is no doubt that, in practice, it is the Council's decision that enables the international agreement to produce legal effects at both the level of international law and EU law. Without the Council's decision, the international agreement could not be incorporated into EU law. In this sense, the EU also seems to present the traits of a dualist legal order.[35] EU law is thus a mixture of monist and dualist aspects. This very fact, as noted in the literature, starting with A. von Bogdandy,[36] calls for a release from this diatribe.[37] Moreover, as A. Peters made clear, the matter whether a provision of an international agreement concluded by the EU has direct effect 'must be distinguished from the prior question of how rules of international law are integrated into the internal [EU] order and acquire the formal status of a source of law'.[38] This means that even in dualist system direct effect could be recognized. In such a case, the possibility of invoking a rule of international law is admitted, although it is rooted (and justified) in domestic law.[39] In any case, as noted by Peters, the fact that two opposing arguments can be made regarding the nexus between direct effect, either with monism or with dualism, 'demonstrates that it is analytically preferable to distinguish the mode of incorporating international law and the question of direct effect'.[40]

The focus, as regards both the adaptation to international agreements and their effects, must therefore be turned to the practice of case law, bearing in mind that it is up to the

[31] ibid (emphasis added).

[32] CJ, *Ioannis Katsivardas*, C-160/09, EU:C:2010:29, para 34.

[33] As noted by K Lenaerts, P Van Nuffel and T Corthaut, *EU Constitutional Law* (OUP 2021) 695–712, 695. Lenaerts (n 26) 45: 'the incorporation of public international law into EU law follows, to some extent, a "monist approach"'.

[34] According to P Eeckhout, 'The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems' (1997) 34 Common Market Law Review 11, 25, 'legally there is no need for any act of transformation beyond the Council's decision to conclude [the agreement].' In contrast, see, A Rosas, *EU Law and National Law: A Common Legal System*, AEL working paper, 2024, at <https://cadmus.eui.eu/handle/1814/76744, accessed 25 October 2025, 12, according to whom the Council's decision renders the international agreement directly applicable within the EU legal system.

[35] As is recognized by P Eeckhout, who supports the view that EU law is a monist legal system towards international agreements, 'legally there is no need for any act of transformation beyond the Council's decision to conclude [the agreement].' See Eeckhout (n 34).

[36] von Bogdandy (n 23) 397, 398.

[37] For a definition of these concepts when international agreements in the EU legal order are at stake see Peters (n 10) 18: 'in the monist model, international law and domestic law are only different elements of one universal body of law, so that—strictly speaking—the question of how to incorporate international law into domestic law does not arise. According to the dualist conception, international law and domestic law are two separate legal systems because they have different sources, different contents, and different subjects.'

[38] Peters (n 10) 48. See also Ghazaryan (n 1) 39, who noted that 'monism and dualism denote the process of the incorporation of a treaty into a domestic legal order. From this perspective, caution is required against conflating the issues of direct effect or "invocability of a treaty provision" with the classification of the system as monist or dualist.' In respect to the WTO, AG Maduro observed that 'the fact that WTO law cannot be relied upon before a court does not mean that it does not form part of the Community legal system' (Opinion of AG Maduro of 20 February 2008, *FIAMM*, joined cases C-120-121/06 P, EU:C:2008:98, para. 37). In contrast, see Klabbers (n 28) 263: 'starkly put: if the Court finds treaty provisions, or other rules of international law, to be directly effective, then it will treat those rules as being part of Community law; if the Court thinks these rules are not directly effective, then they will not enter the Community legal order'.

[39] In this vein see Eeckhout (n 34) 28–29. In contrast, see R Kovar, 'Les Accords liant les Communautés Européennes et l'ordre juridique communautaire: à propos d'une jurisprudence récente de la Cour de Justice' (1974) 17 Revue du Marché Commun 345, 352.

[40] Peters (n 10) 49.

CJEU to identify the prerequisites and avenues of reception and legal effects. In other words, the CJEU must fill the legal vacuum underpinning EU law under both profiles: incorporation and direct effect (or lack thereof). The Court has, in fact, 'monopolized' both matters,[41] acting as 'gatekeeper'[42] with respect to the entry of international law into EU law and the determination of its effects.

The rationale for the above-described centralization is to ensure uniformity[43] in the EU legal order[44] and among the Member States.[45] Obviously, the choice of the type of reception of international agreements that is deemed necessary, made in *Haegeman II* with regard to a specific agreement, from then on applies to all agreements concluded by the Union. In this regard, the CJ found 'no difference'[46] between agreements concluded by the Community/EU alone,[47] by the Community/EU and the Member States,[48] or only by the Member States.[49] Agreements concluded only by Member States include the General Agreement on Tariffs and Trade (GATT) of 1947, no longer in force, and the 1951 UN Geneva Convention and Protocol relating to the Status of Refugees and other relevant treaties of 1967, still in force. The 1947 GATT was considered binding by the CJ because the Community had assumed 'the competence previously exercised by the Member State in the field to which the agreement applie[d]'.[50] The UN Convention and the Protocol on the Status of Refugees are agreements with binding force for the EU, as well as for the Member States, since the TFEU is the source of the EU competence in this area by virtue of the express reference to both agreements in Article 78(1) TFEU.

Regarding the recognition or denial of direct effect, in the absence of provisions in the agreement or in a subsequent Council's decision, the CJEU has to decide on a case-by-case basis.[51] This leads to the risks inherent in the Court's wavering attitude and in the lack of clear guidelines for conceptualizing the legal effects of international agreements, which in turn give rise to the many doubts that the EU's jurisprudence on the 'externalization' of direct effect[52] continues to generate.[53]

[41] In these terms, with regard to direct effect of international law, see Schütze (n 21) 51.

[42] On such role, with regard to both the reception and legal effects, see Snyder (n 12); Klabbers (n 28) 296; M Cremona, 'External Relations and External Competence of the European Union: The Emergence of an Integrated Policy' in Craig and de Búrca (eds), (n 26) 215–68, 234; I Hadjiyianni, 'The CJEU as the Gatekeeper of International Law: The Cases of WTO Law and the Aarhus Convention (2021) 70 International & Comparative Law Quarterly 895, 897; FC Mayer, 'European Law as a Door Opener for Public International Law?' in JM Thouvenin and C Tomuschat (eds), *Droit International et Diversité des Cultures Juridiques—International Law and Diversity of Legal Cultures* (Pédone 2008) 241–55, speaks of 'door opener', as reported by Van Vooren and Wessel (n 2) 218.

[43] See the opinion of AG Trabucchi of 14 January 1976, *Bresciani*, 87/75, EU:C:1976:3, 148. On uniformity and the principle of equality see F Casolari, 'The Acknowledgment of the Direct Effect of EU International Agreements: Does Legal Equality Still Matter?' in LS Rossi and F Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 83–129.

[44] See *Kupferberg* (n 24), para 14: 'it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community'.

[45] On international agreements and the principle of uniformity from the standpoint of Member States see the opinion of AG Mayras of 25 October 1972, *International Fruit Company*, EU:C:1972:89, 1234.

[46] Peters (n 10) 21.

[47] eg *Kupferberg* (n 24).

[48] eg CJ, *Meryem Demirel*, 12/86, EU:C:1987:400.

[49] eg *International Fruit Company* (n 19). On the specificities of these agreements see Schütze (n 21) 61–76.

[50] Lenaerts, Nuffel and Corthaut (n 33) 695, who also wrote that 'since the competence in connection with the application of that agreement was conferred on the Community by the EC Treaty and the Community itself subsequently took part in the tariff negotiations'. See *International Fruit Company* (n 19), paras 10–17, whose core reflections have been reiterated in the subsequent case law, such as CJ, *Peralta*, C-379/92, EU:C:1994:296, para 16.

[51] As confirmed by the CJ in *Portugal v Council*, C-149/96, EU:C:1999:574, para 34. However, see Section XI on the preclusion of direct effect in the international agreements, as well as on the role of the Council's decision in such denial.

[52] The term is borrowed from Ghazaryan (n 1) 29.

[53] On the diversity of interpretative methods related to the interplay between international law and EU law, and on the lack of clarity in the case law of the CJEU, see, most recently, R Dunbar, 'Learning from Failure in "an Integral Part" of EU Law: Interpretation of International Treaties in the CJEU' (2024) 1 European Law Open 1.

While these questions are at the heart of the analysis carried out in the following sections, one issue must be addressed here, before resuming its examination in Section X, namely the relationship between direct effect and direct applicability.

Since claiming that international agreements are automatically incorporated in the EU legal system from their entry into force means something different than asserting direct effect, the key question is whether all international agreements are directly applicable, as if they were *mutatis mutandis* EU (external) regulations.[54] A positive answer would certainly rest on the assumption that direct effect and direct applicability[55] are distinct categories, given that only some international agreements, subject to certain conditions indicated by the CJEU, contain directly effective rules. If the point of departure is that all international agreements are directly applicable, to maintain that they are not distinct categories would in fact mean that all international agreements, *insofar as* they are directly applicable, are necessarily directly effective. This assertion is unfounded and at odds with the case law, which is frequently reluctant to attribute direct effect to those agreements, as will be observed at length in the following sections. This is why a reconstruction that holds all international agreements to be directly applicable can only consider the notion of direct applicability to be different from that of direct effect. Amongst scholars who hold, on the one hand, that direct effect and direct applicability are two separate categories,[56] and, on the other, that direct effect is a possible, rather than inevitable, attribute of international agreements,[57] there are those who write that direct applicability 'only makes [international agreements] capable of having direct effects'.[58] Direct applicability would therefore be the precondition for direct effect.

In this contribution, the perspective is different. In line with AG Tesauro's opinion in *Yousfi*,[59] we believe that direct effect and direct applicability have, in practice, the same meaning when it comes to international agreements.[60] This is because once a rule of an international agreement is sufficiently unconditional, that is, directly applicable to govern the case, then it is necessarily also clear and precise, ie, directly effective. Proof of this is that the CJEU, in much of its case law, uses the terms to indicate the same concept, as it often does with regard to 'internal' direct effect.[61] For example, the overlap is clear in the *Demirel*[62] and *Kziber*[63] judgments, whereby it was noted that a provision of an agreement concluded by the Community with non-Member third-parties should be considered 'directly applicable' where it involves 'a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'.[64]

[54] R Schütze, 'Direct Effects and Indirect Effects of Union Law' in Schütze and Tridimas (eds) (n 2) 265–99, 286.

[55] Both RA Wessel, 'Reconsidering the Relationship between International and EU Law: Towards a Content-based Approach?' in Cannizzaro, Palchetti and Wessel (n 3) 7–3, and A Nollkaemper, 'The Direct Effect of Public International Law' in JM Prinssen and A Schrauwen (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (European Law Publishing 2002) 156–80, 160–61, quite surprisingly, refer to 'validity' rather than to 'direct applicability'.

[56] Expressly in these terms see F Castillo de la Torre, 'The Status of GATT in EC Law, Revisited. The Consequences of the Judgement on the Banana Import Regime for the Enforcement of the Uruguay Round Agreements' (1995) 35 Journal of World Trade 53; I Cheyne, 'International Agreements and the European Community Legal System' (1994) 19 European Law Review 581; Rosas (n 34) 12.

[57] Ghazaryan (n 1) 40, first writes that 'all agreements concluded by the EU are directly applicable' and then notes that international agreements devoid of direct effect are 'toothless as far as their enforcement in national courts is concerned'. Lenaerts (n 26) 45, considers direct effect and direct applicability as 'two different, albeit intertwined, concepts'.

[58] Schütze (n 54) 275.

[59] See the opinion of AG Tesauro of 23 February 1994, *Zoubir Yousfi*, C-58/93, EU:C:1994:63, para 4.

[60] Accordingly, see Peters (n 10) 158.

[61] See, for instance, CJ, *Jean Reyners v Belgian State*, 2/74, EU:C:1974:68, para 32, regarding the (then) art 52 of the EEC Treaty, currently art 49 TFEU, concerning freedom of establishment, where the norm was defined as 'directly applicable'/'directement applicable', even though at stake was its justiciability.

[62] CJ, *Demirel* (n 48).

[63] CJ, *Office national de l'emploi (Onem) v Bahia Kziber*, C-18/90, EU:C:1991:36.

[64] *Demirel* (n 48), para 14 and *Kziber*, ibid, para 15. See also, amongst many others, CJ, *Asda Stores*, C-372/06, EU:C:2007:787, para 82.

There are, thus, two takeaways from all this. The first: direct applicability is different from the concept of reception and integration of international agreements into the EU legal order. The second: direct applicability and direct effect are, in practice, synonymous. A critical juncture is reached when an international agreement, following the decision of the Council concluding it, enters into force for the Union and is valid in international law, that is binding for third States that have ratified it together with the Union, as well as for the Union and its Member States. From that moment on, some of the agreement's norms, or all of them, may be considered directly applicable/effective, provided that they are sufficiently complete in their scope and content.

Against this background, the following section will examine the case law of the CJEU. In the literature, it has been observed that 'the paradox of the extension of [direct effect] to international agreements lies in the fact that the doctrine helped to "define" the EU legal order "in opposition to international law", largely due to reversing the presumption that international treaties were not capable of having direct effect'.[65] Therefore, direct effect, on the one hand, is a doctrine that, although known to international law at the time of *Van Gend & Loos*,[66] represents the means to free EU law from standard international legal categories, with the consequence that a real presumption of direct effect is asserted. On the other hand, when direct effect is relied on by the CJEU, it serves as a means to exploit the potential of EU international agreements and decisions of international organizations[67] from the point of view of their enforceability and justiciability before both national and EU courts. In this respect, precisely because EU law is a legal order different from international law, the 'external' direct effect cannot be investigated using, to the letter, the same logic that applies to 'internal' direct effect. The fact that 'internal' direct effect is the rule rather than the exception, that its establishment originates in EU law rather than in national law, and that the interpretation for its detection is objective and teleological rather than subjective and literal,[68] requires us to look at 'external' direct effect somewhat differently from the *Van Gend & Loos* doctrine. This perspective leads to a better understanding of the extent to which 'external' direct effect has unclear contours. Indeed, the CJEU grasps the inherent potential of international agreements (in terms of their justiciability) only partially in its case law. As will be shown in the following analysis, much depends on the type of judicial proceedings in which international law is at stake and on the type of international agreement, bilateral or multilateral, at the heart of such proceedings. Additionally, one should not underestimate the contribution to these uncertainties stemming from the CJ's tendency towards argumentative minimalism and the—at times—barely comprehensible and foreseeable application of rules and principles of interpretation that the Court itself uses in its jurisprudence. A tendency that exists also with respect to 'internal' direct effect, as has been explained in the literature.[69]

[65] Ghazaryan (n 1) 29.

[66] CJ, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos*, 26/62, EU:C:1963:1.

[67] The CJ is more reluctant to do the same vis-à-vis general international law, as observed in Section VII of this Chapter.

[68] 'Objective' means that the intent of the Contracting Parties is not evident directly from the written norm, which shall be interpreted first and foremost by the CJ in the light of the structure and objectives of the European Treaties.

[69] See, amongst others, J Steiner, 'Direct Applicability in EEC Law—A Chameleon Concept' (1982) 98 Law Quarterly Review 229; R Kovar, 'La Contribution de la Cour de Justice à l'Édification de l'Ordre Juridique Communautaire. Cours Général de Droit Communautaire' in *Recueil des cours de l'Académie de droit européen* (Kluwer Law International 1995) 15; S Prechal, 'Does Direct Effect Still Matter?' (2000) 37 Common Market Law Review 1047; D Edward, 'Direct Effect: Myth, Mess or Mystery?' in JM Prinssen and A Schrauwen (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (European Law Publishing 2002) 1–13; S Prechal, 'Direct Effect Reconsidered, Redefined and Rejected' in Prinssen and Schrauwen (eds), ibid, 15–41; K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 European Law Review 287; J Bengoetxea, 'Is Direct Effect a General Principle of European Law?' in U Bernitz, J Nergelius and C Cardner (eds), *General Principles of EC Law in a Process of Development* (Wolters Kluwer 2008) 3–24; M Bobek, 'Van Gend en Loos +50: The Changing Social Context of Direct Effect' in A Tizzano, J Kokott and S Prechal (*Organizing Committee*), *50ème anniversaire de l'arrêt Van Gend en Loos: 1963-2013: actes du colloque, Luxembourg, 13 mai 2013*, 2013, at <https://curia.europa.eu/jcms/jcms/P_95693/en/, accessed 25 October 2025, 181–87; M Bobek, 'The Effects of EU Law in the National Legal Systems' in C Barnard and S Peers (eds), *European Union Law* (3rd edn, OUP 2020) 154–89; D Gallo, 'Rethinking Direct Effect and its Evolution: A Proposal' (2022) 1 European Law Open 576; D Gallo, *Direct Effect in EU Law* (OUP 2025).

III. THE CJEU AND 'EXTERNAL' DIRECT EFFECT: AN OVERVIEW

The vast majority of case law of the General Court (GC) and CJ on direct effect and international law relates to international agreements.

Regardless of whether the agreements are concluded by the Union alone, as mixed agreements, or only by the Member States, as in the case of the GATT or the UN Convention and Protocol on the Status of Refugees (see above), individuals can challenge domestic or EU secondary law for their incompatibility with these agreements. The available procedural avenues are the preliminary references on interpretation before the CJ under Article 267 TFEU to challenge domestic law and the preliminary references on validity before the CJ under Article 267 TFEU and the actions for annulment before the GC under Article 263(4) TFEU to challenge EU secondary law. The case law also covers international agreements invoked before the CJ by States under Article 263(2) TFEU against EU acts.

As to the nature of the agreements, it is possible to identify three types.[70] While some, like the WTO Agreement(s),[71] are multilateral, the majority are bilateral: (i) trade agreements; (ii) association, cooperation, and partnership agreements; and (iii) non-trade related agreements. Excluded from agreements that are relevant, or contentious, in terms of direct effect, are all new-generation[72] free trade agreements,[73] some association, partnership and cooperation agreements,[74] some protocols establishing dispute settlement mechanisms mainly related to trade,[75] and the agreements related to both the Area of Freedom, Security and Justice (AFSJ)[76] and the Common Foreign and Security Policy (CFSP),[77] because they explicitly deny, frequently in their general and final provisions,[78] that their provisions have

[70] For a systematization of all EU agreements, from the standpoint of their legal effects, see Mendez (n 5) 107–286; N Zipperle, *EU International Agreements. An Analysis of Direct Effect and Judicial Review Pre- and Post-Lisbon* (Springer 2017) 9–62.

[71] Marrakesh Agreement Establishing the World Trade Organization (WTO), 15 April 1994, and its Annexes.

[72] See, *inter alia*, the account by A Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements (2014) 51 Common Market Law Review 1125; G Van der Loo, P Van Elsuwege and R Petrov, 'The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument' EUI LAW working paper, 2014, at <https://cadmus.eui.eu/handle/1814/32031>, accessed 25 October 2025; A Van Waeyenberge and P Pecho, 'Free Trade Agreements after the Treaty of Lisbon in the Light of the Case Law of the Court of Justice of the European Union' (2014) 20 European Law Journal 749; D Thym, 'The Missing Link: Direct Effect, CETA/TTIP and Investor-State-Dispute Settlement' 4 January 2015, at <https://verfassungsblog.de/en-verhinderte-rechtsanwendung-deutsche-gerichte-cetatiip-und-investor-staat-streitigkeiten-2/>, accessed 25 October 2025; V Stoynov, 'The Direct Effect of EU Bilateral Trade Agreements Such as the TTIP in the Light of the Jurisprudence of the CJEU' (2017) 9 Amsterdam Law Forum 42; S Poli, 'La diretta invocabilità degli accordi internazionali' in ME Bartoloni and S Poli (eds), *L'azione esterna dell'Unione europea* (Editoriale Scientifica 2021) 93–97; CHL Labus, *L'esclusione dell'effetto diretto negli accordi internazionali dell'Unione: riflessioni alla luce della prassi recente*, in S Poli and S Marinai, *L'Unione europea sulla scena internazionale: sfide e trasformazioni sul piano interno ed esterno, Atti del VI Convegno Nazionale AISDUE Università di Pisa, 25-26 ottobre 2024* (Editoriale Scientifica 2025) 353–80.

[73] See, eg art 30(6) of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11/23, 14 January 2017, 23: 'Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.'

[74] See eg all annexes to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261, 30 August 2014, 4.

[75] See eg art 18(2) of the Protocol between the European Union and the Republic of Tunisia establishing a Dispute Settlement Mechanism applicable to disputes under the trade provisions of the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Tunisia, of the other part, OJ L 40, 13 February 2010, 76.

[76] eg art 21(1) of the Agreement between the EU and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program.

[77] eg surreptitiously, art 24 of the Agreement between the EU and the Democratic Republic of the Congo on the status and activities of the European Union police mission in the Democratic Republic of the Congo: 'the purpose of the privileges and immunities as provided for in this Agreement are not to benefit individuals but to ensure the efficient performance of the EU Mission/operation'. See R Schütze, *European Union Law* (3rd edn, OUP 2021) 187.

[78] The preclusion may also be provided in other provisions of the agreement, as noted by Semertzi (n 72) 1129; see Section XI of this Chapter for an overview.

direct effect. The same holds true for the EU–UK Trade and Cooperation Agreement (TCA) of 2021.[79] The implications of this practice will be analysed in greater detail in Section XI of this Chapter.

Overall, from the analysis of the approximately 100 cases concerning the direct effect (or lack thereof) of international law in the EU legal order,[80] it can be inferred, as will be shown in the next sections, that while many bilateral agreements have been found to comprise directly effective provisions, the contrary holds true for the great majority of multilateral treaties, such as the GATT 1947, the WTO agreements, including the GATT 1994, the United Nations Convention on the Law of the Sea (UNCLOS), the European Convention on the Protection of Animals Kept for Farming Purposes, and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[81] Multilateral treaties found to have direct effect are rare and include the Yaoundé/Lomé/Cotonou agreements between the EU and African, Caribbean, and Pacific countries[82] and the Montreal Convention for the Unification of Certain Rules for International Carriage by Air.[83]

As to the judicial enforceability of decisions of bodies of international organizations established by EU international agreements, the rulings that are relevant from the point of view of direct effect are less frequent.[84] They are issued by the CJ in preliminary (interpretation and validity) and annulment proceedings, with individuals or States as plaintiffs.

With regard to customary law,[85] the question has arisen in a few cases, three in particular: first, the *Racke* preliminary ruling, concerning the validity of Council Regulation (EEC) No 3300/91 of 11 November 1991[86] suspending the trade concessions provided for in the Cooperation Agreement between the EEC and the Socialist Federal Republic of Yugoslavia[87]; secondly, *Opel Austria*, concerning the annulment of Council Regulation (EC) No 3697/93 of 20 December 1993[88] withdrawing tariff concessions pursuant to Articles 23 (2) and 27(3)(a) of the Free Trade Agreement between the Community and Austria (General Motors Austria)[89]; and, thirdly, *Air Transport Association of America*, with respect to the validity of Directive 2008/101/EC of the European Parliament and of the Council of

[79] Trade and Cooperation Agreement (TCA) between the European Union and the European Atomic Energy Community, of the one part, and the UK of Great Britain and Northern Ireland, of the other part, OJ L 149, 30 April 2021, 10, art 5(1) ('Private rights'): 'Nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties.' See C Eckes and P Leino-Sandberg, 'The EU-UK Trade and Cooperation Agreement—Exceptional Circumstances or a new Paradigm for EU External Relations' (2021) 84 Modern Law Review 164, 191–92.

[80] For a recent contribution see CHL Labus, *Sul mancato effetto diretto e indiretto degli accordi internazionali nell'ordinamento dell'Unione: riflessioni alla luce della sentenza* KaiKai 5 *Quaderni AISDUE* (2025) 41, 45–51; Labus (n 72).

[81] On the case law about all such conventions but the European Convention on the Protection of Animals Kept for Farming Purposes (on which CJ, *Compassion in World Farming*, C-1/96, EU:C:1998:113, paras 32–34), see Sections IV–VI of this Chapter.

[82] See, eg CJ, *Chiquita Italia*, C-469/93, EU:C:1995:435.

[83] See, eg *Air Transport Association of America* (n 18).

[84] As is the case of both the reports issued by the World Trade Organization (WTO)'s Dispute Settlement Body (DSB) and the recommendations rendered by the Aarhus Convention Compliance Committee (ACCC). Some references will be made in this section and the following sections. For a comparison of the two types of decisions see Hadjiyianni (n 42).

[85] See Section VII of this Chapter.

[86] Council Regulation (EEC) No 3300/91 of 11 November 1991 suspending the trade concessions provided for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia, OJ L 315, 15 November 1991, 1.

[87] CJ, *Racke*, C-162/96, EU:C:1998:293.

[88] Council Regulation (EC) No 3697/93 of 20 December 1993 withdrawing tariff concessions in accordance with art 23 (2) and art 27(3)(a) of the Free Trade Agreement between the Community and Austria (General Motors Austria), OJ L 343, 31 December 1993, 1.

[89] GC, *Opel Austria*, T-115/94, EU:T:1997:3.

19 November 2008 amending Directive 2003/87/EC[90] so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community.[91]

IV. THE EARLY CASE LAW

A. The *International Fruit Company/Bresciani/Polydor* trio and its aftermath

The first case in which the CJ had occasion to reflect on the direct effect of provisions of an international agreement is *International Fruit Company*, concerning the compatibility of certain Commission regulations with Article XI (prohibition of quantitative restrictions) of the GATT 1947. The case, therefore, relates to the role of direct effect when an individual wishes to invoke an international agreement to challenge an EU measure. It has four main features, which are also at the heart of many subsequent rulings on the legal effects of international agreements, especially preliminary rulings on validity or annulment proceedings. First, direct effect is seen as a precondition for challenging EU acts. The reasons why it is so, differently from what occurs in internal direct effect, however, are not provided by the CJ. Secondly, the CJ clearly links direct effect to the existence of a right arising from the international agreement insofar as the latter can only be invoked, and lead to the invalidity of an EU act, if the provision contained therein is 'capable of conferring on Community nationals rights which they can invoke in court'.[92] Thirdly, the interpretation to be used to make such assessment must take into account, not only the 'terms', but also the 'general scheme' of the GATT.[93] Fourthly, several factors—that will be mentioned in the subsequent case law on the WTO—are identified by the CJ and preclude, in the opinion of the Court, the recognition of direct effect of Article XI of the GATT. They all serve to highlight the flexible character of the agreement, resulting from the fact that it 'is based on the principle of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements"'.[94] Proof of this includes the provisions 'conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties'.[95] In this respect, by dwelling on Article XXIII of the GATT, the CJ made it clear that the Contracting Parties can adopt 'written recommendations or proposals which are to be "given sympathetic consideration", investigations possibly followed by recommendations, consultations between or decisions of the contracting parties, including that of authorizing certain contracting parties to suspend the application to any others of any obligations or concessions under the General Agreement and, finally, in the event of such suspension, the power of the party concerned to withdraw from that agreement'.[96] Significantly, the test of direct effect, examined in the preceding Chapters with respect to rules of EU law and their penetration in national legal orders, gives way to considerations centred exclusively on the dimension, political in the broad sense, of the GATT. This is the premise at the origins of what the CJ would affirm, in a more articulate manner, in its subsequent WTO jurisprudence, about the problem of the separation of judicial and executive powers when an international agreement is at stake.

[90] Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ L 8, 13 January 2009, 3.

[91] *Air Transport Association of America* (n 18).

[92] *International Fruit Company* (n 19), para 27.

[93] ibid, para 27.

[94] ibid, para 20.

[95] ibid, para 21.

[96] ibid, para 25.

The reasoning developed in *International Fruit Company* is endorsed by the CJ, albeit in less plain terms, again with reference to the GATT, in this case Article II (schedule of concessions), and again in the context of a preliminary ruling on validity, in the *Schlüter* judgment. In fact, there remains the identification of a structural link between direct effect and the conferral of a right, and also the reliance on a systematic and teleological interpretation of the agreement.[97]

Some two years after the *International Fruit Company*/*Schlüter* duo, the direct effect of (a rule of) an international agreement was recognized by the CJ in the *Bresciani* case.[98] This is the first case[99] in which the CJ extended the application of the doctrine of 'internal' direct effect to the external dimension of the relationship between EU law and international law. It was a question submitted by the Tribunal of Genoa for a preliminary ruling so that the CJ could directly rule on the effects, direct or otherwise, of the Association Agreement between the European Economic Community and the African States and Madagascar associated with that Community (Convention of Yaoundé). The extension of direct effect to international law is performed by the CJ in a bland manner, as evidenced by the absence of any reference to *Van Gend & Loos* in the judgment.

In *Bresciani*, it was 'simply' stated that 'Article 2 (1) of the Yaoundé Convention of 1963 confers on Community citizens the right, which the national courts of the Community must protect, not to pay to a Member State a charge having an effect equivalent to customs duties.'[100] The approach of the CJ has five distinctive features. First, the object of the domestic proceedings, unlike in *International Fruit Company* and *Schlüter*, was a challenge to national legislation (in this case, Italian). No EU law provisions were cited. Secondly, the interpretation of Article 2(1) of the Yaoundé Convention was systematic and teleological, in line with the type of interpretation made by the CJ on 'internal' direct effect, whereby it was written that 'regard must simultaneously be paid to the spirit, the general scheme and the wording of the Convention',[101] as well as with part of the reasoning carried out in *International Fruit Company*. Thirdly, an assessment, although rather superficial, was made as to the existence of an individual right deriving from Article 2(1). Indeed, the conferral of that right was the backbone of the CJ's thinking on direct effect, as already made clear in both *International Fruit Company* and *Schlüter*. Fourthly, attention was drawn to several provisions of the EEC Treaty, including Article 13 on customs duties and charges having equivalent effect, which are reflected and referred to in the Convention.[102] Fifthly, the fact that, as the CJ argued, there is an 'imbalance between the obligations assumed by the Community towards the Associated States, which is inherent in the special nature of the Convention', did not imply that its provisions were deprived of direct effect.[103]

In the aftermath of *Bresciani*, although the referring courts or the parties had explicitly mentioned the matter of direct effect, the CJ at first tended to bypass such issue by interpreting the international provision so as to avoid a conflict with European law. This occurred in *Nederlandse Spoorwegen*[104] and, especially, in *Polydor*. *Polydor* is about the interpretation of Articles 14 and 23 of the Agreement concluded on 22 July 1972 between the European

[97] CJ, *Schlüter*, 9/73, EU:C:1973:110, paras 27–30.

[98] CJ, *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze*, 87/75, EU:C:1976:18.

[99] A von Bogdandy and M Smrkolj, 'European Union Law and International Law' in *Max Planck Encyclopedia of Public International Law*, February 2011, at <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e620?rskey=jIgrVs&result=3&prd=OPIL>, accessed 25 October 2025, para 11, note that at the time the CJ was generous in attributing direct effect to international agreements.

[100] *Bresciani* (n 98), para 26.

[101] ibid, para 16.

[102] ibid, paras 6–7, 15, 17, 19, 21–22, 25.

[103] ibid, para 23.

[104] CJ, *Nederlandse Spoorwegen*, 38/75, EU:C:1975:154.

Economic Community and the Portuguese Republic.[105] Here the Court, seized pursuant to Article 267 TFEU by the Court of Appeal of England and Wales, excluded the application of the exhaustion doctrine of industrial and intellectual property rights to that Agreement. This stance was taken despite the fact that direct effect was at the heart of the submissions of the parties, the intervening States, the Commission, and the referral by the UK Court, and despite the similarities of some of its provisions to those of the EEC Treaty.[106] The Court did so also highlighting that the Agreement, differently from the EEC Treaty, does not aim at establishing a domestic market. No reference is made anywhere in the judgment to the possible enforceability of Articles 14 and 23 and/or to the conferral of rights originating from those provisions.

The approach adopted by the CJ in *Polydor* could be explained as it follows: if the Court had recognized direct effect to rules with characteristics similar to directly effective EU rules, in a dispute between private companies concerning the alleged infringement of copyright, it would have had to admit direct effect in horizontal disputes.[107] The issue, of horizontal direct effect, was problematic at the time, as it is today, and still remains unresolved in systematic terms with respect to international agreements, as it is partially also with respect to other sources of EU law.[108]

Polydor is followed by an abundant case law, beginning with a preliminary ruling related to the interpretation of another Association Agreement, ie, the *Pabst* case.[109] In this case, the CJ received a reference stemming from the *Finanzgericht* of Hamburg on the interpretation of Article 53(1) of the Agreement establishing an Association between the European Economic Community and Greece. The Court stated that that provision 'precludes a national system of relief from providing more favourable tax treatment for domestic spirits than for those imported from Greece'.[110] The reasoning of the Court revolves around six key points, some of which confirmed the previous case law, especially *Bresciani*, while others marked an evolution. First, the CJ focused on an interpretation related to the 'objective' and 'nature' of the Association Agreement, in line with the teleological interpretation employed in *Bresciani*.[111] Secondly, the reasoning on the direct effect of Article 53(1) builds upon the directly effective character of Article 95 of the EEC Treaty, currently Article 114 TFEU. Even though the Association Agreement with Greece did not include express references to Community law provisions, unlike the Yaoundé Convention in *Bresciani*, the CJ highlighted the similarity between Article 53(1) of the Association Agreement and Article 95 of the EEC Treaty inasmuch as the former provision 'fulfil[led], within the framework of the Association Agreement', the same function of the latter, forming part of a group of provisions the purpose of which was to introduce, several measures 'for the gradual adjustment to the requirements of Community law' to the Greek legal system.[112] Thirdly, unlike *Bresciani*, there is no reference to the conferral of an individual right. Here began, from this case onwards, the Court's wavering attitude regarding the conferral of rights, in some cases explicitly associated with direct effect, in others not even referred to. Fourthly, there appears, for the first time in relation to the direct effect of international agreements, the well-known, and

[105] CJ, *Polydor*, 270/80, EU:C:1982:43.

[106] The existence of similarities between EU directly effective provisions and provisions of international organizations does not necessarily imply that the latter are directly effective as well, as noted by Schütze (n 77) 186. This depends on the nature of the agreement, as a whole, rather than on the specific provision(s) at hand. See also J Boulouis, 'Le droit des Communautés européennes dans ses rapports avec le droit international général' in (1992) 235 Recueil des cours 13–79, 77.

[107] As remarked by Mendez (n 5) 99.

[108] On horizontal direct effect of EU law, *today*, see extensively Gallo, *Direct Effect* (n 69) 181–246.

[109] CJ, *Pabst*, 17/81, EU:C:1982:129.

[110] ibid 27.

[111] ibid 27.

[112] ibid, para 26.

controversial,[113] test on direct effect insofar as Article 53(1) was considered a provision containing 'a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.'[114] A test which has two seemingly overlapping elements[115] and seems to revolve only around the condition of unconditionality. Fifthly, the CJ referred to direct applicability rather than to direct effect for both Article 95 of the EEC Treaty and Article 53(1) of the Association Agreement. On the relationship between direct effect and direct applicability, too, the Court is ambiguous, as it will be in later rulings. Sixthly, the CJ affirmed that 'all measures conflicting' with Article 53(1) had 'to be abolished.' The remedy of disapplication, here like in most of the subsequent case law, has no relevance, unlike in the EU case law on 'internal' direct effect, as is well known.

B. The developments in the *Kupferberg* judgment

The *Kupferberg* case concerns a preliminary question raised by the *Bundesfinanzhof* on the interpretation of Article 21 of the Agreement of 1972 between the EEC and the Portuguese Republic. At stake was a challenge against a national tax law. The case is particularly important because the CJ, for the first time, focused its analysis and the answer to the questions posed by the referring judge on the direct effect of Article 21, recognizing it in opposition to the intervening States and AG Rozès.[116] As seen in relation to *Pabst*, the judgment, on the one hand, stands in continuity with the previous case law, while on the other, it is the origin of six developments, which would go on to guide subsequent case law. Continuity is discernible for three reasons. First of all, reference is made to the ability of Article 21 to produce direct effect because of its precise and unconditional nature.[117] Secondly, in addition to the notion of direct effect, that of direct applicability is employed, with identical meaning.[118] Thirdly, interpretation is systematic, contextual, and teleological. The CJ considers that attention must be paid to the 'subject-matter',[119] 'purpose',[120] 'nature',[121] 'structure',[122] 'object',[123] and 'context'[124] of the Agreement.

On the other hand, as anticipated, there are six developments stemming from *Kupferberg*. First, for the first time, the CJ emphasizes the need for a uniform interpretation of the Agreement. In fact, it is written in the judgment that it is for the Court, 'within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community'.[125] In this sense, the Court made it clear that, in the absence of express indications in the Agreement as to its legal effects, it is for the Court to regulate said legal effects.[126] Secondly, for the first time, the existence of a 'special institutional framework for consultations and negotiations *inter se* in relation to the implementation of the agreement' is not sufficient in itself to exclude 'any judicial application of that

[113] On such test see, recently, Gallo, *Direct Effect* (n 69) 87–92.
[114] *Pabst* (n 109), para 26.
[115] Accordingly, see Van Waeyenberge and Pecho (n 72) 754, who noted that there is no difference between 'clarity' and 'precision' and that the case law is generally not clear.
[116] See Opinion of AG Rozès of 5 May 1982, *Kupferberg* (n 24), 104/81, EU:C:1982:137. On this matter see the reflections by Eeckhout (n 2) 336.
[117] *Kupferberg* (n 24), paras 10 and 23.
[118] ibid, para 21.
[119] ibid, para 18.
[120] ibid, para 23.
[121] ibid, para 22.
[122] ibid, para 22.
[123] ibid, para 23.
[124] ibid, para 23.
[125] ibid, para 14.
[126] ibid, para 17.

agreement',[127] thus also its direct effect. At the same time, the recognition of direct effect 'does not adversely affect the powers' conferred by the agreement on bodies, such as the joint committees provided for in the Agreement with Portugal, which can make recommendations and take decisions.[128] Thirdly, not even the existence of derogations in the Agreement that allow the Parties to derogate from some of its rules 'in specific circumstances and as a general rule after consideration in the Joint Committee in the presence of both Parties' is 'sufficient in itself' to preclude the direct effect of some of the Agreement's provisions.[129] Fourthly, for the first time, the CJ is confronted with the risks associated with the lack of reciprocity in the implementation of the Agreement, should direct effect be affirmed by the CJ but denied by the courts of the States Parties.[130] Fifthly, like *Pabst*, but unlike *Bresciani*, there are no references in *Kupferberg* to the conferral of rights as a precondition for direct effect. Sixthly, the CJ, once having clarified that the test for direct effect is to be made only if there are no clear indications, one way or the other, in the agreement, envisaged a 'two-stage test'.[131] The first step takes the form of a global 'policy' assessment of the agreement,[132] by means of an interpretation, as seen above, related to the intention of the Contracting Parties and the purposes of the agreement.[133] The second step aims to investigate the nature of the specific provision whose direct effect is at issue.[134]

C. The refinements related to association/partnership/cooperation agreements, as well as to the GATT, and the *Fediol*/*Nakajima* doctrine(s)

Two strands of judgments can be identified in the subsequent case law—but prior to the jurisprudence related to the WTO agreements to which a specific analysis is devoted later in this section.

The first strand (i), concerning association, partnership, and cooperation agreements as well as the GATT, is characterized by a confirmation of the reasoning and arguments developed in the CJ's previous case law. There are a few exceptions, such as some interpretive preliminary rulings of the early eighties about the effects of the GATT, in which no reference was made to the doctrine of direct effect.[135] In the majority of cases, however, the CJEU, in more or less incidental terms,[136] often[137] but not always[138] reiterating the direct effect/conferral of a right nexus, maintained the previous dichotomy: on the one hand, it systematically attributes direct effect to partnership, cooperation, and association agreements,[139] frequently

[127] ibid, para 20.
[128] ibid, para 19.
[129] ibid, para 21.
[130] ibid, para 18.
[131] In these terms see Schütze (n 21) 51.
[132] Schütze (n 21) 52, speaks of a 'policy test' in relation to the intention of the parties.
[133] *Kupferberg* (n 24), paras 11–22.
[134] ibid, paras 23–27.
[135] See CJ, *SIOT*, 266/81, EU:C:1983:77; CJ, *Singer and Geigy*, joined cases 290–291/81, EU:C:1983:79. More recently see CJ, *Commission v Germany* (n 18), on which see the observations by S Gáspár-Szilágyi, 'The "Primacy" and "Direct Effect" of EU International Agreements' (2015) 21 European Public Law 343, 363.
[136] For cases containing a mere reliance on previous direct effect see CJ, *Hallouzi-Choho*, C-126/95, EU:C:1996:368; CJ, *Kus*, C-237/91, EU:C:1992:527. For cases where, although direct effect is not even mentioned, there is a reference to a preclusion of national law see CJ, *Administration des Douanes et Droits Indirects v Léopold Legros and Others*, C-163/90, EU:C:1992:326, paras 22–27.
[137] eg *Demirel* (n 48), para 24.
[138] eg CJ, *Deutscher Handballbund*, C-438/00, EU:C:2003:255.
[139] eg *Demirel* (n 48), para 14; *Hallouzi-Choho* (n 136), paras 19–20; *Kziber* (n 63), paras 15–23; CJ, *Zoubir Yousfi v Belgian State*, C-58/93, EU:C:1994:63, paras 16–19; CJ, *Pissouri*, C-432/92, EU:C:1994:277, paras 23–27; CJ, *Krid*, C-103/94, EU:C:1995:97, paras 21–24.

overlapping it with direct applicability,[140] on the other hand, in an equally systematic manner, it denies direct effect with respect to the GATT.[141]

There are three developments in the pre-WTO strand of rulings. The first is the *Sevince* judgment,[142] and the subsequent rulings that refer to it,[143] where it was stated that the provisions contained in the decisions of the Council for the conclusion of the agreement can have direct effect if they 'satisfy the same conditions as those applicable to the provisions of the Agreement'.[144] The reasoning used with regard to international agreements is therefore extended to the decisions of the entities established by those agreements, including dispute settlement bodies.

The second development lies in the *Germany v Council* judgment, in which, for the first time, the CJ had to reflect on direct effect, international agreements, and the challenging of EU law by a Member State pursuant to Article 263 TFEU (rather than a request for a preliminary ruling pursuant to Article 267 TFEU). At stake was the request for annulment by Germany of Title IV and Article 21(2) of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas[145] in the light of the GATT. The Court concluded that the direct effect of the international agreement was a condition, not only to challenge Member States' legislation, as stated in the previous case law, but also to allow a Member State to request the legality review of EU acts. The critical points, still today, also considering the reiteration of this approach in subsequent case law, are precisely these two: first, is it acceptable to make the recognition of direct effect a condition for an annulment action under Article 263 TFEU? Secondly, is the CJ entitled to deny, by virtue of an interpretation regarding the 'spirit' and 'general scheme' of the agreement, such recognition based on a narrow conception of direct effect, where the conferral of a right is its *condicio sine qua non*?

According to the CJ, with reference to the GATT, both the denial of a conferral of a right and the flexibility underpinning the agreement's obligations based on the principle of negotiations and on reciprocal arrangements 'preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State under the first paragraph of Article 173 of the Treaty [currently Article 263 TFEU]'.[146] Referring to the detailed analysis in the following section, it must be anticipated here that the CJ's reconstruction is problematic and presents several serious loopholes. On the one hand, it is difficult to understand why direct effect, which is not a prerequisite for challenging EU secondary law under Article 267 TFEU or Article 263 TFEU in the light of EU primary law, should instead be such a prerequisite where the legal basis for the challenge is an international agreement. On the other hand, even if it were to be accepted that direct effect is a necessary condition, it is difficult to understand why direct effect should be interpreted narrowly rather than broadly, whereby 'broadly' means encompassing legality review in the absence of a conferral of a right stemming from an international agreement.[147]

The third development is that the direct effect test described above, consisting of a first stage centred on the agreement as a whole and a second stage related to the specific provision(s) of the agreement, while often replicated, in some cases is carried out in inverted

[140] eg *Sevince* (n 8), para 26.
[141] CJ, *Germany v Council*, C-280/93, EU:C:1994:367, paras 103–12; *Chiquita Italia* (n 82), paras 26–29.
[142] *Sevince* (n 8), para 14.
[143] eg CJ, *Eroglu*, C-355/93, EU:C:1994:369, paras 11 and 17.
[144] *Sevince* (n 8), para 14.
[145] Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas, OJ L 47, 25 February 1993, 1.
[146] *Germany v Council* (n 141), para 109.
[147] See also Section VIII of this Chapter.

terms.[148] Thus, the CJ happened to reason first about the specific provision and then about the agreement as a whole, with the consequence, evidently, of distorting the test. Indeed, as pointed out by F. G. Jacobs, 'it seems that it would make little sense to analyse the provision and conclude that it is apt to have direct effect, but then to deny that conclusion on the ground that the agreement as a whole is not apt to have such effect'.[149] In this respect, the reading of the judgments in which the CJ chooses to invert the phases of the test makes it clear that the reasoning on the object and purpose of the agreement supports and confirms the crucial reasoning on clarity, precision, and unconditionality. Indeed, the CJ, after verifying the presence of these conditions, regularly asks whether what it found 'is not contradicted by consideration of the purpose and the nature of the Agreement' of which the provision at stake 'forms part'.[150] Conversely, the test is not reversed, and thus the first step is the one related to the agreement as a whole, as far as the GATT is concerned. To be more precise, the Court focuses only on the overall analysis of the agreement, thus going no further than this first step, since none of its rules can be considered directly effective. Once the analysis on the first step has been concluded in negative terms, the analysis on the second step becomes unnecessary.

The second strand of rulings (ii) consists of the only two exceptions, labelled by Eeckhout as 'implementation principle',[151] to the rule that the GATT cannot be directly invoked before a court to challenge an EU act: the *Fediol*[152] and *Nakajima* cases.[153] Referring to Section V of this Chapter on the deeper nature, extent, and unexpressed potential of these rulings, as well as their relationship with broad direct effect, here we merely recall their general nature in a nutshell. According to the *Fediol* doctrine, the CJEU can review the legality of a Community/EU measure in the light of the GATT if the former refers to a precise provision of the latter. According to the *Nakajima* doctrine, such review can be conducted if the Community/EU legislature intends to implement a particular GATT obligation.[154] The effect in both cases, therefore, seems to be a (bizarre) middle ground between direct and indirect effect. While it could be said that formally it is not direct because the CJ says so—although *de facto* this is open to criticism as will be shown below in Sections V and VIII—, it is not even indirect effect because Community/EU law, instead of being subject to a consistent interpretation in the light of the GATT, is possibly reviewed and annulled.

[148] See, for instance, *Kziber* (n 63), paras 15–29.

[149] FG Jacobs, 'Direct Effect and Interpretation of International Agreements in the Recent Case Law of the European Court of Justice' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations* (CUP 2008) 13–33, 32.

[150] Amongst others, see CJ, *Nour Eddline El-Yassini, v Secretary of State for Home Department*, C-416/96, EU:C:1999:107, para 28.

[151] Eeckhout (n 26) 189–204.

[152] *Fediol* (n 11).

[153] *Nakajima* (n 11).

[154] For an early ruling following the two doctrines see *Germany v Council* (n 141), para 111. On *Fediol* and *Nakajima* and their aftermath, see F Castillo de la Torre, 'Anti-dumping Policy and Private Interest' (1992) 17 European Law Review 346; A González and N Luis, 'Nuevos desarrollos en la aplicación del GATT' (1992) 19 Revista de Instituciones Europeas 195; P Egli and J Kokott, 'Portuguese Republic v Council of the European Union (Judgment). Case C-149/96' (2000) 94 American Journal of International Law 740; S Peers, 'WTO Dispute Settlement and Community Law' (2001) 26 European Law Review 605; GA Zonnekeyn, 'The Latest on Indirect Effect of WTO Law in the EC Legal Order: The Nakajima Case Law Misjudged?' (2001) 4 Journal of International Economic Law 597; GA Zonnekeyn, 'The CJEU's Petrotub Judgment: Towards a Revival of the "Nakajima Doctrine"?' (2003) 30 Legal Issues of Economic Integration 249; JF Delile, 'A propos de l'arrêt Vereniging Milieudefensie: la seconde naissance de l'invocabilité *Nakajima*' (2012) 48 Cahiers de droit européen 687; S Gáspár-Szilágyi, 'The Relationship between EU Law and International Agreements: Restricting the Application of the *Fediol* and *Nakajima* Exceptions in Vereniging Milieudefensie' (2015) 52 Common Market Law Review 1059; K Stoyanov, 'Three Decades of the "Nakajima" Doctrine in EU Law: Where Are We Now?' (2021) 24 Journal of International Economic Law 724; T Perišin and E Antonakin, 'Judicial Review of EU Measures in the Light of WTO Rules: *Fediol* and *Nakajima*' in Butler and Wessel (eds) (n 3) 183–93.

V. THE WTO AGREEMENTS AND THE SYSTEMATIC DENIAL OF DIRECT EFFECT

The systematic denial of the direct effect of the GATT 1947 is confirmed by the CJEU in its jurisprudence concerning the challenge of both national law (via preliminary rulings proceedings on interpretation pursuant to Article 267 TFEU)[155] and EU law (via preliminary rulings proceedings on validity pursuant to Article 267 TFEU and annulment proceedings pursuant to Article 263 TFEU)[156] on the basis of the WTO agreements, to which both Member States and the EU are parties, as is well known. Such denial goes through the use of the direct effect test, which, as occurred in the context of the GATT 1947, follows the original trend, that is, first, the assessment on the nature and the broad logic of the agreement, secondly, if the first step is successfully met, the evaluation of its specific provisions.[157] This second step, however, has never been taken by the CJEU. The two-fold circumstance that the WTO regime has a more developed institutional structure and a more advanced dispute settlement system, characterized by 'many compulsory elements',[158] does not lead the CJ and the GC to attribute direct effect to the WTO agreements[159] and to the decisions of the Dispute Settlement Body (DSB), which cannot be distinguished from the WTO rules that are interpreted in the DSB's reports.[160] Such an effect is excluded from *Portugal v Council*

[155] eg *Chiquita Italia* (n 82).

[156] As for preliminary rulings on validity, see, amongst others, CJ, *Omega Air*, joined cases C-27/00 and C-122/00, EU:C:2002:161. As for judgments *ex* art 263 TFEU see, amongst others, *Portugal v Council* (n 51).

[157] eg CJ, *C & J Clark International*, joined cases C-659/13 and C-34/14, EU:C:2016:74, para 84.

[158] The term is borrowed from S Gáspár-Szilágyi (n 26) 170.

[159] On the lack of direct effect of WTO agreements see, *inter alia*, *Portugal v Council* (n 51), paras 34–52; CJ, *Parfums Christian Dior and Others*, joined cases C-300/98 and C-392/98, EU:C:2000:688, paras 41–44; CJ, *Netherlands v European Parliament and Council*, C-377/98, EU:C:2001:523, para 52; *Omega Air* (n 156), paras 89–97. For further reading see, in the huge literature, amongst those who have a supporting view of the CJ's approach, ELM Volker, 'The Direct Effect of International Agreements in the Community's Legal Order' (1983) 10 Legal Issues of Economic Integration 131; Eeckhout (n 34); J Trachtman, 'Bananas, Direct Effect and Compliance' (1999) 10 European Journal of International Law 655; A Rosas, 'Case Annotation on Case C-149/96, Portugal v Council, Judgment of the Full Court of 23 November 1999' (2000) 37 Common Market Law Review 797; A Rosas, 'Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective' (2001) 4 Journal of International Economic Law 131; P Mengozzi, 'Les droits et les intérets des entreprises, le droit de l'OMC et les prérogatives de l'Union européenne: vers une doctrine communautaire des "political questions"' (2005) 9 Revue du droit de l'Union européenne 229; A Antoniadis, 'The European Union and WTO Law: A Nexus of Reactive, Coactive, and Proactive Approaches' (2007) 6 World Trade Review 45; A Arcuri and S Poli, 'What Price for the Community Enforcement of WTO Law?' EUI Working Papers, Law 2010/01, 2010, at <https://cadmus.eui.eu/handle/1814/13534>, accessed 25 October 2025; Eeckhout (n 2) 343–65; Mendez (n 5) 202–49; P Eeckhout, 'The Application of International Law by the Court of Justice of the European Union' in CA Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019), 79–98. Criticism is made by many others, amongst whom see E-U Petersmann, 'Proposals for a New Constitution for the European Union: Building-Blocks for a Constitutional Theory and Constitutional Law of the EU' (1995) 32 Common Market Law Review 1123; JM Beneyto, 'The EU and the WTO. Direct Effect of the New Dispute Settlement System?' (1996) 10 Europäische Zeitschrift für Wirtschaftsrecht 295; M Bronckers and P Kuijper, 'WTO Law in the European Court of Justice' (2000) 37 Common Market Law Review 1313; S Griller, 'Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/96, Portugal v Council' (2000) 3 Journal of International Economic Law 441; S Peers, 'Fundamental Right or Political Whim? WTO Law and the European Court of Justice' in G de Búrca and J Scott (eds), *The EU and the WTO: Legal and Constitutional Aspects* (Hart 2001) 111–30; A Ott, 'Der EuGH and das WTO Recht: Die Entdeckung der politischen Gegenseitigkeit—altes Phänomen oder neuer Ansatz?' (2003) 3 Europarecht 504; M Bronckers, 'The Effect of the WTO in the European Court Litigation' (2005) 40 Texas International Law Review 443; D De Mey, 'Recent Developments on the Invocability of WTO Law in the EC: A Wave of Mutilation' (2006) 11 European Foreign Affairs Review 63; M Bronckers, 'The Relationship of the EC Courts with Other International Tribunals: Non-Committal, Respectful or Submissive?' (2007) 44 Common Market Law Review 601; M Bronckers, 'The Domestic Law Effect of the WTO in the EU – A Dialogue with Jacques Bourgeois' in I Govaere, R Quick and M Bronckers (eds), *Trade and Competition Law in the EU and Beyond* (Edward Elgar 2011) 240–56.

[160] As foreseen in *FIAMM* (n 38), paras 128–29. On the lack of direct effect of the DSB's decisions see GC, *Fruchthandelsgesellschaft Chemnitz*, T-254/97, EU:T:1999:178, paras 28–30; CJ, *Atlanta*, C-104/97 P, EU:C:1999:498, para 20; CJ, *Van Parys*, C-377/02, EU:C:2005:121, paras 38–48; GC, *Cordis Obst*, T-18/99, EU:T:2001:95, paras 44–60; GC, *Bocchi Food Trade International GmbH*, T-30/99, EU:T:2001:96, paras 49–65; GC, *T. Port GmbH*, T-52/99, EU:T:2001:97, paras 44–60; GC, *Internationale Fruchtimport Gesellschaft Weichert*, joined cases T-64-65/01, EU:T:2004:37, paras 139–42. In the literature see N Lavranos, 'Die Rechtswirkung von WTO Panel Reports im Europäischen Gemeinschaftsrecht sowie im deutschen Verfassungsrecht' (1999) 34 Europarecht 289–308; GA Zonnekeyn, 'The Legal Status of WTO Panel Reports in the EC Legal Order. Some Reflections on the Opinion of Advocate General Mischo in the Atlanta Case' (1999) 2 Journal of International Economic Law 713; GA Zonnekeyn, 'The Status of Adopted Panel and Appellate Body Reports in the European

onwards. In *Portugal v Council*, it is written that the WTO agreements 'are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the [Union] institutions' due to their nature and structure.[161] Additionally, in the very same judgment, as stated with respect to the GATT 1947, the CJ clarified[162] that the only exceptions, also with respect to the WTO agreements, are those outlined in *Fediol* and *Nakajima*. Furthermore, these exceptions are interpreted by the CJ in a very restrictive manner. In practice, while *Fediol* has never been successfully applied so far, the *Nakajima* doctrine has been applied (only) in respect of the anti-dumping regulation adopted to comply with the obligations of Article VI of the GATT and the GATT Anti-Dumping Code adopted for the implementation of that Article.[163]

At the core of the reluctance of the CJ to attribute direct effect to the WTO agreements lies its political character. Indeed, the CJ's reasoning, in respect to such agreements, confirms and develops the previous case law regarding the GATT 1947 by holding that the test of direct effect is ultimately political[164] since at its heart lies two closely interconnected principles: the separation of powers[165] and the institutional balance.[166] In fact, already in 2007, AG Ruiz-Jarabo Colomer had criticized in his opinion in *Merck* that the arguments of the CJEU prohibiting direct effect of WTO law 'belong rather to the political than the legal sphere'.[167] As observed by AG Ćapeta in her opinion in *KaiKai*, 'the reason for refusing, in principle, to recognise the direct effect of WTO law was not to deprive individuals of the possibility of relying on international agreements in court, but rather was aimed at allowing the EU institutions a political margin of manoeuvre'.[168]

In short, if the CJEU, in the case of actions for annulment under Article 263 TFEU and preliminary rulings on validity under Article 267 TFEU, and the national courts, in the case of domestic proceedings and/or interpretative preliminary rulings proceedings, had full freedom in reviewing the legality of EU law or national laws, respectively, the other institutional

Court of Justice and the European Court of First Instance' (2000) 34 Journal of World Trade 93; S Peers, 'W.T.O. Dispute Settlement and Community Law' (2001) 26 European Law Review 605; A Rosas, 'Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective' (2001) 4 Journal of International Economic Law 131; M Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on the WTO and Beyond' (2008) 11 Journal of International Economic Law 885; A Tancredi, 'On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order' in Cannizzaro, Palchetti and Wessel (eds) (n 3) 249–68; MQ Zang, 'Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement' (2017) 28 European Journal of International Law 273; Hadjiyianni (n 42).

[161] *Portugal v Council* (n 51), para 47.

[162] ibid, para 49.

[163] CJ, *Petrotub SA and Republica SA v Council of the European Union*, C-76/00 P, EU:C:2003:4, paras 52–63. The application of the *Fediol/Nakajima* doctrines has been explicitly excluded in the great majority of judgments, amongst which: CJ, *Biret*, 93/02 P, EU:C:2003:517, para 53; *Van Parys* (n 160), paras 41–54; *FIAMM* (n 38), para 112; CJ, *Ikea Wholesale Ltd*, C-351/04, EU:C:2007:547, paras 29–35; CJ, *Commission v Armenal*, C-21/14 P, EU:C:2015:494, paras 40–41; CJ, *Rotho Blaas*, C-207/17, EU:C:2018:840, paras 42–57.

[164] Klabbers (n 28) 264: international law's direct effect is 'inherently political'. See, for a global law perspective, T. Cottier, *A Theory of Direct Effect in Global Law*, in A von Bogdandy, PC Mavroidis, Y Mény (eds), *European Integration and International Co-ordination* (Kluwer 2002) 99.

[165] On this point see Schütze (n 77) 187. As affirmed by Oesch (n 9) 278, the matter 'boils down to the issue of separation of powers among the branches of government and, in particular, the proper role of courts in external trade relations'. See also T Cottier and KN Schefer, 'The Relationship between World Trade Organization Law, National and Regional' (1998) 1 Journal of International Economic Law 83, 120–22.

[166] On the EU, the principle of institutional balance, and international law see the critical remarks by P Eeckhout, 'Judicial Enforcement of WTO Law in the European Union—Some Further Reflections (2002) 5 Journal of International Economic Law 110; A Tancredi, 'EC Practice in the WTO: How Wide is the "Scope for Manoeuvre"?' (2004) 15 European Journal of International Law 933; Bronckers and Kuijper, 'WTO Law' (n 159) 1317–23; Tancredi (n 160). On the denial of direct effect based on a number of arguments and allegations regarding the relationships between EU institutions see, eg *Kupferberg* (n 24), paras 16–17. In general, on EU external relations law and the importance of balance of competences in the EU institutional framework see C Hillion, 'Conferral, Cooperation and Balance in the Institutional Framework of EU External Action' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Hart 2018) 117–74.

[167] CJEU, C-431/05, Opinion of AG Ruiz-Jarabo Colomer of 23 January 2007, *Merck Genéricos—Produtos Farmacêuticos Ld[a] v Merck & Co. Inc. and Merck Sharp & Dohme Ld[a]*, EU:C:2007:48.

[168] Opinion of AG Ćapeta of 13 July 2023, *KaiKai*, C-328/21 P, EU:C:2023:576, para 62.

actors responsible for the EU's international policy, above all the Council and the Commission, would be considerably limited in the exercise of their competences and, more fundamentally, of their discretion.[169] This could have a particularly negative impact if in the other WTO Contracting States direct effect was not admitted, as is in fact is the case in the US and Japan, amongst others. In other words, the CJ denied the direct effect of a complex multilateral legal system like the WTO to preserve the political discretion of the EU institutions in charge of steering the EU's trade external relations. As written in the literature, the CJEU chooses not to take over tasks that should be carried out, with great political flexibility, by other institutions.[170] A flexibility that allows the EU 'every latitude to resolve disputes with trading partners within the WTO framework'[171] through negotiation.[172] This flexibility, moreover, is less significant in the context of bilateral trade agreements, which frequently—as seen in the previous section—contain provisions identical or similar to those of the EU.[173] The *Fediol* and *Nakajima* exceptions do not call this reasoning into question because the CJEU considers them to be the result of the EU legislator's intention to limit its discretion as far as the application of WTO rules is concerned. This is the reason why the CJEU could review the legality of an EU measure and the measures taken to implement it in the light of the WTO agreements.[174]

In this sense, reciprocity, already the focus of *International Fruit Company*,[175] has become the core of the Court's approach. Indeed, the initial premise underlying the judges' reasoning is that 'some of the contracting parties, which are among the Community's most important trading partners, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law'.[176]

The CJ then recalls, citing paragraph 18 of the *Kupferberg* ruling, that lack of reciprocity is not *per se* associated with lack of direct effect.[177] However, when it comes to WTO agreements, which are based on 'reciprocal and mutually advantageous arrangements', the lack of reciprocity 'may lead to disuniform application of the WTO rules'.[178] Hence, 'to accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for *manœuvre* enjoyed by their counterparts in the Community's trading partners'.[179]

The logic behind the CJ's denial of direct effect is political, then, because in so doing it safeguards the allocation of powers and does not subvert the institutional balance underlying the external policies of the EU. On the other hand, there is a further rationale, also mostly political: the preservation of EU law when international law is invoked.[180] In other words, it is no coincidence that the recognition of direct effect, with respect to international agreements, is the rule when a measure of a Member State is challenged as opposed to when an

[169] On the matter of States' margin of appreciation see Hadjiyianni (n 42) 927.

[170] See Eeckhout (n 26) 375–78.

[171] Lenaerts, Van Nuffel and Corthaut (n 33) 701.

[172] On this matter see C Dordi, 'The Direct Effect of the Agreements Concluded by the EU: Some Inconsistencies in CJEU Case Law?' in C Dordi (ed), *The Absence of Direct Effect of WTO in the EC and in other Countries* (Giappichelli 2010) 1–11, 2–3. In this regard, von Bogdandy and Smrkolj (n 99), para 26, wrote that at the origins of the denial of direct effect by the CJ lies, along with the lack of reciprocity, 'the negotiability of WTO obligations'.

[173] This point is stressed by Eeckhout (n 26) 196.

[174] See also *Commission v Armenal* (n 163), para 40.

[175] *International Fruit Company* (n 19), para 21.

[176] *Portugal v Council* (n 51), para 43.

[177] ibid, para 44.

[178] ibid, para 45.

[179] ibid, para 46.

[180] For a critical appraisal see G Bebr, 'Agreements Concluded by the Community and Their Possible Direct Effect: From International Fruit Company to Kupferberg' (1983) 20 Common Market Law Review 35, 46.

EU act is challenged, as the WTO case law demonstrates.[181] This is an asymmetry that gives rise to perplexity and will be investigated in more detail, alongside the advantages and downsides of the CJEU's approach, in Section X.

VI. BEYOND THE WTO: THE AMBIVALENT JURISPRUDENCE ON BILATERAL AND MULTILATERAL AGREEMENTS

A. Recognizing direct effect to bilateral agreements

The EU case law on the WTO, which is particularly restrictive regarding the recognition of direct effect, has not affected the generally favourable attitude of the CJEU towards the direct effect of bilateral trade agreements, as well as of partnership, cooperation, and association agreements, including the decisions of the bodies established therein. In numerous judgments, the Court, reiterating the approach taken in its earlier case law, does indeed recognize direct effect[182] and does so often on the basis of an inverted test. Consequently, the rule, also confirmed by more recent practice, seems to be as follows: the test is, first, on the specific provision(s) whose direct effect is in question, then on the agreement, as a whole. An example is the *Simutenkov* case,[183] concerning a reference for a preliminary ruling on the interpretation of Article 23(1) of the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, on the one side, and the Russian Federation, on the other, of June 1994.

Under challenge in *Simutenkov* were several Spanish sporting rules which limited the number of players from non-Member countries who could be fielded in national competitions. In the ruling, the CJ considered it a priority to first verify compliance with the classic conditions regarding the clarity, precision, and unconditionality of Article 23, and then shifted the analysis to the agreement and found confirmation of the assessment made in relation to the specific provision(s) concerned. As already observed in relation to the pre-WTO era, this second part of the analysis on direct effect seems to be merely an aid for supporting the findings of the first part.[184]

The CJ, first of all, held that Article 23(1) of the Community-Russia Partnership Agreement 'lays down, in clear, precise and unconditional terms, a prohibition precluding any Member State from discriminating, on grounds of nationality, against Russian workers, vis-à-vis their own nationals, so far as their conditions of employment, remuneration and dismissal are concerned'.[185] As a matter of fact, the rule provides for a precise obligation to achieve a result and, 'by its nature, can be relied on by an individual before a national court as a basis for requesting that court to disapply discriminatory provisions without any further implementing measures being required to that end'.[186] Moreover, the CJ deemed that a certain margin of appreciation underlying the unconditionality inherent in Article 23(1) would not *per se* preclude the recognition of direct effect.[187] Subsequently, the CJ noted that the attribution of direct effect cannot be refuted by the nature and purpose of the Agreement. Indeed, Article 1 provides that the purpose 'is to establish a partnership between the parties with a view to promoting, *inter alia*, the development between them of close political

[181] In the opinion of von Bogdandy and Smrkolj (n 99), para 12, 'the policy dimension becomes apparent in the fact that the CJEU is more prone to attributing direct effect to an international agreement if the legality of a Member State measure is in question'.

[182] But see other judgments, such as *Asda Stores* (n 64), para 91.

[183] CJ, *Igor Simutenkov*, C-265/03, EU:C:2005:213. On the case and horizontal direct effect see Section IX.

[184] *Simutenkov*, ibid, paras 21–29.

[185] ibid, para 22.

[186] ibid, para 23.

[187] ibid, para 24. On this point see the remarks by Dordi (n 172) 6.

relations, trade and harmonious economic relations, political and economic freedoms, and the achievement of gradual integration between the Russian Federation and a wider area of cooperation in Europe'.[188] The Court observed that the fact that the agreement merely establishes a partnership between the parties, 'without providing for an association or future accession of the Russian Federation to the Communities, is not such as to prevent certain of its provisions from having direct effect'.[189] The Court was careful not to cite previous judgments in which the test was executed in the original order, that is, first the analysis of the agreement and then that of the specific provision, preferring other judgments in which the order of the assessment was the opposite, including *Gloszczuk* and *Wählergruppe Gemeinsam*.[190]

B. Denying direct effect to non-trade multilateral agreements

Beyond the WTO and the partnership, cooperation, and association agreements, the EU jurisprudence is characterized by a progressive closure to the recognition of direct effect and/or to the transposition of the *Fediol/Nakajima*-style legality review in non-trade-related areas. The most illustrative cases are the following[191]: (i) *Intertanko*, concerning the UNCLOS[192]; (ii) *Brown Bear*,[193] *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*,[194] *ClientEarth*,[195] *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*,[196] *North East Pylon Pressure Campaign Ltd*,[197] *LB*,[198] and *Societatea Civilă Profesională de Avocaţi Plopeanu & Ionescu*[199] concerning the Aarhus Convention; (iii) *Air Transport Association of America*, on the Air Transport Agreement between the European Community and the USA (the so-called 'Open Skies Agreement') and the Kyoto Protocol; (iv) *SCF*[200] and *Recorded Artists Actors Performers Ltd*,[201] on the 1996 World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty (WPPT), as well as *KaiKai*[202] on the Paris Convention for the Protection of Industrial Property and the Patent Cooperation Treaty (PTC).

In the case of *Intertanko*,[203] a preliminary reference was made by the High Court of Justice of England and Wales on the validity of Articles 4 and 5 of Directive 2005/35/EC on ship-source pollution and the introduction of penalties for infringements under

[188] *Simutenkov*, ibid, para 27.

[189] ibid, para 28.

[190] ibid, para 21. See CJ, *Gloszczuk*, C-63/99, EU:C:2001:488, paras 30–38, and CJ, *Wählergruppe Gemeinsam*, C-171/01, EU:C:2003:260, paras 54–67.

[191] See the overview in Mendez (n 5) 250–86.

[192] CJ, *Intertanko*, C-308/06, EU:C:2008:312.

[193] CJ, *Lesoochranárske zoskupenie VLK* (*Brown Bear*), C-240/09, EU:C:2011:125.

[194] CJ, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, joined cases C-401-403/12 P, EU:C:2015:4.

[195] CJ, *ClientEarth*, C-602/13 P, EU:C:2015:486.

[196] CJ, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987.

[197] CJ, *North East Pylon Pressure Campaign Limited*, C-470/16, EU:C:2018:185.

[198] CJ, *LB*, C-826/18, EU:C:2021:7.

[199] CJ, *Societatea Civilă Profesională de Avocaţi Plopeanu & Ionescu*, C-252/22, EU:C:2024:13, paras 76–78.

[200] CJ, *SCF*, C-135/10, EU:C:2012:140.

[201] CJ, *Recorded Artists Actors Performers Ltd*, C-265/19, EU:C:2020:677.

[202] CJ, *KaiKai*, C-382/21 P, EU:C:2024:172.

[203] See, *ex multis*, E Denza, 'A Note on Intertanko' (2008) 33 European Law Review 870; J González Giménez, 'Régimen comunitario de la contaminación por descargas procedentes de buques: la relación con las normas internacionales y la sentencia del TJCE sobre el asunto *Intertanko*' (2009) 13 Revista de Derecho Comunitario Europeo 915; J Makowiak, 'Spécificité de l'ordre juridique communautaire et pragmatisme de la Cour: ou comment lutter efficacement contre les pollutions maritimes' (2009) 3 Revue trimestrielle de droit européen 402; S Vezzani, 'Pacta sunt servanda? La sentenza della Corte di giustizia nell'affare Intertanko (caso C-308/06) e l'adattamento dell'ordinamento comunitario al diritto internazionale pattizio' (2009) 1 Studi sull'integrazione europea 233.

UNCLOS,[204] to which the Community, now the EU, was a party.[205] The reference was made in proceedings brought by a number of associations, including the International Association of Independent Tanker Owners (Intertanko), against the Secretary of State for Transport. There are three salient aspects of the ruling concerning the direct effect of UNCLOS. First, the review of legality under Article 267 TFEU presupposes that the provisions of UNCLOS are directly effective. Secondly, the test on direct effect first covers the agreement in its entirety, taking into account its nature and logic as 'disclosed in particular by its aim, preamble and terms',[206] and then the specific provision(s) that the applicants intend to invoke before the national court. Thus, it is the original test that is applied, rather than the inverted test used in part of the case law. Thirdly, the enquiry as to clarity, precision, and unconditionality is inextricably linked to the conferral of a right stemming from the UNCLOS. Indeed, the CJ stated, at first, that it can examine the validity of Community legislation in the light of an international treaty 'only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise'.[207] Afterwards, the Court, while recognizing that 'certain provisions of UNCLOS, such as Articles 17, 110(3) and 111(8), appear to attach rights to ships',[208] noted that it does not follow from this that those rights are 'conferred on the individuals linked to those ships, such as their owners, because a ship's international legal status is dependent on the flag State and not on the fact that it belongs to certain natural or legal persons'.[209] The Court, therefore, curiously draws a dividing line between natural persons and legal persons, the former being the only ones that should be taken into account regarding the attribution of direct effect. In so doing, the CJ excludes direct effect precisely because 'UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer on them rights or freedoms enforceable against States'.[210] The entire reasoning, however, seems to be centred on the enquiry into the agreement as a whole, given the statement of the CJ that 'it follows that the nature and the broad logic of UNCLOS prevent the Court from being able to assess the validity of a Community measure in the light of that Convention'.[211]

As to the Aarhus Convention,[212] the CJ denied, for the first time, the direct effect of some of its provisions, although not of the agreement in its entirety, in *Brown Bear*. This

[204] Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, OJ L 255, 30 September 2005, 11.

[205] The claimants in the domestic proceedings also claimed that the legality of the directive had to be assessed in the light of the International Convention for the Prevention of Pollution from Ships (MARPOL). The CJ responded in these terms: 'It is true that all the Member States of the Community are parties to Marpol 73/78. Nevertheless, in the absence of a full transfer of the powers previously exercised by the Member States to the Community, the latter cannot, simply because all those States are parties to Marpol 73/78, be bound by the rules set out therein, which it has not itself approved. Since the Community is not bound by Marpol 73/78, the mere fact that Directive 2005/35 has the objective of incorporating certain rules set out in that Convention into Community law is likewise not sufficient for it to be incumbent upon the Court to review the directive's legality in the light of the Convention' (paras 49–50).

[206] *Intertanko* (n 192), para 54.

[207] ibid, para 45.

[208] ibid, para 61.

[209] ibid, para 62.

[210] ibid, para 64.

[211] ibid, para 65.

[212] See E Chiti, 'EU Administrative Law in an International Perspective' in C Harlow, P Leino and G della Cananea (eds), *Research Handbook of EU Administrative Law* (Edward Elgar 2017) 545–71; L Ankersmit, 'An Incoherent Approach Towards Aarhus and CETA: The Commission and External Oversight Mechanisms' in I Govaere and S Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Hart 2019) 321–40; H Schoukens, 'Access to Justice before EU Courts in Environmental Cases against the Backdrop of the Aarhus Convention: Balancing Pathological Stubbornness and Cognitive Dissonance?' in C Voigt (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (CUP 2019) 74–118; G de Búrca, C Kilpatrick and J Scott, 'Questioning the EU's "principled openness" to International Law: An Examination of the Court's Reception of the Aarhus Convention and the Convention on the Rights of Persons with Disabilities' in M Claes and E Vos (eds), *Making Sense of European Union Law* (Hart 2022) 3–18.

case concerned an environmental association's request to be a 'party' to the administrative proceedings relating to the granting of derogations to the system of protection for species such as the brown bear, access to protected countryside areas, or the use of chemical substances in such areas. To be more precise, in its interpretive preliminary ruling, the Court denied that Article 9(3) was directly effective and could then be invoked to challenge a decision to derogate from a system of environmental protection, such as that put in place by the Council Directive 92/43/EEC of 21 May 1992[213] on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive'),[214] as confirmed in *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*,[215] as well as in *Protect Natur, Arten- und Landschaftsschutz Umweltorganisation*,[216] *North East Pylon Pressure Campaign Ltd*,[217] and *LB*.[218] In other rulings, other provisions of the Aarhus Convention were deemed deprived of direct effect, such as Articles 4(1) and (4)(c) (*ClientEarth*),[219] Article 9(2) (*LB*),[220] Article 9(4) (*North East Pylon Pressure Campaign Ltd*[221]), and Article 9(5) (*Societatea Civilă Profesională de Avocați Plopeanu & Ionescu*)[222].

The *Brown Bear* ruling, whose argumentative core is often reproduced/echoed in later case law, complicates matters when it comes to identifying the main elements for specifying the content and extent of direct effect. First of all, references to the conferral of a right as a precondition for the legality review disappear altogether. Moreover, the CJ, on the one hand, moved from the assumption enshrined in many previous judgments, according to which direct effect—or rather, in the CJ's wording, direct applicability—[223] exists if a provision 'contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure', 'regard being had to its wording and to the purpose and nature of the agreement'.[224] On the other hand, the Court completely overlooked this second aspect. Arguably, this is because, once unconditionality has been ruled out on the grounds that 'only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in Article 9(3)' and, thus, serving 'a subsequent measure', there is no need to reason about the agreement as a whole.[225] The problem with this approach is that it does not give due consideration to the fact that, unlike many other multilateral agreements, such as the WTO, the Aarhus Convention is not based on reciprocal and mutually beneficial rules. Nor does the Court accord appropriate weight to the fact that the Convention is 'the expression of a human right to the environment'.[226] It is a Convention, therefore, which has little in common with the WTO and which, nevertheless, the CJ considers in the same way as the latter, although the reasoning relates completely to the individual provisions rather than to the agreement as a whole. But there is more. Not only has the Convention, to date, been held to lack direct effect, with

[213] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22 July 1992, 7.
[214] *Brown Bear* (n 193), para 52.
[215] *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (n 194), para 55.
[216] *Protect Natur, Arten- und Landschaftsschutz Umweltorganisation* (n 196), para 45.
[217] *North East Pylon Pressure Campaign Ltd* (n 197), para 52.
[218] *LB* (n 198), para 69.
[219] *ClientEarth* (n 195), para 40.
[220] *LB* (n 198), para 52.
[221] *North East Pylon Pressure Campaign Ltd* (n 197), para 52.
[222] *Societatea Civilă Profesională de Avocați Plopeanu & Ionescu* (n 199), paras 76–78.
[223] On the merging of these two concepts in respect to international law see Sections II and X of this Chapter.
[224] *Brown Bear* (n 193), para 44.
[225] *Intertanko* (n 192), para 45.
[226] Opinion of AG Jääskinen of 8 May 2014, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, Joined Cases C-401/12 P to C-403/12 P, EU:C:2014:310, paras 88–89.

reference to some of its most innovative provisions for the protection of the subjective prerogatives connected with the protection of the environment. In addition, the CJ has also excluded, without further elaboration, in a number of cases, that the *Fediol* and *Nakajima* doctrines could be used in connection with the Aarhus Convention. It did so by emphasizing, in this respect, the peculiarities of the WTO and the special, unexplained, exclusive connection of both doctrines to the latter agreement.[227]

With regard to the Open Skies Agreement and the Kyoto Protocol, the most notable case is the *Air Transport Association of America* judgment,[228] which involved a reference for a preliminary ruling relating to some provisions of some international agreements regarding aviation. The applicants (Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., and United Airlines Inc.) relied upon these agreements to challenge both a measure adopted by the UK and the validity of Directive 2008/101/EC,[229] inasmuch as it includes aviation in the scheme for greenhouse gas emission allowance trading under Directive 2003/87. The CJ, first of all, remarked that the EU is bound by Article 2(2) of the Kyoto Protocol and Articles 7, 11(2)(c), and 15(3) of the Open Skies Agreement, but not by the Convention on International Civil Aviation (the so-called 'Chicago Convention') since 'the powers previously exercised by the Member States in the field of application of the Chicago Convention have not to date been assumed in their entirety by the EU'.[230] Secondly, the Court referred to the test on direct effect in order to verify whether a legality review can be made and did so by reaffirming the classic two-stage assessment on the 'nature and the broad logic' of the agreement and, subsequently, 'where the nature and the broad logic of the treaty in question permit the validity of the act of European Union law to be reviewed in the light of the provisions of that treaty', on the characteristics of the provision(s) of the agreement. In this respect, the question to be asked is whether clarity, precision, and unconditionality are fulfilled.[231] As for the Open Skies Agreement, the CJ's answer was affirmative because it contains rules which are 'designed to apply directly and immediately to airlines and thereby to confer upon them rights and freedoms' and the nature and the broad logic of the agreement do not preclude such conferral.[232] At the core of the reasoning, therefore, lies the attribution of rights, which should be inferable from the agreement as a whole and from the specific provisions that are invoked before the judiciary.

As for the Kyoto Protocol, following the same type and order of assessment, the CJ instead[233] denied direct effect of the provision at hand, ie Article 2(2). According to the Court, an interpretation of the objectives of the Kyoto Protocol leads to the conclusion that the latter allows certain Contracting Parties, which are undergoing the process of transition to a market economy, a certain degree of flexibility in the implementation of their commitments. Moreover, the Conference of the Parties, established by the Framework Convention, 'is responsible for approving appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of the protocol'.[234] This means that the Parties to the Protocol 'may comply with their obligations in the manner and at the speed upon which they agree'.[235] From this flows a significant degree of flexibility left to the domestic authorities. In particular, Article 2(2) of the Kyoto Protocol provides that the Parties thereto must limit their

[227] eg *ClientEarth* (n 195), para 38.
[228] See also Section VI of this Chapter on the case and customary law.
[229] Directive 2008/101/EC (n 90), 3.
[230] *Air Transport Association of America* (n 18), para 71.
[231] *Intertanko* (n 192), paras 53–55.
[232] ibid, para 84.
[233] ibid, paras 73–78.
[234] ibid, para 75.
[235] ibid, para 76.

emissions of certain greenhouse gases from aviation bunker fuels thanks to cooperation with the International Civil Aviation Organization (ICAO). Hence, in the opinion of the Court, that provision, as regards its content, 'cannot in any event be considered to be unconditional and sufficiently precise so as to confer on individuals the right to rely on it in legal proceedings in order to contest the validity of Directive 2008/101'.[236]

As for the case law on intellectual property rights, the reasoning on the effects of the WPPT was briefly developed in *SCF* in respect to its Article 23(1). That provision requires the Contracting Parties 'to adopt, in accordance with their legal systems, the measures necessary to ensure the application'[237] of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), that is of a WTO agreement whose direct effect had already been excluded.[238] Hence, direct effect was denied by the CJ since the provisions of the WPPT, being subject to the adoption of subsequent measures, were 'not such as to create rights for individuals which they may rely on before the courts by virtue of that law'.[239] As regards *Recorded Artists Actors Performers Ltd*, the CJ observed that private parties, such as performers or their collecting societies, could not rely directly on Article 15(3) of the WPPT due to its lack of unconditionality.[240] Finally, in *KaiKai* the CJ, differently from AG Ćapeta,[241] on one hand, simply[242] reiterated the approach taken in *SCF* inasmuch as it held that 'the rules set out in Article 4 of the Paris Convention must be regarded as producing the same effects as those produced by the TRIPs Agreement'[243] and, for this reason, due to the lack of direct effect of the TRIPs Agreement, considered Article 4 unable 'to create rights upon which individuals may rely directly before the courts by virtue of EU law'.[244] On the other hand, the Court excluded the applicability of the *Fediol* and *Nakajima* exceptions—enabling 'private individuals [to] rely directly on the provisions of the WTO Agreements before the Courts of the European Union'—to the case at hand.[245] It did so noting that it is not possible either to find in EU law any express reference to Article 4 of the Paris Convention[246] nor to infer from any EU law specific provisions regarding the 'legislature's intention'[247] 'to implement into EU law a particular obligation stemming from the WTO Agreements'.[248] Accordingly, it must be observed that the consequence is that direct effect shall not be asserted.[249]

There are four considerations to be made in the light of *SCF*, *Recorded Artists Actors Performers Ltd*, and *KaiKai*. First, the conferral of rights returns to be a pillar of the CJ's reasoning on the direct effect of international agreements. Secondly, the test on direct effect seems to consist exclusively of the enquiry into its premises, rather than the purpose and

[236] ibid, para 77.
[237] *SCF* (n 200), para 47.
[238] ibid, paras 45–48.
[239] ibid, para 48.
[240] *Recorded Artists Actors Performers Ltd* (n 201), para 87.
[241] Opinion of AG Ćapeta, *KaiKai* (n 168).
[242] On the problematic self-restraint of the CJ in the case see D Sarmiento and S Iglesias Sanchez, 'Insight: Is Direct Effect Morphing into Something Different?', EU Law Live, 4 March 2024, at <https://eulawlive.com/insight-is-direct-effect-morphing-into-something-different-by-daniel-sarmiento-and-sara-iglesias-sanchez/>, accessed 25 October 2025.
[243] *KaiKai* (n 202), para 62.
[244] ibid, para 63.
[245] ibid, para 64.
[246] ibid, para 65.
[247] ibid, para 67.
[248] ibid, para 66.
[249] ibid, para 68. On this point see the analysis by L Lonardo, 'The Will of the Legislator and the Direct Effect of EU International Agreements (Case C 382/21 P KaiKai Company)', EU Law Live, 2 May 2024, at <https://eulawlive.com/op-ed-the-will-of-the-legislator-and-the-direct-effect-of-eu-international-agreements-case-c%E2%80%91382-21-p-kaikai-company-by-luigi-lonardo/>, accessed 25 October 2025; Labus (n 80) 57–71.

nature of the agreement. Thirdly, unconditionality plays a key role, *de facto* absorbing the other two on clarity and precision. Lastly, from the *KaiKai* judgment, it may be inferred that the two *Fediol* and *Nakajima* doctrines, if applicable, are a form of direct effect rather than an exception to the latter and an unusual form of indirect effect.[250]

VII. CUSTOMARY INTERNATIONAL LAW

Finally, leaving aside international agreements and the decisions of the bodies established by these agreements, it must be understood whether and, if so, to what extent general international law can be invoked by individuals, States, and EU institutions to challenge EU law.[251] The question arises, of course, because the EU must comply with customary law in addition to international agreements.

In this regard, it was recalled in Section I that the question has arisen in a few cases, notably in *Racke*, *Opel Austria*, and *Air Transport Association of America*, all concerning compatibility of EU secondary law with customary law raised in preliminary rulings proceedings on validity (*Racke* and *Air Transport Association of America*) and annulment proceedings (*Opel Austria*). The red thread is that customary law is invoked by the plaintiffs to challenge EU law by virtue of direct effect. For example, in the *Racke* case, the analysis of the validity of the contested Council Regulation (EEC) No 3300/91 in the light of customary law emerged 'incidentally' in a dispute in which the company Racke argued that the preferential rates of customs duties resulting from Article 22 of the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia should be applied. According to the Commission, the CJ had no jurisdiction because the preliminary reference concerned the validity of the contested regulation based on customary law 'alone',[252] in particular on the principles governing the termination of treaties and their suspension.

The CJ boldly rejected this (poorly elaborated) argument and did so, implicitly, on the basis of the idea that there is no difference between international agreements and customary law, as to their possible invocation in the courts.[253] The CJ noted that Article 22(4) of the Contested Regulation is 'capable of conferring rights to preferential customs treatment directly upon individuals',[254] as is also confirmed by the purpose and nature of the Cooperation Agreement with Yugoslavia of which Article 22(4) is a part. It then analysed whether,[255] by invoking preferential customs treatment under Article 22(4), Racke may challenge the validity of the contested Regulation suspending the trade concessions granted under that agreement from 15 November 1991 under the rules of customary law because of a fundamental change of circumstances.

[250] On the interplay between direct effect and the *Fediol* and *Nakajima* doctrine see Section VI of this Chapter.

[251] Amongst those who support the view that customary law can entail direct effect according to the EU case law see J Wouters and D Van Eeckhoutte, 'Giving Effect to Customary International Law Through European Community Law' in JM Prinssen and A Schrauwen (eds), (n 55) 181–234; von Bogdandy and Smrkolj (n 99), paras 45–51; Schütze (n 21) 59–60; R Dunbar, 'The Application of International Law in the Court of Justice of the European Union: Proportionality Rising' (2021) 22 German Law Journal 557, 580. For similar thoughts, and also for some clarifications about the specificities of the direct effect test vis-à-vis customary law, see NAJ Croquet, 'The Import of International Customary Law into the EU Legal Order: The Adequacy of a Direct Effect Analysis' in (2013) 15 Cambridge Yearbook of European Legal Studies 47–81. For a contextualization of customary law's direct effect in the light of the international legal regime see AT Müller, 'The Direct Effect of Customary International Law' in F Lusa Bordin, AT Müller and F Pascual-Vives (eds), *The European Union and Customary International Law* (CUP 2022) 210–39.

[252] *Racke* (n 87), para 25.

[253] ibid, paras 26–27.

[254] ibid, para 30.

[255] ibid, para 37.

The answer given by the CJ is that this can occur in a situation where the plaintiff 'is 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'.[256] This is the reason, according to the Court, why the case 'does not … concern the direct effect of those rules'.[257] At the same time, however, the CJ, in order to allow individuals to rely upon rights originating from international agreements, affirmed that an individual can invoke, 'in order to challenge the validity of the suspending regulation, obligations deriving from rules of customary international law which govern the termination and suspension of treaty relations'.[258] This is quite a logical fallacy: to rely on rights enshrined in agreements and challenge an EU act, the plaintiff invokes the compliance with obligations which are part of customary law. In this connection, the Court believes that such 'judicial review'[259] must be limited to the question of whether, by adopting the suspending Regulation, 'the Council made manifest errors of assessment concerning the conditions for applying customary rules'.[260] Notwithstanding the Court's assumption that direct effect does not come into play, the question arises as to how this invocation, which is instrumental to reliance on international agreements, differs in practice from the direct effect doctrine itself. There seems to be no difference at all, upon a closer look. The fact that the direct effect test is not performed, of course, depends on the assumption from which the CJ moves, but also on what has been observed regarding the direct effect of general principles of EU law. In the case of unwritten principles/rules, the test tends to be naturally devoid of utility.

Opel Austria neither contradicts nor confirms *Racke*. In the case, the GC ruled on an action *ex* Article 260(4) TFEU seeking the annulment of Council Regulation (EC) No 3697/93 withdrawing tariff concessions in accordance with Article 23(2) and Article 27(3)(a) of the Free Trade Agreement between the Community and Austria (General Motors Austria). The annulment was sought on the ground that the Council allegedly infringed the public international law principle of good faith, as a key rule of customary law binding on the Community,[261] a few days before the European Economic Agreement (EEA) entered into force. The GC, rather than affirming explicitly that the principle of good faith is directly effective and/or can be relied upon to challenge an EU act, noted that such principle 'is the corollary in public international law of the principle of protection of legitimate expectations which, according to the caselaw, forms part of the Community legal order'.[262] Hence, any economic operator to whom an institution has given justified hopes 'may rely on the principle of protection of legitimate expectations'[263] and can do so on the basis of a general principle of EU law. The fact that an EU principle, which includes a customary rule of international law, is invoked, rather than that rule expressly, in no way means that the latter is not endowed with direct effect and that therefore its breach cannot be a ground for challenging EU law. Arguably, however, it could be said that doubts remain.

The doubts above seem to be definitively overcome by the aforementioned *Air Transport Association of America* judgment, where the CJ affirmed that several customary international maritime and air law principles, which were invoked by some private parties to challenge the validity of Directive 2008/101/EC, can be relied upon by natural and legal persons.[264] This

[256] ibid, para 47.
[257] ibid, para 47.
[258] ibid, para 51.
[259] ibid, para 52.
[260] ibid, para 52.
[261] ibid, para 90.
[262] *Opel Austria* (n 89), para 93.
[263] ibid, para 94.
[264] *Air Transport Association of America* (n 18), paras 107–10.

is possible, according to the Court, 'even though the principles at issue appear only to have the effect of creating obligations between States'.[265]

On closer inspection, *Air Transport Association of America*, in which no direct effect test was carried out, is a confirmation of *Racke*, as argued above, where the Court, while clarifying that a rule of customary law does not have 'the same degree of precision as a provision of an international agreement', concludes that 'judicial 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' customary law.[266] Here, there are no rules of the agreement that stand between the customary rule and the claimant as to its invocability, as had been the case in *Racke*. There is legality review and, therefore, direct effect. This holds true although there is no conferral of any right. In fact, as observed in-depth in the following section, there is no reason why direct effect should be understood only in its narrow meaning. To the contrary, a broad-objective direct effect, first, is consistent with what the CJ affirms in its jurisprudence. Secondly, it preserves the useful effect of a doctrine aimed at allowing both individuals to assert their prerogatives before the courts and EU law to be properly enforced.

VIII. THE RELATIONSHIP BETWEEN DIRECT EFFECT, LEGALITY REVIEW, AND THE *FEDIOL–NAKAJIMA* DOCTRINES

As observed in the literature,[267] direct effect must be interpreted broadly in the relationship between EU law and domestic legal orders. Thus, it possesses a second dimension in addition to the subjective and narrow one rooted in the *Van Gend & Loos* judgment. This dimension is objective insofar as the (explicit or implicit) conferral of a right is not a *condicio sine qua non* for the recognition of direct effect. Such a conception of direct effect, which is independent from the conferral of a right as one of its core characteristics, by now, seems to have been acquired by the CJEU in its case law.

As for the 'external' direct effect, things are more complicated for four reasons. Firstly, depending on the case, at stake is the challenge to either national measures, in respect of which direct effect is often recognized, or EU measures. In this respect, it has been seen above that the CJEU's approach to direct effect is restrictive to the extent that the possibility for individuals and States to challenge EU acts based on international agreements is systematically denied, especially vis-à-vis the GATT/WTO agreements. This challenge to EU provisions, unlike the one to domestic provisions, is not aimed at disapplication, but rather at annulment, either through a preliminary ruling on validity *ex* Article 267 TFEU or by virtue of Article 263 TFEU. In the second place, the CJEU, frequently, regardless of the judicial proceeding concerned, seems to consider the conferral of a right as a necessary condition of direct effect. Thus, the Court often endorses narrow direct effect rather than broad direct

[265] ibid, para 109.

[266] ibid, para 110.

[267] See, amongst others, A Bleckmann, 'L'applicabilité directe du droit communautaire' in M Waelbroeck and J Velu (eds), *Les recours des individus devant les instances nationales en cas de violation du droit européen* (Larcier 1978) 85–130; M Ruffert, 'Rights and Remedies in European Community Law: A Comparative View' (1997) 34 Common Market Law Review 307; D Edward, 'Direct Effect, the Separation of Powers and the Judicial Enforcement of Obligations' in *Scritti in onore di Giuseppe Federico Mancini* (Giuffrè 1998) 423–45; C Hilson and T Downes, 'Making Sense of Rights: Community Rights in EC Law' (1999) 24 European Law Review 121; Prechal (n 69) 1059–64; W van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 Common Market Law Review 501; S Prechal, *Directives in EC Law* (2nd edn, OUP 2005) 98–100 and 231–41; B de Witte, 'The Continuous Significance of *Van Gend en Loos*' in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 9–15; L Squintani and J Lindeboom, 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions' (2019) 38 Yearbook of European Law 18–72; Gallo, 'Rethinking Direct Effect' (n 69) 581–88; Gallo, *Direct Effect* (n 69) 103–116.

effect. Thirdly, on the one hand, narrow direct effect is generally[268] considered the prerequisite for challenging EU acts,[269] while on the other hand, the Court admits, with the *Fediol* and *Nakajima* doctrines, that this form of legality review must be distinguished from direct effect. Fourthly, beyond the intention to implement an international obligation or the specific referral to the latter in EU law, it is not easy to understand why the justiciability underpinning legality review in the *Fediol* and *Nakajima* doctrines differs from the justiciability implied in direct effect when the challenge to EU law is at stake. These two doctrines, like direct effect, have nothing to do with a purely interpretative approach, as would be the case with consistent interpretation. The reference is to what the Court stated in *Nakajima* whereby it was held that the applicant was 'not relying on … direct effect' since natural and legal persons, in the context of Article 263 TFEU, 'in fact question … in an incidental manner … the applicability' of EU law 'by invoking one of the grounds for review of legality' referred to in that article.[270]

The proposal put forward in this contribution is based on three criticisms of EU case law. Criticism number one: direct effect shall not be understood as a condition for a legality review under Article 263 TFEU and Article 267(1)(b) TFEU,[271] unlike what has been recently confirmed by the CJ in *Changmao Biochemical Engineering*[272] and *KaiKai*.[273] It shall not be understood in this manner when it comes to invoking EU primary law to challenge EU secondary law, and also when it comes to investigating the legal effects of international law within the EU in order to challenge an EU act.[274] As mentioned above, direct effect serves to challenge national law in order to entail its disapplication. It does not concern the annulment of EU provisions. To this end, the instrument available to individuals and States is the legality review provided for in Articles 263 and 267 TFEU, in view of the specific procedural conditions laid down therein, which are particularly strict, as is well known, with regard to the direct and individual concern enshrined in Article 263(4) TFEU.[275] Thus, the CJEU adopts a quite opaque approach when it either explicitly states or implicitly suggests that direct effect is a prerequisite for performing legality review under Articles 263 and 267 (1)(b) TFEU, unlike what it (correctly) does in relation to infringement actions pursuant to Articles 258–260 TFEU, whereby the matter of direct effect is not examined.[276]

Criticism number two: in any case, if one wanted to draw direct effect into the scope of the legality review of EU acts, albeit the former concerns disappication and the latter annulment, the existence of an ontological difference between direct effect and legality review must be excluded. At stake is the invocability of a norm, its justiciability, that is, the ability of

[268] But see, in respect to customary law, *Racke* (n 87), para 54: 'Even if, as the Council maintains, the CBD 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.'

[269] See, amongst others, *Germany v Council* (n 141), para 109; CJ, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*, C-344/04, EU:C:2006:10, para 39; *Intertanko* (n 192), para 45; *FIAMM* (n 38), para 110; *Air Transport Association of America* (n 18), para 54; *SCF* (n 200), para 46; CJ, *Z*, C-363/12, EU:C:2014:159, para 86; CJ, *Ordre des barreaux francophones et germanophone and others*, C-543/14, EU:C:2016:605, para 49.

[270] *Nakajima* (n 11), para 28.

[271] For a different opinion, mainly based on the need to ensure legal certainty and avoid divergences in EU judicial protection, see, amongst many others, Peters (n 10) 66–71; Eeckhout (n 2) 295; Koutrakos (n 23) 255.

[272] CJ, *Changmao Biochemical Engineering*, C-123/21P, EU:C:2023:708, paras 70–71.

[273] *KaiKai* (n 202), para 63.

[274] As far as international law is concerned, see, in the same vein, O Jacot-Guillamord, 'Droit Communtaituaire et droit International Public' Geneva, *Librairie de l'université Georg*, 1979, 226; Dunbar (n 251) 572.

[275] Peters (n 10) 68: 'The procedural prerequisites for launching an action (in particular the question of standing) are one issue; the capacity to make a legal argument based on an international agreement is a different issue which relates to substance.' On the distinction between direct effet and direct concern see Opinion of AG Bobek of 6 October 2021, *Nord Stream 2*, C-348/20 P, EU:C:2021:831, para 40.

[276] Eeckhout (n 34) 45.

an external provision (of international law) to govern the case in place of a provision of EU law. *Fediol* and *Nakajima* are, as has been anticipated, very far from indirect effect.[277] The boundaries between such doctrines and direct effect seem to be thin, *in concreto*, to the point of disappearing in *KaiKai*, whereby, *immediately* after having denied their application in relation to Article 4 of the Paris Convention, the Court wrote: '[i]t follows that the rules set out in Article 4 of the Paris Convention do not have direct effect and, accordingly, are not such as to create, for individuals, rights on which they may directly rely by virtue of EU law.'[278] Legality review of the *Fediol* and *Nakajima* type and direct effect, thus, in terms of invocability and justiciability of a norm, are not *per se* different.

Criticism number three: to exclude direct effect and, consequently, the legality review of EU law, on the ground that the provisions of international law do not confer rights on individuals, as the CJEU generally does, is to follow a narrow conception of direct effect. This cannot be justified[279] either as regards 'internal' direct effect or as regards 'external' direct effect. A view centred on the conferral of a right as a structural element of direct effect unduly constricts effective judicial protection and the private (fair) enforcement of the law. The enquiry into direct effect, understood in the broad sense, as done by the CJ with respect to customary law,[280] is an enquiry into legality review, which is focused on the unconditionality of an international norm, that is, on its capacity to be invoked by the plaintiff before a judge and enforced by the latter to govern the dispute.[281] In M. Oesch's words, 'a norm of international law is directly effective when it can be invoked by a private party in proceedings before domestic authorities. Direct effect can have a twofold purpose: (1) a treaty norm, which is granted direct effect, might allow individuals to derive rights therefrom; and/or (2) it might serve as a basis to challenge the legality of an existing (conflicting) domestic legal act'.[282]

As observed by Peters, 'as a matter of consistency and legal stringency, we do not need a specific concept (other than justiciability) reserved to applicability of international treaties'.[283]

The preceding considerations suggest that the restrictive approach of the CJEU regarding the recognition of direct effect, eg with respect to the GATT and WTO, the Aarhus Convention, and the Kyoto Protocol, does not seem to rest on a sufficiently solid reconstruction of direct effect. The true reason for the denial of direct effect, when the challenge of EU acts is at stake, seems to be another. Indeed, it lies in the political dimension of 'external' direct effect, as has been observed in the previous sections and will be investigated in more detail in Sections X–XII.

IX. HORIZONTAL DIRECT EFFECT OF INTERNATIONAL LAW

The question of the horizontal direct effect of international law has not yet been explicitly answered by the CJEU.[284] Moreover, the issue has so far only arisen with reference to

[277] ibid 42, observed that '[W]hether one calls that type of effect direct or indirect, it is clear that, in theory at least, it involves more than mere consistent interpretation'. See also Eeckhout (n 166) 104 and Hadjiyianni (n 42) 901, who spoke of a 'narrow exception' 'akin to direct effect'.

[278] *KaiKai* (n 202), para 68.

[279] For a categorization of the different forms of invocability see Peters (n 10) 43.

[280] See Section VII of this Chapter.

[281] In contrast, see Klabbers (n 28) 265; A Antoniadis, 'The Chiquita and Van Parys Judgments: Rules, Exceptions and the Law' (2005) 32 Legal Issues of Economic Integration 460.

[282] Oesch (n 9) 277.

[283] Peters (n 10) 44, who also defined 'direct effect' as a 'provision in an international treaty has direct effect whenever courts are entitled and bound to apply the rule without having to wait for any executory legislation. This is the case when two conditions are fulfilled: the Contracting Parties must have intended the rule to be applicable by the judiciary, and the rule must be, by its contents, suited to give rise to concrete legal consequences. In the purely domestic context (within the national legal order), the fulfilment of these conditions makes national laws "justiciable"'.

[284] According to Schütze (n 77) 188, the CJ 'evaded' the problem.

international agreements. The CJEU has neither denied nor asserted the capacity of international agreements to generate direct effects in inter-individual relations for decades.[285] The first case in which this capacity was discussed and implicitly granted is *Deutscher Handballbund*, where the CJ admitted that international agreements may be invoked by private parties against other private parties, not only against States and the EU.

The problem at hand was whether Article 38(1) of the Association Agreement with Slovakia, establishing the movement of workers, applied to a rule laid down by a (private) sports federation. The question remains the same when it comes to horizontality: are certain rules—of EU law, when the framework is that of 'internal' direct effect, or of international law, when the framework is that of 'external' direct effect—capable of creating obligations vis-à-vis private entities?

In response, the CJ relied on the prohibition of discrimination enshrined in the EC Treaty, in particular Article 48, now Article 45 TFEU, as well as on the *Bosman* judgment,[286] in which it was stated that working conditions in the different Member States are governed 'sometimes by laws or regulations and sometimes by agreements and other acts concluded or adopted by private persons'. Limiting the application of the freedoms of movement to acts of public authority would create 'inequality' in their application.[287] At the heart of the Court's reasoning, therefore, was the comparison with EU law, as has been done in some of its previous case law on the applicability of international law in vertical relationships.[288] The Court, on the one hand, noted that association agreements, such as the one with Poland of 1991, do not establish a principle of full freedom of movement for third-country workers within the Community, unlike the EC Treaty. On the other hand, the judges stated that certain provisions of those agreements, such as Article 38(1) of the Association Agreement with Slovakia, establishing 'the right to equal treatment as regards working conditions', have the same scope as their counterparts in the EC Treaty. It follows that the approach adopted by the Court in respect of Community law, in particular with regard to its direct effect in horizontal situations, 'can be transposed' to the association agreements, including the association agreement with Slovakia.[289] Although the Court did not expressly recognize the horizontal direct effect, there is no doubt about the direct application of an international rule in disputes between private parties made by the Court in this case.

Confirmation of the possible horizontal direct effect of international agreements comes from the *Simutenkov* case, already cited and discussed above with regard to the extent of the direct effect test.[290] In the judgment, concerning Article 23(1) of the Agreement on Partnership and Cooperation with the Russian Federation, the CJ, first, acknowledged that such a provision, 'very similar' to Article 38(1) of the Association Agreement with Slovakia,[291] has direct effect. Secondly, the Court, without expressly mentioning the horizontal character of direct effect, considered Article 23(1) to be applicable in the present case.[292] The Court does in relation to the 'external' direct effect what it often does in relation to the horizontal 'internal' direct effect of Treaty provisions, as has already been seen: it applies the rule to disputes between private parties, without expressly providing its reasoning with regard to horizontal direct effect.

[285] See, eg *Polydor* (n 105).

[286] CJ, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and Others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:463.

[287] *Deutscher Handballbund* (n 138), para 32.

[288] See Sections II–VII of this Chapter.

[289] *Deutscher Handballbund* (n 138), para 50.

[290] See the subsection VI.A.

[291] *Simutenkov* (n 183), para 34.

[292] ibid, paras 29, 33–34.

X. 'EXTERNAL' DIRECT EFFECT'S CORE ELEMENTS AND ITS SIMILARITIES AND DIVERGENCES WITH 'INTERNAL' DIRECT EFFECT IN THE LIGHT OF THE CJEU CASE LAW

This section aims to summarize, on the basis of what the case law investigated so far, the most distinctive aspects of the direct effect of international law, including the advantages and downsides of its recognition. This will be done through a comparison with the doctrine of 'internal' direct effect. There are some similarities, some divergences, and some half-way features.

As to similarities, first of all, the jurisprudence on both internal and 'external' direct effect is unsteady and ambiguous. The confusion, exacerbated by the different approaches and terminologies used in the literature,[293] is mainly the result of the CJEU's steady argumentative minimalism. This ambiguity, confusion, and self-restraint affect many aspects, including the following: the relationship between direct effect and direct applicability; the narrow or broad conception of direct effect and the role of the conferral of rights in the direct effect test; the order of the two steps of the test, the one focusing on the nature and purpose of the agreement and the other on its specific provisions; and the interplay between direct effect and challenges to EU law in proceedings under Articles 263 and 267 TFEU (on validity of EU secondary law).

Secondly, as to the test for direct effect, both 'internal' and 'external', the dividing line between clarity and precision is neither clear nor precise. Indeed, there does not appear to be one. Moreover, it can be drawn from the case law that unconditionality, at the heart of the case law on 'internal' direct effect, is also the core of the reasoning of the CJEU on 'external' direct effect. Clarity and precision are indeed absorbed in the premise of unconditionality, and, for this reason, unconditionality is the only true core element and *condicio sine qua non* of direct effect. In other words, if a norm is clear/precise, it is not necessarily unconditional, while if a norm is unconditional, it is *in re ipsa* clear/precise. If there is no need for the adoption of a further internal legal act to make the EU or international provision enforceable, then the obligation contained therein, due to its unconditional character, cannot but be clear/precise. If unconditionality means that a norm is self-sufficient since it does not require an additional act of transposition, unconditionality equals direct applicability. Moreover, since direct applicability/unconditionality, by absorbing the conditions of clarity and precision, is the only premise of direct effect, direct effect and direct applicability, albeit conceptually distinct, end up being, in practice, the same thing.[294] As a matter of fact, an analysis of EU and national case law shows that direct effect and direct applicability often merge: what really matters is whether an EU provision is justiciable, that is, applicable to the dispute at hand.[295] This holds true for both 'internal'[296] and 'external' direct effect.

Thirdly, notwithstanding what is written in some of the literature,[297] as can be inferred from several judgments of the CJEU, just as both 'internal' and 'external' direct effect, on one hand, and, on the other, direct applicability are identical concepts, in practice, both

[293] See Peters (n 10) 42, with regard to both the EU case law and the literature: 'The problem of direct effect of international agreements concluded by the Community in Community and Member State law suffers from a considerable degree of confusion.' See also Klabbers (n 28) 263, according to whom, 'there is nothing "natural"' about 'external' direct effect.

[294] See CJ, *Yvonne van Duyn v Home Office*, 41-74, EU:C:1974:133, para 12: 'If, however, by virtue of the provisions of Article 189 regulations are directly applicable and, consequently, may by their very nature have direct effects, … '. On this matter cf Gallo, *Direct Effect* (n 69) 92–96 and 100–102.

[295] See *Reyners* (n 61), para 32: 'It is right therefore to reply to the question raised that, since the end of the transitional period, Article 52 of the Treaty is a directly applicable provision despite the absence in a particular sphere, of the directives prescribed by Articles 54 (2) and 57 (1) of the Treaty.'

[296] CJ, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* ('*Defrenne II*'), EU:C:1976:56.

[297] See subsection II.B.

being related to the justiciability of a norm, that is, to its unconditionality,[298] the matter of the incorporation of international law into EU law, of the monist kind does not relate to the direct applicability of the agreement; it has to do, rather, with its immediate transposition within the EU legal order.

Fourthly, the direct effect test is neither mentioned nor carried out when dealing with unwritten rules. This holds true for both general principles of EU law[299] and customary international law.

Fifthly, in the context of both 'internal' and 'external' direct effect, direct effect can be recognized also when the rule is imbued with a certain margin of appreciation.[300]

Regarding the specifics of the 'external' direct effect, and thus the differences with the 'internal' direct effect, first of all, the centrality of the political dimension, *lato sensu*, implied in the 'external' direct effect is much more evident that in the case of 'internal' direct effect. Politics means separation of powers and institutional balance within the Union. Separation of powers means the allocation of legislative, executive, and judicial competences amongst EU institutions in the realm of external relations. In short, with 'internal' direct effect the disapplication made by the judge, or by the administration, which results from the application of directly effective EU law, limits the perimeter of the legislative power to the benefit of the expansion of EU law, its effectiveness, and penetration into national legal systems. Within 'external' direct effect and when such doctrine is an instrument for challenging a national law, the discourse could be deemd similar only superficially. It looks similar because the EU agreement, that is an act of the Union, is enforced in the place of the national law with which it conflicts. It is, in truth, different because the recognition of 'external' direct effect gives private applicants and judges the opportunity to enforce the agreement in a diffuse manner, thereby eroding the discretion of the EU institutions in charge of steering the external relations of the EU. Moreover, when the 'external' direct effect aims at challenging EU law, rather than national law, the CJEU is reluctant to admit direct effect because it tends to preserve its own legal order, that is, its autonomy. This seems to be the reason for the CJEU's particularly restrictive approach towards challenging EU law, as opposed to the expansionism of EU jurisprudence concerning the recognition of 'internal' direct effect.

Secondly, while the remedy of disapplication is a recurring element of EU case law regarding 'internal' direct effect, insofar as the CJEU explicitly refers to a duty to set aside a national law which conflicts with EU law, within 'external' direct effect such a remedy is not systematically referred to, not even in interpretative preliminary rulings, where at the origins of domestic proceedings is national, rather than EU, law.

Thirdly, whereas, outside the realm of international agreements, in proceedings under Articles 263 and 267 (on the validity of EU secondary law) TFEU when EU primary law is the parameter of legality, the review of EU secondary law is independent of direct effect, within 'external' direct effect, generally, direct effect is considered by the CJEU as a precondition for the annulment of EU secondary law under those two provisions. A direct effect that, while, in principle, should be distinguished, in the opinion of the Court, from the legality review underpinning the *Fediol*/*Nakajima* doctrines, in practice, from

[298] See *Demirel* (n 48), amongst others, as has been highlighted in subsection II.B.

[299] See CJ, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others*, 222/86, EU:C:1987:442, para 14.

[300] cf Simutenkov (n 183), para 24.

the standpoint of the justiciability of a norm, does not seem to be so different from the latter.

Fourthly, while in 'internal' direct effect the test, if it is carried out at all, has only one step, that of checking for clarity, precision, and unconditionality, in 'external' direct effect, with reference to international agreements and decisions of international bodies, there are two steps, in an order that changes repeatedly in the EU case law for no apparent reason. One stage concerns the three conditions just mentioned, another the agreement, investigated in its entirety. Hence, the consequence that identical rules may generate direct effect, if they are part of EU primary or secondary law, and an effect that is not direct if they are contained in international agreements or in decisions of international bodies.

With regard to the points that are partially in common, first, the interpretation of the rule, EU in the case of 'internal' direct effect, international in the case of 'external' direct effect, relates, for both, to its nature, logic, and purpose. However, in the case of 'external' direct effect, in line with international law, subjective methods of interpretation are frequently used, which means that the focus is also considerably on the intention of the Contracting Parties.[301] Secondly, while horizontal direct effect is recognized with respect to both the relationship between EU law and domestic legal orders and the relationship between international and EU law, the case law, despite uncertainties, is clearer in relation to 'internal' direct effect than to 'external' direct effect.[302] Thirdly, while the CJEU has traditionally been at the heart of the doctrine of direct effect, both 'external' and 'internal', because centralizing the assessment on direct effect ensures legal uniformity, nowadays, on such matter, there is no full convergence between the two manifestations of direct effect. Indeed, as anticipated above and will be further explained in the next section, there is a significant recent trend, especially in international agreements related to trade, characterized by a preclusion of direct effect in the text of such agreements, advocated by both the European Commission and the Council, with the consequence that the role of the CJEU as 'gatekeeper' is being weakened with respect to 'external' direct effect.

XI. THE RISE AND FALL OF THE CJEU AS 'GATEKEEPER'? THE IMPLICATIONS OF THE RECENT PRACTICE BY THE COUNCIL AND THE COMMISSION

A. Anticipating the Court: clauses precluding direct effect in EU international agreements and Council decisions

While the previous sections have thoroughly analysed the case law of the CJEU concerning 'external' direct effect of international law, this section explores the role of the CJEU as an institutional actor of the EU in the framing of this doctrine. This analysis is particularly important to demonstrate how denying direct effect to international agreements often rests on reasons largely extraneous to law. This observation underlines the finding that direct effect is a political construct as much as a legal category. To this end, the CJEU's position as a 'gatekeeper' and its relationship with other EU institutions will be analysed. In this respect, as anticipated in Sections I and II, F. Snyder was the first to define the CJEU as a 'gatekeeper', endowed with the power to decide, firstly, which provisions of international law should be incorporated into the EU legal system and, secondly, if they could be considered directly effective.[303] Nonetheless, already in 2001, J. Klabbers had argued that the 'idea of

[301] On the importance of subjective interpretation see M Prek and S Lefèvre, 'La Dimension "subjective" de l'invocabilité des Accords Internationaux' in Neframi and Gatti (eds), (n 2) 231–55.

[302] cf *Defrenne* (n 296); CJ, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, 36-74, EU:C:1974:140.

[303] See F Snyder (n 12), who confined his analysis to the role of the CJ concerning the incorporation of WTO law.

direct effect thus functions as a gatekeeper: some norms may enter, others may not'.[304] Later, N. Ghazaryan reached the conclusion that the CJEU had originally assumed the gatekeeper role 'in a legal vacuum',[305] transforming over time into a '*flexible* gatekeeper'.[306] Therefore, this section will assess the extent to which the CJ and its use of the direct effect doctrine still function as 'gatekeepers' towards international law.

The point of departure for this analysis is that the assessment of direct effect by the CJEU is subsidiary to the will of the parties: if the parties have regulated the (denial or attribution of) direct effect in the international agreement, the Court does not deviate from this decision.[307] In practice, provisions in international agreements explicitly addressing direct effect (either positively or negatively) have always been uncommon.[308] For positive prescriptions of direct effect, this observation still holds true. One rare example of such a positive prescription is the Agreement establishing the European Common Aviation Area of 2006.[309] On the other hand, negative prescriptions have been on the rise since the 2010s.[310] A very early example of this practice can be found in the Agreement on international humane trapping standards with Canada and Russia of 1998, which states that '[t]his Agreement is not self-executing'.[311] It might seem surprising that the provision refers to 'self-executing' norms instead of direct effect or direct applicability of said norms. This choice of words may be interpreted as a preference of the Commission and the Council to apply US legal jargon rather than the terminology of EU law when it comes to 'external' direct effect.[312] This semantic particularity illustrates the aversion of the Commission and the Council towards the recognition of 'external' direct effect. Moreover, this expression illustrates that the concepts of direct effect and direct applicability tend to merge in practice, as has been argued in Sections II and X of this Chapter, and that in some cases they can even be equated with other related concepts such as self-executing norms.

Notably, in the past 15 years, the practice of excluding direct effect in the text of EU international agreements has evolved into a more large-scale phenomenon. Indeed, in recent years, there has been a trend of inserting clauses excluding direct effect for certain provisions or even for the whole agreement, especially in bilateral Free Trade Agreements (FTAs) and association agreements.[313] As first established by A. Semertzi in 2014 and as illustrated in the following part of this section, exclusions of direct effect are usually present in one of four phenotypes, defined as follows.[314] The first type (type i) consists of a general clause

[304] See the account by Klabbers (n 28), 295–96.

[305] Ghazaryan (n 1) 28.

[306] ibid 73.

[307] *Kupferberg* (n 24), para 17; cf Ghazaryan (n 1) 69; Koutrakos (n 23) 258.

[308] See Koutrakos, ibid 258; Semertzi (n 72) 1127. See also Dunbar (n 251) 560.

[309] Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area, OJ L 285, 16 October 2006, 3, art 15(1): 'Without prejudice to paragraphs 2 and 3, each Contracting Party shall ensure that the rights which devolve from this Agreement … may be invoked before national courts'. See Ghazaryan (n 1) 62.

[310] See Ghazaryan (n 1) 61–64; Poli (n 72) 93–97; Semertzi (n 72).

[311] Agreement on international humane trapping standards between the EC, Canada and the Russian Federation, OJ L 42, 14 February 1998, 43, art 17(3): 'This Agreement is not self-executing. Each Party shall implement the commitments and obligations arising from this Agreement in accordance with its internal procedures.'

[312] On the historical origins of 'direct applicability' versus 'self-executing', see K Kaiser (n 9), paras 4–5. See also Ghazaryan (n 1) 30–33.

[313] See the account by Ghazaryan (n 1) 62–64; Koutrakos (n 23) 258; Semertzi (n 72); Poli (n 72).

[314] The following typology mirrors the classification by Semertzi (n 72) 1129, applying this categorization also to more recent bilateral agreements.

precluding direct effect, often placed in the 'general and final' provisions of the agreement. The second type (type ii) describes clauses which state that FTA panel rulings under the respective agreement 'shall be binding on the Parties and shall not create any rights or obligations for natural or legal persons'. The third type (type iii) refers to clauses in the schedules of commitments in services, excluding any self-executing effect of those norms, rendering them not invocable by private parties. Lastly, type (iv) clauses are provisions in the approving Council decision claiming that the agreement does not confer any rights or obligations on individuals, which could then be invoked before national courts or the CJ.[315]

First, as introduced in Section III of this Chapter, an example for a clause of the first phenotype (type i) can be found in the EU–UK TCA, according to which ' … nothing in this Agreement … shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement … to be directly invoked in the domestic legal systems of the Parties'.[316] Nonetheless, there are exceptions in the TCA, concerning, for instance, law enforcement and judicial cooperation in criminal matters.[317] Other examples of category (i) include the Comprehensive Economic and Trade Agreement (CETA) with Canada,[318] the Trade Agreement with Colombia and Peru,[319] the agreement for economic partnership with Japan,[320] the Central America association agreement,[321] and the FTA with Singapore.[322] Furthermore, some more recent FTAs contain such an exclusion, like the FTAs with Vietnam and New Zealand.[323] Finally, several FTAs currently under negotiation or awaiting ratification include similar clauses, such as the FTAs with Chile,[324] Indonesia,[325] and Australia.[326] Nonetheless, it must be noted that not all recent FTAs contain such a clause.[327]

[315] Semertzi (n 72) 1129. Ghazaryan (n 1) 62–64, on the other hand, seems to only differentiate between categories (i) and (iii).

[316] TCA (n 79), art 5(1) ('Private rights').

[317] art 5(1) TCA (n 79) refers to the provisions of Part Three of the TCA; cf Poli (n 72) 96.

[318] CETA (n 73), art 30.6.

[319] Trade Agreement between the European Union and its Member States, on the one part, and Colombia and Peru on the other part, OJ L 354, 21 December 2012, 3, art 336: 'Nothing in this agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law.'

[320] Agreement between the European Union and Japan for an Economic Partnership, OJ L 330, 27 December 2018, 3, art 23.5 ('No direct effect').

[321] Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, OJ L 346, 15 December 2012, 3, art 356: 'Nothing in this agreement shall be construed as conferring rights or imposing obligations on persons, other than those rights or obligations created by this agreement nor as obliging a party to permit that this agreement be directly invoked in its domestic legal system, unless otherwise provided in that party's domestic legislation.'

[322] Free Trade Agreement between the European Union and the Republic of Singapore, OJ L 294, 14 November 2019, 3, art 16.16 ('No direct effect').

[323] Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, OJ L 186, 12 June 2020, 3, art 17.20 ('No direct effect'); Free Trade Agreement between the European Union and New Zealand, OJ L 28 February 2024, 1, art 27.6 ('No direct effect'), paras 1 and 2.

[324] Interim Agreement on Trade between the European Union and the Republic of Chile, 17 November 2023, 2023/0259 (NLE), at <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/7668ad45-b14f-4ef6-823d-8899fbac72d2/details?download=true>, accessed 25 October 2025, art 33.14 ('Private Rights'), entered into force on 1 February 2025, at <https://www.consilium.europa.eu/en/press/press-releases/2024/03/18/eu-chile-council-gives-final-endorsement-to-bilateral-trade-agreement/>, accessed 25 October 2025.

[325] EU-Indonesia Comprehensive Economic Partnership Agreement (CEPA)(Unofficial text of the agreement; negotiations concluded on 23 September 2025), at <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/ef997fab-91c1-4825-b1a5-884ffbc89d46/details>, accessed 25 October 2025, art X.6 ('No direct effect').

[326] EU–Australia Agreement (negotiation phase), Final Provisions, at <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/05355f97-fcdc-4650-a9ec-715478a14528/details>, accessed 25 October 2025, art X.6 ('No direct effect').

[327] See Economic Partnership Agreement between the European Union, of the one part, and the Republic of Kenya, member of the East African Community, of the other part, 18 December 2023, OJ L 1648, 1 July 2024, 1.

Secondly, there are various instances of clauses belonging to category (ii), namely in the dispute settlement mechanism agreements of the Euro-Mediterranean Agreements[328] and in the Partnership and Cooperation Agreement (PCA) with Iraq.[329] Other examples can be found in the FTAs and association agreements with South Korea,[330] Colombia and Peru,[331] Central America,[332] and Singapore.[333] This mechanism has been described as a 'safety valve, raising a fence against potential FTA loopholes that could backfire (in the event the FTA ruling was invocable by private parties) and endanger the well-entrenched non-direct effect of WTO law'.[334] However, since this Chapter does not focus in depth on dispute settlement decisions, this second category is less relevant to this analysis.

Thirdly, clauses belonging to category (iii) are found in the association agreements with Georgia,[335] Moldavia,[336] and Ukraine,[337] and in the trade agreements with South Korea,[338]

[328] EU-Tunisia Protocol establishing a DSM (n 75), art 18(2): 'Any ruling of the arbitration panel shall be binding on the Parties and shall not create any rights or obligations to physical or legal persons.' OJ L 40, 13 February 2010, 76; Protocol, between the European Community and the Republic of Lebanon establishing a dispute settlement mechanism applicable to disputes under the trade provisions of the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part, art 18(2), OJ L 328, 14 December 2010, 20; Protocol between the European Union and the Arab Republic of Egypt establishing a dispute settlement mechanism applicable to disputes under the trade provisions of the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part, art 18(2), OJ L 138, 26 May 2011, 2; Protocol between the European Union and the Hashemite Kingdom of Jordan establishing a dispute settlement mechanism applicable to disputes under the trade provisions of the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, art 18(2), OJ L 177, 6 July 2011, 3; Agreement between the European Union and the Kingdom of Morocco establishing a dispute settlement Mechanism, art 18(2), OJ L 176, 5 July 2011, 2.

[329] Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, art 77(2): 'Any ruling of the arbitration panel shall be binding on the Parties and shall not create any rights or obligations for natural or legal persons. … ', OJ L 204, 31 July 2012, 20.

[330] Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127, 14 May 2011, 6, art 4.17(2): 'Any ruling of the arbitration panel shall be binding on the Parties and shall not create any rights or obligations for natural or legal persons.'

[331] Trade Agreement with Colombia and Peru (n 319), art 318(2).

[332] Central America Association Agreement (n 321), art 323(3).

[333] FTA with Singapore (n 322), art 14.19(2).

[334] Semertzi (n 72) 1133–34.

[335] EU-Georgia Association Agreement (n 74), Annex XIV-B, List of Commitments on Cross-Border Supply of Services (Union), para 6; Annex XIV-C, List of Reservations on Key Personnel, Graduate Trainees, and Business Sellers (Union), para 9; Annex XIV-D, List of Reservations on Contractual Services Suppliers and Independent Professionals (Union), para 10; Annex XIV-E, List of Reservations on Establishment (Georgia), para 3; Annex XIV-F, List of Commitments on Cross-Border Supply of Services (Georgia), para 6; Annex XIV-G, List of Reservations on Key Personnel, Graduate Trainees, and Business Sellers (Georgia), para 9; Annex XIV-H, List of Reservations on Contractual Services Suppliers and Independent Professionals (Georgia), para 10.

[336] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 260, 30 August 2014, 4, Annex XXVII-A, List of Reservations on Establishment (Union), para 3; Annex XXVII-B, List of Commitments on Cross-Border Services (Union), para 6; Annex XXVII-C, List of Reservations on Key Personnel, Graduate Trainees, and Business Sellers (Union), para 9; Annex XXVII-D List of Reservations on Contractual Services Suppliers and Independent Professionals (Union), para 9; Annex XXVII-E, List of Reservations on Establishment (Republic of Moldova), para 5; Annex XXVII-F, List of Commitments on Cross-Border Services (Republic of Moldova), para 6; Annex XXVII-G, List of Reservations on Key Personnel, Graduate Trainees, and Business Sellers (Republic of Moldova), para 9; Annex XXVII-H, List of Reservations on Contractual Services Suppliers and Independent Professionals (Republic of Moldova), para 9.

[337] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29 May 2014, 3, Chapter 14, n 1: 'For the avoidance of doubt, this Title shall not be construed as conferring rights or imposing obligations which can be directly invoked before the domestic courts of the Parties'; see also Annex XVI-A to Chapter 6, EU Party Reservations on Establishment, para 4; Annex XVI-B to Chapter 6, List of Commitments on Cross-Border Services, para 6; Annex XVI-C to Chapter 6, Reservations on Contractual Services Suppliers and Independent Professionals, para 9; Annex XVI-F to Chapter 6, Reservations on Contractual Services Suppliers and Independent Professionals, para 9. For an analysis of this agreement from the perspective of EU values in association agreements, see D Gallo, 'I valori negli accordi di associazione dell'Unione europea' in E Sciso, R Baratta and C Morviducci (eds), *I valori dell'Unione europea e l'azione esterna* (Giappichelli 2016) 142–63.

[338] FTA with South Korea (n 330), Annex 7-A-1 EU Party List of Commitments in Conformity with art 7.7; (Cross-Border Supply of Services), para 6; Annex 7-A-2 EU Party List of Commitments in Conformity with art 7.13 (Establishment), para 6; Annex 7-A-3 EU Party List of Reservations in Conformity with arts 7.18 and 7.19 (Key Personnel and Graduate Trainees and Business Service Sellers), para 9; Annex 7-A-4 Korea Schedule of Specific Commitments in Conformity with arts 7.7, 7.13,

Colombia and Peru,[339] Central America,[340] and Singapore.[341] Notably, these clauses, like the aforementioned Agreement on international humane trapping standards with Canada and Russia of 1998,[342] use the language of self-executing effect, not direct effect or direct applicability, stating that the '[t]he rights and obligations arising from this list of commitments shall have no self-executing effect and thus confer no rights directly to individual natural persons or juridical persons'.[343]

Finally, it must be noted that the type (iii) exclusion of direct effect stems from the fact that the schedules for commitments in service areas in the respective agreements are based on the General Agreement on Trade in Services (GATS).[344] Thus, this type of exclusion *per se* does not seem to be aimed at 'sidelining' the CJEU, but rather at reinforcing the CJEU's jurisprudence on WTO law, similarly to type b exclusions.[345] Nonetheless, the type (iii) exclusion is crucial for its interplay with type (iv) exclusions, see below.

Fourthly, there are various Council decisions (on the signing or the conclusion of the agreement) precluding direct effect of international agreements (type iv).[346] Since their legal effects remain debated, as will be shown below, they merit closer attention. The best-known Council Decision excluding 'external' direct effect might well be the 1994 Council decision concerning the Agreement establishing the WTO, as well as its annexes, such as the GATT 1994 (Annex 1A to the WTO Agreement). Said decision states that 'by its nature, the Agreement establishing the WTO, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts … '.[347] On the one hand, this Decision could be seen as proof that the Council and the CJEU in some cases, do agree on the exclusion of direct effect, with the CJ seemingly embracing the Council's point of view shortly after in *Portugal v Council*.[348] Therefore, this decision could be seen as an example of the EU institutions collaborating on the exclusion of direct effect. From a more critical perspective, it could also be a sign that the Council wanted to ensure that the CJEU would not

7.18 and 7.19, para 9; Attachment II (Adult education services): 'The rights and obligations arising from the list below shall have no self-executing effect and thus confer no rights directly to natural or juridical persons.'

[339] Trade Agreement with Colombia and Peru (n 319), Annex VII, List of Commitments on Establishment (referred to in art 114 of this Agreement), s A: Colombia, para 6; s B: EU Party, para 6; s C: Peru, para 6; Annex VIII, List of Commitments on Cross-Border Supply of Services (referred to in art 118 of this Agreement), s A: Colombia, para 6; s B: EU Party, para 6; s C: Peru, para 6; Annex IX, Reservations Regarding Temporary Presence of Natural Persons for Business Purposes, Appendix 1: Reservations on Key Personnel and Graduate Trainees (referred to in art 124 of this Agreement), s A: Colombia, para 7; s B: EU Party, para 8; s C: Peru, para 6; Appendix 2: Reservations on Contractual Services Suppliers and Independent Professionals (referred to in arts 126 and 127 of this Agreement), s A: Colombia, para 7; s B: EU Party, para 8; s C: Peru, para 6.

[340] Central America Association Agreement (n 321), Annex X, Lists of Commitments on Establishment, Section A: EU Party, para 6; Section B: Republics of the CA Party, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama, para 8; Annex XI, Lists of Commitments on Cross-Border Supply of Services, Section A: EU Party, para 6; Section B: Republics of the CA Party, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama, para 8; Annex XII, Reservations on Key Personnel and Graduate Trainees of the EU Party, para 9; Annex XIII, Lists of Commitments of the Republics of the CA Party on Key Personnel and Graduate Trainees, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama, para 11; Annex XIV, Lists of Commitments of the Republics of the CA Party on Business Service Sellers, Costa Rica, Guatemala, Honduras, Nicaragua, Panama, para 11.

[341] FTA with Singapore (n 322), Appendix 8-A-1, Union Schedule of Specific Commitments in Conformity with art 8.7 (Schedule of Specific Commitments) (Cross-Border Supply of Services), para 5; Appendix 8-A-2, Union Schedule of Specific Commitments in Conformity with art 8.12 (Schedule of Specific Commitments) (Establishment), para 5; Appendix 8-A-3, Union Schedule of Specific Commitments in Conformity with art 8.14 (Key Personnel and Graduate Trainees, Business Services Sellers), para 8.

[342] See n 312.

[343] See the provisions in n 336 as examples.

[344] See Ghazaryan (n 1) 64.

[345] ibid.

[346] See also ibid 64–73.

[347] Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986–1994), OJ L 336, 23 December 1994, 1, recital 14.

[348] See Section V of this Chapter, in particular nn 162–164.

change its case law on the GATT after the creation of the WTO. It could be seen as an attempt to dictate the Court's decision in this regard.

A more complex situation arises when the text of the international agreement and the Council decision on the signing or conclusion of the respective agreement vary as regards the scope of the exclusion of direct effect.[349] For instance, in its decision regarding the conclusion of the EU–Georgia Association Agreement, the Council held that the entire '[a]greement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals'.[350] This clause is surprising since this agreement already contained the exclusion of direct effect for certain parts under type (iii), as outlined above.[351] The same dissonance between the text of the agreement and the text of the respective Council decision can be observed regarding the bilateral agreements with Korea,[352] Moldova,[353] and Ukraine.[354] The contrast is especially surprising regarding the association agreement with Ukraine since that agreement in one clause seemed to leave open the possibility for direct effect at least for some of its provisions, stating that '[r]ights conferred … upon the EU Member States or their public entities, undertakings or individuals in relation to each other, shall be understood to be conferred … [to] Contracting Parties, the latter also being understood, as the case may be, as their competent authorities, public entities, *undertakings or individuals*' (emphasis added).[355] This clause demonstrates that the contracting parties did want to leave some space for direct effect of certain provisions in this agreement, excluding it only for certain parts of the agreement and even expressly opening the agreement up to the possibility of a conferral of rights to individuals. Thus, it needs to be assessed why the Council decision differs in scope from the text of the agreement. There seems to be either a mismatch between the intentions of the negotiator, ie the Commission, and the Council which adopted the decision precluding direct effect for the entire agreement, or a change of heart of the Council during the negotiations. Otherwise, it is unclear why the Council would adopt a decision on the conclusion of this agreement in which the scope of the exclusion of direct effect for the agreement in question deviates from the text of the agreement. Future research should analyse this issue in more detail.

Furthermore, it must be queried what legal effects Council decisions excluding 'external' direct effect can produce. In particular, one might wonder whether they are fit to override the text of the agreement. This issue has been dealt with by AG Saggio in *Portugal v Council*, in which he demonstrates that Council decisions cannot preclude direct effect of EU international agreements for two main reasons. First, they cannot be classified as a 'reservation' under the Vienna Convention on the Law of Treaties.[356] Secondly, due to the hierarchy of norms in EU law, 'the Council may not, by an act of secondary legislation, limit the Court's

[349] On this issue, see Ghazaryan (n 1) 64–73.

[350] Council Decision 2016/838/EU of 23 May 2016 on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 141, 28 May 2016, 26, art 5.

[351] See n 336.

[352] Council Decision 2011/265/EU of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127, 14 May 2011, art 8; cf Semertzi (n 72) 1135.

[353] Council Decision 2016/839/EU of 23 May 2016 on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 141, 28 May 2016, 28, art 5.

[354] Council Decision 2014/295/EU of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, art 1, and Titles I, II and VII thereof, OJ L 161, 29 May 2014, 1, art 5.

[355] EU–Ukraine Association Agreement (n 337), Appendix XVII-1, Horizontal Adaptations and Procedural Rules, point 6.

[356] Ghazaryan (n 1) 69.

jurisdiction, nor decide to rule out the jurisdiction of national courts to apply these agreements'.[357] Even if they could count as the EU's intentions as a contracting party, under 'the *Kupferberg* formula, the Court's jurisdiction to determine the effects of the agreement is secondary only to the agreement between the parties'.[358] Hence, the AG excludes a legally binding effect of Council decisions both on international law and on EU law grounds.[359] The CJ, however, unfortunately missed the chance to clarify the status of the Council decision in its ruling in the case.[360] Instead, the Court merely stated 'post factum'[361] that its 'interpretation corresponds, moreover, to what is stated in the final recital in the preamble to Decision 94/800, according to which "by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts"'.[362] This phrase leaves much room for speculation: was the Council decision a guiding factor for the Court's assessment from a policy perspective or was it nothing more than a fortunate coincidence that the Court and the Council reached the same conclusion?[363] Thus, the effects of the Council decisions have been interpreted differently in the literature, attributing more or less authority to them.[364] Nonetheless, bearing in mind the hierarchy of norms of EU law, it seems more convincing to follow AG Saggio, at least on affirming that the Council decisions are not apt to exclude the CJEU's jurisdiction on the matter.[365]

In any case, in absence of a ruling of the CJEU on the issue of a mismatch between the text of the agreement and the Council decision, it remains an open question how the CJEU would deal with this type of dissonance in practice. Possibly, even in the case of a Council decision denying direct effect to an EU agreement that does not expressly preclude direct effect or that only excludes direct effect of some of its provisions (eg a type (iii) exclusion), the CJEU could decide to annul an EU act pursuant to Articles 263 or 267 TFEU on the base of an EU international agreement. This would depend on whether the characteristics of the agreement as a whole and its provisions satisfy the direct effect test.[366] Realistically, however, it seems unlikely that the CJEU would go against the policy decision expressed in the Council Decision.[367]

[357] See the opinion of AG Saggio of 25 February 1999, *Portugal v Council* (n 51), C-149/96, EU:C:1999:92, para 20; cf the opinion of AG Tesauro of 13 November 1997, *Hermès International v FHT*, C-53/96, EU:C:1997:539, para 24.

[358] Ghazaryan (n 1) 69.

[359] ibid 66.

[360] *Portugal v Council*, paras 36–48; see Ghazaryan (n 1) 66.

[361] Ghazaryan (n 1) 66.

[362] *Portugal v Council*, para 48.

[363] Ghazaryan (n 1) 66: 'In fact, the CJEU does not specify the capacity in which the Council's decision was taken into account.'; Rosas (n 159) 808: 'The Court thus seems to hold this statement relevant, but has carefully placed the reference to it after the main conclusion on the legal nature of the WTO Agreements.'

[364] See Mendez (n 5) 217: 'Both the interventions and the Council Decision might be viewed as undue political pressure and, even though the ECJ was careful not to attribute a direct impact to the Decision, it would be naïve to suggest that they do not influence the Court.'; Rosas (n 159) 810: 'The Court of Justice … took note of the position of the EU itself, as expressed in the Preamble to the Council Decision approving the Uruguay Round Agreements.'; H Ruiz Fabri, 'Is There a Case—Legally and Politically—for Direct Effect of WTO Obligations?' (2014) 25 European Journal of International Law, 151, 162: 'Certainly, the ECJ considers that only primary law can solve this issue and that it is not legally bound to follow the position of the other institutions the acts of which it is in charge of reviewing but, inasmuch as the treaties remain silent on the issue, it has to give an answer and to give reasons for its stance.'; cf Ghazaryan (n 1) 66–73.

[365] In this sense, Ruiz Fabri ibid 151, 162. For a thorough analysis of the possible effects of said Council decisions under international law, see Ghazaryan (n 1) 69–71.

[366] For further reflections see Casolari (n 43) 119–24.

[367] See Mendez (n 5) 217; Semertzi (n 72) 1135.

B. The impact of the practice on the role of the CJEU

Against this background, the recent practice begs the question why the Commission[368] and the Council[369] have only in recent years started to exclude direct effect in the Union's international agreements, and why the Council adopted its decisions in the manner outlined above.

On the one hand, one might think that these 'political' institutions are attempting to challenge the CJEU's role as gatekeeper. It could be inferred from the recent practice of the EU 'political' institutions that said EU institutions want to decide autonomously which provisions of the EU's international agreements can be invoked by individual claimants before the European courts, opposing the traditional case law of the Court.[370] In practice, the 'Council and the Commission are willing to mitigate the openness created by direct applicability through limitations to direct effect'.[371] This is also due to the recent increase of provisions in newer FTAs that exclude direct effect of the entire agreement, not only of some of its parts.[372]

On the other hand, some scholars have argued that the reason behind the choice by the Commission and by the Council is that such clauses in many respects purely echo the content of the WTO agreements.[373] This assessment seems plausible since the extent of reception of the WTO agreements has been linked to the extent of the exclusion of direct effect in FTAs, especially regarding type (ii) and (iii) exclusions.[374] However, regarding type (ii) exclusions, there appear to be some open questions: as Semertzi has argued, the inclusion of a WTO-like dispute settlement mechanism 'per se cannot have been the determinant factor for this shift towards restricting the internal effects of the agreements'.[375] Instead, she wrote that 'the decisive obstructing factor will be the element of WTO incorporation, whereby an explicit WTO reference in the wording of the FTA provisions would leave no room for any interpretation diverging from the WTO'.[376] However, this interpretation does not seem to fully explain the shift to excluding direct effect for the whole agreement and not only for the WTO-derived parts, especially in the Council decisions. Regarding type (ii) and (iii) exclusions, this seems to be one very important piece of the puzzle. Nonetheless, these partial exclusions may then lead to the abovementioned problem of divergences between the text of the agreement and the Council decision. Thus, one could hypothesize that the exclusions for the whole agreement (type i) are increasingly used in order to avoid the issue of a mismatch between the text of the agreement and the Council decision and to align the effects of bilateral trade agreements with the effects of WTO agreements established by the CJEU case law.[377] Further research on this issue is required. All in all, while it is difficult to reach a final

[368] In the negotiation phase, as the Commission is usually appointed as the Union negotiator, see F Hoffmeister, 'The European Union as an International Trade Negotiator' in JA Koops and G Macaj (eds), *The European Union as a Diplomatic Actor* (Palgrave Macmillan 2015), 138–154, 138; Schütze (n 77) 293.

[369] Initially through the decision authorising the opening of negotiations, during the negotiating process through the negotiating directives, and afterwards in the Council decisions on the signing and the conclusion of the agreement, see art 218(2)–(6) TFEU.

[370] cf Mendez (n 5) 217 regarding Council Decision 94/800/EC: 'However, we need to ask ourselves why the political institutions have taken the unprecedented step of stating their position in the preamble and also to be forceful and generally united in their stance before the Court. They have gone to such lengths because the doctrinal edifice that has been judicially constructed exhibits a willingness, at least theoretically, to use EU Agreements as a review criterion and thus a strong case to the contrary has to be made which was provided, in particular, by the DSU, as the ECJ duly recognized.'

[371] Ghazaryan (n 1) 74.

[372] See nn 317–27.

[373] Poli (n 72) 94.

[374] Semertzi (n 72) 1147–55.

[375] ibid 1155, see also 1145–46 and 1147–55.

[376] ibid 1145–46.

[377] cf ibid 1155.

verdict on the reasons for the changes in the practice, it is crucial to query what implications it entails.

The ramifications of the recent practice described above can be interpreted from different angles. From one perspective, it could be argued that the express exclusion of direct effect in the text of the agreements leads to greater legal certainty.[378] In this vein, one could suppose that the EU 'political' institutions are merely seeking to prevent the insecurity resulting from the often-ambiguous jurisprudence of the Court. Additionally, this phenomenon poses no problems in terms of reciprocity since in most cases the exclusion of direct effect is reciprocal.[379] But even when reciprocity is lacking, the impact is limited since reciprocity is not a precondition for the assumption or exclusion of 'external' direct effect, as affirmed by the CJEU's jurisprudence regarding bilateral agreements.[380]

Conversely, in practice, the result of the exclusion of direct effect deprives individuals of effective redress to safeguard their rights and enforce compliance with EU international agreements.[381] Indeed, the systematic exclusion of direct effect hinders the legal protection of individuals' rights before national courts. It also affects individual rights invoked before the CJEU for proceedings under Article 263(4) TFEU and Article 267 TFEU (on validity of EU secondary law), since the CJEU, as demonstrated in Sections VIII and X, generally considers 'external' direct effect to be the precondition to use international law as basis to challenge EU law.[382] By denying direct effect and, thereby, the legality review of EU law under the standards of such agreements, the implementation of certain agreements is thus removed from the judicial dynamics and handed over exclusively to the political and diplomatic process conducted by the political institutions of the Union.[383] This development can be described as a shift in power, influencing the EU institutional balance.[384] It has been rightly observed in the literature that 'the accordion of direct applicability stretches and squeezes in different situations in different ways, as the EU institutional equilibrium requires'.[385] Nonetheless, it would seem exaggerated to assume a breach of the principle of institutional balance, as defined in the *Meroni* judgment.[386]

In any event, even though the principle of institutional balance is not violated by the current practice, there has been a noticeable shift in the relations between EU institutions regarding 'external' direct effect. One might even argue that, in the end, the logic of the CJEU's overall conservative approach regarding multilateral agreements, such as the WTO agreements and non-trade-related multilateral agreements like UNCLOS, have prevailed

[378] See the EU–Singapore FTA (n 322), art 16.16: '*[f]or greater certainty*, nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law' (emphasis added) and Association Agreement with Ukraine (n 337), Chapter 14, fn 1: '*For the avoidance of doubt*, this Title shall not be construed as conferring rights or imposing obligations which can be directly invoked before the domestic courts of the Parties' (emphasis added).

[379] Exceptions can be found in the Central America association agreement (n 321), art 356: 'Nothing in this agreement shall be construed as conferring rights or imposing obligations on persons, other than those rights or obligations created by this agreement nor as obliging a party to permit that this agreement be directly invoked in its domestic legal system, unless otherwise provided in that party's domestic legislation.' See also the FTA with Vietnam (n 323), art 17.20 ('*No direct effect*'): 'Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law. Viet Nam may provide otherwise under its domestic law.'

[380] *Bresciani* (n 98), para 23. See Semertzi (n 72) 1145.

[381] E Cannizzaro, *Il diritto dell'integrazione europea* (Giappichelli 2022) 432.

[382] Mendez (n 5) 108–43, 143–47, 157–62 and 162–68; cf Ghazaryan (n 1) 40.

[383] See the account by Cannizzaro (n 381) 432.

[384] See, in this regard, Ruiz Fabri (364) 151, 160–65.

[385] See P Mengozzi, 'The Jurisprudence of the Court of Justice and the Court of First Instance of the European Communities' in G Sacerdoti, A Yanovich and J Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP 2006) 474–81, 481; cf Semertzi (n 72) 1152.

[386] CJ, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, Case 9-56, EU:C:1958:7; see O Moskalenko, 'The Institutional Balance: A Janus-Faced Concept of EU Constitutional Law' (2016) 45 Politeja 125, particularly 132–36.

over the broad approach the CJEU had initially applied to bilateral agreements. Therefore, the era in which the Court readily recognized direct effect to most provisions of bilateral agreements seems to have come to an end, at least regarding the new generation of FTAs and association agreements. This phenomenon underlines the political nature of direct effect, as has already been outlined in Sections V and X of this Chapter. Moreover, the political dimension of the recognition of direct effect appears especially pertinent when considering the current geopolitical situation. In this regard, the stark contrast between the recognition of direct effect to the EC Partnership and Cooperation Agreement with the Russian Federation of 1994, which is still in force today, in the *Simutenkov* case,[387] on the one hand, and, on the other hand, the denial of direct effect in the text of the EU–Ukraine Association Agreement cannot go unnoticed. This asymmetry is a key demonstration that the question of external direct effect needs to be integrated into policy debates concerning EU external action.

In conclusion, further developments in the short, medium, and long term in negotiating and concluding international trade agreements will demonstrate whether the recent practice will be a temporary exception to the rule of recognition of direct effect of bilateral agreements or a durable policy change. In any case, the mismatches between Council decisions and provisions of the international agreements regarding the scope of exclusion of direct effect highlight two key points. First, the CJEU appears to have lost much of its 'gatekeeper' role in the assessment of 'external' direct effect. Secondly, there seems to be significant disagreement between the different EU institutions either on whether direct effect should be attributed at all to the norms, or, in most cases, on which norms of an agreement should have direct effect. Consequently, the current practice is further testament to the fact that the doctrine of 'external' direct effect is not a monolithic concept, but a hotly contested political issue.

XII. CONCLUSION

The issue of direct effect of international agreements continues to be controversial to this day, and the question remains who the ultimate 'gatekeeper' of the EU legal order is. In this Chapter, it was illustrated how the CJEU has created a considerable bulk of case law on direct effect of international law, oscillating between a more generous and a more reserved approach towards the attribution of 'external' direct effect.

Recognizing 'external' direct effect of international agreements, and thereby acknowledging their decentralized direct invocability, can affect the institutional balance, the reciprocal relationships with third-country partners, and the uniform application of those agreements in domestic legal systems. It is, therefore, understandable that European judges are cautious in using the doctrine of direct effect with respect to international law. Acting cautiously, however, does not necessarily entail systematically and increasingly denying the prerequisites of legality review. This holds true particularly when EU law is at stake, as the CJEU has established in its jurisprudence based on the assumption that direct effect, in its narrow dimension, is the precondition for challenging EU acts. An assumption that has been subject to criticism in this contribution. In any case, even if it were to be considered that EU acts could be challenged only on the basis of the recognition of international agreements' direct effect, the constant denial of 'external' direct effect leading to the denial of legality review regarding such acts is such as to challenge the two rationales underpinning *Van Gend & Loos* and its progeny. First, just as 'internal' direct effect allows applicants to act as private enforcers of EU law, the legality review through 'external' direct effect guarantees the

[387] See *Simutenkov* (n 183).

enforcement of the principle *pacta sunt servanda*, as codified in Article 26 of the Vienna Convention on the Law of Treaties. In this vein, direct effect is instrumental to compliance with international law by which the EU is bound.[388] Secondly, the recognition of legality review by virtue of 'external' direct effect for the purpose of challenging EU acts is closely related to the effective judicial protection of States' interests, and of natural and legal persons' rights. The protection of such rights is safeguarded in EU law and explicitly held in the *Les Verts* ruling.[389] Those interests and rights are questioned if, even in the face of a breach of a sufficiently clear, precise, and unconditional international law provision by an EU act, the latter cannot be subject to legality review[390] due to a narrow interpretation of direct effect.

To date, the jurisprudential practice is unclear, characterized by multiple uncertainties and criticalities, as detailed above. Most importantly, there has been a major evolution of the role of the CJEU and the other EU institutions regarding the direct effect of international agreements. Ever since the 1970s, the CJEU had assumed the function of a gatekeeper deciding on direct effect of international agreements since back then it was unusual to regulate their legal effects directly in one or more of their provisions. Thus, the CJEU was free to use the notion of direct effect as both a shield against international law and a sword piercing Member States' legislation.[391] However, in recent years, there has been a trend emerging with the Commission and the Council willing to take matters into their own hands. Indeed, the EU negotiating teams have started the practice of advocating for the insertion of clauses precluding effect directly in the text of EU FTAs or association/cooperation agreements. This current phenomenon, which extends to the present day with proposals for the exclusion of direct effect for agreements currently being negotiated, is apt to challenge individuals' legal protection. Furthermore, this trend shows once and for all what has been already observed: the choice on the recognition of the 'external' direct effect—torn between respect of the autonomy of the EU legal order and compliance with international law—is ultimately political. Hence, it comes as no surprise that the EU institutions in charge of the EU external action have taken the lead in this field.

Against this background, it is questionable what function the CJEU may assume in the future, considering that the role of the Court as a gatekeeper has shrunk dramatically regarding bilateral trade agreements. On the one hand, one might hope that, in the long run, the CJEU will resolve the numerous doubts about the scope and extent of 'external' direct effect identified in the sections above in order to enhance legal certainty. On the other hand, the hope is that the EU will fully grasp the potential inherent in such doctrine, following, in this respect, the expansionist approach adopted in its jurisprudence on 'internal' direct effect. This seems to be, however, an unrealistic hope, at least in the short term, as shown by the above mentioned EU recent practice on the preclusion of direct effect: it seems unlikely that the CJEU will return to a more favourable approach towards 'external' direct effect in the near future.

A more modest and, perhaps, more realistic proposal is that the CJEU, instead of interpreting the doctrine of direct effect in an unduly restrictive manner, where it denies the invocability of EU agreements and the review of legality of EU secondary law based on these agreements, as is unfortunately often the case, should not evoke the doctrine of direct effect

[388] On the efficiency of, and compliance with, international law through direct effect see J Bello, 'The WTO Dispute Settlement Understanding: Less Is More' (1996) 90 American Journal of International Law 416; G De Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2009) 51 Harvard International Law Journal 1; Mendez (n 5) 107–13; A Nollkaemper, The Duality of Direct Effect of International Law' (2014) 25 European Journal of International Law 105, 118.

[389] CJ, *Parti écologiste 'Les Verts' v European Parliament*, 294/83, EU:C:1986:166, para 23.

[390] Tancredi (n 160) 267–68.

[391] See Nollkaemper (n 388) 108.

when a challenge to an EU act is at stake. Rather than relying on a contorted interpretation of direct effect that is filled with loopholes, the CJEU should expressly build its reasoning on policy considerations related to the principle of EU institutional balance, most notably on the respect for the role of the Commission and the Council in the exercise of EU external action. Indeed, the denial of 'external' direct effect, if aimed precisely at a denial of legality review of EU law, should always be handled with care, especially when there is a high risk that it could be improperly used to pursue goals that, while being politically legitimate, have little to do with EU law and its enforcement.

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