

EU Member State Enforcement of ‘Mixed’ Agreements and Access to Justice: Rethinking Direct Effect

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Article 344 TFEU forbids Member States to pursue any other means of dispute settlement, when issues regarding the application and interpretation of the Treaties are concerned. The Court of Justice extended this principle to include disputes arising under international agreements, where the subject matter falls under European Union (EU) competence. At the same time, the number of international agreements to which direct effect is not granted is slowly rising. Consequently, the question arises whether Member States still have proper access to justice under these international regimes vis-à-vis other Member States or the EU, given that: first, they cannot pursue litigation under the agreements’ dispute resolution system if the foreign body risks interpreting the agreement, which also forms part of EU law; second, they cannot rely on these agreements before the Court. This article argues that a rethinking of the direct effect doctrine of international agreements is necessary. Member States should not be equated with individuals, when invoking international agreements before the Court to challenge the validity of EU acts.

1 INTRODUCTION

Article 216 TFEU grants the EU the possibility to conclude international agreements which are binding upon its institutions and the Member States. The type of agreements to which the Union is a signatory can fall under exclusive EU competence, but national and Union competence can also coexist in the context of an international agreement, thus giving rise to the concept of ‘mixture’.¹ It might also happen that an agreement was signed only by the Member States, but over time the Union took over the Member State obligations covered by the

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¹ P. Koutrakos, *EU International Relations Law* 137 (Hart Publishing 2006) [hereinafter Koutrakos].

agreement and became bound by it.² It is also possible that an agreement was signed by all the Member States, and the Union is not bound by it.³

This article shall only focus on mixed agreements, to which both the EU and the Member States are parties. In accordance with the principles applicable to mixed agreements, the part of the agreement that is based on shared competence between the EU and the Member States becomes an integral part of the EU legal order. Consequently, the Court of Justice (hereinafter ‘the Court’) shall have exclusive jurisdiction over these provisions just like it would have for provisions falling under exclusive EU competence. However, if part of the agreement falls under exclusive Member State competence, the Court shall not have any jurisdiction over it.⁴ Therefore, the part of the agreement that falls under exclusive Member State competence shall be granted effect according to the laws of the Member State. In such a case, ‘EU law does not require or forbid the legal order of a Member State to accord to individuals the right to rely directly’ on the rule laid down in the agreement.⁵

However, it is not only the Court that has jurisdiction over international agreements. Most agreements set up their own dispute resolution mechanisms, ranging from many highly developed and judicial dispute settlement mechanisms like the WTO panels and Appellate Body, to Joint Committees found in most cooperation or association agreements.

The first part of this article deals with Article 344 TFEU, according to which Member States are barred from pursuing other means of dispute settlement when the application or the interpretation of the Treaties is at issue. The second part of the article offers a short introduction into the reasons for denying direct effect to certain international agreements as well as the conditions under which a Member State can rely on an agreement before the Court. The third part focuses on the procedures in which a Member State can rely on an international agreement before the Court. This is followed by the risks of not providing Member States with proper access to justice when they need to rely on international agreements.

² Joined Cases 21 to 24/72, *International Fruit Company NV and others v. Produktschaap voor Groenten en Fruit* [1972] E.C.R. 01219 – The Community (Union) became bound by the GATT 1947, as during the transitional period it took over the Member States’ competences in the areas covered by the Common Commercial Policy.

³ For e.g. The International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 (Marpol 73/78); The Convention on International Civil Aviation, 1947 (The Chicago Convention). See also: *The Union, the Member States and International Agreements* (editorial comments), 48 Com. Mkt. L. Rev. 1, 1-7 (2011).

⁴ N. Lavranos, *Concurrence of Jurisdiction between the ECJ and other International Courts and Tribunals*, 14 European Envtl. L. Rev. 213, 220 (2005) [hereinafter Lavranos, *Concurrence of Jurisdiction*].

⁵ C-392/98, *Dior and Others* [2000] E.C.R. I-11307, para. 48; C-431/05, *Merck Genericos v. Merck* [2007] E.C.R. I-07001, para. 34; Case C-240/09, *Lesoochránárske zoskupenie v. Ministerstvo zivotného prostredia* [2011], 2 CMLR 43, para. 32.

The last part of the article comprises the purpose of this academic endeavour. Linking the previous findings, the question arises of how a Member State should seek justice against the EU or another Member State, when it too is a signatory to an international agreement. Article 344 TFEU gives exclusive jurisdiction to the Court over the matter, but at the same time Member States might be denied the possibility to rely on the agreement. Does then such a scenario hamper Member States' access to justice under the international agreement?

It shall be argued that when a Member State invokes an international agreement in order to review the legality of EU measures, the question of direct effect should not arise at all. If direct effect of the agreement was still a precondition for the review of EU legislation, the broad interpretation of direct effect should be followed. Furthermore, this article does not focus on the doctrine of 'consistent interpretation' which is a secondary means of granting effects to international agreements and has certain limits compared to direct effect.⁶

2 ARTICLE 344 TFEU AND ACCESS TO JUSTICE

Article 344 TFEU (former Article 292 TEC) was one of those provisions, that up to some years ago remained 'all but unnoticed' for fifty years.⁷ According to Article 344 TFEU, 'Member States undertake not to submit a dispute *concerning the interpretation or application of the Treaties* to any method of settlement other than those provided for therein.'⁸ Prior to the *Mox Plant* judgment,⁹ the Court only succinctly referred to former Article 292 TEC in Opinion 1/91. It held that this provision confirms the exclusive jurisdiction of the Court when it comes to disputes arising between Member States, concerning the interpretation or application of the EC Treaty (now TFEU).¹⁰ The Court went on to refine the interpretation of this article in *Mox Plant*.

In this case, the United Kingdom authorized the building of a nuclear waste recycling plant (Mox plant) on the shores of the Irish Sea. Prior to the judgment

⁶ For the doctrine of 'consistent interpretation' of national law in light of EU law, see A. Arnall, *The European Union and its Court of Justice* 229–225 (2d ed., Oxford U. Press 2011); for the doctrine of 'consistent interpretation' of EU law in light of international law, see P. Eeckhout, *EU External Relations Law* 355–357 (2d ed., Oxford U. Press 2011).

⁷ N. Lavranos, *Mox Plant Dispute – Court of Justice of the European Communities: Freedom of member states to bring disputes before another court or tribunal*, 2 *European Const. L. Rev.* 456, 456 (2006) [hereinafter Lavranos, *Mox Plant Dispute*].

⁸ Highlights added by author.

⁹ C-459/03, *Commission v. Ireland* [2006] E.C.R. I-4635, paras. 40–44 [hereinafter *Commission v. Ireland (Mox Plant)*].

¹⁰ Opinion 1/91 [1991] E.C.R. I-06079, para. 35.

of the Court, the Irish authorities sought justice without success¹¹ before an arbitral tribunal set up under the OSPAR Convention.¹² Ireland also instituted proceedings before the Arbitral Tribunal provided for in Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS). It also requested the International Tribunal on the Law of the Sea (ITLOS) to institute interim measures. The ITLOS held that it had *prima facie* jurisdiction and dismissed the United Kingdom's objections against jurisdiction. Later on, the United Kingdom raised the same objections once again before the Arbitral Tribunal, which notified the European Commission and decided to suspend proceedings, arguing that there was a possibility that the Court of Justice had jurisdiction over the matter.¹³

The Commission launched infringement proceedings against Ireland, and the Court delivered a judgment which prohibited Ireland from pursuing other means of dispute resolution, arguing that the issue involved the interpretation or application of EU law. The judgment delivered by the Court, however, 'has been met with mixed feelings, as it raised many questions regarding concurrent jurisdiction' of different international dispute settlement bodies.¹⁴

Relying on previous case-law,¹⁵ the Court held that UNCLOS (signed under shared competence) formed an integral part of the European legal order, and mixed agreements have the same status in EU law as purely EU agreements.¹⁶ Given that UNCLOS was a mixed agreement, it had to be seen whether the provisions of the Convention relied on by Ireland before the Arbitral Tribunal came under Union competence.¹⁷ The Court first argued that the question of EU competence is one which relates to the attribution and thus, the very existence of competence and not to its exclusive or shared nature.¹⁸ Using its previous conclusions in *AETR*,¹⁹ the Court held that when the Treaties grant such competence, the existence of external EU competence does not depend on the adoption of secondary EU legislation.²⁰ Lastly, if a declaration of competence is attached to the international agreement, then the rules set out in the declaration

¹¹ *Dispute Concerning Access to Information under 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland, final award*, Decision of 2 Jul. 2003, http://untreaty.un.org/cod/riaa/cases/vol_XXIII/59-151.pdf (accessed 11 Feb. 2013) [hereinafter *OSPAR, Ireland v. UK*].

¹² *Ibid.*, para. 185.

¹³ *Commission v. Ireland (Mox Plant)*, paras. 40–44.

¹⁴ N. Schrijver, Case C-459/03, *Commission of the European Communities v. Ireland*, 47 *Com. Mkt. L. Rev.* 863, 863 (2010) [hereinafter Schrijver].

¹⁵ Case C-344/04, *LATA and ELFAA* [2006] E.C.R. I-0000, para. 36 and Case C-13/00, *Commission v. Ireland* [2002] E.C.R. I-02943, para. 14.

¹⁶ *Commission v. Ireland (Mox Plant)*, paras. 82–84.

¹⁷ *Ibid.*, para. 86.

¹⁸ *Ibid.*, para. 93.

¹⁹ Case 22/70, *Commission v. Council (AETR)* [1971] E.C.R. 00263, para. 17.

²⁰ *Ibid.*, paras. 94–95.

have to be followed.²¹ In the specific context of UNCLOS, the 'Declaration of Community competence' made the transfer of shared competences subject to the existence of Union rules.²² In the areas covered by this case, the EU had already enacted secondary legislation, some of which were used by Ireland in its pleadings before the Arbitral Tribunal. Given the existence of such directives, the Court concluded that the parts of UNCLOS relied on by Ireland before the Arbitral Tribunal fell under Union competence. Therefore, it had jurisdiction to deal with disputes that concern the application and interpretation of those provisions.²³

However, it had to be seen whether this jurisdiction is exclusive, as to 'preclude' any other forms of dispute settlement. Relying on previous opinions,²⁴ the Court first argued that an international agreement cannot affect the allocation of responsibilities defined in the Treaty (TFEU). Article 344 TFEU conferred to it the exclusive jurisdiction to handle disputes between Member States with regard to the interpretation or the application of the EC Treaty (TFEU).²⁵ It then referred to Article 282 UNCLOS, which gives precedence to a dispute settlement procedure agreed through a 'general, regional or bilateral agreement' relating to a dispute concerning the interpretation or application of the Convention.²⁶ The Court argued that the UNCLOS provisions at issue came under Union competence, and the dispute concerns the interpretation and application of the EC Treaty (TFEU), within the terms of Article 344 TFEU.²⁷ It then concluded that Article 344 TFEU was breached, as Ireland had submitted EU law instruments for interpretation by a foreign dispute settlement body. Furthermore, as a consequence of these actions, Ireland breached Article 10 TEC (now Article 4(3) TEU), which 'must be understood as a specific expression of Member States' more general duty of loyalty'.²⁸

The *Mox Plant* judgment can, thus, be seen as a clarification of previous case-law and opinions with regard to Union competence over international agreements. The Court also concluded that in this specific case Article 344 TFEU granted it exclusive jurisdiction, as to preclude any other forms of dispute settlement. However, the judgment is important for another reason as well. Submitting a dispute concerning another Member State to a foreign judicial body, that risks applying or interpreting EU law, does not only constitute a breach of

²¹ *Ibid.*, paras. 98–108.

²² *Commission v. Ireland (Mox Plant)*, paras. 106–107.

²³ *Ibid.*, paras. 110–121.

²⁴ Opinion 1/91 [1991] E.C.R. I-6079, para. 35 and Opinion 1/00 [2002] E.C.R. I-3493, paras. 11–12.

²⁵ *Commission v. Ireland (Mox Plant)*, paras. 123.

²⁶ *Ibid.*, para. 125.

²⁷ *Ibid.*, paras. 126–127.

²⁸ *Commission v. Ireland (Mox Plant)*, para. 169.

Article 344 TFEU, but is also a breach of the Member States' general duty of loyalty.

Some clarifications, however, are needed when examining the Court's line of arguments. It is problematic for the Court to rely on Article 282 UNCLOS when it comes to the conclusion that the system of dispute resolution between Member States, under the TFEU, takes precedence over the dispute resolution system contained in UNCLOS.²⁹ Article 344 TFEU is intended to apply to disputes concerning the interpretation and application of the Treaties and does not act as a general clause for the settlement of any international dispute.³⁰ ITLOS specifically stated, when asked to order provisional measures, that Article 282 of the Convention³¹ only refers to those 'general, regional or bilateral agreements, which provide for the settlement of disputes concerning what the Convention refers to as "the interpretation or application of this Convention"'.³² It furthermore held that the dispute settlement mechanisms of the OSPAR Convention and the EU Treaties 'deal with disputes concerning the interpretation and application of those agreements, and not with disputes arising under the Convention'.³³ However, states can provide that priority and exclusivity is to be given to the dispute settlement mechanism of one treaty over the other, when both treaties cover similar issues.³⁴ Therefore, Article 344 TFEU could be viewed as an expression of the contracting parties (the Member States) to favour the enforcement of the founding Treaties, over other international agreements.

In conclusion several issues need to be highlighted. First, the fundamental condition to trigger the application of Article 344 TFEU is, whether a Member State submitted a dispute which concerns the application or interpretation of the Treaties to a different dispute settlement method. Second, an international agreement to which the EU is a party forms an integral part of the EU legal order and the Court will treat the part of the agreement that falls under EU competence as EU law. Therefore, a breach of Article 344 TFEU will also arise when such an international agreement is submitted to a foreign forum which might decide over issues concerning the Union part of the agreement's application or interpretation.

²⁹ *Ibid.*, para. 125.

³⁰ Schrijver, 875.

³¹ This would be a case of 'residual jurisdiction', according to which a court's jurisdiction operates when no other international court or tribunal exercised its jurisdiction in the matter. See P.J. Kuijper, *Conflicting Rules and Clashing Courts: The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO*, Issue Paper No. 10, ICTSD, Geneva, Sep. 2010, 32–33. As a consequence of Art. 282 UNCLOS, ITLOS will exercise its jurisdiction, when no other agreements exist which provide that another international court/tribunal should apply or interpret the UNCLOS provisions.

³² ITLOS, *The Mox Plant Case (Ireland v. United Kingdom)*, Case No. 10 Order of 3 Dec. 2011, para. 48 [hereinafter ITLOS, *The Mox Plant Case*].

³³ *Ibid.*, para. 49.

³⁴ P. Eeckhout, *The EU and its Member States in the WTO – Issues of Responsibility*, in *Regional Trade Agreements and the WTO Legal System* 467 (L. Bartels & F. Ortino eds., Oxford U. Press 2006).

3 THE IMPORTANCE OF DIRECT EFFECT ON ACCESS TO JUSTICE

The goal of this article is to examine how the requirement of direct effect might impede Member States' access to justice in relation to international agreements. To this end, this section shall first briefly deal with the most important agreements to which the Court has denied direct effect and shall then be followed by the more sensitive question of the requirement of direct effect of international agreements and Member States.

3.1 THE LACK OF DIRECT EFFECT OF CERTAIN INTERNATIONAL AGREEMENTS

This sub-section shall succinctly present how the GATT and the WTO Agreement were denied direct effect, as well as the more recent denial of direct effect to the UNCLOS and certain provisions of the Aarhus Convention.³⁵

The denial of direct effect of the GATT 1947 and the WTO Agreement became one of those hotly debated topics that spurred an abundance of legal literature, criticisms and commentaries.³⁶ In *International Fruit Company*,³⁷ individuals challenged the validity of measures adopted by the EU institutions in light of the GATT through the preliminary ruling mechanism. The Court went on to conclude that such a review was possible if: (a) the EU is bound by the agreement in question and (b) the agreement confers rights on individuals which they can invoke before the courts.³⁸ Although the EU did not sign the GATT, the Court held that it had assumed the functions inherent in the tariff and trade policy through the gradual transfer of those powers from the Member States to the EU.³⁹ The Court went on to analyse 'the spirit, the general scheme and the terms' of the agreement and found that the system was based on reciprocal and mutually advantageous agreements that offered too much flexibility in their provisions.

³⁵ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 1998) [hereinafter *Aarhus Convention*].

³⁶ For further reading see also: Koutrakos, ch. 7; Eeckhout, at 343–365; G.A. Zonnekeyn, *Direct Effect of WTO Law* (Cameron May 2008); B.E. Olsen, M. Steinicke & K.E. Sørensen, *WTO Law From a European Perspective* ch. 5 (Wolters Kluwer 2012); M. Bronckers, *The Effect of the WTO in the European Court Litigation*, 40 *Texas Intl. L. Rev.* 443 (2005); A. Antoniadis, *The European Union and WTO Law: A Nexus of Reactive, Coactive, and Proactive Approaches*, 6 *World Trade Rev.* 45 (2007); M. Bronckers, *The Relationship of the EC Courts with Other International Tribunals: Non-Committal, Respectful or Submissive?*, 44 *Com. Mkt. L. Rev.* 601 (2007); M. Bronckers, *The Domestic Law Effect of the WTO in the EU – A Dialogue with Jacques Bourgeois*, in *Trade and Competition Law in the EU and Beyond* (I. Govaere, R. Quick & M. Bronckers eds., Edgar Elgar Publ. 2011).

³⁷ Joined Cases 21 to 24/72, *International Fruit Company v. Produktschaap voor Groenten* [1972] E.C.R. 01219 [hereinafter *International Fruit Company*].

³⁸ *International Fruit Company*, paras. 7–8.

³⁹ The 'functional succession' doctrine.

Thus, the General Agreement was not capable of conferring rights to individuals that could be invoked before the courts.⁴⁰

Later on in *Germany v. Council*⁴¹ (in detail in section 3.2) the issue of GATT's effects arose in the course of Article 263 TFEU review proceedings. The Court came to the conclusion that the same features of the General Agreement that stopped individuals from relying on it, would also bar Member States to invoke it when challenging secondary EU legislation. The Court also restated and clarified its earlier findings in *Fediol*⁴² and *Nakajima*,⁴³ holding that it can only review Union acts in light of the GATT provisions, if the EU intended to implement a particular obligation or the EU act expressly refers to a specific provision of the General Agreement.⁴⁴ These exceptions were later on referred to as the 'implementation principle'. However, the Court in subsequent cases interpreted the *Nakajima* exception restrictively so as to only apply in the specific situation of WTO anti-dumping.⁴⁵

As regards the WTO Agreement, to which both the Member States and the European Union were now signatories, the Court decided not to depart from its previous jurisprudence regarding GATT. Although the new WTO regime had a much stronger institutional structure and one of the most well-developed dispute settlement systems, which contains many compulsory elements, the Court in *Portugal v. Council*⁴⁶ decided to extend the previous GATT case-law to the newly adopted WTO Agreement. The Court did not expressly use the term 'direct effect' when it came to the conclusion that the WTO agreements due to their nature and structure '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'.⁴⁷ However, when arguing for the need to introduce the criteria of reciprocity in order to prevent the 'disuniform application of the WTO rules',⁴⁸ the Court alluded to the practices of other contracting parties where the WTO might or might not enjoy 'direct application'.⁴⁹

⁴⁰ *International Fruit Company*, paras. 14–27.

⁴¹ Case C-280/93, *Germany v. Council* [1994] E.C.R. I-04973 [hereinafter *Germany v. Council*].

⁴² Case 70/87, *Fediol v. Commission* [1989] E.C.R. 01781.

⁴³ Case C-69/89, *Nakajima v. Council* [1991] E.C.R. 01689 [hereinafter *Nakajima v. Council*].

⁴⁴ *Ibid.*, para. 111.

⁴⁵ Eeckhout, at 361–363. See Case T-19/01, *Chiquita v. Commission* [2005] E.C.R. II-315, para. 120. In two very recent cases, the General Court decided to extend the 'implementation principle' to the Aarhus Convention as well. Because the Commission appealed, it shall be seen whether the Court will follow the General Court's judgment or overturn it. See Case T-396/09, *Vereniging Milieudefensie v. Commission* [2012], not yet published and Case T-338/08, *Stichting Natuur v. Commission* [2012], not yet published.

⁴⁶ Case C-149/96, *Portugal v. Council* [1999] E.C.R. I-08395 [hereinafter *Portugal v. Council*].

⁴⁷ *Ibid.*, para. 47.

⁴⁸ *Ibid.*, para. 45.

⁴⁹ *Ibid.*, para. 44.

For a while, it seemed that the GATT/WTO Agreement were the 'black sheep' of international agreements, being denied direct effect in Article 267 TFEU proceedings or at least the possibility to rely on it in Article 263 TFEU proceedings. However, the Court struck again in *Intertanko*⁵⁰ by not granting direct effect to UNCLOS. Several associations alleged that multiple provisions of an EU directive ran against UNCLOS.⁵¹ The Court applied the 'WTO method' to the interpretation of the Convention⁵² and held that the validity of EU secondary legislation can be reviewed in the light of an international agreement if two conditions are met: (a) the EU is bound by the agreement, and (b) the nature and the broad logic of the agreement does not preclude the review of validity as well as the provisions of the agreement are unconditional and sufficiently precise.⁵³ The Court found that the EU was bound by UNCLOS under Article 216(2) TFEU (former 300(7) TEC) as it was a contracting party. In the Court's words, the provisions of the Convention 'codify, clarify and develop' the rules of general international law relating to the peaceful cooperation of the international community when exploring, using and exploiting marine areas and lays down legal regimes governing these areas, but does not in principle grant independent rights and freedoms to individuals.⁵⁴ The irony of this decision is that the individuals concerned did not invoke the Convention to claim rights for themselves but to review the Union's compliance with its international obligations.⁵⁵

The latest convention to join the group of international agreements signed by the EU, without having direct effect, is the Aarhus Convention. In the recent *Lesoochránárske zoskupenie* judgment,⁵⁶ the Court held that Article 9(3) of the Aarhus Convention did not have direct effect within EU law as it did not contain any clear and precise obligation capable of directly regulating the legal position of individuals.⁵⁷

⁵⁰ Case C-308/06, *Intertanko v. Secretary of State* [2008] E.C.R. I-04057 [hereinafter *Intertanko*].

⁵¹ The validity was also challenged under the Marpol 73/78 Convention. The Court found that the EU was not bound by Marpol 73/78 as only the Member States were signatories to it, and no functional succession took place.

⁵² M. Bronckers, *From 'Direct Effect' to 'Muted Dialogue' – Recent Developments in the European Courts' Case Law on the WTO and Beyond*, 11 J. Intl. Econ. L. 858, 894 (2008).

⁵³ *Intertanko*, paras. 44–45.

⁵⁴ *Ibid.*, paras. 53–59.

⁵⁵ S. Marsden, *Invoking Direct Application and Effect of International Treaties by the European Court of Justice: Implications for International Environmental Law in the European Union*, 60 Intl. & Comp. L. Q. 737, 753 (2011) [hereinafter Marsden].

⁵⁶ Case C-240/09, *Lesoochránárske zoskupenie v. Ministerstvo životného prostredia* [2011], 2 CMLR 43 [hereinafter *Lesoochránárske zoskupenie*].

⁵⁷ *Ibid.*, para. 45.

3.2 MEMBER STATES AND DIRECT EFFECT

The question of effects of international agreements mostly arose in preliminary ruling proceedings that concerned individuals. Therefore, some commentators were of the opinion that the doctrine, according to which the review of legality of secondary EU legislation was preconditioned by the direct effect of the agreement, did not apply to direct actions of annulment brought under Article 263 TFEU.⁵⁸ Such a situation soon arose in *Germany v. Council*. Germany challenged the validity of several provisions of the 'Banana Regulation'⁵⁹ under Article 263 TFEU (former Article 173 TEEC), claiming that they were contrary to the GATT.

Before going into the analysis of *Germany v. Council*, it is important to clarify the issue of what exactly is meant by 'direct effect'. The concept of direct effect of EU law has undergone developments since *Van Gend en Loos*. Gradually, a second concept emerged in the Court's case-law which led academics to differentiate between the *broad* and the *narrow* concepts of direct effect.⁶⁰ Thus, according to the former, the concept of direct effect is broader because it allows those provisions to be relied upon, which do not as such create rights.⁶¹ Such provisions can be invoked for other purposes, such as the review of national legislation. The latter concept refers to the provisions creating rights which can be enforced in national courts.⁶² Consequently, direct effect can either refer to the 'invocability' of a provision before a national court or to its capacity to create enforceable rights.⁶³

Regarding this case, Germany submitted that compliance with GATT rules should be a precondition for the legality of Union acts, 'regardless of any question as to the direct effect of GATT'.⁶⁴ The Court reiterated its findings in *International Fruit Company* and held that although GATT binds the Union, the 'scope' of it in the Union legal system has to be assessed by looking at the 'spirit, general scheme and the terms of GATT'.⁶⁵ Based on this method of purposive interpretation, the Court denied Germany the right to invoke GATT in order to challenge the lawfulness of secondary EU legislation. It held that the same features of the Agreement that precluded individuals from 'invoking' GATT to challenge the

⁵⁸ Eeckhout, at 294.

⁵⁹ Reg 404/93.

⁶⁰ S. Prechal, *Does Direct Effect Still Matter?*, 37 *Com. Mkt. L. Rev.* 1047, 1050 (2000) [hereinafter Prechal].

⁶¹ Another development in the concept of *direct effect* of EU law allows not only individuals, but also national administrations to rely on EU law before national courts. See Prechal, 1049 with reference to Case C-431/92, *Commission v. Germany (Grosskrotzenburg)* [1995] E.C.R. I-02185.

⁶² *Ibid.*, 1050–1052, with reference to P. Pescatore, *The Doctrine of 'Direct Effect': An Infant Disease of Community Law*, 8 *European L. Rev.* 155 (1983).

⁶³ P. Craig & G. de Burca, *EU law: Text, Cases and Materials* 270 (Oxford U. Press 2008) [hereinafter Craig and de Burca].

⁶⁴ *Germany v. Council*, para. 103.

⁶⁵ *Ibid.*, para. 105.

lawfulness of EU acts would apply in an action brought by a Member State, for the same reasons.⁶⁶ Thus, the great flexibility of GATT provisions, the possibility of contracting parties to unilaterally suspend obligations and the possibility to negotiate, are special features which are not unconditional and 'an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of GATT'.⁶⁷

The arguments offered by the Court are not without criticism. The Court does not mention the term 'direct effect' per se, but it does mention the term 'directly applicable', and it also refers to the possibility of an individual to 'invoke' the agreement at hand. Two observations have to be made.

First, the Court sometimes considers the formula 'produces direct effects and creates individuals rights' to be synonymous with 'directly applicable'.⁶⁸ The terminological confusion between direct effect and direct applicability can also be found in the Court's case-law regarding the effects of international agreements in the EU legal order.⁶⁹ As the difference between the two terms shall be explained later on, now it suffices to say that the term 'directly applicable' used by the Court in this judgment could refer to several different concepts.

Second, one must look at how reliance on the GATT was denied in *International Fruit Company* and *Germany v. Council*. In the former, the Court came to the conclusion that the special features of the General Agreement *could not grant enforceable rights to individuals*, and therefore they could not challenge the validity of secondary EU legislation. In other words, the special features of the agreement denied it having 'narrow direct effect'. In the latter case, the Court came to the conclusion that the same special features of GATT *precluded a Member State from 'invoking'* the agreement in order to challenge the validity of secondary EU legislation. In other words, the special features of GATT denied it having 'broad direct effect'.

⁶⁶ *Germany v. Council*, para. 109.

⁶⁷ *Ibid.*, para. 110.

⁶⁸ P. Craig & G. de Búrca, *EU Law: Text, Cases and Materials* 105 (Oxford U. Press 2011). See Case 93/71, *Leonisio v. Italian Ministry of Agriculture* [1972] E.C.R. 293, para. 22 – the Court refers to the *direct effect* mentioned in former Art. 189 EEC (Art. 288 TFEU); in Case 26/62, *Van Gend en Loos*, para. 13. – when defining *direct effect*, the Court also refers to the lack of implementation into national law of the Treaty provision, which is actually *direct applicability*.

⁶⁹ The Court uses the term *direct effect* in the following cases: *Portugal v. Council*, para.34; Case C-93/02, *Biret* [2003] E.C.R. I-10497; Cases C-120/06 and C-1201/06, *FIAMM v. Council and Commission* [2008] E.C.R. I-06513; Case C-257/99, *Barkoci and Malik* [2001] E.C.R. I-06557, para. 30; Case C-265/03, *Simutenkov* [2005] E.C.R. I-02579; Case C-213/03, *L'etang de Berre* [2004] E.C.R. I-07357. The Court uses the term *directly applicable* in the following cases: Case 12/86, *Demirel* [1987] E.C.R. 03719, para. 14; Case C-63/99, *Gloszczuk* [2001] E.C.R. I-06369, para. 29; *Lesoochránárske zoskupenie*, para. 44.

Based on this, it can be said that the same features of the General Agreement that deny it narrow direct effect, also deny it broad direct effect. Eeckhout concludes that, whether an international agreement can be relied on in order to challenge the validity of secondary EU legislation depends on the *direct effect* of the agreement, and it is irrelevant: (a) whether the agreement is relied on in a direct action for annulment under Article 263 TFEU; (b) whether it is relied on before a national court in order to challenge the validity of EU legislation; or (c) whether that action was brought by an individual, Member State or EU institution.⁷⁰ These conclusions need to be accepted with reservations, keeping in mind the differences between narrow and broad direct effect.

Koutrakos is of the opinion that this reasoning of the Court ‘mitigates the implications of a two-tier test for the application of the direct effect’ doctrine, as Member States and individuals are equally barred from relying on certain agreements, under the same conditions.⁷¹ Eeckhout also views this development as a positive one, as it ‘indeed should not matter’ under which procedure and by whom is the legality of secondary EU legislation challenged.⁷²

To conclude, it is worth mentioning that the Court in *Germany v. Council* used the same features of GATT that prohibited it to grant rights to individuals, in order to prohibit a Member State of relying on it in Article 263 TFEU proceedings. Besides the terminological confusion, it seems that in the case of Member States, the Court favours the notion of ‘broad direct effect’. Thus, the focus falls on whether an agreement can be invoked and not whether it confers rights to individuals. Given these, it is yet a matter of assumption, whether the Court would deny Member States the possibility to invoke the UNCLOS or Aarhus Convention in order to challenge the validity of secondary legislation, following the same line of argument that it used to deny individuals the possibility to do so.

4 HOW CAN MEMBER STATES ENFORCE INTERNATIONAL AGREEMENTS?

Article 344 TFEU is worded without distinguishing as to the respondent party. Thus, not only actions against other Member States, but also actions brought against the Union⁷³ before an international dispute settlement body are prohibited. Therefore, under EU law, a Member State is barred from relying on an international agreement before another international forum, if that international

⁷⁰ Eeckhout, at 295.

⁷¹ Koutrakos, at 255.

⁷² Eeckhout, at 295–296.

⁷³ This is a highly unlikely scenario, given the Member States’ duty of loyalty towards the Union.

agreement is considered to be EU law, the application and interpretation of which cannot be subjected to a foreign dispute settlement method.

The next sections shall deal with the situations in which Member States can or should be able to invoke international agreements either as a defence mechanism or as a basis of their claim.⁷⁴ The review of legality of secondary EU law is not the only basis of a dispute involving an international agreement.

4.1 A DIRECT ACTION DISPUTE: REVIEW OF SECONDARY LEGISLATION

Article 263 TFEU allows a Member State to bring proceedings before the Court for the review of legality of secondary legislation and acts of the institutions, among other grounds, for the infringement of the Treaties or of any rule of law relating to their application. In *Germany v. Council*, the Court made it clear that in order for a Member State to challenge the validity of secondary EU legislation in light of GATT, the same special features of GATT that barred an individual from invoking it, would also apply to Member States.

However, the judgment in *Netherlands v. Parliament and Council*⁷⁵ may add some nuance to these previous findings. The Netherlands launched Article 263 TFEU proceedings, alleging that an EU Directive⁷⁶ infringed several international agreements. The Court held that the Union is not bound by the European Patent Convention (EPC), as it is not a party to it. Furthermore, the two WTO Agreements (TRIPS and TBT Agreement) were not of the kind that permitted the review of legality of secondary EU legislation.⁷⁷ The same conclusion, however, was not reached with regard to the Convention on Biological Diversity (CBD). Looking at the features of the CBD, the Court first went on to hold that unlike the WTO Agreement, the agreement at hand is not strictly based on reciprocal and mutually advantageous arrangements.⁷⁸ According to the Court:

(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 [Union] as a party to that agreement [...]

(55) Moreover, and in any event, this plea should be understood as being directed, not so much at a direct breach by the [Union] of its international obligations, as at an obligation

⁷⁴ Besides the three possibilities mentioned here, it seems that Art. 265 TFEU could also entitle a Member State to launch an action against a Union body, by invoking the Union's failure to implement an international agreement, the failure to abide by it or give effect to the decisions of the judicial bodies set up by the agreements.

⁷⁵ Case C-377/98, *Netherlands v. Parliament and Council* [2001] E.C.R. I-07079 [hereinafter *Netherlands v. Parliament and Council*].

⁷⁶ Dir 98/44.

⁷⁷ *Netherlands v. Parliament and Council*, paras. 51–52.

⁷⁸ *Ibid.*, paras. 53.

imposed on the Member States by the Directive to breach their own obligations under international law, while the Directive itself claims not to affect those obligations.⁷⁹

It seems that even though an agreement is incapable of conferring rights to individuals, it could still act as a ground for the review of secondary legislation, in order to check whether the Union complies with its international obligations. One possible reading is that the Court ‘felt embarrassed’ by not allowing Member States, also parties to mixed agreements, to pursue judicial review on grounds of violation of certain agreements.⁸⁰ Corroborating these findings with the argumentation in *Germany v. Council*, it seems that when Member States challenge the validity of secondary legislation in light of an agreement, the Court will favour the ‘broad’ notion of direct effect. Therefore, when Member States seek to review EU legislation to check compliance with the Union’s international obligations, it should not matter whether direct effect is granted in the sense that the agreement creates rights to individuals which they can invoke before the courts (narrow direct effect). What should matter is whether the features of the agreement grant the Member States the possibility to invoke the agreement (broad direct effect).

It is hard to draw general conclusions from a handful of cases. *Netherlands v. Parliament and Council* is important though, because it seems to acknowledge that States should be able to ask for the review of EU acts in light of their international obligations, even if that agreement does not confer rights to individuals.

4.2 A MEMBER STATE VERSUS MEMBER STATE DISPUTE

Member States are international actors with treaty-concluding powers and are frequently parties to international disputes, unlike for example the constituent States of the USA.⁸¹ ‘Legal disputes between Member States are a rare occurrence’ whether before the Court or international tribunals that deal with inter-state disputes.⁸² The choice of forum to settle the dispute between the two Member States will largely depend on whether the issue falls under EU competence or Member State competence. In the latter case, the Member State is free to refer the dispute to an international dispute settlement body.

⁷⁹ *Netherlands v. Parliament and Council*, paras. 54–55; highlights added by author.

⁸⁰ Eeckhout, at 298.

⁸¹ According to Article I sec. 10 Cl.1 of the US Constitution, ‘No State shall enter into any Treaty, Alliance, or Confederation[...]’. However, when it comes to the judicial enforcement of the law, both state and federal courts have a role. See also P.J. White, *Legal, Political and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States*, 71 *Cincinnati L. Rev.* 937, 938–940 (2002–2003).

⁸² P.J. Cardwell & D. French, *Who Decides? The ECJ’s Judgment on Jurisdiction in the Mox Plant Dispute*, 19 *J. Envtl. L.* 12, 122 (2007) [hereinafter Cardwell and French].

Article 259 TFEU allows a Member State to bring a case before the Court against another Member State, for an alleged infringement of its obligations under the Treaties. This also holds true for the infringement of an international agreement to which the EU is also a party, as the agreement forms an integral part of EU law.⁸³ The Commission will first have to be notified and shall deliver a reasoned opinion.⁸⁴ However, direct confrontations between Member States are undesirable and might destabilize the Union. For this reason, Article 259 TFEU is rarely used, and Member States prefer to delegate the law enforcement functions to the Commission.⁸⁵

Because of the rare use of Article 259 TFEU, it is not yet known whether direct effect of the international agreement is a precondition in order for a Member State to rely on it against the infringing Member State. Therefore, an analysis of Article 258 TFEU should provide the basis for an analogy given that both articles refer to infringement proceedings, however, brought by different actors.

4.3 INFRINGEMENT PROCEEDINGS BROUGHT BY THE COMMISSION

Under Article 258 TFEU, the Commission can launch infringement proceedings against a Member State that 'has failed to fulfil an obligation under the Treaties'. Under Article 216(2) TFEU, agreements signed by the Union are binding on both the institutions and the Member States; the Member States will not only have to comply with the Treaties but also any international agreement to which the EU is a party to.⁸⁶

The Commission availed itself of this prerogative in *Commission v. Ireland*,⁸⁷ where it launched proceedings against Ireland, for Ireland's failure to adhere to the Berne Convention. This obligation was laid down in one of the Protocols to the EEA Agreement, to which Ireland was a party as well. The Court reiterated previous case-law according to which mixed agreements have the same status as purely EU agreements.⁸⁸ Furthermore, Member States are under an obligation within the EU system to ensure the respect of commitments arising from an agreement concluded by the EU.⁸⁹ The Berne Convention creates rights and

⁸³ Case 181/73, *Haegeman v. Belgium* [1974] E.C.R. 00449, paras. 5–6 [hereinafter *Haegeman v. Belgium*].

⁸⁴ L. Prete & B. Smulders, *The Coming of Age of Infringement Proceedings*, 47 *Com. Mkt. L. Rev.* 9, 27 (2010).

⁸⁵ C. Harlow & R. Rawlings, *Accountability and Law Enforcement: The Centralized EU Infringement Procedure*, 31 *European L. Rev.* 447, 452 (2006).

⁸⁶ Eeckhout, at 301.

⁸⁷ Case C-13/00, *Commission v. Ireland* [2002] E.C.R. I-02943 [hereinafter *Commission v. Ireland*].

⁸⁸ *Ibid.*, para. 14.

⁸⁹ *Ibid.*, para. 15.

obligations in areas covered by EU law and thus, Member States have to fulfil the requirement under the EEA Agreement's Protocol to adhere to the Berne Convention.⁹⁰

The case is interesting because the agreement that contained the specific obligation is the EEA Agreement. Both the Commission and the Court relied on this agreement to prove Ireland's failure to fulfil its obligations under it. However, nowhere in the judgment does the Court mention the necessity of the EEA Agreement to have direct effect in order to be relied on in the proceedings. Thus, the question arises whether direct effect of the international agreement is only a precondition when the validity of EU legislation is challenged or whether this holds true in other proceedings as well. According to Eeckhout, it appears that 'there is no requirement of direct effect or creation of rights, or any other form of requirement, for an agreement to qualify as the basis for an enforcement action'.⁹¹ Would this also hold true for a *Member State v. Member State infringement case*?

The author's contention is that the same requirements should be applied in both scenarios. It should not matter whether enforcement is sought by the Commission or by the Member State; in both types of infringement proceedings, direct effect should not be a precondition.

5 POTENTIAL RISKS IN LIMITING ACCESS TO JUSTICE

Under EU law, Member States cannot pursue any forms of dispute settlement before a foreign body, if that judicial body risks applying and interpreting an agreement which is also a part of EU law and under EU competency. It follows that the only available judicial venue is the Court, which will decide whether they are capable of invoking the agreement or not.

If Member States are denied access to justice by the Court, they might be prone to seek remedies before the dispute settlement bodies of international agreements or ad hoc bodies. The Article 344 TFEU prohibition is only binding on Member States of the EU, but it does not have any effect on international courts, committees or arbitral tribunals. While customary international law is binding on all states, treaties are only binding on the contracting parties.⁹² Furthermore, there is no hierarchy between the various international dispute settlement bodies.⁹³

⁹⁰ *Ibid.*, paras. 19–20.

⁹¹ Eeckhout, 302.

⁹² N. Lavranos, *The Mox Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbitrator?*, 19 *Leiden J. Intl. L.* 223, 233 (2006) [hereinafter Lavranos, *Which Court is the Supreme Arbitrator?*].

⁹³ Lavranos, *Concurrence of Jurisdiction*, at 216.

ITLOS considered 'that both in terms of the content of the various treaties involved, as well as the dispute settlement procedures put in place to determine disputes thereof, each treaty (UNCLOS, OSPAR Convention, EU Treaties) was an individual, and identifiable, legal manifestation worthy of equal respect'.⁹⁴ Some argue that other international dispute settlement bodies should accept the precedence of EU primary law over international law in the EU legal order because the EU legal order is a sui generis one, and from an international law perspective it stands on an equal footing with international law.⁹⁵

Whether an international judicial forum will defer a case to the Court of Justice will be up to that dispute settlement body to decide. Several scenarios can arise. First, the international forum might suspend proceedings until the question of competence is settled between the EU and the Member States.⁹⁶ Second, the international judicial body might simply disregard any questions of competence and internal procedures.⁹⁷ Third, the tribunal might consider that although several treaties can contain similar or identical rights and obligations, each one of these rights and obligations has a separate existence under the specific treaties.⁹⁸ Lastly, the arbitral tribunal might assert that it will not interpret EU law, but it will none the less do so.⁹⁹

In the *Iron Rhine*¹⁰⁰ case, the Netherlands and Belgium agreed to submit their differences to arbitration under the auspices of the Permanent Court of Arbitration, even though there was a risk that the interpretation of EU law might be involved. The arbitral tribunal took account of Article 344 TFEU and acknowledged what the parties agreed in the arbitration agreement. The agreement between the two states specified that the arbitral tribunal would refer a preliminary question to the Court of Justice, if during the proceedings it would have to engage in the interpretation of EU law.¹⁰¹ Therefore, in this case the Commission did not launch infringement proceedings against the two Member States (Netherlands and Belgium) for violating Article 344 TFEU, even if the arbitral tribunal might have actually interpreted EU law. In this type of situations, the launching of infringement proceedings will be at the discretion of the

⁹⁴ Cardwell & French, 123. See also ITLOS, *The Mox Plant Case*, paras. 47–52.

⁹⁵ Lavranos, *Which Court is the Supreme Arbiter?* 233.

⁹⁶ *Ibid.*, 225–226. The Arbitral Tribunal, set up under UNCLOS in the dispute between Ireland and the UK, suspended proceedings until issues of jurisdiction were settled.

⁹⁷ OSPAR, *Ireland v. UK*, paras. 143–144.

⁹⁸ ITLOS, *The Mox Plant Case*, para. 50.

⁹⁹ *The Kingdom of Belgium and The Kingdom of the Netherlands*, Arbitration regarding the Iron Rhine (IJzeren Rijn) Railway, Award of the Arbitral Tribunal, 24 May 2005 [hereinafter *Iron Rhine award*]. See also Lavranos, *Which Court is the Supreme Arbiter?* 228.

¹⁰⁰ *Iron Rhine award*.

¹⁰¹ *Ibid.*, para. 103.

Commission. And if such cases do occur, then it will be a question of comity,¹⁰² whether the Court will accept the foreign tribunal's decision or award.

In conclusion, there is a possibility for Member States to 'flee' from the Court and seek access to justice at other judicial fora. However, such a situation would raise other problems, such as the enforcement of these awards in the EU legal order and the possibility of the Commission to launch infringement proceedings. In order to avoid such scenarios, the best solution would be for Member States to refrain from pursuing international dispute settlement when the interpretation of EU law might occur or if they wish to pursue other forms of dispute settlement, conclude an arbitral agreement like the Netherlands and Belgium did in the *Iron Rhine* case.

6 RETHINKING DIRECT EFFECT IN ORDER TO ALLOW ACCESS TO JUSTICE TO MEMBER STATES

The main role of the Court is to ensure that the law is observed in the interpretation and application of the Treaties.¹⁰³ Whether the Court offers proper access to justice to Member States, when it takes over the role of the judiciary from foreign dispute settlement bodies is questionable.

One recent example is eloquent. The Court denied granting direct effect to a specific provision of the Aarhus Convention dealing with individuals' access to justice in environmental matters.¹⁰⁴ It could be assumed that if direct effect is not granted to such a provision, then the EU could at least provide similar protection. The Compliance Committee, however, found that access to justice for individuals under Article 263 TFEU does not live up to the EU's obligations under the Convention.¹⁰⁵ The Committee held, that parties are not forbidden under Article 9(3) Aarhus Convention 'from applying general criteria of a legal interest or of demonstrating a "direct or individual concern" provided the application of these criteria does not lead to effectively barring all or almost all members of the public from challenging acts and omissions related to domestic environmental laws'.¹⁰⁶

¹⁰² Using the words of the UNCLOS Arbitral Tribunal, considerations of 'mutual respect and comity' should prevail between judicial institutions when both of them might be called upon to determine rights and obligations between states. See *Ireland v. United Kingdom (Mox Plant)*, PCA, Arbitral Tribunal Order No. 3, 24 Jun. 2003, para. 28, http://www.pca-cpa.org/showpage.asp?pag_id=1148 (accessed 11 Feb. 2013).

¹⁰³ D. Chalmers, *European Union Public Law* 143 (Cambridge U. Press 2010) [hereinafter Chalmers].

¹⁰⁴ *Lesoochránárske zoskupenie*.

¹⁰⁵ Compliance Committee under the Aarhus Convention (CC), Findings of April 2011 I ACCC/C/2008/32 (Part I), *European Community: Client Earth – Access to the European Court of Justice*, paras. 69–95, <http://www.clientearth.org/reports/aarhus-convention-compliance-committee-c32-findings.pdf> (accessed 8 Feb. 2013).

¹⁰⁶ *Ibid.*, para. 80.

After reviewing the case-law of the Court pertaining to the *Plaumann test*, the Compliance Committee came to the conclusion that this test is too strict to meet the criteria set down by the Convention.¹⁰⁷ If a parallel could be drawn with the conclusions of the European Court of Human rights in *Bosphorus*, the Court of Luxembourg should handle matters which fall under an international agreement, only if it can provide 'equivalent' protection to that offered by the specific agreement.¹⁰⁸

The scope of this section is to provide remedies for situations when Member States do not have proper access to justice before the Court, when invoking an international agreement. To this end, they should be capable of invoking any type of international agreements, to which they are signatories as well. Three possible solutions shall be explained in detail in the following. First, Member States should be able to invoke an international agreement before the Court, regardless of whether it grants rights to individuals or not. Second, even if 'direct effect' remains a precondition, the broader approach of this concept should be used. Third, if a precondition was still preferred, than this should be 'direct applicability'.

6.1 DIRECT EFFECT SHOULD NOT BE A PRECONDITION FOR MEMBER STATES TO INVOKE AN AGREEMENT

Just as the concept of supremacy of EU law, the concept of direct effect has been developed by the Court. A distinction is made between 'internal direct effect' and 'external direct effect'. The former denotes the relationship between EU law and national law while the second one applies to the relationship between international law and EU law.¹⁰⁹ Strangely enough, the Court seems to apply the concept of direct effect of international law, much like the direct effect of EU law, without fully taking into account the different actors that can invoke the international agreement.

6.1.[a] *Direct Effect is a Means of Private Enforcement*

Direct effect has been called a powerful tool, 'allowing individuals to enforce rights which are solely granted by EU law'.¹¹⁰ Article 258 TFEU provided for a means of *public enforcement* of EU law, but it was silent on the issue of *private enforcement*.¹¹¹

¹⁰⁷ *Ibid.*, para. 87.

¹⁰⁸ Case of *Bosphorus Hava Yollari Ticaret v. Ireland* (Application No. 45036/98), Judgment of the ECtHR of 30 Jun. 2005, para. 108.

¹⁰⁹ Eeckhout, at 330.

¹¹⁰ Marsden, 744.

¹¹¹ Craig & de Burca, at 269.

The reasons of the Court to develop the notion of direct effect of EU law are to be found in the aim of legitimating private enforcement of EU law, 'by holding that Treaty articles, subject to certain conditions, have direct effect, such that individuals could rely on them before their national courts and challenge inconsistent national action'.¹¹² Over the years, the jurisprudence developed and became more complex and was expanded to include besides Treaty articles, regulations, decisions and to a certain extent, directives.¹¹³ The initial *Van Gend en Loos* criteria were loosened and according to some commentators, 'the invocability of Treaty provisions has now been reduced to a simple question of justiciability'.¹¹⁴ Others consider that direct effect causes more harm than good, and the concept became wide and diluted.¹¹⁵

Given that within EU law, direct effect has been designed in order to allow individuals to enforce a right conferred by EU law in their national courts, caution should be taken when this concept is applied to the world of effects of international law within the Union legal order. Direct effect remains a tool for the private enforcement of EU law, and the concept has been broadened and diluted when it comes to the effects of EU law in the national legal orders. Therefore, the usage of a stricter approach for Member States when invoking international agreements against EU law seems unfounded and not in line with the development of the direct effect of EU law.

6.1[b] *Member States Invoke International Agreements for Different Reasons*

International agreements create three different types of legal relationships: interstate relationships, relationships among private parties and relationships between private parties and a state.¹¹⁶ Therefore, the obligations and rights of Member States under an international agreement are different than the rights or obligations which individuals can derive from them. When individuals invoke an international agreement, the question that the Court should raise is whether the agreement confers rights that can be invoked before the court, in other words, whether the agreement in question affects the legal status of the individual.¹¹⁷ The reason for a Member State to invoke an agreement is not whether 'the legal status

¹¹² *Ibid.*, at 269.

¹¹³ *Ibid.*, at 269–302. See also A. Arnulf, *The European Union and its Court of Justice* ch. 7 (Oxford U. Press 2006) [hereinafter Arnulf].

¹¹⁴ Chalmers, at 273 with reference to P. Pescatore, *The Doctrine of 'Direct Effect': An Infant Disease of Community Law*, 8 *European L. Rev.* 155, 176–177 (1983).

¹¹⁵ Prechal, 1068.

¹¹⁶ S.D. Murphy, *Does International Law Obligate States to Open their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?*, in D. Sloss, *The Role of Domestic Courts in Treaty Enforcement* ch. 2 (Cambridge U. Press 2009).

¹¹⁷ Case C-366/10, *The Air Transport Association of America* [2011], Opinion AG Kokott, para. 58.

of the individual' is affected, but whether its own international obligations under the agreement and its EU obligations under Article 216(2) of the TFEU are affected by applying EU legislation which runs counter to them.

From the Vienna Convention on the Law of Treaties, it is not apparent whether contracting parties to an agreement can always derive rights or be liable to obligations under an agreement. States frequently enter into soft law agreements, most of which do not include any dispute settlement or monitoring mechanism.¹¹⁸ However, according to the International Law Commission's preparatory works, the phrase 'governed by international law' also includes the element of 'intention to create legal obligations'.¹¹⁹ When the contracting parties to an international agreement pursue litigation under the agreement's dispute settlement body, the simple fact of being a party to the agreement suffices to defend their rights under the agreement. Direct effect of the agreement or provisions of the agreement is not a precondition. The same holds true for the founding Treaties of the EU, which can be invoked by the Member States, without the need for the TFEU or the TEU to have direct effect. This does not hold true for individuals. Unlike the Member States, which as signatories of the Treaties have rights and obligations under them, for individuals to rely on the Treaties it has to be seen whether the provisions would create rights for them.¹²⁰

Therefore, a Member State wants to prevail itself of the right to challenge EU measures which it deems contrary to its obligations under the international agreement. As a party to the agreement and as a member of the Union, it is bound to perform the international agreement co-concluded by the Union in good faith.¹²¹ However, an individual seeks to enforce a specific right which is granted to him/her by the agreement, by challenging legislation that runs contrary to the agreement.

The Court fails most of the time¹²² to notice the different reasons for which an agreement is invoked by a Member State or an individual. The Court should acknowledge this difference and allow Member States to invoke the agreement freely, in order to prevent a breach of their own international obligations.

¹¹⁸ A.T. Guzman, *The Design of International Agreements*, 16 *European J. Intl. L.* 579, 581 (2005).

¹¹⁹ *Intl. L. Commn., Drafts on the Law of Treaties with commentaries* 189, para. 6 (1966).

¹²⁰ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie* [1963] E.C.R. 1.

¹²¹ Article 26 VCLT.

¹²² The Court partially acknowledges that Member States might infringe their international obligations, due to conflicting EU law. See also Case C-162/96, *Racke v. Hauptzollamt Mainz* [1998] E.C.R. I-3655, paras. 48–49 and *Netherlands v. Parliament and Council*, para. 55.

6.1[c] *Direct Effect of International Agreements is Not a Precondition in Infringement Proceedings*

As previously mentioned, when the Commission brings infringement proceedings against a Member State under Article 258 TFEU, for the failure to fulfil an obligation under an international agreement, it seems that direct effect of the international agreement is not a precondition. This conclusion is correct, as Article 258 TFEU is a *public enforcement* mechanism, where the conferral of individual rights is not an issue. Given that in essence, Article 259 TFEU provides for an infringement procedure launched by the Member State and not the Commission, it would seem logical that as a means of public enforcement, the conferral of individual rights should not arise.

Furthermore, as previously concluded, the rights and obligations of a Member State under an international agreement are different than those of individuals. The breach of any of these obligations can be a reason to launch infringement proceedings. Thus, it does not matter whether the infringement is based on the Member State's obligations to enact legislation, or the Member States failure to grant certain rights to its citizens. Infringement proceedings will still be launched without the need of the international agreement to have direct effect. It follows that, by introducing the precondition of direct effect in order to challenge EU legislation in light of an international agreement, the Court is protecting EU law from international law, but it does not apply the same standards for the review of national law in light of the international agreement.

6.1[d] *An International Agreement Already Has Different Effects*

As mentioned, some authors argue that the Court's ruling in *Germany v. Council* is welcomed because it does not differentiate between who invokes an agreement and in what type of proceedings, thus equally barring Member States and individuals from relying on an agreement. Therefore, it creates a sense of unitary application of the agreement.¹²³ When it came to the GATT/WTO agreements, the same features of GATT that prohibited the granting of right for individuals, also prevented a Member State from doing so. The question is, would the same reasons for which the UNCLOS was denied the capability of conferring rights to individuals, bar a Member State from invoking it?

Arguing that this should be done so for the sake of the unitary application of an agreement can be challenged for several reasons. First, a mixed agreement has two separate existences. The part of the agreement that falls under exclusive Member State competence shall be granted effect according to the laws of the

¹²³ *Supra* nn. 71–72.

Member States. In such a case, 'EU law does not require or forbid the legal order of a Member State to accord to individuals the right to rely directly' on the rule laid down in the agreement.¹²⁴ Second, it seems that the same international agreement does not need to have direct effect if relied on in infringement proceedings.

Therefore, to bar a Member State from having access to justice under and international agreement, based on the argument that international agreements should have a unitary application, is incorrect. International agreements already have different effects, depending on whether the EU or Member States have competence over a specific part of the agreement.

6.1[e] *Direct Effect of the Treaties is Not Necessary in Article 263 TFEU Proceedings*

An international agreement forms part of EU law from the moment of its entry into force.¹²⁵ International law has primacy over secondary EU law, and it is situated between the founding Treaties and secondary legislation.¹²⁶

Member States are 'privileged applicants' under Article 263(1) TFEU and have a 'general power to seek judicial review of acts of the EU institutions'.¹²⁷ They have 'general and unrestrained policing power' against the EU institutions, which is justified due to the important public interests the Member States are meant to protect.¹²⁸ It appears that they can launch actions for annulment, even when the act is addressed to others.¹²⁹ According to the last paragraph of Article 263 TFEU, the only condition that has to be met by Member States is the two-month time limit.

Therefore, when a Member State brings a direct action under 263 TFEU, which challenges the validity of secondary EU legislation for breaching one of the founding Treaties, there is no requirement whatsoever that the founding Treaties confer rights to individuals. Given that international agreements are situated above secondary EU legislation, thus they become 'the higher' norm in the light of which review of legality is sought.

As previously discussed, the Court showed some willingness in *Netherlands v Parliament and Council* to grant a Member State the possibility to invoke an international agreement, even if that agreement did not confer rights to individuals. It is interesting to note how the Court acknowledged that Member

¹²⁴ *Lesoochranárske zoskupenie*, para. 32; C-392/98, *Dior and Others* [2000] E.C.R. I-11307, para. 48; C-431/05, *Merck Genericos v. Merck* [2007] E.C.R. I-07001, para. 34.

¹²⁵ *Haegeman v. Belgium*, paras. 5–6.

¹²⁶ Marsden, 742.

¹²⁷ Chalmers, at 413.

¹²⁸ *Ibid.*

¹²⁹ Craig & de Burca, at 508.

States might be put into the difficult position of breaching their own international obligations, because of EU law which claims that does not affect such obligations.¹³⁰ These findings come as partial relief to what certain Member States witnessed during the *Banana* saga, when Germany was eventually obliged to apply EU legislation, which it was not allowed to challenge and which the WTO condemned as well.¹³¹

6.2 IF DIRECT EFFECT REMAINS A PRECONDITION, THE BROAD APPROACH SHOULD BE PREFERRED

As previously mentioned, the concept of direct effect of EU law has undergone developments since *Van Gend en Loos*. Besides the narrow approach of granting rights to individuals, a provision could also have broad direct effect. In this case, the determining factor is whether the provision can be invoked and not whether it grants rights to individuals.

In *Germany v. Council*, the Court evaded the term ‘direct effect’ but came to the conclusion that the same features of the GATT that barred it from conferring rights to individuals would also bar Member States from being able to invoke it. Later on in *Netherlands v. Parliament*, the Court was more specific in stating that even if a provision of an international agreement does not have direct effect, in the sense of granting rights to individuals, it could still be invoked by a Member State in Article 263 TFUE review proceedings. Therefore, there is a possibility of an international agreement of having ‘broad direct effect’ for Member States, even if it did not have ‘narrow direct effect’ for individuals.

As previously mentioned, the reasons for a Member State to rely on an international agreement are different than those of individuals. Whether a specific substantive right is conferred or not on the individual, should not be a precondition. If direct effect is to be used for Member States as well, than the broad approach should be followed. Thus the question should be whether a Member State that signed the agreement has the right to ‘invoke’ the agreement. Furthermore, if certain international rules are ‘less perfect’, they could still be used as a ground of reviewing EU legislation.

6.3 IF A PRECONDITION WAS NEEDED, IT SHOULD BE ‘DIRECT APPLICABILITY’

Different terms denote the effects of international agreements in the domestic legal order. International rules can have ‘direct effect’; they can be ‘directly

¹³⁰ *Netherlands v. Parliament and Council*, paras. 54–55.

¹³¹ Eeckhout, at 296.

applicable' or 'self-executing'. The Court of Justice apparently considers the formula 'produces direct effects and creates individuals rights' to be synonymous with 'directly applicable', although it has never used the term 'self-executing', favoured by the US legal system.¹³² As previously mentioned, the Court also uses these terms interchangeably, when looking at the effects of international agreements. In certain cases, an agreement is deemed to have 'direct effect',¹³³ while in similar cases the Court uses the expression 'directly applicable'.¹³⁴

Without going into too much detail, it suffices to mention that the question of effects of international norms in domestic law first arose in the United States. According to the United States Supreme Court in *Foster v. Nielson*,¹³⁵ a treaty is self-executing when it can be directly applied 'by the courts or executive agencies' without further implementing measures.¹³⁶ It will depend on the agreement, whether for its correct application, implementation measures are needed or not.¹³⁷ The creation of individual rights and duties, however, is not essential in the US notion of 'self-executing'.¹³⁸ If a parallel may be allowed, international agreements can either be applied without the need of any further implementing measures, just as regulations, or subsequent implementing measures might be needed, the method of which is left to the contracting party, just as in the case of directives.¹³⁹ However, the concept of direct effect that is so often used and understood by European legal thinkers found its way into EU law through a different route. European scholars mainly relied on the advisory opinion of the Permanent Court of International Justice in *Jurisdiction of the Courts in Danzig*.¹⁴⁰ As a result of this opinion, self-executing treaties were regarded in Europe as those which confer rights to individuals, enforceable in national courts.¹⁴¹

¹³² J.A. Winter, *Direct Applicability and Direct Effect. Two Distinct and Different Concepts in Community Law*, 9 Com. Mkt. L. Rev. 425, 425 (1972) [hereinafter Winter].

¹³³ *Portugal v. Council*, para. 34; Case C-93/02, *Biret* [2003] E.C.R. I-10497; Cases C-120/06 and C-1201/06, *FLAMM v. Council and Commission* [2008] E.C.R. I-06513; Case C-257/99, *Barkoci and Malik* [2001] E.C.R. I-06557, para. 30; Case C-265/03, *Simutenkov* [2005] E.C.R. I-02579; Case C-213/03, *L'étang de Berre* [2004] E.C.R. I-07357.

¹³⁴ Case 12/86, *Demirel* [1987] E.C.R. 03719, para. 14; Case C-63/99, *Głoszczuk* [2001] E.C.R. I-06369, para. 29; *Lesoochranárske zoskupenie*, para. 44.

¹³⁵ *Foster & Elam v. Nielson* – 27 U.S. (2 Pet.) 253 (1829).

¹³⁶ *Ibid.*; for EU Law see also Arnulf, at 185.

¹³⁷ Eeckhout, at 327.

¹³⁸ Winter, 429.

¹³⁹ Marsden, 744.

¹⁴⁰ *Jurisdiction of the Courts of Danzig*, Advisory Opinion P.C.I.J., No. 15, 3 Mar. 1928, para. 37. According to the PCIJ, it is a well-established principle of international law that an international agreement cannot as such create direct rights and obligations for individuals. This however, does not mean that the object of the agreement may not be the adoption by the Parties of 'some definite rules creating individual rights and obligations [...] enforceable by national courts'

¹⁴¹ Y. Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 Va. J. Intl. L. 627, 629 (1985–1986).

Whether a treaty is directly applicable (self-executing) or whether it grants individual rights or duties are two different questions which should not be confused. For example, treaties which merely set forth powers or duties of judicial or administrative authorities of states can also be directly applied in domestic law.¹⁴² Creating rights and duties to individuals is only a single facet of directly applicable treaties.¹⁴³ In the United States, self-executing/directly applicable treaties have the status of judicially enforceable federal law the moment they are ratified.¹⁴⁴ It follows that as long as a treaty does not require further implementing measures it should be enforceable.

Given these considerations, there are two distinct fundamental problems that have to be distinguished. First, how is treaty law incorporated in the domestic legal order and becomes the law of the land? Second, under which conditions are these rules that became the law of the land, susceptible of being invoked before the national courts by individuals?¹⁴⁵

It is the author's contention that in order to have a better understanding of the relationship between international agreements and EU law, 'direct applicability' should refer to agreements which do not need further implementing measures. However, 'direct effect' should be used when an international agreement grants rights to individuals which they can enforce before the Court of Justice or the national courts (narrow direct effect).

Therefore, if any precondition was necessary for a Member State to rely on an international agreement before the Court, it should be the direct applicability of the agreement; whether it can be applied without any further implementing measures. The conferral of rights on individuals should be exclusively a precondition for private parties. Even the precondition of 'direct applicability' seems unnecessary, as Member States are signatories to mixed agreements as sovereign entities. Such a construction would mean that for part of the agreement that falls under EU competence, the Member States would be equated with simple domestic authorities. Such a conclusion seems unfounded.

7 CONCLUSIONS

Because Member States, unlike constituent states of federal entities, still retain a broad range of sovereignty in external matters, it is hard to delineate where EU competency ends and Member State competency begins.

¹⁴² *Ibid.*, 648.

¹⁴³ *Ibid.*

¹⁴⁴ J.F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 Va. J. Intl. L. 655, 666 (2010). Reference to *Medellin v. Texas*, 552 U.S. 491 (2008).

¹⁴⁵ Winter, 425.

The role of Article 344 TFEU is unquestionable, as a means of providing uniform application of EU law and preventing the risk of fragmentation of EU law due to enforceable foreign decisions delivered for disputes between certain Member States. It is questionable whether international agreements should fall in the ambit of this article, but the case-law as it stands now clearly affirms this. However, given that most international agreements are signed by Member States, the latter should be afforded adequate access to justice by the Court. Therefore, the direct effect of international agreements should not be a precondition when relying on them in order to challenge the validity of EU legislation. If preconditions are still to be used, the author has argued that the concept of 'direct applicability' is much more advisable, or keeping in line with the development of the direct effect of EU law, a broader approach to direct effect is welcomed.