

Case Comment on Case C-366/10, *Air Transport Association of America and others v. Secretary of State for Energy and Climate Change***

1. Introduction

On December 11, 2011, the Court of Justice of the European Union (Court) ruled on Case C-366/10, *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v. Secretary of State for Energy and Climate Change*.¹ The Court was asked to give preliminary ruling on the validity of Directive 2008/101 on the aviation activities in the scheme for greenhouse gas emission allowance trading within the Community.² The decision is important in that it highlights the nature and scope of the European Union's obligation to observe the rules of international law. Moreover, the judgment is a fundamental contribution to clarify whether and to what extent individuals are entitled to rely in court on principles of customary international law in order to defeat (challenge) an act of the Union.³

The present paper has not only the aim to analyse and assess the judgment in hand, but it also seeks to turn attention and to contribute to the clarification of a few concepts which are used in the context of this case analysis.⁴

2. Factual background

These questions were originally raised in litigation between the Air Transport Association of America (ATAA) and three airlines (whose headquarters are in the USA) on the one hand and the national authority being primarily responsible for the implementation of Directive 2008/101 in the United Kingdom on the other. The Air Transport Association of America (ATAA), a non-profit-making entity, is the principal trade and service association of the United States scheduled airline industry. The airlines American Airlines Inc., Continental Airlines Inc. and United Airlines Inc. operate worldwide, also serving destinations within the European Union.

The claimants brought judicial review proceedings asking the referring court (the High Court of Justice of England and Wales) to annul the measures of the United Kingdom Minister for Energy and Climate Change. They assert, in essence, that Directive 2008/101 – which the 2009 Regulations serve to transpose – is not compatible with certain principles of international customary law and international agreements and is therefore invalid.

3. Legal context

3. 1. European Law

The European Union is committed to transforming Europe into a highly energy-efficient and low greenhouse gas-emitting economy. The European Council made a firm independent commitment for the EU to reduce its greenhouse gas emissions to at least 20 % below 1990 levels by 2020.⁵ In line with this commitment the EU (together with its Member States)

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became the party of the United Nations Framework Convention on Climate Change (UNFCCC), which has the ultimate objective to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.⁶ The EU also approved the Kyoto Protocol to the UNFCCC.⁷

The scheme for greenhouse gas emission allowance trading applicable within the European Union (EU emissions trading scheme) serves to limit and reduce greenhouse gas emissions using market-based instruments.⁸ This scheme was introduced by Directive 2003/87/EC.⁹ This Directive aims to contribute to fulfilling the commitments of the European Community and its Member States under the Kyoto Protocol more effectively, through an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment.¹⁰

The Kyoto Protocol particularly requires developed countries to pursue the limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation, working through the International Civil Aviation Organisation (ICAO).

Under Directive 2003/87, greenhouse gas emissions resulting from aviation activities were originally not covered by the EU emissions trading scheme. In 2008, however, the EU legislature resolved to include aviation activities in the scheme as from 1 January 2012. Directive 2003/87 was amended and supplemented by Directive 2008/101 for that purpose.¹¹

On the basis of the emission trading scheme introduced by it, each aircraft operator are allowed to emit pollutant only on the amount which is determined by emission allowances allocated to them. All airlines – including those from third countries – will have to acquire and surrender emission allowances for their flights for a period of one year from and to European aerodromes. Penalties for infringement of emission limits can extend to an operating ban.¹² The Directive applies to „all flights which arrive at or depart from an aerodrome situated in the territory of a Member State to which the Treaty applies shall be included.¹³

3. 2. International Law

Reference is made in the request for a preliminary ruling to certain international agreements, especially the Chicago Convention, the Kyoto Protocol and the ‘Open Skies Agreement’ between the European Union and the United States of America.

While the Community is not a Contracting Party to the 1944 Chicago Convention on International Civil Aviation (the Chicago Convention), all 27 Member States are Contracting Parties to it.¹⁴¹⁵ Article 1 of the Chicago Convention provides that ‘The contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory.’

The United Nations Framework Convention on Climate Change, adopted in New York on 9 May 1992 (‘the Framework Convention’), has the ultimate objective of achieving stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. On 11 December 1997 the parties to the Framework Convention adopted, pursuant thereto, the Kyoto Protocol to the United Nations Framework Convention on Climate Change (‘the Kyoto Protocol’), which entered into force on 16 February 2005. The European Union and the Member States are parties to both those instruments.¹⁶

On 25 and 30 April 2007, the European Community and its Member States, of the one part, and the United States of America, of the other part, concluded an air transport agreement designed in particular to facilitate the expansion of international air transport opportunities by opening access to markets and maximising benefits for consumers, airlines, labour, and communities on both sides of the Atlantic.¹⁷

Article 7 of the Open Skies Agreement (headed ‘Application of laws’) states in paragraph 1: ‘The laws and regulations of a Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft utilised by the airlines of the other Party, and shall be complied with by such aircraft upon entering or departing from or while within the territory of the first Party.’¹⁸

The provisions of Article 11(1) and Article 11(2) c.) state that fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Party for use in an aircraft of an airline of the other Party engaged in international air transportation shall be exempt from taxes, levies, duties, fees and charges.

Finally, Article 15(3) provides that ‘When environmental measures [of the parties at the regional, national, or local level] are established, the aviation environmental standards adopted by the [ICAO] in annexes to the [Chicago] Convention shall be followed...’

4. The Opinion of the Advocat General

The European Union is bound by customary international law as well as (in the light of the above) by the international agreements applicable to it.¹⁹ (AG Kokott drew an analogy...) AG Kokott argued that criteria for determination of the invocability of international customary law should not differ from those applicable on an examination of whether and to what extent the validity of EU acts can be gauged against international agreements.²⁰ It would make no sense if, when individuals are relying on one and the same principle of international law, different conditions were to apply according to whether it was being relied upon as a principle of customary international law or as a principle under an international agreement.²¹ It follows from the second sentence of Article 3(5) TEU (the Union ‘shall contribute to [...] strict observance and the development of international law’ as a whole) on the one hand and from the fact that many principles of customary international law have now been codified in international agreements on the other.²²

Based on the reasoning above, AG Kokott concluded that principles of customary international law should be recognised as a benchmark against which the validity of EU acts can be reviewed only when the two (above mentioned) conditions are satisfied: “1.) First, there must exist a principle of customary international law that is binding on the European Union. 2.) Secondly, the nature and broad logic of that particular principle of customary international law must not preclude such a review of validity; the principle in question must also appear, as regards its content, to be unconditional and sufficiently precise.”²³

5. The judgment

5. 1. Invocability of provisions of international agreements

The claimants are challenging Directive 2008/101 on three grounds: First, they contend that the European Union is exceeding its powers under international law by not confining its emissions trading scheme to wholly intra-European flights and by including within it those

sections of international flights that take place over the high seas or over the territory of third countries. (26) Secondly, they maintain that an emissions trading scheme for international aviation activities should be negotiated and adopted under the auspices of the ICAO; it should not be introduced unilaterally. (27) Thirdly, it was argued that the emissions trading scheme amounts to a tax or charge prohibited by international agreements.²⁴

The starting point for the Court's judgment is the restatement of what have become according to settled case-law the standard requirements for the invocability of international agreement's provisions as a benchmark against which the validity of acts of EU institutions can be reviewed:

*52 First, the European Union must be bound by those rules.*²⁵

*53 Second, the Court can examine the validity of an act of European Union law in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this.*²⁶

*54 Finally, 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, it is also necessary that the provisions of that treaty which are relied upon for the purpose of examining the validity of the act of European Union law appear, as regards their content, to be unconditional and sufficiently precise.*²⁷

*55 Such a condition is fulfilled where the provision relied upon contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.*²⁸

As far as the Chicago Convention is concerned, the European Union (as it has been established above) is not a party to the Chicago Convention while, on the other hand, all of its Member States are contracting parties.²⁹ The Court pointed out, with reference on the settled case-law,³⁰ that, although the first paragraph of Article 351 TFEU implies a duty on the part of the institutions of the European Union not to impede the performance of the obligations of Member States which stem from an agreement prior to 1 January 1958, such as the Chicago Convention, that duty of the institutions is designed to permit the Member States concerned to perform their obligations under a prior agreement and does not bind the European Union as regards the third States party to that agreement. Consequently, in the main proceedings, it is only if and in so far as, pursuant to the EU and FEU Treaties, the European Union has assumed the powers previously exercised by its Member States in the field, to which that international convention applies that the convention's provisions would have the effect of binding the European Union (see, to this effect, *International Fruit Company and Others*, paragraph 18; Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 16; and Case C-301/08 *Bogiatzi* [2009] ECR I-10185, paragraph 25). Indeed, in order for the European Union to be capable of being bound, it must have assumed, and thus had transferred to it, all the powers previously exercised by the Member States that fall within the convention in question (see, to this effect, *Intertanko and Others*, paragraph 49, and *Bogiatzi*, paragraph 33). Therefore, the fact that one or more acts of European Union law may have the object or effect of incorporating into European Union law certain provisions that are set out in an international agreement which the European Union has not itself approved is not sufficient for it to be incumbent upon the Court to review the legality of the act or acts of European Union law in the light of that agreement (see, to this effect, *Intertanko and Others*, paragraph 50).³¹

On the basis of examination of the EU's legislative activity in the international air transport,³² the Court concluded that 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 European Union. Therefore, the latter is not bound by the convention.³³

In case of Kyoto Protocol the first requirement is met, since it was approved on behalf of the Union. Consequently, in sense of the settled case-law, its provisions form an integral part of the Union's legal order, thus, the Union must be bound by the Protocol. At the same time, the Court established that the protocol allows the contracting parties certain degree of flexibility in the implementation of their commitments. (therefore, the nature and the broad logic of the Protocol precludes the examination of the validity of an EU act in the light of its rules). Moreover, its relevant provisions 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 2008/101.³⁴

The Open Skies Agreement was also approved on behalf of the Union. As far as the invocability is concerned, the Court concluded that *"Since the Open Skies Agreement establishes certain rules designed to apply directly and immediately to airlines and thereby to confer upon them rights and freedoms which are capable of being relied upon against the parties to that agreement, and the nature and the broad logic of the agreement do not so preclude, the conclusion can be drawn that the Court may assess the validity of an act of European Union law, such as Directive 2008/101, in the light of the provisions of the agreement."*³⁵ Thus, as a following step, the Court went on to investigate (examine), "whether the provisions of the Open Skies Agreement [...] as regards their content, to be unconditional and sufficiently precise, so as to enable the Court to examine the validity of Directive 2008/101 in the light of those particular provisions."³⁶

The Court established that all the provisions of the Open Skies Agreements referred by the claimants contain an unconditional and sufficiently precise obligation that may be relied upon for the purpose of assessing the validity of Directive 2008/101 in the light of that provision.³⁷

5. 2. Invocability of rules of customary international law

As possible grounds for challenge the validity of Directive 2008/101, the referring court mentions the principle that each State has complete and exclusive sovereignty over its airspace, the principle that no State may validly purport to subject any part of the high seas to its sovereignty and the principle of freedom to fly over the high seas.

As a starting point of the reasoning, the Court cited its earlier case-law, establishing that customary international law is an integral part of the Community legal order.³⁸

As far as the criteria for recognition of invocability of customary international law (above) is concerned, the Court essentially followed the AG's line of reasoning. However, it should be pointed out that the Court interpreted these criteria as a competence-question, stating that „the principles of customary international law [...] may be relied upon by an individual for the purpose of the Court's examination of the validity of an act of the European Union in so far as, first, those principles are capable of calling into question the competence of the European Union to adopt that act [...] and, second, *the act in question is liable to affect rights which the individual derives from European Union law or to create obligations under European Union law in this regard.*"³⁹ In line with this reasoning, the Court made a substantial distinction between binding effect of international customary law on the one hand and those of international agreements on the other: *"since a principle of customary international law does*

*not have the same degree of precision as a provision of an international agreement, 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 those principles”.*⁴⁰ That means that *the lack of competence of the Union can be established (only) in so far as the Union, in the light of principles of international customary law, made a manifest error of assessment attributable to the European Union regarding its competence to adopt that directive.*⁴¹

Based on the conditions summarised above, the Court went on to investigate, if the validity of the directive can be challenged on the basis of infringement of principles referred to by the applicants (claimants) of the main proceeding.

5. 3. The result

Having regard to all the foregoing considerations, the Court established that the only principles and provisions of international law, from among those mentioned by the referring court, that can be relied upon for the purpose of assessing the validity of Directive 2008/101, are: first, the principles of customary international law, within the limits of review as to a manifest error of assessment attributable to the European Union regarding its competence to adopt that directive; second, the provisions of the Open Skies Agreement investigated above.⁴²

The Court then went on to summarize the essence of the questions of the referring court as the following: whether Directive 2008/101 is valid in the light of the possible grounds for review identified above if and in so far as that directive is intended to apply the allowance trading scheme to those parts of flights which take place outside the airspace of the Member States, including to flights by aircraft registered in third States.⁴³ Accordingly, the Court built up a two-stage method of investigation: 1. It should first be determined whether and to what extent Directive 2008/101 applies to those parts of international flights that are performed outside the airspace of the Member States by such airlines. 2. Second, the directive’s validity should be examined in that context.⁴⁴

At the first stage, the Court established that the directive is not intended to apply as such to international flights flying over the territory of the Member States of the European Union or of third States when such flights do not arrive at or depart from an aerodrome situated in the territory of a Member State.⁴⁵

As far as the reference on customary international law is concerned, the Court concludes, in essence, that it follows from the above interpretation of the extent to which Directive 2008/101 applies, that the directive does not infringe the principles of customary international law in question, since the EU legislation may be applied to an aircraft operator when its aircraft is in the territory of one of the Member States. In such a case, that aircraft is subject to the unlimited jurisdiction of that Member State and the European Union.⁴⁶

The Court argued that it is only if the operator of such an aircraft has chosen to operate a commercial air route arriving at or departing from an aerodrome situated in the territory of a Member State that the operator, because its aircraft is in the territory of that Member State, will be subject to the allowance trading scheme. As *European Union policy on the environment seeks to ensure a high level of protection* in accordance with Article 191(2) TFEU, the European Union legislature may in principle choose to permit a commercial activity to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfill the environmental protection objectives which it has set for itself, in particular where *those objectives follow on from an international agreement to which the European Union is a signatory, such as the Framework Convention and the Kyoto Protocol.*

Furthermore, the fact that, in the context of applying European Union environmental legislation, certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question, in the light of the principles of customary international law, the full applicability of European Union law in that territory.

The Court then came to the final conclusion that the European Union had competence, in the light of the principles of customary international law capable of being relied upon in the context of the main proceedings, to adopt Directive 2008/101, in so far as the latter extends the allowance trading scheme to all flights which arrive at or depart from an aerodrome situated in the territory of a Member State.⁴⁷

Comment

In the present judgment, the Court sheds further light on position of international law in the Community legal order. The ruling gives opportunity to examine the following questions in particular: 1.) under which conditions can rules of customary international law be regarded as ground for invalidity of secondary EU Law; 2.) to which extent are able private individuals to rely on a rule of customary international law before judicial bodies in order to see their rights protected.

Before starting our analysis, a short remark should be made on the issue, why it is especially important to investigate the position of individuals in cases concerning review the validity of EU acts on the ground of rules of international law. Most of the questions related to the position of international law in the EU legal order, as in the present case, too, have been raised in the framework of preliminary ruling procedure.⁴⁸ As it is well known, the procedure gives authorisation to the Court to decide those questions on interpretation and validity of EU law, which arise in proceedings brought before national courts.⁴⁹ As regards the position of international law in the EU legal order, the question thus arise as to whether the private individuals can invoke their rights under the rules of international law before the national court, in order to challenge/contest the validity of acts of the EU institutions. Consequently, as the Court explained in its judgment *International Fruit Company*, “Before invalidity can be relied upon before a national court, that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts.”⁵⁰

1. International agreements concluded by the EU as grounds for review the legality of secondary EU-norms

Although the European Union is an International Organisation itself, the founding Treaties of the EU are laconic as to what position and effects have norms of international law in the EU legal order. Article 3(5) TEU only provides that: “In its relations with the wider world, the Union [...] shall contribute to [...] the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”

As regards international agreements to which the EU is a party, Article 216(2) TFEU declares that “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.” According to the settled case law, agreements covered by this article form an integral part of the legal order of the European Union as from its entry into force,⁵¹ and, consequently, they prevail over acts of the European Union.⁵² Thus, the Court concluded in the present case that both the Kyoto Protocol and the Open Skies agreement as instruments being approved on behalf of the EU must be binding on its institutions (in the sense of Article 216(2) TFEU.)

This provision is silent on the issue of what effects should be given to international norms within the EC legal order.⁵³ In its early ruling *Kupfenberg*, the Court explained that

“In conformity with the principles of public international law Community institutions [...] are free to agree with [a non-member country] what effect the provisions of the agreement are to have in the legal order of the contracting parties.”⁵⁴

However, the practice has shown that the contracting parties rarely determine which effects such agreements must have.⁵⁵ As regards the latter case, the Court also added that “if the contracting parties have not agreed which effects an international agreement should have, this

question must be determined within the Community according to Community law criteria.”⁵⁶ These criteria were finally formulated in the judgment *Demirel*, as the following:

“A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, *regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.*”⁵⁷

In its subsequent case law, the Court further clarified the first precondition as the “wording and the purpose and nature” of an international treaty is appropriate for creating direct effect “only where the nature and the broad logic of the latter do not preclude this”.⁵⁸

This (the above) interpretation of the conditions for invocability of international agreements has remained substantively unaltered in the present judgment. Thus, the Court established that only the Open Skies Agreement is able to meet the requirements of the “direct effect test” (see the *Demirel* formulation above) formed by settled case law. The Kyoto Protocol, although it is also binding on the EU, can not be regarded as an agreement being invocable to review the validity of a secondary EU act, since it allows the parties a certain degree of flexibility in the implementation of their commitments.

Such as previous cases concerning the effect of agreements concluded by the EU, the present judgment also suggests that the direct effect test is identical to the general conditions having established in the settled case law for direct effect of internal EU norms.⁵⁹ As a result, the conclusion can be drawn that the Court not simply declares these agreements as “integral part of the Union’s legal order”, but practically gives them the same effect as internal EU norms.⁶⁰

2. International agreements concluded by Member States as grounds for review the legality of secondary EU-norms

As far as international agreements concluded by Member States with third states or international organisations are concerned, the Court has not adopted the same approach. In the present case, the claimants also refer to the Chicago Convention, to which all the Member States are parties, but not the EU itself.

The founding Treaties say nothing on the effect of these agreements. Article 351(1) TFEU only declares that „ The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other [so called „prior agreements/treaties”], shall not be affected by the provisions of the Treaties.”

As regards the effect of the prior treaties in the EU legal order, the Court made clear in its decision *Burgoa* that

“...the purpose of that provision is to lay down, in accordance with the principles of international law, that the application of the treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder. [...] However, *that duty of the Community institutions is directed only to permitting the Member State concerned to perform its obligations under the prior agreement and does not bind the Community as regards the non-member country in question.*”⁶¹

The Court acknowledged only the following situation as exceptional case:

“it is only if and in so far as, pursuant to the EU and FEU Treaties, *the European Union has assumed the powers previously exercised by its Member States in the field*, [...] to which [the prior agreement] applies that the convention’s provisions would have the effect of binding the European Union.”⁶²

This exception has its foundation on the ruling of the Court in *International Fruit Company*.⁶³ That case concerned an apple importer who challenged (before the national court) the validity of three Community regulation imposing restrictions on the importation of apples on the ground that they infringed provisions of GATT 1947. The Court answered the question referred by the Dutch court for preliminary ruling that:

“10. *It is clear that at the time when they concluded the treaty establishing the European Economic Community the Member States were bound by the obligations of the General Agreement.*

12. *[...] their desire to observe the undertakings of the General Agreement follows as much from the very provisions of the EEC Treaty [...]*

13 *That intention was made clear in particular by article 110 of the EEC Treaty,⁶⁴ which seeks the adherence of the Community to the same aims as those sought by the General Agreement, as well as by the first paragraph of article 234 (now article 351 TFEU) [...]*

14 *The Community has assumed the functions inherent in the tariff and trade policy, progressively during the transitional period and in their entirety on the expiry of that period, by virtue of articles 111⁶⁵ and 113⁶⁶ of the Treaty (now article 207 TFEU).*

15 *By conferring those powers on the Community, the Member States showed their wish to bind it by the obligations entered into under the general agreement.*⁶⁷

The reasoning of the Court clearly shows the way in which agreements covered by Article 351 TFEU are able to have binding effect on the EU. The judgment is a manifestation of the succession theory of international law, under which it is generally possible that treaty commitments are transferred from one entity to another; a typical example of this is the state succession when there is a change in legal identity.⁶⁸ In the legal context of the case, the reference on the ex-articles 110, 111 and 113 has built a bridge between obligations of the Member States undertaken in the prior agreements on the one hand and the (exclusive) competence of the EU (as successor) in the field of Common Commercial Policy on the other. However, the Court appears to be reluctant to apply the succession theory as set out in *International Fruit Company* case and rather tends to exclude the possibility of assumption of previous Member States’ commitments by the EU.⁶⁹ This was the case in the present judgment, as well, in which the Court argued that the EU does not have “exclusive competence in the entire field of international civil aviation as covered by [the Chicago] Convention,”⁷⁰ and, thus, is not bound by that convention.

The Court also adopted a negative stance in relation to those agreements, which are invoked to challenge the validity of EU acts having the aim to incorporate the agreement in question in EU law. An illustration of this can be found in *Intertanko*,⁷¹ where the claimants in the main proceedings submitted that the Directive 2005/35⁷² did not comply with Marpol Convention 73/78,⁷³ to which only Member States are parties but not the EU. The Court concluded that

“Since the Community [in the absence of a full transfer of the powers previously exercised by the Member States to it] 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.⁷⁴

It can be noted here, in the light of the implied power case law, that the way of interpretation of the “assumption of powers” in the present context does not seem to be consistent with the Court’s generally broad view of implied exclusive EU powers. The concept of implied power has its origin in the early AETR judgment,⁷⁵ in which the Court ruled that

“... it follows that to the extent to which [internal] Community rules are promulgated for the attainment of the objectives of the treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations *which might affect those rules or alter their scope.*”⁷⁶

The use of term “affect” has been instrumental in expanding the external competences of the EU in almost all areas of law.⁷⁷ In order to draw the borderlines of the EU’s exclusive treaty-making powers, the Court seems to apply the “effect-based” test⁷⁸ quite extensively, in particular in its recent case law, which suggests that hypothetical, possible or future effect of Member States’ legislative development/treaty-making practice on EU law is sufficient to satisfy the test.⁷⁹

As opposed to the traditional broad interpretation of exclusive implied powers in the AETR and subsequent decisions, the Court, as we have seen, *inter alia*, in the present case, does not follow a similar approach in relation to “assumed powers” in the light of the *International Fruit Company* ruling. The Court limited the possibility of assumption of the Member States’ international commitments only to those cases where the EU assumed all the powers previously exercised by the Member States that fall within the convention in question; in other words, the EU must have exclusive competence in the entire field covered by that convention. Moreover, when investigating the scope of EU’s exclusive competencies, the Court does not use the same “effect-based” test as that of the implied power case-law; as basis for assumed (implied) exclusive powers it rather focuses only on the fields which were indeed pre-empted, but does not take in account fields, in which, exercise of powers individually by Member State(s), even if potentially or hypothetically, might affect the functioning of internal EU rules.

From a strict legal perspective, it is difficult to understand why the Court sees more restrictively the scope of exclusive external EU powers when interpreting them as assumed powers on the basis of Member States’ prior agreements than in any other cases, whereas the scope of external powers can be determined, whatever may be the legal context, according to the provisions of the founding Treaties and internal EU legislation in force. For a reasonable answer, it is worth to investigate closer the legal situations, where the scope of external EU powers arises is at stake. The question of assumed powers typically arises when the Court considers the validity of an EU act in the light of a prior agreement of Member States (in the framework of preliminary rulings procedure and in the case of action for annulment). In such cases, the Court thus indirectly determines the binding effect of the contested international agreement on the EU, as well. Accordingly, the more extensively interprets the Court the scope of assumed powers, the larger sphere leaves it for international law’s influence on the legislative activities of the EU institutions. (Of course, the legality of the Member States international commitments towards third parties remains out of question.)

Defining the scope of external EU powers has an opposite consequence in any other cases, where international law does not serve as a benchmark against validity of EU legislation. The Court usually has to investigate the question of (explicit or implied) external EU powers in the framework of infringement procedure, as well as in procedure provided by Article 218(11) TFEU (compatibility with the Treaties of an envisaged agreement to be concluded by the EU). Both procedures are *inter alia* designed, even if indirectly, to give jurisdiction to the Court to rule on questions of division competences between EU and Member States,⁸⁰ and, consequently, on the legality of the Member States' international commitments in the light of the founding Treaties. Thus, in the latter case, EU law has a better position than in the previous situation, since the Court is still able to influence the scope of individual international commitments of the Member States towards third parties. The more extensively interprets the Court the exclusive external competencies of the EU and, consequently, the more restrictively the ability of (the sphere in which) the Member States can undertake international commitments outside the framework of the Union, the less place remains for the influence of international law into the EU legal order.

As we have seen, in both cases, the independency of EU law from international law is at stake and the different ways of interpretation serve the same political interest: safeguarding the autonomy of the EU legal order from the influence of international law. At this point, we can firmly accept Lavranos' view that the main aim and result of the new line of jurisprudence is to protect the autonomy of European law from international law interferences.⁸¹

Based on the wording of the *International Fruit Company* judgment cited above and the whole context of the case, two directions of interpretation of the "assumption of powers" theory can be identified: 1.) The Court does not require that the powers previously exercised by the Member States must be assumed by the EU in its entirety in the subject matter of the international agreement in question 2.) The assumption of powers by the EU is possible only in the same legal context as that of the *International Fruit Company* case, namely, when the scope of the EU's exclusive powers spread over the whole field covered by the agreement. (In the latter case, as we have seen above, the Court tends to interpret the scope of assumed power restrictively.)

The Court has chosen both in the present judgment and in the *Intertanko* ruling the second way of interpretation, although the first one nor should have been excluded; the reasoning of the Tribunal (CFI) in the case *Kadi*⁸² serves as an illustration for it. The case, due to its special legal context, raises interesting questions concerning the effect of international law norms in the EU legal order.

The applicants started proceedings under Article 230 EC (now 263 TFEU) arguing, *inter alia*, that the Community sanction regulation,⁸³ under which they were listed as suspected terrorists, had been adopted in breach of certain fundamental rights guaranteed under EU law.⁸⁴ The regulation implemented a United Nations Security Council resolution designed to freeze the funds of individuals and organizations associated with terrorist networks.

As the UN Charter itself is (also) an agreement covered by Article 351 TFEU,⁸⁵ the CFI based its reasoning on an analogy with the *International Fruit Company* judgment:

"201 Since the entry into force of the Treaty establishing the European Economic Community, the transfer of powers which has occurred in the relations between Member States and the Community has been put into concrete form in different ways within the framework of the performance of their obligations under the Charter of the United Nations (see, by analogy, *International Fruit*, paragraph 16).

202 Thus it is, in particular, that *Article 228a of the EC Treaty (now Article 301 EC)*⁸⁶ was added to the Treaty by the Treaty on European Union in order to provide a specific basis for the economic sanctions that the Community, which has exclusive competence in the sphere of the common commercial policy, may need to impose in respect of third countries for political reasons defined by its Member States in connection with the CFSP, most commonly pursuant to a resolution of the Security Council requiring the adoption of such sanctions.

203 It therefore appears that, *in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community (see, by analogy, on the question whether the Community is bound by the General Agreement on Tariffs and Trade (GATT) of 1947, International Fruit, paragraph 18]*”

As it is clear from the above cited argumentation, the CFI does not require the assumption of powers previously exercised by Member States in its entirety in the field covered by the prior agreement. The CFI refers on the exclusivity of EU competence (with reference on an analogy with *International Fruit Company* judgment) only in the particular field to issue economic sanctions.

In addition, in contrast to the conclusion of the Court in *Burgoa*, that duty of the EU institutions is directed only to permitting the Member State to perform its obligations under the prior agreement, the CFI states that

„204 Following that reasoning, it must be held, first, that the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that *in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations.* “

The Court did not follow the reasoning of the CFI and partially annulled the regulation, on the basis of the following arguments:⁸⁷

“ ... *an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC...* “⁸⁸

„*Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.* “⁸⁹

As regards the way of argumentation concerning the scope of Article 351(1) TFEU and effect of agreements covered by it, the Court apparently followed a different path than the CFI: instead of competence approach, that is considering powers previously exercised by Member States and than being assumed by the EU, the Court rather focused on the borderline which

generally can limit the exercise of EU competences, irrespective of the art and scope of the competence in question: the ‘very foundation of the Community legal order’.⁹⁰

Lavranos pointed out, that “This very sweeping and categorical line of reasoning of the ECJ regarding Article 307 EC [now 351(1) TFEU] reveals an important new aspect [...], namely, the confirmation that the concept of the ‘very foundation of the Community legal order’ is also applicable within the context of pre-accession treaties and their potential conflict with Community law.” The judgment makes clear that, while derogations from primary EU law on the basis of Article 351(1) TFEU and in the light of *Centro-Com*⁹¹ are possible, there is an untouchable core of fundamental European constitutional law values and principles from which in no circumstances any derogations are allowed – even if a prior agreement as important as the UN-Charter so requires.⁹²

As far as the rights of individuals are concerned, the Court made in the *International Fruit Company* decision (as it was already cited above) an indirect link between “invocability” of the provisions of Member States’ agreements and their “direct effect”: “Before invalidity can be relied upon before a national court, that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts.” In its subsequent case-law, the Court echoed the conditions for direct effect of agreements to which the EU is a party as it was determined in the *International Fruit Company* ruling. This approach might suggest, on the face of it, that once a prior agreement satisfies the strict “binding effect” test on the basis of assumption of Member States’ powers, then it can be part of the EU legal order, under the same conditions as an agreement concluded by the EU itself. However, in decisions on agreements concluded by the EU,⁹³ the Court appears to extend their legal effect and let us conclude that, in the light of the *International Fruit Company* judgment, Member States’ treaties could be only used as a background against which legality of EU acts might be judged, while EU agreements could be interpreted and applied as if they were enacted as EU law.⁹⁴

Once the Court excludes the possibility of assumption of powers previously exercised by Member States under a prior agreement, Article 351(1) TFEU itself neither can give rise to rights, which individuals can invoke before national courts. In *Burgoa*, the Court emphasised that the provision does not have the effect of conferring upon individuals who rely upon an agreement concluded prior to the entry into force of the treaty or, as the case may be, the accession of the member state concerned, rights which the national courts of the member states must uphold. Nor does it adversely affect the rights which individuals may derive from such an agreement.⁹⁵

Nevertheless, the Court seems to be open to use prior agreements as a tool for interpreting norms being accepted as part of the EU legal order. In *Intertanko*, for example, while it did not accepted the view to regard Marpol 73/78 as a Convention being binding on the EU, established that

“The [...] fact [that Marpol 73/78 binds the Member States] is, however, liable to have consequences for the interpretation of, first, UNCLOS [which is an agreement concluded by the EU] and, second, the provisions of secondary law which fall within the field of application of Marpol 73/78. *In view of the customary principle of good faith, which forms part of general international law, and of Article 10 EC [now Article 3(4) TEU], it is incumbent upon the Court to interpret those provisions taking account of Marpol 73/78.*”⁹⁶

It follows from the reasoning above, that even if Article 351(1) TFEU does not give rise to binding effect for prior agreements toward institutions of the EU, the Court is obliged, under the general duty of sincere cooperation laid down in Article 3(4) TEU, to interpret EU law in consistency with these agreements.

3. Rules of customary international law as grounds for review the legality of secondary EU-norms

As grounds for review the validity of directive 2008/181, the claimants refer not only to provisions of international agreements, but also to a certain principles of international law. The Court consequently recognized in its early case-law, too, that general rules of international law such as customary international law are binding on the EU.⁹⁷ However, that recognition does not of itself resolve all the questions concerning the legal effects which such law may produce in the EU legal order.⁹⁸ There is further case law in which the Courts have attempted to clarify those effects; the present judgment is the last one in this series.

The Court already established in the early *Poulsen* case that „*the European Community must respect international law in the exercise of its powers*” and „*therefore provisions of EC legislation have to be interpreted, and their scope limited, in the light of the relevant rules of customary international law at hand.*”⁹⁹

In the case *Racke*, the Court acknowledged customary international law as part of the EU legal order for the first time. In order to understand the significance of the present judgment in the right way, it is worth to set the ruling *Racke*¹⁰⁰ out in detail.

The Co-operation Agreement of 2 April 1980 concluded between the European Economic Community and the MemberStates on the one hand and the Socialist Federal Republic of Yugoslavia on the other (in following: "Co-operation Agreement"), introduced a preferential tariff for the import of wine originating in Yugoslavia. In 1991, a regulation of the Council suspended the co-operation agreement unilaterally.¹⁰¹ The reasons given were the fundamental change in circumstances (*rebus sic stantibus*), i.e. the civil war and the disintegration of Yugoslavia. Racke, a German company, imported wine from Yugoslavia, argued that vine import should benefit from the preferential rate of custom duty provided by the cooperation agreement and contested the validity of the regulation the German *Bundesfinanzhof*. The latter referred question for preliminary ruling to the Court, asking, whether the regulation suspending the Co-operation Agreement was valid in the light of the *rebus sic stantibus* rule of customary international law.

The Court concluded that

„...the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.”

*“In those circumstances, an individual relying in legal proceedings on rights which he derives directly from an agreement with a non-member country may not be denied the possibility of challenging the validity of a regulation which, by suspending the trade concessions granted by that agreement, prevents him from relying on it, and of invoking, 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.”*¹⁰²

As Wouters and van Eeckhoutte rightly emphasize that it should not be overstretched the judgment's significance for the question of invocability of customary international law in the Community legal order.¹⁰³ They mention a few manners/points in which the Court restricts its ruling.

Firstly, the judgment can be viewed as a restriction of the invocability of a rule of customary international law to review the legality of a Community act to the situation in which this Community act is, in fact, an implementation of the invoked rule of customary international law, since the contested regulation explicitly stated to have been taken on the basis of *rebus sic stantibus*.¹⁰⁴

Secondly, they point out that the Court further restricts its ruling to rules of customary international law of a *fundamental* nature.¹⁰⁵ Although the Court does not define what a *fundamental* rule of customary international law is, it makes clear in the judgment that the principle of *pacta sunt servanda* and the rule of *rebus sic stantibus* belong to this category.¹⁰⁶ Finally, the Court created a very limited legality test applicable to review the legality of Community acts on the basis of a rule of international customary law:

„However, because of the complexity of the rules in question and the imprecision of some of the concepts to which they refer, *judicial review must necessarily, and in particular in the context of a preliminary reference for an assessment of validity, be limited to the question whether, by adopting the suspending regulation, the Council made manifest errors of assessment concerning the conditions for applying those rules.*”¹⁰⁷

In the present judgment, the Court essentially re-affirms its earlier interpretation in *Racke* concerning the invocability of customary international law to challenge the validity of acts of EU institutions. However, in a few points, the Court's recent ruling facilitated (reaching) the conditions of that invocability.

Firstly, the judgment does not restrict the invocability of a rule of customary international law to challenge the legality of an EU act to the situation in which the EU act is an implementation of the rule of customary international law.

As regards the international legal context, in contrast to the regulation being subject matter of *Racke*, the aim of the directive 2008/101 is not the implementation of a certain principle of the customary international law. Instead, the directive refers on the global aim to promote reductions of greenhouse gas emissions (in a cost-effective and economically efficient manner), as it is laid down in international agreements concluded by a large number of the actors of international law. However, the appropriate provisions of these international agreements can not be regarded as codification of a principle of customary international law.¹⁰⁸ Thus, in the present case, the invocability of a rule of the Customary international law, seems to be independent from the fact that whether the aim of the EU legislator was the implementation of that rule or not.¹⁰⁹

Secondly, in the present judgment, the Court does not restrict its ruling to a certain (higher) category of customary international law. The Court acknowledges the invoked principles as being able to serve as ground for invocability, without qualifying them as „rules of customary international law of a *fundamental* nature”.

However, the reason why we can say that the Court essentially re-affirms its decision in *Racke* is that it upholds the distinction between the possible grounds for reviewing the legality of EU acts in the international law, saying, that “a principle of customary international law does not have the same degree of precision as a provision of an international agreement”. Therefore “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 those principles”.¹¹⁰ With that reasoning, the Court not only repeats the same “marginal appreciation test”¹¹¹ as in *Racke*, but it expresses its view to make distinction between the invocability of provisions of international agreements on the one hand and that of the rules of customary international law on the other in a more obvious way.

The meaning of “manifest error of assessment” became somewhat clearer in the present judgment. The Court has to investigate, in essence, whether the extent to which Directive 2008/101 shall apply is compatible with the rules of customary international law relied upon by the claimants. As we have seen, the Court interpreted the legality of the extent of the directive’s application not only in the light of these rules, but it also found support to its argumentation in the primary EU law [Article 191(2) TFEU] and in provisions of an international agreement concluded by the EU (Kyoto Protocol). The reasoning of the Court suggests that the legality test (where rules of customary international law serve as grounds for review) means that if the customary law rule in question may be interpreted flexible, the Court has to choose the way of interpretation which is the most compatible with the main objectives of EU law (that is in the present case the aim of environmental protection).¹¹² Consequently, the institution which adopted the contested EU act in conformity with such an interpretation method, did not make a manifest error of assessment concerning the conditions for applying the principles of customary international law. The argumentation presented by the Court firmly confirms the view that the main intention of the Court is to protect the autonomy of European law from international law interferences by excluding as much as possible any conflicts between European law and international law.¹¹³

The “marginal appreciation test” might be contested from several points of view. According to the critical remark of Wouters and van Eeckhoutte (to the same reasoning of the Court in *Racke*), it is a misconception and oversimplification to hold that rules of customary international law are vague, uncertain and imprecise. They also point out, that the customary rule of *rebus sic stantibus*, as it has been codified in Article 62 of the 1969 Vienna Convention and in Article 62 of the 1986 Vienna Convention, has similar characteristics to a treaty provision. „It is therefore unacceptable to hold that in reviewing the legality of a Community act on the basis of a rule of customary international law only a marginal appreciation test should apply, whereas this is not the case in reviewing the legality on the basis of a treaty provision.”¹¹⁴ The opinion of AG Kokott in the present case also reaffirms this view, arguing that “criteria for determination of the invocability of international customary law should not differ from those applicable on an examination of whether and to what extent the validity of EU acts can be gauged against international agreements.”¹¹⁵

At this point, it is worth to take a closer look at the judgment of the Tribunal (CFI) in *Opel Austria*.¹¹⁶ Opel Austria GmbH has exported gearboxes to the EU and received Austrian state aid for their production. The European Community found the state aid as a violation of the Free Trade Agreement between the EC and Austria, and, as a reaction to the aid, the Council adopted on 20 December 1993 Regulation (EC) No 3697/93, which introduced an import duty for the car gearboxes produced by Opel Austria.¹¹⁷ On 13 December 1993, the EC had approved the Agreement on the European Economic Area between the European Community and their Member States on the one hand and Austria on the other (“EEA Agreement”). The EEA Agreement entered into force on 1 January 1994.

Opel Austria introduced an application for annulment against the Regulation, arguing, that it is incompatible with Article 10 of the EEA Agreement. Although the incompatibility was fairly obvious in the case,¹¹⁸ the CFI could not directly apply the EEA Agreement, since it had not entered into force on 20 December 1993.¹¹⁹ However, Opel Austria also argued that by adopting the regulation a few weeks before the entry into force of the EEA Agreement, the

Council had infringed the rule of customary international law, according to which a signatory may not defeat the object and purpose of a treaty prior to its entry into force. The CFI made a „sudden leap”.¹²⁰

„*the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which, according to the case law, forms part of the Community legal order.*”¹²¹ Therefore, „*traders may rely on the principle of protection of legitimate expectations in order to challenge the adoption by the institutions, during the period preceding the entry into force of [the EEA] agreement, of any measure contrary to the provisions of that agreement which will have direct effect on them after it has entered into force.*”¹²²

Accordingly, the CFI annulled the contested regulation after it established that it is incompatible with Article 10 of the EEA.¹²³

The first reading of the judgment suggests that „by means of “transformation approach”, the CFI made a rule of customary international law a rule of Community law. Hereby, the complex question of invocability of rules of customary international law is avoided.”¹²⁴

Similar to the situation in *Racke*, Article 10 of the EEA agreement (the agreement concluded between the Community and a third state) would also be able to have direct effect, if it had yet entered into force at the time when the contested measure of the Council has been adopted.

Secondly (as a second and far-reaching conclusion) , the decision confirms the approach that, from the point of view of invocability as ground for review the validity of EU acts, rules of customary international law can have the similar characteristics to a treaty provision. Namely, the reasoning applied by the CFI let us conclude that the relation of rules of customary international law and provisions of international agreements might be interpreted, by analogy, as that of the general principles of EU law and articles of the EU Treaties. It is well-established in the settled case law of the ECJ, that general principles belong to the primary sources of EU law having the same rank as the provisions of the EU Treaties thus possessing all the characteristics of them:¹²⁵ That means, they are able to have direct effect and can serve as a ground for review the legality of the EU acts under the same conditions as the Treaty provisions. Likewise, it should not be excluded that the rule of customary international law (by way of interpretation), is able to have the similar effect as provisions of an international agreement under certain circumstances. Therefore, there is no acceptable reason to hold the view – which was represented by the Court both in the ruling *Racke* and in the present judgment – that the principle of customary international law never has the same degree of precision as a provision of an international agreement and thus the nature of (all type of the) rules of customary law itself limits the scope of review to the “manifest errors of assessment”.

The conclusion can be drawn that there it is no reason to make distinctions between provisions of international agreements concluded by the EU on the one hand and rules of customary international law on the other, as basis for challenging the validity of an EU act, on the ground that they “do not have the same degree of precision as a provision of an international agreement” The *Opel Austria* case shows that general principles of the EU law might be regarded as a manifestation of a rule of customary international law, which, as the Court established in the settled case-law, can be sufficiently clear and precise to have direct effect in the EU legal order, although they are often general formulated and its precise content can be determined by the way of interpretation. Viewed from this angle, the nature of rules of customary international law is similar.

The effect of rules of customary international law might be influenced rather by another issue, that is, the purpose of these rules. The Opinion of Jacobs AG in *Racke* also supports this

view.¹²⁶ He argued that there were good reasons for not allowing individuals to challenge Community acts *on the basis of customary international rules relating to treaties*, since the overall nature and purpose of the law of treaties was to lay down rules applying in the relations between States and IOs and it was not intended to create rights for individuals. Nonetheless, Jacobs AG holds the view that such challenges could not be wholly excluded; as a reason for it, he referred to the *Opel Austria* and the *Racke* cases, “where an agreement had direct effect and created rights for individuals, the beneficiaries of such rights could have legitimate expectation as to the correct and proper interpretation of the agreement, a was recognized in Opel Austria. To some extent those expectation could extent to the life itself of the agreement, [...] as in *Racke*, it could be legitimate for an individual to expect that the agreement would not suddenly be suspended without due cause.” In conclusion, the AG was of the opinion that the Court should review only manifest violation of the law of treaties to the detriment of the individual concerned. There had to be a relatively wide margin of discretion for the Community institutions to take decision concerning the life of an agreement, in accordance with their powers under the Treaty, as it was only logical that this life should be primarily in the hands of the contracting parties, and there was an important political dimension to the conclusion and termination of agreements which did not lend itself readily to judicial review.

However, AG Jacobs also acknowledged that there could be other types of customary international law which did intend to confer rights on individual and their effects should be distinguished from those of the law of treaties; he mentioned as an exception rules of international humanitarian law.

The reasoning of AG Jacobs made it clear that the purpose and nature of the rule of customary international law in question can determine the effect of these rules on different way. However, this is also the case by international agreements. As regards the latter, several types of agreements can be distinguished on the basis of intention of the contracting parties to confer rights on individual. The conclusion can be drawn that there is no reason to examine the “nature and purpose” of rules of customary law another way then provisions of international agreements. (nature and purpose: political assessment)

As regard rules of customary international law other than law of treaties, it is important to investigate closer the nature and purpose of fundamental rights. Several of these rights enshrined in the European Convention on Human Rights can also be qualified as rules of regional, i.e. European, customary international law.¹²⁷

At this point, it is worth to recall the jurisdiction of the ECJ concerning fundamental rights, as well. Wouters and van Eeckhoutte point out, that the course of reasoning adopted by the CFI in *Opel Austria* is inspired by the Court of Justice’s case-law accepting fundamental rights as „*an integral part of the general principles of Community law protected by the Court of Justice*”.¹²⁸ As it is well-known, because of the fundamental economic character of the integration (Community), human rights have not originally been declared by the EC Treaty as belonging to the EU legal order. In the earliest phase of the integration, only the Court was who made reference on them, saying that, for the purpose to identify the content of fundamental rights, „*the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories*. In that regard, the ECHR has special significance.”¹²⁹ To date, the Treaty of EU recognizes that “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of

the Union's law."¹³⁰ Moreover, it attributes to the Charter of Fundamental Rights of the European Union the same legal value as to the founding Treaties.¹³¹

From a formalistic point of view, as a result of this integration process, rules arising from "outsider" legal orders (i. e. national law of the Member States and international law) have been (became) not only an integral part of the EU legal order but also belong to the 'very foundation of the Community (EU) legal order', as it was emphasized in the judgment *Kadi*. Is it a realistic vision that the same thing will happen with those principles of customary international law which do not belong to the (sub)category of fundamental rights?

The case law of the ECJ (the judgment *Kadi*, in particular) also made clear that the review of legality of EU acts on the basis of human rights is not limited to the "manifest errors of assessment", although the formulation of these rights not always have the same degree of precision as the provisions of the EU Treaties.

Taking into account all of these considerations, the question arises, why the case-law consequently excludes that rules of customary international law can have the same effect in the EU legal order than other norms of EU law (either provisions of the EU Treaties or those of international agreements concluded by the EU with third states). The recent judgments of the Court (the present judgment, as well) support the presumption that the reason behind can be the protection of the EU (autonomous) legal order from international law.

None of these judgments can be seen as an alteration from the traditional *Völkerrechtsfreundlichkeit* of the EU, but rather as an expression of the intention of (formed case by case in the jurisprudence) the Court (of the principle) that EU law must be protected from the influence of any other "strange" legal system, as much as possible. As Klabbers established, even the decision *Kadi* is not seen as an exception to the *Völkerrechtsfreundlichkeit*, much less as a merely internal constitutional case but rather as the formulation of the Court's position on the relationship between international law and EU law: namely that the Court is interested first and foremost in the defence of the autonomy of the EU legal order,¹³² by excluding as much as possible any conflicts between European and international law.

Viewed from this angle, it can be easier understood, why the Court upholds in the present judgment the distinction, as grounds for review the legality of EU acts, between provisions of international agreements to which the EU is a party on the one hand and rules of customary international law on the other. The Court sees international agreements concluded by the EU rather as part of the EU law and less as part of the international law, and, in doing so, it does not suffer the (possible) establishment of invalidity of an EU secondary norm as an "injury" to the autonomy of the EU legal order.

This attitude of the Court can be seen as which entails that the legality of the EU measures can only be judged against its own legal framework; that is, against norms that have (somehow) been incorporated in the EU legal order.¹³³ Thus, although the Court declared/acknowledged in its settled case law customary international law also as integral part of the EU legal order, it seems so that it still regards these rules rather as a strange body ("outsider"), and therefore accepts them as possible grounds for invalidity of an EU act only in exceptional cases.

However, as regards the "outsider" rules of international law, the case law shows that customary law (still) have a higher position in the EU legal order than agreements to which Member States are parties but not the EU. In the case *Intertanko*, the Court, after it established that the EU has not assumed the commitments of the Member States undertaken by the Marpol Convention 73/78, concluded that

„as is clear from settled case-law, the powers of the Community must be exercised in observance of international law, including provisions of international agreements in so far as they codify customary rules of general international law. None the less, it does not appear that [...] Marpol 73/78 [is] the expression of customary rules of general international law.“¹³⁴

With this statement, the Court made an obvious distinction: the rules of customary international law rather have a similar function to the general principle of EU law in the EU legal order, since the EU institutions have a general obligation to respect them when acting in their legislative capacity. Consequently, this duty is independent from the subject matter of the legislation, while international agreements of the Member States are binding on the EU only in so far as the EU has assumed the international commitments undertaken by the Member States. Thus, the binding effect of the agreements is the question of scope, since the EU has the capacity to assume the international commitments of the Member States only in the field where it has exclusive external competence, which can be derived (explicitly or implicitly) from the provisions of the EU Treaties.

4. The question of “invocability” and “direct effect” of international legal norms in the EU legal order

Distinguishing the terms “invocability” and “direct effect” has become the most difficult question in the context of application customary international law. As we have seen above, both concepts were applied in connection with the review of validity of an EU act on the basis of international legal norms, in particular with the rights of individuals to invoke rules of customary international law to challenge legality of secondary EU norms before judicial bodies. The *Racke* case has served an excellent illustration for the problem of determination the scope of individual rights in such a context. Therefore, it is worth to recall the judgment in the case again and compare it with the present ruling. The language used by the Court is quite similar, however, the decisions have different consequences on individual rights.

In *Racke*, the Court firmly separated the question of application of customary international law from the issue of direct effect. The judgment is restricted to the situation in which an individual invokes a rule of customary international law to review the legality of a Community act, at the same time it does not concern the question of direct effect.¹³⁵ The Court expressly said, that „*In this case, however, the plaintiff is incidentally challenging the validity of a Community regulation under those rules [of customary international law] in order to rely upon rights which it derives directly from an agreement of the Community with a non-member country. This case does not therefore concern the direct effect of those rules.*”¹³⁶ It follows from this paragraph that the Court viewed the case rather as one in which a private individual relies on the direct effect of the Co-operation Agreement and, in doing so, challenges the validity of a Community regulation preventing him from relying on the rights granted to him.¹³⁷ Thus, the Court in *Racke* (especially in paragraph 47 and 51) makes clear that the individual may invoke obligations that for the EC flow from customary international law.¹³⁸ However, not the rule of customary international law itself is able to grant to him directly invocable rights. In this sense, the decision *Racke* did not step over the significance of the Kupfenberg ruling and following case law, which mention only „[the] provision of [an international agreement concluded by the Community is]” as “capable of conferring rights on citizens [...] which they can invoke before the courts”.¹³⁹

On the contrary, Eeckhout found an analogy between legal effect of agreements concluded by the Member States on the one hand and that of rules of customary international law on the other. He holds the view that when one compares the facts and claims in *Racke* with those in *International Fruit Company*, it is difficult to find any material differences. The position of international law in *International Fruit Company* was not dissimilar: if the regulation restricting imports of apples had been declared invalid, International Fruit Company (the individual) would have benefited from the right to free importation under the then applicable Community rules and not directly under the provisions of GATT. Despite of that, the Court defined as requirement for invocability that the provision of international law (itself) confers rights on citizens. On the basis of that reasoning, Eeckhout concludes that “the *Racke* case was concerned with the direct effect of rules of customary international law, contrary to the Court’s own assessment”.¹⁴⁰

Eeckhout view suggests that “direct effect” might be regarded as a collective concept which relates not only to international norm being able both to confer rights on individuals and to be invocable before national court (at the same time) but also to norm owning solely the last character. However, this approach has not been shared unanimously in the legal literature. Holdgaard’s definition, for instance, does not make a direct link between “invocability” and individual rights: “a provision of international law is directly invocable if it can be relied on within the Community legal order *per se*, i. e. without the assistance of a domestic legal norm.”¹⁴¹ since “In a particular case, [...] the practical effect of a hierarchically superior rule of international law depends on whether it can be directly invoked”.¹⁴² In accordance with this approach, most of the commentators hold the view that direct effect concerns the justiciability of an international norm, that is whether the provision at issue is sufficiently clear and unconditional (and does not require further implementing acts) to be capable conferring rights on individuals.¹⁴³

Facing different views in the legal literature on use of terminology is not surprising. As we have seen above, the Court itself also applies the concepts “invocability”, and “direct effect” in a confusing way. The above cited paragraph of the ruling *International Fruit Company* shows that the Court applies the word „invoke” to the rights of individuals arising from an international agreement concluded by the EU which can be protected before national courts and serve, at the same time, as a ground for challenge the validity of an EU act. The legal literature typically uses the term “direct effect” to refer provisions of international agreements being capable to confer directly invocable rights on individuals in the sense of *International Fruit Company* decision.¹⁴⁴

In contrast, as regards the effect of rules of customary international law in EU legal order, the ruling *Racke* apparently shows, that not necessarily the international norm containing rights of individual will be invocable in order to grant protection to these rights.¹⁴⁵ This is the element of the reasoning which let us conclude that the Court did not require “direct effect” for the invocability of a norm of customary international law to review the legality of a Community act.¹⁴⁶

Having regard to the factual background to the *International Fruit Company* case, the ruling gives rise to confusion when interpreting „invocability” in the judgment *Racke*. Eeckhout rightly points out that if the contested regulation in *International Fruit Company* had been declared invalid, the individual would have benefited from the right to free importation under the then applicable Community rules and not directly under the provisions of GATT. However, the case-law subsequently has confirmed the view that, in the meaning of *International Fruit Company* judgment, “direct effect” and „invocability” of provisions of an international agreement can not be separated from each other. Thus, the case-law on direct effect of international agreements do not support the interpretation that the similarity of facts and reasoning in *Racke* on the one hand and in *International Fruit Company* on the other let

us to conclude that the Court implicitly gave direct effect to rules of customary international law. The analogy of the approach adopted in *Racke* with those adopted in relation to the effects of directives¹⁴⁷ can support the latter conclusion: in its judgment *Unilever*, the Court established that the inconsistency of the adoption of national measure with the procedure laid down in a directive on technical standards was allowed to be invoked in proceedings between individuals whilst the Court expressly excluded the direct effect of the directive.¹⁴⁸

The legal literature interpreting case law on effects of international law seems to be consequent only in so far as it makes a clear distinction between „justiciability” of an international legal norm on the one hand and the ability of that norm to be ground for review the legality of EU act on the other. On the basis of argumentations presented above, two types of individual rights in the context of challenging the validity of EU acts on the basis of norms of international law can be distinguished:

- 1.) the substantial right of the individual which can directly be derived from the norm of international law and which needs to be protected. The international legal norm which serves as the source of these rights has direct effect if protection of the rights can be granted to the individual before the judicial forum in question.
- 2.) the procedural right of the individual to challenge the validity of the EU act which infringed/violated the substantial right described in the point 1.). The norm of international law is invocable, when the individual can invoke it in order to protect its substantial right according to point 1.).

There are many situations when both the substantial and the procedural right derive from the same norm of international law: this is the case by international agreements which confer rights of individuals. However, in certain cases, the sources of the substantial and procedural rights are different, as we have seen in *Racke* examined above.

Returning to our present case, the conclusion can be drawn that the ruling has brought some changes concerning the invocability of rules of customary international law to review the validity of an EU act, from the point of view of individuals, as well.

Firstly, in the present case, the legal context in which customary international law have been invoked was different from that in *Racke*, as the claimant’s reference to the rules of customary international law has not been attached to rights which could be derived from international agreements. In other words, the reference on customary international law to challenge the validity of the contested directive was independent from the reference on provisions of international treaties. Unlike the cases *Racke* and *Opel Austria*, the rules relied upon by the claimants do not belong to the subgroup of the law of treaties within customary international law but they can be regarded as embodying the current state of customary international maritime and air law, as it was emphasized by the Court itself.¹⁴⁹ The overall nature and purpose of this kind of law, in contrast to the law of treaties, do not exclude automatically that its rules (the principle of freedom to fly over the high seas, for instance) might be sufficiently clear and precise to confer rights on individuals.

Under these circumstances, the Court had no reason to separate, as did it in *Racke*, the source of rights granted to the private individual on the one hand and the source of obligations for the EC on the other. Thus, an opportunity was given to the Court to change its viewpoint to direct effect of the rules of customary international law.

As a result, the Court, for the first time, did not excluded the possibility that rules of customary international law might give rise to invocable rights for individuals, even if it did not acknowledged the direct effect of these rules expressly:

“even though the principles at issue appear only to have the effect of creating obligations between States, it is nevertheless possible, in circumstances such as those of the case which has been brought before the referring court, in which Directive 2008/101 is liable to create obligations under European Union law as regards the claimants in the main proceedings, that the latter may rely on those principles and that the Court may thus examine the validity of Directive 2008/101 in the light of such principles.”¹⁵⁰

The Court’s careful approach is in consistency with the practice of domestic courts in Europa. In most domestic legal systems, courts are under certain conditions willing to accept that a private individual invokes a rule of customary international law to interpret a domestic rule in conformity with customary international law; to derive a right out of a rule of customary international law; or – the strongest and most far-reaching use – to contest the legality of a rule of domestic law.¹⁵¹ However, this last type of reliance on customary international law is especially severely restricted in the case-law of many States.¹⁵² As regards the first case, the Court seems to be also open to use rules of customary international law as a tool for interpreting EU law.¹⁵³

Conclusion

This case analysis shows that the present judgment can not be regarded as a dramatic turn in the case-law concerning the relationship between EU law and international law. The decision is rather fits in the series of recent rulings and tends to confirm the Court’s conception that the autonomy of the EU legal order must be protected from international law. At the same time, the judgment made also clear that the autonomy of the EU legal order is not unlimited, since the EU institutions must act within the limits which were raised by the norms of international law.

As regards the position of international agreements in the EU legal order, the argumentation of the Court in the present judgment does not diverge from the line of reasoning followed in previous case-law. Accordingly, the Court is reluctant to accept the binding effect of agreements to which (only) the Member States are parties and tends to acknowledge only the agreements concluded by the EU as integral part of the Union’s legal order. However, the judgment made somewhat easier the way in which the legality of the EU acts on the ground of rules of customary international law can be reviewed and, in contrast to previous case law, did not exclude the possibility that individuals can derive invocable rights directly from these rules.

It was argued above that, viewed from a formalistic legal point of view, a similar process of integration into the EU legal order as it is seen in the case of human rights can not be excluded. This assumption might be reinforced by reference on the conception (presented above) which regards fundamental rights as special group within rules of customary international law, i.e. European (regional) customary international law. Art 3(5) TEU, expressly providing that the EU shall contribute to the observance and the development of international law, might also serve as a basis for such an integration process.

However, the new line of jurisprudence concerning the relationship between EU law and international law does not support the above assumption. The present judgement also confirms the view that the Court seeks to protect the autonomy of EU legal order by all possible means of reasoning and this intention determines the outcome of its decisions. The Court seems to be especially careful when investigating the effect of those international legal norms which have not been incorporated in the EU legal order.

On the one hand, it can be the reason for the Court's refusing attitude toward binding effect of international agreements concluded by Member States. Accordingly, the Court's restrictive interpretation on scope of assumed power previously exercised by Member States under prior agreements (covered by Article 351(1) TFEU) fails to be consistent with its argumentation concerning exclusive external powers of the EU according to the AETR "effect-based" test. On the other hand, the Court's (presumed) intention to safeguard the autonomy of EU law also appears in its attitude to customary international law. Even if the latter enjoys a better position in the EU legal order than agreements to which the Member States are parties, the Court is still far away from giving to them the same rank in the EU law as to the agreements concluded by the EU (although it went one step ahead with facilitating the conditions for invocability of rules of customary international law). The result of the present judgment suggests that the Court does not regard the "justiciability" of these norms equal to that of provisions of international agreements concluded by the EU, albeit if formally acknowledges them as "integral part of the Union's legal order". Thus, taking together the result of the present judgment and the tendency in the case-law, we rightly can have the feeling that rules of customary international law have a valid ticket to enter, but still remain outside the exclusive club of the EU legal order.

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¹ Case C-366/10, *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v Secretary of State for Energy and Climate Change* [not yet reported]

² 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, 13.1.2009, p. 3–21*

³ It (consideration) was also pointed out in the introduction of AG Kokott's opinion delivered in the case, see para 4

⁴ The Directive and the judgment itself also has significant impact on environmental protection and trade in the EU. See further: Benoît Mayer, 'Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, Judgment of the Court of Justice (Grand Chamber) of 21 December 2011' (2012) 49 *Common Market Law Review*, Issue 3, pp. 1113–1139. The present paper does not concern these aspects in detail.

⁵ Recital 4 in the preamble of Directive 2008/101

⁶ Article 2 of the Convention (94/69/EC: Council Decision of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change, *OJ L 033, 07/02/1994 P. 0011 – 0012*, Annex A)

⁷ 2002/358/EC: Council Decision of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfillment of commitments thereunder, *OJ L 130, 15.5.2002, p. 1–3*. The Kyoto Protocol has been approved as one of the legal instruments to achieve the Convention's long-term objective of preventing dangerous anthropogenic interference with the climate system for the period beyond 2000.

⁸ Kokott, para 22

⁹ Kokott, para 22. Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, *OJ L 275, 25.10.2003, p. 32–46*

¹⁰ Recital 5 in the preamble of Directive 2003/87

¹¹ Kokott, para 24.

¹² Article 16 of Directive 2008/101

¹³ Annex I. of Directive 2008/101

¹⁴ Recital 9 in the preamble of Directive 2008/101

¹⁵ The International Civil Aviation Organisation (ICAO) was established by the Chicago Convention and has had the status of a specialised agency of the United Nations since 1947. All Member States are members of it whereas the European Union itself merely has observer status within the ICAO.

¹⁶ C-366/10 para 10

¹⁷ C-366/10 para 13

¹⁸ C-366/10 para 19

¹⁹ Opinion of AG Kokott in case C-366/10, 108.

²⁰ AG Kokott 110.

²¹ AG Kokott 112.

²² AG Kokott 108. and 112.

²³ AG Kokott 113.

²⁴ Kokott, para 42.

²⁵ see Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219, paragraph 7, and *Intertanko and Others*, paragraph 44

²⁶ see Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* [2008] ECR I-6513, paragraph 110

²⁷ see *IATA and ELFAA*, paragraph 39, and *Intertanko and Others*, paragraph 45

²⁸ see Case 12/86 *Demirel* [1987] ECR 3719, paragraph 14; Case C-213/03 *Pêcheurs de l'étang de Berre* [2004] ECR I-7357, paragraph 39; and Case C-240/09 *Lesoochranárske zoskupenie* [2011] ECR I-0000, paragraph 44 and the case-law cited

²⁹ Para 60

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- ³⁰ Case 812/79 *Burgoa* [1980] ECR 2787, paragraphs 8 and 9
- ³¹ Paras 61 – 63
- ³² Paras 65 – 70
- ³³ Para 71
- ³⁴ Paras 73 - 78
- ³⁵ Para 84
- ³⁶ Para 85
- ³⁷ Paras 87, 93, 94 and 100
- ³⁸ Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraphs 9 and 10, and Case C-162/96 *Racke* [1998] ECR I-3655, paragraphs 45 and 46
- ³⁹ C-366/10, 107. (emphasis added)
- ⁴⁰ C-366/10, para. 110 (emphasis added)
- ⁴¹ C-366/10, para. 111 (emphasis added)
- ⁴² C-366/10, para. 111
- ⁴³ C-366/10, para. 112
- ⁴⁴ C-366/10, para. 113
- ⁴⁵ C-366/10, para. 117
- ⁴⁶ C-366/10, paras 124 – 126
- ⁴⁷ C-366/10, paras 127 – 130
- ⁴⁸ See for instance: C-192/89 *S. Z. Sevince kontra Staatssecretaris van Justitie* [1990] ECR 3461, Case C-265/03 *Igor Simutenkov kontra Ministerio de Educación y Cultura és Real Federación Española de Fútbol* [2005] ECR I-2579
- ⁴⁹ See a detailed analysis on the purpose and nature of the procedure: Morten Broberg and Niels Fenge, *Preliminary references to the European Court of Justice* (Oxford : Oxford University Press, 2010)
- ⁵⁰ Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219, para. 8
- ⁵¹ See Case 181/73 *Haegeman* [1974] ECR 449, para. 5
- ⁵² Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para. 52
- ⁵³ Jan Willem van Rossem, Interaction between EU law and international law in the light of Intertanko and Kadi: The dilemma of norms binding the Member States but not the Community. *Netherlands Yearbook of International Law*, (2009) 40 , pp 183-227, p. 194.
- ⁵⁴ Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* [1982] ECR 03641 p. 17
- ⁵⁵ Rass Holdgaard, *External relations law of the European Community: legal reasoning and legal discourses* (Alphen aan den Rijn, Kluwer, c2008) p. 247
- ⁵⁶ *Kupferberg*, para 18.
- ⁵⁷ Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 03719 para. 14 (my emphasis)
- ⁵⁸ See in particular, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, para. 39 and Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* [2008] ECR I-6513, para. 110
- ⁵⁹ As regards previous case law, Holdgaard also refers to that similarity. See p. 248. However, it should be noted that direct effect is not a requirement for the invocability of “internal” Community acts in the context of the review of legality. For these reasons it would be altogether better, according to Wouters and van Eeckhoutte to discard the use of direct effect as a requirement for the invocability of a treaty provision in the context of the review of legality of a Community act. (p. 41)
- ⁶⁰ See further: Francis G. Jacobs, Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice 13 – 33., in: Alan Dashwood and Marc Maresceau, *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (1. ed., Cambridge University Press, 2008)
- ⁶¹ Case 812/79 *Burgoa* [1980] ECR 2787, para. 8 and 9
- ⁶² C-366/10, para. 62 (my emphasis)
- ⁶³ Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219
- ⁶⁴ “By establishing a customs union between themselves the Member States intend to contribute, in conformity with the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international exchanges and the lowering of customs barriers.”
- ⁶⁵ Article 111 provides the procedure to be applied, in the course of the transitional period, for the establishment of common action and regarding the achievement of a uniform commercial policy.
- ⁶⁶ Article 113 (1) reads as follows: “After the expiry of the transitional period, the common commercial policy shall be based on uniform principles, particularly in regard to tariff amendments, the conclusion of tariff or trade agreements, the alignment of measures of liberalisation, export policy and protective commercial measures including measures to be taken in cases of dumping or subsidies.” Paragraphs (2) – (4) provides the procedure to be applied, after the expiry of the transitional period for the putting into effect of this common commercial policy.

⁶⁷ *International Fruit Company*, para. 10 - 15

⁶⁸ Jan Klabbers, *Völkerrechtsfreundlich?* International law and the Union legal order, in: Panos Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar Publishing, 2011) p. 106 - 107

⁶⁹ See for example Case C-379/92 *Peralta* [1994] ECR I-3453, para. 16; and Case C-301/08 *Bogiatzi* [2009] ECR I-10185, para. 25

⁷⁰ C-366/10, para. 69

⁷¹ Case C-308/06 *Intertanko and Others* [2008] ECR I-4057

⁷² 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 2005 L 255, p. 11; corrigenda at OJ 2006 L 33, p. 87, and OJ 2006 L 105, p. 65)

⁷³ The International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978

⁷⁴ *Intertanko*, para. 49 - 50

⁷⁵ Case 22/70 *Commission v. Council (AETR)* [1971] ECR 263.

⁷⁶ *AETR*, para. 22

⁷⁷ Lavranos, p. 275

⁷⁸ The term is used by Nikolaos Lavranos, *Protecting European Law from International Law* (2010) 15 *European Foreign Affairs Review*, Issue 2, pp. 265–282, p. 276 and 277

⁷⁹ For illustration of hypothetical incompatibility, see in particular: Case C-45/07, *Commission v. Greece* [2009] ECR I-00701; and Case C-205/06 *Commission v. Austria* [2009] ECR I-01301, Case C-249/06 *Commission v. Sweden* [2009] ECR I-01335 as far as agreements covered by Article 351 TFEU are concerned. See further, Lavranos, p. 277 - 282

⁸⁰ As examples for cases where the Court decides in competence question in the framework of infringement procedure (Article 258 TFEU), see the *Open Skies* judgments: Case C-466/98 *Commission v. United Kingdom* [2002] ECR I-9427, Case C-467/98 *Commission v. Denmark* [2002] ECR I-9519., Case C-468/98 *Commission v. Sweden* [2002] ECR I-9575., Case C-469/98 *Commission v. Finland* [2002] ECR I-9627., Case C-471/98 *Commission v. Belgium* [2002] ECR I-9681., Case C-472/98 *Commission v. Luxemburg* [2002] ECR I-9741., Case C-475/98 *Commission v. Austria* [2002] ECR I-9797., Case C-476/98 *Commission v. Germany* [2002] ECR I-9855. As regards the opinion on envisaged agreements according to Article 218(11) TFEU, the Court expressly recognized that, in the framework of the procedure “*The compatibility of an agreement with the provisions of the Treaty must be assessed in the light of all the rules of the Treaty, that is to say, both those rules which determine the extent of the powers of the institutions of the Community and the substantive rules.*” [*Opinion 1/75 (OECD Local Cost Standard) Opinion 1/75 (OECD Local Cost Standard)*, emphasis added]. This view has been confirmed later in § 107(2) of the Rules of Procedure of the Court of Justice.

⁸¹ Lavranos, p. 265

⁸² Case T-315/01 *Kadi v. Council and Commission* [2005] ECR II-3649

⁸³ Regulation No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000 (OJ 2001 L 277, p. 25)

⁸⁴ The applicants claimed that the regulation violated their right to respect for their property, their right to be heard and their right to an effective judicial review. In additions, they argued that

⁸⁵ The UN Charter dates back from 1945, all the Member States are parties to it but not the EU.

⁸⁶ Now Article 215 TFEU

⁸⁷ Joined cases C-402/05 P and C-415/05 P. *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Kadi II.)* [2008] I-06351

⁸⁸ *Kadi II.*, para. 282 (my emphasis)

⁸⁹ *Kadi II.*, paras 282, 283, 304

⁹⁰ The concept finds its origin in Opinion 1/91 (*EEA agreement*) [1991] ECR I-6079

⁹¹ C-124/95, *Centro-Com* [1997] ECR I-81., paras 56 - 61

⁹² Lavranos, p. 270 – 271

⁹³ See in particular: *Haegeman*, para 5.; from the recent cases: Case C-162/00 *Land Nordrhein-Westfalen v Beata Pokrzepowicz-Meyer* [2002] ECR I-01049, Case C-23/02 *Office national de l'emploi v Mohamed Alami* [2003] ECR I-01399

⁹⁴ Ilona Cheyne, Haegeman, Demirel and their Progeny in: Dashwood, Alan – Hillion, Christophe (eds.): *The general law of E.C. external relation* (Sweet & Maxwell, London, 2000), p. 23

⁹⁵ *Burgoa*, para 10.

⁹⁶ *Intertanko*, para. 52

⁹⁷ See Case 41/74, *Van Duyn v Home Office* [1974] ECR 1337, para. 22, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *Ahlström v. Commission* [1988] ECR 5193, para. 18.

⁹⁸ Piet Eeckhout, *External Relations of the European Union – Legal and Constitutional Foundations* (Oxford University Press, Oxford, 2004) p. 324

⁹⁹ Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.* [1992] ECR I-6019, para. 9.

¹⁰⁰ Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-3655

¹⁰¹ 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 1991, L 315/1)

¹⁰² *Racke*, paras. 46 and 51 (emphasis added)

¹⁰³ Jan Wouters And Dries van Eeckhoutte, Giving Effect to Customary International law through European Community Law, *Institute for International Law K.U. Leuven, Working Paper* No 25 - June 2002 (pp. 1 – 49), p. 21

¹⁰⁴ Wouters and van Eeckhoutte, p. 21

¹⁰⁵ *Racke*, para. 48: „Racke is invoking *fundamental rules of customary international law* against the disputed regulation, which was taken pursuant to those rules and deprives Racke of the rights to preferential treatment granted to it by the Co-operation Agreement.” (emphasis added)

¹⁰⁶ Wouters and van Eeckhoutte, p. 21

¹⁰⁷ *Racke*, para. 52

¹⁰⁸ The expression of customary international law is used in accordance with the definition of Article 38 (1)(b) of the Statute of the International Court of Justice, which defines “international custom” as “evidence of a general practice accepted as law”. On the basis of it, customary international law is generally defined as “rules that follow from concordant practice by a considerable number or even large majority of States over a certain period of time, practice which is perceived by those States as being required by law (*opinio juris*)”. (See the definition, *inter alia*, in: Jan Vanhamme, Formation and Enforcement of Customary International Law: The European Union’s Contribution, *Netherlands Yearbook of International Law*, (2008) 41, p. 127

¹⁰⁹ However, it is important to note that the rule which served as a ground for invalidity in the action of the claimant (*clausula rebus sic stantibus*) was neither in the case *Racke* the rule of customary law being implemented by the Community act. As the basis for reviewing the legality of it the *pacta sunt servanda* as the general rule has been invoked to which the *rebus sic stantibus* should be regarded as an exception. Thus, the contested EU act in *Racke*, in fact, was not the implementation of the invoked rule itself, but that of an exceptional rule to it. Consequently, with the implementation of the exceptional rule a situation was created, in which the correct interpretation of the invoked principle of customary international law was significant.

¹¹⁰ See para. 107 of the present judgment above.

¹¹¹ The phrase is used by Wouters and van Eeckhoutte, p. 21

¹¹² This reasoning is similar to that which is presented to the concept of „indirect effect”. See further:

¹¹³ Lavranos, fn. above.

¹¹⁴ Wouters and van Eeckhoutte, p. 22

¹¹⁵ Opinion of Kokott in Case C-366/10, see above.

¹¹⁶ T-115/94 *Opel Austria v. Council* [1997] ECR II-39.

¹¹⁷ Council Regulation (EC) No 3697/93 of 20 December 1993 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), *OJL 343, 31.12.1993, p. 1–3*

¹¹⁸ Article 10 of the EEA agreement contained a prohibition on levies equivalent to custom duties.

¹¹⁹ Eeckhout, p. 327

¹²⁰ Wouters and van Eeckhoutte, p. 26

¹²¹ *Opel Austria*, para. 109 (my emphasis)

¹²² *Opel Austria*, para. 94

¹²³ *Opel Austria*, paras 96-99 and 103-122

¹²⁴ Wouters and van Eeckhoutte, p. 28

¹²⁵ Case 29/69 *Stauder* [1969] ECR 419, paragraph 7, and Case 44/79 *Hauer* [1979] ECR 3727, paragraph 14 et seq., for a comprehensive analysis on the position and effect of general principles in the EU legal order, see *inter alia*: Antony Arnull, et al., *Wyatt & Dashwood’s European Union Law*, (5th ed., 2006, London, Sweet & Maxwell) Ch.7, Takis Tridimas, *The General Principles of EC Law* (Oxford University Press, Oxford, 1999), Opinion of Advocate General Trstenjak delivered in Case C-101/08 *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* [2009] ECR I-09823, paras 66 – 73

¹²⁶ paras 76 – 90 of the Advocate General Jacobs. The opinion of the AG were also examined by Eeckhout, p. 329 – 330 and Klabbbers, p. 109

¹²⁷ Wouters and van Eeckhoutte, p. 27 – 28. In accordance with this conception and on the basis of the general definition of customary international law, Vanhamme regards rules enshrined in the human rights clauses of

international agreements concluded by the EU with third parties also as rules belonging to customary international law. See further: Vanhamme, p. 142 - 147

¹²⁸ Wouters and van Eeckhoutte, p. 27

¹²⁹ Case 29/69 *Stauder* [1969] ECR 419, para. 7; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 37; Case C-283/05 *ASML* [2006] ECR I-12041, para. 26, Case C-305/05 *Ordre des barreaux francophones et germanophone and others* [2007] ECR I-5305 para. 29

¹³⁰ Article 6(3) TEU

¹³¹ Article 6(1) TEU

¹³² Klabbers, p. 99

¹³³ van Rossem, p. 185. A second factor of this dualist nature of the EU legal norm is that not the international legal instruments, but only EU acts incorporating them into the EU legal order are able to be reviewed before the EU courts. As the Court clearly established in *Kadi*: „in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.”¹³³ (see further:

¹³⁴ *Intertanko*, para. 51

¹³⁵ Koutrakos, Panos, *EU International Relations Law* (Hart Publishing, Oxford, 2006), p. 248. Wouters and van Eeckhoutte share this view, p. 21

¹³⁶ Racke, para. 47

¹³⁷ Wouters and van Eeckhoutte, p. 21

¹³⁸ i. m. p. 21

¹³⁹ *Haegeman*, paras 4-5; *Kupferberg*, paras 11-14.

¹⁴⁰ Eeckhout p. 332.

¹⁴¹ Holdgaard, p. 244

¹⁴² i. m. p. 245

¹⁴³ van Rossem p. 196, Cheyne p. 40. Wouters and van Eeckhoutte context-based approach is not far away from this view. They argue that the term “invocability”, in comparison with „direct effect” better catches the different manners in which international law can be used by private individuals, in particular the review of the legality of domestic (national or EC) rules and the interpretation of those rules in conformity with international law. In contrast to “invocability” the “direct effect” is typically used in the context of the relationship between rules of Community law and rules of national law. (Wouters and van Eeckhoutte, p. 6)

¹⁴⁴ See, for instance: Jacobs, p. 13 – 33, Cheyne, p. 20 – 41, Bebr, *Agreements concluded by the Community and Their Possible Direct Effect*, *Common Market Law Review* (1983) 20, p. 46

¹⁴⁵ See in particular para. 47 of the judgment, cited above.

¹⁴⁶ van Rossem, p. 40

¹⁴⁷ This analogy was expressly referred by Koutrakos: p. 248

¹⁴⁸ Case C-443/98, *Unilever Italia SpA v Central Food SpA*, ECR [2000] I-07535

¹⁴⁹ C-366/10, para. 104

¹⁵⁰ C-366/10, para. 109. However, in the present case, the Court did not come, in fact, to the conclusion that the principles of customary international law relied upon in the context of the main proceedings conferred rights on individuals.

¹⁵¹ Jan Wouters And Dries van Eeckhoutte, p. 6

¹⁵² i. m. p. 4

¹⁵³ See the *Paulsen* judgment above.