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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS



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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

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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS
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IN THE LIGHT OF *INTERTANKO* AND *KADI*:
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BUT NOT THE COMMUNITY**

JAN WILLEM VAN ROSSEM*

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1 INTRODUCTION

Few areas of European constitutional law are as high-profile and contested today as that of the European Union's (EU) foreign relations.¹ Of interest in particular is the reception and position of external norms within the EU legal order. A question of boundaries, the way in which legal orders respond to norms that originate outside their realm, is always delicate. What makes this issue even more complex in the context of the federally structured European legal order, is the interplay of EU law with Member State law. Unlike in federal states such as the United States and Germany, where, at a decentralized level, states generally lack the power to enter into foreign relations or only dispose of such a power in a constitutionally restricted form,² EU Member States in many instances retain their capacity as autonomous international actors. Where the EC/EU has the competence to conclude treaties, this does not have to be a problem.³ Though by no means without legal difficulties – think of mixed agreements – the case-law of the European Court of Justice (ECJ) provides relatively clear rules how to receive such agreements in the EU legal order and how to deal with incompatibilities that may result from this, when an international agreement is formally binding upon the EU. In some instances, however, the EU is not bound by a treaty or international norm, but nonetheless sees itself confronted with the legal effects thereof within the confines of its legal order. This is the case when one or more Member States have entered into legal obligations on the international plane on a certain subject and the EU regu-

¹ Only look at the abundant academic literature that has come out in recent years. See e.g. Panos Koutrakos, *EU International Relations Law* (Hart, Portland 2006); Rasmussen Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (Wolters Kluwer, Alphen a/d Rijn 2008); Marise Cremona and Bruno de Witte eds., *EU Foreign Relations Law: Constitutional Fundamentals* (Hart, Oxford and Portland 2008); Geert de Baere, *Constitutional Principles of EU External Relations* (OUP, Oxford 2008).

² In the U.S., states, ex article I, sect. 10, cl. 1 Constitution, lack the power to conclude treaties altogether. The German *Grundgesetz* provides in article 32 (3) that where the *Länder* are in possession of this competence, they may only do so with the consent of the federal government. In both cases, however, some nuances seem to be in order to the wide powers of the central authorities in matters of external relations. Thus, in the U.S., states, with the consent of Congress, have the power to enter into agreements or compacts with foreign states (article I, sect. 10, cl. 3). And as regards Germany, it is said that the *Länder* may conclude a valid treaty even without the consent of the federal government and also bear international responsibility in the event of a breach. See J.H.H. Weiler, 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle', in: J.H.H. Weiler, *The Constitution of Europe* (CUP, Cambridge 1999) 130, 144-148; 155-158; 165, fn. 108. *Contra*: Hans D. Jarass and Bodo Pieroth, *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, 7th ed. (Verlag C.H. Beck, München 2004) 700.

³ In view of both the increasing level of coherence between the different pillars and the expected entry into force of the Treaty of Lisbon, this contribution, although technically not always correct, will not critically discern between the terms EU and EC. Even so, unless otherwise provided, this article primarily focuses on the interaction between international and *Community* law, as the latter category, in the context of the EU's external relations law, constitutes the main area of judicial activity.

lates or has already legislated on this issue in the internal Community sphere. Such a conjunction can raise intricate constitutional questions.

This has recently come to the fore in two cases before the ECJ: *Intertanko* and *Kadi and Al Barakaat*.⁴ In both rulings, the Court refused to take the international context of the contested measures into account as a possible ground for review. Considering that these measures were not binding upon the EU and, consequently, did not form part of the Community legal order, it instead opted for reviewing them solely through the prism of EU law. *Kadi* in particular, the more profiled of the two cases, has been thoroughly criticized for the allegedly inward-looking perspective adopted by the ECJ.⁵ However, in light of the Court's habitual insistence on the autonomous nature of the Community legal order, the outcome in both decisions is arguably not that surprising. Amongst others, this entails that the legality of EU measures can only be judged against its own legal framework; that is, against norms that have somehow been incepted in the corpus of EU law. Lacking this quality, the international agreements that were in play in *Intertanko* and *Kadi* could not influence the (in)validity of the Community measures that were in dispute. Convincing though this may be from the point of view of EU law, there are several aspects to this approach that are open to questioning. First of all, there is the question of how such a posture affects the Member States on the international plane. Secondly, one could wonder how the attitude of the ECJ in these cases relates to past judicial examples, notably in the context of the European Convention of Human Rights (ECHR), in which the non-binding nature of international norms did not appear to constitute an impediment for reaching out to the normative appeal of foreign standards. Thirdly, and related to this, there is the issue of how the Court's analysis conforms to an ever more pluralist world view.

Seizing upon the examples of *Intertanko* and *Kadi* to ponder over these questions, this contribution will argue that if the concept of autonomy of EU law is taken seriously, the choices the ECJ made as regards the relationship between the EU and the international legal order were legitimate. However, it submits that on another level these choices lay bare that the Court's autonomy conception sits uncomfortably within the broader international legal configuration. In some respects resembling the traditional notion of sovereignty, there seem to be two sides to the coin of EU autonomy. On the one hand this implies that the EU can better be regarded as a federal polity than a classical international organization; on the other hand it requires playing by the basic rules of the international legal order of which non-derivative autonomy is a corollary. Nonetheless, the reasoning of the ECJ

⁴ Case C-308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-4057; Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] nyr.

⁵ See, e.g., Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*', Jean Monnet Working Paper No. 1/09. Available at <http://www.jeanmonnetprogram.org/papers/09/090101.html>; 'Editorial' (2009) 19 *European Journal of International Law* 895; Andrea Gattini, 'Case Law', (2009) 46 *Common Market Law Review* 213.

appears not to conform to this second dimension. To assess whether this line of argument can hold, this working paper starts by giving an overview of the two highlighted judgments (section 2). Next, it will evaluate how these cases fit into the ECJ's broader case-law on the reception of international law into the EU legal order (section 3). After reflecting upon possible tensions that result from a conjunction of European law and international norms binding the Member States but not the EU (section 4), the paper continues by analyzing how the Court's posture relates to the EU's entanglement with other legal orders (section 5). It concludes by trying to find a rationale, which can reconcile European and international law in cases like *Intertanko* and *Kadi* (section 6).

2 THE CASES

2.1 *Intertanko*

The *Intertanko*-case concerned a request from the administrative division of the High Court of England and Wales for a preliminary ruling on the compatibility of Directive 2005/35/EC, laying down rules and introducing penalties on ship-source pollution,⁶ with certain provisions of two maritime international agreements, the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) and, in a more indirect way, the United Nations Convention on the Law of the Seas (UNCLOS).⁷ The Directive on measures relating to maritime transport, adopted under article 80 (2) EC in the aftermath of a pollution disaster off the coasts of Spain, Portugal and France in 2002 with the tanker *Prestige*,⁸ introduced a liability regime that was stricter than provided by the respective treaties. In its recitals, the EC legislator expressly referred to MARPOL and made clear that the rules which the legislative piece embodied purported to harmonise the agreement at the Community level.⁹ Before the national court, the applicants, major organisations within the international maritime transport industry, claimed that this extension of the liability regime was unlawful and that the Community measure should be invalidated on account of breaching higher rules of international law. The ECJ, convening in the formation of Grand Chamber, did not agree. It found that both MARPOL and UNCLOS could not affect the validity of the contested directive. Yet the grounds upon which the Court reached its conclusions differed from the two international treaty regimes at hand.

In establishing whether or not to uphold the directive, the ECJ started by declaring that agreements concluded by the Community were binding upon all its institutions and that, accordingly, such agreements are higher in rank than second-

⁶ OJ 2005, L 255/11.

⁷ See resp. UN Treaty Series, vol. 1341, no. 22484; Third United Nations Conference on the Law of the Sea, Official Documents, vol. XVII, 1984, Doc. A/Conf.62/122, at 157-231.

⁸ See Eileen Denza, 'Case Comment: A Note on *Intertanko*', (2008) 33 *European Law Review* 870.

⁹ See the recitals 2, 3, 15 and article 1 (1) of Directive 2005/35/EC.

ary Community measures.¹⁰ Acknowledging that this means that directives are in principle susceptible of judicial review, it went on, however, to subject such a test to two conditions. First, the Court recalled that in order for a review to be carried out, the Community has to be bound by an international agreement.¹¹ Secondly, it bore in mind that the validity of a Community measure can only be judged upon if ‘the nature and the broad logic of’ the international instrument purported to be a standard of legality does ‘not preclude this and, in addition, the treaty’s provisions appear, as regards their content, to be unconditional and sufficiently precise’.¹² With regard to MARPOL, the first prong of this test sufficed for the ECJ to assess that the applicants’ claim could not pass muster. MARPOL, negotiated within the International Maritime Organization (IMO), forms a treaty to which all EU Member States are parties, but the EC is not. The Court was not persuaded by the argument that the Community had succeeded the Member States in exercising powers in the field to which the agreement applied and that, for that reason, the latter’s provisions had become binding upon the EC.¹³ According to the ECJ, this rationale, in the past famously applied to GATT in the *International Fruit*-cases,¹⁴ failed because the Community could not be said to have substituted the Member States in an exclusive way. Also rejected was the plea that the binding nature of MARPOL indirectly followed from the fact that the disputed directive sought to incorporate the agreement in Community law.¹⁵ While stressing that the EC has to exercise its powers in conformity to international law, this, in the opinion of the Court, would only be true if the relevant provisions from MARPOL could be regarded as codifying customary law. This, however, was not the case.

In contrast to MARPOL, the EC is a signatory party to UNCLOS. Consequently, the Court in *Intertanko* recognized that the provisions of this second treaty were binding upon the Community and formed an integral part of the EC legal order.¹⁶ It nonetheless discarded the claim that UNCLOS constitutes an agreement that confers rights on individuals that can be relied upon before a European court.¹⁷ Therefore, this route was also cut off for the applicants. As regards this part of its decision, the ECJ adopted a different point of view than Advocate-General Kokott in her Opinion to the case. Whereas the Court judged that the nature of UNCLOS prevented it from assessing the validity of the contested directive, the A-G, taking the opposite view, argued that the extent to which individuals could rely on the treaty depended on the content of each separate provision.¹⁸ In turn, this interpretation enabled Kokott to let MARPOL in through the backdoor. Allegedly,

¹⁰ *Intertanko*, para. 42.

¹¹ *Ibid.*, para. 44.

¹² *Ibid.*, para. 45.

¹³ *Ibid.*, paras 48-49.

¹⁴ Joined Cases 21-24/72, *International Fruit Company v Produktschap voor Groenten en Fruit* [1972] ECR 1219.

¹⁵ *Intertanko*, paras 50-52.

¹⁶ *Ibid.*, para. 53.

¹⁷ *Ibid.*, paras 54-65.

¹⁸ *Ibid.*, paras 48-59 of the Opinion of A-G Kokott.

UNCLOS, itself a framework treaty generally not sufficiently unconditional and precise, required ‘the adoption of corresponding international standards’. According to the A-G, MARPOL could be regarded as constituting such standards and, thus, though not binding upon the Community of itself, was incorporated as a standard of review by UNCLOS.¹⁹ However, to Kokott, this finding did not affect the validity of the directive. By way of a conform interpretation, the A-G argued that it was possible to reconcile the directive with the relevant provisions in MARPOL, so that, in the end, she reached the same substantive result as the ECJ subsequently did.²⁰

2.2 Kadi

Destined to become an instant classic of European constitutional law even before it was handed down by the ECJ, the *Kadi*-case hardly needs an introduction. In *Kadi*, the Court partially annulled a Community sanction regulation, enacted under articles 60, 301 and 308 EC in reference to a common position under the Common Foreign and Security Policy (CFSP) of the EU, which implemented a United Nations Security Council (UNSC) resolution designed to freeze funds of individuals and organizations associated with terrorist networks.²¹ The ruling, which was issued in September 2008, three months after *Intertanko*, was delivered against the background of the global war on terror and has stirred the legal community.²² The applicants in *Kadi*, a Saudi Arabian and a Swedish national, started proceedings under article 230 EC arguing, *inter alia*, that the regulation under which they were listed as suspected terrorists had been adopted in breach of certain fundamental rights guaranteed under EU law.²³ Initially, the Court of First Instance (CFI) had rejected this claim.²⁴ Apart from a somewhat surprising review in light of *ius cogens*, which did not produce any concrete results,²⁵ the CFI essentially decided that the applicants’ request fell outside the scope of judicial review that it

¹⁹ *Ibid.*, paras 65-66 of the Opinion of A-G Kokott.

²⁰ *Ibid.*, paras 80-112 of the Opinion of A-G Kokott.

²¹ See especially Council Regulation (EC) no. 881/2002, *OJ* 2002, L 139/9; Common Position 2002/402/CFSP, *OJ* 2002, L 139/4; S/RES/1267 (1999) of 15 October 1999.

²² See, besides the literature mentioned *supra*, at note 5, e.g. Stefan Griller, ‘International Law, Human Rights and the European Community’s Autonomous Legal Order: Notes on the European Court of Justice Decision in *Kadi*’, (2008) 4 *European Constitutional Law Review* 528; Bjørn Kunoy and Anthony Dawes, ‘Plate Tectonics in Luxembourg: The *Ménage à Trois* Between EC Law, International Law and the European Convention on Human Rights Following the UN Sanctions cases’, (2009) 46 *Common Market Law Review* 73; Samantha Besson, ‘European Legal Pluralism after *Kadi*’, (2009) 5 *European Constitutional Law Review* 237.

²³ More specifically, the applicants argued that the regulation violated their right to respect for property, their right to be heard and their right to effective judicial review.

²⁴ Case T-315/01, *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649; Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533.

²⁵ *Kadi* (CFI), paras 226-292. Critical: Christina Eckes, ‘Judicial Review of European Anti-Terrorism Measures: The *Yusuf* and *Kadi* Judgments of the Court of First Instance’, (2008) 14 *European Law Journal* 74, 87-90.

was capable to perform. It came to this conclusion after conducting a two-pronged assessment of the special nature of the category of law that lay at the basis of the contested regulation: UN law. First, the CFI established that, as a matter of international law, the Member States were bound to respect the relevant UNSC resolution.²⁶ In particular, this followed from article 103 UN Charter, which enshrines the primacy of UN obligations over other international agreements. Additionally, the CFI noted that article 307 EC, which deals with Member State obligations entered into before the entry into force of the Treaty of Rome in 1958, makes that the EC Treaty does not affect the obligations of the Member States under the Charter. Secondly, the CFI also asserted that the resolution was binding as a matter of European law.²⁷ Since the Community is not a member of the UN, this required a more innovative reading. Amongst others, the CFI based its understanding on an analogy with the ECJ's ruling in the *International Fruit* cases. In this judgment, which, as mentioned, was also invoked in *Intertanko*, the ECJ developed the idea that, in so far as the EC has assumed powers previously exercised by the Member States, the provisions of the agreement corresponding to those powers can, by way of substitution, be considered as having the effect of binding the Community.²⁸ According to the CFI, in that context also referring to a commitment inherent in the Treaties not to impede the operation of the Charter,²⁹ this rationale could be applied to economic sanctions.

Putting these two findings on the binding character of UN law together, the Court concluded that it did not have the jurisdiction to review the lawfulness of the disputed measure.³⁰ Thus, in the end, although the CFI initially departs from the understanding that the binding nature of the Charter can be explained by way of Community law, it seems to envisage an international legal order in which UN law is hierarchically superior to the EU law.

The ECJ chose an entirely different path than the CFI. Whereas the CFI had attached considerable weight to the international context of the *Kadi*-case, the ECJ chiefly focused on the importance of the EU's primary law, which includes the protection of fundamental rights. Recalling the constitutional nature of primary law, the Court declared that 'an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system'.³¹ In the opinion of the ECJ, from this consideration followed 'that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty'.³² To the Court's mind, this understanding did not amount to any disrespect for the international legal order. Strictly distinguishing between the regulation it saw itself con-

²⁶ *Ibid.*, paras 181-191.

²⁷ *Ibid.*, paras 192-207.

²⁸ *International Fruit*, paras 15-18.

²⁹ *Kadi* (CFI), paras 193-197.

³⁰ *Ibid.*, paras 221-225.

³¹ *Kadi*, para. 282.

³² *Ibid.*, para. 285.

fronted with and the resolution which was at the origin of this Community act, it reasoned that a possible annulment of the regulation would not dispute the primacy of the resolution as a matter of international law.³³

In this vein, the ECJ further observed that UN law does not prescribe how its norms should be transposed in the domestic legal orders of its members.³⁴ Therefore, although the EU is generally committed to respecting the special importance of the UN within the international configuration in the exercise of its powers,³⁵ it could not be said that international law bars the ECJ from judging upon the legality of a measure giving effect to it. Moreover, the Court argued, a basis for such immunity of jurisdiction could also not be found in the Treaties itself.³⁶ In contrast to the CFI, which had pointed to the significance of articles 297 and 307 EC, the ECJ emphasized that these provisions cannot ‘be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.’³⁷ Finally, in a disguised manner, the Court also rebuked the CFI for its refuge to the analogy of *International Fruit*, specifically as regards the consequences the latter had drawn from this. Referring to *Intertanko*, it indicated that even if UN norms were binding upon the EC and to be accorded a place within the Community legal order, this would not mean that they could not be reviewed as to its compatibility with fundamental rights.³⁸ Once an integral part of the EC legal order, UN law, though prevailing over secondary Community rules, would rank below primary law.

2.3 A brief evaluation

There are substantial differences between the judgments of the ECJ in *Intertanko* and *Kadi*. For one thing, in *Kadi*, because of the involvement of fundamental rights, constitutional rhetoric featured prominently, while in *Intertanko* this element was largely absent. Also absent in *Intertanko*, at least with respect to the way international norms were incorporated in the EC legal order, was the cross-pillar dimension that characterized *Kadi*. More fundamentally, whereas in *Intertanko* the Court’s refusal to accord a binding status to the international provisions at play served to uphold the legality of the contested Community rule, in *Kadi* this rejection paved the way towards striking down the disputed internal measure. Indeed, in *Intertanko* international law was meant to serve as a ground for review, while the external measure in *Kadi* formed part of the problem. Finally, *Kadi* involved UN law, a category of law to which almost all Member States committed them-

³³ *Ibid.*, paras 286-288.

³⁴ *Ibid.*, paras 298-299.

³⁵ *Ibid.*, paras 291-297.

³⁶ *Ibid.*, paras 300-

³⁷ *Ibid.*, para. 303.

³⁸ *Ibid.*, paras 305-308.

selves before becoming a member of the EU,³⁹ thereby bringing the question of immunity under article 307 EC into the equation.⁴⁰ In contrast, the treaties that figured in *Intertanko* were concluded later in time and could not claim this protection.

Despite these differences, the reasoning of the Court in both cases nevertheless shows clear similarities and, as such, provides an interesting insight into the interaction between EU law and international law. To begin with, the judgments demonstrate that there are limits to the extent that the EU legal order can absorb norms that are not formally binding upon the Community. In line with this observation, it could additionally be argued that *Intertanko* and *Kadi* are indicative of the subordinate place reserved for international law within the bounds of the Community in general. An important question is to what degree this picture conforms to earlier pronouncements of the Court on the position of international law. It has been argued that the judgments mark a clear break with the past. As one commentator put it, the cases are ‘the latest in a series, in which the ECJ, instead of making rational use of arguments of international law, opening itself up to a dialogue with other international bodies and tribunals, promoting a model of international “open network structures”, has increasingly displayed its determination to reduce the residual role of international law as much as possible, and consequently the margin of manoeuvre of Member States, in the realm of Community law.’⁴¹

3 RECEPTION OF INTERNATIONAL LAW INTO THE EU LEGAL ORDER

3.1 Expansion and openness

To get an idea how *Intertanko* and *Kadi* fit into the Court’s broader doctrine on the relationship between EU law and international law, it is instructive to take a step back and study the initial phase of the process of European integration. Whereas

³⁹ Germany is the only Member State that acceded to the UN after having become a member of the EC. This could explain why, instead of article 307 EC, article 297 EC – a ‘fall-back’ rule in the case of domestic or international emergencies – was used by the Member States to justify the implementation of UN sanctions at the time that the Treaty did not yet provide for this. See Jan Klabbers, *Treaty Conflict and the European Union* (CUP, Cambridge 2009) 151-153.

⁴⁰ The fact that UNSC resolutions are decisions of an UN body and can, as such, not exactly be equated with the Charter does not seem relevant for the applicability of article 307 EC. Decisions stemming from international organizations are usually treated the same way as treaties by the ECJ. See e.g. Nikolaos Lavranos, *Legal Interaction between Decisions of International Organizations and European Law* (Europa Law Publishing, Groningen 2004) 53. Moreover, article 307 EC speaks of ‘rights and obligations arising from agreements concluded before 1 January 1958’.

⁴¹ See Gattini, *op. cit.* note 5 *supra*, at 226-227 who in addition warns that “‘(s)elf-contained” judgments such as *Kadi*, and with the due distinctions the recent preliminary ruling in *Intertanko*, do not bode well for the future of customary international law either, which up until now seems to have escaped the ECJ’s wrath.”

the original EEC, under the Treaty of Rome, had been endowed by a, for that time, impressive machinery of competences to rule on internal Community matters, its powers to act at the international plane looked rather bleak.⁴² The Community only possessed express powers to enter into foreign relations in the context of the Common Commercial Policy (CCP) and with regard to association agreements, currently situated under articles 133 and 310 EC, resp.⁴³ In addition, the Treaty provision establishing its legal personality probably only referred to the EC's position in the Member States.⁴⁴ As the latter remained to a large extent in charge of the external dimension of issues over which they had lost control internally, there was an inherent tension between Community law and international law right from the outset. This deepened, when the Court, in the early 1960s, gave judgment in the ground-breaking *Van Gend & Loos* and *Costa/ENEL* cases.⁴⁵ Now allegedly no longer belonging to the body of public international law, but an autonomous legal order instead, it got even harder to explain how the Community could stay dependent on the same Member States over which, within the scope of its own legal order, its law had gained unconditional precedence.⁴⁶ This all changed after the ECJ's landmark *AETR*-ruling.⁴⁷ In this decision, the Court established that an express attribution of powers was not required for the EC to act on the international plane. Invoking the doctrine of implied powers, it judged that the conferral of an internal competence could be sufficient in this respect.⁴⁸ Consequently, the Community was enabled to tap into a whole new reservoir of external powers;

⁴² See Robert Schütze, 'EC Law and International Agreements of the Member States – An Ambivalent Relationship?', (2006-7) 9 *Cambridge Yearbook of Legal Studies* 387, 387-389; Koutrakos, *op. cit.* note 1 *supra*, at 7-11.

⁴³ The Community was also empowered to maintain relations with other international organizations.

⁴⁴ Cf. article 281 and 282 EC. See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials*, 4th ed. (OUP, Oxford 2008) 169-171, who contrast this to both the ECSC and Euratom, in which international legal personality was expressly provided. However, one can question to what extent this distinction is really relevant, since the ICJ had already established in 1949 that the UN could be considered an international legal person. See *Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep. 174, 179-180.

⁴⁵ Resp. Case 26/62, *Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR I; Case 6/64, *Costa v ENEL* [1964] ECR 585.

⁴⁶ Ironically, an important argument in making a case for the supremacy of EC law in *Costa/ENEL* was that the EC enjoyed legal personality at the international plane.

⁴⁷ Case 22/70, *Commission v Council* [1971] ECR 263 (*AETR/ERTA*).

⁴⁸ Specifically, the ECJ in *AETR* ruled that it was possible to imply external powers on the part of the EC because it had already adopted measures on the relevant subject internally. Moreover, these powers were deemed to be exclusive. This reasoning was later expanded in Opinion 1/76 (*European Laying-up Fund for Inland Waterway Vessels*) [1977] ECR 741, in which the Court dropped the demand of the actual adoption of internal rules when establishing an exclusive external competence, although within very narrow confines. From the beginning of the 1990s onwards, the Court has moved away from its *AETR*-tendency to frame external competence issues mainly in terms of exclusivity towards a policy of formulating 'mixity-principles'. See in particular Opinion 1/94 (*WTO Agreements*) [1994] ECR I-5267. See also Craig and de Búrca, *op. cit.* note 44 *supra*, at 173-182; Koutrakos, *op. cit.* note 1 *supra*, at 77-134.

something that was made explicit and reinforced by the inference of express competences during Treaty revisions from the mid 1980s onwards.⁴⁹

Having attained a certain balance between the division of internal and external powers, the ECJ soon faced new challenges, for the substantial broadening of the presence of the EC at the international level had considerable consequences for the effects of its actions within the EC legal order and the internal allocation of powers between the Community and the Member States. The Treaty of Rome, in what is now article 300 (7) EC, provided that agreements concluded by the Community are binding upon its institutions and the Member States. Otherwise, however, it remained silent on the issue of what effects should be given to international norms within the EC legal order. The first time the ECJ extensively addressed this question was in *International Fruit*, ironically a case which concerned a treaty to which the Community was not a party, the GATT. In this decision, the Court declared that, provided the Community was bound by this, the grounds on which the validity of secondary EC law could be tested under the preliminary reference procedure included international law.⁵⁰ A year later, in *Haegeman*, it got another chance to expound on the subject. Confronted with the question if an agreement concluded by the EC was to be regarded as an act of an institution reviewable under article 234 EC, the ECJ confirmed, answering that provisions of such treaties ‘from the coming into force thereof, form an integral part of Community law’.⁵¹ In yet another case, *Kupferberg*, the Court explained that this had to do with the fact that the Community can be held responsible for the performance of the in-

⁴⁹ As mentioned earlier, *supra*, note 3, the expansion of the EU’s external relations law described here mainly concerns developments within the Community pillar. As such, this paper does not take into account the gradual coming into being of the separate Common Foreign and Security Policy, which, put simply, covers those matters that are not covered by the EC Treaty. As is well known, this policy, which developed out of the looser European Political Cooperation (EPC) and was created by the Treaty of Maastricht, is largely intergovernmental in nature. Also, the ECJ generally lacks jurisdiction over CFSP matters. For these reasons, the CFSP, on its face, appears to carry less promise as an object for the study of the interrelationship between EU and international law than the Community. Things may be changing, however. First, the academic literature shows a growing interest in the requirement of coherence between the first and second pillar, as laid down, amongst others, in articles 3 and 13 EU. See e.g. Ramses A. Wessel, ‘The Multilevel Constitution of European Foreign Relations’, in: Nicholas Tsagourias ed., *Transnational Constitutionalism: International and European Models* (CUP, Cambridge 2007) 160; Christophe Hillion, ‘*Tous pour un, un pour tous!* Coherence in the External Relations of the European Union’, in: Marise Cremona ed., *Developments in EU External Relations Law* (OUP, Oxford 2008) 10. Secondly, the ECJ, using the hinge of article 47 EU, has over the years introduced a couple of important benchmarks with regard to the interrelationship between the pillars; most recently in C-91/05, *Commission v Council* [2008] ECR I-3651 (*ECOWAS*). Finally, it will be interesting to see how the relationship between CFSP and ‘Community’ law evolves in the new Lisbon Treaty, which, although it continues to set the CFSP apart from the core of Union law, also introduces some important changes, such as a single legal personality for the EU (article 7 EU (new)), and refers to the external policy of the EU in a singular way (articles 3 (5) and 21 EU (new)).

⁵⁰ *International Fruit*, paras 4-6.

⁵¹ Case 181/73, *R. & V Haegeman v Belgian State* [1974] ECR 449, para. 5.

international obligations it has assumed *vis-à-vis* third parties;⁵² a reasoning it has extended to customary international law.⁵³ Besides its relevance for EC institutions, this logic also has important consequences for the Member States. Agreements entered into by the Community bind the latter by virtue of their duties under EC law and not international law.⁵⁴

3.2 Limits to the effects of international law in the Community legal order

The fairly open attitude developed by the ECJ towards international law is usually described as monistic.⁵⁵ Just as its counterpart dualism, monism is a notoriously ambiguous term. Even so, it seems safe to assume that this label, at the very least, points to the fact that the EU legal order receives international law *as* international law; i.e. that no separate act of transposition is needed in order for an international norm to become effective within the Community.⁵⁶ In light of the EU's public

⁵² Case 104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG* [1982] ECR 3641, paras 11-13. See also Holdgaard, *op. cit.* note 1 *supra*, at 178-181.

⁵³ Case C-162/96, *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655.

⁵⁴ According to the ECJ, article 300 (7) EC also applies to mixed agreements, i.e. international agreements concluded jointly by the Community and the Member States. To the Court's opinion, for that reason, such agreements, upon their entry into force, form an integral part of Community law too. However, contrary to 'purely' Community agreements, mixed agreements will not always have the same 'status' as the former category in the Community legal order. This depends on the question whether a particular provision of a mixed agreement comes within the scope of Community competence. As the ECJ construes its jurisdiction to interpret provisions of mixed agreements very broadly, the instances in which such provisions remain outside the Court's reach appear to be rather limited. See Case C-459/03, *Commission v Ireland* [2006] ECR I-4635 (*Mox-plant*), paras 80-85; Case C-431/05, *Merck Genéricos – Produtos Farmacêuticos Lda v Merck & Co. Inc. and Merck Sharp & Dohme Lda* [2007] ECR I-7001, paras 30-33.

⁵⁵ See e.g. Robert Schütze, 'On 'Middle Ground'. The European Community and Public International Law', EUI Working Paper Law No. 2007/13, at 4. Available at <http://cadmus.eui.eu/dspace/handle/1814/6817>.

⁵⁶ Arguably, the issue whether an international norm needs a separate act of transposition to become effective within a domestic legal order is not a question of monism or dualism, but concerns the question whether a domestic legal order uses an incorporation technique or a transformation technique with regard to the reception of international norms. The concepts monism and dualism, in contrast, according to this line of thought concern the more theoretical issue how international law and domestic (national) law relate to each other; that is, whether the validity of an international norm, ultimately, can be traced back to a national norm or *vice versa*. These questions, however, are often confounded. On top of that, the issue of direct effect – which, as will be elaborated upon below, does not relate to the reception, but to the justiciability of a norm – is frequently brought into the equation. Because of this confusion, it is sometimes maintained that it would be better to get rid of the notions monism and dualism altogether. An additional argument in this regard is that the concepts would no longer connect to the present-day reality of globalization and legal fragmentation. See e.g. Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Law', (2008) 6 *International Constitutional Law Review* 397. For the purposes of this article, however, it is submitted that both notions, even if one should be careful what to infer from them, serve as useful denominators to describe the attitude of the Community legal order towards international law.

international law roots and the way the ECJ approaches the comparable issue of penetration of Community law within the legal orders of the Member States, this ‘international law friendly posture’ does not seem very surprising. However, there are two important nuances to this image. First, as came to the fore in *Intertanko*, being an integral part of Community law does not automatically mean that an external norm can also be relied on by EU subjects – Member States and private litigants – before a European court. This issue is regulated through the doctrine of direct effect.⁵⁷ Sometimes called a political question doctrine, the problem of direct effect concerns the justiciability of an international norm, whereas the concept of reception relates to the source of such a measure and to the jurisdiction of the ECJ to rule thereupon.⁵⁸ Most notably negated in the case of WTO-law,⁵⁹ the doctrine of direct effect enables the Court to limit the effects of a binding norm of international law within the EU legal order.⁶⁰ At the same time, a lack of direct effect in a particular instance does not relieve European courts of the obligation of taking into account the external rule that is being invoked. For one thing, the ECJ has formulated a duty of consistent interpretation of Community measures in the face of non-directly effective international law.⁶¹ Furthermore, in the *Fediol/Nakajima*-cases the Court has shown itself prepared to unlock its doctrine for the purpose of a legality review when a Community measure that is being contested intends to incorporate a non-directly effective international rule.⁶²

A second factor that accentuates the openness of the Community legal order towards international law is the fact that, once an integral part of this order, an international rule is absorbed in a hierarchy of norms in which it ranks below the EU’s constitutional law. As was mentioned when discussing *Kadi*, within the EU legal order an external norm is positioned between secondary and primary EU law.⁶³ In a sense, then, an international measure, although being received as international law, gets ‘communitarized’ upon its inception and subdued to internal structuring rules.⁶⁴ An important consequence of this communitarization is that

⁵⁷ See generally Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford, OUP 2004) Chapter 9.

⁵⁸ See Ilona Cheyne, ‘International Instruments as a Source of Community Law’, in: Allan Dashwood and Christophe Hillion eds., *General Law of EC External Relations* (Sweet&Maxwell, London 2000) 256-258.

⁵⁹ See Case C-149/96, *Portugal v Council* [1999] ECR I-8395.

⁶⁰ In its extensive case-law on this topic, the ECJ over the years has come up with various factors that influence the direct effect of international law. As has been pointed out earlier on in this contribution, the two general criteria in this respect are that the overall nature of the treaty must allow this and, additionally, that the treaty’s provisions are sufficiently precise and unconditional. See *supra*, text at note 12.

⁶¹ See Case C-344/04, *IATA and ELFAA* [2006] ECR I-403.

⁶² See Case 70/87, *Fediol v Commission* [1989] ECR 1781; Case 69/89, *Nakajima v Council* [1991] ECR I-2069.

⁶³ Case C-61/94, *Commission v Germany* [1996] ECR I-3938, para. 52.

⁶⁴ See Anne Peters, ‘The Position of International Law Within the European Community Legal Order’, 40 *German Yearbook of International Law* (1997) 9, 34-35, who stresses, at 76, that the invalidation by the ECJ of a decision by which an international agreement is concluded, in

binding international law not only serves as a ground upon which the legality of EC legislation is tested, but, through the decision by which an agreement is concluded on behalf of the Community,⁶⁵ can also be tested upon its own validity.⁶⁶ The Community, the ECJ has reiterated over and over again, constitutes an autonomous legal system. For that reason, its own foundational rules are necessarily at the apex of the legal framework to which the Court looks when confronting validity issues. This self-referential feature of EU law was shaped during the first decennia of European integration. When the ECJ in *Costa/ENEL* expressly contrasted the Treaty of Rome to ‘ordinary international treaties’,⁶⁷ it did not only cut the EC’s umbilical cord with the constitutional law of the member states, but also untied the Community ‘from the existing legal order of public international law’.⁶⁸ That means that, in principle, the Community, at least as regards its own Treaty norms, does not rely on general rules and principles of international law, such as those codified in the Vienna Convention on the Law of Treaties (VCLT).⁶⁹

Indeed, if the Community wants to preserve its autonomous status *vis-à-vis* the Member States, such a separation also seems essential. Would the EU be perceived as a mere ‘vessel for international governance writ large’, this could bring about the risk of defiance of Community law by Member State (judicial) organs.⁷⁰ The supremacy of EC law – and by implication also its autonomy – is generally understood to be guaranteed through the observance on the part of EC institutions, most notably the ECJ, of constitutional values and principles comparable with those found in the Member States. If this *Solange*-response would be sacrificed for the benefit of international law, Member States could be tempted to take matters into their own hands.⁷¹ Arguably, this danger was inherent in the approach of the CFI in *Kadi*. ‘The external and internal dimensions of European constitutionalism’, as Halberstam and Stein phrase it, ‘thus go hand in hand.’⁷² This applies even in a converse way, for the uniformity of Community law could also be threat-

principle stemming from the Council, does not affect the validity of the agreement itself as a matter of international law. It therefore only impinges on the internal effects of the agreement.

⁶⁵ Article 300 EC.

⁶⁶ See Case C-327/91, *France v Commission* [1994] ECR I-3641; Case C-122/95, *Germany v Council* [1998] ECR I-973; Joined Cases C-317/04 and C-318/04, *Parliament v Council and Commission* [2006] ECR I-4721.

⁶⁷ *Costa/ENEL*, at 601.

⁶⁸ Cf. *Kadi*, para. 21 of the Opinion of A-G Maduro.

⁶⁹ This may be different when the ECJ is asked to rule on international agreements that come within the orbit of Community law. See e.g. Opinion 2/00 (*Cartagena Protocol*) [2001] ECR I-9713, para. 24.

⁷⁰ See Daniel Halberstam and Eric Stein, ‘The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order’, 46 *Common Market Law Review* (2009) 13, 62-63.

⁷¹ *Solange* refers to the two famous judgments of the German Constitutional Court in which it declared to trust the ECJ in protecting fundamental rights at the level of the Community law, while at the same time retaining the ultimate competence to speak out on the validity of this law on German soil in case of a breach of fundamental norms of German constitutional law. See BVerfGE 37, 271 [1974] (*Solange I*); BVerfGE 73, 339 [1986] (*Solange II*).

⁷² Halberstam and Stein, *op. cit.* note 68 *supra*, at 63.

ened if Member States were to be allowed to use the EU as a vehicle to enter into international obligations that, within the confines of its legal order, could upset the internal allocation of powers. As the Court made clear in Opinion 1/91, the autonomous nature of EC law therefore places limits on the way the EU can handle its foreign relations and set up treaties.⁷³

4 MEMBER STATE COMMITMENTS NOT BINDING THE COMMUNITY

4.1 Prior and subsequent commitments

When turning to international obligations not undertaken by the Community, but which it sees itself nonetheless confronted with as a result of commitments of its Member States, it is necessary, beforehand, to make a distinction between obligations entered into before and after 1958. At the time the Treaty of Rome was drafted, the original six Member States took due notice of the fact that the extensive commitment they were about to enter into could conflict with existing obligations under international law. To that end, they inserted what is now article 307 EC into the Treaty. Article 307 EC states, in its first sentence, that prior contractual rights and obligations ‘shall not be affected by the provisions of this Treaty’ and, thus, permits the supremacy of Community law to become suspended. The clause reflects the international law principle of *res inter alios acta*, meaning that a treaty cannot adversely affect the rights of one that is not a party.⁷⁴ Accordingly, the main goal of article 307 EC is to allow the Member States to honour their obligations towards third parties, not to enforce these or rely upon the provision against other Member States.⁷⁵ In addition, the Court has made clear that the ‘duty on the part of the institutions of the Community not to impede the performance’ of these obligations ‘does not bind the Community as regards’ third parties concerned.⁷⁶

Another limitation of article 307 EC is its temporal nature. The first prong of the clause aims to protect the Member States from treaty conflicts, not to guarantee the continued existence of prior contractual obligations.⁷⁷ This becomes clear when taking the second part of article 307 EC into consideration. Here the Treaty declares that to the extent that prior obligations ‘are not compatible with this Treaty, the Member States or States concerned shall take all appropriate steps to eliminate the incompatibilities established’. According to the ECJ, such steps could even include the duty to denounce the prior agreement.⁷⁸ Thus, what the Treaty, on the

⁷³ Opinion 1/91 (*EEA Agreement*) [1991] ECR 6079. See also *Kadi*, para. 31 of the Opinion of A-G Maduro.

⁷⁴ See Schütze, *op. cit.* note 42 *supra*, at 391-392.

⁷⁵ Case 10/61, *Commission v Italy* [1962] ECR 1.

⁷⁶ Case 812/79, *Attorney General v Burgoa* [1980] ECR 2997, para. 9.

⁷⁷ See Eckhard Pache and Joachim Bielitz, ‘Das Verhältnis der EG zu den völkerrechtlichen Verträgen ihrer Mitgliedstaaten’, (2006) 41 *Europarecht* 316, 330.

⁷⁸ Case C-84/98, *Commission v Portugal* [2000] ECR I-5215, paras 58-59.

basis of this interpretation, gives with one hand, it takes away with the other. In a sense, then, the second section of article 307 EC is reminiscent of the constitutional principle of Community loyalty of article 10 EC; even to the extent that it may be said to limit the application of the first section.⁷⁹

With respect to commitments of the Member States entered into after the coming into force of the Treaty of Rome, the Treaties do not offer any guidance or exceptions. From the case-law of the ECJ it can be inferred that the Member States, acting individually or jointly, are generally free to conclude treaties outside the Community, provided that a policy area is not pre-empted by EC law and such treaties do not affect or alter the scope of rules in a field which has already been regulated in a substantial way by the EC.⁸⁰ As the *Open Skies* cases amply demonstrated, this is not always easy to establish.⁸¹ What is clear, in contrast, is that post-1958 Member State obligations on the international plane cannot affect or suspend the validity of EU legislation.⁸² When an international treaty, entered into by one or more Member States after 1958, collides with a Community measure, that agreement is essentially treated just as internal national law and, as a result of the supremacy rule, has to make way.⁸³ Though this has been suggested in the case of agreements concluded by Member States under a shared competence on a subject not yet covered by EC legislation, an analogous application of article 307 EC is generally rejected.⁸⁴ More in general, this is also true as regards conventional rules on treaty conflict, such as *lex posterior* or *lex specialis*.

Even if an agreement involves all Member States and is being implemented in EC law, as was the case in *Intertanko*, Community doctrine does not budge. The ECJ thinks avoiding conflict is largely the responsibility of the Member States, which, in their capacity as members of the Council of the EU, should think twice before adopting a measure that implements international rules to which the Union is not committed. At best, this forces the responsible court to interpret the European measure at hand in a manner consistent with an agreement not binding the EC. Such an obligation on the part of the Community, it has been submitted, flows from article 10 EC.⁸⁵ Reviewing a European measure on its validity, however,

⁷⁹ See Koutrakos, *op. cit.* note 1 *supra*, at 304. Critical: Klabbers, *op. cit.* note 39 *supra*, at 115-149.

⁸⁰ See Opinion 1/03 (*Lugano Convention*) [2006] ECR I-1145, paras 114-128. See further Weiler, *op. cit.* note 2 *supra*, at 171-174; Craig and de Búrca, *op. cit.* note 44 *supra*, at 96-100; 176-182; Klabbers, *op. cit.* note 39 *supra*, at 183-193.

⁸¹ See e.g. Case C-466/98, *Commission v United Kingdom* [2002] ECR I-9427 (*Open Skies*).

⁸² This also applies to parts of agreements that are enacted or added after 1958, while the agreements themselves stem from before this date. See *Commission v United Kingdom*, para. 26. A critical Klabbers, *op. cit.* note 39 *supra*, at 133-135, with some justification points to the arbitrary nature of these pronouncements, as such parts can also be regarded as amendments and thus deserve protection under article 307 EC.

⁸³ See Schütze, *op. cit.* note 42 *supra*, at 432. Cf. also Koutrakos, *op. cit.* note 1 *supra*, at 125-126.

⁸⁴ See Pache and Bielitz, *op. cit.* note 77 *supra*, at 336. But cf. Case C-188/07, *Commune de Mesquer v Total France and Total International Ltd* [2008] ECR I-4501, paras 94-98 of the Opinion of A-G Kokott.

⁸⁵ *Ibid.*, at 336-337.

‘would run counter to the finding (...) that the Community is *not* bound by the Member States’ obligations under international law’.⁸⁶ From the perspective of the Community legal order, the logic behind this reasoning is apparent. If international agreements entered into by one or more Member States outside the EC framework were to be accorded a position in the hierarchy of this legal order similar to treaties concluded by the Community, then the Member States could feel invited to circumvent the supremacy of Community (secondary) law by imposing their will through the backdoor. In order to safeguard the integrity and uniformity of the EU legal order, this is not deemed desirable.

4.2 Autonomy revisited

In the doctrine of the ECJ, the precepts of integrity and uniformity are intimately linked to the concept of EC autonomy.⁸⁷ Following the rationale behind *Costa/ENEL*, the autonomous nature of Community law is inherent in the Treaties. Without this claim to normative authority,⁸⁸ the unity of Community law, which, in turn, is paramount in maintaining a common market, would get eroded. Therefore, it seems safe to conclude that as regards Member State commitments not binding the Community the same dynamics are at work as in the case of international norms binding the Community. In both instances the autonomous nature of EC law prevents international law from affecting the fundamental outline of the Community legal order. This assumption also applies to prior commitments of a Member State. Although article 307 EC to a certain extent creates an escape route from the application of EU law, the provision does not function as a sovereignty ‘safety zone’ for the Member States. Crucially, when the legislative institutions of the EU choose to regulate on a subject that falls within the domain of the Member States, the Court has declared that ‘the powers retained by’ them ‘must be exercised in a manner consistent with Community law’.⁸⁹ In *Kadi*, the ECJ extended this reasoning to matters covered by article 307 EC, when it dismissed the argument that the fact that the contested sanction regulation originated in UN law resulted in a Community obligation not to impair the operation thereof.⁹⁰ Once the Member States use the EC to fulfil their international obligations, ‘they must equally wilfully submit to the constitutional logics of the Community legal order’.⁹¹

As was stressed earlier on, more in general, these logics indicate that the ECJ, from the very start of the process of European integration, has considered the Community to be separate from the body of public international law. From the

⁸⁶ *Intertanko*, para. 76 of the Opinion of A-G Kokott

⁸⁷ See generally R. Barents, *The Autonomy of Community Law* (Kluwer Law International, The Hague 2004).

⁸⁸ See on the nature of the claim that the ECJ makes: Miguel Poiars Maduro, ‘The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism’, (2005) 3 *International Journal of Constitutional Law* 332.

⁸⁹ Case C-124/95, *Centro-Com* [1997] ECR I-81, para. 25.

⁹⁰ *Supra*, text at notes 36-37.

⁹¹ See Schütze, *op. cit.* note 55 *supra*, at 19.

moment the Court in *Van Gend & Loos* and *Costa/ENEL* distanced the Community from the international law plane, the Community, with regard to its ‘discovered’ genetic code, looked more like a federal state than an international organisation. Intrinsic to the ECJ’s autonomy thesis is that the relationship between the Community and the Member States is not ruled by international norms – that is, on an interstate basis – but by constitutional principles capable of penetrating the armour of the Member States and affecting individuals.⁹² This characterization is without prejudice to the fact that the EU, as regards its own particular brand of ‘constitution-making’, the treaty revision process, remains heavily dependent on international law tools.⁹³ It also does not signify that international law and Community law are not linked together. ‘(T)he Community’s municipal legal

⁹² But see Bruno de Witte, ‘Direct Effect, Supremacy, and the Nature of the Legal Order’, in: Paul Craig and Gráinne de Búrca eds, *The Evolution of EU Law* (OUP, Oxford 1999) 177, who downplays the ‘uniqueness’ of the special attributes of EU law. Though this may be true for the notions of direct effect and supremacy, the principle of autonomy is harder to put into perspective. Especially the axiomatic point that Community law functions independent of the (constitutional) law of the Member States in their legal orders is difficult to reconcile with an internationalist reading of the EU. Cf. in this regard Maduro, who, in para. 37 of his Opinion to *Kadi*, expressly contrasts the EC Treaty to the ECHR, stating that the latter is ‘an interstate agreement which creates obligations between the Contracting Parties at the international level’, whereas the former ‘has founded an autonomous legal order, within which States as well as individuals have immediate rights and obligations’ and the ‘duty of the Court of Justice is to act as the constitutional court of the municipal legal order that is the Community’. In support of de Witte, it could be argued that international law does not guarantee that an international tribunal will have recourse to norms external to the particular treaty order of which it forms part. Referring to the self-contained regime of the WTO, Eeckhout, for example, has put forward the suggestion that the outcome in *Kadi* would not have been very different if the ECJ had adopted an internationalist reading instead of a constitutional approach. See Piet Eeckhout, ‘Kadi and Al Barakaat: Luxembourg is not Texas – or Washington DC’, Blog of the *European Journal of International Law* of 25 February 2009. Available at <http://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/>. In an international legal configuration that is increasingly fragmented and sophisticated, it is indeed not evident that treaty systems will automatically open themselves to the norms of others. Just like the ECJ, international tribunals such as the WTO-panels and the ECtHR will primarily focus on norms that originate in their own orders. Cf. e.g. Anja Lindroos and Michael Mehling, ‘Dispelling the Chimera of ‘Self-Contained Regimes’: International Law and the WTO’, (2005) 16 *European Journal of International Law* 857. However, an important difference remains that these judicial actors do not make a claim to normative-constitutional authority on behalf of their regimes comparable to the autonomy thesis of the ECJ. Belonging to the body of international public law, the argument could accordingly be made that treaty regimes such as the WTO and the ECHR will have greater difficulties in explaining why they are precluded from applying foreign norms over their own norms; especially if the former norms originate in the UN Charter, which some regard as the ‘constitution of the international community’. Cf., as regards the WTO, in this respect e.g. Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP, Cambridge 2003) 25-40.

⁹³ Cf. Bruno de Witte, ‘International Law as a Tool for the European Union’, (2009) 5 *European Constitutional Law Review* 265, 267-272. An important point to make in this respect is that Community doctrine does not seem to leave room for the Member States to act outside the amendment procedure of article 48 EU, which does not follow from international law. See further, below, note 147.

order and the international legal order', Advocate General Maduro stated in his Opinion to *Kadi*, do not 'pass by each other like ships in the night.'⁹⁴ It does however entail that Community law, at least according to the case-law of the ECJ, controls the way in which international law permeates the EU legal order. This observation also makes that *Intertanko* and *Kadi* do not constitute fundamental breaks with past jurisprudence on the relationship with international law. Notwithstanding its basic monistic outlook, Community doctrine has also always possessed a distinct dualistic streak. The question whether the ECJ in *Intertanko* and *Kadi* has adopted a more inward-looking approach than in the past is thus at best one of degree. Yet the Community has not turned from monistic into dualistic overnight.

5 ENTANGLEMENT WITH THE INTERNATIONAL LEGAL ORDER

5.1 The problem of liability

Although from the perspective of EU law it may be understandable that Member State commitments that do not formally bind the Community cannot affect the validity of EC legislation, at an international and national level this may raise questions. In the case of a conflict with a third party,⁹⁵ Member States concerned run the risk of incurring international responsibility. To be sure, as a basic feature of a legal system in which there is no central administrative or adjudicative body able to intervene in such matters, in principle there is nothing particular about the prospect of international responsibility. Indeed, in a horizontally ordered world, the rule that an internal defect to an agreement cannot affect the validity of that agreement at the international plane is an expression of good faith.⁹⁶ Accordingly, when the Community, due to non-application, violates an external norm to which it considers itself bound, it also becomes liable.⁹⁷ Moreover, as a general rule of law laid down in the VCLT, Member States are not allowed to invoke the Community predicament in order to justify the breach for which they are held responsible.⁹⁸ To affected third parties, the Community, despite its alleged internal constitutional set-up, may just as well be regarded as a device through which the Member States can circumvent their international obligations.⁹⁹

⁹⁴ *Kadi*, para. 22 of the Opinion of A-G Maduro.

⁹⁵ A related but different problem is the instance in which Member States have concluded a treaty outside the Community framework *inter se*. Even if the issue of international responsibility will not arise in the event of a clash with EU law, the status and scope of such agreements is not without controversy; notably when all Member States are involved. See Schütze, *op. cit.* note 42 *supra*, at 408-425; Klabbers, *op. cit.* note 39 *supra*, at 205-211.

⁹⁶ See Peters, *op. cit.* note 64 *supra*, at 33.

⁹⁷ See Case C-327/91, *France v Commission* [1994] ECR I-3641, para. 25.

⁹⁸ See article 27 VCLT. Cf. also ECtHR, *Matthews v United Kingdom* [1999] BHRC 686.

⁹⁹ Cf. article 28 of the Draft Articles on International Responsibility of International Organizations. Report of the ILC (2008) A/63/10.

Still, this does not alter the fact that Member States can find themselves in a difficult situation when they are held responsible for a violation of an international commitment that comes up in the context of a Community action. Particularly if the liability arises out of a finding of a European court of a conflict with EC law, it will not always be clear what path the Member State(s) concerned must follow. In the case of prior agreements, article 307 (2) EC may encourage the ECJ to offer some guidance on the issue. In many instances, however, it will not be obvious what Member States should do to eliminate the incompatibility that has arisen. And even to the extent that guidance is given, it cannot be excluded that the duty that results from this goes further than what is possible under international law.¹⁰⁰

Applied to *Intertanko* and *Kadi*, these observations produce a mixed picture. For one thing, it is not all that clear that both cases constituted a breach of obligations of the Member State at the international level. Therefore, it is possible to argue that the issue of international responsibility does not arise. In particular in the case of *Intertanko* it was not at all certain that the contested directive did indeed violate the MARPOL-treaty. By discussing the matter in terms of jurisdiction, the ECJ circumvented the issue. In addition, the Opinion of A-G Kokott shows that it is possible to construct an argument in which both worlds are reconciled.¹⁰¹ This does not diminish the fact, however, that by shutting itself off from the treaty in question, the ECJ seriously undermines its *effet utile*. Without its incorporation into Community law, the implementation of MARPOL would have been the (sole) responsibility of national authorities. As a result, in case this would not be done properly, the injured private parties in *Intertanko*, dependent on the relevant constitutional rules, would have been in a position to invoke the content of the treaty before a national court. However, as happened in *Intertanko*, with the directive in place, national courts are bound to refer such questions to Luxembourg. Now, the only way for the private parties to pursue their interests – that is, assuming national courts will honour their Community law obligations – would be to seduce a non-Member State party to the treaty to bring the case before one of the international tribunals that are empowered to rule on the subject-matter of the *Intertanko*-case.¹⁰²

Just like in *Intertanko*, one cannot say beforehand that the Court's judgment in *Kadi* amounted to a conflict with international law. By strictly separating the question of the legality of the sanction regulation from that of the UNSC resolution, the ECJ in any case made it appear that such a collision was absent.¹⁰³ The issue not being 'whether or not the Member States are obliged to implement UN sanctions

¹⁰⁰ Cf. Koutrakos, *op. cit.* note 1 *supra*, at 302-316, discussing amongst others Case C-170/98, *Commission v Belgium* [1999] ECR I-5493. See also article 56 VCLT.

¹⁰¹ *Supra*, text at notes 18-20.

¹⁰² Via the route of UNCLOS, to which the EU is a party, this could be done by way of arbitration or, possibly on an *ad hoc* basis, before the International Tribunal on the Law of the Sea in Hamburg.

¹⁰³ *Kadi*, paras 286-288.

through the EC/EU, but rather how the Member States do this', it could indeed be argued that this was not the case in *Kadi*.¹⁰⁴ On further consideration, however, this vision seems to be too narrow. The triangular relationship between international, European and national legal aspects that characterizes *Kadi* precludes one from confining the issue solely to the range of EU law. After all, for the Member States the judgment of the Court resulted in conflicting obligations; besides the obligation to conform to the constitutional requirements of the EU legal order, the obligation laid down in article 103 of the UN Charter to let the Charter prevail in the event of conflict. Accordingly, there is no easy way out of this conundrum. The fact that article 103 UN probably does not, as was suggested by the CFI, impose some kind of hierarchy *vis-à-vis* domestic legal orders does not change this.¹⁰⁵ This applies even more forcefully because most Member States do not fully accept the premises of the concept of autonomy as endorsed by the ECJ.¹⁰⁶ *Mutatis mutandis*, the opposite argument that the Court pushed its interpretation of article 307 EC too far, is not convincing either.¹⁰⁷ While it may be true that it stretches prior decisions on the meaning of this provision, the reasoning of the ECJ on this point nevertheless seems justified. To present article 307 EC as a derogatory ground in all circumstances would shake the constitutional foundations of the EU legal order.¹⁰⁸ However, even when a restrictive interpretation of article 307 EC is rejected, it cannot be excluded that Member States, in order to evade liability internationally, will feel obliged to implement UNSC resolutions into their national legal orders in contravention of their responsibility under EU law.¹⁰⁹ Not surprisingly, in reality the soup will not be eaten as hot as it has been cooked. After the *Kadi*-judgment, then, the Member States and Community institutions came up with a solution that involved concessions both at the EU and the UN plane.¹¹⁰ As

¹⁰⁴ See Nikolaos Lavranos, 'UN Sanctions and Judicial Review', in: Jan Wouters, André Nollkaemper and Erika de Wet eds., *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (TMC Asser Press, The Hague 2008) 195.

¹⁰⁵ See e.g. Griller, *op. cit.* note 22 *supra*, at 538. But Cf. Nigel D. White, 'Hierarchy in Organizations: Regional Bodies and the United Nations', in: Tsagourias ed., *op. cit.* note 49 *supra*, at 140-145. See in general Rudolf Bernhardt, 'Commentary on Art. 103', in: Bruno Simma e.a. eds., *The Charter of the United Nations: A Commentary*, 2nd ed., Vol. II (OUP, Oxford 2002) 1292-1302.

¹⁰⁶ See for a summarized overview of the positions of the most important Member States: Craig and de Búrca, *op. cit.* note 44 *supra*, at 353-374. Note also the recent decision of the German *Bundesverfassungsgericht* on the constitutionality of the Lisbon Treaty (BVerfGE, 2 BvE 2/08 of 30 June 2009 (*Lissabon*)).

¹⁰⁷ Cf. Gattini, *op. cit.* note 5 *supra*, at 225-226, stating that 'the cursory way in which the Court (...) disposes of Article 307, dismissing by the same token its *Centro-Com* precedent, verges on the self-righteous.'

¹⁰⁸ *Kadi*, para. 31 of the Opinion of A-G Maduro.

¹⁰⁹ Cf. Piet Eeckhout, 'Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions', (2007) 3 *European Constitutional Law Review* 183, 192. For a different view see Gattini, *op. cit.* note 5 *supra*, at 226.

¹¹⁰ After the annulment of the contested part of the regulation by the ECJ, the names of the applicants were removed from the sanction list contained in the measure. By order of the Court, at the same time the effects of the regulation were maintained for a period of 3 months to allow for a

a matter of legal principle, *Kadi* nonetheless shows how unsatisfactorily and potentially dangerous it can be to have a normative gap between the level where a decision is taken and the level where a decision is implemented.

5.2 Legal pluralism

How to deal with these tensions? One way to confront the problems that result from the normative discrepancy between the opposite requirements in *Intertanko* and *Kadi* is to have recourse to the theory of legal pluralism.¹¹¹ Indeed, much of the critique that followed the cases, *Kadi* in particular, stemmed from adherents to this popular legal doctrine.¹¹² According to the theory of pluralism, legal boundaries have over the years become increasingly transparent. Arguing that this entanglement is a good thing, pluralism presses relevant organs, both at a domestic and an international level, to enter into ‘judicial dialogue’. Importantly, such networking should not end in the creation of a ‘world legal hierarchy’ or a stringent world constitutionalism. Instead, departing from the premise that fragmentation is not necessarily negative, the notion seeks to strengthen the operation of the law by respecting the relative independence of the various actors concerned.

With respect to the special responsibility of the EU in this development, people often draw attention to the integrative role the ECJ has played on many occasions in the past. Thus, pointing to judgments of the Court in which it referred to the International Covenant on Civil and Political Rights (ICCPR),¹¹³ the UN Charter¹¹⁴ and the ECHR,¹¹⁵ as well as to rulings of tribunals competent to deal with these treaties,¹¹⁶ the case could be built that partaking in judicial dialogue is not

remedy of the infringement. The Council used this time to obtain the reasons for the listing of *Kadi* and *Al Barakaat* from the UN Sanction Committee. Hereupon, the Commission amended the partially annulled regulation to the extent that the names of the applicants were put back on. See Commission Regulation (EC) no. 1190/2008, amending Council Regulation (EC) no. 881/2002, *OJ* 2008, L 322/25. Having sidestepped this issue in the present case, it will be interesting to see how the ECJ responds to the claim that the *basis* of the listing process is contrary to EU law. Possibly, the Court will ponder on this question in an appeal that is now pending before it. See Case C-399/06 P, *Faraj Hassan v Council and Commission*, *OJ* 2006, C 294/30.

¹¹¹ Legal pluralism or constitutional pluralism is a theory that is both popular as a normative account of the international legal order and, with some adjustments, of the EU legal order. See e.g. de Búrca, *op. cit.* note 5 *supra*, at 52-55; Pavlos Eleftheriadis, ‘Cosmopolitan Law’, (2003) 9 *European Law Journal* 241; Neil MacCormick, *Questioning sovereignty: Law, State, and Practical Reason* (Oxford, OUP 1999); Miguel Poniates Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in: Neil Walker ed., *Sovereignty in Transition* (Hart, Oxford and Portland 2003) 501; Neil Walker, ‘The Idea of Constitutional Pluralism’, (2002) 65 *The Modern Law Review* 317.

¹¹² *Supra*, note 5. See also Halberstam and Stein, *op. cit.* note 70 *supra*.

¹¹³ See e.g. Case 374/87, *Orkem* [1989] ECR 3283, para. 18.

¹¹⁴ See e.g. Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications* [1996] ECR I-3953, para. 13.

¹¹⁵ See e.g. Case C-112/00, *Schmidberger* [2003] ECR I-5659, paras 69-72.

¹¹⁶ See for an overview: Marco Bronckers, ‘The Relationship of the EC Courts with other International Tribunals: Non-Committal, Respectful or Submissive?’, (2007) 44 *Common Market Law Review* 601.

something the ECJ is unfamiliar with. Of course, in particular the ECHR and judgments of the ECtHR form resounding examples. Ever since the ECJ has brought fundamental rights into the sphere of Community law, this human rights treaty and interpretations of the Strasbourg Court have constituted important sources of inspiration.¹¹⁷ With express references to the Convention in the EU Treaty, this significance has become even more evident.¹¹⁸ To a pluralist approach, the fact that the EU, as matters currently stand,¹¹⁹ is not formally bound to the ECHR, is not necessarily a problem. In a fragmented world with disintegrating borders the difference between internal and external law is one of degree.¹²⁰ Accordingly, the manner in which these norms are binding also fades.¹²¹ In this vein, discarding both the choices made by the CFI and the ECJ, one of the alternatives brought forward in comments on *Kadi* was to reach out to UN and customary law for interpretative purposes instead of focusing solely on ‘parochial’ EU law, while retaining the ultimate say on the validity of the contested regulation.¹²² This way, both international and Community law would benefit.

Do *Intertanko* and *Kadi* depart from earlier case-law in which the Court embraced values outside its immediate jurisdiction? And could recourse to pluralist principles indeed have relieved the tensions that resulted from these cases? Undeniably, cross-fertilization of legal values in itself is a laudable objective. It does however seem to have its limitations. While pluralism may offer an attractive *descriptive* account of the relationship between legal orders, it appears less convincing as a *normative* underpinning of such interaction. Crucially, when legal borders blur, the foundations of the validity of norms could get shaky. As the story of European constitutionalism illustrates, normativity is to a large extent linked to accountability and predictability requirements.¹²³ Not distinguishing sharply between binding and non-binding rules, while maybe enhancing the effectiveness of international law, could impair such demands. Concretely, in the cases of *Intertanko* and *Kadi*, sidestepping the issue of the binding nature of respectively MARPOL and the UNSC resolution would have entailed that the ECJ had experienced difficulties justifying the requested invalidation of the domestic measures in play. A related issue – and this applies to all judicial actors, domestic as well as international – is the Kelsenian imperative that courts have no choice but to adhere to the *Grundnorm* of the particular legal order under which they have been established.¹²⁴

¹¹⁷ See Case 4/73, *Nold v Commission* [1974] ECR 491.

¹¹⁸ See article 6 (2) and 46 (d) EU.

¹¹⁹ Provided that there are no obstacles at the Strasbourg level, the EU will accede to the ECHR if the Treaty of Lisbon enters into force. See article 6 (2) EU (new).

¹²⁰ See e.g. Allan Rosas, ‘The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue’, (2007) 1 *European Journal of Legal Studies*.

¹²¹ Cf. Christian Tietje, ‘The Status of International Law in the European Legal Order: The Case of International Treaties and Non-Binding International Instruments’, in: Wouters, Nollkaemper and de Wet eds., *op. cit.* note 104 *supra*, at 67-68.

¹²² See *supra*, note 112.

¹²³ See Maduro, *op. cit.* note 88 *supra*, at 336-342.

¹²⁴ See Theodor Schilling, ‘The Jurisprudence of Constitutional Conflict: Some Supplementations to Matthias Kumm’, (2006) 12 *European Law Journal* 173, 175-188. As regards judicial actors

Invalidating a domestic measure on the ground of a violation of a norm that cannot be traced back to its own legal system would, under this reading, be ‘revolutionary’ and ‘make law indistinguishable from general political, or philosophical, discourse’.¹²⁵

Arguably, it is for these reasons that the Court employs the notion of – international agreements concluded by the EC (with or without the Member States) being – ‘an integral part of Community law’. This way, it makes clear that external norms are both accounted for and lie within its reach to adjudicate upon. Because of the possibility of negating direct effect to an international norm, it has been argued that this notion constitutes an ‘empty concept’.¹²⁶ Yet this reading neglects that measures which cannot be relied on can nonetheless produce indirect effects.¹²⁷ As already mentioned, the ECJ has posited a duty of consistent interpretation. However, this does not really distinguish a binding norm from a non-binding one. More important is the fact that a norm that is binding upon the Community brings about an obligation for its institutions to respect it when they act.¹²⁸ Also, the violation of such a norm by a Member State can lead to an infraction-procedure under article 226 EC.¹²⁹

Admittedly, the non-binding nature of the ECHR for the EU does not appear to constitute an impediment to function as an external source of law against which the validity of EU legislation can be tested. A closer look reveals, however, that this is not necessarily a fair representation. First of all, one could argue that the ECHR has become binding upon the Community, if not formally, than substantively; by way of incorporation of the human rights convention through article 6 (2) EU.¹³⁰ Alternatively, if this reasoning is rejected, the correct view seems to be that Strasbourg rights (still) have to be regarded as interpretative guidelines that, together with the constitutional traditions of the Member States, infuse the EC’s doctrine of general principles.¹³¹ Although pluralist in outlook, this suggests the existence of a distinct Community standard, which may diverge from ECHR principles.¹³²

at the international level, one may ask oneself what the *Grundnorm* is these actors have to adhere to. If one departs from the premise that the international legal order, in its basic form, constitutes some kind of unity (which Kelsen seemed to believe) this would point to one *Grundnorm* that directs all distinctive international legal systems. If, in contrast, one believes the international configuration has an inherently heterarchical nature, multiple *Grundnorms* would exist, which, in turn, would ultimately foreclose legal systems from being permeated by external norms without their recognition of these norms. Cf. *supra*, note 92.

¹²⁵ *Ibid.*, at 187.

¹²⁶ See Jan Klabbers, ‘International Law and Community Law: The Law and Politics of Direct Effect’, (2002) 21 *Yearbook of European Law* 263, 292-295.

¹²⁷ See Schütze, *op. cit.* note 55 *supra*, at 6-8.

¹²⁸ Article 300 (7) EC.

¹²⁹ See Case C-61/94, *Commission v Germany* [1996] ECR I-3989.

¹³⁰ Cf. Robert Uerpmann-Witzack, ‘The Constitutional Role of Multilateral Treaty Systems’, in: Armin von Bogdandy and Jürgen Bast eds., *Principles of European Constitutional Law* (Hart, Oxford and Portland 2007) 172-174.

¹³¹ See Schütze, *op. cit.* note 42 *supra*, at 401.

¹³² See Joined Cases 46/87 and 227/88, *Hoechst* [1989] ECR 2859; Case C-17/98 (Order), *Emesa Sugar v Aruba* [2000] ECR I-675.

A final point is that the conceptual problems that mark *Intertanko* and *Kadi* will not likely present themselves in the same fashion in the context of the ECHR. Due to its nature as a human rights treaty, ECHR norms will generally only generate a negative obligation to refrain from certain action and not a positive duty to act. And to the extent that the ECHR does spur positive obligations – either the positive obligation of a contracting party to bring its domestic law into accord with a ruling of the ECtHR or a positive obligation of a contracting party to enforce a Convention norm of its own accord – the harmonious way in which the Strasbourg and Luxembourg Courts coexist has thus far made sure that real normative clashes have not materialized.¹³³ At any rate, when the Lisbon Treaty finally enters into force,¹³⁴ the fear of a conflict between ECHR and EU norms will in principle be something of the past. If the EU, as stipulated in article 6 (2) EU (new), accedes to the ECHR, the ECtHR will have the last word on the interpretation of fundamental rights that come within the orbit of the Convention.¹³⁵ On top of that, the Union's own human rights catalogue, the Charter on fundamental rights, which becomes legally binding under the Lisbon Treaty, provides in article 52 (3) that rights that correspond with Strasbourg rights are to be given the same meaning and scope of the latter.

5.3 Inversed sovereignty

In the end, much of what has been discussed comes back to the timeless conceptual struggle to reconcile two 'absolute maxims': the supremacy of international law over domestic law and *vice versa*;¹³⁶ an effort, which often results in seemingly contradicting positions.¹³⁷ Due to its ambiguous character this tension is in particular apparent with regard to Community law. It is submitted, however, that this 'chicken-and-egg'-dilemma might also provide opportunities in the context of the EU. In part, the dilemma is based on the contention that the international legal configuration can only be explained by pointing to the sovereign nature of states.

¹³³ See, with respect to positive obligations arising out of a ruling of the Strasbourg Court: ECtHR, *Mathews v United Kingdom* [1999] BHRC 686 and Case C-145/04, *Spain v United Kingdom* [2006] ECR I-7917; with regard to positive obligations arising directly out of the Convention: Case C-112/00, *Schmidberger* [2003] ECR I-5659. Cf. further Johan Callewaert, 'Unionisation' and 'Conventionisation' of Fundamental Rights in Europe: The Interplay between Union and Conventional Law and its Impact on the Domestic Legal Systems of the Member States', in: Wouters, Nollkaemper and de Wet eds., *op. cit.* note 104 *supra*, at 109.

¹³⁴ Around the time this working paper was completed, Czech President Václav Klaus put the 27th and final signature under the new Treaty, with the result that it will enter into force as of 1 December 2009.

¹³⁵ The precise ramifications of this provision remain somewhat axiomatic, however, as the second part of article 6 (2) EU (new) states that '(s)uch accession shall not affect the Union's competences as defined in the Treaties'.

¹³⁶ Famously battled over by Hans Kelsen and Carl Schmitt. See Hans Kelsen, *Pure Theory of Law*, transl. from 2nd German ed. (UCP, Los Angeles 1967); Carl Schmitt, *Verfassungslehre*, 9th ed. (Duncker & Humblot, Berlin 1993).

¹³⁷ See Helen Keller, *Rezeption des Völkerrechts* (Springer, Berlin 2003) 3-11.

Sovereignty, often considered to be residing in a people – that is, in a collective identity – can be said to constitute the source of all legal authority in a particular polity, even to the extent that it precedes the constitution of such order, which, in turn, is the ultimate expression of a sovereign decision. As such, the validity of international norms must ultimately be traced back to national law.¹³⁸ At the same time, however, sovereignty, in its traditional sense, can also be understood to exert a limiting influence on the operation of national law. The concept, as developed from the late sixteenth century onwards as a paradigm for the modern state, owes its very existence, at least historically, to the simultaneous construction of the international legal order.¹³⁹ Sovereignty and international law thus presuppose each other; the former notion essentially functioning as a hinge between legal orders.

This argument can be lent additional force when one takes the interrelationship between democracy and fundamental rights into consideration. According to an orthodox, Schmittian conception of sovereignty, the former is a necessary precondition for the latter.¹⁴⁰ Although this view undoubtedly has its merits – logically speaking rules fundamental to a constitutional order need a political decision of a *pouvoir constituant* to become valid – the opposite is equally true. For a democratic order seems difficult to realise in the absence of rule of law principles such as the equality rule and the freedom of speech; ‘the paradox of constituent power indicates that self-constitution begins as the constitution of a political unity through a legal order, not as the constitution of a legal order by a political unity’.¹⁴¹ Importantly, such liberty rights are often deemed to be universal in nature.¹⁴² Under this reading, national democracy thus has its roots in international law.¹⁴³ This can be illustrated by citing the German *Bundesverfassungsgericht*, which, in its recent decision on the constitutionality of the Lisbon Treaty, besides forcefully clinging to the overriding importance of national sovereignty in the context of European integration, maintained that the *Grundgesetz* ‘abandons a high-handed concept of sovereign statehood that is sufficient unto itself and returns to a view of (...) sover-

¹³⁸ For this reason, departing from the premise of sovereignty, some may find it hard to come to terms with the viability of *ius cogens*, which exists regardless of the consent of states. See article 53 VCLT.

¹³⁹ See Jean Bodin, *Les Six Livres de la République* [Paris 1576] (Paris 1986) Book I; Hugo Grotius, *On the Law of War and Peace* [Paris 1625] (Clarendon Press, Oxford 1925, Francis W. Kelsey transl.).

¹⁴⁰ Cf. Hans Lindahl, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’, in: Martin Loughlin and Neil Walker eds., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP, Oxford 2007) 21-24.

¹⁴¹ *Ibid.*, at 22.

¹⁴² Cf. e.g. the French *Déclaration des droits de l’Homme et du citoyen* of 1789, which, besides being one of the first manifestations of popular sovereignty, also put great emphasis on the natural, universal nature of human rights and was, in that vein, in the revolutionary years used as an export product to countries where monarchical rule still constituted the standard.

¹⁴³ International law, here, being conceived as a category of law which is not exclusively positivist in nature, but also has features resembling natural law.

eighty as “freedom that is organised by international law and committed to it”.¹⁴⁴ Even if the Constitutional Court, if the issue is forced, will probably not subscribe to a view which regards the German sovereign people fundamentally constrained by concrete international norms, this consideration wonderfully captures the intertwinement between both starting principles.

Generally, it is not considered to be *bon ton* to use the notion of sovereignty in the context of European integration;¹⁴⁵ at least, as long as the term is approached as an idea that deals with the existence of a meta-judicial *pouvoir constituant* that, by its very nature, is indivisible and requires a uniform legal framework.¹⁴⁶ If one thinks away its state-centred connotations for a moment, however, the concept of sovereignty arguably provides a great deal of insight in the way the ECJ has furnished the Community with an autonomous foundation. For the principle of autonomy, if taken seriously, resembles the concept of sovereignty in a fundamental way. Implying a moment of political self-creation, autonomy, like sovereignty, seems to refer to the existence of the ultimate authority of the Community – normative, political and perhaps even constitutional – to define the scope of its actions.¹⁴⁷ It is submitted this is also what makes the EU federal in nature. Lodg-

¹⁴⁴ See BVerfGE, 2 BvE 2/08 of 30 June 2009 (*Lissabon*) 223. For the English translation of the judgment, see: <http://www.bundesverfassungsgericht.de/>. Cf. also Gráinne de Búrca and Oliver Gerstenberg, ‘The Denationalization of Constitutional Law’, (2006) 47 *Harvard International Law Journal* 243, 247, who speak of a ‘genesis/validity paradox’.

¹⁴⁵ Cf. J.H.H. Weiler, ‘The Transformation of Europe’, (1991) 100 *Yale Law Journal* 2403, 2481.

¹⁴⁶ This is not to say, of course, that the term sovereignty is totally absent in the European constitutional debate. On the contrary, ever since the ECJ in *Costa/ENEL* spoke of a ‘limitation of sovereignty’ and ‘sovereign rights’ on the part of the Member States, the notion featured prominently in discussions on the nature of the relationship between the Community and its members. Regardless of what can be inferred from these early pronouncements, from that moment on slowly but gradually a new paradigm emerged, according to which sovereignty was no longer an all-encompassing power that firmly resided in the peoples of the various states and could not be alienated, but comprised a set of powers that could be ‘pooled’ or ‘divided’ vertically between different layers of government. The understanding of sovereignty as something that is ‘fragmented’ *prima facie* also seems apt to explain the constrained manner in which the Member States, due to their obligations under EU law, exercise their powers on the international plane; traditionally a function of sovereignty *par excellence*. See in this regard e.g. Bruno de Witte, ‘The Emergence of a European System of Public International Law: The EU and its Member States as Strange Subjects’, in: Wouters, Nollkaemper and de Wet eds., *op. cit.* note 104 *supra*, at 48-53. As the same author has recognized elsewhere, however, conceptually it is highly debatable, in the end, if sovereignty constitutes a power that can be reduced or divided into different elements. More fitting seems to make a basic distinction between sovereignty and the *exercise* of sovereignty. See Bruno de Witte, ‘Sovereignty and European Integration: The Weight of Legal Tradition’, in: Anne Marie Slaughter, Alec Stone Sweet and J.H.H. Weiler eds., *The European Court and National Courts: Doctrine and Jurisprudence* (Hart, Oxford 1998) 277.

¹⁴⁷ Arguably, this authority, commonly denoted as *Kompetenz-Kompetenz*, is only interpretative in nature and not legislative, since the Member States are still ‘Masters of the Treaties’ when it comes down to amending the Treaties. Some will point out, however, that within the context of European law, the denomination ‘Masters of the Treaties’ has a restricted nature. Contrary to what the Vienna Convention on the Law of Treaties seems to suggest in the case of treaty amendments (articles 39 and 40 VCLT), the Member States are generally not considered to be

ing two separate sets of claims to authority, it can only survive as long as these claims do not conflict existentially.¹⁴⁸ In an inversed mode, however, the concept of autonomy does not appear to conform to the limitations that are inherently flowing from being embedded in the international legal order as an independent, original entity. Arguably, as a consequence of their sovereign nature, states, when they operate externally, cannot pull out of the general framework of international law.¹⁴⁹ In contrast, the EU seems to use its autonomy to fence itself off from the

free to rely on their international treaty-making powers to amend the Treaties outside the formal framework of article 48 EU. See Schütze, *op. cit.* note 42 *supra*, at 406-414. The ECJ declared as much in Case 43/75, *Defrenne v Sabena* [1976] ECR 455, para. 58. Looking to the Court's case-law, it could even be argued that the Member States are bound in the amendment procedure by certain substantive limitations. See in this respect Opinion 1/91 (*EEA Agreement*) [1991] ECR 6079. Thus, distinguishing between an interpretative and a legislative component of the notion of *Kompetenz-Kompetenz* would not appear to change much; for from the viewpoint of Community law, it makes more sense to regard the Member States acting within the procedure of article 48 EU as *pouvoirs constitués* than as *pouvoirs constituants*. A more promising avenue for someone who wants to use the 'Masters of the Treaties'-argument to put the autonomy-claim of the ECJ into perspective, is to look not to the issue of amendment, but to the issue of termination and withdrawal. An encapsulated understanding of the notion 'Masters of the Treaties' seems difficult to reconcile with the right of withdrawal of the Member States. And indeed, as to the possibility thereto under the current Treaty-regime – cf. article 51 EU – not everyone will agree that this is lawful; again, contrary to what the Vienna Convention has to say about the subject (articles 54-56 VCLT). See already Ulrich Everling, 'Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge?', in: Rudolf Bernhardt e.a. eds., *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte. Festschrift für Hermann Mosler* (Springer-Verlag, Berlin 1982) 183-184. Cf. also Ingolf Pernice, 'Multilevel constitutionalism in the European Union', (2002) 27 *European Law Review* 511, 518-520. As the new EU Treaty will expressly provide for a right to withdrawal (article 50 EU (new)), this argument has lost much of its force, however; that is, unless one believes that this new provision, which comes up with certain procedural requirements, conditions the manner in which Member States are able to withdraw from the Union.

¹⁴⁸ Although, in a sense, this will always be a matter of definition, one could argue that a true federation is a polity in which the question of sovereignty is put off; that is, due to competing claims to authority and a dual political identity, the location of the *Kompetenz-Kompetenz* is obscure, until the moment an existential conflict erupts and the federation either transforms into a state or lapses into a confederation or international organization. Accordingly, one could submit the somewhat tentative argument that the EU is more federal in nature than federal states such as Germany and the U.S., which, though still federal in a technical sense, have over time evolved in what are essentially unitary states. See in this respect already, remarkably apt, Schmitt, *op. cit.* note 136 *supra*, at 366-391, who distinguishes between the concepts 'Bund' and 'Bundesstaat'.

¹⁴⁹ Cf. the famous phrase of PCIJ judge Anzilotti, who, in a separate opinion, remarked 'that the State has over it no other authority than that of international law'. See *Customs Régime between Germany and Austria*, Advisory Opinion, 1931, *PCIJ, Series A/B*, No. 41, 57. Contrast this however to Georg Jellinek, *Allgemeine Staatslehre*, 3rd ed. (Julius Springer Verlag, Berlin 1919) who, at 477, argued that the binding nature of international law constituted a form of self-limitation on the part of states. This second perception, which essentially denies that international law can be distinctly *legal* in character, is similar to views put forward by well-known champions of the state as Thomas Hobbes and Carl Schmitt. Illustrative in this regard is the remark by Schmitt, made in his *Verfassungslehre*, *op. cit.* note 136 *supra*, 73, that the international community, ultimately, is 'only the reflex of the coexistence of autonomous political entities' [transl. JWvR].

international legal order. This gnaws at the legitimacy of EU law. Even more so, because, in the absence of an unequivocal popular substrate, the internal justification for the ECJ's autonomy thesis is also not without conceptual problems. A firmer embrace of international law might help repairing this legitimacy deficit. To that end, it is necessary that the Court modifies its present case-law on the effects of non-binding norms and finds a way to bridge the normative gap that currently exists on this point.

6 BINDING THE COMMUNITY

6.1 Finding a rationale

Is it possible to find an acceptable rationale that enables the ECJ to accord binding status to international norms to which the Community has not committed itself externally? The most obvious example to turn to is the functional substitution-reasoning that was developed with regard to GATT in *International Fruit*, invoked by the CFI in *Kadi* and referred to by the ECJ in *Intertanko*. However, with regard to the UN Charter, many commentators have expressed their doubts on this construction.¹⁵⁰ An important objection is the non-exclusive nature of the competence of the EC to impose economic sanctions, as to accord binding status to UN norms would marginalize the role of Member States in this area. Whereas the CCP, which formed the basis of the Court's reasoning in *International Fruit*, was (afterwards) deemed to be the exclusive domain of the Community, the Member States retain powers to implement sanctions of their own. The same logic could be applied to *Intertanko*, which featured the EC's concurrent competence to lay down rules on ship-source pollution.¹⁵¹ Yet one may question if the absence of exclusivity really should prevent the ECJ from extending its doctrine. The ECJ seems to have traded its preference for a 'dual federalist' approach for one of 'cooperate federalism' in the field of external relations.¹⁵² In line with this switch, it has developed principles – read: supremacy, duties stemming from article 10 EC – that are to be applied when Community and Member State competences collide. As long as there has been a transfer of power from the Member States to the EU and the EU makes use of this power to incorporate norms of a treaty to which all 27 Member States are parties, it is hard to see why these 'mixture' principles cannot be applicable to situations where the EU is not formally bound internationally. Certainly, resorting to this option carries the risk that the playing field of the Member States will be gradually reduced,¹⁵³ but, viewed against the background of the

¹⁵⁰ See e.g. Martin Nettesheim, 'UN Sanctions against Individuals – A Challenge to the Architecture of European Union Governance', (2007) 44 *Common Market Law Review* 567, 585; Halberstam and Stein, *op. cit.* note 70 *supra*, at 48; Schütze, *op. cit.* note 55 *supra*, at 20-21.

¹⁵¹ *Intertanko*, para. 42 of the Opinion of A-G Kokott.

¹⁵² See Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP, Oxford 2009), 320-340.

¹⁵³ Cf. e.g. Case C-431/05, *Merck Genéricos – Produtos Farmacêuticos Ld^a v Merck & Co. Inc. and Merck Sharp & Dohme Ld^a* [2007] ECR I-7001, paras 29-38.

normative tension that results from decisions like *Intertanko* and *Kadi*, that may be a price worth paying.¹⁵⁴

A more serious objection to accord binding status to international norms to which the EC has not committed itself externally might be the fact that a functional succession under the *International Fruit*-doctrine would probably also bring about a positive duty to act under international law.¹⁵⁵ Since the EU is neither a party to the UN nor to the IMO, it is not clear how it will be able to operate in these organisations without the express consent of third parties, as was the case with GATT.¹⁵⁶ An additional complication in the context of the UN is the fact that two of the EU's Member States are permanent members of the Security Council, the UN body that can issue legally binding decisions. As long as international organisations are generally not very prone to welcome a non-state entity as the EU in their midst, a functional substitution under international law therefore might prove to be a bridge too far.¹⁵⁷ Such a conclusion however does not necessarily warrant denouncing the option of legal succession altogether.¹⁵⁸ Another, less far-reaching possibility would be for the Community to consider itself materially bound to the international commitments of its Member States as a matter of EU law; that is, without succeeding to the immediate corresponding responsibilities of the latter. While not piercing through any direct normative relationship internationally, the advantage of such self-binding would lie in ruling out the eventuality of conflict between obligations of the Member States to the EU and at the international level. Crucially, legal substitution under Community law does not have to limit itself to a *de facto* commitment of the EU – meaning only seeking interpretative harmony – but should amount to treating these obligations as an integral part of the European legal order. This would entail that afflicted parties are empowered to invoke an external norm that is not formally binding upon the Community before a European court. Doing so, enables the EU to remain true to the spirit of the *Kupferberg*-principle, which explains the concept of an 'integral part of Community law' as an expression of good faith *vis-à-vis* third parties.

As *Intertanko* and *Kadi* exemplify, this good faith is currently put to the test; even more so, since the EU likes to think of itself as a cementer of the international legal order.¹⁵⁹ Risking that this pledge sounds hollow, the ECJ's repeated

¹⁵⁴ Cf. Eeckhout, *op. cit.* note 57 *supra*, at 438.

¹⁵⁵ See Halberstam and Stein, *op. cit.* note 70 *supra*, 22-23; 48

¹⁵⁶ Uerpmann-Witzack, *op. cit.* note 130 *supra*, at 166, in this respect argues that, as functional substitution is in principle not sanctioned under international law, it is better to view the integration of the Community into the GATT as an 'implied accession'.

¹⁵⁷ Of course, hesitation about the prospect of a possible accession of the EU to an international organisation will not only be found with third parties. Consider for example the sometimes raised, but politically not very realistic prospect of a replacement of France and the UK by the EU in the SC. See in general on the status of the EU within international organisations: Frank Hoffmeister, 'Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies', (2007) 44 *Common Market Law Review* 41.

¹⁵⁸ See Uerpmann-Witzack, *op. cit.* note 130 *supra*, at 168-172.

¹⁵⁹ Cf. the Laeken Declaration on the future of the European Union (15 December 2001), *Bulletin of the EU* 2001, No. 12, 19-23, in which the Member States, convening in the European Coun-

commitment to uphold international law might prove to be a fitting starting point, then, to guide the Court in finding an acceptable basis for materially binding to external law under its own legal order. In a recent article on *Kadi*, Halberstam and Stein have proposed such a rationale.¹⁶⁰ This consists of a combination of the ECJ's reasoning in the *Racke*-judgment¹⁶¹ and the *Fediol/Nakajima*-decisions.¹⁶² In the first case a rule of non-directly effective customary international law was interposed as a ground of review in the instance of an alleged conflict between European legislation and a directly effective international agreement; the second case provides for a legality review of a Community measure against a non-directly effective international rule if the former intends to implement the latter in EU law. A symbiosis of both doctrines, the authors feel, enables the Court to drop the internationally restrictive views that characterized *Kadi* and 'allows for the consideration of general rules of international law to judge the EC's implementation of the Security Council Resolution notwithstanding the fact that neither of these international norms has direct effect'.¹⁶³ To arrive at this innovation, though, Halberstam and Stein have to overcome the fact that the UN Charter, in contrast to the agreements that featured in *Racke*, *Fediol* and *Nakajima*, is not formally binding upon the EU. Hence, they argue that

'the Community's obligation under Article 301 EC to implement the Common Foreign and Security Policy call for economic sanctions should suffice to commit the Community's implementing measure to the observance of international law here. After all, by coming together in the context of the CFSP pillar to call for the Community's implementation of economic sanctions, the Member States *sought to discharge* their international legal obligations.'¹⁶⁴

In other words: if a Community measure clearly intends to give effect to an international obligation of the member states, this could pave the way for judicial review of that measure.

Writing on *Kadi*, the authors further attach special significance to the fact that the issue of fundamental rights was at play. Although, as mentioned, it is undeniable that the allegedly universal nature of human rights adds extra spice to the argument, one fails to see why it cannot be extended to international norms of a less elevated kind, such as the maritime rules that were invoked in *Intertanko*.

cil, rather bombastically profess: 'What is Europe's role in this changed world? Does Europe not, now that it is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples? Europe as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions.'

¹⁶⁰ Halberstam and Stein, *op. cit.* note 70 *supra*, at 64-66.

¹⁶¹ Case C-162/96, *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655.

¹⁶² Case 70/87, *Fediol v Commission* [1989] ECR 1781; Case 69/89, *Nakajima v Council* [1991] ECR I-2069.

¹⁶³ Halberstam and Stein, *op. cit.* note 70 *supra*, at 65.

¹⁶⁴ *Ibid.*, at 65-66 [emphasis added].

Categorising international norms has proven a notoriously hard thing to do and does not relate well with the instrumental and horizontal approach that lies at the foundation of the international treaty system.¹⁶⁵ Therefore, what seems to matter most is not so much whether a given norm or value is human rights, environmental or trade-related, but if it can be established that a Community measure purports to implement an international obligation of its Member States in such a way that the Court finds itself bound to extend its jurisdiction for a legality review. The question of justiciability, as always, comes next, and consequently also the applicability of doctrines such as *Racke* and *Fediol/Nakajima*. Indeed, as regards *Fediol/Nakajima*, one could argue that this doctrine is turned from a justiciability (direct effect) into a jurisdiction (reception) test.

6.2 Yardsticks in the case law of the ECJ

In considering the possibility of applying *International Fruit*, A-G Kokott, in her Opinion to *Intertanko*, argued that, even if the competence of the Community on sea transport had become exclusive in nature, it was doubtful ‘whether such an assumption of powers’ would be ‘sufficient as a basis on which to conclude that the Member States’ obligations under international law are binding on the Community’.¹⁶⁶ Additionally, she claimed, succession is only possible when a power is laid down expressly in the Treaty.¹⁶⁷ To support this argument, Kokott relied on the preliminary ruling of the ECJ in *Peralta*, which, incidentally, also involved MARPOL.¹⁶⁸ When it comes down to binding the EU as a matter of Community law, however, of primary relevance should not be, it is argued, whether a power has an express or implied nature, but if the legislation that results from it can be deemed to incorporate Member State obligations into the EU legal order. In *Peralta*, a ruling that was issued some years before the contested directive in *Intertanko* was enacted, this question did not surface. More interesting, to that end, is the case of *Netherlands v Parliament and Council*,¹⁶⁹ on the validity of the Directive on the legal protection of biotechnological inventions.¹⁷⁰ In this judgment, the Court, amongst others, spoke out on the compatibility of the Directive with the European Patent Convention, a treaty to which the Community is not a party. Although the ECJ in *Netherlands v Parliament and Council* affirms its position that ‘the lawfulness of a Community instrument does not depend on its conformity with an international agreement to which the Community is not a party’,¹⁷¹ it, curiously enough, nevertheless appeared to leave room for a degree of judicial review. For elsewhere

¹⁶⁵ See Klabbers, *op. cit.* note 39 *supra*, at 49-87.

¹⁶⁶ *Intertanko*, para. 43 of the Opinion of A-G Kokott.

¹⁶⁷ *Ibid.*

¹⁶⁸ Case 379/92, *Matteo Peralta* [1994] ECR I-3453, para. 16.

¹⁶⁹ Case C-377/98, *Netherlands v Parliament and Council* [2001] ECR I-7079. See e.g. Eeckhout, *op. cit.* note 57 *supra*, at 251-252.

¹⁷⁰ Directive 98/44/EC, OJ L213/13.

¹⁷¹ *Netherlands v Parliament and Council*, para. 52.

the Court asserted in implicit terms that a review was possible when a ‘plea should be understood as being directed (...) at an obligation imposed on the Member States by the Directive to breach their own obligations under international law, while the Directive itself claims not to affect those obligations’,¹⁷² such as the relevant measure, indeed, expressly stated.¹⁷³ Kokott, who in her Opinion to *Intertanko* points to this ambiguity, seems to consider this deliberation a judicial *faux pas* of the ECJ.¹⁷⁴ Instead, as mentioned previously, she suggests allowing for a legality review of the contested directive in *Intertanko* by having MARPOL incorporated as a review standard by UNCLOS.

Apart from the fact that one can question the tenability of this position,¹⁷⁵ this however appears to be a rather cumbersome way to achieve what from an internationally inclusive point of view is arguably a desirable result. Again, more convincing to that end, it is submitted, would be to adopt the underlying principle of the Court’s seemingly off handed remark in *Netherlands v Parliament and Council* that international obligations of the Member States are binding as a matter of Community law – and, possibly, susceptible for judicial review – when it can be determined that the latter ‘sought to discharge’ these obligations within the EU legal order. Thus, in *Intertanko*, given the express references in the recitals of the contested measure to MARPOL, this rationale would probably have forced the ECJ to treat this agreement as an integral part of Community law. Regardless if it had agreed with A-G Kokott that both instruments could be reconciled or if it had struck the directive down, internationally, this would have produced an outcome more satisfactory than the Court’s current decision. Similarly, in *Kadi*, putting these observations into effect would have meant that the ECJ could have attempted to judge the sanction regulation on its conformity with UN law; since the UNSC resolution at issue left no room for discretion, consisting of international legal standards laid down in the Charter, and possibly supplemented, as Halberstam and Stein argue, by rules of customary international law. *Kadi* provides a less straightforward picture than *Intertanko*, though. Crucially, a self-binding posture of the Court in *Kadi* would not necessarily have resulted in ruling out conflict. Instead, like the ECJ’s present judgment, it might just as well have caused a clash, thereby possibly provoking concerns of third parties that the ECJ would actually frustrate the functioning of the international legal order. This could however be rebutted by the remark that lacking a (judicial) organ competent to oversee the actions of the UNSC – the International Court of Justice does not have this general authority – there is really no central way of telling what the Charter will allow.¹⁷⁶ At any rate,

¹⁷² *Ibid.*, para. 55.

¹⁷³ Article 1 (2) Directive 98/44/EC.

¹⁷⁴ *Intertanko*, paras 75-76 of the Opinion of A-G Kokott.

¹⁷⁵ See Denza, *op. cit.* note 8 *supra*, at 876, who argues that the fact that ‘UNCLOS operates as a constraint on rules elaborated in other fora (...) is rather different from saying that its terms effected a delegation of rule-making powers or incorporated the results into UNLOS itself.’

¹⁷⁶ Cf. Halberstam and Stein, *op. cit.* note 70 *supra*, at 66-68. But see Nettesheim, *op. cit.* note 150 *supra*, at 588-593, who, in the context of the CFI’s judgment, points to the risks of such an

as the relevant UN norms would be integrated in Community law, a clear advantage would be that the Member States, by way of a dynamic interpretation of article 300 (7) EC, would no longer be permitted, under European law, to implement the sanctions on their own. Also, such a position can be said to be in keeping with the Lisbon Treaty, which formulates that the EU's external action shall be guided by respect for the principles of the Charter.¹⁷⁷

6.3 Possible drawbacks

Are there any downsides to this solution? As a matter of Community law, a first possible problem that springs to mind is the fact, identified before, that incorporating Member State agreements into the Community legal order could threaten the uniformity and integrity of that legal order. More specifically, such inception in the Community hierarchy would allow Member States to circumvent the supremacy of EU legislation. This argument only partly hits home, however. It is true that these agreements, as standards of review, would rank higher than secondary law, but given the requirement of the presence of implementing measures it is difficult to see how they can disrupt the functioning of Community law as a whole. Moreover, accepting these premises would not alter the internal supremacy of primary EU law over external, 'communitarized' norms. As an integral part of Community law, these norms would be subjected to the internal hierarchy of the EU legal order. Thus, while the CFI, on its face, may have been right to argue in *Kadi* that the EU must consider itself bound to UN law,¹⁷⁸ it erred in declaring that this category of law, whether it be the Charter or secondary rules such as UNSC resolutions, should be accorded primacy over all EU law. As will be recalled, in a hypothetical excursion, this was also pointed out by the ECJ.¹⁷⁹ However, afraid

attitude. In effect, given the fact that the UNSC resolution left no room for manoeuvre as regards its implementation in Community law, it could be argued that by incorporating UN law into the EU legal order, the ECJ would empower itself to review actions of institutions outside its natural habitat with norms that equally originate from outside its own legal order. While possibly enhancing the coherence of international law, this could also lead to 'chaos', because other domestic courts could feel invited as well to review the actions of the Security Council; without having to conform to a uniform standard.

¹⁷⁷ Article 21 (1) EU (new).

¹⁷⁸ Arguably, the CFI confounded a couple of issues in *Yusuf and Kadi*. While, as submitted in this article, it may have been right in asserting that the EU must consider itself bound to UN law, the premises of its reasoning were incorrect. Arguing that only the Member States are internationally bound to the Charter, the CFI went to considerable length to establish that, upon the EU, UN law was binding as a matter of *Community* law. See *Kadi* (CFI), paras 192-193. Its simultaneous invocation of *International Fruit*, however, appears to entail that the Charter is also binding as a matter of *international* law. Similarly, the CFI's reliance on article 307 EC also seems flawed. As Schütze, *op. cit.* note 42 *supra*, at 406, has rightly remarked, the 'traditional rationale behind Article 307 EC has always been to permit Member States to satisfy their international commitments *against* Community law. The 'internationalist' reading suggested by the CFI would seem to force Member States into fulfilment of their international obligations *qua* *Community* law.'

¹⁷⁹ *Supra*, text at note 38.

of compromising the Community's autonomy, the Court, just as on earlier occasions,¹⁸⁰ backed down from pursuing this matter any further and instead opted for considering the issue only in terms of EU law. Though maybe legitimate from a purely European perspective, this is to be regretted. Rather than putting this at risk, materially binding the EU in these circumstances arguably would have wrapped the claim to normative authority of the Community into a more internationally friendly frame. As such, it would in a way also have strengthened this claim. In the end, the net result would be a picture of separate legal orders – domestic and international – which, though separate, are intimately interwoven and which cannot be considered in isolation.

A second objection to materially self-binding the EU to international commitments of its Member States which are implemented in Community law could be that it does not resolve the question what to do with Member State treaties that cannot be integrated into the Community legal order through the enactment of harmonising measures, but may nonetheless clash with EU law and, as a result, leave the danger of normative incongruity between the obligation of a Member State towards the Community and towards third parties exposed. This is for example the case with various bilateral agreements. As a procedural safeguard against possible conflicting obligations, the ECJ has developed the duty of cooperation, which mainly applies in the context of mixed agreements, but also extends to situations where Member States perform their external relations autonomously.¹⁸¹ According to this principle, which derives from the requirement of unity in the international representation of the Community,¹⁸² Member States are obliged to coordinate their international actions with the Community. However, to respond, in the event of conflict, that a Member State should pay more attention when it concludes such an agreement and that the Community, accordingly, cannot be blamed, will not always be fair. First of all, it will not always be foreseeable how Community competences will evolve and find an application. Secondly, since the demise of the Luxembourg accord a Member State is in no position anymore to bar the adoption of a Community act that may lead to a violation of its international obligation in the Council.

Things may get even more complicated when one considers multilateral treaties to which a majority but not all Member States are parties. This can be illus-

¹⁸⁰ See e.g. Case C-84/95, *Bosphorus v Minister for Transport, Energy and Communications* [1996] ECR I-3953.

¹⁸¹ Case C-266/03, *Commission v Luxembourg* [2005] ECR I-4805, para. 58. See Marise Cremona, 'Defending the Community Interest: the Duties of Compliance and Cooperation', in: Cremona and de Witte eds., *op. cit.* note 1 *supra*, at 157-166. See as regards the application of the duty of application in the context of the CFSP: Christophe Hillion and Ramses Wessel, 'Restraining External Competences of EU Member States under CFSP', in: Cremona and de Witte eds., *op. cit.* note 1 *supra*, at 79.

¹⁸² Alternatively, the duty of cooperation can also be considered to be a manifestation of the loyalty obligation of article 10 EC. See Christophe Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the 'Duty of Cooperation'', CLEER Working Paper 2009/02, 4-7. Available at <http://www.cleer.eu>.

trated by the ECJ's recent *Mesquer*-decision, rendered shortly after *Intertanko* and dealing with a comparable issue.¹⁸³ In *Mesquer*, a French municipality on the Atlantic coast sued the oil company Total for bearing responsibility for polluting its coastline with heavy fuel oil. The dispute concerned the question whether Total was liable to compensate for pollution damage under Directive 75/442/EEC on waste.¹⁸⁴ According to Total, the Directive was not applicable in the case in question, because the issue of liability was already covered by two, interlinked international treaties that deserved precedence over the Community measure: the 1969 Civil Liability for Oil Pollution Damage Convention and the 1971 Establishment of an International Fund for Compensation for Oil Pollution Damage Convention, both amended by protocol in 1992.¹⁸⁵ The Court rejected this claim. First, it emphasized that the Community had not formally acceded to the international instruments; secondly, it ruled out the possibility of a legal substitution along the lines of *International Fruit*, because not all Member States were parties to the conventions.¹⁸⁶

Compared to *Intertanko*, the fact that not all Member States had become parties to the international agreements that were invoked in *Mesquer*, made it relatively easy for the Court to discard the argument of the binding nature of these instruments for the Community. Given that the treaties that were at play in *Mesquer* counted almost all Member States as parties, the claim that was put forward by Total in this regard does not appear to be that far-fetched though. More important in this respect, still, is the fact that the Community, through a Council Decision issued in 2004,¹⁸⁷ explicitly authorized the Member States to accede to a 2003 protocol to one of the two treaties.¹⁸⁸ This Decision, as A-G Kokott concedes in her Opinion to *Mesquer*, 'can be construed as meaning that the Community has permitted the Member States to derogate from Community law' as regards 'the rules of the Liability Convention'.¹⁸⁹ Because the Decision had been adopted a couple of years after the pollution incident, it could not be applied to the circumstances in *Mesquer*.¹⁹⁰ Nevertheless, Kokott's consideration seems to reveal that it is possible for the Community to be forced to bring its law into accord with the obligations of the Member States under international law, even if not all Member States are committed to these obligations.

¹⁸³ Case C-188/07, *Commune de Mesquer v Total France and Total International Ltd* [2008] ECR I-4501.

¹⁸⁴ *OJ* 1975, L 194/39; amended by Commission Decision 96/350/EC (*OJ* 1996, L 135/32); consolidated by Directive 2006/12/EC of the European Parliament and of the Council on waste (*OJ* 2006, L 114/9).

¹⁸⁵ See resp. *OJ* 2004, L 78/32; *OJ* 2004, L 78/40.

¹⁸⁶ *Mesquer*, para. 85.

¹⁸⁷ See resp. Council Decision 2004/246/EC, *OJ*, L 78/99; Council Decision 2004/664/EC, *OJ*, L 303/28.

¹⁸⁸ *Mesquer*, paras 20-22.

¹⁸⁹ *Ibid.*, para. 86 of the Opinion of A-G Kokott.

¹⁹⁰ *Ibid.*, paras 87-89 of the Opinion of A-G Kokott.

Whatever can be inferred from *Mesquer*, from the perspective of EU law it is difficult to envisage how the normative dilemma of Member State treaties not binding the Community can be solved entirely. Opening the gates for all agreements that come within the scope of EU law is obviously not an option, as this would undermine the Community's autonomy and potentially cripple its ability to attain the objectives stipulated in the Treaties. Other possible mechanisms, such as a refuge to a strict dual federalist approach (pre-emption) or an *ex ante* review by the Commission or the Court (e.g. an extension of article 300 (6) EC), are also generally rejected, because they would encroach too much on the 'sovereign' capacity of the Member States.¹⁹¹ Faced with these alternatives, the Member States, possibly, as Schütze has put it, will 'more or less happily (...) accept the risk of international responsibility as a price worth paying for their presence on the international scene'.¹⁹² Moreover, both the solution of pre-emption and *ex ante* review does not take into account that in many instances, no matter if it wants to,¹⁹³ it will not be possible for the EU to engage in international obligations. Many international organizations are only open for state actors. As a result, even if Community law itself provides for this possibility, the EU often will have to depend on its Member States to act externally.

Be that as it may, this does not diminish the normative unease that may result from such situations. Especially, since third parties (and Member States)¹⁹⁴ cannot expect to rely on conventional international rules that are applicable in the case of treaty conflict. As, according to the ECJ, the EC and EU Treaties are no 'ordinary' agreements, from a Community perspective these rules are simply not relevant. Accordingly, in the event of conflict, Community law, at least in the case of subsequent agreements, will in principle prevail. From the point of view of international law, however, this might be a wholly different matter. As has been recently explored in a study by Klabbers, it is possible to think of several ways – notably through applying article 30 VCLT – in which international law would come up with a different answer than European law.¹⁹⁵ For the apparent neglect of its international surroundings, Klabbers compares the ECJ with an 'ostrich', because, by having created 'a world where treaty-conflict is non-existent', it aims 'to avoid problems by sticking its head in the sand (...)'.¹⁹⁶ This would also resound in the various techniques that are used by the Member States and the Community when concluding treaties with third parties to ensure the continued application of the Community regime *inter se*, in particular the so-called disconnection clauses.¹⁹⁷

¹⁹¹ See Schütze, *op. cit.* note 42 *supra*, at 430-437.

¹⁹² *Ibid.*, at 437.

¹⁹³ Cf. article 4 of Decision 2004/246/EC invoked in *Mesquer*, which states that the 'Member States shall, at the earliest opportunity, use their best endeavours to ensure that the Supplementary Fund Protocol, and the underlying instruments, are amended in order to allow the Community to become a Contracting Party to them.'

¹⁹⁴ See Case C-459/03, *Commission v Ireland* [2006] ECR I-4635 (*Mox-plant*).

¹⁹⁵ Klabbers, *op. cit.* note 39 *supra*, at 178-183.

¹⁹⁶ *Ibid.*, at 219.

¹⁹⁷ *Ibid.*, at 219-225.

In light of this alleged ‘parochialism’, Klabbers further considers if it would not be more credible to take a ‘domestic’ approach to the issue.¹⁹⁸ Indeed, given the Court’s thesis that Community law forms an integral part of the legal orders of its Member States, this might be a fair point. True to its claim to autonomy, the Community in many ways behaves more like a federal polity than an international organisation. But in matters concerning treaty conflict, the ECJ seems to put its internationalist cap back on. As a result, a collision between a European norm and a posterior Member State agreement is treated according to the dual assumption that, first, this amounts to an infringement by a Member State of its commitment under article 10 EC, as an expression of the *pacta sunt servanda* rule, to honour its obligations under EU law, and that, second, these obligations always prevail over a competing agreement. This however looks like the Community wants to eat the cake and have it too. For that reason, Klabbers suggests to treat a piece of Community legislation in such a case as purely internal law, which, in turn, would prevent Member States from invoking their treaty obligations under the EU towards third parties.¹⁹⁹ Moreover, the Community, as the federal layer of government, would be forced by international law to enable the Member States to uphold their commitments on the international plane, as long as these were within their competence to enter into.

Again, there might be some truth in this; taking the Court’s autonomy thesis at face value would, as mentioned, imply that Community law is curtailed by international law rather than that the latter allows for unrestricted passage of the former. Yet the problem with this reading is that it glosses over the fact that ascertaining what is within the competence of the Member States to enter into is exactly what constitutes one of the main problems that marks the EU’s external relations debate. Constitutional law of federal states will, by providing for some kind of authorisation mechanism, as a rule, not allow members to conclude agreements in contravention of federal competences.²⁰⁰ But such a mechanism does not exist in Community law and, at any rate, would not solve the fact that the EU in many instances is not allowed to replace the Member States as an international partner as a matter of international law. As it departs from the Member State plane, another comment is that the federal vision, arguably inherent in the ECJ’s doctrine on the special nature of EU law, is not something that is shared by a majority of Member States; or, at least, by their national courts. So, even if the EU, from a pan-European perspective, to a large extent seems to conform to federalist principles – indeed, perhaps closer resembles a ‘true’ federation than most federal states²⁰¹ – a domestic analogy may turn out to be problematic. Nonetheless, as the EU in legal substance moves further and further away from its original interna-

¹⁹⁸ Ibid., at 194-198.

¹⁹⁹ Article 27 VCLT.

²⁰⁰ Cf. *supra*, note 2.

²⁰¹ See *supra*, note 147.

tionalist blueprint, drawing upon federalist theory and experience appears to be a promising avenue for further consideration.²⁰²

7 CONCLUSIONS

The European Union is often considered and portrayed as a complex institutional structure, on which it is hard to put a label. Conceptually, however, things may not be so difficult to grasp as they seem. Anyone who takes a step back from the debate on networking and multilevel governance, sees a federally structured entity, which, as regards its basic outlook, does not differ that much from federal projects of the late eighteenth and nineteenth century. Just as the early US and the different stages towards German unification, the EU constitutes a polity that accommodates competing claims to normative, constitutional authority. And just as its historical counterparts, the EU may be seen as an enterprise that is both committed to overcome fragmentation of the several constitutional identities of its constituent members and to safeguard these identities by its overarching structure. Despite the inherent tensions in these observations, from a legal-theoretical point of view there is nothing notably particular about this. Indeed, the essence of a federation is that it is founded on contradictory premises. What is different and unique about the Community, though, is the inverse choice of policy areas and competences that have been attributed by the states to the federal – or, if you like, supranational – level. Whereas earlier federal projects were, *grosso modo*, always defined by a transfer of typical external relations powers, such as the power to declare war and the power to conclude treaties, the Community, in contrast, was originally mostly endowed with competences that related to internal matters. Only with support of the ECJ did it to an important extent succeed in matching up its internal competences with corresponding external competences. However, even if over the years the EU's powers to act internationally have been expanded significantly, this choice of substance actually may have been crucial in preserving its federal character. As the exercise of external powers often tends to spill over to the internal division of powers, the bestowal of such powers in a plenary and exclusive way on federal entities in the past, arguably forms an important explanation why these entities eventually evolved into full-blown states that, though still federal in name, nowadays to a large extent behave as unitary actors.²⁰³

²⁰² Cf., generally, e.g. Armin von Bogdandy, 'The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty', (2000) 6 *Columbia Journal of European Law* 27; Stefan Oeter, 'Federalism and Democracy', in: von Bogdandy and Bast, *op. cit.* note 127 *supra*, at 53; Schütze, *op. cit.* note 152 *supra*.

²⁰³ See Weiler, *op. cit.* note 2 *supra*, at 167-168, who observes that in the 'very organization as a "state" is implicit a unitary ethos.' 'Indeed', he continues, 'historically the external environment has been one of the cardinal factors which can explain federal *statal* evolution. So much so that it could be argued that this ability to face the outside world as *one* with the concomitant suppression *de jure* or *de facto* of the member states' international personality or capacity is a constituent and perhaps even definitional element which at least historically distinguished the federal state from other federal entities.'

Alternatively, the incongruence between internal and external powers that characterizes the Community also causes conceptual problems. Although the EU has evolved into a mature international actor, concluding treaties on a wide range of issues, its Member States still retain the autonomous capacity to act internationally on matters that fall outside the EU's jurisdiction or that relate to shared competences. In addition, article 307 EC protects Member State agreements that were concluded before the Treaty's entry into force in 1958. As this working paper has sought to explore, difficulties may arise if the Community, due to the grant of an internal competence, chooses to regulate on an issue that touches upon something that has already been covered or is afterwards covered by a Member State agreement. According to the ECJ's doctrine, in the event of a clash, such an agreement cannot affect the validity of European law, as this commitment is not binding upon the Community and, consequently, no integral part of the EU legal order. This may resonate at the international level, however, since the Member State(s) in question would incur liability *vis-à-vis* third parties for breach of contract. Even if international responsibility is a common feature of a system that is horizontally ordered, and the question which obligation has to gain precedence is inevitably somewhat political in nature in the absence of specific rules regulating treaty conflict, the normative tension that such a conjunction creates is apparent. Starting from the premise that the Community forms an autonomous legal order, untied from the order of public international law, the Court, in order to protect the uniformity and integrity of EU law, fences off the EU legal order from the international scene in such a way that, as matter of EU law, conflict becomes practically non-existent. It will simply apply European law and expect this to prevail. Yet in doing so, the ECJ relies on what is basically an international law principle; that Member States have to honour their obligations under the Treaties.

This dilemma presented itself recently in two cases before the ECJ: *Intertanko* and *Kadi*. Although different in many respects, these decisions not only illustrated that there are clear limits to what the Community can absorb, but also showed that international norms, ultimately, have to bow for the constitutional core of the EU legal order. Because of this, some commentators have argued that *Intertanko* and *Kadi* break with earlier case-law on the interaction between European and international law. However, despite that earlier case-law's monistic outlook, it is submitted that this is not the case. As is evident from the way the Court handles external norms that are binding upon the Community, the EU legal order has probably always inhaled distinct dualist features. In fact, in a certain way the judgments, especially *Kadi*, can be regarded as the fulfilment of the promise of *Van Gend & Loos* and *Costa/ENEL*, according to which the validity of Community secondary norms, in the end, can only be judged against their own frame of law. Admittedly, in a world that is increasingly fragmented one cannot be sure that things would have turned out differently in *Intertanko* and *Kadi* if the EU would be considered a self-contained regime of international law. Crucial, however, is that the Court's constitutional way of reasoning does not seem to leave much room for manoeuvre. Again, this is most visible in *Kadi*, where the autonomous nature of the Com-

munity shut the door for the effects of UN law. Yet it is also apparent in *Intertanko*, where the ECJ did not show itself to be impressed by the fact that the applicants asked for judicial review in light of an agreement to which all 27 Member States were parties and which was expressly implemented in Community law.

Although from a purely European perspective the choices the ECJ made in *Intertanko* and *Kadi* may have been legitimate, one does, in view of the ramifications of both judgments internationally, nonetheless wonder if the restrictive approach of the Court cannot be brought more in line with the international obligations of its Member States. After all, given its repeated vow to respect international law this would appear a desirable course of action. As it does not adequately account for the ratio underlying the ECJ's distinction between binding and non-binding norms, it was contended that the theory of legal pluralism, as a normative explanation, does not offer a satisfactory way out. More convincing, it was suggested, is to seek recourse to a concept that is usually discarded as an explanatory account of the Community legal order: the notion of sovereignty. As it implies the creation of an original authority, the Court's autonomy thesis resembles sovereignty in a fundamental way. The former concept does not appear to meet the demands that are attached to the latter on the international plane though. Whereas states, due to their sovereign nature, cannot pull out of the general frame of international law, it looks like the ECJ uses the Community's autonomy to withdraw from the operation of international law. This weakens the legitimacy of the EU. Thus, when a basis can be found that enables the Community to more actively embrace the international legal order, not only international law would benefit, but also the credibility of the concept of EU autonomy.

Arguably, a rationale to accord binding status to agreements not entered into by the Community itself is comprised in the notion of legal succession. Since it does not seem very realistic to expect the Community to fully substitute the Member States on the international plane, it was submitted to focus on legal succession as a matter of European law; that is, aiming at preventing conflict, while leaving the international obligations of the Member States intact. In order not to harm the uniformity and integrity of Community law, crucial as regards the viability of such a self-binding posture is not so much whether a Community competence expressly provides for the power to act externally, but if the legislative organs of the EU can be said to have implemented a Member State commitment into the EU legal order. Yet if this can be established, there is no good reason why the ECJ should not extend its jurisdiction for the purposes of judicial review. To be sure, this solution does not cover the whole range of Member State agreements that, though concluded in good faith, risk colliding with EU law. But as the Member States increasingly coordinate their external efforts, the relevance of such a posture by the Court will only increase. Moreover, materially self-binding the Community appears to constitute a middle course befitting the EU's typical federal structure. Lacking a strict doctrine or mechanism that can avert conflict, this may be as good as it gets. Then again, to adopt such a doctrine or mechanism might be contrary to the spirit of federalism anyway.