

**THE 'PRIMACY' AND 'DIRECT EFFECT' OF EU INTERNATIONAL AGREEMENTS**

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*The rules on invoking EU norms before the Court of Justice and Member State courts are at the core of EU constitutional law. International agreements binding on the EU form an integral part of EU law and have primacy over inconsistent secondary EU legislation. Moreover, they also have primacy over inconsistent Member State law. This article aims to investigate, whether such primacy is capable of having effects independent of direct effect or it needs to be triggered by some form of 'direct effect' of the international agreement.*

## I. INTRODUCTION

The evolution of the relationship between EU law and national law involves a separation between the two key concepts of direct effect and primacy.<sup>1</sup> The ways in which these concepts interrelate has puzzled authors<sup>2</sup> and Advocate Generals<sup>3</sup> over the past decades, and ultimately affect the rules on invoking EU law, which are at the core of EU constitutional law.<sup>4</sup>

The rules on invoking international agreements which are binding<sup>5</sup> on the EU ('EU international agreements') are even less clear and subject to a fair amount of confusing and contradictory case-law. The primacy and direct effect of international agreements are part of the more general debate on how the international, EU and Member State legal orders interact. Such questions reflect the tension between the necessity to preserve the autonomy of EU law and the willingness of the EU to abide by its international obligations.<sup>6</sup> In recent years the interaction between the international and domestic legal orders has outgrown the traditional confines of *monism* and *dualism* and is centred more on the constitutionalist/pluralist debate.<sup>7</sup> According to the

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<sup>1</sup> P.V.F. Regueiro, *Invocability of Substitution and Invocability of Exclusion: bringing legal realism to the current developments of the case-law of "horizontal" direct effect of directives*, Jean Monnet Working Paper 7/02 (2002), 2 <http://centers.law.nyu.edu/jeanmonnet/archive/papers/02/020701.pdf>, (accessed 1 June 2014).

<sup>2</sup> M. Lenz, *Horizontal what? Back to basics*, 25(5) E.L.R. 509 (2002); Regueiro, *supra* n. 1; M. Dougan, *When Worlds Collide! Competing visions of the relationship between direct effect and supremacy*, 44 C.M.L.R. 93 (2007); K. Lenaerts and T. Corthaut, *Of Birds and Hedges: the role of primacy in invoking norms of EU law*, 31(3) ELR 287 (2006); E. Muir, *Of Ages In – And Edges Of – EU Law*, 48 C.M.L.R. 39, 61 (2011).

<sup>3</sup> AG Saggio in Joined Cases C 240-44/98, *Océano Grupo v. Rocío Murciano*, [2000] ECR I-4941, paras 37-39; AG Léger in Case C-287/98, *Luxembourg v. Linster and others*, [2000] ECR I-6917, paras 56-58; AG Kokott in Joined Cases C-387/02, 391/02 & 403/02, *Berlusconi and others*, [2005] ECR I-3565; AG Bot in Case C-555/07, *Küçükdeveci* [2010] I-365, paras. 63-64, with reference to D. Simon, 'Synthèse générale', *Les principes communs d'une justice des États de l'Union européenne, Actes du colloque des 4 et 5 décembre 2000*, La Documentation française, Paris, 2001, 331.

<sup>4</sup> Lenaerts and Corthaut, *supra* n. 2, 289.

<sup>5</sup> The EU can become bound by an international agreement, even when it is not a party to it, through 'functional succession' or the 'doctrine of delegation'. See Joined Cases 21 to 24/72, *International Fruit Company*, [1972] ECR 1219, paras 14-18 and Case C-439/01, *Libor Cipra*, [2003] ECR I-745, paras 23-24. R. Van Rossem, *The EU at Crossroads: A Constitutional Inquiry into the Way International Law is received within the EU Legal Order*, 78 in *International Law as Law of the European Union* (Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel eds., Brill/Nijhoff 2012).

<sup>6</sup> AG Jääskinen in Joined cases C-402/12 and C-403/12 P, *Vereniging Milieudefensie*, [2014] Not yet reported, para 1 (French version).

<sup>7</sup> R.A. Wessel, *Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach* in Cannizzaro, *supra* n. 5, 9-10.

new “composite” legal order<sup>8</sup> and the *heterarchical* model, no hierarchy exists between different legal orders. Each law is supreme in its own legal order and both legal orders will look to accommodate each other.<sup>9</sup> Advocates of pluralism argue that at least liberal democracies should be able to limit the domestic effects of international norms when they severely conflict with domestic constitutional principles.<sup>10</sup> This article, however, has a *narrower* focus and looks at how primacy and direct effect influence the invocation of EU international agreements in the EU and Member State legal orders, from the moment in time when an international agreement becomes an ‘integral part’<sup>11</sup> of the EU legal order and is in line with the constitutional values of the EU.<sup>12</sup> Once this occurred, will the primacy of the agreement be able to create certain effects by itself or will it just function as a remedy, waiting to be triggered by some other set of conditions? It is the ultimate civil-common law debate, of whether primacy is a principle ready to produce its own effects or a remedy, ready to be triggered.

Given the sheer number of EU international agreements,<sup>13</sup> finding the right set of theoretical tools to explain how primacy and direct effect play a role in the enforcement of international agreements is crucial not only to provide more coherence in the Court of Justice’s (the Court) case-law, but also to ensure the effectiveness of enforcing EU international agreements in the EU and Member State legal orders. In order to achieve the goals of this article the following structure is chosen. Part II provides a short overview of different theoretical models which seek to explain the interplay between primacy and direct effect. Part III then looks at how primacy and direct effect influence the relationship between EU international agreements and EU law. Part IV looks at the same issue, but in order to define the relationship between EU international agreements and Member State law. Before concluding and choosing a theoretical model which could explain the relationship between the primacy and direct effect of international agreements, Part V looks at how

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<sup>8</sup> Leonard F.M. Besselink, *A Composite European Constitution. Een Samengestelde Europese Constitutie* (European Law Publishing 2007).

<sup>9</sup> See M. Avbelj, *Supremacy or Primacy of EU Law – (Why) does it matter?*, 17 *European L. J.* 744 (2011); D. Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, 337 in *Ruling the World? Constitutionalism, International Law and Global Governance* (Jeffrey L. Dunoff and Joel P. Trachtman eds, Cambridge 2009).

<sup>10</sup> A. von Bogdandy, *Pluralism, Direct Effect, and The Ultimate Say: On the Relationship between International and Domestic Constitutional Law*, 6 *Int’l J. Const. L.* 397, 398 (2008).

<sup>11</sup> Case 181/73, *Haegeman v. Belgium*, [1974] ECR 449, paras 5-6; Case 12/86, *Demirel*, [1987] ECR 3719, para 7; Case C-93/02 P, *Biret v. Council*, [2003] ECR I-10497, para 60; Case C-240/09, *Lesoochránárske Zoskupenie (Slovak Brown Bear)*, [2011] 2 CMLR 43, para 30.

<sup>12</sup> See *infra* n. 50-51.

<sup>13</sup> There are currently over 1000 bilateral and multilateral agreements concluded by the EU, <http://ec.europa.eu/world/agreements/default.home.do>, (accessed 1 June 2014).

other effects, such as consistent interoperability and the liability of the EU/Member States for breaches of international agreements could be explained.

## II. THE “CROSS-ELASTICITY” OF PRIMACY AND DIRECT EFFECT

Over the years numerous theories or models were put forward in an attempt to explain the relationship between EU law and national law and the interaction between the doctrines of direct effect and primacy. These attempts include the *primacy* and *trigger* models,<sup>14</sup> inspired by the different approach civil and common lawyers have to principles and remedies.<sup>15</sup> In the words of Muir, these two models depend on the “cross-elasticity” of primacy and direct effect. The primacy model’s narrow definition of direct effect is complemented by a large understanding of the effects of primacy. The trigger model, on the other hand, is based on a much broader understanding of direct effect, coupled with a narrower understanding of primacy.<sup>16</sup> These two models were not only used by academics to explain the ‘incidental effect’ of directives and the *Mangold/ Küçükdeveci*<sup>17</sup> line of cases,<sup>18</sup> but some authors have also used the primacy model to explain the effects of EU international agreements.<sup>19</sup> However, caution should be applied when using models developed to describe the relationships between EU law and Member State law to the world of international agreements.<sup>20</sup>

According to the *primacy model* the primacy of EU law is capable of producing effects independently of the principle of direct effect, which is understood in its narrow sense of conferring EU rights on private parties. The consequences of primacy are the duty of consistent interpretation, the doctrine of State liability and an EU norm’s exclusionary effect.<sup>21</sup>

The initial ideas behind this model have their roots in the French perception of direct effect and how in French administrative law the provisions of EU law were also used in order to review

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<sup>14</sup> Muir refers to them as the “unitary” and “dual” models. See Muir, *supra* n. 2, 44.

<sup>15</sup> Dougan, *supra* n. 2, 932.

<sup>16</sup> Muir, 42-43.

<sup>17</sup> Case C-144/04, *Mangold*, [2005] ECR I-9981; Case C-555/07, *Küçükdeveci*, [2010] ECR I-365.

<sup>18</sup> Muir, *supra* n. 2, 44-47.

<sup>19</sup> Lenaerts and Cortbaut, *supra* n. 2, 298-300; K. Lenaerts and T. Cortbaut, *Towards an Internally Consistent Doctrine on Invoking Norms of EU Law*, 508 in *The Coherence of EU Law: The Search for Unity in Divergent Concept* (Sacha Prechal and Bert Van Roermund eds., Oxford 2008). The authors apply the ‘primacy’ model to the WTO case-law.

<sup>20</sup> A criticism is that neither model offers any resolution to sovereignty and competency problems, such as the circumstances under which national courts might disregard the supremacy of EU law. See Dougan, *supra* n. 2, 935 in fn. 16. On this issue See Avbelj, *supra* n. 9.

<sup>21</sup> *Ibid.*, 42.

the behaviour of the State or public authorities for its compatibility with EU law.<sup>22</sup> The French author Simon argued that as a result of the principle of primacy, national courts have an obligation to disapply national rules that are incompatible with EU rules even if the provisions in question have not direct effect in its narrow sense, and made a distinction between an EU norm's *exclusionary* and *substitutionary* effects.<sup>23</sup> This distinction was then taken up by AG Saggio<sup>24</sup> and developed further by AG Léger, according to whom the 'practical effect' of EU law depends on the claims of the parties and it has to be seen whether the individual seeks to *substitute* or *exclude* the application of national law?<sup>25</sup>

The difference between *substitution* and *exclusion* boils down to the idea of "legal vacuums"<sup>26</sup> and existing rights. In case of *substitution* when a private party invokes the EU norm, the old right of national law is displaced by the new EU right. Because the right contained in the higher EU norm is completely foreign to the national legal system, setting aside the incompatible national rules or relying on consistent interpretation<sup>27</sup> will not fill the existing legal "gap".<sup>28</sup> Therefore, the traditional conditions of the EU norm being sufficiently clear, unconditional and precise ('traditional direct effect criteria') are necessary in order to create the new right in national law. In case of *exclusion* due to the principle of primacy, the old national right is set aside and the remaining legal 'gap' is covered by already existing rights and obligations of national law.<sup>29</sup> Because no new EU right has to be introduced into national law, the afore-mentioned traditional direct effect criteria are not needed. However, knowing when a party relies on an EU norm for the purposes of substitution or exclusion is difficult to ascertain and readers familiar with common law might view this distinction as too formal, arbitrary and even artificial.<sup>30</sup>

By contrast, the *trigger model* sees primacy as little more than a remedy to be administered by national courts when resolving a dispute involving EU law, and it is the direct effect of a norm that 'triggers' the remedy provided by primacy. While the primacy model restricts the concept of 'direct effect' to the creation of new subjective EU rights, the trigger model favours a *broadier concept of direct effect*, which encompasses all situations in which EU norms can produce independent effects

<sup>22</sup> S. Prechal, *Does Direct Effect Still Matter?*, 37 C.M.L.R. 1047, 1055 (2000).

<sup>23</sup> D. Simon, *La Directive Européenne* (Editions Dalloz-Sirey, 1997).

<sup>24</sup> Opinion AG Saggio, *supra* n. 3 – The *exclusionary effect* arises whenever an incompatible national rule "comes into consideration for the purpose of resolving a dispute, irrespective of the public or private status of the parties concerned", para 37.

<sup>25</sup> Opinion AG Léger, cited *supra* n. 3, para 57.

<sup>26</sup> Dougan, *supra* n. 2, 938.

<sup>27</sup> Lenaerts and Corthaut, *supra* n. 2, 311.

<sup>28</sup> Dougan, *supra* n. 2, 938.

<sup>29</sup> *Ibid.*

<sup>30</sup> Regueiro, *supra* n. 1, 30.

within national law, be it the creation and enforcement of subjective individual rights or judicial review.<sup>31</sup> Furthermore, the often arbitrary and formalistic divide between *substitution* and *exclusion*<sup>32</sup> is irrelevant to the trigger model. Advocates of this model acknowledge that the duty of consistent interpretation, State liability and direct judicial review are a consequence of the Member States' duty of loyal cooperation to give full effectiveness to EU law.<sup>33</sup>

As to the practical difference between these two models, the main difference concerns the conditions needed to prove 'direct effect'. Whilst the traditional direct effect criteria are required by both models, the situations which amount to direct effect are different. Under the primacy model the traditional direct effect criteria are only needed in case of *substitution*. On the other hand, the trigger model requires the fulfilment of these conditions both in cases when individuals seek to enforce a subjective right granted by EU law and in cases when they challenge the validity of national law.<sup>34</sup>

### III. EU INTERNATIONAL AGREEMENTS AND EU LAW

#### 1. A different version of 'primacy' and 'direct effect'

##### a. The 'primacy' of EU law v. the 'primacy' of international agreements

Primacy is not a feature original to the EU legal order. What is unique is the way in which the relations are coordinated between the EU and national legal orders.<sup>35</sup> It must be recalled that the primacy of EU law was not included in the EEC Treaty<sup>36</sup> and was developed by the Court in a time when a new body of supranational law had to be legitimized in the domestic legal orders of the Member States. It is for this reason that the Court took the original EEC Treaty outside the realm of international law and made it the basis of a "new legal order".<sup>37</sup> The relationship between the EU and its Member States was no longer governed by the rules of public international law, but by

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<sup>31</sup> Dougan, *supra* n. 2, 934.

<sup>32</sup> *Ibid.*, 937-939.

<sup>33</sup> Muir, *supra* n. 2, 43.

<sup>34</sup> *Ibid.*, 44-45.

<sup>35</sup> Luis I. Gordillo, *Interlocking Constitutions – Towards and Interordinal Theory of National, European and UN Law* (Hart 2012), at 16.

<sup>36</sup> A supremacy clause was incorporated in the failed Constitutional Treaty and now the primacy of EU Law is stated in the 'Declaration concerning primacy' included in the Lisbon Treaty, subject to the conditions laid down in the Court's case-law.

<sup>37</sup> Case 26/62, *Van Gend en Loos*, [1963] ECR 1.

constitutional principles of a new and autonomous legal order, capable of penetrating<sup>38</sup> and taking precedence over Member State law.<sup>39</sup> The ‘principle of precedence’ (primacy) showed its true magnitude when the Court held that *any conflicting provisions* of Member State law are rendered automatically inapplicable and Member States are precluded from validly adopting *any new legislation* which would be incompatible with EU provisions.<sup>40</sup> Therefore, the Court came to favour an *absolute* supremacy<sup>41</sup> format under which all law from the EU legal order is superior to the law of the Member State legal orders, regardless of whether the law is existing or has not yet come into force.<sup>42</sup> In general, Member States were and are willing to grant legal authority to EU law as long as it does not violate certain core national constitutional values and the EU does not act outside its competences.<sup>43</sup>

Turning now to international agreements, under article 216(2) TFEU an international agreement concluded by the EU is binding on the EU institutions and the Member States. According to the Court such agreements form an “integral part” of EU law from their entry into force and have primacy over secondary EU law.<sup>44</sup> Therefore, they are situated hierarchically

<sup>38</sup> J. Van Rossem, *Interaction Between EU Law and International law in the Light of Intertanko and Kadi: The Dilemma of Norms Bindings the Member States but not the Community*, XL *Netherlands Yearbook of International Law* 183, 201 (2009).

<sup>39</sup> Case 6/64, *Costa v. ENEL*, [1964] ECR 1141.

<sup>40</sup> Case 106/77, *Simmenthal*, [1978] ECR 629, para 17. See E. Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 *A.J.I.L.* 1, 13 (1978).

<sup>41</sup> See also Avbelj, *supra* n. 9.

<sup>42</sup> Robert Schütze, *European Constitutional Law*, 349 (Cambridge 2012).

<sup>43</sup> Damian Chalmers et. al., *European Union Law*, 204 (2nd ed., Cambridge 2010). See L.F.M. Besselink, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*, 35(3) *C.M.L.R.* 629 (1998); Gordillo, *supra* n. 35, 19; D. Halberstam and Ch. Möllers, *The German Constitutional Court says “Ja zu Deutschland!”*, 10(8) *German Law Journal* 1241, 1258 (2009); A. Von Bodandy and S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 *C.M.L.R.* 1417, 1434 (2011); J. Komárek, *Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII*, 8 *E.C.L.R.* 323 (2012). The most vocal courts have been the German Constitutional Court (GCC) in BVerfGE 73, 339 2 BvR 197/83 (Solange II) and BVerfGE 37, 271 2 BvL 52/71 (Solange I) and the Italian Constitutional Court in Case *Granital*, Decision No 170/1984 and Case *Fragd*, Decision No 232/1989;. The GCC in its *Maastricht* judgment (BVerfGE 89, 155, 188 (1993)) took into account the possibility to review EU law if it was *ultra vires*. The Court also flirted with this idea in its *Lisbon* judgment (BVerfG, 2 BvE/08 (2009)). The recent *Slovak Pensions* case of the Czech Constitutional Court is an unfortunate example of how a Member State court unilaterally decided that the Court of Justice went beyond its competences and acted *ultra vires* when handing down the preliminary ruling. Most recently the GCC made a request for a preliminary ruling to the Court of Justice on the compatibility of a decision of the European Central Bank with several provisions of the TFEU, prior to an *ultra vires* exam. See C-62/14, *Gauweiler and Others*, request for a preliminary ruling, 10 February 2014.

<sup>44</sup> Case C-61/94, *Commission v. Germany*, [1996] ECR I-3989, para 52; Case C-286/02, *Bellio*, [2004] ECR I-3465, para 33; Case C-308/06, *Intertanko v. Secretary of State*, [2008] ECR I-4057, para 42; Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council and Commission (Kadi I)* [2008] ECR I-6351, para 307; Case C-366/10, *Air Transport Association of America*, [2012] 2 *CMLR* 4, para 50.

between the founding Treaties and secondary EU legislation.<sup>45</sup> Being an integral part of EU law, they will also become a source of EU rights.<sup>46</sup> However, international agreements are a product of diplomacy and are drafted as much for political purposes as for legal effect.<sup>47</sup> According to the Court their effects within the EU cannot be determined without taking into account their *international origin*.<sup>48</sup> Besides this, according to the Court the EU legal order is separate from public international law<sup>49</sup> and international agreements must respect the constitutional values of the EU,<sup>50</sup> as well as its internal division of competences.<sup>51</sup> Therefore, the very foundations of EU law can be seen as a form of “super-supreme law”<sup>52</sup> from which no derogations are possible, even in the case of article 351 TFEU agreements, which are only binding on the Member States.<sup>53</sup>

It is interesting to see how the Court uses the same boundaries set up by national constitutional courts to protect the Member State legal orders from the over-intrusion of EU law, in order to shield certain core EU provisions from the intrusion of international law.<sup>54</sup> Furthermore, even though according to the Court all agreements concluded by the EU form an integral part of the EU legal order, the Court allows Member State courts to decide on the effects of those parts of the agreement which fall under exclusive Member State competence.<sup>55</sup> Therefore, at least for the purposes of their effects, it seems that only those parts of mixed agreements form an integral part of EU law which fall under exclusive or shared EU competences.<sup>56</sup>

Based on these preliminary findings it can be said that the *primacy of EU international agreements* and the *primacy of EU law* have differences but also share some common features.

<sup>45</sup> S. Marsden, *Invoking Direct Application and Effect of International Treaties by the European Court of Justice: Implications for International Environmental Law in the European Union*, 60 I.C.L.Q. 737, 742 (2011).

<sup>46</sup> Sz. Gáspár-Szilágyi, *EU International Agreements through a US lense: different methods of interpretation, tests and the issue of 'rights'*, E.L.R., forthcoming October (2014) issue.

<sup>47</sup> A. Glashauser, *Difference and Deference in Treaty Interpretation*, 40 Villanova L. Rev. 25, 30-31(2005).

<sup>48</sup> Case 104/82, *Kupferberg*, [1981] ECR 3644, para. 17; *Biret v. Council*, *supra* n. 11, para 60; Joined Cases C-120/06 P and C-121/06 P, *FIAMM and Fedon v. Council and Commission*, [2008] ECR I-06513, para 108.

<sup>49</sup> *Van Gend en Loos*, *supra* n. 37, page 12; Opinion 1/91, on the conclusion of the EEA Agreement, Recital 21.

<sup>50</sup> *Kadi I*, *supra* n. 44, para 285; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and others v Kadi (Kadi II)* [2013] Not yet reported, para. 67. This approach is extremely similar to the *Solange* approach used by the German Constitutional Court.

<sup>51</sup> Case C-459/03, *Commission v Ireland (Mox Plant)* [2006] ECR I-4635, para 123.

<sup>52</sup> C. Eckes, *Protecting Supremacy from External Influences: a precondition for a European constitutional legal order*, 18(2) E.L.J. 230, 241 (2012). See also Allan Rosas and Lorna Armati, *EU Constitutional Law*, 54-55 (2d ed., Hart 2012).

<sup>53</sup> *Kadi I*, *supra* n. 44, para 304.

<sup>54</sup> See A. Tzanakopoulos, *The Solange argument as a justification for disobeying the Security Council in the Kadi judgments*, in *Kadi on Trial. A Multifaceted Analysis of the Kadi Trial* (Matej Avbelj, Filippo Fontanelli, Giuseppe Martinico eds., Routledge 2014).

<sup>55</sup> C-392/98, *Dior*, [2000] ECR I-11307, para 48; C-431/05, *Merck Genericos*, [2007] ECR I-07001, para 34; *Slovak Brown Bear*, *supra* n. 11, para 32.

<sup>56</sup> See also E. Neframi, *Mixed Agreements as a Source of European Union Law* in Cannizzaro, *supra* n. 5.



From the Court's perspective EU law is a creature of the autonomous EU legal order and as a 'whole' has primacy over any type of national law. Even though international agreements form an integral part of EU law, they are ultimately off-springs of international law and have to respect the autonomy of the EU legal order. Once they become an integral part of EU law, they have primacy over secondary EU law, but are ultimately subjected to the primacy of EU norms of constitutional importance, such as the Founding Treaties and general principles of constitutional importance.<sup>57</sup> However, the primacy of EU international agreements over secondary EU law and the primacy of EU law over Member State law resemble each other. From the Court's perspective EU international agreements are subjected to the constitutional limitations of the EU legal order, but from the perspective of national constitutional courts, EU law is also subjected to the afore-mentioned national constitutional limitations.<sup>58</sup>

b. The 'direct effect' of EU Law v. the 'direct effect' of EU international agreements

The direct effect of EU law has been amply discussed, certain authors viewing it as an outdated concept that causes a high degree of confusion.<sup>59</sup> Other authors praise the concept for its ability to bring under one intelligible field a widening variety of effects, consequences and situations that result from the domestic relevance of EU obligations.<sup>60</sup> Some view it as a package of criteria for selecting an EU norm to be applied or not to a particular case, while others consider it to be concerned with the separation of powers and whether a particular norm is in the province of the judiciary.<sup>61</sup> According to a last view the problem of direct effect is not different from familiar problems of national law. After all, not all national rules can be relied on by individuals and from

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<sup>57</sup> *Kadi I*, *supra* n. 44, para 308.

<sup>58</sup> An interesting, recent development concerns the Agreement on a Unified Patent Court (2013/C 175/01) concluded by 25 Member States (not yet in force), which sets up a European Patent Court (made up of a Court of First Instance, Court of Appeal and Registry). According to article 20 of the Agreement the Patent Court "shall apply Union law in its entirety and shall respect its primacy". Under article 24 the Patent Court can use the Agreement, the European Patent Convention, international agreements, EU regulations and national law as sources of law. However, when using national law, the applicable law shall first be determined "by directly applicable provisions of Union law containing private international law rules."

<sup>59</sup> S. Prechal, *Direct Effect Reconsidered, Redefined and Rejected*, in *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Jolande M. Prinssen and Annette Schrauven eds., Europa Law Publishing 2002).

<sup>60</sup> T. Eijsbouts, 'Direct Effect, the Test and the Terms', in *Ibid.*

<sup>61</sup> In case of the WTO agreement, the Court argues that if the judiciary was empowered to assess the validity of EU measures for their conformity with the WTO Agreement, this would "deprive the legislative or executive organs of the [Union] of the scope for manoeuvre enjoyed by their counterparts in the [Union]'s trading partners". Case C-149/96, *Portugal v Council*, [1999] ECR I-8395, para 46.

not all national norms can individuals derive rights.<sup>62</sup> Academics also differentiate between the *broad* and the *narrow* concepts of direct effect.<sup>63</sup> Thus, according to the former, the concept of direct effect is broader because it allows those provisions to be relied upon, which do not as such create rights. Such provisions can be invoked for other purposes, such as the review of national legislation. The latter concept refers to those provisions that create rights<sup>64</sup> and can be enforced in national courts.<sup>65</sup> The trigger model accommodates both concepts in its notion of ‘direct effect’, while the primacy model’s definition of direct effect only concerns the narrow version.

With regard to the ‘direct effect’ of international agreements, several observations are needed. *First*, as a matter of terminology, just as in the case of the direct effect of EU law, the Court apparently considers the formula “produces direct effects and creates individual rights” to be synonymous with “directly applicable”.<sup>66</sup> For e.g. in a line of cases involving association agreements, the Court held that the provision of an EU agreement is “directly applicable” when, regard being had to the wording, purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.<sup>67</sup> In other cases, the Court refers to the afore-mentioned test but holds that the provisions of the agreement are to be “regarded as having direct effect”.<sup>68</sup> This article will not use the concept of “direct applicability” to refer to a norm’s capacity to create privately enforceable rights or a norm’s capacity to be invoked by private parties, even when no rights are present. This capacity should be reserved for the concept of ‘direct effect’.<sup>69</sup>

*Second*, according to the Court the effects of EU agreements cannot be determined without taking into account their *international origin*. This means that the Court might take into consideration factors, which are not considered when the effects of EU law are concerned, such as:

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<sup>62</sup> D. Edward, *Direct Effect: Myth, Mess or Mystery?*, in Prinssen and Schrauwen, *supra* n. 59, 3-4.

<sup>63</sup> S. Prechal, *Does Direct Effect Still Matter?*, 37 C.M.L.R. 1047, 1050 (2000).

<sup>64</sup> On the issue of ‘EU rights’ see Van Gerven, *Of Rights, Remedies and Procedures*, 37 C.M.L.R. 501, 507 (2000). On the issue of ‘rights’ under EU international agreements, see Gáspár-Szilágyi, *EU International Agreements through a US lense*, *supra* n. 46.

<sup>65</sup> Van Gerven, *ibid*.

<sup>66</sup> The ‘direct applicability’ of EU law can entail different meanings. See J. A. Winter, *Direct Applicability and Direct Effect. Two Distinct and Different Concepts in Community Law*, 9 C.M.L.R. 425, 427 (1972).

<sup>67</sup> *Demirel*, *supra* n. 11, para 14; Case C-262/96, *Sürül*, [1999] ECR I-2685, para 60; Case C-63/99, *Głoszczuk*, [2001] ECR I-06369, para 29; C-257/99, *Barkoci and Malik*, [2001] ECR I-08615, para 30; *Slovak Brown Bear*, *supra* n. 11, para 44.

<sup>68</sup> T-367/03, *Yedas Tarim*, [2006] ECR II-876, para 39.

<sup>69</sup> The author is of the opinion that ‘direct applicability’ should refer to the capacity of a norm to function without domestic transposing measures.

whether the parties have decided on the effects of the agreement,<sup>70</sup> separation of powers concerns or the balancing of domestic policies and external interests of the EU.<sup>71</sup>

*Third*, when it comes to international agreements several hurdles need to be passed in order to prove direct effect. The EU has to be bound by the agreement,<sup>72</sup> the agreement must form an integral part of EU law and if the parties have not decided on its effects, the Court will decide the effects of the agreement.<sup>73</sup> Once the Court is satisfied with these conditions, it will turn to the actual analysis of the international agreement. The Court, to various degrees employs a ‘two-tier direct effect test’,<sup>74</sup> during the course of which it looks at the overall nature and objectives of the international agreement (‘lower threshold test’) and the sufficiently clear, precise and unconditional character of the specific provision (‘traditional direct effect test’). The Court either commences the analysis with the overall nature and objectives of the agreement, in the course of which purposive interpretation takes the centre role; or it starts the analysis with the wording of the specific provision invoked by the claimant, with textual interpretation dominating the analysis.<sup>75</sup> In cases when it followed the latter approach, an overwhelming number of agreements have been granted direct effect.<sup>76</sup> Recent research has also shown that the Court uses either judicial avoidance techniques or maximalist enforcement techniques when faced with the enforcement of EU international agreements.<sup>77</sup> As AG Jääskinen has recently noted, the reality is that different international agreements, such as bilateral trade agreements, association agreements or multilateral agreements, which set out different objectives will also have different effects within the EU legal order.<sup>78</sup>

In conclusion, when looking at the direct effect of international agreements, their international origin is of great importance. This can lead to a set of extra factors to be considered during the direct effect analysis, which otherwise would not appear when the direct effect of EU law is concerned.

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<sup>70</sup> *Kupferberg*, *supra* n. 48, para 17; *Portugal v. Council*, *supra* n. 61, para. 34; *Air Transport Association of America* *supra* n. 44, para 49. See Gáspár-Szilágyi, *EU International Agreements through a US lense*, *supra* n. 46.

<sup>71</sup> *Portugal v. Council*, *supra* n. 61.

<sup>72</sup> *International Fruit Company*, *supra* note 5, para 7; Case C-377/98, *Netherlands v. Parliament and Council*, [2001] ECR I-7079, para 52; *Intertanko* *supra* note 44, para 44; *Air Transport Association of America*, *supra* n. 44, para 52.

<sup>73</sup> *Kupferberg*, *supra* n. 48, para 17; *Air Transport Association of America*, *supra* n. 44, para 49.

<sup>74</sup> A term used by Koutrakos and Schütze. See Panos Koutrakos, *EU International Relations Law*, 241-244 (Hart, 2006); Schütze, *supra* n. 42, 339.

<sup>75</sup> Gáspár-Szilágyi, *EU International Agreements through a US lense*, *supra* n. 46.

<sup>76</sup> Mario Mendez, *The Legal Effects of EU Agreements – Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, 151 (Oxford 2013). Mainly used in the case of association, cooperation and partnership agreements.

<sup>77</sup> *Ibid.*

<sup>78</sup> Opinion AG Jääskinen, *supra* n. 6, para 62.

## 2. EU international agreements and the setting aside of secondary EU law

The primacy and trigger models were mainly employed in order to explain the relationship between EU law and Member State law. International agreements, however, pose a new challenge as the Court is not only faced with the invocation of international agreements against Member State laws and measures, but also against secondary EU legislation. Previous studies have shown that the Court is remarkably resistant to invalidate EU law for its possible non-conformity with international agreements.<sup>79</sup> The next sections will look at whether the international agreements' primacy is sufficient to set aside inconsistent EU legislation, or whether direct effect is also needed. The following sections will focus on vertical proceedings, as horizontal or proceedings between private parties that involve international agreements are discussed in a separate article.<sup>80</sup>

### a. Direct Judicial Review

Article 263 TFEU permits privileged, semi-privileged and non-privileged applicants to bring a direct action of annulment before the Court against any act of the EU institutions, which can culminate in the act being declared void under article 264(1) TFEU.<sup>81</sup> Article 265 TFEU also envisages actions against the EU's failure to act, which merely describes one and the same method of recourse as article 263 TFEU.<sup>82</sup> *Privileged applicants*<sup>83</sup> are deemed to be affected *ex officio* by the EU act<sup>84</sup> which is justified due to the important public interests they are meant to protect.<sup>85</sup> However, this does not mean that the important public interests of the different privileged applicants cannot differ. For e.g., a Member State might launch a direct action of annulment in order to protect its own international obligations under the agreement or its EU obligations under Article 216(2) of the TFEU, if they are affected by applying EU legislation which runs counter to such obligations.<sup>86</sup> *Semi-privileged applicants*<sup>87</sup> also have the possibility to challenge EU acts, but

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<sup>79</sup> J. Klabbers, *The Validity of EU Norms Conflicting with International Obligations*, in Cannizzaro, *supra* n. 5, 125.

<sup>80</sup> Sz. Gáspár-Szilágyi, *The 'Horizontal Direct Effect' of EU International Agreements*, currently under review by European Foreign Affairs Review.

<sup>81</sup> Alan Dashwood, Michael Dougan, Barry Rodger, Eleanor Spaventa and Derrick Wyatt, *Wyatt and Dashwood's European Union Law*, 253 (6d ed., Hart 2011), at 153.

<sup>82</sup> See Alexander H. Türk, *Judicial Review in EU Law* (Edward Elgar Publishing, 2009).

<sup>83</sup> Member States, the European Parliament, the Council or the Commission.

<sup>84</sup> Schütze, *supra* n. 42, 269.

<sup>85</sup> Chalmers, *supra* n. 43, 413.

<sup>86</sup> Sz. Gáspár-Szilágyi, *EU Member State Enforcement of 'Mixed' Agreements and Access to Justice: Rethinking Direct Effect*, 40(2) Legal Issues of Econ. Int. 163, 183 (2013).

<sup>87</sup> The Court of Auditors, the European Central Bank and the Committee of Regions.

only for the purpose of protecting their prerogatives.<sup>88</sup> On the other hand, *non-privileged* applicants must show that they have a specific interest in bringing proceedings, besides the already restrictive conditions of article 263(4) TFEU.<sup>89</sup> This means that they must establish that the annulment of the EU act will remove its adverse effects on their legal position.<sup>90</sup>

Due to these restrictive conditions, direct actions of annulment brought by private parties against EU legislation for their conformity with international agreements are fairly rare. However, indirect review through article 267 TFEU is common and is handled in the next section. In *Opel Austria*<sup>91</sup> a private company supported by the Austrian government brought an action for annulment against a Council regulation for its alleged breach of the EEA Agreement. The regulation was adopted after the signature of the Agreement, but before its entry into force. Even though the decisive factor in the case was the possibility of the traders' to rely on the principle of protection of legitimate expectations,<sup>92</sup> the General Court also looked at the alleged infringement. It first held that agreements concluded by the EU in conformity with the Treat(ies) bind its institutions and the Member States, and form an integral part of the EU legal order from their entry into force. It then held that the provisions of the agreement could have direct effect if they were unconditional and sufficiently precise.<sup>93</sup> Interestingly, the General Court did not actually look at whether the specific provisions met this test, but went on to interpret them in light of both the purpose and the objectives of the Agreement.<sup>94</sup> One could argue that the claimant was seeking to *substitute* the less favourable EU provisions with the more favourable rights granted by the international agreement. Thus, the traditional direct effect criteria were needed in order to introduce a new set of rights into the EU legal order. However, it could also be argued that regardless of whether the claimant was seeking exclusion or substitution, the traditional criteria had to be met in order to trigger the primacy of the international agreement over secondary EU law.

Later in *Petrotub* the claimants relied on the Europe Agreement with Romania in order to challenge the validity of several articles of a regulation. The General Court, however, rejected the first plea of the claimants, without finding it necessary to examine “the question whether article 30

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<sup>88</sup> Article 263(3) TFEU.

<sup>89</sup> For recent developments in this area, See C-583/11 P, *Inuit et al v. Parliament and Council* [2013] Not yet reported.

<sup>90</sup> Anthony Arnall, *The European Union and its Court of Justice* (2nd ed, Oxford 2006), 80; See also Case T-183/94, *Micheli and Others v. Commission*, [2000] ECR II-28.

<sup>91</sup> *Opel Austria v. Council* (Case T-115/94) [1997] E.C.R. II-39.

<sup>92</sup> *Ibid.*, para 94.

<sup>93</sup> *Ibid.*, para 101.

<sup>94</sup> *Ibid.*, para 106.

of the Europe Agreement may be relied upon”.<sup>95</sup> During the appellate proceedings, the applicants also alleged that the regulation was not in conformity with the WTO Anti-Dumping Code.<sup>96</sup> As it is known, the WTO Agreements had been previously denied direct effect. However, the Court remedied the lack of direct effect, by invoking the ‘implementation principle’, according to which an agreement can be relied on in order to review EU legislation, even if it lacks direct effect, if the EU intended to implement a particular international obligation through the challenged legislation.<sup>97</sup> The implications of this will be discussed in more detail in Sec. III.2(c).

Most recently AG Jääskinen seems to have followed the trigger model in a case involving the review of a regulation in light of the Aarhus Convention. Resurrecting the Court’s holdings in *Biotech*<sup>98</sup> (*infra* in more detail), he distinguished between direct effect in the sense of creating subjective rights (narrow) and direct effect in the sense of invoking the international agreement as a benchmark for the judicial review of secondary EU legislation (broad).<sup>99</sup> Thus, in cases of judicial review, the absence of subjective rights should not be an obstacle, especially when environmental NGOs act in the public interest. However, the international provisions being invoked would still have to satisfy the traditional direct effect criteria.<sup>100</sup> The arguments put forward by the AG fit into the trigger model, which requires the traditional direct effect criteria to be satisfied for both broad and narrow direct effect. On the other hand, the primacy model only recognizes narrow direct effect, while the possibility to seek judicial review is a consequence of primacy.

Turning now to proceedings involving privileged applicants, in *Parliament v. Council*<sup>101</sup> (European Development Fund) the Parliament relied on the Fourth Lomé Convention<sup>102</sup> to seek the annulment of a financial regulation. The judgment does not mention any condition of ‘direct effect’ and neither were there structural features of the agreement that could have denied Parliament the possibility to rely on the Convention. Advocates of the primacy model could argue that in this case the Parliament sought the exclusion of secondary EU legislation and did not seek to introduce a new set of rights granted by the Convention. Thus, the traditional conditions of direct effect were not needed as primacy was capable of having its own independent effects. However, as I have argued in a previous article, when privileged applicants rely on an international agreement, narrow direct

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<sup>95</sup> Joined Cases T-33/98 and T-34/98, *Petrotub and Republica v Council*, [1999] ECR II-3837, para 51.

<sup>96</sup> Case C-76/00, *Petrotub v. Council and Commission*, [2003] ECR I-79, para 22.

<sup>97</sup> *Ibid.*, para 54.

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

<sup>99</sup> *Ibid.*, para 77

<sup>100</sup> *Ibid.*, para 79.

<sup>101</sup> Case C-316/91, *Parliament v. Council* [1994] ECR I-653.

<sup>102</sup> Fourth ACP-EEC Convention (Lomé, 1989).

effect should not be a precondition, as direct effect was mainly developed in order to secure the enforcement of EU law by private parties.<sup>103</sup> According to the trigger model (in the EU law Member State law context), certain effects that are produced by EU law are a result of the Member States' duties of loyal cooperation to give full effectiveness to EU Law.<sup>104</sup> It could be argued that in the international law-EU law context, article 216(2) TFEU prescribes the duty of the EU institutions to carry out the obligations found in an international agreement. Thus, the effects of the agreement in this case can have as a source the obligations of the EU institutions to ensure the effective enforcement of the agreement.

The situation became more complicated in *Germany v. Council* (Bananas I)<sup>105</sup> and *Portugal v. Council*,<sup>106</sup> where the Court made it clear that in order for a Member State to challenge the validity of secondary EU legislation in light of the GATT or WTO Agreement, the same special features of the agreements that barred an individual from invoking it, would also apply to Member States.<sup>107</sup> According to Lenaerts and Corthaut the WTO cases have hardly anything to do with the absence of direct effect and more to do with another lower limit for invoking a norm, whereof the validity of a lower EU norm is challenged.<sup>108</sup> Only when this initial lower limit test is passed, can the Court look at the traditional direct effect criteria. Therefore, the problem is not that the provisions are not intended to confer rights on individuals, but whether the international norms are intended to be binding on the EU institutions adopting the contested act.<sup>109</sup> According to this view, the WTO Agreements cannot serve as a benchmark for the review of secondary EU law, even if international agreements are undoubtedly binding on the entire EU, because for the EU they seem as rather political, soft law and not legal commitments.<sup>110</sup>

However, such an interpretation is meant to create instability for the effectiveness of the enforcement of EU international agreements. It means that even though an agreement is binding on the EU, both under EU and international law, some agreements are more binding than others.<sup>111</sup> First, it must not be forgotten, that under article 216(2) TFEU *all* international agreements

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<sup>103</sup> Gáspár-Szilágyi, *EU Member State Enforcement of 'Mixed' Agreements*, *supra* n. 86, 181-182.

<sup>104</sup> Muir, *supra* n. 2, 43.

<sup>105</sup> Case C-280/93, *Germany v. Council*, [1994] ECR I-04973.

<sup>106</sup> *Portugal v. Council*, *supra* n. 61.

<sup>107</sup> *Ibid.*, para 109; *Ibid.*, para 27.

<sup>108</sup> Lenaerts and Corthaut, *supra* n. 2, 299.

<sup>109</sup> *Ibid.*, 300.

<sup>110</sup> *Ibid.*

<sup>111</sup> Some scholars define a 'spectrum of legality' of treaties, ranging from 'soft' law agreements to fully binding ones. Other scholars refute the idea of 'soft law' treaties, implying that treaties (unlike for e.g. political commitments) are chosen as such for their power to create legal obligations. See D.B. Hollis, *Defining Treaties*, 18-19 in *The Oxford Guide to Treaties* (Duncan B. Hollis ed., Oxford 2012).

concluded by the EU *are binding* on the EU institutions and the Member States. *Second*, discerning whether the contracting parties intended to conclude a political rather than a legal commitment is not always easy.<sup>112</sup> According to the bodies meant to interpret and uphold WTO law, the WTO Agreement is binding on the contracting parties.<sup>113</sup> Moreover, the EU through the Commission has previously committed itself to complying with its WTO obligations.<sup>114</sup> Thus, the WTO agreements are more than just a political commitment. *Third*, as mentioned, the Court will take into consideration the international origin of international agreements when granting them effects. It uses two different approaches when analysing their direct effect. It either commences with the ‘lower threshold’ test mentioned by Lenaerts and Corthaut, looking at the nature, structure and objectives of the agreement and then turns to the sufficiently clear, precise and unconditional nature of the specific provision. However, in other cases the traditional direct effect criteria of a specific provision come first and the nature or objectives of the agreement are only mentioned after the first test is conducted.<sup>115</sup> Thus, both the ‘lower threshold’ test and the traditional direct effect test form an integral part of the overall ‘direct effect’ assessment of international agreements.

The judgment in *Biotech* may shed some light on this case-law. Even though the Court did not look at the traditional direct effect criteria, it still conducted the first leg of the two-tier test, when it argued that unlike the WTO Agreements, the CBD Agreement was not strictly based on reciprocal and mutually advantageous arrangements.<sup>116</sup> It then held that even if an agreement does not have direct effect “in the sense that they do not create rights which individuals can rely on directly before the courts”, this does not preclude the review of the obligations of the [EU] under an international agreement.<sup>117</sup> Moreover, the Court held that the action of the Netherlands was directed more towards the obligations imposed by the directive on Member States which would lead to the breach of their international obligations.<sup>118</sup>

With this in mind, it seems that the Court favoured an approach similar to the trigger model. According to this model, direct effect encompasses not only the narrow concept of creating subjective rights, but also the capacity of a norm to be invoked as grounds for judicial review. In a

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<sup>112</sup> For e.g. in the United States the Department of State has issued guidelines for internal purposes to determine when an international agreement is legally binding. See Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate* (2001), 50.

<sup>113</sup> WTO 22 December 1999, WT/DS152/R, *United States – Sections 301-310 of the Trade Act of 1974*, paras 7.35-7.44; See also Zonnekeyn, *The Status of WTO Law in the EC legal order*, 34(3) *Journal of World Trade* 111 (2000).

<sup>114</sup> *Biret v. Council*, *supra* n. 11, para 61.

<sup>115</sup> Gáspár-Szilágyi, *EU International Agreements through a US lense*, *supra* n. 46.

<sup>116</sup> *Netherlands v. Parliament and Council*, *supra* n. 72, para 53

<sup>117</sup> *Ibid.*, para 54.

<sup>118</sup> *Ibid.*, para 535.



traditional EU/national law setting, a higher EU norm is rendered ‘cognisable’ by the courts if it is sufficiently clear, precise and unconditional and the creation of individually enforceable rights is not always a precondition.<sup>119</sup> Given the international origin of agreements to which the EU is also a party, the process of rendering them ‘cognisable’ before the Court is longer and more complex and will include to various degrees the lower threshold test focusing on the nature, structure and objectives of the agreement. In the case of non-privileged applicants, it seems that both the lower threshold test and the traditional direct effect test are needed in order for them to be able to rely on the agreement. In the case of privileged applicants, the lower threshold test may suffice or sometimes it is not even mentioned. However, under the trigger model, the obligation to give full effectiveness to EU law and thus EU international agreements, which form an integral part of it, is capable of producing certain effects.

b. Indirect review through Article 267 TFEU

The review of EU legislation can also be sought indirectly, through the preliminary ruling mechanism.<sup>120</sup> This procedure has played a key role in defining the relationship between national courts and the European courts, as well as the reach of EU law when it comes into conflict with national law.<sup>121</sup> Concerning international agreements, it has been the most important procedure under which seminal judgments<sup>122</sup> regarding their direct effect were laid down.

According to AG Kokott, individuals have a limited possibility to invoke international agreements before the courts as a benchmark to review the validity of EU acts.<sup>123</sup> This can be explained by reference to the objective of affording legal protection to individuals; in general under EU law, individuals can only enjoy legal protection, in so far as it is necessary to safeguard their guaranteed rights and freedoms.<sup>124</sup> However, in a limited number of cases private parties do not seek to safeguard their rights and freedoms, but seek to act in the public interest. As mentioned, AG Jääskinen is of the opinion that environmental NGOs act in the public interest and the creation

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<sup>119</sup> *Ibid.*

<sup>120</sup> Although an alternative route to article 263 TFEU in order to challenge the validity of EU acts, the Court has imposed limits on the availability of this procedure. Case C-188/92 *TWD* [1994] ECR I-833. *See also* Dashwood et al., *supra* n. 81, 225.

<sup>121</sup> Paul Craig and Grainne De Búrca, *EU Law: Text, Cases and Materials* (4th ed, Oxford 2008), 461.

<sup>122</sup> *International Fruit Company*, *supra* n. 5; *Kupferberg*, *supra* n. 48; *Demirel*, *supra* n. 11; *Intertanko*, *supra* n. 44.

<sup>123</sup> AG Kokott in Case C-366/10, *Air Transport Association of America*, para 73.

<sup>124</sup> *Ibid.*

of subjective rights should not precondition their reliance on international agreements in order to review the legality of secondary EU legislation.

In *Intertanko*<sup>125</sup> the Court seems to have taken a restrictive approach. It denied private parties the possibility to invoke UNCLOS, arguing that under the Convention “individuals are in principle not granted independent rights and freedoms.”<sup>126</sup> This restrictive approach seems unwarranted as the associations did not claim rights for themselves but intended to review the EU’s compliance with its international obligations.<sup>127</sup> If one looks at this case from the perspective of the primacy model, it is clear that the aim of the applicants was to *exclude* the application of a directive, which was apparently in conflict with a higher international norm, and not to introduce a new right into EU law, which did not exist before. Therefore, narrow direct effect should not have been required as in the case of exclusion, the primacy of the international agreement is capable of creating effects independent of narrow direct effect. Contrary to this, the Court has consistently held that in order for individuals to indirectly challenge the validity of EU measures for their conformity with international agreements, it first has to be seen whether the broad logic, nature and structure of the agreement allows for such review and whether the international agreement confers rights to individuals which they can rely on before the courts.<sup>128</sup> Therefore, the primacy model does not seem to offer a feasible explanation.

In *Air Transport Association of America*, the Court held that the nature and broad logic of the Kyoto Protocol was not such as to grant rights to individuals.<sup>129</sup> With regard to the EU-US Open Skies Agreement, the Court held that the nature and broad logic of it allowed for judicial review, and found that it contained an unconditional and sufficiently precise obligation that may be relied on in order to challenge the validity of the contested EU act.<sup>130</sup> In *IATA and ELFAA*<sup>131</sup> two airline associations challenged the validity of several articles of a regulation, in light of the Montreal Convention.<sup>132</sup> The Court simply stated that the specific articles were “among the rules, in light of which the Court reviews the legality of acts of the [Union] institutions”, due to the nature and broad logic of the Convention and due to them being unconditional and sufficiently precise.<sup>133</sup>

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<sup>125</sup> *Intertanko*, *supra* n. 43.

<sup>126</sup> *Ibid.*, para 59.

<sup>127</sup> Marsden, *supra* n. 45, 753.

<sup>128</sup> *International Fruit Company*, *supra* n. 5, paras 8 and 20; Case 9/73, *Schlüter*, [1973] ECR 1137, paras 29-30; *Air Transport Association of America*, *supra* n. 44, paras 53-56; *Intertanko*, *supra* n. 44, paras 54-59.

<sup>129</sup> *Air Transport Association of America*, *supra* n. 40, paras 74-76.

<sup>130</sup> *Ibid.*, para 100.

<sup>131</sup> C-344/04, *IATA and ELFAA v. Department of Transport*, [2006] ECR I-00403.

<sup>132</sup> Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999.

<sup>133</sup> *IATA and ELFAA*, *supra* n. 131, para 39.

These cases show that when private parties seek to rely on an international agreement, regardless of the reason for doing so, both the lower threshold test and the traditional direct effect criteria will be needed. Therefore, the trigger model seems to be the more suitable candidate.

### c. The *Fediol* and *Nakajima* Exceptions

The lack of direct effect of the GATT/WTO Agreement, in the sense of relying on the agreements in order to review the validity of secondary EU legislation, was partially remedied by the Court when it introduced what became known as the ‘implementation principle’ or ‘mitigating’ direct effect.<sup>134</sup> In *Fediol*<sup>135</sup> and *Nakajima*<sup>136</sup> the Court held that the review of secondary EU law for its conformity with the GATT was possible if the EU act expressly referred to a specific provision of the General Agreement or the EU intended to implement a particular obligation.<sup>137</sup> The Court in subsequent cases interpreted the *Nakajima* exception restrictively so as to only apply in the specific situation of WTO anti-dumping.<sup>138</sup> However, in two very recent cases<sup>139</sup> the General Court decided to extend this exception to the Aarhus Convention. Because the Commission appealed, it has to be seen whether the Court will follow the General Court’s judgment or follow the opinion of AG Jääskinen and overturn the judgment.

At a preliminary glance it seems that the primacy model could be a suitable theoretical candidate in order to explain these two exceptions. In both cases the applicants sought the *exclusion* of EU measures and the primacy of the international agreement was able to create such independent effects. However, the Court did not base its arguments on the features of the GATT/WTO Agreement, in order to allow the applicants to rely on the international agreement. Instead, the Court referred to the specific features of the EU norms being challenged: the EU norm referred to a specific provision of the international agreement or the EU norm implemented an international obligation. Therefore, it seems that these effects are not so much a result of the primacy of the international agreements, but a consequence of how the lower EU norms relates to the international norm.

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<sup>134</sup> Term used by Prechal. See Prechal, *Does Direct Effect Still Matter?*, *supra* n. 63 with reference to C. Timmermans, *The EU and Public International Law*, 4(2) European Foreign Affairs Review 181, 190 (1999).

<sup>135</sup> Case 70/87, *Fediol v. Commission*, [1989] ECR 1781.

<sup>136</sup> Case C-69/89, *Nakajima v. Council*, [1991] ECR 1689.

<sup>137</sup> *Germany v. Council*, *supra* n. 105, para 111.

<sup>138</sup> Piet Eeckhout, *EU External Relations Law* (Oxford 2011), 361-363. See Case T-19/01, *Chiquita v. Commission*, [2005] ECR II-315, para 120. See *Petrotub*, *supra* n. 96.

<sup>139</sup> Case T-396/09, *Vereniging Milieudefensie v. Commission*, [2012] Not yet reported and Case T-338/08, *Stichting Natuur v. Commission*, [2012] Not yet reported.

Looking at the trigger model, the primacy of the international agreement is a remedy if the international norm has been rendered ‘cognisable’ by the Court, by granting it some form of independent effect. However, under the trigger model certain effects can stem from the Member States’ duty to give full effectiveness to EU law. In the international law-EU Law context it can be argued that article 216(2) TFEU lays obligates EU institutions to effectively carry out the obligations contained in an international agreement. Therefore, it seems plausible to argue that the *Nakajima/Fediol* type of effects are not a result of some form of ‘direct effect’, but a consequence of the EU’s obligation to give effect to international agreements, which it thought to carry out through the specific implementing legislation.

#### IV. EU INTERNATIONAL AGREEMENTS AND MEMBER STATE LAW

##### 1. Comparable *primacy* and *direct effect* to that of EU law?

Agreements which are binding on the EU are considered to form an integral part of EU law and as such will also have ‘primacy’ over inconsistent Member State law. In this manner the international agreement as an ‘EU legal instrument’ will circumvent the different national rules on the incorporation of international law and will have primacy over them. It also means that they are capable of having direct effect in the national legal orders.

However, the primacy and direct effect of EU international agreements in the Member State legal orders should not readily be equated with the primacy or direct effect of EU law over national law. *First*, most Member State courts allow the application of EU law, but some will be reluctant to do so if certain national constitutional values are touched upon. Thus, it is theoretically possible that a Member State’s constitutional court could challenge the enforcement of an international agreement binding on the EU, if it goes against core national constitutional provisions or the EU concluded it *ultra vires*. *Second*, in the case of mixed agreements, it is up to national courts to determine the effects of those parts of the agreement, which fall under exclusive national competence.<sup>140</sup> In a monist country like the Netherlands such provisions might even override constitutional provisions if they have direct effect.<sup>141</sup> In dualist countries like the United Kingdom such parts of international agreements would at best be an aid to the interpretation of national

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<sup>140</sup> *Slovak Brown Bear*, *supra* n. 11, para 32.

<sup>141</sup> A. Nollkaemper, *The Netherlands*, 331 in *The Role of Domestic Courts in Treaty Enforcement* (David Sloss ed., Cambridge 2010). *See also* article 94 of the Netherlands Constitution.

provisions. *Last*, it must be recalled that the Court takes into account the international origin of the agreements when granting them direct effect.

## 2. The Setting Aside of Member State Measures

### a. Infringement proceedings

Under articles 258 and 259 TFEU the Commission or another Member State can launch infringement proceedings against a Member State that “has failed to fulfil an obligation under the Treaties.” Due to article 216(2) TFEU the Member States will not only have to comply with the Treaties but also any international agreement concluded by the EU.<sup>142</sup> The Commission is seen as the guardian of the general EU interest and it is not required to show that it has an interest in bringing the proceedings,<sup>143</sup> because article 258 TFEU is not intended to protect the Commission’s own rights.<sup>144</sup>

In *International Dairy Agreement*<sup>145</sup> the Commission brought infringement proceedings against Germany for allowing the importation of certain dairy products at a customs value lower than the ones found in the International Dairy Agreement (IDA). Interestingly, even though IDA was concluded under the GATT, no structural features of the GATT stopped the Commission from relying on IDA. Likewise, no other criteria for the existence of direct effect were mentioned when the parties relied on the agreement. It seems that the Court was reluctant to go into a direct effect analysis and opted for consistent interpretation.<sup>146</sup> Another plausible explanation is that in this specific case the interests of one Member State were concerned, while in *Germany v Council (Banana I)* the overall EU interest needed to be protected. Thus, the Court seems to have employed tougher criteria for the invocation of international norms, when the EU interest is protected.

In *Commission v. Ireland (Berne Convention)*,<sup>147</sup> the Commission launched proceedings against Ireland, for Ireland’s failure to adhere to the Berne Convention, which was mandated by one of the Protocols to the EEA Agreement. The Court reiterated previous case-law according to which

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<sup>142</sup> Eeckhout, *supra* n. 138, 301.

<sup>143</sup> L. Prete and B. Smulders, *The Coming of Age of Infringement Proceedings*, 47 C.M.L.R. 9, 13 (2010).

<sup>144</sup> *Ibid.* and C-431/92, *Commission v. Germany* [1995] ECR I-2189, para 21.

<sup>145</sup> Case C-61/94, *Commission v. Germany* [1996] ECR I-4006.

<sup>146</sup> P.J. Kuijper and M. Bronckers, *WTO Law in the European Court of Justice*, 42 C.M.L.R. 1315, 1329 (2005).

<sup>147</sup> Case C-13/00, *Commission v. Ireland* [2002] ECR I-02943.

mixed agreements have the same status as purely EU agreements.<sup>148</sup> Furthermore, Member States are under an obligation within the EU system to ensure the respect of commitments arising from an agreement concluded by the EU.<sup>149</sup> Because the Convention created rights and obligations in areas covered by EU law, Member States had to fulfil the requirement under the EEA Agreement's Protocol to adhere to the Berne Convention.<sup>150</sup> Interestingly, nowhere in the judgment does the Court mention the necessity of the international agreement to have direct effect in order to be relied on in infringement proceedings. The same conclusions can be drawn from *L'Étang de Berre II*<sup>151</sup> in which both parties relied on the Barcelona Convention,<sup>152</sup> without the Court mentioning any precondition of direct effect. This later case may present itself as a case of judicial economy, as in the previous *L'Étang de Berre I* the Court found that provisions of the Athens Protocol attached to the Convention had direct effect.<sup>153</sup>

The non-presence of direct effect in these cases can be explained in several ways. As mentioned, when Member States or the Commission rely on an international agreement at least narrow direct effect should not be a precondition. The primacy model might offer a second explanation. It is obvious that the Commission sought the exclusion of the Member States' measures, with the aim of protecting the EU interest and not a specific private right or a specific right of the Commission. In such cases primacy is capable of producing effects independent of direct effect. The trigger model can also provide an explanation for this case. As mentioned, certain effects will have as its source the Member States' duty of loyal cooperation to give full effect to EU law. Since EU agreements form an integral part of EU law, the previously mentioned obligation will apply to international agreements as well. In *Mox Plant* the Member States' duty of loyalty was held to apply in a case involving the UNCLOS.<sup>154</sup> Moreover, article 216(2) TFEU places an extra obligation on them to conform with the obligations laid down in EU international agreements.

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<sup>148</sup> *Ibid.*, para 14; See Gáspár-Szilágyi, 'EU Member State Enforcement of 'Mixed' Agreements', *supra* n. 86, 177-178.

<sup>149</sup> *Ibid.*, para 15.

<sup>150</sup> *Ibid.*, paras 19-20.

<sup>151</sup> Case C-239/03, *Commission v. France (Étang de Berre II)* [2004] ECR I-9328.

<sup>152</sup> Convention for the Protection of the Mediterranean Sea against Pollution, (Barcelona, 1976).

<sup>153</sup> Case C-213/03, *L'étang de Berre I*, [2004] ECR I-07357, paras 40-45.

<sup>154</sup> *Mox Plant*, *supra* n. 51, para 169.

b. Proceedings brought by private parties

The most general remedy available for individuals whose rights have been infringed by national law is the disapplication of national measures which are found to be incompatible with EU law.<sup>155</sup> There are two main lines of cases in which private parties have relied on EU international agreements in order to challenge Member State laws or measures. The first concern association, partnership and cooperation agreements, while the second concern environmental agreements.

Recent studies have shown that the EU applies maximalist enforcement techniques when confronted with association or partnership agreements, which are seen as a venue through which the EU *acquis* is exported.<sup>156</sup> In the predominant number of such cases the court commences the direct effect analysis with the express wording of the relevant provision and the traditional direct effect criteria and the purpose and nature of the Agreement never stood in the way of according direct effect to a provision.<sup>157</sup> Most cases concerned the principle of non-discrimination contained in the agreements, under which workers from associate or partner countries were subject to the same working conditions, remuneration, and social benefits as EU workers. Both the primacy and the trigger models seem to provide an adequate answer. Under the primacy model the traditional direct effect criteria are needed when new EU rights are introduced into the Member State legal order. In these cases it is evident that the individuals sought to enforce their more favourable rights granted by the EU agreements, which were most probably not contained in national law. The trigger model can also explain these cases, as the trigger model requires the existence of the traditional direct effect criteria for both broad and narrow direct effect.

With regard to environmental agreements, in *Slovak Brown Bear* an environmental association sought to rely on article 9(3) of the Aarhus Convention in order to become a ‘party’ to proceedings before the Slovak courts. The Court commenced the direct effect analysis by first looking at the wording, purpose and nature of the agreement.<sup>158</sup> It then held that article 9(3) Aarhus Convention “did not contain any clear and precise obligation capable of directly regulating the legal position of individuals”. The Court then mentions the procedural rights provided under the said article.<sup>159</sup> The Court tried to remedy the lack of direct effect of the agreement by urging national courts to interpret

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<sup>155</sup> Van Gerven, *supra* n. 64, 507.

<sup>156</sup> See A. Matta, *Differentiating the methods of acquis export: the case of the Eastern neighbourhood and Russia*, in *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Peter Van Elsuwege and Roman Petrov eds., Routledge 2014).

<sup>157</sup> Mendez, *supra* n. 76, 151.

<sup>158</sup> *Slovak Brown Bear*, *supra* n. 11, para 44.

<sup>159</sup> *Ibid.*, para 45.

national procedural rules in such a way as to ensure the effectiveness of EU environmental protection.<sup>160</sup> According to the primacy model, these conditions needed to be satisfied because the association was seeking to substitute the Slovak norms. The applicant sought to introduce a new right into the national legal order, the right of members of “the public to have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of [...] national law relating to the environment.”<sup>161</sup> Moreover, the primacy of the agreement could still create the independent effect of consistent interpretation. However, in order for the primacy model to properly apply, its notion of direct effect should be able to accommodate the part of the test dealing with the purpose and nature of the agreement.<sup>162</sup> The trigger model, therefore, seems a better option as it is capable of accommodating a wider notion of direct effect. Consistent interpretation is then explained through the Member States’ duty to give full effectiveness to EU law (and EU international agreements) and the duty not to impede the obligations under an international agreement.

In *L’etang de Berre I*<sup>163</sup> a fishermen’s syndicate launched proceedings against a state owned electricity company. The syndicate clearly acted in the general interest, by challenging national measures (waste produced by a state owned electricity company) in light of the Athens Protocol to the multilateral Barcelona Convention.<sup>164</sup> The Court look at the wording, purpose and nature of the agreement<sup>165</sup> and then found that the provisions were sufficiently clear, precise and unconditional for them to have direct effect “so that any interested party is entitled to rely on those provisions before the national courts”.<sup>166</sup> Because no specific rights are identifiable, it is clear that the syndicate sought the exclusion of the national measure. According to the primacy model in such a case the traditional direct effect conditions are not needed, as primacy can produce the independent exclusionary effects. However, the direct effect conditions were needed. Thus, it seems that the trigger model better accommodates this case.

It can be concluded that the trigger model provides a better model for the afore-mentioned cases. Regardless of whether private parties seek the introduction of new rights granted by EU

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<sup>160</sup> *Ibid.*, para 51.

<sup>161</sup> Aarhus Convention, article 9(3). However, one could also argue that if a right (even in an incipient form) existed under Slovak law, that would allow interested parties from the public to become parties to proceedings, then *exclusion* occurred and not *substitution*. One of the difficulties of the primacy model is to know when can existing rights of national law fill the legal ‘gap’ and when are higher, new rights needed.

<sup>162</sup> See, *Slovak Brown Bear*, *supra* n. 11, para 44.

<sup>163</sup> *L’etang de Berre I*, *supra* n. 153.

<sup>164</sup> Protocol for the Protection of the Mediterranean Sea against Pollution from Landbased Sources (Athens Protocol) attached to the Convention for the protection of the Mediterranean Sea against pollution (Barcelona Convention).

<sup>165</sup> *L’etang de Berre I*, *supra* n. 153, para 39.

<sup>166</sup> *Ibid.* para 47.



international agreements into the national legal order, or whether they seek the review of national laws and measures, the traditional direct effect criteria combined with the ‘lower threshold’ criteria will need to be satisfied.

## **V. OTHER EFFECTS**

### **1. Consistent interpretation**

In order to protect the rights of private parties granted by EU law, the Court created three tools: direct effect, consistent interpretation and the doctrine of State liability.<sup>167</sup> Consistent interpretation originally referred to the obligation of national courts to interpret their national laws in accordance with EU law, even if the relevant EU norm did not have direct effect. As previously seen, this meaning of consistent interpretation has been applied in *Slovak Brown Bear*. Even if article 9(3) of the Aarhus Convention did not have direct effect, Member State courts were under the obligation to interpret their national laws to the fullest extent possible in order to achieve the objectives of article 9(3) and the effective judicial protection of the rights conferred by EU law.<sup>168</sup> Thus, it seems that the duty to interpret national law in conformity with the EU international agreement has as its source the duty of the Member States to help achieve the objectives of the agreement as well as the effective enforcement of rights conferred by EU law. This reasoning is more in line with the trigger model.

However, in the afore-mentioned *International Dairy Agreement* the Court held that the primacy of EU international agreements over provisions of secondary EU legislation means that such provisions “must, so far as possible, be interpreted in a manner that is consistent with those agreements”.<sup>169</sup> Besides extending the consistent interpretation obligation to the interpretation of secondary EU legislation in light of international agreements, the Court bases the source of consistent interpretation on primacy. Therefore, this case seems to be more in line with the primacy model, according to which consistent interpretation is an effect of primacy.

In conclusion, these two cases show that the obligation to interpret national or secondary EU law in a consistent manner with international agreements can either be a consequence of the primacy of the international agreement or the obligation of Member States to enforce international

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<sup>167</sup> Sacha Prechal, *Directives in EC Law*, 180 (2d ed., Oxford 2005).

<sup>168</sup> *Slovak Brown Bear*, *supra* n. 11, para 51.

<sup>169</sup> *Ibid.*, para 52.

obligations arising from EU international agreements and to ensure the effectiveness of the protection of EU rights.

## 2. EU and Member State liability for breaches of EU international agreements

The third important tool for the protection of EU rights is the doctrine of State liability. Articles 268 and 340 TFEU provide for the non-contractual liability of the EU for the wrongdoings caused by its institutions or its servants. Ever since *Francovich*,<sup>170</sup> a Member State can also be held liable for breaching EU law. In an extensive article covering the liability of federal and sub-federal level governments in the EU and the United States I have come to the conclusion, that even if State liability is generally viewed as a corollary to direct effect, and is not preconditioned by it, in the case of the liability of the EU for breaches of international agreements the image is less clear.<sup>171</sup>

The cases<sup>172</sup> that have thus far arisen before the Court have all involved the liability of the EU for alleged breaches of international agreements. The most important one up to date is *FIAMM and Fedon*.<sup>173</sup> The case was launched by several private companies that have suffered losses due to US retaliatory measures, which were set in place as a consequence of the EU's failure to abide by its WTO obligations. As is well known, in order to prove the liability of the EU, the claimant must show that the EU has committed a sufficiently serious breach of a higher norm meant to confer rights.<sup>174</sup> In order to prove the sufficiently serious breach, the Court will essentially have to review the EU law/measure for its conformity with the EU international agreement. However, the Court held that there is no distinction between judicial review in the context of an action for annulment and an action for compensation, and the same conditions will apply.<sup>175</sup> As previously seen, direct effect will need to be proven in order to launch a direct action for annulment against secondary EU legislation for its conformity with EU international agreements. This means that the EU international agreement will need to have direct effect in order to prove the seriousness of the breach. In other words, the direct effect of an international agreement will ultimately precondition a private party's reliance on an international agreement in an action for damages against the EU.

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<sup>170</sup> Joined cases C-6/90 and C-9/90, *Francovich v. Italian Republic* [1991] ECR I-05357.

<sup>171</sup> Sz. Gáspár-Szilágyi, *Monetary Compensation for Federal and Sub-Federal Breaches of Private Treaty Rights*, under review by Columbia Journal of European Law.

<sup>172</sup> Case C-104/97 P, *Atlanta v European Community* [1999] ECR I-7004; *Biret v Council*, *supra* n. 11.

<sup>173</sup> *FIAMM and Fedon*, *supra* n. 48.

<sup>174</sup> Case C-352/98 P, *Bergaderm v. Commission* [2000] ECR I-5291, para 42.

<sup>175</sup> *FIAMM and Fedon*, *supra* n. 48, para 120; See M. Bronckers and S. Goelen, *Financial Liability of the EU for Violations of WTO Law: A Legislative Proposal Benefiting 'Innocent Bystanders'*, 39(4) Legal Issues of Econ. Int. 399, (2012).

Even though actions for damages for the breaches of international agreements by EU institutions are rare, they are not confined to the WTO Agreement. In *Yedaş Tarim* a Turkish company brought an action for damages against the Commission and the Council. The claimant alleged that the way in which the EU institutions implemented the Customs Union instituted by Decision No 1/95 of the Association Council, set up under the Association Agreement with Turkey, infringed several provisions of the said Agreement, which resulted in financial loss. The General Court commenced the liability analysis by looking at the ‘unlawfulness’ of the EU institutions’ conduct.<sup>176</sup> It held that in order for an individual to rely on certain provisions of an international agreement to establish the unlawfulness of the institutions’ conduct, it has to be seen whether the provisions may be regarded as having direct effect.<sup>177</sup> As is well known, two decades earlier the General Court decided in *Demirel* that the Ankara Agreement does not have direct effect.<sup>178</sup> Relying on these prior conclusions, the General Court ended up concluding that the Ankara Agreements was not intended to confer rights on individuals and dismissed the action.<sup>179</sup> The Court upheld the General Court’s conclusions during the appeal.<sup>180</sup>

The Court in *Francovich* distinguished between a directive’s intent to confer rights to private parties and its direct effect.<sup>181</sup> The directive in question was found not to have direct effect, even though the provisions in question were “sufficiently precise and unconditional” to determine its beneficiaries.<sup>182</sup> Still, the lack of direct effect of the directive did not stop the Court from basing the *right to reparation* for a breach of EU law, directly on European law.<sup>183</sup> It argued that the full *effectiveness* of EU rules would be impaired if the beneficiaries of EU rights were unable to obtain redress when Member States infringe these rights.<sup>184</sup> Therefore, at least in the area of implementation of directives, a Member State can be held liable even if the rule of law does not have direct effect, but is intended to confer rights on individuals, because the right to remedies is fundamental to EU law. Thus, in this case liability merely constitutes a supplement and not a substitute to direct effect and consistent interpretation.<sup>185</sup> However, in case of the EU’s liability for

<sup>176</sup> Case C-255/06 P, *Yedaş Tarim v. Council and Commission* [2007] ECR I-94.

<sup>177</sup> *Ibid.*, para 39.

<sup>178</sup> *Demirel*, *supra* n. 11.

<sup>179</sup> *Yedaş Tarim*, *supra* n. 179, paras 42.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Francovich*, *supra* n. 170, paras 26-33. See also Sz. Gáspár-Szilágyi, *Monetary Compensation for Federal and Sub-Federal Breaches of Private Treaty Rights*, under review by Columbia Journal of European Law.

<sup>182</sup> *Francovich*, *supra* n. 170, para 26.

<sup>183</sup> Schütze, *supra* n. X, 398.

<sup>184</sup> *Francovich*, *supra* n. 170, paras 32-33.

<sup>185</sup> S. Prechal, *Member State liability and direct effect: what’s the difference after all?*, 7(2) European Business L. Rev. 299, 301 (2006)..

breaches of EU international agreements the line between the international agreement's capacity to confer rights and its direct effect is blurred. As seen, the direct effect of the international agreement is needed in order to prove the seriousness of the breach and the Court will conduct one direct effect/conferral of rights test. Thus, in this case EU liability is not a mere supplement to direct effect, but a remedy that has to be triggered by the direct effect of the agreement. Thus, the trigger model seems to be the suitable explanation for these cases.

## VI. CONCLUSION

The objective of the current article was to look at how the primacy and direct effect of EU international agreements interrelate and to see whether the existing trigger and primacy models could provide a potential theoretical framework. After having looked at the different scenarios in which international agreements can be invoked (by private parties, Member States or EU institutions) and the different effects international agreements can produce (creation of new EU rights, judicial review of EU/Member State law/measures, consistent interpretation, EU/Member State liability) it seems that the trigger model offers a suitable theoretical background to explain the Court's case-law.

*First*, due to the international origin of EU agreements, the direct effect test in most cases (albeit in different order) involves the traditional direct effect criteria and the lower threshold test, focusing on the nature, structure and objectives of the agreement, which the trigger model seems to accommodate well due to its broader understanding of direct effect. *Second*, when private parties sought to challenge the validity of secondary EU law or Member State law/measures for their conformity with international agreements, the traditional direct effect criteria were always present. Thus, even if they sought the 'exclusion' of the lower norm, the direct effect conditions needed to be satisfied; something, the primacy model does not require. *Third*, the trigger model explains certain effects through the Member States' duty to give full effectiveness to EU law. This duty was expressly mentioned by the Court in the context of EU international agreements as well. This obligation is strengthened by the binding character of international agreements under 216(2) TFEU. This article can also provide the explanation for the cases in which privileged applicants challenged secondary EU law for its conformity with international agreements, but direct effect was not required. *Fourth*, these obligations can also explain such effects as the duty to interpret Member State law and secondary EU law in conformity with international agreements. *Fifth*, the liability of

the EU for breaches of international agreements will also need to be triggered by the agreement's direct effect.