The Relationship between EU law and International Agreements. Restricting the *Fediol* and *Nakajima* Exceptions in *Vereniging Milieudefensie*

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1. Introduction

Late 2014 and early 2015 have seen new developments in the Court of Justice’s case-law on the relationship between international agreements and EU law, as well as their invocability when the validity of secondary EU legislation is challenged. On 18 December 2014 the Court gave a negative opinion on the compatibility of the Draft Agreement on the Accession of the EU to the ECHR, and in a different case refused to extend the *Fediol* and *Nakajima* exceptions to the compatibility of the EU’s banana regime with WTO law.\(^1\)

Then, on 13 January 2015 the Grand Chamber handed down two nearly identical judgments, concerned with the application of the afore-mentioned exceptions to the Aarhus Convention.\(^5\) The Grand Chamber continued its December approach and overturned the General Court’s judgments in *Vereniging Milieudefensie v. Commission*\(^7\) and *Stichting Natuur v. Commission*.\(^8\) In these latter cases the General Court was willing to circumvent the lack of direct effect of Article 9(3) Aarhus Convention ('the Convention')\(^9\) by extending the *Fediol* and *Nakajima* exceptions to this Convention. Following the Grand Chamber’s judgments, it seems that the two exceptions will remain confined to WTO law, more specifically anti-dumping, anti-subsidies and trade barriers.

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\(^{1}\) Opinion 2/13, EU:C:2014:2454. I thank Sejla Imamovic (Maastricht University) for providing a thorough critique of this Opinion at the Copenhagen Postgraduate Law Conference (January, 2015). For additional comments see “Editorial Comments: The EU’s Accession to the ECHR – a “No” from the ECJ!”, 52 CML Rev. (2015), 1-15.


\(^{4}\) Case C-306/13, *LVP v. Belgische Staat (Van Parys II)*, EU:C:2014:2465. I thank Bart Van Vooren (Copenhagen University) for bringing this case to my attention.


\(^{9}\) For the lack of direct effect of Article 9(3) Aarhus Convention, see Case C-240/09, *Lesoochranárske Zoskupenie (Slovak Brown Bear)*, EU:C:2011:125.
The upcoming sections will take a critical look at the reasoning of the General Court, the Advocate General, and the Grand Chamber in Vereniging Milieudefensie. For matters of simplicity Stichting Natuur is not handled in this annotation, since the General Court and the Grand Chamber\textsuperscript{10} presented nearly identical arguments for the application/non-application of Fediol and Nakajima.

2. Background

Before providing the factual and legal backgrounds to the present case, a succinct overview is given of the current application of the Fediol and Nakajima exceptions, as well as the status of the Aarhus Convention in the EU legal order, in order to better understand the implications of this case.

2.1. A restrictive application of the ‘implementation principle’

The Court created a certain dualism and rejected the direct effect of the GATT 1947.\textsuperscript{11} Nonetheless, in the late 1980s and early 90s it sought to partially remedy this lack of direct effect by introducing what became known as the ‘implementation principle’\textsuperscript{12} or ‘mitigated’ direct effect.\textsuperscript{13} This alternative is essentially made up of two separate exceptions, which arose in two different cases: Fediol and Nakajima respectively. In Germany v. Council (Bananas I)\textsuperscript{14} the Court combined Fediol and Nakajima as one major exception. According to the Court “it is only if the [EU] intended to implement a particular obligation entered into within the framework of GATT, or if the [EU] act expressly refers to a specific provision of the GATT, that the Court can review the lawfulness of the [EU] act”.\textsuperscript{15} This formulation was picked up in later judgments as well, and it is now used as the standard articulation of the ‘implementation principle’.

In Portugal v. Council\textsuperscript{16} the Court extended the two exceptions to the review of WTO law. However, subsequent cases have shown an increasing trend of limiting their application to WTO anti-dumping, anti-subsidies and trade barriers.\textsuperscript{17} It is only in Racke\textsuperscript{18} that the Court applied

\begin{thebibliography}{9}
\bibitem{10} In its Stichting Natuur Opinion (EU:C:2014:309) AG Jääskinen only handled the specific issue of whether the Commission acted in its legislative capacity for the purposes of Article 9(3) Aarhus Convention when adopting Regulation No 149/2008 (a matter of applicability) and mentioned that the pleas of the appealing EU institutions were similar to the pleas put forward in Vereniging Milieudefensie (para. 6). These pleas were not discussed since he concluded that Regulation No 149/2008 did not fall within the scope of the Aarhus Convention (paras. 65-72).
\bibitem{11} Kuipper and Bronckers, “WTO Law in the European Court of Justice”, 42 CML Rev. (2005), 1313-1355, at 1316.
\bibitem{12} Term used by Eeckhout. See Eeckhout, External Relations of the European Union (OUP, 2004), p. 316.
\bibitem{14} Case C-280/93, Germany v. Council, EU:C:1994:367.
\bibitem{15} Ibid., para. 111 [highlights added by author].
\bibitem{16} Case C-149/96, Portugal v. Council, EU:C:1999:574.
\end{thebibliography}
Nakajima-review outside WTO law, to customary international law. Furthermore, even if the two alternatives are applied, the Court will rarely annul the EU measure.  

The ‘implementation principle’ is not without its critics. Several academics have questioned the usefulness of this doctrine(s), the exact conditions that need to be fulfilled for its application, the ‘intellectual acrobatics’ it necessitates and whether Nakajima-review is not a special type of consistent interpretation. Nowadays, it seems that the Court prefers a blend between Nakajima-review and consistent interpretation.  

2.2. The status of the Aarhus Convention in the EU legal order

In 2005 the Council via Decision 2005/370/CE concluded the Aarhus Convention, which was entered into by the EU and the Member States under “joint” competence. However, the direct enforcement of the Convention and the implementation of the EU’s international obligations arising from it has not been problem free.

In Slovak Brown Bear the Court was asked to give a preliminary ruling on whether Article 9(3) Aarhus Convention could be viewed as “directly applicable” and “directly effective”. Under this provision each contracting party ensures “that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.”

After having concluded that it had jurisdiction to decide on the direct effect of Article 9(3) Aarhus Convention, the Court in one paragraph held that the said provision did not contain “any clear and precise obligation capable of directly regulating the legal position of individuals”. It appealed, but lost the appeal. During the appellate proceedings no reference was made to the Nakajima or Fediol exceptions. See Case C-213/01 P, T. Port v. Commission, EU:C:2003:130; Joined Cases C-27/00 and C-122/00, The Queen v. Secretary of State for Environment, Transport and the Regions (Omega Air), EU:C:2002:161; T-19/01, Chiquita v. Commission, EU:T:2005:31; See also Herrmann, “Case C-351/04, IKEA Wholesale Ltd v. Commissioners of Customs & Excise, Judgment of the Court of Justice of 27 September 2007, Second Chamber [2007] ECR I-7723”, 45 CML Rev. (2008) 1507-1518.

18 Case C-162/96, A. Racke GmbH & Co. v Hauptzollamt Mainz, EU:C:1998:293.
19 Case C-76/00 P, Petrotub and Republica v. Council, EU:C:2003:4 is one of the rare cases when the Court actually annulled the EU measure.
21 Kuiper and Broneckers, op. cit. supra note 11, at 1326.
23 Case C-240/09, Slovak Brown Bear.
24 Ibid., para. 23.
25 Highlights added by author.
26 Ibid., para. 43.
argued that only members of the public “who meet the criteria, if any, laid down in national law” are entitled to exercise the rights provided in Article 9(3). 27 Thus, the provision was still subject to the adoption of subsequent measures. 28 In the next paragraphs, in an effort to remedy the lack of direct effect, the Court held that it was the duty of Member State courts to interpret their national laws to the fullest extent possible, in such a way as to ensure that an environmental protection organisation can challenge before a national court a decision taken following administrative proceedings liable to be contrary to EU environmental law. 29

Two possible explanations exist for the negative direct effect outcome. First, it could be that the specific provision of the Aarhus Convention did not in fact create a sufficiently precise obligation. Second, it is possible that the Court sought to avoid the direct enforcement of the Convention, until the EU political bodies had a clearer stance on how to implement it. 30 The implementation of the Aarhus Convention led to some friction between the Commission and the Council. In 2003 the Commission submitted a proposal for a directive to the Parliament and Council on access to justice in environmental matters, which was meant to implement this specific provision. Nevertheless, the proposal hit a brick wall before the Council and was never adopted. 31

Furthermore, the Aarhus Convention’s Compliance Committee and the European Parliament have voiced their concerns about the way in which the EU implements its obligations under the Aarhus Convention. In 2011 the Compliance Committee found that access to justice for individuals under Article 263 TFEU did not live up to the EU’s obligations under the Convention. 32 Furthermore, a 2012 study conducted by the European Parliament proposed several solutions to change the existing restrictive EU system towards environmental public interest groups in order to ensure compliance with the Aarhus Convention. 33

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28 Ibid., para. 45.
29 Ibid., para. 48-51.
30 Gáspár-Szilágyi, “EU International Agreements through a US Lens”, op. cit. supra note 27, at 618.
33 European Parliament, Directorate-General for Internal Policies, “Standing up for you right(s) in Europe. Locus Standi: A Comparative study on Legal Standing (Locus Standi) before the EU and Member States’ Court”, Study PE 462.478 (2012), at 15-17. The recommendations are: (a) The Court could consider environmental NGOs (fulfilling the Article 11 Aarhus Regulation conditions) to be ‘individually concerned’ for the purposes of bringing an annulment action against EU measures affecting the environment; (b) a paragraph could be added to Article 263 TFEU that such NGOs do not need to prove individual concern; (c) a specialized European court on environmental matters could be attached to the General Court. For a further study on the access of environmental groups before Member State courts, see Darpò, “Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9(3) and 9(4) Aarhus Convention in Seventeen of the Member States of the European Union”, at 176-177 in Hans, Macrory and Moreno Molina (Eds.), National Courts and EU Environmental Law (Europa Law Publishing, 2013).
2.3. *The legal and factual background*

In order to implement the obligations under the Aarhus Convention, the Parliament and the Council adopted Regulation 1367/2006 (‘Aarhus Regulation, the Regulation’).\(^{34}\) Besides the more than obvious title which specifically refers to the Aarhus Convention, almost every recital of the preamble of the Regulation makes references to the Convention.

Nonetheless, there are some discrepancies between the Regulation and the Convention. Recital 18 mentions that the Regulation only addresses ‘acts and omissions by public authorities’, unlike Article 9(3) of the Convention, which also addresses acts and omissions by private persons. There is also a further difference between the Regulation and the Convention. Under Article 10 of the Regulation any NGO that meets the criteria laid down in Article 11 of the Regulation\(^{35}\) is entitled to make a request for internal review to the EU institution or body that has adopted an “administrative act” under environmental law or should have adopted such an act. Article 2(1)g of the Regulation defines an administrative act as “any measure of individual scope under environmental law, taken by an [EU] institution or body, having legally binding and external effects”.\(^{36}\) Article 9(3) of the Convention, on the other hand, has a broader scope and refers to ‘acts’ and ‘omissions’ of public authorities, not only to administrative acts of an individual scope.

Turning now to the facts in *Vereniging Milieudefensie*, pursuant to the request of the Netherlands, the Commission adopted Decision C(2009) 2560 (‘postponing decision’) postponing the attainment by the Dutch authorities of the objectives under Directive 2008/50/EC on ambient air quality and cleaner air in Europe. Following this Decision, two Dutch environmental NGOs submitted a request to the Commission to internally review under Article 10(1) Aarhus Regulation the postponing decision.

The Commission delivered Decision C(2009) 6121 (‘contested decision’) in which it rejected the request as inadmissible on the grounds that the postponing decision was not a measure of individual scope, but a measure of general application. Therefore, it did not meet the requirements of an ‘administrative act’ under Article 2(1)g Aarhus Regulation and could not form the subject of the internal review procedure provided under Article 10 of that regulation.\(^{37}\)

The applicants sought the annulment of the contested Commission decision by raising two pleas in law. First, they argued that by refusing to review the postponing decision on the ground that it was an act of general application, the Commission infringed Article 10(1) Aarhus Regulation.


\(^{35}\) The NGO has to be an independent non-profit-making legal person, set-up under the laws or practice of a Member State, has the primary objective of promoting environmental protection, it has existed for at least two years and the subject matter of the requested review is covered by the NGO’s objectives and activities.

\(^{36}\) Highlights added by author.

read in conjunction with Article 2(1)g of that regulation. According to the applicants, the contested decision was a measure of individual scope. It was thus covered by the definition of ‘administrative acts’ and could be internally reviewed under Article 10(1) Aarhus Regulation. 38

Second, if the General Court were to reject the first plea, the applicants claimed that Article 10(1) Aarhus Regulation contravenes Article 9(3) Aarhus Convention, insofar as it limits the concept of ‘acts’ to ‘administrative acts’ of individual scope as defined by Article 2(1)g of the Regulation. 39 Such a restrictive approach would limit the possibility of NGOs to request the Commission to perform an internal review under Article 10(1) Aarhus Regulation, since environmental acts usually are of general application. 40 For the purposes of this article the second plea is of greater interest.

3. The General Court Extends Fediol and Nakajima to the Aarhus Convention

The General Court addressed the first plea of the applicants and concluded that the postponing decision was not a measure of individual scope and did not constitute an administrative act under the Aarhus Regulation. Therefore, the Commission did not err in law when it refused to conduct the internal review of the postponing decision. 41

It then moved on to the more delicate issue: the compatibility of the implementing Aarhus Regulation with the Aarhus Convention. The General Court considered that the claimants were raising a ‘plea of illegality’ under current Article 277 TFEU. 42 Under this procedure a party to proceedings has “the right to challenge, indirectly, for the purposes of obtaining the annulment of a decision adversely affecting that party, the validity of earlier measures which constitute the legal basis for the decision at issue”. 43

The General Court then followed the traditional path taken when the validity of secondary EU law is challenged for its conformity with international agreements. It first held that under current Article 216(2) TFEU (ex-Article 300(7) TEC) the EU institutions are bound by an agreement

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38 Case T-396/09, Vereniging Milieudefensie, para. 20 and 24.
39 Ibid., para. 21.
40 W.Th. Douma, “JM 2012/105 Gerecht EU (Zevende Kamer), 14-06-2012, T-396/09, Verplichting lidstaten bescherming en verbetering luchtkwaliteit, Tijdelijke afwijkingen, Verzoek tot interne herziening, Maatregel van individuele strekking, Administratieve handeling, Toetsing aan internationale verdragen, Uitleg verdragsbepalingen, Ontvankelijkheid, Inspraak, NGO’s” (2014), SDU Uitgevers. The author provided me with the Dutch version of this annotation and helped me with the translation. A measure is regarded as being of general application “if it applies to objectively determined situations and entails legal effects for categories of persons envisaged generally and in the abstract”. See Case C-244/88, Usines coopératives de déshydratation du Vexin and Others v. Commission, EU:C:1989:588, para. 13; Case C-171/00 P, Libéros v. Commission, EU:C:2002:17, para. 28; Case T-338/08, Stichting Natuur, para. 30.
41 Case T-396/09, Vereniging Milieudefensie, paras. 22-42.
43 Case T-396/09, Vereniging Milieudefensie, para. 47
concluded by the EU and such agreements prevail over secondary EU legislation. The Court reaffirmed the *Intertanko* test, according to which the validity of secondary EU law can only be assessed in light of an international agreement, if “the nature and the broad logic of the latter do not preclude this” and its provisions are “unconditional and sufficiently precise”.

The General Court then made a surprising twist. It invoked the ‘implementation principle’ and argued that when the EU intended to implement a particular obligation under an international agreement, or where the measure makes an express *renvoi* to particular provisions of that agreement, the Court can review the legality of the EU measure in light of the agreement. Moreover, when a regulation is intended to implement an obligation imposed on an EU institution by the international agreement, the review can be done, without having to first determine whether the conditions of direct effect are met.

The General Court used two arguments for extending the ‘implementation principle’ to the Aarhus Convention. First, even though the Court developed the exception in cases relating to the GATT and the WTO agreements, it had also applied the exception to customary international law in *Racke*. Second, just as in the original *Nakajima* judgment, the applicants were questioning indirectly, in accordance with Article 277 TFEU, the validity of the Aarhus Regulation.

After having concluded that the Aarhus Regulation was in fact adopted to implement the obligations of the EU under the Aarhus Convention, the General Court conducted the actual review and annulled the contested Commission decision, having found that the term ‘administrative acts’ under the Aarhus Regulation restricted the application of the Aarhus Convention. Several appeals followed launched by the Council, the Parliament and the Commission.

### 4. The Advocate General is Not Convinced

The importance of the General Court’s judgment is not to be underestimated, as illustrated by the fact that the three major EU institutions, the Council, the Commission and the Parliament, all brought separate appeals against it, joined in the cases *Council, Parliament and Commission v. Vereniging Milieudefensie*. Advocate General Jääskinen delivered one opinion for the three appeals, which from the outset stated that the appeals raised fundamental questions of constitutional importance concerning the EU’s legal order. They reflected the tension between the necessity to conserve the autonomy of EU law and the intention to respect international obligations arising from agreements to which the

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44 Ibid., para. 52.
45 Ibid., para. 54.
46 Ibid., para. 55.
47 Ibid., para. 56.
48 Ibid., para. 57.
49 Joined Cases C-401/12 P, C-402/12 P and C-403/12 P.
EU is a party. He invited the Court to reanalyse the invocability of provisions of international agreements before the EU courts, when the judicial review of secondary EU legislation is concerned, arguing that the case-law was not perfectly coherent on this matter. According to the Advocate General, the unwillingness of the General Court to first look at the direct effect of the Aarhus Convention was a signal to this lack of coherence.

The Advocate General agreed with the reasoning of the Council, the Parliament and the Commission, according to which the Nakajima and Fediol exceptions need to be given a narrow reading. He argued that the exceptions have a limited application, restricted to GATT/WTO law, which means they could not constitute a general exception to the review of secondary EU legislation. The Advocate General then embarked on a thorough overview of the EU’s case-law relating to the enforcement of international agreements. He first presented the classic cases (Haegeman, Kupferberg, Polydor) illustrating the EU’s mainly monist approach to the incorporation and enforcement of EU law. The Opinion then continues with the dualist GATT/WTO branch of this case-law, which was mainly a result of the special nature of those agreements. The Fediol and Nakajima exceptions were specific to this line of case-law.

The Advocate General then found two major errors in law in the General Court’s reasoning. First, the General Court erred in law when it attributed a universal character to the WTO jurisprudence, disregarding its special character and applying it to the Aarhus Convention. Second, the Court also erred when it sought to apply the Nakajima exception to the legality review of the Aarhus Regulation, since this exception constituted a specific, narrow branch of an already special branch of the Court’s case-law on the effects of international agreements. However, the analysis did not stop here. Whilst asking the Court to partially allow for the appeal and annul the contested judgment, the Advocate General then provided an alternative to the review of secondary EU law in light of international agreements.

He first argued that the Court had to take into account the reality surrounding the different international agreements concluded by the EU, which produce different internal effects depending on their objectives. After having criticized the Court’s approach in Intertanko (in apparent conflict with the prior Poulsen), the Advocate General called for the application of the Biotech doctrine.

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51 Ibid., para. 1.
52 Ibid., paras. 1-3.
53 Ibid., para. 8.
54 Ibid., para. 29.
56 Case 104/81, Kupferberg, EU:C:1982:362.
58 AG Jääskinen in Joined Cases C-401/12 P to C-403/12 P, paras. 39-47.
59 Ibid., paras. 52-53.
60 Ibid., para. 55.
61 Ibid., para. 64.
62 Case C-286/90, Anklagemyndigheden v. Poulsen, EU:C:1992:453. This case was decided before UNCLOS entered into force, but the Court used UNCLOS as evidencing customary international law.
to the present case. The Court in *Biotech* held that the Netherlands could rely on the Convention for Biological Diversity in order to review the legality of secondary EU law, even if the agreement did not have direct effect in the sense of creating rights to private parties.\(^{64}\)

This was followed by a criticism addressed to the Court on the tensions between, on the one hand, denying direct invocability to Article 9(3) Aarhus Convention and, on the other hand, the intention to afford effective protection under the provisions of that agreement, as stated in *Slovak Brown Bear*. After all, the Court as an EU institution was also bound by the Aarhus Convention.\(^{65}\) He then advocated a clear conceptual distinction between the situation where a private party seeks to invoke an international norm directly in order to benefit from a right granted to it and the intention to control the margin of appreciation of the EU’s institutions, when the review of an EU act is sought for its conformity with an international norm.\(^{66}\) Thus, if the nature of the agreement does not forbid such review, the Court should conduct the review, provided the provisions are sufficiently clear and precise.\(^{67}\)

The Advocate General finished his analysis with a thorough look at Article 9(3) Aarhus Convention, which contained a set of “rights of civic participation” in the form of procedural rights in environmental matters. Unlike the WTO Agreement, it was not based on the principle of reciprocity and mutual advantages.\(^{68}\) Even though in *Slovak Brown Bear* the Court held that the said international provision did not contain a sufficiently clear and precise obligation to directly affect the legal situation of private parties, Article 9(3) could still be viewed as a “mixed provision”, which also contained an obligation of result for the contracting parties.\(^{69}\) In light of this, Article 9(3) Aarhus Convention was a sufficiently clear norm in order to serve as a ground for review and the Convention could be used in order to review the legality of acts of the EU institutions.\(^{70}\)

5. **The Grand Chamber Disagrees**

One 13 January 2015, the Grand Chamber delivered its more than succinct judgment in *Council, Parliament and Commission v. Vereniging Milieudefensie*. Compared to the judgment of the General Court and the extensive Opinion of the Advocate General, the Court of Justice delivered its findings in a mere thirteen paragraphs. The judgment follows the trend of recent years to protect the

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\(^{64}\) AG Jääskinen in *Joined Cases C-401/12 P to C-403/12 P*, para. 67.

\(^{65}\) Ibid., para. 69.

\(^{66}\) Ibid., para. 77.

\(^{67}\) Ibid., paras. 78-82.

\(^{68}\) Ibid., paras. 87-88.

\(^{69}\) Ibid., paras. 91-92.

\(^{70}\) Ibid., para. 95.
integrity of EU legislation from the scrutiny of international law. The Court decided to set aside the judgment of the General Court, dismiss the application for annulment launched by the environmental NGOs against the contested decision of the Commission and did not consider the suggestions of the Advocate General to extend the Biotech holding to the current case.

It started by reiterating its classic holdings when secondary EU legislation is reviewed for its conformity with international agreements. It held that agreements concluded pursuant to Article 216(2) TFEU prevail over the acts laid down by EU institutions; however, the effects of such agreements in the EU legal order cannot be determined without taking into account their international origin. It also reiterated that the Court will only decide on the effects of international agreements, if the contracting parties have not already done so. Furthermore, international agreements to which the EU is a party can be relied upon in an action for annulment of secondary EU legislation, provided the nature and broad logic of the agreements do not preclude it and the international provisions are unconditional and sufficiently precise.

The Court then turned to the specifics of the case and the Aarhus Convention. It reconfirmed its holding from Slovak Brown Bear that Article 9(3) Aarhus Convention does not contain any unconditional and sufficiently precise obligation “capable of directly regulating the legal position of individuals” and therefore, it did not meet the afore-mentioned conditions for review.

Following this, the Court proceeded with the Fediol and Nakajima exceptions. After recalling the two alternatives, it swiftly concluded that “those two exceptions were justified solely by the particularities of the agreements that led to their application.” It then deconstructed the holdings of the General Court in a couple of paragraphs and in large part followed the arguments of the three appealing EU institutions.

The Court first argued that Fediol did not apply to the current case. It recalled that in the original case Article 2(1) of Council Regulation No 2641/84 referred explicitly to rules of international law, based essentially on GATT, and conferred on interested parties the right to invoke provisions of the GATT in the context of a complaint lodged under that regulation. Compared to this, in the current case Article 10(1) Aarhus Regulation neither made direct reference to specific provisions of the Aarhus Convention nor conferred rights on individuals. Thus, in the absence of such explicit reference the Fediol judgment could not be deemed relevant for the case at hand.

73 Ibid., para. 54.
74 Ibid., para. 55.
75 Ibid., para. 57.
76 Ibid., para. 58.
Second, *Nakajima*-review was also not applicable. The Court first mentioned that *Nakajima* arose within the specific antidumping system, “which is extremely dense in its design and application”.\(^{77}\) More specifically, the Basic Regulation was adopted in accordance with the Anti-Dumping Agreement.\(^{78}\) On the other hand, in the case at hand, Article 10(1) Aarhus Regulation was not meant to implement any specific international obligations, since Article 9(3) Aarhus Convention gives a broad ‘margin of discretion’ to the contracting parties when defining the domestic rules for the implementation of the ‘administrative or judicial procedures’.

The Court ended its arguments by holding that the Aarhus Regulation was not intended to implement the obligations derived from Article 9(3) Aarhus Convention with respect to national administrative or judicial procedures, which, as EU law now stands “fall primarily within the scope of Member State law”. Based on this, it then overturned the judgment of the General Court.

### 6. Commentary

#### 6.1. Comments on the General Court’s judgment

Before continuing with the Advocate General’s opinion, some observations are needed. First, it seems odd that the General Court chose not to discuss the lack of direct effect of Article 9(3) Aarhus Convention, as affirmed in *Slovak Brown Bear*, before applying the *Nakajima* exception. Legal academics have previously debated whether the lack of direct effect must be proven before *Nakajima*-review can apply or, whether *Nakajima*-review operates independently from the question of direct effect.\(^{79}\) According to Delile, this judgment shows that the General Court is of the view that *Nakajima*-review and direct effect are two independent forms of invocability.\(^{80}\) However, it would have made a stronger argument to first state that the Court had already decided that Article 9(3) Aarhus Convention had no direct effect, but in the interest of complying with the EU’s international obligations, it had to be seen whether *Fediol* and *Nakajima* could apply.

Second, the General Court relied on *Racke*, as an example of *Nakajima*-review having been applied outside the field of WTO law, in order to extend the *material scope* of this exception. However, the General Court did not refer to any of the cases\(^{81}\) (especially those handed down by the

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\(^{77}\) Ibid., para. 59.

\(^{78}\) The Court in *Nakajima* argued that the GATT had the effect of binding the EU and the Anti-Dumping Code was adopted for the purpose of implementing Article VII of the GATT. Moreover, according to the preamble of the new Basic Regulation, it was adopted in accordance with existing international obligations under Article VI of the GATT and the Anti-Dumping Code. Case C-69/89, *Nakajima*, para. 30.


\(^{80}\) Ibid., at 692.

\(^{81}\) *Supra* note 17.
General Court) following Racke. In these cases the European Courts have given a restrictive application to this principle, so as to only apply in the field of WTO anti-dumping, anti-subsidies and trade barriers. In a way the choice of the General Court to extend Nakajima outside WTO law is understandable since there is no consensus in legal academia, whether these exceptions are general and can be applied to any international agreement or whether they are specific to the effects of WTO law. For example, Lenaerts and Smijter, when discussing Nakajima and Fediol, referred to them as exceptions which may lead to the judicial review of EU acts for their conformity with international law, if the EU act in question intended to implement a particular international obligation or expressly referred to a specific provision of international law. Thus, in their view these two exceptions apply to all types of international law, not just the WTO agreements. On the other hand, Eeckhout referred to these ‘exceptions’ in the context of the lack of direct effect of WTO law.

Third, besides extending the material scope of Nakajima-review, these judgments could have also opened the door for numerous other provisions of international agreements, which do not have direct effect, in order to be used incidentally as a benchmark for the review of secondary EU law. Whether this would have resulted in a flood of cases on the already strained EU judiciary is hard to quantify. On the one hand, only a few agreements have been denied direct effect by the Court of Justice, as most of them are capable of direct effect. Moreover, Nakajima needs the presence of an implementing EU act and the incidental nature of the review. So the potential number of cases would have been small. On the other hand, extending Nakajima-review to an agreement such as the Aarhus Convention, granting procedural rights of access to justice to members of the public, might have resulted in a lot more EU instruments being challenged ‘incidentally’ before the Court.

6.2. Comments on the Advocate General’s opinion

This lengthy opinion has some laudable parts but some points deserve further discussion. It is commendable that the Advocate General provided an overview of the divergences of the Court’s case-law regarding the invocability of international agreements and also admitted that different

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82 The General Court was quite vocal about this in T-19/01, Chiquita v. Commission, EU:T:2005:31, paras. 117-118. For a commentary and overview of this case see Di Gianni and Antonini, “DSB Decisions and Direct Effect of WTO Law: Should the EC Courts be More Flexible when the Flexibility of the WTO System has Come to an End?”, 40 Journal of World Trade (2006) 777-793, at 784-786.

83 Lenaerts and De Smijter, “Some Reflections On the Status of International Agreements in the Community Legal Order”, at 349 in Rodríguez Iglesias, Due, Schintgen and Elsen (Eds), Mélanges en hommage à Fernand Schockweiler (Nomos Verlagsgesellschaft, 1999).


85 Delile, op. cit. supra note 79, at 701.

86 GATT, WTO, UNCLOS, Ankara Agreement (partially resolved with the granting of direct effect to the decisions of the Association Council) and Article 9(3) Aarhus Convention.
agreements will have different effects in the EU legal order.\textsuperscript{87} Besides this, he was also forcing the Court’s hand to reaffirm the \textit{Biotech} holding and thus acknowledge that a difference exists between the invocation of an international agreement for the purpose of protecting individual rights and invocation for the purpose of reviewing secondary EU legislation.

However, the Opinion is not without its weak points. First, the Advocate General did not address the argument of the Council and the Parliament, according to which \textit{Nakajima} could not apply since there was only a mere reference to the Aarhus Convention and no specific obligations were meant to be transposed by the Aarhus Regulation. The Advocate General could have spent some paragraphs arguing why the Aarhus Regulation was indeed intended or not intended to implement obligations found in the Aarhus Convention, which refer to public institutions.

Second, the Advocate General could have focused more on the General Court’s argument based on \textit{Racke}, in which the Court extended \textit{Nakajima}-review to customary international law. Instead, he replaced one problematic area with another, namely the discussion on the different types of invocability of international provisions.\textsuperscript{88} The Advocate General argued that even if Article 9(3) Aarhus Convention was not sufficiently clear and precise for the invocation of a specific right granted by the agreement, it was still sufficiently clear and precise in order to be invoked for the review of legality of secondary EU law. However, the Court would have found a hard time accepting this reasoning, since it has never expressly affirmed these different types of invocation, which in practice are often hard to distinguish.\textsuperscript{89}

Third, the application of \textit{Biotech} to this case is questionable. \textit{Biotech} has never been reaffirmed by the Court and some authors find the reasoning of the Court in this case problematic.\textsuperscript{90} Moreover, he seems to disregard the specifics of \textit{Biotech}, which involved a Member State’s (a privileged applicant) reliance on an international agreement. In the specific circumstances of \textit{Biotech}, following the denial of the WTO’s direct effect in \textit{Portugal v. Council}, the Court probably felt embarrassed to deny a privileged applicant the possibility to ask for the review of EU law in light of an international agreement, by asking for the condition that private rights be created by the agreement.\textsuperscript{91} On the other hand, the two recent General Court cases involved private parties which, as I have discussed in a previous article, have to prove the existence of a right granted by the agreement or a specific interest.\textsuperscript{92} Knowing the limited capacity of private parties to challenge the

\textsuperscript{87} For two recent studies on this diverging case-law see Mendez, ‘The Legal Effect of Community Agreements’, op. cit. \textit{supra} note 71; Gáspár-Szilágyi, ‘EU International Agreements through a US lens’, op. cit. \textit{supra} note 27.

\textsuperscript{88} I prefer to use the term ‘invocability’ and not start a debate on the common law and the continental notions of ‘direct effect.’ For a further read, see Dougan, “When Worlds Collide! Competing Visions of the Relationship between Direct effect and Supremacy” 44 CML Rev. (2007) 931-963.

\textsuperscript{89} On this discussion see S. Gáspár-Szilágyi, ‘The ‘primacy’ and ‘direct effect’ of EU international agreements’, 21 \textit{European Public Law} (2015, forthcoming).


\textsuperscript{92} Gáspár-Szilágyi, “EU International Agreements through a US Lens”, op. cit. \textit{supra} note 27, at 619-624.
validity of EU measures in light of EU international agreements, it seems hard to think that the Court would have extended Biotech to a case that involves private parties.

6.3. Comments on the Grand Chamber’s judgment

This section will first discuss the arguments of the Grand Chamber concerning the non-applicability of Fediol. It then turns to the Nakajima line of arguments and presents some further comments.

6.3.1. Fediol is not applicable

The arguments of the Grand Chamber concerning the difference between the original regulation in Fediol and the Aarhus Regulation are not entirely convincing. If one looks at Fediol, there is only one reference made to international law in Article 2(1) of Regulation 2641/84 and in the preamble a succinct and general reference is made to the GATT, without any reference being made to a specific provision of the GATT. The condition of a reference being made to a specific international provision only appears later on in Germany v. Council.

If one were to compare the original regulation in Fediol and the Aarhus Regulation, one would find that the latter makes dozens of references to the Aarhus Convention. The title of the Regulation itself specifies that it is “on the application of the provisions of the Aarhus Convention […] in Environmental Matters to [EU] institutions and Bodies”. As previously mentioned, the preamble makes a reference to the Aarhus Convention in almost every recital, including Recital 5 which mentions that “it is appropriate to deal with the three pillars of the Aarhus Convention, namely access to information, public participation in decision-making and access to justice in environmental matters, in one piece of legislation”. Furthermore, the next line clearly illustrates the purpose of the Aarhus Regulation to contribute “to rationalising legislation and increasing the transparency of the implementation measures taken with regard to [EU] institutions and bodies”.

Furthermore, the Grand Chamber seems to have given too textual of a reading to Article 10(1) Aarhus Regulation, neglecting the overall purpose of the act and its preamble. Article 10(1) cannot be understood properly without referring to Recital 18 of the preamble, which specifically refers to Article 9(3) Aarhus Convention, and how the Aarhus Regulation only concerns acts of the public authorities as opposed to both private and public acts covered by the Convention. One cannot but

93 Highlights added by author.
94 Recital 5, Aarhus Regulation [highlights added by author].
ask the question of what situations the Fediol exception actually covers? In essence, it seems that the Fediol alternative is restricted to the original case and has never been reconfirmed.95

6.3.2. Nakajima is not applicable

The arguments concerning Nakajima also warrant some observations. First, it seems that the Grand Chamber sets an unnecessarily high burden to prove the application of this exception, even when it is clear that a regulation is meant to implement a convention.

Second, the Court interprets the ‘discretion’ granted by Article 9(3) Aarhus Convention too broadly. Article 9(4) Aarhus Convention specifically provides that the procedures laid down in paragraphs 1, 2 and 3 shall provide adequate remedies, be fair and equitable. Whether the denial of direct effect to Article 9(3) Aarhus Convention and the refusal to apply Fediol and Nakajima provide proper access to justice to environmental NGOs before the EU courts is a rhetorical question.

Third, the Grand Chamber does not mention Racke and how Nakajima had been successfully applied outside anti-dumping.96 The Court instead relegates Fediol and Nakajima to certain fields of WTO law and does not try to ascertain whether the argumentation of the General Court was indeed more in line with the EU’s international obligations.

Fourth, it must be recalled that the Aarhus Convention binds the EU just as well as the Member States, and there are certain administrative and judicial proceedings of the EU, and not just of the Member States, which also have to comply with the EU’s international obligations. Plus, it seems that just as in Slovak Brown Bear, the Court tries remedying its own fairly unconvincing conclusions, by passing down the burden to the Member States to interpret their national laws in conformity with international agreements, even if the Court has denied them direct effect.

6.3.3. Some further observations

Another major point that needs some discussion is the Grand Chamber’s silence on the Advocate General’s legitimate concerns regarding the incoherence of the Court’s case-law on the invocation of EU international agreements. As argued, extending the Biotech type of invocability to this case would have been too far of a stretch, since Biotech involved privileged applicants and not private parties. Still, the Court could have embarked on a discussion on invocability in the sense of

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95 As Mendez noted in 2010, it appears that Fediol-review has only been conducted in the original Fediol case and has largely fallen out of use. See Mendez, “The Enforcement of EU Agreements: Bolstering the Effectiveness of Treaty Law?” 47 CML Rev. (2010), 1719-1756, at 1746.
96 The Parliament in its argumentation mentioned Racke but argued that the circumstances of that case were different and the direct effect of the international agreement in that case was not contested. Joined Cases C-401/12 P to C-403/12 P, Council, Parliament and Commission v. Vereniging Milieudefensie, para. 46.
conferral of rights and in the sense of review of secondary EU legislation. If an international agreement cannot be directly invoked and if Nakajima and Fediol do not apply, what alternatives do private parties have? Is consistent interpretation a good enough alternative, knowing that it cannot result in the invalidation of conflicting secondary EU law? 97

Nonetheless a possible explanation for the Grand Chamber’s decision lies in the choice of not to upset the balance between the EU institutions. 98 National constitutional courts as well as supranational courts with constitutional functions, such as the Court of Justice, are often faced with the difficult task of ‘balancing’ different interests. Depending on the interests involved courts can either show enhanced ‘judicial activism’, but also ‘self-restraint’ when they choose to defer certain issues to the political institutions. 99

In this case all major EU institutions appealed, showing the express will of the EU’s political bodies to stop any kind of review of the Aarhus Regulation for its conformity with the Convention. This might have signalled the will of the EU political bodies to first handle the implementation of the obligations arising under the Aarhus Convention themselves, in the detriment of the ‘judiciary’. Thus, it seems that the Court preferred to restrict the application of the ‘implementation principle’, and restrict the right of the public to challenge acts of the EU institutions that have an impact on the environment, until the EU political bodies agree on how to implement the obligations under the Aarhus Convention. However, deferring an issue to the executive or legislative might amount to a denial of justice. 100

The judgment also seems to raise more questions for the application of the Fediol and Nakajima exceptions. Now it is fairly evident that the Court will restrict their application to specific areas of WTO law, but even within those areas what conditions will need to be satisfied? What will a specific reference to an international provision or the implementation of a particular international obligation entail in practice? It seems that the view of some academics, concerning the inoperative character of these exceptions 101 will be strengthened after this judgment.

7. Conclusion


98 This is not a novel argument and has been used by the Court in its WTO line of cases.


100 Ibid., at 237. On this discussion see Gáspár-Szilágyi, ‘EU International Agreements through a US Lens’, op. cit. supra note 27, at 610-611.

101 Kuijper is one such critic. See Kuijper and Bronckers, op. cit. supra note 11, at 1326-1328.
This case can be seen as a further signal that the Court of Justice is re-enforcing the ‘autonomy’ of EU law, by making the review of EU measures for their conformity with international commitments an increasingly difficult task. The Court could have taken an approach similar to its approach in Racke and extend the ‘implementation principle’ outside WTO law to other international agreements which lack direct effect and are relied on in an incidental manner to challenge the validity of secondary EU legislation. By upholding the General Court’s judgment and strengthening the arguments used in the two initial cases, the Court could have guaranteed that the EU’s international obligations under the Aarhus Convention are respected. After all, under Article 216(2) TFEU international agreements are binding on all the EU institutions, including the Court. Instead, the Court chose the opposite direction and restricted the application of Nakajima and Fediol. This might have been a result of the strong opposition of the other three major EU institutions and the Court’s desire not to upset the institutional balance of the EU, over the EU’s international obligations.

This case seems to be also in line with the general trend, not just of the Court but also of the other EU institutions to shield EU law from international scrutiny. As has been noticed by other academics, the new generation of free trade agreements concluded and negotiated by the EU have clauses denying their direct enforcement. This means that in the upcoming years it will be even more difficult to challenge secondary EU law in light of EU international agreements, even if the latter have primacy over the former.

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