

# Article 3(5) TEU a decade on: Revisiting ‘strict observance of international law’ in the text and context of other EU values

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Rupert Dunbar\* 

## Abstract

Article 3(5) of the Treaty on the European Union concerns EU external relations and was a new provision of the Lisbon Treaty. It has been seized upon by scholars for its reference to ‘strict observance of international law’ by the EU in its relations with the wider world. However, recent case law in the Court of Justice of the European Union has demonstrated little movement towards this supposed ideal. This article supports the fact that rigid and unquestioning adherence to international law has not emerged in case law, particularly as Article 3(5) TEU also mandates that the Union ‘uphold and promote its values and interests’. By taking a broader view of both the text and context of Article 3(5) TEU in EU law as a whole, and through consideration of the limited demands international law places on domestic courts, the article argues that – contrary to current literature – a more expressly balanced approach towards respect for international law is required and should be nurtured in the case law.

## Keywords

EU external relations, international law in domestic legal systems, direct effect, customary international law, protection and promotion of EU values

## I. Introduction

Article 3(5) TEU was a new provision in the Lisbon Treaty, and one to which scholars were immediately drawn. It arrived when the Court’s respect for international law was perceived to be at its lowest ebb and the prevailing view was undoubtedly that Article 3(5) TEU required the Court to

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\*Kingston University, Kingston Upon Thames, Surrey, United Kingdom of Great Britain and Northern Ireland

### Corresponding author:

Rupert Dunbar, Kingston University, Faculty of Business and Social Sciences, Penrhyn Road, Kingston Upon Thames, Surrey KT1 2EE, United Kingdom of Great Britain and Northern Ireland.

E-mail: [Rupert.Dunbar@kingston.ac.uk](mailto:Rupert.Dunbar@kingston.ac.uk)

respect international law more greatly moving forward. This optimism pertains today – a decade on. Ultimately, though, Article 3(5) TEU does not appear to have impacted the Court's case law meaningfully.

This article will argue that the lack of impact is eminently justified concerning respect for international law when considering the text of Article 3(5) TEU more fully. This can be further supported by consideration of the manner in which the Court typically interprets EU Treaty provisions and by the demands of international law itself concerning its application in domestic courts. Accordingly, 'respect for international law' is found – both within EU law and international law governing domestic application itself – to be unable to bear the ideological strain which continues to be placed upon it in scholarship. Article 3(5) TEU could, though, be better utilized by the Court in expressly detailing the balanced approach to respecting international law *and EU values* moving forward.

The article is structured to firstly consider the climate of the case law into which Article 3(5) TEU entered. Secondly, the full text of Article 3(5) TEU will be reflected upon. Thirdly, the Court's interpretative approach to EU Treaty articles generally will be analysed. Fourthly, the application of international law in domestic courts will be considered from the perspective of international law's demands and State practice. Finally, the limited impact of Article 3(5) TEU concerning greater respect for international law in case law subsequent to the Lisbon Treaty will be considered and endorsed, although the potential for more meaningful judicial and scholarly engagement with Article 3(5) TEU *in its full text and context* will be highlighted.

## 2. Prominent pre-Article 3(5) TEU case law

In the time between the Lisbon Treaty's conclusion and its entry into force a couple of years passed, and this proved to be a significant period for the Court's application of international law (its 'external case law'). One of these years – 2008 – has been described as an '*annus horribilis*'.<sup>1</sup> Whilst such criticism is often more intense precisely because the EU and its Court had previously been viewed as particularly respectful of international law,<sup>2</sup> undoubtedly the changes were notable and real. We can briefly chart relevant developments leading to this.

The EU itself is a product of successive international treaties. Bold doctrines such as supremacy and direct effect of EU law emanated from what Alter notes to have been 'an obscure Court in Luxembourg'.<sup>3</sup> It is safe to assume that greater tension would have arisen concerning internal acceptance of such doctrines had the Court begun from a position of hostility regarding its relationship with international law; its most obvious touchpoint for legitimacy. Therefore, in *Haegeman II* the Court asserted that international agreements form 'an integral part of EU law'<sup>4</sup> and in *Woodpulp* it appeared that customary international law could even operate as a constraint on

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1. Matthias Kottmann, *Introvertierte Rechtsgemeinschaft* (Springer, 2014) p. 233.

2. For example, Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*', 51(1) *Harvard Law Review* (2010), p. 1.

3. Karen J. Alter, 'The European Court's Political Power: The Emergence of an Authoritative International Court in the European Union' (first published 1996) in Karen J. Alter, *The European Court's Political Power: Selected Essays* (OUP, 2010), p. 92.

4. Case 181/73 *Haegeman v. Belgium* ('*Haegeman II*'), EU:C:1974:41, para. 5.

the EU Treaty itself.<sup>5</sup> The Court opted clearly for a continuous thread with its (then) not so distant past, rather than to plough a lonely furrow. On this reading the most obvious initial benefit of being respectful to international law was internal.

But Brockers and Kuijper note that:<sup>6</sup>

All this has now changed. The Community has become an important factor in international relations . . . Moreover, the Court's position in relation to the other institutions within the Community has changed.

This passage highlights two developments. Firstly, the Court has undeniably become stronger internally which means it is less – if at all – reliant on international law to legitimize itself. Secondly, greater participation of the EU in international relations is clearly pointless unless it promotes its values, often developed by the legislature in tandem with the Court of Justice of the European Union.<sup>7</sup> Rather than simply being a conduit for the promotion and enforcement of all things labelled international regardless of content, the Court's approach would inevitably change. Consequently, the risk of clashes between EU and international law increases as a result.<sup>8</sup>

The Court's treatment of the General Agreement on Trade Tariffs (GATT) and, subsequently, World Trade Organization (WTO) law are the first prominent examples of EU self-interest at the expense of applying international law. Concerning the Court's refusal to grant direct effect (allowing reliance on international treaty law by individuals) to GATT there was, in fact, much scholarly support and relevant arguments were advanced by the Court highlighting GATT's flexible nature.<sup>9</sup> Concerning WTO law, the Court acknowledged it did 'differ significantly [from GATT] . . . in particular by reason of the strengthening of the system of safeguards and the mechanism for resolving disputes'.<sup>10</sup> However, the disinclination of 'significant trading partners' to grant direct effect to WTO law within their legal systems meant that to do so in the EU would have, in the Court's view, deprived the legislature of the 'scope for manoeuvre' enjoyed by others.<sup>11</sup> This position is less readily accepted by scholars and the debate continues to be intense.<sup>12</sup>

5. Joined Cases 89/85, 104/85, 114/85, 116–17/85 and 125–9/85 *Ahlström Osakeyhtiö and Others v. Commission* ('Woodpulp') EU:C:1993:120.

6. Marco Bronckers and Pieter Jan Kuijper, 'The WTO in the European Court of Justice', 42 *Common Market Law Review* (2005), p. 1313 cited in Joost Pauwelyn, 'Europe, America and the "Unity" of International Law', in Jan Wouters, André Nollkaemper and Erika De Wet, *The Europeanisation of International Law* (TMC Asser Press, 2008), p. 220.

7. See e.g. Phil Syrpis, 'Theorising the Relationship Between the Judiciary and the Legislature in the EU Internal Market', in Phil Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (CUP, 2012).

8. Christine Eckes, 'International Law as Law of the EU: The Role of the European Union Court of Justice' in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds.), *International Law as Law of the European Union* (Brill, 2012), p. 268–269 and Piet Eeckhout, *EU External Relations Law* (2nd edition, OUP, 2011), p. 293.

9. Joined Cases 21 to 24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit*, EU:C:1972:115. See further Piet Eeckhout, *EU External Relations Law*, p. 343–350.

10. Case C-149/96 *Portugal v. Council* ('Portuguese Textiles') [1999] ECR I-8395, para. 47.

11. *Ibid.*, para. 46.

12. For defence of the jurisprudence of the Court see e.g. S. Griller, 'Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/96, Portugal v Council', 3(3) *Journal of International Economic Law* (2000), p. 441; Piet Eeckhout, 'Judicial Enforcement of WTO Law in the European Union – Some Further Reflections', 5(1) *Journal of International Economic Law* (2002), p. 91 and Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (OUP, 2013), p. 174–249. For criticism see e.g. Ernst-Ulrich Petersmann, 'Can the EU's Disregard for "Strict Observance of International Law" (Article 3 TEU) be

Whilst a significant blot, ‘the lone exception of GATT and WTO law’ regarding the refusal of direct effect meant that the Court’s jurisprudence was still viewed as respectful towards international law.<sup>13</sup> This rendered the decision in *Intertanko*<sup>14</sup> all the more surprising.<sup>15</sup> In *Intertanko* the Court asserted that<sup>16</sup>:

[The United Nations Convention on the Law of the Sea] does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship’s flag State.

This was noted to deviate from previous case law, particularly concerning the ‘conferral of rights test’, which had long lain dormant, and there was the awkward point that the Court had applied some provisions of UNCLOS in *Poulsen*,<sup>17</sup> a case decided prior to the EU becoming a member.<sup>18</sup> Ultimately, concerning *Intertanko*, many wondered ‘whether... the actual review which the judgment avoids, is influencing the answer... as to the capacity of the Agreement itself to form a review criterion *vis-à-vis* Community law’.<sup>19</sup> In this instance refusing direct effect of UNCLOS ensured a higher level of environmental protection.

*Kadi I* featured a challenge to an EU Regulation<sup>20</sup> on the basis that it breached fundamental rights. Complexity arose as the Regulation implemented without modification a UN Security Council Resolution targeting potential terrorists by freezing their funds.<sup>21</sup> The (then) Court of First Instance was very respectful of the international origin of the EU Regulation and so reviewed it on the basis of *jus cogens* alone, finding no breach. The Court adopted a very different approach; instead of reviewing an EU Regulation on the basis of international law, it reviewed it on the basis of EU fundamental rights law as the ‘autonomous’ nature of the EU legal system

Constitutionally Justified?’, in Inge Govaere, Reinhard Quick and Marco Bronckers (eds.), *Trade and Competition Law in the EU and Beyond* (Edward Elgar, 2011) and Nikos Lavranos, ‘The ECJ’s Relationship with Other International Courts and Tribunals’, in Henning Koch and others (eds.), *Europe: The New Legal Realism – Essays in Honour of Hjalte Rasmussen* (Djøf Publishing, 2010).

13. Piet Eeckhout, *EU External Relations Law*, p. 353. See also Panos Koutrakos, *EU International Relations Law* (Hart, 2006), p. 319.
14. Case C-308/06 *Intertanko and Others* EU:C:2008:312.
15. See Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, p. 275. It is also notable that Kokott AG’s approach in *Intertanko* differed from the Court’s.
16. Case C-308/06 *Intertanko and Others*, para. 64.
17. Case C-286/90 *Anklagemindigheden v. Poulsen and Diva Navigation*, EU:C:1992:453.
18. See e.g. Piet Eeckhout, *EU External Relations Law*, p. 353–355.
19. Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, p. 100. For further criticism see Jan Wouters and Philip de Man, ‘International Association of Independent Tanker Owners (*Intertanko*), International Association of Dry Cargo Shipowners (*Intercargo*), Greek Shipping Cooperation Committee, Lloyd’s Register and International Salvage Union v. Secretary of State for Transport and Case C-308/06’, 103(3) *American Journal of International Law* (2009), p. 555 and Riccardo Pavoni, ‘Controversial Aspects of the Interaction Between International and EU Law in Environmental Matters: Direct Effect and Member States’ unilateral measures’, in Elisa Morgera (ed.), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (CUP, 2012).
20. Council Regulation (EC) 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, [2002] OJ L 139/9.
21. UN Security Council Resolution 1267 (1999).

‘cannot be prejudiced by an international agreement’<sup>22</sup> – even the UN Charter.<sup>23</sup> In finding multiple breaches the Court annulled the regulation *but*, in recognition that ‘immediate effect would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed’, it suspended the judgment’s effect for three months.<sup>24</sup>

The nuance of outcome in *Kadi I*<sup>25</sup> did little to prevent criticisms from some that ‘the judgment seems to lack a thorough engagement with international law issues’<sup>26</sup> and that the Court was guilty of ‘withdrawing into one’s own constitutional cocoon, isolating the international context and deciding the case exclusively by reference to internal constitutional precepts’<sup>27</sup>, with ‘important parts of its reasoning [expressed] in chauvinist and parochial tones’.<sup>28</sup>

*FIAMM* – decided less than a week after *Kadi I* – returned (like *Intertanko*) to the issue of direct effect and rounded 2008 off with a further blow to the potential for review of the legislature’s actions where WTO law was concerned. *FIAMM* was a product of the well-known ‘banana wars’, which saw the EU provide preferential treatment to African, Caribbean and Pacific countries to the detriment of Latin American countries in particular. The result was *WTO-approved* retaliatory action by the US, which impacted directly on certain traders in fields quite separate from the initial dispute.<sup>29</sup> The Court’s disinclination to review the decision of the legislature was based on the risk of hindering action taken ‘in the public interest . . . which adversely affect the interests of individuals.’<sup>30</sup> However, without review the presumption appears that in the WTO sphere the legislator, simply by acting, is *always* acting in the public interest and cannot be questioned.<sup>31</sup> Maduro AG thought the Court had all but established in internal case law the principle that it would review<sup>32</sup> and he thought the threshold for review had been met in *FIAMM* itself.<sup>33</sup> Aside from weakening review functions in EU law, the disinclination to engage with international law in such a case, whilst fitting within the trend of the Court’s WTO case law, was a further disappointment to many.

*Kadi*, *Intertanko* and *FIAMM* combined to represent a year in which international law had not been readily received within the Court’s case law, but with the entry into force of Article 3(5) TEU many scholars encouraged and anticipated a resurgence in respect for international law.

22. Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* (*Kadi I*) [2008] EU:C:2008:461, para. 316.

23. Article 103 of the UN Charter states that ‘[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’

24. Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, para. 373.

25. For further discussion of this point see e.g. J. Larik ‘The Kadi Saga as a Tale of “Strict Observance” of International Law: Obligations under the UN Charter, Targeted Sanctions and Judicial Review in the European Union’, 61(1) *Netherlands International Law Review* (2014), p. 23–42.

26. Jed Odermatt, ‘The Court of Justice of the European Union: International or Domestic Court?’, 3(3) *Cambridge Journal of International and Comparative Law* (2014), p. 696, 717.

27. Whilst heavily critical, Weiler did also note: ‘I have no quibble with the material outcome’, J.H.H. Weiler, ‘Editorial: *Kadi* – Europe’s *Medellin*?’, 19(5) *European Journal of International Law* (2008), p. 895, 896.

28. Gráinne de Búrca, 51(1) *Harvard Law Review* (2010), p. 1, 4.

29. *FIAMM* producing batteries and *Fendon* producing spectacle cases.

30. Joined Cases C-120 and 121/06 P *FIAMM and Fedon v. Council*, EU:C:2008:476, para. 121.

31. See further Anne Thies, ‘The Impact of General Principles of EC Law on its Liability Regime Towards Retaliation Victims After *FIAMM*’, 34(6) *European Law Review* (2009), p. 899.

32. Opinion of Advocate General Maduro in Joined Cases C-120 and 121/06 P *FIAMM and Fedon v. Council*, EU:C:2008:98, para. 80.

33. *Ibid.*, para. 81–82. The Court considered otherwise, at para. 185–186 of its judgment.

### 3. The (over-)emphasis on ‘strict observance’ in Article 3(5) TEU commentary

References to Article 3(5) TEU in the literature have been manifest but partial: ‘[T]he Union shall contribute to . . . the strict observance of international law’ is the typical formulation.<sup>34</sup> It has also become a popular title (emphasizing ‘strict observance’) for journal articles.<sup>35</sup> The prevailing view is clearly that Article 3(5) TEU matters, and that strict observance of international law is its pertinent part. The consequence, unsurprisingly, was that scholars believed it to be a vital new tool for the Court to more robustly apply international law, and one which could be used to criticize case law should it not. Therefore, Mendez suggested that Article 3(5) TEU had ‘supplied the EU Courts with a powerful additional anchor with which to hold a more unreserved embrace of [international] treaty enforcement’<sup>36</sup>, whilst Petersmann asked: ‘Can the EU’s Disregard for “Strict Observance of International Law” (Article 3 TEU) Be Constitutionally Justified?’<sup>37</sup> More surprising than scholarship’s focus on respect for international law alone in Article 3(5) TEU was that this imbalanced approach was followed by Advocates General<sup>38</sup> and the Court,<sup>39</sup> with partial citation of Article 3(5) TEU in case law omitting key references to EU values. However, as noted above and developed below, more robust enforcement of, and respect for, international law in the Court has not occurred as a result. The following two sections will focus on both the text and context of Article 3(5) TEU and will argue as a result of the analysis that ‘strict observance’ of international law is overemphasized in scholarship. The reason for this is that fuller consideration of Article 3(5) TEU and other relevant EU provisions limit its significance, whilst international law’s own requirements fall far short of this purported ideal.

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34. See e.g. Piet Eeckhout, *EU External Relations Law*, p. 326; Judicaël Etienne, ‘Loyalty Towards International Law as a Constitutional Principle of EU Law?’ *Jean Monnet Working Paper* 3 (2011), p. 1, 2; Simon 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(3) *International and Comparative Law Quarterly* (2011), p. 737; T. Konstadinides, ‘When in Europe: Customary International Law and EU Competence in the Sphere of External Action’, 13(11) *German Law Journal* (2012), p. 1177, 1187; Allen Rosas, ‘International Responsibility of the EU and the European Court of Justice’, in Malcolm Evans and Panos Koutrakos (eds.), *International Responsibility of the European Union: European and International Perspectives* (Hart Publishing, 2013), p. 158; Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, p. 321 and Panos Koutrakos, *EU International Relations Law* (2nd edition, Hart Publishing, 2015), p. 224.
35. Ernst-Ulrich Petersmann, ‘Can the EU’s Disregard for “Strict Observance of International Law” (Article 3 TEU) Be Constitutionally Justified?’, in M. Bronckers, V. Hauspiel and R. Quick (eds.), *Liber Amicorum for J. Bourgeois* (Edward Elgar, 2011), p. 214; P. Jan Kuijper, ‘It Shall Contribute to . . . the Strict Observance and Development of International Law: The Role of the Court of Justice’, in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (Springer, 2013), p. 589.
36. Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, p. 321.
37. Ernst-Ulrich Petersmann, in M. Bronckers, V. Hauspiel and R. Quick (eds.), *Liber Amicorum for J. Bourgeois*.
38. For example, Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v. Kadi* (‘Kadi II’), EU:C:2013:518, Opinion of AG Bot, para. 73; Case C-366/10 *Air Transport Association of America and Others*, EU:C:2011:864, Opinion of AG Kokott, para. 75 and Case C-285/12 *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, EU:C:2014:39, Opinion of AG Mengozzi, para. 23.
39. Case C-366/10 *Air Transport Association of America and Others*, para. 101.

## 4. The text

It is submitted that Article 3(5) TEU's modest impact is justified when it is viewed in its full form:

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Within this provision there are many factors which can be viewed to potentially conflict with one another.<sup>40</sup> Not least, in providing that the EU 'shall uphold and promote its values' there is clearly the risk that this will not accord well with 'strict observance' of international law.

Reading the provision, it also appears questionable to isolate 'strict observance' as a stand-alone term; the word 'contribute' appears at the start of the long sentence – containing multiple aims – and appears to suggest further conditionality (for example, 'ensure strict observance' would be stronger). '[C]ontribute' could even be read as being dependent on others; requiring an existing practice which could be contributed to. Linguistically at least, one could argue that the Article may even anticipate that the practice of others would already be one of *strict* observance to which the EU could then contribute (otherwise 'the' seems superfluous). However, strict observance of international law is a practice which reviews of domestic courts' application of international law reveal is far from uniform.<sup>41</sup> Whilst the term 'development' perhaps militates against excusing the EU from making some effort in this circumstance, concerning WTO law it is notable that the reluctance of significant trading partners to grant direct effect was considered by the Court as a barrier to doing so in the EU. Were the Court to have unilaterally granted such effect the compliance pull for others (necessarily representing an empirically larger issue) would clearly have been less than highlighting the problem.<sup>42</sup> Similarly, that *Kadi I* subsequently gave rise to improvements to the UN terrorism listing process in regard to *international* human rights protection could be seen as a 'development' resulting from the Court's (arguably) less than 'strict observance' of the UN Charter.<sup>43</sup>

Article 3(5) TEU is less than decisive in multiple aspects<sup>44</sup> and consideration of Article 21 TEU arguably lends further support to the view that some flexibility was intended. Whilst seeking 'a

40. For example, sustainable development and trade; security and fundamental rights.

41. See e.g. André Nollkaemper, *National Courts and the International Rule of Law* (OUP, 2011) and Dinah Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (OUP, 2011).

42. The conceptual challenge of the EU contributing to strict observance through a possible breach of international law itself is partly replicated in the *Air Transport* case, where the Kyoto Protocol (Article 2(2)) anticipated action though the International Civil Aviation Organization but the process had stalled.

43. See further Panos Koutrakos, *EU International Relations Law* (2nd edition, 2015), p. 225–226 and Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP, 2013), p. 202–203. Compare though Larik, who argues that the Court was 'strictly observing' international law all along: J. Larik, 'The Kadi Saga as a Sale of "Strict Observance" of International Law: Obligations Under the UN Charter, Targeted Sanctions and Judicial Review in the European Union', 61(1) *Netherlands International Law Review* (2014), p. 23.

44. Gragl speaks of Article 3(5) TEU reflecting 'indifference' on the part of the Treaty drafters and arguably the reflection of a concern that 'loose lips might sink ships' if it was more proscriptive, Paul Gragl, 'The Silence of the Treaties', 57 *German Yearbook of International Law* (2014), p. 375, 381.

high degree of cooperation in all fields of international relations', it is notable that the Lisbon Treaty's Working Group on External Action's proposal for 'maximum degree of cooperation' was not adopted.<sup>45</sup> Indeed, the first stated aim of any co-operation in Article 21 TEU is the EU-centric aim to 'safeguard its values, fundamental interests, security, independence and integrity'.<sup>46</sup>

This gives rise to possible clashes between EU and international law where values do not align or (as is more often the case) where EU law is progressing in a given area at a speed which differs from international law. Accordingly, the 'rule of law, the universality and indivisibility of human rights'<sup>47</sup> were at stake in *Kadi*, with EU rules providing for a higher level of individual protection. Concerning airline emissions, after seeking to 'help develop international measures to preserve and improve the quality of the environment' through relevant international aviation bodies, the legislature subsequently acted unilaterally and was challenged in *Air Transport* – but given the challenges of arriving at international consensus it seems that the EU could not, as mandated by Article 21 TEU, 'ensure sustainable development' otherwise. This was similarly so for *Intertanko*, albeit the environmental imperative of ship source pollution appeared less pressing in breadth and magnitude than that at stake in *Air Transport*.

Accordingly, whilst it is true that under Article 21 TEU the EU 'shall promote multilateral solutions to common problems, in particular in the framework of the United Nations', equally it 'shall ensure consistency between the different areas of its external action . . . and its other policies'. Both fundamental rights and environmental protection are good examples of the challenges which pertain as a result of these dual demands. Guaranteeing a certain level of fundamental rights protection or pursuing a certain level of environmental protection within the EU will not – and has not – always accorded with that of UN bodies. The choice then becomes a domestic redrawing of that which was hitherto 'fundamental' in the case of rights or of making adjustments which may give rise to unfairness for participants and ineffectiveness for environmental protection.<sup>48</sup> The question of how far the EU should pursue 'multilateral solutions' before turning to unilateralism – if at all – is heavily debated, but it is reinforced rather than resolved by Article 21 TEU.

It is submitted that Articles 3(5) and 21 TEU are not alone in their indeterminacy regarding the application of international law and appropriate approaches to it within the EU. Should multilateral or bilateral negotiations (encouraged in Articles 3(5) and 21 TEU) end in conclusive agreement, Article 216(2) TFEU states that '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States.' However, in articulating the hierarchy or interaction of concluded international agreements with the EU Treaty, secondary legislation and the Member States' legal systems – and even the first step of governing reliance upon international treaties – Cremona observes that whilst this Article articulates 'an important principle: [it] leaves

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45. CONV 459/02, Final Report of Working Group VII on External Action, Brussels, 16 December 2002, 3. For discussion of Lisbon's reform processes concerning external relations, see Paul Craig, *The Lisbon Treaty: Law, Politics, And Treaty Reform* (OUP, 2010), p. 379–436.

46. Article 21(2)(a) TEU.

47. Article 21(1) TEU.

48. For instance, EU sectors with international elements may be excluded from schemes in spite of being in competition with other sectors and being more polluting. The increasing challenge of overlapping internal and external policy elements was recognized in debating EU Treaty reform, see CONV 459/02, Final Report of Working Group VII on External Action, Brussels, 16 December 2002.



many of these questions [of effects] unanswered'.<sup>49</sup> Mendez notes equally that '[a] textually more explicit provision was certainly possible.'<sup>50</sup>

Indeed, in deciding that international treaties concluded by the EU 'form an integral part of [EU] law',<sup>51</sup> the Court did not even make reference to Article 216(2) TFEU (then Article 228(2) EEC).<sup>52</sup> In subsequent cases the Article was referred to more frequently.<sup>53</sup> However, the Court's varied approaches to international treaties' internal effects seem difficult to object to on the basis of Article 216(2) TFEU alone. The most helpful suggestion is that the provision is merely an expression of the *pacta sunt servanda* principle (that agreements are binding) in international law.<sup>54</sup> Otherwise the dramatic statement that the 'Community constitutes a new legal order of international law'<sup>55</sup> which was 'to some extent . . . defined . . . in opposition to international law'<sup>56</sup> in *Van Gend en Loos* would have been rather redundant. But the 'binding' nature of international agreements within international law, returns us once more to the debate concerning the limited obligations of domestic courts in such instances.<sup>57</sup>

In addition to the textual limitations of Article 3(5) TEU (and Article 21 TEU and 216(2) TFEU), it is submitted that there are contextual limitations to be considered. From the EU perspective this concerns interpretative approaches common to all EU Treaty provisions, whilst from the international perspective, the requirements concerning strict observance have been few and the practice of States suggests reluctance.

## 5. The context

### A. The Court's approach to EU Treaty provisions

Today it is widely recognized that the Court's 'standard' approach to interpretation is the teleological method.<sup>58</sup> This entails extrapolation of meaning and purpose from the law to aid with its understanding. In *CILFIT* the Court explained:<sup>59</sup>

[E]very provision of community law must be placed in its context and interpreted in the light of the provisions of community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

49. Marise Cremona, 'External Relations and External Competence of the European Union: The Emergence of an Integrated Policy', in Paul Craig and Gráinne de Búrca (eds.), *The Evolution of EU Law* (2nd edition, OUP, 2011), p. 234.

50. Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, p. 70.

51. Case 181/73 *Haegeman v. Belgium*, para. 5.

52. Panos Koutrakos, *EU International Relations Law* (2nd edition, 2015), p. 210.

53. Starting in Case 104/81 *Hauptzollamt Mainz v. CA Kupferberg*, EU:C:1982:362, para. 11.

54. Piet Eeckhout, *EU External Relations Law*, p. 325 and (more implicitly) Panos Koutrakos, *EU International Relations Law* (2nd edition, 2015), p. 209–210.

55. Case 26/62 *van Gend en Loos*, EU:C:1963:1.

56. Piet Eeckhout, *EU External Relations Law*, p. 324.

57. See further section 5.2.

58. Anthony Arnall, *The European Union and its Court of Justice* (2nd edition, OUP, 2006), p. 607. See also Lord Slynn, 'They Call it "Teleological"', 7 *Denning Law Journal* (1992), p. 225; Anthony Arnall, *The European Union and its Court of Justice*, p. 607; Piet Eeckhout, *EU External Relations Law*, p. 305 and Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing, 2012), p. 318.

59. Case 283/81 *Srl CILFIT and Lanificio di Govardo SpA v. Ministry of Health*, EU:C:1982:335, para. 20.

It is submitted that this operates to further soften the impact of Article 3(5) TEU concerning respect for international law, as competing aims – such as fundamental rights and environmental protection – are also mandated in the Treaty.<sup>60</sup>

The reality is that ‘EU primary law [itself] is characterized by a high degree of vagueness and pervasive norm collision across most of its substantive areas.’<sup>61</sup> The answer to this problem in much of the Court’s case law has laid not in teleological reasoning but in proportionality analyses resolving conflicts between, for example, free movement of goods and fundamental rights, environmental protection, consumer protection and so on. Whether one prefers a *CILFIT* approach (which interprets a given provision to take account of other provisions) or proportionality (which balances EU aims against one another in a given case), the wider point is that even if Article 3(5) TEU demanded strict observance of international law alone it would be artificial to view it in isolation.

Odermatt suggests that ‘... respect for international law, particularly with regard to the UN and the multilateral system of governance, is given a prominent place within the Treaties’ and could form ‘a constitutional principle that can be used to guide the CJEU.’<sup>62</sup> However, the challenge then would become how this principle would interact with other (potentially conflicting) principles. It is unclear why the Court’s interpretative practices should be put on hold when we are considering provisions of the Treaty concerning international law alone. Without such novel reasoning this would necessitate a broader argument concerning the Court’s interpretative approach to *all* Treaty provisions. Odermatt does not make such an argument, and instead acknowledges that ‘the Court’s approach can be viewed as an outcome of the constitutionalization of both the EU and the international legal orders’, appearing to accept that there needs to be ‘a balance between protecting the autonomy of its own legal order and the openness towards international law that is enshrined in the EU Treaties’, with cases ‘involving multiple relationships’.<sup>63</sup>

Ultimately it appears Article 3(5) TEU has to take its place – and compete – with the other aims present within the Treaty. On this basis the suggestion that ‘[t]he EU Treaties do not lay down explicit rules about the status of international law within EU law’<sup>64</sup> seems appropriate. Respect for international law is undoubtedly encouraged, but so too are *inter alia* consumer rights, public health, environmental protection, free movement and fundamental rights.

## B. Does international law demand strict observance in domestic courts?

It is important to note that the balance between EU values and respect for international law contained within Article 3(5) TEU simply utilizes discretion afforded by international law – and taken by other States<sup>65</sup> – concerning domestic application of it.

60. Articles 2 TEU and 11 TFEU respectively.

61. Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU*, p. 438.

62. Jed Odermatt, ‘The Court of Justice of the European Union: International or Domestic Court?’, 3(3) *Cambridge Journal of International and Comparative Law* (2014), p. 696, 702.

63. *Ibid.*, p. 718.

64. Katja S. Ziegler, ‘The Relationship between EU Law and International Law’, in Dennis Patterson and Anna Södersten (eds.), *A Companion to EU Law and International Law* (Wiley Blackwell, 2016), p. 45.

65. On Treatment of CJEU as a domestic court see Piet Eeckhout, ‘Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions: In Search of the Right Fit’, 3(2) *European Constitutional Law Review* (2007), p. 183, 196; Daniel Halberstam, ‘Local, Global and Plural Constitutionalism: Europe Meets the World’, in Gráinne de Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism* (CUP, 2012), p. 198; Allen Rosas, in

Article 27 of the Vienna Convention on the Law of Treaties provides that a State ‘may not invoke the provisions of its internal law as justification for failing to perform a treaty.’<sup>66</sup> Crawford notes that ‘Arbitral tribunals, the Permanent Court and the International Court have consistently endorsed this position’.<sup>67</sup> That is to say that from the perspective of international law, the State, with its contingent institutions, regions and so on, form a single entity. State obligations at international level operate on a mainly ‘contractarian’/consent basis; if a breach is not challenged by a fellow State or international legal person it may be that a new practice is emerging with regard to treaty or customary law.<sup>68</sup> However, the idea that domestic courts should apply international law and thereby contribute to its enforcement has long been present.<sup>69</sup> This obligation, if strict, would preclude domestic courts having the same ‘scope for manoeuvre’ that their State enjoys (and of which, of course, the court still forms part)<sup>70</sup>, which seems intellectually odd if one is anticipating a mirror of international law at domestic level – rather than something quite different. However, it is settled principle that the application of international law (or otherwise) in domestic courts is for domestic legal systems to determine in ‘complete freedom’.<sup>71</sup>

International courts have occasionally been more forthcoming on this point, such as in *Danzig*.<sup>72</sup> There the Permanent Court of International Justice (PCIJ) stated:<sup>73</sup>

It may be readily admitted that, according to a well-established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts.

The Court acknowledges the ‘well established principle’, which provides discretion for domestic courts, but identifies that in certain circumstances *the parties* to the agreement may have held a different intention, as was found to be the case in this instance. Ultimately, Parry’s observation that, whilst a treaty, the *Beamtenabkommen* ‘was simultaneously something more’ in that it laid

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Malcolm Evans and Panos Koutrakos (eds.), *International Responsibility of the European Union: European and International Perspectives*, p. 159 and Helmut Philipp Aust, Alejandro Rodiles and Peter Staubach (2014) ‘Unity or Uniformity? Domestic Courts and Treaty Interpretation’, 27 *Leiden Journal of International Law*, p. 75, 100.

66. See similarly Article 3, International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts.

67. James Crawford, *Brownlie’s Principles of Public International Law* (8th edition, OUP, 2012), p. 51.

68. For discussion see Daniel Bethlehem, ‘The Secret Life of International Law’ (2012), 1(1) *Cambridge Journal of International and Comparative Law*, p. 23, 24.

69. André Nollkaemper, *National Courts and the International Rule of Law*, p. 7.

70. Nollkaemper refers to this as the ‘double bind’, *ibid.*, p. 14.

71. Antonio Cassese, *International Law* (2nd edition, OUP, 2005), p. 219. See also Jean d’Aspremont and Frédéric Dopagne, ‘Kadi: The ECJ’s Reminder of the Elementary Divide between Legal Orders’, 5 *International Organizations Law Review* (2008), p. 371; André Nollkaemper, *National Courts and the International Rule of Law*; James Crawford, *Brownlie’s Principles of Public International Law*, p. 50; Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, p. 58; Jed Odermatt, ‘The Court of Justice of the European Union: International or Domestic Court?’, 3(3) *Cambridge Journal of International and Comparative Law* (2014), p. 696, 701 and Alina Kaczorowska-Ireland, *Public International Law* (5th edition, Routledge, 2015), p. 128.

72. Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have passed into the Polish Service, against the Polish Railways Administration), Permanent Court of International Justice, Advisory Opinion of 3 March 1928, Series B no 15, p. 17.

73. *Ibid.*, p. 17–18.

down ‘the terms of service of the transferred officials and, as such, [became] a direct source of municipal legal rights’ seems appropriate.<sup>74</sup> This then was a rather unique international treaty, but in the vast majority of circumstances the ‘intention of the contracting Parties’ test is ‘eminently subjective’ and therefore still provides much discretion for domestic judges.<sup>75</sup>

It is notable in this light that the PCIJ and subsequently the ICJ did not return to the *Danzig* principle for a number of years.<sup>76</sup> However, two more recent cases have drawn attention. The *LaGrand*<sup>77</sup> and *Avena*<sup>78</sup> cases both concerned Article 36 of the Vienna Convention on Consular Relations, which allows consulate access to detainees. The obligation of the State authorities (in these cases the US) is to ‘inform the person concerned without delay of *his rights*’<sup>79</sup> and in *LaGrand* the Court found little trouble in establishing that the provision therefore ‘creates individual rights which . . . may be invoked in this Court by the national State of the detained person.’<sup>80</sup> ‘[T]his Court’ though referred to the ICJ, and Shany has read the subsequent *Avena* case as evidence of a margin of appreciation rather than a strict requirement that national courts apply the provision.<sup>81</sup> Hence, whilst the US had breached its obligation to review the convictions in *Avena*, it was recalled from *LaGrand* that ‘[t]his obligation can be carried out in various ways’ and ‘[t]he choice of means must be left to the United States.’<sup>82</sup> Consequently this ruling did not require direct effect to be granted to the Treaty in domestic courts.<sup>83</sup>

The obligation to open one’s domestic courts to international treaty law, then, remains very much the exception. It is not surprising that this also applies concerning customary international law, which could not meet the ‘*Danzig* criteria’, and which is appearing in a context where there remains ‘significant differences in the practice of states as regards the way in which they give effect to their international obligations.’<sup>84</sup>

### C. Do other domestic courts strictly observe international law?

Whilst one should be careful in drawing broad conclusions concerning the practice of domestic courts,<sup>85</sup> it can be highlighted that there is a persistent perception that all domestic courts exhibit some caution in applying international law.<sup>86</sup>

74. Clive Parry, ‘The Function of Law in the International Legal Community’, in Max Sørensen (ed.), *Manual of Public International Law* (Macmillan, 1968), p. 221.

75. Saida El Boudouhi, ‘The National Judge as an Ordinary Judge of International Law? Invocability of Treaty Law in National Courts’, 28(2) *Leiden Journal of International Law* (2015), p. 283, 287.

76. André Nollkaemper, *National Courts and the International Rule of Law*, p. 125.

77. *LaGrand (Germany v. United States of America)*, Judgment, 2001 I.C.J. 466.

78. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, 2004 I.C.J. 12.

79. *LaGrand (Germany v. United States of America)*, Judgment, 2001 I.C.J. 466, para. 77 (emphasis in original).

80. *Ibid.*

81. Yuval Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’, 16(5) *European Journal of International Law* (2006), p. 907.

82. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, 2004 I.C.J. 12, para. 514.

83. See also André Nollkaemper, *National Courts and the International Rule of Law*, p. 11 and David Sloss, ‘United States’, in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (CUP, 2009), p. 103.

84. André Nollkaemper, ‘The Duality of Direct Effect’, 25(1) *European Journal of International Law* (2014), p. 105, 122.

85. André Nollkaemper, *National Courts and the International Rule of Law*, p. 301.

86. See e.g. André Nollkaemper, *National Courts and the International Rule of Law and Dinah Shelton (ed.) International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion*.

Indeed, the fact that ‘States clearly remain reluctant to draft treaties . . . that seek expressly to accord domestic courts a judicial enforcement role’<sup>87</sup> implies that ‘they are concluding treaties against a backdrop of what is not slavish domestic judicial enforcement.’<sup>88</sup> Even where more concrete rules do exist, Jackson suggests that ‘judicial and other institutions have ways to evade the full logical consequences of a [Direct Application and according of Higher Status to international treaties than domestic law] system.’<sup>89</sup> Posner and Goldsmith note similarly – beyond treaty law – that ‘[b]iased national court interpretation of [customary international law] is a well-known phenomenon.’<sup>90</sup>

An interesting progression concerning the application of international law domestically is present in Benvenisti’s studies. In 1993 the conclusion was that ‘national courts tend to interpret international rules so as not to upset their governments’ interests’.<sup>91</sup> Writing with Downs in 2009, the outlook appeared more positive: ‘courts have finally begun to engage quite seriously in the interpretation and application of international law’.<sup>92</sup> However, this should not be equated with a sterile and mechanical application of international law. Instead, ‘[t]he courts discovered that they are almost as well-positioned to exploit the fragmentation of international law and international organizations to their benefit as is the executive branch’.<sup>93</sup> Ultimately, significant shortcomings concerning respect for international law in State practice remain, and these are noted particularly prominently regarding powerful nations’ approaches to international law domestically, such as China<sup>94</sup> and the US.<sup>95</sup>

The reluctance of the US to apply international law is of particular interest for the EU given the observation that:<sup>96</sup>

[T]he reception of international law both in the EC and the United States started from strikingly similar (monist-like) positions. Moreover, the current EC and US positions continue to share very similar

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87. Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, p. 58.

88. *Ibid.*, p. 51.

89. John H. Jackson, ‘Status of Treaties in Domestic Legal Systems: A Policy Analysis’, 86(2) *American Journal of International Law* (1992), p. 310, 334.

90. J. Goldsmith and E. Posner, ‘A Theory of Customary International Law’, *University of Chicago Law School, John M. Olin Law and Economics Working Paper* 63 (1998), [www.law.uchicago.edu/files/files/63.Goldsmith-Posner.pdf](http://www.law.uchicago.edu/files/files/63.Goldsmith-Posner.pdf), p. 1, 70.

91. Eyal Benvenisti, ‘Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of Domestic Courts’, 4 *European Journal of International Law* (1993), p. 159, 161.

92. Eyal Benvenisti and George W. Downs, ‘National Courts, Domestic Democracy, and the Evolution of International Law’, 20(1) *European Journal of International Law* (2009), p. 59, 60.

93. *Ibid.*, p. 66.

94. XUE Hanqin and JIN Qian, ‘International Treaties in the Chinese Domestic Legal System’, 8(2) *Chinese Journal of International Law* (2009), p. 299; Zou Keyuan, ‘International Law in the Chinese Domestic Context’, 44(3) *Valparaiso University Law Review* (2010), p. 935 and Jerry Z. Li and Sanzhuan Guo, ‘China’, in Dinah Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (OUP, 2011).

95. See e.g. John H. Jackson, ‘Status of Treaties in Domestic Legal Systems: A Policy Analysis’, 86(2) *American Journal of International Law* (1992), p. 310; M.J. Garcia, *International Law and Agreements: Their Effect upon U.S. Law* (Congressional Research Service, 2010), <https://fas.org/sgp/crs/misc/RL32528.pdf>; Curtis A. Bradley, *International Law In The U.S. Legal System* (OUP, 2013), p. xiii and Gráinne de Búrca, ‘Internalization of International Law by the CJEU and the US Supreme Court’, 14(1) *International Journal of Constitutional Law* (2016), p. 987.

96. Joost Pauwelyn, ‘Europe, America and the “Unity” of International Law’, Jan Wouters, André Nollkaemper and Erika De Wet, *The Europeanisation of International Law* (TMC Asser Press, 2008), p. 222.

preoccupations with power relations, sovereignty, democratic legitimacy and balance of power between the judiciary and the executive/legislature to deny direct effect of international law (with both gradually moving to a dualist-type conception).

This provides a somewhat fatalistic implication that the two legal systems' approaches were destined to converge due to political realities. After careful comparative analysis de Búrca concludes that '[b]oth courts . . . regularly protect their legislature from challenges based on international law'.<sup>97</sup> But, far from being less respectful of international law than the US, in even the most vitriolic of pieces directed at the EU and its Court's practices towards international law Goldsmith and Posner could only attempt to draw attention to certain equivalences.<sup>98</sup>

In terms of contribution to international law, it does not appear that the EU – or its Court – is falling behind other nations.<sup>99</sup> This provides scope for a continued balance between respect for international law and other EU values, without the EU becoming an outlier in its treatment of international law.

## 6. Prominent post-Article 3(5) TEU case law

As noted above, Article 3(5) TEU has been referred to by Advocates General and the Court in similar, partial, fashion to that of many scholars. However, the most prominent cases since Lisbon have not heralded significant change in the Court's approach towards international law.

*Air Transport* arrived in 2011 and saw a Directive expanding the Emissions Trading Scheme to domestic *and* international flights departing from or arriving in the EU being challenged on the basis of international customary and treaty law. There were encouraging signs for those hoping Article 3(5) TEU would 'bite'. Firstly, the Advocate General noted that the EU 'expressly avows its aim of contributing to the strict observance and development of international law (second sentence of Article 3(5) TEU)'<sup>100</sup> and pointed out that Member States could 'contribute in the public interest to judicial review of the legality of acts of EU institutions [and] [u]nder the second sentence of Article 3(5) TEU this includes ensuring the strict observance of international law.'<sup>101</sup> The Court also made reference to Article 3(5) TEU, and did so in the partial manner familiar in the scholarship, even adding '[c]onsequently, when [the EU] adopts an act, it is bound to observe international law in its entirety, including customary international law'.<sup>102</sup> However, ultimately the

97. Gráinne de Búrca, 14(1) *International Journal of Constitutional Law* (2016), p. 987, 1004.

98. Jack Goldsmith and Eric Posner, 'Does Europe Believe in International Law? Based on the Record it has no Grounds to Criticize the U.S.' *Wall Street Journal* (New York City, 25 November, 2008), [www.wsj.com/articles/SB122757164701554711](http://www.wsj.com/articles/SB122757164701554711).

99. See e.g. Jan Klabbers, *The European Union in International Law* (A Pedone, 2012), Eileen Denza, 'Placing the European Union in International Context: Legitimacy of the Case Law', in Maurice Adams et al. (eds.), *Judging Europe's Judges* (Hart Publishing, 2013), p. 178, 91, Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, p. 74 and Panos Koutrakos, *EU International Relations Law* (2nd edition, 2015), p. 319.

100. Opinion of Advocate General Kokott in Case C-366/10 *Air Transport Association of America and Others*, EU:C:2011:864, para. 43.

101. *Ibid.*, para. 75.

102. Case C-366/10 *Air Transport Association of America and Others*, para. 101.

Court was only willing to conduct a ‘manifest errors’ review of the legislature’s action due to its questionable claim that customary international law lacked certainty.<sup>103</sup> In this regard, the approach to customary international law – at best – reflected the pre-Lisbon case of *Racke*.<sup>104</sup> In that case, too, a margin was provided through ‘manifest errors’ review, although in *Racke* this was due to the specific uncertainty of the relevant provisions of customary international law. In the earlier case of *Poulsen* no such limitation was applied to the review, meaning ‘strict observance’ of customary international law now appears weaker after *Air Transport*, as all rules are treated as less certain.

Kokott AG also – ultimately – seemed to place little emphasis on Article 3(5) TEU in meaningfully changing issues of justiciability of international law before the Court or of internalizing a more significant obligation to respect international law, instead relying on pre-Lisbon case law without distinction or modification on the basis of the new Treaty provisions.<sup>105</sup> Moreover, in answering whether the EU should have acted outside of the International Civil Aviation Organization (a UN body), Article 21 TEU (which calls on the EU ‘promote multilateral solutions to common problems, in particular in the framework of the United Nations’) was not referred to by the Advocate General<sup>106</sup> nor by the Court.<sup>107</sup> Instead the lack of justiciability of international provisions on this issue was the focus.<sup>108</sup>

An interesting aspect of the judgment, though, was the Court’s reference to the fact that ‘European Union policy on the environment seeks to ensure a high level of protection in accordance with Article 191(2) TFEU’ and recognition that the legislation was ‘designed to fulfil the environmental protection objectives which [the EU] has set for itself’.<sup>109</sup> The Court’s inclination to discuss values which the EU pursues accords with Articles 3(5) and 21 TEU (albeit the Court did not make this point expressly).

The opportunity to engage the Articles more fully was desirable, given that appeals to substantive purpose had not previously been of relevance in deciding whether to apply international treaty or customary international law fully<sup>110</sup> – and without fuller articulation this remains the case. However, Article 3(5) TEU seems to open the possibility that there could be a justification available to the legislature where observance of international law is not ‘strict’ but another important EU interest is pursued in the face of international treaty or customary law. To not permit this would be to require the legislature to simultaneously ride two potentially divergent horses (in respect for international law and promotion of EU values), but to do so would herald a significant shift in focus towards a more normative/substance based approach. If carried forward this would harmonize with the approach adopted in

103. For criticism see Jan Wouters and Dries Van Eeckhoutte, ‘Giving Effect to Customary International Law Through EC Law’, in J.M. Prins and A. Schrauwen (eds.), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Europa Law Publishing, Groningen, 2002), p. 206–207. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgment. 1986 I.C.J. 14, para. 212, where the ICJ describes the rule to be a ‘basic legal concept’.

104. Case C-162/96 *Racke v. Hauptzollamt Mainz*, EU:C:1998:293.

105. For example, Opinion of Advocate General Kokott in Case C-366/10 *Air Transport Association of America and Others*, para. 30 and para. 93–97.

106. *Ibid.*, para. 174–194.

107. Case C-366/10 *Air Transport Association of America and Others*, para. 73–78.

108. In particular Article 2(2) of the Kyoto Protocol.

109. Case C-366/10 *Air Transport Association of America and Others*, para. 128.

110. Panos Koutrakos, *EU International Relations Law* (2006), p. 318.

reviewing EU legislation more generally, where (proportionate) pursuit of one interest is permitted even where it impacts on another.<sup>111</sup>

If this was a (very) gentle testing of the waters in the potential to expand this practice by the Court then response to it was decidedly mixed; for some, the environmental credentials of the action could have been more richly argued by the Court but were a noble pursuit,<sup>112</sup> whilst for others the action was flagrant unilateralism, plainly illegal under international law regardless of normative aim.<sup>113</sup> Overall, it is notable that in a case which featured so many elements of Articles 3(5) and 21 TEU, the Court saw little help in them (or at least had little recourse to them) and appeared reluctant to operationalize promising aspects of them.

Certainly not much had changed concerning the Court's observance of international law: the Court's 'curt' reasoning for aspects of international treaty law in *Intertanko*<sup>114</sup> applied once more, this time to customary international law, and the appeal to the importance of the aim – which led many scholars to support the principles espoused in *Kadi* concerning fundamental rights – could be seen recurring concerning environmental protection in *Air Transport*. The availability of Article 3(5) TEU in articulating this reasoning was not fully availed of by the Court, but is hard to see how *Air Transport* would have been required to be decided differently prior to Lisbon, or how *Intertanko* and *Kadi* would have been after Lisbon.

Indeed *Kadi II* reflected this to a large extent. It is notable that the Court did not redeploy its assertions regarding the autonomous nature of the EU legal system from *Kadi I*, however, it has been argued above that ultimately (far from autonomy) the Court balanced respect for international law against fundamental rights in the remedy. In *Kadi II* the Court drew upon the new provisions in the Lisbon Treaty to support what was a very similar analysis:<sup>115</sup>

... it is necessary to determine whether, in the light of the requirements stated, in particular, in Article 3(1) and (5) TEU and Article 21(1) and (2)(a) and (c) TEU, relating to the maintenance of international peace and security while respecting international law ... [the measure] constitutes an infringement of the rights of the defence and the right to effective judicial protection.

111. See e.g. Case C 127/07 *Soci t  Arcelor Atlantique et Lorraine and Others v. Premier ministre*, EU:C:2008:728, which also concerned expansion of the Emissions Trading Scheme but (as the case did not concern international law) where the Court balanced environmental protection against equal treatment. For an overview of the application of proportionality in justifying or invalidating EU secondary legislation see Paul Craig, *EU Administrative Law* (3rd edition, OUP, 2018), 653–663.

112. Christina Voigt, 'Up in the Air: Aviation, the EU Emissions Trading Scheme and the Question of Jurisdiction', 14 *Cambridge Yearbook of European Legal Studies* (2012), p. 475.

113. Brian F. Havel and John Q. Mulligan, 'The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme', 37(1) *Air & Space Law* (2012), p. 3. For a more sensitive analysis, but one which acknowledges legal problems concerning common but differentiated responsibilities for developing States, see Joanne Scott and Lavanya Rajamani, 'EU Climate Change Unilateralism', 23(2) *European Journal of International Law* (2012), p. 469.

114. Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, p. 319. See also Jan Wouters and Philip de Man, 'International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Cooperation Committee, Lloyd's Register and International Salvage Union V. Secretary of State for Transport. Case C-308/06', 103(3) *American Journal of International Law* (2009), p. 555.

115. Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II*, para. 103.



In spite of reliance on the new provisions only as indicating the importance of adherence to international law (rather than articulating a balance between international obligations and EU values), multiple breaches of fundamental rights were identified and the Court's intensity of review from *Kadi I* appeared unchanged. The balance between fundamental rights and respecting international law also arrived at the remedy stage once more; the Regulation was this time not suspended but annulled, albeit only as concerned Mr Kadi and not others.<sup>116</sup>

Article 3(5) TEU case law remains limited,<sup>117</sup> but the extent to which it marks a new, more liberal, approach to invocation has also suffered a significant blow concerning WTO law. In *C & J Clark International and Puma* the position that the Court cannot review the legislature's actions, even – or as the Court put it here 'merely'<sup>118</sup> – after a negative WTO finding for which the time limit to rectify has expired, was confirmed as unchanged after Lisbon. Moreover, far from moving away from the 2008 case law, both *Intertanko* and *FLAMM* were treated as exemplars for the direct effect test rather than anomalies from a regrettable year.<sup>119</sup>

More respect was shown to WTO law in *Commission v. Hungary*, where measures requiring international agreements to be concluded prior to providing educational services into Hungary were challenged under Article 258 TFEU.<sup>120</sup> However, this also reflected pre-Lisbon case law in which the Commission was free to rely upon WTO law should it choose to.<sup>121</sup> Accordingly, Hungary argued that the Commission had brought the case against it 'for purely political considerations' relating to protecting the Central European University, and had 'seriously undermined the right to good administration' as a result.<sup>122</sup> It was a charge to which the Court could merely respond by reiterating that the Commission's discretion in bringing an action was not one which it was able to review.<sup>123</sup> For practical purposes coincidental interests of the EU and international law can lead to greater enforcement across a range of issues,<sup>124</sup> but this remains solely at the discretion of the Commission and is impacted as a solid basis for consistent (let alone strict) observance of international law as a result. Indeed, Article 3(5) TEU was not cited.

The *Western Sahara* case is arguably the strongest evidence of Article 3(5) TEU's limited impact.<sup>125</sup> It saw the referring court question validity of an international agreement based on Article 3(5) TEU specifically. The Court did not address the Article in detail as the case could be dealt with based on narrow textual points within the agreements themselves. Whilst it is true that the Court did not exclude the possibility that Article 3(5) TEU could be justiciable, nor did it herald a new dawn. The Court stated relevant rules that would have been applied if necessary, covering quite exhaustively the key aspects of conclusion and judicial review of international agreements. With mechanical familiarity, 'the Court's settled case-law' is recalled throughout and whilst

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116. *Ibid.*, para. 164.

117. Jed Odermatt, 'Fishing in Troubled Waters', 14 *European Constitutional Law Review* (2018), p. 751.

118. Joined Cases C-659/13 and C-34/14 *C & J Clark International Ltd v. Commissioners for Her Majesty's Revenue & Customs and Puma SE v. Hauptzollamt Nürnberg*, EU:C:2016:74, para. 95.

119. *Ibid.*, para. 84.

120. Case C-16/18 *Commission v. Hungary*, EU:C:2020:792.

121. For example, Case C-61/94 *Commission v. Germany*, EU:C:1996:313.

122. Case C-16/18 *Commission v. Hungary*, para. 43.

123. *Ibid.*, para. 56.

124. For an interesting example see M.J. Bowman, 'International Treaties and the Global Protection of Birds: Part I', 11(1) *Journal of Environmental Law* (1999), p. 87, 116–117.

125. Case C-266/16 *Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs*, EU:C:2018:118.

Article 267 TFEU and 216(2) TFEU feature, Article 3(5) TEU does not.<sup>126</sup> Far from change, the Court appears at pains to select at least one pre- and one post-Lisbon case for each point, reinforcing continuity.<sup>127</sup>

## 7. Conclusion

Ultimately, ‘strict observance of international law’ in Article 3(5) TEU has had little impact, in spite of its prominent place in scholarship. Notwithstanding specific shortcomings in reasoning identified within recent case law<sup>128</sup> and the Court’s apparent reluctance to fully utilize Article 3(5) TEU to introduce more substantive review on the merits of aims pursued within challenged EU legislation, it is submitted that the general position by which Article 3(5) TEU has not resulted in a significant lurch towards this supposed ideal is appropriate.

Firstly, even if one seeks to overlook the balance between promoting EU values and respecting international law within the text of Article 3(5) TEU itself, it is not apparent why this Article alone should be exempt from either teleological interpretation, by which other Treaty articles with varying aims harmonize, or the application of proportionality, by which they compete. Article 3(5) TEU sits within a series of provisions of primary law, which require that things ‘shall’ or ‘shall not’ happen a combined 2531 times.<sup>129</sup>

Secondly, even if we consider Article 3(5) TEU in isolation *and* take only its most internationally friendly provisions, we would be confronted with a challenge in determining what a stand-alone obligation to strictly observe international law would mean in practice. It seems a significant leap to claim that language denoting respect for international law in Article 3(5) TEU can be taken to overturn decades of practice in which domestic courts – under international law – have retained discretion in their application of treaty and customary rules. There is evidence that this is still being enjoyed by ‘significant trading partners’ courts, and the Court of Justice of the European Union becoming a conduit of – rather than participant in – international law would weaken the compliance pull for other States and so could limit ‘strict observance’ in concrete terms.

Thirdly, if the above appears as cynical realpolitik, then a postulation in which we consider the relationship between EU and international law exclusively also poses challenges. The possibility that ‘an “illegal” act . . . contains the seeds of a new legality’ in international law<sup>130</sup> may appear fanciful, but (if illegal) the *Kadi I* decision reflects aspects of this process in a concrete way regarding improvements to the UN terrorism listing system, and *Air Transport* and *Intertanko* seek to do similarly concerning environmental protection. The complexity regarding what is required to respect international law – from the perspective of international law itself – is also confounded by the anticipation of ‘development’ of international law in Article 3(5) TEU.

What, then, should the EU’s interaction with the wider world be and how should the Court respond? These are complex questions and the Treaty undoubtedly assists in addressing them, not least Article 3(5) TEU. But the full text and context of the Article need to be engaged with. Unless we dismiss other provisions within the EU Treaty as meaninglessly shallow, ‘strict

126. *Ibid.*, para. 43–51.

127. Para. 44, 45, 46 and 47. The remaining paragraphs (43, 48–51) contain no case law or only pre-Lisbon case law.


128. For example, the Court’s treatment of customary international law in *Air Transport*.

129. 354 in TEU and 2177 in TFEU.

130. Anthony D’Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971), p. 97–98 cited in Brian D. Lepard, *Customary International Law: A New Theory with Practical Implications* (CUP, 2010), p. 41.

observance of international law' cannot be hallow. We need not look far for confirmation of this; Article 3(5) TEU could just as easily be partially cited as '[i]n its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens . . .'

**ORCID iD**

Rupert Dunbar  <https://orcid.org/0000-0002-2312-1054>