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The Use of International Treaty Law by the Court of Justice of the European Union

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Abstract
The Court of Justice of the European Union has on numerous occasions employed the provisions of the Vienna Convention on the Law of Treaties, to the extent that they represent principles of customary international law, in its judicial reasoning. At first glance, the Court's use of the Vienna rules demonstrate fidelity towards international law; it can be seen as contributing to the 'strict observance and the development of international law'. Upon closer examination, however, one finds that the Court applies these rules in a fashion that often deviates from the way in which other courts and bodies have applied the same principles. This article examines how the Court has used international treaty law, arguing that the Court often employs a novel, 'European' approach to certain principles. While the Court is free to apply treaty law in a manner it believes to be appropriate, the extent of this divergence risks undermining the integrity and uniform application of the Vienna rules.

Keywords: international treaty law, Court of Justice of the European Union, treaty interpretation

I. INTRODUCTION

There has been a great deal of discussion in recent years about the way in which the Court of Justice of the European Union (CJEU) approaches issues of public international law, especially in light of the landmark *Kadi* judgment as well as judgments in which the Court has sought to safeguard the 'autonomy' of the EU legal order. This discussion has focused on the way in which international law is given effect within the EU legal order. A more subtle way in which the Court has given effect to public international law is through the application of international treaty law. On numerous occasions the Court has employed the international law of treaties in its judicial reasoning, including references to the provisions of the 1969 Vienna Convention on the Law of Treaties (VCLT)[1] and the Vienna Convention on the Law

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[1] Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, entered into force 27 January 1980 ('VCLT').

of Treaties between States and International Organizations or between International Organizations (VCLT-IO).[2] Although the Court applies the rules enshrined in the VCLT, it often does so in a way that deviates somewhat from the accepted approach in public international law, developing a 'European' approach to law of treaties.

The present article examines the case law of the CJEU in which it has applied principles of international treaty law. This includes questions such as the definition of an agreement under EU law, the application of principles of treaty interpretation, and the effects of invalidity, termination and suspension of treaties. At first glance, the CJEU's use of the Vienna rules may demonstrate fidelity towards international law. By applying the VCLT rules, the CJEU can be seen as contributing to the 'strict observance and the development of international law'.[3] Upon closer examination, however, one finds that the Court applies these rules in a fashion that often deviates from the way in which other courts and bodies have applied the same principles. For instance, the Court employs Article 31 VCLT to examine the 'object and purpose' of a treaty at the expense of other methods of treaty interpretation. This article shows how the Court's approach to international treaty law is highly influenced by its approach to EU law. Its emphasis on the 'object and purpose' of a treaty, and its reluctance to examine preparatory work or subsequent practice of the parties, for example, mirrors the approach in EU law that favours more teleological reasoning.

This article focuses on the use the VCLT rules with regard to international agreements and, therefore, does not look at the application of these rules to the EU Treaties or EU law. The CJEU has rejected the proposition that the VCLT applies to the EU's founding treaties, emphasising their special character.[4] Yet the Court has applied the provisions of the VCLT to the extent that they represent customary international law.[5] Part II examines how the CJEU identifies the primary source of international law: treaties. Although the Court purports to use the VCLT definition of a treaty to define 'agreement' under international law, the Court's definition is somewhat wider than that under international law. Part III examines the Court's approach to the interim obligation that applies before a treaty enters into force. Part IV examines how the Court has used principles of international treaty law in its judicial reasoning, often in a novel fashion. Part V discusses an example where the Court developed a particularly novel approach to treaty law through its application of the *pacta tertiis* principle. Part VI looks at the end of a life of a treaty, examining how the Court has dealt with the termination and suspension of international agreements. Part VII discusses why this use of international treaty law by the CJEU is

[2] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 March 1986) 25 ILM 543 (1986), not yet in force ('VCLT-IO').

[3] Article 3(5) TEU.

[4] See *SP SpA et al v Commission,* Joined Cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, EU:T:2007:317, para 58.

[5] *Brita v Hauptzollamt Hamburg Hafen*, C-386/08, EU:C:2010:91, para 42. J Crawford, *Brownlie's Principles of Public International Law*, 8th ed (Oxford University Press, 2012), p 368: 'The European Court of Justice has observed that the customary international law of treaties forms part of the European legal order, and it generally follows the VCLT (implicitly or explicitly).'

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problematic. While the Court is free to apply the VCLT in a manner that it feels appropriate, at times the Court uses the VCLT in a rather 'selfish' manner. This misuse of international treaty law, it is argued, goes against the principles of respect for international law enshrined in the EU Treaties.[6]

II. WHAT IS A TREATY?

The CJEU has been called upon to determine whether the instrument before it should be regarded as an international treaty, mostly for the purposes of EU institutional law. While the Court purportedly follows the Vienna Convention definition of 'treaty', it has developed a slightly broader definition in its case-law.

Article 218 TFEU sets out the procedure for the negotiation and conclusion by the Union of 'agreements between the Union and third countries or international organisations.'[7] Yet the EU Treaties do not define an 'agreement' for these purposes. The EU adopts a variety of instruments at the international level, but which of these are to be considered 'agreements' under EU law? Although in most cases it will be clear that the instrument is an international agreement, the Court has been called upon to decide whether certain instruments can be considered 'agreements'. In doing so, it has relied partly on the public international law definition of a 'treaty'.

The precise definition of a 'treaty' in international law has long been a point of academic discussion, and was the subject of debate at the International Law Commission when drafting the VCLT.[8] Article 2 defines a treaty, for the purposes of that convention, as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.' International practice shows that there is a wide and varied nomenclature used for international treaty,[9] and the title of an instrument cannot be relied upon alone when determining whether it is a treaty. Rather, elements such as the intentions of the parties and the content of the instrument itself are examined.

The first part of the definition is that a treaty is between two or more subjects of international law. A state may make a unilateral binding commitment under international law, but this does not fall within the definition of a treaty. The treaty must also be in written form, but this criterion is not applied restrictively. The third element is that the agreement is governed by international law, and not, for example, by the municipal law of one of the states. Above all a treaty requires the intention of the parties to enter into a legal agreement. This requirement distinguishes treaties from other kinds of non-binding instruments. The *UN Treaty Handbook* stresses that

[6] On the duty of the Court to respect international law, see J Wouters et al, 'Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law* (Hart Publishing, 2014).

[7] Article 218 TEU.

[8] VCLT, see note 1 above.

[9] K Schmalenbach, 'Article 2. Use of terms' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) p 29.

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'[a] treaty or international agreement must impose on the parties legal obligations binding under international law, as opposed to mere political commitments.'[10] There must be more than a commitment to enter into obligations, but an intention to enter into legal obligations subject to international law.

The TEU/TFEU give little guidance on what can be considered an 'agreement' for the purposes EU law, referring simply to 'agreements between the Union and third countries or international organisations.'[11] It may be assumed that the term 'agreement' in EU law was intended to carry the same meaning as a treaty under international law. The term 'agreement' rather than treaty avoids confusion with the EU Treaties. Yet there are subtle differences between the Court's definition of 'agreement' in EU law and the term 'treaty' in international law.

In Opinion 1/75[12] the Court discussed the meaning of 'agreement', defining it as 'any undertaking entered into by entities, subject to international law which has binding force, whatever its formal designation.'[13] The agreement at issue was the draft 'Understanding on a Local Cost Standard' developed under the auspices of the Organisation for Economic Co-operation and Development (OECD). It was held that the Standard fulfilled these conditions since it contained 'a rule of conduct, covering a specific field, determined by precise provisions, which is binding upon the participants.'[14] The Court's definition has two elements: (i) subject to international law; and (ii) binding legal force on its participants.

The Court also examined the question of what constitutes an 'agreement' in *France v Commission*[15] regarding a bilateral cooperation agreement between the European Commission and the United States in the field of competition law.[16] The Commission argued that the instrument constituted an 'administrative agreement', and that it had competence to conclude it under EU law. The Court found, however, that the instrument fell within the definition of an international agreement concluded between an international organisation and a State according to Article 2(1)(a)(i) of the 1986 Vienna Convention.[17] One of the relevant factors was that the agreement produced legal effects,[18] since the Community would incur responsibility at the international level in the event of non-performance of the agreement.[19] The administrative agreement between the European Commission and the US Antitrust Division was therefore an 'agreement' for the purposes of EU law.

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[10] *United Nations Treaty Handbook* (United Nations, 2011) part 5.3.4.

[11] Article 218 TFEU.

[12] Opinion 1/75 (Local Cost Standard), EU:C:1975:145.

[13] Ibid, p 1360. See also D Verwey, *The European Community, the European Union and the International Law of Treaties* (TMC Asser Press, 2004), p 96.

[14] See note 12 above, p 1360.

[15] *France v Commission*, C-327/91, EU:C:1994:305.

[16] Agreement Between the Government of the USA and the Commission of the European Communities Regarding the Application of their Competition Laws (23 September 1991).

[17] *France v. Commission*, EU:C:1994:305, para 2.

[18] Ibid, para 23.

[19] Ibid, para 25.

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The Court further elaborated on the meaning of an 'agreement' in Opinion 1/13.[20] This involved a request by the European Commission for an Opinion on whether an envisaged agreement is compatible with the Treaties. The question put to the Court was whether the acceptance of the accession of third States to the 1980 Hague Convention[21] (to which the EU is not a party) falls within the exclusive competence of the Union. In determining whether the request was admissible, the Court had to decide whether a 'declaration of acceptance of accession' should be regarded as an 'agreement' under Article 218 TFEU. The Court acknowledged that under Article 2 (1)(a) of the VCLT, an international agreement may be formed, not only by a formal agreement between the parties, but also by the 'expression of the 'convergence of intent' on the part of two or more subjects of international law, which those instruments establish formally.'[22] The Court found that such a convergence of intent existed. The act of accession on the one hand, and the declaration of acceptance on the other, represent such a meeting of minds, and therefore creates an 'international agreement' upon which the Court could provide its opinion.

Similarly in *Venezuelan Fishing Rights* here was disagreement over whether the instrument before the Court constituted an 'agreement' under Article 218 TFEU[23]. The instrument in question was a Council Decision granting fishing opportunities to Venezuelan fishing vessels off the coast of French Guiana[24]. On the face of it, the Decision in question does not look like a typical bilateral treaty. According to Advocate General Sharpston (AG), it was a 'unilaterally binding declaration'. While it is not uncommon for a state to express its consent to be bound through a unilateral statement,[25] there is little, if any practice of unilateral binding statements being made by international organisations.[26] To the AG, this created problems because the EU Treaties do not explicitly govern the adoption of such 'unilateral' instruments.[27] The AG concluded that the EU Declaration 'is an instrument emanating from the EU that is intended to produce legal effects under international law and to be a basis on which Venezuelan vessels can rely to apply for fishing authorisations.'[28] However, this

[20] Opinion 1/13 (Hague Convention), EU:C:2014:2303.

[21] Convention on the Civil Aspects of International Child Abduction (25 October, 1980) 1343 UNTS 89.

[22] See note 20 above, para 37.

[23] *Parliament v Council and Commission v Council*, Joined Cases C-103/12 and C-165/12, EU:C:2014:2400.

[24] Council Decision 2012/19/EU of 16 December 2011 on the approval, on behalf of the European Union, of the Declaration on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of the Bolivarian Republic of Venezuela in the exclusive economic zone off the coast of French Guiana [2012] OJ L 6/8.

[25] D Verwey, see note 13 above, p 93. *Nuclear Tests Case (New Zealand v France)* (Judgment) [1974] ICJ Rep 457, para 46.

[26] Opinion of Advocate General Sharpston in *Parliament v Council and Commission v Council*, Joined Cases C-103/12 and C-165/12, EU:C:2014:334, para 107.

[27] Opinion of Advocate General Sharpston in *Parliament v Council and Commission v Council*, EU:C:2014:334.

[28] Ibid, para 78.

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does not mean that it is an *international agreement*.[29] The AG found that while the Declaration was intended to produce legal effects, Venezuela, the country who benefits under the Declaration, had not accepted to be bound by the Declaration.[30] The AG stressed that:

> However wide the definition of the term, it is clear that (in whatever context) an agreement presupposes the meeting of minds of at least two parties. It thus does not cover the circumstance where the EU expresses its intention to be bound by the terms of its declaration without the need for acceptance by the third State in whose favour that declaration is made. Nor does it apply to instruments whereby no binding commitment is entered into.[31]

For the AG, it was not sufficient that the instrument produced legal effects, it also had to include the meeting of minds between two parties. Since this second requirement was not fulfilled, the instrument could not be considered to be an 'agreement' under EU law.

The Court disagreed with the AG's assessment. It recalled its previous case law including *France v Commission* on what constitutes an 'agreement' in EU law[32] and found that the EU decision was an *agreement*, the conclusion of which is governed by Article 218 TFEU. This assessment turned on a different interpretation of the facts. To the Court, a 'meeting of minds' was established by the parties, since there had been both an 'offer' and 'acceptance'. The declaration at issue was regarded as an 'offer' made by the EU on behalf of the coastal state to Venezuela,[33] which had then 'accepted' the offer through its subsequent conduct.[34]

The Court's approach to what constitutes an 'agreement' is broad and non-formalistic and is arguably wider than that under international law.[35] Delano Verwey concluded that when determining whether something is an 'agreement' under EU law '[w]hat matters, is that it has to be an agreement between the [Union] and one or more subjects of international law, governed by international law and legally binding on the parties concerned.'[36] First, the definition in the two Vienna Conventions is primarily concerned with whether the agreement is governed by international law. While this is also a criterion in the Court's definition, it also takes into account whether the instrument has 'binding force' on the parties or 'produces legal effects'. Moreover, the Court is less concerned with the type of entity that has entered into the agreement. Whereas the two Vienna Conventions apply to treaties between states and international organisations and other subjects of international

[29] Ibid, para 78.

[30] Ibid, para 81.

[31] Ibid, para 96.

[32] See note 23 above, para 83.

[33] Ibid, para 68.

[34] Ibid, para 71.

[35] D Verwey, see note 13 above, p 96.

[36] Ibid, p 100.

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law, the CJEU views an international agreement as an 'undertaking entered into by *entities*.'[37]

Another difference is the importance placed on the intention to establish legal relations. Under international law, not only must there be *consensus ad idem* ('meeting of the minds') but an intention to enter into legal relationship.[38] It is difficult to argue that Venezuela intended to create legal obligations vis-à-vis the Union in *Venezuelan Fishing Rights*. On the contrary, Venezuela rejected the establishment of a formal binding agreement. Had the Court determined the instrument to be a unilateral declaration, as the AG had recommended, it would have been faced with the complex task of determining which EU rules should apply to adoption of such instruments. Yet the Court, rather conveniently, found the instrument to be an 'agreement' falling under Article 218 TFEU.

III. CONCLUSION AND ENTRY INTO FORCE

In some cases, the CJEU has been called upon to examine the scope of the international law obligations that exist during the period before an international agreement enters into force. Before an agreement enters into force a state or international organisation is under an interim obligation 'to refrain from acts which would defeat the object and purpose of a treaty'.[39] This principle is enshrined in Article 18 VCLT and VCLT-IO and represents a rule of customary international law. It is a manifestation of the general principle of good faith,[40] and establishes an interim obligation for parties that have committed themselves to a treaty text, but have not yet become formally bound by the instrument.

The Article 18 interim obligation was dealt with incidentally by the Court in *Opel Austria.*[41] In this case Austria argued that the Council had acted in breach of the principle of good faith in international law, as recognised in Article 18 VCLT. The Council had adopted a Regulation imposing a duty on gearboxes produced by General Motors Austria. Opel sought to annul the regulation on the basis *inter alia* that it violates the obligation under international law not to defeat the object and purpose of a treaty before its entry into force. The Court found that the principle of good faith was a rule of general international law and thus binding upon the European Union. It found the principle of good faith to be the public international law corollary of the EU law principle of the protection of legitimate expectations. The Court referred in this context to the decision of the Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia* in which

[37] Opinion 1/75 (Local Cost Standard), EU:C:1975:145, p 1360 (emphasis added). D Verwey, see note 13 above, p 96.

[38] K Widdows 'What Is an Agreement in International Law?' (1979) 50(1) *British Yearbook of International Law* 117, p 119.

[39] Article 18 VCLT, see above note 1 above.

[40] O Dörr, 'Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012), p 220.

[41] *Opel Austria v Council*, T-115/94, EU:T:1997:3.

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the Permanent Court indicated that a signatory state may be 'under an obligation to abstain from any action likely to interfere with [the treaty's] execution when ratification has taken place.'[42]

There was a legitimate expectation on the part of traders such as Opel that the Council and other parties to the EEA Agreement would not act so as to defeat the object and purpose of that agreement. Interestingly, it was not the principle in Article 18 that gave rise to actionable rights, but the equivalent Union law principle regarding the protection of legitimate expectations. The Regulation was not annulled due to a deficiency stemming from public international law, but a violation of a Union law principle. The Council argued that Article 18 VCLT and VCLT-IO only applied between sovereign states and international organisations and since they do not confer rights upon individuals, they could not be invoked in order to challenge the validity of EU acts.[43]

From a public international law perspective, one may question the way in which the Court applied the principle in Article 18 VCLT. It is an interim obligation not to defeat the object and purpose of the treaty; it is not intended to allow the provisions of the treaty to be valid prior to the treaty has legally entered into force.[44] As Oliver Dörr put it, 'the States concerned are not bound to comply with the treaty, but not to destroy its very essence, thus not to render its entry into force *de facto* meaningless.'[45] The interim obligation is concerned with acts that would make the performance of the treaty difficult or impossible. Did the Regulation in question really defeat the *object and purpose* of the EEA Agreement? One of the purposes of the Agreement was '[to establish] a dynamic and homogeneous European Economic Area.' It cannot be said that the EU's behaviour threatened the Agreement in such a manner.[46] Although *Opel Austria* is one of the very few judicial pronouncements on Article 18 VCLT[47] it is not a good application of the interim obligation, but would be better categorised as an application of the more general principle of good faith.[48]

Other cases demonstrate that the principle of good faith, not the Article 18 obligation is applied by the CJEU. A week and half before its entry into the EU, Sweden introduced a new tax on sugar. In *Danisco Sugar*, a company sought to annul Sweden's hefty sugar tax.[49] It sought to rely on *Opel Austria*, arguing that the sugar

[42] *Certain German Interests in Polish Upper Silesia*, (1925) PCIJ Ser A, No 7, para 5.

[43] *Opel Austria*, EU:T:1997:3, para 86.

[44] A Aust, *Modern Treaty Law and Practice*, 3rd ed (Cambridge University Press, 2013), p 107.

[45] O Dörr, see note 40 above, p 220.

[46] See P Fischer, 'Case T-115/94, Opel Austria GmbH v. Council, Judgment of 22 January 1997, [1997] ECR II-39' (1998) 35(3) *Common Market Law Review* 765, p 779.

[47] J Klabbers, 'Treaties, Conclusion and Entry into Force' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press), para 13.

[48] See O Dörr, note 40 above, p 222: 'it becomes clear that the Court of First Instance was simply applying the good faith principle as such, and not the interim obligation as one of its concrete emanations.'

[49] *Danisco Sugar v Allmänna ombudet*, C-27/96, EU:C:1997:563.

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law contravened the 'principle of good faith', and amounted to a violation of the interim obligation.[50] Again, the principle being invoked was actually that of the protection of legitimate expectations under EU law, rather than the principle in Article18 VCLT. The facts are quite different from those of *Opel Austria,* however. Danisco Sugar's expectations under the Treaty were not frustrated by an act of the EC, but by a national act of Sweden. At the intergovernmental level, between Sweden and the EC, neither party was of the view that the sugar law defeated the object and purpose of the Treaty. On the contrary, the sugar tax was designed to prevent speculation and the accumulation of excessive stock. In such a situation it would be difficult to find that the 'legitimate expectation' of a private company was frustrated by the national law. The Court found it unnecessary to touch upon the issue of the interim obligation,[51] resolving the issue on other grounds. Yet the case demonstrates the difficulty of applying the principle of Article 18 VCLT to the situation where it is a private entity, not a party to the agreement, relying on the interim obligation.[52]

The Court also dealt with the interim obligation in Case T-231/04*, Greece v Commission.*[53] The European Commission had entered into a Memorandum of Understanding (MOU) with certain Member States related to the sharing of the costs of their representations in Abuja, Nigeria. The Commission took steps to recover amounts that it believed were due to be paid by Greece under the MOU. Greece disputed this amount. The Commission relied, *inter alia*, on the conduct of Greece and the principle of good faith in international law.[54] The Court found that Greece, 'as a signatory of the additional memorandum, was bound to act in good faith as regards the other partners.'[55] Not only had Greece not informed the other parties of its intention to withdraw from the agreement, it continued to act as a full participant in the project. Therefore, 'by reason of the principle of good faith, the Hellenic Republic could not evade its financial commitments by pleading that it had not ratified the additional memorandum.'[56] Once again, while the Court explicitly refers to Article 18 VCLT, this is really another application of the principle good faith.

Jan Klabbers has argued that in these cases, and others ostensibly involving the interim obligation, what is actually being applied is a 'manifest intent' test. This is outlined in the following way:

> if behavior seems unwarranted and condemnable, it may be assumed to have been inspired by less than lofty motivations and ought to be condemned, regardless of

[50] Ibid, para 20.

[51] Ibid, para 31.

[52] J Klabbers, 'How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent' (2001) 34 *Vanderbilt Journal of Transnational Law* 283, p 318.

[53] *Greece v Commission*, T-231/04, EU:T:2007:9.

[54] Ibid, para 71.

[55] Ibid, para 97.

[56] Ibid, para 99.

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> whether anyone's legitimate expectations are really frustrated or can reasonably be said to have been frustrated, regardless of actual proof of bad faith.[57]

It should be remembered that the obligation under Article 18 VCLT is primarily one between states. While there are cases where the interim obligation has been invoked before the Court, the Court is really applying a principle of good faith, or perhaps even a 'manifest intent' test, rather than a true judicial application of Article 18 VCLT.

IV. TREATY INTERPRETATION

Articles 31–33 VCLT concern the general rules of treaty interpretation. While the Court has made use of these provisions on numerous occasions, it often does so in a 'European' manner.

A. General rule of interpretation

The main way in which the Court has applied the law of treaties is through its application of general rules of interpretation, as set out in Article 31 of the VCLT and VLCT-IO. The VLCT famously states that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' The CJEU has made use of Article 31 extensively in interpreting agreements before it, especially by invoking this rule to examine the 'object and purpose' of the agreement.

1. Interpreting the provisions of an international agreement

In Case C-344/04 *IATA and ELFAA*[58] the Court used Article 31 VCLT to examine the object and purpose of the Montreal Convention. The Court looked at the object and purpose of that convention, particularly with reference to the preamble,[59] which refers to 'equitable balance of interests' and the desirability of 'collective State action for further harmonization.'[60] The Court found that the drafters had not intended 'to shield [air] carriers from any other form of intervention' than those in the Convention and found that the Regulation at issue could not be considered to be inconsistent with the Montreal Convention.[61] While the two instruments shared similar objectives, they essentially regulated different legal issues arising from flight delays and hence

[57] J Klabbers, see note 52 above, p 330.

[58] *IATA and ELFA*, C-344/04, EU:C:2006:10.

[59] In general EU law the Court regularly refers to the preamble to determine the aim and content. See eg M Klamert, 'Conflict of Legal Basis: No Legality and No Basis but a Bright Future Under the Lisbon Treaty?' (2010) 35 *European Law Review* 497, p 499: arguing that 'the Court, in recent cases, has perhaps relied too heavily on the preamble as expression of this aim thus risking the undermining of the rule of objectivity.'

[60] See note 58 above, para 4.

[61] Ibid, para 45.

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there was no inconsistency.[62] The case was criticised for its 'selective' use of the preamble to the Montreal Convention.[63] It was argued that Article 29 of that convention provides for the exclusivity of the remedies in respect of passengers. This article had been interpreted by the UK House of Lords[64] and US Supreme Court[65] in a way that confirmed such exclusive nature of this Convention.[66] While the preamble of a convention may be used to identify its object and purpose[67] it cannot be used to defeat the text of the article itself. The CJEU failed to examine the way in which the Convention had been interpreted by other Courts, focusing on what it considered to be the object and purpose of the agreement. In doing so, it arguably deviated from the established international judicial practice on the Montreal Convention.

In *Walz v Clickair*[68] the Court found that the term 'damage' in Article 22(2) of the Montreal Convention must be interpreted in accordance with the Article 31 rules of interpretation.[69] The Court had to determine the meaning of 'damage', examining whether this included purely material damage, both material and non-material damage, or some other combination thereof. The Court stressed the need for a 'uniform and autonomous interpretation' of the term. In order to determine the ordinary meaning of the term, the Court employed Article 31(2) of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ('ASR')[70]. According to the Court, the ASR, which are non-binding under international law, aim 'to codify the current state of general international law'.[71] This is another example of the Court employing Article 31 VCLT to examine the 'wider context' of international law, including principles of customary international law, to interpret an agreement.

2. *International agreements which resemble EU law*

The Court has also employed Article 31 VCLT when examining whether to interpret a provision of an agreement in the same manner as a similar rule under EU law, mostly when examining the object and purpose of association agreements.[72] In *Jany*

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[62] K St Clair Bradley, 'Case C-344/04, The Queen ex parte International Air Transport Association, European Low Fares Airline Association v. Department for Transport, Judgment of the Court (Grand Chamber) of 10 January 2006, nyr' (2006) 43(4) *Common Market Law Review* 1101, p 1111.

[63] J Balfour, 'Correspondence' (2007) 44(2) *Common Market Law Review* 555, p 558.

[64] *Sidhu v British Airways* [1997] AC 430.

[65] *Tseng v EL Al*, 525 US 155, 119 S Ct 662 (1999), 26 Avi 16,141.

[66] See JJ Wegter, 'The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention' (2006) 31(2) *Air and Space Law* 133, p 135.

[67] Article 31 (2) VCLT, see note 1 above.

[68] *Walz v Clickair SA*, C-63/09, EU:C:2010:251.

[69] Ibid, paras 22–23.

[70] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Yearbook of the International Law Commission, Volume II, Part I, Documents of the Fifty-Third Session (2001) (UN Doc A/56/10).

[71] *Walz v Clickair SA*, EU:C:2010:251, para 28.

[72] *Jany and Others*, C-268/99, EU:C:2001:616, para 35.

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and Others it was argued that the term 'economic activities as self-employed persons' in the Association Agreements should be interpreted differently from the term 'activities as self-employed persons' in Article 52 of the EC Treaty (Maastricht). The question arose whether prostitution could be conceived as an 'economic activity.' The Court looked at the preamble of the agreements and found that their purpose was to promote 'expansion of trade and harmonious economic relations between the Contracting Parties in order to foster dynamic economic development and prosperity.'[73] The Court found that there was nothing in the object and purpose of the agreements to lead the Court to interpret the two terms differently.[74] When finding the 'ordinary meaning' of a term in an international agreement, the Court conveniently found that it was the same as the meaning used in EU law.[75]

In *Pabst & Richarz KG v Hauptzollamt Oldenburg*, the Court found it relevant that the provision of an association agreement with Greece on non-discriminatory taxation 'fulfils … the same function as that of Article 95 [EC Treaty].'[76] Looking at the objective and nature of the association agreement, the Court found no reason to interpret the provision differently from the corresponding EU law.[77] Similarly in *Administration des Douanes v Legros and Others* the Court was faced with the meaning of 'charge having equivalent effect' in an agreement between the EC and Sweden.[78] It found that the agreement 'would be deprived of much of its effectiveness if the term 'charge having equivalent effect' contained in Article 6 of the [EC Sweden] agreement were to be interpreted as having a more limited scope than the same term appearing in the EEC Treaty.'[79] The Court did not do so automatically from the identical wording in the two treaties. Rather, it looked at the provision of the agreement in the light of its object and purpose and its context.[80]

More troubling is the Court's use of the object and purpose of an international agreement to stress the 'exceptional nature' of the EU and EU law. In *Polydor* the Court made use of the object and purpose of an agreement to find that a different interpretation should be given to that under EU law.[81] The Court looked at the object

[73] Ibid, para 36.

[74] Ibid.

[75] C Hillion, 'Cases C-63/99 Secretary of State for the Home Department ex parte Wiesław Głoszczuk and Elzbieta Głoszczuk; C-235/99 Secretary of State for the Home Department ex parte Eleanora Ivanova Kondova; C-257/99 Secretary of State for the Home Department ex parte Julius Barkoci and Marcel Malik; judgments of the Full Court of 27 September 2001; Case C-268/99 Aldona Małgorzata Jany e.a v. Staatssecretaris van Justitie, judgment of the Full Court of 20 November 2001; Case C-162/00 Land Nordrhein-Westfalen v. Beata Pokrzeptowicz-Meyer, judgment of the Full Court of 29 January 2002' (2003) 40(2) *Common Market Law Review* 468, p 448 (fn 90): 'One does not really know whether the Community meaning is derived from the 'ordinary meaning' or whether it is the other way around.'

[76] *Pabst & Richarz KG v Hauptzollamt Oldenburg*, C-17/81, EU:C:1982:129.

[77] Ibid, para 27.

[78] *Administration des Douanes v Legros and Others*, C-163/90, EU:C:1992:326.

[79] Ibid, para 26.

[80] Ibid, para 23.

[81] *Polydor and Others v Harlequin and Others*, C-270/80, EU:C:1982:43.

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and purpose of the agreement, including reference to the preamble, to find that it was aimed at consolidating and extending economic relations between the EC and Portugal.[82] The provisions of that agreement were expressed in terms that were almost identical to those in the EEC Treaty regarding the abolition of restrictions on trade within the European Community. The Court found, however, that there was a relevant difference between the EC–Portugal agreement and the EEC Treaty. As the Court found in Opinion 1/91, the fact that an international agreement and provisions of EU law use similar or identical words does not mean that they must be interpreted in the same manner.[83] The Court found that the EEA Treaty 'merely creates rights and obligations as between the Contracting Parties'[84] whereas the EEC Treaty 'constitutes the constitutional charter of a Community based on the rule of law.'[85] In these two cases the Court distinguishes the EEC Treaty, which includes primacy and direct effect, from a 'normal' international treaty.[86]

In *Metalsa*, the Court was asked to decide whether an article of a free trade agreement between the EEC and Austria should be interpreted in the same way as Article 95 EC Treaty.[87] The Court again found that in order to decide whether to extend the European interpretation to the article of a separate agreement, one must examine the aim pursued by that provision, taking into account the object and purpose of the agreement.[88] The Court found that the EEC Treaty aims to establish a common market, whereas the EC–Austria FTA was to progressively eliminate obstacles to trade, in accordance with the provisions of the GATT concerning free trade areas. The Court was faced with a similar issue in *Eddline El-Yassini*, where it was asked to apply its case law concerning the rules governing EEC–Turkey Agreement to the EEC–Morocco Agreement.[89] Again, the Court used Article 31 VCLT to examine these agreements in light of their object and purpose. Upon comparing the two agreements, the Court found that they had different goals and objectives. One difference was that, unlike the EEC–Turkey agreement, the EEC–Morocco agreement did not intend progressively to secure the free movement of workers.[90] The Court's case law relating to the EC–Turkey agreement could therefore not be applied by analogy to the second agreement.[91]

Richard Gardiner is critical of the Court's approach to the interpretation of agreements in these cases. While the Court states that it is applying the principles of the Vienna Convention, it does so in a slightly different manner: 'in *Polydor* the

[82] Ibid, para 10.

[83] *Opinion 1/91 (EFTA Agreement)*, EU:C:1991:490, para 14.

[84] Ibid, para 20.

[85] Ibid, para 21.

[86] PJ Kuijper, 'The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969' (1998) 25(1) *Legal Issues of European Integration* 1, p 3.

[87] *Metalsa*, C-312/91, EU:C:1993:279.

[88] Ibid, para 11.

[89] *Eddline El-Yassini,* C-416/96, EU:C:1999:107, para 47.

[90] Ibid, para 58.

[91] Ibid, para 61.

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Court's approach was much closer to the purposive approach of the Harvard draft than to the Vienna rules.'[92] As Pieter Jan Kuijper noted, the Court's use of Article 31 VCLT is interesting in these cases since 'it constitutes an attempt to base the *exceptional* character of the Community legal order on normal rules of treaty interpretation.'[93] Even though the provisions of the agreement and the EU Treaties are similar in these cases, the Court found that the 'object and purpose' of the agreements differ, using Article 31 VCLT as justification. Kuijper is critical of this (mis)use of Article 31, since the Court is essentially using its own case law on the EU as a 'new legal order' to interpret the provisions of an international agreement.[94] The Court's use of the 'object and purpose' in these cases presents a serious divergence from the use under international law:

> In general international law, the reference to the object and purpose of the treaty is frequently understood to allow for a progressive, evolutive interpretation which potentially decouples a treaty from the original will of the states parties. For the ECJ, however, the reference to the object and purpose of the EEA agreement served to underline the limitations of traditional international agreements as compared to the dynamic nature of Community law.[95]

Although the Court sees the EU Treaties as having developed a distinctive legal order, this should not be taken into account as a contextual element under Article 31 (2) VCLT.

3. Legal basis of concluding an agreement

The Court has made use of Article 31 VCLT when determining the appropriate legal basis for the conclusion of an agreement under EU law. Opinion 2/00[96] concerned *inter alia* the proper legal basis for the conclusion by the Union of the *Cartagena Protocol to the Convention on Biological Diversity*.[97] The Court was called upon to determine the legal basis of the agreement: was it principally an environmental agreement with aspects of trade, a trade agreement with aspects of environmental issues, or were the two issues inextricably linked? In order to answer this question the Court found that it was required to interpret an international agreement, and it should make use of Article 31 VCLT.[98] This allowed the Court to take into account the 'wider context' in which the Protocol was adopted. This included the *Convention on Biological Diversity*, which had been concluded by the Community on the basis

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[92] R Gardiner, *Treaty Interpretation* (Oxford University Press, 2010), p 123.

[93] PJ Kuijper, above note 86, p 3.

[94] Ibid, p 4.

[95] HP Aust et al, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27(1) *Leiden Journal of International Law* 75, p 102.

[96] *Opinion 2/00 (Cartagena Protocol)*, EU:C:2001:664.

[97] Cartagena Protocol on Biosafety to the Convention on Biological Diversity (29 January 2000), 2226 UNTS 208, entered into force 11 September 2003.

[98] See note 96 above, para 24.

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of Article 130s EC. Taking this wider context into account, the Court found that the Protocol 'pursues an environmental objective, highlighted by mention of the precautionary principle, a fundamental principle of environmental protection referred to in Article 174(2) EC.'[99] Its main purpose therefore is the protection of biological diversity.

In the *Energy Star* case, the Court also looked at the object and purpose of an agreement, although without explicitly mentioning Article 31 VCLT.[100] The Court referred to the preamble of the Energy Star Agreement[101] and found that it intended to promote energy efficiency and therefore pursued an environmental objective.[102] However, the Court came to a different conclusion in this case, finding the commercial objective of the agreement to be predominant. In *Daiichi Sankyo*[103] the Court examined the object and purpose of the TRIPS Agreement[104] including reference to its preamble, to determine that the agreement was aimed at 'reducing distortions of international trade.'[105] Since the TRIPS agreement seeks to facilitate international trade, the relevant sections of the TRIPS agreement could fall within the Common Commercial Policy for the purposes of EU law.

Despite the fact that the Court refers to context as a method of treaty interpretation under Article 31 VCLT, international law really does not play a large role in the case law on identifying the appropriate legal basis.[106] This remains an internal issue for the EU legal order, on which treaty law principles have not had a decisive influence.

4. Other means of interpretation in Article 31

The Court has made use of Article 31 VCLT on a number of occasions in order to examine the object and purpose of the treaty under examination.[107] Yet there are fewer examples of the Court using the other elements of treaty interpretation found in Article 31.[108] The Court often employs Article 31 to 'bring in' other principles of

[99] Ibid, para 29.

[100] *Commission v Council*, C-281/01, EU:C:2002:761.

[101] Agreement between the Government of the United States of America and the European Community on the coordination of energy-efficient labelling programs for office equipment, signed in Washington on 19 December 2000.

[102] *Commission v Council*, EU:C:2002:761, para 38.

[103] *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520.

[104] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

[105] See note 103 above, para 58.

[106] Academic commentary on these cases does not discuss the role of the VCLT in the Court's reasoning. See A Dashwood, 'Opinion 2/00, Cartagena Protocol on Biosafety, 6 December 2001, not yet reported' (2002) 39(2) *Common Market Law Review* 353. A MacGregor and E Brown, 'ECJ Pronouncement on the Correct Legal Basis for the Conclusion by the European Community of the EU-US Energy Star Agreement' (2003) 9(2) *International Trade Law & Regulation* 63.

[107] C Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations' in DB Hollis, *Oxford Guide to Treaties* (Oxford University Press, 2012) 517. See PJ Kuijper, note 86 above, p 2.

[108] PJ Kuijper, see note 86 above, p 7.

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international law as part of the 'wider context' in which an agreement should be read, such as the *pacta tertiis* principle in *Brita* (discussed below) or applying customary rules regarding damage in *Walz*. The Court has made very little use of other elements of treaty interpretation in Article 31. For example, subsequent agreement between the parties on the interpretation of the agreement;[109] or subsequent practice in the application of the agreement[110] are rarely employed by the Court in a decisive manner.

B. Supplementary means of interpretation

Article 32 VCLT sets out supplementary means of interpretation. These are intended to be used as means of interpretation when interpretation according to Article 31 VCLT leads to an obscure or ambiguous result, or one which is manifestly absurd or unreasonable.[111] They may also be used to confirm a meaning resulting from the application of Article 31 VCLT.

1. Preparatory work

In this regard the Article 32 VCLT acknowledges that preparatory work (*travaux préparatoires*) may be used as a supplementary means of interpretation in certain instances. The CJEU has generally been reluctant to examine, when interpreting the EU Treaties and EU law, the work that took place in negotiating and drafting those instruments. Whereas other international and domestic courts have examined preparatory work in order to further interpret the provisions of a treaty, EU law is 'somewhat hostile to the principle of historical interpretation'[112] favouring 'autonomous interpretation'. One reason for this may simply be that there is often little in the way of documentation that could be relied upon when determining the drafter's intentions. The EU Treaties went through a complex and drawn-out drafting process, including multiple revisions and language versions, in a process that was largely outside the public's gaze. Identifying the intention of drafters though examination of preparatory work is always difficult; doing so in the context of the EU Treaties would be particularly complicated. Another reason may be more ideological: the Court sees the EU Treaties as living instruments to be interpreted according to their plain meaning, the context and their object and purpose. As the Court states, 'every 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.'[113] The Court may not wish to be bogged down in debates, such as in

[109] Article 31 (3)(a) VCLT, see note 1 above.

[110] Article 31 (3)(b) VCLT, see note 1 above.

[111] Article 32, VCLT, see note 1 above.

[112] N Reich, C Goddard and K Vasiljeva, *Understanding EU Law: Objectives, Principles and Methods of Community Law* (Intersentia, 2003) 26.

[113] *CILFIT v Ministero della Sanità*, C-283/81, EU:C:1982:335, para 20.

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American constitutional law, regarding 'originalism' and the intention of the drafters.[114]

There have been some instances where the Court has employed supplementary work in its reasoning. In *Pringle*, the CJEU was asked to interpret the meaning of Article 125 TFEU, the so-called 'no-bail-out' clause.[115] In order to determine the objective pursued by that article, the Court looked at the preparatory work relating to the Treaty of Maastricht, in particular the *Bulletin of the European Communities*.[116] By examining this preparatory work, the Court found that the original objective of the 'no-bailout' clause was to encourage sound budgetary policies in the Member States of the Euro: 'that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline.'[117]

The Court has subsequently applied *Pringle* to assert that '[t]he origins of a provision of European Union law may also provide information relevant to its interpretation.'[118] In *Inuit Tapiriit Kanatami* the Court examined the *travaux préparatoires* of articles of the proposed treaty establishing a Constitution for Europe, which are identical to the relevant parts of the TFEU under consideration.[119] In these cases the Court used the preparatory work as a primary means of interpretation in order to find the objective of the provisions in question, rather than as a supplementary means of interpretation to confirm the meaning of the provision or to remove ambiguity, as set out in Article 32 VLCT. It is not yet clear whether the reference to preparatory work by the Court in these cases is an anomaly, or whether it marks a turn away from its usual reluctance to examine the drafting history of the Treaties.[120] As more preparatory documentation becomes publicly available, the Court may decide to use it as a means of interpretation in more cases.[121]

When it comes to the interpretation of international agreements, the Court remains reluctant to examine *travaux préparatoires*. In *Bolbol*, AG Sharpston went into quite some detail examining the drafting history behind the Geneva Convention of 28 July 1951 Relating to the Status of Refugees.[122] The Court, having found the wording of Article 1D of that convention to be sufficiently clear, did not examine the preparatory

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[114] See G Huscroft, and BW Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2011).

[115] *Pringle*, C-370/12, EU:C:2012:756.

[116] Bulletin of the European Communities, Supplement 2/91, pp. 24 and 54. See *Pringle*, C-370/12, EU:C:2012:756, para 135.

[117] *Pringle*, EU:C:2012:756, para 135.

[118] *Inuit Tapiriit Kanatami et al v. European Parliament and Council*, C-583/11P, EU:C:2013:625, para 50.

[119] Article 263, para 4, TFEU. *Inuit Tapiriit Kanatami et al v. European Parliament and Council*, EU:C:2013:625, para 59.

[120] See 'From the Board: International Law in the Case Law of the Court of Justice: Recent Trends' (2014) 41(1) *Legal Issues of Economic Integration* 1, p 4.

[121] See S Schonberg and K Fric, 'Finishing, Refining, Polishing: On the Use of Travaux Preparatoires as an Aid to the Interpretation of Community Legislation' (2003) 28(2) *EL Rev* 149, pp 170–171.

[122] Opinion of Advocate General Sharpston in *Bolbol*, C-31/09, EU:C:2010:119, paras 41–47.

work of that convention.[123] The Court's reluctance to refer to preparatory work likely stems from its inclination towards teleological reasoning in EU law.[124] The CJEU's reluctance to examine *travaux* when interpreting EU law seems to apply equally to international agreements.

C. Subsequent practice

Courts may also take into account the subsequent practice of the parties when interpreting a treaty. Article 31(3) VCLT allows the interpreting body to take into account 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'[125] The Court has rejected the notion that 'subsequent practice' is of relevance when interpreting EU primary law, stating that 'mere practice cannot override the provisions of the Treaty.'[126] While the Court can and does adapt to changes that take place over time, it seeks to ensure that the Court's interpretation of the Treaties guide the actions of the Member States, not the other way round: 'its function is to ensure that the law is observed and that the Treaty, not the practice of the Member States, predominates.'[127]

The CJEU is also reluctant to take into account subsequent practice when interpreting international agreements.[128] In *Cayrol v Rivoira* the Court employed the 'settled practice of the parties to the agreement' to confirm its interpretation of an agreement.[129] In *Anastasiou* the Court noted that, in accordance with Article 31 VCLT, 'substantial importance properly attaches to the object and purpose of a treaty and *any subsequent practice in its application* …'[130] The Court found in this case that the practice of the parties, in particular the *de facto* acceptance of certificates issued by the Turkish Republic of Northern Cyprus (TRNC), did not 'warrant a departure from the clear, precise and unconditional provisions' of the 1977 Protocol. The Court seems equally reluctant to give importance to subsequent practice when

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123 *Bolbol*, C-31/09, EU:C:2010:351, para 51.

124 C Brölmann, see note 107 above, p 517: 'in its (sparse) references to the rules of interpretation as part of the general law of treaties, the CJEU can be seen to employ a large degree of teleological reasoning coupled with a reluctance to use the travaux preparatoires as a supplementary means of interpretation.' See PJ Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) 256, p 260.

125 Article 31(3) VCLT, see note 1 above.

126 *France v Commission*, EU:C:1994:305, para 36: 'in any event, a mere practice cannot override the provisions of the Treaty.' See G Slynn, 'The Use of Subsequent Practice as an Aid to Interpretation by the Court of Justice of the European Communities' in R Bieber and G Ress (eds), *Die Dynamik des Europaischen Gemeinschaftsrechts* (Nomos, 1987) 138.

127 G Slynn, see note 126 above, p144.

128 *See Cayrol v Rivoira*, C-52/77, EU:C:1977:196; *Anastasiou*, C-432/92, EU:C:1994:277. See G Nolte, Report 2, *Jurisprudence Under Special Regimes Relating to Subsequent Agreements and Subsequent Practice – Second Report for the ILC Study Group on Treaties over Time*.

129 *Cayrol v Rivoira*, EU:C:1977:196, para 18.

130 *Anastasiou,* C-432/92, EU:C:1994:277, para 43 (emphasis added).

interpreting international agreements as it is when interpreting EU law.[131] A key difficulty in employing subsequent practice is determining *which* practice is relevant in interpreting the agreement. In *Anastasiou*, the practice had been accepted by the European Commission and by the UK, but certainly not by other Member States, particularly Greece.

Georg Nolte, Special Rapporteur on the ILC Study Group on 'Subsequent agreements and subsequent practice in relation to interpretation of treaties' identified that the CJEU has been reluctant to employ subsequent practice in interpreting the EU Treaties. This reluctance to employ subsequent practice also applies to the interpretation of agreements concluded between the Union and third states.[132] Nolte contrasts the CJEU's reluctance to employ subsequent practice with that of the European Court of Human Rights, and argues that the difference may stem from the 'special nature of Union law as it has been developed by the Court.'[133] Nolte points out that for the CJEU the attainment of the Treaty objectives is of great relevance and therefore 'any practice is potentially regarded as a threat and should consequently only be taken into account with great care and reluctance.'[134] In public international law, subsequent practice can be used to identify the intentions of the parties to the agreement. In the EU context, 'subsequent practice' is treated with much more suspicion.

V. TREATIES AND THIRD STATES

It is a well-established principle of treaty law that a treaty only applies to the parties to the agreement, and cannot bind a third state. The Court has applied the principle of *pacta tertiis nec nocent nec prosunt* ('a treaty binds the parties and only the parties; it does not create obligations for a third state') enshrined in Article 34 VLCT.[135] In *Poulsen*, the Court found that EU law could not apply in respect of a vessel outside of the EU's jurisdiction.[136] The vessel in question was registered in Panama and flew the Panamanian flag. Since Panama is not a party to the EU Treaties, EU law cannot be applied to its vessels and an EU regulation could not be applied to it in relation to conduct outside of the EU or EU waters.

The Court also applied the *pacta tertiis* principle in *Brita*, although in more tangential fashion.[137] Brita, a German company, imported drinks makers from an Israeli

[131] See F Hoffmeister, 'The Contribution of EU Practice to International Law' in M Cremona (ed) *Developments in EU External Relations Law* (Oxford University Press, 2008), p 61.

[132] G Nolte, 'Second Report of the ILC Study Group on Treaties over Time: Jurisprudence Under Special Regimes Relating to Subsequent Agreements and Subsequent Practice', in G Nolte (ed) *Treaties and Subsequent Practice* (Oxford University Press, 2013), p 301: 'Even in cases concerning agreements by the Union with third states the Court hardly ever refers to subsequent practice.'

[133] Ibid, p 301.

[134] Ibid, p 302. See also N Fennelly, 'Legal Interpretation at the European Court of Justice' (1997) 20(4) *Fordham International Law Journal* 656, p 664.

[135] Article 34, VCLT, see note 1 above.

[136] *Anklagemindigheden v Poulsen and Diva Navigation*, C-286/90, EU:C:1992:453.

[137] *Brita v Hauptzollamt Hamburg Hafen*, C-386/08, EU:C:2010:91.

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supplier, Soda Club Ltd. The German authorities refused to give preferential treatment to Brita under the EC–Israel Association Agreement on the grounds that it could not be established conclusively that the imported goods fell within the scope of the agreement. This is because Brita had stated that the goods' country of origin was Israel, although they were manufactured in Mishor Adumim, in the West Bank. The question was whether the goods should have been given preferential treatment in any event, since they would have fallen under the EC–Israel Association Agreement or EC–PLO Association Agreement. The Court was therefore called upon to interpret the provisions of an international agreement, and referred to Article 31 VCLT in in order to employ 'relevant rules of international law applicable in the relations between the parties.'[138] One of the rules that to which the Court sought recourse was the *pacta tertiis* principle.

The Court sought to interpret Article 83 of the EC–Israel Association Agreement, which defines the territorial scope of that agreement, in a manner that is consistent with the *pacta tertiis* principle. The Court considered that if it were to interpret Article 83 in a way that allowed Israeli customs authorities to enjoy competence in respect of products originating in the West Bank, this would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the EC–PLO Protocol. Such an interpretation, according to the Court, would create an obligation for a third party without its consent, and therefore would thus be contrary to the *pacta tertiis* principle.

Here the Court used Article 31, a rule of treaty interpretation, to have recourse to Article 34 VCLT, a rule about the relative effect of treaties. The case is an example of the Court applying international law, as Jan Klabbers stated, 'in ways which are all but unrecognizable to the international lawyer.'[139] The Court's application of the *pacta tertiis* principle in order to interpret the treaty led to critical response from some international lawyers. Enzo Cannizzaro is critical of the Court's use of the *pact tertiis* rule:

> In spite of its persuasive force, this approach can hardly have a legal basis in the international principles on treaty interpretation, which limit the relevance of other international rules to those applicable between the parties. One fails to see how the agreement between the EC and the Palestinian authority can be taken into account in the interpretation of another unrelated agreement between the EC and Israel.'[140]

The Court has been criticised for misusing the principle: 'the result of their application is somewhat stretching the scope of the *pacta tertiis* rule.'[141] One can understand that the Court did not want to weigh in on the politically sensitive topic of

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[138] Ibid, para 43.

[139] J Klabbers, *The European Union in International Law* (Pedone, 2012), p 72.

[140] E Cannizzaro, 'A Higher Law for Treaties?' in E Cannizzaro (ed) *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) 425, p 432.

[141] See note 95 above, p 103.

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the territorial application of treaties with Israel and reliance on the *pacta tertiis* rule was a convenient way to avoid dealing with this thorny issue.

VI. INVALIDITY, TERMINATION AND SUSPENSION

Section 3 of the VCLT deals with issues related to the invalidity, termination and suspension of the operation of treaties. Unlike the rules on interpretation, there have been only a few occasions where the Court has applied these provisions. Nevertheless, the Court's few judgments are particularly illuminating regarding the way it deals with international law.

A. Fundamental change in circumstances

Article 62 VCLT sets out that a fundamental change in circumstances may not be used to terminate or withdraw from a treaty, unless two conditions are fulfilled:

> (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.[142]

As the International Court of Justice stated in *Gabčíkovo-Nagymaros*: 'The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.'[143] The reason for the restrictive approach to the principle of fundamental change in circumstances is clear. If parties were able to use a change in circumstances to avoid obligations arising from a treaty, this could potentially destabilise treaty relations. The principle is an exception to the fundamental rule of *pacta sunt servanda* underlying treaty law. The *rebus sic stantibus* principle in Article 62 VCLT is therefore a controversial one,[144] particularly since

> It would be an intolerable offense against the international rule of law if a party could unilaterally relieve itself of treaty commitments which according to its own subjective interpretation had turned out to be overly burdensome.[145]

There is relatively little international judicial or other practice where the principle set out in Article 62 VCLT has been employed, making the Court's use of the *rebus sic stantibus* principle particularly interesting. The principle was famously applied in *Racke,* concerning the termination of an agreement with Yugoslavia based on the

[142] Article 62(1) VCLT, see note 1 above.

[143] Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment) [1997] ICJ Rep 7, para 104.

[144] T Giegerich, 'Article 62. Fundamental change of circumstances', in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012), p 1068.

[145] Ibid, p 1069.

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outbreak of armed conflict in that country.[146] The issue gives rise to two questions before the Court: first, whether the conditions for the application of *rebus sic stantibus* were fulfilled; second, whether an individual could rely on the application of this doctrine in proceedings. The Court found that the outbreak of hostilities was a fundamental change in circumstances under Article 62 VCLT which would allow for the termination of the treaty. At first sight, it may appear that the outbreak of hostilities would constitute the very type of change in circumstances envisaged by Article 62. However, it would be highly problematic if the outbreak of war or civil unrest in a country were all that was needed to allow a third state to terminate a treaty.[147] Indeed, the issue of 'Effects of armed conflicts on treaties' is a complex topic, one that has been considered by the International Law Commission.[148] Yet the Court accepts that the outbreak of armed conflict sufficed to trigger *rebus sic stantibus* principle.

A related question was whether it was permissible to suspend the Cooperation Agreement without adhering to the procedural requirements, including prior notification and a waiting period, as required by Article 65 VLCT.[149] The Court notes that, prior to termination, the Community had made it clear that it would terminate the Cooperation Agreement if a ceasefire were not observed. However, the Court argues that the procedural requirements in the VCLT do not apply to the EU in any event: '[e]ven if such declarations do not satisfy the formal requirements laid down by Article 65 of the Vienna Convention, it should be noted that the specific procedural requirements there laid down *do not form part of customary international law*.'[150] Although the International Court of Justice has not found Article 65 to represent customary international law, it found that the procedural aspects 'at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith.'[151] The US Restatement of the Law claims that these procedural requirements apply 'with special force where the right to suspend or terminate is claimed on grounds of *rebus sic stantibus*, since that basis for termination is particularly subject to self-serving and subjective judgments by the state invoking it.'[152] The Court gives no support for its conclusion that the procedural requirements in Article 65 do not represent customary international law. The termination of a treaty is a highly political act, closely related to issues of foreign policy.

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

147 As J Klabbers notes: 'Taken to the extreme, it amounts to saying that treaties cease to be in force upon any outbreak of hostilities, a statement not easily reconcilable with what many hold to be prevailing customary law.' J Klabbers, 'Case C-162/96, A. Racke GmbH & Co. v. Hauptzollamt Mainz, judgment of 16 June 1998, nyr' (1999) 36(1) *Common Market Law Review* 179, p 186.

148 See, International Law Commission, 'Draft Articles on the Effects of Armed Conflicts on Treaties 2011', adopted at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para 100).

149 Article 65 VCLT, see note 1 above.

150 See note 146 above, para 58 (emphasis added).

151 *Gabčíkovo-Nagymaros*, see note 143 above, para 109.

152 Restatement (Third) of Foreign Relations Law of the United States, para 336 comment f.

The Court evidently did not want to stand in the way of the Community on this issue. As in *Brita*, the Court's reluctance to deal with sensitive political issues led it to use international law to avoid grappling with delicate legal issues. Rosalyn Higgins argued that in *Racke*, the correct approach under international law was not the principle of a fundamental change in circumstances, but the law of counter-measures.[153] Even if international lawyers criticise the Court's application of the principle in this case, the judgment is one of the few applications in practice.[154]

VII. CONCLUSIONS

The present article has discussed the Court's approach to a number of issues under international treaty law, demonstrating how it often does so in a novel or selfish manner. This gives rise to a separate question: why is this problematic? Is the Court, as the highest court of a domestic legal order, not free to develop its own interpretation of the VCLT in a way that feels appropriate? Is the Court's 'selfish' approach any more problematic than the use of the VCLT by other domestic courts?

First, the CJEU, as an organ of the EU, is required to respect international law, a principle enshrined in the EU Treaties. When the CJEU diverges from the established international law approach to a certain issue, it does not contribute to the strict observance and development of international law, but undermines it.[155] By utilising the VCLT in such a manner, the Court may also contribute to the fragmentation of international law. International law by its nature is interpreted and applied by a multitude of international, regional and domestic courts and other bodies, which risks varying interpretations of international law principles. With its 'pick and choose attitude', the Court is contributing to the fragmentation of international law.[156] This is even more problematic given the fact that it is dealing with the VCLT, a highly important instrument in international law. The Court does this at the same time that it seeks to safeguard the autonomy of EU law, seeking to ensure that EU law is interpreted in a consistent and uniform manner.

There is in principle nothing wrong with the Court developing an autonomous meaning for certain terms. For instance, it was argued that the Court's definition of an 'agreement' under EU law differs somewhat from a 'treaty' under international law.[157] The Court is free to develop its own definition of 'agreement' for the purposes of EU law. In doing so, however, it needs to bring in public international law. By seeking to ground the meaning of an EU law term in international law, the Court risks undermining the latter.

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153 R Higgins, 'The ICJ, the ECJ, and the Integrity of International Law' (2003) 52(1) *International and Comparative Law Quarterly* 1, p 9.

154 See O Elias, 'General International Law I the European Court of Justice: From Hypothesis to Reality' 31 *Netherlands Yearbook of International Law* 3 (2000) 17, p 21.

155 Article 3(5) TEU.

156 See note 95 above, p 110: 'With this pick-and-choose attitude, the case law of the ECJ might also contribute to further fragmentation. As a powerful actor watched closely by other courts and tribunals, it could set a negative example for other courts.'

157 See D Verwey, see note 13 above, p 96.

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Second, as the highest court of a regional organisation, the interpretation and application of international law is highly influential. In a recent study on treaty interpretation by domestic courts, for example, the CJEU is examined alongside the Supreme Courts of Mexico and the United States.[158] Although the CJEU is viewed as a domestic court, it is being called upon to interpret and apply international law more than ever, and in doing so plays an important role in the development of international law. Its approach to the VCLT rules can have a wider effect outside the EU legal order. This is another reason for the Court to demonstrate greater fidelity to the established meaning of international law terms.

The final observation of this article is that the Court's approach to the VCLT appears to be highly influenced by its approach to EU law generally, especially with regard to the issue of interpretation. While it has applied the rules of interpretation in Article 31, it has done this mostly in order to examine the 'object and purpose' of the agreement. It remains reluctant to employ other methods of interpretation, particularly examination of subsequent practice or the preparatory work. It should not be surprising that the Court's approach to international treaty law would be influenced in such a manner. Each court develops its own legal traditions, cultures and approaches, and we can expect the CJEU to do so in a similar way. The problem arises, however, when a 'European' approach to the VCLT turns into a *misuse* of the VCLT. Its application of the *rebus sic stantibus* and *pacta tertiis* principles are examples of such practice. Lastly, the use of the VCLT in this way may tell us something more about how the Court sees itself more generally in the wider international legal order. The Court does not to refer to leading case law on the interpretation of international treaties given by the highest courts in other contracting States to the treaty. It feels free to use the VCLT in a way that diverges from its use in wider international law without acknowledging how other Courts have interpreted and applied those principles.

[158] See note 95 above, p 100 arguing that '[i]t has become more and more common, however, to regard the ECJ as being functionally equivalent to a municipal court.'

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