The Non-Trade Agreements Before the EU Courts: The Emergence of Judicial Avoidance Techniques in Challenges to EU Action

1. Introduction

This chapter assesses the case law of the EU Courts in the context of essentially challenges to domestic and EU level action involving those Agreements that do not fall into the category of the preceding two chapters. The catch-all category of ‘non-trade Agreements’ is thus potentially large given the extent of the EU’s treaty-making practice. In actual practice it has given rise to a surprisingly low number of cases before the EU Courts and, indeed, much of the case law which has arisen is of very recent vintage. That there is limited case law from the EU Courts, in what is an increasingly expansive category of treaty-making, is itself a significant finding given that the established case law would arguably have provided litigants with every reason to invoke these EU Agreements where their interests were at stake. Nevertheless, despite the paucity of rulings, there is a great deal to be gleaned from a number of the cases that have arisen and the recent growth in rulings is undoubtedly an indicator of things to come. Most significantly of all, the recent Intertanko ruling suggests a fundamental reassessment in approach to a core plank of the EU’s external relations constitution that results in a considerably less generous gateway for the use of EU Agreements as review criteria than had previously been thought possible.

This chapter is divided into two main sections assessing the two main fashions in which the case law has arisen.
2. Challenges to Domestic Action

Despite the broad treaty-making ambit of the EU, the EU Courts have only had to deal with challenges to action at the Member State level on a handful of occasions.

2.1 Preliminary rulings

The preceding chapters have illustrated that the EU Courts have been called upon to deal with over 150 preliminary rulings in which litigants have sought to challenge domestic action for its alleged incompatibility with EU trade-related Agreements. Strikingly, it was not until 2004 that the ECJ was faced with an alleged incompatibility of national action with a non-trade Agreement.¹

2.1.1 The EDF ruling: the Barcelona Convention and the Mediterranean Sea Protocol

The 2004 EDF ruling concerned a judicial challenge brought by an association of fishermen against the French electricity provider EDF, because of discharges of fresh water from a hydroelectric power station into a saltwater marsh (the Étang de Berre), which communicated directly with the Mediterranean Sea. The action alleged that the discharges breached a Protocol to the Convention for the Protection of the Mediterranean Sea against Pollution (the Barcelona Convention), in particular a provision requiring that such discharges be subject to prior authorization from the competent domestic authorities which had not occurred here. The EU was a party, alongside its Member States, to both the Protocol and the Barcelona Convention. The Cour de Cassation put forth two questions: first, whether the provision in the Protocol must be held directly effective so that interested parties can rely on it before domestic courts to halt unauthorized discharges; secondly, whether it prohibited the discharges at issue.

The ECJ invoked the Demirel direct effect test and asserted it would commence by examining the wording of the provision. A single sentence

followed, holding that it clearly, precisely, and unconditionally laid down a Member State obligation to subject discharges to prior authorization. This was followed by a further sentence reiterating the Commission view that the domestic authority discretion in issuing authorizations in no way diminishes the clear, precise, and unconditional nature of the discharge prohibition absent prior authorization. These two sentences were the extent of the direct textual analysis of the provision. The conclusion was, however, then bolstered by reference to the purpose and nature of the Protocol. It was held to be clear from its articles that its purpose was to prevent, abate, combat, and eliminate certain causes of pollution of the Mediterranean Sea and that to this end Contracting Parties were required to take all appropriate measures. One cannot demur from this exposition of purpose, nor the assertion that followed that the prior authorization requirement contributes to the elimination by Member States of pollution. Here, however, it was followed directly by the assertion that recognition of the provisions’ direct effect can only serve the Protocol’s purpose and reflect the nature of the instrument which is intended to prevent pollution resulting from the failure of public authorities to act. Clearly, if such reasoning were to be employed when looking to the purpose and nature of an EU Agreement in drawing conclusions as to whether particular provisions are directly effective, then it becomes difficult to conceive of provisions that should be deprived of this status. Certainly, treaties will frequently require action from public authorities and accordingly would have their purposes, ultimately ensuring that States Parties comply with the obligations enunciated therein, served by domestic courts policing compliance. To put it another way, if we operate at this level of abstraction then it would rarely be the case that a treaty will not have its purpose served by domestic judicial enforcement.

2 In running this argument the Commission (written submissions) invoked a well-known case holding that the existence of discretion upon national authorities did not preclude individual reliance on a Directive to determine whether this discretion had been exceeded: C-287/98 Linster [2000] ECR I-6917. Linster and other similar cases, notably C-72/95 Kraaijveseld [1996] ECR I-5403, are manifestations of judicial boldness vis-à-vis internal EU law and the difficulties presented by the traditional direct effect lens. It is, thus, noteworthy that whilst reiterating the Commission conclusion there was no citation of this line of cases.

3 The ECJ ruled that the same conclusion applied to the provision as amended, which had not yet come into force, even though it also provided that the prior authorization procedure required the domestic authorities to take due account of relevant decisions or recommendations of the meetings of the Contracting Parties.

4 The obvious exception would be that rare example of a treaty drafted to exclude domestic judicial enforcement.
second question, the ECJ concluded that the relevant provision did, indeed, absent prior authorization, prohibit the relevant freshwater discharges.

The EDF case was clearly of considerable import for it indicated that it was by no means only the predominantly bilateral trade agreements that would receive a receptive hearing before the EU Courts. The direct effect finding was not a foregone conclusion. Admittedly, it had been supported by France, and the Commission, but the counter-argument advanced by EDF was not without merit.⁵ EDF emphasized the interdependence of various provisions of the Protocol. The requirement, in the provision held directly effective, to take due account of provisions in an Annex to the Protocol, was considered vague. A provision concerning the formulation of common standards, not yet defined vis-à-vis the discharge at issue, before a prior authorization system was put in place was also invoked. Moreover, it was argued that this being an EU Agreement those standards could principally be at EU level and, as yet, no relevant Directive existed and accordingly the Commission would also have failed to fulfil its obligations.

2.1.2 The Aarhus Convention and access to justice

The EU became a party in 2005 to the UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (commonly known as the Aarhus Convention). In LZ VLK the ECJ addressed an express question from the Slovakian Supreme Court as to the direct effect of Article 9 and in particular subsection (3) requiring that each Contracting Party ensures that members of the public, meeting the criteria, if any, laid down in national law, have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene national environmental law provisions.⁶ The Grand Chamber found that the dispute fell within the scope of EU law. It emphasized that the dispute concerned whether an environmental association could be a party to administrative proceedings concerning the grant of derogations to the protection for a species mentioned in the Habitats Directive (92/43/EEC). The Court acknowledged the existence of the

⁵ Indeed, the essence of the argument had proved successful before the Cour d’appel d’Aix en Provence from which the case was then appealed to the Cour de Cassation.

EU’s declaration of competence under the Aarhus Convention that clearly stated that the Article 9(3) obligations, with the exception of their applicability to EU institutions, were the responsibility of the Member States until the EU adopted provisions to implement the obligations. However, for the Court even if a specific issue had not yet been the subject of EU legislation it may fall within the scope of EU law if it is related to a field covered in large measure by it. It underscored in this respect that it was irrelevant that the Aarhus Convention implementing Regulation (1367/2006) only concerned the EU institutions, for where a provision could apply both to situations falling within the scope of EU law, it was in the interest of EU law that, to forestall future differences of interpretation it should be interpreted uniformly.\(^7\)

The ECJ followed the Advocate General in rejecting the direct effect of Article 9(3).\(^8\) For the Court, Article 9(3) did ‘not contain any clear and precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in Article 9(3), that provision is subject in its implementation or effects, to the adoption of a subsequent measure.’ Once the jurisdiction hurdle was surmounted, the direct effect conclusion was wholly foreseeable given the express wording of Article 9(3) for even the ECJ’s traditionally generous approach to the direct effect of provisions of EU Agreements would struggle where a provision expressly cross-references national legal criteria for its applicability.\(^9\) However, it was far from predictable that it would require domestic courts nonetheless to interpret their domestic procedural law in such a way as to enable an environmental organization, such as the one in the proceedings (LZ), judicially to challenge an administrative decision liable to be contrary to EU environmental law. It reached this conclusion by first emphasizing that Article 9(3) was intended to ensure

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\(^7\) C-53/96 Hermès, which first used this reasoning to establish jurisdiction over Art 50 TRIPs, was invoked in support.

\(^8\) For the Advocate General this was because it left national law to determine the criteria that trigger its applicability and she added that to attribute that provision direct effect and thus bypass ‘the possibility for Member States to lay down the criteria triggering its application, would be tantamount to establishing an actio popularis by judicial fiat rather than legislative action.’ She also distinguished Kolpak and Simutenkov, relied upon by LZ, as cases where Member States were setting ‘fairly limited procedural criteria, rather than wide-ranging substantive criteria’.

\(^9\) The French Conseil d’État had also previously rejected the direct effect of Art 9(3): Judgment of 5 April 2006, Mme A, MB and others (No 275742).
environmental protection and that, in the absence of EU rules, it was for the
domestic legal system of each Member State to lay down the detailed
procedural rules governing actions for safeguarding individual rights
derived from EU law. For the ECJ it was inconceivable that Article 9(3)
could be interpreted in such a way as to make it, in practice, impossible or
excessively difficult to exercise EU law rights. It was for the national courts,
insofar as concerned species protected by EU law and particularly the
Habitats Directive, and in order to ensure effective judicial protection in
fields covered by EU environmental law, to interpret its national law to
the fullest extent possible consistently with the objectives of Article 9(3).
Put simply, then, the ECJ reached a conclusion that combined reliance
on its effective judicial protection case law with a particularly demanding
manifestation of the principle of consistent interpretation, in all but name,
essentially to dictate the outcome of the domestic proceedings, and
potentially to impact significantly on all manner of domestic proceedings
throughout the EU.

Clearly, then, the LZ VLK ruling is of considerable significance. The
Court was extremely generous in according itself jurisdiction as to the
direct effect determination. The declaration of competence combined
with the absence of EU implementing legislation for Article 9(3) other
than vis-à-vis the EU institutions would surely have led most to conclude,
as it did the Advocate General, that the dispute did not fall within the scope
of EU law and that it was accordingly for national courts to make the direct
effect determination. By reaching the contrary conclusion the Court
was able, notwithstanding its rejection of direct effect, substantially to
bolster the impact Article 9(3) will be accorded across the EU Member
States in a manner that, as one commentator suggested, blurred the distinc-
tion between direct effect and consistent interpretation. Furthermore, the
broad reading on jurisdiction can be viewed as encouraging the Commis-
sion to monitor Member State compliance with Article 9(3), and encourage
potential non-compliance to be drawn to its attention, for without this
ruling the declaration of competence combined with the absence of EU
legislative activity would have sowed strong doubt as to the Court’s

10 The Slovakian Supreme Court proceeded to quash the relevant domestic decisions and
required that the NGO be granted access to the review procedures: see Krawczyk (2012: 60–1).
11 Jans (2011b) has, however, noted Dutch Council of State decisions that followed in which
the interpretative obligation enunciated was not considered.
12 See also the powerful criticism of Jans (2011a) and more briefly Krawczyk (2012: 57–9).
13 Jans (2011a).
willingness to entertain infringement proceedings for non-compliance with those provisions.\footnote{Commission reluctance to monitor the application of EU environmental agreements had in any event long been identified, see Krmer (2000: 5, 284).}

The \textit{LZ VLK} ruling was rapidly followed by the \textit{Trianel} ruling in which the ECJ invoked the Aarhus Convention in offering an interpretation of the Environmental Impact Assessment (EIA) Directive.\footnote{C-115/09 \textit{Bund für Umwelt und Naturschutz Deutschland}, Judgment of 12 May 2011.} That Directive, as amended by Directive 2003/35 EC with a view to giving effect to Aarhus Convention obligations, transposes nearly verbatim Article 9(2) of the Aarhus Convention which requires States to permit certain members of the public access to review procedures to challenge administrative decisions, acts, or omissions. An environmental NGO sought to challenge an administrative decision but a court found that it did not have \textit{locus standi} as it was not relying on the impairment of a substantive individual right as required by German law. That German Administrative Court effectively asked whether the amended EIA Directive, and the Aarhus Convention according to the Advocate General’s Opinion,\footnote{Paragraph 2. The referred questions as articulated in the case do not, however, refer expressly to the Aarhus Convention.} precluded the applicability of that German standing rule to environmental NGOs. Essentially, both the Advocate General and ECJ concluded that the Directive precluded the applicability of that German standing rule to environmental NGOs and invoked the Aarhus Convention in doing so. The ECJ made two specific references to the Aarhus Convention in this respect. First, in asserting that the relevant EU ‘provisions must be interpreted in the light of, and having regard to, the objectives of the Aarhus Convention, with which—as is stated in [the EIA Directive]—EU law should be properly “aligned”.’ And, secondly, in concluding that while Member States determine which infringed rights can give rise to an environmental action they cannot deprive environmental protection organizations which fulfil the conditions laid down in Article 1(2) of the EIA Directive—which the Advocate General noted mirrored Article 2(5) of the Convention—of playing the role granted to them both by the EIA Directive and the Aarhus Convention.

The ECJ could surely have reached precisely the same substantive conclusion without expressly referring to the Convention but both the Advocate General and Court references to it in the substantive parts of their opinion and judgment suggest that their conclusions were directly influenced
by it. It is perhaps not wholly coincidental that this express reliance on
the Aarhus Convention appeared in a ruling concerning the same rule of
national law before the Aarhus Convention Compliance Committee in a
complaint that had been stayed pending the outcome of the EU ruling. 18

2.2 Infringement proceedings: the Étang de Berre ruling

The Étang de Berre case saw the ECJ address its first, and thus far only,
infringement case alleging non-compliance with a non-trade Agreement. 19
In and of itself this was therefore a significant moment, for the Commission
had long been chided by one of its own officials for not pursuing Member
State infringements of environmental agreements, 20 the very type of Agree-
ment at issue. The case arose out of the same factual background as the
EDF ruling. The Commission brought infringement proceedings against
France for allegedly failing to reduce pollution from land-based sources, as
required by provisions of the Barcelona Convention and, in addition,
for breaching the Mediterranean Sea Protocol provision at issue in the
EDF ruling by not instituting a compatible prior authorization system for
discharges. France which had argued in favour of direct effect in EDF, and
thus by definition accepted ECJ jurisdiction over the prior authorization
provision, was now disingenuously arguing that there was no jurisdiction
over the provisions being invoked because they did not fall within the
scope of EU law; there being no EU Directive regulating the discharges
of fresh water and alluvia, the argument ran, resulted in the Convention
and Protocol provisions covering such discharges not falling within EU
competence. 21

17 In contrast, in an earlier case the interpretation of the same provision merely acknowledged
that it implemented the relevant Aarhus Convention provision (although the Advocate General
relied heavily on the objectives and aims of the Aarhus Convention): C-263/08 Djurgården-Lilla
Värtans Miljöskyddsförening [2009] ECR I-9967. The current chair of the Compliance Committee
has remarked that the criteria at issue in that case requiring environmental associations to have
2,000 members for a right of appeal that was found incompatible with the EIA Directive, were
also incompatible with the Aarhus Convention: Ebbeson (2011: 259).
18 ACCC/C/2008/31. The Advocate General’s Opinion acknowledges that this was drawn to
the attention of the Court.
19 C-239/03 Commission v France (Étang de Berre) [2004] ECR I-9325.
20 See Krmer (2000: 5, 284).
21 The Commission’s rejoinder pointed to the ‘flagrant contradiction’ in the argumentation of
France in these two cases. In EDF the ECJ had not engaged with the issue of jurisdiction and the
The French argument was dispensed with employing reasoning of considerable significance to the use of the EU institutional machinery for policing compliance with mixed agreements. The ECJ underscored that the Protocol had been concluded under shared competence and that mixed agreements have the same status in the EU as pure EU Agreements insofar as the provisions fall within the scope of EU competence. The Court continued that from this it had inferred that in ensuring compliance with commitments in EU Agreements the Member States fulfil an obligation to the EU, which assumes responsibility for their due performance.

The ECJ then held that the provisions of the Convention and Protocol covered a field that fell in large measure within EU competence. This was supported by reference to environmental protection, the subject matter of the Convention and Protocol, being in the main regulated by EU legislation, with three water pollution protection Directives being invoked in support. As the Convention and Protocol created rights and obligations in a field covered in large measure by EU legislation, it followed that there was an EU interest in both EU and Member State compliance. This finding, the ECJ held, could not be called into question by the fact that the discharges at issue had not yet been the subject of EU legislation.

The ECJ thus asserted jurisdiction over mixed agreement provisions despite the fact that the EU had not actually legislated for the specific type of water pollution at issue. Certainly, it may have been only a matter of time before such legislation appeared and it does raise its own problems to adopt a stance on jurisdiction over mixed agreements that is dependent, at least where a declaration of competence does not exist, on the emergence of EU legislation directly on point. Nevertheless, it is clear that the less report for the hearing disclosed no attempt by EDF to contest jurisdiction. The association of fishermen did argue for the most expansive of approaches to jurisdiction under a mixed agreement, namely, that, at least where there had been no division of competence, once the EU has adhered to all the provisions of an Agreement, they are part of EU law; that position, however, begs the very question of whether when there is no declaration of competence the EU does indeed adhere to all the provisions.

22 On the elusive concept of the ‘Union interest’ in general, see Cremona (2008) and, along with Neframi (2012: 343–9), at 144–56 in the specific mixed agreements context.

23 eg jurisdiction over provisions would have a markedly temporal dimension; varying over time as the EU legislates and potentially with domestic case law on questions such as direct effect altering over time in line with the position advanced by the ECJ. This applies with a more expansive approach to jurisdiction but in a much less pronounced fashion because if legislation is looked for in a field, or related to a field as it was put in C-240/09 LZ VLK, which falls in large measure within EU competence, it by definition permits less scope for diversity. Indeed, the
expansive approach to jurisdiction sought by France could have been adopted. The Court’s willingness to expand its jurisdictional reach to the provisions at issue arguably owed something to the possibility of the EU’s international responsibility. Thus, although the ECJ did not expressly refer to this, the fact was that it was dealing here with a Convention and Protocol concluded without any declaration of competence and therefore raising the possibility of the EU being jointly liable for any breaches by the Member States. Indeed, this is one reason why the expansive approach to jurisdiction adopted in the later LZ VLK ruling, which relied on the Étang de Berre ruling, was surprising. For if the Étang de Berre ruling was implicitly shaped by potential EU responsibility, in LZ VLK we had a declaration of competence that seemed expressly intended to negate the EU’s joint responsibility for non-compliance with Article 9(3) at the Member State level. In short, if the extent of jurisdiction sanctioned in Étang de Berre was being shaped, if only implicitly, by international responsibility, then LZ VLK could be viewed as severing that link.

The ECJ also rejected the French argument that it was only under an obligation of means, effectively an obligation to prove that it had created

The temporal problem is only reduced rather than overcome through the jurisdictional approach pursued in C-239/03 Étang de Berre, for on that judicial reasoning had such a case arisen in the late 1980s, ie prior to the passage of the Water Pollution Directives that appeared instrumental to establishing jurisdiction, then the field would not have been in large measure covered by EU legislation, only for jurisdiction to be triggered some years later through the passage of the said measures.

A more expansive approach was theoretically possible. The Commission submissions asserted that the simple fact that the EU is party to the Barcelona Convention and the Mediterranean Sea Protocol and that they are mixed agreements concluded in areas of shared competence, meant that the Member States are required to respect them in their entirety; and that this is an obligation owed to the EU that has assumed responsibility for their faithful implementation. Although it acknowledged the recent case law, including vis-à-vis TRIPs, it is clear that the Commission has been advancing the most expansive possible reading of jurisdiction. It was suggested that the ECJ saw an EU interest in holding the Member States to account for the whole of a mixed agreement where it is a matter of shared competence (Cremona 2006: 338–9; 2008: 152), however, the fact that the EU interest point was linked to the Convention and Protocol creating rights and obligations in a field covered in large measure by EU legislation and that the three Water Pollution Directives were cited, suggests that in their absence there would have been no EU interest in ensuring Member State compliance.

See also Kuijper (2010: 209–10). Hoffmeister (2010: 265) also suggested that had the French thesis prevailed ‘the Union might have faced the awkward situation of being held liable internationally without having the means to enforce the agreement internally.’

sufficient legal means to limit the pollution resulting from the discharges. The Commission went for the broadest possible reading, namely, that it was under an obligation to achieve a particular result. The ECJ did not explicitly adopt that approach but found it to be a “particularly rigorous obligation” . . . to “strictly limit” pollution . . . and to do so by “appropriate measures”. France was found wanting, essentially because the pre-litigation procedure attested to large quantities of harmful discharges from the hydroelectric power station and, in addition, there was no prior authorization system in place. In short, France was held to have failed to fulfil its obligations under the Barcelona Convention, the Mediterranean Sea Protocol, and accordingly also Article 216(2) TFEU.

3. Challenges to EU Action

This section is structured around the small number of cases that have arisen. It first touches upon a miscellaneous array of unsuccessful challenges. The subsection that follows engages briefly with the increasingly controversial tension between the EU standing requirements and Aarhus Convention obligations. The final subsection focuses on three cases that can be viewed as representing opposing approaches to the legal effects of EU Agreements in the EU legal order.

3.1 Miscellaneous unsuccessful challenges

Some five cases fall into this category including the very first occasion when the ECJ was required to address the validity of an EU measure because of its alleged incompatibility with an EU Agreement outside the purely trade sphere.27 In the 1998 Compassion in World Farming (CIWF) ruling, CIWF

27 There were also two cases challenging a Council Regulation adopted to fulfil EU commitments under environmental agreements (the Vienna Convention for the Protection of the Ozone Layer and a related Protocol on Substances that Deplete the Ozone Layer) in which the ECJ invoked the consistent interpretation doctrine vis-à-vis EU Agreements but this did not appear to influence the interpretation of the relevant Regulation, the validity of which was upheld, nor was there any indication from the judgment or the Advocate General that EU Agreements were invoked at the behest of the national courts or the litigants: C-284/95 Safety Hi-Tech [1998] ECR 1-4301; and C- 341/95 Bettati v Safety Hi-Tech [1998] ECR 1-4355.
had brought a challenge, referred by a UK court, to the Calves Protection Directive alleging it was incompatible with the European Convention on the Protection of Animals Kept for Farming Purposes and a Recommendation adopted thereunder.\(^28\) This aspect of the case was uncontroversially dispensed with, a position supported by the Council, Commission, and the two intervening Member States. The Court emphasized that the Convention did not define standards in the relevant area, indeed, the provisions were indicative only and were limited to providing for the elaboration of recommendations to the Contracting Parties to apply the principles. As to the Recommendation, it expressly provided that it was not directly applicable and was to ‘be implemented according to the method that each Party considers adequate, that is through legislation or through administrative practice’ and accordingly was held not to contain legally binding obligations. The same Convention arose in a preliminary ruling several years later, where a national court had rejected reliance on it in challenging a Directive by relying on the reasoning in the CIWF ruling.\(^29\) Before the ECJ the relevant party did not rely on this claim but did invoke the Convention in seeking recognition of a general principle of EU law on animal welfare that could invalidate a provision of an EU Directive. The Court held that it was not possible to infer any such principle from the Convention, which ‘does not impose any clear, precisely defined and unqualified obligation’.

The other three cases share a common trait in that in none did the EU Courts invoke the mantra of EU Agreements being an integral part of EU law or refer to Article 216(2) TFEU. In the first to arise, Spain challenged an implementing Regulation as being in breach of both its parent Regulation, which implemented a programme adopted under the EU-concluded North-West Atlantic Fisheries Organization (NAFO) Convention, and a bilateral EU–Canada Agreement concluded within the NAFO framework.\(^30\) Having upheld the validity of the implementing Regulation vis-à-vis its Parent Regulation, the ECJ held that as the relevant EU–Canada Agreement provision was framed in virtually identical terms to those of the parent Regulation, the plea must be rejected, the logic clearly being that it had already passed muster under the virtually identically phrased parent Regulation.


The second case saw several companies bring annulment and damages actions against the Commission due to it reducing aid granted to a project within the framework of an EU–Argentina Fisheries Agreement. The companies alleged this was incompatible with the Fisheries Agreement on the grounds, first, that it did not contain a provision entitling the Commission to reduce financial aid and, secondly, that it requires the Commission to consult the Joint Committee set up under the Agreement and to obtain approval from Argentinian authorities before reducing financial aid. The first argument was rejected because although the Agreement contained no such provision, where the EU grants financial aid for the creation of joint enterprises it must also, according to the Court, have the power to reduce that aid if the conditions for its grant have not been observed. The second argument was rejected because there was no ground for inferring from the Agreement’s provisions such a requirement.

The third case involved a challenge, on a preliminary reference from a Danish court, to the rule of EU-wide exhaustion of distribution rights in the Information Society Directive which allegedly breached international copyright agreements. This was given short shrift, in line with the submissions of the Council, Commission, and European Parliament: the Court holding that neither of the two relevant World Intellectual Property Organization (WIPO) treaties imposed an obligation to provide for a specific exhaustion rule.

### 3.2 The Aarhus Convention and EU law standing requirements

Significant doubts have been expressed as to EU compliance with the access to justice provisions of the Aarhus Convention, given in particular the restrictive public participation rights articulated in the EU level implementing Regulation (1367/2006—the ‘Aarhus Regulation’) combined with

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33 WIPO Copyright Treaty and Performances and Phonograms Treaty to which the EU and the Member States are parties.
the notoriously stringent EU law standing requirements.\textsuperscript{34} The Aarhus Convention was involved in an attempted challenge to certain total allowable catches adopted via a Council Regulation.\textsuperscript{35} One ground of challenge was non-compliance with the EU-concluded UN Fish Stocks Agreement. The Council and the Commission raised a standing-based admissibility objection. WWF-UK argued that under the Aarhus Convention and the Aarhus Regulation it was entitled to be informed early in the decision-making procedure and to be involved in the adoption of the contested Regulation such that it was directly and individually concerned for standing purposes. However, the GC ruled that any Aarhus Convention and Aarhus Regulation entitlements were conferred upon WWF-UK as a member of the public and did not differentiate it from all other persons. The GC went on to assert that in any event the Aarhus Regulation was only applicable after the contested Council Regulation was adopted. This was indeed so. However, as WWF-UK rightly emphasized, the Convention bound the EU prior to the entry into force of the Aarhus Regulation and the Council Regulation being challenged. That the GC did not propose a liberalization of the standing criteria is perhaps unsurprising given the response to its previous attempt.\textsuperscript{36}

The Aarhus Convention Compliance Committee was soon faced with an environmental organization alleging EU non-compliance with its obligations because of the standing rules.\textsuperscript{37} The \textit{WWF-UK} appeal was nevertheless dismissed with no indication that the Aarhus Convention had been raised in the pleas.\textsuperscript{38} This led to renewed communications before the

\textsuperscript{34} See eg Wenneras (2007: ch 5, and 320 et seq); Pallemaerts (2011).
\textsuperscript{35} T-91/07 \textit{WWF-UK v Council} [2008] ECR II-81.
\textsuperscript{37} Communication ACCC/C/2008/32.
\textsuperscript{38} C-355/08 \textit{WWF-UK v Council and Commission} [2009] ECR I-73. The GC ruling was followed in T-37/04 \textit{Região autónoma dos Açores v Council} [2008] ECR II-103 where the autonomous region of the Azores, supported by several environmental associations, sought the annulment of a Council fisheries Regulation and invoked the Convention to bypass the strict standing requirements. This was to no avail for the GC held that the action was brought prior to EU approval of Aarhus, which is the date upon which admissibility is assessed. That conclusion certainly makes sense for it would be inappropriate to allow an EU Agreement to have retroactive impact on how standing is interpreted. However, the GC unnecessarily appeared to set itself against a different approach in that it proceeded to assert that there is an EU Regulation in place to facilitate access to the EU judicature and that ‘it is not for the Court to substitute itself for the legislature and to accept, on the basis of the Aarhus Convention, the admissibility of an action which does not meet the condition laid down in Article 2[63].’ The appeal was dismissed with no
Compliance Committee, with respect to the pending complaint, as to the ECJ stance confirming the incompatibility of EU standing rules with the Aarhus Convention. In April 2011 the report of the Compliance Committee was adopted and it concluded that if the existing standing jurisprudence continued, without adequate administrative review procedures, the EU would fail to comply with Article 9 of the Convention. The recommendations called quite explicitly for the EU Courts to adopt a different approach to the standing jurisprudence in order to ensure compliance with the Convention. There was already an argument to be made that the EU judiciary should liberalize the standing criteria in light of the Aarhus Convention, as it binds all EU institutions under Article 216(2) TFEU. This argument has been bolstered by the Compliance Committee’s findings and recommendations. However, if the ECJ were to allow the Aarhus Convention to influence its approach to interpretation of the standing requirements, and thus the meaning of Article 263, this would arguably require overruling the GC judgment in which it was held that consistent interpretation could not be used vis-à-vis provisions of the Treaty. Of course, from an international law perspective even internal law of constitutional rank provides no justification for failure to perform treaty obligations. Whilst concerns with allowing treaty obligations to be employed in a manner that alters the EU’s primary law are wholly understandable, an indication that the pleas concerned the Aarhus Convention: C-444/08 P Região autónoma dos Açores v Council [2009] ECR I-200.

39 ACCC/C/2008/32.
40 See also Pallemaerts (2011: 311).
41 T-201/04 Microsoft [2007] ECR II-3601, discussed in Chapter IV. In addition in T-18/10 Inuit Tapiriit Kanatami v Parliament and Council, Order of 6 September 2011, applicants challenging a Regulation on Trade in Seal Products invoked both the Aarhus Convention and the Convention on Biological Diversity in support of a broad interpretation of Art 263(4) TFEU but for the Court the applicants did not state how the admissibility conditions should be interpreted; their arguments were viewed as very general and having no bearing on the admissibility conditions with the GC taking the opportunity to underscore, by invoking Kadi (C-402/05 & C-415/05) and its earlier Microsoft ruling, that international conventions may not depart from EU law primary rules.
42 See Art 27 of the 1969 and 1986 VCLT.
43 The Treaty itself is subject to an extremely demanding amendment procedure (Art 48 TEU), even via the newly created simplified revision procedure, which requires unanimity at EU level as well as ratification by all the Member States following whatever domestic constitutional hurdles they have in place. EU Agreements, in contrast, can be the product of qualified majority voting in the Council, without requiring European parliamentary approval (albeit this will be rarely so in the post-Lisbon era), and without having to satisfy additional domestic constitutional hurdles (mixed agreements will, however, be subject to additional constitutional hurdles at the Member State level). In short, it had long been a concern, as evinced in the literature on the ex
alternative outcome is arguably warranted with the much-criticized standing requirements that are not dictated by the language in the EU Treaty. The Aarhus Convention and the Compliance Committee report supplies a strong additional reason for reconsidering the existing approach, if only in the limited environmental context to which it applies.

3.3 Espousing maximalist treaty enforcement?

There were important indicators that the maximalist approach to treaty enforcement had the potential to take hold even where EU measures were being challenged. Two cases stood out, both because of the reasoning employed and, crucially, the number of judges hearing the respective cases.

3.3.1 The Biotech judgment

In the *Biotech* case, mentioned briefly in Chapter IV, the Netherlands had challenged the Biotech Directive with pleas that it breached WTO Agreements. In addition, it was alleged that it breached the Convention on Biological Diversity (CBD), an international environmental agreement to which the EU is a party. The Council argued that a direct effect hurdle must be surmounted and that this requirement was not satisfied by the CBD. The Court held, however, that the WTO exclusion could not apply to the CBD which, unlike the WTO, is not based on reciprocal and mutually advantageous arrangements. It then famously sought to dissociate

ante and ex post review debate considered in Chapter II, that Agreements could be used as a mechanism that bypasses the rigid amendment procedure. As Chapter I noted, in some legal orders treaties can be accorded a hierarchically superior rank domestically to that of the constitution itself, but in two States where this had been constitutionally provided for, as was the case in Austria and is still the case in the Netherlands, an increased parliamentary threshold for Treaty approval was required.

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44 See on the standing debate, Craig and de Búrca (2011: 491–510).

45 Of crucial significance to the adequacy vis-à-vis the Aarhus Convention of the administrative review procedures, are several pending internal review decision challenges under the Aarhus Regulation, see T-338/08 Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission; T-396/09 Vereniging Milieudefensie v Commission. As a result, some issues pertaining to Communication ACCC/C/2008/32 were deferred as sub judice.

direct effect from review vis-à-vis obligations under an EU Agreement by holding:

Even if, as the Council maintains, the CBD contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the [EU] as a party to that agreement. (Para 54)

The ECJ here appeared to position itself as the handmaiden of the international legal order, there to ensure that the EU legislative actors made good on the international commitments which they had voluntarily assumed.47 Direct effect and the language of individual rights with which it has been so closely associated could not, it seemed, be invoked to preclude review in relation to Treaty commitments. Or, if one prefers, this famous paragraph could simply be read as rejecting the narrow approach to direct effect understood as the capacity of a provision to create judicially enforceable individual rights, but not the broad notion of direct effect which focuses rather on mere justiciability or invocability of the provisions. Direct effect is thus relevant on this reading, but individual rights are not. The artificiality of this distinction has already been alluded to in Chapter I, for direct effect can simply be used as a label affixed to norms permitted to be used as criteria for review whether or not they can be said to confer individual rights, and what is or is not an individual right is hardly an issue free from contestation. In any event, a hurdle of provisions needing to create rights which individuals can rely on directly before the courts was rejected and this could be read as embracing a more receptive approach to review of EU norms in relation to EU Agreements. It is this message that was warmly received by segments of the scholarly community, albeit they rarely expressly engage with the normative implications that follow, the unspoken assumption is simply that greater judicial enforcement is to be commended. For Lenaerts and Corthaut it fitted their attempt to build a general theory of invocability around the primacy principle rather than the elusive doctrine of direct effect,48 and for Cremona the trend away from regarding direct effect as a condition of judicial review in direct actions was praised.49

47 Surprisingly there was no reference to Art 216(2) TFEU.
48 (2006). They refer expressly to the Biotech ruling at 298.
The sweeping rejection of the rights hurdle, and potentially direct effect depending perhaps on whether it is construed narrowly or broadly, was followed by the curious proposition that the plea should be understood as being directed not at a direct EU breach of its Treaty obligations, but an obligation imposed on the Member States by the Biotech Directive to breach their international law obligations while it in fact claimed not to affect those obligations. These international law obligations on the Member States come from several sources: the CBD and the WTO are mixed agreements and thus by definition impose international law obligations on the Member States. In effect, however, this meant that as the plea was accepted for the aforementioned reasons we were not in fact told whether the CBD was considered to create rights that individuals could rely on directly. In any case, the Directive emerged unscathed from the review vis-à-vis the CBD.

3.3.2 The IATA ruling

Some five years after the Biotech ruling, the Grand Chamber handed down a preliminary ruling that prima facie sat comfortably with the bold approach to treaty enforcement long exhibited where domestic action was the subject of challenge. In the IATA case, an EU Regulation concerning compensation for passengers in the event of a boarding refusal, cancellation, or long delay of flights (the Air Passenger Rights Regulation: 261/2004), was challenged on the grounds of, inter alia, an alleged incompatibility with the Montreal Convention on the Unification of Certain Rules for International

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50 A Treaty to which the Member States alone were parties (the European Patent Convention) was also at issue.

51 The allegation was that making biotechnological inventions patentable ran counter to the CBD objective of fair and equitable sharing of benefits arising out of the utilization of genetic resources; the ECJ found that there was no provision requiring that conditions for the grant of a biotech patent should include consideration of the interests of the country from which the genetic resource originates or the existence of measures for transferring technology. As to the possibility that the Directive could represent an obstacle to the international cooperation necessary to achieve CBD objectives, it was emphasized that under the Directive the Member States were to apply it in accordance with their biodiversity obligations, in other words suggesting that the Directive should not be used by the Member States to shirk their international cooperation obligations under the CBD. The reading of the compatibility of the Directive with the CBD obligations does not appear to have generated any adverse commentary, see briefly Spranger (2002: 1154–6).
Carriage by Air.\(^{52}\) The ECJ was content to conclude in a single sentence that the provisions were among the rules in light of which it reviewed the legality of EU acts ‘since, first, neither the nature nor the broad logic of the Convention precludes this and, second, those three articles appear, as regards their content, to be unconditional and sufficiently precise.’ One might easily be persuaded that this is so, given that the Convention is concerned essentially with air passengers’ rights vis-à-vis air carriers, but that conclusion was not actually preceded by any analysis of the nature or broad logic of the Montreal Convention or of the unconditionality or precision of the provisions at issue. Conceptually, it was thus of clear constitutional significance for it represented an approach to EU Agreements which took as its starting point their capacity to be used as criteria for legality review. In other words, the judgment, like the Advocate General’s Opinion, read as if there was a clear presumption of invocability such that no reasoned justification other than passing reference to Article 216(2) TFEU, and the oft-repeated assertion that provisions of EU Agreements are an integral part of EU law, was actually required.\(^{53}\) Whilst the criteria referred to for the agreement to be used in legality review are those of the *Kupferberg* and *Demirel* two-part direct effect test, even if their express application was absent, the language of direct effect and individual rights was wholly absent.\(^{54}\) In this sense, the ruling sat comfortably with the *Biotech* judgment and the then emerging emphasis on the primacy-based

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52 C-344/04 *IATA* [2006] ECR I-403. Domestic proceedings between airlines and individuals seeking compensation have led to preliminary rulings in which the Montreal Convention was mentioned in the context of interpreting the Air Passenger Rights Regulation (C-173/07 *Emirates Airlines* [2008] ECR I-5237; C- 549/07 *Wallentin-Hermann v Alitalia* [2008] ECR I-11061; C- 204/08 *Rebder v Air Baltic* [2009] ECR I-6073) or engaged with extensively in the one instance where the domestic court expressly sought an interpretation of the Convention (C-63/09 *Axel Walz v Clickair* [2010] ECR I-4239) but it is two pending cases that have seen national courts directly raise questions pertaining to the validity of the Air Passenger Rights Regulation vis-à-vis the Montreal Convention: C-629/10 *TUI Travel v Civil Aviation Authority* and C-12/11 *McDonagh v Ryanair*.

53 The question put by the High Court in the UK was not framed in terms of direct effect and individual rights which renders it less surprising that the response did not employ the language of individual rights and direct effect. That said, in a contemporaneously decided preliminary ruling, challenging a domestic measure for incompatibility with an EU Agreement (Euro-Med–Tunisia), where the question was also not framed in terms of individual rights and direct effect, the ECJ conducted a direct effect determination within a section of the judgment expressly so entitled: C-97/05 *Gattoussi*.

54 One explanation for this may be the fact that here, unlike in *Kupferberg* and *Demirel*, along with many other cases using the individual rights and direct effect language, we were not dealing with challenges to domestic measures but rather to EU measures.
approach to invocability. Indeed, in a co-authored article by Judge Lenaerts, who was a member of the IATA Grand Chamber formation, this case was cited in support of the proposition that whether an Agreement confers individual rights is not an issue in legality review of EU acts, the articles simply need to be unconditional and sufficiently precise to the extent that they are apt to serve as a yardstick for review and not in the sense that they confer rights on individuals as is required in cases involving direct effect.\textsuperscript{55}

The second stage of the analysis in IATA might, however, be read as providing some grounds for hesitation as to the extent of the judicial receptiveness to treaty enforcement actually exhibited. An interpretation of the Convention provisions was put forth that preserved the validity of the Regulation, consistently with the views put forth by the three EU institutions (Council, Commission, and European Parliament) and the sole intervening Member State (the UK). A distinction was drawn between the types of obligations under the Regulation and those falling within the Convention’s scope. In doing so, the ECJ proposed a distinction between two types of damage: first, excessive delay causing damage almost identical for every passenger and redress of which may take the form of standardized and immediate assistance or care for everyone (e.g., refreshments, meals, accommodation, telephone calls); and, secondly, individual damage inherent in the reason for travelling requiring a case-by-case assessment. The Convention provisions were held to govern the latter damages. And it was held not to follow from the Convention that the drafters intended to shield the carriers from other forms of intervention, particularly action by public authorities to redress, in a standardized and immediate manner, the damage that delay causes without having to suffer the inconvenience inherent in bringing judicial damages actions. For the ECJ, the assistance and taking care of passengers envisaged by the Regulation were standardized and immediate compensatory mechanisms unregulated by the Convention and that simply operate at an earlier stage than the Convention system.

The Court’s analysis has come in for trenchant criticism from a leading aviation law expert who acted for the airline associations.\textsuperscript{56} The distinction between types of damage is alleged to be ‘novel and… misconceived’. Essentially the argument runs that the first type of damage is not as standardized and immediate as the ECJ would have us believe, for the

\textsuperscript{55} Lenaerts and Corthaut (2006: 299).
\textsuperscript{56} Balfour (2007). See also Wegter (2006).
reimbursement obligation under the Regulation, unmentioned by the ECJ and the Advocate General, will vary significantly and ‘in many instances individual factors and circumstances will have to be taken into account on a case-by-case basis’.57 Moreover, the view that the Convention governs the second type of damage is also contested given that there are instances in which courts have held passengers entitled to reimbursement of hotel and transport costs under the delay provisions of the predecessor to the Montreal Convention, which contains essentially identical provisions. Furthermore, no consideration was given to the possibility that if a carrier failed to comply with its obligations under the Regulation for a passenger to then bring a damages action would be in direct tension with the exclusivity provision in the Convention (Art 29).58 Thus, despite the ECJ having commenced its analysis of the scope of the Convention’s provisions by paying lip-service to the Vienna Convention rules on treaty interpretation, it is arguable that the Regulation might not have emerged unscathed had a more textually faithful interpretative exercise been conducted.59

3.4 Embracing judicial avoidance techniques

A much anticipated judgment was handed down by the Grand Chamber in June 2008 which arguably provided the first test of how the theoretically generous approach to the review hurdles employed in cases like IATA and Biotech would play out where there were significant question marks about the compatibility of an EU legislative measure with an EU Agreement.

3.4.1 The Intertanko ruling

In the Intertanko case, several organizations representing substantial proportions of the shipping industry brought a challenge to the recently enacted Ship-Source Pollution Directive before the High Court in the

58 It provides that damages actions in the carriage of passengers can only be brought under the terms of the Convention. Both Balfour (2007) and Wegter (2006) highlighted two judgments, from the House of Lords and US Supreme Court, which had emphasized the exclusivity of the predecessor Convention. This issue has been raised in a pending Dutch preliminary reference: C-315/11 Van de Ven & Van de Ven-Janssen v KLM NV.
UK.60 They alleged that the Directive provided a stricter standard of liability—serious negligence—for accidental discharges than was permitted by the International Convention for the Prevention of Pollution from Ships (MARPOL) of which it was accordingly in breach, and that this also amounted to a breach of the right of innocent passage in the UN Convention on the Law of the Sea (UNCLOS). In support of this argument they invoked the powerful and unequivocal voice of the former President of the judicial body established under UNCLOS, the International Tribunal for the Law of the Sea.61 Unlike MARPOL, to which only the Member States are party, UNCLOS is an EU Agreement. However, MARPOL could nevertheless be relevant for review purposes in one of two ways: first, if the ECJ accepted that the EU had succeeded to the rights and obligations therein, as it had held with respect to the GATT; secondly, because compliance with UNCLOS only permits (Art 211(5)) coastal States in respect of their exclusive economic zones, to adopt vessel pollution laws and regulations conforming to generally accepted international rules and standards, which in this case would be those enunciated by MARPOL.62

The submissions before the Court were illuminating, involving as they did all three institutional actors and ten Member States. The Council and one intervening Member State sought outright to preclude review vis-à-vis UNCLOS in the context at hand by contesting jurisdiction over this mixed EU Agreement. Such challenges offer an EU context-specific avenue for avoiding the consequences that otherwise flow from adherence to an automatic incorporation model. This argument was only addressed by the Advocate General and was rightly given short shrift; the reasoning being that there is jurisdiction over UNCLOS where EU rules exist within the areas covered by the Convention provisions, which was clearly so here via the very Directive at issue.

Of greater significance were the views as to review in relation to UNCLOS. The requirements that review not be precluded by the nature or broad logic of an EU Agreement, and that the provisions at issue be unconditional and sufficiently precise, were considered unsatisfied by four Member States,63 the Council, and the European Parliament. The written observations submitted by the Commission did not address themselves to

60 C-308/06 Intertanko [2008] ECR I-4057.
62 This is clear from Directive 2005/35/EC itself (see recital 2 and Art 1(1)).
63 Three of which (France, Italy, and Spain) automatically incorporate treaties.
this issue, though it did argue for the validity of the Directive. As will be suggested further below, given the nature of UNCLOS, and the scope of its provisions, it is difficult but to conclude that the position advanced by the institutions was a call for use of an avoidance technique to avoid the otherwise logical consequences resulting from adherence to the automatic treaty incorporation model. The stance of those Member States arguing unreservedly for annulment of the Directive’s provisions was relatively predictable given that two (Greece and Malta) were outvoted on the Directive in the Council, whilst the other (Cyprus) abstained, precisely because of the compatibility concerns. The accidents of litigation are such that States in favour of a particular outcome in one case advance a view that need not be representative of a broader normative vision of the place of EU Agreements in the EU legal order.

The Grand Chamber’s ruling outlined a twin-pronged test for review vis-à-vis international rules in preliminary rulings. The first was the requirement from International Fruit that the EU be bound by the relevant rules and, the second, that the nature and broad logic of a treaty not preclude review and that its provisions appear unconditional and sufficiently precise. The IATA ruling was invoked in support of this second requirement, it constituting a change in formulation from the language first used in International Fruit and requiring that the international law provision be capable of conferring rights on EU citizens. MARPOL was unable to surmount the first requirement on the grounds, inter alia, that there had not been a full transfer of Member State powers to the EU.

The analysis of UNCLOS generated the conclusion that its nature and broad logic precluded validity review. The essence of the reasoning was that

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64 The fact that the Advocate General identified four Member States, the Council, and the Parliament as arguing against the possibility of review suggests that the Commission made no such argument.

65 However, given that the EU Courts have been bold when it comes to EU Agreements invoked by litigants vis-à-vis domestic action, both as to the preliminary question of being a relevant review criterion and the substantive interpretation duly proffered (even where direct effect was rejected as in C-240/09 LZ VLK), it is unsurprising that, where those same Member States find themselves outvoted in the Council where serious compatibility concerns with an EU Agreement are apparent, they will attempt to benefit from the ostensibly open channels provided for the invocability of EU Agreements.

66 It was, nevertheless, held that in view of the customary international law principle of good faith, and Art 4(3) TFEU, it was required to take account of MARPOL in interpreting UNCLOS and secondary law falling within its field of application. For comment on this issue, see Eeckhout (2009: 2051–3).
although it lays down legal regimes governing the territorial sea, international straits, archipelagic waters, the exclusive economic zone, the continental shelf, and the high seas, it does not in principle grant independent rights and freedoms to individuals. Rather, on the Court’s understanding, the rights and freedoms, as well as obligations, attach to the flag State. Whilst it was conceded that some UNCLOS provisions appeared to attach rights to ships, it did not follow that those rights were thereby conferred on the individuals linked to those ships. Nor did the Court consider doubt to be cast on its analysis by the fact that Part XI of UNCLOS involved natural and legal persons in the exploration and use of the sea-bed and ocean floor, since the case at issue did not concern such provisions. It was, accordingly, held that UNCLOS did 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.

3.4.2 Assessing the Intertanko ruling

The most striking aspect of the Intertanko ruling was that the language of individual rights reared its head as a mechanism to preclude review. It was, of course, with the establishment of this criterion as the second prong in a two-part test, that the GATT was first rejected as a review criterion for EU law in International Fruit. Over 35 years on, despite the emergence of a rich body of jurisprudence—including with respect to EU Agreements—that dissociated their invocability from an individual rights conceptualization, and the individual rights criterion has been resurrected and read into the exploration of whether the nature and broad logic of an EU Agreement precludes review. It is difficult not to recognize the convenience in its resurrection when it is an EU legislative measure being challenged, especially when it is difficult to envisage how, were review to have been conducted, a substantive scope interpretation of the UNCLOS provisions could have left the Directive intact.67 We might well ask whether the seemingly self-evident answer to the second step of the analysis, the actual review that the judgment itself avoided, is influencing the answer to the first

67 See, however, the Advocate General’s attempt, employing the doctrine of consistent interpretation, and König (2007). Compliance with both UNCLOS and MARPOL was also defended in a book published shortly before the Intertanko ruling by a maritime law expert who acted as the Commission’s agent, though it is noteworthy that he had also suggested that UNCLOS would satisfy the first step of the direct effect test: Ringbom (2008: 401–27, 123). Contrast the strong doubts expressed as to compliance in Tan (2010).
step as to the capacity of the Agreement itself to form a review criterion for EU law.

It is surprising, then, that one respected commentator asserted that ‘The conclusion that UNCLOS . . . sets out rights and duties among states and is not capable of being applied directly by individuals is clearly correct.’ It may be axiomatic that UNCLOS sets out rights and duties among States, but it does not follow that it is not capable of being applied directly by individuals, much less that this is clearly a correct conclusion. The ECJ was faced with a specific question pertaining to a specific EU Agreement but the broader outcome is central to the EU’s external relations constitution—the criteria for review in relation to EU Agreements. In addressing this question, it opted to resurrect the individual rights criterion, however, it could equally have opted, as one would have expected based on recent case law, to ignore individual rights and to explore whether the nature or broad logic of UNCLOS precluded review. To resort to the argument that the absence of individual rights is a manifestation of the nature or broad logic of an Agreement precluding review, is for the Court to endow itself with a fail-safe mechanism or judicial avoidance technique that could generally be invoked at will to reject EU Agreement-based review of EU measures when persuasive and politically contentious challenges arise, as was the case in Intertanko. After all, it will commonly be the case that an EU Agreement can be interpreted as not establishing ‘rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States’. It is essential to probe further and ask whether this is even the right question to ask. If the ECJ has interpreted the founding constitutional document as attaching the EU to a model of automatic treaty incorporation, then this could be viewed as creating a presumption of enforceability that cannot simply be offset by the proposition that a particular Agreement does not establish rules intended to apply directly and immediately to individuals. For which Agreement is so intended to apply? And how are we to discover this intention? Are we concerned here with the intention simply of the drafters of the Agreement invoked? And, if so, how is this to be weighed against the intentions that some would, and appear to, read into Article 216(2) TFEU?

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69 The Advocate General did refer to peaceful use as also being directed precisely at individuals involved in maritime transport and noted that shipping is operated for the most part by private individuals.
Denza proceeded to suggest that the Advocate General, for whom review was possible vis-à-vis UNCLOS, failed ‘to distinguish properly between rights . . . given to ships and enforceable by the flag state and rights capable of being relied on by individuals or enterprises before national courts.’

But it was surely because such a formalistic distinction would have been in marked tension with the extant jurisprudence dissociating invocability and review from individual rights conferral, that no such distinction was defended. Indeed, to the contrary, the Advocate General expressly drew attention to the fact that individuals do not derive rights from the legal bases of the treaties but they may question the legality of secondary law by contesting the legal basis thereof.

That the Advocate General found herself wrong-footed by the Grand Chamber ruling is not surprising, considering that the earlier Grand Chamber ruling in *IATA* provided no express support for the re-emergence of the individual rights analysis (though, of course, it involved an Agreement concerned with passenger damages claims against air carriers). Indeed, as previously noted, the well-known contribution by Judge Lenaerts relied on *IATA* in explicitly disavowing any link between individual rights and review of EU acts.

And if we look back to the *EDF* case, which preceded *IATA* by less than 18 months, the language of individual rights did not even rear its head. A direct effect analysis was conducted, as requested by the French court, but it will be recalled that it started with the text of the relevant provisions invoked, a stage which the ECJ did not even embark upon in *Intertanko*, and an assertion of their clarity, precision, and unconditionality. This was then bolstered by reasoning that seemed to amount to the proposition that direct effect could only serve the purpose of the instrument to prevent pollution. Now, UNCLOS is a treaty of astonishing breadth, so it becomes difficult simply to pinpoint a purpose as the ECJ did with the Mediterranean Sea Protocol; however, there is a section of this grand Treaty devoted expressly to, and so entitled, ‘innocent passage in the territorial sea’. Could one not then say that recognition of direct effect—or rather review of EU norms vis-à-vis UNCLOS—could only serve the purpose of ensuring innocent passage in the territorial sea? And that the UNCLOS provisions

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70 (2008: 875).
72 Likewise with the GATT/WTO jurisprudence subject to *Nakajima/Fediol* and consistent interpretation.
invoked on the right of passage\textsuperscript{73} are clear, precise, and unconditional, and contribute to this purpose? Perhaps this is too narrow a manner in which to construe purpose and does not do the EDF reasoning justice. Nonetheless, if we were to transpose the judicial language employed in \textit{Intertanko}, are we now to believe, and would those persuaded by the individual rights reasoning employed in \textit{Intertanko} concede, that the Mediterranean Sea Protocol established ‘rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States’? The fact that the ECJ required that individuals be allowed to rely on the provisions invoked in \textit{EDF} is a somewhat different matter, because this did not suggest that the Court was addressing whether the Agreement was intended to confer rights on individuals. Undoubtedly, it is now possible, with ex post rationalization, to assert that we were dealing with individual rights in \textit{EDF} and accordingly to square it with \textit{Intertanko}. But this would be to resort to word-games. The critics can inevitably be expected to emphasize that whilst \textit{EDF} shares with \textit{Intertanko} an important trait—a multilateral agreement, or at least not a bilateral agreement (the Barcelona Convention and the Protocol are often classified as regional agreements)\textsuperscript{74}—it is the important distinction—a challenge to domestic rather than EU action—that might explain, or at least contribute to explaining, the contrasting outcomes.

The Council, however, did emphasize in its submissions that UNCLOS does not confer individual rights and resorted to employing the logic used against review of EU measures vis-à-vis WTO Agreements such as: the absence of reciprocity, that is, other national courts generally avoid interpreting UNCLOS, and that it has a variety of dispute settlement procedures which confer on Contracting States a degree of flexibility. The ECJ, however, was not to be drawn on this issue. And so, in this sense, whilst it might be tempting to view the \textit{Intertanko} ruling as the ECJ applying the principles underlying its WTO case law to other treaties,\textsuperscript{75} should be resisted for that reasoning was eminently defensible, grounded as it was in the DSU text and not in the absence of individual rights. Undoubtedly, had the WTO dispute settlement reasoning been employed by analogy, the

\textsuperscript{73} Articles 17, 19, and 211(4).

\textsuperscript{74} It is identified as a multilateral treaty in the EU treaties database but that only provides for a bilateral/multilateral distinction. Eeckhout’s coverage also appears in a section entitled ‘multilateral agreements’ (2011: 352).

\textsuperscript{75} See Bronckers (2008: 886). Cannizzaro (2012: 48–9) and Cremona (2011: 242) both rightly underscore the distinction with the reasoning employed in the WTO context.
criticism would have been severe given the sophisticated nature of the WTO dispute settlement system alongside the express preservation, at least temporarily, of outcomes that do not comply with the substantive provisions of WTO Agreements, both of which would be threatened if EU Courts became, in effect, WTO courts of first instance. UNCLOS does not operate in this fashion and, as the Advocate General emphasized, it does not establish exclusive interpretive competence on the part of other institutions, nor does it provide its Contracting States, in general terms, with flexibility or opportunities to derogate.76

Ultimately, it should be conceded that there was nothing inherent in UNCLOS precluding the Court from reviewing the compatibility of EU measures with its provisions. Many WTO provisions may well be sufficiently clear, precise, and unconditional on their own terms to support their capacity to be used for review purposes; however, there we do have important significant countervailing factors concerning the broad nature and logic of the Agreement. The thin reasoning advanced in Intertanko is a thoroughly unsatisfactory basis on which to choose not to engage with the specific UNCLOS provisions at issue. Both the reasoning and the outcome sit uneasily, to put it mildly, with the internal logic of the model of EU Agreement enforcement that the ECJ had constructed. It was incoherent given the elaboration, in particular, of its own recent case law, for the ECJ in mid-2008 to invoke formalistic reasoning that sought to paint a picture of an interstate treaty that does not have the protection of individual rights at its core. For, in reality, few treaties—human rights treaties being the obvious exception—do have the protection of individual rights at their very core. Ultimately, it behoves the Court to provide more reasoned and credible justification, as it did in the WTO context, as to why the nature of a particular Agreement is such as in principle to preclude review, particularly given that we have seen time and time again the more maximalist approach to treaty enforcement take hold where domestic action has been challenged.

It has been suggested that had the ECJ abandoned its direct effect test, it would have been accused of judicial activism.77 Putting to one side the fact that the Court did not actually use the language of direct effect nor did the referring court in its questions,78 to abandon the direct effect test could be

76 Advocate General’s Opinion at paras 57–8. See also Cannizzaro (2012: 48–9).
77 Denza (2008: 867).
78 It is understandable that the review test enunciated has been viewed as essentially the criteria for direct effect (eg Cremona (2011: 242)), but the ECJ is effectively indirectly
viewed as wholly consistent with the severing of individual rights and direct effect from review in the Full Court’s *Biotech* judgment. Moreover, even if a direct effect test were used, it is not clear why a usage coterminous with the conferral of independent rights for the individual is relevant given, for example, the absence of any such consideration in the *EDF* ruling, which did reason in the language of direct effect.\(^\text{79}\) In any event, even if the direct effect test is to be wedded to individual rights, it does not follow that the conclusions as to UNCLOS are warranted.\(^\text{80}\) Individual rights are in the eye of the beholder, as we have long seen with the ECJ’s own approach to direct effect over the years, and accordingly it was unsurprising that the Advocate General had no difficulty viewing the UNCLOS provisions as crossing that hurdle if necessary. Indeed, as one commentator suggested with respect to the identification of individuals’ rights, it was not easy to distinguish clearly between the collective interests of airline passengers at issue in the *IATA* case and the ‘interests and needs of mankind as a whole’ which was identified as an objective of UNCLOS in *Intertanko*.\(^\text{81}\)

The language of judicial activism employed by Denza is also problematic. Accepting review sat more comfortably with the model that the ECJ had constructed; a model in which it has adopted an especially receptive approach to EU Agreements that is arguably unparalleled in other legal orders. One could seek to ground this generosity in the nature of the Agreements at issue combined with the constitutional reception norm, in the form of Article 216(2) TFEU even if the ECJ has itself been remarkably silent on the relevance of this provision. And, ultimately, if a presumption of judicial enforceability had emerged, as recently decided cases such as *Biotech*, *EDF*, and *IATA* suggested, then accepting UNCLOS as a review criterion would hardly merit a judicial activism critique, instead the contrary conclusion, at least when combined with the absence of a persuasive attempt at justification, leads perfectly naturally to criticism for employing a judicial avoidance technique.

incorporating a substantive rights-based requirement into a test that had long retreated from a rights requirement as concerned internal EU law and was clearly retreating from this as concerns external EU law.

\(^\text{79}\) That case, of course, involved a challenge to Member State rather than EU action.

\(^\text{80}\) See also Eeckhout (2011: 381–3) who supports a rights-based test but was critical of its application. Cremona (2011: 242–3) in contrast queried whether ‘the link to individual rights might be more appropriately directed at specific provisions of the agreement rather than its overall “nature and broad logic”…’.

A further striking aspect of the judgment was that the ECJ did not feel compelled to employ or comment on the use of the consistent interpretation principle, given that the Advocate General made this the centrepiece of her analysis.\(^8\) That is, having concluded that review was possible vis-à-vis the relevant UNCLOS provisions, the Advocate General interpreted the Directive in a manner she viewed as UNCLOS-compatible. The intellectual acrobatics performed illustrate that a natural reading of the Directive is unlikely to be consistent with the clear terms of UNCLOS and MARPOL, and the reading provided was arguably contra legem despite the Advocate General’s insistence to the contrary. To read the terms ‘recklessly’ and ‘serious negligence’ in the Directive as requiring in both cases ‘recklessness in the knowledge that damage would probably result’ flies in the face of legislative intent. The proposed reading suffered from an obvious defect: there are three standards for liability, first, intent; secondly, recklessness; and, thirdly, serious negligence; accordingly to read recklessness narrowly, and then to read serious negligence coterminously, is to leave it with no independent role to play given that any such activity purportedly caught by serious negligence would appear equally to be caught by the definition proposed for recklessness. The interpretation, in other words, was tantamount to reading out one of the standards provided for in the Directive.\(^8\)

There are certain contextual factors that might have contributed to the recalcitrance to review the Ship-Source Pollution Directive vis-à-vis international law in Intertanko. The fact previously mentioned, that the Directive was the subject of considerable controversy in the legislative process as attested to by recourse to majority voting for its adoption, is one. But, in addition, the ECJ had only recently upheld the Commission’s challenge to the then third pillar framework decision on ship-source pollution on the basis that it should have been adopted under the first pillar in the face of the Advocate General’s insistence to the contrary. To read the terms ‘recklessly’ and ‘serious negligence’ in the Directive as requiring in both cases ‘recklessness in the knowledge that damage would probably result’ flies in the face of legislative intent. The proposed reading suffered from an obvious defect: there are three standards for liability, first, intent; secondly, recklessness; and, thirdly, serious negligence; accordingly to read recklessness narrowly, and then to read serious negligence coterminously, is to leave it with no independent role to play given that any such activity purportedly caught by serious negligence would appear equally to be caught by the definition proposed for recklessness. The interpretation, in other words, was tantamount to reading out one of the standards provided for in the Directive.\(^8\)

\(^8\) Especially as Art 1 of the Directive expressly states that its purpose is to incorporate international standards for ship-source pollution into EU law, and Art 9 provides that ‘Member States shall apply the…Directive…in accordance with applicable international law’. One reading of the ‘muteness’ on this issue is that the Court may not have been convinced that it was possible to interpret the Directive in conformity with MARPOL and UNCLOS: see Eeckhout (2009: 2056).

\(^8\) At least outside the territorial sea, for within the territorial sea the Advocate General proposed an unreservedly broader interpretation of serious negligence and, accordingly, precisely the same terms in the Directive would be interpreted one way as far as liability within the territorial sea was concerned, and, through use of the consistent interpretation doctrine, in a different way for liability beyond the territorial sea.
of the Council and 22 Member States arguing the contrary.\(^8^4\) This led one commentator to suggest that it would seem extremely unlikely that it would have reopened this highly politicized debate on criminalization of ship-source pollution by reviewing the Directive in light of international law.\(^8^5\) A further factor is that the attempted reliance on UNCLOS was an indirect way of ensuring review in relation to MARPOL, a convention within the IMO framework which is an organization for which the Commission has long (unsuccessfully) sought accession given the extent of EU competence in the maritime field;\(^8^6\) in effect, to have allowed indirect review in relation to MARPOL would have seen EU legislative output constrained by rules stemming from an organization in which the EU is not a direct participant.\(^8^7\) Whilst these contextual factors should not be ignored, ultimately the bottom line is that the Grand Chamber has erected a clear barrier to review of EU action vis-à-vis UNCLOS and has done so via the reintroduction of a rights-based hurdle which is likely to have significant ramifications for the capacity of EU Agreements to be used to challenge EU and, indeed, domestic level action. It has been suggested that the \textit{Intertanko} ruling does not appear to exclude a priori other types of action, in particular by the Member States and the EU institutions.\(^8^8\) This is reminiscent of the post-\textit{International Fruit} debate where commentators felt that the possibility of GATT-based annulment actions by the Member States and institutions remained. They, of course, were proved wrong by the seminal German challenge to the bananas regime (C-280/93). An alternative outcome would have been difficult to sustain and we can certainly expect the same outcome should Member States or the institutions seek to challenge an EU measure for alleged incompatibility with UNCLOS. An alternative outcome would not only invite the criticism that this is to enshrine double standards, but also require the Court to retreat from the symmetry it first created in the famous 1994 \textit{Bananas} ruling accordingly and either revisit the general inability for Member States and EU institutions to challenge the WTO compatibility of EU measures or find a justification for why what is not


\(^{8^5}\) Mitsilegas (2010: 405).

\(^{8^6}\) The Council has not authorized the Commission to negotiate accession: see Hoffmeister and Kuijper (2006: 26–7).

\(^{8^7}\) The Commission and Member States have, however, been criticized for not having ‘resorted to the IMO to bring about the desired measures laid down by the Directive’ (Tan 2010: 486).

\(^{8^8}\) Boelaert-Suominen (2008: 709).
possible in the WTO context should be possible vis-à-vis UNCLOS. It may be, however, that the infringement procedure could, as appears to be the case in the WTO context, still be used.89 This might be viewed as leaving Article 216(2) TFEU with some role to play but, equally, it would generate accusations of double standards. A related point to note is that one might have expected post-Intertanko cases invoking UNCLOS pleas to be summarily rejected with a simple invocation of the Intertanko ruling.90 And yet in a preliminary ruling decided three weeks after Intertanko, an attempt to rely on an UNCLOS provision to prevent the application of the EU Waste Framework Directive was rejected by the Grand Chamber without invoking this reasoning.91 The case involved an attempt by an oil company to have the obligations in two oil pollution conventions to which the EU was not a party read into EU law via UNCLOS. The ECJ reiterated the French argument that this provision was confined ‘to establishing a general obligation of cooperation between the parties to the convention’. One suspects that were the reading proposed by the oil company convincing, as it patently was not given the wording of UNCLOS, the Intertanko reasoning may well have been repeated.

4. Conclusions

Despite the growth of EU treaty-making activity outside the trade sphere and its well-established jurisprudence on the legal effects of EU

89 This possibility appears confirmed by the earlier assertion that the Court has jurisdiction to assess Member State compliance with UNCLOS: C-459/03 Commission v Ireland [2006] ECR I-4635, para 121. See also Jacobs (2011: 538–9).
90 Subject, that is, to the capacity of UNCLOS norms to be employed for consistent interpretation purposes, to represent customary international law, and thus be potentially capable of a more potent effect within EU law, or if the case involved Part XI provisions. UNCLOS had in fact been engaged with in earlier judgments. Prior to its entry into force, the Court noted that many of its provisions were considered to express the current state of customary international maritime law and drew on it in interpreting an EU Fisheries Conservation Regulation: C-286/90 Poulsen and Diva Navigation [1992] ECR I-6019. In C-410/03 Commission v Italy [2005] ECR I-3507, a breach of EU law for non-implementation of a provision of the Seafarers’ Enforcement Directive (1999/95/EC) relied partially at least on that provision being a corollary of public international law responsibilities with UNCLOS provisions invoked in support. In C-111/05 Aktiebolaget NN [2007] ECR I-2697, the ECJ drew on UNCLOS provisions in interpreting the territorial scope of the Sixth Vat Directive (Directive 77/388/EC).
91 C-188/07 Commune de Mesquer v Total [2008] ECR I-4501.
Agreements, challenges invoking non-trade Agreements have been surprisingly scarce. As Figure V.1 illustrates, the first ruling was not until 1998 and only 15 rulings have followed.  

The activity before the EU Courts has clearly been increasing of late and this trend is likely to continue given the growth in treaty-making activity outside the purely trade sphere; and, indeed, pending cases at the time of the cut-off point for the data-set attest to this.

There are several explanatory hypotheses that could be adduced at this stage for this paucity of litigation before the EU Courts. First, it may be that the Member States and the EU are especially diligent with respect to

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92 Cases that led to appeals are included as at the year the appeal was decided. This list consists of C-1/96; C-179/97; C-377/98; C-189/01; C-213/03; C-239/03; C-254/03; T-201/04; C-344/04; C-479/04; C-308/06; C-355/08; C-444/08; C-115/09; C-240/09; T-18/10. The previously mentioned cases referencing the consistent interpretation doctrine are not included (C-284/95 and C-341/95) nor are the Montreal Convention-related disputes between private parties (C-173/07; C-549/07; C-204/08; C-63/09).

93 Three pending cases directly raised questions pertaining to the Aarhus Convention (C-177/09, C-178/09 & C-179/09 Le Poumon vert de la Hulpe; C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 & C-135/09 Bocus and Roua; and C-182/10 Solcyay and Others) and pending Aarhus Convention challenges to EU action include: T-278/11 (challenge to Commission Decision); T-245/11 (challenge to European Chemicals Agency); pending questions pertaining to the validity of the Air Passenger Rights Regulation vis-à-vis the Montreal Convention include: C-629/10 TUI Travel v Civil Aviation Authority and C-12/11 McDonagh v Ryanair; a challenge to the Aviation Directive (2008/101/EC) based on, inter alia, an Air Transport Agreement with the US and the Kyoto Protocol to the Framework Convention on Climate Change was also before the Court: C-366/10 Air Transport Association of America v Secretary of State for Energy and Climate Change (on which see further Chapter VI).
complying with their international (and EU) obligations, such that there is rarely a serious case to be made as to non-compliance. There does not, however, appear to be any existing evidence in support of such a proposition.\textsuperscript{94} Secondly, and perhaps more plausibly, in many of the spheres occupied by EU Agreements even if there were a credible claim to be made as to non-compliance with a particular Agreement there is no particular individual party sufficiently affected, and with sufficiently deep pockets, to be willing to pursue litigation. This, of course, will be a common problem where a particular EU Agreement might have as its objective the protection of diffuse and collective interests. A third important factor is that many EU Agreements have been the subject of detailed EU-level, and in due course national, implementing legislation. There is considerable secondary legislation that essentially seeks to implement provisions of EU—and indeed non-EU—Agreements.\textsuperscript{95} This is particularly so with respect to EU environmental agreements. The introduction to this book has already noted that aspects of the Aarhus Convention have been implemented via several EU legislative measures resulting in the powerful EU law enforcement tools becoming available to ensure compliance with those EU measures, which has led to a string of infringement rulings against Member States (as well as related preliminary rulings). We can assume that where EU implementing legislation exists there will be less EU litigation directly invoking the EU Agreements as the basis for any challenge. A final factor of relevance is that only one infringement ruling has resulted directly from this category of EU Agreements and, indeed, none were pending at the time the data-set was completed, which is an indicator that policing compliance with such Agreements has perhaps not been a priority for the Commission.\textsuperscript{96}

Turning back to the specifics of the 16 cases, Figure V.2 below illustrates that the EU Courts, in contrast to the Trade Agreements jurisprudence explored in Chapter III, have been overwhelmingly called upon to adjudicate in cases in which it has been the compatibility of EU measures, rather than domestic action, that is at issue.\textsuperscript{97}

\textsuperscript{94} Indeed, simply as concerns the Aarhus Convention we have seen both the EU and the Member States subject to successful complaints before the Compliance Committee. We have also seen courts dealing with EU Agreements without referring questions, for one such example see above at n 9.

\textsuperscript{95} See further the introduction to this book.

\textsuperscript{96} The Commission continues to be criticized for not monitoring or pursuing infringements of EU environmental agreements: Krmer (2011: 400, 431); Hedemann-Robinson (2012).

\textsuperscript{97} A number of cases do not fit smoothly into this twofold categorization. Of the three cases identified expressly invoking the Aarhus Convention (T-91/07 \textit{WWF-UK}, T-37/04 \textit{Região}}
Three of the cases concerning challenges to national measures were of considerable significance: EDF as it was the first occasion in which a non-trade-related agreement, and a non-bilateral one at that, was held directly effective and crucially because the reasoning enunciated in reaching that conclusion evinced a strong attachment to the maximalist enforcement logic characteristic of how EU law proper is treated; Étang de Berre partially because it suggested that the Commission was perhaps becoming more diligent in policing Member State compliance with EU Agreements, but more significantly because it saw the adoption of an expansive approach to jurisdiction over mixed agreements which results in the EU enforcement machinery vis-à-vis EU Agreements being accorded an expansive remit. That last dimension has been further bolstered by the even bolder jurisdictional conclusions reached in LZ VLK coming as they did in the presence of a declaration of competence and a carefully reasoned contrary conclusion by the Advocate General. In the LZ VLK ruling that was followed by a textually irreproachable rejection of the direct effect of Article 9(3) of the

\[ \text{Figure V.2 Challenges to domestic or EU action invoking non-trade EU Agreements (16 judgments)} \]

autónoma dos Açores, T-18/10 Inuit Tapiriit Kanatami) the challenges were not to EU measures as conventionally understood (in T-91/07 WWF-UK the Regulation being challenged was, however, allegedly in breach of a different EU Agreement (the UN Fish Stocks Agreement)) but rather challenges to standing rules in Art 263 TFEU as interpreted by the EU judiciary. One might then view those two cases as essentially attempts to have the consistent interpretation doctrine employed vis-à-vis the standing rules. In C-189/01 Jippe’s reliance was unsuccessfully placed on an EU Agreement to try and generate a general principle of EU law with a view to annulling a provision of EU law. C-115/09 Trianel, which involved a challenge to German law, could also be viewed as simply interpretation of the EU implementing measure consistently with the Aarhus Convention obligations. The broader point remains that the challenges involving the non-trade-related EU Agreements have been primarily in relation to EU rather than Member State action.
Aarhus Convention, however, in doing so the ECJ crucially sought to impose a strikingly stringent interpretative obligation on Member State legal orders. Given that it reached this outcome in the context of challenges to domestic action, it would seem only fitting that the EU Courts take seriously the inevitably forthcoming pleas relying on the Aarhus Convention and its Compliance Committee’s findings against the EU’s standing criteria, in order to relax the standing criteria. The alternative will predictably be accusations of double standards that would be difficult to refute.

Thus far, there has not been a successful challenge to an EU measure relying upon this category of EU Agreements. Undoubtedly, in a number of these cases the alleged incompatibility appeared spurious. Furthermore, the Biotech and LATA cases could and were invoked as evidence of a receptive approach to review in relation to EU Agreements. In the former because of the willingness to separate direct effect and individual rights from review of EU law vis-à-vis EU Agreements, and in the latter because of an apparently manifest willingness to employ an EU Agreement as a review criterion for EU law. However, the actual review conducted in LATA was not free from controversy. And a clear concession that review is possible, even leaving indicia of a receptive approach to EU Agreements (Biotech and LATA), should never lead one to pay insufficient attention to the actual outcome and the substantive interpretation of the relevant provisions. For limiting oneself to a yes/no tick-box approach to the invocability question, as previous chapters have stressed, can generate a relatively superficial picture. In any event, the real litmus test for the potency of the legal effects of EU Agreements is arguably to be provided on those occasions when the challenge to an EU measure appears most convincing. This is one of the reasons why the judicial response in Intertanko was eagerly awaited. And the response where the substantive interpretation would appear to provide little shelter was to resort to closing the gateway to review by resurrecting a conferral of individual rights requirement for review to be permissible.

98 Notably C-479/04; C-1/96; C-189/01; C-179/97; C-254/03 P; C-377/98; C-188/07. The attempted use of the Aarhus Convention in T-37/04 Região autónoma dos Açores was also unconvincing.
99 One wonders if a different outcome to the review or invocability question might have been forthcoming had the first express UNCLOS challenge arisen to a non-legislative measure that did not raise such transparent compliance concerns.
and having primacy over secondary EU legislation can thus be duly recited, as indeed was the case in *Intertanko*, but the air of artificiality in doing so, where this is combined with the wholesale rejection of the Agreement to form a review criterion for EU law,\(^{100}\) is palpable.

\(^{100}\) The Court is still likely to have to resolve whether it would accept a customary international law-based challenge to EU action where the customary international law at stake reflects relevant UNCLOS provisions and a challenge relying on the Part XI provisions which the Court emphasized were not at stake in *Intertanko*. 