Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 8 May 2014[1]

Joined Cases C-401/12 P to C-403/12 P

Council of the European Union
European Parliament
European Commission
v
Vereniging Milieudefensie and

Stichting Stop Luchtverontreiniging Utrecht

(Appeals — Article 9(3) of the Aarhus Convention — Article 2(1)(g) and Article 10 of Regulation (EC) No 1367/2006 — Request for internal review — Inadmissibility — Plea of illegality — Review of the validity of secondary EU law with regard to an international agreement — Case-law resulting from Fediol v Commission and Nakajima v Council — Conditions governing the possibility of relying directly on the provisions of conventions)

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1 — Original language: French.

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I – **Introduction**

1. This series of appeals raises fundamental questions for the European Union legal order. Addressing as they do issues of a constitutional nature, these appeals reflect the tension between, on the one hand, the need to preserve the autonomy of EU law and, on the other hand, the will to comply with international commitments under agreements to which the European Union is party.

2. The present cases relate more specifically to the fact that the international convention in question, namely the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Aarhus Convention'), approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005,[2] seeks, inter alia, to create special procedural rights for the benefit of environmental protection organisations with a view to protecting, as a matter of public interest, the environment, which is regarded as a common asset. The situation at issue here thus goes beyond the dichotomy between public persons and private individuals, the prism traditionally used in the analysis of the internal effects of obligations under conventions.[3]

2 — OJ 2005 L 124, p. 1.

3 — The present appeals are closely linked to a second series of appeals in *Council and Commission* v *Stichting Natuur en Milieu and Pesticide Action Network Europe* (C-404/12 P and C-405/12 P), in relation to which I will also deliver my Opinion today.

3. In the specific context of the Aarhus Convention, the Court is thus asked to rethink the conditions governing the possibility of relying on [4] provisions of international treaty law before the courts of the European Union in the context of proceedings for annulment for the purposes of a review of the legality of secondary EU law.

4. This series of cases has its origin in the juxtaposition of two provisions: one of international treaty law and the other of secondary EU law, the purpose of which is to implement the convention in question.

5. Article 9(3) of the Aarhus Convention on 'access to justice' provides that 'without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'. The scope of that provision is made clear in paragraph 4 of that same article, which requires, inter alia, that the procedures referred to in paragraph 3 must provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable and timely and not prohibitively expensive.

6. The application of the provisions of the Aarhus Convention to the institutions and bodies of the European Union is governed by Regulation (EC) No 1367/2006 [5] ('the Aarhus Regulation'). Under Article 10(1) of the regulation, which relates to the procedure for the 'internal review of administrative acts', '[a]ny non-governmental organisation which meets the criteria set out in Article 11 [6] is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act'. However, the concept of an 'administrative act' within the meaning of that regulation is defined in Article 2(1)(g) of the Aarhus Regulation as 'any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects'. The EU legislature thus excluded acts of general scope from the scope of the review which may be initiated by environmental protection organisations.

7. In the judgment in *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging* (T-396/09, EU:T:2012:301, 'the judgment under appeal'), the General Court reviewed the legality of the Aarhus Regulation in the light of the Aarhus Convention, taking as a basis the case-law resulting from *Fediol* v *Commission* and *Nakajima* v *Council* relating to provisions of the General Agreement on Tariffs and Trade ('the GATT') and the Agreement establishing the World Trade Organisation ('the WTO Agreement'). [7]

8. Even though, for that reason, the judgment of the General Court appears to me to be vitiated by an error of law which must result in it being set aside, the fact remains that the key aspect of that error relates to the conditions governing the possibility of relying on the provisions of conventions formulated by the Court in its case-law, conditions which do not seem to constitute a totally coherent whole. In accordance with that case-law, in order for it to be a criterion governing the validity of an act of EU law, a provision of a convention must be, inter alia, unconditional and sufficiently precise, that is

4 — As was proposed by Advocate General Maduro in his Opinion in *FIAMM and Others* v *Council and Commission* (C-120/06 P and C-121/06 P, EU:C:2008:476), mention should be made here, from a terminological point of view, of the issue of direct effect in the context of the implementation of EU law in the Member States and of 'the possibility of relying directly' on provisions of international conventions. See also J. Dutheil de la Rochère, '*L'effet direct des accords internationaux*', in Court of Justice and the Construction of Europe, 2013.

5 — Regulation of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies (OJ 2006 L 264, p. 13). Pursuant to Article 1 thereof, the objective of the regulation is to contribute to the implementation of the obligations arising under the Aarhus Convention, by laying down rules to apply the provisions of the Convention to Community institutions and bodies, in particular by granting access to justice in environmental matters at Community level under the conditions laid down by the regulation.

6 — It is not in dispute that the respondent organisations satisfy those criteria.

7 — Judgments in *Fediol* v *Commission* (70/87, EU:C:1989:254) and *Nakajima* v *Council* (C-69/89, EU:C:1991:186).

to say it must have direct effect.[8] However, whilst quite rightly seeking a solution which would make it possible to examine the conformity of the Aarhus Regulation with the Aarhus Convention, the General Court manifestly attempted to sidestep that condition.[9] For my part, I am of the view that the message thus conveyed by the General Court must be examined carefully.

9. Accordingly, if it were to agree with my analysis of the error committed by the General Court, the Court of Justice would be presented with the following choice. On the one hand, if the Court of Justice were to have no doubt about that error, it could follow the case-law laid down in *Intertanko*,[10] which makes the possibility of a review of validity subject to the criterion of direct effect, and thus close definitively the means of conducting a review of the legality of the internal law implementing Article 9(3) of the Aarhus Convention at both EU and Member State level.

10. However, for the reasons which I will set out, it appears to me to be preferable to opt for a modification by the Court of the conditions governing the possibility of such reliance, in particular in the same way as the approach adopted in '*Biotech*',[11] in which the Court expressly ruled out direct effect being a universal condition governing the possibility of reliance on provisions in the context of a review of legality.

11. Accordingly, even in the event of the case being referred back to the General Court, a relaxation of the conditions governing the possibility of reliance on provisions would enable the General Court to ascertain, on an appropriate basis, whether by adopting the Aarhus Regulation the Community legislature afforded individuals a sufficient degree of judicial protection in the light of the Aarhus Convention.

II – **Background to the dispute and the judgment under appeal**

12. The cases have their origin in a Commission decision of 7 April 2009,[12] by which the Commission granted the Kingdom of the Netherlands a temporary derogation from the obligations laid down in Directive 2008/50/EC on ambient air quality and cleaner air for Europe[13] ('the derogation decision').

8 — See judgments in *Pabst & Richarz* (17/81, EU:C:1982:129, paragraph 27); *Demirel* 12/86, EU:C:1987:400, paragraph 14; and the Opinion of Advocate General Darmon in *Demirel*, (EU:C:1987:232, point 18). See also judgment in *Racke* (C-162/96, EU:C:1998:293, paragraph 31); *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraph 39; *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 54); and *Z* (C-363/12, EU:C:2014:159, paragraphs 84 to 86).

9 — See judgment in *Lesoochranárske zoskupenie* (C-240/09, EU:C:2011:125), in which the Court held that Article 9(3) of the Aarhus Convention did not have direct effect.

10 — Paragraphs 42 to 45 of the judgment in *Intertanko and Others* (C-308/06, EU:C:2008:312) read as follows: 'It is clear from Article 300(7) EC that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation … It follows that the validity of a measure of secondary Community legislation may be affected by the fact that it is incompatible with such rules of international law. … the Court of Justice thus reviews, pursuant to Article 234 EC, the validity of the Community measure concerned in the light of all the rules of international law, subject to two conditions. First, the Community must be bound by those rules …. Second, the Court can examine the validity [of Community legislation in the light of an international treaty] only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise'.

11 — Judgment in *Netherlands* v *Parliament and Council* (C-377/98, EU:C:2001:523, paragraphs 52 to 54). 'It is common ground that, as a rule, the lawfulness of a Community instrument does not depend on its conformity with an international agreement to which the Community is not party … Nor can its lawfulness be assessed in the light of instruments of international law which, like the WTO agreement and the TRIPS and TBT agreements, … However, such an exclusion cannot be applied to the [Convention on Biological Diversity signed on 5 June 1992 in Rio de Janeiro, the 'CBD'], which, unlike the WTO agreement, is not strictly based on reciprocal and mutually advantageous arrangements. 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 the compliance with the obligations incumbent on the Community as a party to that agreement'.

12 — Commission C(2009) 2560 final.

13 — Directive of the European Parliament and of the Council of 21 May 2008 (OJ 2008 L 152, p. 1).

13. By letter of 18 May 2009, the Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht ('the environmental protection organisations') submitted a request to the Commission for internal review of the derogation decision in accordance with Article 10(1) of the Aarhus Regulation. By its decision, Decision C(2009) 6121 of 28 July 2009 ('the contested decision'), the Commission rejected that request as inadmissible on the ground that the derogation decision was not a measure of individual scope and that it could not therefore form the subject-matter of the internal review procedure provided for in the Aarhus Regulation. The environmental protection organisations therefore brought an action before the General Court.

14. In the judgment under appeal, having rejected the plea advanced by the organisations to have the derogation decision classified as an individual measure, the General Court upheld a plea of illegality raised by those organisations in respect of Article 10(1) of the Aarhus Regulation, read in conjunction with Article 2(1)(g) of that regulation, alleging the incompatibility of those provisions with the Aarhus Convention. As a result, at the request of the environmental protection organisations, the General Court annulled the decision on inadmissibility.

15. For a detailed description of the facts and procedure at the origin of the dispute, reference is made to the presentation that appears in the judgment under appeal.

III – **Forms of order sought by the parties and procedure before the Court**

16. By its appeal brought on 3 September 2012 (Case C-401/12 P), the Council asks the Court to set aside the judgment under appeal, dismiss the action brought by the applicants in its entirety and order the applicants to pay the costs jointly and severally.

17. By its appeal brought on 24 August 2012 (Case C-402/12 P), the Parliament asks the Court to set aside the judgment under appeal, dismiss the action as to the substance and order the applicants at first instance to pay the costs of the present appeal.

18. By its appeal brought on 27 August 2012 (Case C-403/12 P), the Commission asks the Court to set aside the judgment under appeal, rule on the substance of the case and dismiss the action for annulment of the decision on inadmissibility, and to order the applicants at first instance to pay the costs incurred by the Commission at first instance and in the context of the present appeal.

19. By order of the President of the Court of 21 November 2012, Cases C-401/12 P, C-402/12 P and C-403/12 P were joined for the purposes of the written and oral procedure and the judgment.

20. On 25 February 2012, the environmental protection organisations lodged a response. Following the request for rectification, on 1 March 2012 those parties submitted a cross-appeal in accordance with Article 176(2) of the Rules of Procedure.

21. The Council, the Parliament, the Commission, the environmental protection organisations and the Czech Government [14] were heard at the hearing held on 10 December 2013.

14 — The Czech Government's application to intervene in support of the Commission was submitted after the expiry of the time-limit laid down. The intervention was allowed for the purposes of the oral procedure only.

IV – **The basis of the review of legality of provisions of secondary law in the light of international treaty law (first ground of the appeals)**

A – *Arguments of the parties*

22. By their first grounds of appeal, the Council, the Parliament and the Commission essentially submit that a review of the validity of the Aarhus Regulation cannot take place in the present case, since — as acknowledged by the Court in *Lesoochranárske zoskupenie*[15] — Article 9(3) of the Aarhus Convention does not have direct effect and the conditions established in the case-law of the Court on the basis of which a review of the legality of acts of secondary law may be conducted are exceptional in nature. Accordingly, by departing from the approach followed in *Lesoochranárske zoskupenie* and taking as a basis the case-law resulting from *Fediol* v *Commission* and *Nakajima* v *Council*,[16] which allows the legality of acts of secondary law to be reviewed in exceptional cases, the General Court erred in law.

23. In this regard, the appellants agree that, since exceptions are to be interpreted restrictively,[17] the provisions of the Aarhus Regulation do not in any event satisfy the conditions laid down in the *Fediol* v *Commission* and *Nakajima* v *Council* case-law.

24. In the view of the Council, *Fediol* v *Commission* is concerned with the situation in which an act of the European Union refers expressly to specific provisions of an international agreement. This is not the case with the Aarhus Regulation, since the mere reference by an act of secondary law to an international instrument is not sufficient to justify that act being open to judicial review in the light of that instrument. Similarly, the General Court cannot take *Nakajima* v *Council* as a basis, since that judgment relates to a different situation, in which the act of EU law intends to implement a 'particular' obligation under the international agreement.

25. The Parliament agrees with that analysis of *Fediol* v *Commission*. With regard to *Nakajima* v *Council*, the Parliament points out that that case-law has a very limited scope[18] and is concerned with the situation in which the European Union intends to 'implement' a 'particular obligation'. It is not therefore a question of the European Union complying with its international obligations in general where it enjoys discretion as to the manner in which it complies with the obligations incumbent upon it under a particular international agreement,[19] but of the European Union implementing an agreement which imposes on it a positive obligation to act in a particular manner and does not afford it any discretion.[20]

26. For its part, the Commission adds that *Nakajima* v *Council* has its origin in antidumping cases and that it has been applied in practice, in the case-law of the Court, almost exclusively to cases of review — conducted indirectly — of the conformity of the European Union's antidumping regulations with the provisions of the GATT Anti-dumping Codes of 1979 and 1994. In the view of the Commission, that judgment cannot be interpreted as covering all situations in which the European Union adopts a measure in order to comply with its obligations under international conventions.

15 — EU:C:2011:125.

16 — EU:C:1989:254 and EU:C:1991:186.

17 — See, to that effect, *Chiquita Brands and Others* (T-19/01, EU:T:2005:31, paragraph 117).

18 — That of the antidumping legislation, with the exception of the area at issue in the judgment in *Italy* v *Council* (C-352/96, EU:C:1998:531), which related to the GATT rules.

19 — Judgment in *Germany* v *Council* (C-280/93, EU:C:1994:367, paragraph 111); *Portugal* v *Commission* (C-149/96, EU:C:1999:574, paragraph 51); and *Van Parys* (C-377/02, EU:C:2005:121, paragraphs 39 to 42).

20 — *Chiquita Brands and Others* (EU:T:2005:31, paragraphs 125 to 169).

27. In their response, the environmental protection organisations ask the Court to 'uphold the judgment under appeal, correcting or not the grounds on which it is based, and to dismiss the appeals brought by the Commission, the Council and the Parliament in their entirety'. They are of the view that the nature and subject-matter of the Aarhus Convention do not preclude a review of validity, and that the conditions laid down in *Fediol* v *Commission* are met in the present case, since the Aarhus Regulation contains a number of references to that convention.

B – *The effects of international law in EU law*

28. It has been said that in order to understand and assess the attitudes of national courts with regard to international agreements it was necessary to drill down as far as the constitutional foundations of the State in question.[21] That requirement is even more pressing in the present cases, since the Court is required to specify the provisions which must be referred to when reviewing the legality of the internal effects of the Aarhus Convention within the European Union legal order, whereas for decades the case-law on the relationships between international law and EU law has formulated principles the application of which has on occasion raised questions.

29. As I have already stated, it is my view that, by applying the case-law resulting from *Fediol* v *Commission* and *Nakajima* v *Council* in the present case, the General Court erred in law. It did so because those judgments lay down a limited exception developed in the context of the case-law on the GATT and WTO agreements, and not a general approach to reviewing the legality of EU law. In order to illustrate this view, it is, however, necessary to analyse the development of the case-law relating to the internal effects of obligations under international law in EU law. It will become apparent from that analysis that, in the same way as a tree, case-law has developed over the years along several different branches, which are nevertheless connected to a 'common trunk' embodied by the principle of monism.

1. The common monist trunk

30. Generally speaking, it appears to have been accepted since *Haegeman*,[22] a judgment given in 1974, that a monist approach underlies Article 216 TFEU (ex Article 300(7) EC), pursuant to which 'agreements concluded by the Union are binding upon the institutions of the Union and on its Member States',[23] thus entailing 'automatic incorporation',[24] with the result that international agreements, as such, are sources of EU law.

31. In *Kupferberg*,[25] a judgment given in 1982, the Court confirmed the incorporation of international agreements into the Community legal order, whilst making clear that 'the effects within the Community of provisions of an [international] agreement … may not be determined without taking account of the international origin of the provisions in question', and that '[i]n conformity with the principles of public international law [the contracting parties] … [may] agree … what effect the provisions of the agreement are to have in the internal legal order of the contracting parties'. The

21 — Pescatore, P., '*L'application judiciaire des traités internationaux dans la Communauté européenne et dans ses États membres*' in Études de droit des Communautés européennes, Mélanges Teitgen, 1984, p. 356.

22 — Judgment in *Haegeman* (181/73, EU:C:1974), which concerned the association agreement with Greece.

23 — That view is not unanimously shared in legal literature. Indeed, although certain authors support the monist concept (Pescatore, P., '*Die Rechtsprechung des Europäischen Gerichtshofs zur innergemeinschaftlichen Wirkung völkerrechtlicher Abkommen*', 1986, and '*L'application judiciaire des traités internationaux*', *op. cit.*, p. 395), others advocate a dualist approach (Hartley, '*International Agreements and the Community Legal System*', 8 ELR 1983, pp. 383 and 390). Some also take the nuanced view that there is little point giving preference to one approach over the other (Everling, '*The Law of the External Economic Relations of the EC*', in Hilf, Jacobs and Petersmann, '*The European Community and the GATT*', Kluwer 1986, pp. 85 and 95).

24 — See de Burca, '*The ECJ and international legal order*', in The Worlds of European Constitutionalism, p. 105.

25 — 104/81, EU:C:1982:362.

Court explained that the institutions which have the power to negotiate and conclude an agreement with a non-member country are free to agree what effect the provisions are to have in the internal legal order. Only if that question has not been settled by the agreement does it fall for decision by the Court. [26]

32. In accordance with the monist approach, the provisions of conventions thus produce effects within the legal order of the European Union even in the absence of any legislative or regulatory act adopted in order to implement those provisions. [27] As Advocate General Rozès stated in summary in *Polydor*, the function of a regulation approving an international agreement is therefore merely instrumental. [28] A wealth of subsequent case-law confirms that the provisions of international agreements are part of EU law, including where the provisions of those agreements are not provisions which must be referred to for the purposes of the review of the legality of secondary law. [29]

33. It should be pointed out in this regard that it is precisely on account of the principle of monism that the issue of the possibility of relying on international law is raised, quite particularly having regard to the principle of EU law under which international agreements are hierarchically superior to all acts of secondary law. [30] Indeed, case-law acknowledges that Article 216(2) TFEU may constitute the basis upon which a provision of secondary law that is incompatible with international law may be invalidated. Under EU law, that primacy does not extend to primary law, and in particular to general principles or fundamental rights. [31]

34. With regard to the situation in which the legality of an act of EU law is reviewed in the light of a provision of international law, it is for this reason that, in *International Fruit Company and Others*, the Court held that its jurisdiction to conduct a review of validity in the context of a reference for a preliminary ruling extended to all the grounds of invalidity of acts of secondary law, and that the Court was obliged to examine whether the validity of those acts could be affected by reason of the fact that they are contrary to a rule of international law, [32] whilst requiring that the condition of direct effect is satisfied before the national court.

35. Finally, the primacy of international agreements concluded by the Union over acts of secondary law means that the latter must, so far as is possible, be interpreted in a manner that is compatible with those agreements. [33]

26 — Ibid., paragraph 17. See also judgment in *Demirel* (EU:C:1987:400).

27 — See Rosas, A., cited by Marsden S.: 'As far as treaties are concerned, the EU approach is basically [a] monist one: the treaties concluded by the Council become ipso facto part of EU law, without any need for further measures of transposition or incorporation. The decision by the Council to conclude the agreement thus makes it directly applicable'. '*Invoking direct application and effect of international treaties by the European Court of Justice*', International and Comparative Law Quarterly, Vol. 60, No 30, pp. 737 to 757.

28 — 270/80, EU:C:1981:286, p. 353.

29 — Judgments in *Demirel* (EU:C:1987:400); *Andersson and Wåkerås-Andersson* (C-321/97, EU:C:1999:307); *Jacob Meijer and Eagle International Freight* (C-304/04 and C-305/04, EU:C:2005:441). See also *Greece* v *Commission* (30/88, EU:C:1989:422, paragraph 13). With regard to the communitisation of mixed agreements, see judgment in *Commission* v *Germany* (C-61/94, EU:C:1996:313) and *Commission* v *France* (C-239/03, EU:C:2004:598). See also judgment in *Opel Austria* v *Council* (T-115/94, EU:T:1997:3).

30 — Judgment in *International Fruit Company and Others* (21/72 to 24/72, EU:C:1972:115) and the Opinion to that effect of Advocate General Mayras. See also *Air Transport Association of America and Others* (EU:C:2011:864, paragraph 50 and the case-law cited). See, furthermore, judgment in *HK Danemark* (C-335/11 and C-337/11, EU:C:2013:222, paragraph 28).

31 — See, to that effect, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 308).

32 — EU:C:1972:115 (paragraphs 6 and 7).

33 — The rule of interpretation was set out for the first time in the judgment in *Interfood* (92/71, EU:C:1972:30) and confirmed in the judgment in *Commission* v *Germany* (EU:C:1996:313, paragraph 52). See, more recently, judgment in *HK Danemark* (EU:C:2013:222).

36. For the purposes of the present case, it must be pointed out that the monist approach, which entails the automatic incorporation of the provisions of international law, is the basic rule which enables the relationship between EU law and international law to be understood.[34] However, that close relationship means that a prudent attitude must be adopted with a view to preserving the autonomy of EU law; the most significant example of that attitude is the Court's refusal to afford direct effect to the provisions of the GATT and WTO Agreements, which would have meant that they could be relied upon.[35]

2. First dualist branch (GATT/WTO case-law)

37. Even though the distinction between monism and dualism is a simplification which masks important differences between the systems which form part of one or the other camp,[36] the fact remains that one characteristic of dualism lies in the fact that the provisions of international treaty law are not directly applicable nationally, because their legal effects, within the domestic legal order, depend on domestic legislative or regulatory acts intended to ensure their implementation (transformation). It is, however, on account of the existence of an international source that the interpretation of the internal provisions in question is governed by the principle of 'treaty friendly interpretation' in order to prevent, in so far as possible, any conflict between the national provision and an obligation under a convention. This is the approach that the Court essentially applied in its case-law relating to the GATT and WTO Agreements,[37] without, however, acknowledging having departed from monism as the fundamental principle.

38. Thus, responding to the proposal made by Advocate General Mayras, who had argued in favour of consistency between international agreements and the acts of the institutions, the Court held in *International Fruit Company and Others* that the validity of those acts could be judged 'with reference to a provision of international law when that provision binds the Community and is capable of conferring on individuals rights which they can invoke before the courts'.[38] However, in that case, the Court held that Article XI of the GATT did not produce such an effect.

39. The case-law thus adopted confirms the specific nature of the GATT and WTO Agreements,[39] which stems — firstly — from the fact that they are based on the principle of negotiations undertaken on 'the basis of "reciprocal and mutually advantageous arrangements"' and — secondly — from the position of the Community at the time of their adoption.[40]

34 — See de Burca, op. cit., p. 106. Some commentators have argued that the European Union, which is itself the product of international treaties, could only adopt an open attitude to international law, under the principle of 'völkerrechtsfreundliche Integration'. See, for example, Timmermans, '*The EU and Public International Law*', European Foreign Affairs Review, 1999, pp. 181 to 194.

35 — See judgments *International Fruit Company and Others* (EU:C:1972:115) and *Portugal* v *Council* (EU:C:1999:574). By contrast, the provisions of association agreements, under which the European Union occupies a position of strength, are often acknowledged to have such an effect: see Klabbers J., '*International Law in Community Law, The Law and Politics of Direct Effects*', Yearbook of European Law (2001) 21 (1), pp. 263-298. With regard to the agreements concluded under the aegis of the Council of Europe, Klabbers also refers to the application of the 'disconnection clause', under which the Contracting Parties — whilst being obliged to comply with the international treaty — are required to ensure that, in their relations with the European Union, EU law prevails. See Economides, C., '*La clause de déconnexion en faveur du droit communautaire, une pratique critiquable*', Revue générale de droit international public (2006), pp. 273 to 302.

36 — Waelbroeck, M., '*Enforceability of the EEC-EFTA Free Trade Agreements. A Reply*', European Law Review, 1978, pp. 27 to 28.

37 — See also, in relation to dualism, the Opinion of Advocate General Ruiz-Jarabo Colomer in *Merck Genéricos* (C-431/05, EU:C:2007:48, points 76 to 79).

38 — EU:C:1972:115.

39 — With regard to the lack of direct effect of these agreements, see Kokott, J., '*International law — a neglected "integral" part*', in De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins, Bruylant 2013.

40 — Judgment in *International Fruit Company and Others* (EU:C:1972:115, paragraph 21). It is, moreover, in this judgment that the Court acknowledged that the Community has largely succeeded the Member States in their rights and obligations under the GATT.

40. It is common ground that the WTO agreements do not contain any reference to the status of the agreements within the internal legal order of the States signatories to those agreements. Unlike the situation prevailing in EU law following the statement of principle contained in *Van Gend en Loos*, the GATT and the WTO agreements did not create a new legal order including the contracting parties or the Member States and their citizens. [41] Accordingly, the scheme of the WTO agreements affords rights to individuals solely by means of the solutions adopted by the WTO members and under no circumstances requires national courts not to apply a provision which runs counter to the WTO rules. [42]

41. With regard to the GATT, the Court has clearly stated that that agreement could not be relied on by an individual before the Community courts in order to challenge the validity of a Community measure. [43] The GATT was characterised by the flexibility of its provisions, taking into account the non-binding dispute settlement system, as well as by the possibility of evading obligations under the agreement where damage was caused or risked being caused by the effect of the undertakings entered into under the GATT.

42. As far as the WTO agreements are concerned, the Court has specified, firstly, that those agreements do not determine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the WTO members. [44] The Court pointed out the system for resolving disputes accorded considerable importance to negotiation between the parties. This therefore enables a member who has adopted measures incompatible with the WTO rules to have recourse to mutual compensation rather than withdraw the measures at issue. To render a measure contrary to the obligations under the WTO agreements inapplicable would be tantamount to depriving the legislative or executive organs of the contracting parties of the possibility of finding negotiated solutions. The Court also took as a basis the conditions of reciprocity linked to the refusal of the Community's trading partners to submit to a review of the legality of their internal law on the basis of the WTO agreements. [45]

43. The Court has steadfastly stood by its approach by ruling out the possibility of an individual being able to rely on the infringement of the WTO rules in an action for compensation, even where the contested act has been sanctioned by the WTO Dispute Settlement Body. [46] That case-law also means that the privileged applicants themselves may not request a review of legality. [47] That approach did not, however, prevent the Court from finding there to be a failure to fulfil obligations relating to the non-compliance with provisions of the GATT. [48]

41 — See report of the WTO panel: sections US-301-310 of the Trade Act of 1974, WT/DS 152/R, 1999, § 7.72.

42 — See, to that effect, Slotboom, M., '*A comparison of WTO and EC law*', Cameron May 2006, p. 65.

43 — Judgment in *International Fruit Company and Others* (EU:C:1972:115).

44 — Judgment in *Portugal* v *Council* (EU:C:1999:574, paragraph 41).

45 — Ibid., paragraphs 44 and 45.

46 — Judgments in *Biret International* v *Council* (C-93/02 P, EU:C:2003:51) and *FIAMM and Others* v *Council and Commission* (EU:C:2008:476). With regard to the possibility of relying on WTO law, see the Opinion of Advocate General Maduro in *FIAMM and Others* v *Council and Commission* (EU:C:2008:98).

47 — Judgment in *Germany* v *Council* (EU:C:1994:367, paragraph 109), as confirmed by the judgment in *Portugal* v *Council* (EU:C:1999:574). (The Court held that '[the] features of GATT, from which the Court concluded that an individual within the Community cannot invoke it in a court to challenge the lawfulness of a Community act, also preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State under the first paragraph of Article 173 of the Treaty').

48 — See judgment in *Commission* v *Germany* (EU:C:1996:313).

44. However, nothing in the foregoing calls into question the fundamental rule that the GATT and the WTO agreements are part of Community law and, in principle, are therefore binding on the Community.[49] Thus, in the view of the Court, the WTO rules (here the TRIPS agreements) are, as an integral part of the Community legal order, provisions which must be referred to when interpreting acts of EU law.[50]

3. A consequence of the first branch (case-law resulting from *Fediol* v *Commission* and *Nakajima* v *Council*)

45. In the light of the restrictive nature of the general case-law concerning the effects of the GATT and WTO agreements, the Court established an exception,[51] also known as the 'principle of implementation',[52] under which the Community judicature may review the legality of an act of secondary law in the light of the WTO rules, including the GATT, where 'the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements'.[53]

46. In *Fediol* v *Commission*, the applicant challenged the legality of the Commission's decision rejecting its complaint relating to the initiation of a procedure to examine commercial practices in Argentina. To that end, the applicant took as a basis Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices,[54] and added that those practices were also contrary to several provisions of the GATT.[55] In *Nakajima* v *Council*, on the basis of Article 184 EEC, the applicant relied on the inapplicability of provisions of an antidumping regulation, claiming — inter alia — that that regulation ran counter to certain provisions of the GATT Anti-dumping Code.

47. As is clear from *Van Parys*,[56] those judgments are the only two exceptions to the general rule, exceptions which are specific to the GATT and WTO agreements, taking into account their nature and structure, which are based on the principles of negotiation and reciprocity, as well as the need to preserve the discretion enjoyed by the institutions of the European Union.

48. It is in the light of all of the foregoing that the first ground of appeal of the present appeals should be analysed.

49 — See, to that effect, the Opinion of Advocate General Kokott in *Intertanko and Others* (EU:C:2007:689, points 73 and 74). The Advocate General refers to the judgments in *Fediol* v *Commission* (EU:C:1989:254, paragraph 19 et seq.); *Nakajima* v *Council* (EU:C:1991:186, paragraph 31); *Portugal* v *Council* (EU:C:1999:574, paragraph 49); *Biret International* v *Council* (EU:C:2003:517, paragraph 53); and *Van Parys* (EU:C:2005:121, paragraph 40).

50 — Judgments in *Hermès* (C-53/96, EU:C:1998:292, paragraph 35), and *Dior and Others* (C-300/98 and C-392/98, EU:C:2000:688).

51 — Bourgeois, J., '*The European Court of Justice and the WTO*', in Towards a Common Law of International Trade, Weiler, OUP, 2000, p. 103.

52 — Eeckhout, P., '*External Relations of the European Union*', OUP, 2004, p. 316.

53 — Judgment in *Portugal* v *Council* (EU:C:1999:574, paragraph 49). See also judgments in *Italy* v *Council* (EU:C:1998:531, paragraph 19), and *Germany* v *Council* (EU:C:1994:367, paragraph 111).

54 — OJ 1984 L 252, p. 1.

55 — It is important to point out that, in the context of *Fediol* v *Commission*, it was not the agreement as such which was relied upon, but the Community act which served as the link between EU law and international law.

56 — EU:C:2005:121, paragraphs 39 and 40.

C – *The judgment under appeal*

49. I note, first of all, that the line of reasoning followed by the General Court in paragraphs 55 to 57 of the judgment under appeal is based primarily on one of the exceptions developed in the context of the GATT and WTO agreements, namely the *Nakajima* v *Council* case-law, the reference to the *Fediol* v *Commission* case-law being merely subsidiary, or even purely a matter of drafting.[57] Indeed, in my view, paragraph 58 of the judgment under appeal is a summary of the justification of the statement, contained in the first sentence, that the Aarhus Regulation was adopted to meet the European Union's obligations under Article 9(3) of the Aarhus Convention.

50. Accordingly, faced with the Court's refusal in *Lesoochranárske zoskupenie* to acknowledge that Article 9(3) of the Aarhus Convention has any direct effect, and since that refusal appeared to rule out any possibility of a review of the legality of secondary law with regard to a provision of a convention, the General Court opted to apply an exception relating to 'the implementation' of an international agreement on the basis of *Nakajima* v *Council*.

51. It is my view that, by so doing, the General Court erred in law, and that that error of law can be seen on two levels.

52. On the first level, the error in question consists in affording a universal scope to case-law relating to the GATT and WTO agreements. Thus, the error lies in the transposition of case-law relating to specific agreements characterised — as is clear from the foregoing observations — by their own logic and system of law, to a fundamentally distinct area of law, namely that of the Aarhus Convention, in order to conduct a review of the legality of secondary EU law in the light of that convention. However, in my view, the line of reasoning stated as the grounds for that case-law cannot be applied to other areas of law.[58]

53. The Court has already had occasion to underline the specific nature of the rules applicable in the context of the GATT and WTO agreements as compared with the rules under other international conventions, such as the Convention for the Prevention of Pollution from Ships[59] and the Convention on Biological Diversity,[60] in order to infer from that specific nature that those rules may not be applied outside their respective context. Thus, the Court has made clear that the exclusion of the review of the legality of a Community act in the light of the WTO/TRIPS/TBT agreements cannot be applied to a convention which, unlike the WTO agreement, is not strictly based on reciprocal and mutually advantageous arrangements.[61]

54. Similarly, on a second level, the General Court was wrong to seek to justify the review of legality on the basis of an exception established in *Nakajima* v *Council*, given that that judgment is a consequence of the case-law within the case-law relating to the GATT and WTO agreements, which is particular to that area of law.

55. As the General Court pointed out in *Chiquita Brands and Others*, the rule arising from *Nakajima* v *Council* is designed, exceptionally, to allow individuals, in an indirect manner, to plead infringement by the Community or its institutions, of GATT rules or WTO agreements. As an exception to the principle that individuals may not directly rely on WTO provisions before the Community judicature,

57 — Paragraph 54 of the judgment under appeal contains a general citation of the judgment in *Fediol* v *Commission*. Subsequently, in paragraph 58 of the judgment under appeal, the General Court mentions merely an express reference contained in recital 18 of the Aarhus Regulation relating to Article 9(3) of the Aarhus Convention.

58 — See judgment in *Portugal* v *Council* (EU:C:1999:574).

59 — See judgment in *Intertanko and Others* (EU:C:2008:312, paragraph 48).

60 — See judgment in '*Biotech*' (EU:C:2001:523, paragraph 53).

61 — Ibid., paragraph 53.

that rule is to be interpreted restrictively.[62] I take the view that such a definition of its scope rules out any possibility of relying on that exception outside the context of the rules under the GATT and WTO agreements. There is therefore no need even to examine whether the exceptions in question have been applied correctly in the present case.

56. Accordingly, I propose that the first ground of the appeals be allowed and that the judgment under appeal be set aside in so far as it allowed the second plea in law advanced at first instance and conducted the review of legality on the basis of the case-law resulting from *Fediol* v *Commission* and *Nakajima* v *Council*.

57. For the following reasons, which the parties have been unable to debate, the state of the proceedings does not appear to me to permit final judgment to be given in the matter within the meaning of the first paragraph of Article 61 of the Statute of the Court of Justice, and the case should therefore be referred back to the General Court. If, however, the Court were to decide to give judgment in the matter on the basis of *Intertanko and Others*, upon which the appeals are based, there would be no need to refer the case back.

V – **The alternative solution vis-à-vis the review of legality — justification of the referral of the case back to the General Court**

A – *The possibility of relying directly on provisions under conventions for the purposes of the review of the legality of secondary EU law*

1. ‘Direct effect’ as a condition for the review of legality

58. It is established that the validity of an act of the European Union may be affected by the fact that it is incompatible with such rules of international law.[63] In its traditional case-law, the Court therefore examines such incompatibility by following a series of successive stages. Thus, first and foremost, the European Union must be bound by the rules in question.[64] Next, the Court can examine the validity of an act of EU law in the light of an international agreement only where the nature and the broad logic of the latter do not preclude this.[65] Finally, where the nature and the broad logic[66] of the agreement in question permit the validity of the act of EU law to be reviewed in the light of the provisions of that agreement, it is also necessary for the provisions of that agreement which are relied upon for the purpose of examining the validity of the act of EU law to appear, as regards their content, to be unconditional and sufficiently precise, and thus have direct effect.[67]

59. The condition of direct effect is satisfied where the provision relied on contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[68]

62 — EU:T:2005:31, paragraph 117.

63 — ? See judgment in *Air Transport Association of America and Others* (EU:C:2011:864, paragraph 51).

64 — ? Ibid., paragraph 7, and judgment in *Intertanko and Others* (EU:C:2008:312, paragraph 44).

65 — ? Judgment in *FIAMM and Others* v *Council and Commission* (EU:C:2008:476, paragraph 110).

66 — ? In the judgment in *Demirel* (EU:C:1987:400) the Court refers to ‘the purpose and nature of the agreement’ (paragraph 14).

67 — ? See, inter alia, judgments in *Kupferberg* (EU:C:1982:362, paragraph 22); *IATA and ELFAA* (EU:C:2006:10, paragraph 39); and *Intertanko and Others* (EU:C:2008:312, paragraph 45).

68 — ? See judgment in *Demirel* (EU:C:1987:400, paragraph 14), and the Opinion of Advocate General Darmon in that case (EU:C:1987:232, point 18). See also judgment in *Pêcheurs de l’étang de Berre* (C-213/03, EU:C:2004:46, paragraph 39).

60. However, as EU law currently stands, it appears difficult to claim that there is only one single uniform approach as regards reviewing the legality of secondary law in the light of instruments of treaty law. The related case-law is no longer a consolidated block, but — on the contrary — is rather marked by a certain degree of diversity which sometimes borders on inconsistency.

61. First of all, as regards the actual recognition of the direct effect of provisions of an international agreement, the European Union judicature manifestly demonstrates flexibility with regard to the possibility of relying directly on agreements with third States, in particular association agreements. [69] That approach allows individuals to invoke the provisions at issue before the courts, since an international convention is capable of directly affecting their situation. [70] By contrast, as I have already pointed out, in the specific areas of the WTO agreements and the TRIPS and TBT agreements, which are characterised by their own specific nature and broad logic, the provisions of those agreements are not among the rules in the light of which the Court may review the legality of measures adopted by the Community institutions. [71]

62. The abovementioned 'traditional' approach must come to terms with the reality of the increased diversity between the agreements to which the European Union is party, which gives rise to a diversity in the effects that those agreements produce in EU law. Indeed, it is common ground that a trade cooperation agreement cannot produce within the internal order effects comparable to a multilateral convention which creates a body of rules of general scope including ambitious 'political' objectives, which is often the case in particular in the areas of environmental protection and transport law. [72] In addition, association and partnership agreements are of a substantially specific nature where they establish an approximation between the principles of the fundamental freedoms. [73]

63. With regard to the review of legality, although it is true that, in certain cases, the Court carries out a review in the light of provisions of treaty law without, however, providing a detailed statement of reasons as in the case of *IATA and ELFAA*, [74] in other cases the Court adopts a stricter position, as in the case of the approach adopted in *Intertanko and Others*.

64. In the Opinion delivered in that case, Advocate General Kokott took the view that the Convention on the Law of the Sea could constitute a 'criterion of review' with a view to assessing the legality of acts of secondary law. [75] The Court did not, however, follow the line of reasoning proposed by its advocate general, choosing to rely on the lack of rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States. [76]

69 — ? See judgment in *Demirel* (EU:C:1987:400, paragraph 14). With regard to association agreements, see judgments in *Pokrzeptowicz-Meyer* (Case C-162/00, EU:C:2002:57); *Deutscher Handballbund* (Case C-438/00, EU:C:2003:255) and *Simutenkov* (Case C-265/03, EU:C:2005:213), in which the Court referred to the principle of non-discrimination to substantiate the possibility of relying on a provision of a convention. See also the commentary by Jacobs, F., '*The Internal Legal Effects of EU's agreements*', in *A constitutional order of States? Essays in EU law in honour of A. Dashwood*, p. 535. See also *Toprak and Oguz* (C-300/09 and C-301/09, EU:C:2010:756).

70 — ? See, a contrario, judgment in *Ioannis Katsivardas — Nikolaos Tsitskas* (C-160/09, EU:C:2010:293, paragraph 45).

71 — ? Judgments in *Portugal* v *Council* (EU:C:1999:574, paragraph 47); '*Biotech*' (EU:C:2001:523, paragraph 52); and *Dior and Others* (EU:C:2000:688, paragraph 43). See also judgment in *OGT Fruchthandelsgesellschaft* (C-307/99, EU:C:2001:228, paragraph 24), and *Van Parys* (EU:C:2005:121, paragraph 39).

72 — ? For example, the WTO agreement, the United Nations Convention on the Law of the Sea, the Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997, and the 'Open Skies' air transport agreement between the EC and the United States.

73 — ? See the EEC-Turkey agreements (for example, judgment in *Cetinkaya* (C-467/02, EU:C:2004:708), the EEC-Morocco Association Agreement (judgment in *Kziber*, C-18/90, EU:C:1991:36), the European pre-accession agreements (for example, those concluded with Poland and the Czech Republic, see judgment in *Jany and Others* (C-268/99, EU:C:2001:616). With regard to the agreements concluded between the European Community and its Member States and the Swiss Confederation, see judgment in *Ettwein* (C-425/11; EU:C:2013:121).

74 — ? EU:C:2006:10, paragraph 39.

75 — ? *Intertanko and Others* (EU:C:2007:689, point 59).

76 — ? Judgment in *Intertanko and Others* (EU:C:2008:213, paragraph 64). Furthermore, it should be noted, in relation to that case, that the individuals were not seeking to claim rights in their own interest, but in fact seeking an examination of the compatibility of the EU legislation with the Union's international obligations.

65. The solution thus adopted in *Intertanko and Others* raised questions because it marks a break as compared with an earlier judgment, that given in *Poulsen and Diva Navigation*,[77] in which the Court had afforded individuals the right to refer to the same Convention on the Law of the Sea as the expression of customary international law.[78]

66. The Court provided a number of clarifications regarding the possibility of relying on customary international law in *Air Transport Association of America and Others*, in which it held that '[t]he principles of customary international law … may be relied upon by an individual for the purpose of the Court's examination of the validity of an act of the European Union in so far as, first, those principles are capable of calling into question the competence of the European Union to adopt that act …[79] and, second, the act in question is liable to affect rights which the individual derives from EU law or to create obligations under EU law in his regard'.[80]

67. Finally, the case which departs most markedly from the 'traditional' approach set out above is, quite clearly, that which gave rise to '*Biotech*' (EU:C:2001:523).[81] Indeed, the Court took the view that the fact that an international agreement 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, does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement.[82]

68. Such a view appears to me to be decisive in the present cases.

69. Furthermore, it is important to note the tension which exists between the refusal to recognise the possibility of relying directly on Article 9(3) of the Aarhus Convention, justified by the need to adopt implementing measures, and the will to guarantee effective judicial protection compatible with the requirements of the convention, as expressed in *Lesoochranárske zoskupenie*.[83] The Court thus pointed out that the provisions of that convention, 'although drafted in broad terms, are intended to ensure effective environmental protection'. It therefore required the national courts to interpret national law in a way in which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the convention.[84] In addition, it is indisputable that, as an institution, the Court is also obliged to comply with the Aarhus Convention.[85]

77 — ? C-286/90, EU:C:1992:453.

78 — ? Wenneras, '*Towards Ever Greener Union*', CMLR 45, 2008, 1679. Whereas in *Intertanko and Others* the Court refused to conduct a review of legality by reference to the Convention on the Law of the Sea, it did, in a judgment relating to a failure to fulfil obligations, agree to examine the compatibility of the legislation of a Member State with that same convention (*Commission* v *Ireland*, '*MOX Plant*', C-459/03, EU:C:2006:345, paragraph 121).

79 — ? The Court refers here to the judgments in *Ahlström Osakeyhtiö and Others* v *Commission* (89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, paragraphs 14 to 18), and *Mondiet* (C-405/92, EU:C:1993:906, paragraphs 11 to 16).

80 — ? The Court adds, furthermore, that 'since a principle of customary international law does not have the same degree of precision as a provision of an international agreement, judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles'.

81 — ? However, Eeckhout, P. notes 'enigmatic statements' in that judgment, CMLR 46, 2009, p. 2052.

82 — ? Judgment in '*Biotech*' (EU:C:2001:523, paragraph 54). It should be pointed out that the Court did, however, refer to the judgment in *Racke* with regard to customary international law (EU:C:1998:293, paragraphs 45, 47 and 51).

83 — ? EU:C:2011:125, paragraph 46.

84 — ? Ibid., paragraph 51.

85 — ? It has, however, been observed that that approach could be justified by the fact that that convention was concluded by the Community and all its Member States as a matter of shared competence, the Aarhus Convention being a mixed agreement. See, in particular, Neframi, E., '*Mixed Agreements as a source of European Union Law*', p. 335.

2. Modification of the conditions required for the purposes of the possibility of direct reliance

70. I would point out that, in accordance with settled case-law,[86] the Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. The concept of a 'community based on the rule of law' is two-fold: first of all, it has a normative dimension which entails an obligation to comply with the Treaty; secondly, it has a legal dimension which requires that individuals enjoy judicial protection against illegal acts of secondary law.[87]

71. In addition, it increasingly often appears difficult for the Court to guarantee observance of the international obligations incumbent on the European Union whilst also preserving the autonomy of EU law, quite particularly in international law relating to the environment.[88] Environmental law is, in fact, one example of an area in which the law is being drawn up and applied in an increasing number of locations, which necessarily entails instances of the interaction, internationalisation and even globalisation of that law.[89] This multi-layered legal context requires, in my view, the adoption of a nuanced approach.

72. It is true that the principle of direct effect is a principle which allows a national court to apply a rule of international law as the independent basis for its decision where that rule is not transposed into national law or is inadequately so transposed.[90] Under EU law, the theory of direct effect, as applied to the relationships between EU law and the legal order of the Member States, is limited to provisions which satisfy the *requirement of exhaustiveness*.[91] It is established that the concept of direct effect is therefore specific to the position of an individual in the national legal context who wishes to rely on EU law, including the international conventions binding upon the European Union. However, at the current stage of development of EU law, the theory of direct effect, which has been regarded as an 'infant disease' of EU law,[92] is no longer intended to protect its autonomy internationally.

73. Furthermore, in the light of the case-law set out above, the theory of direct effect is not a universal and mandatory principle in the context of the review by the European Union judicature of the acts of the institutions of the European Union.

74. Moreover, in the context of the present appeals, it is important to observe that the automatic and unreserved application of the case-law resulting from *Intertanko and Others* in conjunction with *Lesoochranárske zoskupenie* would result in the Court ruling out any judicial review of compliance with the European Union's commitments under Article 9(3) of the Aarhus Convention *both by the national courts and by the European Union judicature*. Consequently, the concept of judicial protection within the European Union legal order, understood in the broad sense as covering not only the direct legal remedies but also the preliminary ruling mechanism, risks being substantially affected by such an application of that case-law.

86 — ? Judgment in *Les Verts* v *Parliament* (294/83, EU:C:1986:166, paragraph 23).

87 — ? See Simon, D., '*La Communauté de droit*', in Sudre, F. & Labayle, H., '*Réalité et perspectives du droit communautaire*', 2000, p. 85.

88 — ? See, in this regard, judgments in *Pêcheurs de l'étang de Berre* (EU:C:2004:464, paragraphs 42 to 52); *Commission* v *France* (EU:C:2004:598, paragraph 29); *Commission* v *Ireland* (EU:C:2006:345); *Intertanko and Others* (EU:C:2008:312); and *Lesoochranárske zoskupenie* (EU:C:2011:125).

89 — ? I do not dispute that other areas are marked by a similar phenomenon of law being drawn up at several levels, such as — for example — the rules governing efforts to combat money laundering, trade policy, air transport etc.

90 — ? Betlem, G. & Nollkaemper, A., '*Giving Effect to Public International Law and European Community Law before Domestic Courts*', EJIL 2003, Vol. 14, No 3, pp. 569 to 589.

91 — ? See, to that effect, the Opinion of Advocate General Trabucchi in *Defrenne* v *Sabena* ('*Defrenne II*') (43/75, EU:C:1976:39).

92 — ? Pescatore, P., '*The Doctrine of "Direct Effect": An Infant Disease of Community Law*', ELR (1983) 8, p. 155.

75. Having regard to all the foregoing considerations, it therefore appears legitimate to ask how to develop the condition of direct effect for the purposes of the possibility of relying directly on the provisions of conventions.

76. In the light of the line of reasoning followed by the Court in *Air Transport Association of America and Others*, the possibility of relying directly on an act of international law requires, first of all, that that act be examined through the prism of its nature, its broad logic and its objectives, provided that it has been established that the European Union is indeed bound by the act in question. With regard, secondly, to a particular provision of a convention which is capable of serving as a reference criterion for the review of the legality of secondary EU law, great importance must be attached to the characteristics of that law.

77. I am of the view that a clear distinction should be drawn, conceptually speaking, between the situation in which an individual wishes to invoke an act of international law directly by relying on a right laid down in that law for his benefit and that of the review of the discretion enjoyed by the institutions of the European Union during the process of alignment [93] of an act of EU law with an act of international law. It is usually the intention of the privileged stakeholders to initiate such a review before the courts of the European Union, but in the context of the Aarhus Convention that possibility was also afforded to environmental protection organisations satisfying the criteria laid down in this regard.

78. In order to avoid creating an area free from any judicial review, it appears to me to be legitimate to submit that, in the context of the review of the conformity of an act of EU law with international law, the lack of direct effect of a provision — understood to be an exhaustive rule and a source of law — should not preclude an examination of legality, provided that the characteristics of the convention in question do not preclude this.

79. By contrast, a provision of international law which is capable of serving as a reference criterion for the purposes of the review of legality must necessarily include sufficiently clear, intelligible and precise elements. Nevertheless, it is important to point out that such a provision may be mixed in nature. If it is possible to isolate parts of the content of that provision which satisfy that requirement, it must be possible to conduct the review of legality.

80. Indeed, whilst affording the contracting parties significant discretion in certain regards, a provision of international law may contain, at the same time, precise and unconditional rules. [94] I note that such mixed provisions are common in environmental law.

81. Moreover, the modification of the conditions governing the possibility of reliance on certain provisions which I advocate does not contradict the view expressed by the Court that, in the case of provisions which do not have direct effect, such as the WTO agreements, the privileged applicants likewise cannot request a review of legality under Article 263 TFEU. On the contrary, I am of the view that the approach adopted in the judgment in *Germany* v *Council*, [95] and subsequently confirmed

93 — ? The term is borrowed from *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09; EU:C:2011:289, paragraph 41): 'as is stated in recital 5 to Directive 2003/35 [–] EU law should be "properly aligned"' with the Aarhus Convention.

94 — ? See, for instance, the analysis of such a provision in EU law in the judgment in *Bund für Umwelt und Naturschutz, Landesverband Nordrhein-Westfalen*, EU:C:2011:289, paragraphs 55 to 59.

95 — ? EU:C:1994:367, paragraph 109.

in the judgment in *Portugal* v *Council*, EU:C:1999:574, duly reflects the idea that it is above all the particular characteristics of the international agreement in question which either justify the possibility of an individual relying directly on provisions of that agreement and the Court conducting a review of legality or, on the contrary, preclude this. [96]

82. Furthermore, the need to establish, in the case-law of the Court, a distinction between the issue of the possibility of relying directly on a provision of an agreement and the possibility of reviewing the validity of a provision of secondary law in the light of international law has been raised in numerous analyses in legal literature [97] and pointed out by various advocates general. [98] It has thus been submitted, quite rightly, that the theory of the possibility of direct reliance should be reworked independently. [99]

83. More specifically, some authors have argued that the question of whether an international agreement confers rights on individuals was irrelevant for the purposes of assessing whether a provision in question is among the rules to which the Court refers in order to review the legality of acts of EU law. [100]

84. It is therefore necessary to examine whether Article 9(3) of the Aarhus Convention satisfies the conditions thus imposed in order for it to be relied upon.

B – *Article 9(3) of the Aarhus Convention as a rule which must be referred to for the purposes of the review of legality*

85. It must be pointed out, first of all, that the Aarhus Convention, which is regarded as a 'pillar of environmental democracy', [101] was signed by the Community and then approved by Decision 2005/370. As a mixed agreement concluded by both the European Union and its Member States, the convention now forms an integral part of the legal order of the European Union. [102] The European Union is therefore bound by that convention, as are all its legislative, executive and judicial institutions.

96 — ? In the context of the review of legality, regard should be had to the relevance of the admissibility of the plea of illegality allowed by the General Court. The present dispute was in fact brought before the Court following a plea of illegality raised against the Aarhus Regulation. In accordance with case-law, Article 227 TFEU gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if that party was not entitled to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void (see judgment in *Simmenthal* v *Commission*, 92/78, EU:C:1979:53). The possibility of invoking the plea of illegality thus presupposes the admissibility of the action in respect of which it is raised (*Ripa di Meana and Others* v *Parliament*, T-83/99 to T–85/99, EU:T:2000:244, paragraph 35). It follows that recourse to a plea of illegality must therefore be open to the parties to the proceedings against acts which they cannot challenge directly by way of an action for annulment (*Kik* v *OHIM*, T-120/99, EU:T:2001:189).

97 — ? See, *ex multis*, Manin, P., '*A propos de l'accord instituant l'OMC*', RTDE 1997; Klabbers, J., op. cit.; Lenaerts, K. and Corthauts, T., '*On birds and hedges*', E.L. Rev. 2006, 31(3), pp. 287-315, paragraph 298; Pavoni, R., '*Controversial aspects of the interaction between international and EU law in environmental matters: direct effects and Member States' unilateral measures*', in The EU External Environmental Policy of the European Union, Cambridge University Press 2012, pp. 347-377. Furthermore, certain commentators have proposed reversing the order of the reasoning followed by the Court, which first of all analyses the provision with a view to ascertaining whether it satisfies the criterion of direct effect (clear, precise and unconditional nature) before then going on to analyse the agreement itself. See Jacobs, F., '*The Internal Legal Effects …*', op. cit., p. 532.

98 — ? Advocate General Gulmann drew that distinction, whilst also submitting that adoption of the monist approach, under which international agreements form an integral part of EU law, does not mean as a result that those agreements may constitute a parameter for the examination of the legality of acts of EU law. In his view, '[i]t is possible that an agreement may be invoked in the context of an application under Article 173 of the Treaty in spite of the fact that it does not have direct effect. But the position may also be that the reasons leading to the finding that the agreement does not have direct effect are of such a nature as in addition to prevent the agreement from forming part of the legal basis for the Court's review of legality'. See, to that effect, the Opinion in *Germany* v *Council* (EU:C:1994:235, point 137).

99 — ? See Manin, P., op. cit.

100 — ? Lenaerts, K. and Corthauts, T., '*On birds …*', op. cit., paragraph 299: 'the invoked articles need to be unconditional and sufficiently precise, but only to the extent that they must be apt to serve as a yardstick for review, not in the sense that they confer rights on individuals as required in cases involving direct effect'.

101 — ? Prieur, M., '*La convention d'Aarhus, instrument universel de la démocratie environnementale*', RJE, 1999, p. 9, cited by Guiorguieff, J., '*Les règles de recevabilité concernant les actions des particuliers et la convention d'Aarhus*', R.A.E., 2012/3, p. 629.

102 — ? Judgments in *Lesoochranárske zoskupenie* (EU:C:2011:125), paragraph 31, and *Haegeman* (EU:C:1974:41). See also inter alia, by analogy, judgments in *IATA and ELFAA* (EU:C:2006:10, paragraph 36), and *Commission* v *Ireland* (EU:C:2006:345, paragraph 82).

86. The Court has already confirmed its jurisdiction to interpret the provisions of the Aarhus Convention [103] and has given, in that regard, a significant number of judgments in the context of questions referred for a preliminary ruling concerning its interpretation and infringement proceedings. [104]

87. In addition to affording three procedural rights relating to the environment, [105] the Aarhus Convention also lays down requirements. Thus, it provides that it is the duty of every person 'to protect and improve the environment for the benefit of present and future generations'. Since it confers rights relating to objectives of environmental protection, the Aarhus Convention is, by its nature, a procedural instrument. Indeed, the protection of the environment is possible only if the persons concerned have at their disposal genuine policy instruments in the very broad field covered by the convention. The Aarhus Convention is therefore a source of 'rights of civic participation', taking the form of a codification of procedural rights in relation to the environment.

88. Unlike, for example, the WTO Agreement, the Aarhus Convention is not therefore based on reciprocal and mutually advantageous arrangements. [106]

89. On the contrary, the Aarhus Convention serves to enable public authorities and citizens to assume their individual and collective responsibility to protect and improve the environment for the welfare and well-being of present and future generations. [107] It is not a technical example of an agreement in the field of the environment, but in fact the expression of a human right to the environment in its most solemn form. Accordingly, there can be little doubt that, amongst the provisions which it contains, some will not be immediately applicable or 'self-executing'. That fact explains the importance of the national provisions adopted in order to guarantee that such international rules are effective in internal law and, consequently, the need for a review of the legality of those provisions.

90. With regard, more specifically, to Article 9(3) of the Aarhus Convention, that provision lays down a possibility of challenging the infringement of provisions of national law relating to the environment.

91. It is true that, in *Lesoochranárske zoskupenie*, the Court held that the provisions of that article 'do not contain any clear and precise obligation capable of directly regulating the legal position of individuals'. [108] From that perspective, that provision is clearly subject to the adoption of a subsequent act and individuals cannot rely on it. Indeed, Article 9(3) of the Aarhus Convention affords the contracting parties the possibility of defining the criteria governing whether members of the public may be granted the right to bring legal proceedings.

92. However, Article 9(3) appears to me to be a 'mixed provision', since it also contains an obligation on the part of the contracting parties to ensure that there is a clearly identifiable outcome.

103 — ? See judgment in *Lesoochranárske zoskupenie* (EU:C:2011:125, paragraph 30), in which the Court refers, inter alia, to the judgments in *Haegeman* EU:C:1974:41, paragraphs 4 to 6, and *Demirel* (EU:C:1987:400, paragraph 7).

104 — ? See judgments in *Boxus and Others* (C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667); *Križan and Others* (C-416/10, EU:C:2013:8); *Edwards and Pallikaropoulos* (C–260/11, EU:C:2013:221); *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (EU:C:2011:289); *Lesoochranárske zoskupenie* (EU:C:2011:125); and Opinion of 12 September 2013 in *Commission* v *United Kingdom* (C-530/11, still pending before the Court).

105 — ? Economic Commission for Europe, '*The Aarhus Convention: An Implementation Guide*', 2nd edition, 2013, p. 6; Beyerlin, U., and Grote Stoutenberg, J., '*Environment, International Protection*', under the direction of Wolfrum, R., *Max Planck Encyclopedia of Public International Law*, paragraph 73.

106 — ? See, for an application of this criterion, judgment in '*Biotech*' (EU:C:2001:523, paragraphs 51 to 53).

107 — ? European Parliament resolution on the EU strategy for the Almaty Conference on the Aarhus Convention, P6_TA(2005)0176.

108 — ? EU:C:2011:125, paragraph 45.

93. The Court itself has found that '[the provisions of Article 9(3)], although drafted in broad terms, are intended to ensure effective environmental protection'.[109] In Article 9 of the Aarhus Convention, that protection takes the form of the introduction of detailed procedural rules applicable to actions intended to safeguard the 'rights of civic participation' arising from the convention itself. Furthermore, Article 9(3) of the Aarhus Convention must be read in conjunction with Article 1 of that convention, which imposes on each contracting party an obligation to guarantee the rights of access to justice in environmental matters.

94. In any event, the mixed nature of the rule laid down in Article 9(3) of the Aarhus Convention is expressed, nationally, by the discretion afforded to the legislature to determine certain criteria which must be satisfied by an organisation in order for it to challenge an infringement of environmental law. Nevertheless, it seems to me to be beyond doubt that *the obligation to guarantee access to justice is sufficiently clear to preclude a rule which would have the object or the effect of removing certain categories of non-legislative decisions taken by public authorities from the scope of the review to be conducted by the national courts.*

95. I take the view that, having regard to its objective and its broad logic, Article 9(3) is therefore, in part, a sufficiently clear rule which is capable of serving as the basis of a review of legality with regard to the access to justice of organisations which have the standing to bring legal proceedings under national legislation or even under EU legislation. Accordingly, Article 9(3) of the Aarhus Convention may be used as a reference criterion for the purposes of assessing the legality of acts of the institutions of the European Union.

VI – **Analysis in the alternative in relation to the review of legality**

A – *Preliminary remarks*

96. Both in the event of the case being referred back to the General Court and in the event of the Court finding that is able to give judgment on the merits, it appears to me to be essential, in the alternative, to make certain observations relating to the examination of the legality of the Aarhus Regulation in the light of the Aarhus Convention.

97. In that connection, it should be made clear that the present series of cases is not concerned with the general conditions governing access to justice for the purposes of Article 263 TFEU within the field of environmental law, rather its purpose is to analyse whether the EU legislature correctly *supplemented* the legal remedies having regard to the requirements of the Aarhus Convention, by restricting the concept of 'acts' and, more specifically, whether, in that context, it was able to circumvent the access to justice required in respect of non-legislative acts of general application adopted by the institutions of the European Union. Indeed, as is clear from the *travaux préparatoires* for the Aarhus Regulation, by signing the Aarhus Convention the European Community committed to aligning its legislation to the requirements of the convention in matters relating to access to justice.

B – *Arguments advanced by the Commission in the context of the second ground of appeal*

98. In its appeal, the Commission puts forward a second ground of appeal, alleging that the General Court erred in law in its interpretation of Article 9(3) of the Aarhus Convention. It claims that that provision offers an alternative to the contracting parties in that it requires them to guarantee access to administrative *or* judicial review procedures. Thus, the General Court ought at least to have examined whether the applicants were able to avail themselves of a judicial procedure to challenge the

109 — ? Ibid., paragraph 46.

act of individual scope in question, whether in the Netherlands or within the framework of the European Union, before finding Article 10(1) of the Aarhus Regulation to be incompatible with Article 9(3) of the convention. The Commission points out that, pursuant to Article 33 of Directive 2008/50, the Kingdom of the Netherlands transposed the temporary derogation from the requirements of that directive by means of a decree of 19 August 2009.[110] In the view of the Commission, the environmental protection organisations therefore had the opportunity to bring an action before the national courts against the transposition measures. An examination of the validity of the derogation decision could have formed the subject-matter of a question referred for a preliminary ruling.

99. In any event, in the Commission's opinion, Article 10(1) of the Aarhus Regulation does not appear to be the only provision which implements Article 9(3) of the Aarhus Convention. In its view, the fact that that article of the regulation limits the review procedure to acts of individual scope proves that the EU legislature took the view that, in the case of acts of general scope, judicial means are sufficient in order to comply with the requirements of Article 9(3) of the Aarhus Convention.

C – *The existence of a review of infringements of environmental law within the framework of the Aarhus Convention*

100. In accordance with settled case-law, an international agreement must be interpreted by reference to the terms in which it is worded and in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the Law of Treaties and Article 31 of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organisations or between International Organisations, which express general customary international law on the matter, state that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.[111]

101. It is clear from the preamble to the Aarhus Convention that, having regard to the need to protect, preserve and improve the state of the environment, the contracting parties recognised the importance of access to justice in environmental matters for citizens, and acknowledged in this regard that citizens may need assistance in order to exercise their rights. It is also clear from that same preamble that the parties shared a desire that the public, including organisations, have access to effective judicial mechanisms so that its legitimate interests are protected.[112] It is therefore in the light of those objectives that the scope that the authors of the Aarhus Convention intended to confer on the provisions of Article 9(3) of the convention must be assessed.

102. Access to justice is provided for in Article 9 in relation to the three situations identified in paragraph 1 (action relating to access to information), paragraph 2 (action against any decision relating to particular activities concerning the environment) and paragraph 3 (access to administrative or judicial procedures to challenge acts or omissions by private persons and public authorities[113] which contravene provisions of environmental law). More generally, I would like to point to the particular role played by Article 9 of the Aarhus Convention, inasmuch as it constitutes, on the one hand, a guarantee of rights to information and of participation in the decision-making process conferred by the convention and national law and, on the other hand, an objective means of protection provided by a legal order.[114]

110 — ? Decree entitled 'Besluit derogatie (luchtkwaliteitseisen)', published in Staatsblad, 2009, No 366.

111 — ? See *IATA and ELFAA* (EU:C:2006:10, paragraph 40 and the case-law cited).

112 — ? See recitals 8 and 18 in the preamble to the Aarhus Convention.

113 — ? With the exception of acts adopted in the context of legislative or judicial activities, see my parallel Opinion in *Council and Commission* v *Stichting Natuur en Milieu and Pesticide Action Network Europe* (C-404/12 P and C-405/12 P).

114 — ? Stec, S., and Casey-Lefkowitz, S., '*The Aarhus Convention: An Implementation Guide*', pp. 23 to 25.

103. With regard to the scope *ratione personae* of Article 9(3) of the Aarhus Convention, it should be observed that, on the basis of that provision, it is possible to establish in internal law the specific criteria which members of the public authorised to challenge infringements of environmental law must meet. It is therefore clear that it is having regard to the standing of those persons that the parties to the convention may exercise the discretion afforded to them. Accordingly, it appears to be justified to state that Article 9(3) does not intend to establish an *actio popularis* in environmental law. [115]

104. By contrast, with regard to the scope *ratione materiae* of Article 9(3) of the convention, I would point out that that provision must be interpreted in the light of the abovementioned objectives of seeking to guarantee effective mechanisms in order to protect public interests. [116]

105. Furthermore, Article 9(3) should be read in conjunction with the applicable requirements under paragraphs 4 and 5 of that same provision. In accordance with those paragraphs, the procedures must provide adequate and effective remedies; they must be fair, equitable and timely and not prohibitively expensive. The requirement to provide information to the public is clear from Article 9(5) of the convention.

106. The contracting parties are therefore obliged to adopt a mechanism which is above all effective, and not simply to make a choice between different types of procedure. Thus, the view should be taken that the signatories to the convention enjoy a degree of discretion as regards the procedures to be introduced, but that the obligation to introduce administrative or judicial remedies must be performed in accordance with the requirements of the convention in order to guarantee the possibility of challenging infringements of environmental law as provided for in Article 9(3) of the convention. *It follows that the implementation of that obligation must be assessed in the light of the requirement of effective access to justice*. That interpretation is likewise supported by the title of Article 9 of the Aarhus Convention: '*Access to justice*'.

107. This leads me to the key concept laid down in Article 9(3) of the Aarhus Convention, namely the concept of an act which is open to review.

108. It is true that that term is not defined in the convention. Nor on the basis of a literal interpretation of Article 9(3) of the convention may the view be taken that that concept comes under the discretion afforded to the contracting parties. In addition, that same provision does not even require that the acts in question are of a legally binding nature. Legal commentators therefore agree that that provision covers any situation in which provisions of national [117] law relating to the environment are infringed. [118]

109. The prima facie extremely broad scope of Article 9(3) of the Aarhus Convention, *a fortiori* as compared with the scope of paragraphs 1 and 2 of the same article, may, however, be narrowed. Indeed, the scope *ratione materiae* of Article 9(3) of the convention is delimited by the second subparagraph of Article 2(2) of the convention, which provides that the convention does not apply to acts of a legislative nature. Pursuant to the latter provision, the concept of a 'public authority' whose acts — where they contravene environmental law — are open to challenge excludes institutions acting in a judicial or legislative capacity.

110. It is therefore clear that the parties signatories to the Aarhus Convention intended to include within the scope of that convention exclusively non-legislative measures.

115 — ? See Andrusevich, K., *Case Law of the Aarhus Convention*, 2004-2011, p. 80.

116 — ? Article 9(3) must be read in the light of the preamble and other provisions such as Articles 1 and 3 of the convention. In accordance with the will of the parties, the public, including organisations, should enjoy a right of access to effective mechanisms so that it may protect its legitimate interests (see recital 18 in the preamble).

117 — ? For this purpose, EU law is treated as national law. See Communication ACCC/C/2008/32, paragraph 76.

118 — ? Larssen, C., and Jadot, B., '*La convention d'Aarhus*', [in] '*L'accès à la justice en matière d'environnement*', Bruylant 2005, p. 219.

111. In other words, with the exception of acts falling with the scope of legislation, all other types of act adopted by private persons and public authorities, whether acts of general scope or of individual scope, are covered by Article 9(3) of the convention.

112. That view is also confirmed by other factors.

113. First of all, it must be observed that the Court's interpretation of the concept of a 'legislative act' in the context of the implementation of the Aarhus Convention is intended to preserve the effectiveness of Article 9 of the Aarhus Convention. [119] The Court interprets the various provisions of EU law in the light of and taking account of the objectives of the Aarhus Convention, to which the EU legislation must be 'properly aligned'. [120] That approach is essential in order for the Aarhus Regulation to be interpreted in the light of the convention.

114. Reference should also be made to the position adopted by the Aarhus Convention Compliance Committee, namely that the contracting parties are unable to introduce or maintain so strict criteria that they effectively bar non-governmental organisations from challenging acts or omissions that contravene national provisions relating to environmental protection. [121] That position is clearly in line with the position adopted by the Court in its case-law cited above. [122] Furthermore, the committee has expressed doubts as to the European Union's compliance with the conditions laid down in Article 9(3) of the convention. [123]

115. Finally, although — in accordance with case-law — the Aarhus Convention Implementation Guide has no binding force, [124] that guide may nevertheless be used as a point of reference when interpreting the relevant provisions of the convention. [125] In a judgment recently given in *Fish Legal and Shirley* [126], the Court even referred systematically to that guide when interpreting Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [127]in the light of the Aarhus Convention. In addition, the guide gives reasons for and recommends a broad interpretation of the conditions governing access to justice in accordance with the wording and the spirit of the Aarhus Convention. Indeed, with regard to acts which are open to review, the guide makes clear that members of the public have the right to challenge violations of national law relating to the

119 — ? Judgment in *Boxus and Others* (EU:C:2011:667, paragraph 53).

120 — ? See, with regard to recital 5 of Directive 2003/35 of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17), judgments in *Edwards and Pallikaropoulos* (EU:C:2013:221, paragraph 26), and *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (EU:C:2011:289, paragraph 41). With regard to the transposition of the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L 175, p. 40) to the interpretation of Article 2(2) of the Convention, see judgment in *Solvay and Others* (C-182/10, EU:C:2012:82, paragraph 42).

121 — ? Aarhus Convention Compliance Committee, 14 June 2005, Communication ACCC/C/2005/11 (Belgium).

122 — ? See judgment in *Boxus and Others* (EU:C:2011:667).

123 — ? Communication ACCC/C/2008/32 (EU), (http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/DRF/C32Findings 27April2011.pdf, paragraph 88).

124 — ? Judgment in *Solvay and Others* (EU:C:2012:82, paragraph 28).

125 — ? See judgment in *Edwards and Pallikaropoulos* (EU:C:2013:221, paragraph 34): 'although the document published in 2000 by the United Nations Economic Commission for Europe, entitled "The Aarhus Convention, an implementation guide", cannot offer a binding interpretation of that Convention, it may be noted that, according to that document, the cost of bringing a challenge under the Convention or to enforce national environmental law must not be so expensive as to prevent the public from seeking review in appropriate cases'.

126 — ? C-279/12, EU:C:2013:853.

127 — OJ 2003 L 41, p. 26.

environment, 'whether or not these are related to the information and public participation rights guaranteed by the Convention'.[128] It is also clear from the guide that the review provided for in Article 9(3) of the Aarhus Convention[129] is based on the idea of 'citizen enforcement' both directly and indirectly.[130]

D – *The scope of the review of violations of environmental law under the Aarhus Regulation*

116. When interpreting a provision of EU law, account should be taken not only of the wording of that provision and the objectives which it pursues, but also of its context and provisions of Community law as a whole.[131]

117. First of all, with a view to assessing the implementation of the specific obligations under the Aarhus Convention in EU law, it should be borne in mind that the effects of the Convention, a mixed convention, were clearly set out in the declaration by the European Community annexed to Decision 2005/370. It is clear from that declaration that at the time the convention was signed the legal instruments in force were not sufficient to ensure the implementation in full of the obligations resulting from Article 9(3) of the Aarhus Convention, as they related to procedures to challenge acts and omissions by private persons and public authorities *other* than the institutions referred to in the second subparagraph of Article 2(2) of the convention. Accordingly, the Member States remained responsible for the performance of those obligations until the adoption by the Community of provisions to ensure the implementation of the said obligations.

118. In addition, as I have already pointed out, it is clear from the legislative work preceding the adoption of the Aarhus Regulation that the purpose of that regulation was to *align* Community law to the provisions of the convention.[132] It is true that the application of the convention entailed, at EU level, the adoption of other acts of secondary law.[133] However, whilst contributing to the pursuit of the objectives of environmental protection policy, the Aarhus Regulation has endeavoured, primarily, to supplement particular aspects relating to access to justice within a pre-established Community system by means of Articles 9 to 13 of the Aarhus Regulation.[134] This appears all the more important since the draft directive on access to justice has still not come into force as EU law.[135]

128 — ? http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf, p. 131: 'The provision potentially covers a wide range of administrative and judicial procedures, including the "citizen enforcement" concept, in which members of the public are given standing to directly enforce environmental law in court. The obligation can also be met, for example, by providing for the opportunity to initiate an administrative procedure. Regardless of the particular mechanism, the Convention makes it abundantly clear that it is not only the province of environmental authorities and public prosecutors to enforce environmental law, but that the public also has a role to play.'

129 — ? http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf, p. 125: 'Provides review procedures for public review of acts and omissions of private persons or public authorities concerning national law relating to the environment.'

130 — ? http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf, p. 130.

131 — ? See, to that effect, *CILFIT and Others* (283/81, EU:C:1982:335, paragraph 20). The background to a provision of EU law may also contain elements relevant to its interpretation (judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 135).

132 — ? COM(2003) 622 final, 2003/0242 COD, p. 17.

133 — ? It is clear from recital 11 in the preamble to Directive 2003/35 that that directive was adopted in order to make EU legislation 'fully compatible with the provisions of the Aarhus Convention, in particular … Article 9(2) … thereof'. See, in addition, the Opinion of Advocate General Kokott in *Commission* v *United Kingdom* (C-530/11, EU:C:2013:554, and the Opinion of Advocate General Cruz Villalón in *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712). Recital 5 of Directive 2003/4 also makes clear that, in adopting that directive, the EU legislature intended to ensure the compatibility of EU law with the Aarhus Convention as regards the right of access to environmental information (see, in that regard, judgment in *Flachglas Torgau*, C-204/09, EU:C:2012:71, paragraph 31).

134 — ? Indeed, as regards access to justice, the applicable provisions were ex Articles 230 EC and 232 EC, which guaranteed access to justice within the EU. However, those provisions did not allow the Community to ratify the Aarhus Convention, as the provisions of that convention are, in part, more detailed or far-reaching than existing EC provisions. See COM(2003) 622 final, 2003/0242 COD, p. 3.

135 — ? The draft directive on access to justice in environmental matters, which seeks to define a series of minimum requirements relating to access to administrative and judicial procedures in environmental matters, thus transposing into EU law and the law of the Member States the third pillar of the Aarhus Convention. See COM(2003) 624 final.

119. Accordingly, a review of the legality of the Aarhus Regulation in the light of the convention of the same name is required, particularly since — as EU law currently stands — the European Union is obliged to fulfil its commitments in full by means of the implementation of the obligations arising from the Aarhus Convention.

120. Under those circumstances, I propose that the line of argument advanced by the Commission alleging the need for a general examination of the system of effective judicial protection in EU law be rejected. It is established that the judicial protection of individuals, within the EU system of litigation, is ensured not only by means of the various direct legal remedies, but also thanks to the preliminary ruling procedure. However, the preliminary ruling procedure cannot remedy or fill gaps arising from a restrictive approach adopted by the EU legislature in the implementation of a provision of a convention to which the European Union is party.

121. Unlike the Commission, I take the view that establishing legal remedies, primarily at national level, against measures 'which contravene provisions of law relating to the environment' would amount to a new transfer to the Member States of a responsibility borne by the European Union. In addition, the European Union cannot require Member States to ensure a particular level of review in order to fill the gaps in secondary law. Indeed, by adopting the Aarhus Regulation, the European Union remains wholly responsible for the performance of the obligations incumbent upon it under the Aarhus Convention.

122. However, I willingly concede that my assessment of the conformity of the implementation of the obligations arising from the Aarhus Convention would have to be different if such implementation were to be effected by means of directives, since that implementation is guaranteed in two stages, namely the adoption of the directives and their transposition into the law of the Member States. [136]

123. Next, as regards the scope of access to justice under the Aarhus Regulation, it should be pointed out that Article 10(1) of the Aarhus Regulation gives expression to that objective by affording qualified entities, namely associations which represent the public, the possibility of making a request for internal review of an act which contravenes law relating to the environment. It is clear from the *travaux préparatoires* that the review was introduced in order not to interfere with the right to access to justice under the Treaty, under which a person may institute proceedings with the Court of Justice against decisions of which it is individually and directly concerned. [137]

124. With reference to the scope *ratione personae*, by establishing a review procedure Article 10 of the Aarhus Regulation facilitated access to justice for non-governmental organisations, since such organisations do not have to have a sufficient interest or to maintain the impairment of a right in order to exercise that right in accordance with Article 263 TFEU. The regulation therefore effectively affords such groups the status of addressees. [138]

136 — ? Report by the Compliance Committee on the Compliance by the European Community with its obligations under the Convention presented to the Third Meeting of the Parties to the Convention (Kazokiskes Report) http://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_10_e.pdf.

137 — ? COM(2003) 622 final, 2003/0242 COD.

138 — ? It is clear from the legislative work preceding the adoption of the Aarhus Regulation that '… the establishment of a right of access to justice in environmental matters for every natural and legal person has not been considered a reasonable option. This would imply an amendment of Articles 230 and 232 of the EC Treaty and could hence not be introduced by secondary legislation. The proposal [therefore made provision] to limit legal standing to the "qualified entities"'. See proposal for a regulation COM(2003) 622 final, p. 17.

125. By contrast, with reference to the scope *ratione materiae*, the scope of the challenges possible by means of the 'review' procedure is defined in the light of Article 10 read in conjunction with Article 2(1)(g) of the Aarhus Regulation as applying to measures 'of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects'. Furthermore, a measure which may be challenged in the context of such a 'review' is defined as excluding, pursuant to Article 2(2) of the Aarhus Regulation, administrative acts adopted by the EU institution or body 'in its capacity as an administrative review body'.

126. I would point out in that regard that, in its original draft, the proposal for a regulation defined the concept of an 'act' as extending to 'any administrative measure taken under environmental law by a Community institution or body having legally binding and external effect'.[139] The concept of 'administrative' acts 'of individual scope' appeared only when the common position was adopted by the Council[140] and was reproduced by the Parliament at the second reading[141] without any related statement of reasons being provided.

127. In the absence of any definition of the concept of an 'administrative act' in other sources of EU law, the definition in the Aarhus Regulation is an ad hoc definition, the scope of which remains difficult to define.[142] Nevertheless, it seems clear to me that the legislature did intend to restrict the scope of the review procedure.

128. It is true that an act is defined in Article 2(g) of the Aarhus Regulation as covering a measure adopted 'under environmental law'. That final condition is therefore viewed broadly as compared with the objectives arising from Article 191 TFEU.[143] It is likewise true that, in accordance with case-law, the general[144] or individual nature of a decision is assessed in the light of its content in order to establish whether its provisions are capable of affecting directly and individually the situation of the persons to whom they apply.[145] In the context of the Aarhus Regulation, that distinction is fundamentally dependent on the interpretation of the concept of 'legislation' within the meaning of the Aarhus Convention, as reproduced in the Aarhus Regulation, the interpretation of which forms the subject-matter of my parallel Opinion in *Council and Commission* v *Stichting Natuur en Milieu and Pesticide Action Network Europe* (C-404/12 P and C-405/12 P).[146]

139 — ? COM(2003) 622 final, p. 28. It should be pointed out that a distinction was drawn from the outset between the issue of the exclusion of acts adopted in the exercise of legislative or judicial powers and that of the exclusion of acts adopted in the capacity of an administrative review body (State aid proceedings, infringement proceedings, Ombudsman proceedings and proceedings before OLAF etc.) (Ibid., p. 11).

140 — ? Common Position of 20 April 2005, 6273/05 (ENV 57, JUSTCIV 24, INF 38, ONU 10, CODEC 81, OC 80).

141 — ? European Parliament Legislative Resolution on the Council common position for adopting a regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (6273/2/2005 — C6-0297/2005 — 2003/0242(COD)). As early as the common position stage, Belgium pointed out an incompatibility with the Aarhus Convention, in that the provisions have the effect of unduly restricting access to the legal remedies for members of the public which the institutions are obliged to guarantee in accordance with the convention. See, in this regard, the Statement by the Kingdom of Belgium: http://register.consilium.europa.eu/pdf/fr/05/st10/st10896-ad01.fr05.pdf.

142 — ? For a more detailed analysis of the implications of the review procedure, see Pallemaerts, M., '*Access to Environmental Justice at EU Level*', [in] '*The Aarhus Convention at Ten, Interactions and Tensions between Conventional International Law and EU Environmental Law*', Europa Law Publishing, 2001.

143 — ? This would involve not only acts adopted on the basis of Article 191 TFEU, but also acts with a dual legal basis (see, inter alia, judgments in *Commission* v *Council*, C-94/03, EU:C:2006:2, and *Commission* v *Parliament and Council*, C-411/06, EU:C:2009:518).

144 — ? As opposed to a measure of general application, which applies to objectively determined situations and produces legal effects with regard to categories of persons described in a generalised and abstract manner (see judgment in *Calpak and Società Emiliana Lavorazione Frutte* v *Commission*, 789 and 790/79, EU:C:1980:159, paragraph 9).

145 — ? Judgment in *Acciaierie Fonderie di Modena* v *High Authority* (55/63 to 59/63 and 61/63 to 63/63, EU:C:1964:37).

146 — ? Opinion delivered jointly on 8 May 2014.

129. It is, however, established that the review procedure [147] applies only to individual decisions which have legal effects capable of affecting the interests of the addressees of those decisions. More specifically, the very limited scope of challenges relating to violations of the law relating to the environment under Article 10 of the Aarhus Regulation was confirmed at the hearing by the Commission, which managed to provide — albeit not without difficulty — one single example of the specific application of the review procedure, namely the authorisation to place a GMO on the market. It must be stated, moreover, that the field of GMOs and the placement on the market of chemicals in accordance with the REACH Regulation [148] appear to be the main area in which the review procedure is actually applied. [149] The Commission's practice thus confirms the restrictive interpretation of the Aarhus Regulation. [150]

130. Finally, it should be pointed out that, under the Aarhus Regulation, actions brought before the Court pursuant to Article 12 of the regulation relate not to the contested administrative act but to the reply sent by the institution or body to which the request for internal review is made. Accordingly, a non-governmental organisation could therefore request an examination of the substance of matter only by means of a plea of illegality, like that at the origin of the present cases.

131. Consequently, it must be held that Article 10 of the Aarhus Regulation does not fully implement the obligations arising under Article 9(3) of the Aarhus Convention. [151]

132. For the reasons previously set out in relation to the interpretation of Article 9(3) of the Aarhus Convention, that finding is not contradicted by the scope of the discretion afforded to the signatories of the Aarhus Convention. Indeed, whilst affording such discretion in relation to the implementation of Article 9 of the Aarhus Convention (and, for example, that of Article 15a of Directive 96/61/EC [152]) [153] the Court has adopted an approach which is highly protective of the effectiveness and objectives of the convention in relation to the implementation obligations incumbent on the Member States. [154] It does not therefore appear to me to be conceivable for a different approach to be adopted with regard to the European Union itself. [155]

147 — ? In relation to procedural aspects, see Commission Decision No 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts (OJ 2008 L 13, p. 24).

148 — ? Article 64 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1).

149 — ? See the procedure provided for in Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (OJ 2003 L 268, p. 1) — Commission's reply of 26 May 2008 published on the website http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20J_E.pdf.

150 — ? For example, the Commission took the view that the request for a review of the decision approving an assistance programme under the European Regional Development Fund, although legally binding, had no external effects because the recipient Member State could decide on the eligible projects (see Commission's reply to Ekologicky Pravni Servis of 6 August 2008, published on the Commission's website: http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20EPS.pdf). On the basis of the same grounds, the Commission rejected as inadmissible a request for a review of the decision drawing up a short list of candidates for the post of Executive Director of the European Chemicals Agency (Commission's reply to Ekologicky Pravni Servis of 6 August 2008, published on the Commission's website: http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20EPS.pdf).

151 — ? As I have already pointed out, the Committee (Aarhus Convention Compliance Committee) has deemed the Aarhus Regulation to be excessively restrictive or even incompatible with the convention: 'The scope of the Aarhus Regulation is far more restrictive than that of the Aarhus Convention, and so the Regulation fails to fully implement the Convention. This causes three specific problems. First, it appears to make it impossible to challenge a whole range of EC institutions and bodies' decisions. Second, it fails to transpose Article 9(2) of the Convention. Third, it incorrectly transposes Article 9(3) of the Convention' (http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Communication.pdf, p. 20).

152 — Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26).

153 — ? Judgment in *Križan and Others* (EU:C:2013:8, paragraph 106).

154 — ? Judgments in *Boxus and Others* (EU:C:2011:667, paragraph 53) and *Deutsche Umwelthilfe* (C-515/11, EU:C:2013:523).

155 — ? See statements accompanying the adoption of the Aarhus Convention. 'Fully supporting the objectives pursued by the Commission and considering that the EC itself is being actively involved in the protection of the environment through a comprehensive and evolving set of legislation, it was felt important not only to sign up to the Convention at the Community level but also to cover its own institutions, alongside national public authorities', declaration reproduced by: Pallemaerts, M., '*Access to Environmental Justice at EU Level*', op. cit., p. 273. See also Council Decision 2005/370.

133. In the light of all the foregoing considerations, it is my view that the General Court was right to conclude in the judgment under appeal that the plea of illegality directed against Article 10 of the Aarhus Regulation in conjunction with Article 2(1)(g) of the regulation must be allowed. If the Court decides to examine this matter, I therefore propose that the Commission's second ground of appeal be rejected.

E – *Additional remarks*

134. Where an international agreement regarded as a source of rights for individuals lacks direct effect, it may be appropriate to refer to the principle of consistent interpretation as a tool capable of giving effect to such an agreement.

135. Indeed, the European Union judicature is itself required to interpret secondary law in a manner consistent with the international agreements binding upon the Community.[156] It is settled case-law that provisions of EU law must be interpreted, as far as is possible, in the light of the wording and purpose of the international agreements to which the European Union is party.[157] In the case of international law, such a 'conciliatory reading'[158] has one limitation, namely that that principle 'applies only where the international agreement at issue prevails over the provision of Community law concerned'.[159] Accordingly, such interpretation would, in principle, be permissible in the present case.

136. However, the consistent interpretation method may be used only where the contested provision is insufficiently clear or where it is open to multiple interpretations having regard to the context, nature or broad logic of the provision or of the basic act of which it is part. In the light of the foregoing observations, this is not the case for Article 10 of the Aarhus Regulation, from which the intention to exclude acts of general scope from the scope of that provision is clear.

137. Moreover, in the same way as the rules applicable to the interpretation of national law, the principle of consistent interpretation is restricted by the general principles of law and the exclusion of any interpretation *contra legem*.[160] However, since — in my view — the scope of the Aarhus Regulation restricts access to justice by means of the excessively restrictive definition of an act covered by the review procedure in the light of the scope of the Aarhus Convention, a consistent interpretation appears to me to be excluded in the present case.

VII – **The cross-appeal**

138. The environmental protection organisations have lodged a cross-appeal in Cases C-401/12 P to C-403/12 P, a cross-appeal which they regard as 'conditional' in nature inasmuch as it has been brought exclusively 'in the event that the Court were not to allow the pleas advanced in the response'. In this context, the organisations rely on a single plea in law, alleging that the General Court wrongly failed to afford direct effect to the concept of 'acts' contained in Article 9(3) of the Aarhus Convention.

156 — ? The principle of consistent interpretation was formulated in the judgment in *Interfood* (EU:C:1998:292). See judgment in *Kupferberg* (EU:C:1982:362, paragraph 14).

157 — ? Judgments in *Hermès* (EU:C:1998:292, paragraph 28); *Safety Hi-Tech* (C-284/95, EU:C:1998:352, paragraph 22); and *Bellio F.lli* (C-286/02, EU:C:2004:212, paragraph 33).

158 — ? Simon, D., '*La panacée de l'interprétation conforme*', p. 284 [in] '*De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins*', Bruylant 2013.

159 — ? Judgment in *Microsoft* v *Commission* (T-201/04, EU:T:2007:289, paragraph 798).

160 — ? Rule laid down, with regard to the interpretation of national law, for example in judgment in *Dominguez* (C-282/10, EU:C:2012:33, paragraph 25).

139. The Council, the Commission and the Parliament agree that such a 'conditional' cross-appeal [161] is inadmissible. In terms of substance, they propose that the arguments advanced by the organisations be rejected as unfounded. In addition, they point out that the organisations are not requesting that the operative part of the judgment under appeal be set aside, but in reality are seeking a new judgment which upholds the judgment under appeal but on different grounds.

140. First of all, I would point out that, in their forms of order sought, the organisations request that 'the judgment under appeal be set aside and that the Commission's decision on inadmissibility likewise be set aside'. By asking the Court to declare that the concept of an act has direct effect, which would allow the validity of the Aarhus Regulation to be examined, it is not the intention of the environmental protection organisations that the judgment under appeal be 'supplemented'. Indeed, if it were to be allowed, the complaint regarding the absence of a declaration of direct effect would result in the line of reasoning adopted by the General Court, which based the examination of legality on the case-law arising from *Fediol* v *Commission* and *Nakajima* v *Council*, being set aside in its entirety. The organisations are therefore calling into question *Lesoochranárske zoskupenie*, without — however — putting forward legal arguments specifically supporting that request. Indeed, it is by no means apparent from the written submissions on which basis the declaration of direct effect could have been made in order for the legality of the Aarhus Regulation to be reviewed.

141. In addition, an appeal that does not contain any arguments aimed at specifically identifying the error of law by which the judgment of the General Court is allegedly vitiated must be deemed to be inadmissible. [162] This is the case for the present cross-appeal, by which the parties in essence claim that the General Court did not rule on one aspect without, however, specifying any error of law resulting from that failure. Such an appeal, even where it is a cross-appeal, is incapable of forming the subject-matter of a legal analysis by which the Court may perform the role falling to it in the area in question and thus carry out its review of legality. [163]

142. I therefore propose that the cross-appeal be dismissed as inadmissible.

VIII – **Conclusion**

143. I propose that the Court should:

— set aside the judgment of the General Court in *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (T-396/09, EU:T:2012:301) in so far as it allowed the second plea in law raised at first instance and conducted the review of legality on the basis of the case-law arising from *Fediol* v *Commission* (70/87, EU:C:1989:254) and *Nakajima* v *Council*, (69/89, EU:C:1991:186);

— refer the case back to the General Court;

— dismiss the cross-appeal in Joined Cases C-401/12 P, C-402/12 P and C-403/12 P;

— reserve the costs.

161 — ? With regard to the conditional nature of the cross-appeal, I doubt that this factor alone can be a ground for inadmissibility. Indeed, cross-appeals appear to me to be conditional by nature, since they turn on the outcome reserved for the grounds raised in the context of the primary appeal.

162 — ? See, to that effect, order of 6 February 2014 in *Thesing and Bloomberg Finance* v *ECB* (C-28/13 P, EU:C:2014:96, paragraph 25).

163 — ? Judgment in *Wam Industriale* v *Commission* (C-560/12 P, EU:C:2013:726, paragraph 44).