The Conflicting Case of Economic Sanctions and Economic Interests under EU Law

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INTRODUCTION

The year 2014 marked an eventful year for EU sanction policy, the escalated political events in Ukraine made the EU adopt several economic sanctions. States and international organizations take these policy measures in order to produce a change in the political behaviour of other states.[1] The official term used by the EU institutions is 'restrictive measures',[2] which were introduced as part of its non-recognition policy of the alleged illegal annexation of Crimea and Sevastopol.[3]

The restrictive measures were introduced in three stages.[4] The first measures concerned restrictions on admission, visa bans, and freezing of assets of certain natural and legal persons.[5] The subsequent measures are directly aimed at Crimea and Sevastopol and mainly concern bans on imports of goods and certain services.[6] The final measures are directly aimed at Russia

[1] Guidelines 11205/12 of the Council of the European Union on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (15 June 2012), *Consilium Europe* (2012); K. PANOS, *Trade, Foreign Policy and Defence in EU constitutional Law: The Legal Regulation of sancitons, exports of dual-use goods and armaments*, London, Hart Publishing, 2001, 50.

[2] Throughout this paper the terms "economic sanctions", "(international) sanctions" and "restrictive measures" will be used interchangeably.

[3] https://europa.eu/newsroom/highlights/special-coverage/eu_sanctions_en.

[4] V. VOINIKOV, "The EU vs. Russia: Legal Nature and Implementation of the Union's Restrictive Measures", *The Baltic Region* 2015, issue 1, vol. 23, 67-74, https://journals.kantiana.ru/eng/baltic_region/1901/5547/.

[5] Decision Council nr. 2014/145/CFSP, 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, *Pb.L.* 17 March 2014, issue 78, 16; Council Regulation nr. (EU) 269/2014, 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, *Pb.L* 17 March 2014, 78/6.

[6] Decision Council nr. 2014/386/CFSP, 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and

and concern embargoes on goods and bans on imports of goods. These goods are mainly arms or related material.[7] It did not take long before Russia responded with economic sanctions banning the import of numerous agricultural products, raw materials and food originating in the EU and other concerned countries.[8]

The facts show that there are victims on both sides of the involved parties. Not only are there several ongoing cases before the Court of Justice of the European Union in which Russian companies and individuals challenge the imposed sanctions, EU citizens have also been complaining about the restrictive measures and the detrimental effect they have on their business relations.[9]

The problem which will be assessed in this dissertation relates to the legal protection of the economic interests of those affected by restrictive measures. The specific question which arises is how EU restrictive measures can be challenged in the EU by people who are directly or indirectly affected by those measures in order for them to protect their economic interests. My research is limited to EU restrictive measures and their litigation in the EU. Accordingly, I will not look into how economic sanctions are assessed in other jurisdictions. Nor shall I assess the effectiveness of the restrictive measures adopted in the wake of the trading conflict between the EU and Russia.

Three subsections will be examined in order to answer the main research question. Firstly, I will look into economic sanctions as such, in order to figure out their coming into being and I will use a descriptive research method by which I apply a legal-historical interpretation. Secondly, I will examine EU restrictive measures as a legal concept, I will use a descriptive research method by which I apply a systematic, legal-historical and teleological interpretation and an interpretation based on case law, legal doctrine and non-binding legal sources. Thirdly, I will evaluate the litigation of restrictive measures in the EU in light of fundamental freedoms and international law. Particularly the freedom to conduct business and the right to property and the capability of individuals to invoke international agreements and customs of international law in court proceedings. I will use an evaluative research method by which I will analyse the concordance of restrictive measures with those higher legal rules.

Sevastopol, *Pb.L.* 23 June 2014, issue 183, 70; Regulation Council nr. 692/2014, 23 June 2014 concerning restrictions on the import into the Union of goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol, *Pb.L.* 23 June 2014, issue 183, 9.

[7] Decision Council nr. 2014/512/CFSP, 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *Pb.L.* 31 July 2014, issue 229, 13; Regulation Council nr. 833/2014, 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *Pb.L.* 31 July 2014, issue 229, 1.

[8] http://government.ru/docs/14195/;https://www.theguardian.com/world/2014/aug/07/russia-bans-western-food-imports-retaliation-ukraine-sanctions.

[9] http://deredactie.be/cm/vrtnieuws/economie/2.35087.

In the end, I want to achieve a legal research which is on the one hand socially relevant considering the still ongoing trade conflict between the EU and Russia, and on the other hand well documented in order to be scientific in an academic sense, and practical for a legal assessment of the implications created by the ongoing trade conflict.

1. AN INTRODUCTION TO ECONOMIC SANCTIONS

1.1. DEFINITION

1. DEFINITION – *"Assuming that statesmen will continue to want to influence other states or non-state actors, they are likely to find non-military measures, such as economic techniques of statecraft, increasingly attractive."*[10] With that statement David Allen Baldwin explained the increased utility of economic sanctions in foreign policy.

Economic sanctions are taken by one or a group of sender states to express disapproval of the acts of the target state and to induce that target to change its policy. The sanctions' economic character distinguishes them from diplomatic or military policy measures. In that sense, they are not taken for economic gain, but the sender will often bear a commercial sacrifice.[11] The term 'economic sanctions' is often confused with 'boycott', 'embargo', 'blockade' and 'economic warfare'. Nonetheless, all of the above terms are deemed to be covered by the notion of economic sanctions, even though their strict definition is not identical.[12] Economic sanctions can take different forms, one way to categorize them is based on the economic activity that is restricted. Accordingly, roughly five categories can be the subject of economic sanctions: bilateral cooperation programs, imports products, exports products, private financial transactions, and economic activities of international financial institutions.[13]

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[10] D. BALDWIN, *Economic Statecraft*, Princeton, Princeton University Press, 1985, 68.

[11] A. F. LOWENFELD, *International Economic Law*, Oxford, Oxford University Press, 2002, 698; D. BALDWIN, *Economic Statecraft*, Princeton, Princeton University Press, 1985, 68; B. E. CARTER, "Economic Sanctions", *MPEPIL* 2011, 1,http://opil.ouplaw.com.kuleuven.ezproxy.kuleuven.be/view/10.1093/law:epil/9780199231690/law-9780199231690-e1521?rskey=z45dKK&result=1&prd=EPIL; K. PANOS, *Trade, Foreign Policy and Defence in EU constitutional Law: The Legal Regulation of sancitons, exports of dual-use goods and armaments*, London, Hart Publishing, 2001, 50.

[12] A boycott is usually initiated and conducted by groups of private individuals acting on their own initiative, an embargo is imposed by state authorities and a blockade connotes an act of sea warfare aimed at cutting off access to the target state's coasts by means of warships. In that sense economic sanctions are perceived as milder measures because they are generally used in peacetime. K. PANOS, *Trade, Foreign Policy and Defence in EU constitutional Law: The Legal Regulation of sancitons, exports of dual-use goods and armaments*, London, Hart Publishing, 2001, 50; B. E. CARTER, "Economic Sanctions", *MPEPIL* 2011, 1, http://opil.ouplaw.com.kuleuven.ezproxy.kuleuven.be/view/10.1093/law:epil/9780199231690/law-9780199231690-e1521?rskey=z45dKK&result=1&prd=EPIL.

[13] B. E. CARTER, "Economic Sanctions", *MPEPIL* 2011, 1, http://opil.ouplaw.com.kuleuven.ezproxy.kuleuven.be/view/10.1093/law:epil/9780199231690/law-9780199231690-e1521?rskey=z45dKK&result=1&prd=EPIL.

1.2. BRIEF HISTORY

2. MEGARIAN DECREE – Economic sanctions are not a recent phenomenon. The Megarian decree enacted by the Athenian Empire in 432 B.C. is often cited as one of the oldest examples of economic sanction. The decree denied traders from the state of Megara access to Athens' harbour and its marketplace and was imposed because of Megara's alliance with Sparta.[14]

3. STAND-ALONE POLICY – States kept invoking economic sanctions in later centuries but the 20th century marked many changes in the history of economic sanctions. Firstly, after World War I more attention was given to economic sanctions as a stand-alone policy rather than an accompanying warfare measure. It was the American President Woodrow Wilson who noted that "[a] nation boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent deadly remedy and there will be no need for force."[15] Moreover, after World War II military force lost its legitimacy because of the incredible destructive effects that were experienced during the war.[16]

4. COLLECTIVE ACTION – A second feature is the rise of sanctions coordinated through an international organization. Notwithstanding the negative experience of its predecessors with economic sanctions,[17] the United Nations provided an express basis for the imposition of collective sanctions by the Security Council. However, it was not until the 1990s – the so-called 'sanctions decade' – that economic sanctions became the Security Council's tool of choice as it was no longer paralyzed by the Cold War. Moreover, the UN has been by-passed by the EU which is involved in more sanction regimes than any other international organization.[18] As of today, the EU has sanction regimes running against nearly 40 states.[19]

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[14] F. GIUMELLI, "Bringing effectiveness into the debate: a guideline to evaluating the success of EU targeted sanctions", *Central European Journal of International and Security Studies* 2010, issue 1, (81) 85; S. A. LENWAY, "Between war and commerce: economic sanctions as a tool of statecraft", *International Organization* 1988, issue 2, (397) 409-413.

[15] G. C. HUFBAUER, "Economic sanctions: America's folly", Transcript by Council on Foreign Relations, 10 November 1997, http://www.cfr.org/trade/economic-sanctions-americas-folly/p62.

[16] B. E. CARTER, "Economic Sanctions", *MPEPIL* 2011, 3, http://opil.ouplaw.com.kuleuven.ezproxy.kuleuven.be/view/10.1093/law:epil/9780199231690/law-9780199231690-e1521?rskey=z45dKK&result=1&prd=EPIL; D. BALDWIN, *Economic Statecraft*, Princeton, Princeton University Press, 1985, 68.

[17] In the 1930s, the League of Nations unsuccessfully imposed sanctions to respond Italian expansionism; B. E. CARTER, "Economic Sanctions", *MPEPIL* 2011, 4, http://opil.ouplaw.com.kuleuven.ezproxy.kuleuven.be/view/10.1093/law:epil/9780199231690/law-9780199231690-e1521?rskey=z45dKK&result=1&prd=EPIL.

[18] Art. 39 UN Charter; A. F. LOWENFELD, *International Economic Law*, Oxford, Oxford University Press, 2002, 698; A. ADDIS, "Targeted sanctions as a counterterrorism strategy", *Tulane Journal of International and Comparative Law* 2010, issue 1, (187) 190-192; I. CAMERON "Introduction", in I. CAMERON (ed.), *EU sanctions: law and policy issues concerning restrictive measures*, Cambridge, Intersentia, 2013, (1) 3; E. C. HERSEY, "No universal target: distinguishing between terrorism and human rights violations in targeted sanctions regimes", *Brooklyn Journal of International Law* 2013, issue 3, (1231) 1237.

[19] http://eeas.europa.eu/archives/docs/cfsp/sanctions/docs/measures_en.pdf (lastly updated

5. SMART SANCTIONS – Thirdly and more importantly, economic sanctions have shifted from comprehensive sanctions targeting the state as a whole in order to reach the target state's government to smart sanctions or targeted sanctions. aimed at individuals and entities minimizing collateral damage. By freezing financial assets and imposing travel restrictions on leaders of the target state and their supporting elite, ordinary citizens no longer endure massive deprivation in life, liberty and property. Accordingly, the smart sanctions minimized the high costs of comprehensive sanctions and from a moral point of view the paradox of peaceful and yet deadly sanctions was resolved.[20]

6. NON-STATE ACTORS – Last but not least, the rise of non-state actors in international relations such as rebels in international conflicts and suspected terrorists, has led to a new trend of imposing sanctions on those individuals and entities, even though their actions are not related to government policies.[21] This development is different from smart sanctions targeting leaders and their supporters, and gives rise to serious practical problems. Firstly, unlike the latter situation, the individuals are often suspected on the base of not fully disclosed information. Secondly, in contrast to leaders of governments, which generally have access to the international organizations in which the sanctions are debated, they do not possess the same institutional means to challenge the basis on which they are subject to sanctions. Therefore, problems of fair trial and effective remedies arise, making economic sanctions no longer a sole subject of high politics but also of fundamental rights.[22]

2. RESTRICTIVE MEASURES OF THE EUROPEAN UNION

2.1. DEFINING EU RESTRICTIVE MEASURES

7. TERMINOLOGY – *"Restrictive measures are imposed by the EU to bring about a change in policy or activity by the target country, part of country, government, entities or individuals."*[23]

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on 7 June 2016).

[20] A. ADDIS, "Targeted sanctions as a counterterrorism strategy", *Tulane Journal of International and Comparative Law* 2010, issue 1, (187) 190-192; I. CAMERON, "Introduction", in I. CAMERON (ed.), *EU sanctions: law and policy issues concerning restrictive measures*, Cambridge, Intersentia, 2013, (1) 3-4; E. C. HERSEY, "No universal target: distinguishing between terrorism and human rights violations in targeted sanctions regimes", Brooklyn Journal of International Law 2013, issue 3, (1231) 1237.

[21] A. ADDIS, "Targeted sanctions as a counterterrorism strategy", *Tulane Journal of International and Comparative Law* 2010, issue 1, (187) 192; I. CAMERON, "Introduction", in I. CAMERON (ed.), *EU sanctions: law and policy issues concerning restrictive measures*, Cambridge, Intersentia, 2013, (1) 5.

[22] A. ADDIS, "Targeted sanctions as a counterterrorism strategy", *Tulane Journal of International and Comparative Law* 2010, issue 1, (187) 193-195.

[23] § 3 Guidelines 11205/12 of the Council of the European Union on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (15 June 2012), *Consilium Europe* (2012).

Instead of economic sanctions, the term used within the EU is 'restrictive measures'. However, the EU institutions consider restrictive measures to be equivalent to sanctions.[24] It has been argued that the choice for a new term is a pragmatic one because there is no universally accepted definition of sanctions and also because sanctions within the EU are adopted following one and the same procedure regardless of their legal characterization under international law.[25]

However, restrictive measures are not equivalent to sanctions in the sense of criminal law. In accordance with the Security Council, the European Court of Justice asserted that they constitute temporary precautionary measures which are generally not of a criminal nature.[26] Nonetheless, this non-criminal nature is not absolute. Accordingly, the nature of restrictive measures must be assessed on a case by case approach taking into account their duration and degree of severity in order to assure that they do not have a punitive or deterrent purpose.[27]

8. TYPOLOGY – Restrictive measures can be categorized on the basis of three criteria: the type of measure, the target, and their placement within the international legal order.[28]

The EU has a wide range of possible restrictive measures from which it can choose. Restrictive measures may include diplomatic sanctions, suspension of cooperation with a third country, boycotts of cultural events, trade sanctions, financial sanctions, flight bans, and restrictions on admission.[29] They can be

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[24] Basic Principles 10198/1/04 of the Council of the European Union on the Use of Restrictive Measures (Sanctions) (7 June 2004), *Consilium Europe* (2004); Guidelines 11205/12 of the Council of the European Union on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (15 June 2012), *Consilium Europe* (2012); J. KREUTZ, *Hard Measures by a Soft Power? Sanctions Policy of the European Union*, Bonn, BICC, 2005, 5; E. HERLIN-KARNELL and T. GAZZINI, "Restrictive measures adopted by the European Union from the standpoint of international and EU law", *ELR* 2011, issue 6, (798) 799.

[25] E. HERLIN-KARNELL and T. GAZZINI, "Restrictive measures adopted by the European Union from the standpoint of international and EU law", *ELR* 2011, issue 6, (798) 799.

[26] Resolution 2083 of the Security Council (17 December 2012), *UN Doc*. S/RES/2083 (2012); Court of Justice 15 November 2012, joined cases nr. C-539/10 P and C-550/10 P, ECLI:EU:C:2012:711, 'Al-Aqsa/Council and The Netherlands/Al-Aqsa', § 67-73,120; General Court 8 June 2011, nr. T-86/11, ECLI:EU:T:2011:260, 'Bamba/Council', § 43; General Court 30 September 2010, nr. T-85/09, ECLI:EU:T:2010:418, 'Kadi/Commission', § 150-151; M. WIMMER, "Individual sanctions and fundamental rights standards: Bamba", *CMLR* 2013, issue 50, vol. 4, (1119) 1129-1130.

[27]Report A/HRC/12/22 of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (2 September 2009), *UN Doc* (2009), § 42; M. WIMMER, "Individual sanctions and fundamental rights standards: Bamba", *CMLR* 2013, issue 50, vol. 4, (1119) 1129-1130.

[28] G. DE BAERE and M. WIMMER, "EU-sancties tussen rechtsbescherming en effectiviteit: een typologie van beperkende maatregelen in het extern optreden van de Unie", *SEW, Tijdschrift voor Europees en economisch recht* 2014, issue 7/8, (320) 322.

[29] G. DE BAERE, M. WIMMER, "EU-sancties tussen rechtsbescherming en effectiviteit: een typologie van beperkende maatregelen in het extern optreden van de Unie", *SEW, Tijdschrift voor Europees en economisch recht* 2014, issue 7/8, (320) 322; Sanctions EEAS lastly updated on 15 September 2009, http://eeas.europa.eu/cfsp/sanctions/docs/index_nl.pdf#contact.

aimed at third countries but also at entities or individuals. In that sense, restrictive measures can also be geographically limited or not. Where restrictive measures do not indicate a geographical region they are usually aimed at non-state actors.[30]

Besides adopting autonomous sanctions, the EU also implements sanctions adopted by the United Nations Security Council (hereafter: UNSC).[31] Moreover, this is an obligation for all UN members which have priority over other obligations in international law.[32] Even though the EU as such is not a member of the UN, all of its members are. Therefore, they are obliged to implement UNSC sanctions. Within the EU, this obligation is dealt with by virtue of Articles 347 and 351 Treaty on the Functioning of the European Union (hereafter: TFEU).[33] The latter provision ensures that the implementation of the TFEU does not collide with obligations the member states have, resulting from agreements concluded before 1 January 1958, by giving them priority over EU obligations. The former provision entails the member states to consult each other whenever they are called upon to take measures in the wake of international conflicts in order to prevent adverse effects on the functioning of the internal market.[34]

2.2. LEGAL FRAMEWORK FOR THE ADOPTION OF RESTRICTIVE MEASURES

The current legal basis for restrictive measures is the product of a historical development which started in the late 1960 and ended up with the establishment of the Lisbon Treaty in 2009. What follows is an outline of the historical development of sanctions under EU law followed by an analysis of the current provisions.

2.2.1. Historical Development

9. RHODESIA DOCTRINE – During the late 1960's and 1970's when the member states of the EU were called upon to implement UNSC sanctions on Rhodesia, they preferred to do so under national rules rather than Community law. They justified their deviation from Community law on the basis of what is now Article 347 TFEU which in its previous form enabled member states to deviate from Community law in case of extraordinary circumstances. However, the so-called 'Rhodesia doctrine' gave rise to

[30] C. ECKES, "EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions", *CMLR* 2014, issue 3, (869) 874.
[31] E. HERLIN-KARNELL and T. GAZZINI, 'Restrictive measures adopted by the European Union from the standpoint of international and EU law', *ELR* 2011, issue 6, (798) 802; I. CAMERON "Introduction", in I. CAMERON (ed.), *EU sanctions: law and policy issues concerning restrictive measures*, Cambridge, Intersentia, 2013, 1 (1).
[32] Art. 25 and 103 UN Charter.
[33] Art. 347 and 351 TFEU; E. HERLIN-KARNELL and T. GAZZINI, 'Restrictive measures adopted by the European Union from the standpoint of international and EU law', *ELR* 2011, issue 6, (798) 802-803.
[34] Member states relied on this provision in its previous form as an exceptional clause to implement UNSC sanctions under national rules; See *infra* margin nr. 11.

practical problems because the several national sanctions were of different content and implemented at different times.[35]

10. EPC PROCEDURE – During the early 1980's the problem of ineffectiveness was addressed for the first time. The formula put in place was a two-step procedure by which the member states first took a decision within the inter-governmental framework of European Political Cooperation (hereafter: EPC)[36] expressing their political willingness to adopt sanctions. Then a regulation containing the actual sanctions was imposed under the Common Commercial Policy (hereafter: CCP).[37] In *Centro-Com*[38] the Court of Justice endorsed the community's competence over economic sanctions on the basis of Article 113 EC and after a while this formula resulted in a common practice for the EU.[39]

11. TREATY OF MAASTRICHT –The Treaty of Maastricht formalised the above formula making it a full EU operation. Firstly, the EPC and its inter-governmental decision-making process was acknowledged by the treaty and renamed as the Common Foreign and Security Policy (hereafter: CFSP) which formed the second pillar of the EU.[40] Secondly, Articles 301 and 60 EC provided a link between the second pillar and the first pillar of the EU – the European Community. The two legal bases provided for the adoption of a regulation by the Council by a qualified majority imposing respectively trade and financial measures implementing a prior unanimously adopted CFSP decision.[41] However, the member states were sometimes able to

[35] Court of Justice 15 May 1986, nr. C-222/84, ECLI:EU:C:1986:206, 'Johnston', § 26-27; P.J. KUYPER, "Sanctions against Rhodesia the EEC and the Implementation of General International Legal Rules" *CMLR* 1975, issue 12, 231; P WILLAERT, "Les sanctions économiques contre la Rhodésie (1965–1979)" *RBDI* 1984/1985, issue 18, 216; K. PANOS, *EU International Relations Law*, Oxford, Hart Publishing, 2015, 495-496.

[36] Precursor of the CFSP and informal framework of cooperation between the Member States of the then European Economic Community on the basis of procedures set out in three reports respectively called the Luxembourg, Copenhagen and London reports; K. PANOS, *EU International Relations Law*, Oxford, Hart Publishing, 2015, 411-414.

[37] Provision which dealt with measures of export policy; Art. 133 EC

[38] Court of Justice 14 January 1997, C-124/95, ECLI:EU:C:1997:8, 'Centro-Com', *CMLR* 1997, issue 1, 555.

[39] See sanctions against the USSR following the Polish crisis and against Argentina following the Falklands war; P. J. KUYPER, "Trade Sanctions, Security and Human Rights and Commercial Policy" in M. MARESCEAU (ed.), *The European Community's Commercial Policy after 1992: The Legal Dimension*, Dordrecht, Martinus Nijhof Publishers, 1993, 389-390; K. LENAERTS and P. VAN NUFFEL, European Union Law, London, Sweet and Maxwell, 2011, 1010; P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, 503; K. PANOS, *EU International Relations Law*, Oxford, Hart Publishing, 2015, 496.

[40] The Treaty of Maastricht shaped the constitutional structure of the newly established European Union in a pillar structure. The first pillar was the European Community, the second pillar was the CFSP, and the third pillar was Justice and Home Affairs which was later on succeeded by the Police and Judicial Cooperation in Criminal matters framework; K. PANOS, *EU International Relations Law*, Oxford, Hart Publishing, 2015, 414.

[41] K. LENAERTS and P. VAN NUFFEL, European Union Law, London, Sweet and Maxwell, 2011, 1011; I. CAMERON, "Introduction", in I. CAMERON (ed.), *EU sanctions: law and policy issues concerning restrictive measures*, Cambridge, Intersentia, 2013, (1) 8-9; T. GAZZINI and E. HERLIN-KARNELL, "Restrictive measures adopted by the EU from the standpoint of international and EU law", *ELR* 2011, 3; K. PANOS, *EU International Relations Law*, Oxford, Hart Publishing, 2015, 496.

implement sanctions agreed under the CFSP directly.[42]

Even though community competence over trade and financial sanctions was established, this was only to the extent of targeting third countries, rulers of such countries, and individuals and entities directly or indirectly associated with them.[43] No legal basis was available under EU law for sanctions aimed at individuals and entities not linked to the governing regime of a third country.[44] In the wake of 9/11 the EU institutions were urged to find a legal solution for this in order to implement UNSC sanctions countering international terrorism. Accordingly, a solution was found in the so-called flexibility clause.[45]

The new formula introduced by the EPC and formalized by the Treaty of Maastricht was an important development for the EU because it partly introduced foreign policy into the Community after the failed attempt to establish a Defence Community during the 1950's.[46] However, even though the EU courts gained jurisdiction over restrictive measures by virtue of the CCP in which they were implemented, the CFSP remained outside the scope of the EU courts' jurisdiction.[47] The lack of jurisdiction can be explained by the political sensitivity of the CFSP and the desire of the Member States to

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[42] See for example sanctions against Nigeria; Common position Council nr. 95/515/CFSP, 20 November 1995, on Nigeria, *Pb.L.* 11 December 1995, issue 298, 1; Common position Council nr. 95/544/CFSP, 4 December 1995, on Nigeria, *Pb.L.* 21 December 1995, issue 309, 1; K. LENAERTS and P. VAN NUFFEL, European Union Law, London, Sweet and Maxwell, 2011, 1011.

[43] Court of Justice 3 September 2008, joined cases nr. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission', § 163-166; K. LENAERTS and P. VAN NUFFEL, European Union Law, London, Sweet and Maxwell, 2011, 1012.

[44] Court of Justice 3 September 2008, joined cases nr. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission', § 167-178.

[45] Article 308 EC (current Article 352 TFEU) enabled the Council to act unanimously on a proposal from the Commission whenever action was necessary but no appropriate power was provided by the treaty. However, the flexibility clause only enabled the EU institutions to attain objectives of the community pillar whereas restrictive measures implement the objectives of the CFSP pillar. Nonetheless the Court of Justice interpreted both Articles 60 and 301 EC as the expression of an implicit underlying objective of the Community for the purpose of the flexibility clause; Art. 308 EC, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E308:EN:HTML; Court of Justice 3 September 2008, joined cases nr. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission', §226; P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, 505-508; A. ORAKHELASHVILI, "Sanctions and Fundamental Rights of States: The Case of EU Sanctions Against Iran and Syria." in P. EDEN and M. HAPPOLD (eds.), *Economic Sanctions and International Law*, Oxford, Hart Publishing, 2016, 32.

[46] K. PANOS, *EU International Relations Law*, Oxford, Hart Publishing, 2015, 411.

[47] Article 47 TEU (current Article 40 TEU) was already an exception to the general rule of non-jurisdiction by which the EU courts could monitor the delimitation between the different "pillars"; Court of Justice 7 April 1995, C-167/94, ECLI:EU:C:1995:113, 'Grau Gomis'; M. BRKAN, "The Role of the European Court of Justice in the Field of Common Foreign and Security Policy After the Treaty of Lisbon: New Challenges for the Future", in P. J. CARDWELL (ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*, The Hague, T.M.C Asser Press, 2012, (97) 99-100.

remain sovereign in this field.[48]

2.2.2. Current Provisions Governing EU Restrictive Measures

12. ARTICLE 215 TFEU – The Treaty of Lisbon abolished the pillar structure and replaced it with two separate bodies of law: the Treaty on European Union (hereafter: TEU) and the TFEU.[49] It also introduced some important changes with regards to restrictive measures. Firstly, restrictive measures implementing a CFSP decision are no longer adopted on the basis of multiple provisions, but rather on the basis of one englobing provision.[50] Besides providing the legal basis for both trade and financial measures, this new provision puts an end to the controversy of competence and the flexibility clause by adding that restrictive measures can also be adopted against persons and groups or non-state entities.[51]

13. ARTICLE 75 TFEU – Another important change was the introduction of a second legal basis for the adoption of restrictive measures, particularly smart sanctions. Similar to Article 215 TFEU, Article 75 TFEU imposes the inclusion of legal safeguards when adopting restrictive measures. Following the judgments in both *Kadi I* as *Kadi II,* the respect for fundamental rights has been emphasized.[52] However, in contrast to Article 215 TFEU, it works independently from any CFSP decision because it is situated under the Area of Freedom, Security and Justice which is an entirely integrated EU policy matter.[53]

Even though the potential types of restrictive measures are quite similar under both provisions, their adoption does not follow the same procedure. Under Article 75 TFEU the European Parliament has expanded powers acting jointly with the Council. Whereas it is only kept informed by the latter

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[48] M. BRKAN, "The Role of the European Court of Justice in the Field of Common Foreign and Security Policy After the Treaty of Lisbon: New Challenges for the Future", in P. J. CARDWELL (ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*, The Hague, T.M.C Asser Press, 2012, (97) 99.

[49] The TEU contains the former second pillar and a general part whereas the TFEU contains the former first and third pillar. See T. GAZZINI AND E. HERLIN-KARNELL, "Restrictive measures adopted by the EU from the standpoint of international and EU law", *ELR* 2011, 2-3.

[50] Art. 215 TFEU.

[51] Art. 215 TFEU; T. GAZZINI and E. HERLIN-KARNELL, "Restrictive measures adopted by the EU from the standpoint of international and EU law", *ELR* 2011, 4.

[52] In particular, due process rights of the targeted persons and entities must be respected and conform the established case law of the EU courts inter alia with regard to the right of defense and the principle of effective judicial protection. Court of Justice 3 September 2008, joined cases nr. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission', § 336-337; Court of Justice 18 July 2013, joined cases nr C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518, 'Commission/Kadi', § 111-114; § 15-24 Guidelines 11205/12 of the Council of the European Union on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (15 June 2012), *Consilium Europe* (2012).

[53] Art. 75 TFEU; T. GAZZINI AND E. HERLIN-KARNELL, "Restrictive measures adopted by the EU from the standpoint of international and EU law", *ELR* 2011, 4-5; I. CAMERON (ed.), *EU sanctions: law and policy issues concerning restrictive measures*, Cambridge, Intersentia, 2013, 35.

under Article 215 TFEU.[54] This soon gave rise to an inter-institutional dispute between the Parliament and the Council which was settled before the Court of Justice.[55]

In that case the Parliament brought an action for annulment, arguing that the Council should have relied on Article 75 TFEU when it adopted a regulation amending previous restrictive measures because it was a matter of terrorism, hence one of Article 75 TFEU's rationales. Nevertheless, the Court of Justice disagreed and pointed out that combatting international terrorism resorted to the objectives of the EU's external action, hence the part under which Article 215 TFEU is situated.[56] This was even more the case because the regulation was adopted in order to implement UNSC sanctions.[57]

14. ARTICLES 24 AND 275 TFEU – Finally, a third major change was the EU courts' exceptional jurisdiction to review the legality of a CFSP decision providing for restrictive measures against natural or legal persons.[58] This is an exception to the "carve-out" rule by which certain acts are unreviewable, irrespectively of the general jurisdiction the EU courts have to review the legality of EU acts.[59] This exception to the exception is the codification of the case law in *Gestoras Pro Amnistia and others* in which the Court found that listed entities or persons had a procedural right to appeal to the Court against the CFSP common position[60] in accordance with the principle of effective judicial remedies. The court concluded this because the content of the concerned common position was very detailed and went beyond what could be expected of that kind of act. Therefore, the EU courts had jurisdiction to review whether the common position produced legal effects in relation to third parties or not.[61]

15. TWO-STEP PROCEDURE – The Treaty of Lisbon withheld the two-step procedure. The first step takes place within the framework of the CFSP in which the Council may decide to impose restrictive measures against third

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[54] Art. 75 and 215 TFEU.

[55] Court of Justice 19 July 2012, nr. C-130/10, ECLI:EU:C:2012:472, 'European parliament/Council'.

[56] Court of Justice 19 July 2012, nr. C-130/10, ECLI:EU:C:2012:472, 'European parliament/Council', § 60-64.

[57] It is not surprising that the European Parliament had to succumb. The Advocate General had already pointed out that given the global character of terrorism policymakers should opt for restrictive measures which are not restricted to the territory of the Union; Adv. Gen. Y. BOT opinion under Court of Justice 19 July 2012, nr. C-130/10, ECLI:EU:C:2012:472, 'European parliament/Council', nr. C-130/10, ECLI:EU:C:2012:50, § 69.

[58] Art. 24(2) TEU; Art. 275(2) TFEU; C. ECKES, "EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions", *CMLR* 2014, issue 3, (869) 880-881.

[59] Art. 19 TEU; Art. 275(1) TFEU; Adv. Gen. M. WATHELET opinion under Court of Justice 28 March 2017, C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15, ECLI:EU:C:2016:381, § 38.

[60] Prior to the Lisbon treaty Council decisions introducing restrictive measures were called common positions.

[61] Court of Justice 27 February 2007, C-354/04 p and C-355/04 P, ECLI:EU:C:2006:667, 'Gestoras Pro Amnistia', § 53-57; I. CAMERON, "Introduction", I. CAMERON (ed.), *EU sanctions: law and policy issues concerning restrictive measures*, Cambridge, Intersentia, 2013, 35.

countries, individuals or entities.[62] Accordingly, restrictive measures must be consistent with the CFSP general objectives. These are, among others, the preservation of peace and strengthening of international security, the promotion of democracy, the rule of law and respect for human rights, and fundamental freedoms.[63] Proposals for restrictive measures are submitted by the member states or by the European External Action Service[64] and the CFSP decision is taken unanimously by the Council.[65] In the end, the CFSP decision clarifies on the one hand, the legal and political context justifying the imposition of restrictive measures and on the other hand, the different restrictive measures that must be adopted to that end by way of regulation.[66]

The second step is to implement the measures foreseen in the Council's CFSP decision. Implementation takes place either at EU or national level. Measures such as arms embargoes or restrictions on admission are implemented directly by the member states.[67] Whereas other measures such as restrictions on trade and freezing of funds are implemented by means of a Regulation adopted by the Council, acting by qualified majority, on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission.[68]

The internal procedure for the adoption of restrictive measures also contains different steps. Proposals for both CFSP decisions and implementing Regulations are firstly discussed in the Foreign Relations Counsellors Working Group (hereafter: RELEX).[69] Once the RELEX Counsellors have agreed on the proposals, they are submitted to the Committee of Permanent Representatives (hereafter: COREPER)[70] for approval by the Permanent

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[62] Art. 29 TEU

[63] Art. 21 TEU; Sanctions EEAS lastly updated on 15 September 2009, http://eeas.europa.eu/cfsp/sanctions/docs/index_nl.pdf#contact; G. DE BAERE, M. WIMMER, "EU-sancties tussen rechtsbescherming en effectiviteit: een typologie van beperkende maatregelen in het extern optreden van de Unie", *SEW, Tijdschrift voor Europees en economisch recht* 2014, vol. 7/8, (320) 322.

[64] Workgroup which consists of Commission and Council officials and diplomats seconded from the Member States and assists the High Representative of the Union for Foreign Affairs and Security Policy by working in cooperation with the diplomatic sevices of the Member States; Art. 27 TEU; K. PANOS, *EU International Relations Law*, Oxford, Hart Publishing, 2015, 433.

[65] Art. 24 TEU

[66] K. PANOS, *EU International Relations Law*, Oxford, Hart Publishing, 2015, 505.

[67] § 7 Guidelines 11205/12 of the Council of the European Union on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (15 June 2012), *Consilium Europe* (2012).

[68] Art. 215 TFEU; § 7 Guidelines 11205/12 of the Council of the European Union on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (15 June 2012), *Consilium Europe* (2012).

[69] The Council's Foreign Relations Counsellors Working Party; F. GIUMELLI, "How EU sanctions work: A new narrative", *Chaillot Paper* 2013, issue 129, 11; I. CAMERON, "Introduction", in I. CAMERON (ed.), *EU sanctions: law and policy issues concerning restrictive measures*, Cambridge, Intersentia, 2013, (1) 37.

[70] The Committee of the Permanent Representatives of the Member Stats which is tasked with preparing the Council's work. Art. 240 TFEU; § 94 Guidelines 11205/12 of the Council of the European Union on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (15 June 2012), *Consilium Europe* (2012); F. GIUMELLI, "How EU sanctions work: A new narrative", *Chaillot Paper* 2013, issue

Representatives of the Member States. Finally, the relevant Ministers of the Member States formally adopt the decision or regulation in the Foreign Affair Council.[71]

3. FUNDAMENTAL RIGHTS AND INTERNATIONAL LAW

Even though restrictive measures are not taken for economic gain,[72] they are apt to have economic repercussions and not for the least on individuals conducting business and on their property rights. However, *"the introduction and implementation of restrictive measures must always be in accordance with international law (...) they must respect human rights and fundamental freedoms (…)."*[73] In that respect, reference can be made to the principles and objectives governing the EU's external action which the EU not only seeks to advance but also needs to abide with within the CFSP.[74]

In this part of the dissertation, I will evaluate EU restrictive measures in light of fundamental rights and international law. Under the section concerning fundamental rights, I will assess the right to property and the freedom to conduct business. Under the section concerning international law, I will assess whether individuals can invoke provisions from international agreements and/or rules of international customary law.

3.1. RESTRICTIVE MEASURES EVALUATED AGAINST FUNDAMENTAL RIGHTS

3.1.1. The freedom to conduct business and the right to property

16. (ANTE-) CHARTER OF FUNDAMENTAL RIGHTS – The freedom to conduct business and the right to property are two fundamental rights enshrined in the Charter of Fundamental Rights of the European Union (hereafter: the Charter).[75] The Charter came into force in 2009 at the same time as the Treaty of Lisbon and is an autonomous source of law which has the same legal value as provisions of primary law – namely, the TEU and TFEU.[76]

129, 11; I. CAMERON (ed.), *EU sanctions: law and policy issues concerning restrictive measures*, Cambridge, Intersentia, 2013, 39;

[71] Art. 1 TEU; Annex I Guidelines 11205/12 of the Council of the European Union on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (15 June 2012), *Consilium Europe* (2012); I. CAMERON (ed.), *EU sanctions: law and policy issues concerning restrictive measures*, Cambridge, Intersentia, 2013, 38-39.

[72] § 5 Guidelines 11205/12 of the Council of the European Union on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (15 June 2012), *Consilium Europe* (2012).

[73] § 9 Guidelines 11205/12 of the Council of the European Union on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (15 June 2012), *Consilium Europe* (2012).

[74] Art. 21 and 23 TEU.

[75] Art. 16 and 17 Charter of Fundamental Rights of the European Union.

[76] Art. 6(1) TEU; Court of Justice 12 November 1969, nr. 29/69, ECLI:EU:C:1969:57,

However, it should be noted that fundamental rights already made part of the EU prior to 2009 by virtue of the Court of Justice which gradually uplifted the position of fundamental rights within the EU.[77] Therefore, the Court of Justice was guided by traditions of the member states and by treaties on human rights, particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR).[78] Furthermore, the fact that the EU shall accede to the ECHR endorses the existing case law of the Court of Justice.[79]

The existing case law of the EU courts shows that the right to property and the freedom to conduct business was already made part of the fundamental rights within the EU. In that sense, reference can be made to the Explanations relating to the Charter of Fundamental Rights (hereafter: Explanations) which are the primary reference for judicial interpretation of the Charter.[80]

17. FREEDOM TO CONDUCT BUSINESS – The Explanations provide that the freedom to conduct business is based on the freedom to exercise an economic or commercial activity,[81] the freedom of contract[82] and free competition.[83] However, the freedom to conduct business and particularly the freedom to pursue a commercial activity is not absolute and must be seen in light of its social function.[84] Accordingly, this freedom may be subject to certain restrictions. However, such restrictions must correspond to objectives of general interest pursued by the Community and may not form disproportionate and intolerable interference, impairing the very substance of the freedom to conduct business.[85] Moreover, this freedom is not extended to

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'Stauder'; Court of Justice 17 December 1970, nr. 11/70, ECLI:EU:C:1970:114, 'Internationale Handelsgesellschaft'; Court of Justice 14 May 1974, nr. 4/73, ECLI:EU:C:1974:51, 'Nold'; K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet and Maxwell, 2011, 825-826; S. A. DE VRIES, "The protection of fundamental rights within Europe's internal market after Lisbon – an endeavour for more harmony", in S. A. DE VRIES, U. BERNITZ and S. WEATHERILL (eds.), *The protection of fundamental rights in the EU after Lisbon*, Oxford, Hart Publishing, 2013, (59) 59-61.

[77] K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet and Maxwell, 2011, 825-826.

[78] Court of Justice 15 May 1986, nr. C-222/84, ECLI:EU:C:1986:206, 'Johnston', § 18; Court of Justice 15 December 1995, nr. C-415/93, ECLI:EU:C:1995:463, 'Bosman', § 79; K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet and Maxwell, 2011, 828.

[79] Art. 6(2) TEU; K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet and Maxwell, 2011, 828.

[80] Art. 6(1) TEU, Art. 51(7) Charter of Fundamental Rights of the European Union; Explanations C-303/17 of the Praesidium of the Convention relating to the Charter of Fundamental Rights (14 December 2007), *Pb. L.* (2007); P. VAN ELSUWEGE, P. DEVISSCHER, A. VAN BOSSUYT, "Het handvest van de grondrechten van de Europese Unie: Implicaties voor de nationale rechtsorde", *TPR* 2010, issue 2, (529) 546.

[81] Court of Justice 14 May 1974, nr. 4/73, 'Nold', § 14; Court of Justice 27 September 1979, nr. 230/78, 'Spa Eridiana and others', § 20 and 31.

[82] Court of Justice 5 October 1999, nr. C-240-97, 'Spain/Commission', § 99.

[83] Art. 119(1) and (3) TFEU.

[84] Court of Justice 5 October 1995, nr. C-280/93, ECLI:EU:C:1994:367, 'Germany/Council', § 78.

[85] Court of Justice 5 October 1995, nr. C-280/93, ECLI:EU:C:1994:367, 'Germany/Council', §

protect commercial interests or opportunities because these are part of the very essence of economic activity.[86]

18. RIGHT TO PROPERTY – With regards to the right to property, the EU courts have traditionally referred to Article 1 of the First Protocol to the European Convention on Human Rights (hereafter: P 1-1 ECHR).[87] The European Court of Human Rights (hereafter: ECtHR) has interpreted the right to property in a three-rule structure which firstly entitles persons to a peaceful enjoyment of their possessions. Secondly, deprivation is permitted only in the case of public interest and subject to certain conditions. Thirdly, control of the use of property by the State is permitted for certain purposes. The first rule provides the right to peaceful enjoyment of possessions whereas the latter two provide a legal base to interfere with this right.[88] However, similar to the freedom to conduct business, there is no absolute right to property,[89] a fair balance has to be determined between the general interest of the community and the protection of the right to property. This principle of proportionality applies to each of the three rules.[90]

3.1.2. A comprehensive review by the EU courts

19. POLITICAL SENSITIVITY – The assessment of restrictive measures in light of fundamental rights is very controversial because of their strong political dimension. Nevertheless, it has been argued that the Council and the Commission are not given *carte blanche* to infringe fundamental rights by

78; Court of Justice 14 May 1974, nr. 4/73, 'Nold', § 14.

[86] Court of Justice 14 May 1974, nr. 4/73, 'Nold', § 14; Explanation on Article 16 Explanations C-303/17 of the Praesidium of the Convention relating to the Charter of Fundamental Rights (14 December 2007), *Pb. L.* (2007).

[87] Court of Justice 13 December 1979, nr. C-44/79, ECLI:EU:C:1979:290, 'Hauer/Land Rheinland-Pfalz', § 17; Court of Justice 3 September 2008, Joined Cases nrs. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission', § 118; Explanation on Article 17 Explanations C-303/17 of the Praesidium of the Convention relating to the Charter of Fundamental Rights (14 December 2007), *Pb. L.* (2007); E. DREWNIAK, "The Boshphorus case: the balancing of property rights in the European Community and the public interest in ending the war in Bosnia", *Fordham International Law Journal* 1997, issue 20, vol. 3, (1007) 1030-1031; K. LENAERTS and K. VANVOORDEN, "The right to property in the case law of the Court of Justice of the European Communities", in H. VANDENBERGHE, *Property and human rights*, Brugge, Die Keure, 2006, (195) 195-240; S. VAN ERP, 'EU Charter of Fundamental Human Rights and Property Rights', in D. WALLIS (ed.), *European Property Rights & Wrongs*, Lahti, Markprint, 2011, file:///Users/clementuwayo/Downloads/european-property-rights-and-wrongs.pdf, (1) 45; F. MEZZANOTTE, "The Protection of Ownership of Goods in the DCFR: An 'Exclusion Strategy' at the Core of European Property Law?"**,** *ERPL* 2013, issue. 4, (1009) 1024.

[88] ECtHR 13 June 1979, 'Marckx/Belgium', § 63; ECtHR 23 September 1982, 'Sporrong and Lönnroth'; R. GORDON, T. WARD and T. EICKE, *The Strasbourg Case Law: Leading Cases from the European Human Rights Reports*, London, Sweet and Maxwell, 2001, 1421; F. MEZZANOTTE, "The Protection of Ownership of Goods in the DCFR an 'Exclusion Strategy' at the Core of European Property Law?"**,** *ERPL* 2013, issue 4, (1009) 1024.

[89] Court of Justice 5 October 1995, nr. C-280/93, ECLI:EU:C:1994:367, 'Germany/Council', § 78.

[90] ECtHR 23 September 1982, 'Sporrong and Lönnroth', § 69; ECtHR 21 February 1986, 'James/United Kingdom'; R. GORDON, T. WARD and T. EICKE, *The Strasbourg Case Law: Leading Cases from the European Human Rights Reports*, London, Sweet and Maxwell, 2001, 1422.

invoking foreign policy. Moreover, the potential political backlash should not withhold the EU courts from being true to their tasks and responsibilities, which is *inter alia* to review the executive's exercise of power.[91] However, it should be noted that such review is all the more controversial because resolutions of the UNSC could indirectly be reviewed by the EU courts (cf. *supra* margin nr. 8).[92] In that respect a differentiated approach had been put forward by the CFI which depends on the origin of the restrictive measure.[93]

20. KADI I – Eventually, the Court of Justice was confronted with this controversy in *Kadi I*.[94] In that case the Court of Justice was called upon to review the lawfulness of restrictive measures implementing UNSC sanctions (cf. *infra* margin nr. 26). The Council and Commission argued that the EU courts were ill equipped and not in the position to adequately deal with political questions unlike political institutions such as the UNSC. Therefore, the EU courts should not apply normal standards of review but instead less stringent criteria for the protection of fundamental rights.[95] In accordance with Advocate General Maduro's opinion, the Court of Justice rejected such immunity from jurisdiction. It asserted that the Community judicature were required to ensure the full review of all Community acts including restrictive measures, in light of the fundamental rights forming integral part of the general principles of Community law, whether or not if they were designed to give effect to resolutions adopted by the UNSC.[96]

21. KADI II – The findings of the Court of Justice, although groundbreaking and clear-cut, did not put an end to the *Kadi* saga. After the Court of Justice had annulled the contested regulation for breach of fundamental rights, the EU legislative adopted a new regulation once again containing freezing

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[91] I. Canor, "'Can Two Walk Together, Except They be Agreed'—The Relationship Between International Law and European Law: The Incorporation of United Nations Sanctions AgainstYugoslavia Into Com- munity Law Through the Perspective of the European Court of Justice", *CMLR* 1998, issue 35, (137) 162-163.

[92] P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, 511; M. BRKAN, "The Role of the European Court of Justice in the Field of Common Foreign and Security Policy After the Treaty of Lisbon: New Challenges for the Future", in P. J. CARDWELL (ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*, The Hague, T.M.C Asser Press, 2012, (97) 105.

[93] the CFI did not apply normal standards of judicial review on EU acts containing restrictive measures implementing sanctions of the UNSC, rather a limited review in the light of *jus cogens* was applicable. However, autonomous restrictive measures required a full review in light of fundamental rights. Court of First Instance 21 September 2005, nr. T-315/01, ECLI:EU:2005:332, 'Kadi/Council and Commission', § 221-226; Court of First Instance 21 September 2005, nr. T-306/01, ECLI:EU:T:2005:331, 'Yusuf en Al Barakaat International Foundation/Council and Commission', § 266, 272-274; Court of Justice 12 September 2006, T-228/02, ECLI:EU:T:2006:384, 'OMPI/Council', § 99-100, 108, 109, 110.

[94] Court of Justice 3 September 2008, Joined Cases nrs. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission'.

[95] Adv. Gen. P. MADURO opinion under Court of Justice 3 September 2008, Joined Cases nrs. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission', nr. C-402/05 P ECLI:EU:C:2008:11, § 43.

[96] Court of Justice 3 September 2008, Joined Cases nrs. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission', § 326.

measures against Mr. Kadi. However, this time the regulation provided legal safeguards. A summary of reasons for the listing had been requested and obtained from the UNSC to which Mr. Kadi had been allowed to respond to, in order to disprove the allegations. Nevertheless, the Commission decided that it was not satisfied with the response and withheld the freezing measures against Mr. Kadi which then brought a new action for annulment.[97]

This time the Court of First Instance asserted that a comprehensive review had to be applied to the contested regulation in light of fundamental rights. That had to remain the case, so long as targeted individuals did not have access to a comprehensive review within the jurisdiction of the United Nations from which the economic sanctions were initiated.[98] After its comprehensive review, the Court concluded that Mr. Kadi's rights of defence had merely been observed in the most formal sense. Moreover, it was held that he had not been granted an effective judicial protection as the Commission had not taken due account of his comments and had not granted him the most minimal access to the evidence against him.[99] Furthermore, the Court took the view that Mr. Kadi had been severely restricted of his right to property as his funds had been indefinitely frozen for nearly ten years.[100] However, it was only after an appeal judgment by the Court of Justice that the EU legislative accepted that a regulation implementing sanctions from the UNSC did not enjoy immunity from jurisdiction.[101]

3.1.3. Bosphorus

22. FACTS OF THE CASE – Among other fundamental rights, the right to property had been put forward for review in the *Kadi* saga.[102] However, the *Kadi* judgments were not the first EU judgments dealing with restrictive measures in light of fundamental rights. In *Bosphorus* the Court of Justice was addressed by the Irish Supreme Court for a preliminary ruling.[103] It was called upon to review the lawfulness of restrictive measures in light of the right to property and the freedom to conduct business. Following the Yugoslavian civil war, the UNSC had adopted economic sanction against the

[97] Court of First Instance 30 September 2010, nr. T-85/09, ECLI:EU:C:2010:418, 'Commission/Kadi', 50-57.
[98] Court of First Instance 30 September 2010, nr. T-85/09, ECLI:EU:C:2010:418, 'Commission/Kadi', § 126-129.
[99] Court of First Instance 30 September 2010, nr. T-85/09, ECLI:EU:C:2010:418, 'Commission/Kadi', 176-179.
[100] Court of First Instance 30 September 2010, nr. T-85/09, ECLI:EU:C:2010:418, 'Commission/Kadi', § 148-151.
[101] The Court of Justice dismissed the appeals against the Court of First Instance's judgment annulling the contested regulation; Court of Justice 18 July 2013, joined cases nr C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518, 'Commission/Kadi'; P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, 523-527.
[102] Court of Justice 3 September 2008, Joined Cases nrs. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission', § 49.
[103] Court of Justice 30 July 1996, nr. C-84/95, ECLI:EU:C:1996:312, 'Bosphorus'.

authorities of the Federal Republic of Yugoslavia which were implemented at Community level by Regulation 990/93.[104] This regulation provided that Member States shall impound air crafts in which a majority or controlling interest was held by a person or undertaking in or operating from the Federal Republic of Yugoslavia.[105] Bosphorus Airways a Turkish Airline leased an aircraft from the Yugoslav national airline. The leasing agreement was concluded in good faith and not designed to circumvent the UNSC sanctions. Moreover, the terms of the lease prescribed that Bosphorus Airways provided the cabin and flight crew and had full day-to-day operation control and direction of the aircraft. Furthermore, the aircraft only flew between Turkey and various EU member states or Switzerland. Nevertheless, once landed in Dublin Airport the aircraft was impounded by the Irish authorities who acted after approval of the UN Yugoslavia Sanctions Committee.[106] Beside arguing that Article 8 Regulation 990/93 was not applicable given that the aircraft was not controlled but merely owned by Yugoslavian interest, Bosphorus Airways argued more importantly that if the regulation did apply it would run counter its fundamental right to property and its freedom to conduct business.[107]

23. OPINION ADVOCATE GENERAL – In its opinion Advocate General Jacobs examined Bosphorus Airways' allegations. With regards to the right to property and the freedom to conduct business, he applied the established case law of the Court of Justice (cf. *supra* margin nr. 17 and 18). He found that both rights were not absolute but could be subject to restrictions provided that these restrictions correspond to objectives of general interest pursued by the Community and do not form a disproportionate and intolerable interference.[108] Applied to the facts of the case, the Advocate General found that there was no stronger type of public interest than that of stopping a civil war. Notwithstanding the severity of the restrictions on the fundamental rights of innocent economic operators such as Bosphorus Airways, these restrictions were inevitable if the sanctions were to be effective. The Advocate General concluded that interference with Bosphorus Airways' fundamental rights was not intolerable in light of the aims of the contested regulation.[109]

24. JUDGMENT COURT OF JUSTICE – In its judgment the Court of Justice endorsed the Advocate General's findings. With regards to the alleged fundamental rights, the Court of Justice found that these rights were not

[104] Regulation Council nr. 990/93, 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), *Pb.L.* 28 April 1993, issue 102, 14.
[105] Art. 8 Regulation Council nr. 990/93, 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), *Pb.L.* 28 April 1993, issue 102, 14.
[106] Court of Justice 30 July 1996, nr. C-84/95, ECLI:EU:C:1996:312, 'Bosphorus', § 6-16.
[107] Court of Justice 30 July 1996, nr. C-84/95, ECLI:EU:C:1996:312, 'Bosphorus', § 28.
[108] Court of Justice 5 October 1995, nr. C-280/93, ECLI:EU:C:1994:367, 'Germany/Council, § 78; Adv. Gen. F. JACOBS opinion Court of Justice 30 July 1996, nr. C-84/95, ECLI:EU:C:1996:312, 'Bosphorus', nr. C-177/95, ECLI:EU:C:1996:445, § 60.
[109] Adv. Gen. F. JACOBS opinion Court of Justice 30 July 1996, nr. C-84/95, ECLI:EU:C:1996:312, 'Bosphorus', nr. C-177/95, ECLI:EU:C:1996:445, § 63-65.

absolute and that any economic sanction entails by definition, consequences affecting the right to property and the freedom to pursue an economic activity. It found that the aims pursued by the regulation were important enough to justify the negative consequences it caused. After sketching the aims pursued by the regulation it concluded that the restrictive measures implemented in the regulation could not be regarded as inappropriate or disproportionate.[110] Therefore, the regulation was compatible with Bosphorus Airways' right to property and freedom to conduct business.

25. CASE COMMENTS – Different scholars have commented on the findings of the Court of Justice in *Bosphorus*.[111] Erik Drewniak argued that the impounding of the aircraft did not meet the principle of proportionality. Based on the abstract framing of the aim of the Regulation – the ending of a war – any measure would virtually be found reasonable and proportionate. Drewniak points out to the referring court's interpretation which is more concrete. The Irish Supreme Court interpreted the aim of Article 8 Regulation 990/93 as being to restrict guilty parties in Yugoslavia from the possibility to use aircrafts in order to breach the economic sanctions. Finally, he concludes that there was no reasonable relationship between the impounding of Bosphorus Airways' aircraft and the aims pursued by the European Community by means of the regulation. This conclusion is based on the more concrete interpretation of the aims of the regulation and the fact that Bosphorus Airlines was not operating from Yugoslavia or with persons from Yugoslavia but was using the aircraft for tour operations in the Member States of the European Community and Switzerland.[112]

Another comment on the 'Bosphorus' case is provided by Pieter Jan Kuijper who posits the French doctrine *l'égalité devant les charges publiques* in order to deal with the question why innocent economic operators should bear the negative consequences of measures that are deemed appropriate by the (international) community. But he soon comes to the conclusion that the main Member States of the EU do not adjudicate such damage compensation in the case of economic sanctions.[113]

Finally, Piet Eeckhout warns that affording protection to Bosphorus Airways' right to property would have caused the entire sanction regime to fail because

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[110] Court of Justice 30 July 1996, nr. C-84/95, ECLI:EU:C:1996:312, 'Bosphorus', § 21-26.

[111] E. DREWNIAK, "The Boshphorus case: the balancing of property rights in the European Community and the public interest in ending the war in Bosnia", *Fordham International Law Journal* 1997, Issue 20, vol. 3, 1007-1088; I. CANOR, "'Can Two Walk Together, Except They be Agreed'—The Relationship Between International Law and European Law: The Incorporation of United Nations Sanctions Against Yugoslavia Into Community Law Through the Perspective of the European Court of Justice", *CMLR* 1998, issue 35, 137–187.

[112] E. DREWNIAK, "The Boshphorus case: the balancing of property rights in the European Community and the public interest in ending the war in Bosnia", *Fordham International Law Journal* 1997, vol. 20, issue 3, (1007) 1079-1081.

[113] See also fn. 140; P. J. KUIJPER, case note under Court of Justice 30 July 1996, nr. C-84/95, ECLI:EU:C:1996:312, 'Bosphorus', *SEW* 1997, (411) 411; J. SALMON and N. ANGELET, "Les immunités de droit international et la rupture de l'égalité devant les charges publiques", in A. ALEN, V. JOOSTEN, R. LEYSEN and W. VERRIJDT (eds.), *Liberae Cogitationes: Liber amicorum Marc Bossuyt*, Antwerpen, Intersentia, 2013, 559-578.

it would have opened up a channel for a flood of litigation. He acknowledges that the impounding of the aircraft contributed little to the sanction regime in place but the aircraft nevertheless had to be impounded because the sanctions could only be effective through their aggregate effect.[114] Moreover, before the ECtHR, it was held that the EU system of fundamental rights was equivalent to that of the ECtHR and that the Court of Justice's evaluation of the contested restrictive measures in light of the right to property was not deficient.[115]

3.1.4. Kadi I

26. FACTS OF THE CASE –*Bosphorus* pre-dated the era of smart sanctions which were adopted to counter international terrorism. In *Kadi I* the time had come to review these kind of restrictive measures in light of fundamental rights. In that case, the UNSC had designated Mr. Kadi, a resident of Saudi Arabia, as being associated with Osama Bin Laden, Al Qaeda or the Taliban. Accordingly, economic sanctions were adopted which entailed a freezing of Mr. Kadi's funds and other financial resources. These sanctions were implemented at Community level by Regulation 881/2002.[116] Mr. Kadi brought an action for annulment of that regulation which eventually came before the Court of Justice. He alleged *inter alia* the infringement of his fundamental right to property.[117]

27. JUDGMENT COURT OF JUSTICE – In his opinion Advocate General Maduro asserted that there was no reason to depart from the usual interpretation of the fundamental rights invoked in the case. The only novelty was the question whether the concrete demands of general interest raised by the prevention of international terrorism justified restrictions on the fundamental right of Mr. Kadi.[118] Accordingly, the Court of Justice analyzed whether the freezing measure amounted to a disproportionate and intolerable interference impairing the very substance of the appellant's fundamental right to property.

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[114] P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, 515.
[115] ECtHR 30 June 2005, 'Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi/Ireland'; P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, 515.
[116] Regulation Council nr. 881/2002, 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, *Pb.L.* 29 May 2002, issue 139, 9.
[117] Court of Justice 3 September 2008, Joined Cases nrs. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission'.
[118] Regulation Council nr. 881/2002, 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, *Pb.L.* 29 May 2002, issue 139, 9.Adv. Gen. P. MADURO opinion under Court of Justice 3 September 2008, 'Kadi & Al Barakaat International', § 46.

The Court found that the freezing measure was a temporary precautionary measure which did not suppose the deprivation of Mr. Kadi's property. Nevertheless, based on the general application of the freezing measure and its duration,[119] the measures undeniably restricted Mr. Kadi's exercise of property rights. Applying the principle of proportionality (cf. *supra* margin nr. 18), the Court asserted that the freezing measure could not per se be regarded as inappropriate, having regard to the Community's objective of general interest to fight international terrorism. Furthermore, based on periodic re-examination mechanism provided by the UNSC and the procedure for targeted individuals to have their case re-examined by the United Nations Sanctions Committee, the Court found that the restrictive measures were in principle justified.

However, applying a 'Solange'-like argument,[120] the Court held that the regulation implementing the restrictive measures did not guarantee Mr. Kadi a reasonable opportunity of having his case comprehensively reviewed by a competent authority.[121] This opportunity constitutes a procedural requirement of the right to property as construed in Art. P 1-1 ECHR.[122] Accordingly, having regard to the lack of comprehensive review and the fact that the interference with Mr. Kadi's right to property was significant, the Court of Justice found that the regulation did constitute an unjustified restriction of Mr. Kadi's right to property.[123]

3.1.5. Möllendorf

28. FACTS OF THE CASE – The same regulation was also the subject matter in the case of *Möllendorf* in which property rights were also an issue. However, this time it did not relate to the persons targeted by the restrictive measures. Rather, it concerned an indirect breach of the right to property of persons other than those listed in the regulation.[124]

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[119] Mr. Kadi had been listed since October 2001. Court of Justice 3 September 2008, Joined Cases nrs. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission', § 32.

[120] The so-called doctrine of equivalent protection. Court of Justice Case 17 December 1970, nr. 11/70, ECLI:EU:C:1970:114, 'Internationale Handelsgesellschaft mbH'; Court of Justice 6 May 1982, nr. 126/81, ECLI:EU:C:1982:144, 'Wünsche Handelsgesellschaft'; M. BRKAN, "The Role of the European Court of Justice in the Field of Common Foreign and Security Policy After the Treaty of Lisbon: New Challenges for the Future", in P. J. CARDWELL (ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*, The Hague, T.M.C Asser Press, 2012, (97) 106; L. PANTALEO, "Sanctions Cases in the European Courts", in P. EDEN and M. HAPPOLD (eds.), *Economic Sanctions and International Law,* Oxford, Hart Publishing, 2016, (171) 180.

[121] Court of Justice 3 September 2008, Joined Cases nrs. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission', § 323-326.

[122] ECtHR 21 March 2002, 'Jokela/Finland', § 45; Court of Justice 3 September 2008, Joined Cases nrs. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission', § 368.

[123] Court of Justice 3 September 2008, Joined Cases nrs. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission', § 363-371.

[124] N. LAVRANOS, case note under Court of Justice 11 October 2007, nr. C-117/06,

In 2000, Ms. Möllendorf and Ms. Möllendorf-Niehuus (the sellers) entered into an agreement with Mr. El-Rafei, Mr. Rafehi and Mr. Al-Aqeel (the buyers) for the sale of land and buildings belonging to them in Berlin. In accordance with German Law, they also agreed that ownership of the immovable property would be transferred to the buyers and for that transfer to be registered in the Land Register. However, after the sale price had been paid but before the final registration in the Land Register, Mr. Al-Aqeel was designated as being associated with Osama Bin Laden, Al Qaeda or the Taliban. Therefore, he was listed in Regulation 881/2002 and subject to restrictive measures laid down by that regulation. More specifically, no economic resources were to be made available, directly or indirectly, to, or for his benefit, so as to enable him to obtain funds, goods or services.[125] Moreover, any participation, knowingly and intentionally, in such activities was prohibited.[126] Relying on Regulation 881/2002, the Land Registry refused to effect the registration in the Land Register. Confronted with these facts, the Kammergericht Berlin referred the case to the Court of Justice for preliminary ruling. It asked whether, based on the facts of the case, the regulation had to be interpreted as prohibiting the final registration.[127] The sellers also argued that if the regulation would apply, it would constitute a breach of their fundamental right of property. Notwithstanding the fact that the buyers already enjoyed possession of the property according to German law, the sellers were obligated to repay the buyers because it was not possible to proceed with the final registration of transfer of ownership.[128]

29. JUDGMENT COURT OF JUSTICE – The judgment of the Court of Justice which essentially follows Advocate General Mengozzi's opinion,[129] starts by asserting that the focus should be on the scope of Art. 2(3) Regulation 881/2002 and particularly whether the expression 'making available' is broad enough to encompass the act of final registration in the Land Register of the transfer of ownership of property. In that respect the Court concludes that the expression 'made available' has a broad meaning: *"rather than denoting a specific legal category of act, it encompasses all the acts necessary under the applicable national law if a person is effectively to obtain full power of disposal in relation to the*

ECLI:EU:C:2007:596, 'Möllendorf', *ELR* 2008, issue 4, (137) 138.

[125] Art. 2(3) Regulation Council nr. 881/2002, 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, *Pb.L.* 29 May 2002, issue 139, 9.

[126] Art. 4(1) Regulation Council nr. 881/2002, 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, *Pb.L.* 29 May 2002, issue 139, 9.

[127] Court of Justice 11 October 2007, nr. C-117/06, ECLI:EU:C:2007:596, 'Möllendorf', § 40.

[128] Adv. Gen. MENGOZZI opinion under Court of Justice 11 October 2007, nr. C-117/06, ECLI:EU:C:2007:596, 'Möllendorf', nr. C-117/06, ECLI:EU:C:2007:267, § 95-97.

[129] Adv. Gen. MENGOZZI opinion under Court of Justice 11 October 2007, nr. C-117/06, ECLI:EU:C:2007:596, 'Möllendorf', nr. C-117/06, ECLI:EU:C:2007:267, § 40.

property concerned."[130] Accordingly, final registration in the Land Register constitutes such an act because under German law it is only after such an act that the buyer has the power to mortgage and to transfer the title to that immovable property. Therefore, the regulation must be interpreted as prohibiting the final registration of the transfer of ownership in the Land register.[131]

However, with regards to the potential incompatibility of the prohibition with the sellers' fundamental right to property, the Court of Justice is rather discrete. It asserted that it was a matter of national law whether the obligation to repay would constitute a disproportionate infringement of the sellers' right to property. Nevertheless, the Court pointed out that the referring court needed to apply the requirements flowing from the fundamental rights within the legal order of the Community.[132]

30. CASE COMMENTS – In his comment *Möllendorf*, Nikolaos Lavranos argued that the Court of Justice had placed *"a too heavy burden on private parties by substantially limiting their fundamental rights."*[133] Following the judgment of the Court of Justice, private parties were obligated to investigate whether their counterpart were listed by UN or EU sanctions or not before entering into any agreement involving the transfer of economic resources. Nor could any contracting party be expected to reveal that he or she was targeted by restrictive measures as it would come down to a form of self-incrimination.[134]

Another comment was provided by Francis Donnat, who described the Court of Justice's assessment of the fundamental right to property as deceiving.[135] Even though he understands why the Court chose a prudent posture, he nevertheless points out that it could have chosen another outcome. In that respect, he refers to the serious harm both Ms. Möllendorf endured for the sake of the Community's objectives of general interest, which could have been compensated on the base of non-contractual liability of the Community.[136]

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[130] Court of Justice 11 October 2007, C-117/06, ECLI:EU:C:2007:596, 'Möllendorf', § 51.
[131] Court of Justice 11 October 2007, C-117/06, ECLI:EU:C:2007:596, 'Möllendorf', § 46-57.
[132] Court of Justice 11 October 2007, C-117/06, ECLI:EU:C:2007:596, 'Möllendorf', § 74-79.
[133] N. LAVRANOS, case note under Court of Justice 11 October 2007, nr. C-117/06, ECLI:EU:C:2007:596, 'Möllendorf', nr. C-117/06, ECLI:EU:C:2007:267, *ELR* 2008, issue 4, (137) 142.
[134] Art. 6 ECHR; Art. 48 Charter of Fundamental Rights of the European Union; N. LAVRANOS, case note under Court of Justice 11 October 2007, nr. C-117/06, ECLI:EU:C:2007:596, 'Möllendorf', *ELR* 2008, issue 4, (137) 141.
[135] F. DONNAT, "CJCE, 11 octobre 2007, Möllendorf et Möllendorf-Niehuus, aff. C-117/06, Rec. P. I-836 I", *RAF* 2007-2008, issue 2, (453) 457.
[136] It should be noted that following the judgment in *Fiamm*, damages on the basis of non-contractual liability of the EU is *de facto* impossible. Court of Justice 9 September 2009, nr. C-120/06 P and C-121/06 P ECLI:EU:C:2008 :476 ; F. DONNAT, "CJCE, 11 octobre 2007, Möllendorf et Möllendorf-Niehuus, aff. C-117/06, Rec. P. I-836 I", *RAF* 2007-2008, issue 2, (453) 457; J. WAKEFIELD, "The changes in liability of EU institutions: *Bergaderm*, *FIAMM* and *Schneider*", *ERA Forum* 2011, vol. 12, issue 4, 625-639.

3.1.6. Rosneft

31. FACTS OF THE CASE – In a recent case, the Court of Justice dealt with the right to property and the freedom to conduct business of a Russian oil company. These rights were allegedly breached by restrictive measures adopted by the EU in view of Russia's actions, destabilising the situation in Ukraine.[137] As mentioned in the introduction, the EU adopted a set of restrictive measures in response to the actions of Russia which were regarded as destabilising the situation in Ukraine.

In Decision 2015/512 the EU established that the export of certain sensitive products and technologies from the Russian oil sector had to be prohibited and that certain operators in that sector had to be restricted to access the EU's capital market in order to increase the costs of the actions of Russia designated to undermine Ukraine's territorial integrity, sovereignty and independence and to promote a peaceful settlement of the crisis.[138] Rosneft, a Russian oil company which is controlled by the Russian State has been subject to some of the restrictive measures imposed by Decision 2014/512 and its implementing regulation.[139]

Rosneft brought an action before the EU courts and before the national courts in the United Kingdom. In the latter proceedings, the High Court of Justice was doubtful as to the validity and the interpretation of the acts containing the restrictive measures. Therefore, it made reference to the Court of Justice for preliminary ruling.[140] Rosneft argues that the contested acts are disproportionate with respect to their objective and interfere with its to freedom to conduct business and right to property. In that respect, Rosneft particularly refers to the fact that non-Russian parties can be relieved of any contractual obligation concluded with it because the contested acts permit the confiscation of Rosneft's assets and interference with its accrued contractual rights, in other words, Rosneft's property rights.[141]

32. JUDGMENT OF THE COURT – Applying its established case law with regards to the freedom to conduct business and the right to property, the Court of Justice asserts that these fundamental rights are not absolute. Accordingly, their exercise may be subject to restrictions justified by objectives of public interest pursued by the EU, provided that such restrictions are not disproportionate and intolerable with regards to their

[137] Decision Council nr. 2014/512/CFSP, 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *Pb.L.* 31 July 2014, issue 229, 13; Regulation Council nr. 833/2014, 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *Pb.L.* 31 July 2014, issue 229, 1; Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', § 35.
[138] Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', § 29.
[139] OJSC Rosneftegaz, a body owned by the Russian State, has a majority shareholding of 69,5% in Rosneft. Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', § 30.
[140] Court of justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', § 36-38.
[141] Court of justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', § 35 and143-145.

pursued aim.[142] Subsequently, stating the leading authority, the Court proclaimed that *"restrictive measures, by definition, have consequences which affect rights to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions"*[143] and that this was *a fortiori* the case with respect to the consequences of smart sanctions.

Having regard to the EU's wider objective of maintaining peace and international security,[144] the Court of Justice asserts that the objectives pursued by the contested acts, namely the protection of Ukraine's territorial integrity, sovereignty and independence and the promotion of a peaceful settlement of the crisis in that country, justify potential negative consequences for certain operators. Therefore, the Court of Justice concludes that the interference with Rosneft's freedom to conduct business and its right to property caused by the contested acts cannot be considered to be disproportionate.[145]

33. CASE COMMENT – Drewniaks's criticism with regards to the abstract framing of the objective pursued by the contested regulation in *Bosphorus* could also be put forward in this case (cf. *supra* margin nr. 25). It is indeed hard to argue that the EU's restrictive measures would be unreasonable if such measures are adopted in order to achieve a broad and abstract aim such as the protection of territorial integrity, sovereignty and independence, and the promotion of peaceful crisis settlement.

However, Advocate General Wathelet argued that the contested acts aim at a carefully circumscribed objective. That is to say, restricting the supply of equipment and the provision of financing to the Russian oil sector. From that point of view, the restrictive measures could be regarded as proportionate as they do not affect Russian economic operators without regard to their strategic importance to the Russian economy.[146]

3.2. RESTRICTIVE MEASURES EVALUATED AGAINST INTERNATIONAL LAW

3.2.1. Status of International Law within the EU

34. STATUS OF INTERNATIONAL AGREEMENTS WITHIN THE EU – As it appears from Article 3(5) TEU, the EU is to contribute to the strict observance and development of international law. Accordingly and consistent

[142] Court of Justice 14 May 1974, nr. 4/73, ECLI:EU:C:1974:51, 'Nold', § 14; Court of Justice 30 July 1996, nr. C-84/95, ECLI:EU:C:1996:312, 'Bosphorus', § 21; Court of Justice 16 November 2011, nr. C-548/09 P, ECLI:EU:C:2011:735, 'Bank Melli Iran', § 113-114; Court of justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', § 148.
[143] Court of Justice 30 July 1996, nr. C-84/95, ECLI:EU:C:1996:312, 'Bosphorus', § 22; Court of justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', § 149.
[144] Art. 21 TEU.
[145] Court of justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', § 150.
[146] Adv. Gen. M. WATHELET opinion under Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15, ECLI:EU:C:2016:381 § 203.

with the vital international law principle of *pacta sunt servanda*,[147] Article 216(2) TFEU provides that international agreements concluded by the EU are binding on its institutions and Member States.[148] However, Article 216(2) only expresses the binding character of international agreements concluded by the EU and does not describe their legal effects within the EU. In accordance with the principle of sovereign equality and non-interference in internal affairs, treaties, as a general rule, leave this question to the discretion of each individual state.[149]

However, with regards to the founding treaties of the EU, a fundamentally different approach was taken by the Court of Justice when it introduced through two seminal judgements the principles of direct effect and supremacy which marked the constitutionalization of a new legal order of international law.[150] With regards to international agreements concluded by the EU, The Court of Justice held in words reminiscent of the language used in *Costa/ENEL*, that once the agreement comes into force, its provisions form an integral part of EU law.[151] In subsequent case law, the Court also held that such agreements have primacy over secondary EU law.[152] Therefore they are situated hierarchically between primary EU law and secondary EU law.[153]

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[147] For a legal historical outline on the principle of *pacta sunt servanda* see also J.B. WHITTON, "La régle 'pacta sunt servanda'", *Rec. Cours.* 1934, issue 3, 151-268.

[148] Art. 216(2) TFEU; P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, 325.

[149] In that respect, the Permanent Court of International Justice held in *Danzig* that an international agreement cannot, as such, create direct rights and obligations for private individuals but that it ultimately depended on the intention of the parties. Permanent Court of International Justice 3 March 1938, 'Danzig', 17; I. I. Lukashuk, "The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law", *The American Journal of International* 1989, issue 83, 515; M. MENDEZ, *The Legal Effects of EU Agreements*, Oxford, Oxford University Press, 2013, 2.

[150] Firstly, the judgment in *Van Gend en Loos* established that EU nationals are subject of this new legal order which also intended to confer rights upon them independently of legislation by the member states. This was a radical shift from the position that the domestic legal order determines the legal effect that treaties have therein. Subsequently, the judgment in *Costa/ENEL* reaffirmed that the European Economic Community Treaty has created its own legal order which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply. Moreover, because of its special and original nature, Community law cannot be overridden by domestic legal provisions and enjoys therefore supremacy. Court of Justice 4 Februari 1963, nr. 26/62 ECLI:EU:C:1963:1, 'Van Gend en Loos'; Court of Justice 15 July 1964, nr. 6/64 ECLI:EU:C:1964:66, 'Costa/ENEL'; M. MENDEZ, *The Legal Effects of EU Agreements*, Oxford, Oxford University Press, 2013, 11; P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, 325.

[151] In this case the Court was addressed by a Belgian Court for a preliminary ruling on the incompatibility of a community measure with the Community's obligations under international law. However, the real significance of the case lay in the assertion that an international agreement concluded by the EU is an act of the institutions such as to give the Court jurisdiction to address preliminary references. Court of Justice 30 April 1974, nr. 181/74 ECLI:EU:C:1974:41, 'Haegeman'; J. KLABBERS, "International Law in Community Law: The Law and Politics of Direct Effect", *Yearbook of European Law* 2001, issue 21, (263) 275; M. MENDEZ, *The Legal Effects of EU Agreements*, Oxford, Oxford University Press, 2013, 63-66.

[152] Court of Justice 10 September 1996, nr. 61/94 ECLI:EU:C:1996:313, 'Commission/Germany'.

[153] G. S. SZILARD, "The 'Primacy' and 'Direct Effect' of EU International Agreements", *European Public Law* 2015, issue 2, (343) 349; S. MARSDEN, "Invoking Direct Application and Effect of International Treaties by the European Court of Justice: Implication for International

Moreover, it suffices that the agreement has been concluded in accordance with the procedure set out in Article 218 TFEU to form an integral part of EU law.[154] It is one thing to know that international agreements are binding upon the EU and form integral part of EU law, however it is another thing to know whether their application necessitates any form of implementation.[155]

35. STATUS OF CUSTOMARY INTERNATIONAL LAW WITHIN THE EU – International law does not only consist of international agreements. In that respect, international custom, which should be applied as evidence of a general practice accepted as law, is also a source of international law.[156] Similar to international agreements concluded by the EU, rules of customary international law form an integral part of EU law.[157] The Court of Justice has asserted this implicitly and explicitly on various occasions, [158] even where the Commission had doubted this view.[159] Moreover, international agreements not binding upon the EU are also integral part of EU law in so far as they codify principles of customary international law.[160] This is for example the case for the 1969 Vienna Convention on the law of Treaties (hereafter:

Environmental Law in the European Union, *International Comparative Law Quarterly* 2011, vol. 60, 747.

[154] J. RIDEAU, "Les Accords internationaux dans la jurisprudence de la Cour de Justice des Communautés Européennes", *Revue générale de droit international public* 1990, issue 94, 308; P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, 327.

[155] Consistent with Article 216(2) TFEU, the Court held in *Kupferberg* that the implementation of the measures of an international agreement concluded by the EU had to be done, according to the state of EU law for the time being in the areas affected by the provisions of the agreement, either by the EU institutions or by the Member States. Piet Eeckhout notes in that respect that it is not possible to point to any consistent implementation practice, as each agreement is different and may thus require various types of action or inaction. Court of Justice 26 October 1982, nr. 104/81 ECLI:EU:C:1982, 'Kupferberg', § 12; C. KADDOUS, "Effects of International Agreements in the EU Legal Order", in M. CREMONA and B. DE WITTE (eds.), *EU Foreign Relations Law Constitutional fundamentals*, Portland, Hart Publishing, 2008, 292-293; P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, (291) 328.

[156] Article 38(b) of the Statute of the Permanent Court of International Justice; J. CRAWFORD, *Brownlie's Principles of Public International Law,* Oxford, Oxford University Press, 2012, 21-22; K. LENAERTS and E. DE SMIJTER, "The European Union as an Actor under International Law", *Yearbook of European Law* 1999, issue 19, (95) 122; P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, 383.

[157] A. ROSAS, "The European Court of Justice and Public Interntaional Law" in J. WOUTERS, A. NOLLKAEMPER and E. DE WIT (eds.), *The Europeanisation of International law,* The Hague, TMC Asser Press, 2008, 79 (71-85, 238); K. LENAERTS and E. DE SMIJTER, "The European Union as an Actor under International Law", *Yearbook of European Law* 1999, issue 19, (95) 123-124.

[158] Court of Justice 4 December 1974, nr. 41/74 ECLI:EU:C:1974:133, 'Van Duyn', § 22; Court of Justice 31 March 1993, joined cases nr. C-89/85, C-104/85, C-11/85, C-116/85, C-117/85 and C-125/85 to C-129/85 ECLI:EU:C:1993:120, 'Woodpulp', § 15-23; Court of Justice 24 November 1992, nr. C-286/90 ECLI:EU:C:1992:453, 'Poulsen and Diva Corp', § 9; Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', § 44; K. LENAERTS and E. DE SMIJTER, "The European Union as an Actor under International Law", *Yearbook of European Law* 1999, issue 19, (95) 123-124; P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, 384-387.

[159] Adv. Gen. JACOBS opinion under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', nr. C-162/96 ECLI:EU:C:1997:582, § 53.

[160] Court of Justice 24 November 1992, nr. C-286/90 ECLI:EU:C:1992:453, 'Poulsen and Diva Corp', § 9-10.

Vienna Convention).[161] However, we must conclude that as with international agreements, recognition does not of itself resolve all questions concerning the legal effects which customary international law may produce in the EU legal order (cf. *infra*. 42).

3.2.2. Enforcement of International Agreements within the EU

36. ENFORCEMENT OF INTERNATIONAL AGREEMENTS – Where acts of the EU institutions may be in conflict with provisions of an international agreement binding on the EU, the question arises whether the violation of an international agreement can be invoked by individuals to challenge the legality of such acts. It is at this point that the concept of direct effect comes into play.[162]

In a recent case the Court of Justice set up a three-step analysis to determine whether a provision of an international agreement may be relied upon in order to review the legality of measures adopted by the EU institutions or to set aside conflicting national law.[163] Firstly, the EU must be bound by the international agreement in question.[164] In that respect, by virtue of Article 216(2) TFEU, international agreements concluded by the EU are binding upon its institutions and member states (cf. *supra* margin nr. 34). Secondly, a provision of an international agreement can only be relied upon to examine the validity of an act of the EU where the nature and the broad logic of the agreement do not preclude this.[165] This condition has been describes as the direct applicability of an international agreement.[166] It's only where the

[161] Court of Justice 25 February 2010, nr. C-386/08 ECLI:EU:C:2010:91, 'Brita', § 42.

[162] In a decade time the Court of justice set up the foundation of direct effect of international agreements concluded by the EU. This development started with the judgment in *International Fruit Company* and somewhat reached its culmination point in the judgment of *Kupferberg*. J. KLABBERS, "International Law in Community Law: The Law and Politics of Direct Effect", *Yearbook of European Law* 2001, issue 21, 263-298; M. MARESCEAU, "The Court of Justice and Bilateral Agreements, in A. ROSAS, E. LEVITS and Y. BOT (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty years of Case-Law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence,* The Hague, Asser Press, 2013, (693) 695-699; P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, 331-338.

[163] A similar analysis was already drawn out the judgment in *International Fruit Company*. Court of Justice 12 December 1972, nr. 21 to 24/72 ECLI:EU:C:1972:115, 'International Fruit Company'; Court of Justice 21 December 2011, nr. C-366/10 ECLI:C:EU:2011:864, 'ATAA & Others'; K. LENAERTS and E. DE SMIJTER, "The European Union as an Actor under International Law", *Yearbook of European Law* 1999, issue 19, (95) 113.

[164] Court of Justice 21 December 2011, nr. C-366/10 ECLI:C:EU:2011:864, 'ATAA & Others', § 52.

[165] Court of Justice 21 December 2011, nr. C-366/10 ECLI:C:EU:2011:864, 'ATAA & Others', § 53.

[166] An international agreement binding upon the EU will not be directly applicable if the contracting parties to the agreement agreed, either explicitly or implicitly, that such an agreement requires further implementing measures, or where that determination stems from its 'nature and broad logic'. K. LENAERTS, "Direct Applicability and Direct Effect of International Law in the EU Legal Order", in I. GOVAERE, E. LANNON, P. VAN ELSUWEGE and S. ADAM (eds.), *The European Union in the World Essays in Honour of Marc Maresceau,* Leiden, Martinus Nijhof Publishers, 2014, (45) 46; K. LENAERTS and E. DE SMIJTER, "The European Union as an Actor under International Law", *Yearbook of European Law* 1999, issue 19, (95) 113.

intention of the contracting parties is not explicitly set out in the international agreement, that the Court shall look at its nature and structure in order to assess its direct applicability.[167] Finally, once it has been established that the international agreement is directly applicable, it is necessary to examine whether the relevant provisions are unconditional and sufficiently precise in order to produce direct effect.[168]

37. SIMUTENKOV – Since the 1st of December 1997, the EU is bound by the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part (hereafter: PCA).[169] Therefore, provisions of the PCA could be invoked by individuals to review the legality of measures adopted by the EU if the PCA is directly applicable and if the concerned provisions of the PCA are unconditional and sufficiently precise.

In *Simutenkov* the Court was addressed by a Spanish court for a preliminary ruling on the direct effect of Article 23(1) of the Partnership and Cooperation Agreement between the EU and Russia.[170] The Plaintiff, a Russian Football player employed in Spain, invoked this non-discrimination provision in order to set aside inconsistent national law, since under the rules of the Spanish Football Federation, Spanish clubs could only field a limited number of players from non-EU countries. The Court concluded that the non-discrimination provision has direct effect, as it is a clear and precise obligation which by its very nature can be relied on by any individual before a national court and does therefore not need any implementing measure.[171] Subsequently, the Court asserted that the direct effect of the non-discrimination provision is not gainsaid by the purpose and nature of the PCA. The fact that the PCA merely established a partnership without providing for an association or a future accession was no obstacle for some of its provisions to have direct effect. Accordingly, the Court clarified that when an agreement established a co-operation between the parties, some of the provisions of that agreement could directly govern the legal position of individuals. In that respect, it has been noted that the Court of Justice assumes, in contrast to multilateral agreements, that bilateral agreements –

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[167] Court of Justice 26 October 1982, nr. 104/81 ECLI:EU:C:1982, 'Kupferberg', § 17; K. LENAERTS, "Direct Applicability and Direct Effect of International Law in the EU Legal Order", in I. GOVAERE, E. LANNON, P. VAN ELSUWEGE and S. ADAM (eds.), *The European Union in the World Essays in Honour of Marc Maresceau,* Leiden, Martinus Nijhof Publishers, 2014, (45) 56; P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, 335.

[168] Court of Justice 21 December 2011, nr. C-366/10 ECLI:C:EU:2011:864, 'ATAA & Others', § 54; K. LENAERTS, "Direct Applicability and Direct Effect of International Law in the EU Legal Order", in I. GOVAERE, E. LANNON, P. VAN ELSUWEGE and S. ADAM (eds.), *The European Union in the World Essays in Honour of Marc Maresceau,* Leiden, Martinus Nijhof Publishers, 2014,(45) 56-57.

[169] Decision Council and Commission nr. 97/800, 30 October 1997 on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, *Pb.L.* 28 November 1997, issue 327, 1.

[170] Court of Justice 12 April 2005, nr. C-265/03 ECLI:EU:C:2005:213, 'Simutenkov'.

[171] Court of Justice 12 April 2005, nr. C-265/03 ECLI:EU:C:2005:213, 'Simutenkov', § 22-23.

whether association agreements,[172] co-operation agreements,[173] or free trade agreements[174] – are in principle directly applicable.[175]

38. PORTUGAL V COUNCIL – Since the 1st of January 1995,[176] the EU is bound by the Agreement establishing the World Trade Organization (hereafter: WTO Agreement) and its annexes including *inter alia* the General Agreement on Tariffs and Trade 1994 (hereafter: GATT). Therefore, provisions of the WTO Agreement could be invoked by individuals to review the legality of measures adopted by the EU if the WTO Agreement is directly applicable and if the concerned provisions of the WTO Agreement have direct effect.

In *Portugal v Council* the Court of Justice was called upon to review the compatibility of a Council decision concluding agreements on trade in textile products with Pakistan and India, in light of rules contained in the WTO Agreement, and in particular provisions of the GATT.[177] Having regard to the nature and the structure of the WTO Agreement which considerably underscores negotiation between the parties, the Court concluded that it lacked direct applicability. To require judicial organs to set aside rules of domestic law which are inconsistent with the WTO Agreement would deprive the legislative or executive organs of the contracting parties of this possibility of entering into negotiated arrangements.[178] However, the findings of the Court with regards to direct applicability went further. The Court asserted that, as the WTO Agreement is based on reciprocity, lack of reciprocity with regards to judicial application may eventually lead to a 'disuniform' application of the WTO rules.[179] Moreover, the Court added, to ensure that domestic law complies with WTO rules, would deprive the legislative or executive organs of the EU of the scope for manoeuvre enjoyed by their trading partner counterparts.[180] This finding was particularly remarkable because the Court had previously established in *Kupferberg* that a lack of reciprocity in judicial application did not as such constitute a lack of

[172] Concerning the EU's Association Agreement with Turkey see Court of Justice 11 May 2000, nr. C-37/98 ECLI:EU:C:2000:224, 'Savas'.
[173] Concerning the EU's Cooperation Agreement with Morocco see Court of Justice 31 January 1991, nr. C-18/90 ECLI:EU:C:1991:36, 'Kziber'.
[174] Concerning the EU's Partnership and Cooperation Agreement with Russia see Court of Justice 12 April 2005, nr. C-265/03 ECLI:EU:C:2005:213, 'Simutenkov'.
[175] K. LENAERTS, "Direct Applicability and Direct Effect of International Law in the EU Legal Order", in I. GOVAERE, E. LANNON, P. VAN ELSUWEGE and S. ADAM (eds.), *The European Union in the World Essays in Honour of Marc Maresceau,* Leiden, Martinus Nijhof Publishers, 2014, (45) 59.
[176] Decision Council nr. 94/800, 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), *Pb.L.* 23 december 1994, issue 336, 1.
[177] Court of Justice 23 November 1999, nr. C-149/96 ECLI:EU:C:1999:574, 'Portugal/Council'.
[178] Court of Justice 23 November 1999, nr. C-149/96 ECLI:EU:C:1999:574, 'Portugal/Council', § 36-40.
[179] Court of Justice 23 November 1999, nr. C-149/96 ECLI:EU:C:1999:574, 'Portugal/Council', § 45.
[180] Court of Justice 23 November 1999, nr. C-149/96 ECLI:EU:C:1999:574, 'Portugal/Council', § 46.

reciprocity in the implementation of the agreement.[181] However, the Court noted that the interpretation in *Kupferberg* applied to international agreements which were distinguished from the WTO Agreement as they introduced a certain asymmetry of obligations, or created special relations of integration with the Community.[182]

3.2.3. Rosneft

39. COMPATIBILITY OF RESTRICTIVE MEASURES WITH THE PCA – Since the 1st of December 1997, the EU is bound by PCA.[183] Therefore, provisions of the PCA could be invoked by individuals to review the legality of measures adopted by the EU if the PCA is directly applicable and if the concerned provisions of the PCA have direct effect.

In the case of *Rosneft*, the Court of Justice was addressed by a court of the UK for a preliminary ruling on the legality of Article 1(2)(b) to (d) and (3) of, and Annex III to Decision 2014/512 adopting restrictive measures against Russia and certain individuals, including Rosneft, in view of Russia's actions, destabilising the situation in Ukraine and Article 3(1), (3) and (5), Article 3a(1) and Article 5(2)(b) to (d) and (3) of, and Annexes II and VI to Regulation 883/2014 implementing the former decision (cf. *supra* margin nr. 31 for the facts of the case).[184] Rosneft alleged that those articles infringed Article 10(1) (grant of most-favoured-nation treatment in relation to trade in goods), Article 12 (freedom of transit for goods), Article 36 (grant of no less favourable treatment in relation to the cross-border supply of services) and Article 52(2), (5) and (9) (free movement of capital) of the PCA.[185]

In that respect, the Council, Commission and several Member States submitted observations arguing that the restrictive measures concerned were justified in accordance with Article 99(1)(d) of the PCA because they are necessary for the protection of the essential security interests in time of ware or serious internal tension constituting threat of war. Moreover, the articles on which Rosneft relies have no direct effect in their view.[186]

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[181] Court of Justice 26 October 1982, nr. 104/81 ECLI:EU:C:1982, 'Kupferberg', § 18.
[182] Court of Justice 23 November 1999, nr. C-149/96 ECLI:EU:C:1999:574, 'Portugal/Council', § 42.
[183] Decision Council and Commission nr. 97/800, 30 October 1997 on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, *Pb.L.* 28 November 1997, issue 327, 1.
[184] Decision Council nr. 2014/512/CFSP, 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *Pb.L.* 31 July 2014, issue 229, 13; Regulation Council nr. 833/2014, 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *Pb.L.* 31 July 2014, issue 229, 1; Adv. Gen. WATHELET opinion under Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15 ECLI:EU:C:2016:381, § 106.
[185] Adv. Gen. WATHELET opinion under Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15 ECLI:EU:C:2016:381, § 108.
[186] Adv. Gen. WATHELET opinion under Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15 ECLI:EU:C:2016:381, § 107.

40. OPINION ADVOCATE GENERAL – Following the three-step analysis, Advocate General Wathelet concluded that the invoked provisions of the PCA have direct effect. Consistent with established case law, the Court found that the PCA was binding upon the EU, and that the provisions of the PCA form an integral part of EU law.[187] Subsequently, the Advocate General acknowledged that Articles 10(1) and 12 of the PCA referred to specific provisions of the GATT which in accordance to the Court's established case law lacked direct applicability (cf. *supra* margin nr. 38). However, the Advocate General asserted that the PCA is not an agreement that only concerns trade in goods, to which the case law in *Portugal v. Council* might be applied and went on to refer to its previous judgement in *Simutenkov* in which it found that the nature and structure of the PCA did not as such prevent certain of its provisions from having direct effect (cf. *supra* margin nr. 37).[188] Accordingly, the Advocate General expressed that it failed to see in what way the wording of the concerned provisions of the PCA do not satisfy the criteria for direct effect which Article 23(1) of the PCA, concerning labour conditions, did satisfy in its judgment in *Simutenkov*.[189]

Consequently, the Advocate General examined whether the Articles of the PCA at issue were restricted. It firstly found that the limited scope of Articles 10 and 12 of PCA were not restricted by the invoked provisions of the EU acts at issue because the latter did not concern customs tariffs applicable to exports or imports of goods, nor a freedom of transit of goods through the EU.[190] Moreover, the Advocate general pointed at Article 19 of the PCA which provides a justification for restrictions on both Articles of the PCA on grounds of public policy and public security.[191] Secondly, the Advocate General found that none of Rosneft's services restricted by the restrictive measures relates to the services covered by Article 36 of the PCA.[192] Lastly, with regards to Articles 52(2), (5) and (9) of the PCA relating to the free movement of capital in the form of direct investment between the EU and Russia, the Advocate General concluded that the alleged provisions of the EU acts at issue, invoked by Rosneft, did not constitute a restriction of the free movement of capital safeguarded by the PCA, in so far as that they did not lead to participation in an undertaking for the purpose of establishing lasting economic relations.[193] Moreover, the Advocate general is of the opinion that in this case a restriction on the free movement of capital is justifiable on grounds of public policy and public security. The Advocate

[187] Adv. Gen. WATHELET opinion under Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15 ECLI:EU:C:2016:381, § 109.
[188] Adv. Gen. WATHELET opinion under Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15 ECLI:EU:C:2016:381, § 113-113.
[189] Adv. Gen. WATHELET opinion under Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15 ECLI:EU:C:2016:381, § 117-118.
[190] Adv. Gen. WATHELET opinion under Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15 ECLI:EU:C:2016:381, § 122-130.
[191] Adv. Gen. WATHELET opinion under Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15 ECLI:EU:C:2016:381, § 132.
[192] Adv. Gen. WATHELET opinion under Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15 ECLI:EU:C:2016:381, § 133-136.
[193] Adv. Gen. WATHELET opinion under Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15 ECLI:EU:C:2016:381, § 136-141.

General posits in that respect that the restrictive measures at issue were adopted with a view to increase the costs of Russia's actions to undermine Ukraine's territorial integrity, sovereignty and independence and to promote a peaceful settlement of the crisis. Therefore, the Advocate General concluded that since Rosneft, in which the Russian State is a majority shareholder, has the largest oil reserves and the highest production levels of all oil companies listed on the Russian stock exchange, the restrictions imposed upon Rosneft by the alleged provisions of the EU acts at issue are necessary and proportionate in order to apply sufficient pressure and achieve their objective.[194]

Furthermore, the Advocate General held that in the case of an unjustified restriction on the Articles of the PCA at issue, such restriction could be justified by reference to Article 99(1)(d) of the PCA on the grounds of protection of the EU's essential security interests in time of war or serious international tensions constituting threat of war.[195] In that respect, the Advocate General is of the opinion that the Council would not have made any manifest error in its assessment of the seriousness of the international tension when adopting the restrictive measures at issue. Therefore, the Advocate General relies in its opinion on the unprovoked violation of Ukraine sovereignty and territorial integrity by Russia, the downing of Malaysian Airlines Flight MH17 in Donetsk, the illegal annexation of Crimea and Sevastopol and the fact that there is no point in looking for any declaration as to the existence of a threat to peace in the UNSC's resolutions, given the actual or potential exercise by Russia of its right of veto within the UNSC.[196]

41. JUDGEMENT OF THE COURT – The Court of Justice came to the same conclusion as the Advocate General, but it conducted a shorter analysis. With regards the validity of the contested provisions of Decision 2014/512 and Regulation 833/2014, the Court endorses the Advocate General's opinion and refers to its previous judgment in *Simutenkov* to set aside the observation of the Council, the Commission and certain member states that the provisions of the PCA invoked by Rosneft lack direct applicability.[197] However, the Court went on to conclude that there is no need to give further ruling on the matter given that Article 99 of the PCA permits their adoption. In that respect, the Court notes that in accordance with Article 99 of the PCA, the restrictions must be necessary for the protection of the EU's essential security interests, particularly in time of war or serious international tension constituting a threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.[198]

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[194] Adv. Gen. WATHELET opinion under Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15 ECLI:EU:C:2016:381, § 144-147.
[195] Adv. Gen. WATHELET opinion under Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15 ECLI:EU:C:2016:381, § 148.
[196] Adv. Gen. WATHELET opinion under Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', nr. C-72/15 ECLI:EU:C:2016:381, § 150-151.
[197] Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', § 109.
[198] Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', § 110-111.

Subsequently the Court proceeded to an examination of the restrictive measures in light of Article 99 of the PCA. Firstly, the Court asserted that the events which took place in Ukraine, a country bordering the EU, are capable of justifying measures designed to protect essential EU security interests and to maintain peace and international security because the wording of Article 99 of the PCA does not require that the 'war' or 'serious international tension constituting a threat of war' refer to a war directly affecting the territory of the EU.[199] Secondly, the Court reminds of its previous judgement in *National Iranian oil Company v. Council* in which it reaffirmed the Council's broad discretion in areas which involve the making of political, economic and social choices and for which the Council is called upon to undertake complex assessments.[200] Lastly, the Court referred to the arguments put forward by the Advocate general in its opinion (cf. *supra* margin nr. 40 *in fine*) in order to conclude that the adoption of the restrictive measures at issue was necessary for the protection of the essential EU security interests and for the maintenance of peace and international security, in accordance with Article 99 of the PCA.[201]

3.2.4. Enforcement of International Customary Law within the EU

The fact that a rule of international customary law is binding upon the EU does not automatically mean that an individual can rely upon it in court proceedings. Once again, the possibility of invoking such norm depends on the direct effect of that norm. In the case of *Racke* the Court of Justice was addressed by the Bundesfinanzhof, a German court, for a preliminary ruling on the compatibility of an act of the EU with customary international law.[202]

42. FACTS OF THE CASE – In accordance with Article 22 of the former Cooperation Agreement between the European Economic Community and the Socialist federal Republic of Yugoslavia (hereafter: Cooperation Agreement), as amended by protocol, certain wines coming from Yugoslavia were to be imported under preferential duties.[203] However, in 1991, Yugoslavia started to dissolve due to war in that country. The EU attempted to play an active role in putting an end to the conflict by *inter alia* contributing to a ceasefire agreement which was reached in The Hague in October 1991. When the ceasefire agreement was not respected, the EU threatened to terminate the Cooperation Agreement.[204] Eventually, as the war continued, the EU adopted Decision 91/586 (hereafter: suspension decision) suspending the Cooperation Agreement with immediate effect and also adopted

[199] Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', § 112
[200] Court of Justice 1 March 2016, nr. C-440/14 P EU C:2016:128, § 77, 'National Iranian oil Company/Council; Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', 113.
[201] Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft', § 114-117.
[202] Court of justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke'.
[203] Court of justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', § 4-5
[204] Court of justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', § 8; P. EECKHOUT, *EU External Relations Law,* Oxford, Oxford University Press, 2011, 387.

Regulation 3300/91 (hereafter: suspension regulation) to the same effect.[205] Two weeks later the EU terminated the Cooperation Agreement as prescribed by Article 60 of the Cooperation Agreement.[206] Whereas a termination of the Cooperation Agreement was foreseen by the agreement itself, the suspension decision, on the other hand, had no legal basis in the agreement. Racke, a German company, had imported wines from Kosovo several months after the suspension of the agreement. Nevertheless, when Racke was demanded to make up the difference between the preferential rate and the third-country rate, given that the Cooperation Agreement was no longer in force, it argued that its imports should benefit from the preferential rates for which the Cooperation Agreement had provided.[207] Once the case reached the Bundesfinanzhof, that court made a preliminary reference to the Court of Justice because it doubted the validity of the EU's acts, in particular the lawfulness of the suspension regulation and suspension decision. The Bundesfinanzhof reasoned that, as the agreement did not provide for suspension, the EU's suspension decision and regulation had to be compatible with the international customary rule of *rebus sic stantibus* on the suspension and termination of treaties, codified in Article 62 of the Vienna Convention on the Law of Treaties. That provision provides that a fundamental change of the circumstances under which a treaty has been concluded and which was not foreseen by the parties could not be invoked as a ground for terminating or withdrawing from the treaty unless that fundamental change affected the essential basis of the parties' consent to be bound by the treaty and the change effectuates a radical transformation of the extent of obligations still to be performed under the treaty.[208]

43. OPINION ADVOCATE GENERAL – In the opinion of Advocate General Jacobs, the Court of Justice found itself in uncharted waters as it was the first time that an act of the EU was sought to be declared incompatible with a rule of customary international law.[209] Referring to the landmark judgement in *International Fruit Company* the Advocate General asserts that the matter is a question of direct effect of customary international law.[210] After a comparative examination of the effect of international customary law in the legal order of the member states, he concluded that the member states are rather cautious in allowing individuals to rely on international customary

[205] Decision Council nr. 91/586, 11 November 1991 suspending the application of the Agreements between the European Community, its Member States and the Socialist Federal Republic of Yugoslavia, *Pb. L.*, issue 315, 47; Regulation Council nr. 3300/91, 11 November 1991 suspending the trade concessions providing for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia, *Pb. L.*, issue 315, 1

[206] Decision Council nr 91/602, 25 November 1991 denouncing the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia, *Pb. L.*, issue 325, 23.

[207] Court of justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', § 15-18.

[208] Article 62 of the Vienna Convention on the Law of Treaties.

[209] Adv. Gen. JACOBS opinion under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', nr. C-162/96 ECLI:EU:C:1997:582, § 38 and 51.

[210] Adv. Gen. JACOBS opinion under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', nr. C-162/96 ECLI:EU:C:1997:582, § 77.

law.[211] Moreover, the Advocate General points out that the overall nature and purpose of the Vienna Convention is to lay down rules applying in the relations between states and international organisations, and not to create rights for individuals. The rules of international customary law codified in the Vienna Convention would therefore not to be conducive to direct effect. Nevertheless, the Advocate General is of the opinion that other types of rules of customary international law might confer rights on individuals, such as rules of international humanitarian law. [212]

Though, the Advocate general believes there are good reasons for not allowing individuals to rely upon rules of customary international law codified in the Vienna Convention, he nevertheless considers that direct effect of such rules could not be wholly excluded.[213] In that respect, the Advocate General refers to the judgement in *Opel Austria* where it was held that the beneficiaries of rights with direct effect may have legitimate expectations as to the correct and proper implementation of the international agreement from which those rights stem.[214] Such entitlement to some measure of individual protection of legitimate expectations is even more supported by the strength of the customary rule of *pacta sunt servanda* codified in the Vienna Convention. Consistent with the International Court of Justice case law exceptions to that principle are in any event to be narrowly construed.[215] Accordingly, the Advocate General posits that the Court of Justice should only review whether the suspension regulation was adopted in manifest violations of the rules of customary international law concerning the suspension and termination of international agreements.[216] The Advocate General then proceeded to such limited review and concluded that there was a fundamental change of circumstances affecting the very basis of the parties' consent to be bound by the Cooperation Agreement. That change also effectuated a radical transformation of the extent of obligations still to be performed by the EU because there was clearly no point in continuing the economic, financial and trade cooperation in view of the political situation encountered by Yugoslavia's demise due to war.[217] Accordingly, in response to Racke's argument that some trade nonetheless continued, the Advocate General asserts that the principle of *rebus sic stantibus* does not require an

[211] Adv. Gen. JACOBS opinion under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', nr. C-162/96 ECLI:EU:C:1997:582, § 80-81.
[212] Adv. Gen. JACOBS opinion under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', nr. C-162/96 ECLI:EU:C:1997:582, § 84.
[213] Adv. Gen. JACOBS opinion under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', nr. C-162/96 ECLI:EU:C:1997:582, § 86.
[214] Court of First Instance 22 January 1997, nr. T-115/94 ECLI:EU:T:1997:3, 'Opel Austria', § 87-92; Adv. Gen. JACOBS opinion under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', nr. C-162/96 ECLI:EU:C:1997:582, § 87.
[215] International Court of Justice 25 September 1997, 'Hungria/Slovakia', § 104; Adv. Gen. JACOBS opinion under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', nr. C-162/96 ECLI:EU:C:1997:582, § 88.
[216] Adv. Gen. JACOBS opinion under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', nr. C-162/96 ECLI:EU:C:1997:582, § 89.
[217] Adv. Gen. JACOBS opinion under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', nr. C-162/96 ECLI:EU:C:1997:582, § 92-100.

impossibility to perform obligations.[218]

44. JUDGEMENT OF THE COURT – In essence the Court of Justice followed the Advocate General's analysis as its analysis amounted to the same conclusion. However, the Court followed another approach in its assessment of the nature of the case. According to the Court, the question of direct effect principally relates to Article 22 of the Cooperation Agreement and only incidentally relates to the customary rule of *rebus sic stantibus*.[219] The Courts reasoning is that if Article 22 of the Cooperation Agreement has direct effect and if the suspension regulation is invalid, than the preferential treatment granted by the Cooperation agreement would remain applicable in EU law until the EU brought that agreement to an end in accordance with the relevant rules of international law.[220]

In that respect the Court found, consistent with its established case law, that Article 22 of the Cooperation Agreement has direct effect.[221] Subsequently, the Court examined whether the suspension regulation is valid in light of the *rebus sic stantibus* rule of customary international law invoked by Racke. From thereon the Court's analysis is similar to that of the Advocate General as it asserts that the rule forms an exception to the *pacta sunt servanda* principle, a fundamental principle of international law on which the exception of *rebus sic stantibus* can only be applied in exceptional cases.[222] Therefore, an individual could invoke rules of customary international law which govern the termination and suspension of international agreements in order to challenge a regulation which prevents him from relying on rights which he derives directly from an international agreement.[223] However, judicial review must be limited to the question whether, in adopting the suspension regulation, the Council made manifest errors of assessment concerning the conditions for applying those rules of customary international law. This was justified because of the complexity of the rules in question and the imprecision of some of the concepts to which they refer.[224] Finally, after its limited review, the Court found, following the Advocate General's opinion, that no such manifest error of assessment had occurred, and that the suspension regulation was therefore not invalid. [225]

45. CASE COMMENTS – In its case note under *Racke* Jan Klabbers argues that the Court's approach which departs from the Cooperation Agreement and only incidentally examines the rule of customary international law, is a wiser course to follow than the Advocate General's approach which in his view

[218] Adv. Gen. JACOBS opinion under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', nr. C-162/96 ECLI:EU:C:1997:582, § 99.
[219] Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', § 29.
[220] Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', § 41-43.
[221] Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', § 31-34.
[222] Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', § 50.
[223] Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', § 51.
[224] Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', § 52.
[225] Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', § 54-61.

mixes legalism with concerns of equity and lacks clarity.[226] However, with regards Racke's argument that the performance of the obligations of the Cooperation Agreement were not impossible as some trade still continued, he was not satisfied with the Court's and Advocate General's statement that *rebus sic stantibus* does not require an impossibility to perform obligations arising from the Cooperation Agreement but has more to do with whether one of the parties still sees "the point" of cooperation. In his opinion this view may please *Realpolitiker* but runs the risk of undermining the sanctity of international commitment. Moreover, Klabbers is not convinced as the Court justifies its "manifest error" test by pointing to the complexity of the rules in question and the imprecision of some of the concepts involved. In his view, it is precisely where complex rules and imprecise concepts are involved that judicial intervention may be most needed. In that respect he refers to the scholarly prepatory works to the Vienna Convention which could have served as guidance. Nevertheless, Julian Kokott and Frank Hoffmeister observe that the need to invoke a right of suspension under the customary rule of *rebus sic stantibus* will arise less frequent in the future as the EU has begun to insert a special "non-fulfillment clause" into its cooperation agreements. This clause gives the EU the express right to suspend the agreement after consultation with the state concerned.[227]

Koen Lenaerts and Eddy De Smijter conclude their analysis of the judgment in *Racke* by stating that a rule of customary international law can always be invoked by an individual in the framework of a claim based on another rule of EU law, such as a provision with direct effect of an international agreement concluded by the EU. On the other hand, they assert that the question whether an individual may claim rights which derive directly from a rule of customary international law, remains open for the time being. But that there is no reason to suppose that the EU's settled case law on direct effect of rules of international agreements should be different in relation to rules of customary international law. Though, they do acknowledge that it is more complicated to assess whether rules of customary international law are intended to confer rights on individuals since that type of law is not necessarily codified in international agreements.[228] However, Klabbers argues that to ascribe direct effect to custom is not, in most if not all circumstances, very plausible because rules of customary international law are by definition not very precisely circumscribed.[229] Moreover in that respect, Pieter Jan Kuyper posits that from the perspective of democratic legitimacy, if a parliament collaborates in the adoption of an agreement, it has presumably done so 'en connaissance de cause' and hence must accept that the agreement possibly sets aside national or EU norms, because in

[226] J. KLABBERS case note under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', *CMLR* 1999, issue 36, (184) 184-185.
[227] J. KOKOTT and F. HOFFMEISTER case note under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', *American Journal of International Law* 1999, issue 93,(205) 209.
[228] K. LENAERTS and E. DE SMIJTER, "The European Union as an Actor under International Law", *Yearbook of European Law* 1999, issue 19, (95) 124 and 126.
[229] J. KLABBERS case note under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', *CMLR* 1999, issue 36, (184) 184.

principle it should have known that the adopted treaty norms might conflict with earlier legislation. For the same reason, international customary law, on the other hand, cannot be said to have such direct effect. In his view, this may also be a contributing factor to the lack of enthusiasm of the highest courts for direct effect of customary international law.[230]

CONCLUSION

I started my dissertation by referring to the ongoing trade conflict between the EU and Russia which has implication for both citizens of the EU as for citizens of Russia. Accordingly, the specific question which arose is how EU restrictive measures can be challenged in the EU by people who are directly or indirectly affected by those measures in order for them to protect their economic interests. My research in finding an answer to this question was conducted in three steps. After giving an introduction on the concept of economic sanction I proceeded to an outline of restrictive measures, as economic sanctions are called in EU official terms. The third step was to analyse restrictive measures in light of fundamental rights and international law.

With regards to fundamental rights, I wanted to know to what extent restrictive measures are compatible with the right to property and the freedom to conduct business. I observed that the EU adopted the Charter of Fundamental Rights in which the right to property and the freedom to conduct business are enshrined. However, prior to this charter the Court of Justice, guided by the European Convention for the Protection of Human Rights and Fundamental Freedoms, had already uplifted the position of fundamental rights within the EU. In that respect, the Court of Justice had noted that both the right to property and the freedom to conduct business are not absolute rights and that a fair balance had to be determined between the general interest of the EU and the protection of these fundamental rights.

With regards to the assessment of restrictive measures in light of these fundamental rights the Court of Justice firstly established in the *Kadi* saga that whenever restrictive measures were contested in light of fundamental rights, a comprehensive review had to be applied regardless of their origin.[231] Secondly, in *Bosphorus*, the Court of Justice was called upon for the first time to review restrictive measures in light of the right to property and the freedom to conduct business. In essence, the Court held that these fundamental rights were not restricted because the restrictive measures were

[230] P.J. KUIJPER, "Customary International Law, Decisions of International Organisations and Other Technigues for Ensuring Respect for International Legal Rules in European Community Law", in J. WOUTERS, A. NOLLKAEMPER and E. DE WIT (eds.), *The Europeanisation of International law,* The Hague, TMC Asser Press, 2008, (87) 96.
[231] Court of Justice 3 September 2008, Joined Cases nrs. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46; 'Kadi and Al Barakaat International Foundation/Council and Commission'; Court of Justice 18 July 2013, joined cases nr C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518, 'Commission/Kadi'.

proportionate in light of the stronger public interest of stopping a civil war.[232] In that respect legal scholars argued that the Court's assessment of the restrictive measures was too soft as virtually any measure would have been found reasonable and proportionate in light of such an abstract and broadly framed objective.[233] Thirdly, in *Kadi*, the Court of Justice was confronted with a similar review however in this case the restrictive measures were so called smart sanction, as they aimed at specific persons. The Court concluded that the restrictive measures had been an unjustified restriction of the right to property due to their excessive time span and the lack of comprehensive review.[234] Fourthly, in *Möllendorf*, the EU's restrictive measures had created a "boomerang effect". The Court of Justice was confronted with a claim of EU citizens which alleged that the EU's restrictive measures were restricting their right to property as they wanted to conclude a property transaction with a person listed in the EU's restrictive measures. The Court held that the restrictive measures were indeed applicable to their property transaction but it did not settle whether there had been a restriction of their right to property and left this issue to the referring German court.[235] Legal scholars argued that the Court had placed a too heavy burden on private parties with this judgement as they were now required to investigate whether their counterpart were listed by restrictive measures or not.[236] Lastly, in *Rosneft*, the Court of Justice was confronted with a Russian company claiming that the EU's restrictive measures restricted its right to property and freedom to conduct business. In essence, the Court concluded that these fundamental rights were not restricted because the restrictive measures were proportionate in light of their objective to protect Ukraine's territorial integrity, sovereignity and indepence and the promotion of a peaceful settlement of the crisis in that country.[237] Similar to the judgment in *Bosphorus* it could be argued that such abstract and broadly framed objective would in any event be proportionate and cover any restriction of the fundamental rights at issue.

From all this I conclude that the litigation of restrictive measures in light of the right to property and the freedom to conduct business will not be very effective for directly or indirectly affected individuals as the Court of Justice is inclined not to inhibit the EU's objectives in external policy. However, it should be noted that following the Court's judgment in *Kadi* the standard of protection has been lifted. In that respect, it could be argued that the Council and the Commission take into account the potential impact their restrictive measures may have upon individuals.

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[232] Court of Justice 30 July 1996, nr. C-84/95, ECLI:EU:C:1996:312, 'Bosphorus'.
[233] E. DREWNIAK, "The Boshphorus case: the balancing of property rights in the European Community and the public interest in ending the war in Bosnia", *Fordham International Law Journal* 1997, vol. 20, issue 3, (1007) 1079-1081.
[234] Court of Justice 3 September 2008, Joined Cases nrs. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:46, 'Kadi and Al Barakaat International Foundation/Council and Commission'.
[235] Court of Justice 11 October 2007, nr. C-117/06, ECLI:EU:C:2007:596, 'Möllendorf'.
[236] N. LAVRANOS, case note under Court of Justice 11 October 2007, nr. C-117/06, ECLI:EU:C:2007:596, 'Möllendorf', nr. C-117/06, ECLI:EU:C:2007:267, *ELR* 2008, issue 4, (137) 142.
[237] Court of Justice 28 March 2017, nr. C-72/15, ECLI:EU:C:2017:236, 'Rosneft'.

With regards to international law, I wanted to know to what extent international agreements and international customary law could be invoked by individuals in court proceedings against restrictive measures. I came to the conclusion that the fact that international agreements and international customary law are recognized as an integral part of EU law and occupy a higher position than the EU acts which give form to restrictive measures, does not automatically mean that they can be invoked by individuals to combat those restrictive measures. The latter depends on the concept of direct effect.

With regards to international agreements, the Court of Justice has established case law by which provisions of international agreements can be invoked by individuals in court proceedings. In that respect, the recent case of *Rosneft* is an illustration of how provisions of the Partnership and Cooperation agreement between the EU and Russia have been invoked by a Russian company to combat the EU's restrictive measures. However, this case shows that invoking international agreements will not always be a successful path against restrictive measure as they usually contain provisions which allow the contracting parties to take measures which restrict the rights granted by the international agreement.

With regards to rules of international customary law, the Court of Justice has been less enthusiast to asserts their direct effect. In the seminal case of *Racke* the Court was addressed with that question. In that case, the Court held that the question of direct effect of a rule of customary law was subordinate to the question of direct effect of a provision of an international agreement. Therefore, the Court established the criteria for invoking a rule of international customary law but only to support a claim based on another rule of EU law. Moreover, it seems in that respect that the Court's review of the compatibility of an EU measure with a rule of customary international law is only limited to the question whether the EU legislative made a manifest error of assessment. Nevertheless, legal scholars have argued that where treaty provisions must be unconditional and sufficiently precise in order to be directly effective, the same conditions must apply to rules of international customary law.[238] However, they also acknowledge that with regards to rules of international customary law it is complicated to define whether those rules where intended to confer rights on individuals, the more because they are not necessarily codified in international agreements and do not have the same democratic legitimacy as international agreements.[239]

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[238] J. KLABBERS case note under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', *CMLR* 1999, issue 36, (184) 185.

[239] J. KLABBERS case note under Court of Justice 16 June 1998, nr. C-162/96 ECLI:EU:C:1998:293, 'Racke', *CMLR* 1999, issue 36, (184) 185; K. LENAERTS and E. DE SMIJTER, "The European Union as an Actor under International Law", *Yearbook of European Law* 1999, issue 19, (95) 124; P.J. KUIJPER, "Customary International Law, Decisions of International Organisations and Other Technigues for Ensuring Respect for International Legal Rules in European Community Law", in J. WOUTERS, A. NOLLKAEMPER and E. DE WIT (eds.), *The Europeanisation of International law,* The Hague, TMC Asser Press, 2008, (87) 96.