

**COMENTARIOS A LA CONTRIBUCIÓN  
DE A. DIMOPOULOS/ COMMENTS  
TO A. DIMOPOULOS'S PAPER**

**BETWEEN THE AUTHORITY  
OF INTERNATIONAL LAW AND THE AUTONOMY  
OF EU LAW**

Ramses A. WESSEL

**SUMARIO:**

1. BETWEEN INTERNATIONAL AMBITIONS AND THE PRESERVATION OF AUTONOMY.
2. THE FUTURE OF SHARED COMPETENCES.
3. CONCLUSION: NEW QUESTIONS.

**1. BETWEEN INTERNATIONAL AMBITIONS AND THE PRESERVATION OF  
AUTONOMY**

Despite the absence of a clear provision in the Treaties, and despite the focus on the «autonomy» of a 'new legal order' in early case law<sup>1</sup>, the legal order of the Union is widely identified as «monist» in its relation to public international law<sup>2</sup>. Indeed, the EU does not seem to have a problem with allowing binding international norms to become part of its legal order. One observer even noted the Union's «good international citizenship»<sup>3</sup>. Arguments are usually drawn from Article 216 (2) TFEU —which provides that international agreements concluded by the Union are binding upon the institutions of the Union and on its Member States— as well as from case law<sup>4</sup>. Indeed, after an initial period in which the Courts' emphasis was laid on a strengthening of the autonomous nature of the Community, beginning in the early 1970's, international treaties were considered to form «an integral part of Community law»<sup>5</sup>, and it was argued that international law ranked between primary and secondary law<sup>6</sup>. This status of international law is not restricted to international agreements (including mixed agreements<sup>7</sup>), but also holds true for customary law<sup>8</sup>, and secondary international law deriving from international agreements

---

<sup>1</sup> In particular of course in ECJ, *NV. Algemene Transport en Expeditie Onderneming Van Gend en Loos/Nederlandse Administratie der Belastingen*, 5 February 1963 (C-26/62). Cf. also BARENTS, R., *The Autonomy of Community Law*, Kluwer Law International, 2004.

<sup>2</sup> See more extensively WESSEL, R. A., «Reconsidering the Relationship between International Law and EU Law: Towards a Content-Based Approach?», in CANNIZZARO, E., PALCHETTI, P. and WESSEL, R. A. (eds.), *International Law as Law of the European Union*, Martinus Nijhoff Publishers, 2011, pp. 7-33.

<sup>3</sup> DUNNE, T., «Good Citizen Europe», in *International Affairs*, 2008, p. 13.

<sup>4</sup> See further the contributions by ECKES, C., «International Law as Law of the EU: The Role of the Court of Justice», and VANROSSEM, J.W., «The EU at Crossroads: A Constitutional Inquiry into the Way International Law is Received within the EU Legal Order», in CANNIZZARO, PALCHETTI and WESSEL, *op. cit.*; as well as JACOBS, F. G., «Direct Effect and Interpretation of International Agreements in the Recent Case Law of the European Court of Justice», in DASHWOOD, A. and MARESCEAU, M. (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge University Press, 2008, pp. 13-33.

<sup>5</sup> CJ, *Haegeman/Belgium* (181/73), 30 April 1974.

<sup>6</sup> See for instance: CJ, *Spain/Commission*, 2 March 1999 (C-179/97); CJ, *Racke GmbH & Co./Hauptzollamt Mainz*, 16 June 1998 (Case C-162/96), par. 45.

<sup>7</sup> See on this Issue VANROSSEM, *op. cit.*

<sup>8</sup> Case C-162/96 *Racke*, cited, par. 45; GC, *Opel Austria GmbH/Council* 22 January 1997 (Case T-115/94); as well as CJ, *Bosphorus Hava Yolları Turizm ve Ticaret AS/Minister for Transport, Energy and Communications and Other*, 30 July 1996 (C-84/95).

such as Association Council decisions<sup>9</sup>. Furthermore, it is clear that separating international law from the Union's legal order would neglect its role as «a “tool” or “asset” for the European Union and its member states, when developing the agenda of European integration»<sup>10</sup>. And, finally, the interplay between international and European law also may be important to understand from the reverse effect: the influence of EU law on the international legal order<sup>11</sup>.

Indeed, the new European Treaties reflect the extended international ambitions of the EU, inter alia laid down in new provisions on «external action» and a new role in global governance (cf. Art. 3, 5 TEU). Paradoxically, this «internationalisation» of the EU goes hand in hand with a renewed interest in the EU's autonomy. The question of the relationship between the EU legal order and the international legal order has been raised ever since the Court held that the Community was to be seen as «a new legal order of international law»<sup>12</sup>. And indeed, in this new legal order, EU legal norms could collide with international norms. Recent case law, in very different areas (ranging from *Mox Plant* or *Kadi* to, more recently, *PFOS*) made us aware of the implications of the stronger international presence of the EU, in particular in relation to the existing external competences of the Member States. In *PFOS*, the question was raised to what extent Member States are constraint in their actions under international law by the fact that they are not only states, but also (or perhaps above all) Member States of the EU<sup>13</sup>. Obviously, this question was not new and lies at the heart of almost all struggles in EU external relations law, but in this case no inter-institutional agreement was concluded and no formal EU decisions were taken which would *prima facie* restrain MS from exercising their own competences under international treaty law as we know from previous case law<sup>14</sup>. Indeed, the duty of cooperation — post Lisbon known as the duty of sincere cooperation — was stretched a bit further<sup>15</sup>. At the same time the case pointed clearly to the limits of «procedural and substantive obligations of the Member States as loyal members of the Union when acting as contracting parties in their own right» when we do not want to undermine the very existence of separate competences of the Member States<sup>16</sup>.

The *BITs* (Bilateral Investment Treaties) cases analysed by Angelos Dimopoulos also underline the idea that new external terrains are being developed by the EU<sup>17</sup>. The EU's presence in the field of

---

See KUIJPER, P. J., «Customary International Law, Decisions of International Organisations and other Techniques for Ensuring Respect for International Legal Rules in European Community Law», in WOUTERS, J., NOLKAEMPER, A. and DE WET, E. (eds.), *The Europeanisation of International Law: the Status of International Law in the EU and its Member States*, T.M.C. Asser Pres, 2008, pp. 87-106; as well as WOUTERS, J. and VAN EECKHOUTE, D., «Giving Effect to Customary International Law through European Community law», in PRINSEN, J. N. and SCHRAUWEN, A. (eds.), *Direct Effect*, European Law Publishing, 2004, pp. 183-234.

<sup>9</sup> See for instance: CJ, *Sevince/Staatssecretaris van Justitie*, 20 September 1990 (C-192/89).

<sup>10</sup> See DE WITTE, B., «Using International Law for the European Union's Domestic Affairs», in CANNIZZARO, PALCHETTI and WESSEL, *op. cit.*, pp. 133-156.

<sup>11</sup> See HOFFMEISTER, F., «The Contribution of EU Practice under International Law», in CREMONA, M. (ed.), *Developments in EU External Relations Law*, Oxford University Press, 2008, pp. 37-127.

<sup>12</sup> CJ, *Flaminio Costa/ENEL*, 15 July 1964 (6/64).

<sup>13</sup> See also the case note by CREMONA, M., *CMLR*, 2011, 43, pp. 1639-1666.

<sup>14</sup> Including Opinion 1/91, 14 December 1991; Opinion 1/94 (*Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*), 15 November 1994; CJ, *Hermes International/FHT Marketing*, 16 June 1998 (53/96); CJ, *Parfums Christian Dior SA*, 14 December 2000 (Joined Cases C-300 & 392/98); CJ, *Merck Genériques/Merck & Co. Inc and Merck Sharp & Dohme Lda*, 11 September 2007 (C-431/05); CJ, *Commission v. Ireland (Mox Plant)*, 30 May 2006 (459/03); and *Commission/Council (FAO)*, 19 March 1996 (25/94).

<sup>15</sup> See on the many dimensions of the duty of cooperation HILLION, C., «Mixture and Coherence in EU External Relations: The Significance of the Duty of Cooperation», in HILLION, C. and KOUTRAKOS, P. (eds.), *Mixed Agreements Revisited – The EU and its Member States in the World*, Hart Publishing, 2010. See also NEFRAMI, E., «The Duty of Loyalty: Rethinking its Scope Through its Application in the Field of EU External Relations», *CMLR*, 2010, 47; CREMONA, M., «Defending the Community Interest: The Duties of Cooperation and Compliance», in CREMONA, M. and DE WITTE, B. (eds.), *EU Foreign Relations Law – Constitutional Fundamentals*, Hart Publishing.

<sup>16</sup> CREMONA, M., «*PFOS* Case Note», *op. cit.*, p. 1665. See more extensively the contribution by A. Thies in this volume.

<sup>17</sup> CJ, *Commission/Austria*, 3 March 2009 (C-205/06); CJ, *Commission/Sweden*, 3 March 2009 (C-249/06); CJ,

foreign investment not only forms an example of new international ambitions, but ironically also triggered the traditional reflex: an acceptance of the authority of international law, but at the same time a preservation of the autonomy of EU law. Although the cases differ from the above mentioned *PFOS* case, they seem to reflect a similar trend: exclusivity by stealth<sup>18</sup>.

## 2. THE FUTURE OF SHARED COMPETENCES

The outcome of the *BITs* cases is that all (over 1000) BITs will have to be renegotiated in order to prevent incompatibilities with EU law. As Dimopoulos indicates, the long-term objective of the EU is to replace Member State BITs with EU Investment Agreements. In the meantime an authorization system should combine the validity of the BITs that were concluded on the basis of international treaty law with the primacy of EU law. Dimopoulos rightfully questions whether the Investment Regulation protocol will ensure legal certainty, since it renders the future of existing BITs uncertain.

It is indeed the need for primacy of EU law that undermines existing competences Member States enjoy both under EU law and under international law. Where, traditionally, Member States are not *a priori* pre-empted from rule-making in an area of shared competence, the *BITs* cases reveal a number of Member States obligations even when the EU itself has not legislated. The reason being the «hypothetical incompatibility» of existing international agreements with EU law<sup>19</sup>. The Court argued that even a perceived —but not yet materialized— conflict between the international agreements and EU law would lead to a violation of the capital movement provisions in Art. 307 EC (now Art. 351 TFEU). The incompatibilities could jeopardise the future exercise of EU competences. In that sense, the judgments indeed continue «the trend set by the ECJ in its *Mox Plant* and *Kadi* judgments by first decoupling the international law obligations from the EU law obligations and subsequently subordinating the former from the latter»<sup>20</sup>.

As in earlier case law, in the *BITs* cases the Court does not simply deny the relevance of international law, but it claims that it cannot be used in this case. Indeed, the fact that the EU has powers «on a matter which is identical to or connected with that covered by an earlier agreement concluded between a Member State and a third country, reveals the incompatibility with that agreement where, first the agreements does not contain a provision allowing the member State concerned to exercise its rights and to fulfil its obligations as a member of the [EU] and, second, there is also no international law mechanism which makes that possible»<sup>21</sup>.

This is indeed the complex conflict we face. By arguing that international law itself does not offer solutions, the Court has no choice but to preserve the autonomy of EU law by limiting Member States' traditional competences under international law, and by doing so it also hinders the exercise of shared competences and thus also reinterprets primary EU law.

Dimopoulos argues that a narrow reading of the judgments would render the outcome of the cases more comprehensible. In that interpretation Member States' international agreements are incompatible with EU law only when they preclude the future exercise of EU competence, so that *any* measure taken by the EU under a relevant power-conferring provision is conflicting with the Member States' obligations. While there are certainly reasons to opt for this interpretation, the language used by the Court is more worrisome and could also be read as a hostile take-over by the EU of both Member states competences and international (treaty) law. After all, it is not at all clear that the BITs would in fact be incompatible with EU law, as long as EU competences have not been exercised. In these cases the Member States argue that an incompatibility could only exist after the EU had actually adopted the

---

*Commission/Finland*, 19 Novemembr 2009 (C-118/07).

<sup>18</sup> WESSEL, R. A., «Integration by Stealth: On the Exclusivity of Community Competence», in OBRADOVIC, D. and LAVRANOS, N. (eds.), *Interface between EU Law and National Law*, Europa Law Publishing, 2007, pp. 43-52.

<sup>19</sup> LAVRANOS, N., «Case Note, Cases C-205/06 and C-249/06», *American Journal of International Law*, 2009.

<sup>20</sup> *Ibid.*

<sup>21</sup> Pars. 37 and 31.

measures. Moreover, in case of an actual conflict, international treaty law offers mechanisms to deal with this situation (such as suspension, renegotiation, or ultimately denouncement of the agreements, in line with the *rebus sic stantibus* doctrine). The question indeed is whether a hypothetical conflict could be seen as an incompatibility, in particular taking into account the consequences Member States enjoy in an area of shared competence.

In that sense, the arguments used by the Court may have more general implications, as they are partly based on an interpretation of the principle of sincere cooperation, which guides the exercise of shared competences in general<sup>22</sup>. While Dimopoulos' narrow interpretation would indeed offer a way out of the dilemma that any other interpretation would seriously affect the very nature of shared competences, it is difficult not to see the *BITs* cases as part of a more general trend to limit the traditional freedom of Member States to make way for the more outspoken international ambitions the EU displays since the Lisbon Treaty.

### 3. CONCLUSION: NEW QUESTIONS

As one observer asked: «Why is the ECJ so concerned by the increasing influence of international law that it considers such a sweeping and preemptive protection of the autonomy of the EU legal order necessary?»<sup>23</sup> Is it the fear that the exclusive jurisdiction is undermined, for instance by the international arbitral tribunals foreseen in many of the *BITs*? Or is it because the EU's new international ambitions by definition call for a reassessment of the external competences Member States enjoy? The latter seems indeed relevant. As Dimopoulos describes, the *BITs* are to be renegotiated to ensure their compatibility with EU law and in the long run they will probably be replaced with EU Investment Agreements.

This will have consequences for the relationship between international law and EU law as Member States' international competences may be further restraint on the basis of not only ongoing but also future EU action. One may regard this as a logical consequence of the (external) coming of age of the EU. Yet, new questions arise: 1. Internally: how far can the principle of sincere cooperation be stretched without turning existing shared competences into a mere theoretical notion?; 2. Externally: to which extent is international law well enough developed to allow the EU to take over state-like functions (e.g. in relation to the law of treaties, diplomatic law and the law on international responsibility)? In doctrinal analysis it may be wise to take these two questions together to allow for a smooth transition.

---

<sup>22</sup> Cf. KOUTRAKOS, P., «Case note, Cases C-205/06, *Commission v. Austria*; Case C-249/06, *Commission v. Sweden*, 3 March 2009», *CMLR*, 2009, 46, pp. 2059, 2060-2061.

<sup>23</sup> LAVRANOS, N., *op. cit.*, at 5.