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# *European Exceptionalism in International Law*

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## **Abstract**

*For Member States of the European Union, participation in this supranational organization has increased the number of difficulties in the international arena. Occasionally, the expanding legislative activity of the European institutions reaches out beyond the borders of the European legal system and incidentally affects the EU Member States' autonomous relations with third parties. Consequently the EU and its members, often with success, seek third parties' consent to exceptional treatment. Because of their number and significance, such derogations have inspired this article to inquire into their expansion and legal status under international law. Even though the EU-related exceptions have not created an international customary rule, the article observes that European integration shapes international rules in diverse fields and adjusts them to its needs. Since European integration is designed to administer and regulate an increasing number of issues, the autonomous international obligations of the EU Member States may become an obstacle. Because the European Union is likely to continue using special treatment in the future, it is important to assess how far the supranational exception can go in order to accommodate all interests at stake.*

## **1 Introduction**

In the family of international organizations, the European Union (EU)<sup>1</sup> stands apart. Carrying out a project of economic and political integration, this supranational entity escapes the traditional categories of constitutional and international law.

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<sup>1</sup> In this article, I will often refer to the EU as covering also the EC structure or to the EU/EC in aggregate, if appropriate, because in the field of foreign affairs, the legal basis for European action sometimes consists

The EU members have endowed the supranational institutions with many domestic and external powers. In recent years, the exercise of these powers has given rise to intricate international situations. Unlike the EU itself, the EU Member States are and remain sovereign entities. This means that even in fields where competences have been transferred from the national to the supranational level, these states may be held internationally liable if the execution of a European rule infringes upon their pre-existing obligations toward foreign states and international organizations. Yet, the emergence of such conflicts does not absolve the same states from their obligations under EU law.

However novel this issue may seem, it mirrors traditional experiences recorded by federal states. Federations, whose constitutions reserve large areas of autonomy to sub-federal entities, observe that sub-federal actions may provoke international consequences that potentially affect the whole nation. The absence of international legal personality, nonetheless, keeps the sub-federal entities safe from direct international reactions. In contrast, the international sovereignty of the EU Member States may expose the latter to international liability for wrongful acts done by the supranational institutions.

The EU members have been challenged on this account mainly before the European Court of Human Rights (ECtHR) and the judicial organs of the World Trade Organization (WTO). A potential risk also lurks behind the intensive implementation by the European institutions of the obligations arising under the United Nations (UN) Charter.<sup>2</sup> In these and other instances the European states meet difficulties that have much in common with the situation that federal governments traditionally encounter. In both cases the governments in question face international effects provoked by an entity the international legal capacity of which to act is paradoxically missing or incomplete.

The complexity of the EU legislation that incidentally generates international consequences makes the international situation of the Member States more difficult every day. For this reason, the EU and its members have introduced legal tools that, if consented to by third parties, endow the international obligations of the EU states with flexibility. It seems that third parties have indeed paid attention to the peculiar nature of the EU legal order and to the specific legal position in which the EU states often operate. A generalized understanding has emerged that whenever an EU Member State comes to the international-negotiation table, the European-law implications will be part of the agenda. Accordingly, third parties adjust to this state of affairs, and the question today is whether this EU-friendly treatment has reached the status of an international custom.

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of a complex combination of acts issued in both, EC and EU framework. If appropriate, I will distinguish between the two. The supranational qualification is linked obviously only to the EC, whereas the EU is governed by the inter-governmental method of decision-making.

<sup>2</sup> Charter of the UN, signed on 26 June 1945, entered into force 24 Oct. 1945, 59 Stat. 1031, 993 UNTS 1153.

Only a tiny number of scholarly writings have examined the issue from both European and international sides.<sup>3</sup> Rather, these two aspects have been dealt with separately. Such partial inquiries are useful, but they remain incomplete because both legal orders intervene and interplay when normative conflicts between them appear. The purpose of this article is thus to merge both perspectives into a comprehensive analysis of the challenge that the EU members face in this context and of the correlative transformation that international practice undergoes in consequence. The article proceeds as follows.

The first part lays out the problem of the EU states' international autonomy in the context of European integration. Here, I will briefly discuss the American federal experience of foreign relations, which mirrors the current interrogations in Europe. I then describe the legal framework of the European law of external relations. Afterwards, I expose the conflicts in the EU states' obligations and the solutions offered respectively in European and international law. Because neither of these solutions provides satisfactory answers, the second part of this article analyses new developments that European diplomacy is bringing into international practice, either to heal existing conflicts or to prevent them. In this part I first consider the well-established experience of the European states under the GATT and the WTO. Subsequently, I examine recent puzzles that have surfaced before the ECtHR and regarding the UN Charter. Even though the European strategy calls for a value judgement, this article does not imply, by the choice of its title, an *a priori* opinion. The term 'exceptionalism' merely refers to the factual state of affairs in which the EU members ask for and receive a growing number of EU-friendly exceptions from their international partners.

## 2 European Integration and the International Autonomy of EU Member States

Every political entity, whether a sovereign state or a supranational organization, allocates the responsibilities to different political levels with respect to international powers. Nations organized under a federal form of government generally assign the conduct of foreign relations to the federal government.<sup>4</sup> If self-executing, international rights and obligations that result from the exercise of this power have domestic legal effects and trump conflicting state law. Even though the constitutional rules do not always prevent the undesirable involvement of sub-federal constituencies in federal foreign policy, national enforcement mechanisms usually restore the unity of action.<sup>5</sup>

<sup>3</sup> Hoffmeister, 'Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v. Ireland. App. No. 45036/98', 100 *AJIL* (2006) 442; Kuijper and Paasivirta, 'Further Exploring International Responsibility: the European Community and the ILC's Project on Responsibility of International Organisations', 1 *Int'l Orgs L Rev* (2004) 111.

<sup>4</sup> See Art. VI of the US Constitution or Arts 25 and 32(1) of the German Basic Law. Note, however, Art. 32(3): '[i]nsofar as the Länder have power to legislate, they may, with the consent of the Federal Government, conclude treaties with foreign states'. ('Soweit die Länder für die Gesetzgebung zuständig sind, können sie mit Zustimmung der Bundesregierung mit auswärtigen Staaten Verträge abschließen'.)

<sup>5</sup> To recall a major example, the Massachusetts Burma legislation provoked an action within the WTO that the whole US federation had to face. See the complaint by the EC WT/DS88, denouncing the violation

In the last few decades, the European Union has been granted an unprecedented number of external powers which has engendered the need to circumscribe the corresponding competences of the EU members. Unlike a federal government the supranational institutions are not endowed with sovereignty because the latter remains with the constituent states only. Accordingly, the EU states may pursue autonomous external policies but also be penalized if their conduct infringes EU law. This situation is similar to the legal consequences that a sub-federal entity faces if its action unduly affects national foreign relations. There is, however, one major difference. Because sub-federal units do not generally have international legal personality, they cannot validly establish legal relations with foreign nations, including legal relations arising out of liability.<sup>6</sup> For the purpose of international responsibility, a state action that impinges on national foreign engagements will be ascribed to the federal government.<sup>7</sup> The latter must then find means to accommodate national foreign commitments and call the recalcitrant state to order without, however, infringing principles of vertical federalism.

Today, the federal experience is, in this respect, mirrored in European practice. After 50 years of existence, the EU has engendered a dense legal order. On occasion, its legislative activity reaches beyond the EU's legal space and incidentally affects relations between third parties and EU members. The latter can be held internationally liable *vis-à-vis* third parties for conduct arising out of the implementation of EU law. Like the federal government, the respective EU states must then confront the international consequences of behaviour that is not their own.

### ***A The EU Member States and the International Consequences of European Integration***

Launched in 1957, the process of European integration has today engendered a unique entity. Usually qualified as an international organization *sui generis*, the European Community (EC) has created a specific legal order engaging supranational

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by the US of the General Procurement Agreement, which is one of the instruments administered by the WTO. The EC filed an official request for consultation on 20 June 1997 with respect to the Act regulating State Contracts with companies doing Business with Burma (Myanmar), enacted by the Commonwealth of Massachusetts on 25 June 1996. The panel proceedings were suspended at the request of the complainants, on 10 Feb. 1999, and have not been resumed since. More recently, comments have been triggered by a decision of the Texas Court of Criminal Appeals, which refused to obey a presidential memorandum requesting state courts to comply with a decision of the International Court of Justice (ICJ) in the *Avena* case (*Avena and Other Mexican Nationals (Mexico v. US)* [2004] ICJ Rep 128, at 12), *Ex parte José Ernesto Medellín*, Tex Crim App, 15 Nov. 2006, No. AP-75207.

<sup>6</sup> In 1942 the US Supreme Court could announce that 'in respect of [the US] foreign relations generally, state lines disappear. As to such purposes the State[s ...do] not exist': *US v. Pink*, 315 US 203 (1942), at 331.

<sup>7</sup> See Art. 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001, available at: [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf). See also UN GA res. 59/35 of 2 Dec. 2004. For judicial decisions confirming the rule see quotations by the International Law Commission in the Draft Arts with commentaries, at 84–92, reproduced in Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10) and in the annex to UN GA res. 56/83 of 12 Dec. 2001.

institutions, member states, and the citizens thereof. Its origins are rooted in the Treaty of Rome<sup>8</sup> and therefore remain international. The secondary law derived from the Treaty of Rome has, however, been shaped pursuant to methods of integration and qualifies as supranational. This means that the European decisions are generally taken not by a unanimous vote, but by simple or qualified majority. The supranational nature of the EC legal order is also associated with its direct effect, primacy over the norms of different states, effect of pre-emption, and efficient mechanisms of enforcement.<sup>9</sup>

In the last three decades the supranational endeavour has acquired a large international dimension. The EC has concluded or adhered to many international treaties and has become a major actor in a number of international institutions. The textual foundations of the European law of external relations are, nevertheless, fragmentary. Article 281 of the EC Treaty<sup>10</sup> establishes the international personality of the European Community,<sup>11</sup> but the provision itself does not reveal anything about the circumstances under which it can be exercised. Unlike sovereign states and like every international organization, the EU must comply with the principle of enumerated powers, i.e., it can act only when duly authorized and only to the authorized extent.<sup>12</sup>

It is not easy to present the legal framework of European external relations because it is built upon elements whose shape changes over time. First, the existence of an EC/EU international power is rarely explicitly anchored, and most of the time its recognition emerges progressively. Secondly, once it is identified, the task of determining whether this competence is exclusively supranational or whether it is shared with Member States is equally intricate. Even when both points are clarified, the assessment can never be definitive because the supranational competences may vary over time. These uncertainties affect Member States as well as third parties. Every supranational

<sup>8</sup> Treaty establishing the European Economic Community, signed on 25 Mar. 1957 which entered into force on 1 Jan. 1958, 298 UNTS 11. See also the consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community. OJ (2006) C 321/1.

<sup>9</sup> See De Witte, 'Retour à Costa. La primauté du droit communautaire à la lumière du droit international', 20 *Revue trimestrielle de droit européen* (1984) 425.

<sup>10</sup> *Supra* note 8.

<sup>11</sup> The legal personality is understood as an agglomerate of capacities to enter into binding agreements, to implement international obligations, and to carry out activities relating to right to receive and send diplomatic delegations (passive and active legation). The EC has been entitled to act with respect to all these powers. Their exercise is, however, constrained by the limited functions that the EC is permitted to carry out. In practice, the delimitation of external competences is rather a matter of degree than one of clear-cut solutions. It also depends on international rules that the EC is willing to subscribe to because some international conventions do not allow for the participation of the international organizations.

<sup>12</sup> See Art. 5(1) EC. See generally F. Hoffmeister, *The Contribution of EU Practice to International Law* (forthcoming). See also D.R. Verwey, *The European Community, the European Union and the International Law of Treaties. A Comparative Legal Analysis of the Community and Union's External Treaty-Making Practice* (2004). For the EU external relations legal framework as conceived in the Treaty Establishing a Constitution for Europe see B. Martenczuk, 'The Constitution for Europe and the External Relations of the European Union', in S. van Thiel, K. de Gucht, and R. Lewis (eds), *Understanding the New European Constitutional Treaty, Why a NO Vote Means Less Democracy, Human Rights and Security* (2005), at 253.

competence implies important constraints upon the Member States<sup>13</sup> that can be subject to EU sanctions if their international behaviour violates powers already allocated under the supranational authority. The boundaries are relatively clear with respect to the traditional provinces of the EC, such as external trade anchored in Article 131 EC. In contrast, the Member States have to be vigilant in areas where the EC's competence is just beginning to develop and rather vague. In such cases, the correlative international obligations of the Member States may be unclear.

Third states may be confused as to whether the EU or the Member States are competent to deal with them with respect to a particular subject. The respective powers of the EU and of the Member States are by definition entangled, and whenever the former expands the latter become smaller. But whether the division of powers within the EU will be taken into consideration internationally depends entirely on the agreement of third parties. In recent international practice the question is sometimes addressed by declarations of competences that the EC and EC members have to provide and update in order to be allowed to participate in some international agreements.<sup>14</sup>

In many areas the European institutions have been able to take over the conduct of external relations previously managed by the Member States. In many other areas this ability still does not exist. Because the autonomous international acts of the states may hamper supranational policies, the EC legal order has developed efficient mechanisms of prevention and sanction. If the need exists, the Member States are required to renegotiate and even to terminate undesirable international agreements. However, the third parties may not necessarily agree to this adjustment and insist on keeping the agreement in force. In situations where no legal link exists between a third party and the EU, the Member States may be held internationally liable for conduct arising out of the implementation of an EU rule incompatible with their international duties. These states may thus face the impossible task of complying with mutually exclusive obligations.

This situation is not without solutions. The EU legal system provides one, and so does the general international law of treaties. On occasion, a specific treaty may establish its own conflict-of-laws regime. Both schemes, nonetheless, have a major flaw. Their validity is by definition confined to the boundaries of the legal order that has engendered them, whether European or international. The next section assesses these solutions and identifies their limits.

<sup>13</sup> For a recent manifestation of an international action by the EU Member States, prohibited under EC law, see the set of three decisions in the MOX Plant case: International Tribunal on the Law of the Sea *The MOX Plant Case (Ireland v. UK)*, Request for provisional measures, 3 Dec. 2001, Case No. 10, 41 ILM (2002) 405; The Permanent Court of Arbitration, *The MOX Plant Case (Ireland v. UK)*, order No. 3, Suspension of proceedings on jurisdiction and merits and request for further provisional measures, 24 June 2003, 42 ILM (2003) 1187; Case C-459/03, *Commission v. Ireland* [2006] ECR I-4635.

<sup>14</sup> The multilateral treaties that under EC law qualify as mixed often contain provisions requiring the Member States and the EC to communicate and periodically update a list specifying the intra-European division of powers with respect to the given treaty. Powers not listed as supranational are automatically presumed to fall within the authority and under the international responsibility of the Member States: see Annex IX of the UN Convention on the Law of the Sea (UNCLOS) of 10 Dec. 1982, which entered into force on 16 Nov. 1996, 1833 UNTS 31363; 21 ILM (1982) 1261.

## B Normative Conflicts between International and Supranational Obligations of the EU Member States: Two Legal Systems at Odds

By definition, normative conflicts arising from the obligations of the EU states call into question two different legal orders, European and international. It is relatively easy to identify solutions foreseen for normative conflicts within each of them separately. However, every normative system tends to favour its own legal rules over norms coming from an external normative order. Consequently, the resolution of the conflicts often favours the legal system of the forum. The European system will typically require the Member States to give priority to their European commitment before any international one. Conversely, a number of international agreements oblige the same states to disregard any conflicting duties, including EU obligations. The two following subsections show how the two legal orders generally react in situations of conflict.

### 1 Solutions in International Law: Inadequacy of Traditional Answers

Any obligation arising under EC law is a treaty-based obligation. Yet, some elements of EC practice are puzzling. Compared with the majority of treaty conflicts, inconsistencies involving the EC treaty<sup>15</sup> defy the traditional legal framework. The density of the EC legal order, the political interdependence of current members, and the immediacy of EU enforcement mechanisms encourage the EU Member States to honour their EU duties first.

When the European Court of Justice (ECJ) announced the *sui generis* nature of the supranational legal order, it contrasted it with 'ordinary international treaties'<sup>16</sup> and qualified it as a 'new legal order of international law'<sup>17</sup> and as a legal order on its own.<sup>18</sup> Nevertheless, the Treaty of Rome was concluded in the form of an international treaty, and the methods of its amendment remain those applicable to 'ordinary' international agreements. Accordingly, normative conflicts arising between the EC and other international conventions are a law-of-treaties problem.

The peculiarity of treaty conflicts consists in their definitional relativism. Each treaty may lay down its own conflicts-of-laws rules. If the agreement contains no provisions of this kind, the general interpretive rules of the Vienna Convention on the Law of Treaties (VCLT) apply.<sup>19</sup>

<sup>15</sup> *Supra* note 8.

<sup>16</sup> Case 6/64, *Costa v. ENEL* [1964] ECR 1141: '[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, ..., became an integral part of the legal systems of the Member States and which their courts are bound to apply'. In the French version, it is '*ordre juridique propre intégré au système juridique des Etats membres*'.

<sup>17</sup> Case 26/62, *Van Gend en Loos v. Nederlandse Administratie des Belastingen* [1963] ECR 3: '[t]he European Economic Community constitutes a new legal order of international law for benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only the Member States but also their nationals'.

<sup>18</sup> Case 6/64, *supra* note 16.

<sup>19</sup> The Vienna Convention was adopted on 22 May 1969, and entered into force on 27 Jan. 1980, 1155 UNTS 331. To date the Vienna Convention has 45 signatories and 108 parties. The majority of the EU states have ratified with the exception of France, Malta, and Romania. See generally P. Reuter, *La Convention de Vienne sur le Droit des traités* (1970), at 61.

Conflicts in treaty obligations may appear in different constellations, depending on the identity of the subject matter and of the parties, as well as on the chronology of their adoption. Accordingly, interpretation under general international law operates with basic rules such as *lex specialis* and *lex posterior*.<sup>20</sup> Since these apply only to conflicts of treaties with identical parties, they do not provide much help for our problem. Article 30(4) of the VCLT,<sup>21</sup> dealing with ‘application of successive treaties relating to the same subject matter’ and involving different parties, provides:

When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States Parties to both treaties the same rule applies as in paragraph 3 [the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty];

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

By virtue of paragraph (4)(b) of Article 30, treaty conflicts are resolved in a way that favours the preservation of the validity of incompatible instruments. The parties engaged simultaneously by two or more agreements are invited simply to choose which duty they will honour and which they will violate by virtue of this choice. Embracing the principle of relative effects of treaties, the provision shifts the problem away from the issue of the validity of the conflicting treaties to the international responsibility that violation of one of the treaties will most likely trigger.

Analogous reasoning applies to VCLT Article 27, which is another major rule in this context and a mirror image of the relative-effects-of-treaties principle. Article 27 codifies the international customary rule prohibiting states from referring to their domestic law in order to justify a violation of an international obligation.<sup>22</sup> For the purpose of this article, the latter provision has significance in so far as the EC legal order may be compared, in light of its specific features, to a domestic one. It is difficult to argue that by its legal form the EC Treaty is different from an international treaty. However, the highly integrated nature of EC secondary law and the above-mentioned dicta of the ECJ inspire views that the international implications of the Member States’ duties under EU law should be considered in light of VCLT Article 27 rather than Article 30. The assimilation of law produced by international organizations to a domestic

<sup>20</sup> See Art. 30 VCLT, *supra* note 19.

<sup>21</sup> I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd rev. and enlarged edn, 1984). For the application of the Vienna Convention in the EC see Kuijper, ‘The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties’, 25 *Legal Issues of European Integration* (1998) 1. See Report of the Study Group of the International Law Commission, finalized by M. Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, doc. A/CN.4/L.682, at 17–18, paras 21–22, at 129 ff, para. 253 ff.

<sup>22</sup> ‘A party may not invoke provisions of its internal law as justification for its failure to perform a treaty’. The rule of Art. 27 is mirrored in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which has not yet entered into force, adopted on 21 Mar. 1986, doc. A/CONF.129/15. Neither the EU nor the EC has signed it and a minority of the EU states have signed or ratified.



legal order was discussed in the 1980s, during the conference leading to the adoption of the Convention on the Law of the Treaties between States and International Organizations or between International Organizations. The participating delegations addressed this question, but it is still open today.<sup>23</sup> Whatever the case, both articles embody the principle of *pacta sunt servanda*.<sup>24</sup> In both cases the rule of international non-opposability of rules to parties who have not consented to them applies.<sup>25</sup>

The Vienna Convention is not the only place where rules on treaty conflicts can be found. To a considerable extent these are default rules, because very often treaties provide their own mechanisms for resolving normative conflicts. These particular mechanisms mainly include different types of conflict clauses,<sup>26</sup> which typically preserve the applicability of previous or subsequent same-subject-matter treaties or which lay down the hierarchical primacy of a given treaty.<sup>27</sup> The architects of European integration anticipated the risk of normative conflicts, and included in the EC's founding document a clause of the latter kind.

## 2 Solutions in EC Law: Limits of Domestic Answers

The Treaty of Rome establishing the European Economic Community (the EEC, later the European Community) entered into force on 1 January 1958. International law required that in concluding the Treaty of Rome the participating states did not violate pre-existing commitments. This was a real challenge, given that the EEC's first objective was to set up a customs union and that the six original members were among the signatories to the General Agreement on Tariffs and Trade (GATT).<sup>28</sup> The GATT is animated by the most-favoured-nation principle, which prohibits all forms of discriminatory treatment.

<sup>23</sup> Morgenstern, 'The Convention on the Law of the Treaties between States and International Organizations or between International Organizations', in Y. Dinstein *International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne* Martinus (1988), at 439. For a summary of discussion see UN Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 Feb.–21 Mar. 1986, Official Records, Vol. I, Summary records of the plenary meetings and of the Committee of the Whole, UN, New York, 1995, A/CONF.129/16, Vol. I.

<sup>24</sup> Codified in Art. 26 VCLT. The customary nature of the *pacta sunt servanda* rule was affirmed by the ICJ in the *Fisheries Jurisdiction Case (UK v. Iceland)*, Jurisdiction of the Court, Judgment [1973] ICJ Rep 3, at 18. See also the case law of the Permanent Court of International Justice (PCIJ) in *SS Wimbledon (France v. Germany)*, 17 Aug. 1923, PCIJ, ser. A, No. 1, at 29–30; *Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland)* (merits), 25 May 1926, PCIJ, ser. A, No. 7, at 19; *Treatment of Polish nationals and other persons of Polish origin or speech in the Dantzig territory*, 4 Feb. 1932, advisory opinion, PCIJ, ser. A/B, No. 44, at 24. See also Case C–286/90, *Anklagemyndigheden v. Poulsen and Diva Navigation Corp.* [1992] ECR I–6019, at 6052, para. 9.

<sup>25</sup> See Annex IX to UNCLOS, *supra* note 14.

<sup>26</sup> See Koskenniemi, *supra* note 21, at 17–18, paras 21–22 and 129 ff, para. 253 ff.

<sup>27</sup> See, e.g., Art. 103 of the UN Charter, *supra* note 2: '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. The provision is referred to in Art. 30(1) VCLT, *supra* note 19: '[s]ubject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs'. See also Art. 20 of the Covenant of the League of the Nations (Treaty of Versailles, 28 June 1919) and Arts 103 and 104 of the North American Free Trade Agreement (NAFTA) of 8, 11, 14, and 17 Dec. 1992, 32 ILM (1993) 289.

<sup>28</sup> 55 UNTS 194, TIAS 1700. In many aspects, the Treaty of Rome took inspiration from the GATT.

The first goal that the European endeavour sought to achieve was the establishment of a customs union, that is to say, a regionally integrated economic entity the external effect of which could only be discriminatory. The resulting antinomy was finally resolved partly by the text of the GATT itself and partly by the GATT signatories, who consented, not without resistance, to the *statu quo*.<sup>29</sup> This example shows that the risk of normative conflicts has been evident since the beginning of European integration. The Treaty of Rome itself foresaw the need for a provision addressing inconsistencies arising out of the Member States' pre-existing international engagements. Its Article 307(1) (then Article 234(1)) reads as follows:

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.<sup>30</sup>

This *prima facie* flexibility of Article 307 toward potentially conflicting pre-existing engagements is to a great extent undercut in the following paragraph of the provision, which states:

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.<sup>31</sup>

This provision gave the Member States a certain diplomatic leeway to comply with their pre-existing international engagements, but it simultaneously implied that these states would proceed to renegotiation. The standing European case law seems to construct this obligation as one of the results. The ECJ has indeed made it clear that if the renegotiation efforts fail, the Member States must denounce the instrument. The margin of action left to the states is thus very narrow.<sup>32</sup> If the normative conflict

<sup>29</sup> O. Blin, *La Communauté européenne, le GATT, l'Organisation mondiale du commerce. Contribution à l'étude des rapports institutionnels entre la Communauté européenne et les organisations internationales*, PhD thesis, University of Toulouse (1997); M. Ličková, *La Communauté européenne et le système GATT/OMC. Perspectives croisées* (2005).

<sup>30</sup> On Art. 307 see Klabbers, 'Moribund on the Fourth July The Court of Justice on Prior Agreements of the Member States', 26 *ELRev* (2001) 187; Cohen-Jonathan, 'Article 234', in V. Constantinesco, R. Kovar, J.-P. Jacqué and D. Simon (eds), *Traité instituant la CEE, Commentaire article par article* (1992), at 1497, 1501.

<sup>31</sup> Art. 307(3) reads as follows: '[i]n applying the agreements referred to in the first paragraph, member states shall take into account the fact that the advantages accorded under this Treaty by each member state form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other member states'.

<sup>32</sup> See, e.g., Case 10/61, *Commission v. Italian Republic* [1962] ECR 1; Case 812/79, *Attorney General v. Juan C. Burgoa* [1980] ECR 2787; Case C-158/91, *Ministère public and Direction du travail et de l'emploi v. Jean-Claude Levy* [1993] ECR I-4287; Case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649; Case T-306/01, *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533; Case T-70/89, *British Broadcasting Corporation and BBC Enterprises Ltd v. Commission* [1991] ECR II-535; Case 76/89, *Independent Television Publications Ltd v. Commission* [1991] ECR II-575; Case 69/89, *Radio Telefis Eireann v. Commission* [1991] ECR II-485; Cases 241/ 91 P and 242/91 P, *Radio*

results from a treaty to which a Member State subscribed after the creation of or after its accession to the EU, the protection of Article 307 does not apply and the standard responsibility regime for violating EU law comes into play.<sup>33</sup>

Accession treaties, which are a part of EC primary law, contain provisions that specify the scope of Article 307 with regard to the particular circumstances of the EU enlargements. Until the 1995 enlargement, the relevant accession instruments operated simply as practical arrangements relating to international affairs. The first five accessions required that the newcomers adhere to a certain number of international agreements.<sup>34</sup> But the scope of international-related adhesion prerequisites has radically changed since the 'big' 2004 accession.<sup>35</sup> In comparison to the previous situation, the enlargement documents have embraced a rather restrictive policy. This shift can presumably be explained by the unprecedented size of the 2004 enlargement and by underlying concerns about the manageability of future conflicts if these were not resolved upon accession. Hence, the restrictive rule of Article 307 has been further tightened in the following way.<sup>36</sup>

In addition to the previous active obligation to accede to specified international instruments, the enlargement documents have added a negatively worded duty to renegotiate or denounce international engagements not compatible with EC law.<sup>37</sup> Upon their accession, the new states were supposed to have brought their international portfolios into complete harmony with EC requirements. Treaty renegotiation necessarily involves third countries' interest and consent and their inclination to consider the specific accession situation of the 10 states varied. This exercise proved to be a real challenge, but the European Commission helped to bring the vast majority of relevant agreements into line.

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*Telefís Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission* [1995] ECR I-743; Joined Cases C-364/95 and 365/95, *T. Port GmbH & Co v. Hauptzollamt Hamburg Jonas* [1998] ECR I-1023; Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079.

<sup>33</sup> See, e.g., the *Open Skies Agreements* case of 5 Nov. 2002 involving 8 Member States: Case C-466/98, *Commission v. UK* [2002] ECR I-9427; Case C-467/98, *Commission v. Denmark* [2002] ECR I-95; Case C-468/98, *Commission v. Sweden* [2002] ECR I-9575; Case C-369/98, *Commission v. Finland* [2002] ECR I-9627; Case C-471/98, *Commission v. Belgium* [2002] ECR I-9681; Case C-472/98, *Commission v. Luxembourg* [2002] ECR I-9741; Case C-475/98, *Commission v. Austria* [2002] ECR I-9797; Case C-476/98, *Commission v. Germany* [2002] ECR I-9855.

<sup>34</sup> See Arts 3-6 of the Act of Danish, Irish, Norwegian, and UK Accession (the First Accession Treaty), OJ (1973) L 73/14; the Act of Greek Accession, OJ (1979) L 291/17; the Act of Iberian Accession, OJ (1985) L 302/23. See Arts 4-7 of the Act of Accession of Norway, Austria, Finland, and Sweden, OJ (1994) C 241/21.

<sup>35</sup> See Documents concerning the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and the Slovak Republic to the EU, OJ (2003) L 236/1; see especially the Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and the Slovak Republic, OJ (2003) L 236/33, at Art. 6. See also the Treaty concerning the Accession of Bulgaria and Romania to the EU, OJ (2005) L 157/1 and especially the Act of Accession of Bulgaria and Romania, OJ (2005) L 157/203, Art. 6.

<sup>36</sup> See Case 11/77, *Patrick v. Ministre des Affaires culturelles* [1977] ECR 1199. If the accession treaty creates a derogation from a Treaty provision, it is to be read restrictively: see, e.g., Case 77/82, *Peskeloglou v. Bundesanstalt für Arbeit* [1983] ECR 1085.

<sup>37</sup> See Arts. 10(6) and 12 of the Act of Accession of the Czech Republic, etc., *supra* note 35.

The thorough review of the Member States' treaties on the occasion of the 2004 accession has resulted in a paradoxical situation. Whereas the pre-existing international treaties of the 12 newcomers have, with only minor exceptions, been fully harmonized, the pre-existing engagements of the 'old' members do not seem to have ever been processed in a comparable way. The case of bilateral trade agreements still maintained in force by some Member States, despite the exclusive nature of the EC's external trade powers, is particularly revealing.

Shortly after the establishment of the common commercial policy (CCP), some Member States requested authorization to preserve bilateral commercial treaties with third parties. Even though the CCP implies the EC's exclusive authority with respect to trade, the measure was aimed at reducing the practical impediments encountered by the young European Community, which lacked a well-equipped diplomatic service. Surprisingly, the *ad hoc* exception accorded for the first time in 1969 for a limited period has since been regularly renewed.<sup>38</sup> The last exception expired on 30 April 2005.<sup>39</sup> Since then no action has been taken, despite the Commission's proposal to include 17 bilateral trade agreements of the 10 '2004' states in this special treatment.<sup>40</sup> These trade agreements, the exemption of which from the general regime has not been renewed, are hence illegal under EC law.

European integration is an undertaking in progress<sup>41</sup> and, in consequence, the scope of the supranational powers changes shape over time to include new powers, including external ones. This means that the applicability of Article 307 is not exclusively attached to a precise time limit after which no international agreement may fall under its aegis.<sup>42</sup> The evolutionary nature of the EC's competences makes this provision continuously operative. An international agreement concluded after 1 January 1958 or after the dates of the various enlargements can still qualify if its conclusion precedes the emergence of a corresponding EC competence. Legal assessment of such agreements is incomparably trickier than the evaluation of the 'pre-EC/EU' ones, since the birth of a new supranational power happens progressively and is often

<sup>38</sup> See Council Dec 69/494/EEC of 16 Dec. 1969 on the progressive standardization of agreements concerning commercial relations between Member States and third countries and on the negotiation of Community agreements, OJ (1969) L 326/39.

<sup>39</sup> The last exception so far was granted by Council Dec 2001/855/EC of 15 Nov. 2001 authorizing the automatic renewal or continuation in force of provisions governing matters covered by the common commercial policy contained in the friendship, trade and navigation treaties and trade agreements concluded between Member States and third countries, OJ (2001) L 320/13.

<sup>40</sup> Proposal for a Council Dec amending Council Dec 2001/855/EC of 15 Nov. 2001 in order to take account of certain treaties and trade agreements concluded with third countries by new Member States prior to their accession to the European Union, COM(2004)0697 final.

<sup>41</sup> One of the main devices of European integration is to create an 'ever closer union among the peoples of Europe': see the Preamble to the Treaty of Rome, *supra* note 8.

<sup>42</sup> Otherwise, these dates would be easy to identify. For the original six members it would be the entry into force of the Rome Treaty, i.e., 1 Jan. 1958, for the other EU members the date of their respective accessions: see the first Accession Treaty, *supra* note 34; Greek Accession Treaty, *supra* note 34; Treaty of Iberian Accession, *supra* note 34; Treaty of Accession of Austria, Finland and Sweden, *supra* note 34; Treaty of Accession of Cyprus, Estonia, Hungary, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, and Slovenia, *supra* note 34; Treaty of Bulgarian and Roumanian Accession, *supra* note 35.

definitively ascertained through litigation before one of the two European Courts. The field of external powers with respect to foreign direct investment seems to be undergoing such a nascent moment, while Finland and Sweden are currently defending the legality of their bilateral investment treaties.<sup>43</sup>

Despite these hurdles, the EC legal system is largely centralized and ultimately produces necessary solutions. These, however, count only within EC legal space, and not with respect to third states. Notwithstanding the legal consequences that Member States may face within the EU, third states are in principle entitled to insist on the timely and proper execution of treaty obligations. If the European enforcement mechanisms push the Member States to harsh actions such as denunciations, the latter are left to face the full effects of their international liability towards third parties. The European states and institutions have thus focused their efforts on creating legal tools to preserve as many interests as possible. As the next part of this article reveals, to a large extent this challenge has been met.

### 3 Resolving Normative Conflicts: Bringing EU-specific Solutions into International Practice

International and EC law do not offer helpful solutions to normative conflicts arising out of the EU Member States' obligations. The answer provided in the VCLT basically avoids the issue by allowing all conflicting treaties to remain valid. As a result, the problem shifts from the field of the law of treaties to the field of state responsibility. The solution contained in Article 307 of the EC Treaty as applied by the European Courts is an efficient but radical option; it forces the Member States to renegotiate and even to terminate EU-inconsistent international engagements.

Daily international practice, nevertheless, requires answers that are effective but that do not unnecessarily disturb the course of inter-state relations. Hence, the European states, the EU, and also international institutions have come up with solutions aspiring to cure conflicts without being inefficient or exceedingly aggressive. In this context, the EU states have had to defend the international compatibility of their EU duties with respect to the GATT, the WTO, the ECHR, and the UN Charter. Because the prevention of conflicts is generally more desirable than subsequent complex litigation, European diplomacy has in this regard undertaken anticipatory steps in the form of the disconnection clause.

#### *A From the GATT to the WTO: Testing the International Specificity of the EC Treaty*

Today the European Community is one of the most senior and economically one of the most important participants in multilateral trade talks. Despite the fragmentary nature of the EC Treaty provisions on external powers, the EC representatives became regular visitors to the GATT Geneva headquarters shortly after the Treaty of Rome entered into force. Since the early 1960s, the European institutions as well as the original EEC

<sup>43</sup> Art. 188 C of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, places foreign direct investment under the competence of the EU [2007] OJ C306/01.

members have tried to persuade other GATT signatories to exempt the ‘Six’ from the general GATT requirement of the most favoured nation clause (MFN clause). The first objective that the young integration process purported to achieve consisted in the establishment of a customs union, which, like every form of regional economic integration, is by definition inconsistent with the GATT’s chief principle of non-discrimination.<sup>44</sup>

The way out appeared easy, because the General Agreement itself contained a solution to this problem. The EEC Member States asserted the right to benefit from the exception under the GATT’s Article XXIV. By means of paragraphs 4 and 5 of this provision, the contracting parties recognized:

the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area.

The GATT, however, did not provide the promoters of European integration with a blank cheque to depart from the general multilateral rules without conditions. Article XXIV specifies the limits of the internal and external economic effects of the integration enterprise. Accordingly, the Treaty of Rome underwent a thorough examination.<sup>45</sup> The review lasted several years but did not produce any explicit conclusions concerning compatibility, even though European integration was hugely criticized. Rather, the GATT parties progressively and tacitly recognized it as GATT-compatible.<sup>46</sup>

In a similar way, institutional relations between the GATT and the EEC also took shape as a matter of practice, without an explicit textual basis. The GATT litigation record shows that during the period from 1947 to 1993, the EEC appeared on both defensive and offensive sides and represented common interests of the European states *vis-à-vis* third parties.<sup>47</sup>

Since January 1995, the EC has been a fully fledged WTO member alongside its Member States, whose autonomous role there has become very limited.<sup>48</sup> So much

<sup>44</sup> Art. I of the GATT contains the most favoured nation clause.

<sup>45</sup> XXX, ‘L’examen par le G.A.T.T. du Traité de Rome instituant la Communauté européenne’, 4 *Annuaire Français du Droit International* (1958) 621.

<sup>46</sup> Haight, ‘Customs Unions and Free-Trade Areas Under GATT. A Reappraisal’, 8 *J World Trade L* (1972) 391. Art. XXIV was implemented for the first time during the review of the custom union established between South Africa and Southern Rhodesia: see Report II/190 adopted on 18 May 1949. The second agreement examined pursuant to Art. XXIV was the free trade zone agreement concluded between El Salvador and Nicaragua: see Dec II/32 of 25 Oct. 1951. After the adoption of a new review mechanism set up by the WTO in 1994, the regional agreements such as the EC treaty must be periodically reviewed.

<sup>47</sup> The WTO dispute settlement documents list 21 cases: see at: [www.wto.org/english/tratop\\_e/dispu\\_e/gt47ds\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm).

<sup>48</sup> The Final Act of the Uruguay Round was concluded on 15 Dec. 1993 and the World Trade Organization (WTO) agreement as well as its annexes entered into force on 1 Jan. 1994, 1867 UNTS 14. Art. XI(1) of

so that the EC–GATT and WTO symbiosis can be cited today as the most successful example of the Member States' international replacement by their supranational organization.<sup>49</sup>

Under the GATT 1947 as well as under the WTO, the EU states benefit from the presence and negotiating power of the European Commission. In this context, third states have agreed to take into account the internal EU division of international trade powers. Hence, the question of standing in litigation involving the EC is generally easy to resolve. Yet, because the EC states remain sovereign members of the WTO, they can act here, at least in theory, in an autonomous manner, including in the dispute resolution procedure. This is, however, unlikely ever to happen, because such action would violate the domestic division of EU trade powers. An autonomous action by an EU member in the WTO could constitute a violation of EU law and bring about an infringement procedure. This information helps one to understand why, on rare occasions, the WTO members direct their complaints to a group of individual EC members and not to the EC as a whole. The third states that engage in this strategy include mainly the United States, with which other states sometimes join.<sup>50</sup> These cases end up being managed by the supranational representatives anyway, and their significance seems to be purely political. Nevertheless, the possibility exists and reveals the legal intricacies of the EU states' international position.

In a recent decision, *European Communities – Selected Customs Matters*, the WTO Appellate Body took special care to avoid dealing with possible external consequences of the internal EU division of powers.<sup>51</sup> The US attacked the

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the Agreement Establishing the World Trade Organization mentions the 'European Communities' and not the 'European Union' as the WTO member.

<sup>49</sup> For the legal assessment of different aspects of the EC's participation within the GATT/WTO see, e.g., the decision in Case C–93/02, *Biret International v. Council* [2003] ECR I–10497 or Case T–90/03, *Fédération des industries condimentaires de France and others v. Commission* [2007], not yet reported.

<sup>50</sup> See Cases WT/DS67, *United Kingdom – Customs Classification of Certain Computer Equipment*, WT/DS68, *Ireland – Customs Classification of Certain Computer Equipment*, and WT/DS62, *European Communities – Customs Classification of Certain Computer Equipment*, panel report circulated on 5 Feb. 1998, Appellate Body report circulated on 5 June 1998. See also Cases WT/DS82, WT/DS83, and WT/DS115, *Measures Affecting the Enforcement of Intellectual Property Rights concerning respectively Ireland, Denmark and European Communities*, Mutually agreed solutions notified 13 June 2001 (Denmark) and 13 Sept. 2002. See also Cases WT/DS124, *European Communities – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programmes* and WT/DS125, *Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programmes*, Mutually agreed solutions notified 26 Mar. 2001. For other examples see Cases WT/DS172, *European Communities – Measures Relating to the Development of a Flight Management System* and WT/DS173, *France – Measures Relating to the Development of a Flight Management System*, requests for consultation 21 May 1999, WT/DS210, *Belgium – Administration of Measures Establishing Customs Duties for Rice*, mutually agreed solution notified on 2 Jan. 2002, and WT/DS316, *European Communities and certain Member States – Measures Affecting Trade in Large Civil Aircraft*, request for consultations received on 6 Oct. 2004.

<sup>51</sup> Cases WT/DS315/1, *European Communities – Selected Customs Matters*, request for consultation by the US, 21 Sept. 2004; WT/DS315/AB/R, *European Communities – Selected Customs Matters*, Report of the Appellate Body, 13 Nov. 2006. For the analysis of the EC customs administration see paras 2.2–2.31 and 7.155 ff of Panel report WT/DS315/R, *European Communities – Selected Customs Matters*, Report of the Panel, 16 June 2006.

WTO-consistency of the European classification and valuation of products for customs purposes.<sup>52</sup> The peculiarity of the alleged violation stemmed from the mixed legal nature of its origins. Though framed by a number of EC regulations, the customs administration is traditionally executed by the national authorities of the EC members, as in the case of any other European law. Therefore, while identifying the allegedly invalid measures, the US referred not only to supranational legislation but also to ‘the myriad forms of administration of these measures’<sup>53</sup> introduced by the Member States’ customs authorities. The US denounced as WTO-inconsistent:

‘the design and the structure’ of the European customs system, organized through twenty-five ‘separate, independent customs authorities [in that it] does not provide any institution or mechanism to reconcile divergences automatically and as a matter of right when they occur.’<sup>54</sup>

Partially accepting the American claim, the Appellate Body declined the invitation to disapprove the European customs system ‘as a whole’.<sup>55</sup> Pointing to the insufficient factual findings in the panel’s report on this issue, the permanent WTO judicial body could consequently avoid addressing the intricate question of the external legal effects of the EC domestic division of powers between supranational institutions, on the one hand, and the Member States, on the other.

The *Selected Customs Matters* case demonstrates the particularly challenging international situation that the European integration process can bring about for EU Member States. Although none of the states was targeted individually in the American complaint, any of them could have been. The European Commission would certainly have stepped in, and very likely would have handled the dispute. But one can recall that the EC origin of the national customs measures is rather remote and their immediate cause is national. On the other hand, the whole enterprise of European integration rests on the capacities of the Member States to implement and administer EC law. As already mentioned, the latter feature is a part of EU domestic arrangements that third states may or may not consider. Within the WTO, it is generally the case because the EC usually shelters the EU states from claims denouncing a measure of the EU as WTO-inconsistent. This is not necessarily the case in other international fora where the EC or EU has not acquired full membership. Two prominent illustrations are the ECHR and the UN Charter, neither of which allows for the participation of international subjects other than states. In respect to both, the EU has engendered law with non-negligible effects that may call into question the international liability of EU states.

<sup>52</sup> *European Communities – Selected Customs Matters*, request for establishment of a panel by the USA, 14 Jan. 2005, WT/DS315/8.

<sup>53</sup> *Ibid.*

<sup>54</sup> Panel Report, *supra* note 51, at para. 69.

<sup>55</sup> *Ibid.*, at para. 7.64 and Appellate Body Report, *supra* note 51, at paras 271–287.



## B Curing Normative Conflicts: the International Liability of EU Member States Relating to the Execution of European Law

All EU states are parties to the ECHR<sup>56</sup> and to the UN Charter,<sup>57</sup> whereas the EU itself is not. The EC and the EU have, nevertheless, developed activities that touch upon questions of human rights and international security. Without aiming specifically at implementing the ECHR, the European legislation happened to affect its execution by the EU states. Consequently, the latter have had to face complaints lodged in this regard before the ECtHR.

In contrast, the obligations that the EU Member States assume within the UN have not been negatively affected by their common European enterprise. To the contrary, the EU institutions are deploying considerable efforts to implement the EU states' UN duties. Besides raising questions as to its legal basis, this assistance cannot shield European states against problems that an inaccurate EU-driven implementation of the UN Charter may provoke.

### 1 The European Convention on Human Rights: the Presumption that EU Law is Consistent with Human Rights

Even though the ECHR allows for inter-state litigation, the ECtHR has dealt with inter-state complaints only four times up to now.<sup>58</sup> The remaining case load has consisted of actions by individual plaintiffs. The EU states have had to defend several pieces of legislation implemented as a direct obligation arising out of their EU membership. Several cases brought before the European Commission of Human Rights and ECtHR opened the question whether the responsibility of an EU state could be engaged, even though that state was not the immediate author of the challenged measure.<sup>59</sup> The ECtHR did not consider the fact that the alleged infringement stemmed from the implementation of EU duties as a mitigating circumstance. Nevertheless, the judges devoted several thoughts to the complexity of the EU Member States' legal situation. The classical examples of the relevant case law are the *Matthews*<sup>60</sup> and *Bosphorus*<sup>61</sup> decisions.

The judgment in the *Matthews* case arose out of a complaint brought by a British citizen and resident of Gibraltar after her application to be registered as a voter in the elections to the European Parliament was turned down. It was explained to her that, pursuant to the European Community Act on Direct Elections of 1976,<sup>62</sup> Gibraltar

<sup>56</sup> Convention for the Protection of Human Rights and Fundamental Freedoms of 4 Nov. 1950, which entered into force on 3 Sept. 1953, ETS 5, 213 UNTS 222.

<sup>57</sup> *Supra* note 2.

<sup>58</sup> For the most recent example see the application lodged by Georgia against the Russian Federation on 27 Mar. 2007. The previous ones were *Ireland v. UK* (1978); *Denmark v. Turkey* (2000), and *Cyprus v. Turkey* (2001). A further 17 inter-state applications were dealt with by the European Commission of Human Rights, abolished in 1999.

<sup>59</sup> See, e.g., App No 8030/77, *CFDT v. European Communities*, 13 D and R 231, at 239–240; see also App No. 13258/87, *M & Co v. Germany*, 64 D and R 138; App No. 24833/94, *Matthews v. UK* (Grand Chamber), 1999-I at 305; App No. 36677/97, *SA Dangeville v. France*, 2002-III at 71.

<sup>60</sup> *Matthews v. UK*, *supra* note 59.

<sup>61</sup> App No. 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v. Ireland* (Grand Chamber), judgment of 30 June 2005, 42 EHRR (2006) 1. See Hoffmeister, *supra* note 3.

<sup>62</sup> See Dec 76/787 of the representatives of the Member States meeting in the Council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage, OJ (1976) L 278/1.

was not included in the franchise. Exclusion from the franchise was effected multilaterally by the EC states' common decision, which modified the text of the founding documents of the Community. Therefore, the ECtHR had to review provisions of EC primary law.

The applicant denounced the decision of the Gibraltar authorities as a violation of her right to choose the legislature as guaranteed in Article 3 of Protocol No. 1 to the ECHR. After confirming that the latter provision is applicable in Gibraltar, the ECtHR addressed the issue in a three-pronged analysis. First, the judges assessed whether the United Kingdom could be held responsible for the lack of elections to the European Parliament in Gibraltar, given that the act under review originated in the EC. The Court observed that it was incompetent to review EC acts as such, because the EC was not a party to the ECHR. Nevertheless, the Court did not accept the British argument that no effective control could be exercised over the challenged act.<sup>63</sup> Instead the Court remarked that the parties to the Convention remained fully responsible for its execution. The fact of entering subsequent international treaties, such as the EC Treaty, could not absolve them from their pre-existing obligations under the European Convention.<sup>64</sup>

Article 3 of Protocol No. 1 uses the term 'legislature'. In the second part of its analysis the ECtHR had to answer the question whether the term also covers an elected body of a supranational nature such as the European Parliament. The Court concluded that the ambit of the Article is not limited to domestic bodies and can therefore be applied to the European Parliament as well. In the third part of their reasoning, the judges examined the real functions that the Parliament exercised with respect to Gibraltar in the relevant period. Compared to its national counterparts, the European Parliament does not have the full range of competences, and the British defence focused on this point. The Court held, however, that the body was sufficiently involved in the legislative process within the EC to qualify as a 'legislature' under Article 3 of Protocol No. 1.<sup>65</sup> The ECtHR took into account the specific nature of the supranational legal system of the EC to hold that the European Parliament could be equated with a domestic legislative body.<sup>66</sup> The Court considered the progressive increase in the European Parliament's powers and thus departed from the case law established on this point by the European Commission of Human Rights.<sup>67</sup> As a result, the implementation of an EC act by the United Kingdom led the Court to the conclusion that the latter had failed in its duty to safeguard the right to a 'free expression of the people in the choice of the legislature'.<sup>68</sup>

<sup>63</sup> *Matthews v. UK*, *supra* note 59, at para. 26.

<sup>64</sup> *Ibid.*, at paras 32–34. The ECHR was adopted in 1950, but the Rome Treaty several years later in 1957.

<sup>65</sup> *Ibid.*, at paras 38–44.

<sup>66</sup> See the dissenting opinions by Judges Sir John Freeland and Karel Jungwiert.

<sup>67</sup> *Ibid.*, at para. 50; see App No. 8364/78, *Lindsay v. UK*, 15 Decisions and Reports 247, and App No. 11123/84, *Tête v. France*, 54 Decisions and Reports 52.

<sup>68</sup> See also *SA Dangeville v. France*, *supra* note 59, and App Nos 49217/99 and 49218/99, *SA Cabinet Diot and SA Gras Savoye v. France*, 3 Sept. 2002.

The *Matthews* case has shown the potential risk to which EU Member States are exposed while implementing EU primary legislation. A recent decision of the ECtHR makes it clear, however, that *Matthews*-like decisions will probably remain exceptional and that the Court is ready to exercise considerable self-restraint when confronted with EU-related claims, even in the context of EC secondary law. The *Bosphorus* decision<sup>69</sup> involved a complex case implicating the laws of the ECHR, the EU, and the UN Charter. As in *Matthews*, an EU Member State had to face allegations that by implementing an EU law it violated the ECHR.

The applicant, a Turkish airline company, leased an aircraft from Yugoslav Airlines which, while in Ireland, was seized by the Irish authorities pursuant to an EC Council Regulation.<sup>70</sup> The regulation implemented the UN sanctions adopted against the Federal Republic of Yugoslavia (Serbia and Montenegro). These sanctions were later relaxed and the aircraft was returned to the owner. Subsequently, the applicant denounced a violation of his right to protection of property, guaranteed under Article 1 of Protocol No. 1 to the ECHR. Ireland hence faced a difficult situation. The challenge was directed against an Irish measure which, though implemented by national authorities, was adopted in the supranational decision-making process over which Ireland had only very limited control. On this point, the ECtHR noted that the EC Regulation in question was 'generally applicable', 'binding in its entirety', and 'directly applicable', and that, in consequence, no Member State could lawfully depart from it. The Court observed as well that the Irish authorities were right to consider themselves obliged to impound any aircraft to which the EC regulation applied, and that in this exercise they had no discretion.

However, the fact that Ireland was bound by EC law could not absolve it from its duties under the ECHR. Thus, the European Court subsequently inquired into whether the impounding constituted a violation of the Convention. On this point, the Court posited an important presumption in favour of the consistency of EC law with the ECHR. Taking into account the specificity of the EU states' engagement under the EC Treaty, it held that the protection of fundamental rights by EC law could have been considered 'equivalent to that of the Convention system'. This is a critical step in the Court's reasoning. It implies that the ECtHR will exercise significant self-restraint whenever the lawfulness of a national measure implementing an EC rule is in question. But this leniency is not without conditions. As the Court explained, the presumption can be rebutted if the protection of fundamental rights is manifestly deficient. Because this was not the situation in the case at hand, Ireland was found not to be in violation of any of its obligations under the European convention.

It is rather difficult to predict under what circumstances the presumption of the consistency of EU law with the ECHR can be rebutted. One can foresee that the ECtHR will exercise particular caution before accepting a rebuttal. The perception of EC law as generally respectful of human rights will most likely lead the judges in Strasbourg to

<sup>69</sup> See *supra* note 61.

<sup>70</sup> Council Reg 990/93/EEC, of 26 Apr. 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), OJ (1993) L 102/1.

remain deferential. Even though the context is very different, there is a good chance that as with the WTO, the presumption of the consistency of European rules will generalize also in the field of human rights.

Although the EU is not a UN member, the supranational institutions repeatedly carry out the EU Member States' duties under the UN Charter, and especially their obligation to bring into effect Security Council (SC) resolutions. This practice presents a considerable practical advantage, but it becomes problematic regarding the question whether the EU or its members will face international responsibility if EU implementation fails to comply with UN standards. Unlike the European system of human rights protection, the UN Charter does not give rise to much litigation. However, this traditional situation recently recorded interesting developments when private parties challenged the UN-consistency of EU legislation before the CFI and ECJ.

## 2 *Implementing the Charter of the United Nations: the European Way*

Recently, several EU acts were adopted to carry out the Security Council's Chapter VII anti-terrorist resolutions. Without being a UN member, the EU can establish links with the world organization in various ways, especially in the context of UN Chapter VIII.<sup>71</sup> No UN Charter provision, however, provides for the participation of international organizations. Obligations are hence addressed to the UN member states only. Yet, the systematic implementation of UN duties by means of the EC/EU framework has manifestly become the vehicle for EU states' compliance. Because the Security Council resolutions are addressed to UN members, and because the EU is not among them, the questions arise as to the legal basis upon which EU implementation is anchored, as well as to the corresponding liability for faulty execution.<sup>72</sup>

The practical advantage of the situation is beyond any doubt. Supranational legislation generates a unified and efficient response to SC decisions. The European institutions have turned out to be a rather committed actor in this field, and third states seem to approve the practice. Nevertheless, in the past few years a substantial number of private challenges have been brought before the EU Courts. This situation has led the EU judges to assess the legal basis that allows the EU to implement UN obligations. The European judges have executed this task with a great deal of originality, which has not gone without criticism. In the *Yusuf* and *Kadi* decisions<sup>73</sup> the Court of First Instance linked, with unexpected obiter conclusions, several legal grounds to justify

<sup>71</sup> Ch. XIII deals with regional agreements established to deal with the matters related to the maintenance of international peace and security.

<sup>72</sup> On the issue of international responsibility of the EU/EC see generally Kuijper and Paasivirta, 'Does One Size Fit All?: The European Community and the Responsibility of International Organizations', 36 *Netherlands Yrbk Int'l L* (2005) 169; Kuijper and Paasivirta, *supra* note 3.

<sup>73</sup> Case T-306/01, *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533, currently under appeal; Case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649, currently under appeal. See 'Editorial Comments, Hegemonic International Law Revisited', 97 *AJIL* (2003) 873; S. Zašova, 'La lutte contre le terrorisme à l'épreuve de la jurisprudence du Tribunal de première instance des Communautés européennes', 74 *Revue trimestrielle des droits de l'homme* (forthcoming, 2008).

supranational involvement in the UN terrain, and even to deduce its own exceptional power to review the SC resolutions' conformity with the norms of *ius cogens*.<sup>74</sup>

The facts were remote from the adoption of a series of EC measures executing the UN sanctions against the Taliban regime in Afghanistan.<sup>75</sup> Based on the SC resolutions, the Community froze the funds of several entities, including two Swedish companies. These attacked the EC measures, denouncing a violation of their fundamental rights to property and to a hearing. The CFI considered it necessary to establish first the EC's relationship with the UN and then to verify its powers to review the SC's decisions, to which, in its opinion, the review of the challenged acts amounted.

On the first point, the CFI concluded that while the EU was not a UN member, it had succeeded to its Member States' UN obligations. The Court then combined various provisions of the EC Treaty to deduce that the EU was competent to implement measures relating to the maintenance of international peace and security. The European judges then observed that, as a matter of principle, the Court lacked jurisdiction to review the SC's resolution except, however, when the resolution allegedly violated norms of *ius cogens*. This statement has provoked numerous scholarly comments because of its direct opposition to Article 103 of the UN Charter. For the first time in international history, a regional court has declared its competence to set aside a binding SC Chapter VII resolution. The exercise of this power seems to be strictly limited to the question of *ius cogens*, but this limitation has been counterbalanced by the very wide reading that the CFI gave to the latter term.

The question of the legal basis of the European UN-related action are today governed by *Kadi* and *Yusuf*. The intriguing question of legal consequences should the European implementing legislation prove to be inconsistent with UN obligations, however, remains open. Will the Member States be held liable in such a situation? Will they have to give priority to the original version of the SC resolutions, pursuant to Article 103 of the UN Charter,<sup>76</sup> or will they have to apply the EU interpretation

<sup>74</sup> In the Lockerbie Case the ICJ held that *prima facie* the US and Libya had to respect SC resolutions notwithstanding any other legal obligation. Indication of provisional measures asked for by Libya would 'impair the rights ... enjoyed by the United State by the virtue of Security Council resolution 748 (1992)'. So far, the case has not advanced to the merits stage, so the ICJ has not yet had occasion to decide the question of possible review of the SC resolution.

<sup>75</sup> EU Council Reg 467/2001 of 6 Mar. 2001 on the prohibition of the export of certain goods and services to Afghanistan, strengthening of the flight ban, and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ (2001) L 67/1; Commission Reg 2199/2001 of 12 Nov. 2001, OJ (2001) L 295/16 and Council Reg 2062/2001 of 19 Oct. 2001, OJ (2001) L 277/25; Council Reg 881/2002 of 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, OJ (2002) L 139/9.

<sup>76</sup> 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' On this point see the commentary by Koskenniemi and Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden J Int'l L* (2002) 553, at 559: 'if the UN Charter *really* was a constitution of mankind, its character as such could be derived neither from popular legitimacy nor sociological effectiveness. Even as Article 103 may seem like a constitutional provision, few would confidently use it to uphold the primacy of Security Council decisions over, for examples, human rights treaties.'

instead? There is no doubt that the states remain wholly and exclusively responsible for meeting the terms of SC resolutions, to which Article 103 of the UN Charter gives priority. The functional advantage of the co-ordinated EU implementation, EU devotion to the UN cause, and the truly problematic legal and political consequences of a contrary solution make it likely that any foreseeable litigation will rely on some version of the supranational exception or presumption in favour of the consistency of EU acts with the UN Charter.

The incidents provoked by the external negative impacts of EU law compel EU institutions and the EU states to search for legal tools that will eliminate, or at least reduce, the risk of their occurrence. Even though their rationale is far from being limited to this end, disconnection clauses are a distinctive legal instrument that European diplomacy has introduced into international practice in order to avoid normative conflicts and accommodate the needs of integration.

### *C Preventing Normative Conflicts: the Policy of Disconnection Clauses*

On 20 October 2005, a majority of the UNESCO member states adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Diversity Convention).<sup>77</sup> The result of intense negotiations, the Diversity Convention has today gathered 146 signatories, including all EU Member States and the European Community.<sup>78</sup> This last is not a UNESCO member. However, while the negotiating process was under way, the European institutions attempted to design a unified negotiation position that the EU members would adopt. This agenda invited Member States to make efforts to ensure that the following provision became part of the final text:

Notwithstanding the rules of the present Convention, those Parties which are members of a regional economic integration organization constituted by sovereign States to which their member States have transferred competence over matters governed by this Convention, shall apply in their mutual relations the common rules in force in that regional economic integration organization.<sup>79</sup>

In the draft, the provision was placed after the current Article 30 dealing with federal or non-unitary constitutional systems,<sup>80</sup> but in the end it did not win support from the other negotiating parties. Had it been accepted and incorporated into the final text,

<sup>77</sup> The United Nations Educational, Scientific and Cultural Organization. The Convention entered into force on 18 Mar. 2007, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=31038&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>78</sup> The EC acceded on 18 Dec. 2005; Council Dec 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection of the Diversity of Cultural expressions, OJ (2006) L 201/15. See Art. 27(3) of the Convention, detailing conditions upon which a regional organization may accede.

<sup>79</sup> The provision was entitled 'Regional economic integration organizations': archived document of the EU Council, 22 April 2005, 7962/05, JUR 156 CULT 21.

<sup>80</sup> And which differentiates between the duties of the central governments with respect to the execution of the convention: '[r]ecognizing that international agreements are equally binding on Parties regardless of their constitutional systems, the following provisions shall apply to Parties which have a federal or non-unitary constitutional system: (a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those Parties which are not federal States; (b) with regard to the provisions of the Convention, the implementation of which comes under the jurisdiction of

the statement would have become the most recent example of what have become known as 'disconnection clauses'.<sup>81</sup> These clauses are currently included in two dozen multilateral agreements. By their means, the EU states 'disconnect' themselves from the general regime of the treaty, to the extent that the subject matter is covered by EU/EC law and only as far as their mutual relations are concerned. The content of disconnection clauses varies from one treaty to another, but it can be expressed as follows:

Notwithstanding the rules of the present Convention, those Parties which are members of the European Economic Community shall apply in their mutual relations the common rules in force in that Community.<sup>82</sup>

This instrument has not gone without criticism. Concerns have recently been expressed about the risks that this practice represents for the unity of a given treaty regime and also for the international system as such, should this course of action become frequent.<sup>83</sup>

The disconnection clauses seem to challenge, if not contradict, the well established principle of relative effect of treaties<sup>84</sup> by making intra-EU rules internationally opposable to third states. The EU members claim by this means a right to detach themselves from a negotiated regime. However astounding this may be, disconnection clauses have acquired the status of positive law because other signatories have acquiesced in them.

If the practice of disconnection is followed by other states, it may make little sense to work for difficult multilateral compromises only to watch them collapse into disparate legal obligations afterwards. It is presumably for this reason that in its recent work on the fragmentation of international law, the International Law Commission (ILC) is rather critical of this tool without, however, being explicit about the reasons.<sup>85</sup>

To date such clauses can be found in approximately 17 conventions.<sup>86</sup> They have known the greatest flamboyance around the negotiation table at the Council of Europe.

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individual constituent units such as States, counties, provinces, or cantons which are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform, as necessary, the competent authorities of constituent units such as States, counties, provinces or cantons of the said provisions, with its recommendation for their adoption'.

<sup>81</sup> Upon its ratification the EC issued the following declaration: '[a]s regards Community competences described in the Declaration ... the Community is bound by the Convention and will ensure its due implementation. It follows that the Member States of the Community which are party to the Convention in their mutual relations apply the provision of the Convention in accordance with the Community's internal rules and without prejudice to appropriate amendments being made to these rules': Council Dec 2006/515 EC, *supra* note 78, Annex II.

<sup>82</sup> Art. 27 of the Convention on Mutual Administrative Assistance in Tax Matters 1988 quoted in Koskenniemi, *supra* note 21, at 148, para. 289 *in fine*. See also Goldsmith, 'The Unexceptional U.S. Human Rights RUDs', 3 *U St Thomas LJ* (2005) 311.

<sup>83</sup> See Koskenniemi, *supra* note 21, at 148.

<sup>84</sup> See Art. 30 VCLT, *supra* note 19.

<sup>85</sup> See Koskenniemi, *supra* note 21, at 148 ff. For critical comments see Economidès and Kolliopoulos, 'La clause de déconnexion en faveur du droit communautaire: une pratique critiquable', 110 *RGDIP* (2006) 273.

<sup>86</sup> See Koskenniemi, *supra* note 21, para. 289.

The need for such provisions is being justified by the capacity of the EC to develop a dense normative system that goes far beyond what traditional intergovernmental cooperation is able to generate. Also, it is suggested that the supranational endeavour will unavoidably be frustrated if its external ramifications are not co-ordinated and if the international action of the EU states lacks a common line.

The rules of the European Commission's and the Council's archives allow only limited access to recent documents. Hence, it is not possible to say with accuracy what the line of reasoning on this issue is. For example, when the negotiations on the UNESCO Convention on Cultural Diversity<sup>87</sup> were in process, the Legal Service of the Council of the EU delivered an opinion explaining that the inclusion of a disconnection clause was appropriate.<sup>88</sup> The proposal contains the traditional wording<sup>89</sup> of the clause, but the 12-page discussion about its justification remains classified.<sup>90</sup> Basically two sets of reasons are put forward in this context. The first set concerns relations between Member States and third parties, while the second reflects the features of the EU legal order. The international argument goes as follows. The growing breadth of the EU's external powers makes it increasingly difficult for the Member States to survey the consistency of their international engagements with EU law. Deepening discomfort about the situation has led the EU states and institutions to promote disconnection clauses as a tool to ensure that EU states' international engagements will not become an obstacle to EU domestic evolution. Third states in consequence lose the legal ability to request EU members to apply the multilateral rules in their mutual relations. However, the proponents of disconnection clauses argue that third parties can hardly ever be affected by intra-European developments, because the latter are limited to the EU Member States' relations *inter se* and because, with respect to third countries, the multilateral obligations remain in force. On this point, one can ask whether it will always be easy to draw a clear line between 'legal relations between EU Member States *inter se*', on the one hand, and their relations towards third states, on the other. Some multilateral treaties regulate subjects such as the prevention of arms sales or illegal drug trafficking, and their efficiency clearly depends on the co-operation of all parties involved. Any fragmentation of the established regime may thus threaten the success of this objective.<sup>91</sup>

<sup>87</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions, *supra* note 77.

<sup>88</sup> Document of the EU Council 7962/05, *supra* note 79.

<sup>89</sup> Art. 29*bis* of the Council proposal states: '[r]egional economic integration organizations: Notwithstanding the rules of the present Convention, those Parties which are member of a regional economic integration organization constituted by sovereign States to which their member States have transferred competence over matters governed by this Convention, shall apply in their mutual relations the common rules in force in that regional economic integration organization', *supra* note 79.

<sup>90</sup> For another example see the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents, signed on 21 May 2003 in Kiev.

<sup>91</sup> In a slightly different context, Warner AG suggested the utility of distinguishing between agreements the full execution of which can be achieved only by the mutual teamwork of all signatories on the one hand, and purely bilateral ones, on the other: Case 34/79, *R. v. Henn and Darby* [1979] ECR 3795, Opinion of



The idea that two or more parties to a multilateral treaty cannot ‘disconnect’ themselves from the general rule without impeding the common goal merits consideration. By exempting the whole group of EU states from a multilateral regime, the clause creates a legal enclave the extent and implications of which may be hard to assess. The defence of the European position can, however, build upon empirical evidence showing that the European rules tend to be stricter and more detailed than the multilateral ones.<sup>92</sup> As such, they can hardly disturb multilateral enterprises, although this conclusion must be assessed over time. On the other hand, if European regulation merely runs beyond the basic multilateral standard, this argument conflicts with a parallel justification of the clause according to which the clause is said to prevent inconsistencies and EU states’ international responsibility should a conflict arise.

Despite this curious logic, one can understand the efforts to secure a pragmatic safeguard against litigation. The fact that the EU states give away a large amount of their normative powers makes them vulnerable whenever their international obligations entitle third states to require specific action. They may no longer be able to embrace such conduct, in which case they will have to rely on the EC institutions’ diligence.

Under this perspective, the disconnection policy recalls features of the federal clause. By this means, federal states waive their international responsibility for the execution of a given treaty in so far as its subject matter cannot be administered by the national governments because of particular restrictions arising from federalism.<sup>93</sup> While recently ratifying the UN Convention against Transnational Organized Crime and its two protocols,<sup>94</sup> the USA introduced a reservation referring to ‘fundamental principles of federalism’ by which the American government refused to criminalize matters of ‘purely local character’. The reservation explained that federal criminal law does not apply in situations where the conduct ‘does not ... involve interstate or foreign

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Warner AG, at 3818. According to some commentators, the AG’s first category implicitly referred to multilateral treaties establishing so-called objective regimes, even though this term has a specific meaning in the law of succession in treaties. For a commentary see Cohen-Jonathan, *supra* note 30, at 1497–1508.

<sup>92</sup> See EU Council Doc 8799/95 of 6 July 1995, JUSTCIV 40, from the (Spanish) Presidency to the Group Directeur III ‘Conclusions du séminaire “Aspects internationaux de la séparation et du divorce: problématique dans l’Union européenne”’. Foreseeing the possible conclusion of a new convention on the subject by the EU States *inter se* (title VI of the EU Treaty), the Spanish presidency suggested, *inter alia*, that a disconnection clause be included in the new convention ‘in order to ensure the compatibility’ between the latter and the Brussels and other conventions (*‘d’assurer la compatibilité entre la Convention de Bruxelles II et d’autres conventions internationales par le biais de clauses de déconnexion’*).

<sup>93</sup> See as one of the first examples Art. XI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (New York Convention), available at: [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html). See generally Hollis, ‘Executive Federalism: Forging New Federalist Constraint on the Treaty Power’, 79 *S California. L Rev* (2006) 1327; Liang, ‘Notes on Legal Questions Concerning the United Nations: Colonial Clauses and Federal Clauses in U.N. Multilateral Instruments’, 45 *AJIL* (1951) 108.

<sup>94</sup> Convention Against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), and the Protocol Against Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol), 15 Nov. 2000, S. Treaty Doc. No. 108-16, UN Doc. A/Res/55/25, available at: [www.unodc.org/unodc/en/crime\\_cicp\\_signatures.html](http://www.unodc.org/unodc/en/crime_cicp_signatures.html) and quoted by Hollis, *supra* note 93, at 1361.

commerce, or another federal interest'. As with the relationship between disconnection clauses and EU law, the federal clause at the international level provokes the domestic limitations that federalism imposes on the federal government. In this way, the federal government absolves itself from international obligations requiring legislation that would intrude into fields falling within the traditional competence of the states. Disconnection as well as federal clauses hence reflect national governments' concern to shield themselves from international liability for actions or omissions that escape their immediate control.

Besides international considerations, disconnection clauses reflect an important concern specific to the EU domestic legal system. Disconnection clauses appear both in treaties in which the EC cannot participate (e.g., conventions within the Council of Europe) and in mixed agreements, i.e., international treaties in which both the EC and the Member States participate. International agreements entered into by the EC automatically become part of the European legal system, where they are endowed with legal force that trumps secondary EC legal norms. This principle is partly anchored in Article 300(7) of the EC Treaty and has partly been developed by the ECJ.<sup>95</sup> Hence, it may be possible for a Member State successfully to resist a duty to implement an EC norm by claiming that the latter would amount to a violation of an international agreement to which the EC and the Member States had subscribed. By ensuring the priority application of the domestic EU regime, disconnection clauses defeat such a strategy in advance. In this sense, before the adoption of the European Council Convention on Cybercrime of 2001,<sup>96</sup> the Commission argued that the insertion of a disconnection clause was a matter of great importance.<sup>97</sup> The Commission explained

<sup>95</sup> Case 181/73, *Haegeman v. Belgium* [1974] ECR 449; Case 104/81, *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641; Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719; Case C-312/91, *Metalsa* [1993] ECR I-3773; Case C-158/91, *Ministère public et Direction du travail et de l'emploi v. Jean-Claude Levy* [1993] ECR I-4306, para. 19; Case C-432/92, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd* [1994] ECR I-3134, para. 50; Case C-327/91, *France v. Commission* [1994] ECR I-3674, para. 25; Case T-115/94, *Opel Austria GmbH v. Council* [1994] ECR II-70, paras 90–91; Case C-286/90, *Anklagemyndigheden v. P.M. Poulsen and Diva Navigation Corp* [1992] ECR I-6052, at 6054, paras 16 and 26–27; Case C-316/91, *Parliament v. Council* [1994] ECR I-646, para. 69. With respect to international custom see Case 48/69, *Imperial Chemical Industries v. Commission* [1972] ECR 619. See also Case C-162/96, *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655.

<sup>96</sup> Art. 39(2) of the Convention. The Convention was signed on 23 Nov. 2001 and entered into force on 1 Jan. 2004, CETs No. 185. It is open only to states and not to international organizations. The text of the Convention is available at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm> or 41 ILM (2002) 282.

<sup>97</sup> The proposition included not only the well known reference to the priority of the EC rules but equally of the EU ones, adopted pursuant to Title VI of the EU Treaty. In the same document, the Commission advocates the EC participation clause. The Commission acknowledges that the EC had not yet acquired powers in the field, which, according to the Commission, must however be just a matter of time. The Commission pointed to the precedent of an anticipatory clause in the Council of Europe convention 164 of 4 Apr. 1997: EU Council archived document 6643/01, obtained in French, of 27 Feb. 2001, CRIMORG 23, '[n]ote de transmission, Emetteur Bernhard Zepter, Secrétaire Général Adjoint de la Commission Européenne, destinataire Javier Solana, Secrétaire Général/haut représentant Projet de Convention du Conseil de l'Europe sur le Cyber-criminalité – adhésion de la CE et clause de déconnexion', Commission doc SEC(2001) 315 of 19 Feb.

that the clause was necessary to ensure legal clarity and to make every EU state's national rule based upon the convention consistent with EC law. The Commission hence revealed that the main objective of the disconnection clause was not to depart from international standards, but to ensure that these did not hamper the implementation of European law.

The continuing discussions on the subject of disconnection clauses show that the issue is likely to lead to interesting developments. Its significance lies, however, in the fact that it is part of a broader tendency that European diplomacy promotes in order to shield the supranational endeavour against the disturbing effects of international law. If the EU succeeds, its endeavour has the chance to become the casebook example of international law fragmentation and a perfect example with which to open or close lectures on the hierarchy of international norms. There is no particular reason to be much concerned about it, because:

The I.C.J., human rights bodies, a trade regime or a regional exception may each be used for good or ignoble purposes and it should be a matter of debate and evidence and not of abstract 'consistency', as to which institutions should be preferred in a particular situation.<sup>98</sup>

What else can one add? This quotation is perfectly tailored to the European case and to the diverse legal tools by which the European instances and EU Member States promote the European regional exception in the landscape of international co-operation. In diverse forms and fora, the exception has been advanced for almost half a century and has been, to a great extent, accepted or at least tolerated. The question that remains open is to what extent this exception should be presumed as a matter of custom.

## 4 Conclusion: Is the European Exception Making its Way into International Law?

The transfer of powers to European supranational institutions and the resulting constraints on the domestic as well as external conduct of the 27 EU members is transforming on a daily basis the international legal condition of these states. The EU has developed a complex international practice. Its legal rules relating to external relations impose constraints primarily on the EU Member States, but by definition they also affect third parties. This is particularly so whenever EU members have to reconsider and review bilateral or multilateral engagements entered into with third parties. The latter are often entitled to insist on these engagements being honoured and they may also trigger the Member States' international responsibility.

The EU members must hence deploy their best diplomatic efforts in order to obtain third parties' concessions permitting them to embrace their EU obligations fully without infringing international ones. In many instances the European states together with European institutions have succeeded in this difficult exercise. With regard to

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2001, Document de travail des services de la Commission, *Projet de Convention du Conseil de l'Europe sur la Cyber-criminalité – adhésion de la CE et clause de déconnexion.*

<sup>98</sup> Koskenniemi and Leino, *supra* note 76, at 578.

the numerous exceptions that the 'EU-Member States' group has been granted since the first success in the GATT, one can ask whether this record will bring about the emergence of a new international customary rule favouring European integration. The developments within the GATT and the WTO support this movement, and so does the ECtHR's position in *Bosphorus*. The current practice of enacting supranational legislation implementing the Security Council's resolutions suggests that some sort of supranational exception will also apply in this context.

The process of European integration is an open-ended endeavour. The administration of normative conflicts will therefore remain a permanent challenge for all actors concerned. Given the evolution of European law, the topical uncertainties about the intra-EU division of international powers, and the proliferation of international norms, the risk of inconsistencies is likely to persist rather than disappear.

It is therefore possible to imagine that the use of international legal tools favouring the supranational enterprise will persist and even increase. Without any doubt, the alleged *sui generis* nature of the Brussels-related international agenda has annoyed numerous diplomats and legal scholars. Without these tools, however, European integration could be seriously hampered, because its subject-matter coverage touches upon an increasing number of issues of international importance. No international court will probably ever say that there is a genuine customary supranational exception, because nothing guarantees that the EC will always respect its international duties. Nevertheless, there is a strong likelihood that the sophistication of the European legal order, combined with practical, legal, and political considerations, will lead different international actors to lean towards deference whenever the supranational element enters the theatre of international life.