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EDITORIAL COMMENTS

The Union, the Member States and international agreements

As a result of a succession of cases before the Court of Justice, it has become increasingly clear over the last years that the Union has a persistent problem in respect of international agreements to which it is not a party, but to which all or nearly all the Member States are parties. Moreover, such agreements are often made within the framework of international organizations of which Member States are Members, but the Union is not; it mostly has the weak status of observer. Often such agreements lead to Union legislation or there is already Union legislation on the subject matter of the international agreements in question. Although such Union legislation may go further than the agreements, it is normally broadly in line with them. In these circumstances, questions of nuance or suspected deviation from the agreements' text may arise. This has placed the Court of Justice repeatedly in difficult situations.

In *Kadi*,[1] for instance, the Court felt compelled to annul the Union implementation measure of a Security Council decision which was binding on the Member States, because it was in breach of fundamental rights of individuals under Union law. In *Intertanko*,[2] the Court ruled that the Marpol Convention,[3] to which all Member States are parties, was not binding on the Union, but that its provisions, though not capable of having direct effect or setting aside Union secondary law, could be taken into account in interpreting the relevant Union law. Similarly, in *Bogiatzi,*[4] the Court decided that the Warsaw Convention[5] was not binding on the Union for the same reason as the Marpol Convention,

1. Cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission,* [2008] ECR I-6351. See also recently Case T- 85/09, *Yassin Abdul Kadi* v. *European Commission*, judgment of the General Court of 30 Sept. 2010, nyr.

2. Case C-308/06, *The Queen ex parte Intertanko et al.* v. *Secretary of State for Transport,* [2008] ECR, I-4057.

3. The International Convention for the Prevention of Pollution from Ships (MARPOL) includes six technical annexes, entered into force on 2 Oct. 1983, and is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. The convention has been negotiated and is administered within the framework of the International Maritime Organization (IMO), in which the EU has a weak observer status. See <www.imo.org/about/conventions/listofconventions/> last visited 12 Jan. 2011.

4. Case C-301/08, *Irene Bogiatzi* v. *Deutscher Luftpool et al.,* [2009] ECR I-10185.

5. The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 Oct. 1929 (Warsaw Convention) See <www.jus.uio.no/lm/air.carriage.warsaw.convention.1929/portrait.pdf> last visited 12 Jan. 2011. This Convention is

and that Union legislation in several respects deliberately went further than the Warsaw Convention, for instance on the threshold for damages to be paid. However, this did not stand in the way of the national court applying a time limitation on making claims laid down in the Warsaw Convention.

Very recently, in the *TNT case*,[6] the Court ruled, once again, that the Union was not bound, this time by the Convention on the Contract for the International Carriage of Goods by Road (CMR), and in particular by its provisions on the limitations for claims for damage in case of loss of goods during transport. The Court therefore decided that it did not have the power to interpret the provisions of the CMR. The Court's main ruling was, however, that Article 71 of Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation)[7] should be interpreted in conformity with the object and purpose of the latter so as to minimize the negative consequences of its reference to the so-called specialized conventions, of which the CMR is one.

This editorial seeks to look further into the background of these cases and the common problem underlying all of them. The question is whether the Court can do much more than it already did in these cases and, if not, how the political institutions of the Union should address this problem.

Some background to the cases

First of all it is important to make a distinction between cases that concern matters which are purely internal to the Union and those that touch Member State treaty relations with third States. In the first category are such events as the fall on the tarmac of Ms. Bogiatzi in Luxembourg, while boarding a Luxair airplane, and the transport by road of goods between the Netherlands and Germany by TNT delivery van. In such situations, it is in conformity with constant case law of the Court that treaty obligations of the Member States between themselves cannot prevail over Union law. Nevertheless, the unity of treaty systems that are broader than the Union Member States and sometimes even world-wide is being broken in this way – which may be seen as a negative point. On the other hand, it is equally true, for instance in the *TNT* case, that the unity of the Union system of execution and enforcement of judgments in civil and commercial matters is being undermined by the specialized conventions, and this cannot be accepted in the same fashion as it was during the time

now administered and has been amended within the framework of the International Civil Aviation Organization (ICAO), in which the EU has a weak observer status.

6. Case C-533/08, *TNT Express* v. *AXA Versicherungen,* Judgment of the Court (Grand Chamber) of 4 May 2010, nyr.

7. O.J. 2001, L 12/1.

that the Brussels Regulation was still the Brussels Convention and not part of Union law.[8]

The second category is formed by cases, such as *Kadi* and *Intertanko.* Of these two, *Kadi* is an example of the complications that result when the binding decisions of an international organization of which the Member States are Members, but the Union is not, clash with fundamental rules of Union law, which have the status of primary law. This leads to a situation where the Union is placed before an awkward choice. Either the Union renounces the possibility of implementing binding UN sanctions and lets the Member States do this, with all the concomitant possibilities of distortions in and evasions through the internal market. Or the Union superimposes on the UN measures its own procedure, which would do justice to the right to be heard and the right to property, with the risk that the final implementation of the sanctions by the Union would not be in conformity with the terms of the Security Council decision.

On the other hand, *Intertanko* is the example of a case where secondary Union law that may be incompatible with a treaty to which all Member States are parties, but the Union is not, cannot be set aside because of such incompatibility. At best, such secondary law can be interpreted in a harmonious way with the international agreement in question. However, in *Intertanko* the point of harmonious interpretation was never reached, since the complainants had asked only for the setting aside of provisions of secondary Union law.

Although it is important to differentiate between these situations, they are all basically rooted in the underlying problem of a discontinuity between the internal legislation and the external obligations of the Union. Another way of putting this is that the Union institutions have lost sight of the maxim of the classic *AETR* case of parallelism between internal and external Union law.[9] This is the consequence of either the Member States in the Council not being willing or able to respect this parallelism or of third States parties to the treaties in question or members of the international organizations concerned not being ready or capable of opening the treaty or organization to international organizations like the EU. The most discouraging example of good will, but practical inability, to open up a treaty organization to the EU is the Convention on International Trade in Endangered Species (CITES). In 1983 its treaty body adopted the text of an amendment enabling so-called Regional Economic Integration Organizations (read: the EU) to accede. However, so far the number of Members having ratified the amendment, though high, has not passed the

8. All the more so, since there are many more specialized conventions than the CMR, which would make the system of Reg. No 44/2001 in reality into a residual system, especially in the field of commercial law, including transport law.

9. Case 22/70, *Council* v. *Commission*, [1971] ECR 263. See also Art. 3(2) TFEU.

threshold necessary to let it enter into force.[10] In the meantime the EU happily goes on adapting its implementing rules, every time CITES decides a change in the lists of endangered species, as if it were already a party/member of this treaty organization.

Limits to the Court's adaptive action

The cases referred to above clearly show the limits to the Court's adaptive action in respect of situations of discontinuity between the Union's internal powers and legislative action and its external action. The instance in which the Court has gone furthest in finding a "solution" to this problem was, of course, in the domain of human rights. At the time, all Member States were parties to the European Convention on Human Rights, while the Community did not even have the power to become a party.[11] As is well known, the Court filled this gap single-handedly by referring to both the principles laid down in the ECHR and to the fundamental rights common to the national constitutional systems of the Member States. In the end, and this in spite of the fact that the Court's gap-filling was generally approved, even in this domain a full "legislative" solution was considered necessary by lifting the Charter of Fundamental Rights of the European Union to Treaty rank and by enabling the EU to seek accession to the ECHR (Art. 6 TEU).[12]

The provisional solution found in the human rights area to the problem of the discontinuity between internal and external action is clearly not available in the other areas of discontinuity, as is quite evident from the cases briefly evoked earlier. Another way of dealing with this discontinuity that has been suggested in some of the cases above, namely the functional succession theory developed by the Court in the *International Fruit* case[13] in relation to the GATT, and also applied implicitly in the cases where reference was made to provisions of the ECHR, was rejected by the Court.[14] Therefore, the need for a "legislative" solution would seem all the greater also in the other sectors, especially if one takes into account that one of the great moving forces behind the

10. For the CITES Convention and the text of the so-called Gaborone Agreement see www.cites.org , last visited 29 Dec. 2010.

11. Thus the situation of discontinuity in the area of human rights was even more fundamental than in the cases discussed above, because there was not even a potential external power to conclude human rights treaties as such. Cf. Opinion 2/94 on accession to ECHR, [1996] ECR I-1759.

12. One has to hope that this will not end in a CITES-like deadlock for lack of ratification by Council of Europe Members, including EU Member States.

13. Joined Cases 21-24/72, *International Fruit*, [1972] ECR 1219.

14. *Intertanko*, cited supra note 2, para 48. This rejection seems correct. In the case of the GATT, the succession theory was created by the Court also because of the general acceptance by the GATT and its contracting parties of the presence of the Community in the GATT organs.

reforms inherent in first the Constitutional Treaty and later the Lisbon Treaty has been the improvement of the capacity of the EU to act effectively on the international scene.

The first signs in this respect are not hopeful. The attempt of the EU to obtain an enhanced observer status in the UN General Assembly, for instance, has ended in a diplomatic disaster, when the draft Resolution to this effect, spelling out that the EU would have almost all the rights and privileges in the Assembly of full Members (procedural and substantial) without being one, was shelved by a large majority of the Members, including countries which are normally quite supportive of the Union. The operation had simply been very badly prepared.[15] So far, no new attempt has been made to pass the proposed resolution. In another disappointing development, important Member States ganged up against the first Commission proposal containing transitional legislation relating to the transfer of the new exclusive Union power in respect of Foreign Direct Investment as part of the common commercial policy.[16] It remains to be seen whether the newly won powers of the European Parliament are sufficient to move these Member States away from what seems to be their wish to scuttle any development of the Union power in the field of FDI.

What is required for a "legislative solution" to the problem?

One must hope that in particular the fate that has struck the EU proposal with respect to its status in the UN General Assembly concentrates the minds of all concerned, since there is no other serious way forward on this issue than action that aligns external powers with internal legislation of the Union. One cannot forever leave the burden on the shoulders of the Court, which is in no position to do much more than continue its policy of muddling through.

If the European Union under the Lisbon Treaty really wants to give a higher profile to its international position, the full membership of, or at least enhanced observer status in, international organizations and treaty systems should be one of the starting points. This requires an energetic attempt to overcome the passive resistance of many third States, a strong rejection of the eternal argument that the Union is comparable to other international organizations and would thus create an "impossible" precedent, and forceful resistance to the innate tendency of the Member States to become lethargic in these efforts once

15. See Emerson and Wouters, The EU's Diplomatic Debacle at the UN: What else and what next?, available through the website of the European centre for Policy Studies, www.ceps.eu

16. See Lavranos, "New developments in the interaction between international investment law and EU law", 9 *Law and Practice of International Courts and Tribunals*, (2010), 409–441, and id., "From the Board, Foreign Direct Investment: The First Test of the Lisbon improvements in the domain of trade policy", 37 LIEI (2010), 261–272.

it turns out to be difficult and to require spending some serious political capital. These efforts should initially concentrate on acquiring the necessary ratifications for treaty amendments enabling the Union to accede to organizations or treaty systems, such as CITES, where these have already been decided. After that, they should be aimed at the Union becoming member of organizations and party to treaty systems where the discrepancy between internal legislation and external powers has become (too) severe and threatens the coherence of Union law. It is suggested that these areas are transport (air, sea and land) and private international law, as well as investment and investment protection.

Another possibility to increase coherence in Union internal and external policy, in cases where Member States in the Council or third States are resistant to undertaking such efforts, is to have recourse to coordination and delegation mechanisms. Where this concerns positions to be taken in international organizations where the Union has still a weak observer position while there is considerable Union legislation in the domain of that organization or international convention, there could be more recourse to formal decision-making in the Council, including qualified majority voting, in order to ensure that the Member States will follow a uniform course of action at important meetings of the organization or of treaty bodies.[17]

Insofar as new instruments or Protocols are adopted in the framework of organizations or treaty bodies where the Union's position is weak and which consequently lack the necessary Union accession clauses, their ratification could be done according to the delegation procedure. That is to say that Member States are authorized by the Council to ratify such instruments or Protocols in whole or in part in the name of the Union, since the instruments contain provisions that fall at least in part within the exclusive powers of the Union.[18]

Finally some situations, where there is a strong discrepancy between the scope of internal legislation and Union external powers, might be suitable to the use of so-called disconnection declarations by Member States.[19] These

17. Case C-370/07, *Commission* v. *Council (CITES),* [2009] ECR I-8917, annotation by Heliskoski in 48 CML Rev. (2011) forthcoming, was in part about the need to take such formal positions and to get away from the consensus that is always considered necessary in the case of informal positions.

18. "This delegation of powers back to the Member States, based on formal authorization by the Council, was mentioned by the Court in Case 41/76, *Donkerwolcke,* [1976] ECR 1921, para 32 and is also at the basis of parts of the Commission proposals in the field of Foreign Direct Investment. Following the introduction of new external relations powers for the European Parliament by the Treaty of Lisbon such formal authorization should be granted henceforth by the Council *and* the Parliament.

19. In their most recent form, disconnection clauses or declarations read as follows: "Parties which are members of the European Union shall, in their mutual relations, apply Community

have been criticized in certain cases in the past, in particular when they were included as treaty provisions in mixed agreements. Their original function, however, was in cases where only Member States could be parties to international agreements in whose domain there was considerable Union legislation. There they put third States on notice that Member States among themselves had different, and even higher, loyalties as well, often embodied in Union legislation likely to go further than the international convention in question.[20]

Obviously delegation back to the Member States and "disconnection declarations" are secondary to the primary need to organize a concerted campaign on membership and enhanced observer status. The emphasis must be clearly on the latter. Some might object that this is "unrealistic" given the prevailing political climate in respect of the Union in the Member States. However, some of the causes underlying that climate, such as the globalization and the reflexive withdrawal of the public into the national, not to say nationalistic, cocoon, should have made it clear to the governments of even the bigger Member States that they can no longer go it alone on the world scene. That realization, after all, was what inspired the political leaders of the Member States to enhance the external status of the Union in the Treaty of Lisbon. If they stumble already at the first step, that would be rather sad. So it is time that they stop following their national political climate and start changing it. Compared to what needs to be done in the way of changing the political climate in respect of the Euro, following up on enhancing the international status of the Union and convincing national electorates of its necessity is small beer.

and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties." Art. 43(3) COE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. See Cremona, "Disconnection Clauses in EU Law and Practice" in Hillion and Koutrakos (Eds.), *Mixed Agreements Revisited, The EU and its Member States in the World* (OUP, 2010), pp. 160–186.

20. When Council of Europe Conventions, *inter alia* on Television without Frontiers, had not yet been equipped with Community participation clauses, the function of disconnection clauses was exactly this, as well as to protect Member States from being accused of having breached Community loyalty.