15 The European Union as a Source of Public International Law

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This article asks what contributions the European Union (hereinafter 'EU') has made to the international legal system as a source of international law. In particular, it focuses on the contribution of decisions of the EU courts as subsidiary sources of international law under Article 38(1)(d) of the Statute of the International Court of Justice (hereinafter 'ICJ').[1] Drawing on this analysis, it goes onto consider the impact of the EU as a source of 'practice accepted as law' in the work of the International Law Commission on the responsibility of international organizations. A traditional or formalist approach to international law is adopted for two reasons. First, international lawyers advising what the international law is on a specific matter still answer that question by reference to the traditional sources and methodology of international law.[2] Second, assessing the EU's contribution to the content of international law through the traditional methodology of sources may inform the discourse on alternative models of international law which hold up the EU as an example of the potential of international law beyond the state.[3]

15.1 The Contribution of the EU Courts as a Subsidiary Source

The EU is, of course, established by 'particular' international conventions which establish rules for its member states. To that extent the EU treaties are a source of public international law recognized by Article 38(1)(a) of the ICJ Statute as binding on the 27 EU

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1 Art. 38(1), the applicable law provision of the ICJ Statute requires the ICJ to apply "(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) [. . .] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

2 H. Thirlway, 'The Sources of International Law', *in:* M. Evans (Ed.), *International Law*, 3rd edn, New York, Oxford University Press, 2010, Chap. 4, p. 99; M. Koskenniemi, 'What is International Law For?', Evans, 2010, p. 32.

3 As discussed in A.-M. Slaughter, Tulumello & Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', 92 *AJIL*, 1999, pp. 367, 378; D. McGoldrick, *International Relations Law of the European Union*, Longman, New York, 1997, pp. 210-211.

member states,[4] which may as a matter of international law prevail over the member states' other international obligations.[5] The EU also contributes as a source in the sense of Article 38(1)(a) of the ICJ Statute when, as a legal person recognised in accordance with the rules of international law governing legal personality, it negotiates and concludes treaties with third states and other international or intergovernmental organizations. The EU and its predecessors have been increasingly active in this regard: the Treaties Office of the EU Commission on the Europa website lists 779 concluded bilateral treaties and 240 multilateral treaties to which the EU is a party. As a treaty party, the EU's statements and practice will affect their interpretation and application when questions of interpretation of that treaty arise.[6] The readiness of third states to enter treaties with the EU reflects its real 'soft' power as an international actor.[7]

The more interesting question is whether there is an identifiable EU contribution to general international law, *i.e.* the customary rules of public international law which apply 'universally' to all states, international organisations or individuals, or the interpretation and application of provisions common to human rights and trade treaties. One way of assessing this is by considering the use of decisions of EU courts as a subsidiary source of international law under Article 38(1)(d) of the ICJ Statute.

There are no references to the decisions of the EU courts in judgments of the ICJ, the Inter-American Court of Human Rights, the Iran-US Claims Tribunal or International Tribunal for the Law of the Sea (hereinafter 'ITLOS') awards. By contrast, the ICJ, Iran-US Claims Tribunal and the Inter-American Court cite judgments of the European Court of Human Rights and domestic courts.[8]

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4 *See* G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', *in: Symbolae Verzijl*, La Haye, M. Nijhoff 1958, p. 153; I. Brownlie, *Principles of Public International Law*, 7th edn, Oxford, Oxford University Press, 2008, pp. 1-2. *See* A. Pellet, *in:* A. Zimmerman, Ch. Tomuschat & K. Ollers-Frahm (Eds.), *The Statute of the International Court of Justice,* Oxford University Press, 2006, pp. 703-704.

5 *Mox Plant Case (Ireland v. UK)*, *Order No. 3*, 24 June 2003, 126 ILR 310, paras 14-28.

6 Arts. 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties 1969 and the equivalent provisions of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986 (not in force; while ten international organizations have signed the treaty and twelve have ratified it, the EU has not).

7 F. Andreatta, 'Theory and the European Union's International Relations', *in:* C. Hill & M. Smith (Eds.), *International Relations and the European Union*, Oxford University Press, Oxford, 2005, p. 35, and S. Meunier & K. Nicolaidis, *The European Union as Trade Power,* Hill & Smith, 2005, Chs. 14 & 12. Because of its economic strength, the EU together with the US has enjoyed "a nearly predominant position of power and influence" *within the WTO (and IMF): Jackson, The Jurisprudence of the GATT and the WTO: Insights on treaty law and economic relations,* Cambridge University Press, 2000, pp. 260-261.

8 For example, the decision of the Supreme Court of Canada in the *Reference by the Governor-General concerning Certain Questions relating to the Secession of Quebec from Canada* ([1998] 2 SCR 217; 161 DLR (4th) 385; 115 *ILR* 536) was cited by counsel and referred to but distinguished by the ICJ in the *Kosovo Advisory Opinion*, ICJ Reports 2010, paras 55-56. Decisions of national courts on the immunity of 27 state officials were referred to the ICJ and considered by it in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Reports 2002, p. 3, para. 58.

World Trade Organization (hereinafter 'WTO') panel and Appellate Body reports refer to the judgments of the European Court of Justice (hereinafter 'ECJ') – and the Appellate Body has cited the ECJ as an example of an international court or tribunal which, like the ICJ, has the power to give an advisory opinion[9] – but references are for the most part made in the context of an analysis of compliance by the EU and its member states with their WTO obligations, not as a subsidiary source of international law. States' attempts in proceedings before WTO Panels and its Appellate Body to rely on ECJ decisions concerning the application and interpretation of free movement provisions of the EC Treaty (Treaty Establishing the European Community, now the Treaty on the Functioning of the European Union, hereinafter 'TFEU') as guides to interpretation of similar terms in the WTO agreements have generally been unsuccessful. In *Korea – Taxes on Alcoholic Beverages* (1998) the Panel indicated that "there is relevance in examining how the ECJ has defined markets in similar situations to assist in understanding the relationship between the analysis of non-discrimination provisions and competition law".[10] But it also said it was "mindful that the Treaty of Rome is different in scope and purpose from the General Agreement, the similarity of Article 95 and Article III, notwithstanding".[11] More recently, in *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (2009)[12] China relied on an ECJ judgment[13] to support its position that the measure challenged fell under the free movement of services (GATS), not goods (GATT). The Panel gave the argument short shrift:[14]

> the fact that it may be legally appropriate for the [ECJ] not to apply EC rules on the free movement of goods to an import transaction involving hard-copy cinematographic film does not mean that it would be legally appropriate for a WTO panel not to apply China's trading rights commitments to an analogous import transaction.

ECJ judgments have been cited by one Panel to interpret the scope of analogous public policy derogations under the GATT.[15] However, using ECJ judgments in this way might be characterised as an example of the use of subsequent practice of the contracting parties to interpret

9 United States – Continued Dumping and Subsidy Offset Act of 2000, 16 January 2003, note 135.

10 Panel Decision of 17 September 1998, para. 10.81. The specific question before the Panel was the relevance of ECJ case law on "similar products" under the tax provision which is now TFEU Art. 110 to the interpretation and application of Art. III of the GATT on national treatment of taxation.

11 *Ibid.*

12 Panel Decision of 12 August 2009. The action was brought by the United States. The EC reserved its rights to participate.

13 Case C-17/92 *Federación de Distribuidores Cinematográficos v. Estado Español and Unión de Productores de Cine y Televisión* [1993] ECR I-2239.

14 Note 12, para. 7.555.

15 United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services, 10 November 2004, para. 6.473.

a treaty provision, rather than as an example of their use as a subsidiary judicial source under Article 38(1)(d) of the ICJ Statute. The Panel's reasoning leaves open both possibilities.[16]
The European Court of Human Rights' (hereinafter 'ECtHR') references to the judgments of the ECJ are not infrequent,[17] but there are only a handful of cases where the ECJ judgment has been invoked by the Court in support of a particular interpretation or application of a Convention right.[18] However, the limited impact of ECJ fundamental rights jurisprudence on that of the ECtHR is only one aspect of a complex interchange between these two treaty systems, a point returned to below. By comparison to the ECtHR, human rights committees under the United Nations' ('UN') human rights treaties have been less persuaded by ECJ jurisprudence. The Human Rights Committee under the International Covenant for Civil and Political Rights 1966 has held that the Netherlands' reliance on ECJ decisions to support its arguments that it was not in breach of EU law did not prevent it being in breach of the ICCPR.[19] The International Covenant on Cultural, Social and Economic Rights 1966 Committee found, in its periodic report on Germany, that the restrictive approach taken by the ECJ to the meaning of 'administration of the state' breached Article 8(2).[20]
EU court judgments are most often cited as subsidiary sources of international law by tribunals hearing investor-state disputes under bilateral investment treaties. The ECJ's judgments and practice have been cited alongside ICSID awards, WTO Appellate Body decisions and judgments of the ICJ, Permanent Court of International Justice (hereinafter 'PCIJ') and regional human rights courts to support the acceptance in international law

16 The Panel observed that "Other jurisdictions have accepted that gambling activities could be limited or prohibited for public policy considerations, in derogation of general treaty or legislative rules", citing various decisions of the ECJ: *Ibid.,* para. 6.473. For a recent discussion on the dual role of national court judgments as state practice and subsidiary sources, *see* A. Roberts, 'Comparative international law? The role of national courts in international law', 60 *ICLQ*, 2011, p. 57.

17 ECJ judgments have been listed in recent cases as 'relevant' international law materials alongside national court and ICJ judgments, but not necessarily referred to in the ECtHR's reasoning, *e.g., Al-Jedda v. United Kingdom*, Appl. No. 27021/08, 7 July 2011 (2011) 53 EHRR 23.

18 *Micallef v. Malta*, Appl. No. 17056/06, 15 October 2009 (2010) 50 EHRR 2009, paras 78-85 (ECJ jurisprudence was relied on, alongside those of national courts, to support the conclusion that Art. 6 protections now extend to interim and provisional measures), *Stec v. UK*, Appl. No. 65731/01, 12 April 2006 (2006) 43 EHRR 47, para. 58 (the 'strong persuasive value' of the ECJ's finding that Art. 7 of the Equal Treatment Directive 79/7/EEC allowing derogation from the principle of non-discrimination for the purposes of old age or invalidity benefits was objectively justifiable to the question of whether discrimination on the basis of sex in UK pensions law was legitimate and objectively justified under Art. 14), *Lithgow v. UK*, 7 March 1984 (Commission Decision) (1985) 7 EHRR 56, para. 370 (noting the ECJ has adopted a similar test of proportionality for claims of breach of Art. 1, Protocol 1), *Maslov v. Austria*, Appl. No. 1638/03, 23 June 2008, para. 93 (that in cases of expulsion the role of the court is to look at the actual expulsion not the final expulsion order), *Sufi and Elmi v. UK* (Applications nos 8319/07 and 11449/07), 28 June 2011, paras 225-226 (Art. 3 of the Convention offers comparable protection to Art. 15(c) of the Qualification Directive as interpreted by the ECJ). *See Hobbs v. UK*, Appl. No. 63684/11, 14 November 2006 (2007) 44 EHRR 54, paras 66-69 (refusing a remedy of 'levelling up' for inequality of treatment) where the Court expressly chose not to follow ECJ jurisprudence.

19 [1999] UNHRC 41, CCPR/C/66/D/786/1997, 29 July 1999.

20 E/C.12/1/Add.68, 24 September 2001, para. 22.

of the principle of *abus de droit*;[21] as an example of international litigation practice in the context of challenges to the participation of certain counsel;[22] as treating gambling as any normal part of the entertainment industry and therefore a legitimate investment;[23] upholding the principle of legitimate expectations and legal certainty in relation to governmental conduct[24] and the clarity required in legislation;[25] for the principle that review of arbitration awards should be limited in scope and annulment of, or refusal to recognize, an award should be possible only in exceptional circumstances;[26] the interpretation of the term 'measures' in international law;[27] and for the proposition that not all losses sustained in the face of government economic policy entail compensation.[28] The EU treaties are cited as an example of a treaty with specific dispute resolution mechanisms[29] and the ECJ as one of the courts or tribunals that can carry out 'international judicial review'.[30]

The conclusion drawn from this survey is that, apart from investor-state arbitration awards and a handful of recent ECtHR decisions, it is rare to find any reference to the judgments of the ECJ in a discussion about the existence or content of a customary rule or the interpretation of a particular treaty provision.

15.2 Why Is the Contribution of the EU Courts Limited?

There are a number of possible explanations for the limited contribution of the ECJ to international law as developed by international courts and tribunals, two of which will be explored here.[31] The first is the ECJ's assertion of the EU's 'otherness' from international law and the international legal system. Although in the early case of *Van Gend en Loos* the ECJ confirmed the Community was a legal order of international law, at the same time it asserted the Community's exceptional nature as a '*new* legal order'.[32] The principles of direct effect and primacy

21 *Mobil v. Venezuela*, ICSID Case No ARB/07/27, 20 June 2010, para. 175.

22 *Rompetrol Group NV v. Romania*, ICSID Case No ARB/06/3, Decision of the Tribunal on the Participation of a Counsel, 14 January 2010, para. 22.

23 *International Thunderbird Gaming v. Mexico*, UNCITRAL Award, 26 January 2006, para. 18.

24 *Ibid.,* paras 27, 49.

25 *Ibid.,* para. 46.

26 *CME Czech v. Czech Republic*, Judgment of the Svea Court of Appeal of 15 May 2003, Case No T8735-01.

27 *Loewen v. United States*, ICSID Case No ARB(AF)/93/3, 5 January 2001, para. 45.

28 *Amco Asia v. Indonesia*, ICSID Case No ARB/81/1, Resubmitted case award of 31 May 1990, para. 128.

29 *International Thunderbird Gaming v. Mexico*, UNCITRAL Award of 26 January 2006, para. 13.

30 *Ibid.*

31 Other related explanations include the ECJ's particularly purposive or teleological (and at times unpredictable) approach to the interpretation of its own treaties and the difficulty of using EU law as source with any confidence because of its volume and complexity.

32 [1963] ECR 1, 12. The view that EU law between member states is not governed by principles of international law but by EU law as a distinct source of law was the European Commission's position in its submissions to the ILC's work on the responsibility of international organizations: *see* A/CN.4/637, 14 February 2011, pp. 19-21.

that flowed from this characterization were not new to international lawyers.[33] What was new was the assertion of the primacy of EU legal acts over all domestic rules including constitutional rules, combined with the sheer volume of EU legislative activity that would come to have direct effect and primacy in national legal systems. Indeed, 23 years later the ECJ would distinguish the EC Treaty from international treaties by recasting it as a 'constitutional charter of a Community based on the rule of law'.[34] Forty five years after *Van Gend en Loos* the ECJ's *Kadi* Judgment rejected the priority of EU member states' treaty obligations under the UN Charter over their obligations under EU law, despite the priority accorded by Article 103 of the Charter to Charter obligations over other treaty obligations. This was perhaps the strongest indication yet that the ECJ no longer regards the EU as a treaty system governed by, or even subject to, international law.[35]

Therein lies a second explanation: uncertainty as to what kind of 'thing' the EU is. The answers vary depending on vantage point, purpose of characterization and inclination: EU lawyers may describe it a supranational legal system[36] or 'executive federalism';[37] international relations scholars as a 'normative civilian power'[38] or 'soft' power;[39] public international lawyers as a regional international or intergovernmental organization (albeit one that has greater powers and depth than any other), a 'legal order',[40] a 'quasi-state',[41] an example of evolving global governance[42] or

33 *Ibid.* and Case 6/64, *Costa v. ENEL* [1964] ECR 1141. For a summary of the varying approaches to the incorporation of international law into municipal law, *see* A. Cassese, *International Law,* 2nd edn, Oxford, Oxford University Press 2005, Ch. 12.

34 Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para. 23, *Opinion 1/91 (EEA Agreement)* [1991] ECR I-6079.

35 Case C-402/05 [2008] ECR I-6351. *See* the reasoning at paras 281-327 where the ECJ makes repeated reference to the 'Community legal order' as distinct from the 'international legal order'. *See also,* T. Hartley, 'International Law and the Law of the European Union: A Reassessment', 72 *BYIL* 1, 2001. The ECJ's reasoning in *Kadi* was tempered to some extent in the 2011 judgment in Case C-548/09 P *Bank Melli v. Council of the European Union* [2011] ECR I-000 also on implementation of UN sanctions, where the ECJ at least referred to the EU as an entity created by treaty (para. 102).

36 Alan Dashwood describes it as a 'constitutional order of sovereign States'.

37 *See e.g.,* the references in F. Hoffmeister, 'Litigating against the European Union and its Member States: who responds under the ILC's Draft Articles on international responsibility of international organizations', 21 *EJIL* 3, 2010, pp. 723, 733.

38 Meunier & Nicolaïdis, note 7, Ch. 12, p. 248.

39 Andreatta above, n. 7, p. 35.

40 The *Mox Plant* arbitral tribunal, note 5, para. 27.

41 A. Bradford & E.A. Posner, 'Universal Exceptionalism in International Law', 52 *Harvard International Law Journal* 1, 2011, p. 12. n. 44.

42 Anderson, in 'Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks', 118 *Harvard Law Review*, 2005, p. 1255, describes seven "leading contemporary positions on sovereignty [. . .] and global governance (as ordinarily understood to mean some kind of legal structure of rules binding on sovereigns or to mean the weakening or even disappearance of sovereignty altogether)" (p. 1260), two of which derive from the theory and experience of the evolving EU. One is the ideal of pooled sovereignty as "a progressive, transformative ideal whose optimal end is not the continued reign of democratic sovereigns, but is instead a pooling of sovereignty that leads to a new world federal political institution no longer dependent for its legitimacy on the assent of democratic sovereigns [. . .]" (p. 1263). Another is liberal internationalism, which "require[s] no real assent from the bottom up for their legitimacy; the model's legitimacy depends not on consent but the presumed rightness of its human rights universals [. . .] It evinces an understanding that it is necessary to move from the legitimacy now residing in democratic sovereigns to legitimacy residing in transnational, supranational institutions". (p. 1265).

as a disaggregated sovereignty that serves as a model for a new world order.[43] Perhaps the most startling characterization comes from the European Commission, which in 2011 referred to the EU as a 'situation of regional (economic) integration',[44] a self-description that studiously avoids casting the EU as any kind of legal or political order.

This opacity is reflected in the ECtHR's jurisprudence. EU treaties and secondary legislation may be treated by the ECtHR as a species of domestic law (because of the principle of direct effect), which creates enforceable property rights under Article 1 Protocol 1,[45] election rights under Article 3 of Protocol 1[46] with which the respondent state is obliged to comply to ensure its compliance with Article 3,[47] or as law that establishes that its interference with family rights under Article 8(2) is in accordance with law.[48] Yet in other contexts the ECtHR characterizes the EU as a distinct treaty regime. The most notable example is its refusal to take into account the time spent on preliminary references to the EU courts in claims for excessive delay under Article 6(1) because that would "adversely affect the system instituted by (TFEU Art. 267) and work against the aim pursued in substance in that Article".[49] The ECtHR's principle of presumptive equivalence – the presumption that a contracting party has not departed from the requirements of the Convention if it has complied with its EU law obligations – [50] is similarly premised on the EU's status as an international organization operating alongside the ECtHR on the international level.[51] Thus there is no clear characterization of the EU as either an international or a domestic entity in terms of how the ECtHR invokes the EU. EU sources may be perceived and received as either 'international' or 'national' or, as in *MSS v. Belgium*, both: an obligation of national law implementing an EU directive which also represents an emerging international standard alongside the work of the UN Refugee Agency and the 1951 Geneva Convention on Refugees. That is, the treatment of EU sources on reception is context rather than category

43 A. Slaughter, *A New World Order*, Princeton University Press, 2004, reviewed by Anderson, *Ibid.,* pp. 1298-1300.

44 In submissions to the International Law Commission (ILC), recorded by the ILC in its Report on the word of its sixty-third session (26 April to 3 June and 4 July to 12 August 2011), General Assembly Official Records, Sixty-sixth session, Supplement No. 10 (A/66/10 and Add.1), p. 38.

45 *Dangeville SA v. France*, Appl. No. 36677/97, 16 April 2002 (2004) 38 EHRR 32, paras 46-48.

46 *Matthews v. UK*, Appl. No. 24833/94, 18 February 1999 (1999) 28 EHRR 361.

47 *MSS v. Belgium and Greece*, Appl. No. 30696/09, Grand Chamber, 21 January 2011 (2011) 53 EHRR 2 (EU directive on treatment of asylum seekers), paras 250-263. The Grand Chamber's approach departs from that in *NA v. UK* where the section treated refused to consider the applicants' submissions based on EU Directive 2004/83, also on asylum, because "its sole task under Art. 19 of the Convention is to ensure the observance of the engagements undertaken by the high contracting parties in the Convention and the Protocols thereto. It is not the Court's task to apply directly the level of protection offered in other international instruments [. . .]": Appl. No. 25904/07, 17 July 2008 (2009) 48 EHRR 15, para. 107.

48 *Mendizabal v. France*, Appl. No. 51431/99, 17 January 2006 (2010) 50 EHRR 50, para. 79 (it was key that the applicant was an EU national).

49 *Pafitis v. Greece*, Appl. No. 20323/92, 28 February 1998 (1999) 27 EHRR 566, para. 95.

50 *Bosphorus v. Ireland*, Appl. No. 45036/98, 20 June 2005 (2006) 42 EHRR 1, paras 150-157.

51 *Ibid.,* paras 150-157.

dependent, to some extent reflecting and reinforcing the ECtHR's characterization of the EU as having a 'supranational' character.[52]

The difficulty of categorizing the EU has of course freed it from the constraints that entails. That is especially true of the ECJ, which both drives and benefits from the lack of conceptual clarity. This is no better illustrated than by its direct effect jurisprudence which is largely driven by context and subject matter rather than the categorization of legal act as decision, directive, regulation or international treaty. So, for example, in its GATT and WTO cases the ECJ has positioned the EU externally as a state-like entity. This ensures the EU's ability as a WTO contracting party to settle disputes diplomatically, which would be compromised if WTO provisions had direct effect because individuals would be enabled to use judicial process to invoke breach of the WTO treaties against the EU institutions or Member states.[53]

The ECJ has taken a similar approach to the United Nations Law of the Sea Convention 1982 in the *Intertanko* decision.[54] The applicants alleged the Union had assumed excessive legislative jurisdiction because the provisions of Directive 2005/35/EC went beyond the jurisdiction that the *United Nations Convention on the Law of the Sea* (hereinafter 'UNCLOS') confers on coastal states. The ECJ refused to proceed with the request to assess the validity of EU legislation against the provisions of UNCLOS because the origin of the action was an Article 267 (ex-Art. 234) proceeding brought by private individuals on whom the relevant provisions of UNCLOS did not, according to the ECJ, confer rights: the rights in question lay with the flag state.[55] The logic of UNCLOS therefore precluded a challenge by an individual instead of the flag state. This judgment runs along the same lines as the ECJ's WTO jurisprudence because it holds open the EU's freedom of action on the international plane to interpret or develop international law by way of its implementing legislation: states may consciously disregard an

52 *Bosphorus*, note 50, para. 150. A further dimension will be added if the EU becomes a party to the European Convention on Human Rights, as it now has competence to do under Art. 6(2) TEU. The ECJ, although a court created by a treaty under international law, will, as an organ of the EU, assume the same subordinate position as it has to the WTO Appellate Body and panels on matters that fall within the ECtHR's jurisdiction, as seems to be anticipated by the third section of the ECtHR in *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA v. Netherlands*, Appl. No. 13645/05, 20 January 2009, para. 18. *See* G de Burca, 'The Road Not Taken: the European Union as a Global Human Rights Actor', 105 *AJL*, 2011, pp. 649, 667-679.

53 The most well-known cases concerning GATT 1947 are Cases 21-24/72, *International Fruit Company* [1972] ECR 1219, paras 20-27, and Case C-280/93, *Germany v. Council (Bananas)* [1994] ECR I-4973, para. 109, Case C-469/93, *Chiquita Italia* [1995] ECR I-4533, paras 26-29. For a similar analysis of the 1994 WTO Agreements, *see* Case C-149/96, *Portugal v. Council* [1999] ECR I-8395, para. 46 and Case C-377/02, *Van Parys* [2005] ECR I-1465.

54 Case C-308/06 [2008] ECR I-4057.

55 Paras 59-65. The ECJ's approach sidestepped, unconvincingly as a matter of its own jurisprudence, the underlying question of the EU's competence to pass the measure in question. It is commonly understood that the individual and direct concern test for standing does not apply to the Art. 267 route of challenge for legality and that there is no requirement that the provision against which the legality of the secondary legislation is assessed should have 'objective' direct effect. If a member state had brought the challenge, it is difficult to see how the ECJ could have avoided answering the question as to the EU's competence to legislate as it had.

international rule for any number of reasons, including as a way of making a new customary rule to replace an existing one or as subsequent practice re-interpreting a treaty provision.[56] Whatever the correct answer is as to whether Directive 2005/35/EC breached international law, the EU, via the ECJ, was, like any other state, controlling the conferral of standing on individuals to raise a breach of international law 'domestically'.[57] An assessment of the EU's compliance with international law by the ECJ was thus avoided.

The *Intertanko* decision is as problematic as the WTO case law for the questions it raises as to the internal consistency of the ECJ's positions on international law as part of the EU order, whether international law is part of the rule of law governing the EU institutions, and whether the ECJ is itself a (supra)national or an international court. The ECJ's WTO and UNCLOS cases suggest that while the ECJ may pursue harmonisation, uniformity and compliance with the EU treaties and fundamental principles by member states (often invoking international law to do so, as in the principle of vertical direct effect of directives), the concern to secure the rule of law internally does not extend to securing the EU's consistent compliance with external international norms. The value of the ECJ's judgments as a subsidiary source of rules and principles of general international law or equivalently worded treaty provisions that might inform WTO or UNCLOS jurisprudence is correspondingly compromised. It is striking that where the EU exercises real 'soft' power (economically)[58] or territorial control (maritime areas)[59] through its member states, the ECJ eschews enforcement by direct effect of multilateral rules of international law in order to protect the EU's ability to pursue EU interests on the international level, *i.e.* to behave like a state. The primary contribution of the EU to the development of WTO law has been as an actor alongside states: it generates much valuable Panel and Appellate Body jurisprudence by being sued and initiating proceedings.

15.3 The EU as Source of Practice

The EU's resistance (both literally and figuratively) to classification as any particular type of legal entity is also evident in the recent work undertaken by the International Law Commission (hereinafter 'ILC') on the responsibility of international organisations for internationally wrongful acts. This is an area of international law to which one might

56 *E.g.,* the UK's attempt to develop the concept of humanitarian intervention under the UN Charter in 1999 in the context of the NATO military intervention in Kosovo (*see* Brownlie 2008, above n. 4, p. 743, note 42 and accompanying text.

57 Another plausible way of characterising the ECJ's position is that it was acting as an international tribunal under UNCLOS, before which a private individual would not have standing. As to the possibility of the ECJ acting as international tribunal under Art. 288 of UNCLOS, it asserts jurisdiction over EU member state compliance: *see* Case C-459/03 *Commission v. Ireland (Mox Plant)* [2006] ECR I-4635, paras 120-133.

58 *See e.g.,* Andreatta 2005, above n. 7, Ch. 2, p. 35.

59 Via its exclusive prescriptive competence over marine conservation and fisheries (TEU Art. 3(1)(d)).

expect the EU – with its developed institutional structure and international legal personality – to make a particular contribution. However, the commentaries to the ILC's 2011 draft articles[60] make only ten references to EU practice in 104 pages[61] and note in 2 others that certain statements made by the EU on a question of responsibility are not clear enough for the ILC to use as an example of practice on the point in question.[62] The ILC cites EU sources to support articles intended for general application to all international organisations, but also acknowledges the EU as a special case that may fall outside general provisions.[63] Indeed, the European Commission,[64] along with various writers,[65] urged

60 Report on the word of its sixty-third session (26 April to 3 June and 4 July to 12 August 2011), General Assembly Official Records, Sixty-sixth session, Supplement No. 10 (A/66/10 and Add.1), at 50*ff*.

61 Para. (14) to Art. 2, p. 75; p. 110, para. (3) to Art. 20, 'Consent'; p. 122, para. (2), commentary to Art. 31, "Reparation"; p. 134, para. (7), commentary to art. 42, 'Particular consequences of a serious breach of an obligation under this Chapter'; pp. 138-139, para. (6), commentary to art. 45, 'Admissibility of claims'; p. 142, para. (1), commentary to Art. 48, 'Responsibility of an international organization and one or more States or international organizations'; p. 145, paras (8)- (9), commentary to Art. 49, 'Invocation of responsibility by a State or an international organization other than an injured State or international organization' (para. (8)); p. 148, para. (4), commentary to Art. 51, 'Object and limits of countermeasures'; pp. 150-151, para. (7), commentary to Art. 52, 'Conditions for taking countermeasures by members of an international organization'; p. 160, para. (4), commentary to Art. 61, 'Circumvention of international obligations of a State member of an international organization'; p. 163, note 356, commentary to Art. 62, 'Responsibility of a State member of an international organization for an internationally wrongful act of that organization'; para. (4), p. 101.

62 For example, according to the ILC, it is not clear from the EC's statement in its oral pleading before a WTO panel in *European Communities – Customs Classification of Certain Computer Equipment* (that the EC was "ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at EC level or the level of Member States", unpublished document, cited at n. 146, p. 95; whether the EC is acknowledging attribution or responsibility: p. 95, para. (3), commentary to Art. 9, Conduct acknowledged and adopted by an international organization as its own (when it would not otherwise be attributable).

63 Note 60, pp. 167-169, commentary to Art. 64, '*Lex specialis*'. In the context of question whether all the obligations arising from rules of the organization are to be considered as international obligations, the ILC notes that there is 'support in practice' for the view that an organization with a high degree of integration is a special case, giving the EU as an example p. 97, para. (5), fn 157, commentary to Art. 10 'Existence of a breach of an international organization'). However, the ILC does not go so far as to endorse the European Commission's view that relations between EU member states and the EU are wholly outside international law.

64 The European Commission submitted several comments and observations to the ILC on general issues and drafts of specific provisions, asserting the EU's *sui generis* nature ('Comments and observations received from international organizations', A/CN.4/556, 12 May 2005, pp. 5-6, A/CN.4/568. Add. 1, 12 May 2006, pp. 16-17, A/CN.4/637, 14 February 2011, pp. 7-8, 19-21, 37-38) and suggesting that the articles specifically reflect this (A/CN.4/556, 12 May 2005, p. 6). In one observation the EU Commission goes suggests that there is a 'strong need' for the articles to apportion responsibility to the EU for breach of its treaties with third states or otherwise its member states and third states "might decide on their own about the international responsibility of the [EU]" (Comments and observations received from international organizations, 1 May 2007, A/CN.4/582, p 23). States, including EU member states appear to have made few comments on the EU.

65 *See* those cited in commentary to Art. 53. For an advocate of a specialist rule, *see* Hoffmeister 2010, above n. 37. However, the complexity of his formulation and the effect he suggests that a lack of proper attention to the rule could have on admissibility and merits might render acceptance of such a rule unattractive and left, for the moment, to be pursued on a case by case basis or by recognition over a period of time – "the traditional procedure by which the law is adjusted to fact" (R. Jennings, *in* R. Jenning & A. Watts (Eds.), *Oppenheim's International Law*, 8th edn, Vol 1, 1994, p. 573). One difficulty for third states is that the organization's internal rules allocating competence are far from clear, as the *POPS* case shows (*see* text accompanying nn 143-146).

the ILC to treat the EU as a special case, arguing its 'specialness' takes it outside the draft provisions on attribution and that where the EU member states are implementing binding EU acts the conduct is attributable to the EU.[66] It has been suggested that customary rules specific to the EU should be developed.[67]

From the perspective of non-EU states it is difficult to see why they should or would agree that the EU should be responsible *in place* of its member states when there is no reciprocity in the position taken by individual EU member states.[68] For example, in the 1998 *Jurisdiction Case (Spain v. Canada),*[69] Spain refused to accept Canada's argument that a dispute over Canada's interception, boarding, seizure and legal action against a Spanish fishing vessel and its Spanish crew had been resolved by Canada's compliance with a settlement agreed in an exchange of notes with the European Community.[70]

The ILC's report does not suggest what ought to happen in this situation. On the question of attribution, it merely explains that a WTO panel has been prepared to accept that member states' organs act as *de facto* EU organs for which the EU is responsible, whereas the ECtHR has not. It leaves open the question in draft Article 63 of whether a *lex specialis* may exist. It might be observed once more that, as with the EU's jurisprudence on direct effect of international law, there appears to be a direct correlation between power and law formation: it is where the EU has significant "soft power" in its own right as an international economic actor that the argument that conduct is attributable to the EU, and that it is responsible for it, has been accepted by an international judicial body and (according to the EU) by most non-EU states.[71] And in one of the areas of international law where the ECJ declines to adjudicate on the EU's compliance.

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66 In saying this, it should be noted that the impact of the ILC's draft articles is itself an open question. The introductory general commentary observes that there was a limited availability of 'pertinent practice' as states and organizations were unwilling to disclose it. This has meant the articles "move the boundary between codification and progressive development [of the law] in the direction of the latter" (above note 118, para. 5, pp. 67-68).

67 As suggested by M. Ličková, 'European Exceptionalism in International Law', 19 *EJIL*, 2008, p. 463.

68 Quite apart from the question of the EU's capacity to make reparations. Given the EU's limited sources of independent revenue and dependence on annual contributions by member states, I would be doubtful that a non-EU state would be prepared to accept the principle that the EU's responsibility under international law would absolve the member states of responsibility – or at least a subsidiary responsibility – even in areas where matters are commonly resolved between the EU and non-EU states directly.

69 ICJ Reports 1998, p. 3,

70 Paras 19-27.

71 The European Commission says in is submissions to the ILC that "most [WTO] disputes are entirely directed and enforced against the European Union only" (A/CN.4.637, 14 February 2011, p 34). Although the EEC never became a party to the GATT 1947, the economic power generated by the common market meant that third states actively sought EEC involvement in the GATT rounds (*see e.g.,* A. Lauring Knudsen, 'European Integration in the Image and Shadow of Agriculture', *in:* D. Dinan (Ed.), *Origins and Evolution of the European* Union, Oxford University Press 2006, pp. 191, at pp. 204-205). The EEC/EC through its institutions appeared and negotiated in the tariff rounds and concluded agreements under the auspices of GATT (Cases 21-24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219, para. 17), including the Uruguay Round which led of the 1994 WTO Agreements, to which the EC is a party (WTO Agreement, Art. IX:1).

It is precisely this relationship between power and international law-making that raises the apprehensions of non-EU states when the EU claims standing as a special international actor independent of its member states. These are not new. During the UNCLOS negotiations in the 1970s and early 1980s, the European Economic Community (hereinafter 'EEC') was accorded observer status and its member states insisted that provision be made for the EEC to become a contracting party.[72] This was resisted by third states, for important political reasons:

> Above all, anxiety was felt lest certain European States, as actual or potential members of the Community, would try and take advantage of the benefits accruing from the participation of the Community in the Convention [. . .] while simultaneously avoiding the obligations of the Convention [. . .]by the simple expedient of not becoming parties to the Convention.[73]

Furthermore, "[q]uestions were also raised whether and to what extent the members of the Community had transferred to the Community their powers and jurisdiction [. . .]".[74] After much discussion, provision was made for *international organizations* to become contracting parties in Article 305(1)(f) if they and their member states complied with the requirements of Annex IX.[75] Annex IX met concerns about dual representation and responsibility for infringement, including in cases of lack of clarity in the allocation of competences,[76] by affirming that participation would in "no case entail an increase of the representation to which its member States which are States parties would otherwise be entitled, including rights in decision-making" (Art. 4(4)), and that failure to respond to requests by third States for information as to the division of competences or the provision of contradictory information would result in joint and several liability" (Art. 5).[77] Annex IX has been labelled a notorious example of an international treaty failing to account for the EU's special nature as a supranational organization,[78] but this criticism completely fails to view the situation from the perspective of third states.

The same anxieties resurfaced 40 years later during the negotiations for enhanced EU participation in the work of the UN General Assembly, sought by the EU after the Treaty of Lisbon came into force.[79] The General Assembly finally adopted Resolution 65/276 in

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72 M.H. Nordquist (Ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume V, Martinus Nijhoff Publishers 1989, para. 305.12.

73 *Ibid.*

74 *Ibid.*

75 *Ibid.,* paras 305.11-305.19.

76 Listed by Conference III President Koh at the 10th session (1981): note 72, para. 305.16.

77 For an analysis of Annex IX, *see* Norquist 1989, note 72, pp. 445-464.

78 McGoldrick 1997, above n. 3.

79 The EU and its predecessors had had observer status since 1974 (General Assembly Resolution 3208 (XXIX) of 11 October 1974). EU positions were submitted to the UNGA through the representative of the member state then holding the EU Presidency.

May 2011 on the Participation of the European Union in the work of the United Nations,[80] by a vote of 180 in favour, none against and with two abstentions.[81] The voting record might indicate overwhelming support for the EU. The history of the resolution and the debates preceding the vote tell a different story. An attempt in September 2010 to secure participant status was unsuccessful. The 2011 resolution was only passed after considerable lobbying by the EU and its member states and a redraft which assured third states that organisations of other states might in time gain similar status and affirmed the EU would not be an extra voice additional to those of its member states.

The Bahamas voiced the concern that the resolution would marginalize the position of small states in the General Assembly 'and beyond' by negatively impacting the negotiating dynamics.[82] Nauru highlighted the 'serious risk' that the Resolution would "change the nature of the United Nations, to the detriment of small States, which do not enjoy the political and economic influence of large developed countries".[83] By giving the 27 EU member states another voice in debate it would privilege them above all others:

> For small States [. . .] this is a major concern, given our modest ability to influence international affairs that have profound implications for our country. The discussions that we have in this house are already dominated by the issues of concern to countries with greater influence. The adoption of this draft resolution would risk further entrenching this position [. . .].[84]

These submissions echo the critique of public international law as weighted in favour of rich, powerful states. While the EU's self-understanding is of itself as a normative civilian power promoting universal values in its internal and external actions,[85] viewed from the outside it is a collection of rich, powerful states promoting their own interests collectively

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80 A/RES/65/276, 10 May 2011.

81 Syria and Zimbabwe. *See* General Assembly GA/11079/Rev. 1, Sixty-fifth General Assembly Plenary, 88th meeting, 3 May 2011. Ten states were absent (Azerbaijan, Cote d'Ivoire, Kirbati, Nauru, Rwanda, Somalia, Sri Lanka, Vanuatu, Venezuela).

82 General Assembly, Sixty-fifth session, 88th Plenary meeting, 3 May 2011, A/65/PV. 88, p. 5 (Bahamas). *See also,* pp. 7-8 (Zimbabwe), p. 13 (Venezuela).

83 *Ibid.,* p. 6.

84 *Ibid.,* pp. 6-7. Indeed, the ability and desirability of the EU projecting itself as an actor independent of its member states is highlighted by many commentators (*see e.g.,* U. Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal*, 2008, p. 454; F. Hoffmeister, 'The Contribution of EU Practice to International Law', *in:* M. Cremona (Ed.), *Developments in EU External Relations Law,* Collected Courses of the Academy of European Law, Oxford, New York, Oxford University Press 2008, p. 37, at p. 125) and failure of the rest of the world to recognize this has been criticized (Brinkhorst, cited in McGoldrick 1997, above n. 3, p. 203).

85 As is well known: *see e.g.,* R. Hollis, 'No friend of democratization: Europe's role in the genesis of the "Arab Spring" ', 88 *International Affairs*, 2012, p. 81; B. Simms, 'Towards a mighty superpower: how to create a democratic European superpower', 88 *International Affairs*, 2012, p. 47, at p. 56.

and sometimes individually. Those states have not relinquished that position by conferring sovereign powers on the EU. It is thus hardly surprising that third states wish to limit the EU's legal capacity to act as an additional source of law and policy through the one UN institution with universal membership, operating on a principle of 'one state one vote'. The problem of dual participation by the EU and member states in other international treaties is in principle addressed by the internal allocation of competences between them under the treaty in question and enforcement of that allocation through the ECJ. But this allocation is often unclear, as illustrated by the dispute which arose between the Commission and Sweden over allocation of competences under the Convention on Persistent Organic Pollutants 2001, a mixed treaty in case C-246/07 *Commission v. Sweden* (the *POPS* case).[86] Not only was allocation of competence not apparent on the face of the relevant treaties, but the ECJ's approach can work against the development of international law: as a result of the *POPS* case EU member states are precluded from unilaterally proposing chemicals for listing under the Convention.[87] The fettering of member states' ability to act unilaterally under mixed treaties works against the development of international law insofar as it can lead to a lower standard of protection under international environmental treaties, the closing-off or watering-down of international debate under environmental treaty regimes, and the prevention of member states from assuming treaty obligations towards third states.[88] The ECJ's reasoning is, however, wholly concerned with the internal constitution, convenient internal legislative arrangements and the political strength of the EU – in a 'state-like' capacity – relative to its member states on the international stage.[89]

15.4 Conclusion

Aside from investment arbitration tribunals and a small number of ECtHR decisions, international courts and tribunals do not use ECJ decisions as a subsidiary source under Article 38(1)(d) of the ICJ Statute even when invited to do so. A review of the ILC's project

86 Case C-246/07, *Commission v. Sweden* [2010] ECR I-3332.

87 Art. 25 of the Stockholm Convention makes provision for regional economic organizations to become parties but stipulates that the instrument of ratification must set out the allocation of competences between the organization and its member states and that any voting rights conferred on the organization replace its member states rights under the Convention are limited to the number of its parties who are also parties to the Convention.

88 *See also* the critique of the EU's approach in negotiations of the 1995 Straddling Stocks Agreement, in D. McGoldrick, 1997, above n. 3, pp. 203-204. For a similar criticism from the EU perspective, *see* A. Dashwood on AG Kokott's Opinion of 26 March 2009 in Case C-13/07, *Commission v. Council (Vietnam)*, *in: Wyatt & Dashwood's European Union Law*, 6th edn, Hart Publishing 2010, pp. 935-936.

89 "Such a situation is likely to compromise the principle of unity in international representation of the Union and its Member States and weaken their negotiating power with regard to the other parties to the Convention concerned" (para. 104. *See also,* paras 94-103). *See*, Advocate General Maduro's Opinion in Case C-246/07, *Commission v. Sweden* [2010] ECR I-3317 (the 'POPS case'), paras 43-45.

on the responsibility of international organizations shows the EU has contributed surprisingly little to this area of international law. It is suggested that this reflects ambivalence over the EU's characterisation, led by the EU institutions themselves, particularly in areas where the EU has real soft power and territorial control: that is, the capacity to behave like a state.
The combination of the EU's soft power with its assertions of specialness also explains why third states deal with the EU[90] but are wary of receiving the EU as an international actor or lawmaker on the terms it seeks.[91] One fundamental problem is the lack of reciprocity entailed by recognition of the EU on a separate and equal basis with its member states: third states do not have an additional voice or vote, and there is no guarantee that treating with the EU will avoid separate responsibility to its member states. The member states and EU institutions have been unwilling or unable to resolve this. Instead the solution seems to be to seek recognition and acceptance of the ambivalent state of affairs from third states in treaty provisions and rules on participation, possibly with a view to developing customary rules specific to the EU. But the effectiveness of this solution depends solely on whether third states can be persuaded to agree to these instruments. This turns on the EU's soft power.
Thus an analysis of the EU's contribution as a source of international law – whether as a source of practice or a subsidiary source through the jurisprudence of its courts – casts doubt on whether the EU really is the herald of a post-Westphalian new world order. Rather, we appear to be looking at a recasting of the relationship of power to law in the old.

90 And may accept disconnection clauses: Ličková 2008, above n. 67.
91 Instead they prefer provisions worded in terms which are generic to international organisations.