The European Union and Interational Treaties: is there a Step towards Better Compliance with International Law? [1]

Lecturer Ion GÂLEA, PhD.
University of Bucharest, Faculty of Law
ion.galea@drept.unibuc.ro

Abstract:
As the European Union intends to become a global actor, its position towards treaties is increasingly important for the issue of achieving the highest degree of compliance with international law. On one hand, the European Union might have an increasing role in concluding itself international treaties: in this case, the questions that appear are to which extent the EU has competence in this sense and what is the legal value of international treaties in the domestic law o the European Union and its Member States. On the other hand,
European Union law might affect treaties concluded by the Member States themselves: both in relation to third countries and in "inter-se" relations. This study attempts to examine these questions from the perspective of the security of treaty relations in general. At the same time, the study departs from the assumption that one of the essential components of international rule of law is its domestic implementation. Therefore, the role of the EU is analysed also from this perspective.
Keywords: *European Union, treaties, competence, rule of law*

Introduction

„Strict compliance with international law" is one of the values of the European Union [2]. One can notice the „nuance" provided by the word „strict" – that might be interpreted not only in the sense that the Union complies with international role, but envisages having an „active role" in ensuring full compliance with international law. The question might appear is whether the European Union genuinly provides the necessary mechanisms in order to fulfill the purpose enshrined by this value.

This question is very general and may comprise a wide number of aspects. This study focuses on treaties, which represent one of the main sources of international law [3]. The word „international treaties" was chosen in the title, even if it is pleonastic, in order to underline the distinction in relation to the founding treaties of the European Union: the Treaty on the European Union („TEU") and the Treaty on the Functioning of the European Union („TFEU"). Indeed, in international law, the correct terminology is „treaty": this term is a generic one that designate agreements between subjects of international law which are subject to international law and have legal effect in international law, notwithstanding their particular denomination and notwithstanding the

fact that they may be expressed in a single instrument or in two or more related instruments [4].

The phenomenon that the Member States of the European Union are witnessing is an increase in the number of the treaties concluded by the Union. Treaties concluded by the Union (named „agreements" in the terminology of the TFEU) are binding for the institutions of the Union and for the Member States [5]. It is true that the Lisbon Treaty introduced in the TEU a provision stipulating that the Union has legal personality: but treaties concluded by the Union are not something new. The Lisbon Treaty transformed the international personality of the Union into an „express" and „unique" one. Before its entry into force, the Union had an international legal personality, but an „implicit" one [6], and the European Community had express legal personality – to which the Union „succeeeds" after the Lisbon Treaty [7].

Two main questions appear in relation to treaties concluded by the Union –that shall be the object of this study. The first question relates to what the position of the Union is, towards the treaties it is a party to. One aspect concerns the competence and procedure, as an increasing tendency of the Union to „take over" the competence of the Member States to conclude treaties can be observed. Another aspect concerns the legal value that treaties take in domestic law. By „domestic law", both EU law and national law of the Member States should be understood. This is important, because the correct enforcement of treaties in the domestic law of the parties is an essential component of the way in which international law works: application of international law in domestic law gives effect to the „international rule of law" [8].

The second question that may concern the position of the European Union towards international law relates to the attitude that the Union takes with respect to the treaties which do not bind the Union, but the Member States. The issue may be analysed from two perspectives: first, the position of the Union towards treaties concluded between Member States and third States, and, secondly, the position of the Union towards treaties concluded inter se, between two Member States.

I. Treaties binding the Union

I.1. Competence and procedure

As any international organisation, the European Union acts on the basis of the principle of conferral [9]. Thus, whether States enjoy full capacity to enter into any international commitments, on the basis of their sovereignty, international organisations – as the European Union – may act only within the limits conferred by their members, on the basis of the constitutive act (for the EU – the TEU and the TFEU). The conferral is achieved by texts in these founding acts, which are of course subject to interpretation. Thus, the interpretation of the way in which the EU is given the power to conclude treaties witnesses the „battle" between the Member States and the institutions of the Union, where the States argue for a narrower interpretation of the Union power to conclude treaties, while the institutions „fight"for an ever-enlarging competence. As such „battles" are often arbitrated by the Court of Justice of the European Union, the result has been in favour of the institutions and the Union: a theory of „implied" competences has been created and the doctrine of „exclusive" competence has been postulated by the Court of Justice [10].

Case-law developments started in the 1970s, with the ERTA [11] ruling, when, essentially, the Court held that the Community had (exclusive) competence to conclude treaties when the parralel internal competence has been exercised. States could no longer conclude treaties, where such treaties would affect common rules or alter their scope. In the Kramer [12] cases, the Court admitted that competence to conclude treaties may be shared between the Union and the Member States [13]. Nevertheless, the competence would remain shared to the extent that the Union had not (yet) excercised its internal competence. The Inland Waterways [14] case was an interesting one, as the Court held that the competence of the Community would become exclusive even if the parralel internal competence has not yet been exercised: the criterion for triggering the exclusive character of the competece was the fact that Member States action would have affected the objectives of the Community. A series of cases, known as the Open Skies [15] cases, related to the situation where air transport agreements concluded by the Member States would have affected common rules or alter their scope – even if, in concrete terms, agreements concluded by the Member States with third

countries were not incompatible with EU law. Thus, the Court found the EU competence to be exclusive with respect to concluding air transport agreements (while the ”internal” competence of the Union in the field of air transportation remains shared).

This tendency – to increase the area of exclusive external competence, while the internal parallel competence of the Union remains shared can be noted in the process of “codification” performed by the Lisbon Treaty. Thus, article 3 (1) of the TEU regulates only five areas of internal exclusive competence, while the scope of the external exclusive competence (exclusive competence to conclude “agreements”) enshrined in article 3 (2) remains quite large. The exclusive external competence exists when: i) the conclusion is provided by a legislative act of the Union; ii) the conclusion is necessary to allow the Union exercise its internal competence and iii) in the conclusion would affect common rules or alter their scope. A parallel reading of article 3 (2) and article 216 (1) (the latter regulating the “general” competence of the Union to conclude treaties, covering both exclusive and shared competence) might lead to the simple conclusion that there is no more shared external competence left. The scope of the two articles is almost identical [16].

The continuous tension between the Union institutions and the Member States is reflected not only in the “exclusive” or “shared” feature of the competence, but also in the choice of a legal basis for concluding an agreement. The legal basis may be relevant for the voting procedure in the Council, when approving the negotiations directives, signature or conclusion of the agreement. Let us suppose an agreement covers trade aspects (for which qualified majority is required) and has certain clauses on justice and home affairs (for which unanimity was required – at least within a certain transitional period). How would the Council vote? The approach of the Court of Justice of the European Union relied on examining both the article(s) which represent(s) the legal basis and the text of the proposed agreement, establishing the criterion of the center of gravity: thus, if the agreement follows two purposes and one of them is merely incidental, the conclusion of that agreement shall rely on only one legal basis, which is the main purpose [17]. What can also be noted is the fact that the Court seemed to interpret the “incidental” character rather largely – the result has been the fact that the competence of the Union in fields like trade (which represents exclusive competence,

according to article 3 (1) of the TEU) has been considered as the sole legal basis for agreements covering also intellectual property [18] or readmission of persons [19].

The procedure for concluding the agreements to which the European Union is becoming a party is another “theater” for the continuing tension between the institutions of the Union – especially the Commission – and the Member States. The procedure, regulated by article 218 of the TFEU, largely reflects the international practice, establishing the following stages: authorization of negotiation, authorization of signature and “conclusion” (which, in EU terminology, signifies “expression of consent” – somehow similar to ratification or approval in State practice). The phase in which the tension between the Commission and the States appears more sharply is the negotiation.

First, the designation of the negotiator presents important challenges: a choice should be made by the Council, between the Commission and the High Representative for External Affairs and Security Policy, the latter being competent when the agreement “relates exclusively or principally to the common foreign and security policy” [20]. For example, does the agreement for the accession of the EU to the ECHR fall within this category? The adoption of the negotiating directives on 4 June 2010 witnessed such opposite arguments – but finally the Commission was chosen as the negotiator.

Second, one important source of tension is represented by the role of the “committee” regulated by article 218 (4) of the TFEU, which the negotiator (the Commission) has to consult while conducting the negotiations. In a recent case [21] – decided in July 2015 –the Commission has challenged before the Court the negotiations directives, arguing, inter alia, that an enhanced role of the committee composed by Member States breaches the principle of the inter-institutional balance. The Court upheld (at least partially) the position of the Commission, considering that the negotiation directives that empower the Committee to establish detailed positions, which could be binding on the negotiator, would be contrary to the TFEU [22].

As a preliminary conclusion, the idea that might be underlined is the continuous tension between the Union and its institutions, on one side – whose purpose is to increase the competences of the Union and the powers of its institutions (especially the

Commission) – and the Member State – whose purpose is to limit the increase of Union's powers or, at least, to control their exercise.

I.2. Legal effect of agreements in EU la and national law of Member States

The legal effect of treaties in the domestic law is subject both to "theoretical approaches", such as monism and dualism [23]. A pragmatic approach suggests that attention should not be focused on the theoretical approach, but on the way in which the constitutional law of States operates different techniques for incorporating international law in domestic law and for solving potential conflicts between international law and domestic law. Thus, States usually employ techniques, such as "automatic incorporation"/"transposition" or "conflict clauses" or "consistent interpretation" [24]. These techniques may be relying on constitutional texts or on jurisprudential developments. The question that arises is whether the European Union uses such "techniques" in order to allow for the application of international treaties in EU law – and, as a consequence, in the domestic law of Member States.

The TFEU contains little indication about the legal value of agreements concluded by the Union: article 216 (2) mentions that such agreements are binding for the institutions of the Union and for the Member States. This article is not by itself a provision reflecting neither "automatic incorporation" nor a "conflict clause". Therefore, the legal effect of international agreements in EU law and national law of Member States remained a jurisprudential construction.

The automatic incorporation was recognized by case-law in 1974, in the Haegeman case, in which the Court of Justice of the European Union held that an agreement concluded by the Community forms integral part of the EU law [25]. In the Bresciani case, the Court admitted that an association agreement forms integral part of the domestic law of the Member States and prevails in case of conflict with the domestic law of that State [26]. Case-law also has consecrated, with certain conditions, the "direct effect" of international agreements. The Court of Justice grounded the direct effect on the principle of good faith in the Kupfenberg [27] case, holding that a person can rely on an agreement concluded by the Union before a national court. One of the reasons was the fact that the legal effect of an agreement should not vary from one State to another. The Court also recognized that a person can rely on an agreement concluded by the

Union in order to contest the validity of secondary legislation, provided that the agreement the its provisions confer rights and liberties capable of being invoked in relation with the parties and the “nature and logic” of the agreement do not prevent the examination by the Court of the validity of an EU act [28].

One supplementary thing may be mentioned: as part of the EU legal order, agreements concluded by the EU enjoy the “traditional features” of EU law, in relation with the domestic legal order of the Member States. These features are: priority, direct applicability and direct effect in relation to the domestic law. EU law doctrine emphasizes that the “source” of these features is not represented by a constitutional technique of the domestic law of States or a jurisprudential creation of the same domestic systems, but must be found in the specific nature of the EU law [29]. Nevertheless, some domestic systems contain themselves constitutional provisions concerning the effect of EU law into domestic law. In Romania, article 148 (2) of the Constitution provides that EU (primary and secondary) law prevails over national legislation (”national laws”), in case of conflict (”respecting the provisions of the Act of Accession”). Thus, in Romanian domestic law, an agreement concluded by the EU will “benefit” of the “priority clause” provided by article 148 (2) of the Constitution.

Nevertheless, it can be noted that the case-law of the Court of Justice of the European Union established limits to the direct effect of an international agreement and to the possibility of private persons to rely on such agreement to invalidate secondary legislation. The criterion established by the Court may be seen as subject to interpretation: the “matter and purpose” or the “wider logic and nature” of an agreement [30]. On the basis of these criteria, the Court denied direct effect of agreements within the WTO, to which the EU is a party, as well as of the United Nations Convention on the Law of the Sea.

As a preliminary conclusion to this section, the EU law helps implementing agreements to which EU is a party. The features of EU law: priority and direct effect work in favour of the proper application of agreements in domestic law. However, in certain cases, the Court of Justice of the European Union provided the necessary tools to deny the direct effect, though rather large criteria [31].

II. Treaties binding only the Member States

II.1. Treaties between the Member States

The questions that appear is whether Member States could still maintain, or even conclude, treaties between themselves and whether the existing intra-EU treaties may continue to be in force. The question depends on whether the EU has competence in the area regulated by that treaty. Naturally, if an area is not subject to EU competence, or if the EU has competence of coordination and support – such as culture, for example – the power of Member States to conclude treaties between themselves remains unaffected.

When the matter covered by the treaty between two Member States coincides with a matter regulated by EU law, the question that appears is what are the rules governing a potential conflict between the two norms. Theoretically, if the EU law is regarded as another „inter-State" norm of an international character, the potential conflict would be governed by the general rule „lex posterior" expressed in articles 30 (3) and 59 (1) b) of the 1969 Vienna Convention on the law of treaties. Thus, article 30 (3) provides: „When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty", while article 59 (1) b) stipulates that: "A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: […] (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time". Both articles contain a reference to „incompatibility". Thus, as far as a previous treaty would be incompatible with EU law, it might be argued that EU law would prevail as lex posterior [32].

The Court of Justice of the European Union dealt with the question of anterior treaties between Member States in the Exportur case [33]: the Court held that a convention between France and Spain, concluded before Spain's accession to the European Communities, could not continue to apply between two Member States, if it is contrary to EU law. The result may be seen as the same that would result from the application of articles 30 and 59 of the Vienna Convention, but the question that may be

raised is whether the Court of Justice of the European Union would not use the argument of the supremacy of EU law (notwithstanding any international law rules). The Court did not elaborate on this issue, but the opinion of Advocate General Lenz was indeed in the sense of grounding the reasoning on the general priority of EU law.

A general „problem" that witnesses the tension between the application of international law rules and the „EU law supremacy" is the relation between Bilateral Investment Treaties („BITs") concluded between Member States and the EU law. The question arised first in front of dispute settlement bodies competent to solve dispute grounded on the BITs. The defendant States – together with the Commission, acting as amicus curiae – argued that the BITs have been terminated by the action of EU law, which enjoys supremacy.

In Eastern Sugar v. Czech Republic [34], the defendan targued in front of an Arbitral Tribunal that by application of article 59, an intra-EU BIT had ceased its validity (arguing, on this basis, that the Arbitral Tribunal lacked jurisdiction to hear the case). The Commission intervened as amicus curiae, invoking the effective priority of EU law, which would cause the lapse of anterior treaties. The Arbitral Tribunal did not uphold this thesis, retaining that article 59 was not applicable, because the two treaties (the TEC and the BIT) were not relating to the same matter [35]. In Eureko v. Slovakia, the defendant State invoked article 30 (3) of the Vienna Convention. This time, the Commission also relied on article 30 (3). Both Slovakia and the Commission argued that the dispute settlement clause of the BIT was incompatible with the exclusive jurisdiction of the Court of Justice of the European Union. The Arbitral Tribunal rejected this argument and held that there is no violation of the EU law [36].

One could note the different views expressed by different fora: the Commission and the Court of Justice of the European Union (in the Exportur) case seem to rely on the principle of general priority of EU law, while investment arbitral tribunals applied the international law rules in articles 30 and 59 of the Vienna Convention, and even interpreted them in the sense that no incompatibility exists. The problem appeared again, but in a different manner, in Micula v. Romania [37]. This time, it was not the dispute itself that related to a potential incompatibility with EU law, as the facts submitted to the Arbitral Tribunal were anterior to the accession to the EU. However, the

Commission is sustaining that the execution of the Arbitral Award would breach EU law, representing an illegal State aid [38]. Indeed, the Romania finds itslef in a very difficult situation: if it executes the award, it would breach the EU law; if it does not execute the award – complying thus with EU law – it would face recognition and execution procedures, not only in Romania, but also in other States. The supremacy of EU law, supported by the Commission, comes into conflict with the traditional system of inter-State arbitration regulated by the ICSID Convention and by the vast network of BITs.

Concluding this sub-section, it could be noted that EU law seems to be „unfavourable" to treaties between Member States. In certain cases, it affects well-established systems, such as BIT arbitrations. What it might be seen asa difficult point is not necessarily the question of whether an incompatibility exists, but the legal basis for dealing with such incompatibilities: on one hand, international law could apply, but on the other hand, the supremacy of EU law could set aside any other treaty rule between Member States.

II.2. Treaties between Member States and third countries

Conflicting treaty provisions in relation between „third parties" is one of the most difficult issues in international law. The hypothesis is the one when a treaty between State A and State B contains obligations for State A which are contrary to obligations of the same State A under a treaty between it and State C. Practically, this is the general hypothesis of the relation between EU law and treaties concluded between Member States and third States. In international law, this issue is not dealt with by the Vienna Convention: it is not a matter of validity of the treaties in question, but it is a matter of conduct and State responsibility of State A [39].

The relevant provisions of EU law have to be taken into consideration. Article 351, first paragraph, of the TFEU establishes that treaties concluded prior to the creation of the European Communities or prior to a State's accession to the EU shall not be affected by EU law. Thus, „prior" treaties seem to be protected in case of conflict with EU law, while „posterior" treaties seem not to enjoy this regime. However, this appears to be only an superficial conclusion, as the second paragraph of article 351 radically changes the paradigm: it imposes an obligation for the Member States to use all necessary means to eliminate the incompatibilities between the treaties with thirds

States referred to in paragraph 1 and EU law. This might be regarded an expression of the principle of the supremacy of EU law [40], or, better said, the expression of the consequences of this principle on the foreing relations of Member States.

The obligation to use all necessary means to eliminate incompatibilities has been interpreted by the Court of Justice of the European Union in the sense that it comprises the obligation to denounce a treaty, in accordance with its provisions and international law. The Court also held that the political situation in that particular third State cannot justify the impossibility to re-negotiate a treaty [41].

Moreover, the obligation to take all necessary means was „extended" in the case of the new Member States that acceeded in 2004, 2007 or 2013. For example, in the case of Romania and Bulgaria, article 6.10 of the Act concerning the conditions of accession to the EU provided expressly that the Acceeding States have the obligation to ensure: withdraw from trade agreeements and ensure incompatibility between EU law and other treaties that they are a party to, before the date of accession. This time element represents an important difference in relation to the „old" Member States. Moreover, the same article 6.10 provided that if incompatibilities could not be eliminated through negotiations before the date of accession, the Acceeding States must denounce the respective treaties with third countries.

In practice, the Acceeding States were „used" by the Commission as „pioneers" of ensuring „priority of EU law". In many instances, the thrid countries in relation to which negotiations were conducted replied with the (somehow relevant) argument that no similar proposals had been received from „old" Member States.

Another question that arises is: what represents an „incompatibility", in the sense of article 351 (2)? Two aspects could be revealed. First, the incompatibility could relate to a overlap of the competence to conclude treaties. If the European Union has exclusive competence to conclude a treaty in a certain field, on the basis of article 3 (2) of the TFEU, such an incompatibility would arise, even if the substantial provisions of the agreement concluded between a Member State and a third country would not run contrary to EU law.This was the case, for example, in the Open Skies cases, in which the Court of Justice held that exercised shared internal competence triggers exclusive external competence [42]. Second, the incompatibility may relate to aspects of

substance: an obligation within EU law could not be fulfilled while complying with an obligation in the agreement with the third Country. Indeed, the Court of Justice of the European Union has expanded this hypothesis: even if there is no concrete substantial incompatibility, but the EU institutions have the power to adopt potential measures that would eventually be contrary to the provisions of an agreement with a third country, an incompatibility would still be deemed to exist. This was the case of the cases concerning Bilateral Investment Treaties against Finland, Sweden and Austria: the Court held that the provisions of the BITs concerning free trasfer of funds were incompatible with the power of the Council to restrict the free movement of capitals in relation with the respective third countries (even if no restrictions were in place and no such restrictions were even envisaged) [43].

In case of a multilateral treaty, holding that the area governing by that treaty belonged to the exclusive competence of the EU, may trigger the conclusion that Member States may have to withdraw from that convention [44]. Ironically, some Council of Europe Conventions provide that the EU and the Member States will have together the number of votes within the body created by the convention, equal with the number of the Member States that are parties to it. Thus, an obligation for the Member States to withdraw would might not take into consideration the political interest of the EU with respect to that respective treaty body: instead of having 28 votes, the representative of the EU will be left with one.

The EU institutions, especially the Commission, should look “beyond the fence” and realize that an equitable balance should be achieved between the “ever increasing” exclusive competence of the EU to conclude treaties and the maintenance of reasonable treaty powers within the hands of Member States. Does the EU really have the capacity to manage the vast relation of treaties concluded by 28 Member States?

Conclusion

The conclusion to this study is rather mixed. Does the EU help in the real enforcement of treaty law? Yes and no. Yes when it comes to the treaties concluded by the EU: they are sources of EU law and, for this reason all the “benefits” of their application in the domestic law of Member States follow. Treaties concluded by are part of the domestic legal order of Member States, and they enjoy priority over national law

and over secondary EU legislation. Under certain conditions – it is true, they are rather "vague" (the "nature and general logic" of the agreement) – the treaties concluded by the EU have "direct effect".

Despite this positive trend, two other elements could be noted. First, there is an increasing tendency of the European Union to expand its competences to conclude treaties. This is not a "win-win" situation: the competence of the European Union to conclude treaties extends to the detriment of the competence of the Member States to do so. It is long established that Member States can no longer conclude trade agreements. But soon, areas like mutual cooperation in criminal matters or even international criminalization of foreign terrorist fighters may be recognized as exclusive EU competence. Second, the general attitude of the EU institutions towards treaties concluded by the Member States can be labelled as generally "negative": the Commission relies on the general paradigm of EU law priority in order to determine the Member States either to renegotiate, or to denounce or withdraw from treaties with third countries.

The situation is "worse" for the treaties concluded between Member States – the EU institutions mitigate for the general application of EU law as "generally superior" to these treaties, notwithstanding relevant rules of international law. Relations between Member States appear, indeed, as rather "domestic" affairs.

The question that appears is whether this trend is helpful for the general promotion of the rule of law on international level. Generally, it is not bad that the EU begins to "behave like a State" on the international level. However, much depends a lot on the "attitude" the EU institutions have with respect to international law. Until now, the Court of Justice of the European Union, even if it had established the fact that treaties concluded by the EU are integral part of the EU law system, has been criticized for its "reluctance" towards international law [45] and international jurisdictions [46]. The recently established European External Actions Service has a legal office in charge of international law composed of only three to five persons. If the EU really intends to become a global actor, it would have to develop a "culture" of international law, at the level of the institutions and of the Court.

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