

Report on the seminar

'The Court of Justice of the European Union and Public
International Law: Strange Bedfellows?'

Temple Garden Chamber Series
in International Adjudication

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'The Court of Justice of The European Union and Public International Law: Strange Bedfellows?'

On 27 November 2014, the British Institute of International and Comparative Law hosted the final seminar in the Temple Garden Chambers Series in International Adjudication entitled 'The Court of Justice of the European Union and Public International Law: Strange Bedfellows?' The panel comprised Mr Rodney Dixon QC (Temple Garden Chambers) as the chair and Judge Allan Rosas (Court of Justice of the European Union) as the keynote speaker.

After introducing the topic and the keynote speaker, Mr Dixon raised various questions on the nature of the relationship between the Court of Justice of the European Union (CJEU) and Public International Law (PIL). He then invited Judge Rosas to comment on the emerging jurisprudence and case law of the CJEU and to explore the question of whether the two are in fact compatible.

Judge Rosas commenced his keynote address by proposing that that PIL and the CJEU are neither strange to each other nor bedfellows. He explained that they are not complete strangers as the basic Treaties founding the CJEU and establishing its jurisdiction were devised as treaties between States. Additionally, the sources of law applied by the Court include international treaties concluded by the European Union (EU) as well as general international law.

On the other hand, the EU legal order and international legal order are too different to be considered bedfellows. Judge Rosas's view in this regard was based on the understanding that the EU legal order is a constitutional legal order rather than a subsystem of PIL. This view was held by the CJEU as early as 1963 in *Van Gend en Loos* and 1964 in *Costa v Enel*.¹ In *Les Verts*, the court characterised the then Community Treaties as a 'constitutional charter based on the rule of law'.² More recently, the first *Kadi* judgment was based on the idea of a Union legal order that is 'internal and autonomous' and is based on a Treaty that is endowed with 'constitutional principles'.³

Judge Rosas proceeded to highlight that given the reasoning in *Kadi*, Article 351 TFEU, which allows Member States the possibility of invoking international treaties that they had concluded before becoming members of the EU in a manner that 'shall not be affected' by Union law, could not be interpreted to suggest that the EU legal order is a subsystem of public international law. In the case, the CJEU considered that Article 351 did not authorise any derogation from basic EU principles relating to the rule of law and fundamental rights. His Honour added that the scope and implications

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¹ Case 26/62 *Van Gend en Loos* EU:C:1963:1; Case 6/64 *Costa v ENEL* EU:C:1964:66.

² Case 294/83 *Les Verts v Parliament* EU:C:1986:166, para 23.

³ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461, para 285, 304, 317.



of Article 351 TFEU are circumscribed by the wording of the Article and Union law more generally as well as by relevant case law.

Given that the basic Union treaties have created 'their own legal system' which constitutes an 'independent source of law', Judge Rosas reasoned that there is a distinction between the internal and external legal sources with regards to the status of international agreements concluded by the Union under EU law.

Judge Rosas stated that internally, the status of international agreements is determined by the EU legal order and that the relations between the Member States can only to a limited extent be regulated by rules of public international law.⁴ As a result, the settlement of disputes between the Member States should in most cases be handled through the EU mechanism. Article 344 TFEU supports this approach, which is based in the existence of the EU constitutional order.

With regards to EU external relations, he stated that whilst the EU is not recognized as a State, it in many respects behaves in ways States do. Judge Rosas noted that unlike intergovernmental organisations the EU has, under Article 216 TFEU, a broad mandate to conclude international agreements. Additionally, the EU has become a member of an increasing number of international organisations. As the areas covered in bilateral agreements are even wider, He remarked that it is, in fact, difficult to name an area that would not be covered.

Judge Rosas then turned to agreements concluded by the EU as well as some or all of its Member States. He stated that in situations where the EU part of the agreement covers more or less the whole agreement, the Union seems responsible vis-à-vis third States and intergovernmental organisations for the fulfilment of the whole agreement. Its status under the EU law therefore appears to be very similar to what it would be if the agreement were concluded by the EU alone. Judge Rosas noted that where the EU is responsible for the fulfilment of the agreement as a whole, the question of international responsibility seems to require an approach quite similar to what would apply to State responsibility. He added that questions of international responsibility are closely connected to the question of the settlement of disputes and international litigation. In this respect, too, the EU by and large acts in a similar manner as States do.⁵

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⁴ A Rosas, 'Relations entre les États membres de l'Union européenne : Le droit international public y a-t-il encore sa place ?' in *L'État souverain dans le monde d'aujourd'hui: Mélanges en l'honneur de Jean-Pierre Puissechet* (Paris, Éditions A Pédone, 2008) 255.

⁵ See, eg A Rosas, 'International Dispute Settlement: EU Practices and Procedures', 46 *German Yearbook of International Law* 2003 284; F Hoffmeister, 'The European Community in International Litigation' (2008) 61 *Revue hellénique de droit international* 205.

Judge Rosas proceeded to address CJEU case law, which holds that the conclusion by the EU Council of international agreements makes them directly applicable in the Union legal order. He argued that direct applicability does not necessarily entail direct effect. Direct effect means that provisions of the agreement can be directly invoked by individuals and the validity of internal EU legal acts can be challenged for alleged violation of such provisions.⁶

Judge Rosas concluded by addressing the question of the application of customary international law. He stated that the CJEU has confirmed that the EU is bound by such law but that controlling the validity of EU legal acts in relation to customary law is subject to some conditions.⁷

Judge Rosas submitted that expectations of a less restrictive approach to controlling the validity of EU legal acts in relation to public international law is not entirely realistic as the EU is a fully-fledged subject of international law. While Article 3(5) TEU instructs the EU to contribute, inter alia, 'to the strict observance and the development of international law', it also instructs the Union to uphold and promote its 'interests' and to 'contribute to the protection of its citizens'.

This language, which would be unthinkable in the context of the constitutive instrument of an intergovernmental organisation, is indicative of the fact that the EU, in addition to merely applying public international law, contributes to its interpretation and development, while being mainly preoccupied with its own constitutional and legal order. This is the context in which the CJEU finds itself and this is the context, which will inevitably affect its approach to public international law as well.

Questions raised by the audience touched on a number of issues. In response to a request for examples of the CJEU's understanding of its obligation to contribute to the observance and development of public international law, Judge Rosas referred to cases prior to the Lisbon Treaty as well as situations in which the CJEU cited judgements of the International Court of Justice on questions of general international law.

With regards to a question asking Judge Rosas whether he considered that the EU constitutional order could influence the UN complaints procedure, he took the position that the office of the UN Ombudsman was created in response to the due process concerns raised in *Kadi*.

Staying with the *Kadi* judgement, a question was raised as to the perception of the CJEU as a more robust defender of human rights than the European Court of Human Rights (ECtHR), to which Judge Rosas responded that while the ECtHR was initially cautious with respect to UN-based sanctions, it now seems to occupy a similar position to the CJEU.

Finally, a question was raised as to the origins of EU legal order in light of the fact that the EU is constituted by the conferral of state powers in the same manner as the UN. Judge Rosas acknowledged that the original treaties were instruments of public international law. However, he drew on

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⁶ See, e.g. Case 308/06 *Intertanko* EU:C:2008:312 (but in this case, the UN Convention on the Law of the Sea was not found to have direct effect); Case C-344/04 *IATA and ELFAA* EU:C:2006:10, para 39.

⁷ Case C-366/10 *The Air Association of America and Others* EU:C:2011:864, paras 107-110.



the decisions of the CJEU that were instrumental in establishing the general principles of the Rome Statute and the amendments of the original treaties by Member States to assert that the founding treaties now have a life of their own and that the EU legal order has become constitutionalised.

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