

The EU Commission and the Fragmentation of International Law: Speaking European in a Foreign Land

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Abstract

The debate on the fragmentation of International Law has been relatively dormant in recent years. However, recent events demonstrate not only that this debate should be re-awoken, but also that some key elements of this debate must be reconsidered. Notably, while the fragmentation of International Law has often been discussed from the perspective of courts and judges, this article examines the view and the impact of a different institutional actor – the Commission of the European Union. This contribution analyzes a series of *amicus* briefs that were submitted in a number of investment treaties-based cases. These briefs, which were recently disclosed to the author, reflect a certain *radicalization* of the European Court of Justice’s view concerning the place and the role of the EU’s legal system within the international legal order. This article discusses the problematic implications that the Commission’s approach may have on the international legal order, as well as possible future pathways.

A. It’s the Fragmentation... All Over Again...

The phenomenon referred to as the *fragmentation of International Law* describes the structure of International Law. It portrays a universe of isolated, self-contained legal regimes (e.g. trade law, human rights law, environmental law, etc.) that have developed over the years with minimal, or no coordination. This isolation and lack of coordination are, at least potentially, problematic, as they imply the possibility of certain conflicts, *inter alia* between the instructions established by these regimes. The International Law Commission (ILC) described this possibility as a case in which “[two or more] relevant treaties seem to point to different directions in their application by a party”.¹

The debate about the fragmentation of International Law has dominated much of the academic sphere during the last decade. Numerous academic articles, symposiums and PhD dissertations were dedicated to the questions that underline this debate, notably the following three: (1) Does fragmentation really exist?; (2) Should fragmentation be considered a problem?; and (3) In case the first two questions are to be answered affirmatively, what should be done

¹ *Report of the Study Group of the International Law Commission to the Fifty-Eighth Session, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006, 81, para. 22 [ILC Report].

about it? These questions have been discussed and debated extensively (and some would say exhaustively) by academics, who have provided a variety of opinions.²

As described by T. Broude, in recent years the debate over the fragmentation of International Law “has virtually gone silent”.³ Broude explains the demise of the debate in the following words:

“[F]ragmentation as a phenomenon – its causes, its effects, its significance – is now hardly the subject of heated arguments and lofty theoretical debates, and perhaps most importantly, is no longer considered to constitute an existential threat to international law as a system. Fragmentation has to great extent been normalized, accepted, as it were, as both politically inevitable and legally manageable.”⁴

In other words, the debate has died out because the fear of fragmentation had been over-exaggerated, and by and large can be lived with. This conclusion of the debate signifies a *victory* for the position championed at the time by former International Court of Justice (ICJ) Judge Bruno Simma. Simma, as early as 2003, declined to view fragmentation as a *threat* to the unification of International Law. Rather, he preferred to view it in a more positive light, as an expression of the diversification and the expansion of International Law.⁵

Simma also added that indeed, despite the proliferation of international courts, fragmentation did not result in contradictory jurisprudence.⁶ This state of affairs is attributed according to Simma, as well as other notable commentators such as former Judge Gilbert Guillaume,⁷ to some sort of a highly delicate, unofficial and somewhat psychological mechanism: International adjudicators,

² See e.g., ILC Report, *supra* note 1; R. Michaels & J. Pauwelyn, ‘Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law’, 22 *Duke Law Working Papers* (2012) 3, 349; T. Broude & Y. Shany, *Multi-Source Equivalent Norms in International Law* (2010).

³ T. Broude, ‘Keep Calm and Carry on: Martti Koskenniemi and the Fragmentation of International Law’, 27 *Temple International & Comparative Law Journal* (2013) 2, 279, 279.

⁴ *Ibid.*, 280.

⁵ B. Simma, ‘Fragmentation in a Positive Light’, 25 *Michigan Journal of International Law* (2004) 1, 845, 847 [Simma, Fragmentation in a Positive Light].

⁶ B. Simma, ‘Universality of International Law from the perspective of a practitioner’, 20 *The European Journal of International Law* (2009) 2, 265, 278 [Simma, Universality].

⁷ Speech by ICJ President G. Guillaume to the Sixth Committee of the UN General Assembly, ‘The Proliferation of International Judicial Bodies: The Outlook for the

it is argued, are mindful of the threats of fragmentation; they are “anxious to avoid” conflicts,⁸ and display the “utmost caution in avoiding to contradict each other.”⁹ The unity of International Law, according to former ICJ Judges Simma and Guillaume, remains firm due to individual Judges’ understanding of the situation, and their willingness to stand up for this unity, even “at the price of dodging issues that would very much have deserved to be tackled.”¹⁰

Although the mechanism described by Simma and Guillaume seems extremely fragile, one must admit that it has held, at least well enough so as to put the fragmentation debate to sleep. The lack of *smoking gun* evidence of the threats often attributed to fragmentation seems to show that indeed, as Broude puts it, fragmentation is “manageable”.¹¹

This article is intended to re-open the currently dormant discussion about the fragmentation of International Law. The author believes that there are two reasons for doing this. First, the events described below demonstrate that the delicate mechanism illustrated by Simma can be easily crashed, and that, unlike Simma’s evaluation, some international institutions are not keen at all to uphold the unity of International Law. It could be therefore that other methods and techniques besides the legal tools often discussed in this context¹² should be considered.

Secondly, these events also reveal that besides courts, other institutions’ role and impact on fragmentation could well be meaningful in this context. The role of institutions in this field is especially interesting in light of the ILC’s decision to ignore this issue in its iconic report on the fragmentation of International Law. The ILC took the position that “[t]he issue of institutional competencies is best dealt with by the institutions themselves.”¹³ Also Simma, while addressing institutional aspects related to courts, did not dedicate much attention to other institutional actors such as international organizations, apart from stating that “when they interpret and apply international law, [they] need to bear in mind that they are acting within an overarching framework of international law,

International Legal Order’ (2000), available at <http://www.icjci.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1> (last visited 26 June 2016).

⁸ Guillaume, *supra* note 7.

⁹ Simma, ‘Fragmentation in a Positive Light’, *supra* note 5, 847.

¹⁰ *Ibid.*, 846.

¹¹ Broude, *supra* note 3, 280.

¹² Notably the *VCLT*’s “tool-box” rules, as described in ILC Report, *supra* note 1, 249, para. 492.

¹³ *Ibid.*, 13, para. 13.

residual as it may be.”¹⁴ The events described below, however, demonstrate that certain institutional actors may be very important in this respect. The role of such institutions, their views on the structure of International Law and their impact on fragmentation should therefore be examined.

B. The European Union’s Institutions and Fragmentation

Many of the events that are generating a renewed interest in the fragmentation debate are related to the European Union (EU), its law and its institutions’ approach towards International Law. The EU is a relatively unique creature in International Law, being a branch of International Law, an international organization, and also a party to numerous treaties.¹⁵ While a discussion of the legal conflicts between EU Law and other types of International Law is interesting and deserves academic attention,¹⁶ this contribution will focus on the EU institutions’ approach towards the fragmentation issue, their view concerning the place of EU Law within the international legal order, and their role in both enhancing and overcoming fragmentation.

While the focus of this article will be placed on the EU Commission’s view and actions, it is important first of all to present the approach taken by the EU’s judicial arm – the European Court of Justice (ECJ) – with respect to the fragmentation of International Law. The ECJ’s attitude towards other competing sources of authority seems to guide the Commission in its activity, notably in its attempts to impose complete EU legal hegemony, even outside of the EU’s legal sphere.

¹⁴ Simma, ‘Universality’, *supra* note 6, 271.

¹⁵ On the relationship between international law and EU law, see K. Ziegler, ‘The Relationship Between EU Law and International Law’, in D. Patterson & A. Soderston (eds), *A Companion to EU and International Law* (2016), 42, [Ziegler, Relationship]; ILC Report, *supra* note 1, 113, para. 219.

¹⁶ Much has been written about the legal conflicts between EU law and other types of international law, see e.g., V. Kosta *et al.* (eds), ‘The EU Accession to the ECHR’ (2014); A. Dimopoulos, ‘The validity and applicability of International Investment Agreements Between EU Member States Under EU and International Law’ 48 *Common Market Law Review* (2011) 1, 63.

I. The European Court of Justice and the Fragmentation of International Law

In the eyes of the ECJ, the EU treaties more closely resemble constitutional documents¹⁷ than international treaties. This approach finds its origins in the iconic *Van Gend en Loos* judgement, in which the ECJ described the *Treaty Establishing the European Economic Community*¹⁸ as “more than an agreement which merely creates mutual obligations between the Contracting States”.¹⁹ The ECJ’s constitutional approach, as well as its relevance to the fragmentation of International Law, was demonstrated most notably in its *Kadi* decision.²⁰ In the *Kadi* case, the ECJ faced a classic *fragmentation* situation in which certain EU Law obligations conflicted with those of the *Charter of the United Nations (UN Charter)*. The ECJ solved this conflict by *de facto* prioritizing EU Law over the *UN Charter*. Ziegler commented that the *Kadi* decision goes as far as “sever[ing] the Community from its origins in international law.”²¹ De Búrca added in this respect:

“In particular, the judgement represents a significant departure from the conventional presentation and widespread understanding of the EU as an actor maintaining a distinctive commitment to international law and institutions.”²²

¹⁷ See in ILC Report, *supra* note 1, 113, para. 218; see also, *Parti écologiste “Les Verts” v. European Parliament*, Case No. 294/83, Judgment of 23 April 1986, [1986] ECR 01339, 1365.

¹⁸ *Treaty Establishing the European Economic Community*, 25 March 1957, 298 UNTS 11.

¹⁹ *Van Gend en Loos*, Case No. 26/62, Judgment of 5 February 1963, [1963] ECR 1, 12.

²⁰ G. de Búrca, ‘The European Court of Justice and the International Legal Order After *Kadi*’, 51 *Harvard International Law Journal* (2010) 1,1; Ziegler, ‘Relationship’, *supra* note 15, 9; K. Ziegler, ‘Strengthening the Rule of Law but Fragmenting International Law: The *Kadi* Decision of the ECJ from the perspective of human rights’ 9 *Human Rights Law Review* (2009) 2, 288 [Ziegler, Strengthening the rule of law]; *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases Nos 402 & 415/05, Judgment of 3 September 2008, [2008] ECR I-6351 [Kadi].

²¹ Ziegler, ‘Strengthening the rule of law’, *ibid.*, 303.

²² de Búrca, *supra* note 20, 2.

And that:

“[T]he ECJ has chosen to use the much-anticipated Kadi ruling as the occasion to proclaim the primacy of its internal constitutional values over the norms of international law.”²³

The approach displayed in the *Kadi* decision was recently reinforced by the ECJ in its opinion concerning the EU’s accession to the *European Convention on Human Rights*²⁴ (*ECHR*). In December 2014, the ECJ decided to reject the EU’s Accession Treaty to the *ECHR* based on potential incompatibilities between the *ECHR* and EU Law.²⁵ The ECJ mentions, *inter alia*, that the autonomy of EU Law “in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU”.²⁶ The ECJ added that “in particular”, the possibility that the ECJ’s findings will be questioned by the European Court of Human Rights (ECtHR) is unacceptable.²⁷

Following this decision the ECJ was described by authors as creating a “fortress EU”,²⁸ and as:

“[S]tan[ding] guard at the gates of the EU legal order, Cerberus-like, one head fending off national constitutional courts, the other keeping the WTO and UN at bay, and now, a third glowering at the European Court of Human Rights.”²⁹

The strong constitutionalist approach demonstrated by the ECJ casts doubts on Simma and Guillaume’s belief in the role of international adjudicators as the guardians of the unified legal order. It also demonstrates how fragile

²³ de Búrca, *supra* note 20, 49.

²⁴ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 3 September 1953, 213 UNTS 221.

²⁵ *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the Draft Agreement With the EU and FEU Treaties*, Opinion 2/13, 18 December 2014, C-2/13, [ECJ Opinion 2/13].

²⁶ *Ibid.*, para. 170.

²⁷ *Ibid.*, para. 186.

²⁸ A. Lazowsky & R. Wessel, ‘When Caveats Turn Into Locks: Opinion 2/13 on Accession of the European Union to the ECHR’ 16 *German Law Journal* (2015) 1, 179, 187.

²⁹ T. Isiksel, ‘European Exceptionalism and the EU’s accession to the ECHR’ (2015) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2590178 (last visited 27 June 2016).

in reality this mechanism is, when it seems that some courts simply do not regard the unity of International Law as important. This is especially true if it is remembered that the judges themselves may be a part of the problem, particularly in the more *specialized* systems of International Law, where professional communities can be regarded as somewhat segregated from the *general International Law* community.³⁰

While it is often the ECJ that is mentioned in the discussion on the relationship between EU Law and International Law, other EU institutions should not be ignored. In a recent set of events, the EU Commission (Commission) demonstrated its own role as a possible agent of fragmentation. Notably, the Commission attempted to impose the ECJ's own constitutional, and somewhat isolationist approach towards the traditional rules of Public International Law, as well as towards other branches of International Law.

While the ECJ applied this approach within its own *home court*, the Commission took one step further: It directly demanded that non-EU tribunals also accept this Euro-supremacist approach, and topped its demand with an implied threat concerning the consequences of ignoring it. Furthermore, while the ECJ bases its decisions on its own applicable law, the Commission insisted on basing the claims it presented in international, *non-EU* fora, almost exclusively on *EU Law*. This article argues that the Commission's action, in these cases, not only widens the already existing fragmentation, but also batters the delicate, somewhat diplomatic mechanism described by Judges Simma and Guillaume that guards the unity of International Law.

The story, however, does not end here. With no early indication or warning, in April 2015 the Commission submitted four additional briefs in which it (almost) completely abandoned its previous EU-supremacist approach, and possibly even departed from the ECJ's own traditional line. These briefs were based almost exclusively on International Law, considering the EU legal order as an *equal* among other regimes, rather than as a supreme source of authority. The

³⁰ Many have written about the fundamental differences existing between the communities surrounding each field of international law, whether differences in culture, ethos or expert knowledge, see e.g., O. Perez, 'Multiple Regimes, Issue Linkages, and International Cooperation: Exploring the Role of the WTO', 26 *University of Pennsylvania Journal of International Economic Law* (2005) 4, 735; J. Ellis, 'Sustainable Development and Fragmentation in International Society', in D. French (ed.), *Global Justice and Sustainable Development* (2010), 57; see also Haas' research on epistemic communities P. M. Haas, 'Introduction: Epistemic communities and international policy coordination', 46 *International Organization* (1992) 1, 1.

Commission's approach(es), as reflected in its *amicus* submissions, are presented below.

II. The EU Commission's Approach(es) to International Law

The following section reviews the EU Commission's *amicus* submissions in a number of investment treaties-based cases. This review is based on the limited access that the author was granted by the Commission to the latter's *amicus* briefs that were submitted in a line of investment disputes, as well as on a review of these briefs by investment tribunals.

The following section begins with the review and analysis of the *EURAM* and *U.S. Steel* cases, which are the only pre-2015 cases in which the Commission's own briefs were available to the author. The author will then review the *Micula* case, partly because of the arguments made by the Commission in this case, but also due to the events that took place after the arbitration award was issued. The *Eureko* and *Electrabel* cases also warrant an examination here because of the informative discussions presented by the tribunals in these cases, and the somewhat unique position expressed by the Commission in the *Electrabel* case. Finally, the author will review the Commission's most recent submissions, filed in the four *Czech cases*.³¹ These submissions, which were recently released to the author by the Commission, are important as they represent an apparent 180° turn in the Commission's approach concerning the role of the EU legal order, within International Law.

Beyond these cases the Commission has intervened, or asked to intervene, as *amicus* in other cases as well.³² Due to scope and space limitations, and because of the fact that the Commission's arguments by and large presented in the cases have been discussed in this article, the author will not elaborate on these cases.

³¹ *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, registered 8 May 2013, pending [Voltaic]; *I.C.W. Europe Investments Limited v. Czech Republic*, PCA Case No. 2014-22, registered 8 May 2013, pending [I.C.W.]; *Photovoltaic Knopf Betriebs-GmbH v. Czech Republic*, PCA, registered 8 May 2013, pending [Photovoltaic]; *WA Investments-Europa Nova Limited v. Czech Republic*, PCA Case No. 2014-19, registered 8 May 2013, pending [WA Investments] [the Czech Cases].

³² See e.g., *EDF International v. Hungary*, UNCITRAL, PCA, Award of 4 December 2014 available at <http://www.iareporter.com/articles/investigation-in-recent-briefs-european-commission-casts-doubt-on-application-of-energy-charter-treaty-to-any-intra-eu-dispute/> (last visited 1 August 2016); *Eastern Sugar v. The Czech Republic*, SCC Case No. 088/2004, Partial Award of 27 March 2007.

1. The Commission's Position in *EURAM v. Slovakia*

The *European American Investment Bank (EURAM) v. Slovakia* arbitration commenced in 2009, based on a bilateral investment treaty (BIT) between Austria and the Czech and Slovak Federal Republic, which became binding on Slovakia by accession (*Austria-Slovakia BIT*).³³ The claimant, a private health insurance provider, claimed that a new Slovakian law, which prohibited the distribution of dividends, and required the re-investment of all profits for the provision of public health care, resulted in the breach of several sections of the *Austria-Slovakia BIT*.³⁴

Slovakia argued that because of its accession into the EU, and due to the fact that EU Law covers similar subject matter, the *Austria-Slovakia BIT* cannot be applied and the arbitral panel should decline jurisdiction.³⁵ Slovakia relied in its arguments on, among other sources, Public International Law, notably the *Vienna Convention on the Law of Treaties (VCLT)*.

Noticing the potential clash between the different legal regimes, including the potential impact on the EU's treaties' objectives, the *EURAM* Tribunal decided to contact the Commission and invite it to submit its observations. In its brief letter of reply (dated October 2011), the Commission opened by stating that as the parties to this dispute are a EU Member State and an EU investor, both "are therefore required to *respect the primacy of European Union law* as well as the *autonomy of its judicial system*"³⁶ (emphasis added). In other words, the Commission's starting point is not one of a competition between different branches of International Law, but rather one that assumes immediate hegemony in any case of normative conflicts between the EU regime and any other.

³³ *Agreement Between the Republic of Austria and the Czech and Slovak Republic Concerning the Promotion and Protection of Investments*, 21 October 1992, available at [http://www.investorstatelawguide.com/documents/documents/BIT-0103%20-%20Austria-Slovakia%20\(Czechoslovakia\)%20\(1990\)%20\[english%20translation\]%20UNTS.pdf](http://www.investorstatelawguide.com/documents/documents/BIT-0103%20-%20Austria-Slovakia%20(Czechoslovakia)%20(1990)%20[english%20translation]%20UNTS.pdf) (10 August 2016).

Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, 1 October 1992, available at <http://www.italaw.com/sites/default/files/laws/italaw6195%284%29.pdf> (last visited 10 August 2016).

³⁴ *European American Investment Bank AG v. The Slovak Republic*, Award on Jurisdiction, PCA Case No. 2010-17, 22 October 2012, para. 46 [EURAM, Award on Jurisdiction].

³⁵ *Ibid.*, para. 48.

³⁶ European Commission, 'Letter Submitted by the European Commission to the Tribunal Concerning *European American Investment Bank AG (Austria) v. Slovakia*, PCA Case No-2010-17', 13 October 2011, Ref. Ares(2011)1091296 [EU Commission's Observations].

The Commission continued by stressing that, as EU Laws “form part of the public order of all its Member States”, the activity of non-EU tribunals ruling on issues that are also regulated by EU Law (i.e. where competing jurisdiction exists) is “in breach of this public order”. Therefore where non-EU tribunals issue decisions that do not conform to EU Law, these arbitral awards will not be recognized or enforced within the EU.³⁷ The Commission adds that the discussed subject matter is indeed covered by EU Law, and ends its submission with a demand that, based on the above, the investment tribunal should decline jurisdiction in this case.³⁸

Unlike Slovakia, the Commission did not refer in its submissions to any of the traditional techniques available under Public International Law concerning the relationship between international regimes, including those enshrined in the *VCLT* (e.g. Articles 30 and 31 of the *VCLT*).

The *EURAM* Tribunal, in stark contradiction to the Commission’s approach, relies in its analysis primarily (and in great length and detail)³⁹ on International Law. The Tribunal opens by discussing the relevance of the *VCLT*, and by specifically stating what some may consider as a given – that EU Law is indeed a part of International Law.⁴⁰ As such, the Tribunal continues, the relationship between the BIT and EU Law should be evaluated by the tools provided by Public International Law, notably the *VCLT*.⁴¹ The Tribunal continues by evaluating the conflict between the two regimes by using Article 59 *VCLT* (the *lex posterior* rule), which, according to the Tribunal need not be applied under the circumstances, as the two regimes in question, despite the Commission’s position, do not have the same subject matter, and therefore should not be regarded as conflicting.⁴²

Concerning the argument according to which the EU’s Human Rights Law includes obligations that are, in essence, overlapping with those available in the BIT, the Tribunal (relying *inter alia* on the ITLOS *Bluefin Tuna* decision)⁴³ states that “the two treaties are far from being so incompatible that they cannot be applied at the same time.”⁴⁴ The Tribunal adds:

³⁷ ‘EU Commission’s Observations’, *supra* note 36, 2.

³⁸ *Ibid.*, 3, 5.

³⁹ The Tribunal dedicates more than 60 pages to its public international law-based analysis.

⁴⁰ *EURAM*, Award on Jurisdiction, *supra* note 34, paras 69-72.

⁴¹ *Ibid.*, paras 73-76.

⁴² *Ibid.*, para. 178.

⁴³ *Ibid.*, para. 231.

⁴⁴ *Ibid.*, para. 226.

“If indeed, the investors are protected in a similar way by two different regimes, why should only one of these regimes be applicable? In such a factual situation, the Tribunal considers that far from being necessarily incompatible, the parallel rules under the BIT and the ECT, can be cumulatively applied.”⁴⁵

The Tribunal then continues to address other issues based on Public International Law rules, including the notification requirement imposed by Article 65 *VCLT*,⁴⁶ as well as Article 30 *VCLT*,⁴⁷ and reaches the conclusion that the two regimes in this case, could be interpreted in “harmony”,⁴⁸ and that the one does not lead to the inapplicability of the other.⁴⁹

2. The Commission’s Position in *U.S. Steel v. Slovakia*

The *U.S. Steel Global Holdings v. The Slovak Republic* arbitration started in 2013, based on a BIT between the Netherlands and the Czech and Slovak Federal Republic, which became binding on Slovakia by accession (*Netherlands-Slovakia BIT*).⁵⁰ In May 2014 the Commission submitted an *amicus curiae* brief.⁵¹ Although this case was eventually discontinued, this particular *amicus curiae* brief is one of the only two pre-2015 *amicus* briefs that are currently available to the author (in addition to the above discussed *EURAM* brief).⁵² Unlike the 4 page *EURAM* brief discussed above, the Commission’s *amicus* submission in the *U.S. Steel* case is a long in-depth analysis, which provides for the first time an opportunity to properly assess the Commission’s legal position, as well as its attitude towards International Law as implied from the language, arguments, references and sources on which the Commission relied.

⁴⁵ *EURAM*, Award on Jurisdiction, *supra* note 34, para. 228.

⁴⁶ *Ibid.*, para. 235.

⁴⁷ *Ibid.*, para. 239.

⁴⁸ *Ibid.*, para. 236.

⁴⁹ *Ibid.*, para. 279.

⁵⁰ *U.S. Steel Global Holdings I B.V. v. The Slovak Republic*, PCA Case No. 2013-6 (currently being edited) [U.S. Steel].

⁵¹ European Commission, *amicus curiae* brief, *U.S. Steel Global Holding I B.V. (The Netherlands) v. The Slovak Republic*, 15 May 2014, unpublished (with the author), [EU Commission’s *amicus curiae* brief, US Steel].

⁵² Although the EU Commission’s brief is not available online, the Commission was willing to share this brief with the author. Unfortunately, requests for any other briefs submitted by the Commission were denied.

The focus of this case was the removal of exemptions previously enjoyed by certain energy producers, with respect to certain fees. This measure, it was claimed, resulted in the breach of several provisions of the *Netherlands-Slovakia BIT*. The Commission intervened, this time on its own initiative, and claimed that according to EU Law, Slovakia was under an obligation to accept the contested measures and annul the exemptions. As in the above described *EURAM* case, a genuine normative conflict arises here; while an investment treaty (allegedly) instructs Slovakia to maintain its rules, the EU regime instructs it to annul them.

As in the *EURAM* case, the Commission demanded that the investment tribunal decline jurisdiction. Also as in the *EURAM* case, the Commission based its contentions mainly on EU Law, despite the fact that it could have relied on arguments from the world of Public International Law. Even in the rare occasions in which the *VCLT* was consulted by the Commission (only two references in a 25 page-long document that is dedicated to the relationship between treaties), the Commission chose to focus on the *VCLT*'s most *confrontational* and excluding aspects. E.g., the Commission mentions Slovakia's *Treaty on Accession* (2004), according to which Slovakia accepted the authority of existing EU Law. The EU Commission used this accession treaty in order to demonstrate the termination (and thus the exclusion) of the *Netherlands-Slovakia BIT*, based on Article 30 *VCLT*.

An alternative, more *accommodating* and less *fragmented* possibility, would have been the use of Articles 31 (3) (a), (b) and (c) of the *VCLT*, that require the Tribunal to interpret the *Netherlands-Slovakia BIT* in its context; to also take into account subsequent agreements between the parties regarding the application of the BIT; the parties' subsequent practices, and "[a]ny relevant rules of international law applicable in the relations between the parties."⁵³ Any of these provisions might have served the Commission's purpose, which was guarding the integrity of its own Competition Law regime. Using these provisions, however, also meant an acknowledgment of the validity of the competing regime in this case, and recognizing it as a competing equivalent source of authority. Such an acknowledgement, as discussed below, was made only in later cases (see discussion below about the *Czech cases*).

The clearest expression of the Commission's rejection of any external legal authority can be found in paragraph 40 of the Commission's brief. The

⁵³ See *Vienna Convention on the Law of Treaties*, 23 May 1969, Article 31 (3) (a), (b), (c), 1155 UNTS 331 [*VCLT*]; EU Commission's *amicus curiae* brief, *US Steel*, *supra* note 50, 16, para. 49.

Commission admits in this paragraph that its position has been rejected several times before by investment tribunals. Very undiplomatically, however, the Commission suggests that such previous decisions, in fact, do not matter, as long as the ECJ (“which has ultimate jurisdiction on matters of interpretation of Union law”) has not given its own ruling on this issue.⁵⁴

Lastly, the Commission adds a threat, one that in the below described *Micula* case has proved to be genuine. The Commission informs the Tribunal that if it decides against the Commission’s position and awards compensation to the investor – based on Investment Law – the Commission will regard such an award as the granting of new State Aid to the investor, and thus a possible violation of EU Law. The meaning of this announcement is that the execution of the award and the payment of compensation will be allowed “only if the Commission was to approve it”.⁵⁵

The Commission’s position in this respect is not based on any clear instruction provided by the EU Treaties concerning the relationship between EU Law and other international tribunals, but rather on the ruling of the ECJ in the *Lucchini* case, as well as on Articles 101, 107 and 108 TFEU.⁵⁶ This comparison is interesting as the *Lucchini* case, as well as the mentioned TFEU provisions, state that due to the primacy of EU Law, *national* European courts should avoid issuing any decisions that might conflict with the EU’s laws on State Aid.⁵⁷ The application of these rules on the decisions of *international* tribunals, including the stretching of the supremacy principle in this context, are the Commission’s own legal interpretation.

The Commission’s legal interpretation is interesting for two reasons. First, it implies that the Commission considers competing international tribunals as equivalent to the EU member States’ national courts, a view that demonstrates the Commission’s notion of EU-supremacy also with respect to other international legal regimes. Secondly, based on these very legal provisions, here the Commission could also have chosen a different path: one that is based on Article 31 *VCLT*, by asking the Tribunal to view the mentioned EU legal provisions as a part of the investment treaty’s *context*, as a subsequent agreement/s, and as relevant rules of International Law applicable between the parties. The Commission’s choice to

⁵⁴ EU Commission’s *amicus curiae* brief, *US Steel*, *ibid.*, para. 40.

⁵⁵ *Ibid.*, para. 20.

⁵⁶ *Ministero dell’Industria, del Commercio e dell’Artigianato v. Lucchini SpA*, Case No. 119/05, Judgment of 18 July 2007 [2007], ECR I-6199.

⁵⁷ EU Commission’s *amicus curiae* brief, *US Steel*, *supra* note 50, 21, para. 69.

avoid basing its arguments on the *VCLT* is telling, in the author's view, and will be discussed below in part III of this paper.

While the Tribunal's reply to the Commission's brief would have been, undoubtedly, informative and interesting, this case was eventually discontinued. The view of investment tribunals, however, can be learned from other cases discussed in this paper.

3. The Commission's Position in *Micula v. Romania*

The proceedings in *Micula v. Romania* commenced in 2005, based on the *Romania-Sweden BIT*.⁵⁸ In its final award (issued in 2013) the *Micula* Tribunal devoted only one paragraph to the purpose of summarizing the Commission's *amicus* submission.⁵⁹ On the face of it, this brief summary suggests a somewhat different narrative – one that is based on International Law. It mentions that the Commission requested that the interpretation given to the *Romania-Sweden BIT* will “take into account” the treaty's “context and origin”.⁶⁰ This argument implies the possibility that, unlike the above reviewed briefs, the Commission may have relied this time on Article 31 *VCLT*. The Tribunal further points out that the Commission relied on Article 30 (3) *VCLT* (the *lex posterior* rule), and asked the Tribunal to prioritize the EU's State Aid rules, where these conflicted with the *Sweden-Romania BIT*.

It should be noted however, that the issues reviewed by the Tribunal in this case are those that the Tribunal chose to address, and not necessarily those that were emphasized by the Commission in its confidential submission. Indeed in other cases where the Commission's submissions were available to the author (e.g. in the *EURAM* case) the Tribunal chose to discuss International Law-based claims, while the Commission's own claims were in fact focussed on EU Law. Furthermore, as reviewed below, in other parts of the *Micula* award the Tribunal also refers to other arguments made by the Commission, which reflect the previously described Euro-supremacist approach.

The *Micula* Tribunal evaluated the role of EU Law in the interpretation of the BIT, according to the traditional rules of International Law. It stated

⁵⁸ *Agreement Between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments*, 1 April 2003, available at <http://www.italaw.com/sites/default/files/laws/italaw6225.pdf> (last visited 10 August 2016).

⁵⁹ *Ioan Micula et al. v. Romania*, Award of the Arbitral Tribunal, 11 December 2013, ICSID Case No. ARB/05/20, para. 93 [Micula, Award].

⁶⁰ *Ibid.*

that as Romania's accession treaty⁶¹ (signed in 2005) did not address the BIT (entered into force in 2003), the Tribunal cannot assume that by acceding to the EU, any of the State parties wished to modify the BIT.⁶² The Tribunal then examined, based on Article 31 (2) *VCLT*, the BIT's preamble and the original association agreement between the EU and Romania, in order to understand the treaty's context, and found that the State parties did not intend to defeat their obligations under the BIT.⁶³

Despite the Commission's (apparent) reliance on International Law, the Commission's supremacist approach, so it seems, was not abandoned. Similarly to the above described cases, the Commission in *Micula* stated that any award against Romania will not be enforceable within the EU, "by virtue of the supremacy of EC law".⁶⁴ Moreover, whilst acknowledging that Article 54 *ICSID Convention*⁶⁵ requires the automatic enforcement of ICSID-based investment awards by national courts, the Commission claimed that in such a case EU Law requires that the enforcement proceedings be stayed, so as to allow the ECJ to decide on the status of Article 54 *ICSID Convention* under the EU regime. The Commission adds in this respect that as the EU itself is not a party to the *ICSID Convention* (although except Poland all of its Member States are), it is not therefore bound by Article 54 of this Convention.⁶⁶

The Commission's argument concerning Article 54 *ICSID Convention* demonstrates the Commission's view that EU Law should prevail not only in the case of a conflict with *intra*-EU investment treaties, but also in the case of a conflict with the *ICSID Convention*.⁶⁷ This point is interesting, as unlike the

⁶¹ *Treaty Between Member States of the European Union and the Republic of Bulgaria and Romania, Concerning the Accession of the Republic of Bulgaria and Romania to the European Union*, 21 June 2005, 48 Official Journal of the European Union L 157, 11.

⁶² *Micula*, Award, *supra* note 59, paras 318-321.

⁶³ *Ibid.*, paras 322-326.

⁶⁴ *Ibid.*, paras 330, 334.

⁶⁵ *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 14 October 1966, 575 UNTS 159.

⁶⁶ *Ibid.*, para. 336.

⁶⁷ This argument is problematic for several reasons, notably because of the fact that, with the exception of Poland, all EU member States are members of the *ICSID Convention*. Furthermore, the Commission expressed its interest to "explore the possibility" of acceding to the *ICSID Convention*, but acknowledges that technical obstacles (only States can accede to this Convention) currently stop it from joining, see European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Towards a Comprehensive European International Investment Policy*, 7 July 2010, COM (2010) 343 final, 5, 10.

BITs discussed in the cases reviewed in this article, the Commission does not dispute the validity of the *ICSID Convention*; rather, it assumes that a perfectly valid Convention should not be observed by its Member States, due to potential clashes with EU Law.

After clarifying its position concerning the (lack of) enforceability of a future award against Romania, so as to sweeten the pill, the Commission added that it believed that a direct conflict between EU Law and the BIT and the *ICSID Convention* would be avoided, if the Commission's above described *VCLT*-based arguments were to be accepted.⁶⁸ In other words, the Commission provided the Tribunal with an opportunity to solve this matter in accordance with the traditional rules of International Law, followed by a warning that, if it adopts the wrong solution, the EU institutions would have to re-address the matter, this time under EU Law alone.

The *Micula* Tribunal chose to ignore the Commission's threats, stating that "it is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered."⁶⁹ It did, however, feel the need to simply quote Articles 53 and 54 of the *ICSID Convention* in full, with no further explanations, as if to gently remind the parties (and especially the Commission) of their international obligations.⁷⁰

4. The Post-*Micula* Events

The *Micula* case is of interest regarding the debate on the fragmentation of International Law, not only because of the above discussion, but also (and perhaps mostly) because of the events that took place after the final award was issued.

Despite the Commission's threats, the *Micula* Tribunal decided on 11 December 2013 to award compensation to the claimants. Immediately after issuing the award, the Commission started to act in order to frustrate its execution of this award. On 30 January 2014, the Commission announced to Romania that the implementation of the award would be considered as State Aid under EU Law.⁷¹ As Romania replied that it had already started to implement the award, the Commission issued a suspension injunction, ordering Romania to stop any further implementation of the award until a final decision was made

⁶⁸ *Micula*, Award, *supra* note 59, para. 336.

⁶⁹ *Ibid.*, para. 340.

⁷⁰ *Ibid.*

⁷¹ Commission Decision (EU) 2015/1470 of 30 March 2015, 58 Official Journal of the European Union L 232, 43, para. 2 [Letter from the Commission].

concerning the compatibility of the State Aid with EU Law.⁷² In a letter issued in October 2014, the Commission announced to Romania that it indeed seemed that the State Aid was incompatible with EU Law, and accordingly an official investigation was to be launched.⁷³

This letter presents some of the above described Euro-centric legal arguments, notably that any conflict between EU Law and other international regimes (the BIT and the *ICSID Convention*) is to be decided in accordance with EU Law alone,⁷⁴ entirely avoiding any mentioning of the rules of International Law, or even the term *International Law*.

These events demonstrate that the Commission's threats are not empty: The Commission intends to actively enforce the supremacy of EU Law by sanctioning any State that chooses to follow the rules of Public International Law, as understood by investment tribunals. As mentioned, such enforcement proceedings are being done in full isolation from, and with no regard to, International Law.

5. The Commission's Position in *Eureko v. Slovakia*

In *Eureko v. Slovakia*,⁷⁵ the Commission presented similar claims to those described above. It claimed *inter alia* that EU Law and the relevant investment treaty are incompatible, and that the only court in which this matter can be resolved is the ECJ.⁷⁶ The Commission further dismissed the traditional rules of International Law; for example, it claimed that the customary rule of *pacta sunt servanda* does not apply to *inter-EU* BITs, due to the EU's principle of supremacy.⁷⁷ The Commission also implicitly rejected the general rules of treaty interpretation, as set in Article 31 *VCLT*, by claiming that:

“[C]onflicts between BIT provisions and EU law cannot be resolved by interpreting and applying the relevant EU law provisions in the light of the BIT. Only the inverse approach is possible, namely interpretation of the BIT norms in the light of EU law.”⁷⁸

⁷² *Ibid.*, para. 6.

⁷³ *Ibid.*, para. 71.

⁷⁴ *Ibid.*, paras 51-55.

⁷⁵ *Eureko E.V. v. The Slovak Republic*, Award of the Tribunal on Jurisdiction, Arbitrability and Suspension, 26 October 2006, PCA Case No. 2008-13 [*Eureko*, Award on Jurisdiction].

⁷⁶ *Ibid.*, paras 177-178.

⁷⁷ *Ibid.*, para. 180.

⁷⁸ The *Eureko* Tribunal quotes from the Commission's submission, in *ibid.*

After stating its departure point, which is that International Law does not matter in light of EU Law's supremacy, the Commission turned to what seems to be a rather redundant discussion on International Law. Concerning the termination of the BIT, the Commission admitted that the parties did not take any "decisive steps" for doing so, and that in light of the *VCLT* this treaty has not, in fact, been terminated.⁷⁹ The Commission added however, that despite this, due to the supremacy of EU Law, any BIT provision that is incompatible with EU Law should be regarded as void.⁸⁰ The Commission refers to Article 30 (3) *VCLT* in order to claim that the latter treaty (EU Law) should prevail in a case of incompatibility between the regimes.⁸¹

Unlike the Commission's approach, the *Eureko* Tribunal decided to approach this issue from the perspective of International Law,⁸² and provided a lengthy analysis of the relationships between EU Law and the BIT based on the provisions of the *VCLT*.⁸³ The Tribunal's analysis is somewhat *integrationist* in nature, as both EU Law and the ECJ's jurisprudence are considered. The Tribunal's analysis opens with the question of whether the BIT had been terminated based on Articles 59 and 65 *VCLT*.⁸⁴ Interestingly, in this review the Tribunal acknowledges and considers decisions made by the ECJ, but decides that as the facts in the current case are somewhat different, the ECJ's ruling cannot be applied.⁸⁵ The Tribunal continued to evaluate the role of Article 30 (3) *VCLT*, where the legality of the arbitral process is evaluated in light of EU Law, and several decisions made by the ECJ.⁸⁶ It can be seen therefore that the Tribunal, unlike the Commission, is not shy of engaging with other fields of International Law and considers these as relevant.

⁷⁹ *Eureko*, Award on Jurisdiction, *supra* note 75, para. 187.

⁸⁰ *Ibid.*, paras 187-188.

⁸¹ *Ibid.*, paras 188-193.

⁸² The Tribunal states: "Whatever legal consequences may result from the application of EU law, those consequences must be applied by this Tribunal within the framework of the rules of international law and not in disregard of those rules." *Ibid.*, para. 229.

⁸³ *Ibid.*, paras 231-277.

⁸⁴ *Ibid.*, para. 231.

⁸⁵ *Ibid.*, paras 248-249.

⁸⁶ *Ibid.*, paras 273-277.

6. The Commission's Position in *Electrabel v. Hungary*

As in the above discussed cases, in *Electrabel v. Hungary*⁸⁷ (*Electrabel* case) the Commission also demanded that the Tribunal decline jurisdiction. However, unlike the above described cases which concerned *intra*-EU BITs, this case was based exclusively on the *Energy Charter Treaty*⁸⁸ (ECT).⁸⁹

The Commission's submission in this case is somewhat older than in the other cases discussed in this paper (*amicus* submission was filed in 2008),⁹⁰ and so its approach, at least as appears from the Tribunal's discussion (the *amicus* brief itself was not released to the author), was somewhat different from the other discussed pre-2015 cases. The Commission founded its arguments on a far less confrontational tone: The Commission reviewed the institutional links between the EU and ECT regimes, and acknowledged the fact that the ECT is binding on the EU's institutions and Member States (a position that was later reversed in the four *Czech cases*).⁹¹ Furthermore, the Commission seemed much more inclined to rely on the traditional rules of International Law, and even presented legal arguments based on the non-confrontational, *harmonizing* parts of the *VCIT*, namely Article 31 of this Convention.

It is difficult to explain the Commission's unique position in this case, especially when evaluated in light of other briefs that were submitted by the Commission before and after this case. As the submission itself was not disclosed to the author, one may only speculate regarding the reasons. It is possible for example that, as in other cases, the Tribunal chose to concentrate on International Law in its decision while the Commission's EU Law-based claims were mostly ignored (see for example the *EURAM* case). In any event, this submission represented a very unique exception to the Commission's pre-2015 approach. This case however, is nevertheless important as it somewhat predicted what seem to be an ideological U-turn that was taken seven years later by the Commission in its most recent submissions in the *Czech cases*, described below.

⁸⁷ A review of the Commission's brief was presented by the Tribunal in this case, see *Electrabel SA v. Republic of Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19 [*Electrabel*], paras 27-34.

⁸⁸ *The Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95.

⁸⁹ *Ibid.*, paras 4.11-4.12.

⁹⁰ *Ibid.*, para. 1.18.

⁹¹ *Ibid.*, paras 4.98-4.100.

7. The Commission Position in the *Czech Cases*

In April 2015 the Commission submitted four *amicus* briefs in four different investment arbitrations held between German investors and the Czech Republic (the *Czech cases*).⁹² These cases were all based on the same treaties, namely the ECT and the BIT between Germany and the Czech Republic, and concerned the same disputed State measure, namely changes made by the Czech Republic to its support scheme for the production of renewable energy. As all four submissions are in essence similar (mostly *copy-pasted*), the author will address them as one.⁹³

On the face of it, these submissions represented a striking change in approach; there is hardly any trace left from the EU constitutional/supremacist approach displayed in previous submissions. Instead, the Commission's arguments are almost exclusively based on International Law. Its legal point of departure is that EU Law should be evaluated against other international regimes, just as any one treaty is to be evaluated against others when conflicts arise.

The Commission's briefs open with an extensive analysis of the relationship between the different treaties, based on the *lex posterior* rule, as reflected in both Articles 59 and 30 of the *VCLT*.⁹⁴ The Commission claims in this respect, that EU Law should trump not due to its inherent superiority, but rather to the fulfilment of the *VCLT*'s rules concerning the termination of treaties and with respect to the relations between successive treaties.

The Commission further argues that the ECT does not apply to the legal relations between the different EU Member States. Here as well the Commission's arguments are not based on EU Law, but rather on the States' intentions, or alternatively, on Article 30 *VCLT*.⁹⁵ The Commission continued to demonstrate this claim by providing a lengthy review of the "Context, preparatory work

⁹² Listed *Czech Cases* in *supra* note 31.

⁹³ European Commission, written *amicus curiae* submission, *Voltaic Network GmbH v. Czech Republic*, 14 April 2015, unpublished (with the author) [Voltaic *amicus* submission]; European Commission, written *amicus curiae* submission, *I.C.W. Europe Investments Limited v. Czech Republic*, 8 April 2015, unpublished (with the author) [I.C.W. *amicus* submission]; European Commission, *Photovoltaic Knopf Betriebs-GmbH v. Czech Republic*, unpublished (with the author) [Photovoltaic *amicus* submission]; European Commission, written *amicus curiae* submission, *WA Investments-Europa Nova Limited v. Czech Republic*, 8 April 2015, unpublished (with the author) [WA Investment *amicus* submission].

⁹⁴ *Ibid.*, paras 28, 32, 33.

⁹⁵ *Ibid.*, para. 50.

and circumstances of the conclusion of the ECT”.⁹⁶ This review, it is stated, is relevant for the application of Articles 31 and 32 *VCLT*,⁹⁷ which requires a *harmonious* approach to be taken to treaty interpretation.

Lastly, unlike its stance in previous cases, the Commission avoided issuing statements that implied an EU-supremacist approach. For example, unlike in previous cases, there are no explicit demands “to respect the primacy of European Union law”,⁹⁸ and no arguments are based on the “virtue of the supremacy of EC law”.⁹⁹

At first glance, EU Law is no longer regarded as a supreme source of authority. Rather, it is seen by the Commission as one among many, whereby questions of hierarchy are resolved by a source that is external to the EU legal order (i.e. the *VCLT*). This implies two ideological changes to the Commission’s previous approach. The first concerns the authoritative equality of EU Law *vis-à-vis* other international sources of authority. The EU legal order is no longer addressed as a supreme legal order, which automatically trumps any competing source of authority. Rather, it is regarded as equal among many; one that will prevail over other sources only where recognized rules of International Law will allow. Secondly and somewhat related to the first point, the Commission’s new approach also represents an acknowledgement of the supremacy of the traditional rules of Public International Law. The Commission no longer tries to subject the relations between the EU and the BITs to EU rules, but rather agrees that such matters are subjected to a higher source of authority, that of the traditional rules of Public International Law, as reflected by the *VCLT*.

In short, at least on the face of it, it seems that the Commission has finally decided to play the game of International Law. The author however, believes that this approach is still far from reflecting a genuine shift in approach. In part 5, at the very end of the International Law-oriented briefs, the Commission repeats its usual threat – that any award that will rule compensation against the State could be frustrated by the Commission.¹⁰⁰ The Tribunals’ view on these claims

⁹⁶ Voltaic *amicus* submission, *supra* note 93, para. 54; I.C.W. *amicus* submission, *supra* note 93, para. 54; Photovoltaic *amicus* submission, *supra* note 93, para. 54; WA Investment *amicus* submission, *supra* note 93, para. 54.

⁹⁷ *Ibid.*, Fn. 34, para. 77.

⁹⁸ ‘EU Commission’s observations’, *supra* note 36.

⁹⁹ *Micula*, Award, *supra* note 59, paras 330 and 334.

¹⁰⁰ Voltaic *amicus* submission, *supra* note 93, paras 118-128; I.C.W. *amicus* submission, *supra* note 93, paras 118-128; Photovoltaic *amicus* submission, *supra* note 93, paras 118-128; WA Investment *amicus* submission, *supra* note 93, paras 118-128.

would have been interesting to assess. The Tribunals however, refused to accept these *amicus* submissions.¹⁰¹

C. Discussion

The cases described above demonstrate that while the debate on the fragmentation of International Law has more or less disappeared, the fragmentation itself, including its most severe adverse effects, still takes place. These cases also underline the fact that international courts are not the only meaningful actors in this debate, and that other institutional actors are very relevant as well. Notably, the Commission reveals itself in these cases as an important agent of fragmentation, increasing the gaps between the different branches of International Law, as well as actively detaching EU Law, and EU Member States, from the general rules of International Law. The following section discusses some of the issues that emerge from the material reviewed above.

I. The Commission's Pre-2015 Approach: A Radicalization of the ECJ's Approach?

As discussed above, the isolationist approach of the ECJ with respect to International Law is not new. The author, however, believes that the ECJ's constitutional approach, as presented in *Kadi*, has been *radicalized* by the Commission, and that this radicalization imposes a threat to the unity of International Law and to the delicate mechanisms that currently hold it together.

1. The Commission's Decision to *Speak European*

There is no doubt that the Commission continued the ECJ's own Euro-centric line with respect to the relationship between EU Law and International Law. But can the Commission's line, as specifically reflected in its pre-2015 submissions, be seen as a more extreme version of the ECJ's? In the author's view, it would appear that it can. While the ECJ certainly places International Law under EU Law, it did not always ignore its existence and validity. Indeed, in the past the ECJ has applied parts of Customary International Law in its

¹⁰¹ The Tribunals' decisions were not made public. All parties (including the Commission) refused to allow access to these decisions.

decisions,¹⁰² and has confirmed that the EU institutions are bound by it.¹⁰³ Even in its notorious *Kadi* decision, the ECJ insisted that it was not the UN Security Council's Resolution that it was challenging, but only its local implementation.¹⁰⁴ The ECJ further stated in this decision:

“In this respect it is first to be borne in mind that the European Community must respect international law in the exercise of its powers [FN omitted], the Court having in addition stated, in the same paragraph of the first of those judgments, that a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.”¹⁰⁵

The approach displayed by the Commission's pre-2015 submissions seems not only to prioritize EU Law over other branches of International Law (as the ECJ did), but also to mostly ignore the existence of International Law. Notably, when addressing the relationship between the different regimes, the Commission repeatedly based its arguments on EU Law, by and large ignoring the *VCLT*. The Commission's approach seems to reflect the view of Advocate General Maduro, as stated in his opinion in *Kadi*:

“The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.”¹⁰⁶

The Commission's insistence on applying the rule expressed in Maduro's above quotation concerning the relationship between different regimes is in stark contradiction to the *VCLT*. While Maduro's interpretation implies the

¹⁰² See e.g., a review of the cases in which the ECJ applied customary international law in Ziegler, 'Relationship', *supra* note 15, 7.

¹⁰³ *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, Case No. C366/10, Judgement of 21 December 2011, para. 101 [*Air Transport Association*].

¹⁰⁴ *Kadi*, *supra* note 20, para. 298.

¹⁰⁵ *Ibid.*, para. 291.

¹⁰⁶ Opinion of Advocate General Póitares Maduro, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Joined Cases Nos C-402/05 P & C-415/05 P, Judgment of 16 January 2008, para. 24 [Opinion of AG Maduro].

assumption that Member States must all address their international obligations in light of EU Law, the *VCLT* requires an independent, *de novo* inquiry into the context, purpose, and notably also to the intentions of the concluding parties, in each and every case in which treaties interact.

2. The Commission's *Exportation* of the ECJ's Approach

Secondly, the Commission's above described steps seem to expand the application of the ECJ's constitutional approach and apply it also to non-EU *fora*, in what seems to be an attempt to enforce its hegemony also outside of the EU legal sphere. In *Kadi*, as stated in opinion of some, the ECJ acted like a "domestic court",¹⁰⁷ considering the questions before it as mostly an internal issue,¹⁰⁸ and therefore to be resolved in accordance with EU Law. The same legal logic however cannot be found in the Commission's course of action; the Commission's involvement in the investment cases took place outside of the EU's home-court. The Commission operated in Investment Law proceedings, which were based on International Law and adjudicated by International Law experts. While it is expected that legal arguments presented in EU courts will be based on EU Law, the Commission seems to forget, or perhaps simply chooses to ignore the fact that it was operating in a foreign environment, where a different sets of norms, as well as a different legal logic, prevail.

3. Expanding the *Sense of Urgency* Threshold

Another indication of the Commission's radicalization of the ECJ's approach can be found in the threshold set by the Commission in its decision to contradict a competing source of authority. Simma submits that "as a rule, international judges or arbitrators have to experience an extreme sense of urgency before they would decide to straight-up contradict their colleagues in another international jurisdiction."¹⁰⁹ Applying the *extreme sense of urgency* threshold seems useful from the perspective of preventing fragmentation, as it guarantees high levels of respect for other branches of International Law and the prevention of conflicts in most cases. Furthermore, this test also allows some flexibility as it does not entirely stop courts from contradicting other authorities in International Law in order to safeguard those interests that are of fundamental importance.

¹⁰⁷ Ziegler, 'Relationship', *supra* note 15, 10.

¹⁰⁸ *Kadi*, *supra* note 20, para. 317.

¹⁰⁹ Simma, 'Fragmentation in a Positive Light', *supra* note 5, 846.

In *Kadi*, the ECJ dealt with the protection of fundamental human rights, which possess a somewhat constitutional status within the EU legal order.¹¹⁰ It can certainly be said that the necessity to protect human rights gives rise to an *extreme sense of urgency* and therefore may justify the contradiction of a competing source of authority, even one as important as the UN Security Council. On the other hand, it is difficult to argue that a similar *extreme sense of urgency* is what motivated the Commission in its own course of action. In the above described investment cases, the competing authority (the BITs) threatened to contradict mere competition laws. Important as these laws undoubtedly are, the existence of such an *extreme sense of urgency* in this context is doubtful at best.

Moreover, even if one is to attach an *extreme sense of urgency* to the protection of the EU competition regime, one must remember that these investment arbitration awards did not challenge the validity of this regime as a whole, but at most required only a one-off exception with respect to specific economic actors. The fact that only a one-off exception is needed in this respect certainly reduces the *sense of urgency* to contradict other sources of authority.

4. Respect, Deference and the Unity of International Law

One more indication of the radicalization of the ECJ's approach by the Commission in the above discussed cases relates to non-legal elements such as respect and deference, which, as explained below, play an important role in upholding the unity of International Law. As stated by Wessel, the ECJ displayed in *Kadi* a certain respect to the competing international authority (the *UN Charter* in this case) by avoiding a direct challenge to its validity¹¹¹ through creating a clear partition between the source of the competing norm (i.e. the UN Security Council Resolution, which the ECJ had no power to review)¹¹² and its implementation (which is the EU's measure that was the reviewed act in this case). The Commission on the other hand, challenged *head-on* the validity of the source's competing norms, as well as the competing tribunals' jurisdictions.

Admittedly, the partition created by the ECJ in *Kadi* was without any practical consequences, as it is likely that *any* implementation of the UN Security Council Resolution would have been ruled as incompatible with EU Law. The ECJ's approach, however, presented a certain respect and recognition

¹¹⁰ *Kadi*, *supra* note 20, para. 283.

¹¹¹ R. Wessel, 'Reconsidering the Relationship Between International and EU Law: Towards a Content-based Approach?', in E. Cannizzaro, P. Palchetti & R. Wessel (eds), *International Law as Law of the European Union* (2011), 6, referring to *Kadi*, *supra* note 20, para. 298.

¹¹² *Kadi*, *supra* note 20, para. 287.

of International Law, as well as of the legal regimes that are external to the EU. This sense of respect corresponds with the unofficial, delicate and almost diplomatic mechanism that was described by Judges Simma and Guillaume, which attributes the coherence and the unity of International Law to international judges' informal decision to display "utmost caution in avoiding to contradict each other."¹¹³ This mechanism, as mentioned above, is dependent not on any official rule, but rather on judges' willingness to support the unity of International Law, even, as stated by Simma, "at the price of dodging issues that would very much have deserved to be tackled."¹¹⁴

One, therefore, may wonder what the implications of the Commission's approach are, and how it could impact this delicate mechanism. Former Judge Guillaume stated in this respect that "[t]his work of co-ordination is very much dependent on the attitude of the judges, and on their ability to determine their own competence while keeping in mind their position within the international framework."¹¹⁵ Will such an explicit lack of respect change judges' *attitude* and reduce their willingness in the future to cooperate? Will judges resume applying a holistic and systemic legal approach while operating under one regime, where it is clear to them that their *competition* has no intention of doing the same?

The answers to these questions are not yet clear at the time of writing. It is possible however that some implications are already noticeable. For example, in the more recent *Czech cases* the tribunals refused to accept the Commission's request to submit an *amicus* brief.¹¹⁶ As the Commission refused to disclose these decisions, the author has no knowledge of their content. One however, may speculate that the Commission's own isolationist pre-2015 approach had some (possibly informal) influence on the Tribunals' lack of willingness to engage with it. If this speculation is correct,¹¹⁷ this could mean that it is likely that fragmentation will increase in the future.

¹¹³ Simma, 'Fragmentation in a Positive Light', *supra* note 5, 846.

¹¹⁴ *Ibid.*

¹¹⁵ Guillaume, *supra* note 7.

¹¹⁶ See listed *Czech Cases* in *supra* note 31.

¹¹⁷ It should be mentioned, however, that even if the above described decisions will be published in the future, the correctness of this speculation will be difficult to assess. This is due to the fact that it is very unlikely that adjudicators will openly discuss such a non-legal element as the displayed lack of respect as a reason for their refusal to allow these interventions.

II. The *Czech Cases*: A Damascene Conversion?

As discussed above, in April 2015 the Commission submitted four *amicus* briefs, which were based on a completely different approach. Notably, although the Commission kept arguing that EU Law should prevail, and generally attempted to promote the same outcome it had tried in previous cases, this time it chose to advocate its cause based on the traditional rules of Public International Law. For the first time,¹¹⁸ it seems that the Commission is wholeheartedly accepting the role of Public International Law with respect to the relations between different treaties, as well as the place of the EU regime as one among many, and as operating under, or within Public International Law.

For all the reasons described above, the author believes the Commission's apparent sudden change of heart could be seen as a positive development. Notably, it is far more respectful towards other international sources of authority. Moreover, it brings back at least some sense of order and security into the informal, delicate mechanism described above, based on which the unity of the international legal system is maintained, and on which states rely while acting in the world of international relations.

At least on the face of it, it could also be argued that the Commission's new position departs from that of the ECJ. The ECJ, as reviewed above, views the EU Treaties as constitutional documents rather than international treaties, and have treated these on several occasions as superior to other international sources of authority. By treating the EU legal regime as equal to other international regimes, and by subjected it to Public International Law, the Commission's approach seems to depart from the ECJ's somewhat isolationist approach, and, to a certain extent, pulls the EU legal order back into the world of International Law.

On the other hand, despite the change in rhetoric, the Commission did not back away from its refusal to allow the enforcement of the awards, should these be considered as *State Aid*.¹¹⁹ In other words, regardless to the *VCLT* rules on conflicts between treaties, at the end of the day the Commission will choose to unilaterally frustrate the objectives of any competing treaty in order to ensure the superiority of EU Law. In making its decision on *State Aid*, the Commission will not consider the *VCLT* rules, nor the fact that such *State Aid* was in fact justified under International Law. In the author's view, this issue significantly

¹¹⁸ With the exception of the above discussed *Electrable*, *supra* note 87.

¹¹⁹ Voltaic *amicus* submission, *supra* note 93, paras 118-128; I.C.W. *amicus* submission, *supra* note 93, paras 118-128; Photovoltaic *amicus* submission, *supra* note 93, paras 118-128; WA Investment *amicus* submission, *supra* note 93, paras 118-128.

waters down the importance of the *Czech cases* and the Commission's apparent change of heart.

The Commission, so it appears, had no intentions of backing away from its original goal. Why then did the Commission change its rhetoric so suddenly? One may only speculate. A reasonable explanation, however, would be that the Commission's legal agents simply attempted to win. After failing to convince investment tribunals on so many occasions, every sensible lawyer would start questioning their strategic choices. As all pre-2015 decisions clearly demonstrate that investment arbitrators will address, and consider, mostly *VCLT*-based claims, it is likely that the message finally went through, and that the Commission's legal agents decided to play the cards which were most likely to succeed. But as already stated, the change in rhetoric in this case does not necessarily mean a change of approach.

III. The Role of Non-Court Actors in the Debate

The implications of the Commission's pre-2015 approach and its explicit lack of respect may go even further than judges' mere unwillingness to apply a harmonized approach to International Law. Former Judge Guillaume mentions a certain negative competition between the different tribunals:

“Every judicial body tends – whether or not consciously – to assess its value by reference to the frequency with which it is seised. Certain courts could, as a result, be led to tailor their decisions so as to encourage a growth in their caseload, to the detriment of a more objective approach to justice. Such a development would be profoundly damaging to international justice.”¹²⁰

Some questions arise following Guillaume's warning, and in light of the Commission's activity in this field. Will other international tribunals begin to send their *proxies*, for example their secretariats, to intervene in other tribunals' proceedings in order to demand their jurisdiction? The ECJ is not the only Tribunal to claim exclusive jurisdiction over certain types of disputes. For example, the World Trade Organization's (WTO) dispute settlement mechanism claims exclusive jurisdiction over disputes that concern WTO Law violations.¹²¹

¹²⁰ Guillaume, *supra* note 7.

¹²¹ See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Article 23, 1869 UNTS 401.

The possibility of overlapping jurisdictions has been discussed in the context of WTO Law, especially with respect to regional and bilateral trade agreements,¹²² but also in relation to other international regimes such as multilateral environmental agreements.¹²³ Should we expect the rather influential secretariat of the WTO¹²⁴ to intervene in the future where such overlapping cases arise, in order to demand that cases be re-directed towards the WTO?

Whether this concern seems somewhat exaggerated or not, there is no escaping the fact that the role of the Commission, in the context of the debate on the fragmentation, is meaningful. Notably, it demonstrates that the fragmentation can be enhanced not only by courts, but also by other institutional actors who are keen enough to protect their own territory without paying heed to larger systemic implications. Other institutional actors, even if not as powerful as the Commission, can also intervene in the proceedings of international courts as the Commission has done. For example, Article 34 (2) of the *Statute of the International Court of Justice*¹²⁵ specifically grants a special legal status to international organizations, making these bodies the sole entity that is currently authorized to submit *amicus curiae* briefs to the International Court of Justice. Other Tribunals are also receiving *amicus* briefs from international organizations. For example, the World Health Organization has recently requested to submit an *amicus* brief in a certain investment dispute.¹²⁶

The role of non-judicial institutional actors in the context of fragmentation has been discussed in the past by the author.¹²⁷ Notably, the author has

¹²² See e.g., K. Kwak & G. Marceau, 'Overlaps and Conflicts of Jurisdiction Between WTO and RTAs', *Conference on Regional Trade Agreements World Trade Organization - Executive Summary* (2002), available at https://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf (last visited 14 July 2016); C. Henckels, 'Overcoming Jurisdictional Isolationism at the WTO-FTA Nexus: A Potential Approach for the WTO', 19 *European Journal of International Law* (2008) 3, 571.

¹²³ G. Marceau, 'Conflicts of norms and conflicts of jurisdiction: The relationship between the WTO agreement and MEAs and other treaties' 35 *Journal of World Trade* (2001) 6, 1081, 1122-1124.

¹²⁴ See e.g., S. Jinnah, 'Overlap management in the World Trade Organization: Secretariat influence on trade-environment politics' 10 *Global Environmental Politics* (2010) 2, 54.

¹²⁵ *Statute of the International Court of Justice*, 24 October 1945, 1 UNTS XVI.

¹²⁶ C. Trevino & L. E. Peterson, 'World Health Organization is given green-light by arbitrators to intervene in Philip Morris v. Uruguay arbitration' (2015), available at <http://www.iareporter.com/articles/world-health-organization-is-given-green-light-by-arbitrators-to-intervene-in-philip-morris-v-uruguay-arbitration/> (last visited 1 August 2016).

¹²⁷ A. Kent, 'Implementing the principle of policy integration: Institutional interplay and the role of international organizations' 14 *International Environmental Agreements: Politics,*

examined the potential positive role that institutional actors can play in overcoming fragmentation, including by the exchange of expert knowledge and the informing of decision-making processes. The above discussed cases, however, and particularly the post-*Micula* events, demonstrate well that the role of institutional actors may also be negative, one of enforced fragmentation and the silencing of a judicial dialog.

The role of non-judicial institutional actors in this respect raises another important question; one that relates to the delicate mechanism described by Simma and Guillaume and discussed above, and its applicability to other actors besides judges. It could be argued that this mechanism is based on a certain collegial relationship between judges and their understanding of the International Law as a whole. Therefore, it is possible that actors who are not so clearly affiliated with this social and professional milieu may not be inclined to respect this mechanism.

IV. The Way Forward

1. A Grim Point of Departure

The final part of this article essentially asks: *What now can be done?* The grim starting point (at least from the perspective of those who are concerned by the unity of the international legal order), is that any substantive shift in approach is somewhat unlikely. When evaluating the above described situation, it seems probable that some elements that are related more to sociology than to law are in play. The tendency to see one's own group as somewhat more central than others' was mentioned in the context of the fragmentation by authors such as David Kennedy, who commented on this issue:

“When we public international lawyers look out the window, we see a world of nation states and worry about war. We remember the great wars of the twentieth century. We were traumatized by the holocaust, fear totalitarianism and are averse to ideology. [...] Trade lawyers, by contrast, look out the window and see a world of buyers and sellers struggling to deal. Their trauma was the great depression.”¹²⁸

Law and Economics (2014) 3, 203.

¹²⁸ D. Kennedy, ‘One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream’ 31 *New York University Review of Law and Social Change* (2007) 3, 641, 650.

Koskenniemi adds in this regard:

“To be doing ‘trade law’ or ‘human rights law’ or ‘environmental law’ or ‘European law’ – as the representatives of those projects repeatedly tell us – is not just to operate some technical rules but to participate in a culture, to share preferences and inclinations shared with colleagues and institutions who identify themselves with that ‘box’”.¹²⁹

These descriptions seem to correspond well with the EU’s own professional legal community. A review of the current ECJ judges’ profiles¹³⁰ reveals that, with very few exceptions, these judges’ professional environment and background can be defined as highly EU-oriented. The same could probably be said about the Commission’s *Eurocrats*, most of whom have developed professionally within the EU system. This *social* fragmentation may explain the EU legal community’s entrenchment within its own *constitutional* approach. In light of this background it would seem that the expectation of a complete change of approach from the EU institutions may be somewhat exaggerated.

Furthermore, due to its own job description, the Commission may not be willing to change its ways. The Commission is often defined as the “guardian of the treaties”, whose role is to “promote the general interest of the Union” and “oversee the application of Union law”.¹³¹ It is not surprising therefore that the Commission chose to address EU Law in isolation from elements such as Public International Law, and shows very little interest in considering the unity of International Law.

Despite this difficult point of departure, the EU Commission seems to have modified its approach and, at least to a certain extent, to break away from the EU-isolationist approach demonstrated both by the Commission and the ECJ. On the face of it, this move is encouraging from the perspective of those who are interested in keeping the unity of the international legal system. But as stated above, the Commission’s ideological U-turn was somewhat watered

¹²⁹ M. Koskenniemi, ‘International law: Between Fragmentation and Constitutionalism’, 27 November 2006, available at <http://www.helsinki.fi/eci/Publications/Koskenniemi/MCanberra-06c.pdf> (last visited 14 July 2016), 4.

¹³⁰ See http://curia.europa.eu/jcms/jcms/Jo2_7026/ (last visited 14 July 2016).

¹³¹ *Consolidated Version of the Treaty on European Union*, 13 December 2007, Art 17 (1), 2008/ C 115/01.

down by its insistence with respect to the (lack of) enforcement of investment tribunals' awards within the EU.

In short, when asking: *What now can be done?* the first part of the answer should be: 'Let us not expect much'. But nevertheless, the author believes that one possible route seems feasible, notably because in part, it is already being applied.

2. An Increasing Role for the ECJ and the *Sense of Urgency* Threshold

The above discussion presents a certain challenge for those who are concerned with the unification of International Law. It describes the activity of *non-judicial bodies*, which may have *no grasp of, or interest in*, upholding the unity of International Law. This situation simply cannot sit comfortably with the informal mechanism described by Guillaume and Simma, which is based on *judges*, and their *willingness* to uphold the unity of International Law. What then, should, or could be done about it?

As stated above, the informal mechanism described by Guillaume and Simma is based on judges, and their willingness to uphold the unity of international law. Maybe it is time to remind ECJ judges of their role in this respect. Despite the ECJ's own constitutional approach, the author believes that this institution could take several steps, even if declaratory in nature, to mitigate some of the impression made by the Commission, as well as to provide some guidance.

The author does not expect the ECJ to completely abandon its own constitutional approach. Rather, it is claimed that the ECJ should consider the explicit adoption of the *sense of urgency* threshold, sending the message that where the integrity of the EU regime is not being threatened, the ECJ, and the Commission, should attempt to accommodate the decisions of non-EU tribunals as much as possible.

As stated above, the author believes that this is by no means a radical step, as the ECJ is, implicitly, already following the *sense of urgency* test. The use of this test seems useful as it allows the necessity to balance two elements that seem, at times, to be in competition; the need to respect the authority of competing international sources of authority on the one hand, and the need to protect those fundamental elements in one's regime, on the other.

The need to balance these two elements seems to be currently missing from the Commission's perception of its job description as the *guardian of the treaties*. The explicit adoption of the *sense of urgency* also by the Commission

will therefore enable it to guard the EU treaties, but to do so in context, and in understanding of the wider international environment.

3. Hold Actions Until Political Negotiations Are Done

Another, albeit less legal, solution for this situation is simply to hold any action until the EU Member States come out with a clear answer. The fragmentation of International Law is first and foremost the result of uncoordinated law-making. Turning the wheels back to the law-making point of negotiations therefore, may resolve these specific conflicts.

The above discussion presents a picture of normative conflicts between different regimes. Although there is a certain legal uncertainty as to which regimes should prevail, the Commission seems very decisive in its views and actions, and as to the desired result. There is no doubt that the Commission represents the EU's interests; but the EU, one must remember, is a collective of States, and is made of a collective of rules that were agreed upon by these States. It is not clear at all that the Commission's position on this matter represents the will of its Member States, and the level of their consent to be bound by this legal regime. For example, the *Eureka* Tribunal invited the Netherlands' government to express its opinion regarding the validity of the *Netherlands-Slovakia BIT* in light of the Commission's arguments. In a reply letter, the Netherlands' Ministry of Economic Affairs stated that the relevant EU Law should not be seen as terminating the BIT, and that the EU must respect International Law, "in particular with respect to the termination and suspension of international treaties."¹³² The Netherlands' view was indeed enforced by an informal confirmation granted by Slovakia, the respondent in this case, that indeed the BIT between these States is still valid.¹³³

Both States also agreed that this issue should be resolved by the States themselves, through a process of political negotiations.¹³⁴ The Commission published on its website that "Regarding this issue, the Commission is in close contact with the Member States and has repeatedly reiterated that the incompatibility of *intra*-EU BITs with EU law means that they have to be brought to an end."¹³⁵

¹³² *Eureka*, Award on Jurisdiction, *supra* note 75, para. 157.

¹³³ *Ibid.*, para. 159.

¹³⁴ *Ibid.*, paras 162, 163, 166, 167.

¹³⁵ European Commission, 'Bilateral Investment Treaties between EU Member States (intra-EU BITs)', available at http://ec.europa.eu/finance/capital/analysis/monitoring_activities_and_analysis/index_en.htm (last visited at 23 October 2016).

In light of the above, the Commission's decision to intervene in these disputes and to take legal action against certain Member States seems questionable. The Commission is aware of the fact that this issue is currently under discussion, and it is certainly unclear that the Commission's view will prevail eventually. Why then, take such drastic action? Why not wait for the *sovereign*, the Member States in this case, to express their opinion?

Holding back from any further action at this stage seems both politically and legally appropriate. One must remember that the use of complex treaty interpretation rules, or normative conflict resolution rules, is necessary only where the ordinary meaning of the treaty is not clear. The fact that negotiations are taking place, and a practical, politically accepted solution may be agreed upon by the Member States, seems not only politically preferable, but also legally correct as it will save treaty interpreters the need to read (unknown) meaning into current legal lacunas. At the same time, it is important to remember that such a concrete solution will apply only to the currently discussed legal conflicts, and will not be useful in order to resolve the wider problem discussed in this paper, which is the isolationist, supremacist legal approach presented by the Commission.