BOOK REVIEWS

NICOLAS LEVRAT, YULIYA KASPIAROVICH, CHRISTINE KADDOUS AND RAMSES A WESSEL (EDS), *THE EU AND ITS MEMBER STATES' JOINT PARTICIPATION IN INTERNATIONAL AGREEMENTS (HART 2022)*

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TABLE OF CONTENTS

Indhold

I. INTRODUCTION

'Torn between two lovers': as the title of the introductory chapter aptly puts it, the European Union (EU) and its Member States are subject to both EU

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and international law when participating in international agreements.[1] Indeed, EU external relations law finds itself at the intersection of these two fields of law which results in complex legal constellations. These complexities are exactly the topic of the volume on 'The EU and its Member States' Joint Participation in International Agreements' edited by Nicolas Levrat, Yuliya Kaspiarovich, Christine Kaddous, and Ramses A Wessel.[2] The volume collects the output of an online conference on the same topic organised in November 2020 at the Global Studies Institute of the University of Geneva. In the spirit of 'joint participation', each chapter of the volume has been written by a team 'more or less made up of a senior and a more junior scholar', a set-up that this reviewer is appreciative of.[3]

The introductory chapter of the volume, written by all four editors, identifies the two core themes of the book. The volume tackles, on the one hand, competence allocation in the context of mixed agreements and in the EU's international relations more broadly and, on the other hand, the differing international and EU law perspectives on how to integrate the EU with its legal specificities into the international legal order.[4] Accordingly, the edited book has two parts on mixed agreements in the light of EU and international law respectively (Part I and II). Part III of the edited volume subsequently offers insights in the EU and its Member States' parallel participation in international agreements more broadly. Finally, EU international agreements in uncertain times are discussed (Part IV). In essence, the concrete and practical issue that the volume focusses on is the 'joint

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1 Nicolas Levrat, Yuliya Kaspiarovich, Christine Kaddous and Ramses A Wessel, 'Introduction: Torn between Two Lovers: The Application of both EU and International Law to the Participation of the EU and its Member States in International Agreements' in Nicolas Levrat and others (eds), *The EU and Its Member States' Joint Participation in International Agreements* (Hart Publishing 2022) 1–20 <http://www.bloomsburycollections.com/book/the-eu-and-its-member-states-joint-participation-in-international-agreements> accessed 26 February 2022.

2 Levrat and others (n 1).

3 Nicolas Levrat et al., 'Introduction: Torn between Two Lovers...' in ibid 12.

4 ibid 2–11.

participation of the EU and its Member States, in any form (mixed agreements, parallel participation, succession)' and 'the need of a converging approach between the two perspectives [of EU and international law]'.[5] It is thus 'restricted to issues related to international treaty participation and implementation'.[6]

The volume contributes to the vast amount of scholarly writing on the relationship between EU and international law[7], and to the extensive literature on mixed agreements[8], by providing a comprehensive update of the state of the art on these issues. The fast-moving international stage pushes EU external relations law scholarship to remain dynamic and to keep pace with rapid geopolitical developments. Inevitably, some individual chapters could already be updated in the light of changing or new (international) circumstances. However, this is simply proof of how much research in this

5 ibid 11.

6 ibid.

7 Such as: Martti Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer Law International 1998); Malcolm D Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013); Inge Govaere and others (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers 2014); Christine Kaddous (ed), *The European Union in International Organisations and Global Governance: Recent Developments* (Hart Publishing 2015); Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (First paperback edition, Cambridge University Press 2018); Inge Govaere and Sacha Garben (eds), *The Interface between EU and International Law: Contemporary Reflections* (Hart 2019).

8 Such as: David O'Keeffe, Henry G Schermers and Rijksuniversiteit te Leiden (eds), *Mixed Agreements* (Kluwer Law and Taxation Publishers 1983); Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States* (Kluwer Law International 2001); Eleftheria Neframi, *Les accords mixtes de la Communauté européenne: aspects communautaires et internationaux* (Bruylant 2007); Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and Its Member States in the World* (Hart 2010); Niki Aloupi and others, *Les accords internationaux de l'Union européenne* (2019); Merijn Chamon and Inge Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill Nijhoff 2020).

field is needed and the edited volume is more than capable of bringing scholars up to speed with the current situation.

The relationship between international and EU law is an important leitmotif and focal point of the volume (Section II). As this review will show, two additional, and related themes can however be identified throughout the individual contributions. The book's chapters contrast the effectiveness of the EU as a single international actor with the autonomy of the Member States (Section III), and with the autonomy of the EU legal order (Section IV). As Allan Rosas writes in the foreword, it is important that the volume dedicates academic attention to these themes as 'the great complexity of the institutional and other aspects of EU and Member States' external relations […] contributes to the formidable problems the EU is facing in trying to assert a role as a global player'.[9]

II. First overarching theme: the Relationship between EU and International Law as regards Joint Participation in International Agreements

Throughout the book's chapters, the tension between the Member States' double status as Member of the EU and subject of international law is explored. Unlike most international organisations, the EU has legal personality in accordance with Article 47 of the Treaty on European Union. This legal personality results in the specificity and autonomy of EU law in an international system organised around states. At the same time, EU law is considered internal law in this international legal system which means that Member States cannot invoke their obligations under EU law to justify their potential violations of international law.[10] As appears from the edited volume, mixed agreements confront Member States the most with the

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9 Allan Rosas, Foreword in Levrat and others (n 1) v.

10 See Article 27 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331; Nicolas Levrat et al., 'Introduction: Torn between Two Lovers...' in ibid 18.

tension caused by this double status.[11] The editors therefore suggest that it might be time for international law to come to terms with the specificity of the EU.[12] How the international order should proceed to do so, is a question that the book leaves rather open. Indeed, in the book's introductory chapter, the editors put forward that 'it is far from certain that the EU will be able to unilaterally impose the recognition of its genuinely original and unique nature on foreign partners'.[13] They do, however, hold that the contributions to the volume 'point to the need of a converging approach between the two perspectives'.[14]

Such a converging approach could make a difference for the EU's international partners. Currently, these partners are confronted with a highly complex reality when entering into relations with the EU. Chapter one, in which Heliskoski and Kübek propose a revisited typology for EU mixed agreements, is illustrative of this reality.[15] Based on a first criterion, the distribution of competences, Heliskoski and Kübek distinguish 'mandatory mixed agreements', 'facultative mixed agreements', and 'false mixed agreements'.[16] A second criterion, the number of parties, allows for a differentiation of mixed agreements into the categories of 'complete mixed agreements', 'incomplete mixed agreements', 'bilateral mixed agreements', and 'multilateral mixed agreements'. In the case of incomplete mixed agreements, the EU is a party to an international agreement alongside only a part of its Members.[17] Chapter eleven, by Molnár and Brière, offers a very specific example of this highly complex reality when the EU and its Member

11 Yuliya Kaspiarovich and Ramses A Wessel, 'Unmixing Mixed Agreements: Challenges and Solutions for Separating the EU and its Member States in Existing International Agreements' in ibid 299.

12 Nicolas Levrat et al., 'Introduction: Torn between Two Lovers...' in ibid 19.

13 ibid 1.

14 ibid 11.

15 Joni Heliskoski and Gesa Kübek, 'A Typology of EU Mixed Agreements Revisited' in ibid 23–42.

16 ibid 24–34.

17 ibid 34–41.

States are parties to mixed agreements.[18] As Molnár and Brière explain, both the EU and its Member States will participate in the new Review Mechanism of the UN Smuggling of Migrants Protocol. It is, however, still unclear how the specificities of mixity will be taken into account for the review and for the allocation of responsibility as implementation of the Protocol occurs by both EU and national acts.[19]

An additional layer of complexity is added when a Member State leaves the EU legal order and thus returns to its status as a subject of international law only. Kaddous and Touré tackle this topical issue in Chapter fourteen by addressing the status of the United Kingdom (UK) regarding EU mixed agreements after Brexit.[20] When it comes to bilateral mixed agreements between the EU and partner third countries, Member States are formally parties but they do 'not enjoy the autonomy that is attached to this under international law'. Since the UK was thus only a party to these agreements as an EU Member State, it was necessary to negotiate new agreements with these partner countries.[21] More generally, Kaspiarovich and Wessel cover the question of how to 'unmix' mixed agreements in Chapter fifteen.[22] They argue that it would be beneficial for the EU Institutions to be more precise on the division of competences to facilitate the withdrawal of a Member State and the more active role that national parliaments seem to play recently.[23]

As Vanackère and De Witte show in Chapter six, the tension between EU and international law does not only occur within the context of the EU's

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18 Tamás Molnár and Chloé Brière, 'The New Review Mechanism of the UN Smuggling of Migrants Protocol – Challenges in Measuring the EU's and its Member States' Compliance' in ibid 207–230.

19 ibid 224–225.

20 Christine Kaddous and Habib Badjinri Touré, 'The Status of the United Kingdom Regarding EU Mixed Agreements after Brexit' in ibid 271–286.

21 ibid 275–277 and 279–284.

22 Yuliya Kaspiarovich and Ramses A Wessel, 'Unmixing Mixed Agreements...' in ibid 287–304.

23 ibid 304.

external relations.[24] Using the Single Resolution Fund and the conclusion of MoUs for Financial Assistance as examples, the authors illustrate how the EU's economic policy has turned to international agreements between Member States but outside the EU's legal framework.[25] Consequently, complexities similar to those in the case of international mixed agreements arise, for instance, in relation to the allocation of responsibility.[26]

III. Second overarching theme: the Effectiveness of the EU as a Single International Actor vs. the Autonomy of the Member States

Many contributions of the edited volume appear to contrast the EU's effectiveness as a single international actor with the autonomous external action of the Member States. Although Member States are generally protective of their own foreign policy, EU membership implies certain limitations to autonomous external action. For instance, in the second chapter, Kuisma and Larik offer a refreshing view on the much-analysed ERTA doctrine.[27] They argue that the doctrine is essentially meant to safeguard the EU's internal legislative work, which includes the Member States in the Council. Consequently, in its case-law, the Court of Justice (CJEU) reconciles the principle of conferral with the furthering of EU objectives.[28] The third chapter, by Öberg and Klamert, builds further on the idea of pre-empting autonomous international action by the Member States.[29] When acting internationally, Member States are required to respect EU law 'as it is but also to foresee or anticipate its future development' and

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24 Flore Vanackère and Bruno De Witte, 'EMU "Mixity" - Overlap Between EU and Member States Action in Economic Governance' in ibid 117–130.

25 ibid 118–126.

26 ibid 126–129.

27 Mirka Kuisma and Joris Larik, 'The Continuing Contestation of ERTA - Conferral, Effectiveness and the Member States' Participation in Mixed Agreements' in ibid 43–58.

28 ibid 44, 46 and 56–58.

29 Marja-Liisa Öberg and Marcus Klamert, 'Foreseeability and Anticipation as Constraints on Member State Action under Mixed Agreements' in ibid 59–76.

to abstain from acting internationally at least when there is a concerted strategy in the Council.[30]

Even when autonomous external action of the Member States falls within the aforementioned limitations, such action can at times interfere with the EU's effectiveness as a single international actor. Several contributions in the edited volume show that the competence allocation between the EU and its Member States has an important impact on the EU's reliability as an autonomous international actor.[31] For example, in Chapter four, Damestoy and Levrat discuss the mixed nature of the EU-Canada Free Trade Agreement and how the Walloon veto showed that involving national parliaments only at the very end of the conclusion procedure endangers the EU's reputation as a reliable trading partner.[32] Therefore, they propose to organise these parliaments' involvement at an earlier stage by making use of the existing Early-Warning Procedure for internal legislative work.[33] Furthermore, as Chamon and Cremona point out in the fifth chapter, the EU has to accept its joint representation with the Member States in a multilateral forum covering issues of shared competence in the specific set-up of the *AMP Antarctique* case.[34] Indeed, mixed representation in the Commission of the Canberra Convention (for the establishment of Marine Protected Areas) is obligatory following the CJEU's judgment.[35]

In these contexts of joint participation, it is difficult for the EU to appear as a single actor. This is illustrated in the edited volume's Chapter ten in which Koutrakos and Soņeca describe the specific example of the Istanbul Convention on preventing and combating violence against women and

30 ibid 59 and 74–75.

31 Nicolas Levrat et al., 'Introduction: Torn between Two Lovers...' in ibid 2–5.

32 Manon Damestoy and Nicolas Levrat, 'The Mixed Nature of the EU-Canada FTA - Between Competences Distribution and Democratic Legitimacy' in ibid 77–96.

33 ibid 93–95.

34 Merijn Chamon and Marise Cremona, 'The Representation of the EU and its Member States in Multilateral Fora - The AMP Antarctique Effect' in ibid 97–114.

35 ibid 102–107.

domestic violence.[36] The conclusion of the Istanbul Convention was the object of an Opinion procedure before the CJEU (*Opinion 1/19*) and it is characterised by disagreements amongst the Member States as well as the EU Institutions. One of these disagreements concerns the fundamentally important question of the Council's margin of discretion to decide whether to exercise EU shared competence externally.[37] Schaefer and Odermatt argue in Chapter seven that, linguistically, the use of the term 'EU Party' can accommodate shifts in competences and show unity 'to create the perception of a single party'.[38] They conducted the impressive exercise of analysing a large group of mixed trade agreements and concluded that whilst the Member States are fully-fledged parties to these agreements, the use of the term 'EU Party' allows the EU 'to maintain the bilateral character of the mixed agreements'.[39]

Finally, it is also important to consider the potential impact of autonomous actions on behalf of the Member States on the EU's credibility as a defender of good global governance. In this regard, Fahey and Brsakoska Bazerkoska fill a gap in the literature by examining the social and legal relevance of the principle of sincere cooperation in the context of China's Belt and Road Initiative in Chapter thirteen.[40] They argue that the EU's Member States 'increasingly disrespect the duty of cooperation within trade and at its margins' leading to an erosion of the legal principle.[41]

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36 Panos Koutrakos and Viktorija Soņeca, 'The Future of the Istanbul Convention before the CJEU' in ibid 189–206.

37 ibid 195–200.

38 Sabrina Schaefer and Jed Odermatt, 'Nomen est Omen? The Relevance of "EU Party" in International Law' in ibid 131–150; Sabrina Schaefer and Jed Odermatt, 'Nomen est Omen? ...' in ibid 132.

39 ibid 149-150.

40 Elaine Fahey and Julija Brsakoska Bazerkoska, 'Social and Legal Relevance of Sincere Cooperation in EU External Relations Law in an Era of Expanding Trade - The Belt and Road Initiative in Context' in Levrat and others (n 1) 253–270.

41 ibid 253–256.

IV. Third overarching theme: the Effectiveness of the EU as a Single International Actor vs. the Autonomy of the EU Legal Order

In the introductory chapter, the editors write that they 'are aware of and understand the reasons for the CJEU to stress the importance of the EU's autonomy from international law'.[42] Consequently, they do not 'pretend[…] to be able to align the international and EU law horizons'.[43] In the book, this strain between the EU's effectiveness as a single international actor and the necessity to safeguard the autonomy of the EU legal order and its specific characteristics comes forward the most in chapters eight and twelve.

In Chapter eight, Soloch and Mbengue examine whether the EU's participation in international dispute settlement mechanisms matters for the conformity of these mechanisms with EU law.[44] The CJEU's jurisprudence on Investor-State Dispute Settlement lowered the predictability for stakeholders in this regard: the conformity of an international dispute settlement mechanism with EU law is now dependent on its actual impact on the EU's legal system rather than on the formal criterion of the EU's participation.[45] As regards the EU's accession to the European Convention on Human Rights (ECHR), the principle of autonomy is precisely the reason it is burdensome for the EU to accede and become an ECHR party together with its Member States. Chapter twelve, written by Pergantis and Johansen, consists of a fresh take on the EU's accession to the ECHR.[46] The authors explain that 'a more elaborate set of internal EU law rules on responsibility

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42 Nicolas Levrat et al., 'Introduction: Torn between Two Lovers...' ibid 11.

43 ibid.

44 Bartosz Soloch and Makane Moïse Mbengue, 'Conformity of International Dispute Settlement Mechanisms with EU Law - Does the EU's Participation Really Matter?' in ibid 151–170.

45 ibid 162–170.

46 Vassilis Pergantis and Stian Øby Johansen, 'The EU Accession to the ECHR and the Responsibility Question - Between a Rock and a Hard Place' in ibid 231–250.

allocation' in the context of the ECHR should be adopted to safeguard the EU's autonomous legal order.[47]

When it comes to establishing such internal rules on responsibility allocation, Chapter nine by Delgado Casteleiro and Contartese offers valuable insights.[48] These authors argue that 'the EU [should] bear responsibility internationally only to the extent that the CJEU effectively controls how Member States participate [*stricto senso*] and "participate" [*lato sensu*] in international agreements concluded by the EU'.[49] As Pergantis and Johansen point out, fully internalising the issue of the allocation of responsibility could indeed offer a solution to ensure respect for the principle of autonomy. It is nevertheless not a perfect one: relying on internal rules can undermine individuals' right to an effective remedy as these rules form additional obstacles and could lead to a 'blame game' between the EU and its Member States.[50] This reviewer considers that this is crucial to keep in mind because the EU's autonomy and effectiveness at the international stage should not be at the expense of EU or third country citizens.

V. Concluding Remarks and Avenues for Further Research

In today's world, it is considered of exceptional importance that the EU and its Member States effectively jointly participate at the international stage. It is the role of (legal) scholarship to constructively reflect on how to continue organising and improving this participation to ensure the EU's relevance as an international legal actor. The edited volume should be applauded for the manner in which it addresses a large variety of issues and complexities pertaining to mixed agreements and the relationship between the

47 ibid 243–246.

48 Andrés Delgado Casteleiro and Cristina Contartese, 'International Responsibility of the EU and/or its Member States in International Agreements – From Joint Participation to "Participation"' in ibid 171–186.

49 ibid 180–186.

50 Vassilis Pergantis and Stian Øby Johansen, 'The EU Accession to the ECHR...' in ibid 247–249.

international and the EU legal order. Since the book is a volume with many different individual contributions, a fully coherent and unifying view on how to address these issues is lacking. Although this mainly goes to show how intricate these issues are, this book review sought to contribute to the debate by juxtaposing - on the basis of the volume's chapters - the EU's effectiveness as a single international actor with the autonomy of the Member States on the one hand, and the autonomy of the EU legal order on the other hand.

In addition, this reviewer regrets the rather limited insights into the concrete joint implementation and 'day-to-day management' of international agreements. This is a major gap in EU external relations law scholarship more generally and, as Allan Rosas states, 'it is to be hoped that scholars do not limit their focus to legal rules and official documents while turning a blind eye to the actual practice of Union and Member States' institutions and the "reality on the ground"'.[51] Be that as it may, the book covers a large number of observations on more overarching controversies and it presents an array of constructive suggestions on how to continue organising and improving the joint participation of the EU and its Member States in international agreements.

Finally, the volume offers considerable avenues for further research in EU external relations law. It became clear from several chapters that the ambit of certain legal principles, such as the Member States' duty to anticipate and to sincerely cooperate, is not yet fixed. The proliferation of soft law instruments in the EU's international relations presents a challenge in this regard. Moreover, the recent *Opinion 1/19* on the Istanbul Convention gives more insight into the Council's margin of discretion to decide whether to exercise EU shared competence externally. As regards the EU's international responsibility, Hoffmeister's concept of 'normative control' could be further explored and the parallel with the EMU could be delved into when it comes

[51] Allan Rosas, Foreword in ibid v.

to the concrete 'day-to-day management' of mixed agreements.[52] From the perspective of international law, it could be considered further how the international legal system can come to terms with the specificity of the EU while safeguarding citizens' legal remedies. In short, the edited volume offers a stimulating read and considerable food for further thoughts on how to organise the EU's joint participation in international agreements.

[52] Frank Hoffmeister, 'Litigating against the European Union and Its Member States - Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 European Journal of International Law 723.