Jan Klabbers. ***Treaty Conflict and the European Union.*** Cambridge: Cambridge University Press, 2009. Pp. 260. $42.00. ISBN: 9780521728843.

This volume aims to contribute to an understanding of the relationship and conflict between the obligations of EU Member States arising under international treaties and their obligations under EU law. In the preface the author, Jan Klabbers, admits that at the outset he did not have a thesis but rather 'an intuition: the intuition that the EC Court usually makes things too simple for itself by ignoring the international law aspects'. When reading these lines, some of the more recent instances confirming such uneasiness, including the 2008 *Kadi*, *Interanko* and *FIAM* cases, immediately come to mind.

In Part I ('Setting the Scene') Klabbers stresses that it is not a peculiarity exclusive to the European Court of Justice that it does not take into account conflicting norms from other treaty regimes, but rather this is common to other (international) courts as well (at 4). This practice has thus rightly been put at the centre of the debate on the fragmentation of international law (at 7). Within this debate, however,

the relationship between the international legal obligations of the EU Member States and their EU obligations has so far not gained as much attention from international lawyers as it deserves and has mainly remained a topic addressed by Community lawyers. It is for this reason that the author's intent to examine this relationship from both perspectives, the international and European Union perspectives, distinguishes this publication from other recent contributions on this topic and fills an important gap in the literature.

Klabbers makes two main arguments in his study: firstly, the law of treaties is not very well equipped when it comes to solving difficult treaty conflicts, and at the end of the day only a political decision can solve such conflicts; secondly, EU law cannot always prevail over international law.

These two arguments are premised on the distinction between conflicts between higher *values* and *coordination problems* which may both result in treaty conflicts (at 12). For treaty conflicts that are an expression of value conflict, such as in the case of a clash between a human rights and a trade treaty, the provisions of the 1969 Vienna Convention on the Law of Treaties (VCLT) cannot offer any helpful guidance.

Under the title 'Understanding Treaty Conflict', Klabbers provides an overview of different approaches to treaty conflict, concluding that neither doctrine nor jurisprudence offers a 'ready-made' method to deal with treaty conflict (at 18 *et seq.*). He concludes that the legal order can accommodate diverging values and create methods for conciliation, discussion and debate, but it 'cannot place one value systematically over another one without becoming incoherent' (at 46).

Part II ('International Law') deals with the international law perspective on treaty conflicts. Here Klabbers first sketches the pre-VCLT regime, then the drafting of the VCLT, and finally assesses the post-VCLT developments. His discussion of the classic (pre-VCLT) cases leads Klabbers to conclude that the courts approached treaty conflict quite similarly to the classic authors, for instance Grotius and Vattel, meaning that they generally accepted the co-existence of conflicting treaties and then looked for ways to reconcile them via interpretation. The courts were inconsistent in deciding whether the earlier or later treaty should prevail and whether a hierarchy between treaties could be established. Consequently, doctrine has been trying ever since to find solutions as to how to deal with the issue that the VCLT too eventually left unresolved.

Most convincing for the author, and also adhering to the VCLT, is the 1977 proposal put forward by Zuleeg[1] to apply the principle of political decision. This means that a state must choose which of the conflicting commitments it will honour and incur state responsibility towards the state towards which it violates its treaty obligations. For Klabbers the distinctive benefit of the principle of political decision is that it allows states and decision-makers (including courts) to choose the treaty that responds best to the circumstances. It also permits other actors, including civil society, to advocate for the right choice and thus to influence the international decision-making processes so that this can respond to the political actuality (at 90).

At the close of this part, Klabbers welcomes the ILC's proposal in its report on fragmentation concerning the 'principle of systemic integration' in interpreting treaties: meaning that according to Article 31(3)(c) of the VCLT 'any relevant rules of international law applicable in the relations between parties' should be taken into account – rather than claiming that certain regimes or (common) values should be given automatic preference (at 111).

Finally, the author stresses that the relative inefficiency of the VCLT in addressing treaty conflicts may not be such a bad thing because it 'opens up space for politics and civil society'. Only within the sphere of politics can serious treaty conflicts be solved (at 112).

In Part III ('EC Law') Klabbers seeks to show that the ECJ and the Court of First Instance

[1] Zuleeg, 'Vertragskonkurrenz im Völkerrecht', 20 *German Yearbook of International Law* (1977), 246.

(CFI) have not yet internalized the principle of systemic integration, as they mostly limit themselves to applying EC law. He first deals with anterior treaties, i.e. treaties concluded by the Member States prior to their membership. With respect to these treaties the EC has laid down its political decision in Article 307, which states that the rights and obligations deriving from these treaties will remain untouched in the event of conflict with EC law (Article 307 para 1). The Member States, however, must in cases of incompatibilities take all appropriate steps to eliminate them (Article 307 para 2). The ECJ made clear that paragraph 1 applies only to the rights of third states parties and the corresponding obligations of Member States, meaning that the Member States are allowed only to invoke their obligations towards third states against the EC treaty, but not their rights. For Klabbers such an assumption that treaties can always be divided into bundles of rights and corresponding obligations between the parties is most troublesome (at 121; such view ignores that some treaties are concluded to protect the interests of the international community, such as human rights treaties, environmental or disarmament treaties); equally disturbing is the general assumption of the prevalence of the EC Treaty (at 122).

Klabbers further notices a shift in the jurisprudence of the ECJ: whereas in previous cases the court was concerned with the question whether Article 307 para 1 applies, and the pre-Community agreements remain valid, the emphasis in the decisions has now moved to paragraph 2, namely the obligation to modify the agreements or even to denounce them (at 135 *et seq.*).

In search of explanations for such a Eurocentric approach on the part of the ECJ Klabbers identifies two possible explanations: a sociological one and a technical one (at 140 *et seq.*). The sociological explanation is based on the establishment of a firm interpretative community among EU lawyers (not only at the courts but also academics, officials, private practitioners) who all identify with the European project, intellectually and socially. This means that despite their international law background such lawyers within the EU interpretative community limit their international law perspective. The technical explanation, and the most prominent argument among EU lawyers, however, is that EC courts lack jurisdiction to interpret and apply instruments other than EU instruments. The most worrisome consequence of such an argument can be best illustrated by reference to the *MOX Plant* case (at 147). In this case the ECJ had claimed its exclusive jurisdiction to decide disputes that might affect the EC legal order. If at the same time the argument was sustained that EC courts lack jurisdiction to apply law other than EC law this would lead to a gap in the system of legal protection with regard to those elements of the case that are not covered by EC law.

Klabbers deals separately with the UN Charter and the European Convention on Human Rights, claiming that strong arguments exist to show that in the event of conflict EU law should step aside. However, here too he identifies the same attitude of the EC courts, namely that their principal concern is the primacy of EU law and that even if the two instruments are given priority, this is claimed to be done on the basis of EC law. He illustrates this point with the UN economic sanction cases (at 141). He does however admit that while in general it would be desirable to be open to UN law, there is also some 'room for finding that a more receptive attitude towards international law . . . is not without its dangers' (at 159). Regarding the European Convention, he is bothered by the methodology behind applying the Convention rights, namely as an exception or as a justification for the restriction of common market freedoms. What astonishes him even more is the fact that if one looks at the *Bosphorus* case it appears that the European Court of Human Rights also seems to place EU law above human rights (at 172).

In a resigned manner Klabbers concludes that probably the only way out of this case law that 'seems to have neither a natural starting point nor a natural point of conclusion' would be a strict, traditional dualism, that would 'radically dismiss one of the normative orders involved', as advocated by Advocate General Maduro in his *Kadi* opinion. This would close

the European legal order from external influences, unless these have become part of EU law (at 174 *et seq.*).

In the next chapter Klabbers turns to a topic that has thus far received even less attention then the pre-Community treaties, that is the treaties that Member States have concluded after becoming members. Surprisingly, it is here, on page 176 out of 230, that Klabbers for the first time suggests that conflicts between EC law and international treaties are better understood as conflicts between international law and municipal law and not as treaty conflicts. Paradoxically, this does not provide the Community with a leeway under international law but ties it even more firmly to the law of treaties since Article 27 VCLT does not allow parties to international agreements to invoke provisions of their internal law as a justification for their failure to perform a treaty unless they have been in clear violation of their internal distribution of competence (Article 46 VCLT). In other words, the more the Community legal order emancipates itself from general international law the more the Community and its Members are bound by it. Recalling the clear position of the ECJ, that it has no jurisdiction to interpret the provisions of international treaties that do not form part of EC law (with the known GATT 1947 exception), we will have to wait to see whether Klabbers' diagnosis will ever be reflected in the Court's practice.

At the end of this monograph he describes the actual practice regarding posterior treaties, drawing mostly from Finnish and Community treaty practice. The most problematic of these are of course treaties with third parties. Again, he warns that in such cases the Court tends not even to mention international law or to consider that despite being found in violation of Community law such a treaty may still be binding on the Member States (at 218).

In conclusion, Klabbers does admit that as a matter of political choice the EU is of course allowed to fence itself from international law, but warns that some of the examples would be the subject of much more criticism or not even tolerated if they came from a state. He illustrates this by pointing to the criticism of similar practices by the US. There is certainly some irony in this, since the EU does enjoy significant support for its claim that it supports international law and to a great extent it represents a model of international cooperation for the non-European world. However, Klabbers stresses, the more the EU approaches a regular state, the less its non-observance of international law will remain without consequences (at 226).

At the end of the book, one gets the impression that not much is left from Kelsen's pyramid of norms, that instead the relationship between international and EU law is better reflected by Escher's surreal picture of stairways in his famous lithograph 'Relativity', as the author himself suggests with regard to the relationship between EU, UN and European human rights law (at 173). This is by no means due to a failure on the part of the author to properly reconstruct the field, but is rather a reflection of the field as it currently stands.

Although the relationship between international law and European law has been a popular topic in recent years, this book provides a valuable introduction into more neglected questions. It is also a good example of what might be called a more holistic approach to the overlap of EU and international law. However, it is still quite a way from constituting a 'duography', as the author suggests. One aspect which is missing, for instance, is an account of the international practice with regard to those issues, i.e., how international courts and tribunals deal with questions of EU law, like investment arbitration tribunals, ITLOS, etc.

Also missing is an in-depth discussion of the means to facilitate the procedure for political decision in the EU as a solution for conflicts between international and EU norms. It is here, most likely, that the main contradiction of this book is hidden. On the one hand, Klabbers advocates a doctrine of political choice, on the other hand he is not very frank about the political nature of the EU (or better, the EC) since he sees it more as an international organization[2] than as a

[2] This view can also be confirmed by the author's recent second edition of *Introduction to International Institutional Law* (2009).

polity. This probably also explains why he has abstained from dealing with more theoretical issues regarding the nature of the EU, something one might have expected given the theoretical part of the book on international law, especially since one cannot insist on a political choice without addressing the foundations of the relevant legal order or polity. All in all, the book is a very valuable read, affording insights into several aspects of this complicated relationship and spurring further research on the topic.

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