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*Editorial*

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**In this Issue**

**Dispatch from the Euro Titanic: And the Orchestra Played On**

These are challenging times for the European Union. Internally, important, even fundamental, decisions are on the agenda as the Union struggles with the Euro crisis and its underlying economic fissures. (Mercifully, the scapegoating of the USA as an escape from facing Europe's very own breathtaking governmental and private-sector financial and fiscal irresponsibility has all but disappeared – mercifully, since facing reality unflinchingly is a necessary condition for dealing with it effectively.) What is subprime in Europe is the decisional structure of the Union: the European Politburo – President of the Commission, newly-minted President of the Council, tired-old-more-senseless-than-ever rotating Member State Presidency, recycled High Representative answerable to two bosses and thus to none – has proven at best irrelevant to the real actors in you know where (Berlin, Paris, the formidable Merkel, the erratic Sarkozy), at worst distracting – was the able President of the Council's productive moves really helped by the forced tango with his opposite number at the Commission? About a year after the entry into force of the Treaty of Lisbon, it is clear that at least some of the principal objectives intended by the new decisional structure at the top are turning out to be as ineffective (some claim laughable) as critics anticipated.

Externally, the world *sans-Amerique* (or at least with a terribly weakened America) is not waiting for Europe either. Here, the non-handshake of Catherine Ashton and Saeed Jalili, Iran's representative to the resumed talks, was an image emblematic at many levels of the depth of the international challenges and Europe's worrying circumstance.

Be that as it may, on the Institutional Deck – the orchestra plays on. The tune, it would appear, is familiar: the usual melodies associated with Commission, Council, Parliament flaps. This time, however, the harmonies might be more out of tune than usual. To those who remember vinyl, the same old albums, perhaps, but with some pretty deep scratches.

A new Framework Agreement was concluded recently between Parliament and the Commission. *Normale amministrazione* – a quinquennial affair. In and of itself, there

is nothing untoward in such agreements, which are designed to facilitate smooth inter-institutional cooperation.<sup>1</sup> The present Agreement, like its predecessors, is wide ranging. In the Explanatory Statement to Plenary, the legal basis, rationale and permitted scope of such Agreements was usefully stated.

Until the Lisbon Treaty and the new legal basis of Article 295 TFEU, the Treaties did not explicitly encourage the EU institutions to conclude interinstitutional agreements. *Interinstitutional agreements are not allowed to alter primary law stipulations*; nevertheless, they do often clarify them. The draft revised framework agreement on relations between Parliament and Commission, which the Conference of Presidents has forwarded to the Committee on Constitutional Affairs with a view to having it approved in plenary, is actually the fifth agreement of this type between the two institutions. It strictly reflects the institutional balance set up by the Lisbon Treaty. The new agreement represents a clear and significant improvement on the relations with the Commission. As all the agreements, the final text tends to be a compromise between the two parts; but this final compromise presents a balanced judgement and a reasoned and coherent implementation of the Treaty of Lisbon. (emphasis added)

One section would be of particular interest to readers of *EJIL* and is worth reproducing in full.

(ii) International agreements and enlargement

23. Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion of international agreements, including the definition of negotiating directives. The Commission shall act in a manner to give full effect to its obligations under Article 218 TFEU, while respecting each Institution's role in accordance with Article 13(2) TEU.

The Commission shall apply the arrangements set out in Annex 3.

24. The information referred to in point 23 shall be provided to Parliament in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take Parliament's views as far as possible into account. This information shall, as a general rule, be provided to Parliament through the responsible parliamentary committee and, where appropriate, at a plenary sitting. In duly justified cases, it shall be provided to more than one parliamentary committee.

Parliament and the Commission undertake to establish appropriate procedures and safeguards for the forwarding of confidential information from the Commission to Parliament, in accordance with the provisions of Annex 2.

25. The two Institutions acknowledge that, due to their different institutional roles, the Commission is to represent the European Union in international negotiations, with the exception of those concerning the Common Foreign and Security Policy and other cases as provided for in the Treaties.

Where the Commission represents the Union in international conferences, it shall, at Parliament's request, facilitate the inclusion of a delegation of Members of the European Parliament as observers in Union delegations, so that it may be immediately and fully informed about the conference proceedings. The Commission undertakes, where applicable, to systematically inform the Parliament delegation about the outcome of negotiations.

<sup>1</sup> Cf. [www.europarl.europa.eu/en/pressroom/content/20101020IPR88488/](http://www.europarl.europa.eu/en/pressroom/content/20101020IPR88488/).

Members of the European Parliament may not participate directly in these negotiations. Subject to the legal, technical and diplomatic possibilities, they may be granted observer status by the Commission. In the event of refusal, the Commission will inform Parliament of the reasons therefor.

In addition, the Commission shall facilitate the participation of Members of the European Parliament as observers in all relevant meetings under its responsibility before and after negotiation sessions.

26. Under the same conditions, the Commission shall keep Parliament systematically informed about, and facilitate access as observers for Members of the European Parliament forming part of Union delegations to, meetings of bodies set up by multilateral international agreements involving the Union, whenever such bodies are called upon to take decisions which require the consent of Parliament or the implementation of which may require the adoption of legal acts in accordance with the ordinary legislative procedure.

27. The Commission shall also give Parliament's delegation included in Union delegations to international conferences access to use all Union delegation facilities on these occasions, in line with the general principle of good cooperation between the institutions and taking into account the available logistics.

The President of Parliament shall send to the President of the Commission a proposal for the inclusion of a Parliament delegation in the Union delegation no later than 4 weeks before the start of the conference, specifying the head of the Parliament delegation and the number of Members of the European Parliament to be included. In duly justified cases, this deadline can exceptionally be shortened.

The number of Members of the European Parliament included in the Parliament delegation and of supporting staff shall be proportionate to the overall size of the Union delegation.

This is supplemented by Annex 3 to the Agreement:

#### ANNEX 3

##### Negotiation and conclusion of international agreements

This Annex lays down detailed arrangements for the provision of information to Parliament concerning the negotiation and conclusion of international agreements as referred to in points 23, 24 and 25 of the Framework Agreement:

1. The Commission shall inform Parliament about its intention to propose the start of negotiations at the same time as it informs the Council.
2. In line with the provisions of point 24 of the Framework Agreement, when the Commission proposes draft negotiating directives with a view to their adoption by the Council, it shall at the same time present them to Parliament.
3. The Commission shall take due account of Parliament's comments throughout the negotiations.
4. In line with the provisions of point 23 of the Framework Agreement, the Commission shall keep Parliament regularly and promptly informed about the conduct of negotiations until the agreement is initialled, and explain whether and how Parliament's comments were incorporated in the texts under negotiation and if not why.
5. In the case of international agreements the conclusion of which requires Parliament's consent, the Commission shall provide to Parliament during the negotiation process all relevant information that it also provides to the Council (or to the special committee appointed

by the Council). This shall include draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the agreement and the text of the agreement to be initialled. The Commission shall also transmit to Parliament, as it does to the Council (or to the special committee appointed by the Council), any relevant documents received from third parties, subject to the originator's consent. The Commission shall keep the responsible parliamentary committee informed about developments in the negotiations and, in particular, explain how Parliament's views have been taken into account.

6. In the case of international agreements the conclusion of which does not require Parliament's consent, the Commission shall ensure that Parliament is immediately and fully informed, by providing information covering at least the draft negotiating directives, the adopted negotiating directives, the subsequent conduct of negotiations and the conclusion of the negotiations.
7. In line with the provisions of point 24 of the Framework Agreement, the Commission shall give thorough information to Parliament in due time when an international agreement is initialled, and shall inform Parliament as early as possible when it intends to propose its provisional application to the Council and of the reasons therefor, unless reasons of urgency preclude it from doing so.
8. The Commission shall inform the Council and Parliament simultaneously and in due time of its intention to propose to the Council the suspension of an international agreement and of the reasons therefor.
9. For international agreements which would fall under the consent procedure provided for by the TFEU, the Commission shall also keep Parliament fully informed before approving modifications to an agreement which are authorised by the Council, by way of derogation, in accordance with Article 218(7) TFEU.

Several cascading and interlocking issues call for reflection in relation to these portions of the Framework Agreement. The first is the substantive desirability of the procedures put in place for the involvement of Parliament in the international interface of the Union, notably in the negotiation of international agreements. An almost instinctual reaction would be to welcome all measures that increase parliamentary accountability vis. democratic legitimacy. That, indeed, seems to be the underlying rationale of the Agreement. But without careful consideration and reflection, that instinct should be resisted. Parliament is notorious in not internalizing the distinction – and often it is both sharp and justified – between legislation and administration/implementation and here is a case in hand. Its involvement may not necessarily contribute to the effectiveness of the negotiations. It may further hem in the Commission, the principal negotiator of the Union, produce delays and compromise negotiation tactics and overall confidentiality. Its involvement may weaken the clarity of the Mandate of which the Council is typically the author, further compromising the effectiveness of the Commission qua negotiator having to answer to two masters. If true, the interest of the European citizens, their Member States and their Union could be unnecessarily compromised. How real are these dangers is a matter that may be disputed and calls for careful judgment by the institutional stakeholders and experienced observers. Such potential dangers then need to be weighed carefully against any tangible harm to citizens, based on past experience, which

the new arrangements would remedy. What is rather astonishing in this respect is the fact that this Agreement was negotiated in its entirety without Council involvement – arguably contrary to the very Treaty stipulations on interinstitutional agreements<sup>2</sup> – and that the Parliamentary ‘power grab’ seems itself to be instinctual – in the familiar ‘we too’ spirit.

But apart from negotiation effectiveness there is a deeper concern. The distinction between legislative and scrutiny functions on the one hand and administrative implementing functions on the other is not based simply on technocratic effectiveness considerations. It is also based on the need for the body that scrutinized not to be involved in the matter that comes up for scrutiny. On the factory floor, the quality controller should not be the same worker who assembled the component. Most of the Agreements in question do eventually require approval by Parliament. The deeper concern is that by co-opting itself into the negotiating game by specialized committees and delegations, Parliament would weaken its critical scrutiny ability. If Parliament were involved in the negotiations, would it not be all the more difficult to engage in independent scrutiny which at least may be argued is what the Treaty intended? It is not an easy issue – for here, too, there are trade-offs. An up-down, all-or-nothing approval or disapproval of a complex international Agreement by Parliament might be as problematic as an approval of an Agreement in the negotiation of which it had a hand.

But, on resolving this particular trade-off, the Treaties seem to have spoken quite clearly, which brings us to the second issue calling for reflection. Reread carefully Article 23 *et seq.* and the provisions of Annex 3 reproduced above. Would you the reader say that their cumulative effect does not ‘alter primary law stipulations’ in relation to the conduct of international negotiations? Not surprisingly, an angry Council has cried foul and taken the unusual step of publishing a Legal Opinion which argues just that.<sup>3</sup> I let you be the judge of who is right. But I do want to make one comment on a particularly rich detail.

You will have noted Article 23 of the Framework Agreement which contains the following gem:

The Commission shall act in a manner to give full effect to its obligations under Article 218 TFEU, while respecting each Institution’s role in accordance with Article 13(2) TEU.

This, then, is followed by a plethora of arrangements which, at least at face value, seem to do something quite different. Explanation? Some lawyer must have

<sup>2</sup> Article 295 TFEU: ‘The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature.’

<sup>3</sup> For references etc. see the excellent entry in the EU Law Blog: <http://eulaw.typepad.com/eulawblog/2010/11/new-framework-agreement-between-the-european-parliament-and-commission.html>.

felt just a little bit queasy in the face of what might appear to some as not particularly delicate Treaty rewriting. So an insurance policy is put in – should the Agreement be taken to Court it would have to be interpreted in the light of that provision. Whether that device would or should save an *ultra vires* Framework Agreement is questionable. The insurance policy is mostly directed to the professional conscience of the respective legal services of Parliament and Commission. In practice, it is clear that the Commission will follow through with all that they agreed – *pacta sunt servanda*, after all. The splutterings of the Council and its Legal Service are also cause for some mirth. It is true that historically the European Parliament has played the most destructive role among the Institutions in its contempt for any meaningful jurisdictional lines of what the Union may or may not constitutionally be entitled to do. But in this game it found, regularly, willing accomplices in the Commission and the Council. From the culling of baby seals, to emergency food aid, to the notorious Tobacco Advertising Directive which flew in the face of a specific provision of the Treaty, the *ultra vires* pig was regularly koshered by the Council and the Commission (and their respective legal services) when it was found to be appetizing enough, i.e., in furtherance of a worthy cause – of which all the above examples surely were. Its current wrath in the face of this alleged illegal violation of the Treaties, amounting to an assault on the Institutional Balance, is the proverbial kettle calling the pot black. What does not merit any mirth is the lack of credibility of the ECJ in relation to policing jurisdictional lines. The ECJ has a spectacular and courageous record in standing up to recalcitrant Member States bent from time to time on escaping their legal obligations under the Treaties. It has a lamentable and craven record, and thus zero credibility, when it comes to policing the fundamental boundaries of the Union, those between Union and Member State competences and jurisdiction. In the face of this cumulative record of all four Institutions, we should neither be surprised nor morally and legally vent in the face of reactions such as the German Constitutional Court Lisbon Decision or the current European Union Bill before the British Parliament. When the police associates with the robbers, the citizenry resorts to vigilantism and other forms of self help.

Finally, the Framework Agreement flap (and I have only touched on the International Agreement issue – there is much more there, both positive and commendable, and problematic and less commendable) highlights another worrying trend, the continued decline of the Commission. Those familiar with the story (and a few minutes with the likes of Google will enlighten the multitudes) will appreciate the deftness with which the Parliament has used its very considerable powers to bend the Commission to its will, first by, it would seem, holding its President to ransom in the run up to his confirmation, and then by simply bludgeoning an insecure Commission into submission. One must, on the one hand, admire the Chutzpah: though its own legitimacy, as measured by voter turnout, has descended to historical lows both in absolute terms and as compared to national parliamentary elections in the Member States, this has not caused any soul searching when it comes to beating on the weak kid in the institutional playground. On the other hand, one can wonder whether the

new 'Special Partnership' between Parliament and Commission announced in the new Framework Agreement is a solution to the problem of Commission decline or part of its manifestation.

## Snippets from the Editor's Mailbox

Our publisher, OUP, forwarded to me a complaint from another journal of international law. Apparently, an author who submitted an article to that journal and subsequently accepted to publish it therein, withdrew his piece at the last minute since, he explained to the justly irritated editors, another, 'more prestigious' journal published by OUP to which he had simultaneously submitted his piece, had now accepted it for publication. It is worthwhile mentioning from the outset that authors submitting a manuscript to *EJIL* are asked to confirm that it has not been published, submitted or accepted elsewhere.

Here is a composite edit of my correspondence with the author in question. It picks up in the middle of the correspondence.

*It would seem that your article was submitted by you to the xxxx Journal of International Law for publication . . . [and] it would seem that you had accepted to publish with them. . . . They are, absent some convincing explanation by you, justifiably upset and frustrated. . . . Please understand me: Journal editors plan their publications with care and attention. By accepting one article, they may have rejected another, which now might no longer be available. They think carefully about the mixture of pieces in each issue – to offer their readers variety and cover different aspects of the field. An unjustified withdrawal might disrupt all this. But think, principally (and I claim here the privilege of an old man addressing a younger scholar) how you would feel if, say, I accepted your publication for . . . EJIL and suddenly you got a letter from me saying that the offer to publish is withdrawn because a more prestigious scholar has sent in a piece. . . . If there was an agreement between you and the xxxx Journal of International Law that your piece would be published with them, I will simply not take it. This is a matter of considerable importance – We aspire to the highest professional standards; as I explained to you in my earlier email, we would feel that these standards were compromised if we accepted for publication an article for which there was already an agreement to publish with another journal. We are not in the business of poaching. Warmly, JHHW*

## Masthead Changes

Emmanuelle Jouannet steps down from our Board of Editors after three years of dedicated and distinguished service. Andreas Paulus, recently appointed to the German Constitutional Court, steps down from the Scientific Advisory Board after similarly dedicated and distinguished service. We thank them profusely and wish them every success in their future endeavours.

We welcome H el ene Ruiz-Fabri who will be joining the Board of Editors for the next three years. Welcome!

Emily Kidd White steps down as Associate Editor, a role she filled with passion and good cheer. We wish Emily all success in her future plans. She is replaced by Dr Karine Caunes, who will be our new Associate Editor. The Associate Editor and the Managing Editor, the redoubtable Anny Bremner, are part-time positions, which nonetheless demand very considerable effort and dedication. They carry *EJIL* on their shoulders. All readers, authors and editors of *EJIL* owe them a huge debt of gratitude.

## In this Issue

We begin this fourth and final issue of Volume 21 with a mini-symposium on sovereign immunity, which includes two papers. The first, by Dapo Akande and Sangeeta Shah, distinguishes the various categories of immunities conferred under international law. The second paper by Jasper Finke examines competing conceptions of immunity before arguing that it is best understood as a binding principle. It is our hope that these papers will spark new discussions on this fundamental topic of international law.

Four articles follow our mini-symposium. The first is a piece by Annie Bird on Third State responsibility for human rights violations, a piece which we find follows well from our short symposium. Next we publish a detailed investigation into the role of atypical acts in EU external trade and intellectual property policy. This piece by Henning Grosse Ruse-Khan, Thomas Jaeger and Robert Kordic is sure to be a useful contribution for both practitioners and theorists working in this particular field. Weaving once again into topics raised by our mini-symposium authors, we publish a piece by Sarah M. H. Nouwen and Wouter G. Werner, which focuses on the explicitly political effects that the jurisprudence of the International Criminal Court is having in Uganda and the Sudan. The authors offer an innovative lens, examining the jurisprudence and also its use by political actors through the friend-enemy distinction. Last, we believe our readers will enjoy the piece by Mehrdad Payandeh on the concept of international law in the jurisprudence of H. L. A. Hart

In our occasional series, *Critical Review on International Jurisprudence* we publish a piece by Sujitha Subramanian which looks at the EU Microsoft decision.

In early 2008 we published an article by Laurence Helfer entitled, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', available at [www.ejil.org/pdfs/19/1/181.pdf](http://www.ejil.org/pdfs/19/1/181.pdf). In this issue, we continue this important conversation concerning the role of the European Court of Human Rights with a fresh perspective by authors Helen Keller, Andreas Fischer and Daniela K uhne, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals', published under our *Critical Review of International Governance* rubric.

In this iteration of the series, we also include an article by Wenhua Shan and Sheng Zhang which analyses the Lisbon Treaty, now just over one year old, in order to assess

its implications for the international investment treaty practice of the Union and its Member States.

You will find two review essays in this issue: in his essay, Thomas Kleinlein reviews two significant works on constitutionalism beyond the state: Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* and Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law*. The second essay, by Kirsten Sellars, entitled 'Imperfect Justice at Nuremberg and Tokyo', reviews three books: Guénaél Mettraux (ed), *Perspectives on the Nuremberg Trial*; Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal – A Reappraisal* and Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*.

On the Last Page we publish the poem *October by Old Masters* by Leslie Williams.

JHHW

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