

# INTRODUCTION

The use of treaties as a mechanism for governing an increasingly interdependent world has grown exponentially in the last century. To give a sense of this explosion in treaty-making activity it is revealing to consider statistics published in France—a medium-sized country that is one of the founding Member States.<sup>1</sup> Since the 1990s France has been negotiating roughly 200 bilateral treaties a year which is equivalent to 2.5 times the annual number of treaties negotiated during the 1950s. The 1950's rate of 80 treaties a year constituted over five times the number being negotiated during the interwar years (roughly 14 treaties per year) and the interwar years themselves constituted a significant expansion on the four treaties a year that were being negotiated during the period dating from 1881–1918. And as of 2005, France was bound by over 7,400 treaties.<sup>2</sup> However, such crude statistics, in and of themselves, reveal very little as to the significance of the expanding remit of treaty law. At the turn of the century, treaty-making was dominated by very few areas, most prominently peace treaties, maritime boundary treaties, and friendship, commerce, and navigation treaties. Today treaties have come to regulate all manner of affairs that would previously have been left to the internal regulation of the State and, indeed, but for the rise of the multilateral treaty we would be unlikely to have witnessed the constraining effect of the law brought to bear in many important areas. Thus today we can point to large numbers of treaties in areas as diverse as: banking and finance; consumer protection; criminal law; data exchange; environmental protection;<sup>3</sup> human rights; immigration; investment; nuclear proliferation; regulation of the internet; transport; taxation, etc. This profound transformation in the remit of international treaty law was given particularly eloquent expression by Philip Allott:

<sup>1</sup> Conseil d'État (2006).

<sup>2</sup> The fact that France is a member of the EU and that much of its interstate cooperation and regulation within the EU will take place employing the law-making output of the EU, results in a significantly reduced number of treaties than one would expect to take place for any EU Member State were the EU not to exist.

<sup>3</sup> A study published in 2006 noted that of the more than 500 extant environmental treaties, over 60 per cent had been concluded since the early 1970s: see Conseil d'État (2006).

the national executive branches of government come together to regulate collectively every area in which the function of government extends beyond national frontiers and where the activities of governments overlap. The acceleration and intensification of international inter-government, as we may call it, means that there are now, in effect, two forms of international law. Old international law is the modest self-limiting of the potentially conflictual behavior of governments in relation to each other, as they recognise the emergence of new 'states', settle the limits of each other's land and sea territory and the limits of their respective national legal systems, resolve disputes and disagreements which may arise in their everyday 'relations'. New international law is universal legislation.<sup>4</sup>

We can expect this trend of growing recourse to treaties to continue unabated and the legal effect of this immensely significant and growing body of law becomes increasingly important. It is primarily the executive and legislative branches that are best placed to ensure that the treaty commitments to which the State voluntarily commits are respected domestically. Courts, however, have an increasingly important role to play in giving effect to this form of 'universal legislation' (to use Allott's terminology). First and foremost because a substantial portion of this international law-making is likely to find itself transposed into domestic legal norms on which national courts are then called upon to adjudicate. But even where this is not so, courts in most legal systems will find themselves faced with litigants invoking treaty law in support of their claims. Indeed, the EU itself provides an important example. It is through such a process tied to the preliminary reference procedure that the European Court of Justice (ECJ) was able to pronounce on the legal effect of EU norms and that gave rise to the earliest manifestation of the constitutionalization of EU law, whereby EU measures were hardened into supreme, and frequently directly effective, law.<sup>5</sup> This book touches upon a different dimension of this 'constitutionalization' debate, that concerns the legal status accorded to EU Agreements as refracted through the lens of EU law, which is rarely given explicit consideration, but nonetheless deserves incorporation within the conventional account that Weiler and others were so instrumental in framing.

The EU was only born with express treaty-making powers for tariff agreements, trade agreements, and the so-called Association Agreements.<sup>6</sup> Those express powers were, however, quickly and increasingly put to

<sup>4</sup> Allott (2001). <sup>5</sup> Weiler (1991) esp at 2430.

<sup>6</sup> Respectively the old Arts 111(2), 113, and 238 EEC.

significant use. By the early 1960s the EU had already become a party to Association Agreements with Greece, Turkey, and a collection of 18 (recently independent) African and Malagasy States (Yaoundé I),<sup>7</sup> by the late 1960s the growing web of Association Agreements had expanded to include Tanzania, Uganda, and Kenya (via the Arusha Convention) and Morocco and Tunisia;<sup>8</sup> by the early 1970s it had become a party to a significant batch of largely identical bilateral trade agreements with seven of the European Free Trade Association States,<sup>9</sup> and by the mid-1970s a successor to a second Yaoundé Convention had 46 African, Caribbean, and Pacific States as parties (Lomé I).<sup>10</sup> Today few parts of the world remain unconnected to the EU by some form of bilateral or regional trade-related agreement.

Whilst the EU may have been born with the barest of express treaty-making powers, this was famously and radically supplemented by the creation of implied treaty-making powers that was articulated in the 1971 *ERTA* ruling.<sup>11</sup> The ‘masters of the treaties’, for their part, gradually expanded the express treaty-making competence at successive treaty reforms. In its more than half a century existence, the EU—and its predecessors<sup>12</sup>—has become a party, whether alone, or in unison with one or more of its Member States (mixed agreements),<sup>13</sup> to well over 1,000 treaties at a gradually accelerating

<sup>7</sup> For Yaoundé I, see [1964] OJ 93/1431, for the Greek and Turkish Agreements see respectively [1963] OJ L293/63 and [1964] 217 OJ 3687.

<sup>8</sup> For the Arusha Convention see [1970] OJ L282/55, for the Morocco and Tunisia Agreements see respectively [1969] OJ L197/3 and [1969] OJ L198/3.

<sup>9</sup> Austria ([1972] OJ L300/1), Sweden ([1972] OJ L300/96) Switzerland ([1972] OJ L300/188); Iceland ([1972] OJ L301/1); Portugal ([1972] OJ L301/164); Norway ([1973] OJ L171/1); Finland ([1973] OJ L28/1).

<sup>10</sup> [1976] OJ L25/1.

<sup>11</sup> 22/70 *Commission v Council* [1971] ECR 263.

<sup>12</sup> ie treaties concluded by the European Economic Community (EEC), European Community (EC), European Coal and Steel Community (ECSC), European Atomic Energy Community (EAEC), and the EU.

<sup>13</sup> Mixed agreements are agreements to which both the EU and one or more Member States is a Contracting Party. The original EC Treaty, unlike the Euratom Treaty (Art 102), did not expressly sanction mixity nevertheless mixed agreements quickly emerged as a substantial component of its treaty-making practice, and in fact the very first Association Agreement (with Greece) from the early 1960s was a mixed agreement. The legal justification for this practice, as Eeckhout (2011: 212–13) noted, ‘is that parts of the agreement do not come within the EU’s competence, and that conclusion of the agreement therefore requires joint action by the EU and its Member States, the latter complementing . . . the otherwise insufficient powers of the EU.’ The political reality is that Member States, and often other Contracting Parties, see considerable benefit in recourse to mixed agreements: see Rosas (2010), Lenaerts and Van Nuffel (2011: 1037).

rate in line with its expanding competences.<sup>14</sup> The European External Action Service treaties office database lists the following areas of treaty-making activity (a number of which break up into further sub-activities): Agriculture; Coal and Steel; Commercial Policy; Competition; Consumers; Culture; Customs; Development; Economic and Monetary Affairs; Education, Training, Youth; Energy; Enlargement; Enterprise; Environment; External Relations; Fisheries; Food Safety; Foreign and Security Policy; Fraud; Information Society; Internal Market; Justice, freedom and security; Public Health; Research and Innovation; Taxation; Trade; Transport. None of these categories can, however, comfortably house the EU's first human rights treaty, it having recently become a party to the UN Convention on the Rights of Persons with Disabilities.<sup>15</sup> In sum, the extent of the EU's external treaty-making competence (and practice) has come a strikingly long way.

As with a domestic legal system, a portion of the treaties (or at least parts thereof) to which the EU becomes party will be legislatively implemented. There is thus a large body of EU legislation seeking to implement EU—and indeed non-EU<sup>16</sup>—Agreements (or parts thereof). This is particularly apparent with respect to EU-concluded environmental agreements.<sup>17</sup> To give a recent example, parts of the agreement popularly known as the Aarhus Convention, to which the EU became a party in 2005, have been implemented via EU legislative measures.<sup>18</sup> The result is that the full EU

<sup>14</sup> The Treaties Office database figures at the beginning of 2012 had the EU as a party to over 900 treaties, with more than 100 additional treaties not yet in force: see <<http://ec.europa.eu/world/agreements/default.home.do>>.

<sup>15</sup> [2010] OJ L23/35 (27.1.2010). Following the ratification of the Lisbon Treaty with its provision stipulating that the EU shall accede to the European Convention on Human Rights (ECHR) (Art 6(2) Treaty on European Union (TEU)), negotiations have been proceeding to make this a reality.

<sup>16</sup> The sphere of maritime policy provides a good example for the EU is not, nor can it currently become, a member of the International Maritime Organization (IMO) nor, accordingly, can it become a party to the 30-plus IMO Conventions that regulate international maritime transport and safety. Nevertheless, there is EU secondary legislation that effectively implements IMO Conventions (including conventions that were not yet in force) and Resolutions (see generally Jenisch 2006).

<sup>17</sup> The EU has become a party to a host of multilateral environmental agreements such as the UN Convention on the Law of the Sea; the UN Framework Convention on Climate Change and the Kyoto Protocol to that Convention; the Vienna Convention for the Protection of the Ozone Layer.

<sup>18</sup> The full title is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. The relevant EU measures are Directive 2003/4/EC (public access to environmental information) and Directive 2003/35/EC (public participation) and Regulation 1367/2006 (with respect to the application of the Aarhus Convention provisions to EU institutions and bodies).

law enforcement armoury can be invoked for ensuring compliance with these EU legislative measures. This has in fact been the case with the Aarhus implementation measures as a string of Commission infringement proceedings have been brought to ensure compliance.<sup>19</sup> This can be viewed as a constitutionalization of international norms through their transformation into EU law provisions that are then endowed with those special hallmarks of EU law, supremacy and direct effect. This is unquestionably a very important dimension of the enhanced effect that can be accorded international agreements, whether concluded by the EU or not, which is worthy of closer analysis.<sup>20</sup> But this dimension of direct EU Agreement implementation and enforcement of such legislation is not explored in the present study for it does not usually raise the issue of the legal effects of the EU Agreements *stricto sensu*.<sup>21</sup> Indeed, the substantive provisions of the legislative measures, as is often the case in domestic legal systems, frequently do not even refer to the international agreement with which they are seeking to ensure compliance. Thus, the two EU Directives that effectively transpose obligations under the 1979 Convention on the Conservation of European Habitats and Species, to which the EU became a party in 1982, do not refer to the Convention at all.<sup>22</sup> Both Directives have been the subject of litigation before the European Courts but this usually turns on the legal effect and meaning of the specific provisions of the EU measures with the ECJ having rarely engaged with the Convention itself. There are important questions that arise as to why the Member States sometimes do, and sometimes do not, see fit to use the EU legislative process to take up EU Agreement norms in binding EU measures that will in principle be directly effective and supreme domestically. Nevertheless, once they

<sup>19</sup> For two recent examples where Member States failed to fulfil their obligations under the EU implementing legislation, see C-50/09 *Commission v Ireland*, Judgment of 3 March 2011, C-378/09 *Commission v Czech Republic* [2010] ECR I-78.

<sup>20</sup> It has received precious little attention in the literature. There is a monograph touching upon certain developments pertaining to decisions of international organizations to which the EU is, and is not, a party: Lavranos (2004).

<sup>21</sup> It is not wholly excluded in that some WTO Agreements considered in Chapter IV have been directly implemented which has given rise to relevant case law considered in that chapter; in addition, a legislative implementation measure can also be the subject of an EU Agreement-based challenge and one such case is considered in Chapter V.

<sup>22</sup> Directive 79/409/EEC on conservation of wild birds (which was adopted nearly six months before the Bern Convention though it was negotiated simultaneously) and Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora which came ten years after the EU became a party to the Bern Convention.

exercise the option to employ such legislative instruments, the case law that emerges focuses on the secondary legislative measures themselves rather than the international norms that may lie behind them. In addition, also falling outside the remit of this study is the complexity to which the *inter se* legal effects of EU Agreements give rise.<sup>23</sup>

This study focuses instead on how EU Agreements themselves, rather than the legislative instruments implementing such Agreements, have been treated by the EU Courts in three main settings: as the basis for challenging either action at the Member State or EU level, or where in effect it is either the substance of the agreement or the procedure by which it was concluded that is being challenged. To this end, a data-set was developed that attempts to bring together these core strands of EU Agreement case law. The data-set contains some 337 cases, attached as an appendix, and forms the basis of the core empirical work conducted in this book.<sup>24</sup> This recourse to use of a data-set is intended as a response to a shortcoming in extant literature. Whilst there has been a general explosion in valuable work exploring the role of domestic courts in giving effect to international law,<sup>25</sup> which is only likely to grow given the expansion and changing remit of international law combined with the rise in domestic litigation, work of a more empirical bent is largely absent,<sup>26</sup> and even in places where one would expect attention to judicial practice it is to be found wanting.<sup>27</sup> The EU has been no exception to this broader trend, and few have sought to offer treatment of this terrain in a manner attentive to the breadth of judicial practice.<sup>28</sup>

The book is structured as follows. A first chapter explores the broader issue of the legal effects of treaties in domestic legal orders and the role of domestic courts in treaty enforcement. This is an attempt to offer a

<sup>23</sup> This issue has generated the important *MOX Plant* ruling (C-459/03 *Commission v Ireland* [2006] ECR I-4635), but it essentially concerns Member State compliance with internal EU law rather than with the EU Agreement itself.

<sup>24</sup> The appendix explains how the data-set was constructed. The cut-off point is 3 October 2011. A significant case since that cut-off point (C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change*, Judgment of 21 December 2011) is mentioned in a footnote to the concluding chapter.

<sup>25</sup> Recent examples include Nollkaemper (2011), Sloss (2009a), Benvenisti and Downs (2009), Benvenisti (2008).

<sup>26</sup> For valuable examples to the contrary in the US, see Sloss (2009c) and Wu (2007).

<sup>27</sup> Thus, some country reports in a recent edited collection on international law in domestic legal systems (Shelton (2011)) leave us little if not none the wiser as to domestic judicial practice (most starkly the chapter on the one Latin American State—Venezuela).

<sup>28</sup> The coverage in chs 8 and 9 of Eeckhout (2011) constitutes the most comprehensive and recent treatment of which the present author is aware.

different point of departure, and ideally a more context-sensitive approach, than is provided in much of the existing literature pertaining to the legal effects of EU (and indeed non-EU) Agreements in EU law. By articulating the core distinctions in the domestic constitutional approach to the legal status of treaties, and drawing upon the example of certain EU Member States to this end, this first chapter also provides the basis for articulating the constitutional significance of the ECJ's treatment of EU Agreements for the constitutional orders of its Member States. This latter issue, which remains insufficiently articulated in the existing literature, is teased out in Chapter II whilst exploring how the ECJ has responded to several foundational questions pertaining to the constitutional status and legal effects of EU Agreements in EU law. Chapters III, IV, and V then provide an assessment of the case law in the data-set divided into three core strands:<sup>29</sup> first, case law that can be classified as pertaining to the EU's Association, Cooperation, Partnership and Trade Agreements (excluding the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO)), which has generated the bulk of the rulings in the data-set; secondly, case law pertaining to GATT and WTO Agreements which, although trade agreements, merit separate attention not least given that they have been on the receiving end of different judicial treatment than the agreements considered in Chapter II; thirdly, cases which pertain to what is categorized as simply non-trade agreements, insofar as they cannot be classified as pertaining to the agreements in either of the two preceding chapters, and which has generated a small, but gradually increasing, number of rulings. A concluding chapter brings together the findings from the preceding chapters. The extant case law provides some support for the existence of the emergence of a twin-track approach. The first exhibits the unleashing of a maximalist approach to treaty enforcement where it is action at the Member State level that is being challenged using EU Agreements in a manner that resembles the bold purposive treatment long accorded to internal EU law. In contrast the case law suggests that the ECJ has been willing to shield EU-level action from meaningful review. This trajectory has been built in accordance with the defensive submissions of the EU's political institutions and raises important questions about the EU's much-professed commitment to international law.

<sup>29</sup> With the exception of certain cases pertaining to ex post review of EU Agreements considered in Chapter II.

This work is intended to serve as further illustration that its subject matter is not to be reserved solely for the attention of that growing body of experts in EU external relations law (or international law scholars).<sup>30</sup> The relationship between international law and domestic law, and how the latter treats the former, is a central constitutional question in any legal order. Indeed, how to think about this relationship has been rightly referred to as ‘one of the most pressing questions of contemporary constitutional law’.<sup>31</sup> Drawing on such logic, and as this book will also make apparent, the constitutional status and legal effects of EU Agreements in EU law is a crucial constitutional question for the EU, all the more so because in the federal-like system that is the EU how these issues are determined cannot but impact on the constitutional systems of all the Member States. In this sense, this work also aspires to be viewed as contributing to EU constitutional law.

Two final comments are in order. The first is that, as the title of this book itself would suggest, the legal effects in the EU legal order of agreements to which the EU is not a party are in principle excluded.<sup>32</sup> Were this study concerned with the legal order of a State there would be little need to proffer a justification for excluding international agreements that were not

<sup>30</sup> It is hoped that it might contribute to drawing to the attention of a broader international audience the significance of what has been taking place in the EU. It is surprising that even well into the twenty-first century edited collections exploring the legal effects in domestic legal orders of international law in general, and treaties specifically, have emerged without chapters on the EU. This is so for Hollis (2005) which contains 19 country reports, for Sloss (2009a) which contains 11 country reports (though the editor (Sloss 2009b: 16) mentions the issue very briefly in light of the Netherlands’ country report), and perhaps even more surprisingly in Shelton (2011) given that it contains 28 chapters nearly half of which cover EU Member States, including tiny Luxembourg. The obvious justification for exclusion may well be that the EU is not a State. A co-edited collection by a distinguished EU law scholar nearly 25 years earlier did include a chapter on the EU: Jacobs and Roberts (1987).

<sup>31</sup> Kumm (2006: 256–7).

<sup>32</sup> The principal exception is the now defunct 1947 General Agreement on Tariffs and Trade which was not concluded by the EU. There are two core reasons for its inclusion: first, its exclusion would have been anomalous given that the EU concluded international agreements within the GATT framework and these agreements were in fact at issue, as Chapter IV illustrates, in a majority of the GATT era case law, and a number of those cases involved the GATT 1947 itself thus making it impossible to disentangle this line of case law given that the judicial treatment accorded the GATT 1947 by the ECJ loomed large in the case law which involved GATT-concluded agreements; secondly, when the GATT metamorphosed into the WTO, the 1947 Agreement being rechristened GATT 1994, the EU was indeed a party and the ECJ’s approach to the legal effects of GATT 1947 is an important aid to understanding the current stance.

concluded by the relevant State.<sup>33</sup> However, the EU is no ordinary international actor, for it is made up of sovereign States that were already bound by existing treaties when the EU came into being (or by the time they acceded) and continued to conclude their own treaties. The increasing EU litigation and debate to which pre-EU, pre-EU accession, and post-EU accession Member State treaties have given rise are clearly of immense importance and essential for a fuller picture of the judicial treatment accorded to international law,<sup>34</sup> indeed, in that respect as is consideration of the place of customary international law.<sup>35</sup> The non-EU concluded Agreement that dominated debate was traditionally the ECHR,<sup>36</sup> but more recently it has been the status of the UN Charter following the *Kadi*, and related, litigation involving the legal effect of UN Security Council Resolutions in the EU legal order.<sup>37</sup> While *Kadi* itself will be briefly considered in the concluding chapter, a boundary call was essentially made to opt for greater depth, manifested in particular by an empirically oriented focus, at the expense of the greater breadth that could be offered by exploring the broader judicial treatment of international law.

The second point is that this book employs the terminology of Union and the new post-Lisbon Treaty numbering generally throughout.<sup>38</sup> The terminology of Union rather than Community was of course particularly significant in the context of agreements concluded by either the then European Community or under the pre-Lisbon second and third pillar Union.<sup>39</sup> But as none of the case law explored in this book actually concerns

<sup>33</sup> Though even in this setting there have been controversies pertaining to judicial engagement with human rights treaties not ratified by the relevant State: see in relation to the US, Waters (2007).

<sup>34</sup> For a recent valuable monograph to that specific area, see Klabbers (2009).

<sup>35</sup> Casolari's monograph (2008) explores the much broader terrain of incorporation of international law in EU law, thus covering the pre-EU and post-EU Member State treaties and customary international law.

<sup>36</sup> The trials and tribulations of the relationship between the ECHR and the EU legal order generated jurisprudence at the level of both domestic courts and the Luxembourg and Strasbourg Courts: see Craig and de Búrca (2011: ch 7).

<sup>37</sup> C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351.

<sup>38</sup> Including where provisions have been replaced with some alteration such as the old duty of cooperation in Art 10 TEC, now Art 4(3) TEU.

<sup>39</sup> The basic position was that as a result of the old Art 46 TEU, combined with Arts 24 and 38 TEU, the ECJ had no jurisdiction to rule on the validity or interpretation of second and third pillar agreements: see Lenaerts and Van Nuffel (2011: 943–4), though for tentative suggestions to the contrary vis-à-vis third pillar or the third-pillar aspect of cross-pillar agreements, see Hillion

one of the old second or third pillar agreements, and as all the old first pillar Community agreements, have since become European Union Agreements, it was decided to employ the language of Union agreements even where the cases predate the entry into force of the Lisbon Treaty, rather than move backwards and forwards between different labels depending on when a judgment was handed down.

and Wessel (2008: 112–14). In contrast to the post-Lisbon concluded Agreements on Police and Judicial Cooperation, post-Lisbon Common Foreign and Security Policy (CFSP) Agreements will essentially continue to remain outwith the ECJ's jurisdiction as a result of Art 24(1) TEU and Art 275 Treaty on the Functioning of the European Union (TFEU), see Lenaerts and Van Nuffel (2011: 531).

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