The Use of the „Disconnection Clause“ in International Treaties:
What does it tell us about the EC/EU as an Actor in the Sphere of Public International Law?

Abstract:

In the late 1980s Member States of the European Community (EC) and the EC itself began with the practice of seeking to introduce so-called “disconnection clauses”, clauses according to which in their relations inter se certain of the parties to the multilateral convention would not apply the rules of the convention but specific rules agreed among themselves, into multilateral treaties to which either Member States alone were to become parties, as well as in the mixed agreements which also the EC joined. This treaty-making practice did not go unnoticed. The 2006 International Law Commission Study Group Report on Fragmentation of International Law noted the ambiguity of the clause and suggested that this practice raises doubts about the equal application of treaty norms between parties, possibly enabling the EC and its member states to proceed to a negative derogation from the provisions of the treaty. In October 2007 also the Committee of Legal Advisers on Public International Law (CAHDI) was mandated by the CoE Council of Ministers to examine and to report the consequences of the “disconnection clause” in international law and for CoE conventions.

Among various means of a strategy to establish, promote and defend the organizational and substantial aquis of the EU in the multilateral sphere the technique of “disconnection clauses” has been chosen for this paper, being an example that has so far attracted the most attention, as an indicator for European Union’s attitude towards international law.

According to the provisional results, the impression is that EC/EU practice relating to the “disconnection clause” is not a very consistent one and that the institutions themselves do not share the same conception of its implications. Having in mind the fact that mixed agreements are becoming the prevailing treaty practice, it also seems that for this type of agreements the “disconnection clause” is completely superfluous, unless the strategy behind it is to facilitate actual evasion of treaty provisions that bind the Community or Union. Also not conceivable is the use of the clause in treaties dealing with human rights issues. Further reconsideration is due to alternative means to enable the EC/EU to retain (and/or to declare) its possibility to apply the regulatory framework of international treaties in a way pursuant to its onward level of integration and facilitating that this happens in a way transparent to other parties to respective treaties. And finally, it seems that special attention should be directed to the exclusive nature of the clause to the Council of Europe Conventions since these cases have attracted the most attention among practitioners and scholars and indeed it does not seem obvious why European Union should need to negatively depart from common European co-operative and substantial framework facilitated within the CoE.

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1. Introduction

“Pacta sunt servanda” is not just one of the most agreed upon general principles of international public law, it is “the” basis of international legal relations, affirmed in Article 26 of both Vienna Conventions on the law of the treaties. According to the directly following provisions in both of Articles 27, also being an expression of a principle of customary international law, parties to the treaty cannot invoke their domestic/municipal provisions or rules of the organisation as a justification for their failure to perform a treaty. Shortly after the adoption of the 1986 Convention, Member States of the European Community (EC) and the EC itself began with the practice of seeking to introduce so-called “disconnection clauses”, clauses according to which in their relations inter se certain of the parties to the multilateral convention would not apply the rules of the convention but specific rules agreed among themselves, into multilateral treaties to which either Member States alone were to become parties, as well as in the mixed agreements which also the EC joined. The first treaty including such EC-specific clause was the 1988 Council of Europe (CoE)/Organisation for Economic Cooperation and Development in Europe (OECD) Convention on Mutual Administrative Assistance in Tax Matters. Article 27, Paragraph 2 reads:

“Notwithstanding the rules of the present Convention, those Parties which are members of the European Economic Community shall apply in their mutual relations the common rules in force in that Community.”

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3 Cf. KARL DOERHIN, VÖLKERRECHT 5, 320 (2004).
Since 1988, more than 20 further treaties including such a “disconnection clause” can be identified, whereas the EC had, due to the opposition from Member States, failed to introduce such provisions in the WTO-Treaty and the new UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

This treaty-making practice of EC and the Member States did not go unnoticed also beyond negotiations and negotiators for decisive treaties. The 2006 International Law Commission Study Group Report on Fragmentation of International Law noted the ambiguity of the clause and difficulties in its classification by reference to the VCLT and suggested that this practice raises doubts about the equal application of treaty norms between parties, possibly enabling the EC and its member states to proceed to a negative derogation from the provisions of the treaty. In October 2007 also the Committee of Legal Advisers on Public International Law (CAHDI) was mandated by the CoE Council of Ministers to examine and to report the consequences of the “disconnection clause” in international law and for CoE conventions. Beside the questions raised with regard to the law of treaties, the “disconnection clause” might affect the position of international treaties within the norm hierarchy of the European Union.

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8 Pieter J. Kuijper, The Conclusion and Implementation of the Uruguay Round Results by the European Community, 6 (2) EUROPEAN JOURNAL OF INTERNATIONAL LAW 228 (1995).
10 As in the case of the WTO and UNESCO Treaties, supra n. 8 and n. 9. Cp. also Francesco G. Mazzotta, Notes on the United Nations Convention on the use of Electronic Communications in International Contracts and its effects on the United Nations Convention on Contracts for the International Sale of Goods, 33 (2) RUTGERS COMPUTER & TECHNOLOGY LAW JOURNAL 251, 262 (2007); CoE, Parliamentary Assembly, Draft Convention on the protection of children against sexual exploitation and sexual abuse, Report of the Committee on Legal Affairs and Human Righst, 18 April 2007, Doc. 11256, para. 38: „The Assembly opposes such a clause, which has the potential to give rise to new divisions in Europe between the parties which are members of the European Union and those which are not. The problems which concern all Council of Europe member states must continue to be dealt with by means of conventions drawn up within the Council of Europe - with equal participation by all member countries - which set up non-discriminatory regulations common to all the countries which make up "Greater Europe.".” For NGO’s perspective cp. Amnesty International, Council of Europe: European Institutions must cooperate to ensure the highest standards of human rights protection, Public Statement, 12 April 2006, AI Index: IOR 30/008/2005. Amnesty International is gravely concerned that the adoption and implementation of these clauses (known variously as "disconnection" or "transparency" clauses) could result in the EU applying lower standards of human rights protection than those set out in the Council of Europe treaties. To avoid the risk of dilution of the human rights protections in these Council of Europe treaties, Amnesty International calls on the EU to either drop its demand for the inclusion of the disconnect clauses or to limit the clauses in a manner that will expressly bind the EU and its member states to apply the standard that requires the highest protection of human rights- whether it emanates from the Council of Europe or the EU.”
11 Supra n. 5, para. 289 ff.
12 Ibid., para 293.
13 CoE Council of Ministers, Decision No. CM/874/10102007, 1006th meeting, 10 October 2007.
(EU)/EC legal system. According to Article 300 (VII) TEC the treaties concluded by the EC are binding vis-à-vis the Community, meaning that the secondary legislation should be in conformity with the relevant treaty. It seems that by recourse to the “disconnection clause”, the relation between treaties and secondary legislation could be turned over.

In his prominent work Hans Kelsen linked the perception on the position of international law within the internal legal order with political ideology, precisely the idea of sovereignty. According to Kelsen the choice for primacy of international law is indicative of internationalism and pacifism as ethical and political preferences whereas the choice for primacy of national law denotes nationalism and imperialism.14 An analogy of Kelsen’s position can also be drawn to the general attitude towards international law by its subjects.15 Under that premise this paper will, using the example of the “disconnection clause”, try to shed light on the EU/EC as a subject of public international law by examining the motives (2), its (possible) effect on the decisive treaties (4) and implications on the internal law of the Community/Union (5).

2. The Emergence of the “Disconnection Clause” and the Motives behind it

As already mentioned, the 1988 CoE/OECD Convention on Mutual Administrative Assistance in Tax Matters was the first treaty containing a “disconnection clause” in para 2 of Article 27 titled “Other international agreements or arrangements”.16 The explanatory report to the Convention referred to the provision as a “general derogation from the Convention”, inserted at the request of the EEC and its Member States because of a need to regulate “the relationship between the Convention and those rules on administrative assistance in tax matters which exist or may exist in the future” among the EEC Member States. EEC Member would therefore in relations with each other only apply the rules of the Convention if no Community rule would exist on the same matter.17 The CoE/OECD Convention was followed by further CoE

14 HANS KELSEN, GENERAL THEORY OF LAW AND STATE 388 (1949), HANS KELSEN, REINE RECHTSLEHRE, 343, 345.
16 Supra n. 6.
Conventions including EU/EC-specific “disconnection clauses”. A reference to the EU was for the first time made in the 2005 CoE Conventions.

Introduction of such clauses was later expanded also to non-CoE treaties, like in Article 13 of 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, UNECE Kiew Protocol and WHO International Health Regulations. Compared to the EC/EU, drafters of these treaties included a more general reference of the “organisations of economic integration or regional bodies” (UNIDROIT Convention) and later of the “regional economic integration organisations” (REIO), noting the possible further integration of other regional economic integration organisations.

Documents on the adoption of the May 2005 CoE Conventions indicate that there was some serious opposition among other CoE Members towards inclusion of the clause in the three instruments. The opposition to adoption was resolved through reformulating the wording of the clause:

“Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties,”

and a declaration of the EC and its Member States made at the adoption of each of the three Conventions:

“The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a “disconnection clause” is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.

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20 Rome, 24 June 1995,
23 Supra note 19.
This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union Party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.

The disconnection clause is necessary for those parts of the Convention which fall within the competence of the Community/Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any Party to the Convention, if necessary, through Community/Union legislation. They will thus guarantee the full respect of the Convention’s provisions vis-à-vis non-European Union Parties.”

This declaration confirms the general position of the Community on the purpose of the “disconnection clause” as referred to in further documents and statements, namely to “clarify relations between Community or EU rules, on the one hand, and the provisions of each of the conventions on the other hand” and “to ensure the coexistence of this Convention with other (including existing) international legal instruments dealing with matters which are also dealt with in this Convention.” If Member States would be obliged to among themselves apply the law of a convention or a treaty instead of Community law these would, “jeopardise the integrity and development of Community law in the area covered by the Convention, unless they are countered by a disconnection clause in the Convention itself.”

3. The Notion of “Disconnection Clause”

Before going into an analysis of the effect of the clause on treaty regimes and EC/EU law, a terminological clarification must be attempted. No consistent use of the term “disconnection clause” can be found in the sparse literature on the subject published so far, as well as in the drafting and explanatory documents. The use of the “disconnection clause” is commonly discussed regarding the potential conflicts between treaty regime and Community Law. The notion is however not EC/EU specific but in my understanding refers to all possible provisions

25 Declaration formulated by the European Community and the Member States of the European Union upon the adoption of the Conventions Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198), on Action against Trafficking in Human Beings (CETS 197), on the Prevention of Terrorism (CETS 196) by the Committee of Ministers of the Council of Europe, on 3 May 2005. Reproduced in the explanatory memorandums to the three conventions.
26 Supra note 23.
in treaties that allow for two or more (but not all) contracting parties of the agreement to among
themselves apply rules different than those agreed in the adopted treaty. The possibility of such
differentiation, also foreseen in Article 30 (2) VCLT, can refer to higher standards, further
cooperation in the same subject matter or already established uniform legislation or special
arrangement. What makes “disconnection clauses” with specific reference to EC/EU and its
Member State more problematic than general “disconnection clauses” is that a possible
derogation from or non-application of the treaty is reserved only to the European
Union/Community and its Members.

Several classifications of the “disconnection clause” types can be attempted. Most decisive for
this appraisal are the distinctions according to the degree of exclusion of the application of the
agreement and the type of agreement with regard to the object of the treaty and the parties to
the treaty. The degree of exclusion of the treaty can either be complete when parties exclude
the application of a treaty for all rules except those that govern a particular subject for which no
Community rule exists. The degree of exclusion can further be partial if the clause specifies the
rules of the convention that will not be applied by EC/EU Members in their relations. And finally,
the exclusion is optional if the wording of the clause provides for a possibility of Members
States to declare that they will not apply the rules of the treaty but rather the rules of the
decisive organisation. With regard to the object of the treaty the distinction should be made
between treaties establishing substantial protection or standards, procedural/administrative co-
operation and treaties enabling the parties to rely on uniform legislation or special treaty
arrangements. Among the treaties establishing substantial protection it is important to
differentiate between treaties according human rights or touching human rights issues and
treaties governing technical standards. With regard to the parties of the treaty it has to be
distinguished between treaties opened only to States as parties and treaties opened also to
International Organisations.

It must also be noted at this point that the technique of “disconnection clauses” is of course not
the only means of a strategy to establish, promote and defend the organizational and

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29 Cf. Ibid.
30 Cp. note 17.
31 UN GA, Fragmentation of International Law: Difficulties Arising from the Diversication and Expansion of
International Law. Report of the Study Group of the ILC. Finalized by Martii Koskenniemmi. ILC, Fifty-eighth session
32 Classification made for the ILC by Economides, ILC, Fifty-seventh session, para 463, note 5.
substantial aquis of the EU in the multilateral sphere but was in this paper chosen as an example that has so far attracted the most attention and has been, because of the potential explained below, discussed as most problematic. The use of all these instruments by the EC/EU was triggered by the increasing scope of the EC’s external competence concurring with increased law-making activity on a multilateral level, going also beyond the treaty level, either within the International Organizations or within autonomous treaty regimes. Such relocation of law-making and regulation of certain areas from the municipal to the international level has of course also been affecting EC/EU areas of competence and its aquis, also raising the concern that participation of Member States on the multilateral level could substantially affect their EC obligations and enable them to evade their Community obligations by putting forward their international obligations.

This however does not mean that all the EC/EU interests and concerns should or can prevail over other levels of international law. Just as the states have had to give up some part of their sovereignty and capacity in order to achieve international cooperation, the EC/EU aquis and its objects also cannot always prevail over international level. In the following the effect of the EC/EU specific “disconnection clauses” in these correlations will be examined.

3. The Possible Effect of the “Disconnection Clause” on Treaty Regimes

For the ILC the main concerns regarding the “disconnection clause” arise from its exclusiveness afforded only to some parties of the agreement, possible uncertainties of other parties to the treaty on the precise content of relevant EC Law and that the latter might be

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35 Cf. only ILC final report on fragmentation (note 31), para. 5 ff.
subject to changes that could also lead to a negative derogation of the convention in the relations between member states.\textsuperscript{38} Undoubtedly the question is not the validity of the clause as such since all parties consented to it when adopting or ratifying the treaty. But they might not have had agreed to a later modification of EC rules that would substantially deviate from the treaty if they would have known about it at the time of adoption or ratification. It can also be questioned whether the state parties were fully aware of the scope and content of EC law affecting the subject matter regulated by the treaty.\textsuperscript{39}

With regard to these considerations two main issues should be considered. The first question is whether (and if so, why) the general rules of the VCLT and customary international law on \textit{inter se} agreements and general “disconnection clauses” suffice to allow for the EC/EU to regulate the subject of the treaty divergently from the treaty, or put differently, what could the real surplus of the EC/EU specific “disconnection clause” be for the treaty regime and for the EC/EU.

But at start it must be noted that the provisions on \textit{inter se} agreements of Article 41 VCLT are applied analogically since the disconnection clause only resembles an authorisation to conclude \textit{inter se} agreements on the subject matter according to Art. 41 (1)a) but differs from it in the time perspective, since article 41 foresees \textit{future} agreements whereas the disconnection clause relates to possible already existing rules governing the same subject matter. Still, Art. 41 is in general more suited for the application on the phenomena of the “disconnection clause” as norms on reservations would be, since the latter in contrary to “disconnection clause” are not part of the treaty as such and according to Art. 20 VCLT other states parties do not need to agree with it, unless explicitly provided for in the treaty. Furthermore a reservation has to be much more specific with regard to the provisions of the treaty that the contracting party will not or apply just to a limited extent, whereas the disconnection clause is most unspecific in defining the provisions not applicable for certain constellations. The VCLT also does not explicitly specify whether discriminating reservations (i.e. reservations affecting only some parties of the treaty) are permitted at all. At the same time of course they are also not explicitly forbidden.

Returning to \textit{inter se} agreements, \textit{a contrario} to the conditions laid down in Art. 41 (1) b), the disconnection clause would thus be needed because different EC/EU regulation might (i)
“affect the enjoyment by other parties of their rights under the treaty or performance of their obligations” or because it might (ii) “relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.” If this is not the case, then a general disconnection clause or provisions in the treaty allowing in general for *inter se* agreements would suffice. In the case of a declaration given at the adoption of the latest CoE Conventions\(^{40}\) denying the intention to violate the conditions laid down in Art. 41 VCLT, the insertion of the EU-specific “disconnection clause” seems to be entirely superfluous. If the incentive for introduction of the clause is just declaratory, namely to draw the attention to a possible parallel regulatory regime within the Community/Union, then a simple declaration drawing attention to this special situation seems to suffice.

If however the possibility to derogate from the treaty regime does exist, then the second question should be, having in mind that the deviation from the treaty regime only occurs in the relations between Member States, what are/could be the potential cases where this practice does/could have negative effects for other parties or for the object of the treaty. Here it should be distinguished between the different types of treaties regarding the object of the treaty. If EC/EU law provides for more intensive administrative cooperation than provided for by the treaty this at first sight does not really affect other parties as long as EC/EU Member States keep to their obligations towards them. However, if all other parties would also agree with such a higher level of cooperation and would be willing to assure the same to all contracting parties (not necessarily at the time of adoption) but would be stalled in their initiative by the same EC/EU and its Member States then, if one could not argue that such practice violates a concrete norm of international law, such a creation of double standards would at the least be politically improper. The same parallel could be drawn to treaties providing for uniform legislation or special treaty arrangement. The situation is very different however when treaties touch upon human rights. As de Schutter rightly noticed, human rights treaties are not multilateral treaties in the sense that they establish reciprocal obligations on contracting parties but are designed to protect basic rights of individuals against all contracting parties.\(^{41}\) I would take the argument even further and argue that these considerations should be applied not only to treaties establishing or touching upon human rights but on the basis of prohibition of

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\(^{40}\) Note 19.

discrimination\textsuperscript{42} for all treaties providing for or concerning interests of individuals. Derogating indispensable provisions of such treaties therefore cannot count as still being in accordance with either VCLT or/and the spirit of international human rights. Equally not to be endorsed is the “disconnection clause” practice for mixed agreements. If the situation of parallel competence and delimitation of competence between EC and Member States is in general very complex for non-EC parties, it becomes paradoxical through the use of “disconnection clauses”. The clause refers to the area of Community competence and by that to the provisions of the treaty that are binding for the EC. So the EC is at the same time approaching the treaty and excluding itself from application of all provisions that would be applicable for it?

To sum up, it seems that the clause is either not needed, because by analogy to \textit{inter se} agreements no objections exist to enhance cooperation or it is highly controversial, if the regulatory regime in question cannot fall under what is foreseen for \textit{inter se} agreements and its effect either goes beyond reciprocal relations between member states because it affects individual rights or interests. Also debatable from the perspective of good-will or political propriety seems to be the use of the clause in cases where all other parties would also agree with the enhanced co-operation or standards but are excluded because the EC/EU Members States or the Community itself were opposed to introduce this in treaty drafts or are opposing later changes taking such direction.

4. Union/Community’s Internal Practice and the “Disconnection Clause”

Putting aside the complex question on how international treaties are implemented and what is their position in European Union/Community law\textsuperscript{43} which would need a more detailed investigation exceeding the scope and intention of this paper, in the last step the implications of the “disconnection clause” on the internal law of the Community/Union will be discussed by examining the jurisprudence of the European Court of Justice.

\textsuperscript{42} Art. 26 International Covenant on Civil and Political Rights (ICCPR).
The first case to be mentioned is the 1996 *Commission v. UK*. It is a perfect “textbook example” on the impact of the “disconnection clause” in EC/EU practice. The Commission charged the UK with a failure to fulfil its obligations according to Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. The main question in the case were the criteria for determining which satellite broadcasters fell under the jurisdiction of the UK. The criteria in Article 2(1) of the Directive differed from those of Article 5(2) of the CoE Convention on Transfrontier Television, adopted five month before EEC directive. As the Court recapitulated, the differences in both acts were not coincidental but the EEC legislator rather intentionally deviated from the new convention. In its national legislation the UK implemented the Directive by interpreting it in light of the Convention rules arguing that otherwise it would be placed in an “impossible situation” requiring it to infringe its legal obligations either at international or at Community level. The Court refused the argument by pointing to the “disconnection clause” of Article 27(1) of the Convention expressly providing that Member States are in cases of parallel rules to apply those of the Community. In the case of this convention however, the impact of the Community legislation eventually went beyond the exceptional application between Member States. The adoption of a modified EC directive triggered the change of the CoE instrument in order to adjust to Community rules.

A second reference point can be found in the ECJ’s opinion on the Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In the opinion exclusive competence of the EC to conclude new Lugano Convention was asserted by interpreting the Community rules on the recognition and enforcement of judgments as “indissociable” from those on jurisdiction of the courts and by that requiring a unified and coherent system that can only be assured by the EC as the exclusive party to the convention. In the opinion however the ECJ missed the point on implications of the “disconnection clause” and its relevance for the

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44 Note 37.  
46 Para 49-50 of the judgment.  
47 Para 52.  
48 Para 53.  
51 Opinion 1/03 of 7 February 2006.  
52 Para 172-173.
drafted convention and indications on Community’s competence by assessing that the existence of the “disconnection clause” in an agreement “does not constitute a guarantee that the Community rules are not affected by the provisions of the agreement […] but, on the contrary, may provide an indication that those rules are affected.”\(^{53}\) The wording of the ECJ indicates that it misunderstood the pleadings of the Commission that questioned the need for the clause if the Court would decide that the Convention falls within the exclusive competence of the Community\(^{54}\) by assuming they were arguing the “disconnection clause” was some sort of declaration or provision guaranteeing that the agreement does not affect Community rules and not a provision regulating the relations between agreement and EC legislation in a manner excluding the application of the agreement in case of existing EC law on the subject and by that enabling that the EC rules are not affected.\(^{55}\) With regard to the arguments put forward by the Commission and the Council the wording also implicates that the Court did not ultimately refuse to link the existence of the “disconnection clause” in Art. 54 (b) of the previous Lugano Convention as an indication on the Community (exclusive) competence.

On the other side the ECJ did not deal with one further argument advanced by the Commission, namely on a “particular nature” of a “disconnection clause” in international agreements of private international law, differing from a “classic disconnection clause”. Namely that in the new Lugano Convention to which only the EC is a party now a provision is included that can in the part mentioning Regulation (EC) No. 44/2001 also be understood as a partial “disconnection clause”.\(^{56}\) The Commission argued its purpose was not to apply the EC regulation each time it is applicable, “but to regulate in a coherent manner the distributive application of that regulation and of the agreement envisaged.”\(^{57}\) Why such clauses should be a particularity of international private law agreements and could not be inserted in the same

\(^{53}\) Para 130.

\(^{54}\) Para 83-85.


\(^{56}\) Art. 64 (1). “This Convention shall not prejudice the application by the Member States of the European Community of the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as well as any amendments thereof, of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on 27 September 1968, and of the Protocol on Interpretation of that Convention by the Court of Justice of the European Communities, signed at Luxembourg on 3 June 1971, as amended by the Conventions of Accession to the said Convention and the said Protocol by the States acceding to the European Communities, as well as of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Brussels on 19 October 2005.” Signed in Lugano, 30 October 2007.

\(^{57}\) Para 85.
manner into other agreements does not seem evidentiary. The same could be concluded for the reason that there is a “disconnection clause”-like provision at all included in the new Convention since the Community alone is a party and thus by limiting the scope of application of the convention it more or less reserves the application of the provision of the Convention for its internal sphere thereby indicating that Member States cannot apply it directly among themselves, similar to the effect of the “disconnection clause” in case of provisions of mixed agreements that fall under in the area of Community competence.

Both examples of the ECJ’s interpretation of the clause once more confirm the presumption that the notion of the “disconnection clause” is misleading, i.e. does not always reflect its real impact or potential and each use of the clause calls for a separate examination of its potential and practical relevance. But what can be asserted at this point is that no coherent understanding of the clause exists among Community institutions, having as a consequence also incoherent practice.

5. Conclusion

In the Introduction I promised to provide an answer concerning the EU as an actor in the sphere of international law by drawing a parallel to Kelsen. In the Conclusion I will have to admit that the answer is not as straightforward as the analysis above might indicate since it did not provide for firm conclusions but more or less sketched the questions to be considered in more detail if one wants to properly asses what the impact of the “disconnection clause” is on international treaties and international law in general and how it connects to the European Community/Union as an international actor. Some provisional results however can be outlined.

First of all, the impression is that EC/EU practice relating to the “disconnection clause” is not a very consistent one and that the institutions themselves do not share the same conception of its implications. Secondly, having in mind the fact that mixed agreements are becoming the prevailing treaty practice, it seems that for this type of agreements the “disconnection clause” is completely superfluous, unless the strategy behind it is to facilitate actual evasion of treaty provisions that bind the Community or Union. Also not conceivable is the use of the clause in treaties dealing with human rights issues. Further reconsideration is due to alternative means to enable the EC/EU to retain (and/or to declare) its possibility to apply the regulatory
framework of international treaties in a way pursuant to its onward level of integration and facilitating that this happens in a way transparent to other parties to respective treaties. And finally, it seems that special attention should be directed to the exclusive nature of the clause to the Council of Europe Conventions since these cases have attracted the most attention among practitioners and scholars and indeed it does not seem obvious why European Union should need to negatively depart from common European co-operative and substantial framework facilitated within the CoE.

By having in mind these assumptions, the EU in its attitude towards international law is neither an internationalist pacifist nor a nationalistic imperialist but probably just an on it self aligning sceptic.