Cambridge – Durham European Law Workshop,

Cambridge, 26-27 October 2012

The two European Law Centres of Cambridge and Durham University have decided to join forces and to organise a workshop on the "External Relations Law of the European Union". This is to bring together academics and doctoral researchers from both institutions, as well as a number of guest speakers, to discuss a variety of topics related to the Union's contribution on the international scene. The workshop will place in Cambridge and is organised as an informal colloquium and exchange of ideas between younger and more seasoned European lawyers.

The theme of the workshop concentrates on the external aspects of European law. The Union is – of course – an important international actor; yet one that is still struggling to define its constitutional and international relations identity. And to shed light from a variety of perspectives, the workshop will be organised alongside three panels. Panel One will analyse the "Constitutional Framework of EU External Relations", including the institutional arrangements in which the Union conducts its external affairs. Panel Two subsequently concentrates on the "International Law Aspects of EU External Affairs"; while Panel Three finally moves to discuss some "Sectorial Aspects of EU External Relations", such as the Union's investment policy and neighbourhood policy.

In order to ensure its character as a "workshop" and "collegium", speakers are allowed to speak no longer than 15 minutes with another 15 minutes reserved for discussion.

Dr Markus Gehring (Cambridge) & Professor Robert Schütze (Durham)

PROGRAMME

Friday, 26 October

12.30 – 1.15pm Informal Lunch (Møller Centre, Cambridge)

Study Room 10, Møller Centre, Cambridge

1.15 – 1.30pm Welcome & Introduction by the Organisers

1.30 – 2.00pm Keynote by Professor Alan Dashwood CBE QC (Cambridge University)
"Once and future issues in EU external relations law"

Panel One: Constitutional Framework of EU External Relations
Chair: Professor Catherine Barnard (Trinity College, Cambridge)

2.00 – 2.30pm Professor Geert de Baere (Leuven University)
"Reflections on the Choice of Legal Basis in EU External Relations after the Court's Judgment in the Restrictive Measures Case"

2.30 –3.00pm Professor Robert Schütze (Durham University)
"Treaty-Making in the European Union – A Democratic Deficit?"

3.00 – 3.30pm Professor Eleanor Spaventa (Durham University)
"The EU Accession to the ECHR – from Fundamental Rights to Fundamental Problems"

3.30 – 4.00pm Dr Eva Nanopoulos (King's College, Cambridge)
"*The relationship between the UN and the EU and the relevance of the principle of loyal cooperation"*

4.00 – 4.30pm Coffee & Tea

Panel Two: International Law Aspects of EU External Relations
Chair: Dr Alicia Hinarejos (Downing College, Cambridge)

4.30 – 5.00pm Professor Ramses Wessel (Twente University)
"EU Diplomacy and International Law"

5.00 – 5.30pm Dr Andés Delgado-Casteleiro (Durham University)
"The International Responsibility of the European Union: Between pragmatism and Proceduralization"

5.30 – 6.00pm Dr Gleider Hernández (Durham University)
"International Law and Federated Entities: Beyond the Black Box"

6.00 – 6.30pm Dr Veronika Fikfak (Homerton College, Cambridge)
"Does the integration of European Legal Order promise the disintegration of the International? EU courts as actors in the international legal order"

8pm Workshop Dinner, Saltmarsh Room, King's College, Cambridge
(Participants are kindly asked to be prompt, as dinner will commence at 8.10pm)

PROGRAMME

Saturday, 27 October

9.30 – 10.00am Coffee & Tea

Panel Three: Sectoral Aspects of EU External Relations
Chair: Professor Robert Schütze (Durham University)

10.00 – 10.30am Dr Narine Ghazaryan (Brunel University)
"The Politics and the Law of the ENP: A Difficult Marriage"

10.30 –11.00am Professor Angelos Dimopoulos (Tilberg University)
"Investor-state arbitration in EU investment agreements"

11.00 – 11.30am Dr Markus Gehring (Hughes Hall, Cambridge University)
"The Role of European Union Law in the Global Green Economy"

11.30am – 12.00pm Dr Michael Waibel (Jesus College, Cambridge University)
"The Eurozone Crisis and Third States"

12.00 – 12.15pm "*Last Words*" from the Organisers…

VENUES

The Workshop will take place entirely at the Cambridge Møller Centre. Directions to the Møller Centre (and further information on its facilities) can be found on their website: http://www.mollercentre.co.uk/

The Workshop dinner on Friday evening will take place at King's College, in their "Saltmarsh Dining Room". Directions to King's College can be found on their website also: http://www.kings.cam.ac.uk/visit/getting-to-kings.html

ABSTRACTS

"Reflections on the Choice of Legal Basis in EU External Relations after the Court's Judgment in the Restrictive Measures Case"

Geert de Baere,

This paper proposes to take a fresh look at the choice of legal basis in EU external relations post Lisbon, in particular in the light of the judgment of the Court of Justice in the *Restrictive Measures* case (Case C-130/10 *Parliament v Council* [2012] ECR I-0000). There, the Court rejected the European Parliament's action for annulment against Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban [2009] OJ L346/42. The Court held that the regulation was rightly based on Article 215(2) TFEU, thereby rejecting the European Parliament's argument that the measure ought to have been taken on the basis of Article 75 TFEU, which ensured a greater degree of parliamentary participation through the ordinary legislative procedure. In the course of developing its line of reasoning, the Court made a number of important observations on the principles to be followed

when choosing a legal basis, and recalled some of its earlier case-law, in particular *Titanium dioxide* (Case C‑300/89 *Commission v Council* [1991] ECR I‑2867) and its progeny. This paper will reflect upon the application of those principles in a post Lisbon framework.

"Treaty-Making in the European Union – A Democratic Deficit?"

Robert Schütze

Is there – from a constitutional perspective – a "democratic deficit" in the treaty-making procedure(s) of the European Union? The literature on the democratic deficit of the Union is legion, but to address and answer this question a comparative standard is required. For the purposes of this paper, we shall examine this question from by comparing the EU procedures with the democratic credentials (or lack thereof) of the treaty-power within the United States. According to the text of the US Constitution, all international treaties will have to be negotiated and concluded by the President with the "advice and consent" of the Senate. But is this the whole picture? We shall see that this is not the case, as American constitutionalism has generated the so-called "congressional-executive agreement" as a more democratic alternative to the classic "international treaty". What light does this development shed on the constitutional status quo of the treaty-making procedure(s) within the European Union? The principal procedure is now laid down in Article 218 TFEU. What are its democratic credentials? Should we still speak of a democratic deficit of the Union with regard to the creation of international agreements?

"The EU Accession to the ECHR – from Fundamental Rights to Fundamental Problems"

Eleanor Spaventa

Following the introduction of Article 6(2) TEU, the EU has entered into negotiations for accession to the ECHR. Whilst negotiations are far from being completed, the final system is likely to include some sort of 'referencing' SYSTEM from the European Court of Human Rights to the Court of Justice of the EU. This system, whilst welcomed by some, raises a myriad of constitutional and practical problems, which might worsen rather than improve the effectiveness of fundamental rights protection in the EU. In order to illustrate my point, I will discuss some recent case law, and in particular the NSS ruling; the position on standing for non-privileged applicants in the EU; and some of the jurisprudential practices of the Court.

"*The relationship between the UN and the EU and the relevance of the principle of loyal cooperation"*

Eva Nanopoulos

EU lawyers will be familiar with the *Kadi* case where the Court of Justice affirmed that all EU measures must be subject to full judicial review for their compatibility with EU fundamental rights irrespective of origin i.e. irrespective of whether they are intended to give effect to Resolutions adopted by the UN Security Council. Without questioning the fundamental tenet of the Court's judgment that the EU is an autonomous legal order which is founded on the respect for human rights, the paper examines what role the EU principle of loyal could play in analysing the relationship between the UN and the EU and what this would mean in practice for the EU Courts, when faced with measures implementing Resolutions of the UN Security Council.

"EU Diplomacy and International Law"

Ramses Wessel

The main aim of this paper is to confront the diplomatic ambitions of the EU, in particular through the European External Action Service, with the reality of international law. Treaty provisions as well as policy documents and statements of EU officials reveal a development in the direction of a strengthened role for the EU itself as a diplomatic actor. The findings underline a continued tension between the EU's diplomatic ambitions and EU and international law as it stands. In relation to the EU's internal structures, there is no doubt that in the new EU institutional landscape dividing lines remain firmly in place. Yet, the working arrangements do point to 'holistic' thinking implying cooperation and reciprocity. In addition the paper argues that the EU's ambitions sit uncomfortably with traditional state-centred international diplomatic law. Extensive diplomatic activity of the EU depends on the acceptance by the willingness of third states to accept the EU as a diplomatic actor.

"The International Responsibility of the European Union: Between pragmatism and Proceduralization"

Andés Delgado-Casteleiro

EU´s management of its international responsibility for wrongful acts moves between a pragmatic approach to the topic and the proceduralization of the responsibility. The EU either lays down complex procedures in order to manage the allocation of responsibility in order to (allegedly) preserve the internal division of competences or takes a pragmatic approach which disregards any internal division of competences. This paper critically analyses these two trends in EU´s practice. The paper argues that instead of complex and slow procedures or ad hoc pragmatic solutions the EU should push for a rules-based approach which is at the same time pragmatic and respects the principles underpinning the proceduralization of responsibility.

"International Law and Federated Entities: Beyond the Black Box"

Gleider Hernández

The dominant role of the sovereign State in international relations, it hardly needs recalling, remains the basis for our conception of international law; it is generally accepted that this has been so since the Peace of Westphalia imposed a horizontal inter-State model of international relations. However, such a paradigm does not reconcile itself easily to the long-standing practices of certain subnational components of a federation to assert themselves and act on the international plane, forging links with each other or with foreign States. This is a practice which has amplified in recent years due to the growing interdependence between States and economies. The interface between international and domestic legal orders is reciprocal: the expansion of international law to touch upon issues heretofore considered as within the reserved domain of domestic constitutional law, and even to the activities of the federated entities of States, has led to a search for alternative paradigms through which better to understand how international law accommodates such entities. In this respect, the orthodoxy that a central executive acts exclusively on behalf of a State in matters of foreign policy has come to be challenged, and in many respects has a marked impact on the internal legal order of a federal State. This paper will therefore consider how a number of States assign the treaty-making power--an international competence par excellence--within their constitutional structures, with a view to assessing the extent to which international law can accommodate these constitutional realities.

"Does the integration of European Legal Order promise the disintegration of the International? EU courts as actors in the international legal order"

Veronika Fikfak

The paper re-examines the link between the European and the international legal order in light of the new decisions of EU courts and the impact these decisions have had on the international legal order. It shows how in recent decisions relating to the Security Council's Sanctions regime EU courts have sought to remove themselves from the international legal order by asserting their own constitutional order. The manner in which this was achieved is especially relevant: not only did the EU courts deny they formed part of the same legal order as other international institutions, they did so without reference to international law, effectively rejecting its function as a common language of the international legal order. Yet, in spite of this strong rejection of being part of the international order, the EU courts' power over its member states' implementation of the Sanctions regime meant that the Security Council had to respond to its concerns. Since EU member states were no longer able to implement its resolutions, as this would generate a violation of EU law, the Security Council addressed some of the European concerns by introducing a new procedure into the Sanctions regime. Even if apparently acting outside the international legal order, EU courts have therefore created an important role for themselves on the international plane and increased their power over international institutions. As a consequence, I argue, they have to be considered as actors in the international legal order.

"The Politics and the Law of the ENP: A Difficult Marriage"

Narine Ghazaryan

'The European Neighbourhood Policy (ENP) is inherently political in nature. The rationalistic considerations underpinning its launch and subsequent elaboration have necessarily influenced the choice of the legal framework. At the same time, the rules regulating the conduct of foreign policy in the various areas covered by the ENP had a reciprocal impact on policy choices made. The legislative and political developments following the ratification of the Lisbon Treaty and the so called 'Arab Spring' uprisings arguably injected new dynamics in the interaction between the political and legal aspects of the ENP. The proposed paper aims at tracing the interaction of the politics and law of the ENP at four phases of its existence. The phases are merely provisional and some overlapping in time. The first phase concerns the appearance of the initiative and its

formulation. The next phase refers to the post-Lisbon ENP and the role of the new Treaty provisions in the political dynamics of the policy. The third phase focuses on the regional split into the Eastern Partnership and the Union for Mediterranean initiatives. The last and current phase is the post- Arab Spring ENP linked to the policy revisions carried out in reaction to the political turbulence in the Southern neighbourhood.

"Investor-state arbitration in EU investment agreements"

Angelos Dimopoulos

This paper aims to offer a comprehensive analysis of the legal concerns that arise from the inclusion of investor-state arbitration in EU investment agreements. Dispute settlement presents one of the thorniest and most controversial issues in the development of EU investment policy. The inclusion of investor-state arbitration in future EU investment agreements raises significant Union law concerns regarding the scope of EU competences and its compatibility with Union law. Moreover, it is questionable how Union law constraints on investor-state arbitration can be accommodated within international investment law, concerning in particular international responsibility and the available fora for dispute resolution. Taking into consideration the latest developments and in particular the Commission's proposal for a regulation on financial responsibility under investor-state arbitration of June 2012, this paper argues that the inclusion of investor-state arbitration in EU investment agreements requires some delicate balances. It is possible to set up a rigorous and effective investor-state dispute settlement system that both respects Union law and functions within the contours of international investment law; however, whether the current Commission's proposal is appropriate to achieve this is debatable.

"*The Role of European Union Law in the Global Green Economy"*

Markus Gehring

As argued in the 2011 UN Green Economy Report, the world faces an important opportunity to move from current resource depleting, polluting and wasteful forms of economic growth to a new, low-carbon, sustainable green economy. The Rio +20 Summit on Sustainable Development also highlighted the need for such transition. New markets and industries are emerging, for clean renewable energy, environmental goods and services, local organic agriculture, and payment for ecosystem services. International economic law is evolving rapidly, and could foster rather than frustrate this shift. This paper explores the role that EU law plays in the transition to a global green economy. Starting with the expansion of the EU carbon Emission Trading Scheme (ETS) to global aviation, there are now several measures in force in the EU which have an external dimension in pursuit of green economy measures. Besides setting an example at the internal EU level, the paper explores the role that EU law plays in the transition and the limits of this development. The Court of Justice in decisions like ATAA and PFOS has been instrumental in enabling legislation and decisions that enable the EU's shift to a greener economy but also its increased international role relevant for the global green economy.

"The Eurozone Crisis and Third States"

Michael Waibel

One of the most important and contentious aspect of any sovereign debt restructuring is the priority structure. In Greece's first sovereign debt restructuring in February/March 2012, private bondholders were subordinated to Eurozone governments, the European Financial Stability Facility, the European Central Bank, Euro-area national central banks and the International Monetary Fund. The class of creditors claiming priority is growing compared to previous debt crises. The question of how private and public creditors from third states were treated in the restructuring has received less attention. Norway's sovereign wealth fund, for example, voted against the Greek restructuring, but like many other creditors had losses imposed on it by the use of collective action clauses. This question is relevant for several types of creditors, ranging from non-Eurozone governments and central banks in the EU, over official creditors such as China and Brazil to sovereign wealth funds based in the Middle East. I explore lessons from the first Greek restructuring for non-Eurozone states and their creditors. Should another debt restructuring, in Greece or elsewhere in the Eurozone, become necessary, it can be expected that creditors outside the Eurozone will once again be drawn into the crisis resolution. I look at several factors that are likely to shape burden sharing in such restructurings.