PART I

Setting the scene

1

Introduction

Opening words

The parking lot next to a sports hall in the Herttoniemenranta area of Helsinki presents a puzzling sight. The lot has some forty demarcated parking places which, in itself, is no cause for surprise: this is what one would expect in a parking lot. What is cause for surprise, however, is that next to one of the parking spaces, there is a 'no parking' sign: a typical example of conflicting instructions. As an example of conflicting instructions, it is of course not all that uncommon: legislators, at whatever level of governance, may on occasion not realise that instruction A is incompatible with instruction B, or rule A is in conflict with rule B. What makes the case of the parking lot and the 'no parking' sign all the more curious, however, is that the norms do not exist merely in abstract form, as words on paper, but have also met with physical implementation: someone had to build the parking lot and paint the stripes demarcating one parking space from the next, and someone had to put up the 'no parking' sign.

This is not a book about parking signs, or conflicting norm-setting at the local level. It is, instead, a study of the topic of conflicting norms on the international level, where two of the elements characterising the parking problem are usually lacking: international norms do not result from a single norm-setting agency,[1] and typically with international norms, they exist first and foremost as words on paper.

To be more specific, this is a book about treaty conflict in international law with special emphasis on a particular class of conflicts: conflicts between the EC Treaty, and treaties concluded between member states of the EC either with third parties or with each other. It is not a study of

[1] Then again, I am not sure whether this applied in the parking sign example. It is possible that the parking space was created by the parking authority of the city of Helsinki, while some agency at the lower sub-municipality level of Herttoniemenranta bears responsibility for putting up 'no parking' signs. Or *vice versa*.

norm-conflict more generally; it will not address conflicts between treaties and customary norms, or treaty provisions and general principles of law. Nor does it deal with conflicts between EC law and the national laws of its member states. The scope of this study, in other words, is limited to studying the way conflicts between obligations owed under EC law, and obligations owed under some other international treaty, are addressed.

The immediate inspiration for writing this book resides in a string of cases decided by the Court of Justice of the EC. In late 2002, the EC Court came up with its long-awaited judgments in the so-called *Open Skies* cases. During the second half of the 1990s, a generous handful of the EU's member states had concluded bilateral agreements with the US relating to air traffic issues. The Commission, unhappy with this go-it-alone attitude of so many of the EU's member states, initiated proceedings before the Court of Justice, claiming in essence that, when concluding these bilateral agreements with the US, the member states had acted in violation of their obligations under the TEC. Moreover, their bilateral treaty-making with the US had been rather counterproductive for, as the Commission suggested, together the EU member states could boast a far stronger negotiating position towards the US than any of its member states could possibly hope to achieve on its own.

The judgments by the Court largely followed the Commission's position: in concluding the agreements, the Court held, the member states had violated EU law, most notably rules relating to the freedom of establishment, and the general catch-all provision of article 10 TEC, under which the member states agree to act in a spirit of loyalty to the Community – the 'fidelity principle' as it sometimes referred to, or *Gemeinschaftstreue*, in good German.

While scenarios such as those of the *Open Skies* cases do not come about every day, they seem to be recurring with increasing frequency: indeed, at the time of writing, a handful of cases are pending before the EC Court involving the conclusion of bilateral investment treaties by several member states with third parties. Again, the main argument seems to be that these bilateral agreements may interfere with internal Community rules (in this case, the rules on free movement of capital), and with the ubiquitous notion of *Gemeinschaftstreue*.

In addition, ever since the ending of the Cold War helped re-activate the Security Council of the United Nations, issues have arisen before the EC courts concerning the relationship between UN law and EU law; the notorious decisions of the Court of First Instance in cases involving sanctions imposed on Swedish citizens are merely the most recent in

an impressive line of cases – and more cases are pending. On several occasions, the relationship between the EC and the European Convention on Human Rights has reached the courts in Europe, with both the EC Court and the Human Rights Court, for the time being, testing the waters rather than burning any bridges. And a general string of cases involving anterior treaties (treaties concluded by a member state before joining the EC) would seem to suggest that although such treaties are protected under the EC Treaty, the protection offered is really marginal: in the summer of 2000, the EC Court rendered judgment in cases against Portugal for failure to take sufficient steps to terminate several anterior treaties.

The curious thing about most of these decisions is what the Court leaves unsaid: it says not a word on the possible role of international law, despite the fact that the agreements at issue were valid international agreements, creating rights and obligations both for each of those member states and for the treaty partners. The Court remains silent about the possible conflict of norms created by concluding those agreements, yet it is this conflict which will be central to this study.

As noted, the *Open Skies* cases do not represent the first time that the EC Court has decided a case without considering possibly applicable international law.[2] Nor is the EC Court the only international tribunal that tends to look at international cases purely from its own internal perspective, thereby possibly (if not always actually) disregarding international law. In 1989, in its famous *Soering* decision,[3] the European Court of Human Rights did much the same in a case involving the question whether extradition of a criminal suspect from the UK to the US, while possibly envisaged under the bilateral extradition treaty, ran counter to the UK's obligations under the European Convention. While the Court's decision was no doubt justifiable also in terms of general international law, given the terms of the extradition treaty at issue,[4] it is nonetheless surprising to see that the international law context was by and large ignored.[5]

[2] See already F. E. Dowrick, 'Overlapping International and European Laws', *International & Comparative Law Quarterly*, 31 (1982), 59–98.

[3] See *Soering* v. *United Kingdom*, European Court of Human Rights application no. 14038/88, judgment of 7 July 1989, *Publications of the European Court of Human Rights*, vol. 161 (1989).

[4] See also Colin Warbrick, 'Coherence and the European Court of Human Rights: The Adjudicative Background to the *Soering* Case', *Michigan Journal of International Law*, 11 (1989–90), 1073–96, at 1093–4.

[5] For a general comment, see Stephan Breitenmoser and Gunter E. Wilms, 'Human Rights v. Extradition: The *Soering* Case', *Michigan Journal of International Law*, 11 (1989–90), 845–86.

And a decade and a half later, the ECtHR suggested that it has retained that basic approach in a case involving a possible conflict between the European Convention and a bilateral Latvia–Russia treaty on withdrawal of Russia's troops from Latvia's territory: once the Court had found that the bilateral treaty did not affect its jurisdiction (in that Latvia had made no reservation in regard to the treaty upon ratifying the Convention), it paid no further attention to it.[6]

Likewise, as is well-documented,[7] the WTO's dispute settlement bodies have shown a marked reluctance to look beyond WTO law proper in deciding disputes.[8] The International Tribunal for the Law of the Sea held, in deciding upon a request for provisional measures in the *Mox Plant* case, that even though provisions in other treaties might be similar or identical, the request could be captured solely in terms of the 1982 Law of the Sea Convention, excluding other relevant norms.[9] An ICSID panel, confronted with a possible environmental justification for an expropriation, noted that for its decision, the international source of the environmental obligation made 'no difference'.[10]

Only the International Court of Justice seems relatively open to all sorts of norms, not surprisingly perhaps given the fact that it is a court of general jurisdiction. But even the ICJ's openness is limited: the Court did its very best (and succeeded brilliantly) to avoid saying anything with finality on the relationship between the UN Charter and other treaties in the *Lockerbie* cases,[11] and felt the need, in *Oil Platforms*, explicitly to

[6] See *Slivenko* v. *Latvia*, European Court of Human Rights application no. 48321/99, judgment of 23 January 2002 (admissibility), ECtHR *Reports of Judgments and Decisions* (2002-II) 467.

[7] See, e.g., Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003).

[8] As good an example as any is the panel decision in *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291.292.293, 21 November 2006.

[9] See ITLOS, *The Mox Plant case* (Ireland v. United Kingdom), request for provisional measures, order of 3 December 2001, paras. 50–2.

[10] See ICSID, case no. ARB/91/1, *Compañía des Desarrollo de Santa Elena, S.A.* v. *Costa Rica*, final award of 17 February 2000.

[11] It underlined, in its 1992 order on provisional measures, that its discussion of Security Council Resolution 748 and the legal effects thereof was preliminary only, leaving the door open for further reflections and ruminations. These, however, would never come about. See *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v. USA), provisional measures, [1992] *ICJ Reports* 114, esp. paras. 42–5.

justify interpreting a treaty between Iran and the US in light of general international law.[12]

Treaty conflict and fragmentation

As the brief enumeration of recent court decisions above already suggests, treaty conflict is one of the more hotly debated topics among international lawyers at present. In the literature this is reflected in the appearance of numerous studies on treaty conflict generally,[13] sometimes with special reference to the WTO as the focal point for linking issues,[14] as well as studies on more specific instances of conflict related to trade norms: trade versus human rights;[15] trade versus environmental protection[16] and health;[17] trade versus labour protection;[18] trade versus culture.[19] Some

[12] See *Case Concerning Oil Platforms* (Islamic Republic of Iran v. USA) judgment of 6 November 2003, para. 41. Arguably, the Court felt the need to justify this in explicit manner in order to respond to the US argument that the Court's jurisdiction was limited to interpreting and applying the bilateral Iran-US Treaty. *Ibid.*, para. 39.

[13] For the last decade or so alone, see Jan Mus, *Verdragsconflicten voor de Nederlandse rechter* (Zwolle: Tjeenk Willink, 1996); Wilhelm Heinrich Wilting, *Vertragskonkurrenz im Völkerrecht* (Cologne: Carl Heymans Verlag, 1996); Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Leiden: Martinus Nijhoff, n.y.).

[14] See Pauwelyn, *Conflict of Norms*; José E. Alvarez, 'The WTO as Linkage Machine', *American Journal of International Law*, 96 (2002), 146–58.

[15] See in particular Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights', *European Journal of International Law*, 13 (2002), 753–814; Ernst-Ulrich Petersmann, 'Human Rights and the Law of the World Trade Organization', *Journal of World Trade*, 37 (2003), 241–81; Ernst-Ulrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', *European Journal of International Law*, 13 (2002), 621–50; Hoe Lim, 'Trade and Human Rights: What's at Issue?', *Journal of World Trade*, 35 (2001), 275–300.

[16] A fairly early example is Scott N. Carlson, 'The Montreal Protocol's Environmental Subsidies and GATT: A Needed Reconciliation', *Texas International Law Journal*, 29 (1994), 211–30.

[17] See, e.g., Sabrina Safrin, 'Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements', *American Journal of International Law*, 96 (2002), 606–28; Patrick J. Vallely, 'Tension between the Cartagena Protocol and the WTO: The Significance of Recent WTO Developments in an Ongoing Debate', *Chicago Journal of International Law*, 5 (2004–05), 369–78.

[18] See, e.g., Christopher McCrudden and Anne Davies, 'A Perspective on Trade and Labor Rights', *Journal of International Economic Law* 3 (2000), 43–62; Hilary K. Josephs, 'Upstairs, Trade Law; Downstairs, Labor Law', *George Washington International Law Review*, 33 (2000–01), 849–72.

[19] See, e.g., Mary E. Footer and Christoph Beat Graber, 'Trade Liberalization and Cultural Policy', *Journal of International Economic Law*, 3 (2000), 115–44; Tania Voon, 'UNESCO and the WTO: A Clash of Cultures?', *International and Comparative Law Quarterly*, 55 (2006), 635–52.

work discusses the conflict between investment protection and environmental regulation,[20] while various studies have been devoted to treaty conflict within specific branches of public international law, most notably environmental law.[21] Asylum lawyers have started to worry about the possibility that so-called 'diplomatic assurances' (agreements between states that extradited persons will not be subject to human rights violations) may end up eroding earlier, more robust human rights commitments.[22] And, as far as the EU is concerned, the links between Community law and the European Convention have attracted particular attention,[23] as well as (albeit to a lesser extent) the connections between Community and United Nations law.[24]

Partly, the reason for this can be found in the subject's relationship with the broader topic of the fragmentation of international law,[25] something which inspired even the International Law Commission to devote further study to treaty conflict, despite the fact that the topic does not lend itself for a codification convention.[26] Fragmentation, after all, might mean that various sub-disciplines or sub-régimes of international law lose track of one another and end up creating norms which may be in conflict: norms

[20] See Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London: Allen Lane, 2005), ch. 6.

[21] See especially Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Berlin: Springer, 2003); see also Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Utrecht: Eleven, 2005), ch. 9.

[22] See in particular Gregor Noll, 'Diplomatic Assurances and the Silence of Human Rights Law', *Melbourne Journal of International Law*, 7 (2006), 104–26; Martin Jones, 'Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings', *European Journal of Migration and Law*, 8 (2006), 9–39.

[23] See, e.g., Rick Lawson, *Het EVRM en de Europese Gemeenschappen* (Deventer: Kluwer, 1999); Päivi Leino-Sandberg, *Particularity as Universality: The Politics of Human Rights in the European Union* (Helsinki: Erik Castrén Institute, 2005).

[24] A useful recent contribution is Jan Wouters, Frank Hoffmeister and Tom Ruys (eds.), *The United Nations and the European Union: An Ever Stronger Partnership* (The Hague: TMC Asser Press, 2006).

[25] On fragmentation generally, see Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties', Leiden *Journal of International Law*, 15 (2002), 553–79; also very useful is Matthew Craven, 'Unity, Diversity and the Fragmentation of International Law', *Finnish Yearbook of International Law*, 14 (2003), 3–34.

[26] The ILC established a study group, and appointed its then member Martti Koskenniemi as chairperson. The study group has produced two hefty reports on the fragmentation of international law, paying much attention to treaty conflict. The final report is published as UN Doc. A/CN.4/L.682, dated 4 April 2006, under the title *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. A convenient book version was published in 2007 by the Erik Castrén Institute of the University of Helsinki.

emerging from the trade régime may be difficult to reconcile with norms created within the environmental régime, or within the human rights regime.[27] As a result, diverging norms may end up applying to a single state. As international law does not have a central legislature, there is no one to guard the unity of the system, and no one to make sure that the norms the system generates are always compatible with each other. Consequently, the identification of a trend towards fragmentation has spawned concern about treaty conflict, as well as about competing courts[28] and normative conflict more generally.[29] In addition, it has generated a heated debate on whether the sub-disciplines of international law can in any meaningful way be regarded as 'self-contained'.[30]

This study aims to focus on a small, under-analysed part of the question: conflicts between the EC Treaty and treaties concluded between the member states *inter se* and between member states and third parties.[31] That is a small part of the larger question of conflicting treaty norms, and

[27] This may owe much to what Slaughter refers to as the 'disaggregated state': states are no longer unitary actors on the international scene; instead, their agencies and departments operate to some extent on their own. See Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004).

[28] Vaughan Lowe has sensibly observed that some jurisdictional conflicts 'may be approached *via* the Law of Treaties'. See Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals', *Australian Yearbook of International Law*, 20 (1999), 191–204; see generally also Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003).

[29] See already W. Czaplinski and G. Danilenko, 'Conflict of Norms in International Law', *Netherlands Yearbook of International Law*, 22 (1991), 3–42. A novel manifestation of conflict is identified in Yuval Shany, 'Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims', *American Journal of International Law*, 99 (2005), 835–51.

[30] The *locus classicus* is Bruno Simma, 'Self-contained Regimes', *Netherlands Yearbook of International Law*, 16 (1985), 112–36; a recent discussion is Anja Lindroos and Michael Mehling, 'Dispelling the Chimera of "Self-contained Regimes": International Law and the WTO', *European Journal of International Law*, 16 (2005), 857–77.

[31] I am aware of only three published papers addressing the topic of treaties concluded between member states *inter se*. Two of these have been written by De Witte: see Bruno de Witte, 'Old-fashioned Flexibility: International Agreements between Member States of the European Union', in Gráinne de Búrca and Joanne Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Oxford: Hart, 2000), pp. 31–58; and see Bruno de Witte, 'Internationale verdragen tussen lidstaten van de Europese Unie', in Ramses Wessel and Bruno de Witte, *De plaats van de Europese Unie in het veranderende bestel van de volkenrechtelijke organisatie* (The Hague: TMC Asser Press, 2001; Mededelingen van de Nederlandse Vereniging voor Internationaal Recht, no. 123), pp. 79–131. For a third, and very useful, paper see Robert Schütze, 'EC Law and International Agreements of the Member States – An Ambivalent Relationship?', *Cambridge Yearbook of European Legal Studies*, 9 (2006–07), 387–440.

is usually treated in a few paragraphs, or a few pages, in textbooks on the EU's external relations[32] or essays or articles dealing with the connections between international law and EU law.[33] Usually, moreover, the question is studied primarily from the perspective of Community law, with the result that much is made of as general a principle as that of *Gemeinschaftstreue*,[34] or that international law considerations are simply ignored. I am not aware of any monograph on the precise topic of this study; and the number of articles devoted to it is fairly limited as well.[35]

Article 307 TEC and international law

Article 307 TEC is the only article in the entire edifice of the EU relating to the status of treaties concluded by the EU's member states vis-à-vis EU law. Article 307 provides that treaties concluded by member states before the EC came into being or, as the case may be, before the accession of a member state to the EU, shall be immune from the working of EU law. However, as the Court has consistently held, this is not in order to protect the rights of those member states, but rather to protect the rights of others.[36] Moreover, article 307 also entails an admonition that any incompatibilities be terminated as soon as possible, although it fails to prescribe exactly how this termination of incompatibilities should come about.

Still, article 307 is limited only to treaties concluded before the creation of the EC, or a state's accession thereto. That leaves untouched a host of other agreements: those concluded after the member state joined or after the EC was established (I will refer to these as posterior agreements).

[32] See, e.g., I. MacLeod, I. D. Hendry, and Stephen Hyett, *The External Relations of the European Communities* (Oxford: Oxford University Press, 1996), pp. 228–31; Dominic McGoldrick, *International Relations Law of the European Union* (London: Longman, 1997), pp. 123–4; Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford: Oxford University Press, 2004), pp. 333–42. Most generous is Koutrakos, who devotes an entire chapter to 'pre-membership agreements' concluded by the member states. See Panos Koutrakos, *EU International Relations Law* (Oxford: Hart, 2006), ch. 8.

[33] See, e.g., Koen Lenaerts and Eddy de Smijter, 'The European Union as an Actor under International Law', *Yearbook of European Law*, 19 (1999–2000), 95–138, pp. 114–22.

[34] See generally de Witte, 'Old-fashioned Flexibility'.

[35] See above all Ernst-Ulrich Petersmann, 'Artikel 234', in H. von der Groeben, Jochen Thiessing and Claus-Dieter Ehlermann (eds.), *Kommentar zum EWG-Vertrag*, 4th edn (Baden-Baden: Nomos, 1991), pp. 5725–53.

[36] Which others precisely is open to debate; this will be addressed in Chapter 6.

Usually, it is supposed that here Community law simply prevails, and has to prevail by its very nature: if it is indeed the new (and separate) legal order the Court has held it to be, it would seem to follow that its provisions prevail over everything else. After all, any other solution might come to affect the uniformity of Community law; it would provide member states with the possibility of escaping from their obligations under Community law by means of creating conflicting agreements with third parties.

This is, as far as EC law goes, standard fare. The seminal *ERTA* case was already decided on this basis (and not, as is sometimes held, on the basis of the implied powers doctrine): the Court derived a power for the EC to conclude treaties with third parties in the field of road transport from the necessity to safeguard the uniformity of EC law. It was not the case, necessarily, that the founding fathers had intended to provide the Community with such a power; nor was it the case that such a power would have been implied.[37] Indeed, the Court could well have found that EC law was perfectly compatible with treaty-making powers remaining with the member states on the understanding that they would not be allowed to violate their obligations under Community law. Yet the Court found no such thing: instead, it held that the uniformity of EC law warranted the finding of an external power for the EC.[38]

Thus put, it should come as no surprise that article 307 has always been rather restrictively interpreted; the uniformity of EC law permits of no other options. And perhaps for the same reason, it should come as no surprise that the Court tends to ignore (as in the above-mentioned *Open Skies* cases) any possible international law consideration, both when it comes to posterior treaties concluded by the EC's member states, but also (more surprising, given the existence of article 307 TEC) in respect of anterior treaties. To paraphrase Binder, the Court 'conjures up a world without treaty conflict'.[39] Which is, of course, a more polite way of saying that when treaty conflict is at issue, the Court adopts the proverbial[40] ostrich's stance: by putting its head in the sand, the ostrich can see no problems, and if it can't see any problems, they don't exist.

[37] A useful discussion in Dutch is Christine Denys, *Impliciete bevoegdheden in de Europese Economische Gemeenschap* (Antwerp: MAKLU, 1990), pp. 122–32.
[38] See Case 22/70, *Commission* v. *Council (ERTA)* [1971] ECR 273.
[39] See Guyora Binder, *Treaty Conflict and Political Contradiction: The Dialectic of Duplicity* (New York: Praeger, 1988), p. 33. Binder blames ILC Special Rapporteur Fitzmaurice for conjuring up a world without treaty conflict.
[40] At least the Dutch language has the wonderful word '*struisvogelpolitiek*' to denote a policy of simply ignoring problems.