1. Introduction

This chapter aims to contribute to the debate on the interaction between the EU legal order and its external surroundings by exploring under which circumstances international law may be deemed to form part of the EU legal system. The ECJ answers this question mainly along constitutional lines. However, this constitutional approach does not always lead to harmonious outcomes. This contribution hopes to put into focus to which extent and why this is the case. At the forefront of my inquiry will be two, interrelated constitutional concepts: the concepts of autonomy and reception. Both concepts are crucial for a good understanding of the way the EU positions itself vis-à-vis the outside world and may allow us to measure the status of external norms inside the EU legal order. As these tenets are central for our purposes, this chapter starts by giving an overview of them (section 2). Subsequently, it will zoom in on cases and doctrine regarding two types of external actions at the intersection of European, national and international law – mixed agreements and agreements concluded by the Member States without the participation of the EU. For I believe it is at this venue that the position of international law within the European legal order and, by extension, the constitutional premises underlying this position can be best tracked down (section 3). Finally, the chapter will analyze what has been discussed in the preceding two paragraphs. At this point, I will consider the merits of the EU’s constitutional approach towards international law and, in addition, if there are ways to enhance the legitimacy of this perspective (section 4).

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2. Setting the Stage

2.1 The Concept of Autonomy

The concept of autonomy was first launched by the ECJ in the celebrated Costa/ENEL decision. Its development was largely inspired by concerns of an internal nature. If the Community would not be autonomous but still in a constitutional sense dependent on the Member States, the Court feared that it could not firmly establish the notions of direct effect and supremacy, the bedrock pillars of the EU’s special constitutional construction, which, in turn, were necessary in order to achieve uniformity in the application of Community law. However, at the same time, the fact that the ECJ decided to cut the constitutional chord of the Community with the Member States also had implications for the relationship of the EC with the international legal order. From a traditional perspective, international law is ultimately supposed to be derivative of national law. Yet if Community law was no longer dependent on national law, how could it properly continue to form a part of the international legal order?

As regards the internal relationship between the EU and the Member States, today the concept of autonomy largely operates in the shadow of the principles of direct effect and supremacy. In the sphere of external relations, which will mainly concern us here, a converse development took place. Initially, there was little direct contact between the EU and the international legal order. The original EEC was only endowed with limited external powers, which did not match its internal machinery of competences, thus securing that the foreign arena to an important extent remained the domain of the Member States. This gap started to narrow in the 1970’s, when the ECJ gave judgment in a number of cases which widened the scope for the Community

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1 ECJ, Case 6/64 Flaminio Costa v. ENEL [1964] ECR 585. In hindsight, however, the seeds of the perception of the EU as an autonomous legal order were already sown two years earlier, in the equally famous Van Gend & Loos judgment. In this case, the ECJ had argued that the Community constituted ‘a new legal order of international law’. See ECJ, Case 26/62 NV Algemene Transport en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1.

2 This was not an unthinkable idea at the time. See ECJ, Case 6/64 Costa, at 620–623 of the Opinion of AG Lagrange. See further B. de Witte, ‘Direct Effect, Supremacy, and the Nature of the Legal Order’, in P. Craig and G. de Búrca (Eds.), The Evolution of EU Law, Oxford: Oxford University Press, 1999, pp. 177–183.