

# The “European Model” of International Law and its Significance for Asia

## Some Critical Reflections

Benoît Mayer



Source: Court of Justice of the European Union

### ABSTRACT

There is a certain arrogance in the affirmation that a “European model” of regional integration and of compliance with international law should be adopted anywhere in the world, and in Asia in particular. This article argues on the contrary that Asia and Europe are in fundamentally different situations vis-à-vis international law. Based on an analysis of recent events and latest legal developments in Europe, it puts the “European model” of regional integration and the European selective compliance with international law in perspective with regard to the Asian context. Without denying that “civilizations” should learn from one another and that the European experience may be relevant to some extent in Asia, this article concludes that the tools developed in Europe should be used differently in Asia.

### Keywords

Regionalism, European Union, regional integration, Asia, legal transplant, Kadi, ATA, constitutionalism, legal pluralism, international law, regional law

*The EU Centre in Singapore is a partnership of*

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## The “European Model” of International Law and its Significance for Asia: Some Critical Reflections

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### I. Introduction

Does the European model of regional integration continue to hold sway? Over the last years, European states have failed to take a common position on the American invasion of Iraq, disagreed on an EU-led military intervention in Libya<sup>2</sup> and, lately, did not appear united during the grim days of the euro zone sovereign debt crisis. Disillusion has replaced the optimistic mood of the early 1990s, when it seemed that Europe would further integrate, speak with one voice as represented by the European Union (EU) and could thrive as an equal counterpart to the United States. Lately, the EU’s Lisbon Treaty and the Council of Europe’s fourteenth Protocol to the European Convention on Human Rights were only extracted after long and difficult negotiations. Externally, the EU has increasingly been criticised for unilaterally seeking to impose its positions to the rest of the world, in particular on questions such as human rights and environmental protection. Most recently, on 21 December 2011, the European Court of Justice validated the extension of the EU Emission Trade Scheme to aviation activities, although it was fervently denounced by EU partners such as China, India as a “unilateral” initiative. In these circumstances, what do Asian states think of the “European model” now?

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**The views expressed in this working paper are that of the author and do not necessarily reflect the views of the institutions or organisations that they represent, or of the EU Centre in Singapore.**

<sup>2</sup> Ana Gomes. *Was Eufor Libya an April fool's joke?* EU OBSERVER, 13 Jul. 2011.

Regional integration is not to be understood in isolation from the broader world. Regional law and global law maintain existential but complex relations. At the outset, at least, regional integration was based on cosmopolitan theories: region-building was a first step, between like-minded states, to trigger larger international cooperation across civilizations.<sup>3</sup> In the words of the European federalists gathered in the 1948 Hague Congress, for instance, “the creation of a United Europe [was] an essential element in the creation of a united world”.<sup>4</sup> Likewise, Schuman started his 1950 Declaration by declaring that “[t]he contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations”.<sup>5</sup> Going further, Churchill argued in a 1946 speech in Zurich that the European experience was to contribute to a universal model of regional “groupings,” accordingly essential to the construction of a righteous world order:

There is no reason why a regional organization of Europe should in any way conflict with the world organization of the United Nations. On the contrary, I believe that the larger synthesis will only survive if it is founded upon coherent natural groupings. There is already a natural grouping in the Western hemisphere. We British have our own Commonwealth of Nations. These do not weaken, on the contrary they strengthen, the world organization. They are in fact its main support. And why should there not be a European group which could give a sense of enlarged patriotism and common citizenship to the distracted peoples of this turbulent and mighty continent? And why should it not take its rightful place with other great groupings and help to shape the onward destinies of men?<sup>6</sup>

Regional integration, it would appear from the above pronouncements, was based on ideas of the

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<sup>3</sup> The Preamble of the European Convention on Human Rights, for instance, reflects the intention of the European states to “take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.” See Convention for the Protection of Human Rights and Fundamental Freedoms, 5<sup>th</sup> recital, 4 Nov. 1950, 213 U.N.T.S. 222.

<sup>4</sup> Political Resolution of the Hague Congress (7–10 May 1948), art. 14, reproduced in CVCE, [http://www.cvce.eu/obj/Political\\_Resolution\\_of\\_the\\_Hague\\_Congress\\_7\\_10\\_May\\_1948-en-15869906-97dd-4c54-ad85-a19f2115728b.html](http://www.cvce.eu/obj/Political_Resolution_of_the_Hague_Congress_7_10_May_1948-en-15869906-97dd-4c54-ad85-a19f2115728b.html)

<sup>5</sup> The Schuman Declaration (Paris, 9 May 1950), reproduced on CVCE, [http://www.cvce.eu/obj/The\\_Schuman\\_Declaration\\_Paris\\_9\\_May\\_1950-en-9cc6ac38-32f5-4c0a-a337-9a8ae4d5740f.html](http://www.cvce.eu/obj/The_Schuman_Declaration_Paris_9_May_1950-en-9cc6ac38-32f5-4c0a-a337-9a8ae4d5740f.html)

<sup>6</sup> Address given by Winston Churchill (Zurich, 19 Sep. 1946), reproduced on Council of Europe, [http://assembly.coe.int/Main.asp?link=/AboutUs/zurich\\_e.htm](http://assembly.coe.int/Main.asp?link=/AboutUs/zurich_e.htm)

Enlightenment, in particular the ideas of cosmopolitanism and progress. At the outset of the notion of a European integration lies Kant's cosmopolitanism. Kant's second definitive article for a perpetual peace stated that "[t]he law of nations shall be founded on a federation of free states".<sup>7</sup> On this premise, Europe had developed international law as a tool for peace. After World War II, peace was conceived broadly: primarily as the absence of violent conflicts between states, but to some extent also, positively, as the development of friendly relations and cooperation between nations.<sup>8</sup>

Western thinkers generally conceived international law as a one-way linear process along the path of progress. No return to previous states of nature (i.e. anarchy in international relations theory) was allowed. Indeed, this ratchet effect is reflected by the definition of the three main sources of international law (as defined by the Statute of the International Court of Justice). The first source of international law, the treaties, is, according to the *Vienna Convention on the Law of Treaties* (as a general rule subject to exceptions) "not subject to denunciation or withdrawal".<sup>9</sup> The second source, international customs, consists of general practices accepted as law. Customs are antithetical to the notion of a renunciation. Arguably, they can solely be *amended* by another customary norm or by a conventional norm. Lastly, the third source of international law, the "general principles of law recognized by civilized nations," are meant to add to each other, not to terminate at any time.<sup>10</sup> In this cultural context, the "small steps" of regional integration were conceived, in Europe, as a good to the international community, a way to encourage incremental progress of international law, to move the international community toward an international social contract. Small steps can prosper as long as they keep heading toward the same direction.

In this Western construction of international law, however, Asia and, more generally, the Third World, remained at the periphery, generally as passive receptors of a model often imposed upon them. The

<sup>7</sup> Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795) second definitive article.

<sup>8</sup> See, for instance, Charter of the United Nations, art. 1, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153.

<sup>9</sup> Vienna Convention on the Law of Treaties, art. 56, 26 May 1959, 1155 UNTS 331.

<sup>10</sup> Statute of the International Court of Justice, art. 38(1), in annex of the Charter of the United Nations, *supra* note 8.

Westphalian model of international legal order was imposed worldwide through colonialism and other forms of unequal civilizational encounters. International legal personality was conferred exclusively to states<sup>11</sup> and statehood, a fruit of the Western modernity,<sup>12</sup> was precisely denied to colonized peoples. After World War II, however, decolonized states were slowly admitted into the UN. All states were progressively conferred equal sovereignty – South Sudan and China alike – and were conceived as analogous entities possessing a Weberian monopoly on the legitimate use of violence over their jurisdiction. In law, at least, all states are born and remain equal in rights and duties; all contribute assumedly in the same way to defining international rules; and all have the same obligation of compliance to international law. In fact, however, the Third World was knocking at the closed doors of international law but it often remained ignored.

At the same time as Third World states strive to be recognized as genuinely equals, the relations between regional integration and international law are questioned. Critiques of a European "unilateralism" argue that, in our post-modern 21<sup>st</sup> century, regional integration should mainly be understood as a challenge to international law. In a neo-realist perspective, regional integration is a means to another end: defending regional models in a would-be inevitable "clash of civilizations".<sup>13</sup> Instead of a contemporary or a smaller replica of Kant's universal federation of free states, Europe would accordingly become a fortress of self-centred peoples, a defensive union in a generally anarchical world where each region becomes a closed bloc and competition shifts from the national to the regional level. Although the Titanic project of international law was conceived as unsinkable, it would have been challenged and betrayed by regional law. The apocalyptic "autumn of international law"<sup>14</sup> is announced.

The betrayal probably started at the very outset of European integration. European integration started at

<sup>11</sup> Later, legal personality was extended to international organizations of states. See: Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (11 Apr.).

<sup>12</sup> See Kenneth H.F. Dyson. *The State Tradition in Western Europe: A Study of an Idea and Institution* (Oxford University Press, 1980).

<sup>13</sup> On the interpretation of Huntington's theory as neo-realist, see for instance: Richard E. Rubenstein & Jarle Crocker, *Challenging Huntington* (1994) 96 Foreign Policy 113.

<sup>14</sup> Prabhakar Singh, *International Law as an Intimate Enemy*, 17 Afr. Y.B. Int'l L. (forthcoming 2009) (abstract).

the very time when the Iron Curtain descended upon Europe, and for several decades the European project was propelled by the constant anxiety to contain Communism. In the words of a Belgian ambassador in 1948, “what we want before all [...] is to act quickly with the goal of integrating without delay Western Germany in the Western bloc”.<sup>15</sup> The European Economic Community was established less than two years after the Warsaw Pact. At the time, constructing the European project as a reaction to communism was legitimized as self-defensive. When the Iron curtain was torn away, idealist hopes were raised: could Europe, at last, focus exclusively on its cosmopolitan project? Yet, the last two decades constantly disillusioned such hopes. As conflicts arose between European law and international norms, the European Court of Justice (ECJ) renounced to the systematic primacy of the latter. In the words of the critical General Court, the ECJ

Regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of international law—in this case the law deriving from the Charter of the United Nations.<sup>16</sup>

The Euro-centric debate about the relation between Europe and international law certainly concerns Asia, and Asia should play a role in this debate. After all, speaking about the foundations of regionalist movements, Asia and Europe speak a common language, although certainly different dialects. The need to conceive a way to live together is shared universally. Everywhere in Eurasia as elsewhere, the relations between direct neighbours and partners are of special importance, for transnational cooperation is facilitated by similar civilizational traits and common interests. With the exception of rising powers like China or India, most Asian states see in international law in general, and in regional integration in particular, a shield against unilateral actions by greater geopolitical powers. Additionally, Asian states try to use international law as a shield against the pursuance of asymmetrical, post-colonial relations. For superpowers, international law provides the rules necessary for the stability and prosperity of an

interdependent world. Yet it is notable that transnational cooperation in Europe and in Asia has followed different paths.

European integration has often been cited as a model that other regions should follow. Yet, as it is perceived that the European project is stalling, in Asia where regional experiments are taking place, doubts about the European model has deepened. Certainly, on the mono-dimensional scale of a European model for regional integration, the Asian experiments did not go far enough, and the creation of supranational institutions is simply inconceivable. Applying European standards of regional institutions to assess Asia’s transnational achievements would certainly be unproductive. Other forms of transnational cooperation are possible. Asian governments do not have to comply with European premises. Cultural and circumstantial elements, among others, may invite completely different forms of transnational cooperation, even though some needs and goals are probably analogous. As Panikkar already recalled in 1982, “[n]o culture, tradition, ideology or religion can today speak for the whole of humankind, let alone solve its problems.” Asia’s own path toward regional cooperation may even influence the European way, for, as Panikkar goes on, “[d]ialogue and intercourse leading to a mutual fecundation are necessary”.<sup>17</sup> Transnational law in Asia may develop alternative sources to treaties and customs; “gentlemen’s agreements”, in particular, probably play a greater role in Asia than in Europe, along with diverse forms of non-formally binding declarations.

Such differences of approach may even be necessary, for the premise of transnational cooperation in Asia and in Europe are not identical. From the outset, Europe included two great regional powers (France and Germany), each of which could be balanced by the combination of smaller countries (Belgium, Italy, Luxembourg and the Netherlands). In contrast, in East Asia and South Asia, the (European) legal fiction that states are equal and sovereign may appear just too artificial given the greater differences in size and power between states and the incapacity of smaller nations to weight against India or China. Even more than the differences in size and power, is the differences in historical and cultural experiences. In Northeast Asia, one of the least integrated regions in the world (at least formally), how could South Korea

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<sup>15</sup> Letter from Jules Guillaume to Paul-Henri Spaak (Paris, 15 October 1948), reproduced in CVCE, [http://www.cvce.eu/obj/letter\\_from\\_jules\\_guillaume\\_to\\_paul\\_henri\\_spaak\\_paris\\_15\\_october\\_1948-en-789c117d-9dd5-4c3c-9e82-cc7e083e1a65.html](http://www.cvce.eu/obj/letter_from_jules_guillaume_to_paul_henri_spaak_paris_15_october_1948-en-789c117d-9dd5-4c3c-9e82-cc7e083e1a65.html)

<sup>16</sup> Case T-315/01, *Kadi v. Council and Comm’n*, 2005 E.C.R. II-3649 [hereinafter *Kadi-I CFI*], para. 119.

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<sup>17</sup> R. Panikkar, *Is the Notion of Human Rights a Western Concept?* 30:120 *DIAGENES* 75, 75 (1982).

and Japan not become bogged within China's power, or how could China agree to treat its neighbours fully as equals – as the legal fiction of equally sovereign states demands?

In addressing all these different issues, the present paper aims at analysing the significance of recent trends in European integration for the Asian region. There are however strong limitations to any comparison between "Europe" and "Asia." The latter region, even more than the former, is ill-defined. As a geographical entity, its borders are blurred. As a cultural or civilizational entity, also, its unity is uncertain, to say the least. Asia is mostly a negative concept: as Ruskola recalled, the notion of Asia, developed by Europeans, "stands for little more than not being Europe".<sup>18</sup> Broadly defined, Asia includes almost two thirds of the world's population and countries as different and as literally far apart as Saudi Arabia and Japan. This paper focuses on the Eastern part of the giant continent: Northeast Asia, Southeast Asia and South Asia. This region remains however extremely broad and heterogeneous. Regional integration in Asia occurs within sub-continental groupings such as ASEAN and the South Asian Association for Regional Cooperation (SAARC), rather than at the whole Asian level.

Moreover, any comparison has its inherent limitations and it is a two-way process. Although concentrating on the sole influence of Europe on Asia (and not on the reverse movement), this paper also recognises that Europe's strong institutions are not the only possible model for intergovernmental cooperation. Just as a different constitution is necessary for a different country, it is natural that models of regional cooperation, while influencing each other, will maintain key differences, reflecting the different regional settings.

The following discussion is structured around two existential questions in the context of the constant redefinition of the European model - internally, (i.e. within the integrating regions, the EU's perceived lack of unity questions the assumption that European integration could be an influential model for regional integration elsewhere, in particular in Asia) and externally, (i.e. in the relation between the integrating regions and the larger world, the EU's perceived lack

of compliance with international law interrogates the notion that Asia should necessarily comply with international law).

## II. The limits of the European model of regional integration in Asia

The EU is often referred to as a model for successful regional integration. In comparison, Asia is too often viewed as failing to reproduce the European successes.<sup>19</sup> Even ASEAN, often considered the best sub-regional achievement in Asia, has not been able to establish any form of regional judicial body that could stand a comparison with the European Court of Justice or the European Court on Human Rights, or even, beyond Europe, with the Inter-American Court on Human Rights or the African Court on Human and Peoples' Rights. No elected body represents the Asian nations in any manner similar to the European Parliament, nor does any sub-governmental body gather individuals nominated by Asian governments in a way similar to the Parliamentary Assembly of the Council of Europe. ASEAN and SAARC consist solely of summits, councils and committees and inter-governmental meetings with substantially less formal institutions. No Asian organization has a bureaucracy that can be compared to the European Commission with more than 20,000 civil servants. While acknowledging the different circumstances in Asia, there is also a strong belief that regional integration can only be achieved with legalistic and formal institutions like in the EU.

The present section argues that such oft-heard arguments do not hold much water. More specifically, this argument is based on two fragile premises. Firstly, it assumes that Europe has achieved a successful model of regional integration. Of course some nuances may appear from one discourse to the other. For instance, few authors would consider the

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<sup>18</sup> Teemu Ruskola, *Where Is Asia? When Is Asia? Theorizing Comparative Law and International Law*, 44 U.C. DAVIS L.R. 879, 882 (2011).

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<sup>19</sup> There are many examples of such assertions in academic papers as in mainstream media, so that the examples can only be chosen arbitrary. Some of them include: C.H. Kwan, *Yen Block: Toward Economic Integration in Asia*, xiii (2001) (identifying "the introduction of the Euro in Europe" as an instrumental factor in arousing "active discussions" on the need of a reform of the financial architecture of Asia); Ray Barrell and Amanda Choy, *Economic Integration and Openness in Europe and East Asia* (2003); Hwee Kwan Chow & Yoonbai Kim, *A common currency peg in East Asia? Perspectives from Western Europe*, 25 *Journal of Macroeconomics* 331 (2003); Mark Beeson, *Rethinking regionalism: Europe and East Asia in comparative historical perspective*, 12, *Journal of European Public* 969 (2005).

European model of integration as completely successful, or the Asian one as a complete failure. Yet, it remains a commonly accepted conception that European integration, when compared with Asian, has been a relative success. Second, the discourse on the EU's "model" of regional integration also assumes that the conditions for a successful regional integration are analogous in Asia and in Europe, so that the success of regional integration in Europe could be transplanted to Asia. Here again, some may add nuances to the analogy between Asia and Europe, but the somewhat condescending attitude, which some may regard as "neo-colonialist", remains central: accordingly, Asia has to learn from Europe.

Yet objections can be addressed to both of these assumptions. On the one hand, Asia does not have much to envy with regard to European integration (A). On the other hand, significant differences appear between the circumstances of regional cooperation in Europe and Asia (B).

#### **A. Reassessing the success of European integration**

A first objection is that Europe has never fully achieved a model of regional integration. Alternatively, the theoretical "European model of regional integration" was never fully implemented. After all, the history of the European Communities is full of hurdles that were not cleared without significant concessions on the European federalist project. For example, one of these crises occurred in 1965, when French president de Gaulle recalled the French Permanent Representative in Brussels to protest against budgetary reforms and also the application of the majority voting in the Council of Ministers. This crisis was solved the following year through an extraordinary Council meeting in Luxembourg, but only at the cost of a detrimental precedent on the procedure for decision-making in the Council. Taking note of "different views" about the obligation to negotiate before taking a controversial decision in the Council, the final communiqué of 1966 in fact allows a state to veto a decision that, it considers of a "vital importance"<sup>20</sup> for its national interests. The rule that European law makers cautiously kept out of any

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<sup>20</sup> Final Communiqué of the Extraordinary Session of the Council (Luxembourg, 29 January 1966), reproduced in CVCE, [http://www.cvce.eu/obj/final\\_communique\\_of\\_the\\_extraordinary\\_session\\_of\\_the\\_council\\_luxembourg\\_29\\_january\\_1966-en-abe9e77d-9bf9-4e0a-90a9-b80cb48efb47.html](http://www.cvce.eu/obj/final_communique_of_the_extraordinary_session_of_the_council_luxembourg_29_january_1966-en-abe9e77d-9bf9-4e0a-90a9-b80cb48efb47.html)

treaty remains a sword of Damocles hanging over any European negotiation – the possibility (at least theoretical, if rarely implemented) for any state, at any time, to prevent a decision. It certainly does not apply to all countries in the same way; smallest or least influential member states are unlikely to risk playing the same game. Yet, for decisions on issues such as the Common Agricultural Policy, the agreement of a few influential states remains, in fact, necessary.

Beside procedural issues, Europe has not yet met the expectations of the federalist movements in the late 1940s. This is illustrated by the striking contrast between German reunification and the accession of Central and Eastern European States to the EU. In Germany, political "reunification" was a matter of months and the federal government invested massive funds to foster development in the reunified Eastern Länder. By contrast, the accession of 12 member states to the EU took one and a half decades. Even after the accession of the new Central and Eastern European Member States, derogatory conditions included in the treaties of accession were applied for nearly a decade, curtailing the fundamental freedoms of new European citizens and limiting the benefit of their states under pre-existing structural and cohesion funds. Germany, on the one hand, is a strong imagined community, whose members are capable of ambitious sacrifices for the sake of each other, as has recently been tested. The EU, on the other hand, remains little more than an inter-governmental organization, whose policies are guided by national interests rationally assessed and negotiated by each of its member states. Again, most recently, the failure of Europe to establish a genuine transnational solidarity has been displayed, during the "euro crisis," by the incapacity to take sufficiently strong measures early enough. Similarly, the reform of EU primary law has failed to lead to a genuine European debate, and the election of the Members of the European Parliament remains animated almost exclusively by domestic political issues; no democratic European politics have emerged. To employ Tönnies' classical dichotomy, Europe has as yet remained a "society" (*Gesellschaft*) of states seeking their own interests; it has never become a genuine "community" (*Gemeinschaft*) where states would also look beyond their national interests.<sup>21</sup>

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<sup>21</sup> See Ferdinand Tönnies. *Community and Society* (1887).

With the prestige of the European model arguably diminishing, and European integration stalling, it is useful perhaps also to reflect on the Asian model of regional cooperation, and see what lessons Asians can learn from the current crisis. After all, European crises show that, just like in Asia, consensus remains a must in Europe. Interests (as they are perceived by each nation) led, for example, Switzerland out of the EU (formally at least) and the United Kingdom out of the euro. In Asia, likewise, Indonesia did not adopt the 2002 ASEAN Agreement on Transboundary Haze Pollution, ratified by eight other ASEAN members following Sumatra's wildfires. The states affected by haze could not convince Indonesia to recognize its duty toward its neighbours. ASEAN might have also set up an Inter-governmental Commission on Human Rights, but real progress would be slow because of concerns over sovereignty. The crisis in the euro zone however revealed too that – the EU remains an organization of independent and sovereign states, ready to agree only to what they perceive in their own interest.

Certainly, *quantitatively*, more negotiations are successful in Europe. No Asian sub-region is likely to establish a common currency any time soon. In Europe, economies and cultures are more interdependent and interrelated than in any Asian sub-region, which perhaps explains the greater success of European transnational negotiations. There is no inherent superiority of the European model, but only circumstantial differences in the possibility of *quid pro quo* arrangements – the condition for successful negotiations. In Asia as in Europe, negotiations are based on well-thought through national interests, not on prevailing regional concerns; but, if Europe has not *qualitatively* gone further than Asia, if it has not implemented a distinct model or invented a magic formula to achieve what could not be achieved otherwise, why should Asia get inspiration from Europe?

#### **B. Considering Asia's specific regional circumstances vis-à-vis regional integration**

Can Asian and European integration be fruitfully compared? Is it possible that the trajectory of Asian integration would be similar to that of Europe? With different historical background and context and differing visions of "integration", it is unlikely that the Asians would simply adopt the European model. Yet,

the EU has never shied away from offering lessons to be learnt from the European integration process.

Europe is constituted by small countries, which are naturally more prone to pool their sovereignty as a strategy to better defend their independence in a world dominated by bigger states. European integration followed the initial experience of Benelux, an economic union initiated in 1944 by three small European states (Belgium, Luxembourg and the Netherlands) totalling less than 20 million inhabitants. In contrast, Asia is constituted of very different states, in size and power. The total population of today's EU27 represents less than the half of China's or India's population. Even in Southeast Asia, Indonesia alone is close to half of ASEAN's population, while only one European citizen out of six is German (Germany being the most populous European state). Thus, each Asian sub-region is dominated by one (and only one) state, and neither South Asia nor Northeast Asia is composed of a sufficient number of small states to balance the sub-regional hegemony of India and China respectively. Indeed, it may be argued that China and India could arguably be seen as the outcome of successful integration by other means, leading to the creation of extremely large states. When asked what China and India did to meet global challenges, Chinese and Indian representatives can put forward that "by taking care of more than two billion people – and taking care of them well – both China and India were already making a major contribution to global stability and order".<sup>22</sup> Yet, it may be that the countries at the periphery of China and India have largely defined themselves, as fully independent states within the post Second World War world order, in opposition to China and India.

In addition, Asia and its sub-regions lack the EU's relative homogeneity. For instance, while Christianity has played an integral part in the history and traditions in each of the EU's 27 member states, the ten ASEAN Member states are divided between predominantly Buddhist countries (Cambodia, Laos, Myanmar, Thailand, Vietnam), predominantly Muslim countries (Brunei, Indonesia, Malaysia), Christian Philippines, and multi-religious Singapore.

Asia also does not necessarily need or aspire to achieve the same end point as Europe. Intergovernmental cooperation is animated by

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<sup>22</sup> Simon Chesterman & Kishore Mahbubani, *The Asian Way of Handling the World*, The Guardian, 4 March 2010.

peoples' complex social and cultural perception of one another at least as much as rational thinking by academics and bureaucrats. In the context of economic globalisation, Asian societies will, in any case, be pushed to some form of transnational cooperation. It may appear important that this economic cooperation includes other dimensions, such as the protection of human dignity and the fairness of the relations between the peoples. Yet, there is no obvious reason why, for instance, Asian states should participate in one or several relatively closed communities of states rather than, say, a complex set of commitments with different partners; why treaties should be ratified rather than declarations adopted (provided that declarations are implemented as frequently as treaties); why states should be the sole or the primary actor of the process; or why the geographical (instead of, for instance, cultural or economic) proximity should be the strongest criteria to connect nations.

In the context of Asian sub-regions, transnational courts, bureaucracies or parliaments are simply inconceivable, for these "independent" institutions would either fall within the control of a sub-regional dominant power (India, China, Indonesia), or suppose agreements that are unacceptable for these sub-regional dominant powers. Therefore, steps have to be taken in a consensual way, with – on all decisions – the consent of both major and minor powers.

This should not mean, however, that there is no transnational cooperation in Asia. In Northeast Asia, for instance, despite the structural difficulty of coping with dominant China, states have engaged in specific forms of transnational cooperation. Beside bilateral agreements with third states, Northeast Asian states also participate together in larger transnational cooperation initiatives. ASEAN, in particular, has been a structuring institution since 1997, when the ASEAN Plus Three initiative included, at the same negotiating table, China, Japan and South Korea. Furthermore, current trade negotiations extend, beyond ASEAN, to India, Australia and New Zealand. In addition to this, Northeast Asia nations are also engaging in transnational cooperation, through the development of institutions whose membership is not limited to states – thus avoiding the strong imbalance between China and its neighbours. For instance, the Association of Northeast Asia Regional Governments, an international organization established in 1996, encompasses 70 sub-national governments in China, Japan, Mongolia, North Korea, Russia and South Korea.

In other cases, informal forums such as the Northeast Asian Conference on Environmental Cooperation may play a role in researching a sub-regional consensus. Lastly, transnational non-governmental organizations such as the Northeast Asia Economic Forum also contribute in structuring the region without the participation of governments.

### **The particularism of European integration**

The "European model" of regional integration is only one form of transnational cooperation out of others. One must keep its particularism in mind: its invention in very specific historical circumstances in Europe after two World Wars; its support from the philosophy of the Enlightenment and the federalist movement; its development from the first experience of the integration of three small European countries (the Netherlands, Belgium and Luxembourg) before its enlargement to include three larger states; the cultural proximity of Western countries. In fact, the reproduction of the same model of regional cooperation anywhere in Asia does not make much sense, at least because of the disproportion between sub-regional dominating powers and smaller states. Each region needs its own form of transnational governance. In Asia, this should certainly play with the European institutional repertoire instead of reinventing the wheel. The European *experience* (instead of *model*) may be useful if a real comparison is drawn between the circumstances of both regions.

### **III. The EU as a "Model" of Compliance with International Law**

In its relations with the larger world too, the EU has also set up itself as an exemplary model in principled multilateralism and abiding by international laws and standard. Promoting "universal norms" such as human rights, democracy and emphasizing good governance and sustainable development are often seen as part of the EU's contribution to global order, and would be pursued in the context of the EU's relations with Asia. It is often argued that the regional integration of European states within the EU, the Council of Europe or even the Organization for Security and Co-operation in Europe (OSCE), has helped developed a high level of human rights protection, substantive democracy, "good" governance and ambitious environmental policies, and hence Asia could follow the path of global

integration to ratify international treaties and implement these universal norms.

This position seems to be based on two assumptions. Firstly, it is assumed that Europe does comply with international law. Secondly, it is also assumed that Asia and Europe are in an analogous relation with regard to international law. However, objections can be raised with regard to both assumptions. Firstly, the EU has not systematically complied with international law (A). Secondly, Asia and Europe are in different situations regarding international law (B).

### A. Reassessing Europe's compliance with international law

European ideologies have often been hegemonic. The rights proclaimed in the 1789 *French Declaration of the Rights of Man and of the Citizen* were not limited to a given regime or to a given country; its ambit was universal. Today, international negotiations reflect the European willingness to promote international rules on climate change mitigation and labour rights, amongst others. However, post-World War II Europe lost its hegemonic geopolitical influence. The United States, in particular, has gained a decisive influence on international law. Consequently, European states have increasingly been subjected to international rules which they did not actively support (even though they often formally agreed upon them), or, at least, whose details did not entirely conform to prevailing European ideologies.

Two recent cases judged by the ECJ reflected such a conflict between international law and European values: *Kadi* and *ATA*.

*Kadi* concerns the sanctions adopted by the UN Security Council against international terrorism. Mr Kadi argued that an EU regulation implementing Security Council sanctions violated several of its fundamental rights protected by EU law. In 2005, the Court of First Instance recalled that international law prevails over regional law:

pursuant both to the rules of general international law and to the specific provisions of the Treaty, Member states may, and indeed must, leave unapplied any provision of Community law [...] that raises any impediment to the proper performance of their obligations under the Charter of the United Nations.<sup>23</sup>

<sup>23</sup> *Kadi-I CFI*, *supra* note 16, para. 190.

According to the Court of First Instance, the European Community, although not a party to the UN Charter, is “bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it”.<sup>24</sup> In other words, the UN Charter – and the sanctions taken by the Security Council in application of the Charter – bind the European institutions “to adopt all the measures necessary to enable its Member states to fulfil [their] obligations” under the UN Charter.<sup>25</sup> The Court further underscored that “[a]ny review of the internal lawfulness of the contested regulation [...] would [...] imply that the Court is to consider, indirectly, the lawfulness of [the SC] resolutions”.<sup>26</sup> While it did not reject judicial review on its principle, the court limited this control to the “lawfulness of the resolutions of the Security Council in question with regard to jus cogens [“compelling,” quasi-universal norms of international law]”<sup>27</sup> – an extremely narrow control which, in the case at issue, did not seriously challenge the regulations at issue. In other words, for the Court of First Instance, the European system was (almost) completely bound by the UN legal order: the European institutions “had no autonomous discretion” in the implementation of the UN sanctions.<sup>28</sup>

But Mr Kadi appealed, and the Grand Chamber of the ECJ drew very different conclusions. Its judgment, in 2008, annulled the regulation at issue. Unlike the Court of First Instance, the ECJ considered that EU law forms “an autonomous legal system which is not to be prejudiced by an international agreement”.<sup>29</sup> Therefore, it concluded that European law’s deference to international treaties

May in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.<sup>30</sup>

<sup>24</sup> *Id.* para. 193.

<sup>25</sup> *Id.* para. 204.

<sup>26</sup> *Id.* paras. 214, 215.

<sup>27</sup> *Id.* para. 226.

<sup>28</sup> *Id.* at para. 214.

<sup>29</sup> *Id.* para. 316.

<sup>30</sup> Joined Cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat v. Council and Comm’n*, 2008 E.C.R. I-6351 [hereinafter *Kadi-I ECJ*], para. 304.

In other words, the primacy of international law “would not [...] extend to primary law, in particular to the general principles of which fundamental rights form part”.<sup>31</sup> Accordingly, in case of a conflict between an international norm binding the EU and a norm of the European treaty, for instance relative to “the principles of liberty, democracy and respect for human rights and fundamental freedoms”,<sup>32</sup> the European norm prevails – in the European legal order – over its international counterpart.

But the story does not end there. Applying the previous judgment, the Commission sent a letter to Mr Kadi with a brief summary of the grounds for the sanctions against him, but it did not remove him from the sanction list. Therefore, Mr Kadi seized the General Court (formerly the Court of First Instance) anew, asking for the disclosure of “all of the documents relating to the adoption of the contested regulation” and the interruption of the sanctions against him.<sup>33</sup> This time, in a judgment adopted in 2010, the General Court accepted to control the conformity of UN sanctions with EU fundamental principles, although in quite a nonchalant manner. It annulled the new regulation at issue in so far as it concerns Mr Kadi. In this judgment, however, the General Court openly criticized the Court of Justice’s Judgment. It put forward that

Once it is accepted that the Security Council has inherent competence to adopt sanctions targeted at individuals rather than at States or their governments (smart sanctions), such judicial review [as commanded by the European Court of Justice] is liable to encroach on the Security Council’s prerogatives, in particular with regard to determining who or what constitutes a threat to international peace or security, to finding that such a threat exists and to determining the measures necessary to put an end to it.<sup>34</sup>

The General Court went further to underscore that “certain doubts may have been voiced in legal circles as to whether the judgment of the Court of Justice in *Kadi* is wholly consistent with [...] international law”.<sup>35</sup> More explicitly, it argued that “the Court of Justice [...] seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of

international law – in this case the law deriving from the Charter of the United Nations”.<sup>36</sup> Yet, complying with the “hierarchical judicial structure,” it however suggested that

if an answer is to be given to the questions raised by the institutions [about the validity of the Court of Justice’s judgment in *Kadi*], Member states and interested legal quarters following the judgment of the Court of Justice in *Kadi*, it is for the Court of Justice itself to provide that answer in the context of future cases before it.<sup>37</sup>

The Commission and the Council have appealed this judgment before the ECJ. Soon, a decision in *Kadi-II* is expected from the ECJ, which will either uphold, or reform its judgment in *Kadi-I*.

The ECJ in *Kadi-I* derogated from international law with gusto to protect human rights; but the General Court appeared more reserved. Two conceptions of the relation between EU and international law clashed: the constitutionalism of the European Court of Justice and the monism of the Court of First Instance / General Court.

Beside *Kadi*, the ECJ faced similar questions in *ATA*. In its judgment adopted on 21 December 2011, it took an approach remarkably different from *Kadi*. Instead of an explicit decision to derogate from international rules, the ECJ used delicate legal subtleties to uphold a controversial European directive. The case concerned the extension of the EU Emission Trading Scheme, a system whereby states auction compulsory allowances to emit greenhouse gas, to civil air carriers. Strong concerns had been expressed through diplomatic media and, as the EU Commission and Council persisted, the Air Transport Association of America and three large American air carriers challenged the directive at issue. The ECJ upheld the directive, which entered into force on 1 January 2012, ten days after the release of the judgment.

The main argument of the American air carriers was that the *Chicago Convention on International Civil Aviation* prohibited “airport and similar charges”.<sup>38</sup> Yet, a difficulty with this argument is that, while all 27 EU member states are parties to the *Chicago*

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<sup>31</sup> *Id.* para. 308.

<sup>32</sup> *Id.* para. 303.

<sup>33</sup> Case T-85/09, *Kadi v. Comm’n*, 2010 E.C.R. II-\_\_\_\_ (30 Sep.), nyr [hereinafter *Kadi-II GC*], para. 71.

<sup>34</sup> *Id.* para. 114.

<sup>35</sup> *Id.* para. 115.

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<sup>36</sup> *Id.* para. 119.

<sup>37</sup> *Id.* para. 121.

<sup>38</sup> Convention on Civil Aviation art. 15, 7 Dec. 1944, 15 U.N.T.S. 295 [hereinafter *Chicago Convention*].

*Convention*, the EU itself has not ratified it.<sup>39</sup> However, the American air carriers relied on article 351 of the Treaty on the Functioning of the European Union [“TFEU”], providing that “rights and obligations arising from agreements concluded before 1 January 1958 [...] between one or more Member states on the one hand, and one or more third countries on the other, shall not be affected” by European integration.<sup>40</sup> In accordance with its well-settled case-law, the ECJ may (and arguably should) therefore have considered that no provision of EU law should prevent Member states from respecting their obligation not to impose any “airport and similar charges” upon civil air carriers.<sup>41</sup> This exact reasoning was applied by the Court of First Instance in its 2005 judgment in *Kadi-I*, for instance.<sup>42</sup>

Instead, however, the ECJ decided to rely on an ambiguous sentence of the 1980 *Burgoa* case, according to which article 351 TFEU (at the time, article 234 TCE) “does not bind the [EU] as regards the third States party to that agreement.”<sup>43</sup> From this, the ECJ quickly went on to conclude that the EU did not incur *any* duty from the *Chicago Convention*. Yet, *Burgoa* also clearly identified (in the previous sentence of the same paragraph!) a “duty on the part of the institutions of the [EU] not to impede the performance of the obligations of Member states which stem from a prior agreement”.<sup>44</sup> As a consequence of this duty, recognized in *Burgoa* as well as in several later judgments of the ECJ, the EU should have concluded that a pre-existing international norm binding EU member states should prevail over an act of the EU. Thus, at this point, the ECJ decided discretely to evade its own case-laws, through a reference to a truncated sentence of an old judgment.

In fact, at this point and others of the same judgment, the ECJ seeks mainly to avoid any direct confrontation between the European legal regime and the

international legal order.<sup>45</sup> As the EU is party to a transatlantic *Open Skies Agreement*, the provisions of which are often analogous to the *Chicago Convention*, the ECJ resorts to very constructive interpretations. It concludes for instance that the issuance of compulsory carbon allowances does not fall within the resolutely comprehensive prohibition of “taxes, levies, duties, fees and charges”,<sup>46</sup> nor even within the even wider prohibition of “fees, dues or other charges”,<sup>47</sup> simply because it is a market-based measure.

Thus, the ECJ in *ATA* avoided any explicit justification of a derogation to international law. An alternative argumentation, without truncated references to an old judgment or restrictive interpretation of purposefully broad prohibitions, could – and, one may argue, should – have followed an approach similar to the ECJ’s judgment in *Kadi*: climate change mitigation (which appeared to be the ultimate purpose of the emission trading scheme) or, more broadly, environmental protection and sustainable development, could have been considered as another of the “very foundations of the Community legal order”.<sup>48</sup>

If a *Kadi*-like solution in *ATA* would have been more sensible from a lawyer’s perspective, it would however have been less acceptable politically for the international partners of Europe. Some international lawyers would argue that the ECJ’s judgment in *Kadi* is little more than an arbitrary decision self-authorizing the EU not to respect its international obligations. Apparently any rule could be derogated through invoking such “fundamental” norms internal to the European legal regime. However, to play the role of the devil’s advocate, a closer view shows that the ECJ

<sup>39</sup> Case C-366/10, *Air Transport Ass’n of Am. v. Sec’y of State for Energy and Climate Change*, 2011 ECR I-\_\_\_\_ (21 Dec.), nyr, para. 60.

<sup>40</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 15, 5 Sep. 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. The *Chicago Convention* was ratified in 1944, hence it pre-existed to the 1957 Treaty of Rome.

<sup>41</sup> *Chicago Convention*, *supra* note 38, art. 15.

<sup>42</sup> *Kadi-I CFI*, *supra* note 16, para. 186. The Court of Justice avoided to take a position on whether or not the conditions for application of art. 307 (now 351) were met: see *Kadi-I ECJ*, *supra* note 30, para. 301.

<sup>43</sup> Case 812/79, *Attorney Gen. v. Burgoa*, 1980 E.C.R. 2787, para. 9.

<sup>44</sup> *Id.*

<sup>45</sup> See Benoît Mayer, annotation, Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change* (unpublished manuscript).

<sup>46</sup> *Air Transport Agreement between the United States of America and the Member States of the European Union* art. 11(2), 30 Apr. 2007, OJEU 2007 L-134/4, as amended by its protocol, 25 Aug. 2010, OJEU 2010 L-223/4 [hereinafter *Open Skies Agreement*]. See also *Air Transport Ass’n of Am. v. Sec’y of State for Energy and Climate Change*, *supra* note 39, paras. 136-147.

<sup>47</sup> *Chicago Convention*, *supra* note 38, art. 15. The EU is bound by this provision of the *Chicago Convention* in application of *Open Skies Agreement*, art. 3(4), *supra* note 46. See *Air Transport Ass’n of Am. v. Sec’y of State for Energy and Climate Change*, *supra* note 39, para. 153.

<sup>48</sup> *Kadi-I ECJ*, *supra* note 30, para. 304. See generally: Benoît Mayer, (2012) 49 *Common Market Law Review* (forthcoming), note on case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, Judgment of the Court (Grand Chamber) of 21 December 2011.

does not allow *any* derogation from international rules. In *Kadi*, international rules were in open conflict with the protection of fundamental rights, a core principle of the EU. In fact, the European courts were not the only jurisdictions to worry about the compatibility of UN “smart” sanctions with the international human rights project. *Kadi-I* was preceded or followed by similar judgments adopted by domestic jurisdictions.<sup>49</sup> UN human rights bodies too called the attention of the Security Council on its human rights obligations.<sup>50</sup> Article 103 of the UN Charter affirms that states’ obligations under the Charter shall prevail over any other international agreement, but human rights norms are sometimes of a customary nature and, generally, recognized *within* the UN legal regime.<sup>51</sup> Indeed, the Security Council itself recognized many times that states

Must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.<sup>52</sup>

In *ATA*, also, the ECJ could have justified a derogation of international rules on the ground that the imperative of climate change mitigation has become,

<sup>49</sup> E.g., judgment of 3 Nov. 2004, No. 262626, French Conseil d’Etat 10/9 SSR; R v. Sec’y of State for Def. [2007] UKHL 58; Abdelrazik v. Minister of Foreign Affairs and Attorney Gen., Federal Court of Canada, 2009 FC 580.

<sup>50</sup> See Human Rights Committee, views on Communication No. 1472/2006, Nabil Sayadi and Patricia Vinck v. Belgium, Communication No. 1472/2006, U.N. Doc. CCPR/C/94/D/1472/2006 (2008); Human Rights Council, Universal Periodic Review, Concluding Observations: United Kingdom, U.N. Doc. CCPR/CO/73/UK (2001); --- Universal Periodic Review, Concluding Observations: New Zealand, U.N. Doc. CCPR/CO/75/NZL (2002); ---, Universal Periodic Review, Concluding Observations: Yemen, U.N. Doc. CCPR/CO/75/MDA (2002); ---, Universal Periodic Review, Concluding Observations: Estonia, U.N. Doc. CCPR/CO/77/EST (2003); ---, Universal Periodic Review: New Zealand, U.N. Doc. CCPR/C/NZL/CO/5 (2010); ---, Universal Periodic Review: Israel, U.N. Doc. CCPR/C/ISR/CO/3 (2010); UN Committee Against Torture, Agiza v. Sweden, U.N. Doc. CAT/C/34/D/233/2003 (2005), para. 13.1; UN Committee on Economic, Social and Cultural Rights, General Comment 8, The relationship between economic sanctions and respect for economic, social and cultural rights, U.N. Doc. E/C.12/1997/8 (1997).

<sup>51</sup> See Charter of the United Nations, art. 103, *supra* note 8. For the recognition of human rights within the Charter, see *id.* second recital and art. 1(2).

<sup>52</sup> S.C. Res. 1456 (2003), 1535 (2004), 1566 (2004), 1624 (2005), 1787 (2007), 1805 (2008) and 1963 (2010). See also Security Council resolutions 1988 (2011) and 1989 (2011).

in the EU at least, a fundamental rule. Thus, it could have pushed for a better inclusion of environmental standards in international air law. Instead, the ECJ decided to take a low profile and justified its decision, as far as possible, on technical grounds and in regional law. Rather than subordinating the authority of international law to its conformity with European principles, the ECJ dealt with technical issues of recognition, in the EU legal regime, of norms formally binding its member states. While the ECJ’s isolationism in *Kadi-I* was affirmed as a strong political stand – that not anything could be accepted as binding international law – *ATA*’s isolationism was presented as an unfortunate consequence of legal technicalities.

Nonetheless, *ATA*’s apparently accidental conclusions do not hold much water. The directive at issue, extending the EU Emission Trading Scheme to aviation activities, is far from presenting its extraterritorial effects as accidental. This directive was adopted only after (and as a consequence of) the failure of multilateral negotiations carried out within the International Civil Aviation Organization, as were suggested by the Kyoto Protocol.<sup>53</sup> In view of the likely failure of international negotiations, the EU decided to initiate global efforts through a first regional step. The directive leaves no doubt about the EU’s intent to put pressure over multilateral negotiations – only such an activist posture explains that the European Emission Trading Scheme was extended to the *whole* flights arriving in or departing from the EU, including sections of those flights that occur outside of the European territory. The very language of the directive at issue highlights that “[t]he Community scheme may serve as a model for the use of emissions trading worldwide”,<sup>54</sup> and calls the EU and its member states to “continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation”.<sup>55</sup>

*Kadi* and *ATA* would not have attracted the same degree of interest if they had been decided only by

<sup>53</sup> Kyoto Protocol art. 2(2), 11 Dec. 1997, 2303 UNTS 148. See Directive 2008/101/EC of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, 8<sup>th</sup> and 9<sup>th</sup> recitals [hereinafter *Directive 2008/101*].

<sup>54</sup> *Directive 2008/101*, *id.*, 17<sup>th</sup> recital.

<sup>55</sup> *Id.* See also Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community, as amended by directive 2008/101, art. 25(a).

national jurisdictions in a domestic context. The geopolitical significance of *Kadi* and *ATA* stems from their authority over a large and influential regional organization. Two of the EU member states are permanent members of the Security Council, and the EU's economy, taken as a single entity, is the largest economy in the world. In these circumstances, the ECJ decision, in *Kadi*, not to comply with Security Council sanctions that go against fundamental rights, was likely to be an influential push for a reform of these sanctions. In fact, following the ECJ's judgment in 2005, the Security Council adopted a series of resolutions aiming at reconciling "smart" sanctions and fundamental rights:

- Resolution 1617 (2008) defining the criteria for inclusion of individuals and entities on the sanctions list and demanding that states proposing a new name justify their proposal.<sup>56</sup>
- Resolution 1730 (2006) establishing a "de-listing procedure" to be initiated on the request of sanctioned individuals or entities.
- Resolution 1735 (2006) demanding that a state proposing new names for inclusion on the sanction list should "provide a statement of the case."<sup>57</sup>
- Resolution 1822 (2008) providing more specific information and guarantees to listed individuals or entities.
- Resolution 1904 (2009) establishing an ombudsperson to facilitate the de-listing procedure.
- Resolution 1988 (2011) encouraging the Sanctions Committee "to remove expeditiously individuals and entities on a case-by-case basis" when they stop meeting defined criteria.<sup>58</sup>

The ECJ's decision in *ATA*, although justifying European isolationism in much weaker terms, is also likely to have significant international consequences. Following the judgment, the US House of Representatives supported a bill to *prevent* American air carriers from participating in the European scheme,<sup>59</sup> the four main Chinese airlines announced that they would not pay any carbon charge,<sup>60</sup> and the African Airline Association expressed its hostility to

the scheme.<sup>61</sup> Similarly, shortly after the Commission's released its proposal for a regional scheme,<sup>62</sup> the General Assembly of the International Civil Aviation Organization adopted frankly hostile language, "urg[ing] Contracting States not to implement an emissions trading system on another Contracting State's aircraft operators except on the basis of mutual agreement between those States".<sup>63</sup> In 2010, however, the same organ repelled this resolution and adopted another one, which mentioned the *possibility* that market-based measures be "established on national, regional and global levels",<sup>64</sup> and it adopted "guiding principles for the design and implementation of market-based measures (MBMs) for international aviation".<sup>65</sup> Moreover, the American Air Transport Association spectacularly softened its position on multilateral negotiations and, in 2011, it declared itself "part of an industrywide aviation coalition that has committed to continuing the industry's strong record of GHG emissions savings and has proposed the adoption of a global sectoral approach by the International Civil Aviation Organization".<sup>66</sup>

Although using different methods, both *Kadi* and *ATA* cases gave rise to the perception that the EU is becoming isolationist and/or protectionist. *Kadi*, on the one hand, pushes for sanctions more consistent with international human rights standards through explicitly derogating from international rules. *ATA*, on the other hand, indirectly advocates for climate change mitigation in international civil aviation activities through adventurous interpretation of legal documents. In each case, one may wonder whether the end justifies the means. A formal argument from the perspective of international law would reject *Kadi's* constitutionalism as surely as *ATA's* convoluted

<sup>56</sup> Fredrick Obura, *African airlines oppose EU emissions trading scheme*, THE STANDARD, 15 Jan. 2012.

<sup>57</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community of 20 December 2006, COM(2006) 818 final.

<sup>58</sup> ICAO Assembly Res. A36-22, Consolidated statement of continuing ICAO policies and practices related to environmental protection, appendix L, article 1(b)(1).

<sup>59</sup> ICAO Assembly Res. A37-19, Consolidated statement of continuing ICAO policies and practices related to environmental protection, art. 15(a).

<sup>60</sup> *Id.*, annex.

<sup>61</sup> Air Transport Association Comment on the EU Emissions Trading Scheme Preliminary Opinion, 6 Oct. 2011, available at: <http://www.airlines.org/Pages/ATA-Comment-on-the-EU-Emissions-Trading-Scheme-Preliminary-Opinion.aspx>

<sup>56</sup> S.C. Res. 1617 (2005), para. 2, 3.

<sup>57</sup> S.C. Res. 1735 (2006), para. 5.

<sup>58</sup> S.C. Res. 1988 (2011), para. 18.

<sup>59</sup> *Id.*

<sup>60</sup> Jonathan Watts, *Chinese airlines refuse to pay EU carbon tax*, THE GUARDIAN, 4 Jan. 2012.

exegesis. On the other hand, however, one understands only too well the wariness of the EU (or any state in the same position), otherwise unable to protect fundamental rights or the global environment *because of international rules*.

Indeed, a reasonable critique of *Kadi* and *ATA* could be that the ECJ did not seek to justify the exclusion of international rules on the basis of other *international* norms (instead of *regional* norms). In both cases, good arguments might have been found in international law to derogate from the rules that the ECJ decided not to apply. In *Kadi*, after all, as was recalled, even UN human rights bodies had expressed some concerns about the conformity of UN Security Council sanctions with international human rights norms, and these international human rights norms were constantly recalled by the Security Council itself. On the other hand, international environmental law contains a host of principles and rules, ranging from the no-harm principle<sup>67</sup> to the duty of developed states to take the lead in climate change mitigation,<sup>68</sup> to which the ECJ could have resorted. Such constructive interpretations are certainly less detrimental to international law than its mere exclusion, by a regional court, on the ground of regional norms.

Taken as they are, *Kadi* and *ATA* do not form a “model” of compliance with international law that Asia and the Third World generally should follow. They seem to suggest that international law is not much more than institutionalised relations of power between nations, some allowed to deviate from it, while others have to comply. They show that central states do not need to comply with international law nor even to justify their rejection of international norms on an international legal ground. Thus, *Kadi* and *ATA* at least could potentially undermine the European call on Asian states to comply with international law. They show that Europe has been accorded a leeway that is not generally given to Asia, and, as a consequence, an influence that Asia does not have.

<sup>67</sup> *E.g.*, United States of America v. Canada, 3 R.I.A.A. 1911, 1965 (Mixed Arbitral Tribunal, 1941); Stockholm Declaration on the Human Environment, 16 Jun. 1972, 11 I.L.M. 1416; *Rio Declaration on Environment and Development*, 3-14 Jun. 1992, 31 I.L.M. 874.

<sup>68</sup> United Nations Framework Convention on Climate Change art. 2(a), 3(3), 4(2)(a), 14 Jun. 1992, 1771 U.N.T.S. 107.

## **B. Considering Asia’s specific regional circumstances vis-à-vis international law**

Another objection to the notion of a “European model” of compliance with international law is therefore that Asia and Europe are not in analogous situations regarding international law. International legal standards (unlike bilateral or regional treaties) are mainly based on the assumption that all states are in an equal position. The models of human rights, democracy or good governance are expressed as universal rules. At most, some of these rules take specific national circumstances into account. Thus, while international law calls social, economic and cultural rights universal, it recognizes that states with different levels of development may have different degree of obligations. Regarding climate change mitigation, international law recognizes the ambiguous “common but differentiated responsibilities”<sup>69</sup> of all states; practically speaking, this has long meant that only developed states had quantified goals of climate change mitigation.<sup>70</sup>

Yet, on a host of other questions, international law remains blind to obvious differences. Differences between Asia and Europe start at the stage of international law-making. European states are better represented on the world stage diplomatically. The EU’s half a billion inhabitants are represented at the Security Council by two permanent members (France and the UK); other states may apply to the two non-permanent seats open to “Western European and other” states or to the seat open to “Eastern European” states. In contrast, Asia, with a population of nearly four billion inhabitants, has only one permanent seat (China) and two non-permanent seats. An integrated Europe, able to speak as one, further deepens the gap with a fragmented Asia. Too often, international law looks like a flow of norms imposed by Western states to Eastern ones. A contrario, the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Member of their Families, one of the few multilateral treaties sponsored by developing countries, has not been ratified by any developed country.

At the stage of implementing international rules, Asia certainly has less influence than Europe. The International Monetary Fund (IMF), for instance,

<sup>69</sup> *Id.* 6th recital, art. 3(1) and art. 4(1).

<sup>70</sup> See Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 Dec. 1997, 2303 UNTS 148.

would hesitate before imposing alone in Greece the same drastic conditions it imposed on several Asian states during the 1997 financial crisis.

Moreover, identical norms implemented in the same manner in all countries may result in fundamentally unequal conditions for developing ones. Some economists argue that trade measures result in unjustifiable results in the Third World. But the most striking imbalance between Western and Asian countries lies in their different capacity of resistance. Few Asian states would risk themselves to explicitly derogate from Security Council resolution as the ECJ did. In other words, Asian states appeared to be more the target of “international” criticisms.

International law, even more than any other form of law, cannot be understood without this context of an underlying realities of power play – not all states are equally constrained to comply with international law. The EU may unilaterally, for better or worse, decide that an international rule is not good enough to be implemented in Europe; but the same decision from a developing country in Asia may lead to certain punitive action or the decline of strategic partnerships.

#### **Strengthening the international legitimacy of international law**

The “European model” of compliance with international law is a specific and contextual model, which struggles to find some coherence. Asia is definitely not in a similar position, for it has a much lower ability to (explicitly) reject international rules or to contribute in their determination. To this extent, the project of international law should be articulated and affirmed in the same way in Europe and in Asia. The ECJ did raise some fundamental objections on the contradictions between Security Council sanctions and human rights or between international air law and climate change mitigation. However, deciding these matters in a regional context sends a wrong message – an affirmation that international law is an instrument of domination rather than a prevailing rule, a real *jus cogens*. I argue that constitutionalism is necessary, but should be developed on the basis of international law rather than within an isolated regional legal regime. The protection of human rights and the environment are fundamental norms, in Asia just like in Europe. Certainly, allowing domestic jurisdictions to interrogate the validity of international rules may weaken those rules, but it may also

strengthen the legitimacy of an international legal order.

#### **IV. Conclusion**

There is a certain arrogance in the affirmation that a “European model” of regional integration and of compliance with international law should be adopted anywhere in the world, and in Asia in particular. This article argues on the contrary that Asia and Europe are in fundamentally different situations vis-à-vis international law. Based on an analysis of recent events and latest legal developments in Europe, it puts the “European model” of regional integration and the European selective compliance with international law in perspective with regard to the Asian context. Without denying that “civilizations” should learn from one another and that the European experience may be relevant to some extent in Asia, this article concludes that the tools developed in Europe should be used differently in Asia.

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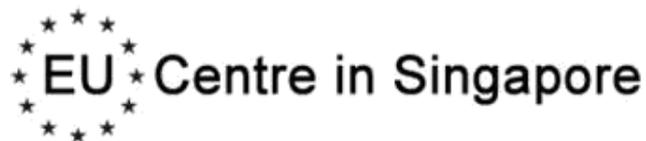
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