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ESIL Newsletter

Vol. 16, Dec. 2014

In this issue

Editorial Board
Massimo Iovane (Napoli), Mario Prost (Keele) and Geir Ulfstein (Oslo)

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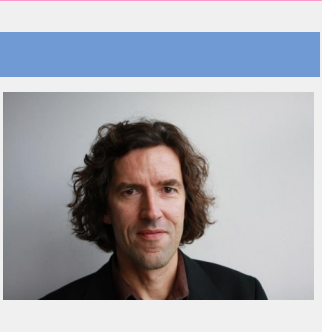
1. Message from the President



Dear ESIL Members,

As 2014 comes to an end, I wish to share with you some thoughts about the enhancement of the role of our Society in the near future. In recent months, several members have raised the question of whether ESIL, as a collective body, should speak out in times of international crisis. The crisis of the moment is the conflict between Ukraine and Russia but the question has come up earlier in relation to previous international crises and is bound to come up with regard to future international crises.

Many international lawyers, in particular scholars, feel it is part of their professional responsibility not just to study the law but also to take part in academic debate, not just to explain the law but also to call for attention or action when international law is fundamentally flouted. What's more, they may not be content to just make their own individual argument but may seek to strengthen their position by enlisting the force of a whole Society. The motivation may be strategic – if ESIL were to speak out on the legality or illegality of the accession of Crimea to the Russian Federation, for example, this might have much more persuasive power than if a few individuals were to speak out - or may be driven by an understanding of the professional role of lawyers.

Whether or not the path of 'voicing concerns' is, or should be, seen as part of the international legal profession (at least as regards scholars) is a question on which opinions will differ among ESIL members, as can be inferred from the practice of participation in public debates. But whereas individual styles and practices will inevitably differ, few will dispute that 'speaking out' can indeed be part of the role of the international lawyer. The question was, to some extent, discussed during the 2013 ESIL Research Forum on 'International Law as a Profession' held in Amsterdam (selected papers from that event will be published shortly by Cambridge University Press; more papers can be found in the ESIL SSRN series at http://www.esil-sedi.eu/node/700).

However, the question of whether ESIL, rather than its individual members, should speak out is of a wholly different nature and much less easily answered in the affirmative. There is a practical aspect to this in that it is difficult to conceive of a satisfactory procedure to identify the endorsement of such positions by the membership. The true problem is more fundamental than that, though. International legal questions, even in times of crisis, are rarely black and white and different interpretations often reflect different political choices. Even when a legal issue may seem relatively clear, the question is whether it is the task of the Society to support one particular interpretation over another possible position. ESIL is premised on and should respect diversity both within its membership and between the Society and other international law communities. Pinning down the Society as a whole on any particular legal position would be difficult to reconcile with such diversity.

This does not mean that the Society cannot do more in moments of crisis and, more generally, be actively engaged with current international law topics. Past annual events have invariably been highly stimulating and creative events but the programmes were prepared months in advance and were not adjusted to take account of what might be happening in the outside world at the time of the event. More can be done in this regard, and ESIL events can offer the opportunity for the exchange of views on current international law problems. For the first time, the ESIL 2015 Annual Conference in Oslo (for which registration will open on 1 January 2015) will include sessions focusing on recent developments in international law, to be defined and arranged at a relatively late stage. Moreover, on an *ad hoc* basis, the Society will start to organize events which allow for the exchange of views and ideas on contested international law aspects of current crises and disputes. Interest groups also can play an important role. In this way, rather than selecting one position from a range of views, the Society will work with and benefit from the diversity of its membership to become a meaningful actor that can make an important contribution to ongoing discussions about international law. I would encourage all members to consider ways to take part in this conversation and to contact me and the other members of the Board with their thoughts and ideas.

André Nollkaemper
President, European Society of International Law (ESIL)
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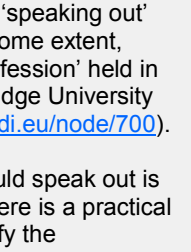
2. Guest Editorial



The Right to Regulate: An Inherent Power Enjoyed by a Government?

Caroline Foster - Faculty of Law, University of Auckland, New Zealand

The interaction between the international economic system and the sovereignty of states has been a significant focus in WTO Appellate Body determinations in 2014. The "exceptions" to the multilateral trade rules found in Article XX of GATT have featured centrally in reports this year. The *EC – Seal Products* decision endorsed WTO Members' rights to impose trade restrictions protecting public morals under Article XX (a) of GATT 1994, although finding the Inuit and indigenous communities exception in the 2009 EU ban on seal products privileged Greenlandic exporters' access to the European market inconsistently with WTO law.[1]

This echoed the high level of respect for regulatory action to protect public morals articulated in *China – Audiovisual Products* just a few years prior, although the Chinese system of content review by import entities was also WTO-inconsistent given that there were alternatives.[2]

The major challenge came in the *China – Rare Earths* case. This case re-addressed the sensitive issue, previously determined against China in *China – Raw Materials,* of whether China was entitled to invoke Article XX (g) of GATT 1994 to justify breaches of the "WTO-plus" commitment in paragraph 11.3 of its protocol of accession to the WTO obliging China to refrain from applying export duties on rare earths, tungsten and molybdenum.[3] The majority of the world's known remaining resources of these valuable industrial minerals are mined in China, and it is common ground that their extraction is highly polluting. China sought to justify its export duties under Article XX (g) of GATT on the basis they related to the conservation of exhaustible natural resources, and under Article XX (b) on the basis they were necessary for the protection of human, animal and plant life and health. China's case under these provisions was not strong enough to have succeeded, but China was not in any event permitted to invoke Article XX under paragraph 11.3.

The Appellate Body has made it clear that the applicability of Article XX to accession commitments will be determined case-by-case.[4] The question is whether the Appellate Body has won the credibility battle? Is the WTO Membership, and indeed the general population, ready to accept a system in which the "right to regulate",[5] described in *China – Audiovisual Products* as "an inherent power enjoyed by a government" can be negotiated away?[6] And even negotiated away where this is a matter not expressly addressed by negotiators, and not unambiguously apparent from the governing documents?[7] Or is *China – Rare Earths* simply a case of China having exercised its sovereignty to negotiate and produce new obligations relinquishing specific aspects of governmental control?[8]

The fundamental tensions arising here have for long been out of the limelight, in part due to the characterisation of Article XX and similar provisions in Article XIV(a) of GATS and in existing and new regional trade agreements as embodying "exceptions". But is Article XX truly a set of exceptions in nature? The text recognises continuing, pre-existing rights as being unaffected by the commitments made in the GATT: "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures…". In the historical Article XX WTO case, *US-Gasoline,* the Appellate Body itself talked of Members' "autonomy" under Article XX.[9] The China cases have put the spot-beam back on this provision. As a set of "exceptions", Article XX attracts the burden of proof. As the more detailed findings in the China cases demonstrate, regulating states may not manage to discharge the burden. Indeed, if Article XX were viewed as referring to inherent rights *instead* of to exceptions, new approaches to the evidentiary dimension of regulatory trade disputes could be needed.

The outcomes in the China cases may sit comfortably for the WTO Membership, except for China, for now. Superficially at least, the right to regulate is as before, and both *EC-Seal Products* and *China-Audiovisual Products* indicate a distinctive level of respect for the right, in the sphere of public morals particularly, provided the accompanying tests are met. Others might ask whether 2014 may not have left the right to regulate diminished in certain respects, for the present.

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3. ESIL Lectures

The ESIL Lecture Series hosts broadcasts of presentations on international law topics held at partner institutions, enabling the presentation to reach a wider audience of ESIL members and non-members alike. ESIL Lectures are available on the ESIL website and on our YouTube Channel.

We welcome proposals for lectures to be included in the series. The guidelines for making such proposals can be downloaded from the ESIL website for the lectures at the link above.

The following lectures have been posted on the website since the previous newsletter:

- Serge Sur, 'La paix et la sécurité internationales selon la Charte des Nations Unies: virtualités et pratiques', University of Geneva, 25 November 2014

- Hilary Charlesworth, 'Rituals and Ritualism in the International Human Rights System', London School of Economics and Political Science, 21 October 2014

- Rosalyn Higgins, 'Rules, Choices, and International Law', Inaugural Memorial Lecture for Professor Vojin Dimitrijević, Belgrade Centre for Human Rights, 6 October 2014

- Interview with Helen Keller, 'Human Rights Protection: The Role of the European Court of Human Rights', University of Oslo, PluriCourts, 8 September 2014

- Dianne Otto, 'Feminist Encounters with International Human Rights Law', Melbourne Law School, 9 May 2014

4. Joint ASIL-ESIL Elephant Law Forum Launched

In November 2014, the ASIL – ESIL Elephant Law Forum was launched. The Forum is a collaborative group bringing together members of the ESIL Interest Group on International Environmental Law and its ASIL counterpart with an interest in elephant law. This is first informal collaboration of interest groups of ESIL and ASIL of this type.

As its first activity, members of the joint Elephant Forum have published papers on the topic in AJIL Unbound, see here. Also, the Forum will organize a panel on elephant protection in international law at the 2015 ASIL Meeting; more details will follow shortly.

Further information on the ASIL-ESIL Elephant Law Forum and its activities can be found on the webpage of the ASIL International Environmental Law Interest Group.

If you want to be involved in the work of the platform, please contact Andre Nollkaemper at p.a.nollkaemper@uva.nl.

5. Forthcoming Events

1. ESIL Research Forum, Florence, 14-15 May 2015

The 2015 ESIL Research Forum will take place on Thursday 14 and Friday 15 May 2015 at the European University Institute in Florence. This year's Research Forum will address themes such as the use of force; statehood, secession and the creation of states; the legitimacy and illegitimacy of governments and states; and territories and boundaries. The Research Forum targets in particular scholars at an early stage of their careers, especially advanced PhD students and post-doctoral researchers. All ESIL members are invited to attend the Research Forum as audience members.

2. ESIL 11th Annual Conference, Oslo, 10-12 September 2015

The 11th Annual Conference of the European Society of International Law will take place in Oslo, Norway, from 10 to 12 September 2015. The conference will be hosted by the PluriCourts Center on the Legitimate Roles on the Judiciary in the Global Order, University of Oslo.

Entitled "The Judicialization of International Law - A Mixed Blessing?", the conference will address the international law aspects of the increased judicialization from an interdisciplinary perspective.

The conference will feature plenary sessions with invited speakers, and a number of agorae with speakers selected on the basis of a call for proposals. The event will also offer poster sessions for early career scholars following a call for posters. Invited speakers include current and former judges of various international courts, as well as legal practitioners and scholars of several disciplines.

For more information, please visit www.uio.no/esil2015

3. IG on the History of International Law Workshop, Oslo, September 2015

Workshop: 'Dreaming of the International Rule of Law - A History of International Courts and Tribunals', Oslo, at the time of the 2015 ESIL Annual Conference. Call for Papers now open.

Further information about the Interest Group and the Call for Papers on the Interest Group website (deadline for submission: 15 February 2015).

4. ESIL 12th Annual Conference, Riga, 8-10 September 2016

The 2016 Annual Conference of the European Society of International law (ESIL) will be held in Riga, Thursday 8 to Saturday 10 September 2016. The event will be hosted by the Riga Graduate School of Law. **Save the date!**

Dans ce numéro

Vol. 16, décembre 2014

Comité éditorial:
Massimo Iovane (Naples), Mario Prost (Keele) et Geir Ulfstein (Oslo)

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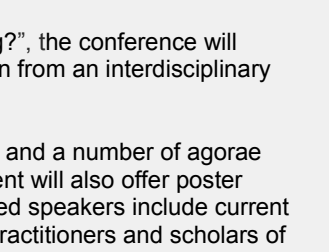
1. Message du Président



Chers membres de la SEDI,

2014 touchant à sa fin, je souhaite partager avec vous quelques réflexions sur la possibilité d'améliorer le rôle de notre Société dans un avenir proche. Ces derniers mois, plusieurs membres ont soulevé la question de savoir si la SEDI, en tant qu'organe collectif, doit faire entendre sa voix en temps de crise internationale. Si le conflit qui nous occupe actuellement est celui entre l'Ukraine et la Russie, la question a déjà été posée lors de crises internationales précédentes et ne manquera pas d'être à nouveau soulevée à l'occasion de nouveaux conflits.

Beaucoup de juristes internationalistes, en particulier dans le monde académique, estiment qu'il est de leur responsabilité professionnelle de ne pas seulement étudier le droit, mais également de prendre part à des débats académiques, non seulement pour expliquer le droit, mais également pour attirer l'attention ou appeler à des mesures quand le droit international est fondamentalement bafoué. Qui plus est, plutôt que d'exposer leurs arguments individuels, ils peuvent être amenés à vouloir renforcer leur position en adhérant à celle d'une Société. La motivation peut être stratégique — une prise de position de la SEDI quant à la légalité ou l'illégalité de l'intégration de la Crimée à la Fédération de Russie aurait par exemple une force de persuasion beaucoup plus importante que la voix de quelques individus — ou reposer sur une vision spécifique du rôle professionnel des juristes.

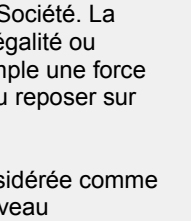
La question de savoir si l'expression de ces préoccupations est ou doit être considérée comme faisant partie intégrante de la profession juridique internationale (au moins au niveau académique) est un point sur lequel les membres de la SEDI auront des opinions différentes, comme le montre en pratique leur participation aux débats publics. Si le style et la pratique sont inévitablement différents d'un individu à l'autre, peu contesteront le fait que « prendre position » peut effectivement faire partie du rôle de l'internationaliste. La question a fait, dans une certaine mesure, l'objet d'un débat lors du Forum de recherche de la SEDI sur « Le droit international en tant que profession », qui s'est tenu à Amsterdam en 2013 (une sélection des contributions sera bientôt publiée par Cambridge University Press ; d'autres contributions figurent dans la série SSRN de la SEDI, http://www.esil-sedi.eu/node/700).

La question de savoir si la SEDI et non ses membres individuels doit se prononcer est d'une toute autre nature et ne peut recevoir une simple réponse affirmative. D'un point de vue pratique, une procédure satisfaisante pour identifier le partage de telle ou telle position par les membres paraît difficilement concevable. Le vrai problème est plus fondamental. Même en temps de crise, les questions de droit international sont difficiles à trancher et différentes interprétations reflètent souvent différents choix politiques. Même quand un problème juridique paraît relativement clair, la question est de savoir s'il appartient à la Société de favoriser une interprétation plutôt qu'une autre. La SEDI est fondée sur la diversité et le respect de la diversité, tant entre les membres qu'entre la Société et les autres milieux du droit international. Le fait de ramener l'organe collectif de la Société à une position juridique spécifique paraît difficilement conciliable avec son fondement basé sur la diversité.

Cela ne signifie pas pour autant que la Société ne peut faire plus en temps de crise et, de façon plus générale, s'engager activement dans les enjeux actuels du droit international. Si, jusqu'à présent, les événements annuels ont toujours été extrêmement passionnants et créatifs, leurs programmes étaient préparés des mois à l'avance et ne prévoyaient pas la possibilité de tenir compte de l'actualité au moment de l'événement. La SEDI pourrait faire plus à ce niveau en créant l'opportunité d'un échange de points de vue sur des problématiques actuelles du droit international pendant les événements qu'elle organise. Pour la première fois, la Conférence annuelle 2015 de la SEDI à Oslo (les inscriptions ouvriront le 1er janvier 2015) inclura des sessions sur des développements récents dans le domaine du droit international, qui seront définies et organisées à un stade relativement tardif. De plus, la Société entend organiser de façon *ad hoc* des événements visant à échanger des points de vue et des idées sur des aspects contestés du droit international dans le cadre de crises et de conflits actuels. De cette façon, les groupes de réflexion pourront également jouer un rôle important. Plutôt que de camper sur une position prise parmi différents points de vue, la Société entend user et profiter de la diversité de ses membres pour se poser en acteur significatif, capable d'apporter une contribution notable aux débats actuels sur le droit international. Je souhaite encourager tous les membres à réfléchir sur la façon de participer à cette discussion et à me contacter ou à contacter d'autres membres du Comité afin de leur faire part de leurs suggestions et de leurs idées.

André Nollkaemper
Président, Société européenne de droit international (SEDI)
P.A.Nollkaemper@uva.nl

2. Editorial de l'Invitée



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3. Conférences SEDI

La Série de conférences SEDI comprend des présentations organisées dans des institutions partenaires de la SEDI sur des sujets d'intérêt en droit international et sont accessibles tant aux membres qu'aux non-membres de la SEDI.

Les vidéos des conférences SEDI sont disponibles sur le site de la Société ainsi que sur notre chaîne YouTube.

Nous invitons les personnes intéressées à proposer des conférences pour la série. Les directives pour soumettre de telles propositions sont disponibles sur le site des conférences SEDI mentionné ci-dessus.

Les conférences suivantes ont été ajoutées sur notre site depuis la parution de la dernière newsletter :

- Serge Sur, 'La paix et la sécurité internationales selon la Charte des Nations Unies: virtualités et pratiques', University of Geneva, 25 November 2014

- Hilary Charlesworth, 'Rituals and Ritualism in the International Human Rights System', London School of Economics and Political Science, 21 October 2014

- Rosalyn Higgins, 'Rules, Choices, and International Law', Inaugural Memorial Lecture for Professor Vojin Dimitrijević, Belgrade Centre for Human Rights, 6 October 2014

- Interview with Helen Keller, 'Human Rights Protection: The Role of the European Court of Human Rights', University of Oslo, PluriCourts, 8 September 2014

- Dianne Otto, 'Feminist Encounters with International Human Rights Law', Melbourne Law School, 9 May 2014

4. Forum Conjoint ASIL-SEDI sur le Droit des Éléphants

Le forum de la SADI-SEDI sur les droits des éléphants a été lancé en novembre 2014. Ce forum est une collaboration entre les membres du groupe de réflexion de la SEDI sur le droit international de l'environnement et sa contrepartie américaine ayant un intérêt pour le droit des éléphants. Il s'agit de la première collaboration de ce genre entre les groupes de réflexion de la SEDI et de l'ASIL.

Pour première activité, le groupe a publié quelques articles sur le site "AJIL Unbound", voir sur le site suivant : http://www.asil.org/blogs/ajil-unbound?blog=83. De plus, le forum entend organiser un groupe de discussion sur la protection des éléphants en droit international lors de la conférence de l'ASIL en 2015. Plus de détails à ce sujet seront disponibles sous peu.

De plus amples informations sur le forum de l'ASIL-SEDI sur le droit des éléphants et ses activités sont disponibles sur le site web du groupe de réflexion de l'ASIL sur le droit international de l'environnement: http://www.asil.org/community/international-environmental-law

Si vous désirez vous joindre au groupe, veuillez contacter André Nollkaemper à l'adresse suivante : p.a.nollkaemper@uva.nl

5. Événements à Venir

1. Forum de Recherche de la SEDI, Florence, 14-15 mai 2015

Le Forum de recherche 2015 de la SEDI se tiendra du jeudi 14 au vendredi 15 mai 2015 à l'Institut universitaire européen à Florence. Cette année, le Forum de recherche portera sur des thèmes tels que l'usage de la force ; l'indépendance des États, la sécession et la création d'États ; la légitimité et l'illégitimité des gouvernements et des États ; ainsi que les territoires et les frontières. Le Forum de recherche s'adresse particulièrement à des chercheurs en début de carrière, en particulier aux étudiants au doctorat et postdoctorat. Tous les membres de la SEDI sont invités à se joindre au Forum de recherche.

2. 11e Conférence Annuelle de la SEDI, Oslo, 10-12 septembre 2015

La 11ème conférence annuelle de la Société européenne de droit international (SEDI) se tiendra à Oslo, en Norvège, du 10 au 12 septembre 2015. Cette conférence sera accueillie par PluriCourts, un centre sur l'étude des rôles légitimes du système judiciaire dans l'ordre mondial à l'Université d'Oslo.

Intitulée « La judiciarisation du droit international: bienfaits mitigés? », la conférence abordera les aspects de droit international de la judiciarisation accrue dans une perspective interdisciplinaire.

La conférence offrira des sessions plénières et des forums avec des intervenants invités ainsi que des agoras composées d'intervenants sélectionnés dans le cadre d'un appel à propositions. L'évènement offrira également des sessions de présentations d'affiches pour les chercheurs en début de carrière qui seront sélectionnées en réponse à un appel à affiches. Les intervenants invités incluront des juges en provenance de diverses cours internationales, des juristes et des chercheurs œuvrant dans des disciplines variées.

Veuillez visiter le site web de la conférence pour de plus amples informations : www.uio.no/esil2015

3. Atelier du Groupe de réflexion sur l'histoire du droit international, Oslo, sept. 2015

Atelier: 'Rêver à l'état de droit international - L'histoire des cours et tribunaux internationaux', Oslo, lors de la conférence annuelle 2015 de la SEDI. L'appel à contributions est maintenant lancé.

Veuillez visiter le site web du groupe de réflexion pour de plus amples informations sur le groupe et l'appel à contributions (la date limite pour la soumission des contributions est le 15 février 2015).

4. 12e Conférence Annuelle de la SEDI, Riga, 8-10 septembre 2016

La conférence annuelle de la Société européenne de droit international (SEDI) se tiendra à Riga du 8 au 10 septembre 2016. Cet évènement sera accueilli par l'École supérieure de droit de Riga. **Réservez la date!**

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