Foreword

The title ‘subjects and objects of EU law’ reminds me of my first steps in international law, when there was much discussion of that topic in international law. The traditional mantra was that ‘only states were subjects of international law’ – and perhaps later, progressively, international organisations. But international law today takes many different forms. The EU itself has been active as a subject of international law; and individuals can appear before some international courts and tribunals.

(By way of a random example: an introductory textbook: International Law of Peace by NA Maryan Green, even in second edition, 1982, about 240 pages in all, seemed to be representative, in having a disproportionate treatment: after two extremely brief chapters, Chapter 3 ‘Subjects of International Law’, over 50 pages, divided into three sections: states, international organisations, and other subjects of international law (the Holy See, etc.). Chapter 4, 30 pages: The position of the individual (including corporations) in international law; Chapter 5, organs of the state. That was most of the book: not much space left (one hundred rather short pages for the rest of international law) …)

Twenty years earlier, in Van Gend en Loos (1963), the Court of Justice proclaimed that the EEC Treaty constituted a new legal order of international law ‘for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals’.

And direct effect has had a remarkable history in EU law: (1) the Treaty provisions may have direct effect, not only where, as stated in van Gend, they are negative and unconditional, but also where they are positive and conditional. (2) Not only the treaties, but regulations may have direct effect: and direct effect is not the same as directly applicable? (3) Not only regulations, but also directives: they are not directly applicable, but may have direct effect. (4) Not only internal EU acts, but treaties concluded by the EU with third states. They may confer rights on third state nationals, which they can claim in EU courts: and they can do so even without reciprocity.

It is interesting to speculate how differently EU law might have been if van Gend had been decided differently. This issue is all the more piquant
because, although all decisions of the Court of Justice are collective and no separate or dissenting opinions are allowed (except to the Advocate General), and although the deliberations of the Court are secret, and every judge and Advocate General undertakes on appointment to preserve the secrecy of the deliberations, we now know that van Gend en Loos very nearly went the other way, and, at a time when the Court had only seven judges, was in the end decided by a 4:3 majority.

This is in fact rather useful as helping to dispel the idea that the Court is a sort of monolith, or even juggernaut, driven onward by a single agenda. In fact there is still, I think, a wide range of views in the Court, which may have implications for considering who or what are the subjects or objects of EU law. For example, those who come from a more traditional international law background may still see the Court as an international court, concerned primarily with disputes between states; they may in consequence be less concerned to protect or develop the right of standing before the court for individuals and undertakings. And there is indeed some basis for the special status of the Member States. Not only are they considered by some as ‘masters (or mistresses) of the Treaty’, as it is sometimes put. They can of course amend the Treaties, although there is a view that there are limits to that power. And they have, under the Treaties, an unqualified standing before the Court, so that they have the right to appear in any case before the Court, without having to demonstrate any specific interest in the outcome of the case. They are therefore sometimes described as having ‘privileged’ access before the Court.

Other members of the Court may, however, take a different stance. And they may in any event consider that the views advanced by a Member State carry no special weight in the Court’s deliberations.

What is perhaps most remarkable about the EU legal system in this respect is the extent to which, in contrast perhaps to some other international and transnational courts, the Member States have regularly sought to develop and to strengthen the EU’s judicial system: by, for example, setting up the General Court to improve the judicial protection of undertakings; by improving the system of judicial remedies generally; by improving the system of judicial appointments and limiting their own prerogatives in that regard; and by introducing the system of sanctions by way of severe financial penalties against the Member States themselves to encourage compliance with judgments of the Court. They have rather often made significant amendments to the Treaties to bring them in line with the case law of the Court. Rarely have their amendments been regressive.
Foreword

All in all, EU law provides a good example of the rule of law in interstate and intra-European relations.

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