UvA-DARE (Digital Academic Repository)

"Effectivity" in international law: self-empowerment against epistemological claustrophobia

d' Aspremont, J.

Publication date

2014

Document Version

Submitted manuscript

Published in

Proceedings of the Annual Meeting - American Society of International Law

[Link to publication](#)

Citation for published version (APA):

d' Aspremont, J. (2014). "Effectivity" in international law: self-empowerment against epistemological claustrophobia. *Proceedings of the Annual Meeting - American Society of International Law*, 165-167. <http://ssrn.com/abstract=2462885>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

THE IDEA OF EFFECTIVE INTERNATIONAL LAW

This panel was convened at 12:45 pm, Thursday, April 10, by its moderator, Vijay Padmanabhan of Vanderbilt University Law School, who introduced the panelists: Jean d'Aspremont of the University of Manchester and the University of Amsterdam; Rachael Kent of WilmerHale, LLP; Timothy Meyer of the University of Georgia School of Law; and Liam Murphy of New York University Law School.*

“EFFECTIVITY” IN INTERNATIONAL LAW: SELF-EMPOWERMENT AGAINST EPISTEMOLOGICAL CLAUSTROPHOBIA

By Jean d'Aspremont[†]

When we think of “effectivity,” we usually think of it as a practical and factual construction. The idea of effectivity, however, is anything but concrete, and raises all kinds of questions regarding legal theory, legal philosophy, epistemology, and the theory of knowledge. It should also be highlighted that, from a linguistic standpoint, the word “effectivity” does not exist in British English. The attachment of the International Court of Justice to Her Majesty’s English explains why the World Court uses the French word, *effectivité*, when it seeks to refer to “effectivity.”

These linguistic debates matter less than the semantics and especially the consensus that “effectivity” ought to be opposed to that of “effectiveness.” “Effectiveness” refers to the *outward* impact of (primary and secondary) rules, institutions, and narratives of international law on all international actors and law-appliers.¹ In that sense, one way to see effectiveness is to equate it with the general state of a rule, institution, or narrative in terms of compliance. “Effectivity,” for its part, evokes an *inward* process whereby facts are integrated into rules, institutions, and narratives as a condition of the operation of law and thus a condition of valid legal reasoning. By virtue of the idea of effectivity, valid legal reasoning is made contingent on the empirical verification of a certain factual variable. Said differently, “effectivity” refers to the internalization of certain factual variables in the law itself, as a result of which valid legal reasoning is conditioned on the demonstration of certain facts.²

The types of factual quality that are made a constitutive part of the operation of rule include (but are not limited to) the finding of an effective government, a certain behavioral practice for the sake of customary law, effective control for the sake of the extraterritorial application of human rights, effective control for the sake of attributing a behavior to a personified actor, and the effective exercise of authority for the sake of belligerent occupation, among others.³ Valid legal reasoning on the basis of those effectivity-based doctrines is thus made contingent on the realization of the factual variable concerned.

It is with such a distinction between effectivity and effectiveness in mind that three brief, rather elementary observations on the idea of effectivity must now be formulated.

* Ms. Kent, Professor Meyer, and Professor Murphy did not submit remarks to the *Proceedings*.

[†] Professor of Public International Law, University of Manchester; Professor of International Legal Theory, University of Amsterdam; Director, Manchester International Law Centre.

¹ This is irrespective of whether or not international law is a very powerful instrument of governance. See Martti Koskeniemi, *The Mystery of Legal Obligations*, 3 INT’L. THEORY 319, 321 (2011).

² It is true that effectivity and effectiveness overlap when the verification of the factual variable required by the former depends on compliance by certain actors with certain standards.

³ For a recent review of all the doctrines in which effectivity plays a role, see FLORIAN COUVEINHES MATSUMOTO, *L’EFFECTIVITÉ EN DROIT INTERNATIONAL* (2014). For a classic, see CHARLES DE VISSCHER, *LES EFFECTIVITÉS DU DROIT INTERNATIONAL PUBLIC* (1967).

THE WORLD OF INTERNATIONAL LAW AND THE OUTSIDE UNIVERSE

The first contention which I venture here is that the idea of effectivity operates as a bridge between the world of international law and what I would call an outside universe.” This is premised on the belief that international law creates a world of ideas (some people say “vocabularies”). The main ideas of the world of international law are states, international organizations, treaties, customs, wrongfulness, territory, crimes, and so on. Strictly speaking, these ideas do not describe anything. They are ideas.⁴

Unsurprisingly, most international lawyers are unhappy with the world of international law being solely a world of ideas. International lawyers want these ideas to reach out to an outside universe. This is the very reason why they have created another idea, i.e., the idea of effectivity. Needless to say, the idea of effectivity created by international lawyer is itself a mere idea among others. Yet it is one that allows the above-mentioned effectivity-based doctrines of international law to be connected with an outside universe. Stated differently, the idea of effectivity is what allows those doctrines to operate outside the closed world of ideas of international law. It allows all these foundational doctrines to pierce the atmosphere of the world of international law and beam themselves to the outside universe. It is in this sense that effectivity, as I understand it here, creates a bridge between the world of international law and an outside universe.

At this stage, it is essential to highlight that the bridge created by effectivity between the world of international law and the universe is *bi-directional*. While effectivity creates a bridge between international law and the outside universe by making valid legal reasoning dependent on factual variables, it does not follow that the world of international law is automatically and unilaterally shaped after such an imported outside universe. Although global actors constantly shape international law in a way that allows the pursuit of certain agendas that they see as in their self-interest, it is important to realize that the universe which is imported into the world of international law by virtue of effectivity simultaneously is, to a significant extent, constructed along the lines of the ideas (and descriptive categories) of the very same world of international law.⁵ In other words, this outside universe (made of effective government, effective control, behavioral practice, and so forth), despite heavily bearing on the design of international law, is itself partly molded upon the categories of the world of international law. At any time, this imported outside universe is simultaneously a projection of the world of ideas of international law. The importation of the outside world as a result of effectivity is thus one facet of what constitutes an intricate dialectic process, for any import in the world of international law and its main doctrines by virtue of effectivity is equally shaped by a projection of the latter. The world that is imported into international law by virtue of effectivity is as much constitutive and constituted by international law.

THE THERAPEUTIC DIMENSION OF THE IDEA OF EFFECTIVITY

The contention made here that effectivity constitutes a connecting tool between the world of international law and an outside universe immediately raises some questions. Why make the foundational doctrines of international law (and the legal reasoning in connection with

⁴ On the relationship between international law, ideas, and the power of ideas, see Philip Allott, *The True Function of Law in the International Community*, 5 GLOBAL L. STUD. J. 391 (1998). See also Philip Allott, *The Concept of International Law*, 10 EUR. J. INT'L L. 31 (1999).

⁵ James Crawford, *International Law as Discipline and Profession*, 106 ASIL PROC. 471, 486 (2012) (“We are collectively part of the makers of that world”).

each of them) dependent on factual determination? Why expressly make space in legal argumentation for factual determinations? Why not restrict legal reasoning to a purely normative or semantic exercise? Why do certain international law professionals feel the need to connect the world of ideas of international law with an outside (albeit self-created) universe?

Part of the answer lies with the profession of international legal academics. More specifically, I submit that the idea of effectivity alleviates a terrible fear of those professionals who are not confronted with practice, that is, the fear of being sequestered in their own world of ideas.⁶ In other words, effectivity soothes the fear of certain professionals of being cloistered in an world of abstract ideas (states, borders, sources, wrongfulness, crimes, etc.) and unable of reaching out to the universe.⁷ In essence, effectivity allows international academics to elude a self-perception that their profession boils down to theology and reassures them that they are not theologians.⁸ The idea of effectivity can accordingly be considered as a powerful drug against epistemological claustrophobia for certain categories of professionals, and especially for legal academics. It helps turn international law into a body of knowledge about the practice going on in the outside universe and, simultaneously, the experts of the ideas of international law into the experts of the outside universe of states, effective governments, customs, territory, wrongfulness. As a result, after having been cured from their claustrophobic anxieties, legal academics, thanks to the idea of effectivity, are in a position to appoint themselves as astronauts in the outside universe.⁹

THE DECEITFUL IDEA OF EFFECTIVITY

It is important to conclude by emphasizing that this image of international law as the social science pertaining to what is going on in this self-created outside universe can be deceitful, at least when confronted with a somewhat ideal external perspective. Indeed, because the idea of effectivity bridges the world of international law with an outside universe, it makes practitioners look as if, from an external perspective, they are in control of the universe that is imported into the world of international law. From an external perspective, practitioners are in the driver's seat in the outside universe and hence in international law. From such an external perspective, those who decide in the outside universe are policymakers, legal advisers, counsels, and judges, and legal academics only occupying a back seat. From an external perspective, legal academics have, at best, spiritual authority.¹⁰ This external imagery brought about by the idea of effectivity reveals the deceitfulness inherent therein. As was explained earlier, the idea of effectivity makes certain categories of professionals feel they are not theologians while making them look as if they have nothing more than spiritual authority. However, as the above remarks also pointed out, the idea of effectivity

⁶ Gerry Simpson, *On the Magic Mountain: Teaching Public International Law*, 10 EUR. J. INT'L L. 70, 74 (1999) ("We are often delighted when judges take notice of international law").

⁷ For critical remarks on the pitfall of self-referentiality, see Jean d'Aspremont, *International Lawyers Live!*, available at <http://ssrn.com/abstract=2271115> (introductory speech to the Fifth Research Forum of the European Society of International Law).

⁸ This does not mean that they lack awareness of the risk of failure, and includes what Martti Koskenniemi calls a "commitment," that is, a sentimental attachment to the field's constitutive rhetoric and traditions with some awareness of the risk of failure. See Martti Koskenniemi, *Between Commitment and Cynicism: Outline of a Theory of International Law as Practice*, in COLLECTION OF ESSAYS BY LEGAL ADVISORS 493 (1999).

⁹ This finding is irrespective of the fact that international lawyers do not need international law as a warrant for their existence as a professional discipline. See Crawford, *supra* note 5 ("One does not have to believe in the existence of God to credit the existence of the clergy"). See also d'Aspremont, *supra* note 7.

¹⁰ As is well-known, this is an image that has been the object of compelling contestations over the last decades. See, e.g., MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* (2004).

simultaneously endows some of these professionals, and especially legal academics, with architectural responsibilities in the construction of the outside universe.

The foregoing should suffice to make clear that for certain professionals of international law, there could not be a more comfortable position. Those professionals define the vocabularies and ideas that are projected in the universe while being simultaneously portrayed, from an external perspective, as being the sole wielders of spiritual authority about what is going on in this universe. Their position is that of immense authority, all of it veiled and concealed by the idea of effectivity. It does not seem controversial to hold that it is in definition and description that lies the greatest power.¹¹ By virtue of the smokescreen provided by the idea of effectivity, certain professionals of international law, and especially legal academics, exert such a definitional power in all secrecy and without much formal accountability but that which is market-related or reputational.

Against that backdrop, there seems no doubt that the idea of effectivity will continue to prosper and inform scholarly debates and representations of the world for the next decades. Indeed, as was argued here, effectivity alleviates the fear of certain categories of professionals, and especially legal academics, of being relegated to the periphery as well as their fear of theology. It provides them with a powerful drug against epistemological claustrophobia. Most importantly, it empowers these professionals with definitional power while allowing them to be perceived as being in the back seat. If those professionals relish power (as I believe they do), they would be foolish to forsake the idea of effectivity.

¹¹ See generally Sahib Singh, *International Law as a Technical Discipline: Critical Perspectives on the Narrative Structure of a Theory*, in JEAN D'ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW* 236 (2013).