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DR. JED ODERMATT & PROF. RAMSES A. WESSEL
'MULTILATERALISM UNDER STRAIN: THE CHALLENGE OF THE EU'S
ENGAGEMENT WITH INTERNATIONAL INSTITUTIONS'

Jed Odermatt & Ramses A. Wessel
2018

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The City Law School

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Multilateralism under Strain: The Challenges of the European Union's Engagement With International Institutions

Jed Odermatt and Ramses A. Wessel

Abstract

Multilateralism is under strain. The election of US President Donald Trump has brought about a new challenge to the rules based international order. The EU, itself a form of multilateral cooperation, also faces internal challenges, including the migration crisis, terrorism, growing populism, and disrespect for the rule of law. This working paper discusses how the EU can respond to such internal and external challenges when engaging with multilateral institutions. At a time when multilateralism is increasingly challenged, the EU requires a clear strategy that links its general support for multilateralism with specific international objectives.

Introduction: Multilateralism under Strain

On 25 September 2018, US President Donald Trump addressed the UN General Assembly at the opening of its 73rd Session. He stated "Around the world, responsible nations must defend against threats to sovereignty not just from global governance, but also from other, new forms of coercion and domination."¹ The speech followed up on the themes in first address to the UNGA, in which he contrasted a system of multilateralism with one of 'strong sovereign nations'.

"The United States will forever be a great friend to the world and especially to its allies. But we can no longer be taken advantage of or enter into a one-sided deal where the United States gets nothing in return. As long as I hold this office, I will defend America's interests above all else, but in fulfilling our obligations to our nations, we also realize that it's in everyone's interests to seek the future where all nations can be sovereign, prosperous, and secure."²

This statement demonstrates the two pillars of Trump's foreign policy doctrine of 'principled realism'. The first pillar is summed up by the 'America First' slogan: the United States will pursue its own self-interest above all else. Multilateral institutions such as the UN are viewed as inefficient and ineffective at best, and openly hostile to US interests at worst. The second pillar is the preference for 'deals'. The Trump doctrine is transactional; it approaches international relations as a zero-sum game in which the most powerful nations win. This approach favours working towards solutions to problems such as the North Korea crisis, not through multilateral forums, but through striking deals with other powerful states (or even individuals) such as China or Russia. This second pillar also relegates the importance of multilateralism and the role of institutions. This is not just rhetoric against multilateral institutions. In many fields of international cooperation – trade, international criminal justice, international security, environmental protection and climate change – the Trump administration has acted to dismantle or weaken a rules-based order. Anne-Marie Slaughter recently predicted that "[t]he next four to eight years may well see the end of the United Nations as a serious forum for global decision making about peace and security."³

A final version of this paper will appear in Ramses A. Wessel and Jed Odermatt (eds.), *Research Handbook on The Engagement of the European Union with International Organizations*, Edward Elgar, 2019.

¹ Remarks by President Trump to the 73rd Session of the United Nations General Assembly, New York, NY, 25 September 2018.

² Remarks by President Trump to the 72nd Session of the United Nations General Assembly, United Nations, New York, 19 September, 2017.

³ A-M Slaughter, 'A Return to Anarchy?' *Columbia Journal of International Affairs*, March 2017.

There are many examples of this assault on multilateralism. Although the 2018 G20 Leaders' Declaration from the Buenos Aires Summit included a commitment "to improve a rules-based international order"⁴, the US had taken a position to reject any inclusion of language supporting multilateralism.⁵ The Trump Administration has withdrawn the United States from the Trans-Pacific Strategic Economic Partnership Agreement (TPP), the Paris Climate Change Agreement and the Joint Comprehensive Plan of Action dealing with Iran's nuclear programme. The crisis facing the WTO caused by the blocking of appointments to the WTO Appellate Body is driven by a broader scepticism towards multilateralism.⁶ The US also announced its withdrawal from UNESCO, a decision Irina Bokova described as "a loss for multilateralism."⁷ The Trump Administration considered an executive order that would reduce funding to the United Nations.⁸ Another draft executive order entitled 'Moratorium on New Multilateral Treaties' would call for a review of all multilateral treaties in which the US is engaged in negotiations or is already a part, and sets up a committee to recommend to the President whether to withdraw from these treaties.⁹ The United States' withdrawal from global leadership in these institutions is all the more striking considering that the US was instrumental in designing and implementing a multilateral order after the end of the Second World War.

It is in this international context that the European Union finds itself in a difficult position. The EU Treaties commit the Union to "promote multilateral solutions to common problems, in particular in the framework of the United Nations"¹⁰ and "promote an international system based on stronger multilateral cooperation and good global governance."¹¹ How does the Union, which seeks to support and support multilateralism and international institutions, respond to this international environment? In addition to these external challenges, the EU also faces numerous internal challenges. From the migration crisis and terrorism, to growing populism, disrespect for the rule of law, and the withdrawal of the United Kingdom, these internal challenges may also put into question the value of engaging with international organizations and institutions. Yet the EU's engagement with international institutions is closely linked to the challenges the EU faces, both at home and internationally. In the wake of the global financial crisis and the European debt crisis, the EU became more active in a wide range of international economic bodies, including the G20, which have influenced the EU's responses to the crisis.¹² In fields such as migration, terrorism, climate change, human rights and global health, the EU has acted with, and through international institutions to address such challenges. Responding to (or even anticipating) the migration crisis, dealing with economic malaise, and addressing the structural problems that have led to populism, can also be addressed through more effective cooperation at the international level. Though multilateralism may seem to be under attack, especially with the attitude of the Trump administration, the EU has a clear interest in supporting a multilateral, rules based order.

Why does the European Union Engage with International Institutions?

The EU's commitment to multilateralism is often equated with its commitment to *international institutions*. Yet multilateralism also involves a commitment to a set of internationally recognized norms in order for these institutions to function: the sovereign equality of states, the principle of non-intervention and prohibition of the use of force in international relations, as well as a commitment to respect for international human rights. The EU's support for multilateralism, therefore, goes beyond supporting the key institutions of global governance, but also certain values that underlie them.

Why is multilateralism important for the EU? A common answer is that the EU has multilateralism and respect for international institutions in its 'DNA'.¹³ According to this argument, one should expect the EU to support multilateralism since it is itself a form of cooperation between states. Established as a form of economic cooperation to respond to the horrors of the Second World War, this argument goes, we should

⁴ G20 Leaders' Declaration: Building Consensus for Fair and Sustainable Development, 1 December 2018, <http://www.g20.utoronto.ca/2018/buenos_aires_leaders_declaration.pdf>.

⁵ 'G20 agreement backs 'rules-based' order but bows to Trump on trade reforms' *The Guardian*, 2 December 2018.

⁶ See R. McDougall, 'Crisis in the WTO: Restoring the WTO Dispute Settlement Function', CIGI Papers No. 194 — October 2018. <<https://www.cigionline.org/publications/crisis-wto-restoring-dispute-settlement-function>>.

⁷ Statement by Irina Bokova, Director-General of UNESCO, on the occasion of the Withdrawal by the United States of America from UNESCO.

⁸ M. Fisher, 'Trump Prepares Orders Aiming at Global Funding and Treaties', *New York Times*, 25 January, 2017.

⁹ See the Trump administration's draft of the executive order on treaties, *Washington Post*, Available at: <https://apps.washingtonpost.com/g/documents/world/read-the-trump-administrations-draft-of-the-executive-order-on-treaties/2307/>.

¹⁰ Art. 21(1) second para, Treaty on European Union (TEU).

¹¹ Art. 21(2)(h) TEU.

¹² See F. Amtenbrink and R. Repasi, 'G7, G8 and G20 and Global Summits: Shortcomings and Solutions in Informal International Governance', and S. Donnelly, 'Financial Stability Board (FSB), Bank for International Settlements (BIS) and Financial Market Regulation Bodies: ECB and Commission Participation Alongside the Member States', in Wessel and Odermatt, *op.cit.*. See the discussion in J. Wouters, S. Van Kerckhoven, and J. Odermatt, 'The EU at the G20 and the G20's Impact on the EU', in B. Van Vooren, S. Blockmans, and J. Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford, Oxford University Press, 2012) 259-271 and J. Wouters, J and Odermatt, 'International Banking Standards, Private Law and the European Union' in M. Cremona, H. Micklitz (eds) *The External Dimension of European Private Law* (Oxford University Press, 2015).

¹³ S. Keukeleire and T. Delreux, *The Foreign Policy of the European Union*, 2nd edn., (Basingstoke, Palgrave Macmillan, 2014), 301: "the EU's commitment to a multilateral approach can be seen as part of its DNA".

expect the EU to also show a friendly attitude towards other multilateral institutions. This is a common narrative, but one that should be challenged. The EU has also shown a tendency towards unilateralism or bilateralism where it has been in its interests. According to another thesis, as the EU moves to becoming a more state-like and realist foreign policy player, we can expect it to be less friendly to multilateral institutions and international law. The more the EU undergoes a process of constitutionalisation, and the more it becomes a global actor with strategic and economic interests, the more the EU will seek to safeguard its independence from international law, and it will be wary of norms that have been developed outside the EU legal order. This can be seen, for example, in the creeping unilateralism that has begun to infiltrate foreign policy.¹⁴ It can also be seen in the trend towards preserving the 'autonomy' of the EU legal order, as exemplified by the difficulties surrounding dispute settlement by other tribunals than the EU's own Court.¹⁵ The EU's support for multilateral institutions is not natural and self-evident, but a deliberate policy that requires renewal and re-thinking.

The EU Treaties nevertheless demonstrate a general commitment to international law and multilateralism. Article 3(5) TEU sets out that

"In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

Article 21(1) TEU further provides that the Union's "action on the international scene" is to be guided by numerous principles, including the "respect for the principles of the United Nations and international law".¹⁶ One of the goals of the EU's external action is to "consolidate and support democracy, the rule of law, human rights and the principles of international law",¹⁷ both in the EU's external action as well as "the external aspects of its other policies."¹⁸ Moreover, the EU's commitment to multilateralism is pursued in the EU's foreign policy documents. The 2016 EU Global Strategy,¹⁹ for instance, seeks to give effect to the EU's commitment to multilateralism:

"The EU will promote a rules-based global order. We have an interest in promoting agreed rules to provide global public goods and contribute to a peaceful and sustainable world. The EU will promote a rules-based global order with multilateralism as its key principle and the United Nations at its core."²⁰
[...]
"The EU will strive for a strong UN as the bedrock of the multilateral rules-based order, and develop globally coordinated responses with international and regional organisations, states and non-state actors."²¹

The Strategy presents some reasons why it is in the EU's interests to pursue multilateralism. As a group of medium-sized states, the Union is more likely to achieve its goals and interests through a rules-based international order, rather than one based on pure power politics. One can notice subtle differences in the way the EU presents its commitment to multilateralism when compared, for instance, to the 2003 EU Security Strategy. Developed in the wake of the Iraq war, which divided EU Member States, the Security Strategy put the EU's commitment to multilateralism front and center. The Security Strategy views multilateralism as a commitment to multilateral *institutions*, especially the United Nations. The 2016 Global Strategy, on the other hand, does not venerate the UN and institutions in the same way. It sees multilateralism as involving other states, other regions, other organizations, civil society and not-state actors. Moreover, whereas the 2003 Strategy highlighted the role of the United States, the 2016 Strategy sees a diminished importance for the US, demonstrating the importance of other regions, including Asia.

Another shift is the importance in ensuring that multilateralism provides *results*. As discussed above, there is little value in pursuing multilateralism for its own sake; it must also effectively address global problems. This is why the EU has presented its role in the Iran nuclear deal as an example of its commitment to

¹⁴ See for example, J. Scott and L. Rajamani, 'EU Climate Change Unilateralism', 23 *European Journal of International Law* 2 (2012) 469.

¹⁵ On some of these problems see C. Hillion and R.A. Wessel, 'The European Union and International Dispute Settlement: Mapping Principles and Conditions', in M. Cremona, A. Thies and R.A. Wessel (Eds.), *The European Union and International Dispute Settlement* (Hart Publishing, 2017), 7-30.

¹⁶ Art. 21(1) TEU; See Opinion in *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:637, para. 43.

¹⁷ Art. 21(2)(b) TEU.

¹⁸ Art. 21(3) TEU.

¹⁹ *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy*, European External Action Service, Brussels, June 2016 (EU Global Strategy 2016).

²⁰ EU Global Strategy 2016, 8.

²¹ EU Global Strategy 2016, 9.

multilateralism. The 2016 Strategy also highlights the need for intersecting multilateralism, that is, cooperation between the Union and other regions. And while the Strategy refers to institutions, it also highlights the need for reform of these bodies, including the UN and international financial institutions. There are also a number of policy areas where the Union sees multilateralism as playing a particularly important role. Disarmament, non-proliferation and peace and security are important. The protection of the environment, action against climate change and policy on sustainable development are also given greater prominence. Areas that have not been previously discussed as having a strong multilateral dimension, such as digital governance and cyber-security, are also mentioned as key areas that necessitate a multilateral approach.

A further reason for the EU to engage with international institutions is the fact that the EU and its Member States are increasingly influenced by the normative activity of these bodies. Their decisions, rules, best-practices, guidelines and so on, often find their way into legislation at the EU or Member State level, or are referred to in case law.²² The CJEU has recognized that even 'recommendations' that are adopted in an organization to which the EU is not a party are "taken into consideration for the purposes of drawing up rules of EU law"²³ and therefore "are capable of decisively influencing the content of the legislation adopted by the EU legislature."²⁴ By engaging with international institutions, the EU is capable of influencing the development of these norms that will find their way into EU law and policy.

In addition to the more general commitment to multilateralism set out in the EU Treaties, there are also legal reasons based on the EU Treaties and the nature of Union law. The EU's participation in international institutions can be considered a logical consequence of the division of competences between the EU and its Member States. It is also an element of the Union's autonomous international legal standing.²⁵ Moreover, especially since the Lisbon Treaty, becoming a more visible and effective global actor and having closer relations with international institutions is a key objective of the Union. Articles 21 TEU expressly refers to the EU's relations with other organizations:

"The Union shall seek to develop relations and build partnerships with [...] international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations."²⁶

The EU Treaties also contain a number of references to specific policy areas²⁷ or organizations with which the EU is to build strong relationships. The Union is to establish, for example, "appropriate forms of cooperation" with bodies such as the UN and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development.²⁸ The EU Treaties even require the Union to join certain international institutions, such as joining the European Convention on Human Rights and its associated organs (Art. 6 TEU).²⁹ More generally, Article 211 TFEU provides a competence for the Union to, at least, cooperate with other international organizations: "Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations."

²² B. Van Vooren and R. A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge, Cambridge University Press, 2014) 247: "many EU (and national) rules find their origin in decision-making processes in other international organizations". See earlier on the connection between international and EU norms A. Føllesdal, R.A. Wessel and J. Wouters (Eds.), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes* (Leiden, Boston: Martinus Nijhoff Publishers, 2008).

²³ Judgment in *Germany v Council* ('OIV'), C-399/12, EU:C:2014:2258, para. 62. For discussion of the OIV judgment, see T. Ramopoulos, 'Agriculture: The EU in the OIV and Other International Agricultural Commodity Bodies', in Wessel and Odermatt, *op.cit.*.

²⁴ *Id.*, para. 63.

²⁵ This is confirmed by the recognition of the Union's legal personality in Art. 47 TEU. See more extensively on the EU's legal status: N.M. Blokker, 'The Structural Impact of General International Law on EU Law: International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law', *Yearbook of European Law*, 2016, 35(1), pp. 471-483; and earlier R.A. Wessel, 'Revisiting the International Legal Status of the EU', *European Foreign Affairs Review* (2000), 507-537; and R.A. Wessel, 'The International Legal Status of the European Union', *European Foreign Affairs Review* (1997), pp. 109-129.

²⁶ Art. 21(1) TEU. The first subparagraph provides: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."

²⁷ This includes cooperation with international organizations in the fields of social policy (Art. 156 TFEU); education and sport (Art. 164 (3) TFEU); vocational training (Art. 166(3) TFEU); culture (Art. 167 (3) TFEU); public health (Art. 168 (3) TFEU); research and technological development (Art. 180 (b) TFEU); the environment (Art. 190 (4) TFEU); economic, financial and technical cooperation measures (Art. 212 (1) TFEU); development cooperation (Arts. 208(2), 209(2), 210(1), and 211 TFEU); humanitarian aid (Art. 214 (7) TFEU). Specific arrangements are also mentioned in relation to economic and monetary policy (Arts. 134(2), 138, 139(2)(i)– (j), and 143(2)(a) TFEU; and Arts. 5.1, 23, and 31(1) of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank; Art. 14 of Protocol (No 5) on the Statute of the European Investment Bank.

²⁸ Art. 220 TEU.

²⁹ See R. Lawson, 'Council of Europe: Co-operation in the Field of Human Rights, Democracy and the Rule of Law', in Wessel and Odermatt, *op.cit.*.

This 'cooperation' may also lead to the establishment of legal relationships, which can be derived from the provisions creating a competence for the Union to conclude international agreements. Thus, Article 216 (1) TFEU provides for international agreements to be concluded "with one or more third countries or international organizations" (see further below) and Article 217 TFEU allows for association agreements to be concluded with both states and international organizations. The procedures to conclude these international agreements are to be found in Arts. 218 and 219 (3) TFEU. So called, 'constitutive agreements' by which international organizations are created, or accession agreements to acquire membership of an international organization, are not excluded.³⁰ In fact, the European Court of Justice established that the European Community's competences in the field of external relations included the power to create new international organizations.³¹ Both the European Economic Area (EEA) and the 'associations' created by association agreements serve as examples of international organizations created by (at that time) the European Community.³² Although not explicitly regulated, this also seems to imply a competence of the EU to fully participate in treaty-regimes, on the basis of a formal accession to a treaty, as exemplified by the EU's participation in the UN climate regime (e.g. the UN Framework Convention on Climate Change, the Kyoto Protocol, and the Paris Agreement, which were formally ratified by the European Union in 1993, 2002 and 2016 respectively).³³

Ever since the 1971 *ERTA* case, the European Court of Justice also acknowledged the treaty-making capacity of the Community in cases where this was not explicitly provided for by the Treaty: "Such authority arises not only from an express conferment by the Treaty [...] but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions." In fact, "regard must be had to the whole scheme of the Treaty no less than to its substantive provisions."³⁴ This means that international agreements, including the ones whereby the EU becomes a member of another international organization or participates in a treaty-regime,³⁵ may also be based on the external dimension of an internal competence. With the entry into force of the Lisbon Treaty, the *ERTA* doctrine was integrated in the general competence-conferring provision on the conclusion of international agreements (Article 216(1) TFEU).³⁶

At least to establish membership of the EU in international organizations, this provision seems to give a broad mandate to the EU to also conclude international agreements in order to become a member of an international organization or to join a treaty-regime in a specific area. Thus, Article 37 TEU allows for international agreements to be concluded "with one or more States or international organisations" in the area of the Common Foreign and Security Policy (CFSP). Similar provisions may be found in relation to development for cooperation (Article 209(2) TFEU), economic, financial and technical cooperation (Article 212(3) TFEU) and humanitarian aid (Article 214(4) TFEU). In the environmental sphere, the Treaty reads that "Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations" (Article 191(4) TFEU). In the field of humanitarian aid, the Treaty refers to "international organisations and bodies, in particular those forming part of the United Nations system" to coordinate operations with (Article 214(7) TFEU). The United Nations (and its Charter) is also mentioned in relation to a number of other policy areas of the Union (Articles 3(5), 21(1)-(2), 34(2), 42(1) and (7) TEU; Articles 208(2), 214(7), and 220(1) TFEU)). In relation to development cooperation a number of provisions have been included explicitly to strengthen commitments of both the Union and its Member States in that area. Thus, Article 208(2) TFEU provides the following: 'The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations'. Article 210(1) TFEU adds to that an obligation of coordination, which means concretely that the EU and Member States must take account of the Millennium Development Goals (MDGs) and their planned post-2015 follow-up ('Sustainable Development Goals' or SDGs), drawn up in the context of the United Nations. In addition, one may come across some references in relation to the European Central Bank and the European Investment Bank (see Protocols Nos 4³⁷ and 5 to the Treaty (Article 14)). A somewhat more general provision, and the first one in a specific Treaty Title on 'The Union's Relations with International Organisations and Third Countries and Union Delegations' is Article 220(1) TFEU: "The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised

³⁰ In fact, they seem to be mentioned in Article 218(6)(a)(iii) TFEU as "an agreement establishing a specific institutional framework by organising cooperation procedures." And also the form seem to be left open, as to allow for an exchange of letters or statements containing the application to join and the acceptance, as long as the result is a treaty under general international law. See also De Baere, *op.cit.*, at 1243 and Sack, *op.cit.*, at 1230.

³¹ Opinion 1/76 of 26 April 1977 *Draft Agreement establishing a European laying-up fund for inland waterway vessels*; EU:C:1977:63, para 5.

³² Schermers and Blokker, *op.cit.*

³³ See R. Kamphof, 'UN Environment Programme (UN Environment) and UN Framework Convention on Climate Change (UNFCCC): EU Action Between Legal Competences and Political Power', in Wessel and Odermatt, *op.cit.*.

³⁴ ECJ, Case 22/70, *ERTA*, paragraphs 15-16; ECJ, Opinion 1/76.

³⁵ See ECJ, Opinion 2/94 *WTO*.

³⁶ "The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."

³⁷ Article 6(2): 'The ECB and, subject to its approval, the national central banks may participate in international monetary institutions'. See also Article 23 on external operations.

agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development. The Union shall also maintain such relations as are appropriate with other international organisations.”

Furthermore, the idea to foster cooperation with third countries and competent international organisations returns in fields of education and sport (Article 165(3) TFEU), vocational training (Article 166(3) TFEU), culture (Article 167(3) TFEU) and public health (Article 168(3) TFEU). A similar promotion of cooperation with other international organisations is mentioned in relation to social policy (Article 156 TFEU) and cooperation in Union research, technological development and demonstration (Article 180(b) TFEU). In addition, the Union’s foreign and security policy includes a number of rules on the way in which the EU wishes to present itself in international organisations, including the representation by the High Representative (Article 27(2) TEU), the cooperation between diplomatic missions of the Member States and the Union delegations (Articles 33 and 35 TEU), the coordination of Member States’ actions (Article 34 TEU) and the general competence to conclude international agreements with international organisations in the area of CFSP (Article 37 TEU).

If there is one thing that this short overview reveals, is that the engagement of the Union with other institutions is based on competences as well as on rules on representation and coordination that are fragmented and scattered across the Treaties.

Thus, the EU has become part of what may be called a ‘global normative web’, as many of its positions and decisions are closely connected to policies and decisions of other international bodies.³⁸ Indeed, activities of the EU are increasingly related to global debates that take place in other international bodies. This has not only become clear in policy areas like trade, health, the environment, but also in relation to more technical (standard-setting) activities on food safety, financial regulation or intellectual property.

The EU has a clear interest in supporting and engaging with international institutions, but it often faces challenges when seeking to influence developments at the international level. How has the EU responded to these challenges? The next sections discuss some of the different ways in which the EU has sought to engage with and influence international institutions. In then turns to the multiple challenges the EU faces when seeking to participate in, and establish relationships with these institutions.

Engagement

There are a number of ways in which the EU seeks to engage with other international institutions. The first is through the EU’s participation in those institutions, both formally and in practice. Second, it is interested in understanding how these international institutions influence the law and policy inside the EU. Earlier research has already pointed to the fact that, indeed, the EU not only brings something to international institutions, it is also affected and sometimes even bound by decisions taken at the international level.³⁹ In other words: the European Union’s external action is not only defined by its influence on international developments, but also by its ability and the need to respond to those developments. While traditionally many have stressed the EU’s ‘autonomy’, over the years its ‘dependence’ on global developments has become clearer.⁴⁰ The EU’s participation in many formal and informal international cooperation frameworks only testifies to that. It has, indeed become part of the ‘global normative web’ referred to above, with many of its rules being influenced by debates taking place in other international for a, which in turn forms a reason for the EU to be present at those tables to make sure that the roles and standards that are adopted are in line with its own preferences. This underlines the notion that the relationship between the EU and international institutions has changed. From a political science perspective Jørgensen pointed to the idea that “reactive policies have been left behind ... [W]hereas the European Union in the past may have been an organization in need of learning about international affairs, the European Union now seems to master several of the disciplines of international relations”.⁴¹ Indeed, there seems to be a ‘two-way flow of influence’ which includes both an instrumental use by the EU of international organisations and an influence of international organisations on EU policies and policy-making.⁴²

Over the years many empirical case studies revealed an influence of international organisations on the EU, including a possibility that international organisations have been ‘teaching’ the European Union, in

³⁸ See further Ramses A. Wessel, ‘Institutional Lawmaking: The Emergence of a Global Normative Web’, in C. Bröllman and Y. Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing, 2016), pp. 179-199; as well as Andreas Føllesdal, Ramses A. Wessel and Jan Wouters (eds), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes* (Martinus Nijhoff Publishers, 2008).

³⁹ A. Føllesdal, R.A. Wessel and J. Wouters (eds), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes* (Martinus Nijhoff Publishers, 2008); as well as Wessel and Blockmans, *Between Autonomy and Dependence*, op.cit.; and R.A. Wessel and S. Blockmans, ‘The Legal Status and Influence of Decisions of International Organizations and other Bodies in the European Union’, in P. Eeckhout and M. Lopez-Escudero (Eds.), *The European Union’s External Action in Times of Crisis*, Hart Publishing, 2016, pp. 223-248. Parts of this section are based on these earlier studies.

⁴⁰ See Wessel and Blockmans, *Between Autonomy and Dependence*, op.cit.

⁴¹ Jørgensen, *The European Union and International Organizations*, op.cit., at 4–5.

⁴² Ibid.

particular in areas where it was a relative newcomer (such as health (the WHO), the monetary and financial system (IMF, and World Bank) or international security (NATO)).⁴³ The influence of international norms varies considerably and reflects the constant struggle between an openness to international law and norms developed at the international level and the idea of an autonomous legal order that is there for the Court to preserve. Obviously, 'influence' is a matter of degree and here we use it to denote the effect of norms created in or by international organisations on the EU and its normative output. The issue can be approached from two sides: the international organisation in question should have the capacity or power to exercise its influence (there has to be an institutional and substantive link), and the EU must be willing or compelled to 'receive' the influence. Influence is not a legal concept and lawyers are not used to working with it. Nonetheless, by discussing a wide variety of case-studies from international institutions active in an array of fields, EU practice reveals the different kinds of influence that takes place. Oriol Costa and Knud Erik Jørgensen revealed that "under certain circumstances international institutions [indeed] shape both policies and policy-making processes, even in ways sometimes unintended by the EU, or undesired by some member states".⁴⁴ They point to the fact that in International Relations (IR)-theory different 'mechanisms' to exert influence have been noticed, which may (1) provide opportunities to, or constraints on actors; (2) change their ability to influence decision-making by changing the distribution of power; (3) establish or spread norms and rules; or (4) create path dependencies. The emerging picture is a complex set of formal and (sometimes very subtle) informal ways in which international organisations (and other multilateral fora) influence the EU. The degree of influence may then also depend on the 'institutional strength' of the international organisation. Some research has shown that "international institutions embodied in toothless non-binding agreements should have less influence on the EU than fully-fledged international institutions including binding treaties and meetings of regular fora".⁴⁵ Obviously, this statement could also be challenged as the EU might be more open to 'non-binding' norms and participation in informal bodies and – also given its cherished 'autonomy' – be more 'guarded' towards norms emanating from 'strong' international institutions. The various case studies in the book at least reveal a large variation.

IR-theory teaches us that the different mechanisms and degrees of influence may have different consequences. Apart from 'normative influence', it is equally possible to find elements of 'institutional consequences', including the role EU and Member State actors can play in international institutions and the way in which formal decision-making processes are used in practice. There is indeed an interaction between the EU and many international organisations, underlining the coming of age of the European Union as a polity. Whereas for an international organisation like the EU⁴⁶ stressing its autonomy is necessary to establish its position both vis-à-vis its own Member States and in the global legal order, its further development sets the limits to that autonomy. In many policy areas the EU has become a global player and everything it does cannot be disconnected from normative processes that take place in other international organisations. This process does come with the same tension that sovereign states face, ie how to square the preservation of one's institutional and constitutional values with accepting a certain dependence on the outside world.

More legally oriented research seems to support the findings of political scientists and IR-theorists: international decisions also normatively influence the creation and interpretation of EU decisions,⁴⁷ and – more generally – global, EU and domestic norms are increasingly interconnected.⁴⁸ The degree of the normative influence of international bodies on the EU and its legal order depends on a raft of factors, ranging from the binding obligations resulting from EU membership and full participation in other international organisations, to the voluntary reception or outright rejection of international norms by the EU legislator and Court of Justice. At the same time, 'domestic conditions' are also an important factor for the degree of influence. Whereas the EU is a unique and very complex legal construction, the separateness of the EU both from national and international law are still propagated by the Court of Justice's autonomous interpretation of EU law and its exclusive jurisdiction therein. In view of globalisation's growing interconnectedness between all sorts of subjects of international law, and the waning economic and financial power of the European Union on the international plane, the Court's refusal to take account of international law in order to protect the unity of the internal market becomes increasingly untenable. This is all the more so because the Court's displayed attitude towards the reception of international law in the EU legal order forms an impediment to meeting the EU's constitutional duties in its relations with the wider world, most notably full respect for international law, whether this emanates from international organisations with legal personality or less institutionalised international regimes.⁴⁹

⁴³ Jørgensen, *The European Union and International Organizations*, *op.cit.*, at 8–9. Cf. also S. Donnelly and R.A. Wessel, 'The International Dimension of the EMU: The Interplay between the Global Financial Stability Architecture and the European Union', in Amtenbrink and Herrmann, *op.cit.*

⁴⁴ O Costa and KE Jørgensen (eds), *The Influence of International Institutions on the EU* (London, Palgrave, 2012).

⁴⁵ As paraphrased by Costa and Jørgensen, *op.cit.*

⁴⁶ Indeed, we consider the EU as an international organisation. See also Eckes and Wessel, *op.cit.* Only recently the EU Court for the first time expressly stated that the EU is not a state; Opinion 2/13 of the Court of 18 December 2014 on the accession of the EU to the ECHR, ECLI:EU:C:2014:2454, par. 49.

⁴⁷ See the various contributions to Wessel and Blockmans, *op.cit.*

⁴⁸ Føllesdal, Wessel and Wouters, *op.cit.*

⁴⁹ See on the various consequences of the EU's autonomy claim also M. Cremona, A. Thies and R.A. Wessel (Eds.), *The European Union and International Dispute Settlement* (Oxford, Hart Publishing, 2017).

Overall, studies over the past years have revealed the impact of many international decisions on the EU. These decisions may be taken by both formal international organisations and more ‘informal’ transnational, regulatory or treaty bodies.⁵⁰ The question of the legal status of these decisions within the EU legal order goes beyond the scope of this paper, but has been addressed elsewhere.⁵¹

Membership and Full Participation

The first, and most apparent form of engagement is when the EU becomes a member of, or participates in an international institution. It is understandable that much of the scholarship on the EU and international organizations has focused on questions of status, speaking rights, and so on. Where the EU is a member, or even an enhanced observer with quasi-member status, the EU is usually able to assert itself within an institution. Yet membership also comes with costs. Membership usually means that the EU is required to implement norms in its legal order. Where the EU is a member *alongside* the EU Member States, which is the usual state of affairs, this gives rise to questions about representation, funding, voting rights, as well as issues relating to the implementation of those international standards and decisions. The case of the FAO demonstrates that, even when the EU is able to obtain full membership within an organization, legal issues and political battles remain. It is also easy to equate EU membership with EU influence. However, these are often separate issues: membership does not necessarily translate into EU influence.⁵²

The EU's membership in international institutions gives rise to a number of challenges. One issue is the so-called ‘watered down’ resolutions of international organizations. The EU's position in international bodies sometimes represents the lowest common denominator, as it is the policy that can be agreed upon by all EU Member States. At the same time, this might help forge consensus within the international organization itself. Another challenge is that the EU Member States might not always decide to use the EU as the appropriate body to push forward their agenda.⁵³ One of the messages is that, where internal political cohesion exists within the EU, it is more likely to be influential in a given organization. Even where the EU is not a member, such as in various economic standard-setting bodies, the Commission has been able to assert influence because there was political internal agreement on a certain policy.

Another issue that arose is that the co-ordination on the ground is important. What will often determine the EU's influence in an organization is its ability to co-ordinate effectively, to share information, and to respond quickly to developments. Such internal co-ordination cannot be developed only through legal tools, but also through interaction and learning over time. Technology is also being used to overcome some of these difficulties.

One particular challenge is the issue of EU voting. Since EU Member States are under an obligation to act in a coherent fashion in IOs, this gives rise to a particular challenge: how to ensure that the EU does not become overly dominant through EU Member States acting as a bloc. In the HCCH, for example, voting rules had to be changed to prevent EU dominance.⁵⁴ Similar concerns arose regarding the EU's accession to the ECHR. Issues of the EU's voting rights, liability, representation and speaking rights are all of concern to other states that are members of an organization. Yet in addition to these more practical concerns, there is also another source of frustration towards the EU, that is, the fear that the EU's presence will modify the state-centric nature of the institution in question. This may appear to be a trivial matter, but time and again it appears as a concern when the EU seeks to upgrade its status at an institution, especially those in the UN context, where the principle of sovereign equality of states is of paramount importance. Seeking to justify EU presence only on the basis of EU competences will not persuade other members of the organization to allow a greater EU presence. What is needed is to show that EU presence gives some added-value to the organization.

Another challenge relates to how to measure EU influence or effectiveness in other organizations and institutions. Does one focus on issues of EU ‘visibility’? Or on how well the EU and its Member States coordinate their positions in IOs? Does one measure how much the EU is able to impact on the development of specific policies? There are numerous studies on these issues of EU influence and effectiveness.⁵⁵ It should be pointed out that ‘influence’ on an organization need not be measured simply by examining whether the EU got its way on a specific issue, or whether its aims were realised in practice. The EU can also influence an institution in many other ways, such as through its active engagement and support for the institution. It can be involved in cooperation and partnership on certain projects and

⁵⁰ See for examples Føllesdal, Wessel and Wouters, *op.cit.*

⁵¹ Wessel and Blockmans, 2016, *op.cit.*

⁵² See the various contributions to Wessel and Odermatt, *op.cit.*

⁵³ See K. Smith, ‘EU Member States at the UN: A Case of Europeanization Arrested?’, 55 *Journal of Common Market Studies* 3 (2017) 628.

⁵⁴ See L. de Almeida, M. Cantero Gamito and H.-W. Micklitz, ‘Institutional and Normative Co-operation in Private Law: Beyond the Hague Conference towards Standard Setting Organizations’, in Wessel and Odermatt, *op.cit.*

⁵⁵ See K.E. Jørgensen and K. Laatikainen ‘The Political Impact of the EU's Interaction with International Institutions: Towards a Two-Way Street – Both Inside-Out and Outside-In Perspectives’, in Wessel and Odermatt, *op.cit.*

programmes. Influence can involve dialogue, such as meetings between representatives and staff to discuss issues of importance of both institutions. EU influence can also come in the form of implementing and enforcing the norms developed within international institutions. This last form of influence is often overlooked. It is important not only to examine how effective the EU actors are in Geneva or New York, but also how the EU engages with international institutions back in Brussels and Luxembourg, when it comes time to put these policies into practice. It should also be remembered that the EU itself is a form of multilateralism, and that lesson learned in EU policymaking can be applied to the EU's external engagement. Many issues that are debated in, say, the UN General Assembly, have already had the chance to be debated and discussed within the EU institutions and the capitals of EU Member States. Just as division on an issue within the EU can also forecast divisions within an organization, compromise and negotiation within the EU can also help develop pragmatic solutions within an international institution. The EU's approach to issues of healthcare, for instance, have often been well developed within the EU before they reach the WHO. The EU's internal experience regarding the politics of climate change laid the groundwork for its external engagement on those issues. 'Influence' is not just a two-way street between the Union and the international organization; it is also a constant interaction between different levels of governance.

Cooperation and Partnership

Beyond membership, there are the different forms of close co-operation and partnership the EU has formed with international institutions. For example, the EU has not become a member of the IAEA, but has significantly influenced the organization through the conclusion of international agreements.⁵⁶ The EU has influenced UNESCO through its cooperation on projects and partnerships.

The EU may also engage international institutions through promoting, supporting and providing funding to an institution. Matera has shown, for example, how the EU has shown strong support for the International Criminal Court, but has not set out to influence the governance of that organization.⁵⁷ However, there is often a discrepancy between the level of the EU's financial support for an organization, and its level of influence. The EU is often an important financial contributor to international programmes, and is a major donor in terms of aid and humanitarian assistance and disaster relief, but this financial assistance does not translate to power and influence.⁵⁸ On the one hand, one may question whether the EU should 'politicise' its funding in such a way. However, it has been pointed out that the EU is often 'punching below its weight' in international organizations, and could try to use its financial resources to assert greater influence.

Compliance

Another form of engagement that has been highlighted in this study is the EU's compliance with, and enforcement of international norms. By ensuring that norms developed within international bodies are given effect in EU law and policy, the EU is also helping to strengthen international institutions. It is important to focus, not only on what happens in organizations in Geneva and New York, but also how the EU's engagement with international institutions has effects in Brussels.

Reform and Renewal

Another form of engagement is through the EU's push towards reforming global governance architecture. The EU Global Strategy sets out the goal "to reform the UN, including the Security Council, and the International Financial Institutions (IFIs)," although it does not provide detail on what kinds of changes it intends to pursue. This recognizes the need to ensure that multilateral governance bodies are accountable, effective and transparent, especially at a time when trust in these institutions is already eroded. The EU has had a more active role in reforming governance in areas such as UN environment and the UNFCCC, and continues to press for governance reform in other bodies such as the WHO. As the Global Strategy recognizes, however, pursuing such reform requires the EU itself to have a stronger and more coherent voice in these bodies.

Interregionalism

The study has also examined the EU's engagement with other regional bodies. Here we find a marked difference between the EU's approach to global organizations and specialised international institutions.

⁵⁶ See A. Södersten, 'International Atomic Energy Agency (IAEA): The EU's Role in International Nuclear Energy Policy', in Wessel and Odermatt, *op.cit.*

⁵⁷ See C. Matera, 'Judicial Co-operation in Criminal Matters: Between EU Internal Competences and Global Actorness', in Wessel and Odermatt, *op.cit.*

⁵⁸ S. Duke, 'Form and Substance in the EU's Multilateral Diplomacy', in K. Jørgensen and K. Verlin Laatikainen (eds), *Routledge Handbook on the European Union and International Institutions* (Routledge, 2013) 18: "A further curious omission from much of the literature concerns the question of why, given the financial contributions the EU makes to the UN in various ways, this has apparently failed to result in any significant leverage."

There are a number of reasons for this.⁵⁹ The first issue is that other regional bodies do not have the same level of integration as the EU. The second issue is that it, given the number of overlapping regional bodies that exist, it may be difficult to identify which other regional body is the most relevant one to engage. Whereas there has been focus on how the EU can improve its bilateral relations with third states, and to bolster multilateralism, its record on inter-regionalism has been patchy. The one exception, of course, is the EU's engagement with other European organizations, such as the Council of Europe or EEA. However, even here the EU's relationship has transformed from one of partnership and co-operation, to one that exhibits more competition, especially as the EU expands into new areas, such as the protection of fundamental rights.⁶⁰ A theme that emerges from the discussion of inter-regionalism is that there appears to be no one-size-fits-all approach.⁶¹ Nonetheless, recent developments show that the EU still seeks to enhance inter-regional cooperation, as the EU-Africa dialogue demonstrates. However, as that example shows, the two regions have very different priorities.⁶² EU policy towards other regions remains 'bottom up', and often is motivated by the EU's specific priorities, such as dealing with migration flows or addressing drug trafficking.

Challenges

Some of the challenges relating to the EU's engagement with international institutions are internal, that is, they relate to the way that EU Treaties and EU law establish the modalities of the EU's international action, or to the internal politics of the EU and the Member States. Other challenges relate to the external environment. This includes the institutional law of a given institution, which may make it difficult for the EU to act within a given organization. It also relates to the external political environment, such as the views of other states that are often less receptive of the EU's involvement in international organizations. This section discusses some of the challenges that are identified in this study, and some of the ways that the EU may seek to address them.

The EU Treaties and EU law

The first set of challenges stem from the EU Treaties and from EU law. Despite the legal and political reasons for the EU to be part of the institutionalised global and regional debates in the various policy fields, "the EU is, under international law, precluded by its very nature from being considered a State",⁶³ which leads to a number of challenges given that international institutions are usually created for cooperation between (or integration of) states. Generally, the possibility or need for the EU to occupy a separate position in an international organization or international treaty-regime depends on two main factors. The first relates to issues of EU law, most importantly the division of competences between the EU and its Member States in the particular issue area. The second relates to the legal order and set-up of the international institution itself.⁶⁴

As to the first factor, the case for a formal role of the EU in international institutions is most evident whenever the EU has a competence related to the objectives and functions of the other international institution. This holds true in particular for areas in which the EU enjoys exclusive competence, but seems equally valid when the competence is shared with the Member States.⁶⁵ However, we are often dealing with situations of 'mixity' and even in cases of EU exclusivity, Member States may have a general preference to remain present and visible themselves in international institutions.⁶⁶ The issue of mixity, which has given rise to legal complications in relation to EU participation in international agreements, has also given rise to complications relating to international institutions, particularly with respect to issues of representation.

Apart from the possible disagreements between the Member States (and certain EU Institutions) and the Court on the possibilities of the Union to join another institution – as exemplified in *Opinion 2/13*⁶⁷ – the Union and its Member States do not always see eye to eye on questions of representation. Recent

⁵⁹ See the chapters on inter-regionalism in Wessel and Odermatt, *op.cit.*

⁶⁰ See R. Lawson, *op.cit.*

⁶¹ See J. Selleslaghs, 'The EU's Engagement with Latin America: The Changing Nature of EU-Latin America Interregional Relations', in Wessel and Odermatt, *op.cit.*

⁶² See A. -L. Chané and M. Killander, 'The EU's Engagement with Africa: The Joint Africa-EU Strategy as a Turning Point', in Wessel and Odermatt, *op.cit.*

⁶³ CJEU, *Opinion 2/13* of 18 December 2014, para 156.

⁶⁴ The latter can be retrieved from Jean d'Aspremont, Catherine Brölmann, and Iain Scobbie (eds), *Oxford International Organizations*; opil.ouplaw.com/home/OXIO, launched in 2017.

⁶⁵ See more extensively on the various forms of exclusive and shared competences B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014; new edition to appear in 2020).

⁶⁶ See more generally on mixed agreements, J. Heliskoski, *Mixed Agreements as a Technique for Organizing the External Relations of the European Community and its Member States* (Kluwer Law International, 2001); as well as the various contributions to Hillion and Koutrakos (Eds.), *Mixed Agreements in EU Law Revisited – The EU and its Member States in the World* (Hart Publishing, 2010).

⁶⁷ On the (non-)accession of the EU to the Council of Europe and the Convention in Human Rights. The Court emphasised the challenge to have the EU operate as if it were a state: "The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law." (para. 193; emphasis added).

examples include the *OIV* case, in which Germany challenged the competence of the Union to establish a position in the International Organisation for Wine and Vine, of which Germany is a member, but not the EU or all Member States.⁶⁸ Germany, *inter alia*, argued that Article 218(9) TFEU (on the possibility for the Council to adopt Union positions in international bodies) merely covers ‘acts having legal effects’, meaning acts binding under international law, and that OIV resolutions were not acts in that sense. The Court took a good look at Article 218(9) and concluded that “there is nothing in the wording of Article 218(9) TFEU to prevent the European Union from adopting a decision establishing a position to be adopted on its behalf in a body set up by an international agreement to which it is not a party”.⁶⁹ Similar controversies also occurred in relation to the representation of the Union before international judicial bodies. The *ITLOS* case was about the question of what institution is to represent the Union in international dispute settlement mechanisms. Can the Commission simply submit a ‘Written statement by the European Commission on behalf of the European Union’ in a case before the International Tribunal for the Law of the Sea?⁷⁰ The Court held that – despite its clear focus on Commission representation in legal proceeding *in the Member States* – Article 335 TFEU is the expression of a general principle that the Union has legal capacity and is to be represented, to that end, by the Commission.⁷¹ A final example is formed by the *OTIF* case, in which the Court basically confirmed the competence of the Union to act in relation to an international organization in certain situations.⁷² Germany challenged the validity of a Council Decision establishing a position to be adopted on behalf of the EU at a session of the OTIF (Organization for International Carriage by Rail) Revision Committee concerning certain amendments to the Convention Concerning International Carriage by Rail (COTIF). Germany had voted against the Council Decision, since it considered that some of the proposed amendments did not fall under EU competence. The Court, however, basically repeated earlier case law and held that in areas where the European Union and its Member States have shared competence, an external Union competence can exist outside the situations laid down in Article 3(2) TFEU.⁷³ Also, as the Court reminded Germany, the existence of an external European Union competence is not, in any event, dependent on the prior exercise, by the Union, of its internal legislative competence in the area concerned.⁷⁴

Recently the Court held that the question of competence division is not merely dependent on EU rules, but that it may even be influenced by international law. In relation to the positions of the Union on the creation of a number of marine protected areas in the Antarctic Seas by the Commission for the Conservation of Antarctic Marine Living Resources (the CCAMLR, established on the basis of the 1959 Antarctic Treaty/Canberra Convention), the Commission had insisted, that those measures fell within the scope of the Union’s exclusive competence for the conservation of marine biological resources. The Court, however, held that the measures at stake fall within the competence regarding protection of the environment; hence a shared competence. More importantly perhaps, the Court held that “In the specific context of the system of Antarctic agreements, exercise by the European Union of the external competence at issue in the present cases that excludes the Member States would be incompatible with international law”.⁷⁵ In this case, the Court held, *international law arguments* call for a shared competence to be exercised in a shared manner:

“In those circumstances, to permit the European Union to have recourse, within the CCAMLR, to the power which it has to act without the participation of its Member States in an area of shared competence, when, unlike it, some of them have the status of Antarctic Treaty consultative parties, might well, given the particular position held by the Canberra Convention within the system of Antarctic agreements, undermine the responsibilities and rights of those consultative parties — which could weaken the coherence of that system of agreements and, ultimately, run counter to Article V(1) and (2) of the Canberra Convention.”⁷⁶

Cases like these underline the continuing tension between the Union and its (or at least some) Member States in situations of external representation. At the same time, it remains clear that they need each other. In fact, effective multilateralism to a large extent depends on the (coordinated) actions by the Member States. This explains, for instance, why the Treaty stresses the obligations of Member States to uphold the Union’s positions “in international organisations and at international conferences where not all the

⁶⁸ See also J. Wouters and A. Andrione-Moylan, ‘The Changing International Cooperation Network of the EU: The Inclusion of Informal (Regulatory) Bodies’, in Wessel and Odematt, *op.cit.*

⁶⁹ Judgment in Case C- 399/12 *Germany v Council* (‘OIV’) EU:C:2014:2258, para 49. See also and more extensively, De Baere, *op.cit.* as well as Ramopoulos, *op.cit.*

⁷⁰ Case No 21. See ‘Request for Advisory Opinion submitted by the Sub- Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015’.

⁷¹ Judgment of 6 October 2015 in Case C- 73/14, *Council v Commission*, EU:C:2015:663, paras 58-59.

⁷² Case C-600/143, *Germany v Council* (OTIF), ECLI:EU:C:2017:935. The case is also referred to as *COTIF*.

⁷³ Para. 61.

⁷⁴ Para. 67.

⁷⁵ Joined Cases C-626/15 and C-659/16, 20 November 2018, ECLI:EU:C:2018:925, para. 128.

⁷⁶ *Ibid.*, para. 133.

Member States participate" (Art. 34 TEU).⁷⁷ The need for coordination between the Union and its Member States (and their diplomatic missions and delegations) in international organizations returns in the obligation for the diplomatic missions of the Member States and the Union delegations to cooperate and to contribute to formulating and implementing a common approach (Arts. 32 and 35 TEU). With a view to the creation of the European External Action Service (EEAS),⁷⁸ the Treaty now also mentions "Union delegations in third countries and at international organizations" which shall represent the Union (Art. 221 (1) TFEU). Indeed, of the over 140 Union delegations, eight are accredited exclusively to other international organizations, including regional organizations, UN bodies, programmes and funds.⁷⁹

It remains important to underline that the 'principle of sincere cooperation' (art. 4(3) TEU) or as it is often referred to 'the duty of cooperation', may restrain Member States in their actions, irrespective of the unclear practical implications of the principle in relation to the actions of the EU and its Member States in other international institutions. As Eeckhout argues: "The [...] case law on the duty of co-operation and the Community's experience with work in international organizations suggest that the principle's effectiveness is limited if it is not fleshed out. There is an obvious case for creating some EU treaty language on this crucial principle for mixed external action. There is also an obvious case for basic legal texts on how to conduct co-operation in the framework of international organizations."⁸⁰ As we have seen, the Lisbon Treaty did not repair this deficiency, and the sometimes unclear division of competences has continued to affect the role of the EU as a cohesive global actor. Competences battles have spilled over into international institutions, and can affect the EU's ability to exert influence in these bodies.

The starting point for any discussion of the EU's engagement with a particular institution is the EU Treaties, and the question of whether the EU has *competence* to engage a particular international body. To an EU lawyer, this makes complete sense, since the EU can only engage internationally when there is some legal basis to do so. Many of the legal and political issues stem from disagreements about competences. This focus on competence, while important, can often overshadow questions about whether the EU should engage with a particular organization, and what the best way to do so. This means that the starting point often is not, what the EU's interests in a given field are, or how it should seek to address a certain global challenge, but whether there is a legal basis for EU external action.

For this reason, this study has not focused solely on the legal rules relating to the EU's external action, but also how the EU engages with institutions in practice. Yet these internal rules come up time and again when discussing the EU's relationship with institutions. The provisions on the Union's external action, and the case law pertaining to those Treaty articles, sometimes prevent the EU from performing in an effective manner. Questions about competences, about who is responsible for the EU's external representation in areas of shared competence, questions about how to integrate different internal and external policies or CFSP and non-CFSP issues, as well as political turf battles that often underlie these disputes, all contribute to this.⁸¹ While the EU Treaties seek to make EU external action more unified and coherent, it often takes time for such practice to develop. Judgments of the EU Court of Justice often raise more questions than they do answers. Much of this is to be expected in a field as complicated and politically sensitive as the EU's external relations, especially given the fact that EU Member States seek to preserve their role and visibility within international institutions. But one of the themes that emerges is that such obstacles can be overcome, and that the EU's engagement with an institution can still work well, even when legal issues are present. As the example of the EU at the UNGA shows, for instance, some of these issues can be addressed through practical arrangements and flexibility.

How could these internal challenges be addressed? One response would be to further reform the EU Treaties. Article 218 TFEU sets out the process for the EU to negotiate and conclude international agreements, but there remains no Treaty article that deals specifically with the EU's membership in and representation within international institutions. It is now accepted that the power to conclude international

⁷⁷ A former provision on this point, Art. 116 EEC (deleted by the Maastricht Treaty), was clarified by the Court in Opinion 1/78 as to have been "conceived with a view to evolving common action by the Member States in international organizations of which the Community is not part; in such a situation the only appropriate means is concerted, joint action by the Member States as members of the said organizations". Opinion 1/78 (International Agreement on Natural Rubber) of 4 October 1979, EU:C:1979:224, para 50.

⁷⁸ See Mauro Gatti, *European External Action Service: Promoting Coherence through Autonomy and Coordination* (Brill/Nijhoff, 2016).

⁷⁹ See S. Duquet, *The Contribution of the European Union to Diplomatic and Consular Law*, PhD thesis, Catholic University Leuven, 2018. Nevertheless, Member States seem to have been somewhat anxious about the developments in this area. In a special declaration to the Treaty (No. 13) they stated that: "[...] the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy and the establishment of an External Action Service, do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations." Delegations accredited at international institutions are the Union Delegation to the United Nations (UN) in New York; to the UN in Geneva; the EU Permanent Mission to the World Trade Organization (WTO) in Geneva; to the UN, the Organization for Security and Co-operation in Europe (OSCE) and other international organisations in Vienna; to the UN in Rome; to the Council of Europe in Strasbourg; to the Organisation for Economic Co-operation and Development (OECD) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Paris; to the African Union in Addis Ababa; and to the Association of Southeast Asian Nations (ASEAN) in Jakarta. Cf. also De Baere, *op.cit.*

⁸⁰ Eeckhout, *op.cit.*, pp. 255.

⁸¹ See F. Hoffmeister, 'Of Presidents, High Representatives and European Commissioners: The External Representation of the European Union seven years after Lisbon' (2017) 1 *Europe and the World: A Law Review* 16-17.

agreements includes the ability to join an international organization or treaty body, but legal right to join IOs is based on the implied power of the EU.⁸² It has been argued that a specific treaty article regarding the EU's engagement with IOs would also be useful.⁸³ Eeckhout has argued, for instance "[t]here is an obvious case for basic legal texts on how to conduct co-operation in the framework of international organizations."⁸⁴ While there are some Treaty articles dealing with EU representation in international institutions,⁸⁵ there is little specific guidance. While there are multiple references to international organizations and multilateralism in the EU Treaties, this has done little to answer some of the more thorny legal questions about how the EU is to be represented in these bodies, or what legal effect is to be given to the normative output of these institutions. Although this has become clearer on the basis of recent case law,⁸⁶ disputes continue to arise.

Yet it is not evident that more law will necessarily help. Often the legal disputes represent deeper disagreements about, say, funding, powers, or core Member State interests, rather than disagreements about the interpretation of a particular Treaty article. What appears to be missing, instead, is an overall strategy about how the EU is to engage with international institutions generally. As High Representative Ashton noted in her December 2012 communication to the Commission, often "the ability of the EU to promote and defend its values and its interests is impaired by its limited status in organisations and fora where important decisions are taken".⁸⁷ Yet since this Strategy, there has been no similar document that sets out how the EU should engage with international institutions. A renewed strategy would allow the EU to prioritise certain institutions and to focus its engagement.⁸⁸ This is not to say that competences are not an issue – they will remain central to the EU's engagement with international institutions – but that they should not necessarily be the sole issue that guides EU engagement.

Legal issues regarding competences, legal basis, mixity, and the role of the different EU institutions, all of which are relevant to the concluding of agreements are therefore also present in relation to the joining of international organizations.⁸⁹ However, this only covers the EU participating in formal organizations that are based on an international treaty. It does not cover EU involvement in a multitude of bodies that are not based on a formal instrument. The EU has been rather successful when engaging with informal bodies, where EU representation has been more ad hoc. Yet this has also given rise to questions about the legitimacy of such action. Does this mean that the Commission, for example, can bypass formal procedures, including the input of the European Parliament and the oversight of the Court of Justice, by engaging with informal bodies?

The EU's effective engagement with IOs does not always turn on whether the EU has competence in a particular field. For instance, with regard to UNESCO, one might think that the EU would have little engagement based on the fact that the organization deals with issues such as culture and education, which are competences that are shared with the EU Member States. However, the EU has been able to engage effectively with this body, since it is in the interests of the EU and the Member States to do so.⁹⁰

It appears that the factor determining whether the EU will seek to engage in an institution is the issue of EU competence. As argued earlier by one of the present authors, "[t]he need for a formal role of the EU in international institutions is obvious whenever the EU has a competence related to the objectives and functions of the other international institution."⁹¹ One reason for this is that, in areas where the EU has substantial or exclusive competence, the output of an international organization is more likely to affect EU law, and risks undermining the integrity of EU law. The EU's membership of the World Trade Organization,

⁸² *Opinion 1/76*, EU:C:1977:63, para. 5: "The Community is therefore not only entitled to enter into contractual relations with a third country ... but also has the power, while observing the provisions of the Treaty, to cooperate with that country in setting up an appropriate organism such as the public international institution which it is proposed to establish...."

⁸³ G. De Baere, 'EU Status in Other International Organizations', in T Tridimas and R Schütze (Eds.), *Oxford Principles of European Union Law – Volume 1: The European Union Legal Order* (Oxford University Press, 2018) 1234.

⁸⁴ P. Eeckhout, *EU External Relations Law* (Oxford, Oxford University Press, 2011) 255.

⁸⁵ For example, in the field of CFSP, the EU High Representative for Foreign Affairs "shall express the Union's position in international organisations and at international conferences" (Article 27(2) TEU).

⁸⁶ See on issues that are more clear R.A. Wessel and S. Blockmans, 'The Legal Status and Influence of Decisions of International Organizations and other Bodies in the European Union', in P. Eeckhout, M. Lopez-Escudero (Eds.), *The European Union's External Action in Times of Crisis* (Hart Publishing, 2016), pp. 223-248; and earlier R.A. Wessel and S. Blockmans (Eds.), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (The Hague: T.M.C. Asser Press/Springer, 2013).

⁸⁷ Communication to the Commission from the President in Agreement with Vice-President Ashton, Strategy for the progressive improvement of the EU status in international organisations and other fora in line with the objectives of the Treaty of Lisbon (C(2012) 9420 final) ('Barroso-Ashton Strategy') 1.

⁸⁸ See J. Wouters, A. Chané, J. Odermatt, T. Ramopoulos 'Improving the EU's Status in the UN and the UN System: an Objective Without a Strategy?' in C. Kaddous (ed) *The European Union in International Organisations and Global Governance* (Oxford, Hart Publishing, 2015).

⁸⁹ See P. Eeckhout, *supra* note 84, 222-223.

⁹⁰ See G. Butler, 'United Nations Educational, Scientific and Cultural Organization (UNESCO): The EU's Transition From Observer to Full Participant on an ad hoc Basis', in Wessel and Odermatt, *op.cit.*

⁹¹ Van Vooren and Wessel, *supra* note 22, 248.

for instance, corresponds with the EU's exclusive competence in the field of common commercial policy.⁹² The same is the case with the status of the Union in many fisheries organizations.⁹³ Yet the reverse is not always the case: the EU is not a full member of all organizations where it exercises exclusive competence. Moreover, the EU's significant competences and law-making activity in fields such as air and maritime transport have not led to membership in important organizations such as the IMO or ICAO. There is a good case that EU membership should be pursued in these organizations. Yet EU competence is not the only reason to engage with an organization. As the example of the WHO shows, where the EU and Member States agree on a certain position or topic, it will often be adopted as an EU position, even if the Member States have competence on that particular issue.⁹⁴

International Law

The second factor determining the possibilities for the EU to participate in international institutions is an external one and relates to the membership rules of the international body. Only few international institutions allow for other international organizations to become a full member, one would assume the second factor in particular to stand in the way of an extension of the Union's role based on the further development of its external relations. At the same time, however, the above-mentioned internal struggles between Member States or between Member States and EU institutions may form an obstacle to the accession of the EU to an international organization. Thus, even in areas where the EU has extensive competences, the EU may be barred from full participation in the global decision-making process (cf. the International Maritime Organization (IMO), the International Civil Aviation Organization (ICAO), the River Rhine Commissions, the International Energy Agency, the executive board of the UN High Commissioner for Refugees (UNHCR) or in bodies under the UN Convention on the Law of the Sea (UNCLOS)).⁹⁵

Participation of the EU is either based on decisions by the participating states to grant the EU observer or full participant status, or on the inclusion of a Regional Economic Integration Organization (REIO) clause in international conventions (Art. II of the FAO Constitution was specifically modified to allow for the accession of 'regional economic organizations').⁹⁶ A REIO is commonly defined in UN protocols and conventions as "an organization constituted by sovereign states of a given region to which its Member States have transferred competence in respect of matters governed by [...] convention or its protocols and [which] has been duly authorised, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it [the instruments concerned]."⁹⁷ In the Convention on the Rights of Persons with Disabilities the REIO clause seems to have evolved to a RIO (Regional Integration Organisation) clause, which does justice to the large scope of activities of the EU beyond economic integration.⁹⁸

A common theme in the discussion of the EU's engagement with IOs is that of a clash between two forms of governance: the EU, representing a supranational system that goes beyond traditional international law, and international institutions, which remain a product of an inter-state system. According to this argument, a main challenge of the EU engaging with IOs stems from the nature of the international system, which has difficulty dealing with entities that are not states. This view should be challenged. Where it is in the interest of the EU and other states to cooperate and engage, international law has for the most part not presented any serious obstacles. In some instances, the foundational treaty of an IO will prove to be an impediment to EU membership. It takes quite some political and diplomatic effort and skill to persuade other states to modify such a treaty to allow the EU to join, which means that the costs of upgrading the EU's membership may not be worth the benefits that such a status would bring. But upon closer inspection, in practice the EU is able to engage closely even in instances where it has no official status. For example, in the context of regional fisheries management organizations, the EU has been represented by an EU Member State in cases where no EU membership exists, creating a situation of 'de facto EU membership'. One might reasonably question whether such practice is in conformity with the rules of the international organization or international law, since it allows a non-member (the EU) to participate when such formal participation has not been consented to by the other members. Yet, such practice has rarely given rise to

⁹² Art. 3(1)(e) TFEU. See T. Perišin, 'World Trade Organization (WTO): The EU's Influential Role in Global Trade Policy', in Wessel and Odermatt, *op.cit.*

⁹³ See Paul Heckler, 'Regional Fisheries Management Organisations: Defining the EU and Member State Roles', in Wessel and Odermatt, *op.cit.*

⁹⁴ See T. Emmerling, 'World Health Organization (WHO) and other Global Health Bodies: The EU Voice in a Fragmented Global Health Landscape', in Wessel and Odermatt, *op.cit.*

⁹⁵ See the various contributions to the present Volume, as well as Kaddous, *op.cit.*; Hoffmeister 2007; and F. Hoffmeister and P.J. Kuijper, 'The Status of the European Union at the United Nations: Institutional Ambiguities and Political Realities', in Jan Wouters, Frank Hoffmeister, and Tom Ruys (eds), *The United Nations and the European Union: An Ever Stronger Partnership* (T.M.C. Asser Press, 2006).

⁹⁶ See for an early assessment already R. Frid, 'The EEC a Member of a Specialized Agency of the UN (FAO)' (1993) 4 *European Journal of International Law*, 239-255.

⁹⁷ See for instance Articles 4.1, 4.2, 4.3 and 4.5, 21 and 22 of the Kyoto Protocol.

⁹⁸ See Art. 44: "Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention."

legal challenges.⁹⁹

It is often argued that the fact that the EU is not a state gives rise to the many of these external challenges.¹⁰⁰ Along with the issue of EU competences, the non-State nature of the EU is surely a source of many issues. In many instances, the EU simply cannot act because a founding instrument does not allow the EU to join or even be an observer. However, the EU can still engage and have influence in bodies that are highly state-driven. Within the UN system, for example, the EU can still operate in a state-centric environment, but that it must be sensitive to the concerns of other states.¹⁰¹

Perhaps the problem does not stem from the fact that the EU is an international organization, but from the type of organization it is. It is not uncommon for an international organization to attend the meetings of another international organization as an observer. In these cases, the observer organization may provide input and comments, but it usually does not seek to function like a state member. When the EU takes part in international organizations, it generally does not seek observer status in order to play this informative or consultative role; it often seeks to take part in a way that bears greater resemblance to a member state of the organization. This will include, for instance, the right to speak behind an EU nameplate or to exercise the right to vote. Its involvement in the organization will often be motivated by the fact that the EU exercises competence in the field covered by the organization and seeks to influence developments in the body in areas in which it supplements or replaces its own Member States. It is this 'state-like' involvement of a non-state that often causes friction. Moreover, it must be remembered that the European states are already viewed as being overrepresented in international institutions. One can understand the reluctance of third states to allow what is perceived to be even more European representation, in addition to the existing European members.¹⁰² Changes will often need to be made to accommodate the EU's presence, such as changing voting rules. This adds a layer of complexity to an organization, and can make negotiations and decision-making more complex. Third states will only accept the EU's presence in these institutions when there is some added value of the EU's presence. It has been argued that "EU participation will become attractive for third parties only if this actor can significantly contribute to the related co-operation project separately from its member states."¹⁰³ Where EU presence adds further complexity to an organization, and little value, the EU's presence will often be resisted.

External Political Environment

Another recurring theme of this study has been that the EU institutions must be sensitive to the political climate of international institutions. The EU will not always be welcome in international organizations, and may face an uphill battle in convincing third states to allow an EU presence. Hoffmeister recently observed that "the external representation of the EU in CFSP matters is not only dependent on the internal (legal) arrangements, but also to a surprisingly high degree by the acceptability of the EU actor by the third country in question."¹⁰⁴ The EU institutions are unlikely to convince non-EU States of the benefits of EU membership or participation based solely on the issue of EU competence.

Resistance to EU participation may stem from a particular issue, or from a more general resistance towards the EU's engagement in international bodies. For instance, resistance to the EU's participation in the Arctic Council can be traced to the Union's dispute with Canada. More problematic for the EU is a general reluctance to allow EU participation based upon a more principled approach. Some states seek to prevent international institutions transforming from state-based organizations to ones that are driven by organizations or groups of states.

The EU therefore often faces a steep political hurdle when seeking to join or upgrade its status in international organizations. However, this reluctance is not spread evenly across all fields. The World Trade Organization, for instance, stands out as a body where the EU has been accepted as an international actor in its own right, although frictions still exist. In the United Nations and the UN system, where the EU seeks to have closer relations and greater influence, the EU has encountered much more resistance. One reason for this may be the fact that it is in the United Nations where the idea of the sovereign equality of states still has resonance.¹⁰⁵

⁹⁹ In a recent case the CJEU used international law arguments to argue in favour of a continued participation of EU Member States in a situation of shared competence, even when the EU could perhaps have acted on its own. Joined Cases C-626/15 and C-659/16, 20 November 2018, ECLI:EU:C:2018:925, paras. 128-130.

¹⁰⁰ See De Baere, *supra* note 83.

¹⁰¹ See E. Paasivirta and T. Ramopoulos, 'UN General Assembly, UN Security Council, and UN Human Rights Council: The EU in State-Centred Multilateral Frameworks', in Wessel and Odermatt, *op. cit.*

¹⁰² V. Lowe, *International Law* (Oxford, Oxford University Press, 2007) 230. "The European Community is a party to many international agreements and often attends conferences alongside Member States, causing concern that the European States are over-represented – a view based largely upon the misconception that the interests of the Commission, which represents the Community, and the Member States are necessarily the same."

¹⁰³ T. Gehring, S. Oberthür and M. Mühleck, 'European Union Actorness in International Institutions: Why the EU is Recognized as an Actor in Some International Institutions, but Not in Others', 51 *Journal of Common Market Studies* 5 (2013) 849. 851.

¹⁰⁴ Hoffmeister, *supra* note 81, 33.

¹⁰⁵ See the discussion in chapter 4 on the UN General Assembly, UN Security Council, and UN Human Rights Council.

Conclusion

At the time of the creation of the EEC, the idea of the Community joining another international organization was not really envisaged.¹⁰⁶ Today, it is difficult to find an international institution or multilateral setting where the EU has no presence or engagement whatsoever. Yet the EU's engagement with international institutions remains a 'patchwork', one where the EU's ability to engage effectively depends on multiple factors, including the EU's interests in the work of the organization, the EU's competence in the field in question, and the institutional environment in which the EU finds itself.¹⁰⁷ This institutional environment is becoming the crucial issue. With the rise of other regional players, and the challenges to the multilateral system, the EU's presence in international institutions will come under strain. The EU must therefore do more to show how its presence in these bodies adds real value, and not to focus on entirely internal issues relating to EU competences and powers. Of course, competences matter – it remains the main compelling reason for the EU to engage in IOs – but they are unlikely to have much sway when seeking to persuade third states of the need for EU presence. The EU cannot be everywhere. There may be instances where it is still appropriate to allow EU Member States to take on an active international role, even where the EU Treaties may allow the EU to have a role. In the field of climate issues, one where the EU has been active and influential, the presence of the EU Member States has amplified, not diminished, the EU's influence. It is important to look, not only at the formal processes by which the EU engages with international institutions, but also at the substantive outcomes of EU engagement. In some instances, EU influence is not so easy to identify. For instance, EU influence may be more evident in the way a policy prioritises a certain approach, such as the EU's approach to issues of global health in the WHO, or the right to food in the FAO.

It is almost taken for granted that the EU, itself a form of international cooperation, would support other international institutions. Yet the EU may also find itself in competition with other institutions, especially when it feels that it has the 'better' approach to a certain issue, such as on climate change mitigation or human rights. At a time when multilateral bodies are under stress and states begin to adopt more unilateral measures, it might be tempting for the Union to similarly forge its own path, without the need to involve multilateral institutions. At a time when multilateral institutions are under threat, the EU is also presented with the question of how to support multilateralism. Does this mean that the EU must work through multilateral settings in every policy area, even if there is deadlock and a lack of meaningful progress? Does it mean that the EU should pursue unilateral measures to protect its interests and pursue these goals, even if this means jettisoning some multilateral institutions? The latter policy is fraught with pitfalls. Even if the EU can use its economic power and influence to produce such results, the methods of achieving them also have the effect of chipping away, not only at international institutions, but the values that make multilateralism work. Moreover, such a policy may also invite other states or regions to pursue similar strategies, further undermining the coherence and effectiveness of global strategies. A renewed commitment to multilateralism will not only strengthen the international rules based system, but also strengthen the Union.

¹⁰⁶ J. Sack, 'The European Community's Membership of International Organizations' 32 *Common Market Law Review* (1995) 1227, 1228.

¹⁰⁷ S. Gstöhl, 'Patchwork Power' Europe: The EU's Representation in International Institutions, 14 *European Foreign Affairs Review* (2009) 385, 401.

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