

# The Interface Between EU and International Law

*Contemporary Reflections*

Edited by  
Inge Govaere  
and  
Sacha Garben

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# Introduction: The Interface between EU and International Law

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INGE GOVAERE AND SACHA GARBEN\*

Over 60 years of EU legal integration leads to the paradoxical finding that the Court of Justice of the European Union's (CJEU) self-proclaimed 'new and autonomous EU legal order'<sup>1</sup> is increasingly taken for granted, whilst at the same time being subject to more and more persistent pressure and critique. The recent *Achmea*<sup>2</sup> case, the pending Advisory Opinion 1/17 on the compatibility of the Investor-State-Dispute-Settlement (ISDS) provisions with the autonomy of the EU legal order,<sup>3</sup> the earlier *Kadi*<sup>4</sup> saga and CJEU Opinion 2/13 on the EU accession to the ECHR,<sup>5</sup> are all most symptomatic but by no means unique cases in this respect. The underlying factors are not only external, such as globalisation and internationalisation of the law.<sup>6</sup> Internal EU law dynamics, in particular the ever-increasing expansion of EU competence,<sup>7</sup> EU territorial enlargement,<sup>8</sup>

\* Sacha Garben is currently on leave from the European Commission. The views expressed in this paper do not in any way represent those of the European Commission.

<sup>1</sup>A 'new legal order of international law' was created by the Member States of the European Economic Community, according to the Court of Justice in Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos tegen Nederlandse administratie der belastingen* [1963] ECR I. In Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585, the Court indicated that this order was to be understood as autonomous as it considered the Treaties 'an independent source of law', which in the original French version was referred to as 'une source autonome'.

<sup>2</sup>Case C-284/16 *Slowakische Republik v Achmea BV* Judgment of the Court (Grand Chamber) of 6 March 2018 ECLI:EU:C:2018:158.

<sup>3</sup>Advisory Opinion 1/17, CETA ISDS, request introduced by Belgium. For an analysis of the compatibility of ISDS with the autonomous EU legal order, see I Govaere, 'TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order' in Bándi, Barak, Debisso (eds), *Speeches and Presentations from the XXVII FIDE Congress, Congress Proceedings* Vol 4, 2016, 123–44.

<sup>4</sup>Case C-584/10 P *Commission v Kadi* ECLI:EU:C:2013:518.

<sup>5</sup>Opinion 2/13 *EU Accession to ECHR* ECLI:EU:C:2014:2454.

<sup>6</sup>M Hiscock and W van Caenegem (eds), *The Internationalisation of Law: Legislation, Decision-Making, Practice and Education* (Edward Elgar Publishing, 2010).

<sup>7</sup>I Govaere, 'To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing, 2018) 71–91; S Garben and I. Govaere (eds), *The Division of Competences between the European Union and its Member States: Reflections on the Past, Present and Future* (Hart Publishing, 2017).

<sup>8</sup>See in particular the contributions in Part VI of I Govaere, P Van Elswege, A Stanislas and E Lannon (eds), *The European Union in the World, Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers, 2014).

as well as the ‘maturing’ of the EU into a forceful and visible international actor culminating in the Lisbon Treaty, are at the crux of the paradox.

The focus of the debate has also radically shifted in recent years. In the aftermath of the *van Gend & Loos* case, the main issue was how to distinguish EU law from international law, in a clear ‘move away’ from international law. Currently, the key question has rather become how the EU legal order should integrate and interact with international law, thus presenting a radically opposite ‘move towards’ international law.

## I. Part I: A Horizontal, Holistic Approach

Before turning to a ‘vertical’ and topical assessment, the first three contributions, contained in the first part of this book, offer complementary approaches to come to terms with this dynamic process of interacting legal systems from a ‘horizontal’ and holistic perspective.

It is submitted that although topical differences can be pinpointed, also a holistic and horizontally applicable approach to the relationship between EU and international law can be discerned in the Treaties and in the case law of the CJEU. The EU as a whole has legal personality pursuant to Article 47 of the Treaty on European Union (TEU). It is also the EU, as a subject of international law, that may contract international rights and obligations, set up other international organisations and participate in international dispute settlement mechanisms.<sup>9</sup> In so doing, the CJEU has since the *International Fruit Company* case<sup>10</sup> consistently held that the EU is necessarily bound to respect ‘international law’. The latter concept is not limited to agreements which the EU itself has concluded (or where the principle of substitution for the Member States applies such as for the General Agreement on Tariffs and Trade (GATT)). The CJEU clarified that the EU is also bound to respect principles of customary international law, even if those are codified in agreements to which the EU is not a party.<sup>11</sup> As a subject of international law, the EU should furthermore be able to participate in setting up other international organisations, as well as international dispute settlement mechanisms. Already in Opinion 1/76, the CJEU accepted, as a matter of principle, that decisions taken by such bodies will be binding on the EU and its institutions including the CJEU itself.<sup>12</sup> The difficulty lies in the condition, namely that this may not affect the ‘autonomy’ of the specific EU legal order with its characteristics of primacy, direct effect and uniform interpretation. This raises

<sup>9</sup> Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* ECLI:EU:C:1977:63.

<sup>10</sup> Joined Cases 21/72 to 24/72 *International Fruit Company* ECLI:EU:C:1972:115.

<sup>11</sup> Case C-162/96 *Racke* ECLI:EU:C:1998:293 and Case C-366/10 *Air Transport Association of America (ATAA)* ECLI:EU:C:2011:864.

<sup>12</sup> Opinion 1/76 (n 9).

the complex question of how to find mechanisms allowing the smooth interconnection of the increasingly interdependent EU and international legal orders, whilst nonetheless firmly safeguarding the distinctive features of the specific EU legal order.

The contribution by Inge Govaere suggests that the establishment of the autonomous EU legal order and its interaction with international law, as perceived and developed by the CJEU, can best be captured by reference to an inflating ‘balloon’. Through referring to an ‘inflating balloon dynamic’ the chapter proposes an imagery of this interactive transformation process over time, thereby critically analysing shifting causes, effects and remedies. It is a deliberate choice not to zoom in on one specific case study or topic, such as the interconnection with the United Nations (UN) or the European Convention on Human Rights (ECHR) or the highly topical investment treaties. Instead, a holistic approach is adopted to pinpoint the complex ‘process’ of interconnecting legal systems specifically from the perspective of the EU. In search of distinctive elements of structural pressure on the autonomous EU legal order, a distinction is made between factors internal and external to the European integration process. It is further considered and assessed what mechanisms may serve to foster a positive interaction, rather than conflict, with international law. The chapter suggests that

the capacity for the EU to maintain an enduring structural autonomy necessarily goes hand in hand with continuously and proactively fostering a relationship of symbiosis rather than clash with international law.

It deploys the imagery of the balloon with a membrane which should necessarily be hermetically closed but at the same time also sufficiently resilient to withstand some pressure without puncturing. Against this backdrop it is assessed whether the Lisbon Treaty sufficiently addressed those challenges and offers elements to forecast whether the EU balloon is meant to continue fly or rather deflate.

The paper by Violeta Moreno-Lax critically examines the development of the concept of the autonomous EU legal order by the Court of Justice over time. She traces its evolution from its initial use, for largely internal purposes, to describe the distinctiveness of EU law as the consequence of integration, to subsequently become the normative cause of the European project. She sets out how ‘autonomy has transformed from being a key tool to preserve “the specific characteristics of the EU and EU law”, to denoting the (normative aspiration of) closeness and self-sufficiency of the regime in its entirety’, going from being

a (privileged) means securing the (formal) emancipation of EU law from its international roots, to becoming a (rootless) end in itself, detached from any identifiable value base – whether in the Rule of Law or in fundamental rights – despite Article 2 TEU.

Her approach is critical indeed; she argues that ‘in the post Opinion 2/13 isolationist era, a point of axiological vacuum has been reached, in which “autonomy” per se has become a (new, if not the ultimate) value of the EU legal order’. This objectivisation, and veneration, of autonomy has not only substantively detached

EU law from international law and its principles, but she argues has uprooted the EU system as a whole, disconnecting it from its own founding values, 'posing grave problems of legitimacy and self-justification'.

In the third and final chapter of Part I, Ramses Wessel explores the interface between EU and international law as academic disciplines, offering context to the differences and commonalities between the two levels as perceived by those who study, work with and build them. Several areas of joint interest are identified, where constructive mutual engagement by these two (mostly) separate disciplines holds the potential for learning and insight: the nature of the legal system; (transnational) constitutionalism; the position of the individual (the citizen, the national); democracy and legitimacy; autonomy and responsibility; territoriality; instruments; and the hierarchy of norms. These links are to serve as 'bridges' between the 'different legal systems' and not to undermine the 'specialness' and autonomy of EU law. The point made by the chapter is a fundamental one. Indeed, it would seem that if the EU is to (continue to) successfully mediate potential conflict with the international level through the 'integration' of international law into the EU legal framework, and move beyond the current 'isolationist trend' described by Moreno-Lax, it is imperative that EU law as a discipline features a sufficient knowledge base, and a similar integration, of international law in its study and scholarship. Furthermore, the identification of such conceptual bridges may allow scholars to transcend the competing claims and interpretations of the different levels, which will necessarily have a different point of departure and as such may be inherently irreconcilable, to resolve theoretical conflicts and point to practical implementation thereof.

## II. Part II: The Interaction between EU and International Law in Selected Areas

The first part of the book, having offered a range of analytical tools to understand and bridge the various, at times seemingly disparate, instances of interaction and friction between EU and international law, it is in the second part of the book that these tools can be put to use. Each chapter focuses on a specific area or topic where interaction between EU and international law has proven particularly important and/or problematic. Perhaps the most obvious choice in this respect is the issue of fundamental rights, as already became clear in Violeta Moreno-Lax' chapter two. The issue is examined in more detail by Cristina Eckes in chapter four and, as far as fundamental social rights are concerned, by Sacha Garben in chapter five. As Christina Eckes says, '[h]uman rights are a special case when it comes to the interaction of different legal spheres', going as far as claiming that 'fundamental rights constitute the most difficult area when pondering questions of resilience, autonomy and porosity of one legal sphere vis-à-vis another'. Sacha Garben agrees that '[f]undamental rights have been, and continue to be, pivotal in defining

the relationship between the international, EU and national legal orders', noting that it is on this issue that national constitutional courts, the CJEU as well as the European Court of Human Rights (ECtHR)

all claim a certain measure of final authority, which may theoretically be reconcilable as 'constitutional pluralism' but nevertheless leads to an uncomfortable state of affairs both from the perspective of the international rule of law and from a more practical point of view.

Eckes' chapter proposes to think differently about these questions by shifting the focus to theories of rights rather than judicial practices. In line with Wessel's contribution, this allows us to build a conceptual bridge between the different interpretations of the relationship between the legal regimes protecting fundamental rights in Europe by the various courts, which all consider this question 'from the perspective of their own legal order', making their claims inherently irreconcilable. The bridge proposed by Eckes, on the basis of a theoretical examination, is 'a reflexive right to justification as the origin of all rights', which means that the appropriate level and forum for human rights protection needs to be established in light of 'the ability of the political structures to make reflexive justification possible'. According to Eckes, this is only 'rudimentary in the international context'. While the national context of modern democracies in principle would allow this, it risks ignoring the interests of those affected by the externalities of national political decisions in a globalised world. Perhaps to some surprise, it is thus the EU that emerges with the most credible claim as the appropriate level for the deliberation of fundamental rights standards, as it not only possesses the necessary political structures but is also sufficiently inclusive. That finding supports her argument that EU accession to the ECHR would be undesirable. Moreover, accession would upset the delicate balance between the various irreconcilable claims to sovereignty and autonomy by national courts and the CJEU, by allowing 'national courts to challenge the core relationship between national, international and EU law from within the logic of EU law', undermining the CJEU's monopoly on the interpretation of EU law by relying on ECtHR judgments as part of the EU legal order. This precarious internal balance, already under mounting pressure due to challenges from national constitutional courts such as in Poland, the Czech Republic and Denmark, would be fundamentally and irrevocably disturbed by EU accession to the ECHR under the terms that had been proposed; it would have punctured the EU balloon. This goes to show how complex and multifaceted the interaction is between internal and external structural pressures on the EU, and indeed, as Inge Govaere has posited, that when the EU balloon is inflated to near maximum capacity this renders its membrane all the more vulnerable to puncturing from the outside.

For similar reasons, Sacha Garben in chapter five opposes the EU's accession to the European Social Charter (ESC) of the Council of Europe. ESC accession has been mooted in light of a number of sensitive conflicts that have arisen between national, EU and international law in the area of social rights, particularly in

relation to the CJEU's case law on the right to strike and take collective action in the context of the internal market in *Viking* and *Laval*,<sup>13</sup> and the EU's Euro-crisis governance. Garben maps these frictions, examining the extent and degree of incompatibility, revealing that the instances of 'hard conflict' may be fewer than assumed, even if they are fundamental. She furthermore analyses the underlying dynamics giving rise to these frictions in light of Inge Govaere's 'balloon theory'. The cause is indeed found to be the (over)inflation of the balloon of European integration. However, it is not so much the EU's own development of social rights, but instead the 2004 Eastern Enlargement and the EU's expanded economic governance powers since the 2008 economic crisis that have led to this problematic over-inflation. Garben considers that

[at] the heart of both developments is the structural internal pressure of profound socio-economic divergence and the EU's attempts (legally, politically) to increase convergence in response. This, in turn, leads to external pressures, in the form of frictions with international social norms and actors.

While a solution should be found to these cases of substantive conflict, Garben argues that EU accession to the ESC would be ineffective and potentially incompatible with the autonomy of the EU legal order if it were to make the CJEU subject to the 'jurisdiction' of the European Committee of Social Rights. Much less intrusive options are available, namely to improve the integration of external social norms in the EU legal order. The ESC already has a special constitutional status, not unlike the ECHR. The CJEU and the Commission should re-calibrate their weighing of economic and social values and rights in light of these external sources (and pressures), and thereby resolve the substantive conflict. Such 'elasticity' would make fundamental institutional changes unnecessary.

Perhaps one of the key messages of chapters four and five is that substantive conflict between national, international and EU norms may occur, and these need to be taken seriously, but that resolving them should not have to lead to fundamental institutional changes to the EU legal order, especially not where they could jeopardise the autonomy thereof. What complicates matters, however, is that substantive and institutional questions are not always separable, as chapter seven on the interplay between international and EU environmental law shows. Nicola Notaro and Mario Pagano discuss the 'on-going and recently escalating conflict' between EU and international law in the context of the Aarhus Convention on access to information, public participation and access to justice in the environmental field. At the heart of the controversy is the CJEU's restrictive *Plaumann* case law<sup>14</sup> on locus standi under Article 263(4) of the Treaty on the Functioning of the European Union (TFEU), which makes it virtually impossible for environmental non-governmental organisations (NGOs) to challenge EU legislation

<sup>13</sup> Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

<sup>14</sup> Case 25/62 *Plaumann & Co v Commission of the European Economic Community* ECLI:EU:C:1963:17.



directly before the CJEU. The EU being party to the Convention, it is directly subject to the obligations contained therein, as interpreted by the Aarhus Convention Compliance Committee. This Committee has found the EU in breach of Article 9(3) on access to justice for members of the public. As Notaro and Pagano note, while the nature of the Committee is ‘non-confrontational, non-judicial and consultative’, its findings ‘recommended amendments of constitutional relevance in the EU legal order and its system of judicial protection, and provided an alternative interpretation – even if not definitive – of EU law provisions’. As it turns out, the EU’s reservation upon joining the Convention that the EU institutions will apply the Convention within the framework of their existing and future rules in an attempt to ‘preserve [the EU’s] *sui generis* character and its constitutional autonomy’ have not been able to prevent a certain challenge to that autonomy. Admittedly, the non-binding nature of the Committee’s recommendations may mean that ‘its findings are no real threat for the constitutional autonomy of the EU legal system’ in a legalistic sense, but as Notaro and Pagano stress, it presents a political challenge – which may equally threaten the integrity of the EU balloon.

From a substantive perspective, it is not always intuitive to support the EU’s position in the specific conflicts reported in chapters two, four, five and six. A certain impression lingers that compared to the international level, its standard of human rights, social rights and environmental rights protection tends to be lower. This needs to be put into perspective. First of all, in the vast majority of cases in all these areas, EU and international law are fully in line with each other. As Notaro and Pagano note in relation to environmental law, the interaction ‘has most often been based on mutual supportiveness, enrichment and cross-fertilisation’. All three chapters show that in fact, the EU and its legal measures are often a catalyst for the international protection of the interests at stake, and for the international measures that protect them. The so-called ‘Brussels-effect’,<sup>15</sup> according to which the EU successfully exports its high regulatory standards to the rest of the world in a range of areas due to legal, economic and political dynamics, can also clearly be detected in the environmental, social and human rights areas. In the rare instances where this is not the case, and where the EU sets the standard at a lower level than the international norm, this can often be explained by the fact that the EU has to weigh these interests against others, such as economic rights and the effectiveness and integrity of EU law. While controversial, as critically examined by Violeta Moreno-Lax in chapter two, this is nevertheless an important deliberation that underlines the fundamental difference between EU and international law: where the latter is fragmented and subject-specific, the former is coherent, consisting of a ‘thick’ and interconnected web of substantive norms of all kinds, embedded in a polity and adopted, as well as mediated, following inclusive political decision-making. It is the difference between a governance level and a legal order.

<sup>15</sup> A Bradford, ‘The Brussels Effect’ (2012) 107(1) *Northwestern University Law Review* 1.

Eckes' argument in relation to human rights may thus be applied to social and environmental rights as well: arguably the EU is the most appropriate level to make decisions in areas where the global nature of the issues make the national level ineffective, but where the international level does not provide sufficiently holistic, coherent and democratic rule. That is not to say that there is no scope for improvement on the EU's engagement with the international level, as argued by Moreno-Lax in chapter two, or on its 'deliberative credentials' and actual substantive output; there indisputably is.<sup>16</sup> The EU still has a penchant for economic integration, which is understandable in light of its origins but can no longer stand in view of what the EU has become: the very autonomous legal order that the CJEU proclaimed it to be, *avant la lettre*, all those years ago. In this sense, it could be argued that the EU needs to take itself seriously as such, and dare claim its mandate and step up to its responsibility to be a fully-fledged polity instead of merely a market, to integrate trade with other interests in a balanced way, and to do so, as much as possible, through its most 'deliberative' and (thus) legitimate mode of governance: the legislative process.<sup>17</sup> Such an approach stands in sharp contrast to the one pertaining that the EU should move closer to international law by subjecting itself directly to external norms and bodies interpreting the compatibility of EU law with those norms.

The final chapter of this second part – 'Implementing International Norms through EU Procedure? The Case of Business and Human Rights' by Pierre Thielbörger – underscores both the insight that the EU's specific features as compared to the international level should be celebrated as its strength and that there is great potential for positive interaction and synergy between the EU and international levels, moving beyond a focus on their rivalry and incompatibility. Thielbörger sets out the global governance approach behind the United Nations Guiding Principles on Business and Human Rights and discusses their current domestic implementation in the EU, and the shortcoming thereof. In a proposal that seeks to deploy 'the strength of the one [level] to make up for the weakness of the other', he suggests that an Open Method of Coordination process should be launched by the EU to improve the implementation of the Principles. This would allow the EU to incorporate the crucially important topic of business and human rights into its activities, and it would allow the UN to benefit from the EU's effective policy- and enforcement apparatus. The fact that 'understanding the issue of business and human rights in Europe as a joint project between the UN and the EU – with both institutions holding distinct roles – is [...] the most promising way forward to achieve real policy change' has indeed been recognised by the EU Fundamental Rights Agency, which has proposed to proceed precisely along these lines. This final chapter thus concludes the book's part on specific areas of

<sup>16</sup> See S Garben, 'The Constitutional (Im)balance between "the Market" and "the Social" in the European Union' (2017) 13(1) *European Constitutional Law Review* 23.

<sup>17</sup> *ibid.*

interaction between EU and international law on a happy note, with a concrete example for synergetic future cooperation in practice.

### III. Part III: The EU and ‘Third’ Countries

In analysing the interface between EU and international law from an EU perspective, as is the subject of this book, an obvious distinction to make is the one between ‘the internal’ and ‘the external’. But as we have also seen in the book’s first two parts, internal and external factors, pressures and dynamics are often interlinked and interdependent, rendering the analysis more complex (and all the more interesting). For one, any internal EU policy may, in principle, have an external dimension. The CJEU has long since recognised this in its case law on implied powers, but it risks being overlooked in the general study of EU law, thus re-emphasising Ramses Wessel’s point in chapter three. Furthermore, even in entirely ‘internal’ decision-making, Member States regularly deploy international elements through the use of ‘parallel’ measures outside the EU legal and institutional framework *stricto sensu*. Important examples of this practice are located in the areas of economic governance and migration, such as the EU-Turkey statement discussed by Ricardo Da Silva Passos in chapter 12. While this phenomenon has a long tradition in the European integration process, especially in areas where the EU’s competence is (considered to be) limited, such as education,<sup>18</sup> the recent use of this ‘mixed method’ in high-profile crisis situations leads to a significant degree of inter-governmentalisation of EU decision-making. The CJEU may have validated this practice in *Pringle* for those instances where a ‘specific’ EU competence is lacking,<sup>19</sup> it has nevertheless been pointed out that this mixed method poses a range of legitimacy problems.<sup>20</sup> It also dilutes the EU’s specific features, putting internal structural pressure on the hermetically closed EU law system,<sup>21</sup> similar to that of the intergovernmentalism of the Common Foreign and Security Policy (CFSP) as discussed by Inge Govaere in chapter one.

The difficulty of separating ‘the internal’ from ‘the external’ is even more pronounced in the case of the EU’s ‘external relations’, where these dimensions are inherently mixed. The third part of the book delves into this matter, taking a broad view of the EU’s relationship to third countries to encompass not only the

<sup>18</sup> See S Garben, *EU Higher Education Law: The Bologna Process and Harmonization by Stealth* (Kluwer Law International, 2011).

<sup>19</sup> Case C-370/12 *Thomas Pringle v Government of Ireland and Others* ECLI:EU:C:2012:756.

<sup>20</sup> C Timmermans, ‘The Competence Divide of the Lisbon Treaty Six Years After’ in S Garben and I Govaere (eds), *The Division of Competences between the European Union and its Member States: Reflections on the Past, Present and Future* (Hart Publishing, 2017).

<sup>21</sup> As this issue has been discussed in a previous publication, it will not be repeated in the present volume. See S Garben and I Govaere (eds), *The Division of Competences between the European Union and its Member States: Reflections on the Past, Present and Future* (Hart Publishing, 2017).

EU's trade and association agreements, but also the issue of (potential) accession, where the external becomes the internal, and on the other hand the issue of secession, where the internal becomes the external. As the various contributions in this part show, these subject matters have the interplay between EU and international law at their very core, and as such they make up the lion's share of the interface between EU and international law. The analyses in chapters eight to 11 confirm the findings in the previous two parts that overall, EU and international law interact in a non-conflictual and often even synergetic manner. EU involvement in international relations tends to counteract the traditional 'softness' of international law, mitigates raw political power-play, promotes multilateralism and internationalism generally, and at the same time enhances the EU's global profile – which may in turn strengthen its hand internally, thereby showing another way in which 'the external' and 'the internal' interact. Although all chapters deal with topics of high political sensitivity, actual tensions between EU and international law are limited, even if the EU is sometimes accused of engaging with, and relying on, international law in a 'selfish manner' as Guillaume Van der Loo puts it in chapter 10. This aligns with the findings of the previous two parts that notwithstanding the EU's commitment to the respect for, and development of, international law, it will always seek to safeguard its own autonomy, integrity and prosperity.

If the chapters of Part II looked at various conflicts, Part III instead reveals a number of interesting 'inconsistencies' and 'inadequacies'. Kieran Bradley in chapter eight points out 'the inadequacy of Article 50 TEU as a whole in light of the relevant provisions of the [Vienna Convention on the Law of Treaties]', Christophe Hillion and Vincent Delhomme in chapter nine criticise 'the recurring inconsistencies between the pre-accession conditions and [EU] membership obligations', Guillaume Van der Loo in chapter 10 discusses 'the inconsistency in the case law [relating] to the CJEU's selective usage of international treaty law' and 'the Union's trade policies towards disputed territories [which] can hardly be described as consistent'. In chapter 11, Michael Hahn delves into a different kind of conflict, not between EU and international law, but instead between the EU and the US based on international law. His account once again underlines the EU's general commitment to the international rule of law, as well as the deep interconnection between the internal and the external, pointing out that

in a world that seems to move to less rules-based approaches, one of the original functions of the Union becomes more evident than ever: to protect the many small and medium-sized European countries from becoming an afterthought for the world's old and new superpowers: *l'unité fait la force*.

That very idea of 'stronger together' was recently rejected in the UK. Kieran Bradley discusses Brexit in chapter eight in light of the relationship between EU and international law. He observes: '[i]f ever there was an agreement which was situated on the cusp of European Union and public international law, it is the withdrawal agreement foreseen by Article 50(2) TEU'. The interests and political stakes

are so high in the volatile Brexit process, beset by insecurity, that it is logical that the various parties scramble for any available legal argument to suit their particular agenda. The chapter shows how the ambiguous nature of this unprecedented situation, that necessarily integrates both internal and external elements, invites arguments about potentially applicable international law provisions. Some argue that the answer to crucial issues, such as the UK's financial obligations upon leaving and the (ir)revocability of the notification of the intention to withdraw, turns on whether they are examined under the EU Treaties or instead under the Vienna Convention. From the perspective of the EU as an autonomous legal order, the answer would seem to be that leaving the EU would have to be determined on the basis of its own terms, ie the EU Treaties. This actually seems to be the position of the Vienna Convention as well: if a Treaty provides for a withdrawal procedure, then that procedure should be followed. EU and international law thus seem largely in line. While, as Bradley points out, a possible future interpretation of Article 50 TEU would invite the CJEU 'to revisit the role of international law in the Union's legal order and indeed, for the greater good of the wider community, interpret certain provisions of international law, including the Vienna Convention', any such interpretation is unlikely to fundamentally alter the relationship between EU and international law in a *Kadi*-like way. It is the relationship between the EU and the UK, and the UK's relationship to EU and international law, that is fundamentally altered by Brexit. Neither does the existence of Article 50 TEU *in abstracto*, or Brexit in particular, seem to provide any conclusive 'evidence' on the EU's 'international' as opposed to '*sui generis*' or 'federal' nature: while it is indeed rare for constitutional orders to allow secession, there are some exceptions, of which – to some irony – the UK itself is one.<sup>22</sup>

Chapter nine turns to the opposite situation, of accession to the Union. Christophe Hillion and Vincent Delhomme examine the extra-territorial application of the EU *acquis* in this context, demonstrating how the EU's accession policy potentially helps the promotion of, and compliance with, international norms and more generally contributes to 'hardening international law'. It can be a win-win situation: '[w]hile the EU has borrowed and instrumentalised international norms for its own purposes, it has also strengthened their normative effect'. As such, EU enlargement policy has a positive effect on international law. At the same time, as we have seen in previous contributions, enlargement adds to internal structural pressures that in turn may complicate the EU's relationship with the international level. While the accession process is in principle specifically designed to limit the legal and structural divergence that might result from the integration of a new member into the EU fold, it would appear that it has not been able to fully meet its mark in this regard. As Sacha Garben discussed in

<sup>22</sup>N Skoutaris, 'Never Letting Go: Why Scotland is at Constitutional Stalemate over Brexit' (LSE British Politics and Society, 2016) <http://blogs.lse.ac.uk/politicsandpolicy/never-letting-go-why-scotland-is-at-constitutional-stalemate-over-brexite/>.

chapter five, persisting socio-economic divergence resulting from enlargement is likely to have played a role in a number of key internal and external controversies in the area of social rights. As Hillion and Delhomme show in chapter nine, the accession process remains wanting for the ‘value-convergence’ that it should ensure. A striking mismatch between EU internal and external competences on human rights is at the heart of this problem:

[t]he disconnection between the EU *acquis* as applicable to the Member States and the accession *acquis* is [...] problematic [...] because of the well-established double standard critic that undermines the effectiveness of the whole projection of EU norms [and] because backsliding does happen.

According to Hillion and Delhomme, the EU needs to strive for a more harmonious interaction between the internal and the external: as ‘the extra-territorial application of EU norms serves its purposes only insofar as substantive and institutional coherence between the internal and the external is secured’.

Incoherence in EU law and policy in an external context is also at the core of Guillaume Van der Loo’s contribution. In chapter 10, he considers the EU’s approach to the politically thorny question of ‘disputed territories’. This issue rears its head in the EU’s trade policy, where it has to be decided how an international agreement is to apply to these territories over which the trading partner does not exercise effective control or which has not been recognised by the EU. While recognising the pronounced differences in the various situations that are examined, which include the application of the EU-Israel Association Agreement to the occupied territories of the West Bank and the Gaza Strip, the EU-Morocco Association Agreement to the Western Sahara and the EU-Ukraine Agreement to Crimea and Sebastopol, Van der Loo’s comparative assessment nevertheless reveals a certain selectivity in the CJEU’s usage of international treaty law. He argues that this is not so much to safeguard the autonomy of the EU legal order, but instead for more pragmatic reasons: to dodge sensitive political issues. Often the CJEU is being put in that situation by the other EU institutions, which are equally inconsistent in their approach to these sensitive questions for obvious (geo-)political reasons.

Geo-politics similarly take centre-stage in chapter 11, where Michael Hahn examines the EU’s reaction to the ‘existential crisis of the US-led multilateral trading system’, brought about by the Trump administration. The central takeaway is not, according to Hahn, the fact that the current US administration is considering measures potentially incompatible with the World Trade Organization (WTO), as ‘many states have done that in the past, and pushing the envelope of legality has a long and distinguished pedigree’. Instead, ‘what is disturbing, is that WTO law compatibility seems to not be any longer part of the political calculus’. In reaction to the US position, the EU has engaged in multiple efforts ‘to strengthen its rules-based approach to international economic governance’, seeking common ground and attempting to build bridges. The US measures concerning steel and aluminum, however, seem to call for a tougher response, but still based on international law rather than in contradiction with it. Indeed, by comparison,

the EU can be considered a poster child for the multilateral world order, its sometimes selective or even selfish treatment of international law notwithstanding.

#### IV. Part IV: A View from Practice: Comments on Current Developments in the Interface between EU and International Law

The Lisbon Treaty has marked an important new phase in the relationship between EU and international law, instigating new and refueling old debates. While many of the themes explored in this book are perennial, the field has indeed seen a number of high-profile and important developments recently. ‘PNR’ Opinion 1/15, ‘Singapore’ Opinion 2/15, *Rosneft* and the pending ‘CETA’ Opinion 1/17, were all mentioned in the more general discussion in Part I of the book, but deserve some further, focalised attention. The contributors to the final part of the book are particularly well-placed to provide such a specific account of these topical issues, as they are working with them directly in their capacity as judge, EU official, lawyer and civil society activist.

Ricardo Da Silva Passos discusses the CJEU’s recent case law on international agreements, identifying some differences in approach between the General Court and the CJEU. The contribution considers the case law concerning the Western Sahara, Opinions 1/15, 2/15 and the pending 1/17. Da Silva Passos notes that ‘it is a complex issue to ensure the autonomy of the ECJ [European Court of Justice] with the co-existence, and possible interference, of another international judicial body’ and recognises that the Court ‘has shown a very rigorous defence of the specific characteristics and of the autonomy of the EU legal order, in particular regarding the conditions of judicial review by another international judicial body’. The analysis reminds us that, for the key question of EU autonomy, the CJEU will look at five central principles: (i) the decisions of the international judicial body shall not bind the EU institutions to a particular interpretation of EU law; (ii) the ECJ has the exclusive competence to interpret EU law in accordance with Article 344 TFEU; (iii) the international judicial body shall not, in any way, interfere with the division of powers between the EU and its Member States; (iv) the international judicial body shall not have jurisdiction to interpret EU law in a manner which could affect the monopoly of the ECJ concerning the preliminary rulings procedure; and (v) it shall not have jurisdiction to appreciate the validity of acts adopted by the EU under the CFSP provisions.

Jenő Czuczai in turn looks at the *Rosneft* judgment, considering it ‘a good example for smooth interaction between EU law and international law.’<sup>23</sup> In contrast to some critiques that with this judgment ‘the Court went too far in order to defend

<sup>23</sup> Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty’s Treasury et al* ECLI:EU:C:2017:236.

the autonomy of the EU legal order', the contribution highlights two aspects of the judgment that prove that 'there is still harmony in the Court's constantly developing jurisprudence' and that the Court seeks to respect international obligations. The Court's interpretation of the EU-Russia Partnership Agreement in the context of the Ukrainian crisis simultaneously protected essential EU security interests as well as international peace and security in accordance with the principles and rules of the UN Charter. As a more general point, the contribution emphasises, in line with the findings in the first part of this book, that the place of international law in the EU legal order has been affected by the Lisbon Treaty, which has given it a firmer grounding in primary law. Czuczai also points out some of the 'examples [of problematic interaction between EU and international law] well-known within the EU legal practitioners' circles', such as the Aarhus non-compliance, dealt with in more detail by Nicola Notaro and Mario Pagano in chapter seven.

Aarhus is also a central element of Laurens Ankersmit's chapter, which looks at international dispute settlement from the Investment Court System to the Aarhus Convention's Compliance Committee. The contribution argues that both external oversight mechanisms may be faced with questions of compatibility within the autonomy of the EU legal order, but that in the compliance mechanism under the Aarhus Convention is far less intrusive than the Investment Court System. The latter, Ankersmit argues, 'is explicitly intended as an alternative to judicial relief to domestic courts and may therefore have more significant effects on the powers granted to the EU judiciary in the Treaties', the rulings are binding, may have financial consequences, and can be effectively enforced in domestic legal orders of states, none of which is provided for in the Aarhus Convention. On that basis, the chapter takes issue with the European Commission's stance on both external oversight mechanisms, in that it is 'vehemently opposing the findings of the [Aarhus Convention Compliance Committee], while at the same time extensively promoting the Investment Court System in its trade agreements'. It considers that 'if the Commission is so opposed to endorsing the findings of the [Aarhus Convention Compliance Committee], it should have been even more alarmed by the prospects of the Investment Court System' thus pinpointing certain inconsistencies in approach.

## V. Conclusion

Despite their many obvious interconnections, EU and international law are all too often studied and practised in separate spheres and fora. While it is natural for either to insist on their different characteristics, and particularly for the EU to emphasise its autonomous and *sui generis* nature as a constitutional order of states, important insights may be lost because of this exclusionary approach, and in practical terms there is a risk of double emploi, conflicts and contradictions. The aim of this book is to contribute to breaking through some of these barriers,



and to reflect on how to ensure a smooth interaction and synergy between EU and International law both in theory and in practice. This therefore includes a more theoretical, constitutional dimension, but also a range of substantive policy areas where EU law and international law, as well as their respective actors and organisations, work alongside each other and perhaps not always in perfect harmony. Through its various contributions, this book addresses both dimensions of the interface between international and European law: the effect of international law on the EU legal order, and the influence of the EU on the international legal order. In both dimensions, there are many interesting recent developments, in case law and policy, which are highlighted and reflected upon both from an academic and a more practical point of view.

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