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# 1. The European Union's engagement with other international institutions

*Emerging questions of EU and international law*

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## 1. INTRODUCTION

Over the years, the European Union's (EU) relationship with other international organizations and institutions has further developed, mainly due to the increasing role of the EU as a global actor.<sup>1</sup> Not only has the EU sought to become more visible and active in these organizations, but the normative output of these bodies also has an important effect on the development of EU law. The EU's participation in international organizations such as the World Trade Organization (WTO), the Food and Agricultural Organization (FAO) and the United Nations (UN) was a logical consequence of the transfer of competences from the Member States to the EU over the past decades. Yet, for legal or political reasons, not all international organizations accept the EU as a full member, which leads to a plethora of different arrangements, ranging from full membership of the EU to having to rely on its Member States to be represented.<sup>2</sup>

Over the past decade, various studies on the EU and other institutions have been written, mainly by political scientists and international relations experts. These volumes have mostly been concerned with the question of how 'effective' the EU has been in various fields of governance and in different organizations.<sup>3</sup> This is not to say that legal

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<sup>1</sup> Among the many examples, see B. Van Vooren, S. Blockmans and J. Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013); J. Czuczai and F. Naert (eds), *The EU as a Global Actor: Bridging Legal Theory and Practice* (Brill/Nijhoff, 2017).

<sup>2</sup> Cf S. Gstöhl, "'Patchwork Power" Europe: The EU's Representation in International Institutions' (2009) 14 *European Foreign Affairs Review*, pp. 385–403.

<sup>3</sup> Along with many individual papers, see in particular K.E. Jørgensen and K. Laatikainen (eds), *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power* (Routledge, 2013); K.E. Jørgensen, *The European Union and International Institutions* (Routledge, 2008); O. Costa and K.E. Jørgensen (eds), *The Influence of International Institutions on the EU: When Multilateralism Hits Brussels* (Palgrave Macmillan, 2012); S. Oberthür, K.E. Jørgensen and J. Shahin (eds), *The Performance of the EU in International Institutions* (Routledge, 2013); A. Orsini (ed), *The European Union with(in) International Organisations: Commitment, Consistency and Effects across Time* (Ashgate, 2014); E. Drieskens and L. van Schaik (eds), *The EU and Effective Multilateralism: Internal and External Reform Practices* (Routledge, 2014); S. Blavoukos and D. Bourantonis (eds), *The EU Presence in*

scholars have been completely inactive in this field. On the contrary, the position of the EU in international organizations has become part of the more general debate on the EU as a global actor and it appears as a topic in most university courses in that area. A number of articles, monographs and edited volumes have been written, mostly on the EU and a certain international organization (for example, the ILO, the UN or a special policy area),<sup>4</sup> and occasionally on the topic as such.<sup>5</sup> While some studies have addressed the influence on the EU of other international organizations' decisions,<sup>6</sup> cooperation and interaction have not been a theme as such. Finally, many of these studies tend to focus on formal institutions, and thus overlook a range of other types of bodies that have become part of the EU's network of cooperation. While the impact of

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*International Organizations* (Routledge, 2011); K.E. Jørgensen (ed), *The European Union and International Organizations* (Routledge, 2009).

<sup>4</sup> Including J. Wouters, F. Hoffmeister and T. Ruys (eds), *The United Nations and the European Union: An Ever Stronger Partnership* (TMC Asser Press, 2006); compare also the planned edited volume by F. Amtenbrink and C. Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press, 2019), which will deal with some international financial organizations.

<sup>5</sup> Recent examples include 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), pp. 1234–81; C. Kaddous (ed), *The European Union in International Organisations and Global Governance: Recent Developments* (Hart Publishing, 2015) which came out of a project in Geneva and focuses on a few UN and Geneva-based organizations; and R. Frid de Vries, 'European Community, Membership in International Organizations or Institutions', *Max Planck Encyclopedia of Public International Law* [MPEPIL], 2014. In 2011 the Centre for European Policy Studies and some other organizations published a short book entitled *Upgrading the EU's Role as a Global Actor: Institutions, Law and the Restructuring of European Diplomacy*. Most other comprehensive and in-depth studies are quite dated. See for instance, R. Frid, *The Relations between the EC and International Organizations* (Kluwer Law International, 1995); F. Hoffmeister, 'Outsider or Frontrunner? Recent Developments under International and European Union in International Organizations and Treaty Bodies' (2007) 44 *Common Market Law Review*, pp. 41–68; J. Sack, 'The European Community's Membership of International Organizations' (1995) 32 *Common Market Law Review*, pp. 1127–56; I. Govaere, J. Capiu and A. Vermeersch, 'In-Between Seats: The Participation of the European Union in International Organizations' (2004) 9(2) *European Foreign Affairs Review*, pp. 155–87; S. Marchisio, 'EU's Membership in International Organizations', in E. Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law International, 2002) pp. 231–60; J.-C. Gautron, 'L'Union Européenne et le concept d'organisation internationale', in R. Vitoria, *L'Union européenne et les organisations internationales* (Bruylant, 1997). And, by the present authors: J. Odermatt, *The European Union as a Global Actor and Its Impact on the International Legal Order*, PhD thesis, University of Leuven, 2016; J. Wouters, J. Odermatt and T. Ramopoulos, 'The Status of the European Union at the United Nations General Assembly', in I. Govaere et al (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers, 2014), pp. 211–23; R.A. Wessel, 'The Legal Framework for the Participation of the European Union in International Institutions' [2011] *Journal of European Integration*, pp. 621–35; and S. Blockmans and R.A. Wessel (eds), *Principles and Practices of EU External Representation*, The Hague, *CLEER Papers*, 2012. Parts of the present chapter are based on those earlier studies.

<sup>6</sup> See in particular R.A. Wessel and S. Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (TMC Asser Press/Springer, 2013).

these bodies on global rulemaking has been widely debated over the past years,<sup>7</sup> the relationship between the EU and these (often regulatory) bodies has not been studied extensively.

It can be concluded that over the years, bits and pieces of the interaction between the EU and international institutions have been addressed by legal scholarship, but so far there has been no comprehensive study dealing with the various relationships between the EU and other international institutions. The aim of the present book is to do exactly that, by providing a more comprehensive overview of the ways in which the EU interacts with other international institutions. The term ‘international institutions’ is used to allow for a broadening of the scope to include international bodies other than formal international organizations.<sup>8</sup> This means that the book not only addresses classical international organizations such as the UN, but also looks at lesser known and more informal bodies, which play an increasingly important role in global governance.<sup>9</sup> The emerging picture is one of a broad range of international normative fora, including intergovernmental organizations with a broad mandate; treaty-based conferences that do

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<sup>7</sup> E. Fahey (ed), *The Actors of Postnational Rulemaking: Contemporary Challenges of European and International Law* (Routledge, 2016) and also J. Pauwelyn, R.A. Wessel and J. Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012); A. Berman, S. Duquet, J. Pauwelyn, R.A. Wessel and J. Wouters (eds), *Informal International Lawmaking: Case Studies* (Torkel Opsahl Academic EPublisher, 2012). In addition, projects have dealt with the role of private actors/bodies in international law. See for instance C. Scott, F. Cafaggi and L. Senden (eds), *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates* (Wiley-Blackwell, 2011).

<sup>8</sup> International organizations can be defined in many ways. The most recent definition laid down in an international legal document may very well be that by the International Law Commission in the 2011 Articles on the Responsibility of International Organizations (see below), which defined an international organization as ‘an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.’ See more extensively S. Bouwhuis, ‘The International Law Commission’s Definition of International Organizations’ (2012) 9 *International Organizations Law Review* pp. 451–65. The definition by Schermers and Blokker is also commonly used: ‘international organizations are defined as forms of cooperation (1) founded on an international agreement; (2) having at least one organ with a will of its own; and (3) established under international law’ – H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity* (Brill/Nijhoff, 2018). See on the qualification of the EU as an international (integration) organization C. Eckes and R.A. Wessel, ‘An International Perspective’, in T. Tridimas and R. Schütze (eds), *The Oxford Principles of European Union Law – Volume 1: The European Union Legal Order* (Oxford University Press, 2018), pp. 74–102.

<sup>9</sup> See Pauwelyn, Wessel and Wouters, *Informal International Lawmaking*, as well as J. Pauwelyn, R.A. Wessel and J. Wouters, ‘When Structures become Shackles: Stagnation and Dynamics in International Lawmaking’ (2014) 3 *European Journal of International Law*, pp. 733–63. Cf also 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 University Press, 2012), pp. 259–71.

not amount to international organizations; informal intergovernmental cooperative structures; and even private organizations that are active in the public domain.<sup>10</sup>

'Engagement' is to be understood broadly, as the book addresses not only the status or position of the EU in other international institutions (for example, member or observer status), but also the cooperation with international institutions in which the EU does not have formal status. Furthermore, the term 'engagement' is used in order to capture a two way dynamic, including an assessment of the EU's influence on international bodies, but also an assessment of the influence of international institutions on the EU. Whereas other studies have focused on the EU's performance in these organizations, this book also seeks to understand how EU law and policy is increasingly shaped in various ways by its interaction with international institutions.<sup>11</sup> Finally, the book addresses challenges and issues from both the EU and the international law angles. It thus addresses both internal EU issues, such as competence struggles (between the EU and its Member States and between the EU institutions), as well as the limits set by international law and the law of international organizations on EU participation in what is still a 'state-centred' international legal system. The EU's increased engagement with international organizations not only has an effect within the EU legal order, but may also have broader consequences for international law, international relations and the law of international organizations. The book also addresses challenges that are not entirely legal in nature. It considers the international context in which the EU seeks to engage with international institutions. At a time when the EU seeks to address its own internal challenges and multilateralism is under strain, how does the EU respond to these political and legal challenges?<sup>12</sup> Although the EU has a clear ambition to play a greater role in many of the institutions discussed in this volume, it often faces obstacles, such as opposition from other states in a given organization or even the EU Member States. The volume therefore addresses both the legal, political and practical challenges facing the EU.

In addition to its broad scope in terms of institutions covered, the book aims to connect the different dimensions of the EU's interaction with other international institutions. Contributions thus address not only legal issues, but also the way in which the EU functions in practice. The chapters in this volume demonstrate how the EU's engagement with international institutions involves issues of EU and international law, and contributes to the development of both fields.

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<sup>10</sup> More extensively on the normative activities of these bodies: R.A. Wessel, 'Regulating Technological Innovation through Informal International Law: The Exercise of International Public Authority by Transnational Actors', in M.A. Heldeweg and E. Kica (eds), *Regulating Technological Innovation: A Multidisciplinary Approach* (Palgrave Macmillan, 2011) pp. 77–94.

<sup>11</sup> But see O. Costa and K.E. Jørgensen (eds), *The Influence of International Institutions on the EU* (Palgrave, 2012).

<sup>12</sup> On this external environment, see the concluding Chapter 34 in this volume.

## 2. THE EU AS PART OF THE GLOBAL INSTITUTIONAL NETWORK

### 2.1 Reasons for the EU to Be Active in Other International Institutions

Why does the EU engage with international organizations? First, there are 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.<sup>13</sup> 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 3(5) and 21 TEU lay down the overall external objectives of the Union and the latter even 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.'<sup>14</sup>

Beyond this general commitment to multilateralism and the UN, the EU Treaties also contain a number of references to specific policy areas,<sup>15</sup> 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 specialized agencies: the Council of Europe, the Organization for Security and Cooperation in

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<sup>13</sup> This is confirmed by the recognition of the Union's legal personality in Article 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' (2016) 35(1) *Yearbook of European Law*, pp. 471–83; and earlier R.A. Wessel, 'Revisiting the International Legal Status of the EU' [2000] *European Foreign Affairs Review*, pp. 507–37 and R.A. Wessel, 'The International Legal Status of the European Union' [1997] *European Foreign Affairs Review*, pp. 109–29.

<sup>14</sup> Article 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.'

<sup>15</sup> 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); and 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; Articles 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; and Article 14 of Protocol (No 5) on the Statute of the European Investment Bank).



Europe and the Organisation for Economic Co-operation and Development.<sup>16</sup> The EU Treaties even require the Union to join certain international institutions, such as the European Convention on Human Rights and its associated organs (Article 6 TEU).<sup>17</sup> 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.'

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 Articles 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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 (for example, 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).<sup>21</sup>

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'.<sup>22</sup> This means that international agreements, including the

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<sup>16</sup> Article 220 TEU.

<sup>17</sup> See Chapter 26 in this volume.

<sup>18</sup> 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'. Also, the form seems to be left open so 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 at 1243 and Sack at 1230.

<sup>19</sup> 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.

<sup>20</sup> Schermers and Blokker.

<sup>21</sup> See Chapter 10 in this volume.

<sup>22</sup> CJEU, Case 22/70, *ERTA*, paras 15–16; CJEU, Opinion 1/76.

ones whereby the EU becomes a member of another international organization or participates in a treaty regime,<sup>23</sup> 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).<sup>24</sup>

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 (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 4 and 5 to the Treaty (Article 14)<sup>25</sup>). 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 agencies, the Council of Europe, the Organisation for Security and

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<sup>23</sup> See CJEU, Opinion 2/94 *WTO*.

<sup>24</sup> ‘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.’

<sup>25</sup> 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.

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 of fostering cooperation with third countries and competent international organizations returns in the 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 organizations 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 organizations, including representation by the High Representative (Article 27(2) TEU), cooperation between diplomatic missions of the Member States and the Union delegations (Articles 33 and 35 TEU), coordination of Member States' actions (Article 34 TEU) and the general competence to conclude international agreements with international organizations in the area of CFSP (Article 37 TEU).

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

A second set of reasons to join or engage with international organizations does not stem from a legal rationale, but from an acknowledgement that if the EU is to be an effective global actor and to influence developments at the international level, then it should more closely engage with other international bodies. Further, as the contributions in this volume demonstrate, the Union is increasingly influenced by the developments in a range of international bodies and processes; it is in the EU's interests therefore to become more visible and active in these fora. Indeed, a structural role of the EU in global governance becomes most visible. Over the years the EU has obtained a formal position in some international institutions, either as a full member or as an observer to be part of the global policymaking in areas in which the EU is active itself. This has the effect that the EU participates in some organs of the international institutions, such as through attending meetings, being elected for functions in the organ and exercising voting and speaking rights.

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.<sup>26</sup> Indeed, EU activities are increasingly related to global debates that take place in other international bodies. This has become clear not only in policy areas such as trade, health and the environment, but also in relation to more technical (standard setting) activities on food safety, financial regulation or intellectual property.

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<sup>26</sup> See further R.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. 179–99 as well as 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).



## 2.2 Challenges Related to the EU Participating in other International Institutions

Despite the legal and political reasons for the EU to be part of the institutionalized 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’,<sup>27</sup> 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 setup of the international institution itself.<sup>28</sup>

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.<sup>29</sup> As many of the chapters in this book underline, however, we are often dealing with situations of ‘mixture’ and even in cases of EU exclusivity, Member States may have a general preference to remain present and visible themselves in international institutions.<sup>30</sup> The issue of mixture, 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 for the Union to join another institution – as exemplified in *Opinion 2/13*<sup>31</sup> – the Union and its Member States do not always

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<sup>27</sup> CJEU, *Opinion 2/13* of 18 December 2014, para 156.

<sup>28</sup> The latter can be retrieved from J. d’Aspremont, C. Brölmann and I. Scobbie (eds), *Oxford International Organizations*, opil.oupplaw.com/home/OXIO, launched in 2017.

<sup>29</sup> 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).

<sup>30</sup> 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 C. Hillion and P. Koutrakos (eds), *Mixed Agreements in EU Law Revisited – The EU and Its Member States in the World* (Hart Publishing, 2010).

<sup>31</sup> On the (non-)accession of the EU to the Council of Europe and the Convention on Human Rights. The Court emphasized the challenge in having 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). See further Chapter 26 in this volume.

see eye to eye on questions of representation. Recent 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; Germany is a member of this body, but neither the EU nor all Member States are.<sup>32</sup> 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'.<sup>33</sup> 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?<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

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

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<sup>32</sup> See also Chapter 3 in this volume.

<sup>33</sup> Judgment in Case C-399/12 *Germany v. Council* ('OIV') EU:C:2014:2258, para. 49. See also and more extensively De Baere, as well as Chapter 23 by Ramopoulos in this volume.

<sup>34</sup> Case No 21. See 'Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015'.

<sup>35</sup> Judgment of 6 October 2015 in Case C-73/14, *Council v. Commission*, EU:C:2015:663, paras 58–9.

<sup>36</sup> Case C-600/143, *Germany v. Council* (OTIF), ECLI:EU:C:2017:935. The case is also referred to as *COTIF*.

<sup>37</sup> Para. 61.

<sup>38</sup> Para. 67.

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'.<sup>39</sup> 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.<sup>40</sup>

Cases like these underline the continuing tension between the Union and its (or at least some of its) 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 Member States participate' (Article 34 TEU).<sup>41</sup> 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 (Articles 32 and 35 TEU). With a view to the creation of the European External Action Service (EEAS),<sup>42</sup> the Treaty now also mentions 'Union delegations in third countries and at international organizations' which shall represent the Union (Article 221(1) TFEU). Indeed, of the

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<sup>39</sup> Joined Cases C-626/15 and C-659/16, 20 November 2018, ECLI:EU:C:2018:925, para. 128.

<sup>40</sup> *Ibid.*, para. 133.

<sup>41</sup> A former provision on this point, Article 116 EEC (deleted by the Maastricht Treaty), was clarified by the Court in Opinion 1/78 as having 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.

<sup>42</sup> See M. Gatti, *European External Action Service: Promoting Coherence through Autonomy and Coordination* (Brill/Nijhoff, 2016).

more than 140 Union delegations, eight are accredited exclusively to other international organizations, including regional organizations, UN bodies, programmes and funds.<sup>43</sup>

It remains important to underline that the 'principle of sincere cooperation' (Article 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.<sup>44</sup>

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. The chapters in this volume explore further how competences battles have spilled over into international institutions, and can affect the EU's ability to exert influence in these bodies.

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 would 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 EU accession 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

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<sup>43</sup> 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; to 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 organizations 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.

<sup>44</sup> Eeckhout, p. 255.

the UN High Commissioner for Refugees (UNHCR) or bodies under the UN Convention on the Law of the Sea (UNCLOS)).<sup>45</sup>

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 (Article II of the FAO Constitution was specifically modified to allow for the accession of ‘regional economic organizations’).<sup>46</sup> 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].<sup>47</sup>

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 EU activities beyond economic integration.<sup>48</sup>

### 3. THE LEGAL POSITION OF THE EU IN INTERNATIONAL INSTITUTIONS

It is one thing for the EU Treaties to make references to international institutions and provide a legal basis for the Union to join or engage with international institutions; how and to what extent the EU actually makes use of these external competences is another question. Engagement can range from full membership in an institution, to observer status with a variety of legal rights and duties, to mere cooperation or no engagement at all.

Full membership is mainly found in areas where the EU has extensive competences (such as trade, fisheries and largely harmonized dimensions of the internal market).<sup>49</sup> The EU is a *full member* of only a limited number of international organizations.<sup>50</sup> We can add another category of participation: *de facto* membership. This is the case where

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<sup>45</sup> See the various contributions to the present volume, as well as Kaddous; 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 J. Wouters, F. Hoffmeister and T. Ruys (eds), *The United Nations and the European Union: An Ever Stronger Partnership* (TMC Asser Press, 2006).

<sup>46</sup> See for an early assessment R. Frid, ‘The EEC a Member of a Specialized Agency of the UN (FAO)’ (1993) 4 *European Journal of International Law*, pp. 239–55.

<sup>47</sup> See for instance Articles 4.1, 4.2, 4.3, 4.5, 21 and 22 of the Kyoto Protocol.

<sup>48</sup> See Article 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.’

<sup>49</sup> Cf. Hoffmeister and Kuijper.

<sup>50</sup> The new edition by Schermers and Blokker (2018, at 79) lists the EU as a full member of the: FAO, WTO, Hague Conference on Private International Law, Intergovernmental Organization for International Carriage by Rail (OTIF), International Renewable Energy Agency,



the EU is not formally a member but exercises participation rights that resemble that of full membership, as with the EU's participation in the World Customs Organization (WCO).<sup>51</sup> It is also commonly observed that the EU's participation in the Organization for Economic Cooperation and Development (OECD) resembles that of a full member.<sup>52</sup> In this case it is made known that 'this participation goes well beyond that of a mere observer, and in fact gives the Commission quasi-Member status',<sup>53</sup> despite the more modest formal arrangement that the European Commission 'shall take part in the work' of the OECD (Article 13 of the 1960 Paris Convention in conjunction with Protocol 1). As will be seen, such status is often more fragile than full legal membership, as it can still depend on the goodwill and readiness of full members to allow full participation by the Union. Moreover, as the chapters in this volume demonstrate, the actual participation of the EU in practice does not always coincide with what the formal status would lead you to believe.

The FAO and the WTO are the obvious examples of important and well known organizations in which the EU participates as a full member.<sup>54</sup> While as a rule EU membership is still excluded both in the UN itself and in the Specialised Agencies (Article 4 (1) of the UN Charter), the Community did join the FAO in 1991, after the provisions of the FAO Constitution had been amended to allow for the accession of

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International Cocoa Organization, International Coffee Organization, International Grains Council, International Olive Council, International Sugar Organization, International Tropical Timber Organization, Common Fund for Commodities, International Copper Study Group, International Jute Study Group, International Nickel Study Group, International Rubber Study Group, General Fisheries Commission for the Mediterranean, Northeast Atlantic Fisheries Commission, Northwest Atlantic Fisheries Organization, South-East Atlantic Fisheries Organization, South Pacific Regional Fisheries Management Organization, Western and Central Pacific Fisheries Commission, Commission for the Conservation of Antarctic Marine Living Resources, Indian Ocean Tuna Commission, Inter-American Tropical Tuna Commission, International Commission for the Conservation of Atlantic Tunas, North Atlantic Salmon Conservation Organization, Baltic Marine Environment Protection Commission (Helsinki Commission), Commission for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Commission), International Commission for the Protection of the Danube River, International Commission for the Protection of the Oder, International Commission for the Protection of the Rhine, United Nations Convention on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, European Economic Area, European Bank for Reconstruction and Development and International Science and Technology Center. See also the Directory of European Union legislation in force, at [http://eur-lex.europa.eu/browse/directories/legislation.html?displayProfile=allRelAllConsDocProfile&classification=in-force#arrow\\_20](http://eur-lex.europa.eu/browse/directories/legislation.html?displayProfile=allRelAllConsDocProfile&classification=in-force#arrow_20). Chapter 23 in the current volume also mentions the International Cotton Advisory Committee. EU membership of the World Customs Organization (WCO) depends on the entry into force of the respective amendment to the WCO constitution after acceptance by all members.

<sup>51</sup> T. Yamaoka, 'The De Facto Accession of the European Communities to the World Customs Organization: Process and Significance' (2013) 8(4) *Global Trade and Customs Journal*, pp. 92–9. See Chapter 14.

<sup>52</sup> On the OECD, see Chapter 17 in this volume. Frank Hoffmeister describes such enhanced observer status as 'full participant': see Hoffmeister, p. 54. See also Oberthür, Jørgensen and Shahin, at p. 30.

<sup>53</sup> [www.oecd.org](http://www.oecd.org).

<sup>54</sup> See also the chapters by Van der Meulen and by Wernaart and Perišin.

regional economic organizations.<sup>55</sup> From the outset, the division of competences was a difficult issue to handle and was to be based on a declaration of competence that had to be submitted by the Community at the time of its application.<sup>56</sup> Following up on its FAO membership, the Community joined the Codex Alimentarius Commission (CAC) in 2003. The CAC was established by the FAO and the WHO and provides almost equal voting and participation rights to the EU as the FAO.<sup>57</sup> The EU's membership of the WTO (Article XI, para 1 of the 1994 Marrakesh Agreement) differs in the sense that the Community was one of the founders of the WTO and a major partner in the Uruguay Round that led to the establishment of the WTO. No difference is made between EU and state membership, although here also voting rights may either be used by the EU (in which case the EU vote has the weight of the number of its Member States) or by the individual EU Member States. However, due to the fact that voting rarely takes place in the WTO, the voting rules remain rather theoretical. Nevertheless, competence problems remain a source for a complex participation of both the EU and its Member States in the WTO.<sup>58</sup>

Full participation is also possible in the case of treaty regimes. Thus, the EU (as such) has joined (or signed) a number of UN Conventions, including the Convention on the Rights of Persons with Disabilities, the United Nations Convention against Corruption, the United Nations Convention against Transnational Organized Crime and the UN Framework Convention on Climate Change. The Northwest Atlantic Fisheries Organization (NAFO) reveals that it is even possible for the EU to become a member of a treaty regime without its Member States themselves being a member.

Observer status implies that the EU can attend meetings of a body or an organization, but without voting rights. The precise set of rights that the EU can exercise differs from organization to organization. It may involve all rights of membership except for voting rights, or can be limited to formal meetings only, after all formal and informal consultations have been conducted with members and relevant parties. In addition, formal interventions may only be possible at the end of formal participants' interventions, which may have an effect on the political weight of the EU.<sup>59</sup> In areas where the EU does have formal competences, but where the statutes of the particular international institution do not allow for EU membership, this may lead to a complex form of EU involvement. A good example is the International Labour Organization (ILO). The 1919 ILO Constitution does not allow for the membership of international organizations. The existence of Community competences in the area of social policy nevertheless called for its participation in ILO Conferences. The Community was officially granted observer status in 1989.<sup>60</sup>

The extensive observer status enjoyed by the EU in the ILO is not unique and can be found in many Specialised Agencies and programmes of the United Nations, as well as

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<sup>55</sup> Frid.

<sup>56</sup> Cf. D. Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' [2012] *EFA Review*, pp. 491–510.

<sup>57</sup> See much more extensively Chapter 5 in this volume.

<sup>58</sup> See Chapter 14 in this volume.

<sup>59</sup> Hoffmeister and Kuijper.

<sup>60</sup> See Chapter 6 in this volume.

in the UN's General Assembly and in ECOSOC. With regard to a number of international institutions (including the ICAO, UNESCO, OECD and the Council of Europe) the arrangements have been referred to as 'full participant' status, indicating that the only element that separates the EU from membership is related to the voting rights.<sup>61</sup>

Another category is non-membership, where the EU exercises no formal participation rights, or very little. Examples are the Arctic Council,<sup>62</sup> the International Maritime Organization and the International Atomic Energy Agency, of which the EU aspires to be a member.<sup>63</sup>

Finally, the European Union may even participate in treaty regimes or informal international networks in areas that are deliberately left to the Member States. Prime examples in this area include the regimes on non-proliferation and on export controls.<sup>64</sup> On the basis of Article 347 TFEU, Member States have always claimed their own competence in relation to commodities related to the maintenance of peace and international security. At the same time, this provision calls upon them to ensure that any measures taken in this respect do not prevent the functioning of the internal market and are in line with the common commercial policy.<sup>65</sup> In turn, this forms a reason for the European Commission (not the EU as such) to participate in some of these regimes, as a 'permanent observer' (for instance in the Zangger Committee to harmonize the interpretation of nuclear export control policies for parties to the Non-Proliferation Treaty) or even as a 'full participant' (as in the Australia Group, which aims to ensure that exports do not contribute to the development of chemical or biological weapons).

The following chapters will provide more detail on the legal status of the EU within different bodies, and how the EU engages with these bodies in practice. One of the key questions in this regard is how the EU translates its status in these bodies into influence.

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<sup>61</sup> Hoffmeister at 54.

<sup>62</sup> See also the chapter by Erwan Lannon and Peter Van Elsuwege in this volume, as well as J. Bjerkem, 'Member States as "Trustees" of the Union? The European Union and the Arctic Council', *College of Europe EU Diplomacy Paper*, 12/2017.

<sup>63</sup> See Chapter 24 and Chapter 13 in this volume, as well as J. Wouters, J. Odermatt and T. Ramopoulos, 'The EU in the World of International Organizations: Diplomatic Aspirations, Legal Hurdles and Political Realities', in M. Smith, S. Keukeleire and S. Vanhooacker (eds), *The Diplomatic System of the European Union: Evolution, Change and Challenges* (Routledge/Taylor & Francis, 2015), pp. 94–111.

<sup>64</sup> H. Alavi and T. Khamichonak, 'A European Dilemma: The EU Export Control Regime on Dual-Use Goods and Technologies' (2016) 7(3) *Danube: Law & Economics Review*, pp. 161–72; Daniel Joyner (ed), *Non-Proliferation Export Controls: Origins, Challenges, and Proposals for Strengthening* (Routledge, 2006).

<sup>65</sup> Martin Trybus, *European Union Law and Defence Integration* (Hart Publishing, 2005).

#### 4. THE INFLUENCE OF INTERNATIONAL INSTITUTIONS ON THE EUROPEAN UNION

The present book approaches the ‘engagement’ between the EU and other international institutions in two ways. First, as discussed above, it is interested in 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.<sup>66</sup> 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.<sup>67</sup> 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 fora, 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 ... whereas 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’.<sup>68</sup> 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.<sup>69</sup>

Over the years many empirical case studies have revealed an influence of international organizations on the EU, including a possibility that international organizations have been ‘teaching’ the European Union, in 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).<sup>70</sup> The influence of international norms

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<sup>66</sup> 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*; 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. 223–48. Parts of this section are based on these earlier studies.

<sup>67</sup> See Wessel and Blockmans, *Between Autonomy and Dependence*.

<sup>68</sup> Jørgensen, *The European Union and International Organizations*, at 4–5.

<sup>69</sup> *Ibid.*

<sup>70</sup> Jørgensen, *The European Union and International Organizations*, 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.

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 organizations on the EU and its normative output. The issue can be approached from two sides: the international organization 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. This volume is not concerned in this regard with 'measuring' the effects that international institutions have on the EU, and vice versa. Rather, by presenting a wide variety of case studies from international institutions active in an array of fields, the volume 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'.<sup>71</sup> They point to the fact that in international relations (IR) theory different 'mechanisms' to exert influence have been noticed, which may (a) provide opportunities to or constraints on actors; (b) change their ability to influence decision making by changing the distribution of power; (c) establish or spread norms and rules; or (d) create path dependencies. The emerging picture is a complex set of formal and (sometimes very subtle) informal ways in which international organizations (and other multilateral fora) influence the EU. The degree of influence may then also depend on the 'institutional strength' of the international organization. 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'.<sup>72</sup> 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 organizations, underlining the coming of age of the European Union as a polity. Whereas for an international organization such as the EU,<sup>73</sup> stressing

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<sup>71</sup> O. Costa and K.E. Jørgensen (eds), *The Influence of International Institutions on the EU* (Palgrave, 2012).

<sup>72</sup> As paraphrased by Costa and Jørgensen.

<sup>73</sup> Indeed, we consider the EU as an international organization. See also Eckes and Wessel. Only recently did the EU Court for the first time expressly state 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, para. 49.



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 organizations. This process does come with the same tension that sovereign states face, that is, how to square the preservation of one's institutional and constitutional values with acceptance of 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,<sup>74</sup> and – more generally – global, EU and domestic norms are increasingly interconnected.<sup>75</sup> 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 organizations, 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 is still propagated by the Court of Justice's autonomous interpretation of EU law and its exclusive jurisdiction therein. In view of globalization'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 attitude displayed by the Court 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 organizations with legal personality or less institutionalized international regimes.<sup>76</sup>

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.<sup>77</sup> The question of the legal status of these decisions within the EU legal order goes beyond the scope of the present introductory chapter, but has been addressed elsewhere.<sup>78</sup>

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<sup>74</sup> See the various contributions to Wessel and Blockmans.

<sup>75</sup> Føllesdal, Wessel and Wouters.

<sup>76</sup> 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* (Hart Publishing, 2017).

<sup>77</sup> See for examples Føllesdal, Wessel and Wouters.

<sup>78</sup> Wessel and Blockmans, 2016.

## 5. CONCLUSION: EMERGING QUESTIONS OF EU AND INTERNATIONAL LAW

The initial short analysis above testifies to the clear engagement of the EU with international institutions and its place within the global institutional network. At the same time, the increasing global activities of the EU and its post-Lisbon focus on global challenges raise a number of new questions in both international and EU law.

In international law, the existence of the European Union as a non-state actor with statelike functions is only partly accepted as a fact. With regard to the EU's normative, substantive influence on international law, the question of the external impact of EU rules and the ways in which these could form a legitimate source of international law has been picked up by legal scholars.<sup>79</sup> This may first of all have been triggered by the clear (some would perhaps prefer 'neo-colonialist') manner in which the EU Treaties these days present the organization's ambitions to 'uphold and promote its values and interests' in the wider world and to be guided by 'the principles which have inspired its own creation' (Articles 3(5) and 21(3) TEU). Furthermore, these provisions make no mistake about not only the Union's intention to respect and observe international law, but also its promise to contribute to 'the development of international law'.<sup>80</sup>

In more institutional terms, international law seems to be experimenting with ways that allow the EU to 'play along'. International law, however, only works when it is applied across the board for certain categories of international actors. Its rationale is to offer clarity and set the conditions for a smooth cooperation between different subjects. At the same time, it is of course possible to create special rules for special entities. The clauses on regional economic integration organizations (REIOs; see *supra*) in some multilateral agreements are a good example. In a similar vein, the extended competences of the EU in the UN General Assembly form a compromise between the conventional impossibility for the EU to join the EU and the fact that on some dossiers it is more qualified to participate in the debates. It is understandable, however, that these compromises are hard to reach. Other parties are keen to avoid an

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<sup>79</sup> See E. Fahey, *The Global Reach of EU Law* (Routledge, 2016), as well as her contribution to the present volume; D. Kochenov and F. Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge University Press, 2013); Odermatt; P. Nevill, 'The European Union as a Source of Public International Law', in *Hungarian Yearbook of International Law and European Law* (Eleven International Publishing, 2014), pp. 281–95; F. Hoffmeister, 'The Contribution of EU Practice to International Law', in M. Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press, 2008), pp. 37–127; R.A. Wessel, 'Flipping the Question: The Reception of EU Law in the International Legal Order' (2016) 35(1) *Oxford Yearbook of European Law* pp. 533–61; and in the same volume T. Konstadinides, 'Means of Interaction between EU and International Law: Customary International Law as a Source of EU Law: A Two-Way Fertilization Route?' (2016) 35(1) *Yearbook of European Law*, pp. 513–32.

<sup>80</sup> Whether or not the EU is successful in that respect has also been debated. See for instance K.E. Smith, 'The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence' (2010) 17 *Journal of European Public Policy*, pp. 224–41; J. Wouters, A-L. Chané, J. Odermatt and T. Ramopoulos, 'Improving the European Union's Status in the United Nations and the UN System: An Objective Without a Strategy?' in Kaddous, pp. 45–74.

overrepresentation of the EU and may display a certain fatigue in relation to division of competences between the EU and its members. A 'single, effective, and strong representation that would replace the Member States in the appropriate international fora'<sup>81</sup> might solve a number of legal problems, but will obviously meet with political opposition from Member States that are not ready to give up their seat at the table, irrespective of any competence transfer.

Most problematic perhaps from an international law perspective is the complex division of competences between the EU and its Member States.<sup>82</sup> The starting point is given in treaty law, pursuant to which an international organization may not invoke the rules of the organization as justification for its failure to perform a treaty (Article 27(2), 1986 Vienna Convention). Article 46(2) of the 1986 Convention adds that an international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance. Article 46(3) specifies that a violation is manifest if it would be objectively evident to any state or any international organization conducting itself in the matter in accordance with the normal practice of states and, where appropriate, of international organizations and in good faith.<sup>83</sup> Given the manifold international relations and the dynamic and extensive competences of the Union, the question arises to what extent the division of competences should be objectively evident to other international actors. It has been argued that once this division is made known, the rules are no longer purely internal, but may form part of the international agreements, or at least form a source for interpretation.<sup>84</sup> This would in particular be true in cases where a 'declaration of competence' has been issued by the EU.<sup>85</sup> It remains difficult, however, to argue that other international organizations

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<sup>81</sup> De Baere at 1280, as well as Gstöhl at 403.

<sup>82</sup> See, among the many studies on this topic, recently S. Garben and I. Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing, 2017).

<sup>83</sup> This seems to have been accepted by the European Court of Justice as well. See, for instance, the case C-327/91 *France v. Commission*; ECLI:EU:C:1994:305 and the PNR cases in Joined Cases C-317/04 and C-318/04 *European Parliament v. Council and Commission*; ECLI:EU:C:2006:346.

<sup>84</sup> 'European Union External Action and International Law', *CAVV Advisory Report* No 24, 2014; [http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV\\_Advisory\\_Report\\_EU\\_External\\_Action\\_and\\_International\\_Law\(1\).pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_Advisory_Report_EU_External_Action_and_International_Law(1).pdf).

<sup>85</sup> For an overview of 'Agreements with a declaration of competence by the EU' see the website of the EU Treaties Office: <http://ec.europa.eu/world/agreements/viewCollection.do>. See on the declarations also J. Heliskoski, 'EU Declarations of Competence and International Responsibility', in M. Evans and P. Koutrakos (eds), *International Responsibility: EU and International Perspectives* (Hart Publishing, 2013), pp. 189–212, as well as A. Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press, 2016).

and their members are bound by a division of competences that is based on EU law only and has not somehow become part of the arrangements with other parties.<sup>86</sup>

New questions also arise in EU law. Partly, these are also related to the division of competences, as for instance exemplified by the many issues related to the question of how and to what extent the United Kingdom can continue to participate in international organizations in which it currently mainly acts under the EU umbrella.<sup>87</sup> And, with the increasing external activities of the EU, the question of the possible negative effects of the EU not being allowed at the table of international organizations whose policy areas fall under the EU's exclusive competences becomes more relevant. Having to rely on Member States to handle issues, they are no longer competent to deal with results in complex situations, and perhaps even loyalty problems. This is the reason why for a long time the EU sought to be engaged in a wide range of bodies, and has expressed ambitions to become a member of a number of them or at least aim for an upgraded status.<sup>88</sup> It should be stressed that even when arguments about EU participation are presented as legal disagreements over the interpretation of, for example, the EU Treaties or the constituent treaty of an international institution, there are often underlying political or other reasons behind such disagreements. While the EU has global ambitions and seeks to be active in a broad range of international bodies, this ambition is often curtailed by opposition from the EU Member States or other states in international bodies, who may resist a greater role being played by the EU. With a view to the Court's case law, however, it has rightfully been argued that the Member States must actively promote the membership of the Union in international organizations in areas in which the EU has (or has gradually gained) exclusive competence.<sup>89</sup>

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<sup>86</sup> The 1982 UN Convention on the Law of the Sea (UNCLOS) serves as an example of such an arrangement. Article 2 of Annex IX provides that an international organization may sign the Convention if a majority of its member States are signatories of the Convention. At the time of signature, an international organization is to 'make a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States which are signatories, and the nature and extent of that competence'. Also, the Statute of the International Renewable Energy Agency (IRENA) provides that in the case of any regional intergovernmental economic integration organization, the organization and its member States are to decide on their respective responsibilities for the performance of their obligations under the Statute, adding explicitly that the organization and its member States 'shall not be entitled to exercise rights, including voting rights, under the Statute concurrently'. Furthermore, in their instruments of ratification or accession, such organizations are to declare the extent of their competence with respect to the matters governed by the Statute, and they are to inform the Depositary Government of any relevant modification in the extent of their competence. See De Baere at 1241.

<sup>87</sup> See on the UK and the WTO for instance F. Baetens, 'No Deal Better than a Bad Deal? The "WTO Option" as a Precarious Safety Net for a Post-Brexit UK' [2018] *CMLR*, pp. 133–74. See more generally R.A. Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and Its Member States' [2018] *CMLR*, pp. 101–32.

<sup>88</sup> See 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*, Brussels, 20.12.2012, C (2012) 9420 final.

<sup>89</sup> De Baere at 1240, with a reference to Joint Cases 3, 4 and 6/76 *Kramer and Others* EU:C:1976:114, paras 44–5: Member States were 'under a duty to use all the political and legal

Especially since the financial and other crises which faced the EU, there are considerable questions about the EU's ability to achieve these global aspirations. The Union has had to consider on which institutions and bodies it should focus its attention and diplomatic efforts. The 2016 EU Global Strategy demonstrates the EU's realistic ambitions, focusing on multilateralism in the UN context.<sup>90</sup> The Strategy also emphasizes the importance of intersecting multilateralism, that is, cooperation with other regional orders and organizations.<sup>91</sup> For this reason, this volume also looks at the EU's engagement with other regional bodies, including other European organizations and those in Africa, Latin America, Asia and the Arctic. Given the challenges facing the EU – both internal and external – how does it respond to ensure that it is adequately represented in the web of global institutions? The following chapters will address these issues.

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means at their disposal in order to ensure the participation of the Community in the Convention and in other similar agreements'.

<sup>90</sup> *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).

<sup>91</sup> *Ibid.*, p. 32.