



City Research Online

City, University of London Institutional Repository

Citation: Fahey, E. ORCID: 0000-0003-2603-5300 (2019). The legal effects of the EU's interaction with other international institutions in law. In: Wessel, R. and Odermatt, J. (Eds.), Research Handbook on the European Union's Engagement with International Organisations. (pp. 644-658). Cheltenham, UK: Edward Elgar. ISBN 9781786438928

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/21370/>

Link to published version:

Copyright and reuse: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

City Research Online:

<http://openaccess.city.ac.uk/>

publications@city.ac.uk

In R. Wessel & J. Odermatt (eds.), *Research Handbook on the European Union's Engagement with International Organisations* (Edward Elgar, forthcoming)

Prof. Elaine Fahey

The City Law School, City, University of London

Email: Elaine.fahey.1@city.ac.uk

Keywords: Effects; European Union law; Public international law; institutionalisation; socialisation; IO participation; IO Membership

I. Overview

The EU's role in the international legal order has increased rapidly in terms of conduct, competence, action and practice. It comprises a dynamic and static set of elements (i.e. conduct etc.)- and a complex intersection between them. Yet methodologically there are arguably many ways to examine EU action in the world . The so-called 'Brussels-effect' or Global Reach of EU law is one of the most famous ways of understanding EU action in the world. It has been charted in literature over several decades and was distinctively developed often by US and Swiss-based authors as much as from EU-based authors/ scholars across a range of disciplines, rendering it a rich field of global thought.¹¹ The essence of the phenomenon of the global reach of EU law is that the laws, rules and standards governing the single market constitute homogenous forms of regulation for a vast range of subject areas governing a bloc of half a billion consumers and traders are sufficiently desirable that many third countries adopt them as takers. Alternatively, traders, businesses, companies, associations, and countries receive them or are subjected to them, compelled to or otherwise. However, it is largely a story told *without* reference to international institutions because it is a story of EU interactions indirectly or passively through acceptance and receipt of EU law by countries, markets, traders and associations. Key scholars remain ambiguous about, for example, whether the WTO constrains or facilitate the so-called 'Brussels Effect'.² It demonstrates the need to examine carefully and holistically the nature of the EU's interactions with the global legal order when we reflect on the place of international organisations or institutions therein. It poses the question as to how to understand EU interactions with international organisations as a question of effect in law and how holistic an approach should be. It demonstrates further the direction of focus as a methodological challenge worth exploring.

This chapter explores the form of EU interactions with international institutions in law as multidirectional: inwards, outwards and the in-between. It is a case study of the normative, empirical and descriptive in an effort to engage in holistic reflections. This chapter seeks to invoke to a highly expansive view of a 'legal effect' of the EU in the international legal order to justify the reflection upon an array of actions, practice and activities, of intersecting internal and external facets of EU law and policy.³ This chapter also seeks to reflect upon a broad notion of 'legal effects' in order to consider the EU's international law-making and practice holistically, *normatively, empirically and descriptively*, as

¹ See A. Bradford 'The Brussels Effect' (2012) *Northwestern University Law Review* 1; J. Scott, 'The New EU Extraterritoriality' (2014) *Common Market Law Review* 1434.

² See A. Bradford 'The Brussels Effect' (2012) *Northwestern University Law Review* 1; D. Sinopoli, 'WTO law, EU Extraterritoriality and the Brussels Effect' (Unpublished PhD manuscript, 2018).

³ E. Fahey, 'European Citizens Initiative STOP TTIP Can Proceed Says General Court' (2017) 8 *European Journal of Risk Regulation* 787-790.

broadly as possible and perhaps wider than the conventional view of EU international relations- or at wider than conventional legal views thereof. It does so by focussing on the EU's interactions with international organisations usually omitted in studies of EU interactions with international organisations. It thus adopts a novel approach to the study of EU interactions with international organisations.

This chapter takes a broad perspective on the concept of framing interactions between organisations in a holistic sense- 'inwards out', 'outwards in' and the 'in between'. The chapter examines the idea of an 'effect' in internal law-making and external law-making practice. It argues that the concept of a legal effect needs to be broadly understood and deliberated upon. The chapter examines the inter-relationship between an internal and external effect of interactions with international organisations on the part of the EU. What are the reasons for differences in understanding effects? How is and should a legal effect be understood? Is norm promotion so fundamental or essential? Is an institutionalised understanding of legal effects factually and normatively justified? What is a viable methodology? This chapter aims to frame the term 'effects' as broadly as possible so as to understand actual practice, soft practice, political practice and give a holistic account of law-making. A holistic account reaches for both internal and external elements of an effect. EU law-making practice in its internal laws and external relations components are rarely linked as a spectrum for joined-up analysis.

This chapter does this as follows. *Firstly*, it explores how one means by which the EU interacts with other international institutions is through participation and design with an 'effect' which is 'outwards':- how the EU engages in the global legal order, as a *normative* proposition. Thus, one means by which the EU engages in participation and design in the form of interaction with other organisations and institutions is through institutionalisation, i.e. the creation of new international institutions, depicted here as a form of external engagement, outwards. *Secondly*, the EU engages 'inwards' with other international institutions through incorporating their norms in its law-making, e.g. by referencing them in its law. This takes place even if it is not a member of that organisation nor is technically required to incorporate those norms. This genre of participation is more internalised and 'inwards' in its operation and is more of an empirical study. *Thirdly*, there is descriptively a story of contestation taking place, which is 'in between':-, which is more of a *descriptive* state of affairs, rather than normative or empirical by design and explores tentatively challenges at national and EU level.

The *first* example will be shown to be an 'outwards' example of active participation whilst the *second* will be shown to be an 'inwards' example of interaction. The link *between* the two is explored in the form of reflection upon the EU's participation in international organisations arising in a dispute between the Member States and the EU institutions in litigation before the Court of Justice. The idea of the 'in-between' effects thereof provides a means to explore the interaction between the two, 'globally versus internally.' It is significant as a form of dynamic conflict or struggle between constituencies of the EU multi-layered legal order. It is also significant because it tries to present a novel and holistic view of EU action in the world and enable deeper inter-disciplinary engagement on the EU in the world. It further compliments chapters to the book discussing interaction and effects as one-dimensional ideas, flowing from the EU's interactions with international organisations in a unidirectional or one-way sense only. The case studies considered, thus inwards, outwards and in-between, are reflected upon by way of contrast. They are argued to be diverse yet to also highlight

the multifaceted components of EU action in the world through law. They highlight the need to link the normative, empirical and descriptive contours of legal effects and to engage more robustly with law. It is argued thus that the multidirectional nature of effects is important methodologically to reflect upon and gives a more accurate picture of the complexities of the EU as a global actor-composite, esoteric and incomplete. It is arguably studied in greater detail in political science rather than legal literature although less so with respect to the nuances of law and legal effects.⁴

The use of sources and approaches both 'inside-out' and 'outside-in', plots interactions of the EU in the world within law-making statically and dynamically. The chapter adopts a 'law in context' approach in European Union law, to take into account the multi-disciplinarity of EU law, its highly diverse instruments and processes.⁵ It addresses the law-making process directly by focussing upon active convergence of sources as to how they arise. It also looks at the descriptive components more carefully through analysis and reflection thereof.

This chapter proceeds as follows. It examines the 'outwards' and 'inwards' effects- and their mutual interaction. Section I considers the 'outwards' effects of EU interactions with international organisations, focussing upon institutions and institutionalisation. Section II considers the concept of 'inwards' effects of participation in international organisations in internal law-making, examining how we understand external norms in EU law and the EU's place therein. Section III reflects upon the relationship between 'inwards' and 'outwards' effects, focussing upon litigation in EU law as to participation in international institutions and organisations, followed by Conclusions reflecting on the need for an interdisciplinary, multi-faceted and holistic view of EU action in the world, particularly where it relates to law.

II. Outwards- the normative story

(i) EU Institutionalisation in the global legal order

One way of viewing the EU's commitment to the external multilateral legal order is through its explicit commitment to institutions and developing these institutions in the global legal order through processes of institutionalisation.⁶ The EU is committed in its Treaties to being an internationalist and to pursuing multilateral solutions, pursuant to the well-known provisions of Article 21(3) TEU. Institutionalisation here is understood as the processes of formalisation and stabilisation of procedures, institutional coordination and the ability of individual actors to influence institutional development, through and by institutions.⁷ There is arguably firm evidence that the EU has shown itself to want to have 'outwards effects' in the international legal order not limited to mere participation therein but also to include its active design and its participation therein.⁸ This further indicates that the EU view of outside effects is exceptionally broad.

⁴ E.g. see the chapter of Jorgensen in this volume.

⁵ See Rob van Gestel, and Hans-W. Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 ELJ, 292, 313-6 ('An Agenda for a European Debate'); Tamara Hervey and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011); Rob van Gestel, Hans-W. Micklitz and Miguel Poyares Maduro, 'Methodology in the New Legal World,' *EUI Law Working Paper 2012/ 13*; Ulla Neergaard, Ruth Nielsen and Lynn Roseberry (eds), *European Legal Method* (DJOF 2011); cf 'The New History of EU Law' project, University of Copenhagen available at <<http://europeanlaw.saxo.ku.dk/>>

⁶ See the Introductory chapter to this Volume by Wessel and Odermatt.

⁷ E. Fahey, *Institutionalisation beyond the Nation State: Transatlantic Relations, Data, Privacy and Trade Law* (Springer Law, 2018)

⁸ Fahey, *ibid*, Ch. 1, et seq.

In an era where major parts of the world wish to leave, threaten to leave or even defund international organisations (African Union from the International Criminal Court (ICC), UK from the Council of Europe and European Union, US from World Trade Organisation (WTO) or United Nations (UN)), we may now even be entering some form of grand era of wholesale 'de-institutionalisation', albeit such a claim is difficult to prove or evaluate at this moment in time. The EU by contrast has a long history of supporting the development of new international organisations through institutionalisation. For example, in the European context, the EU has a recent history of promoting and 'nudging' institutional multilateral innovations, from the International Criminal Court,⁹ a UN Ombudsman¹⁰ to a Multilateral Investment Court¹¹ in its efforts to promote internationalisation, accountability, legitimacy and the rule of law as a broad global agenda. The EU was also recently an active participant in the so-called 'mega-regionals', where EU-US transatlantic relations would have been subsumed within a broader geopolitical shift *outside* of the WTO, through 'new' forms of institutional arrangements.¹² Additionally, the EU has acted as a 'cheerleader' for the development of several key international organisations as part of its multilateral agenda, even if not a member e.g. International Labour Organisation (ILO), World Health Organisation or World Intellectual Property Organisation (WIPO).¹³ This external agenda of institutionalisation has had tangible effects upon the EU in the world, where it seeks to join more international institutions and make its external coherence and presence more palpable in law. Many of these institutions in recent times have been developed very prominently with the help of civil society or through innovative transparency and deliberation practices e.g. as to the Multilateral Investment Court.¹⁴ Much controversy may attach to this agenda but it is still of much significance as evidence of the EU pushing for institutionalisation in a period of deinstitutionalisation through multilateralism and 'active global-ness'.

(ii) Institutionalisation and the EU'S Global Strategy for Foreign and Security Policy: a limited future?

The history of the EU's institutionalisation efforts in the global legal order is not necessarily articulated with precision in the Treaties or in law and policy.¹⁵ One good example of this much is the EU's new Global Strategy for the European Union's Foreign and Security Policy. The Strategy and EU's broader agenda is about supporting public international law. This is because it is an agenda which links clearly to the socialisation of the external norms international organisations into its internal laws, discussed next.

⁹ See: International Criminal Court. See *The Rome Statute of the International Criminal Court (1998)*

¹⁰ See: UN Ombudsman. See UNSC Resolution 2083 (2012). Kokott, Juliane ; Sobotta, Christoph, 'The Kadi Case - Constitutional Core Values and International Law - Finding the Balance?' *European Journal of International Law* 2012 p.1015-1024.

¹¹ See: Multilateral Investment Court. See Council of the European Union, 'Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes' 12981/17.

¹² Billy Melo Araujo, 'Setting the Rules of the Game: Deep Integration in Mega-Regional and Plurilateral Trade Agreements and the Role of the WTO' *UCLA Journal of International Law and Foreign Affairs*. 21, 2, p. 101-153 ; Eyal Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law' (2015) 8 *Global Trust Working Paper Series* 1; Sophie Meunier and Jean-Frederic Morin, 'No Agreement Is an Island: Negotiating TTIP in a Dense Regime Complex' in Mario Teló and Tereza Novotná (eds) *The Politics of Transatlantic Trade Negotiations: TTIP in a Globalized World* (Ashgate 2015).

¹³ See C. Kaddous (eds.) *The European Union in International Organisations and Global Governance: Recent Developments* (Hart, 2015).

¹⁴ Commission, 'Concept Paper: Investment in TTIP and Beyond: The Path for Reform' available at <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 30 April 2018.

¹⁵ See G. De Burca, 'Contested or competitive multilateralism? A reply to Julia C. Morse and Robert O. Keohane' (2016) 5(3) *Global Constitutionalism*, 320.

The EU's Global Strategy for Foreign and Security Policy is the most explicit invocation of the term 'global' in the EU's policy making to date and warrants analysis as to the future of the EU's multilateral agenda.¹⁶ The growing prominence of foreign policy is evident within EU law from the new Strategy, which is 60 pages long and reflects the enhanced foreign affairs competences of the EU post-Lisbon, multiples of its predecessors in length.¹⁷ The place of institutions and institutionalisation there is worthy of remark. The central thesis of the Strategy is that the EU will promote a 'rules-based' global order with multilateralism as its key principle and with the United Nations at its core.¹⁸ Guided by the values on which the EU was founded, the Strategy proclaims that the EU is committed to a global order based on international law. As a result, it has a different goal than the Solana Strategy, then concerned to establish the EU as a global player in security in particular, now being about its concrete realisation, internally and externally, and bilaterally and multilaterally. While the EU is 'incontrovertibly a soft power', it has to demonstrate its hard power capabilities.¹⁹ The Strategy has two features of significance from a legal perspective in assessing the global dimension of EU law: inter-connectedness of internal and external policies and flexibility.²⁰ The specificity of the Strategy as to its commitment to a rules-based legal order and institutionalisation processes must be seen as distinctive, i.e. institutions where the EU enjoys a privileged position, United Nations, World Trade Organisation and International Criminal Court. It thus gives prominence to the institutions where the EU enjoys a privileged position.

¹⁶ It follows on from Vice President Mogherini being asked in December 2013, a decade after the adoption of the Solana Strategy to assess the global environment and report to the Council in 2015. Global Strategy for the European Union's Foreign and Security Policy, June 2016.

¹⁷ The EU's Global Strategy remarks that 'we live in a world of predictable unpredictability' p. 46, as a specific reference to the planned plebiscite of Brexit and its impact upon the geopolitical landscape of the world. See S. Blockmans, *Brexit, Globalization and the Future of the EU* (Intereconomics 2016) 4; G. Grevi, 'A Global Strategy for a soul-searching European Union' [2016] European Policy Centre 1; N. Tocci, 'Interview with Nathalie Tocci on the Global Strategy for the European Union's Foreign and Security Policy' (2016) 51(3) *The International Spectator* 1; W. Wagner and R. Anholt, 'Resilience as the EU Global Strategy's New Leitmotif: Pragmatic, Problematic or Promising?' (2016) 37(3) *Contemporary Security Policy* 414; J. Garcia, 'Resilience as the new EU Foreign Policy Paradigm: A Pragmatist Turn?' [2016] *European Security* 1.

¹⁸ E.g. see 3.5.

¹⁹ 'Editorial comments: "We perfectly know what to work for": The EU's Global Strategy for Foreign and Security Policy' (2016) 53 *Common Market Law Review*, Issue 5, pp. 1199–1207, 1203.

²⁰ 'Shared Vision, Common action: A Stronger Europe: A Global Strategy for the European Union's Foreign and Security Policy' (*European Union Global Strategy*, 28 June 2016), available at <https://eeas.europa.eu/top_stories/pdf/eugs_review_web.pdf> accessed 30 April 2018.

The challenge remains as to how the EU will pursue further or deeper institutionalisation through setting up new organisations even in the era of greater hostility to international organisations, e.g. its development of an Multilateral Investment Court. It does not seem that this is an ambition of the Strategy, where no new institutions are planned. The current global apathy to internationalisation may indeed explain this. Nevertheless, the EU still pursues other multilateral agendas e.g. the Paris Accord. It is thus not necessarily obvious from the Strategy how the EU should more generally pursue institutionalisation beyond the State. Similarly, how Brexit will impact upon the EU's hard-fought place in international organisations remains to be seen. Nonetheless, this should not detract from the place of institutionalisation as a distinctive feature of how the EU engages globally and how it may pursue institutions in other domains *outside* of the Strategy. Overall, it is clear the outwards dimension of the EU in the world appears concrete and realisable and there are many examples of its operation in the form of the creation of new international organisations, as a legal effect. To date, clearly there have been important legal effects of the EU's efforts at institutionalisation, where the outside effects show the EU designing the global legal order *through* institutions.

(II) Inwards- the Empirical Story

(i) Place of external norms of international institutions in EU law

While the EU is under an obligation to respect international law in its Treaties pursuant to Article 3(5) TEU, EU law is not particularly explicit about the relationship between international law and EU law and leaves much of the question of incorporation and effects for further development.²¹ Much legal scholarship has traditionally approached this in a court centric way, studying the place of public international law within EU law. It is only recently that legal scholars have sought to take a broader multidisciplinary take on the relationship between law-making and courts.²² EU legislation in the field of Justice and Home affairs drew inspiration for some time from Council of Europe Conventions.²³ Nowadays the European Union wants to lead as an organisation in the international context.²⁴ It thus forms a very different climate for the use of external norms. AFSJ is a useful field of study as a dynamic policy field with internal and external facets as a study of inwards effects of public international law.²⁵ External norms are deployed in most of the 18 AFSJ Directives of the last legislative cycle of the EU, from 2009-2014, broadly interpreted as diverse instruments of public international law. In 18 Directives of the Stockholm Programme legislative cycle *external* norms also played a role in 15 Directives where they are invoked to justify, explain and support new rule-making. It is a clear study of the rising inwards effects of public international law. The AFSJ is a good example of a field with

²¹ Article 3(5) TEU: 'The EU shall uphold and promote... the strict observance and the development of international law'; T. Konstadindes, 'Customary International Law as a Source of EU Law: A Two-Way Fertilisation Route?' [2016] Yearbook of European Law 1; R.A. Wessel and S. Blockmans, 'The Legal Status and Influence of Decisions of International Organizations and other Bodies in the European Union', in P. Eeckhout, M. Lopez-Escudero (Eds.), *The European Union's External Action in Times of Crisis*, Hart Publishing, 2016, pp. 223-248; R.A. Wessel and S. Blockmans (Eds.), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organizations*, The Hague: T.M.C. Asser Press/Springer, 2013.

²² J. Wouters, J. Odermatt, T. Ramopoulos, 'Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law' in M. Cremona & A. Thies (eds.) *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart 2014), 249-279.

²³ See V. Mitseligas, 'The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?' (2009) 34 E.L.R. 523, 525.

²⁴ In line with Article 21 TFEU: 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, COM (2012) 9420 final.

²⁵ E. Fahey 'Joining the dots: external norms, AFSJ directives & the EU's role in the global legal order', (2016) 41 *European Law Review* 105.

significant external influences in law-making and important links to international organisations arising from those external influences warranting exploration.

It is thus instructive to zoom in upon such law-making. For example, the external norms in instruments 'promoted' in the 19 Directives of the AFSJ include two specific 'internal' norms and the remainder are analysed here as 'external' norms: thus the Convention on Mutual Assistance in criminal matters between the Member States of the European Union is an European Union specific instruments and are thus classifiable as an 'internal' instrument.²⁶ The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) may arguably be classified similarly also because the EU has incorporated it into its Charter, even if it has not acceded to it and ECHR caselaw regularly features in the preambles of many new AFSJ directives.²⁷ Alternatively, it may be viewed the closest external norm of the EU to its own legal order. As amended by the Lisbon Treaty, art. 6(2) TEU provides that the European Union "shall accede" to the Convention for the Protection of Human Rights. Despite the CJEU decision in Opinion 2/13, however, its place as part of the general principles of EU law for some time and its relationship to the Charter of Fundamental Rights suggest that it is a de facto internal norm.²⁸

'External' norms found in AFSJ Directives mostly have a much broader membership than EU Member states in all but two instances.²⁹ These norms include the European Social Charter of 1961,³⁰ General Agreement on Trade in Services (GATT),³¹ Economic Partnership Agreement with the Cariforum countries of 2008,³² the UN Convention on the Rights of the Child,³³ First Optional Protocol on the Involvement of Children in Armed Conflict,³⁴ Second Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography,³⁵ Third Optional Protocol to the Convention on the Rights of the Child on a communications procedure,³⁶ UN Convention on the Rights of Persons with Disabilities,³⁷

²⁶28 parties, all European Union Member States (MS): Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union 2000/C 197/01.

²⁷ The governments signatory hereto, being members of the Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (ECHR) available at <<http://conventions.coe.int/treaty/en/treaties/html/Q05.htm>. > accessed 30 April 2018. 28 European Union Member States (MS).

²⁸ See Opinion 2/13 on EU Accession to the ECHR, ECLI:EU:C:2014:2454, confirming its place as an external norm.

²⁹ I.e. the Economic Partnership Agreement with the Cariforum countries and Third Optional Protocol to the Convention on the Rights of the Child on a communications procedure: see below further in the following footnotes for references.

³⁰ 47 parties and 28 European Union MS are parties to the European Social Charter, available at <http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp> accessed 30 April 2018

³¹ 159 members, all 28 European Union MS members, European Union a member and all members of the WTO are signatories to the GATS 1869 UNTS 183; 33 ILM 1167 (1994) available at <https://www.wto.org/english/docs_e/legal_e/legal_e.htm> accessed 30 April 2018

³² 43 parties, 27 European Union MS except Croatia, and European Union are members of the Economic Partnership Agreement available at <<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?redirect=true&treatyId=7407>> accessed 30 April 2018.

³³194 Parties, all European Union MS are Parties to the United Nations General Assembly (UNGA) Convention on the Rights of a Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series (UNTS), vol. 1577, p. 3. available at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-11&article=4&lang=en> accessed 30 April 2018

³⁴155 Parties, all European Union MS are Parties: Optional Protocol on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) UNGA A/RES/54/263 UNTS, vol. 2173, p.222, available at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-11-b&article=4&lang=en> accessed 30 April 2018

³⁵ 167 parties, all European Union MS are Parties: Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (adopted on 25 May 2000, entered into force 18 January 2002) UNGA A/RES/54/263 UNTS vol. 2171, p. 227 available at <https://treaties.un.org/Pages/ViewDetails.aspx?mtdsq_no=IV-11-c&article=4&lang=en> accessed 30 April 2018

³⁶ 6 European Union MS are parties: Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011, entered into force 14 April 2014) UNGA A/RES/66/138 available at <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsq_no=iv-11-d&article=4&lang=en.> accessed 30 April 2018.

³⁷ 174 parties, all European Union MS are parties, European Union has signed and ratified: UN Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNGA A/RES/61/106 UNTS vol. 2515, p. 3 available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=iv-15&article=4&lang=en.> accessed 30 April 2018.

UN Protocol to Prevent, Suppress and Punish Trafficking in Persons,³⁸ ILO Convention concerning forced or compulsory labour,³⁹ Convention relating to the status of refugees (Geneva Convention),⁴⁰ Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse,⁴¹ the UN Convention on the Elimination of all forms of discrimination against women,⁴² the Council of Europe Cybercrime Convention,⁴³ the Vienna Convention on Road Traffic,⁴⁴ the UN Convention against Transnational Organised Crime⁴⁵ and the Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime and on the financing of terrorism.⁴⁶ The Economic Partnership Agreement with the Cariforum countries and Third Optional Protocol to the Convention on the Rights of the Child on a communications procedure are the external norms used which have the smallest membership and demonstrate preference for the use of broadly accepted norms. More detailed examination of the use of the Conventions in AFSJ law is set out elsewhere.⁴⁷ The vast majority of external norms in AFSJ directives involve all Member States as parties. Contrariwise, the European Union is not a party itself to most of the instruments used, arguably because they are multilateral treaties. A small number of the agreements, treaties or conventions used by the European Union in AFSJ Directives have not been ratified by all of the Member States themselves.⁴⁸ The vast majority form instruments where the EU is not a party but where most but not necessarily all the Member States are, mostly for procedural reasons not allowing the EU to be a party thereto or for other pragmatic reasons, such as where all the States are already members.

This trend demonstrates the widespread socialisation of the EU despite technical challenges to its fuller membership. Their broad incidence also indicates a highly active socialisation process, even in a controversial field and an intention to uphold international law. It forms a useful example of the widespread impact of international organisations upon EU law through the UN. Unlike studies looking at the citation and use of public international law in EU law and generally focussing upon the CJEU,

³⁸ 159 parties, 27 European Union MS are parties, except Czech Republic, European Community has signed and ratified it: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted on 15 November 2000, entered into force 25 November 2003) UNGA A/RES/55/25 UNTS vol. 2237, p. 319 available at < https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsq_no=XVIII-12-a&chapter=18&lang=en > accessed 30 April 2018.

³⁹ 177 parties, all European Union MS are Parties: Convention Concerning Forced or Compulsory Labour No.29 (entered into force 1 May 1932) UNTS vol. 39, p. 55 available at < http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312174 > accessed 30 April 2018.

⁴⁰ 145 Parties, all European Union MS are Parties: UNGA Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), UNTS, vol. 189, p. 137. Available at < https://treaties.un.org/paques/ViewDetailsII.aspx?src=TREATY&mtdsq_no=V-2&chapter=5&Temp=mtdsq2&clang=en > accessed 30 April 2018.

⁴¹ 31 parties, 18 European Union MS are Parties: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse CETS No. 201 available at < <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=1&DF=&CL=ENG> > accessed 30 April 2018

⁴² 188 Parties, all European Union MS are Parties: UN Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) UNTS vol. 1249, p. 13 available at < https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-8&article=4&lang=en > accessed 2017.

⁴³ 66 parties, 28 European Union MS: Council of Europe Convention on Cybercrime CETS No. 185 available at < <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=&DF=&CL=ENG> > accessed 30 April 2018.

⁴⁴ 73 parties, 23 European Union MS are parties: UNGA Vienna Convention on Road Traffic (adopted 8 November 1963) available at < http://www.unece.org/fileadmin/DAM/trans/conventn/CP_Vienna_convention.pdf > accessed 30 April 2018. Its membership is broader than the Geneva Convention on Road Traffic of 1949 (96 parties, 22 MS).

⁴⁵ A/RES/55/25. 188 parties, European Union is a signatory, 26 MS are Parties: UN Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) UNGA A/RES/55/25, UNTS vol. 2225, p. 209 available at < https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsq_no=xviii-12&chapter=18&lang=en > accessed 30 April 2018.

⁴⁶ 28 European Union MS are parties; European Union is a signatory: Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism CETS No. 198 available at < <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=198&CM=8&DF=11/10/2013&CL=ENG> > accessed 30 April 2018.

⁴⁷ Fahey ***

⁴⁸ E.g. the Vienna Convention on Road Traffic.

when we consider the influence of external norms from a particular dimension or interaction as 'effect' we see the broad influence of external norms not limited to the EU itself or one specific court. It provides strong evidence of socialisation through and by external norms even in a highly complex and sensitive legal domain as strong empirical inwards reception of external norms in the AFSJ. It is a very specific field with much openness to external norms in the AFSJ. It is a very specific field with much openness to external norms. It is thus not easily viewed a widespread but still is an important trend in the EU's most sensitive field.

The next section explores the dynamic between the inside out and the outside-in. It considers what alternative means are possible to view this phenomenon. It seeks to look beyond the EU as an 'internal' perspective and examines the broader 'external' or 'international organisation-centric' perspective. The account next turns to the final element of EU interaction with the global legal order reflected on here, the 'in-between' dimension. It is the descriptive element of interaction, where factual contestation of EU interaction and 'effect' is challenged and at issue and thus a useful way to 'round off' the analysis.

III. The 'In-Between' - the Descriptive Story

Contestation as to the participation of the EU in international organisations

There are important issues surrounding the dynamic of 'inwards' and 'outwards' effects that are worth exploring. This chapter thus next reflects upon the relationship between 'internal' and 'external' effects of EU interaction with the global legal order and how the inter-relationship may arise in the 'in between' space. It is useful to recall that the EU has had a very limited formal impact in the global legal order with respect its membership of international organisations in the post-Lisbon period, and arguably limited enough formal 'effects'.⁴⁹ The barriers that the EU faces in developing its status in international organisations have many internal and external dimensions, both within the EU itself and the targeted organisation.⁵⁰ They do not necessary always arise with the same level of particularity or direct salience. It is a factual and rather descriptive state of affairs which is outlined here and thus differs from the normative and empirical reflections above.

There has been very little case law within EU law itself on the interaction of the Member States and the EU in international organisations where the EU is *not* a member. Until recently, Article 218(9) TFEU was understood to apply to the procedures surrounding the negotiating of international agreement *and* the suspension of the aforesaid and more specifically, the positions adopted on the EU's behalf in bodies established by an agreement.⁵¹ Beyond this, the duty of cooperation generally governs unilateral action of the Member States. Existing salient case law on international organisations that the EU is not part of, while numerically small, is perhaps all the more esoteric because it concerns principally the International Maritime Organisation (IMO), a specialist UN agency in maritime affairs which does not allow an international organisation to join and of which all EU Member States are

⁴⁹ See Henri de Waele and Jan Jap Kuijper (eds), *The Emergence of the European Union's International Identity – Views from the Global Arena* (Brill 2013).

⁵⁰ *Ibid.*

⁵¹ Inge Govaere, 'Novel Issues Pertaining to EU Member States Membership of other International Organisations: the OIV case' in Inge Govaere and others (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers 2013), 225; E. Fahey, *The Global Reach of EU Law* (Routledge, 2016), Ch. 2.

members.⁵² This case law mostly has as its common denominator a ratio as to the duty of sincere cooperation on Member States with respect to the *acquis*. However, recent case law has stretched the limits of Article 218(9) TFEU.⁵³ Membership is a useful touchstone of the 'in between' because it targets centrally the issue itself. The decision of the Grand Chamber of the CJEU in *Germany v. Council (OIV)* grants considerable powers to the EU to 'develop' itself in international organisations and act so as to protect its *acquis* where the EU has no formal status and not all Member States are members-yet where EU law still prevails.⁵⁴ It is argued to constitute a distinctive example of the tension between outwards and inwards action *through* EU law. The case is distinctive as a useful example of interaction of inwards and outwards dimensions of the definition of effects.

Germany v. Council concerned resolutions that had been adopted on behalf of the EU in the International Association for Vine and Wine (OIV), an intergovernmental organisation with competences in the areas of vines, wines and related products, and the provisions of Article 218(9) TFEU as to the adoption of a position for the Union.⁵⁵ The EU was not yet a member, nor were all of the Member States and the EU had not acquired any special status in the OIV. The Council had not yet given the Commission authorisation to negotiate accession to the OIV. Secondary law had previously introduced references to OIV resolutions and it raised the question of their 'internal' effects as 'external norms'. It thus raises the question of the sensitivity of the CJEU to 'effects' of external norms. Moreover, previous resolutions adopted by the OIV were not classified as relevant to the EU's *acquis*. For over a year after the entry into force of the Treaty of Lisbon, Commission proposals for a Union position in the OIV were rejected by the Member States. The Member States in 2011 adopted resolutions by consensus, which were deemed to affect the EU's *acquis*, and under pressure of infringement proceedings, a proposal was adopted with four Member States voting against it and one abstaining. A Council decision was then adopted by qualified majority on the basis of Article 43 TFEU as to the common agricultural policy, in conjunction with Article 218(9) TFEU, for the resolutions to be passed and certain Member States voted against it, including Germany. Germany sought the annulment of the decision on the basis that the latter was not the appropriate legal basis and argued that it could not be used where the EU was not a member to the organisation. It also argued that the article presupposed a binding act, with legal effects, which according to Germany, was not the case for an OIV resolution. The Grand Chamber of the Court of Justice found that the wording of Article 218(9) TFEU was not limited to the negotiation and conclusion of agreements.⁵⁶ The resolution decisively influenced EU law because it related to the common organisation of wine markets, which fell under the Common Agricultural Policy. As a result, the EU was entitled to establish a position in light of their direct impact on the EU's *acquis* and the OIV decision had legal effect in EU law. The only case cited in the entire decision of the Grand Chamber decision is *Commission v. Greece*.⁵⁷ However, as the duty of sincere cooperation does not feature in its reasoning, it renders it less convincing to support this construction of the application of Article 218 TFEU. The technical and even procedural nature of the decision should not emasculate its result, which puts significant obligations upon

⁵² See <<http://www.imo.org/en/Pages/Default.aspx>> accessed 30 April 2018. Case C-308/06 *Intertanko* EU:C:2008:312 57 [2008] ECR I-4057. See also the ILO Convention to similar effect.

Case C-188/07 *Commune de Mesquer v Total France* EU:C:2008:359 [2008] ECR I-4501.

Case C-45/07 *Commission v Greece*, EU:C:2009:81 [2009] ECR I-701.

⁵³ See also Opinion 1/13 (Child Abduction) EU:C:2014:2303 [2014] ECR I-000.

⁵⁴ C-399/12 *Germany v Council* EU:C:2014:2258 [2014] ECR I-000.

⁵⁵ <<http://www.oivint/oiv/info/enmembresobservateurs?lang=en>> accessed 30 April 2018. By 2014, there were 21 EU Member States and 46 Member States, marginally more than at the time of the litigation

⁵⁶ Para 54.

⁵⁷ Case C-45/07 *Commission v Greece*, EU:C:2009:81 [2009] ECR I-701.

Member States, not limited to or even based on the duty of cooperation.⁵⁸ The decision amounts to a very questionable extension of EU competence through the procedural terms of Article 218 TFEU.⁵⁹ *Germany v Council (OIV)* is arguably an important example of 'weak' judicial review of external action giving rise to EU 'global reach' because the decision appears to give the EU considerable powers in a broad array of international organisations where the EU is not yet a member. It reflects the fluidity of the construct of competence and the difficult place of court-led jurisdiction in external relations. Similarly, the case is far from a perfect example of external competence intersecting with practice. Yet it should remind us of the challenging contours of the 'in-between' and the difficulty of changing the status quo.

The case has received modest scholarly critique and limited inter-institutional critique. Its esoteric nature could not be more apparent. And yet such weak judicial review of the 'in between' appears to do little for the social legitimacy of the EU as an evolving entity in the global legal order. There are few incentives in EU international relations for a broader diversity of litigants arguably to challenge the in-between. Member States alone are incentivised to litigate yet may not wish to do so for various reasons. It could bring into sharp focus the distinction between blocs of countries, large versus small states or other constellations.⁶⁰ The juridification of the 'in between' is not the only way yet there are very few cases to litigate its contours and so it is a very limited and arbitrary snapshot. Still, it provides a very real case study of change in action. For espace reasons this specific examins has been focussed upon. However, going forward, there are a range of possible examples likely to emerge. For example, it may be the case that the new era of preferential trade agreements post-Lisbon comprising a broad range of regulatory cooperation bodies generates further case law on the parameters of delegations of authority in other parts of Article 218 TFEU.⁶¹ This may generate perhaps a different range of litigation and a broader range of litigant as to aspects of EU and Member State participation in transnational entities. It may be through court-centric methods that the in-between becomes more apparent and real.

Conclusions

The three elements explored here, outwards, inwards and the in-between, focused upon the normative, empirical and descriptive content of EU action in the world, through the broadest understanding of a legal effect. A legal effect is, as this account demonstrates, multifaceted. As has been shown here, the *outwards* dimension of EU action in the world is well exhibited through the EU's institutionalisation attempts. The EU's Strategy does not necessarily give a flavour of the form of activities but is clear that the EU's multilateral agenda is a cornerstone for its State-like behaviour in the world. The effects are thus powerful and realisable where the EU achieves concrete outcomes.

The *inwards* dimension thereof suggest a similarly vibrant and dynamic effort to socialise the EU in the global legal order and incorporate its norms. The effects are more complex and not so realisable

⁵⁸ See Govaere, who describes this omission as 'illogical': above, 238.

⁵⁹ Ibid, 225-243.

⁶⁰ The EP rarely litigates international relations, even now with considerably more powers to defend : E. Fahey 'Between One-Shotters and Repeat Hitters: A Retrospective on the role of the European Parliament in the EU-US PNR Litigation' in Fernanda Nicola & Bill Davies (eds.) *EU Law Stories* (CUP, 2017).

⁶¹ See W. Weiss, 'Delegation to Treaty Bodies in EU Agreements: Constitutional Constraints and Proposals for Strengthening the European Parliament a' *European Constitutional Law Review* (forthcoming).

directly or immediately but still are indicative of practice. The *'in-between'* is more nuanced but suggests significant fundamental conflict on the notion of effects, contestable and challengeable at Member State level. The case studies considered by way of contrast are diverse yet highlight the multifaceted components of EU action in the world through law. They highlight the need to link the normative, empirical and descriptive and to engage more robustly with law and its multi-faceted role. It is an important methodological point to reflect on, as to how to engage with the multidirectional nature of EU interactions with international organisations, which this account has sought to wade into, and requiring doubtless further development.

As the Introduction to this book also explains, the EU's action on the global stage is not fully accepted or understood as of yet. The case studies developed in this chapter overall aim to draw together an idea of what is meant by a holistic understand of EU interactions with international organisations. It is of significance that such casestudies draw attention to a bigger picture, beyond the classical 'Global Reach of EU law' storytale. It draws attention to the place of international organisations in understanding the global reach of EU law in its many nuances. As a contribution, it aims to provoke a future research agenda on the gap between legal, political science, international relations and political economy in particular of EU action in the world, which is dynamic and ongoing and in need of further reflection. Even amongst such approaches, substantive differences exist as to the place of law-making and courts therein. Still, there are gaps even within this form of holistic methodology e.g. as to the place of the CJEU, which underscore the need to reflect upon a holistic future agenda.