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# The European Union's External Action and International Law: A View From the Outside

Andrea M. Pelliconi\*, Jed Odermatt\* and Ramses A. Wessel\*\*

## Abstract

This paper provides a summary of the workshop 'The European Union's External Action and International Law: A View From the Outside' jointly hosted by the ESIL Interest Group 'EU as a Global Actor' and City Law School, International Law and Affairs Group (ILAG).

**Keywords:** European Union, International Law, Economic Law, Fundamental Rights, International Organisations.

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## Introduction

As the European Union's external action continues to expand and evolve, this raises ever more questions about how such practice fits within the state-centric system of international law. Some practices in the EU's external action have been criticised as examples of 'European exceptionalism', in which the EU receives various exceptions from its international partners.<sup>1</sup> The EU's external relations have also been criticised in terms of failing to effectively promote European values seeks in the fields such as human rights or migration policy. International lawyers have also pointed to fields of EU action that may violate international law.

Much of the debate and literature about the EU's external action has come from an 'inside' perspective, that is, from experts in European studies and EU law. The study of the EU's external action, which examines how the EU engages with the 'outside' world of other states and institutions, has shown less reflection on how this behaviour is viewed, accepted and understood from the 'outside'. The aim of the workshop, held on June 12, 2020, and hosted by the International Law and Affairs Group (ILAG) of the City Law School and the ESIL Interest Group on the EU as a Global Actor, was to explore some of these outside perspectives. The workshop involved sixteen panellists and six keynote speakers and a range of different viewpoints from the 'outside' were represented. External approaches that emerged during the event include a variety of academic disciplines, geographical regions and legal specialisations.

The first session of the workshop was chaired by Jed Odermatt (City Law School, City, University of London, UK) and Ramses A. Wessel (Faculty of Law, University of Groningen, The Netherland) and focussed on the EU and Global Values. Vassilis Pergantis (Aristotle University of Thessaloniki, Greece) discussed the relationship between the Court of Justice of the EU and the European Court of Human Rights and the challenges faced to effectively conceptualize the systemic interaction between the European Union system and the European Convention of Human Rights, beyond the *Bosphorus* doctrine. Birgit Hollaus (Vienna University of Economics and Business, Austria) discussed the potential negative impacts of the emerging EU practice of claiming 'special treatment' in the facilitative procedures of compliance mechanisms in Multilateral Environmental Agreements. Reuben Wong (National University of Singapore) examined the clash between normative, market and environmental power narratives in the implementation of the EU's palm oil policy in Southeast Asia.

The second session was chaired by Melanie Fink (Leiden University, the Netherlands) and

<sup>1</sup> See T. Isikel, 'European Exceptionalism and the EU's Accession to the ECHR', (2016) 27 *EJIL* 3, p. 566; M. Ličková, 'European Exceptionalism in International Law', (2008) 19 *EJIL* 3, p. 465.

focussed on the EU and International Organizations. Jorg Polakiewicz (Council of Europe, Strasbourg, France) provided an insightful analysis of the EU's external action from the perspective of the Council of Europe. Cornelia Klocker (University of Konstanz, Germany) explored the limits of the EU-UN partnership in the EU military operations under the Common Security and Defence Policy (CSDP) mandate, in the light of the prohibition of the use of force. Tamás Molnár (European Union Agency for Fundamental Rights, Vienna, Austria) reviewed the perceived role of the EU during the intergovernmental talks negotiating the UN Global Compact on Migration.

Tamás Molnár also chaired the following session about the EU and International Economic Law. David Collins (City Law School, City, University of London, UK) provided an insight on the Canadian perspective about the process of negotiation with the EU in relation to Trade Agreements. Katariina Särkänne (University of Eastern Finland) discussed the relationship between international investment law and EU law in the work of arbitral tribunals in cases concerning international investments. Emilija Leinarte (University of Cambridge, UK) discussed the principle of independent responsibility of the EU and its Member States in the international economic context.

The fourth session explored perspectives on the EU and Other Regions and was chaired by Christine Kaddous (University of Geneva, Switzerland). Rachel Frid de Vries (Ono Academic College, Israel) criticised the way EU Courts apply public international law in matters relating to trade with disputed territories, with particular regard to the Israeli point of view. Jamile Bergamaschine Mata Diz (Universidade Federal de Minas Gerais, Brazil) discussed the relationship between Mercosur and the EU and the possible scenarios for ongoing and future negotiations. Yuliya Kaspiarovich (University of Geneva, Switzerland) compared the EU's Brexit institutional arrangements with the UK and the arrangements in place with Switzerland.

Anne Thies (University of Reading, UK) chaired the last session of the workshop, focussing on the EU and International Law. Mark A. Pollack (Temple University, Philadelphia, US) observed the similar patterns of American 'New Sovereignism' and European 'New, New Sovereignism' and the EU's protective approach with its domestic legal order. Jenny Poon (University of Western Ontario, Canada) discussed non-refoulement obligations in EU third country agreements under international law. Merijn Chamon (Maastricht University, The Netherlands) addressed the EU's contribution to the development of international law in the field of the provisional application of treaties. Lastly, Teresa Cabrera (University of Amsterdam, The Netherlands) addressed the EU's contribution to such development through the lenses of the International Law Commission and its 2018 Conclusions on Customary International Law.

## The importance of external perspectives and aims of the workshop

One of the aims of this research is to bring together different parts of the study of EU external relations. EU external relations is often discussed in terms of a particular policy field. The EU's external action is examined in terms of its role in the field of trade, investment, security, human rights, climate change, and so on. This study seeks to bring together these disparate parts, overcoming this compartmentalized approach. The issues dealt with in the study may appear disparate, but they are brought together by a similar methodological approach, one that aims to take into account issues and challenges that may be overlooked. By bringing together studies from various parts of EU external action, the study can also help reveal patterns that may not be revealed through a sectoral approach.

Another aim of the project is to broaden the range of issues and concerns that are debated. A textbook on EU external relations law may give the impression that issues like the balance of competences or the appropriate legal basis for decisions, are the most important legal issues in this field. While this may be the case from the perspective of EU law, these issues may be less important for those studying EU external action from an outside perspective. 'Foreign relations law' is understood as "the domestic law of each nation that governs how that nation interacts with the rest of the world".<sup>2</sup> This can include legal questions such as the authority of actors to engage in foreign policy, or the role of the courts in reviewing foreign policy decisions. It is understandable, then, that the study of the EU's external relations law would similarly focus on the internal issues, such as the allocation of responsibilities between the EU institutions or the powers of the EU and the Member States. Yet these internal issues for the EU and Member States can have important effects that are relevant for 'outside' actors and the international system in which the EU operates. As Bradley explains, there is a link between a state's foreign relations law and the content and operation of international law: "Foreign relations law can influence how nations form treaties and what they agree to in treaties, and it can also affect the state practice that forms the foundation for rules of customary international law."<sup>3</sup> As an illustration, to understand US foreign relations law by focussing on the internal practice, without also learning how this policy is understood and received outside, would only present part of the picture. Indeed, the US is often criticised for exceptionalism in international law. However, it has been pointed out that the US is not alone in this regard, and the Union

<sup>2</sup> C. Bradley, 'What is Foreign Relations Law?' in C. Bradley (ed) *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford, Oxford University Press, 2019).

<sup>3</sup> *Ibid.*

has also been discussed in such terms.<sup>4</sup>

A number of studies have sought to address the international law aspects of the EU's external relations. These studies include *The European Union as an Actor in International Relations*;<sup>5</sup> *International Law Aspects of the European Union*;<sup>6</sup> *International Law as Law of the European Union*<sup>7</sup> and *The EU's Role in Global Governance: The Legal Dimension*.<sup>8</sup> These studies bring together voices from different legal disciplines and backgrounds. Yet much of their aim is to address the internal legal issues faced by the EU and its Member States. In some cases, they aim to understand how to make EU foreign policy more effective, or to trace how the EU can 'export' its values.

Studies on EU external relations law tend to be written by experts in EU law, and primarily for a European audience. Again, this is understandable, especially given that EU external relations law can be a complex and evolving field of law. Studies on the EU's external relations also tend to present the EU as having a positive role in the world, emphasising, for example, its role in promoting multilateralism or 'global values'. Criticism of the EU's external action tends to be about making the EU more effective. Studies from an outside perspective can help to address this by including a broader range of perspectives and viewpoints. Some scholars have noted this emphasis on internal issues:

“The existing EU literature is mostly devoted to the study of the EU's internal legal framework. As a result, analysis of the EU's place in the international legal arena tends more often than not to be limited to the rules governing the EU's external relations.”<sup>9</sup>

The study of EU external relations, moreover, is no longer a niche discipline, of interest to a limited number of legal scholars in the EU. As the EU's external action develops, the law governing the EU's external action has received greater attention from the 'outside'. This project aims to address these issues by examining the outside perspective in the following areas: EU and Global Values; EU and International Organizations; EU and International

<sup>4</sup> S. Safrien, 'The Un-Exceptionalism of U.S. Exceptionalism', (2008) 41 *Vanderbilt Journal of Transnational Law* 5 p. 1307.

<sup>5</sup> E. Cannizzaro (ed), *The European Union as an Actor in International Relations* (The Hague, Kluwer Law International, 2002).

<sup>6</sup> M. Koskeniemi (ed), *International Law Aspects of the European Union* (The Hague, Kluwer Law International, 1998).

<sup>7</sup> E. Cannizzaro, P. Palchetti and R.A. Wessel (eds), *International Law as Law of the European Union* (Leiden, Martinus Nijhoff, 2011).

<sup>8</sup> B. Van Vooren, S. Blockmans, J. Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension*, (Oxford, Oxford University Press, 2013).

<sup>9</sup> Book Review, 'Kronenberger, Vincent (ed.). *The European Union and the International Legal Order: Discord or Harmony?* The Hague: T.M.C. Asser Press. 2001' 14 *European Journal of International Law* (2003) p. 1051.

Economic Law; EU and Other Regions; EU and International Law.

## Summary of the main findings of each session

### EU and Global Values

The EU has long promoted itself as a normative power and its foreign policy goals include objectives related to the protection of human rights and global values. Yet the idea that the EU promotes a universal common good has always been contested. There is a constant tension between promoting global values and pursuing other foreign policy objectives.

As a consequence of its legal specifics, the EU has regularly requested special treatment in external judicial and non-judicial control mechanisms, thus undermining their institutional and substantial role. An example of special treatment in judicial mechanisms is represented by the relationship between the EU system and the relative regional human rights dispute settlement body.

The special position of the EU within the scope of the European Convention of Human Rights (ECHR) has been criticised by Pergantis, who discussed the challenges faced by the European Court of Human Rights (ECtHR) in its case-law on mutual trust. Pergantis first presented the so-called *Bosphorus* doctrine<sup>10</sup> of presumption of “equivalent protection” of ECHR rights by the EU, even though the EU is not a party, implemented by the ECtHR judgments concerning the responsibility of EU Member States for acts undertaken as a result of their membership to the EU, based on the principles of mutual recognition and mutual trust. Pergantis particularly focussed on the requirement that a State is acting within its strict obligations stemming from its membership to the EU for the doctrine to be activated. He showed that, in some cases, the interaction of the principle of mutual trust with the equivalent protection doctrine creates a “double presumption of compliance” with fundamental rights in favour of the respondent State, thus rendering the victim’s claim against that State almost impossible to be upheld by the ECtHR. Pergantis then argued that more recently, the ECtHR is hesitantly attempting to ‘recalibrate’ this approach by adopting a new jurisprudential strategy in its decisions by shedding those cases, where the implementation of a strict EU obligation was involved, as ones where the respondent State supposedly enjoyed a margin of appreciation, and *vice versa*. He argued that this approach, albeit more coherent for human

<sup>10</sup> European Court of Human Rights, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [ECtHR 2005] App. No. 45036/98, Judgment of 30 June 2005.

rights protection, completely upends the logic and functioning of the *Bosphorus* doctrine exacerbating its already serious inconsistencies. Finally, Pergantis argued that the ECtHR has recalibrated the equivalent protection doctrine and built a new layer of 'blind trust' towards the CJEU – an approach that entails many dangers. Ultimately, in Pergantis' view, the attempt of the ECtHR to accommodate the specificities of the European Union in its judgements is far from satisfactory and it poses the risk of undermining human rights protection from victims' perspective.

Hollaus criticised the special treatment somehow accorded to the EU in non-judicial compliance mechanisms, in particular ones on international environmental law. Hollaus argued that the EU appears to understand these mechanisms as a threat to its autonomy than external judicial control mechanisms, as it is demonstrated by many examples. She claimed that due to this defiance, the EU's participation in compliance mechanisms is increasingly characterised by EU-specific arguments seeking to warrant special treatment for the EU. Such an approach to the participation has the potential of disrupting constructive dialogues and undermining mechanisms' effectiveness. Hollaus also argued that the misunderstanding on these mechanisms' intrusiveness on the EU legal order's autonomy is premised on wrong assumptions, as the legal effects of non-compliance decisions are limited to the internal level. She suggested that the EU should embrace the potential of compliance mechanisms in order to underline its own credibility as an international actor in environmental matters, and to strengthening global compliance, to the benefit of all treaty parties, including the EU.

The proposed solution would also increase the perceived role of the EU as the leading entity in matters of environmental protection, fight against climate change and deforestation. This reputational advantage would also translate in higher trust by partners and would benefit commercial and financial relationships. The importance in trust-building efforts has also been underlined by Wong, who discussed the clashing narratives of the EU in its environmental and trade policies with ASEAN countries. He highlighted the existing developmental tensions between economic growth and sustainability and recalled that palm oil remains a socially and economically essential industry of many ASEAN nations. He recalled that South East Asian nations have undertaken structural adjustment in their economies towards market liberalisation and export orientation, in order to align with international and European requirements. He also underlined how palm oil-producing countries within the region have made substantial efforts toward sustainability, wildlife conservation, reduction of emissions and deforestation. Nevertheless, European narratives on sustainability and environment fail to take into consideration these progressive improvements and risk to heavily impact ASEAN countries' reputation and economies, disregarding not only their developmental needs, but

also evidences that contradict EU's narratives. In Wong's opinion, international standards in fields such as market, human rights and environment owe much to European views and tend to disregard other countries' perspectives. He showed how the European normative, economic and environmental narratives are often conflicting and somehow contradictory, and risk to undermine the climate of mutual trust and cooperative attitude that it is necessary to achieve both developmental, economic and sustainability goals.

### **EU and International Organizations**

The EU not only has foreign relations with states, but also engages with international organizations and institutions. This part turns to the EU's relationship with other organizations. Much of the research in this field has examined how the EU may exert influence within these organizations, and how the EU's representation and participation can be more effective. This poses challenging legal issues for other international organizations, which often have to accommodate a non-state (the EU) in a state-centric system. As the EU engages with institutions such as the United Nations and the Council of Europe, it is questioned what legal challenges are faced by those institutions, and how should these relationships develop.

In the previous section, Pergantis discussed some aspects of the relationship between the EU and the ECtHR and the ECHR's rights. The institutional role of the EU in the Council of Europe was addressed in this second session by Polakiewicz. While recognising, on the one hand, the joint effort of these two systems to achieve greater unity in the region of Europe through respect for the shared core values of pluralist democracy, human rights and the rule of law, Polakiewicz underlined the concerns raised by non-member states of the EU about the impact of EU law and policies on the Council of Europe's standards. In his view, the Council of Europe and the EU have a shared responsibility for upholding the effectiveness of their respective frameworks and ensuring that any overlapping competences in this dual system of rights do not create conflict. He argues that the existing cooperation must be strengthened through a more rational, rule-based approach. In particular, he suggests that the two systems should jointly agree on a series of basic principles on treaty-making process providing for horizontal application by the introduction, for example, of voting and speaking rights, reporting and financial arrangements. He also suggests that the EU's participation and financial contribution to monitoring follow-up should always be considered on a case-by-case basis, taking into account the specificities of each mechanism.

Besides the one with the Council of Europe, another crucial relationship for the EU is the one with the United Nations (UN). Klocker commented on this partnership focussing on their policies on international peace and security and relative military operations. She recalled that

in the UN system, the UN Charter has precedence over any other obligations UN member states might have arising from international agreements and the Security Council is recognised as the key institution tasked with the maintenance of international peace and security. Until today, the Security Council has given prior authorisation to all the extra-territorial military missions brought forward by the EU, to be conducted under its Common Security and Defence Policy (CSDP). However, in 2015 the EU established the military mission Operation Sophia in the Mediterranean Sea without prior Security Council authorisation. Klocker argues that this single deviation from the EU's prior practice and must be considered as an episodic exception. This interpretation is confirmed by the suspension of Operation Sophia and by the establishment of the new Operation Irini which bears prior Security Council authorisation and a carefully delimited mandate. Klocker also mentioned the possible challenges that might remain from this episode, in particular regarding the increasing tasks and responsibilities taken on by EU law enforcement agencies such as Frontex in the context of migration and human trafficking, whose scope operates between the blurred lines of border security and military operations. In conclusion, in Klocker's view, future scenarios are likely to envisage the maintenance of the established practice of cooperation between the EU and the UN Security Council in these issues.

In the last part of this session, Molnár scrutinised the role played by the EU in the drafting and adoption of the UN Global Compact for Safe, Orderly and Regular Migration (GCM) in December 2018. After recognising the EU's growing role as a major actor in global migration governance, Molnár analysed the preparatory and intergovernmental talks of the GCM to assess the degree to which the EU influenced negotiations and their outcome, and the reaction of the international community to the EU's external action in this matter. He argues that despite the presence of procedural constraints and the lack of full consensus among Member States regarding some issues, the EU exercised a tangible influence from the consultation phase until adoption of the soft-law instrument in December 2018. It emerges from Molnár's study that the EU has been successful in advancing its own priorities and its suggestions were widely endorsed in the final text of the GCM (e.g. rules on human rights and refugees protection, root causes such as climate change, natural disasters and man-made crises, pathways for legal migration and inclusion, return of irregular migrants, governance and border management). However, due to the lack of transparency in the phases that followed the preliminary one, whether this success depends on the willingness of the international community to elevate European values and normative standards on migration to the global level, or merely on the EU's strategic capacity, remains an open question.

## EU and International Economic Law

The EU has also been increasingly active in the development of international economic law. Trade agreements concluded by the EU, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA) have been shaped, in part, by internal legal issues within the EU. Investor-State arbitration tribunals have also faced legal questions about the nature of the EU and EU law, in particular the 'autonomy' of the EU legal order. Such practice also sheds light on how the EU is viewed from the 'outside'. Indeed, many states and regions will mostly engage with the EU through economic relations.

The first panellist of this section, Collins, provided a 'Canadian perspective' on the EU-Canada trade agreement (CETA) and its negotiation process. Collins discussed, using examples from talks with practitioners and officials, the different interests and perspectives from the EU and Canadian sides. He observed that one of the problems was the change in EU competencies during the long negotiation, as foreign investment became absorbed by the competency of the Commission rather than the Member States. This scenario was not unfamiliar to Canadian negotiators, used to reflecting issues of concern to the Federal government and the various provinces. Canadian negotiators were also mindful of the realistic objectives of an FTA – they knew in advance that they would never achieve the level of market access available within the EU's internal market, but also that certain barriers could be removed, such as those precluding Canadians from delivering certain services. The CETA negotiations were conducted on the understanding that the EU is a complex organization with many moving parts and with that in mind, it was understandable that the negotiations proceeded in fits and starts.

Särkänne discussed the relationship between international investment law and EU law. How is the EU viewed by such tribunals, and how do they deal with the nature of EU law? According to Särkänne, although arbitral tribunals have recognised the EU legal order to a certain extent, this recognition has not, however, been consistent, and examples can be found from both recognition and rejection of the relevance of EU law. Särkänne argued that international arbitral tribunals have prioritized international law; above all, they have not accepted that EU law could render their jurisdiction invalid, unless this 'EU exception' appears to be valid also under international law. She showed by concrete examples that tribunals appear unanimous in accepting the relevance of substantial EU law to decide on the merits of international investment matters, but clearer rules are needed in such circumstances. She argued that the 'hybrid nature' of the EU is problematic for a certain application of international rules and calls for the implementation of binding instruments of international law regulating the relationship between EU law and international investment law.

Leinarte discussed the rules for allocation of international responsibility between the EU and its Member States and the principle of independent responsibility of in the international economic context. She argued that international dispute-settlement practice does not support the competence-based approach which calls for the transfer of international obligations within an internal legal order. In particular, she recalled the principle of non-transferability of international obligations, according to which when States create international organizations and transfer to them part of their sovereign powers, they do not transfer their responsibility to the organisation. The rule of non-circumvention prevents States from circumventing their obligations by acting indirectly and prevents both States and international organisations, including the EU, from arbitrarily transferring their joint obligations in accordance with their internal division of powers. Therefore, States are not relieved from their obligations solely on the basis that they were merely carrying out the decisions of an international organization. At the same time, organizations are also accountable when they make binding decisions on their members and they carry out unlawful activities. In cases when both a State and an international organization assume international obligations, such as under mixed agreements, they are both bound individually by all obligations under that agreement, unless explicit exceptions. She concluded that the EU and its Member States are independently and individually responsible for their joint obligations, irrespective of their internal division of competences.

### **EU and Other Regions**

The EU's external relations will be perceived differently in various geographical regions. Some regions may view the EU as a form of regional integration whose model can be adapted and reproduced. European States that are not members of the EU, such as Switzerland or Norway, will also have particular perspectives, based on their close proximity and economic ties to the EU. This part of the study seeks to understand some of the various issues that arise for certain countries and regions.

Frid de Vries problematised the European Court of Justice's application of public international law to cases concerning international trade agreements with effects on disputed territories, underlying a certain degree of inconsistency in its case-law, comparing the Court's approach towards Israel and disputed territories in its area on the one hand, and towards other disputed territories such as Western Sahara, Northern Cyprus and Crimea on the other hand. She also

exposed critical issues regarding the *Front Polisario* cases,<sup>11</sup> where the Courts applied public international law principles in its interpretation of the EU-Morocco liberalisation agreements with effects on Western Sahara. She compared the *Front Polisario* case with the more recent *Psagot* judgment,<sup>12</sup> which involved EU law's consumer protections and the right to know the origin of food products when imported from occupied Palestinian territories. She claimed that the EU's Court, in declaring the illegality of Israeli settlements and occupation, acted hypocritically and applied 'double standards' and 'discriminatory practices' with regard to Israel in comparison to other States such as Morocco. In her view, the EU is politicising international law – an activity which is not likely to be well perceived by Israeli institutions and public opinion. Mata Diz provided a view from Latin America, focussing in particular on the EU-Mercosur relationship. She offered a critical perspective on the negotiation of the Association Agreement and on the possible future scenarios of the inter-regional relations at stake. Despite recognising the great importance and the innovative and *sui generis* nature of the Agreement and welcoming the final draft signed in 2019, she highlighted critical issues that are likely to undermine the applicability and the effectiveness of the Agreement. A first aspect of concern is the mechanisms for the incorporation and consequent application of an agreement that must respect the legal orders validly existing in both regions. Mercosur's incorporation rules contained in the Ouro Preto Protocol (OPP) do not clearly establish how the Agreement would simultaneously enter into effect in the respective domestic legal systems of Member States. This ambiguity risks to undermine the effective application of the Agreement. Mata Diz also touched upon the obstacles relating to EU competences in extra-commercial matters, arguing that despite the Agreement has a clear trade content, it also involves collateral aspects related to the environment, social rights, technical standards for product suitability, etc. that do not fall within the EU's competence for external agreements. This link between trade and sustainable development poses further concerns regarding the Agreement's enforceability, mainly rooted in the asymmetries between the two regions. Mata Diz stressed that despite the asserted intentions, the Agreement lacks credible enforcement or accountability mechanisms about trade and sustainable development, and, in her view, the current wording presents inconsistencies that leave room for sidestepping. Moreover, Mercosur Member States' individual agendas (e.g. Brazil) tend to disregard regional negotiations. During the debate, it was also raised that both European and American States are not currently showing to be inclined to ratify the draft Agreement. In conclusion, Mata Diz maintains that the Agreement

<sup>11</sup> General Court, *Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario) v. Council of the European Union* [GC 2015] Case T-512/12, Judgment of 10 December 2015; Court of Justice of the European Union, *Council of the European Union v. Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario)* [CJEU 2016] Case C-104/16 P, Judgment of 21 December 2016.

<sup>12</sup> Court of Justice of the European Union, *Organisation juive européenne and Vignoble Psagot Ltd v Ministre de l'Économie et des Finances* [CJEU 2019] Case C-363/18, Judgment of 12 November 2019.

as it is at the moment is not likely to come into effect any soon.

Kaspiarovich's contribution offered yet another perspective from inside the European geographic area but outside the EU's realm. She concentrated on Brexit and provided a parallelism between EU-UK negotiations and EU-Switzerland institutional arrangements. While the UK is trying switch from relations based on EU law to international law, Switzerland has undergone numerous bilateral agreements based on EU law without establishing a homogeneous institutional mechanism, despite the EU's demands. Starting from the analysis of the Brexit negotiations and the EU-Switzerland agreements, she addressed in particular the issue of dispute settlement and the role of the European Court of Justice. Under international law, relations between the EU and third countries would normally be governed by international law itself and dispute settlement would be based on arbitration or other international jurisdictions agreed upon by the parties to the agreement. On the other hand, the case law of the Court of Justice excludes the competence of any supranational jurisdiction to interpret EU law. Thus, Kaspiarovich argues, under the EU's perspective the dispute settlement mechanism and the role assigned to the Court of Justice will obviously depend on the rationale of the specific agreement and on the nature of the law involved. However, on the international stage, the role granted to the Court of Justice under international agreements concluded by the EU with third States is only the result of political persuasion by EU negotiators and it remains an exception from the point of view of international law, marking yet another example of 'European exceptionalism'. Kaspiarovich suggested that the deal involving an arbitral tribunal with a preliminary-type reference to the Court of Justice, usually offered by the EU to its international partners willing to conclude agreements going beyond trade, seems to be the best compromise between EU and international law principles.

### **EU and International Law**

In the wake of the former session, this last part will go beyond the study of the arrangements between the EU and its geographically 'satellite' States and will address general EU's external relations through the lens of international law. The EU has sought to actively shape the development of international law in a number of areas. Its practice, in areas such as treaty making, may further develop principles of international law. This part examines this external practice in the perspective of international law, and addresses some of the legal complications that arise under international law from the EU's external practice.

As the first panellist of this last section, Pollack raised an important, innovative point about the role of the EU and its legal scholarship within the debate around international law. He compared the US "New Sovereignism", based on the asserted superiority of the US legal

system to the international legal order claimed by the right-wing political spectrum, with what he called the European “New, New Sovereignism” arising from the left and centre-left commentators, seeking to defend EU laws and the autonomy of EU legal order against the intrusions of a growing body of public international law to which they object. He found that American and European neosovereignisms share parallel, albeit ideologically opposite, claims: first, international law-making and interpretive processes are procedurally flawed (with the European side claiming that they are secretive and dominated by the US and corporate influence); second, that at least some international rules and norms are illiberal in their substantive content, conflicting with and threatening to destroy their respective core principles (for Europeans, fundamental rights and social and environmental regulations); and third, that their domestic legal order must be defiantly protected against the intrusion of illiberal international legal influences. Pollack argued that this European version of sovereignism is particularly evident in the EU’s institutional external action, whereas it opposes adoption and internalization of international rules and norms. His findings are based on the analysis of the European responses to the Anti-Counterfeiting Trade Agreement (ACTA), the proposed Transatlantic Trade and Investment Partnership (TTIP) with the US and the Comprehensive Economic and Trade Agreement (CETA) with Canada, and the EU’s practice of non-compliance with the WTO rulings on genetically modified foods. Less than a criticism, Pollack’s argument suggests that contemporary Europe has abandoned its uncritical acceptance of international law and has replaced it with a scepticism that may result rather constructive for the progressive development of international law, if duly taken into consideration.

Poon’s contribution focussed on a rather narrower topic under international law: refugee protection and the principle of non-refoulement. Poon analysed the response of the EU and its Member States to the refugee crisis across the Mediterranean in the light of the mentioned principle and the concept of ‘safe place’ under international law. Part of her study were the controversial implementation of the EU-Turkey agreement and the Italy-Libya Memorandum of Understanding (MoU). She argued the European policies in the matter of refugee rescue and reception show a move from the concept of responsibility-sharing to that of responsibility-shifting and, in so doing, violate international law obligations, including the prohibition of refoulement of asylum seekers. She also noted the general lack under international law of adequate and effective responses to these policies, arguing that the international community as a whole has a shared responsibility to protect these vulnerable individuals. In conclusion, she claims that both the EU’s response and the international community’s non-response to refoulement lack compliance with international general norms.

Chamon commented on the resort to provisional application of treaties in mixed bilateral EU

agreements and the impact of this practice on the development of international law. From Chamon's presentation it emerged that the *ratio* behind provisional application is all in favour of the EU and its Member States as it allows the latter to develop an effective external action, in matters of shared competence, without being limited by the EU's internal division of competences. Chamon showed how the EU has developed a rather consistent practice in this field and explained the different responses of treaty partners to the reference in the agreements of EU's internal law on division of competences, that is something rather unique under international law. Some partners accept that the EU unilaterally determines the scope of provisional application; some partners agree upon the precise scope of provisional application and define it in the treaty itself, but then the European Council's internal decision on provisional application often intervenes to further qualify that scope; other partners retain the faculty to accept or not the precise scope of provisional application proposed by the EU. Chamon argued that the EU's practice thus is largely in line with the draft guidelines on provisional application that are being elaborated by the International Law Commission (ILC), although it is also more refined on some points. Ultimately, Chamon raises a question that remains unresolved both under the draft guidelines and the EU practice, *i.e.* the fate and possible termination of provisional application by the EU of part of a mixed agreement when one individual EU Member State has decided not to ratify that agreement.

More specific focus on the relations between the EU and the ILC's work has been discussed by Cabrita in the last debate of the workshop. Cabrita addressed the EU's ambition to contribute to the development of rules of international law, explicitly stressed out by Article 3(5) of the Treaty on European Union, and evaluated the EU's legal relevance through the lens of the ILC's work. She analysed a set of eight distinct ILC codification projects and the 2018 Conclusions on Customary International Law. Her analysis shows that from the point of view of the ILC, the EU's practice and the case law of the European Court of Justice have been referred to as evidence supporting the identification, formation or expression of rules of international law. Her analysis also shows that the ILC acknowledges the role of the EU as a particularly relevant international organisation that constructively engages in its work. On the other hand, Cabrita noted that the EU's insistence on its own exceptionalism seems to suggest that the EU intends the inclusion of its practices under the realm of international law by way of exception, rather than as a source of general rules applicable beyond its unique case. It seems that the EU aims at operating as a global actor without interferences from the ILC's work, rather than becoming a driver of developments in international law. Therefore, Cabrita suggested that a strategy change is needed, if the EU's objective is actually that of influencing the global legal order and having its own values and principles incorporated into international law.

## Full list of contributions and panellists

### EU and Global Values

*Chair:* Jed Odermatt (City Law School, City, University of London, UK) and Ramses A. Wessel (Faculty of Law, University of Groningen, The Netherland)

- Vassilis Pergantis (Aristotle University of Thessaloniki, Greece), *Recalibrating the Bosphorus Doctrine: The ECtHR vis-à-vis the 'Human Rights Turn' of the CJEU*
- Birgit Hollaus (Vienna University of Economics and Business, Austria), *The EU and Compliance Mechanisms in Multilateral Environmental Agreements: Repeating a Pattern?*
- Reuben Wong (National University of Singapore), *The EU's Palm Oil Policy: Clash between Normative, Market and Environmental Power Narratives in Southeast Asia*

### EU and International Organizations

*Chair:* Melanie Fink (Leiden University)

- Jorg Polakiewicz (Council of Europe, Strasbourg, France), *The European Union's External Action and International Law - The Council of Europe Perspective*
- Cornelia Klocker (University of Konstanz, Germany), *EU Military CSDP Operations, UN Security Council Authorisations and the Prohibition of the Use of Force: Exploring the Limits of the EU-UN Partnership*
- Tamás Molnár (European Union Agency for Fundamental Rights, Vienna, Austria), *Negotiating the UN Global Compact on Migration and the EU's External Action: Views from the International Community During Intergovernmental Talks*

### EU and International Economic Law

*Chair:* Tamás Molnár (European Union Agency for Fundamental Rights, Vienna, Austria)

- David Collins (City Law School, City, University of London, UK), *Negotiating Trade Agreements with the EU: A View from Canada*
- Katariina Särkänne (University of Eastern Finland), *EU Law Considerations in Investor-State Arbitral Tribunals*
- Emilija Leinarte (University of Cambridge, UK), *The Principle of Independent Responsibility of the European Union and its Member States in the International Economic Context*

## EU and Other Regions

*Chair:* Christine Kaddous (University of Geneva, Switzerland)

- Rachel Frid de Vries (Ono Academic College, Israel), *The EU Courts' Application of Public International Law to Trade with Disputed Territories: A View From Israel*
- Jamile B. Mata Diz (Universidade Federal de Minas Gerais, Brazil), *Mercosur and the European Union: Negotiations and Scenarios*
- Yuliya Kaspiarovich (University of Geneva, Switzerland), *EU-UK Institutional Arrangements and Brexit: Lessons Learned from Switzerland*

## EU and International Law

*Chair:* Anne Thies (University of Reading, UK)

- Mark A. Pollack (Temple University, Philadelphia, US), *The New, New Sovereignism or How the Europe Union Became Disenchanted with International Law and Defiantly Protective of Its Domestic Legal Order*
- Jenny Poon (University of Western Ontario, Canada), *The Responses of International Law: Non-Refoulement Obligations in EU Third Country Agreements*
- Merijn Chamon (Maastricht University, The Netherlands), *Provisional Application of Treaties: the EU's Contribution to the Development of International Law*
- Teresa Cabrita (University of Amsterdam, The Netherlands), *Echo-less? An ILC Perspective on the EU*

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