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The influence of international organisations on the EU and its legal order: between autonomy and dependence

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13.1 Conceptual framework

The main question raised in this book is to which extent we witness a normative influence of international organisations on the European Union and what this tells us about the 'autonomy' of that order. This question highlights the tension between the principles of 'autonomy' and 'reception' that together form the cornerstones of the relation between EU and international law. Indeed – as the contributions to this volume demonstrate − the influence of international norms varies considerably and reflects the constant struggle between an openness to international law and norms developed at the international level and the idea of an autonomous legal order that is there for the Court of Justice of the EU (CJEU) to preserve.

To answer the central question of this volume, one first needs to ascertain what the enigmatic notion of autonomy means in the context of EU law. Sixty years after its launch by the CJEU in the case of *Costa v ENEL*, the notion that EU law derives from an autonomous source still leads to divergent interpretations. After the Court's judgment in *Kadi*, it has become increasingly common among EU lawyers to conceptualise autonomy in a strong constitutional sense. Unclear, however, is what exactly this entails for the relationship of EU law with the international legal order. Does a constitutional conception of autonomy warrant the Court to flex its muscles in defence of the EU legal order or is it rather the other way around and should such an understanding induce the CJEU to lower the EU's thresholds so as to more readily absorb international law?

In his chapter, **Jan-Willem van Rossem** submits that the concept of EU autonomy in effect constitutes a disguised claim to sovereignty. Yet, perceiving the claim to authority in *Costa v ENEL* and more recent cases such as *Kadi* as a claim to sovereignty does not automatically pave the way for a jurisprudential approach in which deference towards international law is the norm and in which resistance towards external norms is only acceptable if such norms put the constitutional identity of the EU at risk. After all, sovereignty is not something that slowly fades away as an entity gets more dependent on the influence of international law. On the contrary, being a normative claim to authority closely intertwined with international law, it is an essential device in structuring and ordering this legal category. According to Van Rossem, the real question is therefore how the EU imposes its autonomy on the international legal order, in particular on normative decisions or founding documents of (other) international organisations.

Conceptually speaking, it does not make any difference if an international norm that arrives at the border of the EU legal order is generated by an international organisation or whether it belongs to a

more general body of public international law. This point is made by Van Rossem, Wouters & Odermatt, and supported by several of the case study chapters in part 2 of the book. In order to make an impact on the EU legal order, all international norms will, regardless of their origins, have to be binding on the EU. Furthermore, the nature and the broad logic of these international norms should not preclude this binding force. At the same time, in a factual way it is clear that norms adopted by international organisations are likely to have a greater impact than, e.g., customary international law, which may be harder to enforce, either because they are not codified or because they lack the institutional framework to promote them.

As European integration progressed from an economic to a political project, competences in a variety of areas were latched onto the original treaty frameworks, from migration to energy policy, from security to environmental policy. In pursuing these activities in a global context, the Union has adopted the image of a value-based actor. Rule-of-law based multilateralism forms the pinnacle of the EU's relations with the wider world. In this respect, it is worth recalling Article 3(5) TEU, which states that

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

On the other hand, Article 21(1) TEU prescribes that "the Union's action on the international scene shall be guided by (…)respect for the principles of the United Nations Charter and international law." In the recent past, the Court has sometimes struggled with finding a proper balance between openness towards international law and defending the autonomy of the EU legal order. In part, this can be ascribed to some specific constitutional problems which the EU faces, in particular due to a growing gap between its internal legislative activities and its scope of action on the external plane. To be sure, the Court is not solely responsible for solving these problems. Pursuant to the principle of sincere cooperation laid down in, inter alia, Article 4(3) TEU, the Union and the Member States are, in full mutual respect, obliged to assist each other in carrying out the tasks which flow from the Treaties. To that end, the Member States shall, among others, refrain from taking any measure which could jeopardise the attainment of the EU's objectives. As Van Rossem argues, the CJEU could nevertheless try to be more forthcoming towards receiving international law in the EU legal order. Out of concern for the unity of the internal market, the Court has in recent years refused to take into account international agreements which are either not formally binding upon the EU (*Intertanko* and *Air Transport Association of America*) or threaten the exclusive character of the EU's judicial system (*Mox Plant* and *Opinion 1/09*). The reason why it might make sense to change course in situations like these, Van Rossem submits, is that the Court's attitude towards international law in such cases forms an impediment to meeting the EU's constitutional duties in its relations with the wider world: "if the [Court] is serious about its claim that the Union constitutes an entity with distinct constitutional features, it should be prepared to translate this into a policy of deference towards external norms." The consequence of such a modern, liberal reading would amount to less autonomy for the EU legal order under international law.

Of course, the European Union recognises that engagement with international organisations is vital to allowing it to realise its objectives. Article 21(1) TEU inter alia sets out that the EU "shall seek to develop relations and build partnerships with […] international, regional or global organisations" and that it "shall promote multilateral solutions to common problems, in particular in the framework of the United Nations." One of the cross-cutting aims of EU external relations is to "promote an international system based on stronger multilateral cooperation and good global governance." Furthermore, Article 220 TFEU prescribes the Union to establish all appropriate forms of cooperation with the organs of the UN and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe (OSCE) and the Organisation for Economic Cooperation and Development (OECD). It also obliges the EU to maintain such relations as are appropriate with other international organisations. Article 42(3) TEU ensures to protect the obligations of certain Member States which see their common defence realised in the North Atlantic Treaty Organization (NATO).

However, one cannot help but observe that, whereas the EU takes part in the work of a considerable number of international organisations, the effects of norms emanating from these international bodies upon the EU often remain unclear. In their contribution, **Jan Wouters and Jed Odermatt** open up the analysis of the impact factors of international organisations on the European Union in two ways. First, rather than only examining traditional "international organisations" that possess legal personality, such as the United Nations or the World Trade Organization (WTO), their analysis encompasses a wider range of norm-generating bodies at the international level that may affect the EU. Second, in addition to legal instruments that are binding on the Union and Member States, they also pay attention to the growing body of non-binding norms developed at the international level that influences legal and policy developments within the EU and that may even be referred to in EU legislation and case law. They explore, in a non-exhaustive manner, how rules, standards, codes of conduct, guidelines, principles, recommendations and best practices developed within a variety of international organisations and bodies influence the development of EU law, even if they are not strictly legally binding upon the Union. As case studies, the authors examine how norms developed within several bodies – the Food and Agriculture Organization (FAO), the Codex Alimentarius Commission and the World Health Organization (WHO), all three within the UN family, as well as the OECD, the G20 and some of the machinery this 'international regime' has brought to life, such as the Financial Stability Board (FSB), as well as specific bodies bringing together financial watchdogs like the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) – have been treated within the EU legislature and judiciary. As it happens, the Union seems to have a somewhat ambivalent relationship with international bodies and the numerous norms they develop. The EU currently lacks a comprehensive strategy for its participation in a great number of international organisations, conferences and processes. The authors make the point that, as it seeks to enhance its role within these various international bodies, and even becomes a full member, the EU should consider how the norms developed by these bodies are to be treated within the EU legal order.

In their examination of how the norms adopted by those bodies are received within the EU legal order, Wouters and Odermatt find that, in many instances, the EU legislature demonstrates openness towards these norms and often directly refers to the international processes that led to their development. This is the case especially where the EU is represented in the international body at hand, helps to shape the rules, and where the EU has an interest in seeing them implemented. Indeed, much of the EU's recent legislation in financial governance explicitly mentions commitments

made at the international level, in particular within the G20. In case law, however, the Court of Justice of the EU has rarely relied on norms emanating from these bodies in a substantive fashion. While the CJEU sometimes refers to such norms, it has often given a more autonomous meaning to the EU rules concerned. Resonating the point made by Van Rossem, Wouters and Odermatt point to the fact that, in quite a number of examples, the Court's jurisprudence demonstrates a tendency to pursue a more "European" approach, downplaying the influence of some international bodies and highlighting the autonomy of the EU legal order. In practice, this means that the influence of international norms varies considerably.

Oriol Costa and Knud Erik Jørgenson take the broadening of concepts and methodologies, as advocated by Wouters and Odermatt, one step further by asking questions about constitutional politics rather than the possible effects of EU constitutional law on the reception of international law. They point out that the nature of norms adopted by international organisations, and their impact on the EU and its legal order, surpass the strictly legal realm and can also be expressed in sociological or political terms. Arguably, the influence of international organisations and bodies on the EU is first and foremost a matter of shaping identities and environments, by way of setting out political objectives and strategies, and implementing policies and actions to achieve them. Hence, one may observe dynamic interplays between these different kinds of 'norms': legal norms being sometimes codifications of political practice, the political interpretation of legal norms, etc. It is thus worthwhile to apply a political science perspective on the 'outside-in' *problématique* of international organisations and their normative impact on the European Union and its legal order. The authors show how such impact varies across policy fields, international organisations and time. With the EU being a party to some 250 multilateral treaties, even more bilateral agreements[1] and bound by numerous decisions by international organisations it follows that anything else than a significant variation would be surprising. The authors argue that the distribution of competences between Member States and EU institutions is an explanatory factor which is often complemented by the configuration of policy preferences among the larger – or sometimes a wider group of – EU Member States.

Contrasting the (outside-in) methodology underpinning their findings above, Costa and Jørgenson argue that in order to better determine likely impact, one needs to know about the origin of specific international norms and the policy cycles producing them, i.e. agenda-setters, policy-makers, decision-makers, implementers. They consider sequential analysis as a fruitful avenue of inquiry, and thus provide a theoretical foundation for part the empirical work carried out in the case-study chapters of the book. Sequential analysis suggests analysing the interaction between the EU and international organisations as a two-way street of influence. Indeed, much of the empirical research in this book (see, e.g., the chapters on the IMF, FAO and AFSJ) has identified a *quid pro quo* in the relationship between the EU and international institutions, as if the EU offered openness vis-à-vis the influence of international institutions in exchange for a role, particularly a leadership role, in international negotiations. As Costa and Jørgenson point out, this is especially so in the domains in which the 'actorness' of the EU is not (yet) well established. Similarly, the authors suggest that more attention should be paid to the fact that international impact is increasingly politically contested: the more national parliaments or national courts feel constrained by impact, and the more illiberal

[1] See the Treaties Office Database of the European External Action Service, available at <http://ec.europa.eu/world/agreements/default.home.do> (last accessed 15 July 2012).

norms various international organisations adopt, the less likely it is that they will have an impact on the EU and EU Member States. They predict that, in the future, one might even see the EU opting-out of specific multilateral commitments – even if downplaying the importance of a given multilateral institution or shifting commitments to alternative fora is more likely than exit.

In a world where the position of international players is exposed to more and more external constraints the concern of the CJEU for the autonomy of the EU legal order, as indeed its own exclusive jurisdiction, is unlikely to go away. Ultimately, interpreting case law and identifying legal rules and principles are the tasks of legal scholars. As shown by a raft of chapters included in the second part of the book, these are daunting tasks in the face of what Christina Eckes calls the "Delphic case law of the Court of Justice in the area of external relations." Indeed, some caution is advised so as not to draw too far-reaching general conclusions from individual cases that might be limited to their particular circumstances. Nonetheless, it is safe to say that the CJEU has a longstanding and on-going concern for the autonomy of the EU legal order.

13.2 Empirical evidence

The Court of Justice's concern for the autonomy of the EU legal order has in the past been one of the greatest internal obstacles to EU participation to international legal regimes. Particular concerns have been raised by membership in international organisations and signing of multilateral conventions where these international regimes set up (quasi-)judicial bodies, which were feared to threaten the exclusive jurisdiction of the Court of Justice over the EU legal order. As is well-known, the EU is a member of the WTO and negotiations on the accession to the European Convention on Human Rights (ECHR) are on-going. Even though these two legal regimes serve very different purposes and are structurally difficult to compare, they merit special attention in the context of the current research because both regimes are more "constitutionalised" than other specialised international legal regimes: both legal regimes are rule-based and have developed enforcement mechanisms which have triggered a constitutional discourse. In her exposé, **Christina Eckes** argues that other examples of international (quasi-)judicial bodies do not lend themselves for comparison because they either do not exercise a form of jurisdiction that is likely to create a threat to the EU's autonomy, or demonstrate great deference to the Court of Justice.

Basing herself on an analysis of the impact of the WTO's dispute settlement mechanism and the European Court of Human Rights (ECtHR) on the EU legal order, the author argues that, while the CJEU has generally taken a balanced intermediate approach to international law and its effects within the EU legal order, the Court has, so far, not accepted to be bound by the decisions of any external (quasi-)judicial body. Yet, both EU law (Article 6(3) TEU) and the status of the ECHR (a "constitutional instrument of European public order") can be cited in support of the argument that decisions of the ECtHR require and deserve a greater force than decisions of other external (quasi-)judicial bodies, including the WTO dispute settlement bodies. As Eckes points out, the choice is not between black and white: the CJEU could generally accept the binding force and direct effect of decisions of the ECtHR but express reservations if and when the ECtHR goes too far in interpreting EU law. On the substantive level, the ECHR lays down a minimum standard only and the ECtHR has been firm in its rulings but cautious to establish a margin of appreciation for the Contracting Parties. With particular regard to the CJEU, the Strasbourg Court has even gone as far as to establish a presumption of

equivalent protection. Yet, as Eckes explains, "deference appears to be the soft approach by international courts that have no interest to accept a complete EU shield that would turn the EU into a federation and would no longer allow [them] to directly hold [EU] Member States responsible."

With the Member States enjoying the convenience, the EU has taken over adjudication in the WTO. The question is whether the Member States will do the same in the field of human rights. Should the EU's aim be to be treated on equal footing with the other Contracting Parties under the ECHR? After all, interpretations of the ECtHR could seriously threaten the complex EU construction, both in terms of internal power division and in terms of trust of citizens in the EU enterprise. Eckes observes that the negotiations surrounding accession of the EU to the ECHR provide the most recent example where the EU's autonomy concern has posed and will continue to pose many questions. In this context, **Elise Cornu** reminds us in her chapter about the fact that the Court of Justice in its *Opinion 1/91* stated that the principle of autonomy does not exclude a form of external control of the EU legal order. Thus, the main question relating to the principle of autonomy concerns the reception of the ECHR in the EU legal order. Indeed, the EU's accession to the ECHR might lead the CJEU, when asked, to accept or reject (1) the compatibility of the EU's accession to the ECHR with EU law, and (2) (for the first time) the binding force and direct effect of another court's decisions on a subject matter that places exceptional constraints on its own autonomy, as indeed that of the EU legal order. It goes without saying that any decision of the CJEU against EU accession to the ECHR could be seen as an attempt to protect the EU's autonomy. It is therefore essential that, in the negotiations, the right balance is found between the respective jurisdictions of the two European courts: on the one hand, the competence of the CJEU to interpret EU law and to declare an act of the Union invalid; and, on the other hand, the competence of the ECtHR to interpret the ECHR and to examine the compatibility of EU law with the provisions of the Convention. As Cornu explains, a possible solutions could be to extend a right of "prior involvement" to the CJEU. Eckes concludes that if the EU can have its cake and eat it – i.e. have specialised international legal regimes, show additional deference and understanding for its differentness, while claiming for itself the rights normally attributed to states – it should do so. From the perspective of the EU, this will further develop its "autonomy in practice", irrespective of the rather hypothetical question of "who has the last word".

Eckes' chapter provides the upshot for a wider analysis of the normative impact of the Council of Europe and the WTO on the EU.

As Cornu explains, the links between the Council of Europe and the EU were established since their inception and have been progressively institutionalised with a view to increasing coordination between their respective activities. All Member States of the EU were members of the Council of Europe before joining the European Union. They were, therefore, acquainted with the work done within the Council of Europe, in particular in the field of standard-setting. Indirectly, this has also contributed to a better understanding of the work of the Council of Europe within the institutions of the EU. In parallel, the progressive institutionalisation of coordination between the Council of Europe and the EU has provided a favourable setting for normative interaction. In this connection, negotiations within the Council of Europe often helped to set up a common legal basis, with underlying common values, on which the EU elaborated more specific rules. As a result a number of Council of Europe conventions are today part of the EU's acquis in the field of freedom, security and justice (e.g., the 2008 Council Framework Decision on combating terrorism, and the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union aimed

at supplementing and facilitating the application, between the EU Member States, of the 1959 European Convention on Mutual Assistance in Criminal Matters). At the same time, Cornu points to the reluctance by the EU to accede to multilateral treaties (cf. Article 1 of Protocol No. 8 to the Treaty of Lisbon relating to Article 6(2) TEU).

As regards the relations between the Council of Europe and the European Union, it should be noted that since the last enlargement of the EU and the entry into force of the Treaty of Lisbon, its relations with the Council of Europe have significantly intensified. Contacts take place on a daily basis, both at technical and political levels. The need for co-operation is all the more necessary now that the development of EU competences in fields which are covered by Council of Europe conventions creates a situation of potential conflict, overlapping or double standards between the two organisations, in particular as regards judicial co-operation in criminal matters. But as Cornu points out, a real political will exists on both sides to maintain good relationships in order to foster complementarity between two organisations which, ultimately, pursue the same objective: "seeking to achieve a greater unity between the States of Europe through respect for shared values of pluralist democracy, the rule of law and human rights and fundamental freedoms as well as through pan-European co-operation, thus promoting democratic stability and security to which European societies and citizens aspire".

Pieter Jan Kuijper and Frank Hoffmeister explore the practical side of the autonomy argument further in their contribution on the influence of the World Trade Organization on the legal order of the European Union. They find that WTO primary and secondary law have had considerable influence on EU primary and secondary law and their interpretation. Much of the EU's primary law on the free circulation of goods has been inspired by GATT 1947, and the integration of new trade subjects into the WTO 1994 triggered a constitutional process of expanding the EU's exclusive powers on commercial policy. Moreover, many pieces of EU secondary legislation are either transposing WTO norms or were modified to bring them in line with world trade standards after adverse WTO judicial decisions. This process of transformation and adaptation worked particularly well where the scope and the technical aspects of classical trade policy are concerned, ranging from the scope of the EU's trade policy powers to the details of EU anti-dumping law, where the EU even developed a specific instrument to this effect. Echoing Costa and Jørgenson's theory on sequential analysis, Kuijper and Hoffmeister suggest that the underlying reason for this openness may be that the EU's political institutions expect WTO rules in this area to have been largely influenced by its own practice on the matter and are thus considered to be fully legitimate. Hence, full compliance is not only a matter of abiding by the international rule of law, but also a matter of helping a worldwide system to command respect throughout the entire membership. This also helps the EU in enforcing trade defence disciplines on other WTO members, sometimes with a less strong tradition of domestic rule of law.

With respect to the EU's internal regulatory policies, however, the WTO has had much less influence and the EU has been less law-abiding. Here, the EU's commitment to the WTO legal order can clash from time to time with the principle of democratic autonomy. The EU legislature, like many national legislators, does not automatically resolve this tension in favour of speedy and full compliance. Rather, the EU is on record for delayed and incomplete compliance in a number of sensitive cases (e.g. Bananas, Hormones, Biotech). The hesitation on the side of the EU may be explained by some characteristics of WTO law itself: its primary law under the covered agreements is static, which gives

the judicial branch an ever-increasing responsibility to find the right balance between the interests of members when interpreting vague notions in the covered agreements and when relying on scientific advice. When that balance is not struck "right" in the eyes of the EU legislator, the temptation to ignore a judgment might grow. On the other hand, continued insistence by WTO dispute settlement bodies has always led the EU to finally implement Geneva jurisprudence, often through concluding a friendly settlement.

Kuijper and Hoffmeister conclude that, contrary to a wider-held belief, the “comfort zone” between WTO and EU law is not very big after all. The EU might be a good pupil in the class when it comes to technical details of trade, but when it enters the arena of legislation which concern the health of citizens or value judgments of society, it behaves like many national sovereigns, i.e. torn between its promise of regulatory autonomy vis-à-vis its electorate and its promise of international reliability vis-à-vis its trading partners.

In his contribution to this volume, **Wolfgang Bergthaler** analyses the relationship between the International Monetary Fund (IMF) and the EU to assess the extent to which IMF law influences and interacts with EU law. With a worldwide membership, including all EU Member States, the IMF has a great political and financial influence on individual cash-strapped members. However, IMF law as such has limited influence on EU law in the sense of the IMF’s power to affect EU law. This is largely due to the fact that the EU is not a member of the IMF in its own right. However, due to overlapping membership and mandates, Bergthaler nevertheless finds that IMF law impacts EU law, both directly and indirectly. The author exposes three variations of the influence of the IMF on the EU.

First, EU jurisprudence recognises that under certain circumstances obligations under multilateral treaties, such as the IMF’s Articles—to which all EU Member States are parties but the EU is not—may have a direct binding effect on the EU, even to the extent that the EU assumes the Member States’ competences under the TFEU related to these obligations. By applying the criteria set forth by the CJEU in its jurisprudence, the author finds that Article IV (surveillance), Section 1(iii) and (iv), and 2(a) of the IMF’s Articles are binding on the EU when EU institutions exercise their authority for euro-area members. Even though the EU has not fully and exclusively assumed the competences under Article VIII, Section 2(a) and (b) of the IMF’s Articles (current account exchange system), it has virtually overwhelmingly done so and it is concluded that the EU is also bound by this provision to the extent that the EU has assumed the competences.

Second, the exercise of EU Member States’ rights and obligations under the IMF’s Articles indirectly affects the EU and EU law. This is because the EU has assumed from, or shares with, EU Member States certain competences relevant to the IMF’s Articles. A number of rights and obligations under the IMF’s Articles exemplify this interaction between IMF law and EU law: (i) the IMF conducts surveillance over its members’ exchange rate policies under Article IV of the IMF’s Articles, with all IMF members—including euro-area Member States even though euro-area members no longer have competences related to monetary and exchange rate policy; (ii) given that only EU Member States and not the EU itself are IMF members, only EU Member States may exercise their voting rights at the IMF’s governance bodies and EU institutions merely have observer status. To the extent that the EU and its Member States intend to represent joint positions on IMF-related matters, the EU needs to coordinate positions with EU Member States; (iii) in the context of the current global financial crisis, EU Member States have turned to the IMF to request the use of IMF financial resources. This

has increased the IMF's interaction with the EU, as evidenced by the establishment of EU and euro-area financing mechanisms which frequently refer to IMF terminology and practices and even encourage IMF involvement; and (iv) in its financial operations the IMF continues to interact (under the cloak of EU law) with EU Member States' institutions such as national central banks.

Third, the IMF and the EU also interact in other areas of common interest, thereby mutually influencing policy positions and leading to the use of similar concepts in their respective policies and laws. One example concerns the two organisations' surveillance, the IMF under Article IV of its Articles and the EU under a number of procedural frameworks, such as the Stability and Growth Pact. Similarly, IMF policy positions on collective action clauses have also impacted EU policy decisions.

Given these interactions and influences, Bergthaler demonstrates that the EU's legal order is rather open to the influence by IMF law. However, it should be emphasised that the mandatory effect of IMF law is limited and that EU law mostly voluntarily absorbs IMF law and practice.

As in the case of the IMF, the EU is not a member of the World Intellectual Property Organization (WIPO), whereas all its Member States are. This raises the question to which extent WIPO interacts with the EU and what the impact of its law is on the EU legal order. In their contribution, **Edward Kwakwa and Autumn Talbott** consider the effects of WIPO's norm-making activities, over-arching policies and basic practices on the EU and its legal order. They find that in light of the strong link between the EU and WIPO, the autonomy of the EU in matters of intellectual property is relative.

Applying a sequential analysis, Kwakwa and Talbott start from an examination of relevant EU policies and decisions and their influences on WIPO practices and norm-making activities. They observe that the European Union is among the most active international organisations at WIPO. The EU has been given either member or observer status by WIPO members for several internationally binding agreements and within various decision-making bodies. While this collaboration allows the EU to influence WIPO policy, the authors show that the effects are not one-directional. As the case of the EU in the WTO has shown, participation in a norm-making international organisation impacts the legal orders of those bound by the organisation's norms. The EU is not immune to this reciprocal influence. WIPO's norms, principles and practices are increasingly relevant to the development of intellectual property law within the EU legal order. Similar to the situation within the IMF, the harmonisation of EU Member States' domestic legal systems with WIPO-enacted norms may also indirectly influence the EU legal system, even where the EU is not competent to act directly within WIPO.

Historically, the EU has incorporated both binding and non-binding principles created via the WIPO mechanism. Whereas the WIPO norm-making process heavily influences the body and framework of intellectual property law in the EU, WIPO norms do not have independent normative value within the EU. The EU is not bound by new or evolving intellectual property principles unless, by virtue of its own authority, it chooses to be. As Kwakwa and Talbott show, there is clear evidence that the EU is able to act unilaterally to accept or discard intellectual property norms in its legal order. Despite WIPO's lasting impact on international intellectual property law, the EU therefore remains a relatively autonomous legal order.

Turning to another specialised agency of the United Nations, **Françoise Schild** examines the influence of the Food and Agriculture Organization (FAO) on the European Union. She observes that, over time,

the relationship between the two international organisations has shifted from one between equal partners to a more hierarchical one between an organisation and one of its members. It is exactly because the EU is a full member of the FAO, that it is not wholly unsurprising to find that the EU legal order reveals substantial FAO influence, notably in five policy fields: fisheries, food law, animal health, international food security and forestry. Yet, this hierarchical relationship does not automatically translate into stronger effects of FAO norms inside the EU legal order. As explained in other chapters, the extent of these effects is ultimately determined by the EU legislator and judiciary.

Notwithstanding the concept of autonomy of the EU legal order, Schild finds that the normative impact of the FAO on the EU legal order manifests itself chiefly in terms of the direct incorporation of FAO standards in EU secondary legislation and in references to FAO standards in both EU policy instruments and the case law of the CJEU. The author shows that, in food law and animal health, the influence of the FAO is strongest in internal EU rules, whereas in the fields of fisheries, international food security and forestry, FAO influence is more prominent in external EU policies and actions.

In order to determine whether the EU's membership of FAO is indicative for stronger effects of FAO decisions in the EU legal order, Schild uses two case studies. The first concerns FAO and EU policy discussions in the field of international food security in the period preceding and during the 2010 negotiations in the Committee of World Food Security (CFS). The second case study deals with the EU's (international administrative) activity within the Codex Alimentarius Commission and its effects on EU secondary legislation and case law. Schild also examines whether the Lisbon Treaty's competence re-distribution and institutional innovations in the realm of EU external action have had an effect on EU participation in the FAO. The CFS example shows some effects of the FAO's work on EU policy thinking, even if EU participation was mostly limited to representation by a Member State. Resonating comments made by Wouters and Odermatt, Schild's second case study shows that the EU retains a high degree of autonomy with regard to Codex standards, and that the EU legislator and judiciary exercise full discretion in deciding which standards to incorporate. The participation of Commission officials in Codex decision-making (based on exclusive EU competences) is nevertheless reflected in the influence which Codex standards have in the earlier stages of EU decision-making.

Overall, it can be said that FAO's influence on the EU is most perceptible with regard to exclusive powers and complementary competences of the EU. In the area of shared competences the existing arrangements and the discussion on representation that sparked after the entry into force of the Lisbon Treaty continue to allow for a significant role of the Member States and thus stand in the way of stronger FAO-EU interaction. As long as there is no political will to transfer competences to the EU in these fields, this enables the Member States to engage with the FAO directly, thus curbing the EU's autonomy in these fields.

As noted in the introductory chapter, the question of the autonomy of the EU legal order has in the past always been raised in relation to the former European Community, as it was related to principles of supremacy and direct effect. With the entry into force of the Lisbon Treaty, the former 'non-Community' parts of the EU have been integrated into the same legal order. The sensitive area of police and judicial cooperation in criminal matters is now part of the Area of Freedom, Security and Justice and – unlike the continuing special position of the common foreign, security and defence policies (CFSP and CSDP), this policy field can no longer be said to be immune from the above-

mentioned principles. One may argue that one of the reasons for the CJEU to underline the autonomy of the EU legal order (incl. the preservation of its own exclusive jurisdiction) is less valid in relation to CFSP and CSDP because of the limited role of the Court in that area. Notwithstanding the fact that the jurisdiction of the CJEU does not extend into Title V of the EU Treaty, it is nevertheless interesting to study the impact of a security organisation like the North Atlantic Treaty Organization (NATO) on the autonomy of the EU because of the blurred legal borders between policy areas and the constitutional obligation resting upon the EU institutions' shoulders to strive towards coherence and effectiveness in the realm of EU external action.

Thus, **Steven Blockmans** finds that NATO's impact on the European Union's institutional design, policy-making and operational experience gathering in the field of the security and defence has been "fundamental", even if only few traces of NATO are to be found in EU primary law. It is especially on the operational side, the *raison d'être* of the EU's Common Security and Defence Policy, that NATO's impact has been instrumental. This is evidenced most vividly by the use of the so-called "Berlin Plus" arrangements, which have enabled the European Union to borrow NATO assets and capabilities in order to launch its first-ever military mission in 2003. Craving for the operationalisation of the EU's military persona, Member States went as far as to accept that two acceding countries (Cyprus and Malta) would be excluded from the use of the NATO assets and capabilities. The dependence of the EU on NATO in the build-up of CSDP has, in an ironic twist of history, been exposed by the fact that Ankara obtained a veto over the use of NATO's hardware assets by EU crisis management operations in Turkey's sphere of strategic interests. Atypical for an EU candidate country, Turkey thus holds considerable sway – at least in theory – over the EU security and defence policy- and decision-making, even without being formally part of it. In practice, however, NATO's – and thus Turkey's influence – over the development of CSDP has waned ever since the EU's branding of a military capacity 'of its own'. After its inaugural mission in Macedonia, the European Union has autonomously developed new military operations, deploying missions without having recourse to NATO assets and capabilities.

The war in Libya, however, has shown the political incapability of EU Member States to agree on military intervention under the flag of a *Common* Security and Defence Policy. Whereas EU Member States (notably France and the UK) took the lead in the air war against Gaddafi's troops, they still relied on US military support in the field of intelligence, surveillance, target acquisition and reconnaissance, along with NATO's refuelling and other logistical capabilities required to sustain any air campaign. This goes to show that, in spite of a clear desire of political leaders of Member States to endow their Union with an autonomous military capacity, the EU (as a whole and in parts) remains dependent on NATO (and the US therein) to deploy operations, even in its neighbourhood.

Today, in spite of a huge overlap in membership (twenty-one states) and economic and financial pressures that necessitate a reduction of overlaps and smarter ways of coordination and cooperation, the development of the EU as a security actor possibly trespassing on the perceived prerogatives of NATO remains a contentious issue. While NATO and the EU have been working alongside in peace operations in Afghanistan, Kosovo and the Horn of Africa, a substantive partnership at the strategic level has not emerged. Blockmans posits that a visible discrepancy between specific forms of NATO-EU cooperation and unsatisfactory levels of political consultation between the two organisations could have high costs on both sides, but in particular on that of the European Union.

Finally, **Claudio Matera** explores the influence of international organisations' norms on the relatively young Area of Freedom, Security and Justice (AFSJ). Even though cooperation of the European Union with international organisations and bodies in relation to the AFSJ intensifies, precious little is known about the influence that these international bodies may have on the AFSJ. In the first overview of its kind, Matera's contribution evaluates the extent to which international organisations (can) influence the law-making process, the material content of legal measures and law enforcement within the EU's AFSJ. The author finds that already at EU primary law level, and unilaterally, the EU is bound to respect the norms stemming from international organisations. Yet, while the EU legal order is open to external normative influences, only a couple of international organisations are currently influencing the development of the AFSJ. The most prominent examples are the United Nations and the Council of Europe, which muster the 1951 Geneva Convention on asylum seekers and refugees and the European Convention on Human Rights, respectively. The author argues that it should not come as a surprise that the number of international institutional partners of the EU in the context of the AFSJ are few: only a handful of international organisations work on the fields of the AFSJ and of those, even fewer have the operational powers of the EU. Thus, while the influence of international organisations on the EU's AFSJ occurs at different levels, the leading subjects in this respect continue to be the UN and, most notably, the Council of Europe with an impact which is likely to grow once the EU will accede to the ECHR.

Probing deeper, Matera finds different approaches by the EU towards, on the one hand, absorbing engagements emanating from international fora in order to develop autonomous measures in specific fields of EU criminal law and, on the other hand, fending off external interferences in the development of its *acquis* on private international law by actively participating in the negotiation of multilateral conventions so as to obtain so-called "disconnection clauses". In relation to the AFSJ's agencies it emerges that, due to their founding statutes, these seem formally shielded from negative influences stemming from international organisations in relation to data protection standards.

13.3 Concluding remarks

As has been observed by a number of contributing authors, the picture emerging from this study is a complex set of formal and (sometimes very subtle) informal ways in which international organisations and other multilateral fora influence the EU. The degree of normative influence of international bodies on the EU and its legal order depends on a raft of factors, ranging from the binding obligations resulting from EU membership and full participation in other international organisations, to the voluntary reception or outright rejection of international norms by the EU legislator and Court of Justice. At the same time, 'domestic conditions' are also an important factor for the degree of influence. Whereas the EU is a unique and very complex legal construction, the separateness of the EU both from national and international law are still to a large extent based on case law and hence the Court of Justice's autonomous interpretation of EU law, and its exclusive jurisdiction therein. In view of globalisation's growing interconnectedness between all sorts of subjects of international law, and the waning economic and financial power of the European Union on the international plane, the Court's refusal to take account of international law in order to protect the unity of the internal market becomes increasingly untenable. This is all the more so because the Court's recently displayed attitude towards the reception of international law in the EU legal order

forms an impediment to meeting the EU's constitutional duties in its relations with the wider world, most notably the full respect for international law, whether this is emanating from international organisations with legal personality or less institutionalised international regimes. This book has produced the empirical evidence of the intense legal interactions between the EU and a representative body of international institutions. This is testimony to the coming of age of the European Union as a polity. Whereas stressing its autonomy is necessary to establish the EU's position both vis-à-vis its own Member States and in the global legal order, the Union's further development sets the limits to that autonomy. In many policy areas the EU has become a global player and everything it does cannot be disconnected from the normative processes that take place in other international organisations. If, therefore, the Court is indeed serious about its own claim that the Union constitutes an entity with distinct constitutional features, it should be prepared to translate this into a policy of deference towards external norms. Whereas the consequence of such a modern, liberal approach would amount to less "autonomy" for the EU and its legal order under international law, the European Union, as such, would become a more mature actor on the global stage and – in the mid- to longer term offer its Member States, citizens, natural and legal persons, the opportunity to reap more benefits from its "openness" to the world.