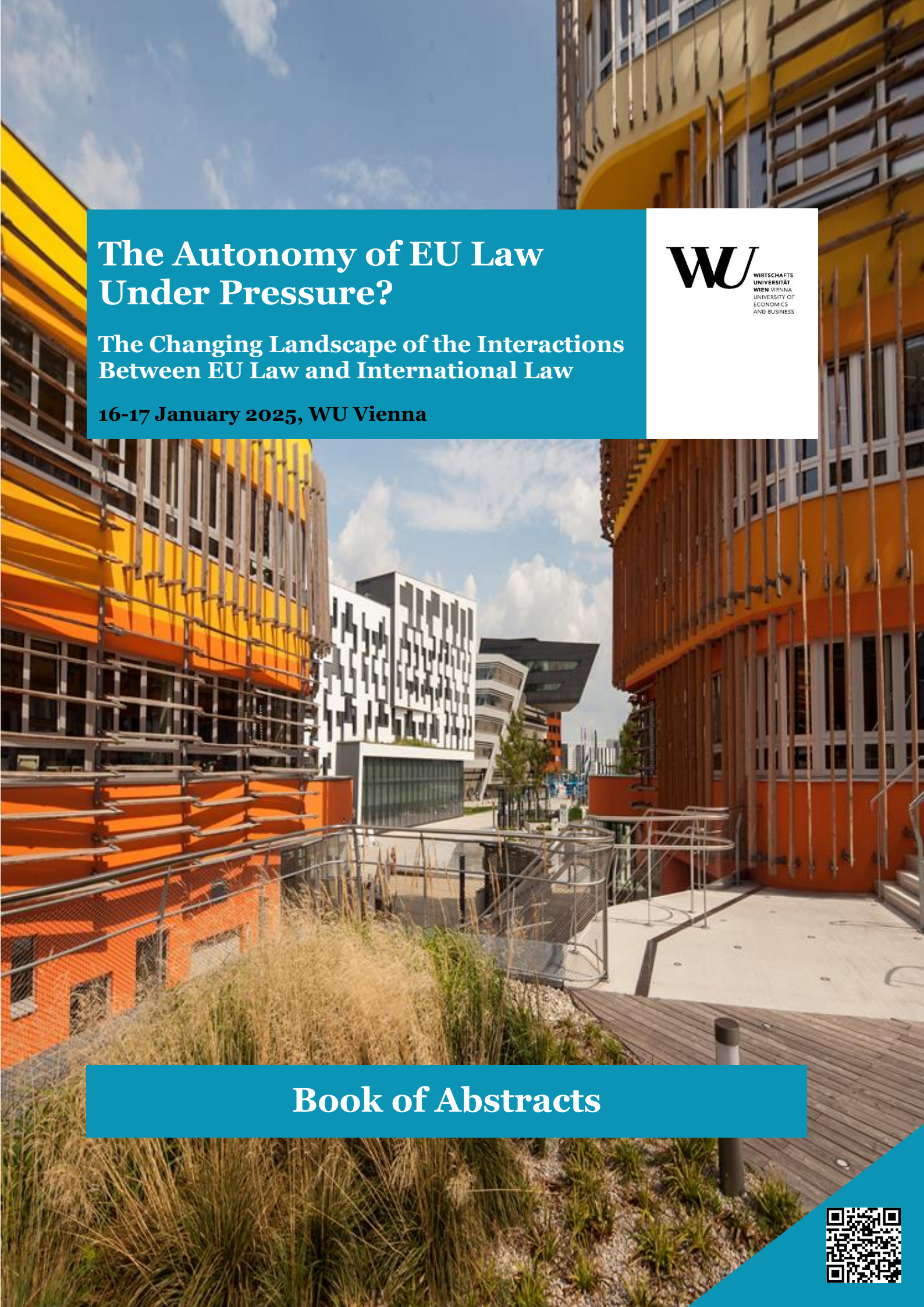

The Autonomy of EU Law Under Pressure?

The Changing Landscape of the Interactions Between EU Law and International Law

16-17 January 2025, WU Vienna

WU WIRTSCHAFTS UNIVERSITÄT WIEN VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS

Book of Abstracts

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Panel I

Autonomy as Sovereignty? The Autonomy of the EU Legal Order and International Investment Arbitration

Mark Konstantinidis, King's College London

The maintenance of the autonomy of the legal order of the EU is a fundamental constitutional interest for the Union, consistently asserted by the Court of Justice of the EU (CJEU). Autonomy can be traced in the early CJEU jurisprudence,[1] and was gradually developed into a structural principle of EU law, with profound constitutional implications, particularly for the EU's relationship with the international legal order.[2] The Court primarily invoked autonomy with a view to safeguarding the uniform interpretation and application of EU law and, in this respect, defended the integrity of the Union legal order from perceived jurisdictional threats. As the paper will demonstrate, in caselaw regarding international investment arbitration ('investor-state dispute settlement'; ISDS),[3] the Court's understanding of autonomy has been enriched with considerations regarding the EU's foundational values set out in Article 2 TEU, including fundamental rights.[4]

The caselaw responded to concerns which are particularly salient in the ISDS debate: international agreements which provide for investment arbitration are perceived as being intrusive on sovereignty, as they arguably restrict a party's ability to set regulatory standards independently and effectively, in accordance with its own values and processes. Arbitral tribunals, situated outside national (or supranational) judicial systems, often hear claims by foreign investors concerning legislative or regulatory measures adopted in favour of sensitive public interests— for instance, regarding environmental protection or public health. However, there are increasing concerns towards the consistency of arbitral decisions and even the impartiality of arbitrators. As such, investment arbitration may be at odds with parties' political and constitutional identity, in particular their commitment to democracy and the rule of law.

Against this background, the paper will examine the principle of autonomy as the main condition subject to which investment arbitration can, in certain circumstances, be compatible with EU law. In light of the jurisprudential evolution of the principle, the paper will argue that the Court's reasoning, developed in an arbitration context, suggests that autonomy does not merely assert the jurisdictional integrity of the Union legal order. Rather, it also reflects a nascent form of sovereignty, notwithstanding the Union's lack of statehood. The paper thus adopts an 'inside' perspective.

First, the paper will set out the structural nature and jurisdictional function of the autonomy principle. The principle serves to defend the EU legal order from external norms which pose systemic or jurisdictional risks, for instance by affecting the allocation or 'essential character' of the powers of EU institutions, or by undermining the judicial dialogue provided by Article 267 TFEU.5 In this regard, autonomy has been fundamentally concerned with maintaining the uniform interpretation and application of EU law, and indeed the Court's own jurisdiction. In this light, the paper will analyse the Court's invocation of autonomy vis-à-vis investment arbitration, accounting for its different application in an intra-EU and extra-EU context. Second, the paper will demonstrate that, since Achmea, the Court has conceptualised autonomy as a manifestation of EU sovereignty, though still within the existing supranational framework. The CJEU prominently integrated autonomy within the normative foundations of the EU (including Article 2 TEU values of democracy and the rule of law, and fundamental rights), in which it inter alia 'resides'.6 On this basis, the Court sought to defend the Union's democratic process, and the values and rights it seeks to uphold, vis-à-vis third states and international (investment) law.

[1] Case 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1, 12; Case 6/64 Flaminio Costa v ENEL [1964] ECR 585, 594.
[2] Opinion 1/91 [1991] ECR I-6079; Opinion 2/13 of 18 December 2015, EU:C:2014:2454.
[3] In particular, Case C-284/16 Slovak Republic v Achmea BV of 6 March 2018, EU:C:2018:158; and Opinion 1/17 of 30 April 2019, EU:C:2019:341.
[4] Article 2 TEU provides, inter alia, that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.
[5] See Opinion 1/00 [2002] ECR I-3493 and Opinion 1/09 [2011] ECR I-1137.
[6] Opinion 1/17 (n 3) para 110.

Of Snowballs and Yo-Yos: Some Conceptual Considerations on EU Autonomy

Stefan Mayr, WU Vienna

The presentation focuses on two important tendencies that can be traced throughout the CJEU's caselaw on the EU's external autonomy: First, a tendency to flesh out new and more requirements and mush them together with existing criteria as well as key tenets of the EU constitutional framework, which I refer to as "snowballing". And second, a tendency to not apply the same criteria with the same rigor, but to pivot between more or less rigid levels of scrutiny, which I refer to as "thin" and "thick" autonomy, thus "yo-yoing" being the two.

In the presentation, I argue that "snowballing" makes it increasingly difficult to assess the weight of the different criteria separately and that the Court's practice to split its relevant reasoning and set out the broad principles that inform its decision in abstract terms at times comes at the expense of argumentative transparency and more fine-grained doctrinal reasoning. As regards the second tendency, I argue that when adopting a "thick" understanding of autonomy the Court scrupulously assesses any potential, and even hypothetical, effects of a treaty arrangement on the autonomy of the EU legal order. By contrast, the Court's "thin" understanding of autonomy entails a more formalistic assessment and tends to "overlook" practical effects.

Both tendencies identified make EU autonomy an effective, but rather unpredictable tool. That said, while much of the literature focuses on its exclusionary effects, a closer look at the Court's case law shows that the "strategic ambiguity" of EU autonomy can cut both ways and has at times resulted in a rather permissive approach. In my presentation, I submit that the application of *different standards* is not *per se* problematic, but that the Court should certainly avoid the impression of applying *double standards*.

Between Fiction and Reality: Revisiting the External Autonomy of EU Law as a 'Shapeshifter'

Szilárd Gáspár-Szilágyi, University of Oslo

In this presentation I would like to revisit a previous paper of mine published by *European Paper* in 2021, entitled 'Between Fiction and Reality: The External Autonomy of EU Law as a "Shapeshifter" After Opinion 1/17'. I would like to see if the arguments I made several years ago, still stand after such newer CJEU cases like *PL Holdings, Komstroy*, and *Micula*, as well as other events such as the denunciation of certain EU Member States of the Energy Charter Treaty.

In the original paper I argued that academics often get caught up in analysing every minute legal technicality in the Court of Justice's assessment of a foreign dispute settlement mechanism (DSM)'s compatibility with EU law and its autonomy. This is not surprising as the compatibility assessment in essence is a constitutionality check with great ramifications. Instead of this formalistic approach, I invited academics and practitioners alike to view autonomy as a "shapeshifter". Just like the "direct effect" of international law in the EU legal order, "external autonomy" will morph into a shield that protects EU law from international law or it will become an embracer of international law and international DSMs.

The shapeshifting might in part depend on the extent to which non-legal considerations inform the Court's strict or narrow approaches to the compatibility assessment. The Court achieves this with the help of different techniques, such as using various fictions and assumptions as legal arguments, as well as the summary treatment of certain issues that might be crucial to the assessment.

Following the more recent developments, I argue that further techniques can be added to the afore-mentioned toolbox of the Court, such as *obiter* pronouncements in cases the subject matters of which had no relationship to the pronouncements made by the Court (*Komstroy*) and the willing/willing mis-characterisation of how other international DSMs work, such as investor-State arbitration (*Micula*).

Revisiting the Theoretical Conundrums behind the Autonomy of EU Law: Discursive Pluralism as a Way out of the Impasse?

Jan Philipp Huth, European University Viadrina Frankfurt (Oder)

More than half a century into the seminal judgments of the Court of Justice in *Van Gend* and *Costa*, the principle of autonomy of EU law is still subject to fierce and controversial debates. Contemporary characterisations oscillate in the wide range between outright denial of an *autonomous* EU legal order, perplexity, and assumptions of autonomy as being indispensable for the continued existence of the Union as such. And while there is by no means a lack of theoretical attempts of all kinds to make sense of the nature of the EU legal order, even prominent voices such as *Walker* describe the entire field of EU constitutional theory as still being "under-cultivated". Before this background, the contribution aims to outline the potential of thinking together *legal pluralism and (legal) discourse theory* as a starting point for reconceptualising the autonomy principle.

In recent years, supranational legal pluralism has been met with criticism from various directions. Some are bemoaning an increasing lack of substance of *pluralist* approaches, due to the inflationary use of the relatively vague scholarly label. Others are pointing to potential misuse of the notion in the debate on the erosion of rule of law standards in some Member States. With regard to their intended reach, conceptions of supranational legal pluralism today often appear either as purely *descriptive* accounts, or as (allegedly) full-fledged theoretical paradigms in themselves. However, it seems that these two ways of understanding the added explanatory value of legal pluralism neither completely square with how *MacCormick* and *Walker* originally conceived of the concept, nor (which is the more problematic point) do they adequately address the challenges identified by both. The contribution argues that both *MacCormick* and *Walker*, at least implicitly, rely on *discourse theoretical* principles when outlining how to engage with irreconcilable claims to final (judicial) authority. *Walker* even goes a step further when considering *society-building* to be an indispensable element of constitutionalisation processes.

The *discursive* pluralist approach at least implicitly inherent in the seminal writings of *MacCormick* and *Walker* is no mere fiction or utopian ideal, but arguably finds a relatively solid normative basis in the Treaties themselves, first and foremost in the notion of *society* in Article 2 TEU. A progressive reading of the provision allows an understanding of society as constituting an overarching objective in itself, i.e. the furthering of a genuinely *European* society. In addition, it is part and parcel of a more general *deliberative rationale* underlying the current Treaty framework.

This *deliberative rationale*, and *discourse theoretical* principles more specifically, need to be reflected in the multilogue of institutional actors in the EU legal order, and thus also in the judicial interaction between the Court of Justice and its domestic interlocutors. The more EU law becomes the legal order of a European society, the stronger its claim for autonomy. In addition, reflecting *discourse theoretical* principles in judicial interaction legitimises the compromises reached between the courts involved, the latter constituting a deviation from their respective claims to final judicial authority demanded by their very mandates.

Panel II

The Third Component of the Autonomy's 'Troika': Revisiting Commission v. Luxembourg and Belgium 60 Years Late

Cristina Contartese, University of Campania 'Luigi Vanvitelli'

In 2014, Phelan published an article titled 'The Troika: The Interlocking Roles of *Commission v Luxembourg & Belgium*, *Van Gend en Loos*, and *Costa v Enel* in the Creation of the European Legal Order', in *European Law Journal,* pp. 116-135. The notion of 'Troika' properly applies to the analysis of autonomy in these three seminal cases. However, one cannot avoid pointing out that, albeit its relevance, *Commission v Luxembourg and Belgium* (joined cases 90 and 91/63), delivered in 1964, has attracted less attention and is, accordingly, less 'famous'.

Commission v Luxembourg and Belgium is, to our knowledge, the first judgement that focused, specifically and directly, on the autonomous nature of EU *vis-à-vis* international law: the CJEU ruled that the then Community law, unlike international law, does not recognize a "relationship between the obligations of parties [according to which] a party, injured by the failure of another party to perform its obligations, [is allowed] to withhold performance of its own". In essence, the Court, by removing the traditional forms of state responsibility from the then Community legal order, opens up the debate on to what extent the EU could properly be defined as a self-contained regime.

This paper aims to analyse this judgment in the light of the academic debate that took place in the 60s from both an EU and international law perspective. EU legal scholars generally perceive the autonomy's 'Troika' as a 'revolutionary' step that detached the then EEC from international law. However, if one zooms into the international law debate on the notion of autonomous legal order, it emerges that the terminology as well as the content of the Court of Justice's case-law on autonomy are embedded within it.

The final purpose of our analysis is to investigate whether the notion of legal order under international law also applies to the EU legal architecture and if so, whether it implies the existence of a *unitary* and *self-referential system*. In essence, is EU's autonomy a peculiar legal feature of the Union or does it rather apply to any legal order? If so, what does it imply for the relationship between EU and international law? By raising these questions, some conclusions will be drawn, 60 years later, on the impact of *Commission v Luxembourg and Belgium* to the current understanding of autonomy.

Unique, Like All the Others: Analysing EU Autonomy in a Comparative Perspective

Jed Odermatt, City St George's, University of London

"Implementation of the very idea and concept of a Community of States necessarily entails as an exercise of sovereignty the creation of a new legal order…"

This statement from the Caribbean Court of Justice in Shanique Myrie v. The State of Barbados [2013] underscores the potential of states to form a new legal order through international treaties. While the notion of a 'new legal order' has primarily been explored within the context of the European Union's legal framework, it also applies in the contexts of international organisations, which are established with their own autonomous legal personality and will. The extent to which the internal law of these organisations is distinct from international law – similar to domestic legal orders – remains a subject of ongoing debate. This paper examines the autonomy of the EU legal order from an external and comparative perspective, aiming to understand how claims of autonomy are articulated and contested outside the jurisdiction of the Court of Justice of the European Union (CJEU). The paper is structured into three main parts. The first analyses how the concept of autonomy is framed within public international law debates, exploring its theoretical foundations and implications for international organisations. The second section addresses how autonomy and related concepts are addressed in the case law of regional economic integration organisations, including the Andean Community, Caribbean Community, and MERCOSUR, highlighting the diverse interpretations and applications of autonomy across different legal contexts. The third focuses on how dispute settlement bodies have responded to claims of EU autonomy, particularly in the realm of international investment disputes and relevant domestic case law. This analysis reveals how claims to autonomy have been made and addressed in a broad range of legal contexts outside the EU legal space. This paper argues that, when viewed from a comparative and international law perspective, the EU's claims to autonomy are not as unique as often asserted.

On Paper Crowns: Conflicting Conceptions of EU Law's Autonomy in International Law

Nariné Ghazaryan and Sarah Thin, Radboud University

In recent years, several high-profile cases have seen the development and consolidation by the CJEU of the concept of autonomy of EU law in relation to international law. Several of these decisions relate to the (non-)accession of the EU to a particular international agreement, most famously the European Convention on Human Rights. Some of these cases appear to directly pitch EU law versus the international legal order as was the case in the famous Kadi saga. Other cases, on their surface, do not appear to result in a normative conflict between international and European legal orders. While they can be interpreted as preventing such conflicts from occurring, in practice they might lead to hindering substantive engagement with international law.

Within this context, this contribution critically examines the concept of autonomy as developed by CJEU's in the wider context of international law. To which extent does the principle of autonomy as interpreted by the CJEU have implications for international law and its implementation?

First, this contribution analyses the CJEU's jurisprudence on the principle of autonomy, questioning the contours of this concept. In particular, it addresses the extent to which the relevant case law directly or indirectly impacts the EU's and its Member States' engagement with international law. How and to what extent is the CJEU redefining the relationship between EU and international law?

Next, this contribution analyses the legal effect (and its limitations) of CJEU decisions enforcing the principle of autonomy as a matter of international law. From an international perspective, EU law includes merely "normal" rules of treaty law and do not inherently take precedent over other rules of international law in the case of a normative conflict. Despite the accommodating approach taken by the Arbitral Tribunal in Mox Plant, international law knows no inherent system of hierarchy between international courts and tribunals, even where a particular body makes a claim to being an authoritative interpreter of a particular treaty. This much is clear from contrasting decisions on the interpretation of human rights treaties between the ICJ and UN human rights bodies. There are therefore important potential limitations to the Court's legal authority to enforce the autonomy of EU law in the international legal order.

Building on this dual-sided analysis of the internal and external implications of the concept of autonomy of EU legal order as interpreted by the CJEU, we identify where potential conflicts may be created between EU and international law. We explore the potential consequences of such conflicts from the perspective of the integrity of international and EU law generally and from the perspective of individual Member States and their ability to regulate their conduct in relation to the law.

Panel III

Open Strategic Autonomy – A New 'Autonomy' Concept and its Legal Constraints

Erich Vranes, WU Vienna

We live in an age of uncertainty. This is evident in the current geopolitical context.

Many states have responded to this situation by seeking to increase their "strategic sovereignty". In the EU, this reorientation is taking place under the banners of "strategic autonomy" and, more recently, "open strategic autonomy" (OSA).

The rapid evolution of this new "autonomy" concept into a virtually ubiquitous leitmotiv in EU affairs mirrors the erosion of three key narratives of the post-Maastricht period, namely rules-based multilateralism, the Washington Consensus and "the West" more generally (Miro 2022).

This new "autonomy" policy needs tools for implementation. In this regard, the EU stresses two main levers, namely the Internal Market and its Common Commercial Policy (CCP): thus, by conditioning access to the Internal Market, the EU will continue to try to export its interests and values to third countries (the famed "Brussels effect"); on the other hand, by means of employing its CCP instruments, namely multilateral, bilateral, unilateral and increasingly also soft law tools, the EU will continue to strive to influence the development of the landscape of international law.

Within this new approach to international relations, the EU has emphasized several areas that it regards as essential in the medium term, one of them consisting in the strengthening of the implementation and enforcement of trade agreements as well as ensuring a "level playing field".

It is under the latter rubric of "levelling the playing field" that the EU has introduced a series of unilateral measures, resulting in a policy reorientation that is often referred to as a "unilateral turn" in the EU's external economic relations. This reorientation must also be seen against the background of the global shift away from multilateralism to increasing regionalism and bilateralism, which has been taking place since the first decade of the millennium, and increasing unilateralism in recent years. In this context, OSA establishes a partial but distinct break away from guiding principles of the last decades, i.e. from decades marked by liberalism, the separation between state and market and the separation between security and economic affairs; a turning away also from an era, guaranteed to a large extent by the US, in which economic relations where legalized and depoliticized in especially within the WTO. In this light, OSA is seen as giving the EU a new direction that is not about "internal debordering", but "external rebordering" (Schimmelfennig 2021).

Several of the unilateral measures adopted by the EU within its new "autonomy" policy may violate basic principles of international (economic) law. This holds true e.g. for the EU's Carbon Border Adjustment Mechanism, its Foreign Investment Screening Regulation, and its Foreign Subsidies Regulation. At the same time, all three instruments are of crucial relevance not least for protecting the EU internal energy market, its sovereignty in energy affairs, and enabling the "green transition" of the EU energy sector.

This contribution therefore aims to answer the following research questions:

1) What are the political and legal implications of the EU's new "autonomy" concept for the interactions between EU law and international law?
2) Can the EU's new "strategic autonomy" policy at least partially escape the constraints that already exist, under international law, for the EU's traditional "autonomy" concept?
3) In order to illustrate the legal, political and economic relevance of these issues: to what extent are key unilateral measures adopted within the EU's new "autonomy" policy compatible with international (economic) law?

The Turn to Strategic Autonomy in EU External Economic Law: Deterrent for a Geopoliticized Global Economic Order or Departure from European Value Constitutionalism?

Andrej Lang, Georg August University Göttingen

The EU's external economic Law has undergone a paradigm shift in recent years. In response to increasing unilateralism and protectionism in international economic relations, the EU has devised a new trade strategy called "open strategic autonomy" and, in this context, adopted a panoply of unilateral and trade-restrictive measures, including a foreign investment screening mechanism, an anti-foreign subsidies regulation, an international procurement instrument, and an anti-coercion instrument. This turn to strategic autonomy raises important questions about the EU's constitutional identity: Does it constitute a necessary deterrent for a geopoliticized global economic order or an undesirable departure from European value constitutionalism?

The proposed paper seeks to answer this question based on an analysis of the anti-coercion instrument (ACI) – arguably the most prominent manifestation of the turn to strategic autonomy. Against a backdrop of increasing economic coercion by third countries, the ACI is positioned as a proactive policy tool, enabling the EU to counter external pressures that threaten the sovereign policy choices of its member states. It empowers the EU to adopt a range of countermeasures in response to economic coercion, positioning the Union as a more assertive actor on the international stage. However, this expansion in EU foreign trade law raises fundamental questions about the balance between the EU's claims to exceptionalism and its longstanding commitment to a rules-based global order. The ACI challenges traditional expectations that the EU will adhere strictly to a values-based, multilateral approach, prompting debate over whether this instrument signals a shift away from EU "value constitutionalism" toward a more pragmatic and sovereignty-centered model of autonomy.

The paper examines the ACI's compatibility with EU primary law against this background, especially regarding its alignment with Articles 206 and 21 of the TFEU, which prioritize trade liberalization and multilateral cooperation, as well as the EU's obligations under WTO law. While the ACI's unilateral measures represent a shift in EU trade policy, the paper posits that this shift is legally justified within the scope of the Union's primary law, as the treaties allow the EU a broad margin to pursue non-economic regulatory goals and ensure strategic autonomy. By embedding countermeasures within an international legal framework, the ACI effectively reconciles the Union's defensive needs with its normative commitments.

Against critics arguing that the ACI risks undermining multilateral norms, the paper contends that, by adhering to strict criteria of proportionality, legality, and the principle of last resort, the ACI exemplifies a model of "normative power" that upholds EU values even as it strengthens the Union's external autonomy. The ACI sets a "best practice" framework for lawful responses to economic coercion, contributing to global standards in the still-developing area of international economic law governing coercive practices. This contribution reinforces the EU's position as a normative leader, shaping international expectations for lawful counter-coercion measures and promoting a rules-based order resilient against geopolitical pressures.

The paper concludes with the assertion that the ACI does not signify a departure from EU constitutionalism but rather an adaptation that affirms the Union's autonomy within an international legal order increasingly shaped by economic coercion. This analysis of the ACI illuminates how the EU navigates the tension between autonomy and multilateralism, offering a robust model for balancing sovereignty and values in contemporary foreign trade law.

The EU Anti-Coercion Instrument and the Labyrinth of Compatibility with International Law Norms

Raimondas Alisauskas, Mykolas Romeris University Vilnius

The EU regulation 2023/2675 on the protection of the European Union and its Member States from economic coercion (so-called „the Anti-Coercion Instrument"), entered into force on December 27, 2023. The EU Anti-Coercion Instrument, introduced to shield the European Union and its Member States from economic coercion by third countries, is a significant advancement in EU trade policy. However, the introduction of such an instrument has sparked extensive discussions about its compatibility with international law norms, particularly those outlined by the World Trade Organization (WTO).

Since the adoption of the Anti-Coercion Instrument, practical aspects of implementing this trade policy instrument have raised numerous questions, such as whether EU Member States will have the political will to initiate the procedures outlined in the regulation, particularly when defending the interests of one of the smaller Member States against economic coercion by a third country. However, an equally important issue in the legal discourse concerns this EU trade policy instrument's compatibility with World Trade Organization (WTO) norms and jurisprudence. This question was widely discussed during the legislative process, and even more interestingly, the responses and explanations provided by the drafters raised further questions. For instance, could we argue that the issue of compatibility between the EU's anti-coercion regulation and WTO law is irrelevant, since, as the drafters claim, international public law allows for retaliatory measures in response to unlawful actions by a third country? A reasonable question arises whether, in a hypothetical trade dispute initiated under the WTO's dispute resolution rules and procedures, a panel would be convinced by such arguments. Few would doubt that the EU anti-coercion regulation's scope and the envisaged response measures cover a broad range of trade-restrictive measures. Therefore, the affected country will likely seek to protect its infringed interests through the WTO's dispute settlement procedures, as this system was created precisely to reduce unilateral actions by countries acting on a "tit-for-tat" basis.

Yet, it is also possible to hypothesize that, given the highly unstable geopolitical environment, the EU attempted to create an instrument that would be effective under exceptional circumstances, and thus, compatibility with WTO norms may not have been the primary concern during the legislative process. No one questions that the EU is one of the WTO's key members, consistently supporting a rules-based international trade system and, under normal conditions, taking all possible measures to implement WTO Dispute Settlement Body decisions and recommendations. Nevertheless, some experts point to the EU's "banana litigation saga" and argue that the EU's legislative decisions often depend not on international legal norms but on political will or even the expectations of European citizens regarding how specific issues should be regulated.

Ultimately, this debate prompts a broader question: Can we rely solely on legal analysis to assess the legitimacy of the EU's Anti-Coercion Instrument? Or should a pragmatic approach be adopted, particularly in light of instances where WTO mechanisms have proven insufficient in curbing economic coercion? As the EU navigates these legal and geopolitical intricacies, the ongoing discourse reflects the challenge of balancing rule of law principles with the necessity of safeguarding its strategic autonomy in an unpredictable global landscape.

Panel IV

Autonomy Undermining Autonomy?

Attila Vincze, Masaryk University Brno

EU legal order is based on autonomy and has stressed its independence from national legislation since the foundation years (26/62 van Gend en Loos). Later on, it has also highlighted its autonomy regarding international law and emphasised that an international agreement cannot affect the allocation of powers fixed by the Treaties or the autonomy of the Community legal system (C-402/05 P and C-415/05 P Kadi).

Nonetheless, autonomy is also used in other contexts. The CJEU acknowledges the member states' procedural (Profi Credit Polska II) or fiscal (C-885/19 Fiat Chrysler) autonomy. What is more, the CJEU has treated Member States' autonomy quite generously recently (Randstad Italia, C-497/20; Hoffmann-La Roche, Case C-261/21; Case C-582/21, Profi Credit Polska II) and lowers the requirements of an effective remedy to a fair access to justice.

My contribution points out that the two abovementioned concepts or aspects of autonomy can undermine each other. In the famous or infamous Achmea case, the CJEU clarified that investment treaties concluded by member states are contrary to Article 344 TFEU, which protects the Court's exclusive jurisdiction. Consequently, they are also contrary to the autonomy of the EU legal system.

That judgment did not consider the Member States' autonomy in this context and did not raise the question as to whether the autonomous EU legal order is capable of providing the same level of investment protection as international treaties and arbitration.

Private parties have no direct access to the CJEU, so they have to seek a remedy before national courts. Member States sets their conditions. The parties have no right to a preliminary ruling, so an eventual access to CJEU cannot be enforced. A remedy before the ECtHR is because of the Bosphorus assumption rarely available. The Commission does not have the manpower and the capacity to chase investments and if it does so like in the case of negative impact of retail taxation on foreign investment in Poland or Hungary, it is not quite successful. Moreover, national courts have a bias towards their own government and therefore they are much less inclined to award damages. All in all, EU law does not provide the same level of protection, and therefore evoking autonomy as argument is rather an illusory one.

The CJEU Adjudicating on the Status of Intergovernmental Organizations

Nikoleta Paraskevi Chalanouli, NATO Mission Appeals Tribunal

The CJEU has advocated that it implements international law, while being in a separate legal framework. Such has equally been the argumentation of International Organizations (IOs), *i.e.* that they operate within their own legal framework enjoying a fundamental principle of their immunities.

Cases where an IO itself has presented itself as a party to a litigation before the CJEU are rare. The first case we will examine, we will refer to as the *Eurocontrol* case.[1] In said case the CJEU did consider the preliminary ruling requested was not referring to the Eurocontrol Convention, i.e., to its organizational immunities, and confirmed its competence. The CJEU rejected Eurocontrol's arguments, which presented itself as an IO, and not as an undertaking as the plaintiff SAT argued. It also added that its relations with the Community are governed by public international law, meaning its relation with the EC was that of *par in parent non habet imperium*, and, consequently, this relation would impede the CJEU to deal with the matter in question and set aside its jurisdiction. The CJEU argued that the Treaty established direct cooperation with national courts of the Member States. This cooperation has a non-contentious nature and excludes the intervention of the parties. For that reason, the CJEU recalled the *Hessische Knappschaft v Maison Singer et Fils* case.[2]

The second case concerned a preliminary ruling related to the European Schools. The European Schools are a legal entity with its own constituent instruments.[3] It also has the specific particularity that the Convention defining the Statute of the European Schools (European Schools Convention), which is currently in force[4] "was also concluded by the European Communities".[5]

And finally we will examine the C-186/19 - Supreme Site Services and Others, where the CJEU, broke the concept of functional immunity of IOs, into acts *iure gestionis* and *iure imperii*.

[1] Case C-364/92, *SAT Fluggesellschaft mbH v Eurcontrol*, [1994], ECR I-43, I-59. SAT argued that Eurocontrol's activities on the organization and collection of route charges was not *acta iure imperii*, but *acta iure gestionis, i.e.,* economic activities governed by private law. However, CJCE judgments on the interpretation of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, from which it is apparent that Eurocontrol is a public authority acting in the exercise of its powers (Case 29/76 LTU v Eurocontrol [1976] ECR 1541, and in Joined Cases 9/77 and 10/77 Bavaria Fluggesellschaft and Germanair v Eurocontrol [1977] ECR 1517).

[2] Case C-44/65, *Hessische Knappschaft v Maison Singer et Fils,* [1965] ECR 965.

[3] The Statute of the European School, signed at Luxembourg on 12 April 1957, 443 *UNTS*, p. 129 and the Protocol on the setting-up of European Schools with reference to the Statute of the European School, signed at Luxembourg on 13 April 1962, 752 *UNTS*, p. 267.

[4] Convention defining the Statute of the European Schools, concluded in Luxembourg on 21 June 1994, *OJ* 1994 L 212, p. 3, which entered into force on 1 October 2002. Said Convention replaced the Statute of the European School and the Protocol on the setting-up of European Schools.

[5] Case C-196/09, *Paul Miles and others v. European schools*, [2011] ECR. I-05105, para. 4; the Court clarifies that the European Communities were "empowered to do so by Council Decision 94/557/EC, Euratom of 17 June 1994 authorising the European Community and the European Atomic Energy Community to sign and conclude the Convention defining the Statute of the European Schools (OJ 1994 L 212, p. 1)".

Scope of Jurisdiction of the CJEU in the Field of CFSP for Human Rights Violations and EU Accession to the ECHR

Péter Budai, Eötvös Loránd University of Budapest

The autonomy of EU law possesses an existential character among the other principles of the EU legal order. It preserves the essential character of the powers of the Union and its institutions to remain unaltered in line with the Treaties. Shuibne highlights that through its case-law, the Court of Justice of the European Union has established three specific dimensions for the principle. First, the purposive dimension of the autonomy of EU law enables the Union to pursue its aims and objectives. Second, the autonomy has a substantive dimension that ensures the (constitutional) consistency between EU law and other legal regimes of international law. Finally, the institutional dimension of autonomy guarantees the respect of allocation of responsibilities and powers of the institutions of the Union and the Member States. The Court of Justice articulated the three characteristics of the autonomy of EU law in Opinion 2/13. It held that the Draft Agreement of the EU to the European Convention of Human Rights (ECHR) is incompatible with primary EU law. Ten years after the negotiations of the Draft Agreement, delegates from the EU and non-EU Member States of the Council of Europe prepared a set of rules for the accession. One of the concerns the Court of Justice formulated, namely the precise scope of its jurisdiction with respect to alleged human rights violations concerning acts, actions, or omissions in matters relating to the common foreign and security policy (CFSP), remained unresolved and that the revised draft agreement did not address. Unsurprisingly, the Court has examined its jurisdiction on CFSP since the publication of Opinion 2/13. Recently, the Court of Justice issued two decisions concerning the scope of its jurisdiction about CFSP matters with regard to alleged human rights violations, i.e., the Neves 77 (C-351/22) case and KS and KD (C-29/22 P) joined cases. It was suspected that the decisions would improve the prospect of the accession of the EU to the ECHR. Yet, after the release of the respective decisions, it is the Court of Justice that decides if its findings in its case-law would fulfill the requirements about the autonomy of EU law.

To fully understand the issue at hand, the Court's recent case-law needs further examination, with special attention to the recent aforementioned decisions. Reflecting on that these decisions have significant implications for the autonomy of EU law, as they clarify the Court's jurisdiction, this paper suggests examining the findings of its case-law regarding CFSP matters if those findings fit the three specific dimensions of the autonomy of EU law introduced by Shuibne. Has the Court of Justice fully explored its jurisdiction? Would the findings fit the aforementioned dimensions of the autonomy of EU law? First, the paper provides a state of play, stressing the deficiencies of the accession agreement to the ECHR, concerning the CFSP, and the development of the Court's case-law (Section I). Then, the paper turns to examine the aforementioned dimensions of autonomy (Sections II, III and IV). As institutional autonomy strongly develops around the Court's exclusive jurisdiction, that aspect will also be examined. To understand the complexity of this issue and to draw the necessary conclusions, the paper examines the Court's relevant decisions and conclusions drawn by advocate-generals. However, as the cases also concern the practice of the European Court of Human Rights (ECtHR), the paper also reflects ECtHR's case-law concerning the related decisions.

Long-Arm Jurisdiction of the Unified Patent Court – The Interplay Between Brussels Regulation, Lugano Convention and UPCA

Marko Andjic, University of Osnabrück

In 2023, the Unified Patent Court (UPC), created under the Agreement on a Unified Patent Court (UPCA), an international treaty ratified by 18 member states of the European Union (EU),[1] began its work. Its Court of First Instance consists of a Central Chamber and various Local and Regional Chambers. Until then, it has been a long way: In the 1970's, the treaty-based European Patent Convention (EPC)[2] laid the foundation for a unified European patent system, however, not yet including a patent litigation infrastructure.

The UPC must face the question if it integrates into the EU court architecture or whether it constitutes a disruptive – potentially autonomy-threatening – element in it. As a common court of several EU member states, the UPC is deemed a court of each member state (see Art. 71a(1)(2)(a) Brussels Regulation). Therefore, when the jurisdiction concerns only UPCA-states, Austria and Germany for example, there are no issues.[3] However, there are three fields of potential tensions:

First, the relation of the UPC to the EU member states that are not UPCA-states. For the international jurisdiction of the UPC, Art. 31 UPCA refers, *inter alia*, to the Brussels Regulation. As the latter classifies the UPC as a common court, general provisions govern international jurisdiction (see Art. 71b no. 1 Brussels Regulation). Thus, the UPC's jurisdiction reaches beyond the UPCA-states and covers all EU member states,[4] for example Spain. However, problematic deviations may exist as far as the Brussels Regulation – such as in Art. 7a(2) – by exception also addresses local jurisdiction. In this case, distribution of competence under Art. 33 UPCA may declare a Local or Regional Chamber of another UPCA-state, devoid of the respective connecting factor (i.e. infringement), is competent.[5]

Second, the question arises as to how the UPC's scope of application for European patents (see Art. 1, 3(c)(d) UPCA) affects EPC-states that are not EU member states, but member states to the Lugano Convention, such as Switzerland. The Lugano Convention does not contain any regulations comparable to Art. 71a et seq. Brussels Regulation.[6] It is disputed whether the UPC's jurisdiction extends to these states by virtue of Art. 71b Brussels Regulation or whether it is restricted by the reciprocity of the Lugano Convention, a phenomenon referred to as "*Lugano Shield*".[7]

Third, the relationship of the UPC to parties domiciled in states that are no member states to any convention governing jurisdiction, but member states of the EPC, such as Turkey or the United Kingdom. As Art. 1, 3(c)(d) UPCA declares the UPC competent to hear claims on all European patents, jurisdiction is extended to third country residents. This is where the "*long-arm jurisdiction*" of the UPC comes into play,[8] which is opened by Art. 71b no. 2, 3 Brussels Regulation, but questionable both from a perspective of international comity and substantial justification.

To develop a solution for the aforementioned constellations which takes heed to the political aim underlying the UPC as well as the EU's international obligations, the interplay between international, EU and national jurisdiction law and the respective effects concerning autonomy must be analyzed.

[1] UPCA member states referred to as "*UPCA-states*"; for an up-to-date list, see https://www.unified-patent-court.org/en/organisation/upc-member-states.
[2] EPC member states referred to as "*EPC-states*"; for a list, see https://www.epo.org/en/about-us/foundation/member-states/date.
[3] Bopp/Kircher/*Bopp*, Handbuch Europäischer Patentprozess, 2nd ed., § 8, para. 14.
[4] *Kalden*, GRUR Patent 2023, 178, 179.
[5] *Hollander*, GRUR Patent 2023, 205.
[6] *Bopp* (n 4) para. 54.
[7] *Grob/Härtle*, Mitteilungen der deutschen Patentanwälte 2023, 489, 495 et seq.
[8] *Grob/Härtle* (n 7) 490.

Panel V

The Autonomy of EU Law Through the Lens of Investment Tribunals: A Costly Clash of Principles

Johannes Tropper, University of Vienna

The idea that EU law constitutes an autonomous legal order, enjoying primacy not only over the domestic law of member states but also over international law, has particularly clashed with investment treaties concluded between EU member states (prior to their accession to the EU). This issue arises not only under intra-EU bilateral investment treaties, but also under the plurilateral Energy Charter Treaty (ECT), concluded in 1994 by EU members, future EU members, and third states. Investment tribunals established under such intra-EU investment treaties have generally been reluctant to accept the view that EU law should be treated as distinct from international law. This conflict between EU law and international investment law became particularly apparent following the CJEU's *Achmea* judgment in 2018 and its *Komstroy* judgment in 2021.

The paper will analyze how investment tribunals have approached EU law from the perspective of international law, in particular the Vienna Convention on the Law of Treaties (VCLT), both before and after *Achmea* and *Komstroy*. Investment tribunals have mostly characterized EU law as having a dual character: part of EU law can be described as the internal law of member states, while the other part can be qualified as international law proper. Consequently, from the perspective of investment tribunals, EU law can be subsumed under the terminology used in the VCLT, and any conflicts between investment treaties and EU law can be resolved within the framework of the VCLT. On this basis, all tribunals except one have found that EU law does not take precedence over investment law in cases of conflict between the two.

After analyzing the view expressed by investment tribunals, this paper examines the alternative approach, which argues that EU law must be treated as *lex superior* with respect to intra-EU investment treaty. In particular, it examines the arguments advanced by the European Commission and some member states that the CJEU' judgments and declarations by EU member states are authentic interpretations of investment treaties, implying that EU law must prevail over investment law in cases of conflict.

Finally, the paper argues that the continued insistence of arbitral tribunals that EU law does not prevail over investment treaties, and the insistence by the European Commission and some EU member states that EU law must prevail over investment law, has led to an irresolvable legal conflict. This has created substantial legal uncertainty for both investors and EU member states and led to delays in remedying the situation by EU member states. EU member states have refrained from terminating intra-EU BITs for an extended period, and, having failed to agree on reforms to the ECT, have taken a long time to withdraw from the ECT. Accordingly, insisting on the special status of EU law, rather than accepting the VCLT-based approach presented by the arbitral tribunals and terminating or withdrawing from treaties, has arguably resulted in significant financial costs for some EU member States.

Jurisdictional Objections before Investment Treaty Tribunals based on the Argument of the Autonomy of the EU Legal Order

Umut Parlar, University of Zurich

This research aims to assess from the perspective of an investment treaty tribunal the prevailing conflict between dispute settlement mechanisms contained in investment treaties between EU Member States, on the one hand, and the EU legal order, on the other. More specifically, it aims to set out a legal framework for investment treaty tribunals to decide on objections to their jurisdiction based on the argument of the Autonomy of the EU legal order.

There is a fundamental ideological rift between EU institutions and scholars on the one hand, and investment treaty tribunals and international law scholars on the other, with respect to the question of how the conflict between dispute settlement provisions in intra-EU BITs and EU law ought to be resolved. Recently, a number of scholars[1] attempted to set out a legal framework to the conflict by emphasizing that EU law does not form a regime that is totally cut off from international law and thus the relationship between intra-EU dispute resolution clauses and EU law must be viewed from the perspective of the law of treaties.

However, this approach does not capture the problem from a wholistic perspective as it presupposes that the applicable legal framework to a tribunal's jurisdiction is based on international law. As to be set out in the paper, this is not necessarily the case. The assessment of the problem at issue ought to start at an earlier step, namely with the question under which conditions an investment treaty tribunal constituted pursuant to a dispute resolution clause in an intra-EU BIT has jurisdiction, and under which conditions the autonomy of the EU legal order may prevent a tribunal of its jurisdiction, namely by interfering with the consent of the parties to the dispute.

In that light, the paper starts with an assessment of the consent to arbitration under an investment treaty and the applicable legal framework to that consent. It will be shown that the decisive factor for the law applicable to a tribunal's jurisdiction is whether the arbitration takes places under the auspices of the ICSID Convention. If that is the case, EU law can only interfere with the parties' consent if it renders a dispute resolution clause in an intra-EU BIT inapplicable based on international law, namely under the principles of *lex posterior* and *lex specialis*. If the arbitration is not based on the ICSID Convention, the question turns to whether the seat of the arbitration is in an EU member state. If this is the case, the law governing the arbitration agreement will be that state's domestic law, which EU law is part of. Therefore, the dispute resolution clause in the respective treaty will be rendered invalid on the basis of EU law.

In that light, the paper aims to set out a wholistic conceptual framework on the jurisdiction of investment treaty tribunals faced with the intra-EU objection. After having set the foundation based on the aforementioned remarks on the consent to arbitrate, it aims to pursue an analysis on how tribunals should decide on their jurisdiction for each of the abovementioned constellations.

[1] For instance Konstantina Georgaki, 'Conflict Resolution between EU Law and Bilateral Investment Treaties of the EU Member States in the Aftermath of *Achmea*' (2023) 41 Yearbook of European Law 374.; Mattia Colli Vignarelli, 'Can the European Union Serve Two Masters? Revisiting the Conflict Between EU Treaties and Investment Agreements Under the Law of Treaties (2024) Diritto del Commercio Internazionale Anno XXXVIII Fasc. 1

The Autonomy of EU Law under Threat: The Role of the Interpretive Community in International Investment Arbitration

Gabriel M. Lentner, University of Continuing Education Krems

The complex interplay between EU law and international law has long been the subject of scholarly debate. Recent legal developments around intra-EU investment arbitration have transformed this theoretical discussion into a practical challenge, confronting courts and tribunals worldwide with difficult questions regarding their interaction and effect. In the landmark case of Achmea, the Court of Justice of the European Union (CJEU) ruled that Articles 267 and 344 TFEU preclude an arbitration clause in an investment protection agreement between EU Member States. In Komstroy, the CJEU extended the application of Achmea to investment protection proceedings under the multilateral Energy Charter Treaty (ECT).

However, ICSID tribunals have largely disregarded these rulings, continuing to assume jurisdiction in intra-EU investment disputes, with only very recent exceptions. This paper argues that this resistance is unsurprising for socio-legal and institutional reasons, best explained by the influence of interpretive communities in legal decision-making. It explores the socio-legal role of corporate lawyers and other actors in shaping interpretations within investment arbitration, positioning them as 'norm-entrepreneurs' (Cass Sunstein) who influence social norms and legal interpretations. Analyses by Nicolas Perrone and Dimitri Van Den Meerssche of business leaders and lawyers in international investment law provide a foundation for understanding these dynamics.

The study delves into the 'grand old men' of the investor-state dispute settlement (ISDS) mechanism, a term rooted in Dezalay and Garth's empirical research on the international arbitration community. Their work, informed by Bourdieu's concept of social capital, highlights the predominance of well-educated, Western-trained males within these networks, which function as exclusive clubs where appointments are traded based on reputation and experience. This insular nature contributes to the rejection of EU law-based interventions by the CJEU, which, due to its status outside that interpretive community of investment lawyers, lacks the de facto legal authority it holds within EU law circles.

Institutionally, the special legal regime of the ICSID convention ensures that the existing interpretive community creates a closed loop that perpetuates their dominance. This dynamic is illustrated through a critical analysis of the interpretive community of investment lawyers and the examination of existing decisions and their citation practices in ICSID awards dealing with intra-EU disputes post-Achmea.

By highlighting the interplay between social norms, professional networks, and legal interpretation, this paper contributes to a deeper understanding of the forces potentially undermining the autonomy of EU law in the field of investment law and underscores the need for systemic reforms.

Panel VIa

The EU’s Climate Accountability in International Law: A Case Study of the Carbon Border Adjustment Mechanism

Agata Bidas, University of Vienna

The autonomy of EU law has become a central topic of debate in discussions about the relationship between the European Union and international law, particularly in the context of the concept of international responsibility. As the EU assumes a prominent role in global climate action, it encounters considerable obstacles in aligning its legal frameworks with the principles of accountability enshrined in international law. In particular, the EU's conceptualisation of its responsibility demonstrates an evolving stance towards external obligations, as it seeks to account not only for emissions within its own territory but also for those embedded in the goods it imports. However, this expanded understanding of responsibility gives rise to intricate issues pertaining to extraterritoriality, sovereignty, and the principles that govern jurisdiction in international law. This prompts questions regarding the extent to which the EU can or should impose its standards on foreign actors, especially when such actions affect countries with differing economic capacities and regulatory environments.

A case study that is particularly relevant in this context is the EU's Carbon Border Adjustment Mechanism (CBAM), which demonstrates how the EU is attempting to operationalise its climate responsibility by addressing its global greenhouse gas footprint. The CBAM introduces a financial adjustment on imported goods based on their embedded carbon emissions, representing an innovative approach to mitigating carbon leakage by creating a level playing field for EU producers. While this mechanism demonstrates the EU's commitment to reducing global emissions, it simultaneously gives rise to significant legal and ethical questions concerning the EU's authority to regulate foreign emissions. The CBAM's jurisdictional reach has resulted in tensions with trading partners who argue that the EU's approach to consumption-based emissions infringes upon their sovereign right to regulate within their own borders.

Furthermore, the CBAM presents a number of challenges within the context of existing international climate agreements, particularly in relation to the principles of equity and Common But Differentiated Responsibilities and Respective Capabilities. Despite the EU's advocacy for collective climate action, the CBAM's structure arguably conflicts with the United Nations Framework Convention on Climate Change (UNFCCC) norms, which prioritise territorial emissions and allow countries flexibility in self-differentiation. The absence of differentiation between trading partners under the CBAM has the potential to exert a disproportionally adverse impact on developing and least-developed countries, which may encounter difficulties in meeting the CBAM's administrative and financial obligations. In response, the European Parliament's amendment to allocate CBAM revenues towards supporting these countries represents a step towards addressing this disparity. However, it remains uncertain whether this financial support will prove sufficient or effective.

The paper's analysis leads to the conclusion that the EU's role as a climate leader must be balanced with a fairer interpretation of its international responsibilities. By adopting a differentiated approach to the CBAM, reflective of the varied capacities of its trading partners, the EU could enhance its climate leadership and mitigate potential conflicts with international trade and climate norms. In conclusion, this study contributes to the ongoing debate surrounding the EU's legal autonomy and its obligations within the context of global climate governance. It proposes potential avenues for aligning the EU's climate objectives with the principles of equity, fairness, and accountability that underpin international law.

The EU as a Global Regulator on Ship Recycling: The Complex Interactions Between EU and International Law

Ioanna Hadjiyianni, University of Cyprus; and Kleoniki Pouikli, Utrecht University

The dynamic interplay between EU and international law is pivotal for regulating global challenges like ship recycling, which affects diverse actors worldwide. End-of-life ships often end up in developing countries, where dismantling under poor conditions causes worker injuries and severe pollution. Shipbreaking currently falls under fragmented, overlapping international and EU regulations. While the Basel Convention and its Amendment Ban, incorporated into EU law via the Waste Shipment Regulation, govern hazardous waste shipments, the Hong Kong Convention—under the International Maritime Organization and set to enter into force in June 2025—addresses ship recycling more specifically. The equivalence between the two international regimes as to requisite level of protection and control has not been settled at the international level and their concurrent application will/is expected to lead to varying and potentially contradicting obligations for port states, flag states and shipbreaking countries. In the meantime, to expedite compliance with the Hong Kong Convention, the EU unilaterally adopted the Ship Recycling Regulation, which deviates from the Basel Ban and aims to 'export' EU standards to facilities in third countries.

In this complex regulatory landscape, the EU acts as a major global force in environmental protection and maritime regulation, overseeing 40% of the world's fleet and unilaterally shaping the interplay between conflicting regimes before full international harmonization—asserting EU internal autonomy. As a significant market and normative power, the EU influences global frameworks both as a party of the Basel Convention, alongside the Member States and indirectly through the International Maritime Organization, despite lacking formal membership. However, the EU's complex representation in international fora can limit its capacity to drive global regulatory action, revealing the limits of its autonomy from an external perspective. The paper explores how the EU navigates its role as a global regulatory actor in ship recycling, particularly in balancing its internal autonomy with compliance under overlapping international legal frameworks.

The paper's structure, after outlining the fragmented regulatory frameworks governing ship recycling at both international and EU levels and analysing the EU's dual role in environmental and maritime governance, focuses on assessing recent international developments that have intensified the already uneasy coexistence of these overlapping regimes. Namely, following the entry into force of the Basel Ban in 2019, and the upcoming entry into force of the Hong Kong Convention, the regulatory landscape has once again shifted. In complying with its international obligations under the Basel Ban requiring it to prohibit the export of hazardous waste to non-OECD countries, the EU seeks to revisit the scope of application of the Waste Shipment Regulation. In parallel, with pending applications from third-country facilities seeking inclusion in the European List of Authorized Facilities under the Ship Recycling Regulation, the EU is once again called to determine and ensure the effective coexistence of multiple regimes.

The paper's main analytical lens highlights the EU's strategic role as a regulatory actor, balancing adherence to international standards with efforts to shape them through diplomacy and unilateral standards, leveraging its market power. The paper examines how the EU independently determines protection levels for EU-flagged ships or those departing EU territory for dismantling. The integration of international standards into the EU acquis and the establishment of equivalency between international overlapping regimes illustrate the two-way interaction between EU and international law. Overall, through a sector-specific focus, the paper assesses how EU legal autonomy and its interplay with international law shape a topical global regulatory challenge.

Audaces Fortuna Iuvat: The EU's Quest for Autonomy in AI and Cybersecurity

Michał Byczyński, University of Lodz

The *Schrems II* ruling by the Court of Justice of the European Union highlighted a critical tension between the EU's high data protection standards and the realities of a fragmented global digital environment. While the EU aspires to set ethical, rigorous standards in artificial intelligence (AI) and cybersecurity - through regulations such as GDPR, DSA, DMA, and the AI Act – the case of *Schrems II* demonstrates that establishing such strict protections within the EU alone cannot ensure equivalent standards globally. This ruling, which invalidated the EU-US *Privacy Shield* due to inadequate protections against US surveillance practices, illustrates the limits of European governance when faced with lower international standards, especially in jurisdictions where data protection norms are less stringent.

This study addresses the question, **to what extent can the EU maintain its high regulatory standards in AI and cybersecurity, given the limitations imposed by global legal fragmentation and the lack of alignment with international standards**? It sheds light on a broader conflict between the EU's regulatory ambitions, framed by the author as '*European governance*,' and the need for '*global governance*'—a harmonized approach to AI and digital governance on a global scale. The EU's commitment to "digital sovereignty" positions it as a global leader in responsible AI governance and cybersecurity; however, the lack of global governance alignment means that these standards remain isolated, limiting their reach and influence beyond EU borders. In response to some of these challenges, particularly following the *Schrems II* ruling, the EU and US introduced the EU-US Data Privacy Framework, which aims to facilitate transatlantic data transfers while respecting EU standards. Nevertheless, this framework is seen as a partial remedy, as it does not resolve the core tension between the EU's strict regulatory model and the lower standards prevalent in other regions, raising questions about its long-term effectiveness.

This study employs doctrinal legal analysis, focusing on relevant EU regulations in this context through the lense of *Schrems II*. By examining the specific compliance challenges these regulations pose for EU-based entities in the context of international data flows, the study highlights the limitations of the EU's regulatory autonomy in a globalized digital economy. Furthermore, the study compares the EU regulations with the proposed Global Digital Compact, an international initiative with considerably lower data protection standards, to illustrate the divergence between EU ambitions and global regulatory practices.

By examining those limitations, **this study reveals the conflict between the EU's aspiration to lead in ethical AI governance and the practical constraints posed by differing global standards**. Thus, achieving effective and widespread AI governance may depend on finding a middle ground that reconciles the EU's ambitious regulatory approach with the varied standards and legal expectations of other key global players.

The European Stability Mechanism as a Common Backstop for the Single Resolution Fund: A Closely Interwoven Web of EU and International Rules

Paul Weismann, University of Salzburg

The phenomenon of international treaties concluded among EU Member States and, partly, also third countries has become a phenomenon occurring in various policy fields (e.g. Schengen *acquis* or Europol Convention). In reaction to the euro crisis, Member States of the euro area notably i.a. committed themselves in the Treaty establishing the European Stability Mechanism (ESM-Treaty). In the context of the Banking Union (originally a project for the euro area which is, however, open to other Member States), an Intergovernmental Agreement (IGA) was concluded in order to regulate the transfer and gradual mutualisation of banks' financial contributions to the Single Resolution Fund – an EU fund which, under strict conditions, may support the resolution/recovery of ailing banks.

Due to political and/or legal constraints, these regimes were not adopted in the form of EU law, but as agreements of public international law. Nevertheless, they are closely attached to EU law, e.g. by means of cross-references or by using EU bodies for their implementation.

More recently, the ESM, in addition to its existing tasks, was installed as a common backstop for the SRF, i.e. as a fall-back position in case the financial capacity of the SRF should prove insufficient in the event of another banking crisis. This required a reform of both the ESM-Treaty, still lacking ratification by Italy, and the IGA. The interlinkage between the two regimes raises a number of issues at the interface of EU law and public international law. By way of example, two of these issues are addressed here:

1) Both the ESM and the IGA contain an 'essential basis clause'. Under the ESM-Treaty, it requires the permanence of relevant EU bank resolution law, with reference to Art 9(1) IGA, but also adding EU rules and principles not mentioned in the IGA. Under the IGA, the critical point is a fundamental change of circumstances (a term not used in the ESM-Treaty) of relevant rules. Whereas under the ESM-Treaty this permanence is a condition for the ESM to act as a common backstop, pursuant to the IGA a fundamental change of circumstances allows each Member State to suspend some of its obligations under this agreement. In case of a deviation, under the ESM-Treaty, a comprehensive review will be initiated, and a decision by the ESM Board of Governors is required to continue the backstop facility. Both under ESM and IGA, the CJEU may be called upon to decide. These two essential basis clauses require closer scrutiny, in particular with a view to their different material scope, their potential to restrict the Council in its legislative reform ambition, and with regard to Art 62 VCLT.

2) With Bulgaria a Member State outside the euro area has joined, as 'participating Member State', the Banking Union and thus also the SRF. As it is not a contracting party of the ESM-Treaty, in terms of the common backstop an alternative solution had to be found. According to Art 18a(10) of the reformed ESM-Treaty, the ESM shall 'cooperate closely with Participating Member States […] in backstop financing […]'. The participating Member States are 'expected to provide parallel [financing] for the SRF alongside the ESM' (Recital 9a). Whereas this amounts to a commitment of the ESM and a strong invitation to participating Member States, it is unclear on which basis participating Member States like Bulgaria are *obliged* to act accordingly.

This contribution aims at addressing these and other issues relating to the common backstop, focusing on the intertwining layers of EU Member States' rights and obligations under two international agreements (the ESM-Treaty and the IGA), on the one hand, and EU law, on the other hand.

Panel VIb

A ‘Genuine Link’: Necessity or Flexibility in the EU’s Approach to Nationality in Light of International Jurisprudence?

Patrik Marek, University of Vienna

This paper seeks to explore a sector-specific perspective within the context of European law, focusing on the relationship between international jurisprudence and the European Union's approach to nationality, particularly in light of the Nottebohm (IGH, 6. 4. 1955, Nottebohm (Liechtenstein/Guatemala)) judgment. The analysis will examine the concept of a "genuine link" as established in international law, and consider its potential relevance within EU law, especially regarding the relationship between national citizenship and EU citizenship.

EU citizenship, derived from the national citizenship of member states, is regulated autonomously by each member state. However, certain constraints within European law apply to the acquisition and loss of nationality when it leads to EU citizenship. Currently, an infringement procedure against Malta (ECJ Opinion AG Collins 4. 10. 2024 C-181/23, *Malta*, ECLI:EU:C:2024:849) addresses whether nationality based on monetary criteria alone satisfies the "genuine link" requirement between the state and the citizenship applicant. This raises questions regarding potential breaches of member states' loyalty obligations should a genuine link be deemed necessary under EU law.

The distinction between nationality in international law and European law is increasingly relevant as EU citizenship has become inseparably tied to national citizenship. From a purely national perspective, nationality is a sovereign matter, but under European law, the loss of national citizenship can also result in the loss of EU citizenship, triggering European legal scrutiny. Both international and European courts are committed to preventing statelessness, and the European Court of Justice has increasingly intervened in cases where EU citizenship is at risk of being lost, as seen in *Rottmann* (ECJ C-135/08, *Rottmann*, ECLI:EU:C:2010) and *Tjebbes* (ECJ C-221/17, *Tjebbes*, ECLI:EU:C:2019:189). This reflects a broader trend toward ensuring that individuals do not lose access to the rights and freedoms associated with EU citizenship, which the European Commission sees as a safeguard against potential abuses such as crime and corruption.

The essential nature of EU citizenship lies in its provision of access to fundamental rights and freedoms within the Union. The Commission has expressed concern that lax national citizenship rules, particularly in the context of "golden passports," could create an entry point for criminal activities and corruption across the EU. Therefore, while nationality remains a core aspect of state sovereignty, the EU has a vested interest in ensuring that citizenship conferrals do not undermine the integrity of EU citizenship.

This paper will conclude with a discussion on the likely outcome of the *Malta* case, emphasizing the importance of maintaining genuine link criteria between an individual and a state. While the precise formulation of such criteria should remain within the competence of member states, respecting their right to self-determination, the necessity of some connection to the state is key to preserving the legitimacy of nationality and its link to EU citizenship.

Given the complex interplay between international law, European legal protections—such as fundamental rights—and national sovereignty in the context of nationality law, this paper is highly relevant to the call for papers. It aligns with the aim to explore the interactions between international, European, and national legal frameworks concerning the acquisition and loss of nationality.

Does the EU Need International Law to Prevent the Sell-Out of EU Citizenship?

Mario Gervasi, University of Bari

Although EU citizenship is dependent on and complementary to national citizenship of EU Member States, it is "destined to be the fundamental status of nationals of the Member States". Enshrined in the TEU, the TFEU, and the Charter of Fundamental Rights of the European Union, EU citizenship has become an essential feature of European integration. Indeed, in laying down the conditions for acquisition and loss of nationality, Member States must have due regard to EU law.

Nevertheless, it seems that EU law alone has little to say when the risk arises that EU citizenship is basically sold under investor citizenship schemes, commonly referred to as "golden passport" schemes. These schemes allow individuals to acquire a new citizenship simply by making pre-determined payments or investments, regardless of their place of birth, residence or descent. In recent years, several EU Member States have introduced investor citizenship schemes, and while most of them have subsequently been suspended or abolished, Malta has maintained its golden passport scheme.

According to the European Commission, such schemes undermine the institution of EU citizenship. And it is here that, interestingly, EU law appears to need international law, specifically the genuine link requirement. The genuine link doctrine dates back to the 1955 Judgment of the International Court of Justice in the *Nottebohm* case. The ICJ held that "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments".

Thereafter, the genuine link requirement seems to have declined in importance. In its codification work on diplomatic protection, the UN International Law Commission restricted the relevance of the genuine link requirement to the exceptional case of multiple nationality and a claim against one of the States of nationality (Article 7 of the Draft Articles on Diplomatic Protection). Similarly, the case law of the EU Court of Justice has so far not given decisive weight to the genuine link requirement. This is apparent, particularly, in the *Micheletti* (1992), *Garcia Avello* (2003), and *Zhu and Chen* (2004) judgments.

Against this background, the *"Golden Passport" Scheme* case, still pending, has the potential to reopen the question of genuine link as a requirement for citizenship under EU law and international law. When, on 21 March 2023, the Commission decided to refer Malta to the EU Court of Justice, it relied on the genuine link requirement to allege a breach of EU Law. The centrality of the genuine link requirement is confirmed by the opinion of Advocate General Collins, delivered on 4 October 2024. In his view, "the Commission has failed to prove that, in order to lawfully grant national citizenship, Article 20 TFEU requires the existence of a 'genuine link' or a 'prior genuine link' between a Member State and an individual".

The paper aims to examine the implications of the *"Golden Passport" Scheme* case from the twofold perspective adopted by the Workshop. It argues that, from an "inside" perspective, reliance on the genuine link requirement undermines the idea of autonomy of EU law from international law, as far as EU citizenship is concerned; from the "outside" perspective, the EU's reaffirmation of the genuine link requirement could mark a shift towards the crystallization of the genuine link norm, thus contributing to the progressive development of general international law. The paper therefore considers the EU both as a supposedly autonomous legal order and as an actor in the international legal system.

Balancing Autonomy with Accountability: The EU's Non-Refoulement Obligations in an Evolving Global Legal Landscape

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The European Court of Justice's (ECJ) jurisprudence demonstrates a nuanced approach in reconciling the European Union's (EU) asylum and migration law with the principle of non-refoulement, as a binding customary international norm while safeguarding the EU's legal autonomy. The ECJ emphasizes the necessity for Member States (MS) to honor international obligations, including the said principle, in the context of EU law implementation. This approach aligns EU asylum policy with broader international human rights standards, reinforcing non-refoulement as a central tenet. Yet, the EU's unique position as a non-party to key human rights treaties presents a fundamental legal challenge: although the ECJ recognizes international standards, EU autonomy restricts the degree to which international courts, such as the European Court of Human Rights (ECtHR), can directly hold the EU accountable for violating the principle of non-refoulement, leaving such right only to the ECJ.

In practice, the Union's responsibility remains constrained by its dependence on MS to execute and enforce these principles. Through frameworks like the "organic model" and the "competence model," the ECJ navigates a complex jurisdictional terrain to address attribution of responsibility. Under the organic model, responsibility is attributed to the EU when its own bodies, such as Frontex, directly control actions, while under the competence model, responsibility lies with the MS when they hold operational authority. This division highlights an unresolved tension between EU and international obligations, underscoring the strain placed on EU sovereignty by the need to comply with customary law while retaining a distinct legal identity.

This research will examine the delicate balance the ECJ must strike between enforcing international customary law while simultaneously protecting the Union's legal independence, especially after the adoption of the New Pact on Migration and Asylum. By embedding non-refoulement into EU law, the ECJ seeks to prevent human rights loopholes, particularly within Frontex-led border operations and in the application of EU law. However, this judicial approach brings the EU closer to an internationalized standard, challenging the Union's legal autonomy. The dual attribution models underscore the persistent tension within EU law: the EU is increasingly compelled to meet international obligations, yet its legislative actions pertain to an interpretation of norms of questionable validity in accordance with international standards. Ultimately, the ongoing pressure from customary international law on the EU's distinctive legal framework reflects a fundamental and recurring tension. As the EU integrates customary principles, its autonomy is increasingly tested within a globalized legal and humanitarian landscape, raising critical questions about the future of the Union's sovereignty and accountability in fulfilling international responsibilities.

Panel VII

The 'Delicate' Autonomy of EU Law vis-à-vis International Human Rights Law

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The autonomy of EU law, especially in terms of International Human Rights Law (IHRL), remains a defining feature of the EU's legal landscape. It underscores the unique nature of the EU as a supranational entity with its legal system and priorities. While this autonomy enhances the EU's ability to protect its legal principles, it also presents challenges and tensions, particularly in how it aligns with broader international legal norms. As the EU continues to navigate these issues, the balance it strikes between autonomy and adherence to international law will significantly impact its role on the global stage and its internal legal coherence. In this framework, our paper seeks to answer several questions raised by the application of EU autonomy to IHRL. Both systems already interact in several ways: The EU Charter of Fundamental Rights mirrors and extends the rights found in IHRL instruments, like the ECHR and the UDHR. The ECJ has clarified that while the EU respects international human rights treaties, the application and interpretation of these treaties must not compromise the autonomy of the EU legal order. This gives rise to legal issues, such as the practical implementation of this autonomy. Other research gaps involve the influence on international norms, finding mechanisms to solve conflicts between legal orders, impact on Member States, defining human rights protection in external policies and effectiveness of human rights advocacy. Moreover, the refusal to join the European Convention on Human Rights, following the negative opinion of the ECJ in *Opinion 2/13* on EU accession to the ECHR, has been a point of contention. The Court held that accession could adversely affect the autonomy of the EU legal order and its distinctive features, including the specific characteristics of EU law. Addressing those gaps can help scholars and policymakers to better understand the role of EU law in the global legal landscape, especially in terms of upholding human rights both within and outside the EU.

The key findings of the present research concern the implications of the autonomy of EU law vis-à-vis international law, particularly in relation to human rights, which are profound and wide-ranging. They extend across legal, political, and socio-economic domains, both within the European Union and globally. This delicate balance between EU law and international law underscores the need for ongoing legal and diplomatic engagement to ensure that EU principles can coexist with international obligations, particularly in the sphere of human rights, where universal standards are vital for legitimacy and efficacy. In fact, our paper attempts to search for legal tools to establish this balance. As for the structure, the study will be split into two parts: The first section covers the challenges raised by the application of the principle of autonomy of EU law to IHRL. And the second identifies the existing and suggested means to benefit from the intersection between both legal orders so as to provide better protection of fundamental rights. Therefore, the research follows doctrinal and analytical approaches, while conducting a comparative analysis to assess the two regimes in parallel. The autonomy of EU law has far-reaching consequences that affect how the EU operates internally and how it engages with the broader world. It impacts legal norms, political strategies, socio-economic policies and human rights protections. Understanding these effects is crucial for policymakers and legal practitioners, especially concerning the intersections between EU law and IHRL to guarantee more protection of fundamental rights and to ensure more consistency and unity of the EU legal order.

EU Target Sanctions – Enforcing or Undermining International Law?

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On 10 April 2024, the EU General Court annulled the inclusion of Petr Aven and Mikhail Fridman in the list of persons subject to restrictive measures. The Court failed to establish causality and did not find sufficient evidence linking these individuals to the acts undermining territorial integrity of Ukraine. This decision by the EU Court is welcome as it provides a modicum of critical assessment of the sanctions regime that has been used extensively in the context of the war in Ukraine. The rulings in Mr. Aven's and Mr. Fridman's case continue the line of judgments reviewing compatibility of sanctions regimes with due process guarantees in the EU – Kadi I and Kadi II being particularly well-known earlier precedents. While sanctions may have strong moral appeal, their harmonization with the principle of legality remains questionable. It has been previously argued that imposing targeted sanctions on private individuals can undermine war effort by recognizing these people's influence on state decision-making. While such ambition is noteworthy, the shadow side of this development is the erosion of trust of EU citizens and national authorities in the functioning of the rule of law and its core tenets, such as legal certainty and prohibition of arbitrariness of executive powers.

The Settled Case Law of the ECtHR: A Supplementary Incentive and a Hint for a Possible Solution to Close the Gap in the Seemingly 'Complete' Legal Protection System under EU Law?

Theresa Gierlinger, JKU Linz

The settled case law of the ECtHR: a supplementary incentive and a hint for a possible solution to close the gap in the seemingly "complete" legal protection system under EU law?

Although, it cannot be denied that there is a gap in the once by the ECJ "completely" established legal protection system under EU law, which is intended to be closed through the preliminary reference procedure in order to provide effective judicial protection for the individual's rights, the ECJ emphasizes in its consistent case law that the system established by Art 267 TFEU is completely independent of any initiative of the parties of the national proceedings and it does not constitute a means for redress. In other words, the determination and the formulation of the referring questions is ultimately up to the national court and the mere fact that the party contends that there is a question which has to be referred to the ECJ, does not compel the national court to do so.

Albeit, the ECtHR based on the same argument, not other than the ECJ, explicitly denies an absolute subjective right of the party to have a question referred to the ECJ, states that the right of a fair trial laid down in Art 6 para 1 ECHR can be violated if a suggestion for a preliminary ruling by the party has been made and a national court of last resort does not reason its refusal to refer according to the CILFIT-exceptions. Therefore, the ECtHR affirms based on Art 6 para 1 ECHR a relative subjective right, namely a subjective right under the conditions that the objective criteria for the national courts obligation to refer are met and a prior suggestion of the party has been made. Notwithstanding that the ECJ has also just recently stated for the first time that a national court of last resort has to justify its refusal to refer, the latter has – other than the ECtHR – not bound that reasoning to a prior suggestion of the party and not explicitly addressed the consequence of not doing so, in particular with view to the case law of the ECtHR in any individual right being violated. Even though at first glance the ECtHR's diverging assessment does not seem to prove problematic, as the ECtHR with Art 6 para 1 ECHR just applies a provision of the ECHR as it is intended to do, it cannot remain unnoticed, that in doing so, it does not leave the national court's obligations in the context of the preliminary reference procedure completely untouched, but rather chooses to interpret them in its own way.

This raises the question whether, and if, to what extent the ECtHR is even allowed to interpret the national court's obligations and its CIFLIT-exceptions differently and what consequences that diverging interpretation may have for the protection of the individual's rights under the EU legal order. This paper will first address these questions in order to ultimately show whether the diverging ECtHR's assessment should make closing the gap in the EU legal protection system not only desirable in view of the incoherence of EU legal remedies, but also with regard to the preservation of the autonomy of the EU legal order, thereby elaborating whether the approach taken by the ECtHR could in that sense even serve as a hint for a possible solution.

New Dimensions of the Right to an Effective Remedy in the Jurisprudence of the CJEU – At the Intersection of Legal Orders

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One of the features of the autonomous legal order of the European Union (EU), often referred to by the Court of Justice of the European Union (CJEU), is that it is based on the rule of law, one of the guarantees of which is that the EU Treaties have established a complete system of legal remedies. This system is a sine qua non condition for the exercise of the right to an effective remedy, as enshrined in the EU Charter of Fundamental Rights. At the same time, however, the case law of the CJEU was necessary to complete (one might say perfect) this system of remedies. In recent years, the jurisprudence of the CJEU has introduced new dimensions of the right to an effective remedy which are mainly linked to the dynamic interpretation and development of the law by the CJEU beyond the text of the EU Treaties.

The aim of the research is to analyse and evaluate this issue in three related areas:

1. *Is the jurisprudence of the CJEU able to adequately guarantee the completeness of the EU's system of legal remedies in the Common Foreign and Security Policy (CFSP)?* Here, a tension is perceivable between, on the one hand, the apparent intent of the EU Member States to separate the CFSP the CFSP in a legal sense from other EU policies, and on the other hand, the need to guarantee individuals an effective remedy in all policy field; the latter currently being limited by the special rules in the Treaty applicable to the CFSP.

2. *What is the perceived impact of the EU's accession to the European Convention on Human Rights (ECHR) on the right to an effective remedy?* Accession would in and of itself enhance the right to an effective remedy by making an external human rights review by the ECtHR possible; yet a notable gap in judicial protection seems to remain as regards acts adopted by the EU in the CFSP framework.

3. *How does the expansion of locus standi to third countries and other external entities at the CJEU affect the principle of effective judicial protection?* While it may well be justifiable from the perspective of the right to a remedy for an entity subject to a sanction to be able to initiate a judicial review of the legality of the act concerned, the CJEU's interpretation of a third country as a 'legal person' for the purposes of standing raises some questions of interpretation in the light of international law.

These three questions are interlinked, as the limited nature of the jurisdiction of the CJEU in the CFSP has implications for the envisaged accession to the ECHR, and third countries and other external entities typically seek to sue before the CJEU on the basis of acts adopted in the field of the CFSP. The research assesses and evaluates the case law of the CJEU in light of its correlation with public international law, taking into account both the enforceability of the right to an effective remedy and the public law limits to an expansive interpretation. It explores how international law norms permeate the EU legal order and how eventual conflicts (mostly of a jurisdictional nature) between them are resolved within the reasoning of the CJEU.